No. 23-1625

IN THE

United States Court of Appeals for the Eighth Circuit

SR. KATE REID, ET AL.,

Plaintiffs-Appellees,

v.

THE DOE RUN RESOURCES CORPORATION, ET AL.,

Defendants-Appellants.

On Petition for Permission to Appeal from the
United States District Court for the Eastern District of Missouri
No. 4:11-cv-00044-CDP, Hon. Catherine D. Perry

OPENING BRIEF OF DEFENDANTS-APPELLANTS

Edward L. Dowd, Jr.
James F. Bennett
Jeffrey R. Hoops
DOWD BENNETT LLP
7733 Forsyth Boulevard
Suite 1900
St. Louis, MO 63105

E. Joshua Rosenkranz
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Additional Counsel Listed on Inside Cover

Thomas P. Berra, Jr.
Michael Hickey
LEWIS RICE LLC
600 Washington Avenue
Suite 2500
St. Louis, MO 63101

Tracie Jo Renfroe
KING & SPALDING LLP
1110 Louisiana Street
Suite 4100
Houston, TX 77002

Robert M. Loeb
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Andrew T. Bayman
Geoffrey M. Drake
KING & SPALDING LLP
1180 Peachtree Street NE
Suite 1600
Atlanta, GA 30309

Counsel for Defendants-Appellants

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs are Peruvian nationals alleging harm from emissions of a metallurgical complex in Peru operated by a Peruvian corporation and governed by a Peruvian environmental program specific to the complex. Instead of suing the Peruvian corporation in Peru, Plaintiffs sued affiliated U.S. corporations, officers, and directors in Missouri. Because hearing Plaintiffs' claims in the United States would be a serious affront to Peruvian sovereignty, international comity requires dismissal. Peru has the sovereign right to select its policies governing economic development, modernization of Peruvian industry, and environmental regulation in Peru. But Plaintiffs' claims are an overt challenge to Peru's policy choices. Hearing those claims in a U.S. court is inconsistent with the U.S.-Peru Trade Promotion Agreement, which provides that environmental claims arising in one country should be adjudicated there. The traditional comity factors further support dismissal. So does *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021), which held that U.S. corporations could not be sued in the United States for U.S.-based decisionmaking overseeing a foreign subsidiary.

Defendants-Appellants request 30 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Eighth Circuit Rule 26.1A, counsel of record for Defendants-Appellants hereby make the following statements of corporate interest:

Defendant-Appellant The Renco Group, Inc. does not have a parent corporation. No publicly held corporations own 10% or more of the stock of The Renco Group, Inc.

Defendant-Appellant DR Acquisition Corp. has as its parent corporation The Renco Group, Inc. No publicly held corporations own 10% or more of the stock of DR Acquisition Corp.

Defendant-Appellant The Doe Run Resources Corporation has as its parent corporation DR Acquisition Corporation, which is in turn owned by The Renco Group, Inc. No publicly held corporations own 10% or more of the stock of The Doe Run Resources Corporation.

Defendant-Appellant The Doe Run Cayman Holdings LLC has as its parent corporation The Renco Group, Inc. No publicly held corporations own 10% or more of the stock of The Doe Run Cayman Holdings LLC.

TABLE OF CONTENTS

Page

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

- The United States And Peru Sign A Bilateral Trade Agreement Reaffirming Peru's Sovereignty On Environmental Law 2
- A Metallurgical Complex In La Oroya Wreaks Environmental Havoc For Decades 3
- Peru Seeks Investors To Modernize The Complex And Establishes A Complex-Specific Environmental Plan 5
- Doe Run Peru Operates The Complex, Spending Hundreds Of Millions Of Dollars On A Modernization Effort Consistent With PAMA 6
- Thousands Of Peruvians Sue In Missouri Alleging Injury From Emissions In Peru 8
- Discovery Reveals Plaintiffs' Claims To Be A Direct Attack On Peru's Regulatory Decisions 11
- On Summary Judgment, The District Court Revisits Its Earlier Decision And Certifies Its Order For Interlocutory Appeal 12

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. International Comity Compels Dismissal Of This Action 18

A. The TPA requires dismissal of this case as a matter of comity. 21

1. Adjudicating this case in the United States conflicts with the TPA. 23

2. The district court's reading of the TPA was erroneous. 29

B. The traditional comity factors further reinforce the need for dismissal. 30

1. Peru has a compelling sovereign interest in adjudicating claims of environmental injury in Peru. 31

2. U.S. interests favor adjudicating this case in Peru. 39

3. Peru is an adequate alternative forum. 47

4. Judicial economy and fairness favor dismissal. . 49

C. The district court erred in focusing on whether there is a "true conflict" between the laws of the United States and Peru. 50

D. Extraterritoriality principles reinforce the conclusion that these claims cannot proceed in the United States. 53

1. Plaintiffs' allegations are materially identical to those the Supreme Court found inadequate in *Nestlé*. 54

2. The nexus revealed in discovery is weaker than in *Nestlé*. 58

CONCLUSION 66

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

66, Inc. v. Crestwood Commons Redevelopment Corp.,
998 S.W.2d 32 (Mo. 1999) 58

Acapolon Corp. v. Ralston Purina Co.,
827 S.W.2d 189 (Mo. 1991) 42, 47, 59, 60

Acuna-Atalaya v. Newmont Mining Corp.,
838 F. App'x 676 (3d Cir. 2020) 47

Aguinda v. Texaco, Inc.,
142 F. Supp. 2d 534 (S.D.N.Y. 2001) 32, 42

Bick v. Legacy Bldg. Maint. Co.,
626 S.W.3d 700 (Mo. Ct. App. 2021) 46

Carijano v. Occidental Petroleum Corp.,
643 F.3d 1216 (9th Cir. 2011) 43

Cooper v. Tokyo Elec. Power Co. Holdings, Inc.,
960 F.3d 549 (9th Cir. 2020) 33, 34

de Melo v. Lederle Lab'ys,
801 F.2d 1058 (8th Cir. 1986) 48

In re Derailment Cases,
416 F.3d 787 (8th Cir. 2005) 44

Dixon v. City of St. Louis,
950 F.3d 1052 (8th Cir. 2020) 18

Doe v. Nestle, S.A.,
906 F.3d 1120 (9th Cir. 2018) 55, 57, 61, 62

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 57

Elliott v. PubMatic, Inc.,
No. 21-CV-01497, 2021 WL 3616768 (N.D. Cal. Aug. 16, 2021) 34

Fed. Republic of Germany v. Philipp,
141 S. Ct. 703 (2021) 40

Freund v. Republic of France,
592 F. Supp. 2d 540 (S.D.N.Y. 2008) 22, 37, 52

Gross v. German Found. Indus. Initiative,
456 F.3d 363 (3d Cir. 2006) 52

Hartford Fire Ins. Co. v. California,
509 U.S. 764 (1993) 51, 52

Hilton v. Guyot,
159 U.S. 113 (1895) 19, 22

Kiobel v. Royal Dutch Petroleum Co.,
569 U.S. 108 (2013) 58

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999) 23

Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.,
660 F.2d 712 (8th Cir. 1981) 48

Mujica v. AirScan Inc.,
771 F.3d 580 (9th Cir. 2014) ..... *passim*

Nestlé USA, Inc. v. Doe,
141 S. Ct. 1931 (2021) 2, 21, 54, 55, 61, 62, 64, 65

New York Life Ins. Co. v. Head,
234 U.S. 149 (1914) 29, 58

Ondrisek v. Hoffman,
698 F.3d 1020 (8th Cir. 2012) 28

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 47, 49

Reid v. Doe Run Res. Corp.,
701 F.3d 840 (8th Cir. 2012) 9

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 28

San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon,
359 U.S. 236 (1959) 28

Sequihua v. Texaco, Inc.,
847 F. Supp. 61 (S.D. Tex. 1994) 19, 32, 37, 43

Smythe v. U.S. Parole Comm'n,
312 F.3d 383 (8th Cir. 2002) 17

Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S. Dist. Iowa,
482 U.S. 522 (1987) 41

Torres v. S. Peru Copper Corp.,
113 F.3d 540 (5th Cir. 1997) 20, 26, 32

Torres v. S. Peru Copper Corp.,
965 F. Supp. 899 (S.D. Tex. 1996) 2, 19, 32, 37, 43, 50

Turner Entm't Co. v. Degeto Film,
25 F.3d 1512 (11th Cir. 1994) 19

Ungaro-Benages v. Dresdner Bank AG,
379 F.3d 1227 (11th Cir. 2004) 2, 22, 30, 44, 52

United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.,
210 F.3d 1207 (10th Cir. 2000) 52

United States v. Bestfoods,
524 U.S. 51 (1998) 56, 60, 61, 62, 63, 64, 65

Washington v. Washington State Com. Passenger Fishing Vessel Ass'n,
443 U.S. 658 (1979) 23

Yegiazaryan v. Smagin,
__ S. Ct. __, 2023 WL 4110234 (U.S. June 22, 2023) 54

Statutes

19 U.S.C. § 3801 *et seq*. 2

19 U.S.C. § 3805 note 2

28 U.S.C. § 1292(b) 1, 14

28 U.S.C. § 1331 1

121 Stat. 1455 (2007) 2

Rules, Regulations, and Treaties

U.S.-Australia Free Trade Agreement..... 40

U.S.-Bahrain Free Trade Agreement 40

U.S.-Chile Free Trade Agreement 40

U.S.-Colombia Trade Promotion Agreement 40

U.S.-Korea Free Trade Agreement 40

U.S.-Mexico-Canada Agreement..... 40

U.S.-Morocco Free Trade Agreement..... 40

U.S.-Oman Free Trade Agreement..... 40

U.S.-Panama Trade Promotion Agreement..... 40

U.S.-Peru Trade Promotion Agreement.....2, 3, 15, 23, 24, 25, 27, 29, 40

Other Authorities

Black's Law Dictionary (11th ed. 2019) 28

Brief of the United States as Amicus Curiae, *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 2857361 (U.S. May 26, 2020) 38

Office of the United States Trade Representative, Executive Office of the President, *Free Trade Agreements*, https://tinyurl.com/5yhrmczp 40

Office of the United States Trade Representative, Executive Office of the President, *Peru TPA: Final Text,* https://tinyurl.com/3w6mvcaw 2

Restatement (Third) of Foreign Relations Law 22

U.S. Dep't of State, *U.S. Relations With Peru* (July 30, 2022), https://tinyurl.com/yexx5b8p 23, 39

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Missouri had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(b). The district court issued the order appealed from and certified that order for appeal under § 1292(b) on January 20, 2023. Defendants-Appellants timely filed their § 1292(b) application on January 30, 2023. This Court granted leave to appeal on April 3, 2023.

