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Aguinda v. Chevrontexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States

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AGUINDA v. CHEVRONTEXACO: MANDATORY GROUNDS FOR THE NON-RECOGNITION OF FOREIGN JUDGMENTS FOR ENVIRONMENTAL INJURY IN THE UNITED STATES

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"At the end of the day, it might be a situation where a U.S. court enforces the judgment, and the marshals have to go to Chevron and seize their assets."[1]

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1. *60 Minutes, Amazon Crude* (CBS television broadcast May 3, 2009) (quoting Steven Donziger, co-counsel for the plaintiffs in *Aguinda v. ChevronTexaco*).

INTRODUCTION

In May 2003, forty-six residents of Sucumbios, Kichwa and Orellana Provinces of Ecuador (plaintiffs) filed a lawsuit against Chevron Corporation (Chevron) in the Superior Court of Justice of Nueva Loja in the Sucumbios Province.[2] The plaintiffs' claims arose from past and ongoing environmental contamination resulting from oil and natural gas operations conducted by a consortium in which Texaco, Inc. (Texaco) participated from 1964 through 1992.[3] The amount of damages sought by the plaintiffs grew from $16.3 billion in April 2008 to $27.3 billion by November 2008.[4] The plaintiffs' attorneys have described the case as an opportunity to "re-allocate some of the costs of globalization . . . from the most vulnerable rainforest dwellers to the most powerful energy companies on the planet."[5] The breadth of the litigation characterized by this statement, the length of time associated with the prosecution of the claims and the amount of damages have caused *Aguinda* to be labeled as "the world's largest environmental lawsuit."[6]

The value of any resultant judgment depends upon its recognition in the United States. The United States is perhaps the most receptive of any state to the recognition of foreign judgments.[7]

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2. Plaintiffs' Complaint Addressed to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio), Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed May 7, 2003) (Ecuador) [hereinafter Lago Agrio Complaint]; *see* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413, 629, 631 (2006) (setting forth a comprehensive history of the Ecuadorian litigation through 2006). Residents of Sucumbios, Kichwa and Orellana Provinces are known as "the afectados" ("affected peoples") and include members of the Cofan, Huaorani, Kichwa, Secoya, and Siona indigenous groups and colonists. *Id.* at 629, 631.

3. Lago Agrio Complaint, *supra* note 2, at 4, 9-14. Chevron was named as a defendant as a result of its October 2001 acquisition of Texaco. *Id. at* 8, 19.

4. CHEVRON CORP., 2008 ANNUAL REPORT 47 (2008), *available at* http://www.chevron.com/annualreport/2008/documents/pdf/Chevron2008AnnualReport_full.pdf [hereinafter ANNUAL REPORT] (noting that a mining engineer appointed by the court suggested damages in the amount of $8 billion for environmental remediation, restoration of natural resources, medical monitoring and negative health effects, disease and death allegedly cause by prolonged human exposure to hydrocarbons and $8.3 billion for unjust enrichment in April 2008, which amounts increased to $18.9 billion and $8.4 billion respectively by November 2008).

5. Steven R. Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America*, HUM. RTS. BRIEF, Winter 2004, at 1, 1.

6. *See* Simon Romero & Clifford Krauss, *A Well of Resentment*, N.Y. TIMES, May 15, 2009, at B1.

7. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 8, introductory note (1987); Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 290 (2007). For purposes of this article, a "foreign-country judgment" is defined as "a judgment of a court of a foreign country." UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005) § 2(2), 13 U.L.A. pt. II 7 (Supp. 2009) *available at* http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf

However, there are no applicable federal statutes or U.S. treaty obligations. Rather, the issue of whether to recognize a foreign judgment is governed by state law.[8] The majority of states have addressed this issue through two statutes. Thirty states, plus the District of Columbia and the U.S. Virgin Islands have adopted the Uniform Foreign Money Judgments Recognition Act of 1962 (1962 Act)[9] while thirteen states have adopted its successor, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (2005 Act).[10] These competing statutes and resulting patchwork of case law have rendered the area of recognition of foreign judgments in the United States unpredictable.[11]

This article examines the status of any potential judgment in the context of mandatory grounds for non-recognition pursuant to the 1962 and 2005 Acts. The article initially examines the history of Texaco's investment in Ecuador's petroleum industry, the environmental impacts allegedly resulting from this investment, and the procedural history of resultant U.S. and Ecuadorian litigation. The article then examines the mandatory grounds for non-recognition in the Acts and their application to any potential judgment that may be rendered in Ecuador. The article concludes that Chevron may be able to establish several significant defenses

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[hereinafter 2005 ACT]; *see* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962) § 1(2), 13 U.L.A. pt. II 39 (2002) *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf [hereinafter 1962 ACT].

8. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (extending Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) to conflicts of law issues); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), pt. IV, ch. 8, introductory note.

9. 1962 ACT, *supra* note 7. The 1962 Act has been adopted by Alaska, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and U.S. Virgin Islands, Virginia, and Washington. Uniform Law Commissioners, A Few Facts About the Uniform Foreign Money Judgments Recognition Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Apr. 13, 2010).

10. 2005 ACT, *supra* note 7. The 2005 Act has been adopted by California, Colorado, Hawaii, Idaho, Iowa, Michigan, Montana, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, and Washington; *see* Uniform Law Commissioners, A Few Facts About the Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp (last visited Apr. 13, 2010). The remaining nineteen states rely upon the common law doctrine of comity. *See infra* note 143 and accompanying text.

11. Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 70 (2006); *see* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (stating that there are few areas of law that are "in a more unreduced and uncertain condition" than enforcement of foreign judgments in the United States); Violeta I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 250 (2003) (referring to the different approaches to the recognition of foreign judgments in the United States as "a scholar's delight").

to recognition. However, Chevron's burden is substantial and presents significant risks for the company.

I. TEXACO IN ECUADOR: A BRIEF HISTORY

A. Hydrocarbon Exploitation and Texaco's Investment

Petroleum exploration in Ecuador dates back to the late nineteenth century.[12] Petroleum exploration in the Oriente, the eastern lowlands, including the eastern slopes of the Andes and a portion of the Amazon River basin, began in the 1920s and continued on a sporadic basis until 1961.[13] In 1964, the Ecuadorian government invited Texaco and Gulf Oil Corporation (Gulf) to conduct exploratory activities in the Oriente.[14] Texaco and Gulf formed a consortium (Consortium) with equal ownership rights through their Ecuadorian subsidiaries to conduct this exploration.[15] The Consortium discovered oil in commercial quantities in 1967 and began export operations in 1972 after completion of a pipeline to Ecuador's Pacific coast.[16] By the end of 1973, production had reached 200,000 barrels of oil per day, and Ecuador's Gross National Product more than doubled in a six year period.[17] Texaco served as the operator on behalf of the Consortium throughout this period of time.[18]

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12. In 1878, Ecuador's National Assembly granted "exclusive [development] rights to M.G. Mier and Company for the extraction of petroleum, tar [and] kerosene . . . in the Santa Elena Peninsula." Texaco, Inc., Texaco in Ecuador: Background on Texaco Petroleum Company's Former Operations in Ecuador, http://www.texaco.com/sitelets/Ecuador/en/history/background.aspx (last visited Apr. 13, 2010) [hereinafter Background on Texaco].

13. Phoenix Can. Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1064 (D. Del. 1987) (discussing unsuccessful oil exploration in the Oriente in the 1920's and 1940's and the granting of a concession to Minas y Petroleos del Ecuador to conduct oil exploration in the Napo, Pastaza, and Morona Santiago provinces of the Oriente in 1961); *see* Background on Texaco, *supra* note 12 (discussing the grant of oil concessions to Shell Oil Company in the Oriente in 1937).

14. Lisa Lambert, Note, *At the Crossroads of Environmental and Human Rights Standards:* Aguinda v. Texaco, Inc. *Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 112 (2000).

15. The Consortium agreement was between Compania Texaco de Petroleos del Ecuador, an Ecuadorian subsidiary of Texaco Ecuador, and Gulf Ecuatoriana de Petroleo, an Ecuadorian subsidiary of Gulf Ecuador. *See Phoenix Can. Oil Co.*, 658 F. Supp. at 1065. Compania Texaco de Petroleos del Ecuador's interest in the Consortium was acquired by Texas Petroleum Company, a subsidiary of Texaco in 1973. Jota v. Texaco, Inc., 157 F.3d 153, 156 n.3 (2d Cir. 1998).

16. Kimerling, *supra* note 2, at 414-15.

17. *Id.* at 417. Ecuador's Gross National Product increased from $2.2 billion in 1971 to $5.9 billion in 1977. *Id.*

18. Lago Agrio Complaint, *supra* note 2, at 5 (alleging that Texaco "had under its responsibility, the design, construction, installation and operation of the infrastructure and necessary equipment for the exploration and exploitation of the crude oil"); *see* Kimerling,

The Consortium underwent significant changes in the 1970's. In September 1971, the Ecuadorian government enacted a new hydrocarbons law that limited the size of concession areas granted to foreign oil companies, increased the royalty payable to the government, and decreed that "[t]he deposits of hydrocarbons and accompanying substances, in whatever physical state, located in the national territory . . . belong to the inalienable . . . patrimony of the State."[19] The hydrocarbons law became effective in June 1972 after the military seized control of the government.[20] As a result, Texaco and Gulf were required to relinquish a portion of the concession area to the state-owned oil company Compania Estatal Petrolera Ecuatoriana (CEPE).[21] A new concession agreement was executed in August 1973.[22] This agreement provided that CEPE would begin participating in the Consortium in 1977.[23] However, in January 1974, the Ecuadorian government issued a decree commencing CEPE's participation in June 1974.[24] Texaco and Gulf were thus required to execute another agreement granting CEPE a 25% interest in the Consortium.[25] Two and one-half years later in December 1976, Gulf transferred its remaining 37.5% interest to CEPE.[26]

From 1977 to 1990, the Consortium operated with Texaco and CEPE/Petroecuador as the only participants and Texaco as the operator.[27] On July 1, 1990, Petroamazonas, a subsidiary of Petroecuador, replaced Texaco as the operator.[28] The concession agreement expired on June 6, 1992.[29] Ecuador elected not to renew the

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supra note 2, at 435.

19. *Phoenix Can. Oil Co.*, 658 F. Supp. at 1066 (citing LEY DE HIDROCARBUROS [Hydrocarbons Law], art. 1 (Ecuador)).

20. *Id.* (discussing Supreme Decree No. 430 (June 6, 1972) (Ecuador)).

21. CEPE was subsequently reorganized and became Petroecuador. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 339 (S.D.N.Y. 2005) (discussing CEPE's organization and operations).

22. *Phoenix Can. Oil Co.*, 658 F. Supp. at 1070 (discussing the negotiation and execution of the August 1973 concession agreement).

23. *Republic of Ecuador*, 376 F. Supp. 2d at 339-40 (discussing the effective date of the August 1973 concession agreement).

24. *Id.* (discussing Supreme Decree No. 9 (Jan. 10, 1974) (Ecuador)).

25. *Id.* at 340 (discussing the negotiation and execution of the June 1974 concession agreement).

26. *Id.* (discussing the transfer of Gulf's interest to CEPE); *Phoenix Can. Oil Co.*, 658 F. Supp. at 1076. The agreement transferring Gulf's interest to CEPE was signed on May 27, 1977 but was effective on December 31, 1976 and required the payment of $82.1 million to Gulf. Kimerling, *supra* note 2, at 420 n.17.

27. *See* Kimerling, *supra* note 2, at 420.

28. *See Republic of Ecuador*, 376 F. Supp. 2d at 340-41. A new operating agreement appointing Petroamazonas as operator was executed on March 25, 1991 effective on July 1, 1990. *Id.* The agreement provided that Petroamazonas would remain the operator in the concession area until the expiration of the 1973 concession agreement. *Id.*

29. *Id.* at 341.

agreement and assumed complete control of the concession area.[30] At the time of the termination of Texaco's interest, the Consortium had operations on more than one million acres, had 339 wells, 18 production stations, 1500 kilometers of pipelines, and had extracted more than 1.4 billion barrels of oil.[31]

B. The Environmental Legacy

The Consortium's operations have exacted a heavy toll on the environment and people of the Oriente region. Oil production and pipeline operations were alleged to have resulted in the discharge of twenty-six million gallons of crude oil and toxic wastewater into the surrounding environment.[32] Approximately 2.5 million acres were impacted by oil-related discharges into wetlands, streams and rivers and leeching into soil and groundwater as well as by combustion of crude oil and the flaring of natural gas.[33] The plaintiffs also alleged that the Consortium dug and operated hundreds of unlined pits, which were used to store toxic chemicals utilized in drilling operations as well as other runoff.[34] Of particular concern in this regard is so-called "production water" and "formation water."[35] The amount of production and formation waters discharged

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30. *Id.*; *see* Texaco, Inc., Texaco in Ecuador: A Timeline of Events, http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx (last visited Apr. 13, 2010).

31. Complaint at 22, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) [hereinafter New York Complaint]; Kimerling, *supra* note 2, at 449-50 (utilizing production estimates from Ecuador's Ministry of Energy and Mines); Debra Abelowitz, Note, *Discrimination and Cultural Genocide in the Oil Fields of Ecuador: The U.S. as a Forum for International Dispute*, 7 NEW ENG. INT'L & COMP. L. ANN. 145, 146 (2001).

