

INDIVIDUAL-BASED, CROSS-BORDER LITIGATION: A NATIONAL SECURITY PRACTITIONER'S PERSPECTIVE

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1. INTRODUCTION

Even a cursory review of the past four years reveals seemingly limitless potential challenges facing national security practitioners, including violent extremists, transnational criminals, hackers, rogue states, pandemics, earthquakes, tsunamis, super storms, and economic and financial meltdowns.

Less visible, but no less real, is another group that regularly affects the national security policy process: individual litigants.

Although by no means a new phenomenon,¹ individual-based, cross-border litigation—be it inside or outside U.S. courts—is a fact of life that affects the national security policy process. For example, during my more than three years leading the Western Hemisphere policy process on the National Security Staff at the White House, cases—or potential cases—affected the policy making context touching on U.S. relations with Argentina, Brazil, Canada, Colombia, Cuba, Ecuador, Guatemala, and Mexico, to name only a small sample.

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¹ The Jay and Marshall Courts, for example, handled plenty of litigation involving foreign affairs from the earliest days of our republic. See Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 867–86 (2005) (attempting to understand the judicial role in foreign policy by analyzing the foreign affairs dockets of the Jay and Marshall Courts).

2. INDIVIDUAL LITIGANTS, SYSTEMIC EFFECTS

Four brief case studies help demonstrate how individual-based litigation affects the U.S. national security policy-making process. The four cases are:

1. The touchstone for this Symposium—the *Lago Agrio* litigation in Ecuador;
2. Litigation stemming from Argentina's December 2001 sovereign debt default;²
3. *Doe v. Zedillo*,³ an Alien Tort Claims Act case against former Mexican President Ernesto Zedillo; and
4. *Martinez v. Cuba*,⁴ an attachment proceeding in U.S. Federal District Court stemming from a Florida state court default judgment.

2.1. *Chevron & Lago Agrio*

The implications of environmental, mass-tort litigation in Ecuador involving Chevron long-ago spilled into the policy-making context as litigants and the Government of Ecuador have extensively lobbied the U.S. Executive and Congress regarding the litigation's potential implications for U.S. policy toward Ecuador.

Chevron and its backers, for example, have frequently petitioned the United States Trade Representative (USTR) and others in the Executive Branch, as well as members of Congress's key trade committees—the Senate Committee on Finance and the

² For background on the default and resulting U.S.-based litigation, see generally *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007) (holding that funds belonging to the Argentina's central bank held in the Federal Reserve Bank are not an attachable interest of the Republic of Argentina). See also Lucy Reed, *Scorecard of Investment Treaty Cases Against Argentina Since 2001*, KLUWER ARB. BLOG (Mar. 2, 2009), <http://kluwerarbitrationblog.com/blog/2009/03/02/scorecard-of-investment-treaty-cases-against-argentina-since-2001/> (listing international arbitration cases arising from the 2001 default).

³ Complaint, *Doe v. Zedillo*, No. 3:11-cv-01433-AWT (D. Conn. Sept. 16, 2011), available at http://acteal97.com/wp-content/uploads/2011/09/complaint_cover_sheet.pdf.

⁴ Order Granting Summary Judgment and Dissolving Writs of Garnishment, *Martinez v. Republic of Cuba*, 708 F. Supp. 2d 1298 (S.D. Fla. 2010) (No. 10-cv-22095-FAM) available at http://www.exportlawblog.com/docs/martinez_v_cuba.pdf (granting Garnishees' Motion for Dissolution of Writs of Garnishment, Summary Judgment, and Attorneys' Fees as well as Government's Motion for Summary Judgment and to quash Plaintiff's Writs of Garnishment).

House of Representatives Committee on Ways & Means—to eliminate Ecuador’s benefits under the Andean Trade Promotion and Drug Eradication Act (ATPDEA).⁵

Based in part on ATPDEA, the United States is Ecuador’s largest trade partner.⁶ The argument has been made that such preferential access to the world’s largest market should not be provided to a country that has subjected a U.S. company to the treatment that Chevron contends it has faced in Ecuador. Even though the bilateral relationship encompasses issues well beyond a dispute between private litigants,⁷ Chevron’s concerns regarding the *Lago Agrio* litigation have colored ATPDEA discussions in Washington and almost certainly will again when the issue comes up for consideration in 2013.