STATEMENT OF THE ISSUES

Does international comity compel a U.S. court to abstain from adjudicating negligence claims alleging harm to Peruvians from a metallurgical complex in Peru, where a U.S.-Peru bilateral trade agreement directs the United States to respect Peru's right to set and enforce its own environmental policies, and where the tort action asks a U.S. jury to second-guess the propriety of a regulatory program for that complex by deciding the appropriate level of pollution control efforts for that complex in Peru?

Relevant Cases

Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014)

Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004)

Torres v. S. Peru Copper Corp., 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997)

Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021)

STATEMENT OF THE CASE

The United States And Peru Sign A Bilateral Trade Agreement Reaffirming Peru's Sovereignty On Environmental Law

This appeal arises against the legal backdrop of the United States-Peru Trade Promotion Agreement (TPA), which the two countries signed in 2006.[1] *See* Office of the United States Trade Representative, Executive Office of the President, *Peru TPA: Final Text,* https://tinyurl.com/3w6mvcaw; App.200-21; R. Doc. 545-12.[2]

Article 18 of the TPA addressed environmental commitments with a fierce commitment to sovereignty. The Article "[r]ecogniz[es] the

[1] President George W. Bush signed the TPA under the statutory authority of 19 U.S.C. § 3801 *et seq*. and Congress provided the requisite approval. 19 U.S.C. § 3805 note, 121 Stat. 1455 (2007).

[2] Record citation numbering (*e.g.*, 1233-14) reflects the docket entry for the document, which may not match the exhibit number. For documents other than legal memoranda, the cited page number corresponds to the ECF-stamped pagination.

sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities." Art. 18.1. It requires both the United States and Peru to provide an "appropriate and effective" forum for adjudicating "violations of [their respective] environmental laws," Art. 18.4(4), and ensure the availability of "appropriate and effective sanctions" for such violations, Art. 18.4(5). Notably, the TPA emphasizes that it does *not* "empower [either country's] authorities to undertake environmental law enforcement activities in the territory of" the other. Art. 18.3(5).

A Metallurgical Complex In La Oroya Wreaks Environmental Havoc For Decades

La Oroya is a remote town nestled high in the Andes mountains in Peru. R. Doc. 1233-14, at 18. The La Oroya Metallurgical Complex began operations in 1922. *Id*. at 18-19. Until approximately 1974, the complex was owned by Cerro de Pasco Corporation, which is not a defendant here. *Id*.

Cerro de Pasco's operations polluted La Oroya and the surrounding area with abandon. *See, e.g.*, R. Doc. 1233-17, at 69-70. The complex belched lead, arsenic, and sulphur dioxide into the air

every day, with virtually no containment measures, impacting about 3100 square miles of land. *Id.*; R. Doc. 1233-15, at 41.

In 1974, the Peruvian government, citing Cerro de Pasco's rampant pollution, nationalized the complex. R. Doc. 1233-19, at 2-4. The government began operating it through a state-owned company called Centromin. R. Doc. 1233-15, at 10. Centromin made some environmental upgrades, but pollution remained a serious problem. R. Doc. 1233-20, at 7-8. An environmentalist who visited the town in 1994 described it as a "vision from hell." R. Doc. 1233-1, at 3. At the time, the complex was emitting 2.5 tons of lead and 1.4 tons of arsenic *per day* through the main chimney stack alone, plus significant "fugitive emissions"—emissions that escape into the environment without passing through a stack. R. Doc. 1233-15, at 28. Large swaths of land in the area were too contaminated for agriculture, and the surrounding rivers contained elevated levels of lead, arsenic, nitrate, and copper. *Id.* at 11-12, 44-45. The mayor of La Oroya publicly despaired: "Who is going to clean this up?" R. Doc. 1233-1, at 3.

Peru Seeks Investors To Modernize The Complex And Establishes A Complex-Specific Environmental Plan

By the mid-1990s, the contamination in La Oroya was dire. But the metallurgical complex was the biggest employer and primary economic engine for the region, by far, and shutting it down would have inflicted incalculable economic harm. R. Doc. 1233-20, at 9. The only solution was foreign investment: a private company that would take ownership and invest in necessary environmental improvements while continuing to operate the facility. *See generally* R. Doc. 1233-14; R. Doc. 1233-35.

The government held an auction, which failed miserably. No company would agree to take over the outdated complex due to "accumulated environmental liabilities." R. Doc. 1233-35, at 2-3. Another problem was that Peru needed the new owner to continue operating the complex with its out-of-date pollution controls while improvements were in progress. R. Doc. 1233-20, at 9. To address concerns about potential legal liability, Peru assured prospective owners that they would enjoy immunity as long as they implemented a government-mandated modernization program specific to that complex. R. Doc. 1233-39, at 7-10. This "Environmental Remediation and

Management Plan," known by the Spanish acronym "PAMA," required the new owner to make specified improvements in a particular sequence over a 10-year timeline. R. Doc. 1233-20, at 16-25. Under Article 1971 of Peru's Civil Code, adhering to the PAMA requirements would then provide the owner with immunity from legal liability related to the operation of the complex. Add.23; *see* R. Doc. 843-17, at 20-21.

Relying on this promise of immunity, Defendants The Renco Group, Inc. (Renco) and its subsidiary The Doe Run Resources Corporation (Doe Run U.S.) expressed interest in buying the La Oroya complex. To retain local authority, however, the Peruvian government insisted on selling the complex to a Peruvian corporation. R. Doc. 1233-40, at 4. So Renco and Doe Run U.S. incorporated a new affiliate, Doe Run Peru, as an indirect subsidiary. R. Doc. 1233-38, at 2. In 1997, Peru transferred ownership of the metallurgical complex to Doe Run Peru. *See generally* R. Doc. 1233-39.

Doe Run Peru Operates The Complex, Spending Hundreds Of Millions Of Dollars On A Modernization Effort Consistent With PAMA

Doe Run Peru owned and operated the complex. Its President and General Manager oversaw all aspects of the company's business,

including day-to-day operations, finance, commercial, and environmental issues. App.388-94, 443-46; R. Doc. 1233-7, at 3-9; R. Doc. 1233-9, at 9-12. The company employed over 3500 people, with several layers of management, and had a vice president for each of its different departments (like its environmental department). App.403, 405-07, 424; R. Doc. 1233-8, at 5, 7-9, 26; *see also* App.374; R. Doc. 1233-6, at 4.

Doe Run Peru's on-site personnel made real-time decisions about plant operations. *E.g.*, App.408-20; R. Doc. 1233-8, at 10-22. Although Doe Run Peru submitted periodic reports to its corporate parents, Add.58, as the heads of Doe Run Peru explained, "[n]o one from the United States, whether at Doe Run [U.S.] or Renco, had any role in the daily operational management of Doe Run Peru or the La Oroya Complex," App.388; R. Doc. 1233-7, at 3.

Doe Run Peru implemented an ambitious program to reduce emissions by modernizing the La Oroya complex following the terms and timelines set out in the PAMA. R. Doc. 1233-56. All told, it spent over $300 million on environmental upgrades and modernization.

R. Doc. 1233-10, at 58. That investment had tremendous impact. *See generally* App.533-596; R. Doc. 1233-58.

In less than 10 years, Doe Run Peru's implementation of the PAMA reduced main stack arsenic emissions by 93% and main stack lead emissions by 68%. R. Doc. 1233-58 at 8. It built systems to eliminate slag and arsenic discharges into the waterways. *Id.* at 7-8, 13-17, 25-27. It built a treatment plant that eliminated 60,000 liters of acid discharge per day into a nearby river. R. Doc. 1233-66, at 10. It also constructed a network to treat waste from the complex and workers' houses, stopping the flow of untreated waste into a nearby river. R. Doc. 1233-58, at 8, 59. By 2007, for the first time, the local rivers were "not … negatively affected by the [complex's] operations." *Id.* at 59.

Thousands Of Peruvians Sue In Missouri Alleging Injury From Emissions In Peru

Despite this progress, U.S. lawyers recruited Peruvian citizens to file lawsuits claiming harm from Doe Run Peru's operations in La Oroya. Plaintiffs filed this suit in Missouri state court in 2008 against Renco, Doe Run U.S., and other corporate affiliates and officers—but

not Doe Run Peru. R. Doc. 1-5; R. Doc. 1-6.[3] Defendants removed the cases to federal court. *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 844 (8th Cir. 2012). More than 40 lawsuits involving over 1400 total plaintiffs are currently consolidated in this action ("*Reid*"). Add.5-6, 78. Another case in the same district, *J.Y.C.C. v. The Doe Run Resources Corp.,* No. 15-cv-1704 (E.D. Mo.) ("*Collins*"), involves over 1000 additional plaintiffs. Add.6 n.1. These are not class actions; each claim requires individual proof and many will need to be tried individually.

Evidence uncovered by the Defendants and Peruvian law enforcement revealed that the efforts to recruit plaintiffs in Peru were rife with irregularities and apparent fraud, including forgery, bribery, and coercion, as documented in an extensive report filed in the district court. *See generally* R. Doc. 1203-2. The indications of fraud in the recruitment process were so strong that Peruvian authorities launched a criminal investigation in 2021 that remains ongoing. *Id.* at 3.

[3] The year after Plaintiffs filed this suit, Doe Run Peru suspended operations of the La Oroya facility, R. Doc. 1233-112, at 65, and the following year it was forced into involuntary bankruptcy, R. Doc. 1233-10, at 27. These events were due mainly to the 2008 global financial crisis. *Id.* at 26-27.