32. *See* Abelowitz, *supra* note 31, at 146 (estimating that 10 million gallons of crude oil were discharged as a result of operations associated with exploration and drilling activities and 16 million gallons were discharged as a result of pipeline ruptures); *see* AMAZON DEFENSE COALITION, RAINFOREST CATASTROPHE: CHEVRON'S FRAUD AND DECEIT IN ECUADOR 4 nn.8, 11 (2006) *available at* http://www.amazonwatch.org/amazon/EC/toxico/downloads/FraudInvestReportNov8.pdf (stating that millions of gallons of crude oil were discharged as a result of exploration and drilling activities and as a result of pipeline ruptures).

33. Abelowitz, *supra* note 31, at 146 (based upon estimates provided by the Rainforest Action Network).

34. Lago Agrio Complaint, *supra* note 2, at 9, 11. The plaintiffs alleged that the Consortium dug and operated 916 open air unlined pits. Amazon Watch, Environmental Impacts, http://chevrontoxico.com/about/environmental-impacts (last visited Apr. 13, 2010). However, this number has been difficult to verify given the possibility of other undiscovered pits and the absence of a master list. *See 60 Minutes, Amazon Crude*, *supra* note 1.

35. "Produc[tion] water" is defined as a mixture of "crude oil, formation water, and chemicals that have been injected down a well or used in the separation process." Kimerling, *supra* note 2, at 452. Chemicals contained in production water may include "biocides, fungicides, coagulants, cleaners, dispersants, paraffin control agents, descalers, foam retardants and corrosion inhibitors." *Id.* at 452 n.106. "Formation water" is defined as "water [contained] in underground geologic formations, . . . [including] hydrocarbon-bearing forma-

directly into the environment as a result of the Consortium's operations is disputed, in part due to difficulties in distinguishing between them and the absence of reliable records.[36] In any event, the amount of such discharged waters was substantial. Additional sources of environmental contamination included the burning of crude oil, gas flaring, and spraying of roads with crude oil for maintenance and dust control.[37]

The consumption of contaminated water and livestock, inhalation of polluted air and exposure to hydrocarbons in the soil were alleged to have severely affected the health and life expectancy of residents.[38] The plaintiffs contended that eighty-three percent of the population of the Oriente suffered one or more diseases attributable to hydrocarbon contamination, including cancer, the mortality rate for which was three times higher than the general population and five times higher than in other Amazon provinces.[39] According to the plaintiffs, seventy-five percent of Oriente residents had suffered a total or partial loss of their crops, and ninety-four percent suffered the loss of animals as a result of hydrocarbon contamination.[40] Indigenous populations were alleged to have suffered in particular through "the violent destruction of their natural habitat and, consequently, of their subsistence means, their way of life and habits."[41]

Ecuador and Texaco attempted to address these environmental and health issues upon the termination of the Consortium. In

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tions," that is brought to the surface in recovery operations. *Id.* at 452. Formation water contains hydrocarbons, including benzene and polycyclic aromatic hydrocarbons, heavy metals (such as cadmium and mercury) and significant concentrations of salt. *Id.*

36. *See, e.g.*, Lago Agrio Complaint, *supra* note 2, at 11 (estimating that the Consortium "contaminated the soil, estuaries, swamps, rivers and natural streams with 464,766,540 barrels of formation waters"); AMAZON DEFENSE COALITION, *supra* note 32, at 16 n.8 (alleging that "Chevron had admitted to discharging roughly 18.5 billion gallons of toxic 'water of formation' in Ecuador"); Kimerling, *supra* note 2, at 450 (alleging that the Consortium "deliberately dumped tons of toxic drilling and maintenance wastes, in addition to an estimated 19.3 billion gallons of oil field brine, into the environment without treatment or monitoring—contaminating countless rivers and streams that served as rich fisheries and water sources for local communities" (citations omitted)); Amazon Watch, *supra* note 34 (alleging that the Consortium discharged 18 billion gallons of "produced water" into surface streams).

37. *See* Lago Agrio Complaint, *supra* note 2, at 11-12 (estimating that Texaco flared 235 billion cubic feet of natural gas during its time as operator of the Consortium and "systematically and continually [spread] crude debris onto the roads"); Kimerling, *supra* note 2, at 451 (alleging that natural gas "was flared, or burned as a waste, without temperature or emission controls, depleting a nonrenewable natural resource and polluting the air and rain with greenhouse gases . . . and other contaminants"); Amazon Watch, *supra* note 34 (identifying the "[r]elease of contaminants through gas flaring, burning and spreading oil on roads" as major sources of pollution).

38. Lago Agrio Complaint, *supra* note 2, at 12.

39. *Id.* at 13.

40. *Id.*

41. *Id.* at 14.

1992, Petroecuador and Texaco retained two environmental consulting firms to conduct an audit of the Consortium's facilities.[42] The results of the audit remain in dispute. Critics contend that the audit was controlled by representatives of Petroecuador and Texaco who limited its scope to environmental impacts, were required to approve personnel conducting inspections as well as inspection sites, and selected the applicable laws and practices that the auditors were to verify in their reports.[43] Furthermore, forty percent of the auditors' fees were contingent upon approval of the results by designated Texaco and Petroecuador representatives.[44] Despite these limitations, it has been alleged that the auditors observed oil or chemical spills at 158 of the 163 sites that they visited and found contamination in every sample of subsurface soils and groundwater that was analyzed for hydrocarbons.[45] By contrast, Texaco claimed that the audits "independently concluded that [it] acted responsibly and that there is no lasting or significant environmental impact from the former consortium operations."[46]

In May 1995, Texaco, Ecuador and Petroecuador entered into "Contract For Implementing Of Environmental Remedial Work and Release From Obligations, Liabilities and Claims" (Remediation Agreement) wherein Texaco agreed to perform work on designated sites in return for a release of claims from Ecuador and Petroecuador.[47] The Remediation Agreement released Texaco and all related companies from claims arising from environmental degradation associated with the Consortium's activities other than those arising from the remediation Texaco was obligated to perform.[48] Texaco began remediation work in 1995 and completed this work

42. Texaco, Inc., Texaco in Ecuador: Remediation, http://www.texaco.com/sitelets/ecuador/en/remediation/default.aspx (last visited Apr. 13, 2010) [hereinafter Remediation]. Petroecuador retained AGRA Earth & Environmental, Ltd., and Texaco retained Fugro-McClelland to conduct the environmental audits. Press Release, Chevron Corp., Inspection by Environmental Experts Confirms that Texaco Conducted an Effective Cleanup in Full Compliance with its Obligations to the Government (Mar. 24, 2004), *available at* http://www.chevron.com/news/press/Release/?id=2004-03-24.

43. Kimerling, *supra* note 2, at 468-71.

44. *Id.* at 471.

45. *Id.* at 473.

46. Remediation, *supra* note 42. Texaco noted that the Fugro-McClelland audit concluded that "fully 70% of the hydrocarbon contamination in the production installations, and 50% of the soil hydrocarbon contamination in the drilling platforms and of the pools '. . . was attributable to the operations of PetroAmazonas . . . from 1990 to 1992.' " Chevron Corp., *supra* note 42.

47. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 341-42 (S.D.N.Y. 2005) (summarizing the Remediation Agreement). The Remediation Agreement has been subject to criticism on the basis that it granted Ecuador's Ministry of Energy and Mines only fifteen days to inspect remediated sites and inform Texaco of any "significant deviations" and lacked "independent oversight of remedial activities, long term monitoring, public comment, or transparency in the approval process." Kimerling, *supra* note 2, at 496.

48. *Republic of Ecuador*, 376 F. Supp. 2d at 342.

in 1998.[49] Texaco spent $40 million in this effort, which included closing and remediating 161 waste pits and seven overflow areas, plugging and abandoning eighteen wells and remediating soil at thirty-six sites.[50] Texaco also made two payments of $1 million each for socio-economic projects[51] and made payments totaling $4.6 million to the municipalities of Lago Agrio, Shushufindi, Joya de los Sachas and Francisco de Orellana in return for their withdrawal of lawsuits and a release from all current and future liability.[52] Despite criticism of Texaco's efforts,[53] in September 1998, the Ecuadorian government and Petroecuador signed the "Act of Final Liberation of Claims and Equipment Delivery" (Final Act) in which they recognized that Texaco had fulfilled its obligations pursuant to the 1995 agreement and released it from current and future liability.[54]

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49. Texaco contracted with Woodward Clyde International and Smith Environmental Technologies to prepare an action plan to be utilized in conducting remediation. Kimerling, *supra* note 2, at 497-98, 497 n.223.

50. Press Release, Chevron Corp. *supra* note 42. Texaco also installed three produced water treatment and reinjection systems, provided Petroecuador with equipment for ten additional systems, designed three oil containment systems, and conducted extensive replanting of native vegetation at the remediated sites. *Id.*

51. CHEVRONTEXACO, CORP., 2002 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT 50 (2003), *available at* http://www.chevron.com/documents/pdf/corporateresponsibility/Chevron_CR_Report_2002.pdf.

52. *See* Kimerling, *supra* note 2, at 511-12.

53. *See* AMAZON DEFENSE COALITION, *supra* note 32, at 5 (contending that Texaco paid less than 1% of the cost of remediation, hid the existence of more than 200 waste pits, failed to follow legal and customary standards for performing the remediation, failed to treat 92 waste pits that it agreed to remediate, and submitted misleading laboratory results to the Ecuadorian government in order to obtain certification of its efforts). The Amazon Defense Coalition also claimed that the remediation constituted "a legal admission that [Texaco] created harmful levels of contamination in Ecuador . . . . [as it] was under no legal obligation to pay damages to the Ecuadorian government, and the Ecuadorian government had neither sued Texaco nor claimed that Texaco was liable for clean-up." *Id.* at 6. *See also* Kimerling, *supra* note 2, at 502-03 (criticizing Texaco's remediation efforts as failing to address contamination at hundreds of well sites and waste pits and adequately remedy contaminated soils and sludge by covering them with dirt without further action). *But see* Defendant's Motion to Dismiss at 12, Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nuevo Loja (Lago Agrio), No. 002-2003 (filed Oct. 8th, 2007) (Ecuador) [hereinafter Defendant's Motion to Dismiss] (contending that Texaco performed environmental remediation at 41% of the sites in use during its tenure as operator, which was in excess of its ownership interest in the Consortium); Press Release, Chevron Corp. *supra* note 42, (claiming that Texaco's remediation efforts were conducted in accordance with standards established by the U.S. Environmental Protection Agency and the American Petroleum Institute and were certified as free of hydrocarbon contamination by URS Corporation and the Universidad Central de Ecuador).

54. *See* Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (quoting the Final Act as declaring that Texaco's obligations pursuant to the 1995 agreement were "fully performed and concluded" and that the government and Petroecuador "proceed[ed] to release, absolve, and discharge [Texaco and its related companies] from any liability and claims by the Government of the Republic of Ecuador, Petroecuador and its affiliates, for items related to the obligations assumed by [Texaco] in the 1995 Settlement"); Letter from Ivonne A-Baki, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (Nov. 11, 1998) (on file with the author) (describing the

II. TEXACO IN ECUADOR: THE RESULTING LITIGATION

A. Litigation in the United States

In November 1993, seventy-four Ecuadorians filed a class action lawsuit against Texaco in the U.S. District Court for the Southern District of New York.[55] The plaintiffs purported to represent more than 30,000 persons residing in the Oriente region who had suffered damages from hydrocarbon contamination as a result of the Consortium's operations.[56] The plaintiffs alleged numerous tort claims and a claim pursuant to the Alien Tort Statute.[57] The claims were ultimately dismissed on the basis of *forum non conveniens*, and the dismissal was upheld by the U.S. Court of Appeals for the Second Circuit.[58] Although detailed discussion of the U.S. litigation is beyond the scope of this article, the litigation is important to the subsequent proceedings in Ecuador and the potential recognition of any judgment.

The initial important result emerging from the litigation is the

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Final Act as having "absolved, liberated and forever freed [Texaco], its employees, principals and subsidiaries of any claim or litigation by the Government of the Republic of Ecuador concerning the obligations acquired by [Texaco] in the [May 4, 1995] contract").

55. *See* New York Complaint, *supra* note 31.

56. *Id.* at 4, 11, 14-15, 17-19.

