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# TRANSNATIONAL LITIGATION AS A PRISONER'S DILEMMA\*

MAYA STEINITZ\*\* & PAUL GOWDER\*\*\*

*In this Article we use game theory to argue that perceptions of widespread corruption in the judicial processes in developing countries create ex ante incentives to act corruptly. It is rational (though not moral) to preemptively act corruptly when litigating in the courts of many nations. The upshot of this analysis is to highlight that, contrary to judicial narratives in individual cases—such as the (in)famous Chevron–Ecuador dispute used herein as an illustration—the problem of corruption in transnational litigation is structural and thus calls for structural solutions. The Article offers one such solution: the establishment of an international court of civil justice.*

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## INTRODUCTION

In this Article we use game theory to argue that perceptions of widespread corruption in the judicial processes in many, usually low-income, countries create *ex ante* incentives to act corruptly in transnational litigation because such perceptions present the litigating parties with a so-called prisoner's dilemma. "Transnational litigation," as the term is used in this Article, is civil litigation involving a foreign party—plaintiff or defendant—in the courts of

another nation.<sup>1</sup> A “prisoner’s dilemma” is a structure of strategic action between rational actors in which it is individually rational to not cooperate even though both parties would benefit from cooperation.<sup>2</sup> As it applies in the present context, understanding judicial corruption as a prisoner’s dilemma suggests that both litigants have an incentive to litigate corruptly, even when it would be collectively rational to litigate honestly if they could trust one another. In other words, it is rational—though not moral—to preemptively act corruptly when commencing many transnational lawsuits.

We illustrate the point in two ways. One is analytic, using game theory to flesh out the strategic incentives applying to litigants. The other is qualitative, illustrating our model by chronicling how perceptions of corruption of the Ecuadorian judicial system precipitated actual corruption in the (in)famous Chevron–Ecuador dispute (“CED”), the longest-running transnational litigation, which yielded the highest-ever environmental award, and which is generally understood to be representative of relevant key features of contemporary transnational litigation.<sup>3</sup>

The normative implication of this analysis is that, contrary to the judicial, scholarly, and media-created narratives of individual cases such as the CED, the Dole/Dow case (below), and others,<sup>4</sup> the problem of corruption in transnational litigation is *structural* rather than a problem of corrupt individuals or corrupt corporations. By

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1. American scholars usually focus on litigation with a foreign component in a U.S. court. See generally, e.g., GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (5th ed. 2011); HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS (2008).

2. See Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390, 1391–92 (1981).

3. For specifics on the ways the CED is representative for our purposes versus the ways in which it is unique, see *infra* text accompanying notes 29–36. See also Theodore J. Boutrous, Jr., *Ten Lessons from the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 219, 219 (2013) (statement of the author, Chevron’s lead defense lawyer) (“Of the many thorny issues raised by transnational litigation against U.S. companies, the lawsuit that Chevron Corporation is fighting in Ecuador touches on them all: legal ethics, weak and corrupt foreign judiciaries, litigation fraud, judgment enforcement, third-party litigation financing, cross-border discovery, and international arbitration . . .”). But cf. Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 263–64 (2004) (arguing that the concerns over human rights and environmental transnational litigation are overreactions); Christopher A. Whytock, *Some Cautionary Notes on the “Chevronization” of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 468 (2013) (arguing against treating the CED as representative of transnational litigation as a whole).

4. See *infra* notes 51–67 and accompanying text.

saying the problem is structural, we mean that the landscape is arranged in a way that pushes parties generally toward corruption. In individual cases, a party may resist corruption, or corrupt acts may not be available to that party, but the environment in which it operates has a corrupting central tendency. As a structural problem, the transnational litigation prisoner's dilemma calls for structural solutions. One possible structural solution—the establishment of an international court for civil justice—is presented in Part III.<sup>5</sup> This argument is not meant to absolve litigants and attorneys—on either plaintiffs' or defendants' side—who act corruptly. Rather, it is meant to highlight that while there is certainly room for ex post civil and criminal sanctions against litigants and lawyers who act corruptly, in order to uphold the rule of law—in recognition of the fact that moral agency is at play—there is also a great need for systemic, institutional solutions to prevent corruption ex ante because of the structural incentives that affect moral choices.

This Introduction starts by presenting the problem: dispute resolution processes that comply with basic requirements of the rule of law are important for global economic development from the perspective of both Western economies and Western-based multinational corporations, as well as the perspective of the developing world and the world's poorest. However, courts in many countries are corrupt, perceived by litigants as such, or both, and other dispute resolution fora are of limited relevance to key types of transnational litigation. We also introduce the real-world case we use to illustrate the prisoner's dilemma we have identified, the CED. Part I draws out the general problem of corrupt litigation with a prisoner's dilemma model. We provide a formal representation of the prisoner's dilemma in an Appendix. Part II draws on facts established through extraordinary discovery and extensive judicial findings in the CED to illustrate the likely perceptions of litigants in transnational litigation and those perceptions' effects on parties' behavior. Part III explores the normative significance of understanding corruption's prisoner's dilemma structure and, after discussing a variety of structural solutions, advocates for a bold solution: the establishment of an international court of civil justice (an "ICCJ").

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5. Advocacy for an international court of civil justice (an "ICCJ") to resolve cross-border mass torts and a blueprint for such a court is forthcoming in MAYA STEINITZ, *THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE* (forthcoming Cambridge Univ. Press 2018). A short essay by the same name previews the book: Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014) [hereinafter Steinitz, *The Case for an ICCJ*].

A. *Judicial Corruption and Its Significance to the Global Economy*

Robust foreign direct investment (“FDI”) flows benefit both capital-exporting nations, which tend to be developed nations, and capital-importing nations, which tend to be developing nations.<sup>6</sup> This is the economic rationale that underlies the Bilateral Investment Treaties (“BITs”) regime, which has seen explosive growth in the recent past.<sup>7</sup> There are now some 3,000 BITs, aimed at facilitating FDI flows, and approximately 93 percent of those include dispute resolution mechanisms.<sup>8</sup> It is widely believed that FDI-derived economic development, in the form of cross-border deals, cannot take place without dispute resolution mechanisms that adhere to basic requirements of the rule of law.<sup>9</sup>

Typically, a state is said to comply with the rule of law when its powers are used against individuals only pursuant to rules that are public, prospective, and general.<sup>10</sup> Beyond these broad principles, however, there is little agreement about what the rule of law demands.<sup>11</sup> There is, however, widespread agreement about its importance: lawyers and philosophers generally agree that the rule of

6. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 45–47 (2d ed. 2004).

7. See, e.g., *INTERNATIONAL INVESTMENT LAW* 57 (Marc Bungenberg et al. eds., 2015); cf. DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? 195–96 (Theodore H. Moran et al. eds., 2005) (noting an “explosion” in FDI in the 1990s).

8. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 7, 9 (OECD Working Papers on International Investment 2012/02), [http://www.oecd.org/investment/investment-policy/WP-2012\\_2.pdf](http://www.oecd.org/investment/investment-policy/WP-2012_2.pdf) [<http://perma.cc/K2FP-6C82>]. There is now, however, a growing discontent with the ICSID, defection from the system, and evidence that more defection is coming. See Joachim Karl, *Investor-State Dispute Settlement: A Government’s Dilemma*, COLUM. FDI PERSP., Feb. 28, 2013, at 2, [http://ccsi.columbia.edu/files/2014/01/FDI\\_89.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_89.pdf) [<http://perma.cc/EL6G-4V35>] (“Discontent is not limited to a few developing countries, but has spread to the G-20 countries . . .”); Mary M. Shepro, *Punctuated Equilibrium and Investor-State Dispute Settlement Mechanisms in Bilateral Investment Treaties* 4 (Apr. 2014) (unpublished manuscript) (arguing that the presence of dispute resolution provisions in BITs follows a punctuated equilibrium model and therefore BITs are likely to quickly shift away from such mechanisms) (on file with the North Carolina Law Review). Bolivia, Nicaragua, Venezuela, El Salvador, Indonesia, and Ecuador have all recently disavowed BITs. See David Ma, *A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America*, 2012 J. DISP. RESOL. 571, 571 (2012).

9. See *infra* notes 17–20 and accompanying text.

10. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 94 (2004).

11. See, e.g., Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565, 567 n.8 (2013); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 138–44 (2002).

law imposes important moral demands on legal systems;<sup>12</sup> economists and political scientists often claim that the rule of law is important for economic prosperity,<sup>13</sup> and the United States and other developed countries have very active rule of law development programs,<sup>14</sup> as do nongovernmental organizations (“NGOs”) and international organizations, including the American Bar Association (“ABA”), the World Bank, and many others.<sup>15</sup> Preliminary results from one of our empirical investigations on the subject, with a novel rule of law measure, are consistent with the general supposition that the rule of law facilitates economic development.<sup>16</sup>

Basic rule of law requires the availability of noncorrupt dispute resolution processes.<sup>17</sup> Judicial corruption may *initially* attract foreign investors into developing countries, since such investors are likely to be able to outbid local residents should their disputes come into court. However, such legal misconduct is likely to lead to ultimate loss of investments in the form of expropriative revolutions provoked by rapacious business practices. This arguably occurred, for example, in

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12. For examples of the lawyerly debate see, for example, RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* 10–18 (2011); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–9 (1997); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 784–89 (1989). For examples of the philosophical debate see, for example, RONALD DWORKIN, A MATTER OF PRINCIPLE 9 (1985); MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 113–23 (2007); ANDREI MARMOR, LAW IN THE AGE OF PLURALISM 3–4 (2007); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210–12 (2d ed. 1979); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 11 (2008).

13. See generally Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008) (reviewing literature).

14. United Nations, NGO, and World Bank rule of law promotion efforts are detailed in Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* 4–6 (Soc. Dev. Papers, Conflict Prevention & Reconstruction, Paper No. 37, 2006), [http://siteresources.worldbank.org/INTCPR/Resources/WP37\\_web.pdf](http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf) [<http://perma.cc/YQF3-Q4WN>]. The numerous U.S. rule of law programs are detailed in SHAWNA WILSON, U.S. RULE OF LAW ASSISTANCE: A GUIDE FOR JUDGES (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/RulLaw11.pdf/\\$file/RulLaw11.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/RulLaw11.pdf/$file/RulLaw11.pdf) [<http://perma.cc/2AMY-9DSS>]. The ABA’s rule of law initiative is detailed at Am. Bar Ass’n Rule of Law Initiative, *Our Work & Research*, A.B.A., [http://www.americanbar.org/advocacy/rule\\_of\\_law/about/work\\_research.html](http://www.americanbar.org/advocacy/rule_of_law/about/work_research.html) [<http://perma.cc/2Y27-RKML>].

15. See PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 2–3, 168–86 (2016) (describing global rule of law development industry).

16. See *id.* at 182–88 (presenting empirical results).

17. See Paul Gowder, *Institutional Corruption and the Rule of Law*, 9 LES ATELIERS DE L’ETHIQUE/ETHICS F. 84, 94–96 (2014) (explaining the relationship between the rule of law and corruption).



Mexico and other Latin American countries.<sup>18</sup> Accordingly, it is reasonable to believe that corrupt dispute resolution procedures impair economic development and thus are bad both for market participants and ordinary citizens in both recipient and investor countries.

The imperative to provide for a rule of law compliant dispute resolution forum accounts for the existence of the World Bank's International Center for the Settlement of Investment Disputes ("ICSID").<sup>19</sup> The ICSID regime is widely understood as the linchpin of foreign investment because it allows foreign investors recourse against governments in the developing world without requiring them to litigate in the courts of those nations. Foreign investors, in turn, seek to avoid such courts because of perceived bias in favor of said sovereigns, as well as perceived corruption.<sup>20</sup>

It is not only American multinational corporations and other foreign investors, however, who require a forum for their grievances that arise out of FDI. FDI is at times associated with unsound environmental practices, human rights violations, unsafe labor conditions, and other abuses.<sup>21</sup> Consequently, the residents of the host

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18. See generally Cole Blasier, *Studies of Social Revolution: Origins in Mexico, Bolivia, and Cuba*, 2 *LATIN AM. RES. REV.* 28, 34-37 (1967) (reviewing literature describing the combination of "absentee ownership," particularly by U.S. investors, economic maldistribution, and control of the government by (often foreign) business interests as causes of revolutions in Mexico, Bolivia, and Cuba). The 2006 Ecuadorian regime change—from a pro-foreign investor regime to a regime antagonistic to foreign multinational corporations—was due at least partially to perceived abusive practices of the latter. Cf. Mercedes Alvaro, *Ecuador's Correa To Enact Hydrocarbons Reforms on Monday*, *ECUADOR REP.* (July 27, 2010), <https://ecuadorreport.wordpress.com/2010/07/27/ecuadors-correa-to-enact-hydrocarbons-reforms-on-monday/> [<http://perma.cc/DPL3-YAXR>] (reporting that Correa threatened to nationalize Ecuador's oil fields if foreign oil companies did not abide by state policies).

19. See *About ICSID*, ICSID, [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home) [<http://perma.cc/UY33-BARJ>].

20. See *infra* notes 57-67 and accompanying text; see also Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *CORNELL L. REV.* 1, 31-34 (2008) [hereinafter *Globalizing Commercial Litigation*]; Henry B. Hansmann, *Extraterritorial Courts for Corporate Law* 4-5 (Yale Law Sch., Faculty Scholarship Series, Paper No. 3, 2005) (suggesting that it would be desirable (and feasible) to have Delaware, and other jurisdictions whose laws have extraterritorial reach, hold hearings and trials out of state). In addition to fear of corruption and pro-host state bias, other common complaints against courts in the developing world are discussed in GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 7-11 (2d ed. 2001).

21. See, e.g., AL GEDICKS, *THE NEW RESOURCE WARS: NATIVE AND ENVIRONMENTAL STRUGGLES AGAINST MULTINATIONAL CORPORATIONS* 13-38 (1993); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443, 452-60 (2001); John Ruggie, *Report of the Special*

states also require a forum to pursue litigation arising from those dark sides of FDI. ICSID provides no forum for such potential plaintiffs because its jurisdiction extends only to suits brought by foreign investors against host states with claims under BITs.<sup>22</sup> U.S. courts—always limited fora due to procedural and political hurdles such as personal jurisdiction requirements and various due process requirements—have been, for a generation now, progressively closing their doors to litigation brought by foreign plaintiffs against U.S.-based corporations.<sup>23</sup> The most recent and high-profile example is the U.S. Supreme Court decision of April 17, 2013, in *Kiobel v. Royal Dutch Petroleum*,<sup>24</sup> which held that the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Claims Act (“ATCA”).<sup>25</sup> This case is widely viewed as the death knell to human rights litigation in U.S. courts against multinational corporations for their actions overseas.<sup>26</sup> The same trend exists in the doctrinal developments in the areas of forum non conveniens (“FNC”) jurisprudence, comity, and enforcement and recognition jurisprudence.<sup>27</sup> We will now describe our example of

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*Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 29 NETH. Q. HUM. RTS. 224, 236–46 (2011). For the FDI-environmental connection in the case of the oil exploitation at the Ecuadorian Oriente, see JUDITH KIMERLING ET AL., *AMAZON CRUDE* (Susan S. Henriksen ed., 1991).

22. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ch. II, Mar. 18, 1965, 575 U.N.T.S. 159, 174–75.

23. See William Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1577–78, 1606–07 (2013).

24. 133 S. Ct. 1659 (2013).

25. *Id.* at 1665.

26. See, e.g., Roger Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1749–54 (2013).

27. See, e.g., *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWx), 2005 WL 6184247, at \*12–13 (C.D. Cal. Nov. 10, 2005) (preventing recognition and enforcement of a Nicaraguan judgment on grounds of lack of personal jurisdiction by the Nicaraguan court); *Franco v. Dow Chem. Co.*, No. CV 03-5094 NM, 2003 WL 24288299, at \*8 (C.D. Cal. Oct. 20, 2003) (granting defendants’ motion to dismiss on, inter alia, grounds of lack of personal jurisdiction). Cutting-edge analyses of the developments in these areas, including the phenomena of “forum shopper’s remorse” and the access-to-justice gap created by the incompatible standards for forum non conveniens (“FNC”) versus foreign judgment enforcement include Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010) (discussing the expansion of FNC and prudential standing doctrines by U.S. courts to dispose of transnational litigation); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (discussing the access-to-justice gap created by “forum shopper’s remorse”); Michael D. Goldhaber, *Forum Shopper’s Remorse*, CORP. COUNS. (Apr. 1, 2010), <http://www.corpcounsel.com/id=1202445653516/Forum-Shoppers-Remorse--> [<http://perma.cc/HH27-PMLL>] (archived

such litigation, the CED, a mass tort action against a foreign investor, to highlight the problems of corruption in non-ICSID litigation.

*B. The Chevron-Ecuador Dispute and the Contemporary Transnational "Litigation Landscape"*

On February 14, 2011, an Ecuadorian court issued an \$18.2 billion judgment against Chevron in an environmental suit brought by a group of forty-seven plaintiffs on behalf of some 30,000 indigenous peoples in the Amazonian rainforest of Ecuador (the "Lago Agrio Judgment" or "Judgment").<sup>28</sup> The litigation stems from personal injuries and environmental damage in the form of the pollution of rainforests and rivers in Ecuador. These damages were found by the Ecuadorian court to be a result of oil-drilling operations conducted by Texaco (which was subsequently acquired by Chevron in 2001) from 1964 to 1990.

The Lago Agrio Judgment is the largest judgment ever imposed for environmental contamination by any court.<sup>29</sup> The litigation has been ongoing for more than twenty years with no end in sight (as discussed below).<sup>30</sup> The CED is, therefore, unique in certain respects. The amount of resources devoted by both parties, but especially by Chevron (estimated to have spent more than \$1 billion on the litigation and still counting),<sup>31</sup> means that the dispute has taken on a scope and character that is unusual. One unusual feature of the

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with LexisNexis]] (discussing Chevron's "forum shopper's remorse" in the specific context of the CED).

28. See *Aguinda v. Chevron Corp.*, No. 2003-0002, at 176-84 (Provincial Ct. of Justice of Sucumbios, Feb. 14, 2011) (Ecuador), <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf> [http://perma.cc/CE5K-M8WG]. The judgment was later reduced by the Ecuadorean National Court of Justice, Ecuador's highest court, to \$9.5 billion, but was otherwise upheld. *Aguinda v. Chevron Corp.*, No. 174-2012, at 222 (Corte Nacional de Justicia Nov. 12, 2013) (Ecuador), <http://chevrontoxico.com/assets/docs/2013-11-12-final-sentence-from-cn-j-de-ecuador-spanish.pdf> [http://perma.cc/6GWC-JD28] (reversing punitive damages but otherwise affirming the judgment). The litigation is known as the "Lago Agrio litigation" after the oil field in which the claimed injuries took place.

29. Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER, Jan. 9, 2012, at 38, 40, <http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe> [http://perma.cc/R6MD-SUSS].

30. The CED and its significance was the subject of the first symposium issue of the *Stanford Journal of Complex Litigation*. See Symposium, *Lessons from Chevron*, 1 STAN. J. COMPLEX LITIG. 199 (2013).