As detailed more fully below, Peru formally protested the adjudication of these claims in U.S. courts, through diplomatic channels in 2007 and then again in 2017. The protests express Peru's "deepest concerns" about these suits' impact on Peru's "sovereignty," App. 223-24; R. Doc. 545-13, at 2-3, and insist that allowing this litigation to proceed in the U.S. is "inconsistent with the text and spirit" of the TPA, App.198; R. Doc. 545-3, at 7.

Citing the TPA and Peru's objections, Defendants in 2017 moved to dismiss the action on international comity grounds, R. Doc.545, and in the alternative sought application of Peruvian law, R. Doc.843. The district court denied both motions. R. Doc. 949.

On choice of law, the district court found no conflict between Missouri common law and the Peruvian Civil Code with respect to Plaintiffs' 12 causes of action, and alternatively held that, if there were a conflict, Missouri law should apply. *Id.* at 49-51. In so ruling, the court did not address the immunity granted under Article 1971.

On comity, the district court gave no weight to the Peruvian government's protests. *Id.* at 56-63. The court concluded that "the interest of Missouri in regulating the conduct of its own citizens, both at

home and abroad, outweighs the interest of Peru" in regulating the environment and industry within its own borders. *Id.* at 61.

Discovery Reveals Plaintiffs' Claims To Be A Direct Attack On Peru's Regulatory Decisions

Plaintiffs' complaint laid out sensational allegations depicting Doe Run Peru as a wanton polluter. R. Doc. 474. Through the course of the litigation, however, Plaintiffs clarified and narrowed their claims. Their position was that Missouri tort law imposes a standard of care that required Doe Run Peru to complete certain pollution control projects earlier than the Peruvian government set out in the PAMA.

This was most evident in the testimony of Plaintiffs' standard-of-care expert, Dr. Jack Matson. He denigrated Peru's "environmental enforcement practices" as "weak and ineffective." App.317, 323; R. Doc. 1231-3, at 11, 17. He explicitly stated that he "disagree[d]" with the PAMA, that its priorities were not what they "should have been," and if he had been in charge, the PAMA "would have looked different." App.298, 317; R. Doc. 1225-2, at 51; R. Doc. 1231-3, at 11. In essence, he proposed replacing Peru's judgment on environmental policy with a different "standard of care" under Missouri law. App.315-16, 323-24; R. Doc. 1231-3, at 9-10, 17-18. Stated otherwise, Doe Run Peru "could

satisfy Peruvian environmental standards … and yet not satisfy the standard of care" under Missouri law. App.315; R. Doc. 1231-3, at 9.

When it came to describing what Doe Run Peru should have done differently, however, Matson's specific criticism was modest: The "crux" of his opinion, App.473; R. Doc. 1233-11, at 5, was that Doe Run Peru should have reordered PAMA's deadlines and completed four projects to address fugitive emissions earlier than Peru required. App.325-27; R. Doc. 1231-3, at 19-21. Matson acknowledged that Doe Run Peru completed those four projects in 2006, as required by the PAMA. App.498; R. Doc. 1233-12, at 15. But he believed Peru was wrong to prioritize other projects over these fugitive emissions projects in the PAMA. App.601; R. Doc. 1277-33, at 5. He opined that had Doe Run Peru done these projects earlier, it "would have gone a long way" to satisfying Missouri's standard of care "or possibly have even made it." App.331; R. Doc. 1231-3, at 25.

On Summary Judgment, The District Court Revisits Its Earlier Decision And Certifies Its Order For Interlocutory Appeal

After discovery, Defendants filed a new motion to dismiss on comity grounds and to apply Peruvian law. R. Doc. 1231. By separate

motion, Defendants alternatively moved for summary judgment under Missouri law. R. Doc. 1233.

The district court agreed to revisit its choice-of-law determination. It recognized that Article 1971 of the Peruvian Civil Code, which would provide immunity from liability if Doe Run Peru complied with the PAMA, conflicts with Missouri law. Add.21-24. The court further recognized that Peru had the greater interest in applying that particular provision, Add.24-26. But the court maintained its position that Missouri law applies to Plaintiffs' tort claims. Add.25-26. The result is a legal chimera, with Missouri law governing the claims, but Peruvian law governing Defendants' immunity defense.

Turning to international comity, the district court held that the TPA did not require Plaintiffs' claims to be heard in Peru. Add.60-62. According to the district court, "[t]he plain language" of the agreement expressly provided jurisdiction over claims of foreign injury brought by foreign plaintiffs in a U.S. court under state tort law. Add.62. Based largely on that legal conclusion, the court held that neither the sovereign interests of Peru nor the federal government's primacy in foreign policy required dismissal. Add.62-68.

The district court has not yet addressed the merits of Defendants' motion for summary judgment under Missouri law. Add.4. Instead, it certified its order on choice-of-law and comity for immediate appeal under 28 U.S.C. § 1292(b). Add.79. This Court granted leave to appeal.

SUMMARY OF ARGUMENT

Plaintiffs are Peruvian citizens who claim harm from emissions from a metallurgical complex in Peru. In conflict with the respect for Peruvian sovereignty demanded by the U.S.-Peru Trade Promotion Agreement (TPA), Plaintiffs seek to have a U.S. jury sit in judgment of the operation of that Peruvian complex and second-guess Peru's policy choices and priorities for a mandatory modernization program for the complex. It fundamentally offends Peruvian sovereignty for a U.S. court to hear Plaintiffs' claims given the TPA, and how substantial an interest Peru has, and how little interest Missouri has, in the enforcement of Peruvian environmental policy. The district court erred in denying Defendants' motion to dismiss on international comity grounds.

A. When two sovereign nations have entered into a binding agreement addressing where cases should be adjudicated, that

agreement resolves the comity analysis. That is the case here: Dismissal is required because adjudicating this case in the United States is fundamentally at odds with the sovereign commitments in the TPA. This litigation flouts the TPA's commitment that domestic environmental harms within a country be addressed in each country's own courts. A U.S. jury sitting in judgment of environmental policy in Peru also impinges Peru's sovereign right, under Article 18.1 of the TPA, to "establish its own levels of domestic environmental protection." The district court's conclusion that the TPA's text affirmatively *invites* foreign plaintiffs to file state-law tort claims is legal error.

B. The traditional comity factors also support dismissal. Start with Peru's interests. Peru officially protested this action as an affront to its sovereignty. That affront is highlighted by Plaintiffs' argument. Justifiedly so. Plaintiffs claim that Defendants violated the Missouri standard of care by following the PAMA's prescribed sequence and timing of environmental improvements. Peru's right to make those policy choices by balancing considerations of economic development, social welfare, and environmental protection is fundamentally sovereign. It is a direct attack on those policy choices to deride them as

"weak and ineffective," App.323; R. Doc. 1231-3, at 17, and to seek to impose liability on that basis.

As for U.S. interests, the TPA embodies U.S. foreign policy interests that this case should be heard in Peru. In addition, failing to respect Peru's formal protests could precipitate a foreign policy dispute.

The only U.S. interest the district court identified favoring hearing this dispute in a U.S. court was Missouri's "interest in the conduct of [U.S.] corporate citizens abroad." Add.67. But as numerous courts have recognized, any U.S. interest in good corporate behavior is dwarfed by a foreign country's interest in regulating conduct occurring in its territory. The weak generic interest in good corporate behavior is further diminished on the facts here. The asserted negligence claimed by Plaintiffs' standard-of-care expert has nothing to do with Defendants' corporate conduct in the United States. That conduct bears on only the question of remedy: whether Defendants can be held liable for emissions from the metallurgical complex operated by Doe Run Peru under veil-piercing or other theories on allocating liability.

Finally, Peru is an adequate forum. For all of these reasons, the comity factors require this case be heard in Peru, not the United States, as other courts have recognized on similar facts.

C. The district court committed a distinct legal error by centering its comity analysis on whether there was a "true conflict" between Peruvian law and Missouri law—i.e., whether it was impossible to comply with both nations' environmental standards. Add.50-51. Adjudicatory comity does not depend on any such consideration.

D. The Supreme Court's extraterritoriality cases confirm that dismissal on comity grounds is warranted. If conduct would be considered extraterritorial under those cases, that is a strong indication that the United States should not serve as a litigation forum for the claims about foreign conduct as a matter of comity. And here, Plaintiffs' claims are virtually indistinguishable from ones the Supreme Court recently held do not belong in U.S. courts.

ARGUMENT

The interpretation of a bilateral agreement is a question of law reviewed de novo. *Smythe v. U.S. Parole Comm'n*, 312 F.3d 383, 385 (8th Cir. 2002). The decision whether to abstain on international

comity grounds is reviewed for abuse of discretion. *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014). A district court abuses its discretion in refusing to dismiss based on comity when it "relies on clearly erroneous factual findings or [makes] an error of law." *Dixon v. City of St. Louis*, 950 F.3d 1052, 1055-56 (8th Cir. 2020) (finding the district court abused its discretion in assessing federal-state comity).

I. International Comity Compels Dismissal Of This Action.

Having this case proceed in the United States is an affront to Peruvian sovereignty in derogation of the TPA. Plaintiffs are Peruvian citizens who claim harm due to emissions from a metallurgical complex in Peru. Exercising its sovereign prerogative protected under the TPA to balance competing considerations including economic development and environmental protection, the Peruvian government adopted a targeted plan to modernize the complex, requiring Doe Run Peru to complete specific projects in a specific sequence on a specific timeline. That plan reflected Peru's priorities and policy choices. Plaintiffs want a Missouri jury to conclude that those policy choices were insufficiently protective of Peruvian citizens and that, by implementing those policy choices, Doe Run Peru was negligent. That is inappropriate under the

doctrine of international comity, as courts have repeatedly recognized in analogous circumstances. *See, e.g., Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994).

International comity embodies "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). There are two strands of international comity. The first, "adjudicatory" comity, is most relevant here. *Mujica*, 771 F.3d at 598. It recognizes that "in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction." *Turner Entm't Co. v. Degeto Film*, 25 F.3d 1512, 1518 (11th Cir. 1994). The second, which is also doctrinally relevant, is "prescriptive" comity, which "guides domestic courts as they decide the extraterritorial reach of federal statutes." *Mujica*, 771 F.3d at 598.