57. The plaintiffs stated causes of action sounding in negligence, public and private nuisance, strict liability, trespass, and civil conspiracy. *Id.* at 27-35. In addition, the plaintiffs stated a cause of action pursuant to the Alien Tort Statute. *Id.* at 35. The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

58. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002). Texaco initially moved for dismissal on the basis of the plaintiffs' failure to join the Republic of Ecuador, *forum non conveniens*, and comity. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 U.S. Dist. LEXIS 4718, at *2 (S.D.N.Y. Apr. 11, 1994). The district court ordered discovery as to whether Texaco's U.S. headquarters directed the activities of its Ecuadorian subsidiaries and the necessity of utilizing evidence located in Ecuador to prove the plaintiffs' claims. *Id.* at *3. The district court subsequently granted Texaco's motion to dismiss on the basis of *forum non conveniens*. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (citing Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994)). However, this dismissal was reversed by the U.S. Court of Appeals for the Second Circuit due to the absence of a requirement that Texaco submit to personal jurisdiction in Ecuador. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998). Upon reconsideration, the district court again dismissed the complaint on the basis of *forum non conveniens*, but only after obtaining Texaco's written consent to "being sued on these claims (or their Ecuadorian equivalents) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of this dismissal any statute of limitations-based defenses that may have matured since the filing of the instant Complaints." Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 539-554 (S.D.N.Y. 2001). The Second Circuit Court of Appeals affirmed this dismissal with the modification that Texaco "waive any defense based on [the] statute of limitations for limitation periods expiring between the date of filing these United States actions and one year (rather than 60 days) following the dismissal of these actions." *Aguinda*, 303 F.3d at 478-80.

viewpoints of the U.S. courts, Texaco and the Ecuadorian government regarding potential forums. The U.S. courts were unanimous in their ultimate conclusion that Ecuador was adequate at least for purposes of *forum non conveniens* analysis. This conclusion was based upon existing precedent[59] as well as the Second Circuit and district court's independent inquiries.[60] This conclusion was endorsed by Texaco, which praised the dismissal and concluded that Ecuador was the appropriate forum due to the location of the plaintiffs, Petroecuador, the operations, and the evidence.[61] Texaco also noted that the remedies sought by the plaintiffs could only be awarded by Ecuadorian courts.[62]

The adequacy of the Ecuadorian judicial system was echoed by the Ecuadorian government, albeit in a different manner. The government contended that U.S. courts were an inadequate forum and that the claims could only be tried in Ecuador. As all natural resources and land, including that upon which the Consortium conducted its operations, were owned by the government, any decision by a foreign court with respect to rights and duties associated with such resources and land was an affront to national sovereignty.[63] According to the Ecuadorian government, private citizens had no right to seek damages for environmental harm to public lands.[64] As a result, the government condemned "the . . . plaintiffs' attorneys in this matter [for] attempting to usurp rights that belonged to the

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59. *See, e.g.*, Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995) (mass tort litigation arising from pesticide exposure); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997) (tort litigation arising from fungicide exposure). *But see* Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978) (concluding that Ecuador was not an adequate alternative forum due, in part, to military control of the judiciary).

60. *See Aguinda*, 303 F.3d at 478 (agreeing with the lower court's conclusion that Ecuador was an adequate alternative forum due to the absence of impropriety by Texaco or the Consortium in any prior judicial proceeding in Ecuador; the pendency of numerous claims against multinational enterprises without evidence of corruption; the adoption of measures to further judicial independence; and the existence of close public and political scrutiny of the plaintiffs' claims, which would prevent the application of undue influence upon the court); *Aguinda*, 142 F. Supp. 2d at 539-45 (concluding that Ecuador was an adequate alternative forum due to the successful prosecution of tort claims by oil workers against the Consortium; the absence of impropriety by Texaco or the Consortium in any prior judicial proceeding in Ecuador; the pendency of numerous claims against multinational enterprises without evidence of corruption; the adoption of measures to further judicial independence; and the existence of close public and political scrutiny of the plaintiffs' claims).

61. *See* Press Release, ChevronTexaco Corp., ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation (Aug. 19, 2002), *available at* http://www.chevron.com/news/press/Release/?id=2002-08-19a; Press Release, Texaco Corp., Texaco Statement re: 01/31/00 Order of the U.S. District Court (Jan. 31, 2000), *available at* http://www.chevron.com/news/Press/Release/?id=2000-01-31&co=Texaco.

62. *See* Press Release, Texaco Corp., *supra* note 61.

63. *See* Defendant's Motion to Dismiss, *supra* note 53, at 16.

64. *Id.*

government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law."[65]

The second important result is the district court's holding with respect to the relationship between Texaco and its Ecuadorian subsidiaries. The district court concluded that the plaintiffs had "come up bone dry" and failed to establish "a meaningful nexus" between the United States and the decisions and practices at issue in the litigation.[66] The plaintiffs were unable to establish "parental control or direction over the pipe design, waste disposal, and other allegedly negligent practices of the Consortium."[67] Rather, the plaintiffs were only able to demonstrate the exercise of general oversight regarding expenses and finances, the rendering of advice on operational decisions previously made in Ecuador, and the provision of technical information on "the maximum safe levels of salt and oil in water and how to clean up oil spills."[68] This evidence fell far short of that needed to establish direction and control of Texaco's subsidiaries such as to impose liability upon the parent corporation.[69] As a result, in July 1995, the plaintiffs stipulated that they had no knowledge, information, or documents having any tendency to prove or lead to the discovery of information or documents that might tend to prove "events relating to the harm alleged by plaintiffs occurring in the United States [including directions, communications, discussions, assistance, or guidance] and . . . the extent, if any, to which conduct *in the United States* caused actionable harm."[70]

The conditions imposed upon Texaco with respect to the dismissal of the complaint are also significant.[71] These conditions are commonly imposed in cases in which dismissal is sought pursuant to *forum non conveniens*, including cases involving environmental harm.[72] However, neither the Second Circuit nor the district court

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65. *Id.* (quoting Letter from Edgar Terán, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (June 10, 1996) (alteration in original)).

66. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 550 (S.D.N.Y. 2001).

67. *Id.* at 549.

68. *Id.* at 550.

69. The district court concluded that:

> [T]he record before the Court, when scrutinized in terms of admissible evidence, establishes overwhelmingly that Texaco's only meaningful involvement in the activities here complained of was its indirect investment in its fourth-tier subsidiary . . . which is not a party here and which conducted its participation in the activities here complained of almost exclusively in Ecuador.

Id. at 548.

70. *Id.* at 550.

71. *See supra* note 58 and accompanying text.

72. *See, e.g., In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-04 (2d Cir. 1987) (affirming the district court's dismissal of the complaint pursuant to *forum non conveniens* on the condition that Union Carbide Corporation consent to personal jurisdiction

conditioned their dismissals upon Texaco's consent to be bound by a judgment resulting from the proceedings in Ecuador. As held by the Second Circuit in the Bhopal litigation, the imposition of such a condition would be premature, predicated on "an erroneous legal assumption" that foreign judgments are not otherwise enforceable in the United States and in disregard of applicable state law.[73] Furthermore, a dismissal on the basis of *forum non conveniens* is not an endorsement of the procedural protections of an alternative forum and does not guarantee recognition of a future judgment. This is an important distinction as the plaintiffs in the Ecuadorian litigation claimed that Texaco had to "agree to pay any judgment imposed against it."[74]

Finally, the outcome in related U.S. litigation may have an impact upon the recognition of any Ecuadorian judgment in the United States. In a decision predating *Aguinda,* the U.S. District Court for the Southern District of Texas dismissed similar claims utilizing *forum non conveniens.*[75] The court found Ecuador to be an adequate alternative forum maintaining "an independent judicial system with adequate procedural safeguards."[76] Secondly, claims asserted by Oriente residents alleging that hydrocarbon pollution caused them to develop cancer were dismissed by the U.S. District Court for the Northern District of California in 2007.[77] In its dismissal order, the district court concluded that the cancer claims were baseless, "manufactured by plaintiffs' counsel," and "likely a smaller piece of some larger scheme against defendants."[78] The district court subsequently imposed Rule 11 sanctions on three of plaintiffs' counsel for failure to conduct adequate inquiry with respect to the cancer claims prior to initiating litigation.[79] In so

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in India and waive the statute of limitations as a defense). The Second Circuit described these conditions as "not unusual." *Id.* at 203.

73. *Id.* at 205 (setting aside the portion of the district court's order conditioning dismissal on the basis of *forum non conveniens* on consent to recognition of any judgment entered in India).

74. Donziger, *supra* note 5, at 3.

75. Sequihua v. Texaco, Inc., 847 F. Supp. 61, 65 (S.D. Tex. 1994).

76. *Id.* at 64.

77. Gonzalez v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 56622, (N.D. Cal. Aug. 3, 2007).

78. *Id.* at *9.

79. Gonzales v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 81222, at *33 (N.D. Cal. Oct. 16, 2007). Federal Rule of Civil Procedure 11 provides, in relevant part, that:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . [is certifying] that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable oppor-

doing, the district court described the claims as "bogus claims that should never have been on the books."[80]

B. Litigation in Ecuador

The plaintiffs initiated litigation against Chevron in Ecuador in May 2003.[81] The plaintiffs based their lawsuit upon provisions of the Ecuadorian Constitution[82] and the Environmental Management Law of 1999 that recognized a "popular action to denounce the breaching of the environmental laws [and] . . . [obtain] damages . . . for the deterioration of . . . health [and] damage to the environment."[83] The primary relief sought by the plaintiffs was "elimination and removal of . . . contaminating elements that still threaten the environment and health of the inhabitants" and "the repair of . . . environmental damages."[84] Additionally, the Complaint sought remittance of ten percent of the cost of remediation work to Frente de Defensa de la Amazonia (Frente).[85] The amount of damages was not specified.

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tunity for further investigation or discovery . . .

FED. R. CIV. P. 11(b)(3). The district court ordered sanctions in the amount of $45,000. *Gonzalez*, 2007 U.S. Dist. LEXIS 81222, at *41. It bears noting that the plaintiffs' attorneys in the California litigation are different from Plaintiffs' counsel in Ecuador.

80. *Gonzalez*, 2007 U.S. Dist. LEXIS 81222, at *40. The claims of the remaining two plaintiffs in the California litigation were subsequently dismissed pursuant to the applicable statute of limitations. Gonzales v. Texaco, Inc., No. C 06-02820WHA, 2007 U.S. Dist. LEXIS 84523, at *23-24 (N.D. Cal. Nov. 15, 2007).

81. Lago Agrio Complaint, *supra* note 2, at 27.

82. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR arts. 23, 86-88, 90-91 (guaranteeing citizens the right to live in a healthy environment, declaring that environmental protection and the preservation of biodiversity are in the public interest, requiring public consultation and approval of decisions that affect the environment, requiring the government to regulate the production, distribution, and use of substances dangerous to human life and the environment, and placing responsibility for environmental damage occurring during the delivery of public services upon the government). All references to the Ecuadorian Constitution contained herein shall be to the 1998 version, which was in force and effect at the time of the filing of the plaintiffs' complaint.

83. Lago Agrio Complaint, *supra* note 2, at 21-22 (citing LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, arts. 41, 43 (Ecuador)).

84. *Id.* at 22-25. The Plaintiffs' claims with respect to "elimination and removal of contaminating elements" included requests for removal, treatment and disposition of contaminants in waste pits, the removal of contaminants from all waterways, the removal of all structures and equipment in the vicinity of closed wells and facilities, and the "clearance of the terrains, plantations, crops, streets, roads and buildings where there may still exist contaminating residuals produced or generated as a consequence of the operations directed by Texaco, including the contaminating debris deposits built as a part of the wrongly [sic] environmental cleaning tasks." *Id.* at 23. The Plaintiffs' claims with respect to the "repair of the environmental damages" included requests to "recuperate the characteristics and natural conditions of the soil and of the adjacent terrains" in proximity to waste pits, institute recuperation and regenerative plans for flora, fauna, and aqueous life and formulate and implement a plan for monitoring and improving the health of affected inhabitants of the Oriente region. *Id.* at 24.

85. *Id.* at 25.

Chevron asserted numerous defenses which are perhaps best summarized in its Motion to Dismiss filed in October 2007. Chevron initially contended that there was no valid claim against it or Texaco, as the Environmental Management Law could not be applied retroactively to Texaco's operations in Ecuador.[86] Furthermore, the claims were barred by the remediation agreement and "Final Acta."[87] Additionally, Chevron claimed that it was not a proper party to the litigation.[88] This defense was based on a number of separate arguments. First, Chevron claimed that the plaintiffs sued the wrong entity by failing to assert claims against Texaco.[89] Second, Chevron alleged that the Superior Court lacked per-

86. Defendant's Motion to Dismiss, *supra* note 53, at 10, 13-14. The Environmental Management Law permits qualified individuals directly affected by environmental contamination to act on behalf of their communities to compel remediation and recover damages. LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, art. 43. The right to bring such an action did not exist prior to 1999. The Ecuadorian Constitution, Civil Code and applicable case law prohibit retroactive application of laws in general and the Environmental Management Law in particular. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 24(1) (stating that "[n]o one may be judged for an act or omission that at the time of perpetration, was not classified legally as a . . . [violation, nor shall a person be judged except in accordance] with the preexisting laws"); CÓDIGO CIVIL art. 7 (Ecuador) (providing that "[t]he law provides only for the future; it has no retroactive effect"); Defendant's Motion to Dismiss, *supra* note 53, at 17 (citing Calva v. Petroproduccion, Case No. 349-2000 (Superior Court of Nuevo Loja, Aug. 20, 2001) (Ecuador) (holding that the Environmental Management Law could not be applied retroactively against a production subsidiary of Petroecuador with regard to pollution that occurred prior to the law's adoption as private individuals did not possess such rights before 1999)). The only similar actions existing prior to 1999 were to prevent or report violations of environmental laws, intervene in administrative proceedings and request reversal of governmental actions that threatened environmental harm. *See* ESTATUTO DEL RÉGIMEN JURÍDICO ADMINISTRATIVO DE LA FUNCIÓN EJECUTIVA [Statute on the Legal-Administrative Rules for the Executive Branch], No. 411, art. 115(b) (Mar. 31, 1994) (Ecuador); LEY DE PREVENCIÓN Y CONTROL DE CONTAMINACIÓN AMBIENTAL [Law for Prevention and Control of Environmental Contamination], Supreme Decree No. 374, art. 29 (Ecuador). Individuals were empowered to bring actions to demand compensation for specific personal and property injuries suffered as a result of another's intentional or negligent acts. CÓDIGO CIVIL art. 2214. The Civil Code also created a cause of action for nuisance in which individuals could seek an injunction against the current owner or operator of the offending property. *Id.* art. 2236. Neither of these provisions authorized a collective action seeking money damages against a multinational corporation for past operations.