31. For example, *New Yorker* reporter Patrick Keefe estimated Chevron's legal costs at approximately \$140 million a year. See Keefe, *supra* note 29, at 49; see also Patrick Keefe, Presentation at the Stanford Journal of Complex Litigation Symposium: Lessons from Chevron: Legal Ethics and Transnational Litigation (Mar. 26, 2013), <https://www.youtube.com/watch?v=vnfR2ytP13U> (last visited Mar. 1, 2016).

litigation is the aggressiveness of its tactics: Chevron has vowed to litigate the case “until hell freezes over and then fight it out on the ice” and promised that the Ecuadorian plaintiffs will endure a “lifetime of litigation” if they “dare pursue their claims.”<sup>32</sup> Chevron has also sued or threatened to sue anyone aiding the plaintiffs.<sup>33</sup> Other unusual features include the extent of the discovery;<sup>34</sup> the number of parallel proceedings; the significance of the litigation to the Ecuadorian national economy;<sup>35</sup> and the amount of third-party funding received by the plaintiffs.<sup>36</sup>

However, with respect to perceptions of corruption and their effect on litigation strategy, the relevant aspects of our analysis, the CED is characteristic of transnational litigation rather than an aberration. These characteristic aspects are, primarily, the de facto

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32. Petition for Writ of Mandamus at 12 n.8, *In re Hugo Gerardo Camacho Naranjo*, No. 11-cv-0691-LAK (S.D.N.Y. June 6, 2011). It is reported that the case could have been settled for \$140 million back in 2001. See Patrick Radden Keefe, *Why Chevron Will Settle in Ecuador*, NEW YORKER (Jan. 4, 2012), <http://www.newyorker.com/news/news-desk/why-chevron-will-settle-in-ecuador> [<http://perma.cc/B3E8-F3ND>]. In addition, it has been known for at least three years that the case can be settled for under \$1 billion because that reservation point has been made apparent by the formula in the funding agreement between Burford, an alternative litigation finance company, and representatives of the plaintiffs, which became public in 2010. For an analysis of the alternative funding of the Lago Agrio plaintiffs' case against Chevron see Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 465–79 (2012).

33. See Petition for Writ of Mandamus, *supra* note 32, at 25 (stating that Chevron filed the RICO action “to intimidate and financially cripple its litigation adversaries”); Paul M. Barrett, *Chevron Sues an Online Poker Magnate Who Backed Plaintiffs in Pollution Case*, BLOOMBERG BUSINESSWEEK (Mar. 18, 2014), <http://www.bloomberg.com/bw/articles/2014-03-18/chevron-sues-an-online-poker-magnate-who-backed-plaintiffs-in-pollution-case> [<http://perma.cc/L3P4-ZXU9>] (“If DeLeon is ultimately held liable for significant damages, his fate could inhibit other investors from backing advocacy-oriented documentaries expressing anti-corporate views.”).

34. See *infra* notes 115–21 and accompanying text; see also *Chevron Corp. v. Salazar*, No. 11–0691(LAK), 2011 WL 7112979, at \*3 (D. Or. Nov. 30, 2011) (finding some of Chevron’s discovery practices as “at least in part, meant to harass” and therefore sanctionable). In the United States alone, Chevron employs five-hundred lawyers from thirty-six different law firms to litigate the CED. See Chevron Corporation’s Appendix to Its Privilege Logs in Response to Defendants Hugo Gerardo Camacho Naranjo’s and Javier Piagueje Payaguaje’s First Set of Requests for Production of Documents and Things, First Set of Interrogatories (as Revised), and First Set of Requests for Admission, *Chevron Corp. v. Salazar*, No. 11–3718–LAK, 2011 WL 3628843, at \*3–7 (S.D.N.Y. Aug. 17, 2011), <http://chevrontoxico.com/assets/docs/2011-08-31-declaration-chevron-lawyers.pdf> [<http://perma.cc/4M3W-PNGV>]; see also Petition for Writ of Mandamus, *supra* note 32, at 9 n.6 (“Under the supervision of Judge Kaplan and his former law partner-turned-Special Master, the deposition of Mr. Donziger has turned into a likely record-breaking fourteen-day Chevron free-for-all.”).

35. See *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 482–90 (S.D.N.Y. 2014) (RICO decision) (noting the Ecuadorian government’s economic interest in the CED).

36. See Boutrous, *supra* note 3, at 228.

unavailability of a forum that can and will generate enforceable judgments, the consequent global injustice, the tremendously high cost of transnational litigation, and the inefficiencies created, specifically, due to the multiplicity of domestic and foreign fora that hear different aspects of transnational cases.

*C. Corruption: The Concept and Its Prevalence*

In order to give an account of what leads to corrupt adjudication and what can be done to prevent it, we must have a firm idea in mind of what corruption is—a subject about which there is copious debate.<sup>37</sup> In prior work, one of us has given a general account of the concept of corruption according to which it is a violation of the rule of law that appears in two forms.<sup>38</sup> Some kinds of corruption appear in the form of what might be called “tainting,” where an individual or institution becomes corrupted by an external influence that disrupts that individual or institution’s decision-making process, distorting it from its untainted form.<sup>39</sup> In the judicial context, a court might be tainted if it is subject to political or economic influence that turns its decisions away from the unbiased fidelity to law that it is expected to have—for example, if the military forces of other branches of government intimidate judges, those who appoint or have the power to fire judges politicize the court, or judicial election campaigns lead judges to make commitments inconsistent with their duties to the law. The second form of corruption is “disloyalty,” which is a generalization of the classic practice of bribe-taking to cover those cases where an individual sells his or her loyalty (or an institution permits such sale) to some third party, rather than directing it at those to whom loyalty is owed.<sup>40</sup>

Both forms of corruption concern us. Our running case study illustrates the way that they relate to one another: under one interpretation of the CED, the plaintiffs were moved to bribe the court (to carry out disloyalty corruption) by the perception that the court was already tainted by unreasonable influence from the oil industry, which rendered it unable to deliver a fair judgment on the merits.<sup>41</sup> On that interpretation, the two kinds of corruption were continuous, rather than discrete: the first kind led to the second.

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37. See generally Gowder, *supra* note 17 (describing the debate about the concept of corruption and offering a general theory of it).

38. *Id.* at 86–87.

39. *Id.* at 86–87, 94.

40. *Id.* at 87–91, 94–96.

41. See *infra* Section II.B.

Accordingly, it would be problematic to treat them as unconnected phenomena or offer an analysis of potential solutions to one without addressing the other. However, this picture is complicated by the fact that tainting-corruption is difficult to identify. To say that a decision-maker is tainting-corrupt is to say that it is subject to a pervasive, improper external influence.<sup>42</sup> But it follows that to identify a decision-maker as tainting-corrupt presupposes an identification of the proper influences on its decisions.<sup>43</sup> Such identifications will often be controversial. For example, suppose a state experiences a socialist uprising that sets up People's Courts to reallocate land. An external corporate litigant would be expected to argue that such courts are corrupted by their political origins and are for that reason unable to come to a fair decision; a local peasant would be expected to argue that the courts are uncorrupted, because they *ought* to be influenced by the ideals of the revolution. It would require a complete theory of judicial legitimacy to correctly identify all cases of tainting-corruption, even for a commentator who knew all of the relevant facts in any given case.

To avoid these problems, our analysis is in the first instance limited to instances of corruption that are carried out by the positive action of a party leading to a discrete piece of litigation (including actions in response to requests by a decision-maker, such as the solicitation of a bribe). On our model, some party must do something to invoke the corruption of a decision-maker; mere background corruption will not suffice. (We will call all such actions "corrupting acts.") Thus, our model covers all cases of bribery (since bribery requires someone to pay the bribe), as well as kinds of tainting-corruption in which a party actively does something to invoke the corruption of a tainted decision-maker in that party's behavior. For example, our model covers situations where a friend of a military regime calls upon her cronies in that regime to pressure its courts, when a litigant seeks to transfer litigation from a neutral forum into one biased by a corrupting influence in its favor, or when one seeks to have a favorable act passed in the legislature to influence the outcome

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42. Gowder, *supra* note 17, at 93–94 (discussing Lessig's notion of improper dependence).

43. To anticipate an objection, it is sensible to speak of institutional or collective decision-makers as well as individual decision-makers as having agency of their own. See generally CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011) (defending notions of collective agency).

of the litigation.<sup>44</sup> While this limitation does not completely insulate us from controversies about what sorts of influences count as corrupting, it does limit their impact: we make no attempt to identify or address corruption that is constituted merely by background bias in some party's behavior.

However, when considering solutions to the problem of litigation corruption, there will be reason to favor those that can ameliorate not only party-initiated corruption, but also background corruption presented in the form of tainting and its resulting bias. Accordingly, we will defend solutions that in the first instance promote neutrality between litigants in general.

Corruption is widely perceived to be a worldwide problem. According to the 2013 "Corruption Perceptions Index" by Transparency International, a global anticorruption NGO and the leading source of corruption data, two-thirds of 177 nations studied score below 50 on a 100-point scale of perceived corruption.<sup>45</sup> In 2007, Transparency International produced a report focusing solely on judicial corruption.<sup>46</sup> Among the findings recounted in that report, the following, based on a 2006 survey of almost 60,000 respondents in 62 countries, are particularly striking: first, "[o]f the 8,263 people who had been in contact with the judicial system recently, 991, more than one in 10, had paid a bribe"; second, "[i]n 33 of the 62 countries polled, a majority of respondents described the judiciary/legal system of their country as corrupt"; and third, "[i]n 35 countries, respondents singled out judges (from a list that also included: police, prosecutor, lawyer, court staff, witness/jury and 'other') as the actors they most needed to bribe to obtain a 'fair' judgment."<sup>47</sup>

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44. In the CED, one interpretation of events is that Chevron removed the litigation to Ecuador in the belief that it would benefit from courts corrupted by the military regime's dependence on oil interests. See *infra* note 152 and accompanying text. We assume, for the purposes of our case study, that the plaintiffs believed as much. As will be seen, our model depends on the parties' *beliefs* about corruption and the incentives therefor, not on the extent of actual corruption with which any given party is confronted.

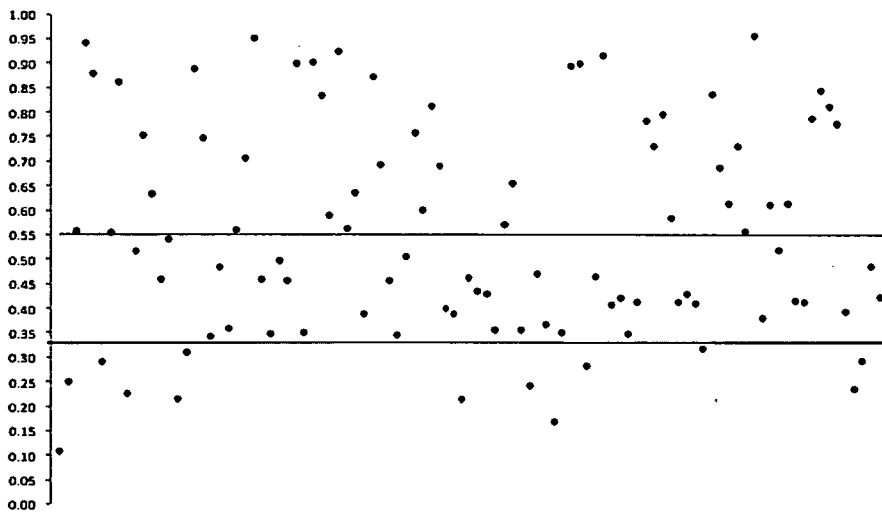
45. For a description of results, see *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2013/results> [<http://perma.cc/667M-G7TY>]. Transparency International describes its methods and sources online at *Corruption Perceptions Index: In Detail*, TRANSPARENCY INT'L, [http://www.transparency.org/cpi2013/in\\_detail](http://www.transparency.org/cpi2013/in_detail) [<http://perma.cc/VJM3-U7FF>].

46. See TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, at xvi (2007), [http://files.transparency.org/content/download/173/695/file/2007\\_GCR\\_EN.pdf](http://files.transparency.org/content/download/173/695/file/2007_GCR_EN.pdf) [<http://perma.cc/PU4N-SRKB>]. Transparency International's definition of judicial corruption focuses on political pressure and bribery, categories that are roughly equivalent to our own. See *id.* at xxiii-xxiv.

47. Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies*, in TRANSPARENCY INT'L, *supra* note 46, at 3, 12.

The World Justice Project is an international rule of law NGO that combines data from expert and general population surveys about a variety of factors relating to the rule of law.<sup>48</sup> We have reviewed its 2014 data relating to subfactor 2.2: scores on the proposition “[g]overnment officials in the judicial branch do not use public office for private gain.”<sup>49</sup> The countries with scores that are more than one standard deviation below the mean are Afghanistan, Albania, Bangladesh, Bolivia, Cambodia, Cameroon, Kyrgyzstan, Moldova, Myanmar, Nicaragua, Sierra Leone, Venezuela, and Vietnam. Ecuador’s score is 0.35, almost one standard deviation below the mean.<sup>50</sup>

**Figure 1. Distribution of World Justice Project Judicial Corruption Scores**



The real-world consequences of the pattern these data demonstrate for transnational litigation can best be seen through a few prominent examples. Another high-profile transnational case that exhibits features like the CED is the Dole/Dow litigation that was

48. The World Justice Project summarizes its methods online at *Methodology*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/methodology> [<http://perma.cc/8DCU-YTU9>].

49. *Absence of Corruption*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/factors/absence-of-corruption> [<http://perma.cc/GMM3-NHRP>].

50. Chart produced by the undersigned using Microsoft Excel, from World Justice Project raw data, made available at <http://data.worldjusticeproject.org> and based on ninety-nine countries for which data was reported. Mean = 0.55, standard deviation = 0.22 (our calculation).



subject to a recognition and enforcement action in *Osorio v. Dow Chemical Co.*<sup>51</sup> In the Dole/Dow litigation, some 10,000 Nicaraguan plaintiffs secured a total of more than \$2 billion in a series of more than 200 lawsuits filed against Dole Food Company in Nicaraguan courts.<sup>52</sup>

In one of the tentacles of the Dole/Dow litigation, the District Court for the Southern District of Florida held that a judgment of over \$97 million awarded to 150 Nicaraguan agricultural workers was unenforceable under Florida's Uniform Out-of-Country Foreign Money-Judgments Recognition Act.<sup>53</sup> The grounds for nonenforcement were, *inter alia*, that the judgment was rendered under a system that does not provide procedures compatible with the American requirements of due process of law; that recognition would be repugnant to Florida's public policy; and that the judgment "was rendered under a system which does not provide impartial tribunals."<sup>54</sup> The Eleventh Circuit affirmed the district court's decision in part but declined "to address the broader issue of whether Nicaragua as a whole 'does not provide impartial tribunals' and decline[d] to adopt the district court's holding on that question."<sup>55</sup>

Other well-known examples of abusive transnational litigation<sup>56</sup> or of access to justice and rule of law deficits created by the absence of jurisdictions capable of granting enforceable judgments<sup>57</sup> are *Bridgeway Corp. v. Citibank*<sup>58</sup> and *Bank Melli Iran v. Pahlavi*.<sup>59</sup>

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51. 635 F.3d 1277 (11th Cir. 2011). The Dole/Dow litigation consists of two interrelated cases in which Nicaraguan workers sought compensation for harms caused by exposure to chemicals supplied by Dow and used by Dole. See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311–14 (S.D. Fla. 2009), *aff'd sub nom. Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011); *Franco v. Dow Chem. Co.*, No. CV 03-5094 NM, 2003 WL 24288299, at \*1 (C.D. Cal. Oct. 20, 2003).

52. WILLIAM E. THOMSON & PERLETTE MICHÈLE JURA, U.S. CHAMBER INST. FOR LITIGATION REFORM, *CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS 3* (Oct. 2011) [hereinafter CHAMBER'S REPORT], [http://www.instituteforlegalreform.com/uploads/sites/1/TransnationalLitigation\\_AbusiveForeignJudgments.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TransnationalLitigation_AbusiveForeignJudgments.pdf) [<http://perma.cc/3SPJ-M526>]. The Chamber's Report was authored by counsel for Dole in the *Osorio* case (discussed below).

53. *Osorio*, 665 F. Supp. 2d at 1312 (applying FLA. STAT. ANN. § 55.601–607 (West, Westlaw through 2015 1st Reg. Sess. & Spec. A Sess.)).

54. *Osorio*, 635 F.3d at 1279.

55. *Id.*

56. CHAMBER'S REPORT, *supra* note 52, at 5.

57. "Remarkably, courts . . . refuse to determine whether the foreign courts afforded the individual litigants due process, relying instead on political 'evidence' and judges' own personal perceptions of the foreign countries." Montréal D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1160 (2007).

58. 201 F.3d 134 (2d Cir. 2000).

59. 58 F.3d 1406 (9th Cir. 1995).

In *Bridgeway*, the Second Circuit upheld the District Court for the Southern District of New York's ("District Court") refusal to enforce a judgment rendered by the Supreme Court of Liberia based on a determination that the Liberian courts did not provide impartial tribunals or procedures compatible with due process.<sup>60</sup> Remarkably, the Second Circuit upheld the District Court's summary judgment even though it was granted *sua sponte*, without prior notice to the Liberian plaintiff-appellant, and based on a finding that *as a matter of law* Liberian courts did not constitute a functioning judicial system.<sup>61</sup>

In *Pahlavi*, the Ninth Circuit upheld the District Court for the Central District of California's summary judgment in favor of the sister of the former Shah of Iran, Ms. Pahlavi, in an action brought against her by Iranian banks seeking to enforce default judgments obtained against her in Iranian courts.<sup>62</sup> The district court found, and the Ninth Circuit upheld, that Ms. Pahlavi *could not* have had due process in Iran during the period that the judgments in question were obtained against her.<sup>63</sup> In other words, here, again, the finding was not that due process was *in fact* denied, but rather that it categorically

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60. *Bridgeway Corp.*, 201 F.3d at 137. Citibank had liquidated its business in Liberia due to the civil war that then engulfed the state. *Id.* at 138. *Bridgeway*, a Liberian corporation, had a balance of \$189,375.66 with the liquidated Citibank branch in Monrovia, Liberia. *Id.* The fact that these funds were owed by Citibank to *Bridgeway* was not in dispute. Rather, Citibank defended itself by challenging the legitimacy of the Liberian judicial system. *Id.* at 139. The District Court rejected a claim that Citibank was judicially estopped from questioning the fairness of the Liberian judiciary having voluntarily litigated before it. *Id.* at 141. Specifically, it rejected a judicial estoppel claim based on the fact that "Citibank has taken part in at least a dozen civil cases in Liberia [during the relevant timeframe] . . . [a]nd in several of those cases, Citibank appeared as a plaintiff." *Id.* The District Court based its summary judgment on U.S. State Department Country Reports for Liberia finding that during the relevant period "corruption and incompetent handling of cases remained a recurrent problem" and that "the judicial system, already hampered by inefficiency and corruption, collapsed for six months following the outbreak of fighting." *Id.* at 138. The Second Circuit affirmed and held that Citibank met both the burden of production and persuasion in presenting the uncontradicted U.S. State Department documents that "describ[ed] the chaos within the Liberian judicial system during the period of interest . . . [and] indicat[ed] that the Liberian judicial system was in a state of disarray." *Id.* at 142 (i.e., the decisions were not based on a finding of judicial corruption in the litigation at bar).

61. The Second Circuit stated that this generally "discouraged practice" of law. *Id.* at 139. Summarily dismissing *sua sponte* without notice did not procedurally prejudice *Bridgeway* because *Bridgeway* itself brought a motion for summary judgment and in its memorandum of law argued that the evidence it submitted was sufficient to establish that the Liberian courts constituted a "system of jurisprudence likely to secure an impartial administration of justice." *Id.*

62. *Bank Melli Iran*, 58 F.3d at 1411.

