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Chapter 8
DEFENDING ACTIONS IN THE UNITED STATES ARISING FROM ALLEGED FOREIGN-BASED TORTS

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§ 8.01 Introduction*[1]

Multinational companies that manage or invest in natural resource development or other large commercial projects in a developing country face legal risks that can include uncertain or changing legal rules and

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[1]Gibson, Dunn & Crutcher is currently serving as counsel for Chevron Corp. and Dole Food Co. in some of the cases referenced in this chapter.

enforcement systems governing their development work. For contractual relationships, dispute resolution provisions including arbitration clauses can mitigate such legal risk with business partners and sometimes foreign governments. In addition, foreign governments sometimes can clarify a company's current and potential future liability before development occurs. But dispute resolution agreements may not be effective in addressing potential pollution, employment, and personal injury claims brought by or on behalf of local residents or project workers.

In recent years, residents of developing countries where multinationals have invested in projects have asserted claims seeking compensation for alleged torts injuring them or their land. Such foreign-based tort claims often are brought or enforced in U.S. courts and led by teams of U.S. lawyers. This chapter reviews some of the rules governing such foreign-based tort claims when such claims are asserted in or enforced through the U.S. legal system.

Such litigation has taken at least three forms:

(1) cases in U.S. courts alleging violations of international law under the Alien Tort Statute;

(2) cases in U.S. courts alleging that business practices in developing countries violate U.S. law;[2] and

(3) cases seeking a foreign judgment in a developing country, and then recognition and enforcement of the foreign judgment in U.S. courts.[3]

These cases present practical and policy-related problems for U.S. courts and decision makers when such tort claims arise in countries with weak or emerging legal systems and socioeconomic and political conditions that may tolerate fraudulent claims. Multinationals who defend these cases often must choose between litigating claims in the United States, where lack of discovery in the host country makes it difficult to defend themselves, or litigating in developing countries, where they may be subject to a biased or politicized judicial system. In addition to the direct consequences for the parties, such litigation has foreign policy and global economic implications.

Section 8.02 of this chapter reviews recent rulings from U.S. courts limiting the scope of claims under the Alien Tort Statute. Section 8.03 discusses

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[2] *See, e.g.*, Mejia v. Dole Food Co., No. BC340049 et al. (Los Angeles Sup. Ct. June 17, 2009) (Redacted Findings of Fact and Conclusions of Law Supporting Order Terminating Mejia and Rivera Cases for Fraud on the Court).

[3] *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), vacated, 2011 WL 4375022 (2d Cir. Sept. 19, 2011); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

some examples of recent tort claims against U.S. and multinational companies relating to business operations outside the United States. In § 8.04, the current legal standards for enforcing foreign judgments in the United States are summarized. Section 8.05 discusses strategic considerations for prosecuting and defending actions arising from foreign-based tort claims, particularly in the context of lawsuits in foreign courts followed by judgment recognition proceedings in the United States.

§ 8.02 Claims in the United States Under the Alien Tort Statute (ATS)

Congress passed the Alien Tort Statute (ATS)[4] in 1789 as part of the original Judiciary Act. The ATS gives federal courts original jurisdiction to decide an alien's tort claim for violation of the law of nations. The ATS states only that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] The ATS does not purport to create any cause of action—it just creates jurisdiction. There is no legislative history explaining why the first Congress adopted the ATS: "Judge Friendly called the ATS a 'legal Lohengrin,' 'no one seems to know whence it came,' and for over 170 years after its enactment it provided jurisdiction in only one case."[6] The U.S. Supreme Court has concluded that Congress probably had three specific offenses against the law of nations in mind at the time: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[7]

The statute was rarely invoked and essentially dormant until 1980, when the Second Circuit issued its *Filartiga* decision.[8] From 1980 to 2004, plaintiffs filed a number of foreign-based tort lawsuits in U.S. federal courts based on the ATS. Then the U.S. Supreme Court issued its decision in *Sosa v. Alvarez-Machain*,[9] which places strict limits on claims under the ATS but does not block them entirely.

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[4] 28 U.S.C. § 1350. Courts refer to the law as both the Alien Tort Claims Act and the Alien Tort Statute. This chapter uses the latter term, consistent with the U.S. Supreme Court's choice of terms in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

[5] 28 U.S.C. § 1350.

[6] *Sosa*, 542 U.S. at 712 (citations omitted).

[7] *Id.* at 715.

[8] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[9] 542 U.S. 692 (2004).

[1] U.S. Supreme Court Decision in *Sosa v. Alvarez-Machain*

Since the Supreme Court decision in *Sosa*, a plaintiff must demonstrate that the principle of the law of nations it is seeking to enforce is clearly established: "Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[10] Examples of such universal established norms are the prohibition of torture, piracy, and slave trading—norms that are specific, universal, and obligatory.[11] In *Sosa*, the Court held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[12]

In *Sosa* the Court offered five reasons for judicial caution in allowing ATS claims:

(1) "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms";[13]

(2) there has been "significant rethinking of the role of the federal courts in making"[14] the common law;

(3) "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases";[15]

(4) allowing new causes of action for violation of international law could implicate foreign policy; and

(5) Congress has not encouraged new claims: "We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional

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[10] *Id.* at 725; *see also id.* at 732 ("under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted").

[11] 542 U.S. at 732.

[12] *Id.* at 738.

[13] *Id.* at 725.

[14] *Id.* at 726.

[15] *Id.*

> understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."[16]

Importantly, in *Sosa* the Court also indicated that it is open to enforcing additional limitations on ATS claims, including the requirement of exhaustion of claims in the local jurisdiction that the European Commission advocated as a separate principle of international law.[17] The Court also indicated it would be open to a further limitation of "a policy of case-specific deference to the political branches," in which federal courts may seek input from the U.S. Department of State about whether allowing particular ATS claims would impact U.S. foreign policy.[18] These limitations could serve as a significant future bar to adjudicating foreign-based tort claims in U.S. courts.

[2] Cases Applying *Sosa*

Most plaintiffs asserting claims under the ATS have not fared well since the *Sosa* decision. With a few exceptions, the lower federal courts appear to have taken to heart the strong caution the Supreme Court urged in *Sosa* and have dismissed most alien tort claims except in the case of claims challenging egregious conduct. Some examples of such rulings are summarized below:

[a] Aiding and Abetting and Conspiracy Liability

In 2009 the Second Circuit clarified the standard for aiding and abetting and conspiracy liability under the ATS and adopted high standards based on principles of international law. The state of mind required of a culpable defendant for aiding and abetting is "purpose" rather than knowledge

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[16] *Id.* at 728.