The impact of *Lago Agrio* on the policy-making context highlights one of the inherent difficulties that come with litigation and its effects. It is common, for example, for officials from other countries to complain about U.S. judicial processes and request that the U.S. Executive Branch weigh in on pending litigation. As a White House staffer, one of the first things you learn is the clear policy of non-intervention in pending judicial processes. The well-founded independence of our judiciary is emphasized until foreign government counterparts move on to a new topic.

Other countries have also learned to invoke “judicial independence”—well-founded or otherwise—to U.S. policy-makers who complain about judicial processes in their countries.

⁵ Under ATPDEA, a broad class of Ecuadoran products—most importantly fresh-cut flowers—enjoys duty-free access to the United States in exchange for Ecuador’s cooperation regarding counter-narcotics efforts. Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 107-210, § 3101, 116 Stat. 1023 (2002).

⁶ See Bureau of W. Hemisphere Affairs, *Fact Sheet: U.S. Relations with Ecuador*, U.S. DEP’T OF STATE (Oct. 24 2012), <http://www.state.gov/r/pa/ei/bgn/35761.htm> (explaining the economic relationship between the U.S. and Ecuador).

⁷ The U.S.-Ecuador relationship has been complicated by actions taken by the Ecuadorian government in recent years, including the expulsion of the U.S. ambassador in the wake of WikiLeaks and the prior expulsion of other senior embassy personnel. See Associated Press, *Ecuador: U.S. Ambassador Expelled over WikiLeaks*, CBSNEWS.COM (Apr. 5, 2011, 3:20 PM), http://www.cbsnews.com/2100-202_162-20050944.html (reporting that Ecuador expelled the U.S. ambassador, making her the third U.S. diplomat to be kicked out of the country since 2008, because she allegedly accused Ecuador’s police chief of corruption in a cable).

Being seen as passing judgment on the veracity or integrity of a foreign judicial process is a tricky business, at best, and underscores the dilemma posed by cases like *Lago Agrio* that revolve in no small measure around questions regarding the basic fairness of judicial processes in a foreign country.

2.2. Argentine Debt Litigation

In December 2001, the Government of Argentina defaulted on \$100 billion in sovereign debt, triggering a mass of litigation, the implications of which have spilled into the policy-making context through two distinct channels.

The first is through actions brought by corporations whose dollar-denominated contracts were severely impaired when the Argentine government unilaterally determined that it would instead make its payments in devalued Argentine pesos. In response, numerous U.S. companies sought relief before the International Centre for the Settlement of Investment Disputes (ICSID). Multiple ICSID panels issued judgments in favor of U.S. companies, but the Argentine government subsequently decided that the judgments were not self-executing and needed to be brought to an Argentine court for enforcement.⁸

When ICSID judgment holders balked and the Argentine government refused to pay, their dispute spilled into the broader U.S.-Argentina policy-making context as the aggrieved U.S. companies petitioned USTR to revoke Argentina's eligibility for the Generalized System of Preferences (GSP).⁹

In October 2011, when President Obama met Argentina's President Cristina Fernández de Kirchner on the margins of the G-20 Summit in France, ICSID and GSP were on the top of their agenda.¹⁰ They would again be high on the agenda when the two Presidents met in April 2012 on the margins of the Summit of the

⁸ See U.S. Dep't of State, *GSP Fact Sheet*, U.S. EMBASSY: BUENOS AIRES <http://argentina.usembassy.gov/gsp2.html> (last visited May 7, 2013) (explaining why Argentina's GSP benefits have been suspended).