87. Defendant's Motion to Dismiss, *supra* note 53, at 13.

88. *Id.* at 18.

89. *Id.* at 18-19. Chevron contended that it did not acquire Texaco in 2001 and thus did not assume its liabilities, including responsibility for environmental injury in Ecuador. Rather, Texaco was merged with a wholly-owned subsidiary of Chevron called Keepep, Inc. *Id.* at 19 & n.14. According to Chevron, Texaco survived the merger because it fully absorbed Keepep. *Id.* As a result, Texaco maintained a separate legal identity and separate responsibility for the Plaintiffs' alleged injuries. *Id.* Furthermore, there was no provision of Ecuadorian law by which to hold Chevron responsible for Texaco's conduct in Ecuador. *See id.* Finally, even assuming that the court found that Chevron and Texaco were in fact one entity for purposes of the litigation, a U.S. court previously held that Texaco could not be held liable for the conduct of its Ecuadorian subsidiaries in the course of operating the Consortium. *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 548-50 (S.D.N.Y. 2001); *supra* notes 66-70 and accompanying text.

sonal jurisdiction.[90] The third element of this defense was that the plaintiffs' claims were barred by the applicable statute of limitations.[91] Finally, Chevron contended that the plaintiffs lacked standing.[92]

The Superior Court deferred ruling on these defenses and commenced trial in October 2003.[93] The conduct of the trial has been the cause of considerable controversy and has provided Chevron with additional defenses. The initial source of controversy has been the procedures employed by the Superior Court. At the beginning of the trial, the court accepted a joint plan for the collection of evidence consisting of judicial inspections of designated well sites to determine the presence of environmental contamination followed by expert determination of the cause of any contamination and the cost of remediation.[94] Pursuant to this procedure, the parties requested judicial inspections of 122 well sites to be conducted pursuant to negotiated sampling and analysis plans.[95] Forty-seven of the 122 designated well sites were ultimately inspected.[96] Chevron submitted reports on forty-five of these sites, which purportedly demonstrated that Texaco's remediation met all applicable standards and there was no ongoing risk to human health.[97] How-

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90. Defendant's Motion to Dismiss, *supra* note 53, at 19-20. This defense was based upon the fact that Texaco's consent to personal jurisdiction in Ecuador was not binding on Chevron, which was not a party to the *Aguinda* litigation in the United States. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 478-80 (2d Cir. 2002). This consent to personal jurisdiction was also inoperative against Chevron as it was not Texaco's successor-in-interest. Defendant's Motion to Dismiss, *supra* note 53, at 20. There were no other grounds for the exercise of personal jurisdiction as Chevron had never operated in Ecuador. *Id.*

91. Defendant's Motion to Dismiss, *supra* note 53, at 19-20. This defense was based upon the fact that Texaco's consent to toll the statute of limitations was not binding on Chevron. *See Aguinda*, 303 F.3d 470, 478-79 (2d Cir. 2002). As a result, the Plaintiffs' claims asserted in 2003 arising from conduct that occurred at the latest with the completion of remediation work in 1998 were barred by Ecuador's four year statute of limitations. *See* CÓDIGO CIVIL art. 2235.

92. Defendant's Motion to Dismiss, *supra* note 53, at 20-21. This defense was based upon the Environmental Management Law, which requires plaintiffs bringing an action on behalf of the public demonstrate individualized harm. *Id.* at 20 (Stating that "[t]he natural or juridical persons or human groups, linked by common interest and affected directly by the harmful act or omission, may file . . . actions for damages and losses and for deterioration caused to health or to the environment. . ." (quoting LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99 37, art. 43)). Chevron contended that the Plaintiffs failed to plead or identify individualized personal injury or property damage as to permit them to seek compensation for "the broadest of communal environmental harms." *Id.* at 20-21.

93. *Id.* at 10.

94. *Id.* at 22-23.

95. *Id.* at 23-24.

96. *Id.* at 24.

97. *Id.* at 25. These conclusions were based upon 1344 water and soil samples analyzed by accredited laboratories in the United States. *Id.*; *see* Rebuttal Brief for Chevron Corporation at 7, Aguinda v. Chevron Texaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed Sept. 15, 2008) (Ecuador), *available at*

ever, Chevron contended that the plaintiffs' experts failed to report data on more than half of the 465 soil and water samples they collected during the first nineteen inspections, submitted only five of these samples to an accredited laboratory for analysis, and submitted the remainder to an unaccredited laboratory in Ecuador, which failed to conduct scientifically appropriate analyses.[98] Chevron moved the court to expunge this evidence from the record on eleven separate occasions, but the court failed to conduct a hearing as required by Ecuador's Code of Civil Procedure.[99]

In March 2007, the plaintiffs obtained a court order waiving further inspections by experts appointed by both parties and appointing a single expert to conduct inspections and report to the court.[100] Chevron objected to this order as inconsistent with the previously-agreed procedures, and as a violation of the Code of Civil Procedure.[101] Nevertheless, the court appointed Richard Cabrera (Cabrera) to determine the existence and source of environmental damage, if any, and specify the nature of the work to be completed to remediate locations where contamination was discovered.[102] In preparing his report, Cabrera visited forty-eight well sites and one

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http://www.chevron.com/documents/pdf/texacoexecutivesummaryecuador.pdf [hereinafter Rebuttal Brief] (claiming that ninety-eight percent of the waste pits remediated by Texaco met the standards established by the Ecuadorian government and ninety-nine percent of the drinking water samples met safety standards established by the World Health Organization and the U.S. Environmental Protection Agency).

98. Defendant's Motion to Dismiss, *supra* note 53, at 27-28. For example, Chevron contended that the Plaintiffs' laboratory reported the presence of contaminants for which it did not test, attributed all metals found in soil samples to the Consortium's activities rather than accounting for their natural presence and took samples in areas that were Petroecuador's responsibility to remediate. *Id.* at 29.; *see* Texaco, Inc., Plaintiffs' Myths, Distortions and Fabrications, http://www.texaco.com/sitelets/ecuador/en/PlaintiffsMyths.aspx (last visited Apr. 13, 2010) [hereinafter Plaintiff's Myths] (alleging that Plaintiffs' experts failed to test 201 out of 648 samples, failed to report all laboratory results, utilized an unqualified laboratory to conduct such tests and failed to follow accepted chain of custody procedures with respect to such samples).

99. Defendant's Motion to Dismiss, *supra* note 53, at 29-30; *see* CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] arts. 256, 258 (Ecuador) (requiring experts to "carry out [their] duties faithfully and lawfully," that essential errors in an expert's report be corrected by another expert, that the court conduct a hearing in the event an expert is deemed to have committed such errors in the course of preparation of a report, and that the court expunge expert reports that contain gross factual errors).

100. Defendant's Motion to Dismiss, *supra* note 53, at 37.

101. *Id.* at 35-38 (citing CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] arts. 252, 292, which states that the parties may "by mutual agreement select the expert or request the appointment of more than one expert to carry out the [expert examination], which agreement shall be binding on the judge" and that litigants' requests "whose objective is to alter the meaning of . . . orders . . . or to maliciously prejudice the other party, shall be dismissed and sanctioned").

102. *Id.* at 37. Chevron objected to Cabrera's appointment due to his lack of experience in hydrocarbon chemistry, epidemiology, hydrogeology, remediation technologies, and oil and gas operations practices. *Id.* at 38.

production station and reviewed aerial photographs.[103] Based upon this review, Cabrera concluded that eighty percent of waste pits and one hundred percent of the production station pits needed to be remediated.[104] Chevron disputed these conclusions, took issue with Cabrera's methodology[105] and accused him of disregarding his mandate[106] and misconduct.[107] As a result, Chevron concluded that Cabrera's report was "a fraud on the court,"[108] and its utilization would be a violation of Ecuador's Constitution.[109]

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103. Rebuttal Brief, *supra* note 97, at 10.

104. Press Release, Chevron Corp., Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure (Sept. 15, 2008) (on file with author), *available at* http://www.chevron.com/news/press/release/?id=2008-09-15. Chevron claimed that these findings were made without determining whether specific sites required remediation and overreliance on erroneous aerial photographs. *See* Rebuttal Brief, *supra* note 97, at 16.

105. *See* Rebuttal Brief, *supra* note 97, at 4, 11 (expressing "grave concerns" regarding Cabrera's "superficial and inappropriate" methodology and procedures, including failing to differentiate between environmental damages that occurred before and after 1990); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 40, 43 (accusing Cabrera of conducting sampling at a limited number of well sites and extrapolating results over the entire area of the Consortium's operations and failing to maintain a chain of custody documentation for samples); David Baker, *Chevron Lawyers Indicted In Pollution Case*, S.F. CHRON., Sept. 13, 2008, at C1; Clare Bolton, *Rumble in the Jungle*, LATIN LAWYER, Mar. 28, 2008, at 7, *available at* http://www.chevron.com/documents/pdf/texacorumble.pdf (presenting Silvia Garrigo's accusation of Cabrera's failure to take water samples in the course of his inspection of well sites and production stations); Randy Woods, *Interviews: Sylvia Garrigo/Kent Robertson, Attorney/Media Relations Advisor/Chevron*, BUS. NEWS AMS., Mar. 24, 2008, *available at* http://www.chevron.com/documents/pdf/texacointerviews.pdf.

106. *See* Rebuttal Brief, *supra* note 97, at 5-6 (accusing Cabrera of failing to perform a detailed assessment of the 335 well and production sites in the former concession area and assessing social and economic conditions in the Oriente in violation of his mandate); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 40 (accusing Cabrera of assessing social and economic conditions in the Oriente in violation of his mandate).

107. *See* Rebuttal Brief, *supra* note 97, at 4-6, 8, 11-14 (accusing Cabrera of manipulating and altering evidence "with the purpose of justifying false conclusions," failing to disclose his methodology in order to prevent verification of and challenges to his results, acting in complicity with the Plaintiffs, "whose claims he uniformly accepted with no valid explanation and often in the absence of supporting data," utilizing unqualified personnel to conduct sampling and testing, barring Chevron representatives from locations while sampling was occurring, pledging to assist the Plaintiffs with the gathering of evidence and collaborating with Plaintiffs' attorneys in the preparation of his report); *see also* Defendant's Motion to Dismiss, *supra* note 53, at 42-44 (accusing Cabrera of failing to notify Chevron representatives of dates and times for sampling, discarding visibly clean soil samples, and destroying exculpatory evidence and concluding that the inspection process was "marked by rank amateurism, disregard for scientific protocol, and irredeemable bias" which could not serve as the basis for "legitimate expert determination of the environmental impact [of hydrocarbon operations in the Oriente] or its source"); Press Release, Chevron Corp. *supra* note 104, (accusing Cabrera of backdating photographs of waste pits constructed by Petroecuador in the 1990's to the 1970's in order to make them appear to have been dug by the Consortium).

108. Press Release, Chevron Corp., Federal Court in San Francisco Dismisses Ecuadorean Cancer Claims Against Chevron as Knowingly False (Aug. 7, 2007) *available at* http://www.chevron.com/news/press/Release/?id=2007-08-07; *see* Rebuttal Brief, *supra* note 97, at 4.

109. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR arts. 13, 22, 24, 192 (providing, in part, that foreigners have the same rights as Ecuadorians, that the state is liable for "judicial error . . . [and] the inadequate administration of justice," that every per-

Perhaps the most controversial of Cabrera's conclusions is his calculation of damages. In April 2008, Cabrera assessed the plaintiffs' damages at $16.3 billion, which included claims for wrongful death, environmental remediation, the establishment of health care facilities, the construction of infrastructure for Petroecuador, and the disgorgement of profits earned by Texaco in the course of its operations in Ecuador.[110] Cabrera revised this estimate to $27.3 billion in November 2008.[111] This revision included $9.5 billion for cancer deaths resulting from hydrocarbon contamination, $3.2 billion for groundwater remediation, $1 billion for soil remediation, $8 billion to fund health care and potable water systems in the region and an unjust enrichment penalty of $8.3 billion.[112] This damages calculation exceeded Chevron's net earnings in 2008 and was almost twice the amount of net earnings derived from its international operations.[113]

Chevron has vigorously contested Cabrera's damages estimates. Chevron contended that the estimates greatly exceeded the scope of Cabrera's mandate by assessing damages for alleged injuries beyond environmental injury.[114] Of particular concern in this regard were Cabrera's assessments relating to cancer deaths and unjust enrichment. Chevron criticized the assessment for cancer deaths on the basis that it not only exceeded Cabrera's mandate but also failed to identify the alleged victims, produce supporting documentation, distinguish between types of cancer, and provide an explanation for its inconsistency with official Ecuadorian statistical data on cancer mortality.[115] The court's failure to strike this portion of the damages assessment was particularly egregious giv-

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son is entitled to due process, including "the right to access to [sic] the judicial organs and to obtain the effective, impartial and expedited protection of their rights and interests," and that "the procedural systems [of the state] shall . . . enforce the guarantees of due process").

