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## The Impact of Third-Party Financing on Transnational Litigation

Cassandra Burke Robertson

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## THE IMPACT OF THIRD-PARTY FINANCING ON TRANSNATIONAL LITIGATION

*Cassandra Burke Robertson\**

*Third-party litigation finance is a growing industry. The practice, also termed “litigation lending,” allows funders with no other connection to the lawsuit to invest in a plaintiff’s claim in exchange for a share of the ultimate recovery. Most funding agreements have focused on domestic litigation in Australia, the United Kingdom, and the United States. However, the industry is poised for growth worldwide, and the recent environmental lawsuit brought by Ecuadorian plaintiffs against Chevron demonstrates that litigation funding is also beginning to play a role in transnational litigation.*

*This article, prepared for a symposium on “International Law in Crisis,” speculates about how the growing litigation-finance industry may reshape transnational litigation in the coming decades. It argues that the individual economic incentives created by third-party financing will likely increase the number of transnational lawsuits filed, raise the settlement values of those lawsuits, and spread out the lawsuits among a larger number of countries than was typical in the past. It further hypothesizes that these individual choices about transnational litigation will lead countries to reassess their internal balance of litigation and regulation and will create pressure for greater international coordination of litigation procedure, including transnational forum choice and cross-border judgment enforcement.*

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\* Associate Professor, Case Western Reserve University School of Law. This article was inspired in part by discussions at the “Evolution or Revolution? American Civil Procedure in the 21st Century” roundtable at the 2011 Southeastern Association of Law Schools Annual Conference, including Richard Freer’s presentation of the Ecuadorian funding agreement and related issues in third-party financing, Dustin Buehler’s discussion of economic incentives in litigation, and Donald Childress’s discussion of recent trends in transnational litigation. Laurie Blank, Thomas Robertson, Steven M. Schneebaum, and Christopher A. Whytock also provided valuable input on earlier drafts of this article.

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### I. INTRODUCTION

The long-running environmental litigation between the Ecuadorian residents of the Amazon region and Chevron/Texaco has spawned multiple adjudicatory proceedings in several countries,<sup>1</sup> a host of scholarly commentary,<sup>2</sup> a documentary film sympathetic to the plaintiffs<sup>3</sup> and another film

<sup>1</sup> See *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300–04 (2d Cir. 2011) (summarizing the initial litigation in the United States, subsequent litigation in Ecuador, including both civil and criminal actions, a related arbitration proceeding, and an action to enjoin the arbitration). There are also appellate proceedings in the Ecuadorian civil action and a simultaneous action in the United States to preclude enforcement of the Ecuadorian judgment. See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1444 (2011).

<sup>2</sup> See generally Whytock & Robertson, *supra* note 1 (examining the interaction of the *forum non conveniens* and judgment enforcement doctrines); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010) (encouraging a more coherent process to provide foreign plaintiffs access to courts); Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241, 295 (2010) (noting Chevron will not be able to escape this law suit without any consequences); Cortelyou Kenney, *Disaster in the Amazon: Dodging “Boomerang Suits” in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857, 858–63 (2009) (using the Chevron case as examples to show the current movement in corporate responsibility and international litigation procedure); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 474–84 (2006) (describing the suit that was originally filed against ChevronTexaco in New York); Jason Burke, Comment, *Defining Investor Confidence: Avoiding Interpretive Uncertainty in Chevron Corp. v. Ecuador*, 34 B.C. INT'L & COMP. L. REV. 463 (2011) (examining investment treaty arbitration); 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 (2011) (using the Chevron case as a case study to describe tactics used by the plaintiffs in litigation).

<sup>3</sup> See *CRUDE: THE REAL PRICE OF OIL* (Entendre Films 2009) (stressing Chevron's hold on Ecuador and the lack of accountability to the Ecuadorian people).

commissioned by the defense,<sup>4</sup> as well as hidden-camera videos allegedly revealing wrongdoing by plaintiffs' counsel.<sup>5</sup> The drama of the Ecuadorian case is in many ways *sui generis*. Nevertheless, various aspects of the case have been useful in highlighting emerging trends in transnational litigation, and the high-profile nature of the case has drawn attention to doctrinal intricacies and litigation strategies that have become increasingly important in transnational cases.<sup>6</sup> One such emerging trend highlighted by the Ecuadorian litigation is the convergence of transnational forum choice and related litigation strategies with third-party litigation financing.<sup>7</sup>

Historically, the U.S. has been a "magnet forum" for transnational cases, as it permits broad discovery and contingent-fee representation, and it offers relatively high damage awards.<sup>8</sup> U.S. courts have relied on the doctrine of *forum non conveniens* to discourage litigation of cases arising abroad that could be tried elsewhere. In the past, it was rare for such cases to be filed abroad after dismissal from the U.S.<sup>9</sup> In recent years, however, a number of other countries—especially those in Latin America—have taken steps to make it easier for plaintiffs to file those cases in the plaintiffs' home forums, and more cases have been tried to verdict abroad.<sup>10</sup>

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<sup>4</sup> See *Chevron Corp.*, 629 F.3d at 309 n. 6 (noting that Chevron has commissioned a documentary to provide "its point of view" of the litigation).

<sup>5</sup> See TexacoEcuador, *Meeting 1, Complete Video, Judge Nunez Misconduct, Chevron Ecuador Lawsuit*, YOUTUBE (Aug. 31, 2009), <http://www.youtube.com/texacoecuador#p/c/29615E4852842C4B/0/A8E-M0j2o-I>.

<sup>6</sup> See, e.g., Whytock & Robertson, *supra* note 1; Robertson, *supra* note 2.

<sup>7</sup> See, e.g., Roger Parloff, *Have You Got A Piece Of This Lawsuit?*, FORTUNE (June 28, 2011), available at <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>.

<sup>8</sup> Robertson, *supra* note 2, at 1087–94; Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 352 (1994) ("The United States is a magnet forum for the afflicted of the world."); Russell J. Weintraub, *The United States as a Magnet Forum and What, if Anything, to do About it*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 213 (Jack L. Goldsmith ed., 1997); but see Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 529 (2011) ("[T]he decline of alienage litigation raises substantial doubts about the claim that the United States is experiencing a transnational litigation explosion.").

<sup>9</sup> See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"*, 103 L.Q. REV. 398, 418–20 (1987) (noting plaintiffs will run out of resources before they can reinstitute the proceeding in the United States).

<sup>10</sup> See Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 21 (2003) (discussing Latin America's blocking statutes); Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 184 (2001) (noting *Delgado v. Shell Oil* as the high watermark for the *forum non conveniens* doctrine because of new legislative action); Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate*

Also in the last decade, a number of countries have loosened restrictions on third-party financing of litigation.<sup>11</sup> Such financing typically encompasses “third parties—with no previous connection to a claimholder—investing in a claimholder’s litigation, covering all his litigation costs in exchange for a share of any proceeds if the suit is successful, or, in the alternative, nothing if the case is lost.”<sup>12</sup> Australia and the U.K. have been leaders in this regard, but other countries such as the Netherlands, Belgium, Germany and South Africa have also liberalized lawsuit financing.<sup>13</sup> More often than not, the cases financed are still purely domestic.<sup>14</sup> Increasingly, however, third-party financing operates transnationally, and multinational financing companies may fund litigation across a number of countries.<sup>15</sup>

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*Accountability*, 27 HOUS. J. INT'L L. 703, 724–26, 735–36 (2005) (discussing Latin America’s anti-*forum non conveniens* legislation).