63. *Id.* at 1413.

could not have been provided in the legal system in question.<sup>64</sup> Here, too, the courts relied on consular information sheets and other reports issued by the State Department.<sup>65</sup> Some of those reported on the Iranian judicial system (while others reported on matters such as terrorism), and they concluded that in Iran “trials are rarely held in public, that they are highly politicized, and that the regime does not believe in the independence of the judiciary.”<sup>66</sup> Finally, here, too, the court declined to judicially estop a party who had previously argued that the case should be dismissed on FNC grounds because Iran would be the proper place for trial.<sup>67</sup>

In sum, a review of the doctrine reveals that U.S.-based multinational corporations and much of the American judiciary perceive the judicial systems of much of the world as corrupt to such a degree that it is unnecessary to examine whether any form of corruption actually occurred in any given case. The doctrine also reveals that these perceptions match those of high-profile international NGOs and those who respond to their surveys.

We now turn to Part I, in which we develop a general model that describes the strategic incentives facing many transnational litigants.

#### I. THE TRANSNATIONAL LITIGATION PRISONER’S DILEMMA

The prisoner’s dilemma is the classic paradox of game theory. In its most traditional form, the game imagines a pair of players who have a choice: to cooperate with one another, or to defect from a mutually beneficial agreement. The catch is that mutual cooperation is better for each than mutual defection, but that defection is better for a single player than cooperation, regardless of what the other player does.<sup>68</sup> This last feature is called, in game-theoretic lingo, a

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64. *Id.* at 1411.

65. *Id.* at 1413.

66. *Id.* at 1412.

67. *Id.* at 1413. In view of the frequent appearance of this pattern of behavior—insist that a suit initially filed in the United States be refiled in a foreign court, and then challenge the foreign court’s judgment on due process grounds—it seems plausible to suppose that defendants are either (a) looking down the game tree and anticipating that subsequent judgments will be unenforceable, or (b) strategically attempting to increase plaintiffs’ litigation costs. This, in turn, suggests that reform of FNC standards, and other doctrines that currently bar access to U.S. courts, may be a part of any structural solution to the transnational litigation problem. *See generally, e.g.,* Whytock & Robertson, *supra* note 27 (proposing solutions at both the FNC stage and judgement-enforcement stage of litigation). However, as discussed at *supra* note 8, the contemporary jurisprudential currents and those of the past generation point the opposite direction, making this solution unrealistic. Thus, a solution is unlikely to emerge from the American judiciary.

68. Axelrod & Hamilton, *supra* note 2, at 1391–92 (describing a prisoner’s dilemma).

"strictly dominant strategy." We have characterized the prisoner's dilemma formally in the Appendix.<sup>69</sup>

The problem from the perspective of parties in corrupt litigation is best captured by an old joke about the crooked judge. As we have heard it told, a judge is wrestling with the following dilemma: having received \$5,000 from the plaintiff and \$10,000 from the defendant, what ruling should be made? The judge comes to the following plan: give \$5,000 back to the defendant, and decide the case on the merits. In that joke, the judge makes out like a bandit, but the parties are the butts: even having paid a bribe, neither gets any benefit. Each has flushed five grand down the toilet. But if you are a party before such a judge, what else do you do? Let the other side be the only briber? In the subsections that follow, we propose to demonstrate that this joke is a model for the real world of transnational litigation.

#### A. *The Corrupt Litigation Game as a Prisoner's Dilemma*

##### 1. Corrupt Trial Courts

The situation of litigants facing a corruptible court can helpfully be understood as a prisoner's dilemma.<sup>70</sup> Each litigant may choose to litigate honestly (cooperate) or carry out a corrupting act (including, but not limited to, paying a bribe) (defect). If a litigant corrupts the court, the court is, *ex hypothesi*, more likely to rule in that litigant's favor. Accordingly, if one's opponent is not corrupting the court, one has reason to corrupt the court at any cost less than the expected value of the additional chance of victory the corrupting act confers. Similarly, if one's opponent *is* corrupting the court, offering one's own corrupting act may "balance the scales" and will be worth doing to the extent sufficient probability of victory can thereby be recovered.

In the Appendix, we have formally described the situation in which corruption of a court constitutes a prisoner's dilemma. Generally, such situations will arise when both parties can relatively cheaply corrupt the court, and when the expected value of corruption will be high either because there is a large amount in dispute or because corruption is particularly likely to lead to victory. In such a situation, the litigants will prefer mutual honesty to mutual

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69. *See infra* Appendix.

70. A corruptible court, in this analysis, is a court in which there is at least one corrupting act available to a party, where that act has an expected value in terms of its effect on the outcome that is higher than its cost to the party (the cost of a bribe, the risk of getting caught, etc.).

corruption, but the conjunction of their strictly dominant strategies will lead them to, e.g., pay bribes and waste their money all while imposing the negative externalities caused by supporting a corrupt legal system.<sup>71</sup>

Importantly, in light of the problem of corruption in the developing world as well as in the specific context of the CED, the prisoner's dilemma is built by *perceptions*. Players' behavior will be driven by their expected returns on bribery, not by the extent to which courts actually are corrupt (or predisposed to bribe-taking). Accordingly, nothing in our argument depends on accepting a claim that many foreign courts are, in fact, corrupt or corruptible<sup>72</sup>—a claim which may, but need not, be based on accurate conceptions of foreign courts (it could also be based on, e.g., cultural bias).<sup>73</sup>

We thus interpret transnational litigation, as illustrated by the CED, as a matter of self-fulfilling perceptions. Both Chevron and the plaintiffs saw the Ecuadorian courts as corrupted by the interests of the opposing parties. Accordingly, both felt the need to intervene to attempt to corrupt the courts further, but their behavior need not have been based in the first place on accurate conceptions of the corruption of the courts.

## 2. What About Appeals?

An appeal functions as a second round of play between the parties but involves a new institution, the appellate court, which may or may not itself be corruptible. Enforcement actions and parallel proceedings, such as the BIT arbitrations at the Permanent Court of Arbitration ("PCA"), that are taking place in the CED are, for our purposes, similar to appeals since they provide another round at a new institution. These proceedings are therefore captured by the analysis above. (By "round," here we mean the term as used by game theorists, i.e., an opportunity to play the game again. In both appeals and enforcement actions the litigants are again asked to make a decision about whether or not to attempt to corrupt the court, in light of the underlying strategic dynamics they face.)

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71. See *supra* text accompanying notes 10–27 (rule of law discussion).

72. As is the view of the U.S. Chamber of Commerce. See CHAMBER'S REPORT, *supra* note 52, at 6.

73. What may appear as a failure of due process may simply be a reflection of differences in legal traditions. See Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 181–82 (2004) (criticizing American legal scholars for disregard of unfamiliar foreign legal systems, using the example of scholarly denial that China has a legal system).

In the model of this Article, the availability of appeals does not fundamentally change the strategic dynamics of the situation. So long as there is a finite upper limit on the number of rounds that may be played, whether or not a prisoner's dilemma is iterated (i.e., has multiple rounds) makes no difference: the sole equilibrium over the multiple-round game, as over the single-round game, remains mutual defection.<sup>74</sup>

Even if subsequent fora are not corrupt (or are mixed between corrupt and noncorrupt fora), the basic logic of the model still holds. The key assumption is that the outcomes of fora in transnational litigation are linked, such that the bribery of a corrupt forum can influence the outcome of a subsequent noncorrupt forum. This assumption will ordinarily be satisfied for the simple reason that corruption is a matter of dispute: the party who procures a corrupt judgment can be expected to deny having done so in a subsequent forum, and so long as there is some nonzero probability that his or her denial will be believed, principles of comity, full faith and credit, deference, and the like will lead the subsequent court to weight its evaluation in favor of the result reached by the prior judgment. Thus, in the enforcement context (i.e., where the jurisdiction in which a defendant's assets are located is different from the jurisdiction in which an alleged tort is committed), subsequent courts must ordinarily rely on the judgment and factual basis thereof established in the prior court.<sup>75</sup> Similarly, in the appellate context, where appellate tribunals must rely to some extent on initial (and potentially corruptible) findings in a trial court,<sup>76</sup> the disparate information held by parties and initial fora relative to subsequent fora all but guarantees some amount of de facto deference, even in the absence of de jure rules requiring it.

In short, appeals or enforcement actions may change the payoffs, but not the basic strategic structure. So long as a bribe in the first

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74. John W. Carroll, *Indefinite Terminating Points and the Iterated Prisoner's Dilemma*, 22 THEORY & DECISION 247, 248–50 (1987). This is not true of an indefinitely repeated prisoner's dilemma with no maximum number of rounds, which can support cooperative equilibria just as can an infinitely repeated version. See Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/prisoner-dilemma/> (last updated Aug. 29, 2014) [<http://perma.cc/WFB7-FGGE> (dark archive)].

75. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(d) (NAT'L CONFERENCE COMM'RS ON UNIF. STATE LAWS 2005) (imposing the burden of proof for establishing a specific ground for nonrecognition upon the party raising it).

76. Thus, in U.S. law, every standard of review shy of de novo represents a dependency between the appellate tribunal and the lower tribunal, such that influencing a result in the latter shifts probability mass toward one's preferred result in the former.

forum makes it more likely that the ultimate decision in subsequent fora will go in a litigant's favor, for sufficiently cheap bribes and sufficiently high stakes in the dispute, each litigant will still prefer to bribe the first forum, even when subsequent fora are incorruptible. A cheap shot at a corruptly procured judgment that might be enforced later in a noncorrupt forum may easily be better, from the standpoint of a litigant contemplating a bribe, than litigating fairly in the noncorrupt forum in the first place. We demonstrate this claim formally in the Appendix.<sup>77</sup>

### 3. Does the Prisoner's Dilemma Really Capture the Problem?

The use of prisoner's dilemma models in the legal literature has been subject to some criticism.<sup>78</sup> It has been suggested that legal scholars use prisoner's dilemma models because they are easy: they generate a unique equilibrium (in one-shot and finitely repeated play), and are readily amenable to a standard toolkit of solutions (e.g., force the players to cooperate).<sup>79</sup> But ease of use is not the same thing as appropriateness, and legal scholars who are insufficiently versed in less popular models may choose the prisoner's dilemma even though it poorly describes the phenomenon under study.

However, the prisoner's dilemma is a powerful tool independent of its relative tractability because it describes a human universal: the temptation to cheat on mutually beneficial social orders.<sup>80</sup> Unsurprisingly, wherever we find mutually beneficial social orders, we find scholars deploying prisoner's dilemma models. For example, the first generation of formal international relations literature was dominated by prisoner's dilemma models.<sup>81</sup> This ought to be unsurprising, since agreements between states such as peace treaties, arms control agreements, and trade agreements obviously have the high-level features of a prisoner's dilemma. Consider an arms control agreement between two parties: it is often beneficial for both parties to have both disarm; it is even more beneficial to hold on to one's

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77. See *infra* Appendix C.

78. See, e.g., Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 210–13 (2009) (recounting criticisms of the prisoner's dilemma and levying his own).

79. See *id.* at 212.

80. See Jules Coleman & John Ferejohn, *Democracy and Social Choice*, 97 ETHICS 6, 6 (1986) (describing the “essence of the Prisoner's Dilemma” as “an incentive to induce others to cooperate and to defect from the joint strategy in the hope of enjoying the fruits of cooperation without incurring the opportunity costs of compliance”).

81. Michael J. Gilligan & Leslie Johns, *Formal Models of International Institutions*, 15 ANN. REV. POL. SCI. 221, 222 (2012).

arms while the other side disarms (and even more so if one expects that the other side will cheat and remain armed).

It is for this reason that international relations scholar and leading game theorist James Fearon argued that the prisoner's dilemma is a part of a general strategic structure common to most international relations scenarios.<sup>82</sup> Fearon's structure works as follows: first, we should understand the players as participating in a coordination game by which they settle on one of the potentially many mutually beneficial agreements; second, we should understand them as participating in a prisoner's dilemma to determine the extent to which they can comply.<sup>83</sup> Fearon's insight has special relevance to the use of prisoner's dilemma models in legal contexts. Some legal contexts involve players who have the opportunity to shape the rules that apply to them (e.g., legislators or contracting parties), and thus as to whom the coordination stage of Fearon's two-stage analytic structure is relevant. However, often the existing rules of the game, establishing a mutually beneficial set of social rules, will be set exogenously in advance (e.g., the applicable tort law), and the only question relevant for a given analysis will be the extent to which the players can be induced to follow the established rules. For example, the enforcement of property rights can easily be understood as an *n*-player prisoner's dilemma: the existence of a system of private property is ex hypothesi beneficial for each of us, but it would be even better for me, personally (and each one of us as an individual), if everyone else obeyed my property rights, but I got to steal. Thus, we have police and jails to make defection costlier than cooperation.

In the instant context, the prisoner's dilemma is the right choice as an initial modeling tool for the same reasons. The situations we are concerned about are those in which the preexisting and mutually beneficial rules of fair and honest litigation are subject to profitable defection.<sup>84</sup> Judicial corruption is the classic example of such a

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82. James D. Fearon, *Bargaining, Enforcement and International Cooperation*, 52 INT'L ORG. 269, 270, 276 (1998).

83. *Id.* at 277–79.

84. Why mutually beneficial? We operate under the assumption that litigants in general, including parties in litigation like the CED, would prefer to fight out their disputes in legal orders characterized by determinate and fair systems of judicial resolution because those systems, inter alia, allow them, from a short-term perspective, to avoid the costs of extra-legal dispute resolution (i.e., violence or the recruitment of others to carry out violence) and uncertainty about the consequences of a particular dispute, and, from a long-term perspective, to benefit from things like enforceable contracts. See Anna Persson, Bo Rothstein & Jan Teorell, *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 456–63 (2013) (presenting evidence from Kenya and Uganda consistent with a collective-action



situation: the players facing a corruptible court may choose either to play by the mutually beneficial rules of litigation or defect by corrupting a judge.<sup>85</sup>

### B. *What Things Solve Prisoner's Dilemmas?*

The key insight that prisoner's dilemma analysis offers for the problem of judicial corruption is that *the parties do not want to be there*. From the standpoint of each litigant, if they do not have incentives to act corruptly, they can avoid wasting resources on corruption.<sup>86</sup> Attending to the strategic structure of the corrupt litigation game will shed light on policy options that may be missed without the formal analysis.

The conventional regulatory solutions currently tend to be only directed at bribery (disloyalty corruption), not the much harder to regulate tainting-corruption which is—as the CED demonstrates—closely linked to it. For that reason, most regulatory solutions are

understanding of corruption on the official level, similar to the model this Article presents at the litigant level: actual political actors see themselves as having an incentive to act corruptly because of the corrupt actions of others).

85. It may be objected that players may spend more or less on corruption, and may do so through multiple rounds. For example, plaintiff may pay one bribe, then defendant may pay a larger bribe, then plaintiff may outbid defendant, and so on. Such a game would not be a prisoner's dilemma, but an auction. However, it would have the key features of a prisoner's dilemma: the players would get their money sucked away, and would prefer, but be unable to reach, an equilibrium in which they did not bribe at all. See Michael R. Baye, Dan Kovenock & Casper G. de Vries, *The All-Pay Auction with Complete Information*, 8 ECON. THEORY 291, 292 (1996). In effect, such a symmetric auction (where players value the good at the same amount) is just a prisoner's dilemma in slightly fancier terms: each bidder would prefer that nobody bid at all, but given that player *X* is bidding any amount *N* less than the total value *V* of the auctioned good (judgment), including *N* = 0, player *Y* has an incentive to bid *N* + some positive amount  $\epsilon$  where  $N + \epsilon < V$ , at which point player *X* has an incentive to bid  $N + \epsilon + \epsilon$ , and so forth, wasting the resources of both because they are unable to cooperate. This may not hold for cases where the parties value the outcome of litigation differently (e.g., because more than money is at stake for one party). See generally Gadi Fibich & Gal Oren, *An Elementary Proof of the Common Maximal Bid in Asymmetric First-Price and All-Pay Auctions*, 122 ECON. LETTERS 190 (2014) (proving that no bidder bids more than the lowest maximum bid in such asymmetric auctions). In general, auction theory gets very complicated once we leave the symmetric case, and our results may not apply to all such cases. However, we are concerned primarily with litigation in which the parties primarily care about the money at stake, and, for that reason, have symmetrical payoffs. When other values are at stake, we would expect the parties to sometimes reach a Coasean bargain. For example, where one party is particularly concerned about the reputational cost of losing litigation, we often see settlements paired with confidentiality agreements.

86. In effect, litigants become free to choose honest litigation only when they have the option of corrupting the court taken away from them. See generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000) (describing how agents may benefit from the option to bind themselves).

flawed from the start. However, we describe them to give the reader a sense of the contemporary context and the flaws in current strategies, even in terms of their limited goals.

The first conventional regulatory solution to bribery is to impose criminal punishments on the activity.<sup>87</sup> In strategic terms, this is an attempt to directly increase the costs of corruption, hopefully to the point that it is larger than the expected value of biasing the judge in one's favor. However, when we observe bribery despite criminal punishment, we can conclude that this strategy has failed at least in part.<sup>88</sup>

A second conventional regulatory solution to bribery is to control the corruptibility of judges by subjecting *them* to criminal prosecution. In strategic terms, this is an attempt to indirectly increase the costs of corruption to the parties by causing judges to demand more money to compensate for the increased risk of punishment. However, this strategy is also ineffective in some contexts, particularly in the international context, where the state with criminal jurisdiction over the judge (e.g., Ecuador) may be different from the state that wants to prevent the bribery, or from any state that has the enforcement capacity to detect and prosecute it.<sup>89</sup>

Since these conventional solutions are imperfect, the prisoner's dilemma model allows us to see a number of alternatives that may be available. These include the following:

### 1. Facilitating Enforceable Side-Bargains

Imagine the following simple prisoner's dilemma, where (by convention) the player who chooses the columns gets the payoffs listed first:

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87. See, e.g., Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012) (imposing criminal penalties for bribery of foreign officials).

88. Failure might occur (a) because bribery is prohibitively costly for the government to prosecute (including not just where there are problems of detection or proof, but also where governments with jurisdiction have conflicting interests, such as in permitting their own nationals to use bribery to obtain a competitive advantage or where the relevant officials would like to profit from bribes themselves), or (b) because the magnitude of punishment necessary to deter is so high given the magnitude of the goods at stake that imposing a punishment of sufficient size would lead to other policy costs (such as political opposition, costs associated with the destruction of bribing companies, chilling effects in which companies refrain from lawful behavior for fear of prosecution, etc.).

89. For more on why anticorruption measures are only likely to be enforced transnationally if their adjudication is internationalized, see *infra* notes 248-58 and accompanying text.

	Cooperate	Defect
Cooperate	\$10,000; \$10,000	\$10,001; \$0
Defect	\$0; \$10,001	\$1; \$1

This is a truly horrible prisoner's dilemma. The parties destroy almost all of their utility by following their (strictly dominant) defection strategies. However, suppose each could make an enforceable agreement with the other: "I will pay you fifty dollars for not defecting." This changes the game as follows:

	Cooperate	Defect
Cooperate	\$10,000; \$10,000	\$9,951; \$50
Defect	\$50; \$9,951	\$1; \$1

Here, the prisoner's dilemma has been eliminated because defection is no longer a strictly dominant strategy. This translates, in terms of the corrupt litigation game, into a side-agreement between the parties according to which they mutually increase the costs of corrupt acts. Theoretically, they might implement such an agreement by, for example, voluntarily creating an incorruptible independent monitor for their litigation and giving that monitor the power to impose large financial penalties on any litigant caught paying a bribe. Policymakers could, in principle, facilitate such transactions by providing the legal tools to permit such monitors, e.g., by giving monitors powers such as liens and access to (noncorrupt) courts to enforce their punishments, or by requiring their use. Essentially, this would amount to imposing the costs of enforcing national antibribery law on the parties rather than on the legal system.