110. ANNUAL REPORT, *supra* note 4, at 47.

111. *Id.*

112. Amazon Watch, $27 Billion Damages Assessment, http://chevrontoxico.com/about/historic-trial/27-billion-damages-assessment.html (last visited Apr. 13, 2010).

113. ANNUAL REPORT, *supra* note 4, at 34, 38 (stating that Chevron had net earnings of $23.93 billion in 2008, of which $14.58 were derived from its international operations).

114. *See* Rebuttal Brief, *supra* note 97, at 6, 17-18 (criticizing Cabrera's estimates on the basis that they "assessed billions of dollars to compensate for alleged personal injuries, to improve public services, to foster indigenous cultures, to modernize Petroecuador's equipment, and to take away alleged 'unfair profits' " and accusing Cabrera of going "on a roving patrol and, using innuendo and speculation, attempt[ing] to ascribe to [Texaco] endemic social problems that are plainly not of its making").

115. Rebuttal Brief, *supra* note 97, at 17; *see* CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON 10 (2009), *available at* http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf [hereinafter ECUADOR AND THE LAWSUIT]; Press Release, Chevron Corp., Chevron Cites New Instances of Misconduct Marring Trial in Ecuador (Feb. 12, 2009) (on file with author) *available at* http://www.chevron.com/news/press/release/?id=2009-02-12; Press Release, Chevron Corp., *supra* note 108.

en its refusal to permit Chevron to depose Cabrera with respect to his methodology, and the fact that similar claims were deemed frivolous in related litigation occurring in the United States.[116] These shortcomings led Chevron to conclude that the damages assessed for cancer deaths were "completely fabricated."[117] The unjust enrichment penalty was criticized as beyond Cabrera's mandate, lacking a basis in Ecuadorian law, grossly excessive in comparison to the actual profits derived by Texaco from the Consortium's operations and, in any event, not requested in the Complaint.[118]

Those damages estimated within the scope of Cabrera's mandate were, according to Chevron, grossly inflated.[119] Chevron accused Cabrera of including more than $1 billion in soil remediation costs for locations that he did not visit or waste pits that do not exist.[120] This assessment also estimated the cost of remediation of waste pits at $3.08 million per pit when Petroecuador, with the government's approval, was remediating its pits at a cost of $85,000 per pit.[121] Chevron also alleged that the estimate relating to the improvement of Ecuador's potable water system was tainted by Cabrera's failure to take a single drinking water sample.[122] Similar estimates with respect to groundwater remediation were not supported by sufficient data.[123] Chevron concluded that Cabrera's "sole interest was to facilitate the result sought by plaintiffs' counsel and the Government of Ecuador: a windfall damages judgment against a U.S. oil company that never operated in Ecuador and had nothing to do with the Consortium."[124]

Chevron also claimed that the Superior Court was influenced

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116. *See* Rebuttal of Chevron to the Supplemental Expert Report, at 6, Aguinda v. Chevron Texaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed Feb. 12, 2009) (Ecuador), *available at* http://www.chevron.com/documents/pdf/cabrerarebuttalexecutivesummary.pdf [hereinafter Rebuttal to the Supplemental Expert Report].

117. Press Release, Chevron Corp., *supra* note 104.

118. *See* Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10; Press Release, Chevron Corp., *supra* note 104; Plaintiff's Myths, *supra* note 98. Chevron claimed that Texaco's "total profits over the 28-year life of the Consortium were approximately $490 million." Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7.

119. *See* Rebuttal Brief, *supra* note 97, at 17.

120. *See* Rebuttal Brief, *supra* note 97, at 6; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10.

121. *See* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10. According to Chevron, Cabrera's assessment also improperly lowered acceptable levels of contaminants in ground soil in contravention of Ecuadorian law and arbitrarily expanded the area requiring remediation surrounding each waste pit by fifty percent in surface area and twenty-five percent in depth. *See* Rebuttal Brief, *supra* note 97, at 16; *see also* Press Release, Chevron Corp., *supra* note 104.

122. ECUADOR AND THE LAWSUIT, *supra* note 115, at 10.

123. *Id.*

124. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 3.

by political pressure.[125] The primary source of this pressure was Ecuadorian President Rafael Correa.[126] According to Chevron, President Correa has attempted to influence Cabrera and the court since assuming office in January 2007.[127] These efforts include a visit to the former concession area in order "verify the environmental, social, and cultural impacts caused by hydrocarbon exploitation, in particular that of the U.S. company Texaco," statements referring to the plaintiffs' counsel as "compañeros," offering the government's support to the plaintiffs, pledging to assist in evidence gathering and calling upon Ecuador's Prosecutor General to indict persons involved in the Remediation Agreement and Final Act.[128] Additional sources of pressure include members of Ecuador's Constituent Assembly[129] and protestors allegedly organized by the plaintiffs.[130] As a result, Chevron concluded that "the thumbs of politics are weighing heavily on the scales of justice."[131]

Closely related to the exertion of improper political pressure is concern regarding the integrity of the presiding judge Juan Evangelista Nuñez Sanabria (Nuñez). In August 2009, Chevron revealed the existence of taped conversations between Nuñez, private contractors, and Ecuadorian government officials regarding the outcome of the litigation.[132] According to Chevron, the video-

125. ECUADOR AND THE LAWSUIT, *supra* note 115, at 7.

126. *Id.*

127. *Id.*

128. ECUADOR AND THE LAWSUIT, *supra* note 115, at 2, 7-8 (describing President Correa as "a revolutionary man of the people crusading against foreign economic interests" and quoting statements referring to the Plaintiffs' counsel as "compañeros" and calling upon Ecuador's Prosecutor General to indict the "miserable Mafiosi" involved in the Remediation Agreement and Final Act); *see* Rebuttal Brief, *supra* note 97, at 8 (quoting statements by President Correa offering government support to the Plaintiffs, pledging to assist the Plaintiffs in evidence gathering and labeling Texaco's representatives who signed the Remediation Agreement and Final Act as "traitors . . . who for a few dollars are capable of selling souls, country [and] family"); *see also* Bolton, *supra* note 105, at 1 (describing President Correa's visit to the Oriente to "be the witness of the atrocities caused by Texaco," his offer of state support to the Plaintiffs for evidence gathering and call for criminal prosecution of government officials who approved the Remediation Agreement and Final Act).

129. *See* Rebuttal Brief, *supra* note 97, at 8-9 (referring to statements by two members of the Constituent Assembly endorsing the Plaintiffs' lawsuit and placing the economic, social and cultural impacts of hydrocarbon exploitation entirely on Texaco).

130. ECUADOR AND THE LAWSUIT, *supra* note 115, at 7 (alleging that the Plaintiffs organized a courtroom protest on June 14, 2006 in which the presiding judge was assailed in his chambers by demonstrators demanding expedited proceedings). Donziger described these tactics as "something you would never do in the United States, but Ecuador . . . this is how the game is played, it's dirty." *Id.*

131. Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12 (quoting Chevron spokesman James Craig).

132. *See* David R. Baker & Tyche Hendricks, *Tapes Show Judicial Misconduct, Chevron Says*, S.F. CHRON., Sept. 1, 2009, at A1; *see also* Steven Mufson & Juan Forero, *Chevron Alleges Bribery in Ecuador Suit*, WASH. POST, Sept. 1, 2009, at A8; Press Release, Chevron Corp., Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit (Aug. 31, 2009) (on file with author) *available at* http://www.chevron.com/

taped meetings between the Ecuadorian government officials and the contractors established that: (1) the Ecuadorian government was "managing Judge Nuñez;" (2) Chevron will lose the trial; (3) the Ecuadorian government "provided lawyers to help craft the opinion against Chevron;" (4) President Correa's legal advisor "instructed Judge Nuñez on how to route the judgment money;" and (5) Carlos Patricio Garcia Ortega, a political coordinator for President Correa's Alianza Pais political party, would "give the Judge his share of the bribe money."[133] Chevron further alleged that the two videotaped meetings in which Nuñez participated established that: (1) Nuñez decided to hold Chevron liable for the environmental damage that has occurred in the Oriente; (2) the award would be more or less than $27.3 billion to be determined in his sole discretion; (3) a portion of the award would be directed to the Ecuadorian government; (4) the ruling would be issued in October or November 2009; (5) any appeal initiated by Chevron would be "a formality;" and (6) "[t]he American government [would] tell Chevron: You lost the trial, so pay up."[134] Based upon these disclosures, Chevron called upon Ecuador's Prosecutor General to conduct a full investigation, that Nuñez be disqualified from further participation in the case and that his previous rulings be vacated.[135] Nuñez recused himself on September 4, 2009 at the request of the Prosecutor General, and the case was reassigned to Judge Nicolás Zambrano.[136] Chevron's request to annul Nuñez's rulings was

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news/press/release/?id=2009-08-31. The four recorded meetings occurred in May and June 2009 and involved Carlos Patricio Garcia Ortega, a political coordinator for President Correa's Alianza Pais political party; Juan Pablo Novoa Velasco, a lawyer representing the Ecuadorian government; Aulo Gelio Servio Tulio Ávila Cartagena, a lawyer with alleged connections to Nuñez; Pablo Almeida, an environmental remediation contractor; Rubén Dario Miranda Martinez, an assistant to Patricio Garcia; Diego Borja, a former Chevron contractor; and Wayne Hansen, an American businessman. Letter from Thomas F. Cullen, Jr., Attorney, Jones Day, to Washington Pesántez Muñoz, Prosecutor General of Ecuador (Aug. 31, 2009) (on file with author). Nuñez participated in two of these meetings in Lago Agrio and in Quito. *Id.* at 2.

133. Letter from Thomas F. Cullen, Jr. to Washington Pesántez Muñoz, *supra* note 132, at 2.

134. *Id.*

135. *See id.*; *see also* Baker & Hendricks, *supra* note 132 (referring to Chevron's request to disqualify Nuñez from the case and annul his previous rulings); Simon Romero & Clifford Krauss, *Chevron Offers Evidence of Bribery Scheme in Ecuador Lawsuit*, N.Y. TIMES, Sept. 1, 2009, at A4 (quoting Charles James, Chevron's general counsel, as stating that "[w]e think this information absolutely disqualifies the judge and nullifies anything that he has ever done in this case"); Press Release, Chevron Corp., *supra* note 132 (calling upon the Ecuadorian government to "conduct a full investigation of this matter—focusing not only on the conduct of Judge Nuñez, but also on the very serious indications of political interference in this case"). On August 31, 2009, the Ecuadorian government issued a statement that it found no "corrupt acts" on the part of the government but nevertheless promised that the matter would be "thoroughly, aggressively and fairly investigated." Mufson & Forero, *supra* note 132.

136. *See* David R. Baker, *Judge Recuses Himself in Suit Against Chevron*, S.F. CHRON.,

pending at the time of the preparation of this article.[137]

There are other sources of controversy regarding the conduct of the trial and the plaintiffs' tactics. For example, despite a provision of the Code of Civil Procedure that requires courts to rule upon motions that raise purely legal issues within three days of filing, the Superior Court has yet to rule on Chevron's numerous motions dating back to 2003.[138] Additionally, in May 2009, the New York Attorney General's office issued a letter to Chevron inquiring as to whether it had adequately warned shareholders about the risks it faces in the Lago Agrio litigation, asking it to explain its defenses, provide an estimate of damages and state whether it had established adequate financial reserves.[139] In responding to this inquiry, Chevron stated that it presumed the inquiry was "a result of a campaign by the American trial lawyers behind this case that seeks to pressure Chevron into a settlement."[140] Chevron has resisted this pressure despite the growing damages estimates, the increasing number of procedural obstacles to a fair trial, the incurrence of significant costs and fees defending the litigation over the course of the past six years and the distinct possibility of a signifi-

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Sept. 5, 2009, at DC-1; *see also* Simon Romero & Clifford Krauss, *Under Pressure, Ecuadorean Judge Steps Aside in Suit Against Chevron*, N.Y. TIMES, Sept. 5, 2009, at A8.

137. The Plaintiffs accused Chevron of engaging in a "sting" and a "dirty-tricks operation." Mufson & Forero, *supra* note 132 (quoting Steven Donziger); Romero & Krauss, *supra* note 135 (quoting Steven Donziger). The Plaintiffs called for an investigation of Chevron's role in the videotaping but concluded that the incident would have a minimal impact on the litigation. *See* Romero & Krauss, *supra* note 135 (quoting Steven Donziger as stating that "there needs to be an investigation into Chevron's role in this as much as the judge's" and that "[a]t the end of the day this will not affect the underlying case, . . . other than it might cause a short delay if the judge needs to be replaced").

138. Defendant's Motion to Dismiss, *supra* note 53, at 10 (citing CÓDIGO DE PROCEDIMIENTO CIVIL [Code of Civil Procedure] art. 835).