[17] *Id.* at 733 n.21 (citation omitted):

> This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

[18] *Id.* Commentators have noted the problems that result when a U.S. president takes a different view of the effect of ATS claims on foreign policy than his predecessor. *See, e.g.*, Beth Stephens, "Judicial Deference and the Unreasonable Views of the Bush Administration," 33 *Brooklyn J. Int'l L.* 773, 773-75 (2008) (The administration of President George W. Bush filed letters or *amicus* briefs opposing many ATS cases against corporate defendants; of eight cited cases, courts dismissed only two based on the Bush administration's expression of foreign policy concerns.).

alone.[19] For a conspiracy claim under the ATS, the court requires proof of a joint criminal enterprise and a criminal intention to participate in a common criminal design.[20] The case involved claims by Sudanese plaintiffs who sued a Canadian corporation contending that it aided and abetted or conspired with the government of Sudan in carrying out human rights abuses in order to develop a Sudanese oil concession through affiliates.[21] In evaluating these claims before affirming their dismissal, the court noted some threshold concern about whether the defendant, which owned only a 25% stake in the company that developed the Sudanese concessions, could be deemed to control that entity: "This attenuation between the plaintiffs' allegations and the named defendant (the only entity over which the district court had personal jurisdiction) raises knotty issues concerning control, imputation, and veil piercing (among other things)."[22] The alleged assistance that the defendant's affiliate provided consisted of upgrading airstrips, designating certain areas for oil exploration, providing financial assistance to the government, and giving general logistical support to its military.[23] The Second Circuit evaluated each of these kinds of assistance and concluded that engaging in these activities would not constitute substantial purposeful assistance in violations of international law. Instead, the court concluded that ATS liability cannot be established through knowledge of alleged abuses coupled only with commercial activities such as resource development in the area.[24]

[b] No Corporate Liability Under Customary International Law

In 2010, the Second Circuit issued an opinion that restricts ATS claims by holding that corporations are not subject to ATS liability because they

[19] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79, 122 (2010). Among other things, the court analyzed the previous fractured *per curiam* decision in *Khulumani v. Barclay Nat'l Bank Ltd*. in which two judges joined in concluding that a plaintiff may plead a theory of aiding and abetting liability under the ATS. *See Khulumani*, 504 F.3d 254, 258, 260 (2d Cir. 2007), *aff'd without opinion*, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (Supreme Court lacked a quorum of six because four justices recused themselves; treated as affirmed by equally divided Court). The dissenting judge in *Khulumani* argued: "By incorporating a vague 'substantial assistance' standard, this newly minted theory of aiding-and-abetting liability will create many practical problems harmful to the political and economic interests of the United States." 504 F.3d at 330 (Korman, J., concurring and dissenting).

[20] *Talisman Energy*, 582 F.3d at 260.

[21] *Id.* at 247.

[22] *Id.* at 261.

[23] *Id.*

[24] *Id.* at 262-64.

are not subject to liability under customary international law.[25] The court explained:

> No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS.[26]

The Eleventh Circuit had reached the opposite result in 2008 in *Romero v. Drummond Co.*,[27] relying on a previous circuit precedent. It explained: "The text of the Alien Tort Statute provides no express exception for corporations, *see* 28 U.S.C. § 1350, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants. Again, we are bound by that precedent."[28] In May 2011, the Eleventh Circuit reinstated ATS claims against a corporation without discussing the issue or the Second Circuit decision in *Kiobel*.[29] And the Ninth Circuit ruled in May 2011 that personal jurisdiction over a German auto manufacturer existed for ATS claims in California, without discussing *Kiobel* or the issue of whether ATS claims can be valid against a corporation.[30]

[c] Dismissal Based on *Forum Non Conveniens*

The U.S. District Court for the Southern District of New York dismissed foreign-based tort claims under the ATS on *forum non conveniens* grounds in favor of courts in Turkey in *Turedi v. Coca-Cola Co.*[31] The plaintiffs' claims "arose from an alleged violent attack on them by Turkish police during a labor dispute in Istanbul, Turkey, between plaintiffs and CCI, an

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[25] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-49 (2d Cir. 2010) (petition for certiorari filed June 6, 2011); *see also* Liu Bo Shan v. China Const. Bank Corp., No. 10-2992-cv, 2011 WL 1681995 (2d Cir. May 5, 2011) (unreported) (following *Kiobel*). The D.C. Circuit is currently considering this issue. *See* Mohamad v. Rajoub, 634 F.3d 604, 608 n.** (D.C. Cir. Mar. 18, 2011) ("The issue whether corporations may be held liable in a suit brought under the ATS is pending before this court in *Doe v. Exxon Mobil Corp*., No. 09-7125 (D.C. Cir. argued Jan. 25, 2011).").

[26] *Kiobel*, 621 F.3d at 148-49.

[27] 552 F.3d 1303 (11th Cir. 2008).

[28] *Id*. at 1315 (citation omitted).

[29] Baloco *ex rel*. Tapia v. Drummond Co., Inc., 640 F.3d 1338 (11th Cir. 2011).

[30] Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011).

[31] 460 F. Supp. 2d 507, 521-29 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009) (unreported).

entity that had employed some of the plaintiffs and that they claim is controlled by or an agent of Coca Cola and CCEC."[32]

[d] State Action Requirement and War Crimes Exception

The Eleventh Circuit has recognized a state action requirement for claims under the ATS, with an exception for war crimes. In *Romero*,[33] the court explained: "Under the Alien Tort Statute, state actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation."

The Eleventh Circuit applied that state action requirement in *Sinaltrainal v. Coca-Cola Co.*[34] and affirmed the dismissal of claims where the plaintiffs failed to show state action, i.e., that paramilitaries who engaged in wrongdoing were either state actors or sufficiently tied to the Colombian government. The court explained that the state action requirement under the Torture Victim Protection Act (TVPA)[35] could be satisfied with proof that at least one public official was involved in the challenged wrongdoing or proof of a "symbiotic relationship between a private actor and the government that involves the torture or killing alleged in the complaint. . . ."[36] The plaintiffs in that case also could not meet the exception to state action the Eleventh Circuit recognizes for war crimes because the alleged misconduct did not occur during a civil war.[37]

§ 8.03 Examples of Tort Claims Against U.S. and Multinational Companies for Business Operations in Africa, Asia, and Latin America

This section reviews some recent cases arising from foreign-based tort claims that have been litigated in U.S. courts. One author recently identified three categories of foreign-based tort claims against companies involved in extractive industries: cases involving environmental claims, labor-related issues, and security forces, with claims being asserted under the ATS as well as under traditional theories including securities fraud, breach of

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[32] 460 F. Supp. at 509.

[33] 552 F.3d at 1316.

[34] 578 F.3d 1252, 1265-67 (11th Cir. 2009).

[35] 62 Stat. 934 (1948) and 106 Stat. 73 (1991) (codified at 28 U.S.C. § 1350).

[36] *Sinaltrainal*, 578 F.3d at 1264.

[37] *Id.* at 1267 ("the war crimes exception applies only to claims of non-state torture that were perpetrated in the course of hostilities").

fiduciary duty, assault, battery, and the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[38]

The following examples of recent cases brought in U.S. courts demonstrate the wide range of conduct that has been challenged. In general, U.S. courts have not been receptive to tort claims by foreign nationals for conduct outside the United States except in the most egregious circumstances involving alleged foreign government involvement in serious human rights abuses. This has been particularly true since the U.S. Supreme Court tightened standards in 2004 for bringing claims under the ATS.[39] The reluctance of U.S. courts to entertain such claims may explain why some foreign plaintiffs recently have decided to pursue tort judgments in foreign courts and international tribunals.[40]

[1] Cases Dismissed by U.S. Courts

The following are some recent examples of foreign-based tort cases that U.S. courts have dismissed.