However, this solution is unrealistic in the present context. As the CED has demonstrated, monitors too can be corrupted.<sup>90</sup> Accordingly, implementing this solution in practical contexts would require the creation of substantial infrastructure to protect against

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90. See discussion *infra* notes 179–93 (describing corruption of an ostensibly independent monitor in the CED).

corrupting such monitors but without the enforceability advantages of the international courts discussed below. Thus, we mention this option for analytical completeness only.

## 2. Facilitating Repeated Play

It is well known among game theorists that cooperation can sometimes be sustained in an indefinitely repeated prisoner's dilemma, given sufficiently low discounting of the future.<sup>91</sup> Typically, this works because, in repeated play, the players may adopt a variety of conditional retaliation strategies: for example, the well-known mutual "grim trigger" strategy amounts to each player telling the other "I'll cooperate now, but if you defect in this round, I will defect forever, and we will both end up with the lousy payoffs for mutual defection."<sup>92</sup>

In the litigation context, this suggests that it will sometimes be possible for parties who anticipate future dealings to avoid the mutual bribery outcome by creating these kinds of self-enforcing strategies. Policymakers, for their part, can encourage this by encouraging parties to structure their deals in a fashion that permits long-run play.<sup>93</sup>

More concretely, we might organize individuals who find themselves in transnational bargaining (or litigation) with international corporations into aggregate entities, such as labor unions, consumers' unions, special-purpose municipal corporations, and the like, in order to facilitate long-run interaction and extend the time-horizons of the parties. For example, major deals can be conducted between parties organized as indefinitely lived corporate entities, which may anticipate future play more readily than finitely lived individuals.

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91. Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting and with Incomplete Information*, 54 *ECONOMETRICA* 533, 533 (1986). By contrast, finitely repeated play will not work. For any determinate  $N$  rounds of a prisoner's dilemma, the only subgame perfect equilibrium is mutual defection at every round. *Id.* at 534.

92. See Fiona McGillivray & Alastair Smith, *Trust and Cooperation Through Agent-Specific Punishments*, 54 *INT'L ORG.* 809, 814-15 (2000) (explaining grim trigger strategies).

93. In general, economists are beginning to recognize the importance of creating indefinitely lived parties to solve systemic commitment problems of all types. See, e.g., DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 46, 158-69, 242-43, 262-63, 267 (2009) (detailing the development of indefinitely lived organizations in economic history and its role in solving numerous kinds of commitment problems).

Again, this option seems somewhat nonviable in the present world. It would require extensive changes to the local legal regimes for handling FDI in recipient countries, not all of which could be expected to cooperate with such a program. Accordingly, we leave this prospect aside as well, potentially to be further explored in future work.

### 3. Creation of a Noncorrupt Tribunal

A player that looks down the game tree and sees that it will find itself in a mutual-defection situation may choose the mutual-cooperation payoff before entering into litigation, or regulators may choose such a forum for parties.<sup>94</sup> This may be done before the onset of a controversy, as with arbitration agreements written into an original contract where the designated arbitrator is not corruptible.<sup>95</sup> It may also be done after the onset of a controversy, but before the onset of litigation, as when a plaintiff may only choose noncorrupt fora (for example, there may be mandatory jurisdiction in a noncorrupt international court). It might even be done after the onset of litigation by forum-selection rules that permit defendants to move the case to a less corrupt forum.<sup>96</sup>

The effectiveness of those institutional modifications that depend on ex ante party choice, like arbitration agreements, depends on the assumption that each player prefers mutual honesty to mutual corruption and can anticipate that unilateral corruption is impossible (“if I bribe, I know you will bribe, too”). Under these circumstances, each player will want to bind its own hands and make it impossible for either player to pay a bribe. The effectiveness of the modifications that take the choice away from the parties depends on the willingness

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94. In order to solve the prisoner's dilemma, the parties must not be able to choose a corrupt forum at the time of litigation (their hands must be tied). However, they may be able to choose between a corrupt and a noncorrupt forum before a dispute arises so long as when there is a dispute they have made the correct choice ex ante.

95. Critiques of the international system, with its repeat-play private contractor-arbitrators, may render arbitration a problematic solution. See discussion *infra* notes 215–28. At any rate, this discussion is academic since tort cases cannot be resolved in arbitration as a matter of public policy.

96. Interestingly, the U.S. system, which permits defendants to remove some cases to federal court, may be interpreted in this fashion. In some circumstances, we may suppose that federal judges are less susceptible to corruption than state judges, e.g., because they have more to lose when they get caught (thanks to life tenure), because they are subject to more external scrutiny, because federal prosecutors are particularly aggressive about such things, etc. In those circumstances, removal may serve as a corruption-preventing measure. In addition and analogously, one of the (historical) rationales for diversity jurisdiction was the fear of bias in state courts. STEPHEN N. SUBRIN ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* 272 (3d ed. 2008).

of states that operate corrupt courts to transfer litigation away from their own courts to others. Both types of modification also depend on the availability of some noncorrupt forum, backed by state power, willing and able to enforce the agreement to litigate before the optional tribunal. The efficacy of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>97</sup> is an example of how such enforcement can be achieved. The convention requires domestic courts to enforce arbitration agreements and is universally regarded as the most successful convention relating to commercial law.<sup>98</sup> Of course, it is imperative in these circumstances to avoid creating institutions that permit corruption. To be precise, any such forum must be perceived as incorruptible, so that the parties have no reason to try to corrupt it. Here, too, international tribunals, while often controversial on other grounds, are not generally criticized for being corrupt.<sup>99</sup>

A genuinely impartial court may be able to solve bribery problems that are not akin to a prisoner's dilemma. Not all corrupt transnational litigation will have a prisoner's dilemma structure—a party with a meritless position may have payoffs so low from honest litigation that it prefers mutual bribery, which increases costs to all parties litigating, to fair and efficient adjudication. Allowing the other party in such a dispute to select a noncorrupt forum either by initial filing (for plaintiffs) or removal (for defendants) would contribute to solving even such non-prisoner's dilemma corruption. This is another reason we believe that an international court is a potentially politically viable solution: it benefits both corporate defendants and plaintiffs with meritorious claims against those with frivolous claims or defenses who prefer mutual corruption to honest litigation.

Accordingly, below, we argue for the creation of an ICCJ as the most direct solution to the problem of judicial corruption. Such a court, because its interests are independent of those of the parties or of the economy of any particular nation-state, is more likely to be perceived as incorruptible and will therefore give the parties no incentive to attempt to actually corrupt it.

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97. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

98. BORN, *supra* note 20, at 20–21.

99. For our discussion on the international best practices for judicial independence that the ICCJ should adopt (and that international courts and tribunals generally adopt in one variation or another) to meet the requirement of noncorruptibility, see *infra* text accompanying notes 260–74.

## II. "THIS IS ECUADOR"<sup>100</sup>—THE CAUTIONARY TALE OF THE CHEVRON-ECUADOR DISPUTE

For reasons described in the Introduction, we use the CED to illustrate the existence and operation of perceptions of corruption in transnational litigation.

Given the ongoing nature of the litigation, we wish to explicitly note that it is not our intention to take sides on any of the issues in dispute in the Lago Agrio litigation, the RICO litigation, or any of the other associated proceedings. We are interested, instead, in the parties' perceptions of the judicial process and, to the extent discernable, the litigation strategies that flow from these perceptions. The interested reader can turn to the extensive media campaigns of both parties, as well as the extensive court records, and make up his own mind on the respective merits of the parties' positions. If anything, we concur with Professor Burt Neuborne who admonished both parties: "A plague on both their houses."<sup>101</sup> Indeed, it is the depressing fact that despite the tremendous stakes—the welfare of the residents of the Ecuadorian Amazon, the environmental impact of oil drilling, the ability of multinational corporations to conduct FDI—neither party wears the white hat in this case that provided the very impetus for our inquiry as to what went wrong.

### A. *Background: The Longest-Running Transnational Litigation and the Largest-Ever Environmental Judgment*

As noted above, to date the CED has yielded the largest judgment ever imposed for environmental contamination by any court, and the litigation has been ongoing for more than twenty years. In the words of the Second Circuit, "The story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary."<sup>102</sup>

While the Lago Agrio Judgment has now been upheld by Ecuador's highest court, numerous associated and parallel

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100. Lead plaintiffs' attorney, Steven Donziger: "[Y]ou know, this is Ecuador, okay . . . you can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want. Sorry, but it's true . . . Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 427 (S.D.N.Y. 2014) (RICO decision) (discussing an outtake from *Crude*).

101. Burt Neuborne, *A Plague on Both Their Houses: A Modest Proposal for Ending the Ecuadorean Rainforest Wars*, 1 STAN. J. COMPLEX LITIG. 509, 510 (2013).

102. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012) (global injunction decision).

proceedings are currently underway globally in connection with the Judgment. These include: recognition and enforcement actions in Argentina, Brazil, and Canada,<sup>103</sup> with more such actions expected in some of the other seventy-plus jurisdictions in which Chevron has assets;<sup>104</sup> an international investment arbitration brought by Chevron against the Republic of Ecuador in the PCA for alleged violations by Ecuador of a BIT between Ecuador and the United States (“PCA arbitration”);<sup>105</sup> and a civil RICO action brought by Chevron against Donziger, plaintiffs’ lead counsel, and others in the United States District Court for the Southern District of New York (“RICO action”).<sup>106</sup>

The scope of this ongoing litigation makes it impossible (and unnecessary) to describe its procedural history in full. Some key procedural milestones, however, are pivotal to understanding both the kind of corruption feared *ex ante* by litigants, as well as the perceptions of corruption evident in this particular litigation. These milestones are the FNC proceedings, which commenced in 1993 and concluded in 2002; the foreign discovery proceedings; the so-called global injunction against enforcement outside of Ecuador; the PCA arbitration; the appeals in Ecuador; and the RICO action. These are described in the following paragraphs. Their significance to the record regarding perceptions of corruption and actual corruption, as well as the incentives demonstrated in our formal model, become clear in Sections II.B through II.E, where we describe the parties’ perceptions and consequent litigation strategy as evidenced by the records of these proceedings.

***The FNC Proceedings.*** The CED commenced in 1993 when Maria Aguinda Salazar and a group of Ecuadorian plaintiffs filed a class action against Texaco (“Aguinda Litigation”) in the Southern District of New York advancing claims under the ATCA.<sup>107</sup> Chevron spent the better part of the next nine years seeking the dismissal of the Aguinda suit on grounds of, amongst others, *forum non*

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103. See Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 430 (2013).

104. *Id.* at 431 n.10.

105. Chevron Corp. v. Republic of Ecuador, Case No. 2009-23, Claimants’ Notice of Arbitration, at 1. (UNCITRAL Arb. Sept. 23, 2009) [hereinafter Claimants’ Notice of Arbitration], [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf) [http://perma.cc/8BS2-PXMK].

106. Chevron Corp. v. Donziger, No. 11 Civ. 00691(LAK), 2013 WL 1087236, at \*1 (S.D.N.Y. Mar. 15, 2013).

107. See Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).



conveniens.<sup>108</sup> Chevron prevailed, and the case was dismissed.<sup>109</sup> The plaintiffs appealed the ruling, and the Second Circuit reversed on the ground that the District Court had failed to obtain a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts.<sup>110</sup> The Second Circuit remanded with instructions to require Texaco's consent to Ecuadorian jurisdiction.<sup>111</sup> Texaco provided the required commitment and then renewed its motion to dismiss, which was granted.<sup>112</sup>

In 2003, the plaintiffs commenced a new action in Ecuador, which ultimately resulted in the Lago Agrio Judgment. And while at the insistence of the Second Circuit, and as a precondition for the FNC dismissal, Texaco made a commitment to submit to the jurisdiction of the Ecuadorian court,<sup>113</sup> on the very first day of the proceedings in Ecuador, Chevron's lawyer argued that the Ecuadorian court did not have jurisdiction to try the case.<sup>114</sup>

**The Foreign Discovery Proceedings.** In the process of defending against the Lago Agrio litigation, Chevron discovered a discrepancy between two versions of the film *Crude*—a documentary about the Lago Agrio litigation produced at Donziger's invitation and with his cooperation.<sup>115</sup> One version was released in theatres; the other was available on Netflix.<sup>116</sup> The Netflix version contained footage suggesting that the purportedly neutral court-appointed damages expert, Richard Cabrera Vega, was in fact working with and for the plaintiffs.<sup>117</sup>

Following this discovery, Chevron launched dozens of discovery proceedings pursuant to 28 U.S.C. § 1782, which provides for domestic discovery attendant to foreign litigation throughout the United States. The Third Circuit characterized the campaign as

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108. *Id.* at 472–74.

109. *Id.*

110. *Id.* at 475.

111. *Id.*

112. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 389 (S.D.N.Y. 2014) (RICO decision).

113. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002) (“Texaco has now unambiguously agreed in writing to being sued on these claims . . . in Ecuador.”).

114. See CBS, *60 Minutes: Amazon Crude*, YOUTUBE (May 3, 2009), <https://www.youtube.com/watch?v=UGG1nIwxNhs> (last visited Feb. 20, 2016) [hereinafter *60 Minutes Interview*].

115. See *Chevron Corp.*, 974 F. Supp. 2d at 453–54; Barrett, *supra* note 33.

116. *Chevron Corp.*, 974 F. Supp. 2d at 453–54; Barrett, *supra* note 33.

117. *Chevron Corp.*, 974 F. Supp. 2d at 454.

“unique in the annals of American judicial history.”<sup>118</sup> Two of the dozens of § 1782 proceedings are particularly noteworthy. First is the so-called Berlinger § 1782 proceeding, decided by District Court Judge Kaplan. Judge Kaplan held that the director of the documentary was not entitled to the qualified evidentiary privilege for information gathered in a journalistic investigation.<sup>119</sup> Consequently, six-hundred hours of outtakes from the documentary were produced and became publicly available. The hundreds of hours of footage revealed much of the damaging evidence against Steven Donziger and formed a significant part of the foundation for the findings in the RICO litigation. The second proceeding involved a § 1782 order by Judge Kaplan that Donziger produce all of his litigation files.<sup>120</sup> These included, among other things, Donziger’s personal diary, in which he chronicled the litigation and his perceptions, thoughts, and beliefs relating to it.<sup>121</sup>

***The Global Injunction.*** As the date of the Lago Agrio Judgment was approaching, and it was becoming clear that the judgment would likely be favorable to the plaintiffs, Chevron brought an action under New York’s Uniform Foreign Country Money-Judgments Recognition Act<sup>122</sup> in the District Court, asking for a global injunction against the enforcement of such a judgment. Chevron prevailed and received a preliminary injunction that prohibited plaintiffs from enforcing or preparing to enforce the forthcoming Ecuadorian judgment against Chevron anywhere outside of the Republic of Ecuador.<sup>123</sup> The District Court found that since the election of President Correa in 2006, the Ecuadorian judicial system had become incapable of producing a judgment enforceable in New York courts.<sup>124</sup>

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118. *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

119. *See In re Chevron Corp.*, 709 F. Supp. 2d 283, 293–99 (S.D.N.Y. 2010), *aff’d sub nom.* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

120. *See In re Chevron Corp.*, 749 F. Supp. 2d 141, 167–70 (S.D.N.Y. 2010).

121. *See* Declaration of Kristin L. Hendricks in Support of Chevron Corporation’s Motion for Preliminary Injunction at Exhibit 76, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691(LAK) (S.D.N.Y. Jan. 28, 2013) [hereinafter *Donziger’s Diary*] (composite of Steven Donziger’s personal notes).

122. New York’s Uniform Foreign Country Money-Judgments Recognition Act, N.Y. C.P.L.R. §§ 5301–09 (MCKINNEY 2013).

123. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011), *rev’d and remanded sub nom.* *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (global injunction decision).

124. *Id.* at 634–35. It then went on to hold that there was “ample evidence of fraud in the Ecuadorian proceedings.” *Id.* at 636. But compare Neuborne’s tongue-in-cheek comment: “Unlike the United States, where politics simply never affects judicial nominations or the outcome of litigation, I am shocked to learn that President Correa has

The Court of Appeals for the Second Circuit unanimously reversed the District Court's decision, finding its ruling to be a misapprehension of the law.<sup>125</sup> It stated: "The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor."<sup>126</sup> The Second Circuit criticized the factual foundation of the District Court's decision in finding that the Ecuadorian judiciary was categorically incapable of producing an enforceable judgment, noting that the finding relied heavily on a single declaration by an avowed political opponent of President Correa.<sup>127</sup> Moreover, the Second Circuit opined that "when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver."<sup>128</sup>

**The Ecuadorian Appeals.** Chevron swiftly appealed the Ecuadorian trial court's judgment, but its appeal was dismissed by the court of appeals, the Provincial Court of Justice of Sucumbíos. The court of appeals reaffirmed the judgment below in its entirety, ordered Chevron to pay court and attorney fees for abuse of process and "manifest procedural bad faith," and harshly criticized Judge Kaplan's portrayal of the Ecuadorian judicial system.<sup>129</sup> Chevron also filed for extraordinary review before the National Justice Court of Ecuador. The National Justice Court upheld the judgment sans the punitive damages, thereby halving the judgment.<sup>130</sup>

**The RICO Action.** In the context of the global injunction proceedings, Judge Kaplan, outraged by the mounting evidence of improprieties by Donziger and his team, "signaled to Chevron's counsel his amenability to potential racketeering charges."<sup>131</sup>

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been charged with seeking to exercise undue influence over the Ecuadorean judiciary by asserting the power to appoint friendly judges." Neuborne, *supra* note 101, at 509 n.1.

125. *Naranjo*, 667 F.3d at 239.

126. *Id.* at 240.

127. *See id.* at 238 & n.9.

128. *Id.* at 244.

129. *See Aguinda v. Chevron Corp.*, No. 2011-0106, at 13, 15-17 (Provincial Ct. of Justice of Sucumbíos Jan. 3, 2012) (Ecuador); *see also* Gómez, *supra* note 103, at 443.

130. *Aguinda v. Chevron Corp.*, No. 174-2012, at 222 (Corte Nacional de Justicia Nov. 12, 2013) (Ecuador), <http://chevrontoxico.com/assets/docs/2013-11-12-final-sentence-from-cn-j-de-ecuador-spanish.pdf> [<http://perma.cc/6GWC-JD28>].

131. Petition for Writ of Mandamus, *supra* note 32, at 4. It is the plaintiffs' team's view that "[o]ne district court judge used the soap box of a limited discovery proceeding to usurp the role of the Ecuadorian court and pass judgment on the merits of the underlying case; issued a gratuitous condemnation of the Ecuadorian Plaintiffs and everyone associated with them; and, in the process, became Chevron's single greatest ally in its eighteen-year effort to evade liability[.]" *Id.* at 2.