<sup>11</sup> Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 107 (2008).

<sup>12</sup> Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 347 (2011); see also Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 628 (Fla. Dist. Ct. App. 2005) (providing an example of a litigant in a product liability action who, through a litigation loan, sold interest in her lawsuit). Occasionally, funding contracts may call for repayment in excess of the amount recovered. See A.B.A. COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE 29 (2011) (describing how a plaintiff may hesitate to accept reasonable settlements due to his/her obligation to repay litigation loans).

<sup>13</sup> See Martin, *supra* note 11, at 107 (“[M]any countries including the UK, Australia, the Netherlands, Belgium, Germany and South Africa have become more amenable to third parties financing lawsuits, typically on a contingency basis.”); de Morpurgo, *supra* note 12, at 360 (“Third-party litigation funding started to develop in Australia at the beginning of the 1990s and soon spread over the rest of the common law world (United States, United Kingdom, New Zealand) and further, developing in some European civil law countries (Germany, Switzerland, Austria).”).

<sup>14</sup> See, e.g., Michael G. Faure, Ton Hartlief & Niels J. Philipsen, *Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands*, 2 UTRECHT L. REV. 1, 12 (2006) (describing domestic litigation in the Netherlands).

[T]here are now, especially for handling personal injury claims, an increasing number of commercial legal assistance services on which victims may call. The advantage (from the victim’s perspective) is that these are not bound by legal ethics and can thus usually work on a contingency or ‘no win no fee’ basis and also generally seem to do so.

*Id.*

<sup>15</sup> See, e.g., de Morpurgo, *supra* note 12, at 362–63, 365 (offering examples such as Burford Capital Limited, one of “the largest litigation-finance firms,” which “invests in commercial litigation, ‘provid[ing] financing in support of significant corporate litigation, arbitration, and other disputes, working with clients in both the United States and internationally,’” and Allianz Prozessfinanzierung, which “has funded litigation costs to plaintiffs in Germany, Austria, and Switzerland, holding claims of at least €100,000, with a high probability of success and with a potentially divisible award that the company can share, in exchange for 20 to 30% of the proceeds (if any).”) (alteration in original).

Both of these trends converged in the Ecuadorian litigation. The case was first filed in the U.S., then dismissed on the ground of *forum non conveniens* and refiled in Ecuador.<sup>16</sup> The Ecuadorian part of the litigation was funded in part by the publicly traded firm Burford Capital, which “invested \$4 million in the Ecuadorians’ case against Chevron . . . in exchange for a 1.5% stake in any recovery, with the stated goal of increasing its outlay to \$15 million, entitling it to a 5.5% share.”<sup>17</sup> Originally, the funding agreement was subject to confidentiality restrictions. After plaintiffs’ counsel discussed the funding agreement on film with the documentary filmmaker, however, a court found that the agreement’s privilege was waived, and it ordered the entire agreement to be disclosed.<sup>18</sup> Burford then sold its interest to another party.<sup>19</sup> At this time, the Ecuadorian court has ordered an \$18 billion judgment, suggesting that the investment would yield between \$270 million and \$1 billion.<sup>20</sup> However, the case is not yet final—Chevron is currently appealing the judgment in Ecuador and simultaneously contesting judgment enforcement in the U.S.<sup>21</sup>

<sup>16</sup> Mark Hamblett, *Despite Old Ruling, Chevron Cleared to Challenge Ecuadorean Courts*, N.Y.L.J. (Sept. 2, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202513294225&slreturn=1>.

<sup>17</sup> Parloff, *supra* note 7.

<sup>18</sup> *Id.*

<sup>19</sup> BURFORD CAPITAL LIMITED, BURFORD REPORTS CONTINUED ACTIVITY AND ENTRY INTO UK MARKET 4 (Dec. 12, 2012), [http://www.burfordfinance.com/docs/default-document-library/burford\\_12de2011\\_rns\\_final.pdf](http://www.burfordfinance.com/docs/default-document-library/burford_12de2011_rns_final.pdf).

Burford provided \$4 million of such financing to the law firm in November 2010, but sold a \$4 million participation in the investment to a third party in December 2010. Thus, Burford has no risk in the matter but does retain a residual interest in the outcome. Originally, the potential maximum financing commitment—at Burford’s option—was up to \$15 million, and was included as such in the special situations portfolio. Further developments have led Burford to conclude that no further financing will be provided and thus decide to reduce the commitment level in the special situations portfolio accordingly.

*Id.*

<sup>20</sup> *Id.*

According to Burford’s funding agreement, the deal goes like this: If Burford ponies up the full \$15 million and the plaintiffs end up recovering \$1 billion, Burford will get \$55 million. If the plaintiffs recover \$2 billion, Burford gets \$111 million, and so on. But . . . [i]f the plaintiffs recover less than \$1 billion . . . Burford would still get \$55 million.

*Id.*

<sup>21</sup> *Illegitimate Judgment Against Chevron in Ecuador Lawsuit: Chevron to Appeal in Ecuador, Enforcement Blocked by U.S. and International Tribunals*, CHEVRON (Feb. 14, 2011), [http://www.chevron.com/chevron/pressreleases/article/02142011\\_illegitimatejudgmentagainstchevroninecuadorlawsuit.news](http://www.chevron.com/chevron/pressreleases/article/02142011_illegitimatejudgmentagainstchevroninecuadorlawsuit.news) (“Chevron will appeal this decision in Ecuador and intends to see that justice prevails. United States and international tribunals already have taken steps to bar enforcement of the Ecuadorian ruling.”).

The funding agreement in the Ecuadorian litigation demonstrates how outside financing can shape litigation incentives at several levels, from individual litigant choices to international cooperation. The availability of outside funding may affect the initial decision to file suit, and it may change settlement incentives once suit is filed. Outside funding can also affect forum choice, potentially offsetting the traditional magnet effect in the U.S. and making it easier to maintain suit in other countries. These individual litigant incentives, in turn, affect the social and regulatory choices made at the national level. Likewise, these national choices affect countries' international cooperation and coordination in transnational litigation procedure.

## II. THE INTERNATIONAL GROWTH OF THIRD-PARTY LITIGATION FINANCE

Third-party funding for lawsuits was originally prohibited in feudal England, where the practice was referred to as "maintenance" (when the lawsuit was funded by a person who had no pre-existing relationship with the case) and "champerty" (when the maintenance was undertaken for profit).<sup>22</sup> At the time, such funding was viewed as detrimental to the developing legal system with little offsetting benefit. Feudal lords subsidized their subjects' litigation for both sport and profit, "underwrit[ing] suits against their enemies as a form of private warfare to weaken their opponent's coffers."<sup>23</sup> Furthermore, these feudal lords often took an interest in the real property at issue in the litigation, using their funding agreements to expand their holdings and ultimately to consolidate land wealth in fewer hands.<sup>24</sup> According to Blackstone, champerty thereby "pervert[ed] the process of law into an engine of oppression."<sup>25</sup>

Restrictions on champerty and maintenance traveled with English common law into the U.S. and gradually loosened over the subsequent centuries. Early in the twentieth century, states created an exception to the traditional doctrine by allowing lawyers to charge contingency fees—a practice that was traditionally barred in England.<sup>26</sup> The civil rights movement in

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<sup>22</sup> Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 579 (2010); *In re Primus*, 436 U.S. 412, 424–25 n.15 (1978) ("Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."). See generally Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935) (discussing the concepts of maintenance and champerty with particular focus on their history).