⁹ See *id.*

¹⁰ See *US: Obama-CFK Meeting 'Warm,' But Argentina Must Cancel Debt*, BUENOS AIRES HERALD, Nov. 9, 2011, <http://www.buenosairesherald.com/article/84136/us-obamacfk-meeting-warm-but-argentina-must-cancel-debt> (explaining that, while in Cannes, Fernández de Kirchner and Obama discussed bilateral relations and Argentina's debt restructuring with the Paris Club).

Americas in Colombia.¹¹ The end result: Argentina continues to refuse to pay the ICSID judgments, Argentine products no longer enjoy preferential access to the United States after President Obama revoked GSP for Argentina,¹² and the two leaders spent a disproportionate amount of scarce meeting time discussing narrow commercial disputes.

The second way in which litigation has affected the relationship between the two countries—that could otherwise focus on a myriad of hemispheric and global issues—is through litigation brought by bondholders, particularly bondholders that have rejected two different Argentine settlements with other bondholders.

The hold-out bondholders have pursued an aggressive litigation strategy and made their views and displeasure regarding the Argentine government well known to Executive Branch and Congressional policy makers.¹³ Although the bondholders were not formally part of the ICSID-GSP saga, their efforts clearly affected the policy-making environment.

In late 2012, the far-flung effects of Argentine bondholder litigation took a turn toward magical realism when the Argentine tall ship the ARA *Libertad*, a large ceremonial sailboat owned and operated by the Argentine Navy, was seized in accordance with a local court order by Ghanaian authorities when it made a port of call during a training tour.¹⁴ Behind the court order stood bondholders seeking to enforce judgments to pay outstanding

¹¹ See *CFK and Obama Agree to Solve Trade Differences*, BUENOS AIRES HERALD, Apr. 15, 2012, <http://www.buenosairesherald.com/article/98164/cfk-and-obama-agree-to-solve-trade-differences> (indicating that Obama requested the meeting in advance of the summit while Argentina was “facing questions from industrialized nations about trade barriers . . .”).

¹² See U.S. EMBASSY, *supra* note 8 (“The United States is thus statutorily required to revoke Argentina’s GSP benefits.”).

¹³ The most prominent effort has been undertaken by the American Task Force Argentina. See *generally About Us*, AM. TASK FORCE ARGENTINA: PURSUING A FAIR RECONCILIATION OF THE ARGENTINE DEBT DEFAULT, <http://www.atfa.org/about-us/> (last visited Mar. 1, 2013) (communicating AFTA’s mission and methods for achieving a negotiated settlement of the Argentine debt default).

¹⁴ See Daniel Politi, *Liberty or Debt*, a post in *Latitude: Views From Around The World*, THE INT’L HERALD TRIB. GLOBAL OPINION (Oct. 17, 2012, 6:37 AM), <http://latitude.blogs.nytimes.com/2012/10/17/holders-of-argentinas-defaulted-debt-hold-up-a-frigate-in-ghana> (recounting the taking of the ARA *Libertad*, an Argentine training frigate, as due payment for Argentina’s debt default).

obligations against the Argentine government,¹⁵ underscoring the far-reaching effects of individual-based, cross-border litigation in a shrinking world.¹⁶

2.3. *Doe vs. Zedillo*

Individual-based, cross-border litigation in U.S. courts—just like cases filed abroad—can also affect the U.S. policy-making process.

Doe v. Zedillo—a suit filed in U.S. District Court in Connecticut in September 2011 against a former President of Mexico, Ernesto Zedillo, who now works at Yale and thus lives in Connecticut—is an example of such litigation, and its effects. The complaint seeks \$50 million in damages for alleged violations of the Alien Tort Claims Act, the Torture Victims Claims Act, customary international law, and various international human rights conventions for the actions taken by Mexican security forces in Acteal, Chiapas, Mexico, on December 22, 1997, when Zedillo was President of Mexico.¹⁷

Alien Tort Claims Act litigation is not new,¹⁸ nor is its interaction with, and effects on, U.S. international relations.¹⁹ During the course of decades, plaintiffs have brought cases in U.S. courts that have implicated governments around the world,

¹⁵ See *id.* (Investment firm NML Capital petitioned the Ghanaian judge to prohibit the ship from leaving port).