[a] Alleged Abuses by Indonesian Security Forces

In *Doe VIII v. Exxon Mobil Corp.*,[41] the plaintiffs sued the operators of Indonesian natural gas fields, contending that defendants "retained members of the Indonesian military to provide security" and "while under direction of defendants, the retained soldiers committed a variety of offenses against plaintiffs." In its 2009 ruling, the district court followed "the general rule that nonresident aliens have no standing to sue in United States courts."[42] The court found that the case did not fall within any of the

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[38] Jonathan Drimmer, "Human rights and the extractive industries: Litigation and compliance trends," 3 *J. of World Energy L. & Bus.* 121, 122-23 (2010).

[39] *See supra* § 8.02.

[40] *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (proceedings concerning potential enforcement in United States of multibillion dollar judgment by Ecuadorian provincial court); *see also* Jonathan C. Drimmer & Sarah R. Lamoree, "Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases," 19 n.16 (U.S. Chamber Institute for Legal Reform, June 2010), http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf (listing cases in Australia, Canada, Colombia, England, and Netherlands). The Drimmer & Lamoree, *supra* note 40, report triggered various responses. *See, e.g.*, EarthRights International, "Missing the Point: A response to the U.S. Chamber of Commerce report 'Think Globally, Sue Locally'" (2010), http://www.earthrights.org (search title) (contending that Chamber report is biased).

[41] 658 F. Supp. 2d 131, 132-33 (D.D.C. 2009); *see also* Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 554 U.S. 909 (2008).

[42] 658 F. Supp. 2d at 134 (quoting Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976)).

three exceptions to that general rule under which nonresident aliens have standing to sue: (1) where the res is the United States; (2) where the statutory scheme allows suits by nonresident aliens[43]; and (3) where a nonresident alien is seized abroad and transported back to the United States for prosecution.[44] It explained: "Indeed, where a non-resident alien 'is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court.'"[45]

[b] Class Action Challenging Conditions for Factory Workers in Asia and Latin America

In 2005, class action plaintiffs representing employees of companies that sold goods to Wal-Mart challenged alleged conditions for factory workers in Bangladesh, China, Indonesia, Nicaragua, and Swaziland in federal court in California in *Doe I v. Wal-Mart Stores, Inc*.[46] The "claims relied primarily on a code of conduct included in Wal-Mart's supply contracts, specifying basic labor standards that suppliers must meet."[47] The plaintiffs relied on four theories under California law, all of which the Ninth Circuit rejected in affirming the district court's dismissal of the claims: (1) the plaintiff employees are third-party beneficiaries of the standards in the supply contracts; (2) Wal-Mart is plaintiffs' "joint employer"; (3) negligent breach of an alleged duty to monitor the suppliers and protect the employees from the suppliers' working conditions; and (4) unjust enrichment resulting from alleged employee mistreatment.[48] The court of appeals explained:

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[43] *See, e.g.*, Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1189 (D.C. Cir. 1972) (exception exists to rule of no standing for non-resident aliens "where courts have invoked the remedial purposes of the immigration laws and the hospitable treatment they mandate upon questions of reviewability to justify their conclusions").

[44] 658 F. Supp. 2d at 134.

[45] *Id.* at 135 (quoting Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D. D.C. 1976)).

[46] 572 F.3d 677, 679 (9th Cir. 2009).

[47] *Id*. at 680 ("The Standards require foreign suppliers to adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor, and discrimination." The Standards also included a right of inspection.) The Ninth Circuit concluded these standards did not create a duty for Wal-Mart:

> The language and structure of the agreement show that Wal-Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them. . . . Because, as we view the supply contracts, Wal-Mart made no promise to monitor the suppliers, no such promise flows to Plaintiffs as third-party beneficiaries.

Id. at 681-82.

[48] *Id.* at 681.

> Wal-Mart had no legal duty under the Standards or common law negligence principles to monitor its suppliers or to protect Plaintiffs from the suppliers' alleged substandard labor practices. Wal-Mart is not Plaintiffs' employer, and the relationship between Wal-Mart and Plaintiffs is too attenuated to support restitution under an unjust enrichment theory.[49]

[c] Injuries from Alleged Pollution from Copper Mining Operations in Peru

Residents of Peru sued a mining company in federal court in New York in 2000 in *Flores v. Southern Peru Copper Corp.*,[50] asserting personal injury claims for lung disease from alleged pollution from copper mining, refining, and smelting operations in Peru. Plaintiffs relied on international law and the ATS, contending that defendants' actions "infringed upon their customary international law 'right to life,' 'right to health,' and right to 'sustainable development.'"[51] After a detailed analysis of the sources of customary international law, the Second Circuit held that the plaintiffs failed to prove violations of customary international law and affirmed the dismissal of their claims. The court held: "customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[52] The court found that rights to life and health from such sources as the U.N. Universal Declaration of Human Rights are vague, amorphous, "boundless and indeterminate," and lack articulable or discernible standards and regulations, and therefore "do not meet the requirement of our law that rules of customary international law be clear, definite, and unambiguous."[53] Reviewing treaties, U.N. General Assembly resolutions, and decisions of the International Court of Justice and European Court of Human Rights, the Second Circuit also failed to find a custom of international law against intra-national pollution.[54]

[d] Alleged Harm from Paramilitary Units to Trade Union Organizers in Colombia

Plaintiff trade union leaders sued Coca-Cola in federal court in Florida in 2001 under the ATS and TVPA "alleging their employers—two bottling companies in Colombia—collaborated with Colombian paramilitary

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[49] *Id.* at 685.

[50] 414 F.3d 233, 236-37 (2d Cir. 2003).

[51] *Id.* at 237.

[52] *Id.* at 248.

[53] *Id.* at 255.

[54] *Id.* at 255-66.

forces to murder and torture Plaintiffs."[55] The TVPA was enacted in 1992 and "establishes a cause of action for victims of torture and extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation.'"[56] The Eleventh Circuit affirmed the dismissal of the claims, holding that the court lacked subject matter jurisdiction under the ATS, and that plaintiffs failed to state a valid claim under the TVPA because plaintiffs failed to establish state action (i.e., involvement by the Colombian government), conduct falling within the war crime exception to the state action requirement, or a conspiracy with state actors in carrying out state-sponsored torture.[57] The court of appeals explained: "Plaintiffs' complaints outline a litany of unfortunate events occurring in a country that Plaintiffs describe as experiencing ongoing civil unrest and lacking a robust legal system. Nevertheless, . . . plaintiffs fail to sufficiently plead factual allegations to connect the paramilitary forces, who perpetrated the wrongful acts, with the Colombian government."[58]

[2] Recently Settled Cases

Three cases that have been settled involved alleged foreign-based torts and human rights violations and claims of abuse of foreign sweatshop workers.

[a] Alleged Mistreatment of Garment Workers in Saipan

In class action cases filed in 1999, plaintiffs accused 18 U.S. retail chains and apparel companies of mistreating garment workers in "sweatshops" in Saipan (a Pacific island that is part of the Northern Mariana Islands, a U.S. commonwealth). In these lawsuits filed in U.S. federal courts in Los Angeles, the Mariana Islands, and San Francisco, the plaintiff class alleged the defendants "conspir[ed] to place thousands of workers in involuntary servitude and otherwise mistreat them to hold down production costs."[59] The class plaintiffs sought to represent a potential class of 50,000 workers and asked for damages of more than $1 billion; they relied on information gathered by private investigators, testimony from apparel workers, and reports from the U.S. Department of Labor and the U.S. Department

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[55] *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1257 (11th Cir. 2009).