<sup>23</sup> Lyon, *supra* note 22, at 581.

<sup>24</sup> See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1287 (2011).

<sup>25</sup> *Thalhimer v. Brinckerhoff*, 3 Cow. 623 (N.Y. Sup. Ct. 1824).

<sup>26</sup> Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 100 (2011) ("Courts and legislatures quickly found an exception to the restrictions on champerty such that by

the middle of the century further loosened restrictions, as the Supreme Court held that organizations such as the NAACP had a constitutional right to support litigation that furthered its aims, and could not be barred from providing such support by traditional rules against maintenance.<sup>27</sup>

Even though England and Australia did not share in the same piecemeal exceptions to the doctrine—neither had a similar history of contingent-fee litigation or widespread civil rights litigation—these countries were the first to abandon the old champerty and maintenance doctrines in favor of for-profit lawsuit investment.<sup>28</sup> Litigation finance has been allowed at least to some degree for more than fifteen years in Australia.<sup>29</sup> It expanded even more after 2006, when the High Court of Australia gave its stamp of approval to third-party financing agreements in *Campbells Cash & Carry v. Fostif*.<sup>30</sup> The court held that not only could a third party finance the lawsuit, it could also retain a great deal of control over the lawsuit; it explicitly noted that “a person who hazards funds in litigation wishes to control the litigation is hardly surprising.”<sup>31</sup> Litigation finance has grown rapidly since that 2006 decision, and indeed the financing companies are demanding a great deal of control over litigation strategy, including an option to withdraw funding prior to termination of the case.<sup>32</sup> At this time, there are several major litigation financing companies active in the Australian market, and two of the largest are publicly traded on the Australian Securities Exchange.<sup>33</sup> Industry profits have also increased substantially.<sup>34</sup>

Though not yet as robust as the Australian market for litigation funding, the litigation finance industry has also become relatively well established in the jurisdiction of England and Wales, where the old prohibi-

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1930, even in those states that strictly prohibited maintenance, a lawyer was permitted to ‘invest’ in his client’s civil litigation.”).

<sup>27</sup> *Id.* at 101 (“It can be taken as a given that, whatever a state might want to do with its maintenance law, it cannot, under the First Amendment, limit the power of laypersons to engage in selfless maintenance designed to protect constitutionally protected rights through litigation.”); *NAACP v. Button*, 371 U.S. 415, 438–39 (1963).

<sup>28</sup> *See* Parloff, *supra* note 7 (“England and Australia have embraced litigation financing even more enthusiastically than America has.”).

<sup>29</sup> Lyon, *supra* note 22, at 590.

<sup>30</sup> *Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd.* [2006] 229 CLR 386 (Austl.).

<sup>31</sup> *Id.* para. 89, at 434 (Gummow, Hayne, and Crennan, JJ, concurring).

<sup>32</sup> Lyon, *supra* note 22, at 602 (“[E]ven plaintiffs who retain nominal control of their suits will not make choices that are counter to the funder’s wishes.”).

<sup>33</sup> Michael Legg et al., *Litigation Funding in Australia 2* (Univ. of New S. Wales Law Research Series, Paper No. 12, 2010), available at <http://ssrn.com/abstract=1579487>.

<sup>34</sup> *Id.* at 2–3 (“In the financial year ended 30 June 2009, IMF (Australia) Ltd received net income from litigation funding in the sum of \$35,246,957, with total net income of \$38,748,833. This represented a 21% increase in profitability from the previous year.”); *see also* Martin, *supra* note 11, at 107–08.

tion on maintenance and champerty was abolished by statute.<sup>35</sup> Although contingency fees (lawyer-financed lawsuits) have not traditionally been permitted, “nonlawyer capital providers” may finance such suits “in exchange for a share of the recovery.”<sup>36</sup> Additionally, as funding for legal aid has dried up in England, some “conditional fee” agreements similar to contingency fees have also been allowed.<sup>37</sup> Unlike the Australian system, third-party financing providers in England and Wales do not typically take a controlling role in litigation strategy.<sup>38</sup>

The market for litigation funding in the U.S. is not yet as well established as the markets in Australia and the U.K., but it is growing quickly.<sup>39</sup> The civil rights movement in the middle of the century was instrumental in changing public perceptions of litigation; lawsuits, once viewed as a necessary evil, became seen as “a form of political expression” and an avenue by which the less powerful members of society could enforce their rights.<sup>40</sup> Given the political nature of legal services, some courts and legal scholars have suggested that outside investment—either in individual lawsuits or in law firms—may be constitutionally protected.<sup>41</sup>

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<sup>35</sup> Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study* 28–29 (Dec. 2, 2009), available at <http://ssrn.com/abstract=1511714> (citing Courts and Legal Services Act, 1990, c. 41, § 58 (U.K.); Access to Justice Act, 2000, § 27 (U.K.)).

<sup>36</sup> Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 92 (2010).

<sup>37</sup> *Id.*; see also Hodges et al., *supra* note 35, at 6 (“Governments are set to impose significant cuts in public expenditure as a consequence of the financial environment, and civil justice is not a high priority for spending. . . . Legal aid is likely to remain largely unsustainable as a public expenditure item.”).

<sup>38</sup> Molot, *supra* note 36, at 92 (“Funders generally do not control the course of litigation or unduly interfere with the attorney-client relationship.”).

<sup>39</sup> *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011).

The consistent trend across the country is toward limiting, not expanding, champerty’s reach. Some states have squarely rejected tort claims based on champerty. Other states have refused to recognize champerty as anything more than a defense by a party to enforcement of the allegedly champertous agreement, implicitly rejecting a broader tort remedy.

*Id.*

<sup>40</sup> Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1990 (2004).

<sup>41</sup> See Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals*, OHIO ST. L.J. (forthcoming 2012) (manuscript at 33), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1800258](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800258) (“[C]ommercial speech about the delivery of legal services is inherently political speech, speech that goes to the heart of meaningful access to the law, speech deserving of the strongest of protection that the constitution offers.”); see also *Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001) (“The First Amendment freedoms of petitioning and of association protect groups who for whatever reason want to contribute to a law-suit openly

There is also strong political support for loosening traditional restrictions, with lobbyists in a number of states actively seeking liberalization of the lawsuit funding market.<sup>42</sup> Thus, for example, when the Ohio Supreme Court reaffirmed traditional restrictions in champerty, the Ohio Legislature statutorily abolished the restriction very shortly thereafter.<sup>43</sup> Currently, just over half of the states permit nonlawyer financing of lawsuits, and that number is growing.<sup>44</sup> The leading position on litigation finance in the U.S. finds the traditional public policy justifications for prohibiting outside financing to weigh less significantly than the importance of promoting access to justice.<sup>45</sup> The trend toward acceptance of third-party funding may also grow in response to a diminution on public legal aid funding in the United States, which mirrors the funding crisis in England.<sup>46</sup>

The changing cultural perception of litigation, the need for alternate funding sources to promote access to justice, and the political efforts to loosen restriction on lawsuit finance have combined with a larger deregulation of financial products to create a significant market for litigation funding in the U.S.<sup>47</sup> In 2010, it was estimated that the third-party litigation finance market in the U.S. was about \$1 billion, with the bulk of the funding going

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or to stand apart from public view while another party files a lawsuit, assuming no rule or statute independently requires disclosure of the aid.”).