¹⁶ As it continues in the United States District Court for the Southern District of New York, the underlying bondholder litigation has raised the specter of another Argentine debt default, and spawned a dispute as to whether rulings in that case endanger the New York Federal Reserve Bank's \$2.6 trillion payments system. See Agustino Fontevicchia, *Billionaire's Hedge Fund Rebuffs NY Fed in Argentina Case: No Risk to \$2.6T Payments System*, FORBES.COM (Nov. 26, 2012, 8:40 PM), <http://www.forbes.com/sites/afontevicchia/2012/11/26/billionaires-hedge-fund-rebuffs-ny-fed-in-argentina-case-no-risk-to-2-6t-payments-system> (describing the potential implications of litigation “[p]itting a hedge fund against a nation”).

¹⁷ Complaint at 1, 8, *Doe v. Zedillo*, No. 3:11-cv-01433-AWT (D. Conn. Sept. 16, 2011), available at http://acteal97.com/wp-content/uploads/2011/09/complaint_cover_sheet.pdf.

¹⁸ See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 461–62 (1989) (citing federal district court actions brought as early as 1980 under the Alien Tort Claims Act).

¹⁹ See generally *id.*

touching on relations with governments that were friends and foes of the United States.²⁰

There is no country in the world more important to the United States today than Mexico, and there is perhaps no country in the world with whom we have a more complex relationship given our shared history and geography. Mexico is the third largest U.S. trading partner²¹ and the second largest destination for U.S. exports, with more than \$1 billion in trade, on average, crossing the shared border every day.²² It is our second largest source of imported oil.²³ We have deep cultural, familial, and historical ties to Mexico—the country of origin for the largest segment of foreign-born individuals in the United States.²⁴ Transnational criminal organizations traffic in people, drugs, guns, and money across our shared border with devastating consequences for communities in both countries.

The intensity of the bilateral relationship is evident in the fact that, in my more than three years as the President's principal White House advisor on the Western Hemisphere, the maximum number of times I visited any particular country in my area of responsibility other than Mexico was four; I visited Mexico seventeen times.

Despite the depth and breadth of the relationship, in 2011 and 2012, the 1997 Acteal massacre became a focal point of U.S.-Mexico relations. The government of out-going Mexican President Felipe

²⁰ See *id.* at 461–64 (explaining that foreign citizens have employed the Alien Tort Claims Act as a vehicle for suing *inter alia* the U.S.-backed Nicaraguan “contras,” the Palestinian Liberation Organization, and an Argentine military general).

²¹ See *Top Trading Partners – Total Trade, Exports, Imports: Year-to-Date November 2012*, U.S. CENSUS BUREAU (Jan. 11, 2013), <http://www.census.gov/foreign-trade/statistics/highlights/top/top1211yr.html> (serving as a source of data about United States trade and the economy).

²² *Id.*

²³ See U.S. Energy Info. Admin., *Petroleum & Other Liquids: U.S. Imports by Country of Origin*, U.S. DEPT. OF ENERGY (Mar. 15, 2013), http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbl_a.htm (listing U.S. import of petroleum and other liquids in annual-thousand barrels by country of origin).

²⁴ See *Statistical Abstract of the United States: 2012, Table 42. Foreign-Born Population by Citizenship Status and Place of Birth: 2009*, U.S. CENSUS BUREAU (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0042.pdf> (reporting the number of foreign-born individuals in the United States by place of birth and citizenship status as recorded in 2009).

Calderón urged the United States to support former President Zedillo's head of state immunity claim in *Doe v. Zedillo*²⁵ and not without some personal concern regarding cross-border litigation.