[56] *Id.* at 1258 (discussing 28 U.S.C. § 1350 note § 2(a)). *See also id.* at 1263-64 ("The TVPA is broader than the ATS in that the TVPA allows citizens, as well as aliens, to seek remedy in federal court for official torture.").

[57] *Id.* at 1265-70 (referencing 28 U.S.C. § 1350 note).

[58] *Id.* at 1270.

[59] Steven Greenhouse, "Suit Says 18 Companies Conspired to Violate Sweatshop Workers' Civil Rights," *New York Times*, Jan. 14, 1999.

of the Interior.[60] These lawsuits were settled between 1999 and 2002, with no admissions of wrongdoing and reported settlement payments of approximately $20 million for back wages and to underwrite a monitoring program.[61]

[b] Actions by Military in Myanmar/Burma as Part of Construction of Gas Pipeline

In *Doe I v. Unocal Corp.*,[62] in 1996 plaintiffs representing a proposed class of tens of thousands of residents of Myanmar (formerly known as Burma) sued defendants who were building offshore drilling stations and a natural gas pipeline. The class plaintiffs contended that the defendants, acting through military, intelligence, and police forces connected with a military junta called the SLORC, used "violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline."[63] Asserting causes of action under U.S. law including the ATS, federal RICO,[64] and California law, the class plaintiffs contended the "defendants' conduct has caused plaintiffs to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property, in violation of state law, federal law and customary international law."[65] The district court dismissed and granted summary judgment for defendants on the federal claims in 1997 and 2000.[66]

The Ninth Circuit affirmed that ruling in part and reversed it in part. Relying on "international law," and "[i]nternational human rights law," the Ninth Circuit reversed the dismissal of the plaintiffs' claims under the ATS for forced labor, murder, and rape.[67] The Ninth Circuit granted *en banc* review, and while that was pending the U.S. Supreme Court issued its

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[60] *Id.*

[61] "Levi Opts Out of Saipan Settlement," *Los Angeles Times*, Apr. 26, 2003; N. Cleeland, "Firms Settle Saipan Factory Workers Suit," *Los Angeles Times*, Sept. 27, 2002.

[62] 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (*en banc*).

[63] *Id.* at 883.

[64] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

[65] 963 F. Supp. at 883.

[66] 963 F. Supp. 880 (C.D. Cal. 1997) and 176 F.R.D. 329 (C.D. Cal. 1997) (motions to dismiss) & 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (summary judgment), *aff'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (*en banc*).

[67] 395 F.3d 932, 946-56, 962 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (*en banc*).

decision in *Sosa v. Alvarez-Machain*,[68] which clarified the relatively narrow scope of the ATS. In 2005, the parties agreed to dismiss the appeal and vacate the Ninth Circuit's previous ruling.[69] Press reports indicate that defendants paid approximately $30 million to settle the claims in the federal case and in a state court case in California.[70]

[c] Alleged Torture of People in Nigeria Who Opposed Development

In four related cases filed in 1996, four Nigerian émigrés sued an oil company conducting oil exploration operations in Nigeria for allegedly participating in human rights violations against them and their deceased relatives.[71] The plaintiffs sued under the ATS, contending the defendants cooperated with the Nigerian government and military to suppress dissent and torture Nigerian citizens. For example, plaintiffs alleged that defendants "recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity."[72] Relying in part on the TVPA, which Congress passed in 1992, the Second Circuit reversed the trial court's dismissal on *forum non conveniens*.[73] The cases continued in the district court through discovery, with the filing of additional motions to dismiss, including motions relying on the Supreme Court ruling in *Sosa*. After 14 years of litigation and various court rulings, the parties reached a settlement in 2009 on the eve of trial, with the defendants reportedly paying $15.5 million.[74]

[3] Recent Cases Proceeding to Trial in U.S. Courts

At least six cases involving foreign-based tort claims have proceeded to a trial in the United States in the past 10 years.[75] The bench trial and three

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[68] 542 U.S. 692 (2004); *see supra* § 8.02.

[69] 403 F.3d 708 (9th Cir. 2005) (*en banc*).

[70] *See, e.g.*, Paul Magnusson, "A Milestone for Human Rights," *Business Week*, Jan. 24, 2005.

[71] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

[72] *Id.* at 92.

[73] *Id.* at 107-08 (citing 28 U.S.C. § 1350).

[74] Ed Pilkington, "Shell pays out $15.5m over Saro-Wiwa killing," *Guardian.co.uk*, June 9, 2009.

[75] One blog writer offers a summary of victories for plaintiffs under the ATS since its inception. *See* "Alien Tort Statute Cases Resulting in Plaintiff Victories" (Nov. 11, 2009), http://viewfromll2.com.

of the jury trials resulted in verdicts for the plaintiff, although the claims in two of the successful jury trials were against foreign individuals.

[a] Plaintiff Successful

[i] Torture in Bangladesh

In *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*,[76] the plaintiff contended that the defendants violated the ATS and the TVPA by causing him to be imprisoned on false charges and tortured in Bangladesh. One of the defendants was a U.S. citizen. The plaintiff alleged that the U.S. citizen defendant and his employer filed a false report of criminal charges with the police in Bangladesh, alleging bank fraud, which caused the plaintiff to be imprisoned in Bangladesh for about five months and to be tortured while in police custody. At a 2009 trial, the jury returned a verdict for the individual plaintiff awarding $1.5 million in compensatory damages and $250,000 in punitive damages.[77]

[ii] Torture by Military Personnel in El Salvador

In *Arce v. Garcia*,[78] "Salvadoran refugees who were allegedly tortured by military personnel in El Salvador during a campaign of human rights violations by the Salvadoran military from 1979 to 1983" had sued two leaders in the Salvadoran military relying on the ATS and obtained a jury award of $54.6 million in 2002. The Eleventh Circuit affirmed the judgment entered on the jury verdict.[79]

[iii] Execution of Civilian During Coup in Chile

Relatives of a Chilean economist executed by Chilean military officers after a coup d'état in 1973 sued one of the Chilean military officers who was alleged to have participated in the execution. The Chilean officer, who had moved to Miami at the time of the lawsuit, was accused of helping carry out the brutal killing of 13 prisoners, including the plaintiffs' relative. The lawsuit, filed in 1999 based on events in 1973, was allowed based on the doctrine of equitable tolling of the statute of limitations because the cover-up of events made it impossible for relatives to investigate the

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[76] 588 F. Supp. 2d 375, 378 (E.D.N.Y. 2008).

[77] Chowdhury v. WorldTel Bangladesh Holding, Ltd., No. 08-CV-1659 (E.D. N.Y.) (trial in Aug. 2009; court decision not to disturb jury verdict entered Sept. 16, 2009).

[78] 434 F.3d 1254 (11th Cir. 2006).