<sup>42</sup> Binyamin Appelbaum, *Lobby Battle Over Loans for Lawsuits*, N.Y. TIMES, March 10, 2011, at B1 (“Since February, the industry’s allies have filed bills in New York and in at least four other states: Alabama, Kentucky, Indiana and Maryland. Legislators in Tennessee and Maryland have also introduced similar bills, but with somewhat stronger consumer protections.”).

<sup>43</sup> OHIO REV. CODE ANN. § 1349.55 (West 2011) (superseding *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220 (Ohio 2003) (court assumes a thirty percent contingency fee)); Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677, 682 (2010).

<sup>44</sup> Sebok, *supra* note 26, at 98, 107 (listing twenty-eight states that permit maintenance, sixteen of which explicitly permit maintenance for profit).

<sup>45</sup> See Gillers, *supra* note 43, at 689–92 (discussing the value of non-recourse advances and addressing counter-arguments).

<sup>46</sup> See Hodges et al., *supra* note 35, at 6 (noting the reduction in funding for access to justice in England); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 870 (2009) (“Rising rates of foreclosures, bankruptcies, and unemployment create more needs for legal assistance among those least able to afford it. At the same time, resources for legal services providers cannot keep pace. . . .”); see also Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12 (describing cuts to legal aid programs in the United States in the wake of the economic crisis).

<sup>47</sup> Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2011, at A1 (“The business of lending to plaintiffs arose over the last decade, part of a trend in which banks, hedge funds and private investors are putting money into other people’s lawsuits.”).

to relatively small cases.<sup>48</sup> The American Bar Association's Commission on Ethics 20/20 recently studied the growing market and warned that United States lawyers who assist their clients with litigation financing must take care to maintain "professional independence, candor, competence, undivided loyalty, and confidentiality" in client representation.<sup>49</sup>

Although the litigation finance industry has grown on a global scale over the last decade, most litigation financing still occurs in single forum: U.S. companies financing small personal injury lawsuits in the U.S., for example, or Australian companies financing commercial litigation in Australia.<sup>50</sup> Burford Capital's decision to finance transnational litigation in Ecuador is an exception to this trend, and it enters into a transnational arena where there is significant room for growth. Even in the well-developed Australian market, observers have noted that foreign companies may profit from entering the market.<sup>51</sup> But more importantly, there are a number of countries where litigation finance is permitted, but not yet commonly available. The profitable experience of companies in Australia, England, and the U.S.—and their comfort in operating on a global scale—may spur the growth of litigation finance in other countries that permit litigation financing but do not have a well-developed litigation funding industry.<sup>52</sup> Thus, countries such as Spain, Brazil, Mexico, Argentina, Bulgaria, Latvia, and Estonia may offer an untapped market for established companies looking to expand out of Australia, the U.K., or the U.S.<sup>53</sup> Furthermore, this opportunity has not gone unnoticed by investment firms; Burford, for example, has expressed an interest in "expand[ing] its focus to other attractive and suitable jurisdictions."<sup>54</sup>

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<sup>48</sup> Binyamin Appelbaum, *Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A1.

<sup>49</sup> A.B.A. COMM'N ON ETHICS 20/20, *supra* note 12, at 41.

<sup>50</sup> See Martin, *supra* note 11, at 107 (noting that funders have typically focused on smaller personal injury claims in the U.S. and larger commercial cases in Australia).

<sup>51</sup> See Legg et al., *supra* note 33, at 42 ("It may also be the case that if litigation funding continues to result in significant returns that more entities, including those from outside of Australia, will enter the litigation funding market so as to be able to participate in those returns.").

<sup>52</sup> See de Morpurgo, *supra* note 12, at 399 ("In the civil law world no specific legislative or judicial prohibitions seem to apply to [third-party litigation financing]. However, the industry is not developed.").

<sup>53</sup> *Id.* at 400 ("In all these countries, despite the absence of formal prohibitions, third-party funding of litigation is virtually nonexistent. . . . Because no prohibitions seem to apply, the reasons why [third-party litigation funding] has not developed in the civil law world are not clear.").

<sup>54</sup> BURFORD CAPITAL LIMITED, *supra* note 19, at 2.

### III. THE ECONOMIC INCENTIVES OF LITIGATION FINANCE

The tremendous global growth in third-party litigation over the last decade—and its projected expansion in the coming decade—will likely play a larger role in transnational litigation strategies in the near future. The availability of outside funding is likely to increase the number of lawsuits filed that involve parties from different countries. It is also likely to increase the settlement value of those cases. Third-party litigation finance may also influence where such lawsuits are filed, potentially offsetting the traditional magnet effect of the U.S. and increasing the number of viable forum choices. Each of these factors will change the calculus of litigation expenses for transnational business, which may correspondingly shape business decisions, regulatory choices, and even the development of substantive tort and business law. While it is impossible to predict how those changes will ultimately develop, this section explores some of the possible ways in which litigation financing could affect transnational litigation and related legal developments.

#### A. *Individual Incentives*

Most scholars who have examined the issue of investor financing agree that such financing will likely increase the total number of suits filed.<sup>55</sup> Funding agreements, by supplying the upfront costs of the lawsuit, increase the probability that the plaintiff will be able to respond to private incentives to sue. Economic theory tells us that a plaintiff will likely file suit “when her expected benefit exceeds her litigation costs.”<sup>56</sup> In mathematical terms, “a plaintiff will only file a claim if the expected value of the claim (the probability that the plaintiff will win,  $p$ , times the amount of recovery if it wins,  $w$ , less the costs of suit,  $c$ ) is greater than zero.”<sup>57</sup> Thus, the economic rationality of a plaintiff’s decision to file suit can be expressed by the equation “ $(p*w) - c > 0$ .”<sup>58</sup>

Plaintiffs without available cash on hand cannot always afford to file suits even when the expected payment would make such a suit econom-

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<sup>55</sup> See, e.g., *id.* at 384–85 (“[B]y increasing the funds available to claimholders to pursue litigation, [third-party litigation funding] would cause an increase in the overall number of claims . . . .”); see also Keith N. Hylton, *The Economics of Third-Party Financed Litigation* (Boston Univ. Sch. of Law, Working Paper No. 11-57), available at <http://ssrn.com/abstract=1971229> (“Third-party funding permits victims to transfer their claims to more efficient litigators, who would then prosecute these claims.”).

<sup>56</sup> Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. (forthcoming Fall 2012), available at <http://ssrn.com/abstract=1880975>.

<sup>57</sup> Whytock, *supra* note 8, at 487 n.25 (citing ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 33–34 (2003)).

<sup>58</sup> *Id.*

ically worthwhile; if they do not have cash on hand to pay litigation costs, they cannot file suit even when the expected recovery significantly outweighs litigation costs.<sup>59</sup> Litigation financing, however, can enable plaintiffs to file suit when the economic incentives suggest that it may be worthwhile for them to do so by providing the up-front funding necessary. Litigation financing may not change the cost of filing suit, but it does change the time at which the plaintiff can access funds expected in litigation—and therefore allows the plaintiff to take advantage of an economically rational choice that might otherwise be out of reach. Once litigation is no longer artificially suppressed by the potential plaintiffs' limited cash on hand, the number of suits filed is likely to grow.