Our government would not tolerate a court in, say, Peru's Yauli Province sitting in judgment of the modernization efforts at a U.S. factory. No nation would. Each nation has a sovereign right to set environmental programs for industry operating within its territory. It

would be clear a violation of Peruvian sovereignty for the EPA to impose a modernization plan on industrial facilities in Peru. The incursion on sovereignty is just as stark, and every bit as insulting, when a court empowers a jury to sit in judgment of Peru's environmental policy, and impose liability for implementing that policy. *See Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (tort action in Peru "strikes … at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged").

Indeed, this is precisely how Plaintiffs have couched their claims. They seek to override the PAMA because the regulatory judgments reflected in the PAMA were not what they "should have been." App.317; R. Doc. 1231-3, at 11. To allow Plaintiffs' claims to proceed in Missouri is to grant a Missouri jury the power to substitute its own assessment of the complex array of environmental-protection and economic-development interests at play for the judgment of Peru's own government.

The district court made four critical errors when it permitted this incursion on Peruvian sovereignty in denying Defendants' renewed

motion to dismiss on comity grounds. It first committed legal error in misconstruing the TPA. § I.A. Second, the court abused its discretion in evaluating the respective interests of the United States and Peru. § I.B. Third, the court committed legal error when it cited the absence of a "true conflict" between Missouri and Peruvian law to justify not dismissing this case on comity grounds. § I.C. Finally, the court misapplied *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021), in finding that Defendants' conduct in the United States supplied a sufficient nexus to the United States. § I.D.

A. The TPA requires dismissal of this case as a matter of comity.

The simplest route to reversal is to correct the district court's fundamental misreading of a single sentence in the TPA to conclude—in defiance of multiple other TPA provisions and the TPA's central objective—that the agreement affirmatively invites courts in each country to adjudicate claims of environmental harm purportedly incurred in the other country. The TPA controls the comity analysis here, but the court read it exactly backwards.

Courts typically consider whether to abstain on international comity grounds by balancing "the strength of the United States' interest

in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004); *see Mujica*, 771 F.3d at 603 (applying *Ungaro-Benages*); Restatement (Third) of Foreign Relations Law § 403 (listing similar considerations).

Such ad hoc balancing is not necessary or appropriate, however, when two sovereign nations have negotiated a bilateral agreement addressing where they think cases belong. In such circumstances, the "most certain guide" to whether comity compels abstention is the language of that agreement. *Guyot*, 159 U.S. at 163. And here, the TPA reflects the U.S. government's considered "determin[ation] [of how] the interests of American citizens, on the whole, would be best served." *Ungaro-Benages*, 379 F.3d at 1239 (centering comity analysis around executive agreement with Germany); *cf. Freund v. Republic of France*, 592 F. Supp. 2d 540, 564, 578-79 (S.D.N.Y. 2008) (similar).

As detailed below, the TPA enshrines the United States and Peru's mutual understanding that environmental enforcement—and adjudication of environmental claims—should take place at home. In

reading the agreement to mean the exact opposite, the district court committed legal error.

1. Adjudicating this case in the United States conflicts with the TPA.

a. The State Department describes the TPA as "a cornerstone of the bilateral relationship" between the United States and Peru. U.S. Dep't of State, *U.S. Relations With Peru* (July 30, 2022), https://tinyurl.com/yexx5b8p. As an agreement between sovereign nations, the TPA, like a contract, must be interpreted to achieve the parties' objectives. *See Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).

The TPA devotes an entire section, Article 18, to balancing each nation's interests regarding the "Environment." The Article opens with the express acknowledgement "that each Party has sovereign rights and responsibilities" over environmental regulation and enforcement. Art. 18 (Objectives).[4] It guarantees respect for "the sovereign right of each Party to establish its own levels of domestic environmental protection

[4] The text of Article 18 is available at https://tinyurl.com/z8k9tah7, and App.200-21; R. Doc. 545-12.

and environmental development priorities." Art. 18.1. On top of that commitment, the TPA layers multiple protections of each Party's sovereignty.

Article 18.4 addresses each Party's respective obligation to maintain adequate domestic environmental enforcement procedures. Each Party is required to "ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws." Art. 18.4(1). The language "its laws" unambiguously speaks to the sovereign's enforcement of "its" own environmental laws in its own country. The TPA repeatedly emphasizes that message. Each Party must make available "judicial, quasi-judicial, or administrative proceedings … to provide sanctions or remedies for violations of *its* environmental laws." Art. 18.4(2) (emphasis added). Each Party is obligated to "provide persons with a legally recognized interest under *its* law … access to remedies for violations of that Party's environmental laws or for violations of a legal duty under that Party's law relating to the environment"; such remedies include the right "to sue another person under that Party's jurisdiction for damages under that Party's laws." Art. 18.4(4) (emphasis added).

And each Party must "provide appropriate and effective sanctions … for violations of *that Party's* environmental laws." Art. 18.4(5) (emphasis added). The message is clear: The United States is to enforce and provide remedies for domestic violations of "its" environmental laws and duties, and Peru is to enforce and provide remedies for domestic violations of "its" environmental laws and duties.

Article 18.3(5) punctuates the point: "Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." Art. 18.3(5). If one Party is dissatisfied with the other's environmental standards or enforcement, its recourse is the TPA's dispute-resolution procedure. *See* Arts. 18.8, 18.12.

b. This litigation is fundamentally at odds with the sovereign commitments the United States made in the TPA. Allowing this case to proceed in Missouri violates Peru's sovereign right to "establish its own levels of domestic environmental protection," under Article 18.1. Respecting that sovereign right means that Peru regulates industry and the environment in Peru and makes the rules relating to the health and welfare of Peruvian citizens. It did so here based on its own assessment

of factors including its environmental priorities; the La Oroya complex's role as the primary economic engine for the region; and its determination of the policies and conditions necessary to attract foreign investment.

Conversely, a U.S. court infringes that sovereign right when it authorizes a Missouri jury to decide whether Defendants can be held liable for the manner in which Doe Run Peru operated the La Oroya complex. Plaintiffs' expert's opinion that Doe Run Peru "could satisfy Peruvian environmental standards … and yet not satisfy the standard of care" under Missouri law, App.315; R. Doc. 1231-3, at 9, tells this Court everything it needs to know: Plaintiffs hope to persuade a Missouri jury to choose a standard of care that establishes a different level of domestic environmental protection for Peru than Peru itself has chosen. That would, in turn, override the balance Peru has struck between protecting the environment and all the other considerations recited above. Peru was justified in protesting that this case would "require a court of the United States to pass judgment on the official acts and policies of the Peruvian State," App.198; R. Doc. 545-3, at 7. *See Torres*, 113 F.3d at 543. And the insult is not merely theoretical:

Uncertainty about who has the final word on compliance with Peruvian environmental policies—Peru or a U.S. jury—would frustrate Peru's efforts to harness foreign investment to expedite environmental modernization and grow its economy.

This litigation also flouts Article 18.4's commitment that domestic environmental violations within a country be addressed in each country's own courts. By requiring "Each Party" to provide remedies for violations of "*that Party's* environmental laws," Article 18.4 contemplates that each Party's courts are the exclusive forums for enforcing purported violations of environmental rules within its territory. That means that lawsuits regarding environmental harm in Peru must be brought in Peru, not in the United States.

Finally, this lawsuit is inconsistent with Article 18.3's pronouncement that the TPA does not empower U.S. "authorities" to "undertake environmental law enforcement activities in the territory of" Peru. Art. 18.3(5). Article 18.3 does not authorize courts or juries to set the standard of care for Peruvian industry any more than it authorizes the EPA to prosecute civil enforcement actions in Peru.

"Enforcement" is "[t]he act or process of compelling compliance with a law." Black's Law Dictionary (11th ed. 2019). Such "regulation can be as effectively exerted through an award of damages" in a lawsuit "as through some form of preventive relief." *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 247 (1959). That is especially true because Plaintiffs seek punitive damages, which, of course, "are designed to punish and deter harmful conduct"—a clear form of regulation. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1027 (8th Cir. 2012). Even "[t]he obligation to pay compensation … is … a potent method of governing conduct and controlling policy." *Garmon*, 359 U.S. at 247; *cf. Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008) (treating state common-law claims as a form of regulation equivalent to state statutes). By seeking compensatory and punitive damages in this action, Plaintiffs are attempting to enforce their vision of proper environmental policy in Peru and deter what *they* think is undesirable conduct. But this usurps Peru's role: It is for *Peru* to make the policy choice about how to balance competing social interests to serve the welfare of its people.

2. The district court's reading of the TPA was erroneous.

The district court failed to address most of the TPA's language, its structure, and its evident objectives. Its assessment of the TPA revolved largely around two points—both erroneous.

First, the court held that Article 18.4 affirmatively supports adjudication of these claims in U.S. courts by allowing "[e]ach Party" to provide remedies for violations of "that Party's environmental laws." Article 18.4. The court read that provision to authorize Plaintiffs' suit because Plaintiffs assert alleged violations of "Missouri law relating to environmental conditions affecting human health." Add.62.

But those "environmental conditions affecting human health" existed *in Peru* and there is no "Missouri law relating to environmental conditions" *in Peru*. Missouri law does not apply extraterritorially. The Supreme Court long ago held that "it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State…. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The district court made a variation of the same mistake in its second point: that it did not need to defer to the federal foreign policy articulated in the TPA because state tort law is an interest within traditional state competence. Add.74. Missouri has an interest in addressing environmental torts *in Missouri*. But Missouri has no legitimate interest, and certainly not a strong interest, in addressing environmental torts in Peru. *See infra* at 42-47. In any event, the TPA supersedes whatever interest Missouri has in hearing this case. *Ungaro-Benages*, 379 F.3d at 1239-40 (affirming dismissal of state-law tort claims on comity grounds based on an executive agreement with Germany).

B. The traditional comity factors further reinforce the need for dismissal.

Although it is inappropriate to engage in an ad hoc balancing of comity factors where the TPA balances the interests of the two sovereign nations, any such balancing favors dismissal because Peru's interests vastly outweigh Missouri's interests.