[79] *Id.* at 1256, 1258.

killing.[80] These plaintiffs' claims went to trial in federal court in Florida, where the jury awarded plaintiffs $3 million in compensatory damages and $1 million in punitive damages. On appeal, the Eleventh Circuit affirmed the judgment entered on the jury award.[81]

[iv] Alleged Forced Labor in Curaçao

A 2008 case tried to the court, rather than a jury, resulted in an $80 million judgment against the defendant, although the defendant had abandoned its defense by the time of that trial. In *Licea v. Curaçao Drydock Co.*,[82] Cuban individuals sued the operator of a drydock facility in federal court in Florida in 2006, contending that it "conspired with the Republic of Cuba to force Cuban citizens to travel to facilities the Defendant owns in Curaçao, to hold them in captivity there, and to force them to work repairing ships and oil platforms."[83] The plaintiffs asserted claims under the ATS and the federal RICO.[84] The court's decision does not explain the defendant's ties to the United States, but recites that the defendant withdrew its lack of personal jurisdiction defense and notes that "the scheme at issue had substantial effects within the United States."[85] The defendant "abandoned its defense of this lawsuit during the discovery phase" and therefore the court entered a finding of default on liability.[86] After a non-jury trial on damages in which Curaçao Drydock declined to appear, the court entered judgments in favor of each of the three plaintiffs, with two of them receiving awards of $15 million in compensatory damages and the third one an award of $20 million. The court also awarded $10 million in punitive damages to each plaintiff.[87]

The court's docket does not reflect the filing of any appeal of this judgment. In 2010 the plaintiffs moved to commence supplementary proceedings to implead the governments of Curaçao and the Netherlands Antilles

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[80] Cabello v. Fernández-Larios, 402 F.3d 1148, 1155 (11th Cir. 2005).

[81] *Id.* at 1151, 1152.

[82] 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

[83] *Id.* at 1359.

[84] *Id.* at 1357.

[85] *Id.* at 1357, 1359.

[86] Licea v. Curaçao Drydock Co., No. 1:06-cv-22128-JLK, Order affirming report of magistrate (May 27, 2011), Dkt. 180 at 2 (Order); *see also* 584 F. Supp. 2d at 1357 n.3.

[87] *Licea*, 584 F. Supp. 2d. at 1366.

and add them as judgment debtors. The court dismissed those proceedings in May 2011, but allowed the plaintiffs to file an amended motion.[88]

[b] Defendant Successful

[i] Alleged Torture and Assassination of Trade Union Leaders in Colombia

In *Estate of Rodriquez v. Drummond Co.*,[89] relatives of deceased Colombian coal mine workers and a trade union brought claims against the coal mine operator and others in Alabama under the ATS, TVPA, and state law tort claims. The plaintiffs contended that executives of a Colombian subsidiary of an Alabama coal mining company paid paramilitary operatives to torture and assassinate leaders of a Colombian trade union. Some of the claims proceeded to a jury trial in 2007, where the jury ruled in favor of the defendants on all claims; the jury's verdict was affirmed on appeal.[90] The Eleventh Circuit decision indicates that plaintiffs had difficulty proving their claims at the 2007 trial, in part because of the late disclosure/exclusion and unavailability of certain witnesses plaintiffs contended have knowledge of the dispute.

The dispute continues, however, through a new lawsuit that was filed in 2009 by the children of the three deceased union leaders. In 2011, the Eleventh Circuit reversed the district court's dismissal of their claims, including the district court's finding that the claims were barred under res judicata by the judgment in the previous litigation.[91]

[ii] Action by Security Forces to End Protest on Oil Platform in Nigeria

In *Bowoto v. Chevron Corp.*,[92] Nigerian citizens involved in staging a protest in 1998 on an oil platform off the coast of Nigeria brought claims under the ATS, Nigerian law, and California law in federal court in California in 1999, challenging actions by Nigerian government security forces to end the protest. After nearly 10 years of pretrial proceedings, the claims proceeded to trial in California in 2008. The jury found in favor of the defendant on all claims and the Ninth Circuit affirmed the judgment on appeal.

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[88] Licea Order at 9-10.

[89] 256 F. Supp. 2d 1250, 1253-54 (N.D. Ala. 2003).

[90] Romero v. Drummond Co., 552 F.3d 1303, 1308-09 (11th Cir. 2008).

[91] Baloco *ex rel.* Tapia v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011).

[92] 621 F.3d 1116, 1120 (9th Cir. 2010).

§ 8.04 Legal Standards for Recognition of Foreign Judgment in United States

Recognition by one court in the United States of judgments entered by another court in the United States is governed by the Full Faith and Credit Clause of the U.S. Constitution,[93] the federal statute implementing it, and commonlaw decisions. Those rules give courts in the United States little discretion in whether to recognize a final judgment on the merits of a dispute from another court in the United States. In essence, while there are some exceptions, one court must give a judgment the same preclusive effect the judgment would have in the court that rendered it.

In contrast, recognition by U.S. courts of judgments from courts outside the United States is governed by statutes and common law principles that are narrower than the Full Faith and Credit principles. Those rules have evolved from principles of comity among nations.[94]

As explained in detail below, prerequisites for recognition of a foreign country's judgment in a court in the United States include:

- it must be a civil judgment granting or denying a recovery of a sum of money;
- it must be a judgment that is final, conclusive, and enforceable in the country where it was rendered; and
- it cannot be a judgment for taxes, fines, or other penalties.

The key defenses to recognition are discussed in detail below and summarized in the table in § 8.04[3]. The main mandatory grounds for nonrecognition of a judgment are a judgment from a tribunal that was not impartial or did not follow procedures compatible with due process, or lacked personal or subject matter jurisdiction.

[1] Common Law and *Restatement (Third) of the Foreign Relations Law of the United States* Standard

In the leading U.S. Supreme Court case on recognition of foreign judgments, *Hilton v. Guyot*,[95] decided more than 115 years ago, the Court explained that a foreign judgment can, in some circumstances, be enforced in a U.S. court:

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[93] U.S. Const. art. IV, § 1. *See also* 28 U.S.C. § 1738; 18 *Moore's Federal Practice* § 130.01 (3d ed. 2011).

[94] *See, e.g.*, 18 *Moore's Federal Practice* §§ 130.03, 130.50–130.52 (3d ed. 2011). This chapter does not address potential enforcement of foreign arbitral awards in U.S. courts. For information on that subject, see generally United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 25 U.S.T. 2517, 330 U.N. Treaty Ser. 38 (1958); and 9 U.S.C. §§ 1-16.

[95] 159 U.S. 113 (1895).

> When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.[96]

The Court reached this conclusion applying principles of comity under international law:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[97]

The Supreme Court recognized in *Hilton* that

> our receptivity toward the recognition and enforcement of foreign country money judgments is not without limit. Recognition and enforcement may be denied where the party resisting enforcement shows that there was: "prejudice in the [rendering] court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of the United States should not allow it full effect."[98]

Since 1895, courts in many U.S. states, applying *Hilton*, have developed state common law rules for enforcement of foreign country judgments.[99]

The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* (1987) (*Restatement (Third)*) summarizes such state[100] common law rules in sections 481 to 486. Under *Restatement*

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[96] *Id.* at 123.

[97] *Id.* at 163-64.

[98] Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 632 (S.D.N.Y. 2011) (quoting *Hilton*).

[99] [I]n the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.

Restatement (Third) of Foreign Relations Law in the United States § 481, cmt. a (1987).

[100] In § 8.04, the word "state" refers to one of the 50 states comprising the United States, rather than to a foreign state, i.e., a foreign country.