During his tenure, President Calderón, who also moved to the United States upon leaving office, intensified the Mexican government's efforts against transnational criminal organizations, sparking abuses claims from human rights organizations²⁶ and touching off attempts to initiate cross-border legal proceedings. In November 2011, for example, Mexican human rights activists filed a war crimes complaint in the International Criminal Court (ICC) against Calderón and Mexico's top drug trafficker, Joaquín "Chapo" Guzmán, raising the specter that individual-based, cross-border litigation would follow Calderón from office.²⁷

In September 2012, upon petition of the court, the U.S. government filed a brief, consistent with past practice, supporting Zedillo's immunity defense. *Doe v. Zedillo* remains pending before the District Court, and the ICC has yet to determine the disposition of the initial complaint against Calderón. Nevertheless, these cases demonstrate how litigation triggered by individuals can have a direct impact, at least in the context of U.S. relations, at the highest levels with our most important global partners.

²⁵ See Randal C. Archibold, *U.S. Moves to Grant Former Mexican President Immunity in Suit*, N.Y. TIMES, Sept. 8, 2012, <http://www.nytimes.com/2012/09/09/world/americas/us-moves-to-grant-former-mexican-president-immunity-in-suit.html> (recounting a statement by the U.S. government recommending that the federal court dismiss the suit against Zedillo on head of state immunity grounds); Daniel Ozawa Sussman, *Mexico: Calderón Administration Demanded Immunity for Ex-President*, PULSAMERICA (Sept. 17, 2012), <http://www.pulsamerica.co.uk/2012/09/17/mexico-calderon-administration-demanded-immunity-for-ex-president-zedillo/> (relating that the Mexican ambassador warned the U.S. government of the potential diplomatic consequences stemming from the lawsuit against Zedillo).

²⁶ See generally HUMAN RIGHTS WATCH, NEITHER RIGHTS NOR SECURITY: KILLINGS, TORTURE, AND DISAPPEARANCES IN MEXICO'S "WAR ON DRUGS" (2011).

²⁷ See Sara Webb & Manuel Rueda, *Mexican Group Asks ICC to Probe President, Officials*, REUTERS (Nov. 25, 2011, 10:05 PM), <http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126> (reporting on a request by Mexican human rights activists that the ICC investigate President Calderón's supposed responsibility for drug-related violence in Mexico); Diana Castrillón, *Mexico Presidency Threatens Legal Action over ICC Complaint*, AGENCE FRANCE PRESSE, Nov. 28, 2011, <http://www.ntn24.com/news/news/mexico-presidency-threatens-legal-action-over-icc-complaint> (describing backlash by the Mexican presidency in response to the ICC complaint).

2.4. *Martinez v. Cuba*

The intersection of individual-based litigation and U.S. foreign policy is also evident in the thicket of statutory and administrative rules and regulations and related litigation that has accumulated over the course of the last fifty years of U.S. policy toward Cuba.²⁸

These statutes include, perhaps, the most direct attempt to use individual-based litigation as a tool of U.S. policy—the Cuban Liberty and Democratic Solidarity Act of 1996,²⁹ which, among other things, established an individual right of action in U.S. District Court for those who had property confiscated by Cuban authorities after the Cuban Revolution and who subsequently became U.S. citizens.³⁰ This unprecedented expansion of U.S. jurisdiction, which was meant to freeze efforts by Cuba to attract direct foreign investment, has never come into force. It included a national security waiver by which every six months the President of the United States can toll its entry into force. Thus far, three Presidents have exercised this waiver, thirty-one times in total.³¹

That, however, does not mean the U.S.-Cuba policy thicket is not affected by individual-based litigation in the United States. It most certainly is.

Cases brought in Florida state courts alleging human rights violations by Cuban authorities represent the principal manifestation of this phenomenon. As Cuba has regularly refused to appear, let alone defend itself, in these cases, a series of significant default judgments have accumulated against the Cuban

²⁸ See generally DIANNE E. RENNACK & MARK P. SULLIVAN, U.S.-CUBAN RELATIONS: AN ANALYTIC COMPENDIUM OF U.S. POLICIES, LAWS & REGULATIONS (2005), available at http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf ("This compendium presents the texts of the U.S. policy statements, laws and regulations . . . that govern U.S. relations with Cuba.").

²⁹ 22 U.S.C. Ch. 69A (2012).