139. David R. Baker, *N.Y. Asks Chevron to Explain Pollution Case*, S.F. CHRON., May 7, 2009, at C1. New York Attorney General Andrew Cuomo was quoted as stating:

> In recent weeks, we have received complaints regarding Chevron's disclosures of the potential litigation risks and Chevron's characterization of available legal defenses. Given the fact that both New York State and New York City public pension funds hold substantial Chevron shares . . . this office has an interest in ensuring that public statements about the litigation are accurate and complete.

Id. In its 2008 Annual Report, Chevron stated that it did not expect future costs for known environmental obligations that are probable and reasonably estimable to have "a material effect on its consolidated financial position or liquidity. . . [or] any significant impact on the company's competitive position relative to other U.S. or international petroleum or chemical companies." ANNUAL REPORT, *supra* note 4, at 48. However, Chevron also stated that it was "not possible to predict with certainty the amount of additional investments in new or existing facilities or amounts of incremental operating costs to be incurred in the future to . . . remediate and restore areas damaged by prior releases of hazardous materials." *Id.* at 50. Nevertheless, Chevron did not deem such costs to have "a material effect on the company's liquidity or financial position." *Id.*

140. Baker, *supra* note 139 (quoting Chevron spokesman Kent Robertson).

cant verdict in favor of the plaintiffs.[141]

III. THE RECOGNITION OF FOREIGN JUDGMENTS IN THE UNITED STATES

A. Introduction

Recognition of foreign money judgments in the United States is a matter governed by one of three sources of state law.[142] These sources are statutes based upon the 1962 and 2005 Acts and comity.[143] The following section will discuss the mandatory bases upon which foreign money judgments may be disregarded pursuant to the Acts.

B. The Uniform Foreign Money Judgment Recognition Act

The 1962 Act was a product of the National Conference of Commissioners on Uniform State Laws. The Act was intended to increase the likelihood of recognition of U.S. state court judgments abroad by codifying practices applied by the majority of U.S. courts.[144] The 1962 Act has been adopted in thirty states at the

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141. *See* Debra J. Saunders, *Oil and Water Mix in Ecuador*, S.F. CHRON., June 21, 2009, at H6 (quoting Mitch Anderson of Amazon Watch that Chevron should settle the litigation because it has become "a legal Vietnam").

142. In 1941, the U.S. Supreme Court extended its holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) to the area of conflict of laws. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). As a result, it has been assumed that federal courts must apply principles of law from the states in which they sit to conflict of laws issues. However, the U.S. Supreme Court has never directly resolved the issue of whether state law governs the recognition of foreign judgments. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 22.35 n.5 (3d ed. 2000); *see also* R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 429-30 (1982); Gul, *supra* note 11, at 87; Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 126 (2002).

143. Although beyond the scope of this article, states that have not adopted the 2005 or 1962 Acts rely upon the common law doctrine of comity. Comity is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). In the context of foreign judgments, comity provides that "[n]o sovereign is bound . . . to execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought . . . the tribunal in which the suit is brought, . . . [is free] to give effect to it or not, as may be found just and equitable." *Id.* at 166; *see* Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839) (defining comity as "the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests"). However, "a procedurally regular and non-fraudulently obtained foreign judgment" is entitled to comity, and the losing party is not permitted to retry the case on the merits or avoid enforcement on the grounds that the judgment was based on an error in law or fact. Balan, *supra* note 11, at 235; *see Hilton*, 159 U.S. at 203.

144. 1962 ACT, *supra* note 7, prefatory note.

time of preparation of this article.[145]

The 1962 Act applies to final, conclusive and enforceable judgments entered in foreign states.[146] Enforceability is limited to judgments "granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."[147] A foreign judgment meeting these requirements is deemed conclusive between the parties and subject to recognition in the same manner as judgments of sister states.[148] Despite these restrictions, the 1962 Act allows states to recognize foreign judgments not covered by the Act, such as those granting equitable relief, through utilization of comity.[149]

Section 4 of the 1962 Act sets forth three circumstances in which a foreign judgment will not be deemed conclusive. Initially, foreign judgments are not deemed conclusive if the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[150] The second circumstance is if the foreign court did not have personal jurisdiction over the defendant.[151] The final circumstance is if the foreign court lacked subject matter jurisdiction.[152]

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145. *See supra* note 9 and accompanying text.

146. 1962 ACT, *supra* note 7, § 2. A "foreign state" is defined as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands." *Id.* § 1(1). A judgment is deemed final, conclusive and enforceable despite the pendency or possibility of an appeal. *Id.* § 2. However, a U.S. court may stay recognition proceedings until such time as the appeal has been fully determined or the period of time in which an appeal may be prosecuted has expired. *Id.* § 6.

147. *Id.* § 1(2).

148. *Id.* § 3. The 1962 Act does not prescribe a uniform procedure by which states are to recognize foreign judgments but leaves this to individual determination utilizing rules applicable to judgments of sister states. *Id.* at prefatory note.

149. *Id.* § 7.

150. *Id.* § 4(a)(1).

151. *Id.* § 4(a)(2). A foreign court will be deemed to possess personal jurisdiction under a wide array of circumstances, including personal service in the foreign state, a voluntary appearance in the foreign state, or an agreement to submit to the personal jurisdiction of the foreign court prior to the commencement of the litigation. *Id.* § 5(a)(1)-(3). An appearance is not deemed voluntarily if it was for the purpose of protecting property from actual or threatened seizure or contesting personal jurisdiction. *Id.* § 5(a)(2). Personal jurisdiction may also exist if the defendant was domiciled in the foreign state or maintained its principal place of business in the state at the time of commencement of the litigation, the defendant had a business office in the foreign state and the foreign proceedings arose from business conducted through such office, or the defendant operated a motor vehicle or airplane in the foreign state and the proceedings arose from such operation. *Id.* § 5(a)(4)-(6). Section 5 also permits courts to recognize other bases for the assertion of personal jurisdiction. *Id.* § 5(b).

152. *Id.* § 4(a)(3). Section 4 also sets forth six instances in which states may refuse recognition of foreign judgments. *Id.* § 4(b)(1)-(6) (providing that a U.S. court may refuse to recognize a foreign judgment due to lack of notice, fraud, public policy, conflict with another final and conclusive judgment or an agreement between the parties, or if the forum was "seriously inconvenient"). These discretionary grounds for non-recognition are beyond the

C. The Uniform Foreign-Country Money Judgments Recognition Act

The National Conference of Commissioners on Uniform State Laws updated the 1962 Act in 2005.[153] The 2005 Act was designed to address four shortcomings of the 1962 Act. These were: (1) clarification of the distinction between recognition and enforcement of foreign judgments, including the difference between foreign judgments and judgments entered within the territory of the United States; (2) allocation of the burdens of proof with respect to the entitlement of a foreign judgment to recognition and establishment of defenses to recognition; (3) designation of procedures by which to seek recognition of a foreign judgment; and (4) establishment of a statute of limitations for recognition proceedings.[154] The Commissioners urged states to adopt the 2005 Act as soon as possible in the interest of promoting uniformity of state law and dissuading the U.S. Congress from preempting the field.[155]

In a manner similar, but not identical to its predecessor, the 2005 Act applies to final, conclusive and enforceable judgments[156] granting or denying recovery of a sum of money[157] entered in a for-

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scope of this article.

153. National Conference of Commissioners on Uniform State Laws, Summary of the Uniform Foreign-Country Money Judgments Recognition Act, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ufcmjra.asp (last visited Apr. 13, 2010) (stating that the 2005 Act is "not a radically new act . . . [but rather] a necessary upgrade for the 21st Century").

154. *Id.*

155. *Id. But see* Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT'L L. & POL'Y 111, 145-46 (2007) (concluding that the individual states have long established practices with respect to the enforcement of foreign judgments and thus have little incentive to unify their practices through adoption of the 2005 Act). According to Luthin, true uniformity can only be achieved through adoption of federal legislation preempting state law. *Id.* The 2005 Act has been adopted by thirteen states. *See supra* note 10 and accompanying text.

156. 2005 ACT, *supra* note 7, § 3(a)(2). Unlike the 1962 Act, the 2005 Act defines when a judgment is final, conclusive and enforceable. A judgment is final "when it is not subject to additional proceedings in the rendering court other than execution." *Id.* § 3 cmt. 3. A judgment is deemed conclusive when "it is given effect between the parties as a determination of their legal rights and obligations." *Id.* "A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in the collection of the judgment." *Id.* As in the 1962 Act, a judgment is final, conclusive and enforceable even if it is appealable, but a U.S. court may stay recognition proceedings until such time as the appeal has been fully determined or the period of time in which it may be prosecuted has expired. *Id.* § 8.

157. *Id.* § 3(a)(1). The 2005 Act clarifies the issue of recognition of a foreign court judgment granting or denying recovery of a sum of money and providing for some other form of relief. In such circumstances, the 2005 Act is applicable to the portion of the judgment granting or denying monetary relief but not to that portion of the judgment providing for some other form of relief. *Id.* § 3 cmt. 2. U.S. courts remain free to recognize the non-monetary portion of any foreign judgment through the application of comity. *Id.* §§ 3 cmt. 2,

eign country.[158] A foreign judgment meeting these requirements is recognizable in the same manner as judgments of sister states.[159] The 2005 Act diverges from the 1962 Act by including definitions of fines and penalties[160] and assigning the burden of proof to the party seeking recognition.[161]

Section 4 sets forth three circumstances in which a foreign judgment may not be recognized. These circumstances are identical to the three circumstances set forth in Section 4(a) of the 1962 Act.[162] There are, however, two important distinctions. Initially,

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11. In a manner similar to its predecessor, the 2005 Act does not apply to judgments for taxes, fines, penalties and money judgments arising from domestic relations proceedings. *Id.* § 3(b)(1)-(3).

158. *Id.* § 2(1)-(2). The definitions in this section of the 2005 Act are different than those set forth in the 1962 Act. The 2005 Act no longer utilizes the term "foreign state" but rather uses "foreign country," which it defines as:

> (1) "Foreign country" means a government other than:
> (A) the United States:
> (B) a state, district, commonwealth, territory, or insular possession of the United States; or
> (C) any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

Id. § 2(1)(A)-(C); *see also id.* § 2 cmt. 1. A "foreign-country judgment" is defined as "a judgment of a court of a foreign country." *Id.* § 2(2). The Commissioners deemed these changes necessary for several reasons. First, substitution of the terms "foreign country" and "foreign-country judgment" for "foreign state" and "foreign judgment" were necessary in order to clarify that the Act does not apply to recognition of sister-state judgments. *Id.* § 2 cmt. 1; *see also* Eagle Leasing v. Amandus, 476 N.W.2d 35, 38 (Iowa 1991) (commenting on the error of the lower court's application of the 1962 Act to a judgment entered by a West Virginia court and noting that the term "foreign judgment" is a term of art normally applied to sister-state judgments). Second, the addition of the reference to the Full Faith and Credit Clause was designed to prevent confusion between recognition and enforcement. A judgment entitled to full faith and credit may be immediately enforced through state registration procedures. 2005 ACT, *supra* note 7, § 2 cmt. 1. Conversely, a "foreign-country judgment" must be recognized prior to enforcement. *Id.* The reference to a court in "foreign-country judgment" clarifies that the judgment must be of an adjudicative body within the foreign country and specifically excludes alternative dispute resolution procedures. *Id.* § 2 cmt. 3. Nevertheless, foreign-country judgments subject to recognition need not take a particular form and include judgments rendered in proceedings in which a government entity is a party. *Id.* § 2 cmts. 3-4.

159. 2005 ACT, *supra* note 7, § 7(1)-(2).

160. *Id.* § 3 cmt. 4. A foreign-country judgment will be deemed a fine or penalty based upon a determination of whether its purpose is "remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." *Id.* However, U.S. courts remain free to recognize foreign judgments imposing fines, penalties or liability for taxes through the application of comity. *Id.* §§ 3 cmt. 4, 11.

161. *Id* § 3(c). This allocation is based upon case law interpreting the 1962 Act, which placed the burden of proof upon the party seeking recognition. *See, e.g.*, Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 285 (S.D.N.Y. 1999); S.C. Chimexim, S.A. v. Velco Enters., Ltd., 36 F. Supp. 2d 206, 212 (S.D.N.Y. 1999); Mayekawa Mfg. Co. v. Sasaki, 888 P.2d 183, 189 (Wash. Ct. App. 1995).