1. Peru has a compelling sovereign interest in adjudicating claims of environmental injury in Peru.

a. There is a good reason why the U.S. government would not tolerate a Peruvian court sitting in judgment of the pollution control efforts of a U.S. factory. Every nation has a weighty interest in the setting and enforcing environmental policy in its own territory. That is especially true where those policies relate to investing in and extracting the nation's own natural resources. As Peru put it in its 2017 protest: "Natural resources 'are the patrimony of the Nation,' and '[t]he State is sovereign in their utilization.'" App.197; R. Doc. 545-3, at 6 (quoting various provisions of Peru's Constitution).

As discussed above (at 3-5, 18, 25-26), Peru undertook a conscious balancing of competing interests. The environmental conditions in La Oroya were dire in the mid-1990s, after 70 years of rampant pollution. *Supra* at 3-5. Peru needed to address the mounting problem—without inflicting devastating economic harm by shutting down the region's primary economic engine. *Supra* at 5. So it adopted a regulatory program taking specific steps to protect the environment while also promoting investment in its industry. Peru has an overwhelming

interest in resolving disputes in which a party is seeking to rebalance the competing interests that Peru has already balanced. Peru's interest in regulating what happens in La Oroya is every bit as weighty as our interest in regulating factories operating in St. Louis.

Numerous courts have reached this conclusion on almost identical facts. In one case bearing an uncanny similarity to this case, for example, the Fifth Circuit affirmed a district court's decision to abstain on international comity grounds where Peruvian citizens sued in U.S. court claiming injury from industrial emissions in Peru. *Torres*, 965 F. Supp. at 905; 113 F.3d at 545. The district court reasoned that "the challenged conduct is regulated by … Peru and [the] exercise of jurisdiction by this Court would interfere with Peru's sovereign right to control its own environment and resources." 965 F. Supp. at 909; *see also Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 551 (S.D.N.Y. 2001) (Ecuador's interest in "environmental pollution of [its] rainforest regions" was "very substantial"); *Sequihua*, 847 F. Supp. at 63 (similar). The same is true here.

The district court acknowledged Peru's strong interest when it held that "Peru has the most significant relationship with regard to …

defendants' Article 1971 immunity defense." Add.25. The court recognized that Article 1971 "reflect[s] a policy decision" about how to approach tort liability, and that "Peru has a strong interest in the certainty, predictability, and uniformity of result for claims related to PAMA." Add.26. Of course, Peru has the same interest in "certainty, predictability and uniformity" with respect to the overall environmental regulation of the La Oroya metallurgical complex, especially since that certainty is critical to Peru's ability to attract the investment that creates jobs and provides the resources necessary to modernize facilities, protect the environment, and grow its economy. *Supra* at 5, 25-26. Regardless, even the district court's limited acknowledgment of Peru's interest weighs in favor of adjudicating this case in Peru. "If [the foreign country's] interest in the applicability of its laws to this case was strong enough to overcome [the state's] interests in the choice-of-law analysis," that supports the conclusion "that [foreign country] ha[s] a similarly strong interest in being the place where [the plaintiffs'] claims are litigated." *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 567 (9th Cir. 2020).

In *Cooper*, the claims were governed by the Japanese "Compensation Act." *Id.* The Ninth Circuit observed that "if the suit proceeds in [the United States], …. [n]ot only would the district court have to educate itself on [Japanese] law, but it would need to understand how the Compensation Act has been administered in the thousands of cases resolved in Japan, lest the 'change in courtrooms' mean a change in result." *Id.* The same is true here. The district court here identified substantial uncertainty regarding various issues of Peruvian law including the scope of Article 1971 immunity and the standard for assessing PAMA compliance. *E.g.*, Add.26-28. Peruvian courts have a far greater interest in resolving these nuanced and novel issues of Peruvian law, saturated with important policy judgments, than a court in Missouri. *Cooper*, 960 F.3d at 567; *Elliott v. PubMatic, Inc.*, No. 21-CV-01497, 2021 WL 3616768, at *4 (N.D. Cal. Aug. 16, 2021) ("[T]he U.K. has a strong interest in interpreting and applying its own regulatory scheme for Internet privacy, a scheme largely lacking in precedent.").

b. Unlike in many comity cases, this Court need not hypothesize how Peru might respond to this suit. This Court has the benefit of

Peru's actual official reaction, expressed in the most concrete and direct of terms—twice, both from the highest levels of Peru's national government, and both depicting this lawsuit as an affront to Peruvian sovereignty. *Supra* at 10. In 2007, the President of the Peruvian Council of Ministers—the authorized spokesperson for the Peruvian government—sent a letter to the U.S. Ambassador expressing Peru's "deepest concerns" about these suits. App.223-24; R. Doc. 545-13, at 2-3. The letter declared that Peruvian "*sovereignty*" was at stake—specifically, "the right of the Republic of Peru to regulate and control … activities conducted within its territory" as well as its right to "legislate and to apply its laws over the people … in its territory." *Id.* The letter protested that "the jurisdiction of the case pertains solely to the authorities and courts in Peru." *Id*. at 2.

Peru renewed its protest in 2017—this time in a letter from its Ministry of Economy and Finance to the Department of State. Peru incorporated in full its prior strident objection and reiterated that the "situation in La Oroya relates to national concerns and policies" and that Peru "maintains the importance of its sovereign rights with respect to these issues." App.195, 198; R. Doc. 545-3, at 4, 7. The letter

declared that "States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies," "which includes" not only "enabling relevant judicial and administrative proceedings," but also "adjudicating liability for victims of pollution." App.196-97; R. Doc. 545-3, at 5-6.

The letter also emphasized Peru's rights under the TPA, highlighting the provisions guaranteeing Peruvian sovereignty over environmental regulation. App.195-96; R. Doc. 545-3, at 4-5. Allowing this suit to proceed in U.S. courts, Peru protested, was "inconsistent with the text and spirit" of the TPA. App.198; R. Doc. 545-3, at 7. It was here that Peru protested that this suit "might require a court of the United States to pass judgment on the official acts and policies of the Peruvian State, rule on arguments relating to compliance with the laws and regulations of Peru, [and] interpret specific regulatory statements, policies, decisions and actions of Peru," App.198; R. Doc. 545-3, at 7—all affronts to Peruvian sovereignty.

Peru's official protests against a U.S. court adjudicating Plaintiffs' claims weigh heavily in favor of dismissal. "[I]nherent in the concept of comity is the desirability of having the courts of one nation accord

deference to the official position of a foreign state." *Mujica*, 771 F.3d at 611). A foreign state's position does not get more official or express than Peru's position here. And protests like this should not be lightly disregarded.[5] *See, e.g., id.*; *Sequihua.*, 847 F. Supp. at 63 (declining jurisdiction in part because of Ecuador's "strong opposition" to the litigation); *Torres*, 965 F. Supp. at 909 (similar); *Freund,* 592 F. Supp. 2d at 578-79 (refusing to dismiss the case "would imply that federal courts possess greater aptitude than … the French government to compensate Holocaust victims").

c. Two features of this litigation further amplify Peru's interests. First, as discussed above (at 11-12, 25-27), Plaintiffs' claims are a blatant, direct attack on Peruvian environmental policy and enforcement. In fact, in a real sense, the jury will sit in judgment of Peru itself, because the Peruvian government owned and operated the La Oroya facility for nearly a generation (1974 to 1997). *Supra* at 4-6.

---

[5] The district court claimed that Peru's protests were undercut by its recent statements in ongoing arbitration proceedings "acknowledg[ing] … that 'a federal court will hear the Missouri Plaintiffs' claims.'" Add.65. But all Peru did was recognize that the district court refused to dismiss the case. That was hardly a signal Peru agreed with the decision it has repeatedly protested.

Defendants' causation defense will also call upon the jury to decide whether Peru is responsible for any claimed harm—i.e., whether Peru poisoned its own people when it ran the facility. *See* R. Doc. 1233, at 95-108. That too is a question that Peru has a strong interest in adjudicating at home—not in the United States.

Second, the affront to Peru's sovereignty is aggravated by the Peruvian government's concerns about the recruitment practices related to this litigation. The evidence of forgery, bribery, fraud, and coercion would be of deep concern to any sovereign. *Supra* at 9. Hence, Peru's criminal investigation. But adjudicating this suit in the United States limits Peru's ability to order meaningful remedial action, because it has no control over the lawsuit in Missouri and no power to dismiss claims procured fraudulently.

c. In downplaying Peru's predominant interests, the district court held that a much more stringent comity standard applies in the absence of parallel foreign proceedings. Add.66-67. The court's undue emphasis on this point was legal error. *See Mujica*, 771 F.3d at 603, 607 (declining to articulate this factor as relevant to foreign interests, despite the dissent's emphasis on it); Brief of the United States as

Amicus Curiae, *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 2857361, at *13-14 (U.S. May 26, 2020) (setting out the United States' official views on comity abstention). The absence of current parallel proceedings does not diminish a foreign government's sovereign interest in exercising its jurisdiction over matters within its own territory. That is especially true here, because the fact that Peruvian Plaintiffs bypassed Peruvian courts to litigate their claims in U.S. courts is precisely the problem to which Peru has taken offense. *Supra* at 35-36. The court erred in finding this factor to weigh heavily against dismissal.

2. U.S. interests favor adjudicating this case in Peru.

a. U.S. foreign policy interests also strongly favor dismissal. A court cannot lightly dismiss the United States' declaration (through the TPA) of a foreign policy of respect for Peru's sovereign right to environmental regulation within its own territory. *Supra* at 21-30.

The fact that Peru views this litigation as inconsistent with the United States' commitments in the TPA alone creates the potential for foreign policy tensions. It could jeopardize the billions of dollars in increased trade and investment produced by the TPA. U.S. Dep't of State, *U.S. Relations With Peru* (July 30, 2022),

https://tinyurl.com/yexx5b8p. And because the TPA applies equally to both the United States and Peru, the United States has an interest in ensuring the agreement is interpreted to respect *both* countries' sovereignty, to prevent Peru from taking "reciprocal action" if a U.S. court proceeds to pass judgment in this case. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021).