Litigation financing also goes further, however—in addition to changing the timing of costs, it also changes the expected values of other variables in the litigation equation. To the extent that financing companies also serve to provide the additional expertise that comes from being repeat players in the litigation market, the probability of winning may also increase.<sup>60</sup> Of course, the final element of the equation—the amount of the award—will also change with third-party financing, as the plaintiff will have a financial obligation to the funding company, and therefore a somewhat lower expected recovery. Depending on the strength of the repeat-player advantage, the overall shift in incentives may spark an increase in litigation in excess of the increase caused by the change in timing of available resources. Along with the increase in the number of lawsuits filed, there is likely to be a corresponding increase in the settlement value of those claims. The claims that went unfiled without third-party financing essentially had a value of zero: because the aggrieved party could not afford to bring the claim, there was no cost for the potential defendant. In other cases, however, the plaintiff may have filed a claim but not had sufficient resources to pursue it to an economically efficient conclusion.<sup>61</sup> In such a case, the defendant could have settled the claim for significantly less than the plaintiff would have likely to be able to obtain at trial; effectively, the defendant

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<sup>59</sup> See Gillers, *supra* note 43, at 690.

The plaintiff may be pressed by her financial predicament to take the advance, but without it she is pressed to sell her entire claim for less than her due, possibly far less. . . . In any event, the availability of litigation funding means she will be able to make a choice.

*Id.*

<sup>60</sup> Cf. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103–05 (1974) (describing the advantages of “repeat players” who are “engaged in many similar litigations over time” over “one-shotters” who “have only occasional recourse to the courts” and concluding that the “invention of new forms of institutional facilities” may offset some of these traditional advantages).

<sup>61</sup> See Gillers, *supra* note 43, at 689–90.

may “buy” the plaintiff’s claim “for far less than market value.”<sup>62</sup> Again, the availability of outside financing means that the plaintiff would have other options to obtain funds, thus alleviating the need to settle quickly—and the presence of more parties in the marketplace who can “buy” the claim means that there is likely to be economic competition, driving the price at which the plaintiff is willing to sell to a number closer to the amount recoverable through trial.<sup>63</sup>

But while litigation funding is likely to increase the volume of litigation and the settlement value of the cases filed, not all of the additional lawsuits will be meritorious. The litigation increase is not likely to come from frivolous suits, as most contracts permit only nonrecourse funding arrangements—if the plaintiff cannot obtain a recovery, the investor will not be paid.<sup>64</sup> Nevertheless, there is still an economic incentive for a funder to invest in high-value claims that, while not frivolous, nevertheless have a low probability of actual recovery. If the expected value of a win is high enough, then even the low probability of such a win may spur investors to take a chance on funding the litigation.<sup>65</sup> This analysis (that the break-even point can be measured by the dollar amount of expected recovery multiplied by the probability of recovery) is typically known as the “net present value,” “asset pricing,” or “discounted cash flow” model.<sup>66</sup> Burford Capital’s investment in the Ecuadorian litigation may be an example of such high-risk funding that makes sense under a net present value model; given the enormous Ecuadorian judgment, investment in the claim may be warranted even if there is a low probability of judgment enforcement.

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see also Mariel Rodak, *It’s About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 522 (2006) (“Since entering into a litigation finance contract presumably gives the plaintiff the resources and ‘threat credibility’ to carry her claim to trial, litigation financing may draw an otherwise obstinate defendant to the bargaining table and result in a fairer settlement award.”).

<sup>64</sup> See de Morpurgo, *supra* note 12, at 384 (“The selection of cases by the financing company works as a ‘filter’ that leaves out frivolous and unmeritorious claims, in the same way attorneys working on a contingency basis do not accept cases that are not likely to be successful.”) (citation omitted).

<sup>65</sup> *Id.*

For a risk neutral investor, the expected value of a \$500 million claim with only a 5% chance of success is equal to that of a \$25 million claim with 100% probability to win. Because investors make their decision to invest based on the comparison between E(R) [expected revenue] and E(C) [expected cost], they might be attracted by highly risky (unmeritorious) claims with huge damage awards at stake.

*Id.*; see also the litigation equation in the text accompanying note 55 (if the expected value of the recovery is high enough, than a litigant may rationally file suit even when the probability of winning is quite low).

<sup>66</sup> Buehler, *supra* note 56, at 21; Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1273 (2006).

Finally, by potentially raising the break-even point, outside financing of litigation may also reduce incentives to settle altogether in some cases.<sup>67</sup> As noted above, for example, the financing agreement in the Ecuadorian case would have provided Burford Capital with a base payment of \$55 million for any settlement of \$1 billion or less.<sup>68</sup> The plaintiffs, however, would have little incentive to settle for less than that amount, as one observer has noted:

In other words, if there were a \$69.5 million recovery, Burford would still get \$55 million, though that sum would, under the circumstances, constitute almost 80% of the pot. In that event, by the way, the remaining 20% would not go to the plaintiffs; rather, it would go to other investors, who are also supposed to get their returns on investment (not just their capital outlays) before the plaintiffs start seeing a dime. In fact, under the “distribution waterfall” set up by the 75-page contract, it is only after eight tiers of funders, attorneys, and “advisers” (including the plaintiffs’ e-discovery contractor) have fed at the trough that “the balance (if any) shall be paid to the claimants.”<sup>69</sup>

With these flat-rate payments committed under the financing agreement, the plaintiffs would see so little of a recovery for any settlement less than \$1 billion that they would be much less likely to settle for a lesser amount. By lowering the expected recovery to account for these repayments, the financing agreement essentially raises the range within which the plaintiffs would be willing to negotiate a settlement.

#### B. *Shifting Magnetic Polarities*

Litigation financing may also affect forum choice. As discussed above, the U.S. has traditionally been a magnet forum for transnational litigation, due in part to its contingent fee tradition.<sup>70</sup> When outside financing of litigation was unavailable, plaintiffs were often in a position to sue only if someone else could pay the cost of litigation up front—and, with contingency fees, that option was typically available in the U.S., while rarely available elsewhere.

Third-party financing may open new options for transnational litigation, though it is unlikely to completely eliminate the magnetic effect of U.S. courts, as broad discovery rules and relatively high damage awards are

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<sup>67</sup> See Michael B. Abramowicz, *A Fee Limitation Rule for Litigation Finance*, Public Policy Roundtable on Third Party Financing of Litigation, at 29–30 (2009), available at [http://www.law.northwestern.edu/searlecenter/papers/Abramowicz\\_Finance\\_Final.pdf](http://www.law.northwestern.edu/searlecenter/papers/Abramowicz_Finance_Final.pdf) (discussing scenarios that may affect a client’s ability to settle).

<sup>68</sup> Parloff, *supra* note 7.