162. *See supra* notes 150-52 and accompanying text. In their comments to the 2005 Act, the Commissioners elaborated upon the non-recognition of a judgment rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due

the presence of any of these circumstances renders a foreign judgment non-conclusive pursuant to the 1962 Act.[163] By contrast, the presence of any of these circumstances does not render a foreign judgment non-conclusive pursuant to the 2005 Act but does render such judgment nonrecognizable.[164] Section 4 also provides that "[a] party resisting recognition of a foreign-country judgment has the burden of establishing . . . a ground for nonrecognition."[165] This section was designed to resolve the conflict between different courts interpreting the 1962 Act.[166]

Sections 6 and 9 of the 2005 Act address procedural issues. Section 6 requires the filing of an original action seeking recognition of a foreign judgment or as a counterclaim, crossclaim, or affirmative defense in pending litigation.[167] This new requirement was imposed in order to prevent plaintiffs from using registration and enforcement procedures reserved for judgments of sister states for foreign country judgments.[168] This requirement was not imposed, however, to allow defendants to relitigate the merits of foreign proceedings in U.S. courts.[169] Section 9 establishes a statute of limitations for the filing of recognition proceedings in the United

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process of law. Specifically, the Commissioners noted that the focus of this inquiry was on the basic fairness of the foreign proceedings rather than procedural differences such as the absence of a jury trial or different evidentiary rules. 2005 ACT, *supra* note 7, § 4 cmt. 5. The U.S. Supreme Court's holding in Hilton v. Guyot, 159 U.S. 113 (1895) was particularly useful in this regard. According to the Commissioners, "impartial administration and basic procedural fairness" are provided by a system that grants:

> a full and fair trial . . . before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of . . . [the United States] should not allow it[s] full effect.

Id. (quoting *Hilton* 159 U.S. at 202).

163. 1962 ACT, *supra* note 7, § 4(a)(1)-(3).

164. 2005 ACT, *supra* note 7, § 4(b)(1)-(3).

165. *Id.* § 4(d).

166. *Id.* § 4 cmt. 13 (citing Bridgeway Corp., 45 F. Supp. 2d at 285 (placing the burden of proof to demonstrate the absence of a mandatory basis for non-recognition on the plaintiff), Courage Co. v. ChemShare Corp., 93 S.W.3d 323, 331 (Tex. Ct. App. 2002) (requiring the party seeking to avoid recognition to prove grounds for non-recognition)). Section 4 also sets forth eight discretionary instances in which states may refuse recognition of foreign judgments. 2005 ACT, *supra* note 7, § 4(c)(1)-(8) (providing that a U.S. court may refuse to recognize a foreign judgment due to lack of notice, fraud, public policy, a conflict between the foreign judgment and another final and conclusive judgment or an agreement between the parties, the foreign court was "a seriously inconvenient forum," the judgment was "rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or the specific foreign proceeding resulting in the judgment was inconsistent with the requirements of due process).

167. *Id.* § 6(a)-(b).

168. *Id.* § 6 cmt. 1.

169. *Id.* § 6 cmt. 3.

States.[170]

The Acts do not mention any requirement of reciprocity. Inclusion of such a requirement in the 1962 and 2005 Acts as adopted by the states has been subject to much criticism.[171] Nevertheless, a handful of states have included reciprocity as a basis for non-recognition.[172]

IV. *AGUINDA* RETURNS TO THE UNITED STATES: MANDATORY GROUNDS FOR NON-RECOGNITION

A. The Existence of a Recognizable Foreign Money Judgment

1. Introduction

The initial issue in determining whether a U.S. court should recognize a judgment entered by the Superior Court is whether there is a money judgment that is final, conclusive, and enforcea-

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170. *Id.* § 9. The statute of limitations is "the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country." *Id.* This section is intended to eliminate disparities in case law interpreting the 1962 Act. *Id.* § 9 cmt. (citing La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E.2d 30 (Ill. App. Ct. 1997) (applying the statute of limitations applicable to domestic judgments to foreign judgments), Vrozos v. Sarantopoulos, 552 N.E.2d 1053 (Ill. App. Ct. 1990) (applying Illinois' general statute of limitations to proceedings to enforce foreign judgments)).

171. *See, e.g.*, SCOLES ET AL., *supra* note 142, §§ 24.33-.38 (noting the absence of reciprocity in English common law and U.S. statutes and common law); William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 230 (2002) (criticizing reciprocity requirements as holding the interests of private litigants hostage to the government's interest in promoting reciprocity); Friedrich Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 9-10 (1988) (noting the absence of reciprocity in English common law and U.S. statutes and common law, and cited by Stevens, *supra* note 142, at 118, 120); Vishali Singal, Note, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L.J. 943, 971-72 (2008) (criticizing reciprocity requirements as resulting in renvoi as the United States and foreign states refuse to recognize one another's judgments due to failure to reciprocate).

172. *See* FLA. STAT. § 55.605(2)(g), (2009) (stating that a foreign judgment need not be recognized if "[t]he foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state"); GA. CODE ANN. § 9-12-114(10) (2008) (prohibiting the recognition of a foreign judgment if "[t]he party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state"); ME. REV. STAT. ANN. tit. 14, § 8505(2)(G) (2009) (stating that a foreign judgment need not be recognized if "[t]he foreign court rendering the judgment would not recognize a comparable judgment of this State"); MASS. GEN. LAWS ch. 235, § 23A (2008) (prohibiting recognition of foreign judgments if "judgments of this state are not recognized in the courts of the foreign state"); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (2009) (stating that "a foreign judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment' ").

ble in Ecuador that does not constitute a fine or penalty. The burden of proof with respect to these issues rests with the plaintiffs.[173] Assuming that Ecuadorian courts would recognize a judgment issued by the Superior Court as final, conclusive, and enforceable, the only issues with respect to recognition in the United States are the existence of a money judgment and the absence of a fine or penalty. These issues present significant obstacles for the plaintiffs.

2. Legal and Equitable Relief

Foreign money judgments are not automatically entitled to recognition. Rather, the judgment must refer to a "specific sum of money."[174] A finding of liability with the damages phase of the trial or the determination of specific amounts deferred to a later date is not a foreign judgment entitled to U.S recognition. Equally unrecognizable is any judgment that grants the plaintiffs an award of undetermined costs and fees incurred in the litigation.[175]

The plaintiffs did not request a specific sum of money in the Complaint.[176] Presumably the Superior Court will award a specific sum of money and designate portions of this award to the various claims for relief. However, it is possible that the Superior Court may defer a decision on damages, in whole or in part, for later resolution. A deferral of the damages phase of the litigation would have the advantage of allowing the court to more closely examine all aspects of the plaintiffs' claims. Additionally, a deferral would allow Chevron to pursue an appeal on the issue of liability alone without complicating such proceedings with the thorny issue of damages. The Superior Court's interest would be further served from the standpoint of judicial economy should an appellate court

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173. *See, e.g.*, 2005 ACT, *supra* note 7, § 3(c); *see also supra* note 161 and accompanying text.

174. *See, e.g.*, Kreditverein der Bank Austria Creditanstalt für Niederösterreich und Burgenland v. Nejezchleba, No. 04-72(JRT/JSM), 2006 U.S. Dist. LEXIS 47011, at *9-10 (D. Minn. June 30, 2006) (denying recognition of an Austrian judgment in which the appellate court had affirmed the defendant's liability but remanded the issue of damages to the lower court for precise determination); Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1365 (S.D. Fla. 2003) (refusing to recognize a Dominican judgment that failed to award a specific sum of money); *In re* Transamerica Airlines, Inc., No. 1039-VCP, 2007 Del. Ch. LEXIS 68, at *67-68 (Del. Ch. May 27, 2007) (denying recognition to portions of a Nigerian judgment that determined the plaintiff was entitled to damages for breach of contract but failed to reduce such damages to a specific amount); Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc., 770 N.E.2d 684, 696-98 (Ill. Ct. App. 2002) (refusing to recognize an Italian judgment that did not award the plaintiff a specific sum of money).

175. *See, e.g.*, Farrow Mortgage Serv. Pty Ltd. v. Singh, No. 93-7171, 1995 Mass. Super. LEXIS 495, at *11-12 (Mass. Super. Ct. Mar. 30, 1995) (refusing to recognize an Australian judgment to the extent it awarded undetermined litigation costs).

176. Lago Agrio Complaint, *supra* note 2, at 26 (stating that "[t]he amount of the claim, in view of the nature of it, is at this time, undetermined").

determine that Chevron has no liability.

This approach also would provide the parties with the opportunity to reach a settlement. This outcome would be preferable to the plaintiffs and the court. The plaintiffs would receive some amount of compensation without having to expend time and money and risk the uncertainties associated with a U.S. recognition action. The court's interest in its reputation and the sanctity of its judgments would be preserved by an outcome in which a review of its determinations by a U.S. court could be avoided. Nevertheless, a complete deferral of any award of damages would render the foreign judgment unrecognizable in the United States. A partial deferral would render recognizable only those portions of the judgment for which specific amounts of money had been awarded.[177] At the very least, such an outcome would cause a U.S. court to stay any recognition action pending future proceedings in Ecuador.[178]

U.S. recognition of other relief sought by the plaintiffs in Ecuador presents a clearer issue. In their Complaint, the plaintiffs requested significant equitable relief.[179] This relief may not be recognized by a U.S. court should it be granted by the Superior Court. Rather, only the monetary portion of a foreign court judgment consisting of both legal and equitable relief is entitled to recognition utilizing the Acts.[180] However, no provision of either Act prevents recognition of foreign judgments other than those granting or denying monetary relief. The Acts establish a floor for the recognition of foreign judgments but not a ceiling. States are free to recognize foreign court judgments utilizing comity.[181] This freedom applies to injunctive relief such as that sought by the plaintiffs.[182]

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177. *Farrow Mortgage Serv. Pty Ltd.*, 1995 Mass. Super. LEXIS 495, at *11-12 (refusing to recognize only those portions of an Australian judgment that were not reduced to specific sums of money); *see also In re Transamerica Airlines, Inc.*, 2007 Del. Ch. LEXIS 68, at *67-68 (determining that a portion of a Nigerian judgment that did not award a specific sum of money for breach of contract was not recognizable).

178. *See, e.g., Kreditverein der Bank Austria*, 2006 U.S. Dist. LEXIS 47011, at *10 (ordering that a U.S. recognition action be stayed "[in] the interests of judicial economy and the prevention of piecemeal litigation" pending a determination and award of a specific sum of money by an Austrian court).

179. *See supra* note 84 and accompanying text.

180. 2005 ACT, *supra* note 7, § 3 cmt. 2 (stating that "[i]f a foreign-country judgment both grants or denies recovery of a sum [sic] money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief").

181. *Id.* §§ 3 cmt. 2, 11 (stating that "U.S. court[s] . . . would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law" and providing that "[t]his [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act]").

182. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, 433 F.3d 1199, 1213-14 (9th Cir. 2006) (in which the Ninth Circuit concluded that the 1962 Act as adopted by California neither expressly authorized or prevented the enforcement of foreign injunc-

Despite this freedom, it is unlikely that a U.S. court applying comity would enforce injunctive relief that imposes the enormous obligations sought by the plaintiffs. As will be discussed later in this article, Chevron possesses significant defenses to recognition of the monetary portion of any judgment entered by the Superior Court let alone any provision granting equitable relief.[183] Recognition of any equitable portion of the Superior Court's order is further problematic to the extent U.S. courts require reciprocity as a precondition to recognition.[184]

Additionally, U.S. courts have expressed reluctance to recognize and enforce injunctive relief entered in foreign proceedings.[185] Recognition of any such relief must either adhere exactly to the provisions of the foreign injunction or risk leading to inconsistent interpretation and enforcement. Furthermore, any U.S. amendment to the foreign injunction is an expression of disrespect for the issuing court and would unnecessarily interfere with ongoing foreign proceedings. Any interference would offend rather than advance the interests recognized by comity.[186] U.S. case law recognizing foreign injunctions is distinguishable as having narrow application[187] and requiring the foreign proceedings to be "orderly, fair and consistent with United States policy," a conclusion which is in significant doubt with respect to the proceedings against Chevron in Ecuador.[188]

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tive relief); *see also* Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 161 (2001) (noting that "[n]othing . . . prevents recognition or enforcement of judgments other than money judgments").

183. *See infra* Part IV.A.2-B.3.

184. For a discussion of *Hilton's* reciprocity requirement, see *supra* note 162 and accompanying text.

185. *See, e.g.*, Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1039, 1046 (D. Del. 1984) (refusing to issue a preliminary injunction prohibiting the defendant from violating an injunction issued by an English court on the bases that a U.S. injunction might interfere with the foreign proceedings and lead to inconsistent interpretation and enforcement of the English injunction).

186. *See* Hilton v. Guyot, 159 U.S. 113, 166 (1895) (noting that the interests advanced by comity are utility, convenience and the establishment of usages amongst states by which final judgments of their courts are executed); *see also* Somportex, Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (stating that the underlying interests served by comity are "practice, convenience, and expediency").

187. *See, e.g.*, Clarkson Co. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976) (issuing an injunction granting a trustee in a Canadian bankruptcy proceeding access to documents located within the United States).

188. *See, e.g.*, Murray v. British Broad. Corp., 906 F. Supp. 858, 865 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (2d Cir. 1996) (concluding that the United Kingdom provided an adequate alternative forum as an injunction entered by an English court preventing copyright infringement would be enforceable in the United States). The holding in *Murray* is further distinguishable as it was entered in the context of the defendant's motion to dismiss on the basis of *forum non conveniens*, a significant determination but nevertheless lacking the gravity of a judicial determination of whether to recognize a judgment entered by a foreign

3. The Prohibition upon Fines and Penalties

The award of a specific sum of money to the plaintiffs is only the starting point for the recognition of a foreign judgment. The Acts exclude judgments imposing penalties or fines from recognition.[189] This exclusion is based upon the long-standing rule that states will not enforce one another's public laws.[190]

Both Acts fail to define the terms "penalty" and "fine." However, a common definition may be found in case law applying the Acts as well as comity.[191] According to these cases, the test for whether a judgment is a fine or penalty focuses on its "essential character."[192] The specific issue is whether the judgment is "a punishment of an offence against the public, or a grant of a civil right to a private person."[193] A judgment which benefits private persons and compensates them for individual harm is remedial in nature and generally does not constitute a fine or penalty.[194] By contrast, a judgment that punishes an offense against public justice is more likely to be deemed a fine or penalty.[195] Such actions are penal to the extent they award "a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong."[196]

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court. *See id.*

189. *See* 2005 ACT, *supra* note 7, § 3(b)(2).