This interest is not isolated to Peru. The United States has entered into numerous trade agreements containing language almost identical to that in Article 18.4 of the TPA. To give just one example, the successor to NAFTA—the U.S.-Mexico-Canada Agreement—contains a nearly identical provision guaranteeing that each party will provide domestic remedies for violations of its environmental laws. *See* USMCA, art. 24.6.[6] Thus, the foreign policy stakes here extend beyond U.S.-Peru relations to U.S. foreign relations more broadly.

---

[6] *See also* U.S.-Australia Free Trade Agreement, art. 19.3; U.S.-Bahrain Free Trade Agreement, art. 16.3; U.S.-Chile Free Trade Agreement, art. 19.8; U.S.-Colombia Trade Promotion Agreement, art. 18.4; U.S.-Korea Free Trade Agreement, art. 20.4; U.S.-Morocco Free Trade Agreement, art. 17.4; U.S.-Oman Free Trade Agreement, art. 17.3; U.S.-Panama Trade Promotion Agreement, art. 17.4. The text of these agreements is available at the website of the Office of the U.S. Trade Representative. *See* USTR, *Free Trade Agreements*, https://tinyurl.com/5yhrmczp.

The district court discounted U.S. foreign policy interests because the State Department has not submitted a Statement of Interest. Add.66. But the State Department generally "does not take positions regarding … litigation between private parties, unless required to do so by applicable law." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S. Dist. Iowa*, 482 U.S. 522, 554 n.5 (1987) (Blackmun, J., concurring in part and dissenting in part). In many of the cases where the State Department took the unusual step of submitting a Statement of Interest, it was responding to the court's explicit request. *E.g.*, *Mujica*, 771 F.3d at 586. There was no such request here.

In any event, this Court does not have to guess about U.S. interests, because they are already reflected in the TPA and in the State Department's other statements. For example, the State Department has explained that "foreign courts generally should resolve disputes arising in foreign countries." *Mujica*, 771 F.3d at 609. Otherwise, adjudicating such claims in U.S. courts "could give the impression that the U.S. government does not recognize the legitimacy of [foreign] judicial institutions," which can "have negative consequences" on American foreign relations. *Id.*

b. The only U.S. interest the district court identified *favoring* adjudicating this dispute in the U.S. was Missouri's "interest in the conduct of [U.S.] corporate citizens abroad." Add.67. But the Missouri Supreme Court explained in *Acapolon Corp. v. Ralston Purina Co.*, 827 S.W.2d 189 (Mo. 1991) (en banc), that this interest pales in comparison to a foreign sovereign's interest in enforcing its laws within its own borders. The court there addressed the relative interests of Missouri and Guatemala in a products-liability case where products were allegedly designed in St. Louis but sold in Guatemala by a Guatemalan subsidiary. In dismissing the case on forum non conveniens grounds, the Missouri Supreme Court held: "Missouri's interest in assuring that its corporations comply with [U.S. products liability laws] abroad is less substantial than [Guatemala's] interest in protecting its citizens from injury and setting standards for the manufacture and distribution of products within its borders." *Id.* at 194. There is no meaningful distinction between Missouri's products-liability laws and Missouri's tort law, and thus no reason why this holding does not apply equally to the relative interests of Missouri and Peru here. *See also Aguinda*, 142 F. Supp. 2d at 551 (finding the "Ecuadorian local interest in …

environmental pollution of Ecuador's rainforest regions" was "very substantial" and "the public interest of the United States" "in not permitting its companies to participate in … misconduct" was "much more modest"); *Torres*, 965 F. Supp. at 909 (similar); *Sequihua*, 847 F. Supp. at 63 (similar).

The district court cited *Carijano v. Occidental Petroleum Corp*. for the proposition that "the United States … has a 'significant interest in providing a forum for those harmed by the actions of its corporate citizens.'" 643 F.3d 1216, 1232 (9th Cir. 2011); *see* Add.47. But the Ninth Circuit itself disapproved this language in *Mujica*, holding that this "general interest in good corporate behavior … should not be overstated." *Mujica*, 771 F.3d at 610-11. Moreover, the foregoing analysis shows that *Mujica*, not *Carijano*, represents the consensus approach. *Supra* at 42. Further, *Mujuca* explained that, because foreign relations are the province of the federal government, the primary focus of the adjudicatory comity analysis is the interests of the federal government. To the extent state's interests are considered, they should not be "give[n] undue weight." *Mujica*, 771 F.3d at 604; *see also*

Ungaro-Benages, 379 F.3d at 1232-33 (state laws "do not necessarily reflect national interests").

Even putting aside the diminished role state interests play in the comity analysis, Missouri's interests are not meaningful to the comity analysis here. This is a tort case alleging environmental injury in Peru from industrial emissions and the central question is the standard of care regarding those emissions. These are considerations in which Peru naturally has the greater interest. *See In re Derailment Cases*, 416 F.3d 787, 795 (8th Cir. 2005) (finding the forum where the pollution occurred to be the forum with the greater interest in the dispute).

Missouri's limited interests are even further diminished here given how Plaintiffs frame their claims. As discussed above (at 12), Plaintiffs' case revolves largely around expert testimony that Doe Run Peru violated the standard of care by completing four environmental projects in the order that Peru prescribed in the PAMA. But the timing and completion of those projects were matters that occurred entirely in Peru. After discovery, Plaintiffs could not point to any evidence that anyone in the United States, *see infra* at 62-64, decided the timing of these four projects, or refused to approve spending needed to complete

these specific projects earlier. R. Doc. 1276, at 119-36; *see also* App.350-60, 363; R. Doc. 1233-5, at 16-26, 29; App.600; R. Doc. 1277-33, at 4. In fact, their expert admitted that Doe Run Peru did not initiate the projects earlier because "Doe Run *Peru* did not consider [the projects] a priority." App.355; R. Doc. 1233-5, at 21. He further admitted that Doe Run Peru could have completed the four projects in question earlier for "minimal cost," and that Doe Run Peru had the necessary funds in its budget to do so, had it decided to prioritize them. App.320, 325-27; R. Doc. 1231-3, at 14, 19-21.[7]

Thus, Defendants' corporate conduct in the United States has nothing to do with Plaintiffs' efforts to prove negligence in Peru. To the extent it has any relevance, it bears only on the question of *remedy*. Although Plaintiffs claim injury from Doe Run Peru's emissions in Peru, Doe Run Peru is not a defendant. Plaintiffs invoke Defendants'

---

[7] The district court stated that Plaintiffs' theory was not limited to these four projects. Add.22. But their expert's initial report did not mention any other projects Doe Run Peru should have done but didn't. App.602; R. Doc. 1277-33, at 6. Nor did his first deposition. *Id.* Nor did his rebuttal report. *Id.* At his second deposition, after much floundering, Plaintiffs' expert eventually floated *one* additional project he had not previously mentioned. *Id.* Plaintiffs simply cannot escape the fact that their case revolves largely around the order and timing of the four projects.

activities in the United States to hold Defendants liable for Doe Run Peru's emissions through theories like veil piercing, "an equitable doctrine used by the courts to look past the corporate form and impose liability upon owners of [a] corporation." *Bick v. Legacy Bldg. Maint. Co.*, 626 S.W.3d 700, 705 (Mo. Ct. App. 2021) (quotation marks omitted).[8] In short, Peru's interests in determining whether Doe Run Peru violated Peru's environmental standards are primary, and Missouri's interests—which come into play only *if* a primary environmental violation is found—are ancillary.

The district court ignored the difference between the negligence claim and the remedy when analyzing the relative interests of Missouri and Peru. But virtually no fact it identified as showing a nexus to the United States related to actual operational control of the metallurgical complex. Add.55-59; *infra* at 59-64. Missouri's purported interest in

[8] Plaintiffs have also brought supposed "direct liability" claims against Defendants. R. Doc. 474, at 52-59, 70-76. These claims are meritless for the reasons explained in Defendants' pending summary judgment motion. R. Doc. 1233, at 82-85. At any rate, despite their title, these claims have the same essential feature described above: Plaintiffs' arguments establishing negligence are analytically distinct from the arguments that Defendants should be held liable for that negligence, and Defendants' corporate conduct bears on the latter, not the former.

veil-piercing does not justify exercising jurisdiction over the underlying negligence claim arising and causing injury in Peru to Peruvian citizens, in which Peru has the far greater interest. Indeed, even as to veil-piercing it is not clear why Missouri would have a substantial interest; the company whose veil would be pierced is a Peruvian company organized under the laws of Peru. *Cf. Acapolon*, 827 S.W.2d at 193 (Guatemala, not the United States, has an interest in "[t]he respect to be shown to … a Guatemala corporation"). In sum, Missouri's interests pale in comparison to Peru's, and the chasm between them requires dismissal.

3. Peru is an adequate alternative forum.

The district court's recent order did not address whether Peru is an adequate alternative forum, but plainly it is. An alternative forum is generally adequate if (1) "the defendant is amenable to process" there and (2) the other jurisdiction offers a satisfactory remedy. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (quotation marks omitted); *Mujica*, 771 F.3d at 614. Courts have routinely found Peru to be an adequate forum under these principles. *E.g.*, *Acuna-Atalaya v. Newmont Mining Corp.*, 838 F. App'x 676, 681 n.6 (3d Cir. 2020)

(collecting cases and observing that "no federal court has concluded that Peru is an inadequate alternative forum"). Both factors are satisfied here.