<sup>69</sup> *Id.*

<sup>70</sup> See sources cited *supra* note 8.

still likely to maintain the courts' attractiveness.<sup>71</sup> Third-party financing is likely to make a difference in cases that U.S. courts refuse to hear, however, and may allow cases to be heard in a foreign forum after dismissal from a U.S. court. As noted above, U.S. courts are increasingly likely to dismiss cases under the doctrine of *forum non conveniens* when it appears that there is another forum able to hear the case. A large number of these cases involve foreign plaintiffs and U.S. corporate defendants.<sup>72</sup> In the past, cases dismissed from U.S. courts were rarely refiled abroad.<sup>73</sup> Now, however, other countries are enacting procedures to make it easier for their nationals to refile such suits in their home forums.<sup>74</sup> The growth of the litigation finance industry may work in tandem with these efforts, making it easier to claims for be filed in foreign forums—or even refiled after dismissal from a U.S. court.

Courts in other countries may therefore begin to hear a larger proportion of transnational lawsuits. It is difficult to predict which countries will get the most cases—and indeed, it may be that the litigation is spread out among a number of countries.<sup>75</sup> While Australia, England, and the U.S. may have the largest number of litigation finance companies, a number of the companies are quite large, some even publicly traded, and they have the resources and ability to be comfortable operating internationally. Most other countries, even those that lack their own lawsuit-financing market, have few or no restrictions on investment from other companies. They may welcome international investment in litigation funding—especially when the plaintiffs who stand to benefit from the suit are residents, and the defendants

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<sup>71</sup> Beyond the instrumental reasons for choosing to file in the United States, plaintiffs may also find an “expressive” value in filing suit in the United States, especially in Alien Tort Statute actions against multinational, U.S.-based corporations. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation*, 100 GEO. L.J. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1815413](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815413) (“By alleging that a corporation is violating international law, plaintiffs subject corporations to brand damage while gaining significant publicity in hopes of both encouraging policy change and a monetary settlement.”).

<sup>72</sup> See Robertson, *supra* note 2, at 1106–07.

<sup>73</sup> David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. REV. 398, 418–20 (1987) (finding that only eighteen percent of personal injury plaintiffs and twenty percent of commercial plaintiffs re-filed cases abroad after *forum non conveniens* dismissals).

<sup>74</sup> Robertson, *supra* note 2, at 1091–93 (discussing the demagnetizing movement proposed by American legal scholars).

<sup>75</sup> See Whytock, *supra* note 8, at 486–87 (“From a simple rational choice perspective, [a litigant] will choose the court in which the expected value of her claim (less the costs of litigation) is the highest based on the substantive and procedural rules of that court’s legal system.”).

potentially subject to a judgment are not.<sup>76</sup> As a result, there may well be a global diffusion of transnational cases, with courts in a much larger number of countries regularly hearing cases involving foreign parties.

### C. *Social and Regulatory Impact*

The individual incentives for litigation suggest that the growth in litigation finance will increase the number of transnational cases filed and will broaden the number of countries in which those cases are heard. Because litigation finance changes the incentives for individual litigants, it will also have an effect on governmental social and regulatory incentives. The balance of regulation and litigation in individual countries will therefore change—and may thereby create incentives for greater international coordination of litigation procedures.

#### 1. Altering the balance of regulation and litigation

Each country establishes its own balance of regulation and litigation to protect the public interest. In the United States, the balance has historically tilted more toward the litigation side, as the justice system has been used as a tool to vindicate civil rights,<sup>77</sup> promote product safety,<sup>78</sup> and punish wrongdoing through the award of punitive damages.<sup>79</sup> In other countries, the balance has tilted more heavily toward regulation.<sup>80</sup>

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<sup>76</sup> *Id.* at 1127–28 (noting that a restrictive court-access doctrine in the United States “encourage[s] other countries to create mechanisms to hold U.S. corporations accountable for the harms they cause abroad—and, perhaps, to hold them accountable with much higher damages than they would face in the United States, and without U.S.-style due process protections.”).

<sup>77</sup> *See, e.g.,* *Brown v. Board of Education*, 347 U.S. 483, 488 (1954); *see also* Symposium, *Regulation through Litigation*, 71 *MISS. L.J.* 613, 615–16 (2001) (“The Civil Rights movement, for example, is one that is probably the prime example where you had stagnation in Congress, and you went to the courts and you ended up with major, major change.”).

<sup>78</sup> *See* Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 *HARV. ENVTL. L. REV.* 179, 181 (2005) (“Perhaps the best-known example of this new method of regulation is the 1998 settlement between the attorneys general of forty-six states and several major cigarette manufacturers.”).

<sup>79</sup> *See* Catherine M. Sharkey, *Punitive Damages As Societal Damages*, 113 *YALE L.J.* 347, 359 (2003) (“The prevailing justification for punitive damages is individually oriented, retributive punishment.”); Thomas F. Burke, *The Rights Revolution Continues: Why New Rights are Born (and Old Rights Rarely Die)*, 33 *CONN. L. REV.* 1259, 1260 (2001) (“[R]egulation by litigation has deep roots in the structure of American government and American political culture.”).

<sup>80</sup> *See* Symposium, *supra* note 77, at 615 (“The Europeans and most folks do ex ante regulation to take care of social reform. Litigation is ex post.”).

Both regulation and litigation ultimately have a regulatory effect.<sup>81</sup> As a result, the balance between the two is essentially a matter of comparative institutional choice, requiring the forum state to analyze how best to enforce societal goals and adopt corresponding policies that emphasize regulation and litigation to varying degrees.<sup>82</sup> But while both regulation and litigation serve similar goals, they operate differently. Regulation occurs *ex ante*, as policymakers attempt to predict the risks of the regulated conduct and the incentives necessary to minimize those risks to the desired level.<sup>83</sup> By contrast, the regulatory effect of litigation necessarily occurs *ex post*.<sup>84</sup> Instead of predicting future risks, the harms from the challenged conduct can be quantified through litigation at trial. A more regulatory tilt thus allows greater democratic participation in the evaluation of future risks and incentives,<sup>85</sup> while a tilt toward litigation allows more accurate measurement of harm, a more targeted remedy that focuses on the parties causing that harm, and a gradualist approach to changing incentives.<sup>86</sup>

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<sup>81</sup> See Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155 (2003) (“Tort law is a form of regulation, and always has been.”); Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, in REGULATION THROUGH LITIGATION 212, 232 (W. Kip Viscusi ed., 2002) (“Ideally, the threat of civil liability has a regulatory effect by promoting optimal deterrence—the taking of precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs.”); Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEXAS L. REV. 897, 899 (2005).

Whether imposing civil liability for unreasonably dangerous product design or for medical care below the standard of the applicable medical community, tort law acts as a significant regulatory device by filling the gap between criminal behavior and socially advantageous behavior. In this sense, all tort litigation can be considered ‘regulation through litigation.

*Id.*

<sup>82</sup> See Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 728 (2007) (recommending factors to be included in the “comparative institutional analysis” of regulation and litigation).

<sup>83</sup> See Posner, *supra* note 81, at 1155 (“[T]he policy here is to give manufacturers an *ex ante* incentive to invest in safety.”).

<sup>84</sup> See Symposium, *supra* note 77, at 615.

<sup>85</sup> See Schroeder, *supra* note 81, at 898 (“By avoiding traditional democratic processes, it is suggested that regulation through litigation provides a novel and subversive way of legislating—allowing decisions to be made in secret settlement negotiations, rather than through public congressional debate or the administrative comment process.”).