THE COURT: The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write up a check and be done with it . . . . [P]ut a lot of pressure on the courts to feed them a record in part false . . . in order to persuade Chevron to come up with some money. Now, do the phrases **Hobbs Act, extortion, RICO, have any bearing here?**<sup>132</sup>

A few months later, Chevron launched *Chevron v. Donziger*,<sup>133</sup> a civil RICO case against Donziger and others.<sup>134</sup> Judge Kaplan presided, held a six-week bench trial, and issued a nearly five-hundred page opinion. It ruled that Donziger had used "corrupt means" to obtain the Lago Agrio Judgment, including corruption and coercion of judges and judicial officials, fraud, deception, extortion, obstruction of justice, and money laundering.<sup>135</sup> He therefore enjoined the plaintiffs from enforcing the judgment in the United States.<sup>136</sup>

**The PCA Arbitration.** In September 2009, Chevron commenced an international investment arbitration against the Republic of Ecuador, administered by the PCA in the Hague and brought under a 1993 BIT between the United States and Ecuador.<sup>137</sup> In the arbitration, Chevron argued that Ecuador failed to honor a 1995 settlement it had signed with Texaco.<sup>138</sup> Chevron is asking the arbitral tribunal to find that Ecuador colluded with the plaintiffs to bring the underlying litigation and deny Chevron justice in its courts, that Ecuador abused its criminal justice system by using it to coerce Chevron, and that Ecuador is responsible for all damages Chevron incurs from defending against the Judgment.<sup>139</sup>

A day before the Second Circuit declined to serve as "a transnational arbiter" over enforcement actions overseas, the arbitrators presiding over the PCA arbitration issued interim orders directing Ecuador to take all measures within its power to prevent the Judgment from becoming final and enforceable.<sup>140</sup> These proceedings

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132. *Id.* at 25 (first alteration in original).

133. 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (RICO decision).

134. *See id.* at 544.

135. *Id.* at 578, 582, 593, 594, 644.

136. *Id.* at 641-42.

137. *See* Claimants' Notice of Arbitration, *supra* note 105, at 1.

138. *Id.* at 15.

139. *See id.* at 15-18.

140. *Chevron Corp. v. Republic of Ecuador*, Case No. 2009-23, First Interim Award on Interim Measures, at 16 (UNCITRAL Arb. Jan. 25, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf> [<http://perma.cc/Z5UG-6UDU>].

are not only conducted in parallel to the domestic ones but also function as a *de facto* appeal over the Ecuadorian courts.<sup>141</sup> One commentator described the arbitration as an “institutional failure,” explaining that “[t]he spectacle of private BIT arbitrators solemnly condemning Ecuadorean courts as procedurally unjust while sitting as closed, *ex parte* accusatory tribunals would be funny if so much were not at stake.”<sup>142</sup>

Because of the unparalleled scope of discovery and the extensive pleadings, the CED presents a unique view of the litigants’ perceptions. The FNC, global injunction, and RICO proceedings provide evidence and findings regarding corruption. The Ecuadorian appeals, PCA arbitration, and the parallel RICO litigation present examples of iterative play. (The RICO decision also provides a description of the iterative play at the Ecuadorian trial level.) These are all explored below.

Moreover, and more specifically, as the following Sections demonstrate, there is ample evidence that the parties to the CED were well aware of and concerned about the corruption that appeared to be prevalent in the Ecuadorian judiciary at the time the Lago Agrio litigation began.<sup>143</sup> The following Sections also evidence that the plaintiffs and their lawyers worried that the judicial system was rigged in favor of any oil company, especially in favor of Texaco/Chevron (tainting-corruption), and that these concerns shaped the plaintiffs’ litigation strategy.<sup>144</sup> This litigation strategy, the District Court found, ultimately turned into various forms of disloyalty corruption.<sup>145</sup>

In other words, there are numerous indications that in this real-world case, a perception of a corrupt judiciary led to actual corruption, precisely as our formal model predicts. The record in this case illustrates how perceptions of corruption create a prisoner’s dilemma whereby, though it is optimal for both parties to “cooperate,” i.e., avoid corruption, in fact, parties “defected,” i.e., chose to act corruptly. It appears, therefore, the assumptions made in

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141. See Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373, 374 (2013).

142. Neuborne, *supra* note 101, at 520–21 (“The private arbitrators permitted Chevron to attack the legitimacy of Ecuadorean courts, the integrity of the victims’ lawyers, and the moral integrity of the Ecuadorean trial judge without permitting the affected victims, the accused lawyers, or the accused judges an opportunity to defend themselves in person.”).

143. See *infra* Sections II.B, II.C.

144. See *infra* Section II.B.

145. See *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 557–60 (S.D.N.Y. 2014) (RICO decision) (describing the types of misconduct used in the Lago Agrio court).

the formal model, as well as the conclusions of the model, are true to life.

*B. Plaintiffs' Perceptions of Corruption Prior to the Filing of the Lago Agrio Litigation*

[T]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty. . . . *We have to occasionally use pressure tactics to neutralize their [Chevron's] corruption.*

—Steven Donziger, lead plaintiffs' attorney<sup>146</sup>

The plaintiffs' attorneys insisted that the Ecuadorian judiciary was "weak and corrupt and did not provide impartial tribunals" back in the 1990s.<sup>147</sup> This observation was made well before the filing of the Lago Agrio litigation in Ecuadorian courts and in reaction to Chevron's motion to dismiss on FNC grounds. In a 1994 memorandum in opposition to Texaco's motion to dismiss, the plaintiffs asserted that:

In matters involving the petroleum industry, the Ecuadoran judiciary lacks sufficient independence. In *Phoenix Canada Oil Co. v. Texaco, Inc.*, the court found Ecuador an inadequate alternative forum due to the Ecuadoran military's control of the judiciary. . . . The Ecuadoran military is still funded exclusively from oil revenues and those in Ecuador who protest the oil industry's substandard practices face serious reprisals from the military.<sup>148</sup>

Indeed, Texaco's attorney testified that in a dispute between a municipality and Petroecuador, a state-controlled oil company and Texaco's co-venturer, the former has come to the conclusion that "it is impossible to win an action [against an oil company] . . . where the political influence of the petroleum exploitation company, which income is essential for the national economy, is a lot stronger than the fair demands of a small town in the middle of the jungle."<sup>149</sup>

The District Court's subsequent finding in the RICO decision conveys the plaintiffs' lawyers' beliefs about the Ecuadorian courts

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146. Petition for Writ of Mandamus, *supra* note 32, at 19 (third alteration in original). (bold typeface omitted).

147. *Chevron Corp.*, 974 F. Supp. 2d at 390.

148. *Aguinda v. Texaco, Inc.*, No 93 Civ. 7527(VLB), 1994 WL 16188155, at \*3-4 (S.D.N.Y. Mar. 10, 1994) (internal references omitted).

149. Reply Brief for Plaintiffs-Appellants at 12, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (No. 01-7756L) (quoting Affidavit of Luis Tobar Sanchez at A6709 to 10, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)).

and the acceptable practices before them. These beliefs existed prior to the filing of the Lago Agrio litigation and persisted throughout:

During *Aguinda*, [Donziger] argued strenuously that Ecuador was not an adequate forum because the Ecuadorian judiciary was weak.... After the Lago Agrio case began, he made repeated statements—many on camera—in which he amplified this view. For example:

- “They’re all [*i.e.*, the Ecuadorian judges] corrupt! It’s—it’s their birthright to be corrupt.”

...

- “You know, what... just happened with this judge, um, is sort of sad to me because it represents the fact that the judicial system here is so utterly weak—like the only way you can secure *a fair trial* is if you do things like that, like go in and confront the judge with media around....”

...

- “We believe they make decisions based on who they fear the most, not based on what the laws should dictate.... [W]e want to send a message to the court that, ‘don’t fuck with us anymore—not now, and not—not later, and never.’”<sup>150</sup>

The significance of the FNC proceedings for understanding the parties’ perceptions of corruption and its effects on litigation behavior extends beyond the plaintiffs’ attorneys’ perception of Ecuadorian corruption. Some argued that the strategic thinking behind the FNC motion, including the willingness to stipulate to Ecuadorian jurisdiction in the future, reflected Chevron’s confidence of its own grip on the Ecuadorian judicial and political systems—systems that were controlled, at the time, by a pro-foreign business, right-wing government.<sup>151</sup> This led Chevron to believe that even if plaintiffs found the resources and inclination to re-initiate action in Ecuador, it could have confidence that such legal action would be futile.<sup>152</sup>

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150. *Chevron Corp.*, 974 F. Supp. 2d at 392–93 (third and fifth alterations in original) (emphasis added) (footnotes omitted).

151. See, e.g., Neuborne, *supra* note 101, at 518–19.

152. Burt Neuborne, Inez Miliholland Professor of Civil Liberties, N.Y. Univ., Comments at the Stanford Journal of Complex Litigation Symposium: Lessons from Chevron (Feb. 8, 2013), <https://journals.law.stanford.edu/stanford-journal-complex-litigation-sjcl/symposia> [<http://perma.cc/ZX93-BWUH>]; see also Neuborne, *supra* note 101, at 518; 60 Minutes Interview, *supra* note 114 (broadcasting Donziger stating his belief that Chevron thought plaintiffs would not refile in Ecuador). Empirical findings support such

While not specifically relating to corruption, for purposes of completeness we should note that Chevron was accused of dishonest litigation from an early stage in the proceeding. According to Ecuador's Ambassador to the United States, "Chevron . . . has itself committed a fraud on the Ecuadorian courts."<sup>153</sup> In so doing, she refers to allegations that Chevron concealed TexPet's contamination from the Lago Agrio court and that Chevron conducted unauthorized inspections that revealed to Chevron "clean spots" and "dirty spots," information it then used to attempt to mislead the court.<sup>154</sup>

Chevron has also been accused of illegal acts. The Government of Ecuador alleges, in the PCA Arbitration, that a Chevron contractor, Diego Borja, attempted to entrap then-presiding Judge Núñez by illegally recording him and attempting to get him to admit to accepting bribes.<sup>155</sup> It also alleges that after Borja engaged in such illegal activities to further Chevron's litigation strategy, Chevron escorted him and his wife out of Ecuador and provided them with

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an assumption. See *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 683 n.5 (Tex. 1990) (Doggett, J., concurring) (discussing David Robertson's research, which found that "[o]f the 55 personal injury cases [dismissed in the period studied], only one was actually tried in a foreign court"). Under this view, Chevron's fortunes shifted in 2006 when Rafael Correa, a left-wing politician with affinities to Venezuela's Hugo Chavez, was elected President of Ecuador. See Neuborne, *supra* note 101, at 519; *More of the Same, Please*, THE ECONOMIST: AMERICAS VIEW (Feb. 18, 2013, 4:14 PM), <http://www.economist.com/blogs/americasview/2013/02/ecuadors-presidential-> [<http://perma.cc/Q9HQ-GSRS>]. The District Court explained the (perceived and actual) significance of the change of administrations:

Donziger explained the fundamental change that the [2006] election had worked. The [plaintiffs] had "gone basically from a situation where we couldn't get in the door to meet many of these people in these positions in the government to one where they're actually asking us to come and asking what they can do. . . ." The [plaintiffs] "had connections" with the new administration, Donziger said. "They love us and they want to help us."

*Chevron Corp.*, 974 F. Supp. 2d at 449 (internal brackets omitted).

153. Nathalie Cely Suarez, *Let's Focus on the Real Issues*, LETTERS BLOGATORY (Mar. 17, 2014), <https://lettersblogatory.com/2014/03/17/republic-ecuador-responds-judge-kaplan/> [<http://perma.cc/7B74-VYUP>].

154. See *Chevron Corp. v. Republic of Ecuador*, Case No. 2009-23, Respondent's Track 2 Rejoinder on the Merits of the Republic of Ecuador, at 63-82 (UNCITRAL Arb. Sept. 23, 2009) [hereinafter Respondent's Track 2 Rejoinder]; Suarez, *supra* note 153. The Ambassador stated that there is overwhelming evidence that Texaco directed its officers to destroy documents and evidence of spills and accidents. Respondent's Track 2 Rejoinder, *supra*, at 6, ¶ 12. In support she cited an internal Texaco memo that instructs the destruction of some oil spill reports. See Letter from R. C. Shields, Chairman of the Bd., to N.E. Crawford, Acting Manager, Texaco Petroleum Co. (July 17, 1972), <http://lettersblogatory.com/wp-content/uploads/2014/03/n1.pdf> [<http://perma.cc/Q2CC-GTC9>] (memo entitled "Reporting of Environmental Incidents [-] New Instructions").

155. See Respondent's Track 2 Rejoinder, *supra* note 154, at 7-8.



luxurious accommodations in the United States and more than \$2 million in monetary benefits for his testimony.<sup>156</sup> Finally, paid-for testimony also played a key role in Chevron's RICO case against Donziger, as discussed below.<sup>157</sup>

Relatedly, Donziger's lawyers have also represented his state of mind as it related to perceptions of corruption and its effects on litigation behavior, claiming that:

Mr. Donziger went to the courthouse [the day the opening quote was made, *supra* text accompanying note 146] only to *combat Chevron's efforts to corrupt the case....* [I]n the outtakes... Mr. Donziger emphasizes his displeasure that *Chevron has forced him into an unconventional battle against the company's efforts to corrupt and sabotage the Lago Agrio Litigation*: "You don't have to do this in the United States. It's dirty. I *hate* it." "I would prefer to litigate the case, but unfortunately the system isn't fair."<sup>158</sup>

These perceptions are no doubt also informed by the backdrop of general transnational corporate corruption. It is evident from a casual look at the general media that corporations sometimes act corruptly overseas.<sup>159</sup> Recent high-profile examples include Walmart's Mexico bribery scandal<sup>160</sup> and the investigation over JPMorgan's practices of hiring the children of high-ranked officials in China.<sup>161</sup> The list of corporations engaged in transnational corruption goes on and on, and it includes additional household names such as

156. *See id.* at 8–9.

157. *See infra* text accompanying notes 194–98. The District Court's heavy reliance on such testimony is now the subject of an appeal pending before the Second Circuit.

158. Petition for Writ of Mandamus, *supra* note 32, at 19 (emphasis added) (internal citations omitted) (bold typeface omitted).

159. Some corporations have even been caught on tape, as in the case of the deep web of bribery and other forms of criminality involving Vladimiro Montesinos, the de facto commander of Peru's army and intelligence agencies, and executives in the mining industry. *See* Lowell Bergman, *Montesinos's Web*, PBS: FRONTLINE WORLD, <http://www.pbs.org/frontlineworld/stories/peru404/web.html> [<http://perma.cc/97GM-4YWR>] (sharing excerpts from secret recordings videotaped by Montesinos).

160. *See* Stephanie Clifford & Steven Greenhouse, *Wal-Mart's U.S. Expansion Plans Complicated by Bribery Scandal*, N.Y. TIMES (Apr. 29, 2012), [http://www.nytimes.com/2012/04/30/business/wal-mart-bribery-scandal-complicates-us-expansion-plans.html?\\_r=0](http://www.nytimes.com/2012/04/30/business/wal-mart-bribery-scandal-complicates-us-expansion-plans.html?_r=0) [<http://perma.cc/6XJZ-MTJQ>].

161. *See* Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES: DEALBOOK (Aug. 17, 2013), <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/> [<http://perma.cc/3UD3-864J>].

Daimler,<sup>162</sup> Johnson & Johnson,<sup>163</sup> and Halliburton.<sup>164</sup> Of course, American corporations are not the only offenders, and the United States is not the only one prosecuting. GlaxoSmithKline, the British drug giant, was recently fined nearly half a billion dollars by the Chinese government.<sup>165</sup> The German giant Siemens, one of the world's biggest companies, has agreed to pay \$1.6 billion "in the largest fine for bribery in modern corporate history."<sup>166</sup>

The problem of corporate corruption is so significant that the Department of Justice has recently stated that enforcement of the Foreign Corrupt Practices Act<sup>167</sup> ("FCPA")—which prohibits American firms from bribing foreign officials to obtain business—has become a top priority, second only to antiterrorism prosecutions.<sup>168</sup> American corporations' strident protests that the lacking enforcement of anticorruption laws in other developed nations places them at a disadvantage<sup>169</sup> is further evidence that corporate corruption overseas is a significant phenomenon that they experience. Corporate corruption is also the subject of empirical investigation and monitoring by NGOs and intergovernmental organizations such as the World Bank,<sup>170</sup> the European Bank for Reconstruction and Development,<sup>171</sup> and Transparency International.<sup>172</sup>

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162. Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all> [<http://perma.cc/VT54-AWLS>].

163. *See id.*

164. *See id.* ("Albert J. Stanley, a legendary figure in the oil patch and the former chief executive of the KBR subsidiary of Halliburton, recently pleaded guilty to charges of paying bribes and skimming millions for himself.")

165. Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html> [<http://perma.cc/FZM6-5722>].

166. Schubert & Miller, *supra* note 162 (observing that what is remarkable about the case is "how entrenched corruption had become at a sprawling, sophisticated corporation that externally embraced the nostrums of a transparent global marketplace built on legitimate transactions").

167. 15 U.S.C. §§ 78dd-1 to -3 (2012).

168. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 782 (2011).

169. *See id.* at 824.

170. *See Corruption*, WORLD BANK GROUP: ENTERPRISE SURVEYS, <http://www.enterprisesurveys.org/> [<http://perma.cc/V7ZK-82CD>] (surveying experience and perceptions of corruption with data collected from face-to-face interviews with top managers and business owners in over 130,000 companies in 135 economies).

171. *See Economic Data*, EUROPEAN BANK FOR RECONSTRUCTION & DEV., <http://www.ebrd.com/what-we-do/economic-research-and-data/data.html> [<http://perma.cc/H9WR-PR85>]. The European Bank for Reconstruction and Development partners with the World Bank to develop "Business Environment and Enterprise Surveys." *See id.*

C. *Chevron's Perceptions of the Corruption of the Ecuadorian Judicial System*

Taking Chevron's (previously Texaco's) legal positions as formulated in its court filings at face value, one can conclude that perceptions of corruption did not emerge before 1999. In 1999, Texaco stipulated<sup>173</sup> that it would not contest Ecuadorian courts' jurisdiction in connection with the dismissal of the Aguinda Litigation on FNC grounds: "As part of its argument that the case belonged in Ecuador and not the United States—and, as will be seen, a great irony—Texaco argued that Ecuador would be an adequate alternative forum because it had an independent judiciary that provided fair trials."<sup>174</sup>

While on the plaintiffs' side it is possible to identify a single "mastermind," namely Donziger,<sup>175</sup> as well as access direct evidence of his state of mind in the form of his diary entries and candid on-camera commentary, the same is not true on the defendant's side. Chevron is a very large entity with multiple senior agents, both in-house and in the form of outside counsel. Nonetheless, the record is replete with clues of Chevron's senior executives' early-on beliefs that the Ecuadorian judiciary is, in fact, corrupt, that plaintiffs' attorneys systemically exert political pressure and manipulate the legal processes in susceptible foreign jurisdictions,<sup>176</sup> and that many foreign judgments in transnational litigations of the type discussed herein emanate from politicized and corrupt judicial environments: "Do you think that this judge is going to [have] any independence? Is [she]

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172. Transparency International produces the Bribe Payer Index, which "evaluates . . . the likelihood of firms from the world's industrialised countries to bribe abroad [by] survey[ing] senior business executives . . . . The index includes a ranking of 22 of the world's most economically influential countries according to the likelihood of their firms to bribe abroad." *Bribe Payer's Index*, GATEWAY: CORRUPTION ASSESSMENT TOOLBOX, <http://gateway.transparency.org/tools/detail/131> [<http://perma.cc/LQP6-7K5X>].

173. See Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 16–17, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2014) (Nos. 93 Civ. 7527, 94 Civ. 9266).

174. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 389 (S.D.N.Y. 2014) (RICO decision); see also *Aguinda v. Texaco, Inc.*, 945 F. Supp. 626, 628 (S.D.N.Y. 1996) (granting Texaco's motion to dismiss on FNC grounds).

175. *Chevron Corp.*, 974 F. Supp. 2d at 386 ("[T]he events ultimately center on one man—Steven Donziger . . .").