³⁰ 22 U.S.C. § 6082 (2012).

³¹ See Stephen F. Propst, Presidential Authority To Modify Economic Sanctions Against Cuba 7 (Feb. 15, 2011) (unpublished forum paper), available at <http://www.hoganlovells.com/files/Publication/57d34e80-51b8-4ee0-ae64-750f65ee7642/Preview/PublicationAttachment/55896b90-840a-42bf-8744-752a7a206333/Cuba%20Aritcle%20FINAL.pdf> (citing 22 U.S.C. § 6085(c)) (reviewing the sources of the President's authority to ease U.S. sanctions against Cuba).

government.³² Those judgments will add to the policy puzzle when relations between the United States and Cuba change as holders of those judgments are today U.S. citizens and, like aggrieved former property holders in Cuba, are likely to petition U.S. authorities to champion their interests. But those judgments do not only promise to affect the future policy-making context; they have real effects today and in 2011 threatened to undo President Obama's signature policy initiative related to Cuba.

In April 2009, President Obama eliminated all restrictions on Cuban-American family visits and remittances to Cuba.³³ In the year that followed, more than 300,000 Cuban Americans—a record number—visited Cuba.³⁴ Such family travel relies on licensed air charters as there has not been regularly scheduled commercial air traffic between the United States and Cuba since 1962.

In 2010, a Florida plaintiff seeking to enforce a default judgment almost brought these charters to a halt. After securing a \$27.2 million default judgment against Cuba, Ana Margarita Martinez sought to collect the judgment by attaching the landing fees U.S. air charter companies pay to Cuba. If the payment of those fees had stopped, so too would have the President's policy initiative to increase the free flow of information to, from, and among the Cuban people and decrease the dependence of the Cuban people on the Cuban state.

The *Martinez* attachment litigation quickly found itself front and center among policymakers in Washington. To preserve the U.S. national security interests at the heart of the President's policy initiative, the United States intervened in the litigation,

³² See Debra Cassens Weiss, *Cuban Exile Awarded \$2.8B in Suit Against Castro Government*, A.B.A. J., Aug. 25, 2011, http://www.abajournal.com/news/article/cuban_exile_awarded_2.8b_in_suit_against_castro_government/ (announcing a large judgment against Cuba for an exiled individual who claimed persecution and noting that because Cuba does not defend itself in alike lawsuits, judgments against it have become "almost automatic").

³³ See Press Release, The White House, Fact Sheet: Reaching Out to the Cuban People (Apr. 13, 2009), available at http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people (summarizing President Obama's orders to cabinet members which were intended to "facilitate . . . contact between separated family members in the United States and Cuba and increase the flow of information and humanitarian resources directly to the Cuban people").

³⁴ Lizette Alvarez, *Pull of Family Reshapes U.S.-Cuban Relations*, N.Y. TIMES, Nov. 21, 2011, <http://www.nytimes.com/2011/11/22/us/cuban-americans-take-lead-in-building-ties-with-cuba.html?pagewanted=all>.

2013]

CROSS-BORDER LITIGATION

753

successfully arguing that the plaintiff failed to comply with key aspects of the regulatory thicket underlying U.S. policy toward Cuba.³⁵ The charters continue.

CONCLUSION

These four very different case studies highlight how a single litigant, or group of litigants, can affect, either unintentionally or purposefully, key U.S. foreign policy interests and relationships, and how such result can happen without the litigant ever seeking to make the United States a formal party to such litigation.

Just like a myriad of other man-made (and naturally occurring) challenges, individual-based, cross-border litigation is a reality of which every national security practitioner must be aware and prepared to address head on.

³⁵ See Statement of Interest of the United States of America at 13-14, *Martinez v. Republic of Cuba*, 708 F. Supp. 2d 1298 (S.D. Fla. 2010) (No. 10-cv-20611-FAM), available at <http://www.state.gov/documents/organization/194063.pdf> (asserting that plaintiff could not satisfy her judgment as she neglected to obtain applicable license required by U.S. regulations and no statute overrides such regulations).