(Third) § 481, a foreign country's judgment granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property is conclusive between the parties and is entitled to recognition in courts in the United States, subject to the grounds for nonrecognition in *Restatement (Third)* § 482. Section 482 lists the following mandatory and discretionary grounds for nonrecognition:

(1) A court in the United States *may not recognize* a judgment of the court of a foreign state if:

   (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

   (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States *need not recognize* a judgment of the court of a foreign state if:

   (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

   (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

   (c) the judgment was obtained by fraud;

   (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

   (e) the judgment conflicts with another final judgment that is entitled to recognition; or

   (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.[101]

Restatement (Third) §§ 483 to 486 confirm that U.S. courts are not required to recognize or enforce (1) judgments for the collection of taxes, fines, or penalties rendered by the courts of other states (countries) (§ 483); and (2) foreign divorce decrees, foreign child custody orders, or foreign support orders except in certain circumstances (§§ 484, 485, 486).

More than 15 states currently apply common law rules for recognition of foreign judgments that spring from *Hilton* and principles summarized in the *Restatement (Third)*.

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[101] *Restatement (Third)* § 482.

[2] Uniform Foreign-Country Money Judgments Recognition Act

Many states have enacted a version of the uniform act for recognition of foreign money judgments, the Uniform Foreign Money-Judgments Recognition Act, which the Uniform Law Commission (National Conference of Commissioners on Uniform State Laws) first adopted in 1962 (1962 Act). The 1962 Act was extensively revised in 2005 by the Uniform Foreign-Country Money Judgments Recognition Act (2005 Revised Act).[102]

As of June 2011 31 states along with the District of Columbia and Virgin Islands had adopted the 1962 Act[103]; 15 states, all of which had adopted the 1962 Act, also had enacted the 2005 Revised Act[104]; and at least six other states and the District of Columbia are considering adopting the 2005 Revised Act.[105] This section focuses on the provisions of the 2005 Revised Act because most states are moving toward adoption of that updated uniform act.

The original impetus for the 1962 Act was to persuade foreign countries to recognize judgments from U.S. courts:

> Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.[106]

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[102] *See* 13 U.L.A. (Part II) at 39-80 (2002 & Supp. 2010). The current text and adoption history of these two uniform acts is available at Uniform Law Commission, http://www.nccusl.org. Some states have enacted variations on the uniform act. Such variations are beyond the scope of this chapter.

[103] Those jurisdictions that enacted the 1962 Act are: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, and Washington. *See* http://www.nccusl.org, Legislative Fact Sheet for Foreign Money Judgments Recognition Act.

[104] Those jurisdictions that enacted the 2005 Revised Act are: California, Colorado, Hawaii, Idaho, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Washington. *See* http://www.nccusl.org, Legislative Fact Sheet for Foreign-Country Money Judgments Recognition Act.

[105] *See generally* http://www.nccusl.org.

[106] 1962 Act, Prefatory Note, http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf.

The 2005 Revised Act was adopted to take account of many changes in applicable legal principles; its Prefatory Note explains the changes since 1962 that prompted the revision:

> This Act continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation. Among the more significant issues that have arisen under the 1962 Act which are addressed in this Revised Act are (1) the need to update and clarify the definitions section; (2) the need to reorganize and clarify the scope provisions, and to allocate the burden of proof with regard to establishing application of the Act; (3) the need to set out the procedure by which recognition of a foreign-country money judgment under the Act must be sought; (4) the need to clarify and, to a limited extent, expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law; (5) the need to expressly allocate the burden of proof with regard to the grounds for denying recognition; and (6) the need to establish a statute of limitations for recognition actions.[107]

The drafters of the 2005 Revised Act decided not to require reciprocity as a condition of U.S. foreign-country judgment recognition. The Prefatory Note explains:

> In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.[108]

For a "foreign-country judgment" to be eligible for enforcement, section 3 of the 2005 Revised Act requires that the judgment be one that grants or denies recovery of a sum of money, and is final, conclusive, and enforceable under the law of the country where it is rendered. Section 3 specifically excludes from foreign enforcement judgments for taxes, fines, or other penalties; or for divorce, support, maintenance, or other domestic relations judgment. Section 8 of the 2005 Revised Act provides that if an appeal is pending or will be taken, the court may stay proceedings on enforcement until the appeal is concluded.

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[107] 2005 Revised Act, Prefatory Note, http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm#TOC1_1.

[108] *Id.*

The 2005 Revised Act's main provisions are in section 4, which sets forth both mandatory and discretionary standards for nonrecognition of a foreign-country money judgment. Section 4 provides:

> SECTION 4. STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.
>
> (a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.
>
> (b) A court of this state *may not recognize* a foreign-country judgment if:
>
> (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> (2) the foreign court did not have personal jurisdiction over the defendant; or
>
> (3) the foreign court did not have jurisdiction over the subject matter.
>
> (c) A court of this state *need not recognize* a foreign-country judgment if:
>
> (1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
>
> (2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
>
> (3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;
>
> (4) the judgment conflicts with another final and conclusive judgment;
>
> (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
>
> (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
>
> (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
>
> (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.
>
> (d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.[109]

The mandatory and discretionary categories for nonrecognition set forth in section 4 of the 2005 Revised Act track common law exceptions to enforcement. The Prefatory Note to the 1962 Act explained that the Act was meant to codify existing majority rules, but did not go as far as some court decisions:

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[109] *Id.* § 4 (emphasis added).

> The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than it is required to do by the provisions of the Act. In codifying what bases for assumption of personal jurisdiction will be recognized, which is an area of the law still in evolution, the Act adopts the policy of listing bases accepted generally today and preserving for the courts the right to recognize still other bases. Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.[110]

Section 11 of the 2005 Revised Act also gives a court discretion to enforce other foreign-country judgments that may not be covered by the Act: "This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act]." The Prefatory Note explains:

> Towards this end, the Act sets out the circumstances in which the courts in states that have adopted the Act must recognize foreign-country money judgments. It delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise.[111]

[3] Summary of Key Defenses

This table summarizes some of the key defenses to recognition of a foreign judgment.

Defense to Recognition of Foreign Country's Money Judgment	Legal Basis Under U.S. Law
Not final/enforceable: Judgment not final and enforceable where rendered	2005 Revised Act § 3(a)(2); 1962 Act § 2; *Restatement (3d)* § 481(1).
Penalty: Judgment is fine, penalty, or tax	2005 Revised Act § 3(b)(1)-(3); 1962 Act § 1(2); *Restatement (3d)* § 483.
No jurisdiction: Foreign court lacked jurisdiction (personal or subject matter), or was a seriously inconvenient forum	2005 Revised Act § 4(b)(2) & (3), 4(c)(6); 1962 Act § 4(a)(2) & (3) & (c)(6); *Restatement (3d)* § 482(1)(b) & (2)(a). *See also Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

[110] 1962 Act, Prefatory Note, http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf.

[111] 2005 Revised Act, Prefatory Note, http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm#TOC1_1.

