Why do defendants routinely seek to dismiss transnational tort cases brought in a U.S. court on grounds that permit or even encourage plaintiffs to sue elsewhere? One answer: They are mistakenly relying on past experience. The common perception has long been that if a case were dismissed on one of several of what I call “transnational litigation avoidance doctrines,” the case would be over. As shown most dramatically by two high-profile cases, the Chevron/Ecuador and the Nicaragua DBCP litigations, this assumption is false. Foreign fora are increasingly hospitable to high-stakes litigation and plaintiffs are increasingly choosing them. The resulting foreign judgments, in turn, can be readily enforced in the United States, which has one of the most lenient foreign-money-judgment-enforcement regimes in the world. Defendants nevertheless continue to invoke transnational litigation avoidance doctrines aggressively, operating on mistaken assumptions about the imminence of finality following dismissal from a U.S. court, and insufficiently sensitive to the potential benefits of litigating in U.S. courts and to the realities of U.S. foreign-judgment enforcement.

To help understand this behavior, Section 1 of this chapter offers a framework for understanding “transnational litigation avoidance doctrines” as a group. Section 2 discusses some of the consequences of their expansion in light of defendants’ mistaken assumptions about transnational litigation in the U.S. and abroad. First, as a result of the growing popularity and success of transnational litigation avoidance doctrines, the path of transnational tort litigation brought in the United States has become more circuitous: It is increasingly likely to be dismissed, go abroad, and return in the form of a judgment. This process undermines institutional—and some party—interests in getting to finality, but it does advance other goals. Second, the expansion of transnational litigation avoidance doctrines coupled with the growing
receptiveness of foreign fora likely will lead eventually to plaintiffs bringing more cases abroad and, in those still brought in the United States, defendants one day invoking transnational litigation avoidance doctrines more sparingly. Doing so, I argue, may result in an unexpected feedback loop that will further strengthen the doctrines and encourage plaintiffs to sue elsewhere in the first instance. As U.S.-style transnational litigation thus becomes more prevalent in foreign jurisdictions, where corporate defendants may not have assets, those defendants that eschewed U.S. courts in the first instance will increasingly have to confront the generous U.S. enforcement regime. The enforcement of these foreign judgments, however, may make transnational litigation avoidance doctrines less attractive in retrospect, and ultimately will make them less attractive ex ante. When defendants therefore invoke these doctrines only in cases where they have confidence in the foreign forum, however, the doctrines may become even stronger as courts are more willing to defer to such jurisdictions. Section 3 considers the importance of these developments and their effect on various stakeholders. Although there are certain systemic benefits to foreign jurisdictions hosting more transnational litigation, it is unclear whether plaintiffs or defendants will fare better in foreign courts, and certain benefits of U.S. adjudication of disputes will be lost.

1 Transnational Litigation Avoidance Doctrines

I use the term “transnational litigation avoidance doctrines” to describe those grounds that permit or require courts to dismiss transnational litigation1 before reaching the merits for a reason associated with the case’s “foreign-ness.” Forum non conveniens—according to which a court may dismiss a case if it finds, at the defendant’s request, that a foreign forum would be more convenient for the defendant—is a common example.2 There are a variety of other such doctrines, including enforcement of forum selection clauses,3 international comity, and,

1 By “transnational,” I mean cases with a foreign or international component, e.g., the conduct at the center of the case occurred abroad, one or more of the parties is foreign, or the case involves the application of foreign law. See, e.g., Donald Earl Childress III, Forum Conveniens: The Search for A Convenient Forum in Transnational Cases, 53 Va. J. Int’l L. 157, 179 n. 1 (2012) (hereinafter Childress, Forum Conveniens) (using this nomenclature).
3 When faced with tort litigation, defendants can use forum selection clauses, when they point to a foreign forum, to try to have the case dismissed. See, e.g., Lam Yeen Leng v. Pinnacle