176. Because the Chamber of Commerce is the lobbying group of American businesses, it is fair to attribute its views of corruption of foreign judicial systems to its constituents including Chevron, the third largest American corporation. This would include the view that plaintiffs' attorneys can and do easily "find a jurisdiction in which corruption and/or general judicial and political dysfunction" guarantees them a favorable verdict even if claims are frivolous. CHAMBER'S REPORT, *supra* note 52, at 6.

going to look at the rule of law? Is [she] going to look at the contracts and determine what's legitimate and illegitimate?"<sup>177</sup>

Finally, as noted above, there is reason to believe Chevron's FNC strategy, which predated the filing of the Lago Agrio litigation in Ecuador, betrayed a belief that Ecuadorian judicial processes can be politically steered by the powerful (tainting-corruption).

*D. Plaintiffs' Attorneys Feel Compelled to "Go Over to the Dark Side" and Are Found to Have Engaged in a Broad-Scale Corrupt Scheme*

Perhaps most telling for our purposes, i.e., for understanding how the perceptions of corruption encourage acting corruptly "preemptively" (defecting), is the following finding with which the District Court chose to open its scorching RICO judgment:

[T]he Court finds that Donziger began his involvement in this controversy with a desire to improve conditions in the area in which his Ecuadorian clients live. To be sure, he sought also to do well for himself while doing good for others, but there was nothing wrong with that. In the end, however, he and the Ecuadorian lawyers he led corrupted the Lago Agrio case.<sup>178</sup>

Also revealing is the District Court's analysis of Donziger's diaries, in which the District Court actually identifies and describes the turning point at which Donziger "goes over to the dark side."<sup>179</sup> The time is relatively early in the life of the Lago Agrio litigation, and the occasion is the appointment of the court's settling experts whose role is to resolve disputes between the parties' inspection experts' reports. Donziger came up with an idea: to bring in a seemingly independent institution, in fact paid for by the Lago Agrio plaintiffs, to monitor the settling experts.<sup>180</sup> The District Court quotes Donziger's contemporaneous accounts of the meeting in which he solicits the paid-for monitoring, indicating this is the turning point: "Deal with [the 'independent' monitor]—feel like I have gone over to the dark side."<sup>181</sup> The account goes on: "[t]his was my one bargain with the devil, but we can't win with the devil [because] they can

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177. See *60 Minutes Interview*, *supra* note 114 (interviewing Sylvia Garrigo, Chevron's Manager of Global Issues and Policy). In the same interview, the interviewer presented the presiding judge with the question: "Chevron says they can't get a fair trial in your court." *Id.*

178. *Chevron Corp.*, 974 F. Supp. 2d at 384.

179. See *id.* at 416–19.

180. *Id.* at 417.

181. *Id.* (quoting Donziger's Diary, *supra* note 121, at 22).

always pay more. Really frustrating, feel really boxed in”—further indicating that this move to the dark side was motivated by a perception that litigating within the bounds of the law would be futile.<sup>182</sup>

For the purposes of illustrating the scenarios contemplated by our formal model, it is worth zooming in on the heart of the corrupt scheme: the ghostwriting of Judge Zambrano's final judgment by the discredited former Judge Guerra in exchange for a half-million dollar bribe. (Guerra was the first judge to preside over the Lago Agrio litigation. He was removed from the bench for misconduct.)<sup>183</sup>

Guerra's ghostwriting career began with an arrangement that had nothing to do with the Lago Agrio litigation and was made exclusively between him and Zambrano. Zambrano was new to the bench and inexperienced in civil cases, having previously served as a prosecutor.<sup>184</sup> He and Guerra entered into an agreement by which Guerra ghostwrote decisions in various civil matters in exchange for \$1,000 a month.<sup>185</sup> In late 2009, shortly after Zambrano was assigned to the Lago Agrio litigation, Zambrano directed Guerra to contact Chevron's representatives to solicit a bribe in return for a decision in favor of Chevron.<sup>186</sup> The decision to reach out to Chevron was motivated by a belief that Chevron had more resources and would therefore pay a higher bribe than the plaintiffs.<sup>187</sup> Guerra contacted Chevron's Ecuadorian lawyer repeatedly, but was rebuffed.<sup>188</sup>

Given this rejection, Zambrano decided to instead approach the plaintiffs' lawyers and attempt to solicit a bribe from them.<sup>189</sup> This overture was successful and resulted in an agreement that the case would be expedited, that Chevron's procedural motions would be denied, and that plaintiffs' lawyers would pay Guerra's \$1,000 monthly retainer in exchange for him drafting the orders in the case.<sup>190</sup> Zambrano was rotated off the case and then reappointed.<sup>191</sup> When he was reappointed, he once again instructed Guerra to reach out to Chevron to solicit a bribe.<sup>192</sup> After some back and forth, the

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182. *Id.* at 417–18 (quoting Donziger's Diary, *supra* note 121, at 22).

183. *See id.* at 502.

184. *Id.* at 505.

185. *Id.*

186. *Id.* at 507.

187. *Id.*

188. *Id.* at 507–08.

189. *Id.* at 508.

190. *Id.*

191. *Id.* at 511, 513.

192. *Id.* at 513.

plaintiffs' lawyers ultimately accepted the proposition and bribed Zambrano to allow them to ghostwrite the final judgment in exchange for half a million dollars from the proceeds of the litigation.<sup>193</sup>

The epilogue came in 2012. As noted above, the \$18 billion judgment against Chevron was issued in February 2011.<sup>194</sup> In April 2012, Zambrano, recently removed from the bench, instructed Guerra to approach Chevron with the truth and negotiate a handsome payment in return for evidence of and testimony regarding the fraudulent provenance of the judgment.<sup>195</sup> Chevron paid Guerra \$48,000 for physical evidence he provided.<sup>196</sup> Also, it paid for Guerra, his wife, his son, and his son's family to relocate to the United States and paid for Guerra's visa. Chevron paid him \$10,000 a month and paid his family's health insurance. Chevron leased a car for him, paid for his attorney for immigration matters as well as all dealings with federal and state investigative authorities, and paid for any civil litigation.<sup>197</sup> His testimony was pivotal for the RICO case.<sup>198</sup>

#### *E. A Postscript on Foreign Perceptions of the American Judicial System*

To get a full view of litigants' perceptions and consequent litigation behavior, it is important to note that "[p]erceptions that American courts are hostile to foreign parties are widespread"<sup>199</sup> among "litigants, attorneys and commentators . . . [who believe that] American courts, and in particular American juries, are hostile to foreign parties."<sup>200</sup> Some empirical research substantiates such fear. One of the only empirical studies on the topic has found that "[t]he

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193. *Id.* at 515.

194. *See id.* at 516.

195. *Id.*

196. *Id.*

197. *Id.* at 517. While the District Court takes all these payments into account for credibility assessment, and in that context notes that "Guerra admitted that he came forward because he believed he would be 'rewarded handsomely,'" *id.* at 518, it does not regard these payments as illicit.

198. For example, "[t]he only evidence connecting the Plaintiffs with the draft Judgment is Mr. Guerra's purchased, hearsay testimony that Judge Zambrano told him so." Respondent's Track 2 Rejoinder, *supra* note 154, at 113.

199. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1497 (2003); *see also* Kevin Claremont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1120 (1996) ("[M]any people believe that litigants have much to fear in courts foreign to them. In particular, non-Americans fare badly in American courts. Foreigners believe this. Even Americans believe this."); Moore, *supra*, at 1497 n.1, 1499 n.8 (providing literature reviews of foreign perceptions of American courts and the lack of empirical analysis of xenophobia's effects).

200. Moore, *supra* note 199, at 1499.

data validates concerns that American courts, and American juries in particular, exhibit a xenophobic bias. . . . [But that] there is no significant difference in win rate . . . when judges adjudicate.”<sup>201</sup>

Such perceptions, whether justified or not, may further enhance plaintiffs’ ex ante belief when devising transnational litigation strategy that they are backed into a corner, facing an institutional and procedural uphill battle irrespective of the merits of their clients’ case. For example, in June 2011, Donziger’s team petitioned the Second Circuit to issue a writ of mandamus to direct Judge Kaplan to recuse himself from the *Chevron v. Donziger* matter (the RICO action) and the associated *Chevron v. Salazar* matter. It was their perception that Judge Kaplan did not maintain the appearance of impartiality. They described how:

Judge Kaplan shared his belief that “important” companies like Chevron must be insulated from judgment collection efforts . . . . “[W]e are dealing here with a company of considerable otherwise importance to our economy that employs thousands all over the world, that supplies a group of commodities . . . on which every one of us depends . . . . I don’t think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and find that there isn’t any gas there because these folks have attached it in Singapore or wherever else.”<sup>202</sup>

In their petition, which was denied, the plaintiffs’ lawyers wrote:

The world is closely watching this landmark case. And what the world sees is an American company that fought for nine years to wrest jurisdiction from the American courts in favor of litigating the case in Ecuador, only to come running back to the United States for a preordained, home-cooked bailout when things did not go as well as planned in Ecuador. Worse yet, it sees a federal district court that is not just willing, but apparently *determined*, to overlook the fact that said American company just spent the last eight years committing a series of outrageous abuses against the Ecuadorian courts it swore to respect as it begged to move the case there.<sup>203</sup>

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201. *Id.* at 1504.

202. Petition for Writ of Mandamus, *supra* note 32, at 11 n.7 (second alteration in original).

203. *Id.* at 5–6.

As noted, the Second Circuit denied the petition.<sup>204</sup> (In fact, the Second Circuit denied multiple attempts by the plaintiffs to recuse Judge Kaplan or require reassignment of the case).<sup>205</sup> But Ecuador's Ambassador to the United States echoed the sentiment three years later, after the RICO decision was handed down. She wrote:

Judge Kaplan . . . has since chosen to accept the testimony of a Chevron witness who has admitted to being paid hundreds of thousands of dollars in cash and literally millions of dollars in financial benefits by Chevron, yet Judge Kaplan simultaneously chose not to consider evidence relating to Chevron's own misconduct . . . .<sup>206</sup>

Let us sum up. It appears that the real world scenario of the CED matches our formal model closely enough to demonstrate the traction the model gives us on the problem. First, plaintiffs' counsel (on Donziger's claims) perceived the Ecuadorian judicial process as corruptible. Moreover, from the standpoint of plaintiffs, Chevron's filing of the FNC motion constitutes a dishonest act: with it, the court moved the litigation from a relatively neutral forum into one that was biased in Chevron's favor. It was rational for Chevron to do so. Moreover, Chevron did so by means not subject to the sanctions attached to bribery. In effect, from the plaintiffs' standpoint, it costlessly corrupted the judicial process<sup>207</sup> ("costlessly" here is used in the strategic sense to mean without risk or punishment—from plaintiffs' standpoint Chevron managed to corruptly shift the probability of victory in its favor without paying any price for it). Moreover, given the presence of reasonable disagreement about which courts are biased and toward whom, it seems impossible for policymakers to create a regulatory structure that can assign blame and punishment to litigants for choosing biased courts.

By contrast, plaintiffs do not seem to have believed they had an initial opportunity to pay a bribe, meaning the symmetrical features of the prisoner's dilemma are not wholly present. However, once the matter landed in Ecuador, the opportunity presented itself to plaintiffs, and they (claim that they) felt obliged to take it. Within the Ecuadorian courts, we can interpret that either as plaintiffs

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204. See *Chevron Corp. v. Naranjo*, No. 11-1150-cv(L), 2011 WL 4375022, at \*1 (2d Cir. Sept. 19, 2011); see also *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239 n.11 (2d Cir. 2012) (global injunction decision) (acknowledging the denial in *Chevron Corp. v. Naranjo*).

205. See *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 546 (S.D.N.Y. 2014) (RICO decision).

206. Suarez, *supra* note 153 (internal quotations omitted).

207. See *supra* Section II.B.



responding in kind to the initial corrupting act, or, from the defendants' perspective, as plaintiffs carrying out the first corrupting act, forcing defendants, in turn, to do more explicitly corrupt things—like paying a confederate of the once-bribed judge handsomely for his testimony in subsequent actions.

The sequencing of events makes the story significantly more complicated than our sparse model, as real life always is, but the heart remains: the parties both seem to have felt themselves driven by perceptions of a corrupt act by the other (whether tainted-corrupt or disloyal-corrupt) to carry out corrupting acts. Even though it seems like both parties would have had reason to prefer honest litigation to what happened, neither got it. Chevron, had it found itself in a fair forum, could have settled the case for somewhere between \$140 million and \$1 billion dollars.<sup>208</sup> Instead, it has spent more than that amount fighting over numerous years and in various fora, in substantial part because of its prior rational decision to remove the case to a biased and corruptible forum. The plaintiffs, too, would have at least had a chance at winning an enforceable judgment had they been able to litigate in an incorruptible court. They now—thanks to Donziger's rational (but immoral) decision to bribe the court—find themselves with a tainted judgment, and, like the defendant, with staggering litigation costs and great uncertainty over enforceability.

We cannot be sure that the parties would have preferred honest litigation to the consequences of mutual corruption—perhaps Chevron is carrying out what we might call a “scorched earth” strategy, in which it disregards its own litigation costs in an effort to deter future plaintiffs. Alternatively, perhaps the plaintiffs are carrying out what we might call a “frivolous gamble” strategy, in which their case is so meritless that they fare better with a tainted judgment than the defeat they could otherwise expect in a fair court. But absent the power to read minds, it certainly is reasonable to suspect that parties in the positions of those in the CED more generally would find themselves frustrated by the incentives to litigate corruptly in the face of their preferences for honest litigation—the key feature of the prisoner's dilemma.

The next Part retreats from the CED to suggest a systemic solution to such problems.

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208. See Keefe, *supra* note 31.

### III. A SYSTEMIC SOLUTION TO A SYSTEMIC PROBLEM: AN INTERNATIONAL COURT OF CIVIL JUSTICE

The upshot of the foregoing analysis is that the discussion of corruption in the transnational process must expand beyond a discussion of corrupt individuals or of any specific corporation that exerts undue influence or engages in other foul play. The discussion must expand to include systemic solutions to the structural features that promote corrupt actions.

As already noted, the key conclusion from understanding the transnational litigation prisoner's dilemma is that no one wins from the contemporary transnational litigationscape. Multinational corporations are spending millions of dollars defending lawsuits that, by their very transnational nature, are expensive and complex. Given the high rate of ultimate nonenforcement of the foreign judgments, such defendants believe the lawsuits themselves are frivolous.<sup>209</sup> (Though the CED discussion should demonstrate, as Judge Kaplan takes pains to note when he disclaims opining on the merits of the plaintiffs' case,<sup>210</sup> that the collateral attacks on the judgments often succeed as attacks on the quality of the foreign judicial system as opposed to attacks on the actual merit of the plaintiffs' claims.)

Plaintiffs, on their part, have no competent forum to turn to for their day in court, other than such compromised foreign courts that leave them with unenforceable judgments, even when they prevail on the merits, and even when no corruption has been proven with respect to their particular litigation.<sup>211</sup> As the *Bridgeway*, *Pahlavi*, *Dole*, and CED cases demonstrate, defendants such as Citibank, the Shah's sister, the Dole Corporation, the Dow Corporation, and Chevron sometimes enjoy a de facto immunity from enforcement of judgments.<sup>212</sup> Since courts are public goods—meant to provide justice

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209. For more critiques along these lines, see, for example, Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-Of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 473–88 (2011); Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non-Conveniens Legislation*, 49 HARV. INT'L L.J. ONLINE 95 (2009) (sponsored by Dole Food Company, Inc.).

210. See, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 427 n.340 (S.D.N.Y. 2014) (RICO decision) (“[T]he existence or absence of contamination in the Orienté was not at issue in this trial.”).

211. See, e.g., Montréal D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1159–60 (2007).

212. For similar critiques, see *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680–81 (Tex. 1990) (Doggert, J., concurring) (“[T]he ‘doctrine’ [of FNC that defendants] advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad.”).

not only to the litigants but to communities as a whole—every member of the global community is adversely affected by the absence of a legal forum that affords plaintiffs their day in court and defendants their due process rights.

Unfortunately, a focus on reforming judicial processes in individual states, while important in its own right, is not likely to yield solutions to the transnational litigation prisoner's dilemma in the foreseeable future. "[E]xperience has shown reform to be both difficult and slow, especially where the independence and integrity of the judiciary are in question."<sup>213</sup> While it is generally understood that effective courts are a necessary, albeit insufficient, condition to economic development and that "[b]adly performing courts are a burden not only for litigants, but nations as a whole," reforming underperforming courts has nevertheless proved elusive.<sup>214</sup>

#### A. *Existing Proposals for Change*

Policymakers and commentators have offered various solutions aimed at addressing at least some aspects of the rule of law gap created by the limitations of current judicial fora at home and abroad. Below is a nonexhaustive list of some of those suggestions and the limitations built into them.

Gus Van Harten has argued for an international investment court to deal with the deficiencies of ICSID, in particular its lack of accountability, openness, independence, and the incoherence of its jurisprudence.<sup>215</sup> However, Professor Van Harten's proposal is limited to investment disputes under BITs and is motivated by the public law nature of such disputes. This public nature—the distribution of public funds to private businesses that is the essence of investment arbitrations—he contends, makes private adjudication by private contractors (arbitrators) inappropriate. Conversely, we are interested first and foremost in private disputes between private parties of the types discussed in the Introduction as well as those that are similar to

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213. *Globalizing Commercial Litigation*, *supra* note 20, at 3. Dammann and Hansmann go on to review and summarize the empirical literature. *Id.* at 31–32.

214. *Id.* at 3.

215. See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007). For earlier calls for designated international courts in this area, see Arthur S. Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 AM. J. INT'L L. 371, 374 (1959); Sigmund Timberg, *An International Trade Tribunal—A Step Forward Short of Surrender of Sovereignty*, 33 GEO. L.J. 373, 386 (1945).

the CED.<sup>216</sup> In fact, disputes like the CED represent the “negative space,” to borrow a term from the arts, created by ICSID and the BIT regime. The latter allows only for claims brought by foreign investors but precludes claims against foreign investors of the kind brought by the Ecuadorian plaintiffs.

Jens Dammann and Henry Hansmann start with a similar premise: that private arbitration cannot fully replace public courts as an alternative to ineffectual domestic courts. Professors Dammann and Hansmann suggest opening up the well-functioning courts in the developed world to litigants in the developing world. (This would be done for a fee, so as not to externalize the cost to the forum state’s taxpayer but to the contrary—provide a profit incentive for such expansion of the courts’ role).<sup>217</sup> However, they specifically limit their proposal to disputes between merchants.<sup>218</sup>

Mark Gibney has written on the need for an international civil court, but he made the point with respect to the effectuation of human rights only.<sup>219</sup> In so doing, Professor Gibney made and demonstrated in the human rights context a pertinent point: that individuals “have shown a far greater interest in seeing that justice is served than states have.”<sup>220</sup> This fact points towards an institutional solution specifically, towards establishing a court where individuals can seek justice.<sup>221</sup> A larger, albeit admittedly very American point, is that private enforcement of law is a useful tool in overall civil law enforcement.<sup>222</sup> It is also the case that it is a tool of growing global acceptance.<sup>223</sup>

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216. One can envision a future in which the growing discontent with ICSID and the BIT regime may lead to a folding-in of such disputes under the jurisdiction of the envisioned ICCJ.

217. See *Globalizing Commercial Litigation*, *supra* note 20, at 46–48.

218. *Id.* at 6 (limiting their proposal further to “litigation in which all parties consent to employing the foreign court, either by means of a choice of forum clause in their original contract or by mutual agreement after their dispute arises”).