Defense to Recognition of Foreign Country's Money Judgment	Legal Basis Under U.S. Law
Not impartial: Rendering country lacked impartial tribunal	2005 Revised Act § 4(b)(1); 1962 Act § 4(a)(1); *Restatement (3d)* § 482(1)(a). *See, e.g., Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 632 (S.D.N.Y. 2011); *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).
Due process: Judgment was rendered in a system that does not afford procedures compatible with due process, or specific proceeding leading to judgment was not compatible with due process	2005 Revised Act § 4(b)(1) & (c)(1) & (8); 1962 Act § (4)(a)(1) & (b)(1); *Restatement (3d)* § 482(1)(a) & (2)(b). *See, e.g., Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 632 (S.D.N.Y. 2011); *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).
Conflicts with other judgment: Judgment conflicts with another final and conclusive judgment	2005 Revised Act § 4(c)(4); 1962 Act § 4(b)(4); *Restatement (3d)* § 482(2)(e).
Barred by agreement: Judgment is contrary to agreement between the parties to submit the controversy to another forum	2005 Revised Act § 4(c)(5); 1962 Act § 4(b)(5); *Restatement (3d)* § 482(2)(f).
Public policy: Judgment is based on cause of action repugnant to public policy	2005 Revised Act § 4(c)(3); 1962 Act § 4(b)(3); *Restatement (3d)* § 482(2)(d). *See also Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).
Fraud: Judgment was obtained by fraud	2005 Revised Act § 4(c)(2); 1962 Act § 4(b)(2); *Restatement (3d)* § 482(2)(c). *See, e.g., Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 632 (S.D.N.Y. 2011).
Integrity of rendering court: Judgment was rendered in circumstances that raise substantial doubt about integrity of the rendering court with respect to the judgment.	2005 Revised Act § 4(c)(7).

§ 8.05 Prosecution and Defense of Actions Arising from Foreign-Based Tort Claims

Individuals or government entities prosecuting foreign-based tort claims, and companies defending them, will want to consider some or all of the recurring strategic considerations discussed below, particularly when pursuing a judgment in a foreign country and then seeking to have the judgment recognized by a U.S. court.

[1] Considerations for Party Seeking Foreign Judgment

[a] Choice of Foreign Venue

Plaintiffs should seek a fair, defensible foreign venue. It is a risky strategy for a plaintiff to pursue a money judgment in a country with a biased or corrupt legal system or judges. If a defendant can raise grounds to challenge a corrupt judge or legal system, the plaintiff's credibility and all aspects of the claim can be undermined.[112]

There are many sources of information on foreign legal systems. For example, the U.S. Department of State prepares annual country reports called "Human Rights Reports" and "Investment Climate Statements" that sometimes include information on concerns with foreign countries' legal systems.[113]

[b] Finality and Enforceability of Judgment

A judgment creditor cannot seek to enforce a foreign judgment in the United States unless it is final and enforceable in the country whose court rendered it.[114] Plaintiffs should plan ahead for any enforcement process and anticipate potential objections.

[c] Prejudgment Attachment Issues

Sometimes foreign plaintiffs seek to attach a defendant's assets in the foreign country before they have obtained a judgment. The rules for such prejudgment attachment in other countries vary considerably.

U.S. law places severe due process limitations on prejudgment attachment. A plaintiff that adopts an aggressive prejudgment attachment

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[112] *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (granting preliminary injunction against enforcement of multi-billion dollar judgment from court in Ecuador based on concerns about lack of due process and potential fraud with judgment from Ecuador); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (declining to recognize $97 million Nicaraguan judgment based on due process violations and public policy concerns).

[113] *See* http://www.state.gov/e/eeb/rls/othr/ics ("Investment Climate Statements 2011").

[114] *See* § 8.04, *supra*.

strategy that looks like it violates U.S. due process standards may undermine its ability to ultimately enforce any money judgment, because the foreign judicial process may appear tainted by a lack of impartiality and due process, or even by fraud.

[d] Counterclaims and Key Defenses

As part of their overall strategy, foreign plaintiffs should anticipate the defendant's possible counterclaims and key defenses. For a plaintiff seeking to obtain a money judgment that can be recognized in U.S. courts, it is critical to ensure a fair process in the foreign court.

[2] Considerations for Party Defending Potential Foreign Judgment

[a] Subject Matter and Personal Jurisdiction

A defendant must carefully evaluate the strength of possible objections to the foreign court's personal jurisdiction and subject matter jurisdiction. If the defendant did significant work in the foreign country, a challenge to the court's personal jurisdiction will likely be weak. If the foreign court recognizes a procedure for a defendant to make a special appearance without waiving objections to the lack of personal jurisdiction, a defendant may want to follow that procedure.

The key caution for a defendant is to avoid inadvertently waiving potential jurisdiction defenses. Lack of personal or subject matter jurisdiction is one of the strongest defenses to recognition of a foreign judgment under U.S. law. For strategic reasons, a defendant may decide to participate fully in the foreign court proceeding. Indeed, a foreign court may not rule on a jurisdictional defense until its ruling on the merits. But a defendant should be alert to how to maintain a jurisdictional defense, and potential claims of waiver, when making such a decision.

Some U.S. courts also will decline to recognize a foreign judgment if it was rendered in a seriously inconvenient forum. For example, the 2005 Revised Act gives a court discretion not to recognize a foreign judgment if jurisdiction is based only on personal service, and "the foreign court was a seriously inconvenient forum for the trial of the action."[115] A defendant that may want to rely on that defense to recognition may need to present a *forum non conveniens* defense or motion in the foreign court proceeding to preserve such an argument.

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[115] 2005 Revised Act § 4(c)(6), http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm#TOC1_1.

[b] Judgment Recognition Issues

A defendant that may be facing a large foreign money judgment should consider the judgment recognition issues early and throughout the foreign proceeding. Strategic considerations for the defendant include the following:

[i] Obtain General Information About the Fairness of the Court and Judge

What general information is available on the foreign court and judge, and what problems, if any, could lead to biased decision making or affect the fairness of the foreign court proceeding? A defendant will want to seek out public information (e.g., U.S. Department of State country reports) and speak to local authorities and experts.

[ii] Obtain Specific Information on Court Proceeding

What is happening with the foreign court proceeding? Does the judge engage in *ex parte* contacts? Is the court relying on hired experts? Is there political pressure on the court or judge? A defendant will want to examine all available information that could affect the fairness of the foreign court proceeding and the formal and informal inputs that may affect the foreign court's decision.

[iii] Analyze Possible Locations for Judgment Recognition

In what jurisdictions is the plaintiff likely to seek to have the foreign court's judgment recognized? Because the judgment of one state or federal court in the United States normally must be recognized by other U.S. courts, the plaintiff may not choose a forum where the defendant has assets or significant operations.

[iv] Consider Whether to Mount a Vigorous Defense

Should the defendant mount a vigorous defense in the foreign court proceeding, or is that an unwise strategy in a forum that seems biased? The answer to this question depends on the potential fairness of the foreign court. If a defendant believes it may receive a fair hearing in the foreign court, it is usually wise to try to win the dispute or mitigate the harm in that court first. It can be much more difficult to challenge an adverse result in judgment recognition proceedings than in the original foreign court proceeding. But a defendant that fully participates in a process that it later believes is unfair may confront arguments that it has waived some or all of its objections to such an unfair process.

[c] Evidence to Challenge Recognition of Foreign Judgment

One of the greatest challenges a defendant can face is how to develop evidence to support possible arguments to challenge recognition of a foreign judgment. If a proceeding is tainted by corruption or unfair tactics, proof may be difficult to gather.