<sup>86</sup> See Dru Stevenson, *Judicial Incrementalism: A Reply To Professor Sunstein*, 34 OHIO N.U. L. REV. 191, 221 n.116 (2008) (“[T]he case-by-case litigation method, with all its attendant evidentiary restrictions, jury ballots, and the checks and balances of the adversarial system, will mean more gradual management of public risks than command-and-control regulation by administrative agencies, which is clearly the inevitable alternative.”).

A global increase in transnational litigation may destabilize the equilibrium between regulation and litigation in individual countries.<sup>87</sup> This destabilization may lead to changes in the substantive law, which is predicated on a certain expected level of litigation and regulatory cost.<sup>88</sup> It is difficult to predict what such substantive changes would look like; depending on the nature of the litigation and the public policy of the state, substantive responses could go in a variety of opposing directions.

First, litigation may increase in areas where there has been regulatory failure or inaction. In these cases, litigation may serve to reveal additional information about the defendant's conduct in a way that drives public opinion toward increasing regulation in the area as well, thus resulting in an overall increase in both regulation and litigation in the subject area.<sup>89</sup> We may be seeing an example of this phenomenon in the Ecuadorian litigation. Defendants in the lawsuit argued that the environmental practices that contaminated the Amazon were in fact allowed by the government, which had allegedly weighed the cost of possible environmental harm against the benefit of foreign investment and oil development.<sup>90</sup> The litigation itself, howev-

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<sup>87</sup> Cf. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1102 (1997).

[A] given regulatory context can be viewed as a legal equilibrium and described as stable or unstable based on its response to a disturbance. If legal treatment of an issue is in a state of stable equilibrium, the legal regime is not readily changed through small or incremental shifts in political forces—the type of shifts associated with evolutionary legal change. . . .

Changes in legal rules can be expected in an unstable legal equilibrium, by contrast, because of its inherent potential for change.

*Id.*

<sup>88</sup> Catherine T. Struve, *Procedure as Palimpsest*, 158 U. PA. L. REV. 421, 438 (2010).

For example, a country in which public enforcement of certain types of legal obligations is relatively strong may rely less on private enforcement of such obligations and that balance may help to explain features that restrict private litigants' access to the courts to litigate such claims. . . . [I]n some foreign countries this balance may be shifting, in the sense that some countries outside the United States are in fact experimenting with an expansion of their use of private suits to supplement governmental regulation.

*Id.*

<sup>89</sup> See, e.g., Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1876 (2008) (analyzing the influence of tort litigation on regulatory policy making); Wagner, *supra* note 82, at 729 (concluding that litigation can increase the information available about defendants' practices and the risks created by those practices).

<sup>90</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 551 (S.D.N.Y. 2001) (“On any fair view of the evidence so far adduced in this case, the alleged preference given by the Consortium to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador in order to stimulate its economy.”).

er, has brought significant public attention to the environmental harm caused by oil extraction in the Amazon—and may have spurred some of the more recent environmental law choices, including constitutional amendments that explicitly rely on both regulation and litigation to protect environmental interests.<sup>91</sup>

Second, litigation may increase in areas where there has not been regulatory failure, but where litigation satisfies policy goals more effectively than direct regulation. For example, economic theory suggests that increased levels of litigation can lead to increased product safety, as manufacturers are then required to internalize the costs of the harms caused by their product.<sup>92</sup> When goods are sold only in a single country, that nation's regulatory policy probably affects product safety much more than the level of litigation affects it.<sup>93</sup> When goods are sold internationally, however, these domestic regulatory forces may be less effective. Essentially, product manufacturers can offset higher litigation costs in some countries with lower costs in others—and can thereby avoid internalizing the full cost of the injuries attributable to the product.<sup>94</sup> Litigation may therefore do more to achieve product safety for goods sold globally.

When litigation complements existing regulatory policy, an increase in transnational litigation may have a substitutionary effect. Governments may come to rely less on regulatory policy and more on judicial remedies to address social needs. The United States, for example, has historically offered a higher level of compensatory damages to tort victims than other countries have provided—but this has been offset by a lesser social safety net.<sup>95</sup> If litigation financing offers opportunities to increase the number of

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<sup>91</sup> There is skepticism, however, about whether the new constitutional guarantees will be enforced in practice. Mary Elizabeth Whittlemore, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL'Y J. 659, 660 (2011) (“[T]he new articles grant the environment the inalienable right to exist, persist, regenerate, and be respected. They also guarantee Ecuadorean citizens the right to sue for enforcement of these rights.”).

<sup>92</sup> See Buehler, *supra* note 56, at 20 (“[P]roducts liability forces manufacturers to internalize the full cost of harm caused by unsafe products, providing an incentive for those manufacturers to take precautions that reduce product risk.”).

<sup>93</sup> See *id.* at 20 n.108 (“[M]arket forces and government regulation provide adequate incentives for manufacturers to address well-publicized product risks.”).

<sup>94</sup> See Robertson, *supra* note 2, at 1109 (arguing that, when a certain harmful product is also available in the American market, the United States has an incentive in deterring the sale of that harmful product abroad, thereby reducing the presence of harmful products on the global market); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 574 (2007) (“[P]roducers operating in global markets may be able to avoid internalizing all of the costs imposed on others by their product, which in turn skews economic incentives to make the product or activity safer.”).

<sup>95</sup> Robertson, *supra* note 2, at 1110–11 (“Damage awards in the United States are higher than in other countries, in part because U.S. damage awards must substitute for the social

transnational cases, then other countries may follow the lead of the United States, and may reduce public spending in favor of private litigation.<sup>96</sup> This substitutionary effect may be especially strong in lawsuits involving domestic plaintiffs and foreign defendants, as successful litigation would bring additional financial resources into the country, potentially offsetting governmental expenditures.<sup>97</sup>

Finally, however, litigation may also increase in areas where there has not been regulatory failure—and where, instead, the regulatory balance was carefully crafted and effectively functioning. In these situations, litigation is likely to be less welcomed by the government, and will instead be “perceived as being at odds with legislative or administrative policy making.”<sup>98</sup> When litigation conflicts with regulatory policy choices, it may spur preemptive legislation rather than complementary regulation, “provok[ing] a backlash in the form of immunity legislation, [and] foreclosing the potential contribution of litigation to policy experimentation.”<sup>99</sup>

## 2. Coordination of litigation procedures

As noted above, an increase in transnational litigation, sparked by the greater availability of outside financing, could have significant effects on the substantive and regulatory policy choices made by individual governments. However, the nature of those changes depends on whether the new lawsuits complement regulatory policy, substitute for it, or conflict with it. Although individual countries must strike their own balance based on domestic policy, the effects of these decisions will be felt globally.<sup>100</sup> When aggregated, individual nations’ regulatory changes will have an effect on countries’ interrelationships and on global governance more broadly.<sup>101</sup> As a result, litigation finance may incentivize greater international coopera-

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safety net that exists in a number of other countries. In many countries, lower damage awards are offset by government-funded health care and other benefits.”); Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 404 (2006) (“The possibility to obtain larger damages in the United States is also due to the fact that the amount of the damage award is likely to be keyed to the higher living standards but lower social safety net in the United States.”).

<sup>96</sup> See Struve, *supra* note 88.

<sup>97</sup> See sources cited and text accompanying *supra* note 8.

<sup>98</sup> Lytton, *supra* note 89, at 1876.