219. See generally Mark Gibney, *The Evolving Architecture of International Law: On the Need for an International Civil Court*, 26 FLETCHER F. WORLD AFF. 47 (2002) (arguing for protection of human rights through international law).

220. *Id.* at 51.

221. *Id.* at 50–51 (demonstrating the point by discussing the flood of human rights litigation brought in U.S. courts in the wake of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and contrasting “the plethora of [ATCA] suits that have been brought in U.S. courts with the sorry record of the U.S. Justice Department”).

222. For a discussion of private enforcement of the law and its highly American character, see John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669–77 (1986). The role of private law enforcement in ensuring civil justice for the otherwise powerless, however, has been recognized for centuries. See Paul Gowder, *Democracy, Solidarity, and the Rule of Law: Lessons from Athens*, 62 BUFF.

Burt Neuborne has proposed solving the CED by establishing a claims facility modeled on the Remembrance, Responsibility, and the Future Foundation. The Foundation was established to settle a series of class actions arising out of the Holocaust era and is considered “[t]he most successful use of the legal system, thus far, to provide relief to individuals harmed by allegedly unlawful transnational corporate behavior . . . .”<sup>224</sup> Such a proposal can be generalized into an argument that claims facilities may be useful in resolving cross-border mass claims. But claims facilities are a form of alternative dispute resolution (“ADR”), i.e., they are proper as *alternatives* to courts. In fact, the shadow of in-court litigation is the source of claims facilities’ appeal and of their success.<sup>225</sup>

Also in the vein of ADR, the Special Representative of the United Nations Secretary-General for Business and Human Rights, John Ruggie, proposes that corporations “establish or participate in effective operational-level grievance mechanisms for individuals and communities” and that “[i]ndustry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.”<sup>226</sup> This proposal too is limited to human rights abuses and does not stand alone. It is part of a larger remedial scheme that envisions state-based judicial and non-judicial fora that individuals can turn to. This proposal, too, has the limitations of ADR. It also has the general limitations associated with self-regulation.<sup>227</sup>

L. REV. 1, 32 (2014) (describing Athenian recognition of the egalitarian importance of private litigation).

223. See CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* 102–05 (2008); Manuel A. Gómez, *Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America*, 43 U. MIAMI INTER-AM. L. REV. 481, 494–95 (2012); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307–10 (2011); Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI., 7, 9–10 (2009).

224. Neuborne, *supra* note 101, at 510.

225. It is generally understood that claims facilities are effective because they offer defendants global “legal peace” in the form of dismissal of pending claims (often class actions) and preclusion of future claims. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1361–62 (2005); Neuborne, *supra* note 101, at 515.

226. U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶¶ 29–30, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

227. See, e.g., Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. REV. 158, 174–75 (2014) (“The

Judge Mark Wolf of the U.S. District Court for the District of Massachusetts has outlined a proposal for a new international anticorruption court modeled on or as part of the International Criminal Court ("ICC"). The court would have jurisdiction over civil as well as criminal fraud and corruption cases.<sup>228</sup> We believe such a mandate can be brought under the subject matter jurisdiction of the envisioned ICCJ and, indeed, could create added incentives for repeat-defendants to buy in to the new institution. And whereas an anticorruption court would deal only with corruption, an ICCJ would also resolve the problem of access to justice.

*B. The Need for an International Court of Civil Justice*

As we have just signaled, we suggest that there is another solution, one that would meet the criteria of the rule of law and satisfy the conditions for avoiding the prisoner's dilemma outlined in Part I. That solution is to set up an ICCJ with subject matter jurisdiction over cross-border mass torts as well as certain commercial matters. As explained above, of the three things that would solve the prisoner's dilemma outlined in Part I, namely, facilitating repeat play, facilitating enforceable side-bargains, and resolving the dispute in an incorruptible institution, only the latter is presently a viable solution in the litigation context. An indefinitely repeated prisoner's dilemma is not realistic between two litigants embroiled in a single (or even multiple) legal disputes that will ultimately resolve in either settlement or judgment without major changes to the internal legal structure of collective and mass litigants across the world. Facilitating enforceable side-bargains requires cooperation and is antithetical to the adversarial nature of litigation. We are left, thus, with referring the dispute to an incorruptible tribunal. The model, moreover, teaches us that the forum needs to be perceived as incorruptible, especially at the trial level where the first "game" is played.

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impact of industry self-regulation to curb human rights violations through codes on conduct is unclear at best. . . . [T]here is evidence that some companies may enact them simply to deflect criticism in an attempt to prevent more effective regulation . . . [and] only a very small percentage of transnational businesses have adopted them. . . . [A]ccessing information about compliance from sources other than the companies is notoriously difficult. . . . [T]here is no evidence demonstrating that companies that have adopted codes of conduct have evinced better performance in their compliance with the standards set out in those codes.").

228. See MARK L. WOLF, BROOKINGS INST., THE CASE FOR AN INTERNATIONAL ANTI-CORRUPTION COURT 10-11 (July 2014), <http://www.brookings.edu/~media/research/files/papers/2014/07/international%20anti%20corruption%20court%20wolf/anticorruptioncourtwolffinal.pdf> [<http://perma.cc/72UF-C4HE>].

Such a forum currently does not exist. Because of their limited jurisdiction, neither international commercial arbitration nor international investment arbitration can cover the kind of disputes we analyze here. U.S. courts could have served such a purpose, at least in cases where one of the parties is an American individual or entity. However, the trend in U.S. courts to limit foreigners' access,<sup>229</sup> epitomized by the 2013 *Kiobel* decision, renders that option de facto unavailable. European courts are also not available to hear most of the kinds of disputes we are concerned with if for no other reason than because none would have personal jurisdiction over most of the disputes under discussion. An ICCJ—to which states delegate the authority to decide the kind of disputes we discuss here (where states' own courts will not decide such disputes) and that is designed to meet the requirements of the rule of law—would meet the criteria above and would solve the problem of the missing forum. Such an independent supranational court should be perceived as incorruptible, in part because its judges will be subject to close monitoring from an international audience, and hence, litigants will expect that such judges will find it more difficult and costly to take bribes. Since perceptions of corruptibility are a condition of the prisoner's dilemma, an ICCJ should eliminate the prisoner's dilemma.

An obvious reaction may be that an ICCJ seems like an idealistic pipe dream. This, in fact, has been the reaction to many proposals for new international courts that have subsequently become a reality.<sup>230</sup>

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229. *Id.*; Alford, *supra* note 26, at 1754.

230. Consider, for example, Sir William Randal Cremer's 1905 Nobel Lecture, titled "The Progress and Advantages of International Arbitration":

Thirty-four years ago, when the organization of which I am secretary formulated a plan for the establishment of a "High Court of Nations," we were laughed to scorn as mere theorists and utopians, the scoffers emphatically declaring that no two countries in the world would ever agree to take part in the establishment of such a court. Today we proudly point to the fact that the Hague Tribunal has been established; and notwithstanding the unfortunate blow it received in the early stages of its existence by the Boer War, and the attempt on the part of some nations to boycott it, there is now a general consensus of opinion that it has come to stay.

Randal Cremer, *The Progress and Advantages of International Arbitration*, NOBELPRIZE.ORG (Nov. 7, 2014), [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1903/cremer-lecture.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1903/cremer-lecture.html) [http://perma.cc/GAN4-77CQ]. To give another example, the idea for an International Criminal Court was first articulated in the Treaty of Versailles (1919), which provided that Kaiser Wilhelm II be prosecuted by an international tribunal for a "supreme offence against international morality." See John P. Cerone, *U.S. Attitudes Toward International Criminal Courts and Tribunals*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 131, 134 (Cesare

The reality is that behind the coming-into-being of each international court is an idiosyncratic confluence of socio-historical global forces converging to make it a reality, often over the course of many decades.<sup>231</sup> The long and winding road towards a new international court is usually characterized by ebbs and flows of support<sup>232</sup> and by tweaks or even major overhauls of design features, both before and over the life of an institution. It is not unusual for “blueprints” to be developed over decades and to collect dust until the time is right and conditions are ripe. History shows, specifically, that “new style” international courts of the post-Cold War era—courts with compulsory jurisdiction that allow non-state actors to initiate litigation—come into being out of “disappointment, fueling legal idealists, who drew lessons and stood ready to advocate for more effective international legal institutions when the opportunity presented itself.”<sup>233</sup> Charismatic visionaries and social entrepreneurs can play a key role. So can social movements of scholars, jurists inside and outside of academia, practitioners, politicians, and others.<sup>234</sup> Such social movements allow broad “constituencies of support” to come together by “linking communities that care about the larger policy domain (for example, free-trade, human rights, and such), with supporters of the rule of law, with advocates for the particular legal regime . . . with self-interested litigants pursuing personal agendas and with the legal community of lawyers, judges, and scholars.”<sup>235</sup> This Article, and the larger project it is a part of, aims to start a conversation and the development of such a blueprint.

Another possible objection is that the establishment of an ICCJ is not politically viable because U.S.-based multinational corporations, and politicians who support them, are likely to oppose a court in which they may be successfully sued. Consequently, this argument goes, the United States is unlikely to sign on to such a regime. Our response to this objection is threefold. First, a well-designed ICCJ can dramatically decrease the direct costs of litigation

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P. R. Romano ed., 2009) (quoting Treaty of Versailles art. 227, June 28, 1919). The idea became a reality a century later with the establishment of the ICC in 2002.

231. See generally KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2004) (examining and comparing the creation and efficacy of a wide variety of international courts); STEINITZ, *supra* note 5 (forthcoming book advocating for an ICCJ to resolve cross-border mass torts and discussing a blueprint for such court).

232. See generally STEINITZ, *supra* note 5 (forthcoming book discussing in part common characteristics of the creation of international courts).

233. ALTER, *supra* note 231, at 118.

234. *Id.* at 19–21.

235. *Id.* at 5.



to all litigating parties. Second, an ICCJ can reduce the even-higher indirect costs of litigation. And third, an ICCJ can be designed to go even further than cost reduction and provide a forum for cross-border litigation that is currently not available, but corporations may seek to bring or otherwise be interested in. It is instructive to note here that in another famous cross-border mass tort litigation, the BP oil spill, it was businesses rather than individuals that received a larger share of the compensation provided by the ensuing claims facility.<sup>236</sup> We develop these three responses in the following paragraphs. But first, as a threshold matter, we note that the ICCJ's jurisdiction could be complementary, as it is at the ICC.<sup>237</sup> This means that, if the home jurisdiction of the multinational corporation is willing and able to hear the case, the ICCJ will not exercise jurisdiction.<sup>238</sup> Allowing American corporations to "remove" the case to an American court means that unless one is willing to endorse the proposition that mass torts require no compensation, the solution we offer is almost morally inescapable.

The primary costs of litigation across borders include, for example, the cost of litigating FNC motions and enforcement proceedings as well as the costs of parallel litigation. Examples of all of these in the context of the CED are described above, and the reader will recall that the primary cost of the ongoing litigation to Chevron has been estimated to exceed \$1 billion.<sup>239</sup> Such direct cost, in turn, can increase exponentially because foreign courts' decisions do not have full preclusive effect.<sup>240</sup>

On top of all of these direct costs, one must consider the hidden costs of litigation, which can exceed the primary costs.<sup>241</sup> Hidden costs are major restrictions on a corporation's ability to do business—for

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236. Businesses, including those with multibillion dollar revenues, were the biggest benefactors of the compensation scheme set up by BP, as required by the unique regime of the Oil Pollution Act, to remediate its devastation of the Gulf Coast. See Steinitz, *The Case for an ICCJ*, *supra* note 5, at 75–76 (contrasting the speedy compensation of American cross-border torts victims in the BP Oil spill with the CED).

237. Rome Statute of the International Criminal Court art. 20, July 17, 1998, 2187 U.N.T.S. 90.

238. "Able," in this context, would mean, *inter alia*, noncorrupt. See Steinitz, *The Case for an ICCJ*, *supra* note 5, at 82.

239. See *supra* text accompanying note 31.

240. See, e.g., Philip L. McGarrigle, *The Role of Foreign Judgments in Patent Litigation: A Perspective and Strategic Overview*, 39 IDEA 107, 112 (1998) (discussing how U.S. courts re-litigate factual findings of foreign courts).

241. See Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1171–72 (2015); see also Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 373–75 (2009).

example, to carry out mergers or acquisitions and to obtain debt or equity—that are imposed because a large legal dispute is ongoing.<sup>242</sup> Certain large-scale litigation has also been known to depress the defending corporation's stock price.<sup>243</sup> The hidden costs of transnational litigation also include, e.g., the economic impact of the backlash against a multinational corporation created by the current transnational litigationscape which includes “the increasing adoption by foreign jurisdictions of American-style pro-plaintiff procedural features, at times tailored to apply only to cases brought against American multinational corporations; the use of domestic criminal procedures against corporate executives in host states; and expropriation and even regime change from pro-[FDI] to populist regimes.”<sup>244</sup>

An example of a hybrid primary and secondary cost of litigation is contained in the District Court's analysis of “irreparable harm” in the litigation to enjoin enforcement of the Ecuadorian judgment. The District Court noted that without an injunction, “Chevron would be forced to defend itself and litigate the enforceability of the Ecuadorian judgment in multiple proceedings. . . . [Its] assets would be seized . . . thus disrupting Chevron's supply chain . . . damaging ‘Chevron's business reputation . . . and harm[ing] the valuable

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242. See generally Steinitz, *supra* note 241 (discussing the hidden costs of litigation to corporate plaintiffs and providing examples of litigations that have proven to be obstacles to mergers and other deals); Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1903–06 (2013) (discussing the valuation and accounting problems presented by litigation); see also, Molot, *supra* note 241, at 373–75 (providing a somewhat different formulation of similar problems litigation presents to corporate defendants, referred to by Molot as “tertiary costs”).

243. In the CED case, at one point at least one stock research company predicted a 5% decline in Chevron's stock valuation should the \$9 billion Ecuadorian judgment be enforced and further opined that “long-term impact could include tighter anti-pollution regulations and stricter enforcement. This would likely raise costs for oil companies, an effect that would be reflected in profit margins.” See SIMON BILLENNESS & SANFORD LEWIS, AMAZON WATCH & RAINFOREST ACTION NETWORK, AN ANALYSIS OF THE FINANCIAL AND OPERATIONAL RISKS TO CHEVRON CORPORATION FROM *AGUINDA V. CHEVRONTEXACO* 5 (May 11, 2011), [http://chevrontoxico.com/assets/docs/Chevron-Ecuador\\_Risk\\_Analysis\\_Report\\_May2011.pdf](http://chevrontoxico.com/assets/docs/Chevron-Ecuador_Risk_Analysis_Report_May2011.pdf) [<http://perma.cc/DV78-46KG>] (quoting Trefis, *Chevron Could Take Big Hit from Potential Payout in Ecuador*, THE STREET (Mar. 31, 2011), <http://www.thestreet.com/story/11068458/1/chevron-could-take-big-hit-from-potential-payout-in-equador.html> [[perma.cc/SEDZ-YJX4](http://perma.cc/SEDZ-YJX4)]). For empirical work on the effects of litigation on a company's stock price, see David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. ECON. 157, 157–58 (1988).

244. Steinitz, *The Case for an ICCJ*, *supra* note 5, at 81.

customer goodwill Chevron has developed over the past 130 years.’ ”<sup>245</sup>

An ICCJ can vastly reduce such costs “through procedural features that ensure that non-meritorious cases are dismissed relatively early, summary judgment-like” and through “limitations on American-style pro-plaintiff procedural features in favor of a more continental design: no jury, less discovery, and no punitive damages.”<sup>246</sup> The benefits of these features can be compounded if signatories to the ICCJ’s underlying instrument agree that its holdings and judgments have global preclusive effects. *Res judicata* will then provide “global legal peace” to a given dispute at the end of a single litigation and collateral estoppel will reduce the costs of other proceedings.<sup>247</sup>

An ICCJ’s subject matter jurisdiction can be formulated to include matters that corporations care about but currently find difficult to enforce. Perhaps the best example of such subject matter is the law of anticorruption. Judge Wolf, the former chief federal public corruption prosecutor in Massachusetts, made the case for internationalizing the adjudication of corruption.<sup>248</sup> Corruption violates the laws of virtually every nation on earth as well as a number of international instruments.<sup>249</sup> However, national authorities and their highest-ranking officials have no incentives, and often have disincentives, to pursue anticorruption enforcement. They themselves, their friends, and their family members might be the

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245. Preliminary Injunction of U.S. Federal District Judge Lewis A. Kaplan at 65, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (RICO decision) (quoting Declaration of Rex J. Mitchell in Support of Chevron Corporation’s Motion for Preliminary Injunction at ¶¶ 8, 10, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (RICO decision)).

246. Steinitz, *The Case for an ICCJ*, *supra* note 5, at 82. While eliminating such features may seem too pro-defendant, there is no evidence that other legal systems are more pro-defendant than the American system, which is unique in its embrace of these procedures. As discussed, *supra* text accompanying notes 45–50, pro-defendant biases that may not exist in other, more “protectionist” legal cultures, arguably balance out any pro-plaintiff effects of such measures. Therefore, there is no reason to assume that any common law-civil law hybrid procedure negotiated by the Member States of the future ICCJ as well as a diverse bench including judges from the developing world will be more favorable towards multinational corporations even without such features.

247. Steinitz, *The Case for an ICCJ*, *supra* note 5, at 82; *see also* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413 (2014) (arguing that costly class action litigation was preferable to the BP administrative program because it allowed BP to “purchase” legal peace).

248. *See generally* WOLF, *supra* note 228 (arguing for an international anticorruption court).

249. *See id.* at 2.

beneficiaries or agents of corruption.<sup>250</sup> Judge Wolf analogizes to the American experience where federal prosecutors and courts pursue corruption at the state and local level precisely because they are more likely to be removed from it than are state and local officials.<sup>251</sup> National anticorruption enforcement is further complicated in the international context by the “quiet complicity of other nations, which benefit from foreign investment and official favor.”<sup>252</sup> American corporations are likely to be keen on seeing anticorruption laws enforced, which as stated above is likely to happen in a robust way outside the United States only if adjudication is internationalized, because corruption represents a major inefficiency and distorts market forces.<sup>253</sup> American corporations, in particular, contend that the high enforcement of the American FCPA<sup>254</sup> coupled with the low or no enforcement of anticorruption laws in other developed countries puts them at a competitive disadvantage.<sup>255</sup> Across-the-aisle constituencies, i.e., human rights advocates, should be similarly eager to see such law enforcement. According to the U.N. High Commissioner for Human Rights, “[C]orruption is an enormous obstacle to the realization of all human rights—civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community.”<sup>256</sup> The White House has also characterized corruption as “a violation of basic human rights.”<sup>257</sup> Thus, the United States is likely to support the internationalization of the adjudication of anticorruption measures in order to level the global playing field for American corporations.<sup>258</sup>

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250. *Id.* at 5–8 (collecting examples of the global failure to prosecute “grand corruption”).

251. *Id.* at 2.

252. *Id.* at 7.

253. See Yockey, *supra* note 168, at 828–29; see also G.A. Res. 58/4, U.N. Doc. A/RES/58/4, at iii, Foreword, United Nations Convention Against Corruption (Oct. 31, 2003), [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) [<http://perma.cc/55US-MVPV>].

254. 15 U.S.C. § 78 dd-1 (1977).

255. See Yockey, *supra* note 168, at 824–25.

256. Navi Pillay, High Comm’r for Human Rights, Opening Statement at Panel on the Negative Impact of Corruption on Human Rights (Mar. 13, 2013), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13131&LangID=e> [<http://perma.cc/GP92-WHBX>].

257. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (May 2010), [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) [<http://perma.cc/R9U4-L2YS>].

258. WOLF, *supra* note 228, at 13.

Finally, subject matter jurisdiction may also encompass business-to-business contract disputes that are currently channeled to expensive, private, international commercial arbitration—currently the only alternative to foreign courts. International commercial arbitration will then truly become a form of *alternative* dispute resolution.<sup>259</sup>

Beyond design features that are necessary for an ICCJ to be politically viable, in order to solve the problem identified, an ICCJ should also be designed to ensure due process and fundamental fairness. The next few paragraphs detail institutional design features that are based on international standards that promote judicial independence and accountability and combat judicial corruption.<sup>260</sup> It will be immediately obvious why, as discussed above, reforms of existing judiciaries to bring them into compliance with these standards have been elusive. For the same reasons, a new international institution that transcends the domestic-political landscape may be more successful in complying with these standards. Prior to detailing such criteria, it is also helpful to note that merely *removing* the adjudicators, through the internationalization of the judicial process from the control and influence of domestic executive branches, legislators, politicians, and pressure groups, should have a positive influence on independence and accountability. (Consider, for

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259. See generally *Globalizing Commercial Litigation*, *supra* note 20 (arguing in part that international commercial arbitration offers an insufficient solution to transnational commercial litigation).

260. See generally, e.g., THE BANGALORE PRINCIPLES ON JUDICIAL CONDUCT (2002) (generally recognized as the most comprehensive standards on judicial conduct); COUNCIL OF EUR., JUDGES: INDEPENDENCE, EFFICIENCY, AND RESPONSIBILITIES (Nov. 17, 2010), [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282010%2912E\\_%20judges.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282010%2912E_%20judges.pdf) [<http://perma.cc/CC3H-Z6GV>]; IBA MINIMUM STANDARDS FOR JUDICIAL INDEPENDENCE (INT'L BAR ASS'N 1982); USAID, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY (GUIDE) (Jan. 2002), [http://pdf.usaid.gov/pdf\\_docs/PNACM007.pdf](http://pdf.usaid.gov/pdf_docs/PNACM007.pdf) [<http://perma.cc/YAJ3-X5EL>]; *Combating Corruption in Judicial Systems: Advocacy Toolkit*, TRANSPARENCY INT'L (2007), <http://www.u4.no/recommended-reading/transparency-international-advocacy-toolkit-combating-corruption-in-judicial-systems/> [<http://perma.cc/NE9U-PB77>]; Keith Handerson et al., *Judicial Transparency Checklist: Key Transparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms*, IFES (2003) [hereinafter *Judicial Transparency Checklist*], <http://gateway.transparency.org/tools/detail/199> [<http://perma.cc/Y2H6-FBT7>]; *Montreal Universal Declaration on the Independence of Justice*, INT'L ASS'N JUD. INDEP. JUST., <http://www.jiwp.org/#!montreal-declaration/c1bue> [<http://perma.cc/A3G9-M9PC> (dark archive)] (the only document aimed specifically at the international judiciary); U.N. Office of the High Commissioner, *Basic Principles on the Independence of the Judiciary* (1985), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [<http://perma.cc/4LBF-CNDX>] (adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders).

example, the suggestions below that remove political and corporate influence from the case assignment process as well as the potential comparative advantage that international watchdogs, such as the international media, civil society, and academia have to be engaged, vigilant, and effective).

There is some controversy regarding the appropriate meaning of “independence” of international judges, as distinct from their domestic counterparts, in recognition of the fact that international judges are appointed by states and that they may decide cases that implicate their home states’ interests. However, there is a consensus on the general applicability of the concept of “independence” to all international judges.<sup>261</sup> Generally speaking, according to international best practices, judicial selection should be conducted through an objective and transparent appointment process. The appointment process of international judges varies from court to court, but “the general approach is similar. Each of the states involved . . . is entitled to nominate a single candidate, who is then subject to an election process along with the other nominees.”<sup>262</sup> Appointment and promotion should be based on a demonstrable record of competence and integrity.<sup>263</sup> Appointment decisions should be well documented and publicly available.<sup>264</sup> To maximize legitimacy with a global constituency the bench should be diverse and representative of the world community in terms of gender, race, ethnicity, and religion.

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261. See, for example, the debate between Professors Yoo and Posner, who argue that international tribunals’ effectiveness increases as their independence (from the member states) decreases, and Professors Helfer and Slaughter, who emphatically challenge both the empirical soundness and normative underpinnings of Yoo and Posner’s work. Compare John Yoo & Eric Posner, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005), and John Yoo & Eric Posner, *Reply to Helfer and Slaughter*, 93 CALIF. L. REV. 957 (2005), with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005). See also Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 275 (2003); Nathan J. Miller, *Independence and the International Judiciary: General Overview of the Issues* 2 (Jan. 24, 2002), [http://www.pict-pecti.org/activities/ILA\\_study\\_grp/ILA1.pdf](http://www.pict-pecti.org/activities/ILA_study_grp/ILA1.pdf) [<http://perma.cc/63D3-PFPJ>] (working draft) (providing background for the meeting of the ILA Study Group in London, February 2, 2002).

262. See Mackenzie & Sands, *supra* note 261, at 278. For a comprehensive discussion of the nomination and selection processes at major international courts see Miller, *supra* note 261.

263. See Miller, *supra* note 261, at 10; *Judicial Transparency Checklist*, *supra* note 260, at 27; U.N. Office of the High Commissioner, *supra* note 260, at ¶ 10.

264. See USAID, *supra* note 260, at 36, 37, 60, 71.

Guarantees for judges should include either tenure for life or for a long period of time.<sup>265</sup> Judges should be compensated with adequate salaries and pensions.<sup>266</sup> Clear and objective criteria for judicial advancement should be articulated, as should the grounds for discipline and removal.<sup>267</sup> Removal should only be possible for misconduct or incapacity to carry out judicial function, and judicial immunity should be extended for official actions but not for corruption or other criminal conduct.<sup>268</sup>

Rules requiring judges to disclose their assets at appointment time and periodically may be advisable.<sup>269</sup> Such rules may be extended to cover disclosure of family members' assets and to cover other judicial officers.<sup>270</sup> Outside income while in office should be prohibited or closely monitored.<sup>271</sup> For example, it may be appropriate to authorize but monitor honoraria for teaching and speaking engagements.

A written code of ethics that meets international standards, with a clear and effective mechanism for the enforcement of ethical rules, should also be developed. Such a code should include clear conflict of interest rules setting out, e.g., whether judges are allowed membership in political parties or direct or indirect political activity. Ethics training should be mandatory.

Case assignment should be carried out through a transparent process with clearly articulated and transparent guidelines.<sup>272</sup> Procedural rules should discourage excessive adjournments but also ensure that judges have adequate time to hear cases and prepare written judgments.<sup>273</sup>

In order to promote transparency and legal accountability, court decisions should be written, reasoned, recorded, signed by the authoring judges, and accessible to the public generally and

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265. Miller, *supra* note 261, at 15; *Combating Corruption in Judicial Systems*, *supra* note 260, at 35.

266. USAID, *supra* note 260, at 32; Miller, *supra* note 261, at 15; *Combating Corruption in Judicial Systems*, *supra* note 260, at 35.

267. USAID, *supra* note 260, at 19; Mackenzie & Sands, *supra* note 261, at 275; Miller, *supra* note 261, at 15; *Combating Corruption in Judicial Systems*, *supra* note 260, at 24, 35.

268. See Miller, *supra* note 261, at 12; *Combating Corruption in Judicial Systems*, *supra* note 260, at 20, 24, 25, 35, 44, 47; U.N. Office of the High Commissioner, *supra* note 260, ¶¶ 18, 19.

269. Miller, *supra* note 261, at 9; *Combating Corruption in Judicial Systems*, *supra* note 260, at 24, 38.

270. Miller, *supra* note 261, at 9.

271. USAID, *supra* note 260, at 137.

272. *Combating Corruption in Judicial Systems*, *supra* note 260, at 24, 35.

273. See COUNCIL OF EUR., *supra* note 260, at 17, 20.

specifically via (indexed and searchable) electronic databases available online for free.<sup>274</sup> Court records should also be maintained and accessible to the public. Architects of the court should also consider whether the benefits of having recourse to an appellate process, as a further check on the trial court, outweigh the costs of adding such a layer of adjudication.

#### CONCLUSION

We have shown, through game theoretical tools as well as real-life illustration, that as far as transnational litigation is concerned, corruption breeds more corruption. The fact that the judiciary in much of the world either is corrupt, or is perceived to be corrupt, sets up a prisoner's dilemma whereby it is rational to act corruptly preemptively. The prisoner's dilemma also illuminates the fact that no one—not repeat- or other plaintiffs nor repeat- or other defendants—benefits from a system with the incentives created by the current system. This means that it is in the interests not only of those advocating human rights, workers' rights, environmental protection, and the like, but also of multinational corporations to change the system to eliminate the prisoner's dilemma.

We have also argued that of the various analytically possible ways to solve a prisoner's dilemma—facilitating repeat play, facilitating side-bargains (between litigation adversaries), or setting up an incorruptible tribunal—only the third is a potentially viable solution in the case of transnational litigation. (Indeed, virtually all of the solutions advocated by others and surveyed above involve a significant role for either domestic, international, or foreign courts or tribunals). Had there been an available incorruptible forum, like U.S. courts, the problem could have been resolved without setting up a new institution. However, none of the existing fora, as we have seen, are both willing and able to take on the task, and reforming existing fora, whether in the United States or the developing world, is unrealistic in the foreseeable future. An ICCJ is therefore a potential solution, and we hope others will join us in contemplating what features might make such a solution attractive to as many stakeholders as possible. Such a collective effort could lead to an institutional solution that would benefit the causes of access to justice, rule of law, and global economic development.

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274. *See id.* at 8.



## APPENDIX

This Appendix contains light formalizations of the game theoretic claims made in the main body of the Article. It may safely be skipped by those who believe (or are willing to suspend disbelief in) our analytic assertions.

*A. Characterization of the Prisoner's Dilemma*

Formally, we can depict the simplest version of the prisoner's dilemma in tabular form as follows:

	Cooperate	Defect
Cooperate	$A, A$	$B, C$
Defect	$C, B$	$D, D$

In this visualization, player one chooses between the columns, player two chooses between the rows, and player one's payoff is listed first.  $A$  is the mutual cooperation payoff, and  $B$  is the payoff a player gets when he manages to successfully "sucker" the other player—defect while the other player cooperates.  $C$  is the "sucker's payoff," and  $D$  is the payoff each player gets when both players defect.

In order for the game just described to constitute a true prisoner's dilemma, defection must be a strictly dominant strategy for each player (each player must be better off defecting), and the mutual defection payoff must be strictly worse than the mutual cooperation payoff. That is, the game is a prisoner's dilemma when  $B > A$  (each player prefers defecting when the other is cooperating),  $D > C$  (each player prefers defecting when the other is defecting), and  $A > D$  ( $B > A > D > C$ ).<sup>275</sup> As constructed, the prisoner's dilemma represents a costly failure of cooperation: the only (one-round) Nash equilibrium to the game is mutual defection, even though mutual defection is worse for everyone than mutual cooperation.

The attentive reader will notice that in the simplest version, it is assumed that the players have symmetric payoffs. This assumption is easily relaxed, in which case by convention we can denote each player's version of the payoff by a subscript ( $A_1$ ,  $A_2$ , etc.). In that case, a

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275. Axelrod & Hamilton, *supra* note 2, at 1391–92. Note that Axelrod and Hamilton specify an additional condition on a prisoner's dilemma, but that condition (which is meant to rule out repeated play in which the players trade off sucker's payoffs, *see id.* at 1396 n.17) does not apply in the litigation context.

prisoner's dilemma is where  $B_1 > A_1 > D_1 > C_1$  and  $B_2 > A_2 > D_2 > C_2$ . No assumptions need be made about the relationship of players' payoffs to one another, provided we make the simpler assumption that the players cannot make enforceable side-bargains with one another to break the model.<sup>276</sup>

### B. *When Is Litigation a Prisoner's Dilemma?*

We now state the conditions under which litigation is a prisoner's dilemma. We begin by defining some variables. Let:

$i, j$  be litigants.<sup>277</sup>

$B_i$  be the amount that litigant  $i$  pays to carry out a corrupting act (e.g., the amount of the bribe paid to the judge, the risk of being punished, the additional litigation costs incurred by transferring the case from an honest to a corrupted forum, etc.).

$C_i$  be litigant  $i$ 's noncorruption costs.

$V$  be the amount in dispute.<sup>278</sup>

$M_i$  be the legal merits of  $i$ 's case, expressed as  $i$ 's probability of winning without a corrupting act ( $M_i + M_j = 1$ ).<sup>279</sup>

$P_{ib}$  be  $i$ 's probability of winning having carried out a corrupting act of cost  $B_i$  (the  $b$  subscript will be dropped where appropriate); the supposition is that  $P_i$  is an increasing function of  $B_i$  and  $M_i$ . For the limiting case in which litigant  $i$  does not engage in a corrupting act,  $P_i = M_i$ .

Given those definitions, let litigant  $i$ 's payoff for litigating be  $L_i = P_i V - C_i - B_i$ . Then, litigant  $i$  has the opportunity to corrupt a court if there is some positive  $B_i$  such that  $P_{ib} V - B_i > M_i V$ .

Observe that the noncorrupt cost terms, being constant, may be safely dropped and that this model depends on the assumption that  $B_i$  is within  $i$ 's budget.<sup>280</sup> Then  $P_{ib} V - B_i > M_i V$  describes the situation

276. The possibility of enforceable side-bargains would make matters significantly more complicated. However, if such a bargain is enforceable, we are no longer playing a prisoner's dilemma: the whole idea of a prisoner's dilemma is that cooperation between the parties is not enforceable. See discussion, *supra* Section I.B.1 (suggesting that making enforceable side-bargains is unlikely in the adversarial setting of a litigation).

277. For simplicity, we assume two-party litigation, although the model ought to be extendible to multiparty litigation without serious difficulty.

278. We assume that each party has the same amount at stake, i.e., that the suit in question is purely one for monetary damages. Again, the model ought to be extendible to situations where the parties value the litigation at different rates without serious difficulty.

279. This model assumes that a corrupted court still has to pay *some* attention to the merits of a case, even if only for appearance's sake, but that corruption will induce the court to favor the briber when there is room for disagreement on either side.

280. I.e., that no party may be priced out of the competition by litigation costs, that there are diminishing returns to corrupting act costs (e.g., because judges are only so greedy,

where player  $i$  prefers unilateral defection to mutual cooperation. Whether such a  $B_i$  exists depends on the impact of  $B_i$  on  $P_i$ : where it is very costly to carry out a corrupting act relative to the amount in dispute, or where corrupting acts make very little difference to the ultimate probability of winning, no such  $B_i$  will exist.

Suppose that player  $i$  is corrupting. Player  $j$  will also have an incentive to corrupt where there is some  $B_j$  such that  $P_{jCb}V - B_j > M_{jC}V$ . Here  $P_{jCb}$  and  $M_{jC}$  represent the corruption and no-corruption probabilities, respectively, for  $j$ 's victory conditional on  $i$ 's having corrupted the court (the timing of the two corrupting opportunities makes no difference). Informally, the given inequality will be satisfied where paying a compensatory bribe (etc.) will lead the corrupt judge to shift enough of the probability mass for winning back in  $j$ 's favor to make it worth  $j$ 's while to pay the amount demanded.

Accordingly, corruption will be a strictly dominant strategy when  $P_{ib}V - B_i > M_iV$  (player  $i$  prefers unilateral corruption to mutual honesty),  $P_{jb}V - B_j > M_jV$  (player  $j$  prefers unilateral corruption to mutual honesty),  $P_{iCb}V - B_i > M_{iC}V$  (player  $i$  prefers mutual corruption to being the only noncorrupter), and  $P_{jCb}V - B_j > M_{jC}V$  (player  $j$  prefers mutual corruption to being the only noncorrupter).

In such a situation, the litigation will be a prisoner's dilemma when the litigants also prefer mutual honesty to mutual corruption, i.e., when  $M_iV > P_{iCb}V - B_i$  and equivalently with the appropriate change in subscripts for  $j$ . Note that this will be true (inter alia) for all nonzero  $B$  in all cases where the players are symmetric in their power to corrupt, e.g., where players cannot outbid one another due to wealth constraints or systemic superiority, and where there is no positional advantage relative to being the first or second briber (i.e., where  $P_{iCb} = P_{jCb}$ ). In other cases, the game may not be a formal prisoner's dilemma, because one player may prefer the mutual bribery outcome, however, many of the systemic concerns will be the same as those described in the text.

### C. *Modeling Noncorrupt Appeals and Enforcement Actions*

In the text, we claimed that the opportunity for parties to take appeals to or the requirement they seek enforcement in incorruptible fora does not change the underlying model, so long as an original corrupt judgment makes it more likely that the player who procures it

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perhaps because of the different levels of per capita wealth in the developed and developing world), or that the costs of corrupting acts like bribes necessary to conclusively outbid the other party are so large that they swamp the expected return of the litigation.

will win the lawsuit than if the parties had litigated in the incorruptible forum in the first place (we call this a "status quo effect").

To see this, suppose there are two jurisdictions: the home jurisdiction ( $H$ ) and the enforcement jurisdiction ( $E$ ), where  $H$  is corruptible and  $E$  is not. A party has the choice of procuring a corrupt judgment in  $H$  and trying to enforce it in  $E$ , or simply attempting to win a noncorrupt judgment directly in  $E$ . Assume that her probability of winning in  $E$  is  $\Pi$ , and that there is positive probability  $\Phi$  that a corruptly procured judgment in  $H$  will be enforced in  $E$ . To model the assumption of a status quo effect, we specify that  $\Phi > \Pi$ . Let us further assume (the key assumption) that if  $E$  refuses to enforce a judgment from  $H$ , the parties will have the opportunity to relitigate the merits in  $E$ .

Then, a party will prefer to procure a corrupt judgment in  $H$  when  $\Phi V - K + (1 - \Phi)(\Pi V - C) > \Pi V - C$ . In that inequality,  $V$ , as before, is the value of the litigation,  $C$  is the cost of litigating in  $E$ , and  $L$  maps the additional costs to the party from seeking the corrupt judgment in  $H$ , including corrupting and litigation costs in  $H$  as well as additional litigation costs from the enforcement action in  $E$ , risk-adjusted penalties for getting caught at corruption, etc. Essentially, a litigant pays  $K$  for the privilege of getting an extra round of litigation at the beginning with a thumb on the scale in her favor.

After some algebra, the inequality reduces to  $V + C > \frac{K}{\Phi} + \Pi V$ , illustrating that a litigant will be more likely to prefer to procure a corrupt judgment as the costs of litigating fairly rise, the costs of litigating corruptly decrease, the likelihood of enforcing a corruptly procured judgment increases, and so forth. But so long as that inequality holds, the strategic structure of the overall litigation holds: if the litigation in  $E$  is round  $N$ , then in round  $N - 1$ , a party will prefer to defect from honest litigation in  $H$  if he can get away with it; so long as it is better to corrupt in round  $N - 1$  if the other player is bribing, the payoffs, viewed from round  $N - 1$ , still have the structure of a prisoner's dilemma. Accordingly, the game as a whole is still subject to the same kind of backward induction solution that leads to the standard subgame perfect equilibrium of a finitely repeated prisoner's dilemma: mutual defection.