In many countries, discovery can be difficult to obtain. Discovery is sometimes available under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[116] depending on whether a country is a signatory and what limitations a country has placed on information requests. In some countries, however, it is nearly impossible to obtain information through formal discovery means.

Some defendants have used the U.S. federal statute, 28 U.S.C. § 1782, to obtain evidence relevant to a foreign proceeding. For example, in the *Chevron* litigation challenging a large judgment from Ecuador, much of the information on which the New York court relied in granting a preliminary injunction against enforcement of the judgment was gathered using the tool of 28 U.S.C. § 1782.[117]

Section 1782 provides a mechanism for "assistance to foreign and international tribunals and to litigants before such tribunals." Section (a) of that statute authorizes U.S. federal courts to require the production of information or testimony by a witness within the court's jurisdiction for use in a foreign proceeding:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be

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[116] For information on which countries have agreed to be bound by the Hague Convention on Service and what reservations they have registered, see http://www.hcch.net (search for information on Service Section).

[117] *See* Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 605 (S.D.N.Y. 2011):

> These and perhaps other circumstances caused Chevron during the first quarter of 2010 to begin seeking discovery under 28 U.S.C. § 1782 from American witnesses thought to have knowledge of pertinent facts. In a series of proceedings around the country, Chevron obtained, among other things, the outtakes from *Crude*—the video segments that did not make it into the film as released—as well as documents and testimony from Donziger, Stratus, and others. The information gained in the Section 1782 proceedings is remarkably informative about the Lago Agrio litigation and related matters bearing heavily on this motion and it provides a significant part of the evidentiary record.

> produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.[118]

Courts have construed section 1782 to allow discovery assistance for both pending and anticipated adjudicative proceedings that are "within reasonable contemplation."[119] The discovery sought under section 1782 need not be the sort that would be discoverable in the foreign court proceeding.[120] In evaluating a request under section 1782, U.S. courts consider whether the person from whom discovery is sought in the United States is a participant in the foreign proceeding or a third party, because discovery under section 1782 from participants to the foreign proceeding is less favored: "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[121] U.S. courts also consider factors including "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[122]

Some courts have limited section 1782 discovery requests if the foreign court or agency where the underlying proceeding is pending opposes the discovery and is not receptive to U.S. judicial assistance.[123] Such a limitation

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[118] 28 U.S.C. § 1782(a).

[119] *See* 6 *Moore's Federal Practice* § 26.08 (3d ed. 2011); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004).

[120] *Intel Corp.*, 542 U.S. at 244 ("Section 1782 is a provision for assistance to tribunals abroad. It does not direct U.S. courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.").

[121] *Id.* at 264.

[122] *Id.*

[123] *See, e.g., In re* Microsoft Corp., 428 F. Supp. 2d 188, 194 (S.D. N.Y. 2006) (quoting *In re* Schmitz, 259 F. Supp. 2d 294, 298 (S.D. N.Y. 2003)) ("Granting discovery in the face of opposition from the foreign tribunal would undermine the spirit and purpose of the statute by discouraging that and other foreign tribunals from 'heeding similar sovereignty concerns posited by our governmental authorities to foreign courts.'").

is not appropriate absent a "clear directive" from the foreign tribunal that it "would reject evidence" produced in the United States.[124]

Federal Rule of Civil Procedure 27 also provides a mechanism to perpetuate testimony about any matter "cognizable in a United States court." The party petitioning for an order authorizing a deposition must show that it "expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought."[125] The requesting party cannot use Rule 27 as a substitute for discovery, seeking to ascertain unknown testimony, but instead must set forth in detail the substance of the testimony it needs to preserve.[126] There are few precedents where parties have successfully invoked Rule 27, so it is relatively untested.[127] Nevertheless, this tool may be useful for a defendant in a foreign court proceeding that needs to develop information for potential use in challenging a U.S. court's recognition of the foreign judgment.

Many defendants have found it necessary to rely heavily on informal investigation tools to gather information to challenge the fairness of a foreign court proceeding. The success of such informal information gathering depends on the skill of the investigators and local laws that may affect such work.

[d] Evidentiary Hearing in U.S. Court Before Recognizing Judgment

U.S. courts normally hold an evidentiary hearing to decide disputed fact issues that are raised as part of the proceedings for recognition of a foreign country's judgment. For example, the 2005 Revised Act now includes in section 6 a procedure for recognition of a foreign-country judgment that calls for the judgment creditor to file "an action seeking recognition of the foreign country judgment." The nature and extent of the issues to be

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[124] Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1100 (2d Cir. 1995); Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373, 377 (5th Cir. 2010).

[125] *Fed. R. Civ. Proc.* 27(1)(A).

[126] *See, e.g.*, Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375-76 (D.C. Cir. 1995) (remanding to district court for it to possibly allow a taxpayer to take a deposition of a retired IRS employee who was 81 years old and might be unavailable to testify at the time of a future trial, in a future court proceeding after IRS administrative remedies had been exhausted).

[127] In one successful instance, a court authorized immediate depositions under Rule 27 to perpetuate testimony from members of a ship's crew in aid of a contemplated future arbitration proceeding in London. The ship was about to leave a U.S. port with no assurance that the crew members would be subject to depositions once they left the port. *See In re* Deiulemar di Navigazione, S.p.A., 153 F.R.D. 592, 592-93 (E.D. La. 1994).

resolved in the U.S. proceeding will depend on the character of the wrongdoing that is alleged to have occurred in the foreign court.

The 2005 Revised Act explains why detailed factfinding may be necessary even if it will complicate and delay the procedure for recognizing a foreign court's judgment:

> The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. *Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered.* The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. *These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised.* Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.[128]

Such an evidentiary hearing gives the defendant challenging recognition of the foreign court judgment an opportunity to prove the merits of its defenses to recognition using evidence it has gathered through formal and informal processes.

[e] Counterclaims, Discovery, and Evidentiary Hearing in Foreign Court Proceeding

If a defendant is subject to the foreign court's jurisdiction and not pursuing a strategic decision to abstain from participating in the foreign court proceedings, then it needs to raise and preserve all possible defenses in the foreign court proceeding. It also should consider asserting counterclaims if the facts warrant, seeking discovery, and participating in evidentiary hearings in the foreign court proceeding. These steps may facilitate a later challenge to recognition of the foreign court's judgment.

[f] Bilateral Treaty Rights

The defendant should examine all treaties in place between the United States and the foreign country where the action is pending, including bilateral treaties and multilateral treaties to which both countries are

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[128] 2005 Revised Law, § 6 cmt. 1, http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm#TOC1_1 (emphasis added).

signatories. Such treaties may create requirements or procedures that the foreign government must follow, or rights for the defendant appearing in a legal proceeding in the country.

[g] Prejudgment Remedies

As noted above in § 8.05[1][c], a plaintiff may seek prejudgment remedies against a defendant or assets that it owns in the foreign country where the court action is proceeding. The defendant should anticipate such prejudgment actions and preserve its defenses relating to such actions. If a plaintiff engages in overreaching conduct or the foreign court allows overreaching conduct in seeking prejudgment remedies, that may ultimately support the defendant's arguments that the foreign court was biased or failed to follow procedures consistent with due process.