<sup>99</sup> *Id.*

<sup>100</sup> Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 118 (2009) (“[T]he global governance functions of domestic courts are important not only because of their impact on litigants, but also—and perhaps even more importantly—because of their influence beyond the parties to particular lawsuits and beyond state borders.”).

<sup>101</sup> See *id.* at 74 (“[A] wide variety of institutions—domestic and international, public and private, formal and informal—make critical contributions to global governance.”).

tion in transnational litigation procedures such as forum choice and judgment enforcement.

As discussed above, the availability of litigation financing may decrease the United States' magnet effect for litigation. If transnational litigation truly becomes multipolar,<sup>102</sup> U.S. courts may take steps to bring transnational lawsuits back to the U.S.—especially in cases against U.S. defendants. Right now, U.S. defendants often file *forum non conveniens* motions to seek dismissal from U.S. courts in favor of an alternate forum. Typically these defendants do not actually want to litigate abroad; instead, they are essentially bluffing, betting on plaintiffs' inability to follow through with suit elsewhere.<sup>103</sup> Thus, for example, it may have been a reasonable litigation strategy for Robinson Helicopter to move for a *forum non conveniens* dismissal from a U.S. court in favor of a Chinese forum, as it did in one recent case.<sup>104</sup> When the plaintiffs refiled the case in China, however, Robinson Helicopter did not appear for trial—it is quite possible that the company had never expected to have to defend the case abroad and was unprepared to do so.

The demagnetization of U.S. courts may encourage greater international cooperation in setting guidelines for forum selection. Courts in the United States have historically granted dismissal with little scrutiny, though other countries have objected to this practice insofar as its limits their citizens' ability to bring suit in the U.S. against U.S. defendants.<sup>105</sup> Although a lenient *forum non conveniens* practice may save administrative costs and may protect U.S. corporate defendants in the short run, the calculation changes significantly if more cases go to trial abroad.<sup>106</sup> Defendants are likely to be much more comfortable litigating at home with familiar due process protections<sup>107</sup> rather than litigating abroad in an unfamiliar environment, and they may therefore support a more open court-access policy than they would have in the past. If this were to happen, we would see

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<sup>102</sup> See generally Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 17 Sw. J. INT'L L. (forthcoming 2011), available at <http://ssrn.com/abstract=1874370> (predicting that transnational litigation will become increasingly multipolar over the next decade).

<sup>103</sup> Robertson, *supra* note 9, at 418–20 (finding that few cases dismissed from U.S. courts were subsequently re-filed abroad).

<sup>104</sup> Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc., 2009 WL 2190187, at \*1 (C.D. Cal. July 22, 2009).

<sup>105</sup> Robertson, *supra* note 2, at 1091–94.

<sup>106</sup> See generally Whytock & Robertson, *supra* note 1.

<sup>107</sup> Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000) (concluding that many countries have “fundamentally fair” judicial systems, even though “[i]t is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law . . .”).

plaintiffs'<sup>108</sup> and defendants' interests converge on a U.S. forum in a manner that could raise the global influence of U.S. procedural innovations and protections.<sup>109</sup>

A global increase in litigation finance—and concomitant increase in transnational litigation, spread among a large number of countries—may also promote international coordination on cross-border judgment enforcement.<sup>110</sup> The plaintiff's ability to enforce a judgment is very important in transnational litigation; without the ability to enforce the resulting judgment, there is little incentive to take the case to trial in a given forum.<sup>111</sup> In many cases, enforcement is not a problem even when the plaintiff must enforce the judgment in a different country than the rendering forum; the global norm leans toward enforcement of foreign judgments, and most countries—perhaps especially the U.S.—have been very open to judgment enforcement generally.<sup>112</sup> But even though judgment enforcement may be

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<sup>108</sup> As noted above, plaintiffs have several reasons to prefer a U.S. forum, including greater discovery, higher damage awards, as well as the “expressive” interest in politically sensitive cases. *See* Childress, *supra* note 71.

<sup>109</sup> *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 470–71 (2010) (arguing that by moving toward convergence in pleading, “America might be able to export U.S. procedural law and norms abroad” and noting that “[t]he trends [toward procedural convergence] provide the opportunity for America to make a positive impact on the development of global procedural norms instead of perennially being contrasted with them.”); Robertson, *supra* note 2, at 1117 (“As more foreign plaintiffs choose to sue in the United States, appreciation for American due process protections may grow, and other court systems may integrate familiar U.S. procedures that are perceived to work well.”).

<sup>110</sup> International cooperation may be especially likely if internal changes due to increased litigation funding create significant domestic pressure for reform. *See, e.g.*, Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 115 (2009).

[D]omestic constraints on the autonomy of regulators, while ensuring some degree of accountability, cast doubt on the purported insulation of the regulators from the domestic political pressures that make formal international agreements difficult to reach. . . . As a result, national regulators acting in [transnational regulatory networks] are not free to pursue optimal global public policy for its own sake. Instead, one should expect that their positions will be shaped by the preferences of domestic constituencies.

*Id.*

<sup>111</sup> *See* Whytock & Robertson, *supra* note 1, at 1462 (describing the judgment enforcement doctrine in the United States).

<sup>112</sup> *Id.*; Linda J. Silberman, *The Impact of Jurisdictional and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 352 (2004) (“In general, recognition and enforcement of foreign country judgments in the United States has tended to be much more generous than the treatment given by foreign courts to U.S. judgments.”); Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 230 (2008).

more common than not, there are enough exceptions to enforceability to cause real problems in transnational litigation.<sup>113</sup> And while there have been efforts to negotiate a judgment enforcement treaty, negotiations ultimately stalled.<sup>114</sup>

A more globalized network of litigation investors might revitalize such negotiations, however. Each country has an interest in seeing its judgments enforced. If more countries are deciding transnational cases, then there will be more countries with a stake in predictable judgment enforcement procedures. As a result, there may be greater incentives to work out the difficulties that have stymied treaty negotiations in the past, and to come up with workable solutions.

#### IV. CONCLUSION

Third-party litigation finance is a growing industry. The market for lawsuit investment is already quite large in Australia, the U.K., and the U.S., and it is poised for growth worldwide. At this point, it is difficult to predict how the growth of this market will affect transnational litigation. It seems likely that the number of transnational lawsuits filed will grow, that the settlement values of those lawsuits will increase, and that the lawsuits may be spread out among a larger number of countries than was typical in the past. If and when this increase in litigation comes to pass, investor-financed lawsuits may also have an impact on the substantive regulatory choices of individual countries and may induce greater international coordination on both regulatory policies and on issues of international litigation procedure, including forum choice and cross-border judgment enforcement.

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[W]hether U.S. judgments fare better, the same, or worse in Europe than do European judgments in the United States depends on a number of factors—the country, the subject matter, the relief granted, the closeness of the dispute to the recognition country, and, in some instances, on who the defendant was in the American proceedings—among others.

*Id.*

<sup>113</sup> See Baumgartner, *supra* note 112, at 174–75.

<sup>114</sup> *Id.* at 175–77; see also Robertson, *supra* note 2, at 1126 (noting that the proposed Hague Judgment Convention failed before adoption, and a less ambitious choice-of-court convention was adopted instead). Although the United States has signed the choice-of-court convention, it has not yet ratified it. *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last updated Nov. 19, 2010).