Defendants satisfied the first factor by asking the district court to "make any dismissal of Plaintiffs' claims based on international comity expressly conditioned on the necessary defendants consenting to jurisdiction in Peru." R. Doc. 756, at 50. Such conditional dismissals are common in the comity context. *See, e.g., de Melo v. Lederle Lab'ys*, 801 F.2d 1058, 1061 (8th Cir. 1986); *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 719 (8th Cir. 1981).[9]

The second factor is also satisfied, because the compensatory damages Plaintiffs seek are available in Peru. That is adequate even though punitive damages are not available in Peru. *See de Melo*, 801 F.2d at 1061. In sum, this is not the "rare circumstance[]" where the

[9] In denying the first motion to dismiss, the district court found Peru to be an inadequate forum because Defendants, in requesting conditional dismissal, asked that the court not require *certain* Defendants—*e.g.*, the individual officers—to submit to Peru's jurisdiction as a condition of dismissal. R. Doc. 949, at 62 n.13. The court, however, was free to decline that suggestion and condition dismissal on all Defendants consenting to jurisdiction in Peru. For the avoidance of doubt, all Defendants consent to personal jurisdiction in Peru.

remedy available in the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft*, 454 U.S. at 254 & n.22.

4. Judicial economy and fairness favor dismissal.

Although judicial economy and fairness are not generally listed as comity factors, *see, e.g., Mujica*, 771 F.3d at 603-08, the district court found these considerations to "weigh against abstention." Add.67. Its conclusion rested on the fact that the case has been pending for a long time and the parties have engaged in discovery and motions practice. *Id.* But Defendants moved to dismiss the case on comity grounds over six years ago. R. Doc. 545. The case has been pending for so long, and advanced so far, only because the district court erroneously denied that motion. The erroneous denial of a comity ruling cannot be a basis for declining to correct the error.

Moreover, even at this juncture, judicial economy actually counsels in favor of abstention. The discovery that the parties have conducted so far is transferrable to Peru. And even that discovery pales in comparison to the work yet to be done. Fact discovery has only begun on a small "discovery cohort" of "several plaintiffs" out of more than

2400 plaintiffs in this case and *Collins*. Add.67. U.S. discovery on the thousands of remaining claims will be challenging, since Plaintiffs are located in a remote part of Peru. And since this case is not a class action, each Plaintiff's claim will need to be separately tried, requiring hundreds if not thousands of trials that will turn on evidence and witness testimony from Peru. In these circumstances, trying the case in Peru would best conserve judicial resources. *Cf. Torres*, 965 F. Supp. at 905-06. Thus, interests of judicial economy and fairness, like the other comity factors, require dismissal.

C. The district court erred in focusing on whether there is a "true conflict" between the laws of the United States and Peru.

The district court committed a distinct legal error in focusing on whether there is a "true conflict" between Peruvian law and Missouri law—i.e., whether it would have been impossible for Defendants to comply with both nations' environmental standards. Add.48-52. In the court's estimation, the absence of a true conflict weighed heavily against, if not outright precluded, dismissal on comity grounds.

Adjudicatory comity is not a conflict-of-law analysis. It is "a doctrine of prudential abstention, one that counsels voluntary

forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Mujica*, 771 F.3d at 598 (quotation marks omitted). As explained above (at 21-22), courts make that determination by balancing the interests of the two nations.

There is no "true conflict" override to that balance. The district court's contrary view was based on a misreading of the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). *Hartford Fire* arose in a very different context. The Supreme Court was addressing antitrust claims under the Sherman Act—a federal statute that unquestionably applies extraterritorially. *Id.* at 794-96. The question before the Court was whether to nonetheless "decline[] to exercise such jurisdiction" as to claims against London-based defendants "under the principle of international comity." *Id.* at 797. Because Congress had already decided to apply U.S. antitrust laws to foreign conduct, the Court stated that "[t]he only substantial question *in this litigation* is whether" it would be impossible for the London defendants to comply with the laws of both countries. *Id.* at

798-99 (emphasis added). Citing the absence of such "true conflict," the Court proceeded to exercise jurisdiction. *Id.*

As the Ninth Circuit has held, nothing in *Hartford Fire* indicated an intent to apply the "true conflict" analysis beyond that unique scenario. *Mujica*, 771 F.3d at 599-601. The case, at most, stands for the proposition that when Congress has made the explicit policy choice to give extraterritorial effect to a federal statute, courts must follow that command unless it is impossible to comply with both U.S. and foreign law, which creates a grave risk of international strife. Accordingly, cases applying the true-conflict requirement have typically involved prescriptive comity (where the question is whether and how much Congress intended to apply a statute extraterritorially). *Id.* at 600-01 (collecting cases). Most adjudicatory comity cases, by contrast, do not consider whether there is true conflict. *See, e.g., id.* (collecting cases); *Ungaro-Benages*, 379 F.3d at 1238; *Freund*, 592 F. Supp. 2d at 573-74. These courts understand that the adjudicatory comity balance does not require a more extraordinary showing.[10]

[10] Two circuits have adopted a different approach. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393-94 (3d Cir. 2006); *United*

This case is on the opposite side of the spectrum from *Hartford Fire*. It is not a prescriptive comity case. There is no relevant federal statute, and therefore no congressional determination that U.S. law should apply to foreign countries. There is thus no "true conflict" requirement.

It makes no difference that the district court claimed it was not deciding that "a true conflict is an absolute requirement." Add.51. Given the heavy emphasis the court placed on the true-conflict inquiry, Add.48-52, 66-67, the district court should at minimum be required to rebalance the factors without this consideration.

D. Extraterritoriality principles reinforce the conclusion that these claims cannot proceed in the United States.

Judge Bybee's opinion in *Mujica* cogently explains that the "guiding principle[s]" from the Supreme Court's extraterritoriality cases apply with equal force "in the context of adjudicatory comity." 771 F.3d at 605. That is because both doctrines "rest[] on respect for the legal systems of members of the international legal community—a kind of

---

Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1223 (10th Cir. 2000). Those cases misread *Hartford Fire* for the reasons stated above.

international federalism." *Id.* at 605; *see also Yegiazaryan v. Smagin*, __ S. Ct. __, 2023 WL 4110234, at *5 (U.S. June 22, 2023) ("[T]he presumption against extraterritoriality … reflects concerns of international comity[.]"). In both contexts, "the weaker the nexus between the challenged conduct and U.S. territory or … parties, the weaker the justification for adjudicating the matter in U.S. courts." *Mujica*, 771 F.3d at 605-06.

Put another way, if conduct would be considered extraterritorial, that is a strong indication that, under adjudicatory comity, the United States should not serve as a litigation forum for the claims about the conduct. The district court agreed with this principle in theory, Add.54, but failed to honor it.

1. Plaintiffs' allegations are materially identical to those the Supreme Court found inadequate in *Nestlé*.

a. In *Nestlé,* the plaintiffs sued U.S. corporations under the federal Alien Tort Statute (ATS), alleging the companies were aiding and abetting child slavery. 141 S. Ct. at 1935. The Ninth Circuit laid out the plaintiffs' allegations as follows:

- Defendant Nestlé USA "coordinate[d] the major operations of its parent corporation" and "[e]very major operational decision

regarding Nestlé's United States market is made in or approved in the United States." *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1123 (9th Cir. 2018).

- Defendant Cargill's "business is centralized in Minneapolis and decisions about buying and selling commodities are made" there. *Id.*
- Defendants had their U.S.-based employees "regularly inspect operations in [Côte d'Ivoire] and report back to the[ir] United States offices." *Id.* at 1126.
- Defendants made payments "akin to 'kickbacks'" to their suppliers in Côte d'Ivoire "to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor." *Id.* These financial arrangements originated in the United States. *Id.*

The Ninth Circuit found these "allegations paint[ed] a picture of overseas slave labor that defendants perpetuated from [U.S.] headquarters" and held this was enough of a domestic nexus to allow suit in the United States. *Id.*

The Supreme Court disagreed, finding these facts insufficient "to support domestic application of the ATS." 141 S. Ct. at 1937. The Court explained that "general corporate activity"—and specifically U.S. corporate "decisionmaking"—did not warrant domestic application of the ATS when the primary violation of international law occurred and caused injury abroad. *Id.* The Court's holding reflected that "the normal relationship between parent and subsidiary" corporations

involves decisionmaking by the parent. *United States v. Bestfoods*, 524 U.S. 51, 71 (1998). Such "oversight of a subsidiary" can involve "monitoring … the subsidiary's performance, supervis[ing] … the subsidiary's finance and capital budget decisions, and articulati[ng] … general policies and procedures" for the subsidiary to follow. *Id*. at 72. If U.S.-based decisionmaking opened the doors to U.S. courts, then decisionmaking as part of corporate oversight would make the United States a forum for virtually any litigation against a foreign subsidiary with a U.S. parent. The Court found that prospect untenable.

b. The district court's nexus analysis is strikingly similar to the Ninth Circuit's discredited analysis. The court relied on Plaintiffs' allegation that Defendants "ma[de] decisions" "in Missouri" "that caused [Doe Run Peru] to emit toxins," with the motive "to make substantial profit" in the United States. Add.54-55. According to the court, Plaintiffs' allegation "that the specific decisions to engage in the conduct that forms the bases of their claims were made in the United States" distinguishes the case from *Nestlé*. Add.55. Setting aside the fact that the summary judgment record proved Plaintiffs' allegations about the locus of decisionmaking to be baseless, *see infra* at 59-64; R.

Doc. 1233, at 38-81, even those broad allegations do not distinguish *Nestlé*. There, too, the "specific decisions" to engage in the relevant conduct—payment of kickbacks to support child slavery—"were made in the United States." Add.55; *see* 906 F.3d at 1126. Yet the Supreme Court was clear: Such ordinary "decisionmaking" by a U.S. parent of a foreign subsidiary is not enough to transform conduct undertaken abroad into domestic conduct. The same is true here, and the district court erred in concluding otherwise.

If anything, the Court's holding in *Nestlé* applies with even greater force here. A basic tenet of the presumption against extraterritoriality is that a federal statute like the ATS *can* apply abroad if Congress expresses that intention clearly enough. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). But Plaintiffs' claims here are based on Missouri tort law, which, as discussed above (at 29), does not apply outside Missouri. The district court acknowledged that Missouri *statutes* do not apply extraterritorially. Add.68. Yet, it held that Missouri *common* law may reach where legislation cannot. Add.68-70. As Defendants explained to the district court, R. Doc. 1231, at 35-36, there is no basis to treat the extraterritorial reach of common law

and statutory law differently. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013) (applying ordinary extraterritoriality principles to federal common-law claims under the ATS). If the Constitution "obviously" prohibits extraterritorial reach of a state statute, *New York Life Ins.*, 234 U.S. at 161, it prohibits extraterritorial application of state common law too.

2. The nexus revealed in discovery is weaker than in *Nestlé*.

The district court also tried to distinguish *Nestlé* with "evidence … developed during discovery." Add.55-59. Before demonstrating why that is wrong, a threshold observation is in order. Even accepting all the evidence the court catalogs, Plaintiffs cannot prove the facts necessary to hold Defendants liable for Doe Run Peru's activities. To pierce the corporate veil, Plaintiffs would need to show that Defendants exercised "*complete domination*, not only of finances, but of policy and business practice" such that Doe Run Peru "had at the time no separate mind, will or existence of its own." *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. 1999) (emphasis added). As we demonstrate below, none of the evidence the district court listed comes close to meeting this standard: The record confirms that Doe

Run Peru exercised independent control over the operation of the La Oroya complex, subject to ordinary corporate oversight. *Supra* at 6-7; *infra* at 59-64; *Acapolon*, 827 S.W.2d at 193 ("[A corporation] does not lose the benefits of limited liability by taking an active interest in the affairs of its subsidiary … so long as the corporate formalities are observed and the rules followed."). Even Plaintiffs' own expert agreed that "[t]he people at Doe Run Peru were in charge of the operations at Doe Run Peru" and that "the president of Doe Run Peru ran Doe Run Peru on a day-to-day basis." App.499, 504; R. Doc. 1233-12, at 16, 21. The court nevertheless found a U.S. nexus without resolving Defendants' motion for summary judgment on veil-piercing. It relied on three categories of evidence, none of which establish a nexus greater than that found insufficient in *Nestlé*.

Domination and control. The court began with the sweeping assertion that "plaintiffs have submitted evidence that … Defendants dominated and controlled DRP." Add.55 (citing Add.34-39). But the actual facts the court cites do not support this characterization. The court says, for example, that Renco and Doe Run U.S. "caused" Doe Run Peru's incorporation, Add.34, that there is "significant overlap of

officers and directors throughout the Renco/Doe Run entities," Add.35, that "salaries and bonuses of some [Doe Run Peru] executives and employees … were paid" by Doe Run U.S., Add.36, and that "several [Doe Run U.S.] employees acted as advisors and/or consultants to" Doe Run Peru, Add.36. These are all features of "the normal relationship between parent and subsidiary," not proof of domination and control. *Bestfoods*, 524 U.S. at 71; *see also Acapolon*, 827 S.W.2d at 193 (a parent "exercis[ing] the control which inheres in stock ownership" does not justify veil-piercing).

Financial controls. The court also emphasized Defendants' supposed financial decisionmaking, mainly along two dimensions. Add.36, 56-57. First, it asserted that Doe Run Peru's "expenditures for environmental remediation projects exceeding [$5000] required approval" from executives in the United States. Add.58. But it is undisputed that Defendants never denied a single expenditure request for environmental remediation. App.423; R. Doc. 1233-8, at 25; *see also* App.513; R. Doc. 1233-52, at 9. Second, the court opined that Defendants extracted money from Doe Run Peru, suggesting that they thereby prevented it from meeting its environmental commitments.

Add.56-57. But it is undisputed that Doe Run Peru spent over $316 million on environmental remediation. App.538; R. Doc. 1233-58, at 6. And here, again, the court did not reconcile the supposed underfunding with how Plaintiffs' standard-of-care expert focused on the criticism that Doe Run Peru should have completed four specific projects more quickly—at "minimal cost." *Supra* at 12, 44-45. Here, again, the nexus analysis collapses because finances had nothing to do with Doe Run Peru's decision not to finish those projects earlier the PAMA required. Doe Run Peru had the budget to finish them earlier; those projects were a drop in the bucket, representing just $12 million of hundreds of millions spent on remediation. App.325-27; R. Doc. 1231-3, at 19-21. In sum, Defendants' financial oversight of Doe Run Peru did not prevent Doe Run Peru from meeting its PAMA commitments.

More fundamentally, however, these details about supposed financial control are precisely the kind of financial oversight and decisionmaking that *Nestlé* held insufficient to establish a nexus to the United States. *Compare* 906 F.3d at 1126 (discussing "kickbacks" approved in the United States) *with Nestlé*, 141 S. Ct. at 1937 (financial "decisionmaking" does not establish a U.S. nexus); *Bestfoods*, 524 U.S.

at 72 ("supervision of [a] subsidiary's finance and capital budget decisions" is ordinary parent-corporation activity).

Oversight. Next, the district court observed that "Defendants received regular reports about the pollution control projects at [Doe Run Peru] and addressed the environmental affairs during monthly meetings in Missouri." Add.58; *see* Add.57-59 (similar allegations). Again, *Nestlé* is directly on point. There, the defendants "had employees from their United States headquarters regularly inspect operations [abroad] and report back to the United States." 906 F.3d at 1126. That type of "general corporate activity" was insufficient to create a nexus to the United States in *Nestlé*, and it is insufficient here. 141 S. Ct. at 1937; *see also Bestfoods*, 524 U.S. at 72 ("monitoring [a] subsidiary's performance" is normal "oversight").

Employees involved. Finally, the court suggested that Defendants and U.S. personnel were involved in environmental remediation in Peru, asserting that "[Doe Run U.S.] employees Buckley, Neil, Vornberg, and Zelms managed [Doe Run Peru's] environmental and modernization projects." Add.57; *see also* Add.36-37 (similar).

There are too many inaccuracies in this statement to address comprehensively, so we focus on the most blatant.

Buckley and Neil successively held the title General Manager and President of Doe Run *Peru* between 1997 and 2006. App.387-88, 442; R. Doc. 1233-7, at 2-3; R. Doc. 1233-9, at 8.[11] When Neil was in that role, he lived in Peru and did not even have an office in the United States. App.388; R. Doc. 1233-7, at 3. When Buckley occupied the role, he shuttled between Peru and the United States because his wife was undergoing cancer treatment in the United States. App.442-43; R. Doc. 1233-9, at 8-9. Such personal travel does not establish a nexus between Plaintiffs' claims against Doe Run Peru and the United States.

Vornberg did have a job with Doe Run U.S., as its environmental director. But Doe Run Peru had its own Vice President of Environmental Affairs, Jose Mogrovejo. App.391; R. Doc. 1233-7, at 6. Mogrovejo "would consult" with Vornberg, but Plaintiffs presented no

[11] At times, Buckley and Neil also held roles in Doe Run U.S., but "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary," and "courts generally presume that the directors are wearing their 'subsidiary hats' … when acting for the subsidiary." *Bestfoods*, 524 U.S. at 69 (quotation marks omitted).

evidence to dispute Neil's sworn statement that "Vornberg did not have any management or decision-making role" in Doe Run Peru. *Id.*; *see also* App.232, 236; R. Doc. 871-3, at 5, 9. Doe Run U.S. personnel supervising, consulting, and monitoring Doe Run Peru personnel is standard for a parent corporation, *Bestfoods*, 524 U.S. at 72, and does not create a nexus to the United States, *Nestlé*, 141 S. Ct. at 1937.

Similarly, Zelms—President and CEO of Doe Run U.S.—received frequent "reports" about environmental improvements in Peru. Add.57-58 & n.36. But here, again, what the district court described and the record shows, *see id.* (citing the Zelms deposition, App.228-47; R. Doc. 871-3), is the kind of general "oversight of a subsidiary," *Bestfoods*, 524 U.S. at 72, that does not create a nexus to the United States, *Nestlé*, 141 S. Ct. at 1937.

***

In sum, the record shows that, as every President and General Manager of Doe Run Peru, including Neil and Buckley, explained, "[n]o one from the United States, whether at Doe Run [U.S.] or Renco, had any role in the daily operational management of Doe Run Peru or the La Oroya Complex." *E.g.*, App.388, 380, 419-21; R. Doc. 1233-7, at 3; R.

Doc. 1233-6, at 10; R. Doc. 1233-8, at 21-23. What the district court described as "conduct and decisions made in the United States", Add.59, amounts to a U.S. parent corporation conducting "oversight of a [foreign] subsidiary." *Bestfoods*, 524 U.S. at 72.

But even *if* Defendants had "made all major operational decisions from within the United States," that would not be enough to overcome a comity argument. *Nestlé*, 141 S. Ct. at 1935. That the Supreme Court in *Nestlé* viewed analogous U.S.-based decisionmaking (there, U.S.-based approval of kickbacks to cocoa plantations allegedly paid with the express goal of maintaining child slavery) to involve an extraterritorial application of U.S. law illustrates that "the justification for adjudicating th[is] matter in U.S. courts" is exceedingly weak—indeed nonexistent. *Mujica*, 771 F.3d at 605-06. Were it otherwise—if courts did not construe the nexus requirement for comity and the ATS in parallel—foreign plaintiffs would have an easy end-run around restrictions on relief under the ATS: They could simply file a common-law tort suit in state court. Shifting foreign litigation from federal court into state court *compounds* the comity issues described above; it does not solve them.

CONCLUSION

For all these reasons, the Court should reverse the district court and remand with instructions to dismiss the case.

Respectfully submitted,

/s/E. Joshua Rosenkranz

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Robert M. Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Andrew T. Bayman
Geoffrey M. Drake
KING & SPALDING LLP
1180 Peachtree Street NE
Suite 1600
Atlanta, GA 30309

Edward L. Dowd, Jr.
James F. Bennett
Jeffrey R. Hoops
DOWD BENNETT LLP
7733 Forsyth Boulevard
Suite 1900
St. Louis, MO 63105

Thomas P. Berra, Jr.
Michael Hickey
LEWIS RICE LLC
600 Washington Avenue
Suite 2500
St. Louis, MO 63101

Tracie Jo Renfroe
KING & SPALDING LLP
1110 Louisiana Street
Suite 4100
Houston, TX 77002

Counsel for Defendants-Appellants

June 29, 2023

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

This brief has been scanned for viruses pursuant to Eighth Circuit Local Rule 28A(h)(2) and is virus-free.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on June 29, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel for Defendants-Appellants