190. 2005 ACT, *supra* note 7, § 3 cmt. 4; *see also* Huntington v. Attrill, 146 U.S. 657, 673-74 (1892) (wherein the Court stated that "a penal law, in the international sense . . . cannot be enforced in the courts of another State"); The Antelope, 23 U.S. 66, 123 (1825) (wherein Chief Justice Marshall stated that "[t]he Courts of no country execute the penal laws of another"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 483, reporters' n.2 (1987).

191. *See* Java Oil Ltd. v. Sullivan, 86 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2008).

192. *Id.*

193. *Huntington*, 146 U.S. at 683.

194. The U.S. Supreme Court has summarized this test as follows:

> [t]he question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673-74; *see also* Erbe Elektromedizin GMBH v. Canady, 545 F. Supp. 2d 491, 497 (W.D. Pa. 2008) (applying *Huntington* to the recognition of an English judgment for patent infringement utilizing the 1962 Act); Chase Manhattan Bank, N.A. v. Hoffman, 665 F. Supp. 73, 75-76 (D. Mass. 1987) (applying *Huntington* to the recognition of a Belgian judgment for embezzlement and related offenses utilizing the 1962 Act); *Java Oil Ltd.*, 86 Cal. Rptr. 3d at 183 (applying *Huntington* to the recognition of a Gibraltar judgment for attorneys' fees utilizing the 1962 Act and stating that, in order to be deemed penal, "[t]he purpose must be, not reparation to one aggrieved, but vindication of the public justice").

195. *See Hoffman*, 665 F. Supp. at 75-76.

196. Loucke v. Standard Oil Co., 120 N.E. 198, 199 (1918).

However, these characterizations are not conclusive. Rather, courts must carefully examine each foreign judgment to determine whether they more closely implicate remediation for individual plaintiffs or punishment for breaches of public justice.[197] Thus, a civil judgment based upon criminal activity yet purporting to compensate affected individuals for actual losses suffered may be entitled to recognition.[198] Similarly, a civil action brought by the government seeking compensation or restitution for the benefit of private individuals should not automatically be deemed penal.[199] Conversely, a judgment rendered in litigation brought by individuals to vindicate rights possessed by the public at large may be penal.

Despite this flexibility, the definition of fines and penalties presents serious obstacles to the recognition of any judgment entered by the Superior Court. Initially, any damages assessed against Chevron relate to the vindication of public rather than private rights. Ecuador's Constitution recognized environmental protection as a societal right consisting of the right to "live in a healthy environment, ecologically balanced and free from pollution."[200] Those areas within the scope of this right included environmental preservation, the conservation of ecosystems and biodiversity, the sustainable development of natural resources, the prevention of pollution and restoration of contaminated sites.[201] The government was designated as the protector of these rights and was required to undertake precautionary measures with respect to any activities that could negatively impact the environment and assume responsibility for environmental injuries.[202] Of particular importance in this regard was the requirement of governmental regulation of all aspects of hydrocarbon exploration and exploitation, including production, distribution, and use of toxic sub-

197. *See* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 202 (1932) (stating that "civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them").

198. *See, e.g.*, *Hoffman*, 665 F. Supp. at 76 (concluding that a Belgian judgment was not penal despite the criminal nature of the underlying activity and proceeding as the associated damage petition sought a civil remedy. The judgment was not based on a violation of public justice and the benefit of the judgment accrued to private individuals).

199. 2005 ACT, *supra* note 7, § 2 cmt. 4; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, cmt. a (1971) (stating that "actions brought by a private person or public body to recover compensation for a loss" are not penal for purposes of enforcement of foreign judgments).

200. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 23(6); *see also* Xavier Sisa Cepeda, *Legal Perspectives on the Debate Concerning Social-Environmental Issues and Petroleum Development in Ecuador*, 10 SW. J. L. & TRADE AM. 41, 43 (2004).

201. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

202. *Id.* art. 91.

stances.[203]

The purpose of the Lago Agrio Complaint and the relief sought by the plaintiffs is the vindication of these societal rights. The fundamental claim underlying the Complaint is an assumption of the Ecuadorian government's constitutional obligations to preserve and protect the environment, prevent pollution and restore contaminated sites. The remedies sought by the plaintiffs are also the responsibility of the Ecuadorian government. This is particularly true of the equitable relief seeking remediation and restoration of the concession area, affirmative acts which are clearly within the state's constitutional obligations.

The same conclusion holds true with respect to the damages sought by the plaintiffs. The plaintiffs are serving as a collection agency for the Ecuadorian government whose responsibility includes the performance of the requested remediation and incurrence of the costs associated therewith. The plaintiffs' characterization of the litigation as a popular action on behalf of "undetermined people" is further evidence that the litigation was filed and prosecuted in the interest of the whole community to redress a public wrong.[204] In so doing, the plaintiffs, although private individuals, are seeking to vindicate rights possessed by the public at large. The result will be a judgment that is penal in nature and thus incapable of recognition.

This conclusion is further bolstered by the identity of the parties receiving the primary benefit of any damages award. The plaintiffs have made no effort to identify affected individuals, the injuries they suffered or the specific amounts of damages sought as compensation. The Complaint did list forty-eight individuals but failed to describe their injuries with any degree of specificity. These failures, despite repeated opportunities to present the Superior Court with specific injuries and claims on behalf of identified individuals, strengthens the conclusion that the litigation seeks the imposition of a penalty as vindication for public rights rather than compensation for documented individual loss.[205]

Furthermore, the Complaint seeks payment of ten percent of

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203. *See* Phoenix Can. Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1071-72 (D. Del. 1987) (quoting Ecuador's then Minister of Natural Resources, Gustavo Jarrin Ampudia, as stating that "the country is the owner of its resources. All of the wealth of the subsoil according to the law, is the inalienable and inprescribable [sic] patrimony of the State").

204. *See* Lago Agrio Complaint, *supra* note 2, at 21; *see also supra* note 86 and accompanying text.

205. *See* Porter v. Montgomery, 163 F.2d 211, 215 (3d Cir. 1947) (noting that "[a] civil action is for damages if it is brought for the compensation of the injured individual" rather than those who have not suffered a direct injury).

the total damages awarded to Frente.[206] This remittance was requested despite the fact that Frente was not named as a plaintiff and has no experience with environmental remediation or the provision of medical services.[207] The requested remittance, which may total $2.7 billion should the plaintiffs succeed on all of their claims, has been characterized as an effort to "claim a monopoly of representation of all people affected by Texaco and manage local politics in an undemocratic fashion."[208] The absence of a demonstrable interest by Frente and the potential size of the damages award which bears no relationship to actual injury suffered by the organization strengthen the conclusion that the litigation seeks the imposition of a penalty as vindication of public rights.[209]

The public purpose behind the litigation is also reflected in a statement made by the plaintiffs' counsel Steven R. Donziger.[210] Donziger's description more closely resembles a penalty for success in the global marketplace or a tax designed to shift the burden associated with globalization than an effort to compensate affected individuals that have suffered demonstrable loss as a direct result of Chevron's activities in Ecuador.

Even more indicative of the public interests served by the litigation was a statement by Cabrera. Cabrera described his mandate as to "achieve change in the overall economic, political and social paradigm to a new view of equality of entitlements, with economic solidarity that has as its ultimate goal benefiting the population as a whole instead of elitist profiteering."[211] According to Cabrera, his mandate could be achieved by a result that values rational and sustainable use of the environment and energy and food supply independence.[212] Cabrera's understanding of his mandate more closely resembles the vindication of public rights rather than an effort to compensate individuals negatively impacted as a direct result of Texaco's activities in Ecuador. Cabrera's description carries considerable weight given his role as the sole expert designated by the Superior Court to determine issues of injury, causation and liability.

Finally, the size of the recommended award more closely resembles a penalty or fine rather than compensation for actual in-

206. Lago Agrio Complaint, *supra* note 2, at 25.

207. Kimerling, *supra* note 2, at 631-32.

208. *Id.* at 632.

209. *See Porter*, 163 F.2d at 215 (noting that a civil action "is for a penalty if it seeks to obtain a sum of money for . . . an entity which has not suffered direct injury by reason of any prohibited action").

210. *See* Donziger, *supra* note 5 and accompanying text.

211. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 8.

212. *Id.*

jury. Courts confronted with judgments, including double and treble damages, have held such awards to be unrecognizable penalties.[213] At $27.3 billion, Cabrera's recommended award is the largest civil damages award ever proposed and is equal to approximately half of Ecuador's gross domestic product.[214] The amount is more than fifty-five times Texaco's net profits derived from its operations in Ecuador and bears no relation to Texaco's ownership interest in the Consortium.[215] If awarded in its entirety, the damages would exceed Chevron's net income for 2008 by more than $3 billion and would be almost double the amount of its net international earnings.[216] According to Chevron, more than ninety percent of the recommended award has no relation to the environmental issues that Cabrera was ordered to assess.[217] Although Chevron's estimate may overstate the amount of damages attributable to items outside of Cabrera's mandate, it may nevertheless be concluded that a significant portion of these damages do not arise from demonstrable injuries suffered by any of the plaintiffs.

The specific elements constituting Cabrera's damages estimates suffer from similar flaws. For example, the assessment of damages for cancer deaths failed to identify the alleged victims, produce supporting documentation, distinguish between types of cancer, or provide an explanation for its inconsistency with official Ecuadorian statistical data on cancer mortality.[218] Other estimates also were grossly inflated. These estimates included the cost of remediation of waste pits, the improvement of potable water systems, and remediation of groundwater contamination.[219] Other damages claims imposed costs on Chevron rather than served a compensatory purpose such as those associated with creation of a healthcare system, raising the standard of living of indigenous populations and funding improvements in Petroecuador's infrastructure.[220] These costs are not insubstantial and total more than $1.2 billion.[221]

Cabrera's damages estimate includes disgorgement of $8.3 billion in alleged profits earned by Texaco in the course of its partici-

213. *See, e.g.*, Java Oil Ltd. v. Sullivan, 86 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2008).
214. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 1.
215. *See supra* notes 19-30, 118 and accompanying text.
216. *See supra* note 113 and accompanying text.
217. Rebuttal Brief, *supra* note 97, at 6, 17.
218. *See supra* note 115 and accompanying text.
219. *See supra* notes 120-24 and accompanying text.
220. *See* Press Release, Chevron Corp., *supra* note 104.
221. *Id.* (estimating the cost of creation of a healthcare system at $480 million, efforts to raise the standard of living of indigenous populations at $430 million, and improvement of Petroecuador's infrastructure at $375 million).

pation in the Consortium.[222] This amount, which constitutes more than thirty percent of the total damages estimate, clearly serves a punitive rather than compensatory purpose and was characterized as such by Cabrera himself.[223] This conclusion is further bolstered by the absence of such a remedy in Ecuadorian law, a fact acknowledged by the lack of an unjust enrichment claim in the Complaint.[224] Even assuming such a claim would be recognized under Ecuadorian law, it has no relation to compensating any of the Plaintiffs for injuries resulting from Texaco's activities. Rather, this claim and the amount sought pursuant thereto more closely resemble an attempt to vindicate rights through disgorgement of corporate profits alleged to have been earned through unlawful exploitation of a public resource. When combined with the previously-referenced estimates, a strong case may be made that a significant portion of the damages award would provide a windfall for the plaintiffs against a U.S. company that never operated in Ecuador and had nothing to do with the Consortium.[225]

If these damages are deemed penal rather than compensatory, their recognition in the United States may also be thwarted by restrictions on punitive damage awards. The Due Process Clause of the U.S. Constitution imposes substantive limits on the ability of U.S. courts to impose and, by extension, recognize punitive damages.[226] Awards imposing "grossly excessive" punishments are constitutionally prohibited.[227] Although the Court has not annunciated a bright line test for determining when such awards are constitutionally impermissible, it has indicated that few awards exceeding a single digit ratio between compensatory and punitive damages will satisfy due process.[228] Thus, the Court has struck down judgments where the punitive damages awarded by the trial court were 90, 145 and 500 times the amount of compensatory damages.[229] Furthermore, the permissible ratio must be smaller as

222. *See* Amazon Watch, *supra* note 112 and accompanying text.

223. Rebuttal to the Supplemental Expert Report, *supra* note 116, at 7 (quoting Cabrera as conceding that the unjust enrichment damages are not intended to compensate for any alleged harm but rather might be imposed as a "punitive" measure).

224. *Id.*; *see also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 10; Press Release, Chevron Corp., *supra* note 104; Plaintiff's Myths, *supra* note 98.

225. *See* Rebuttal to the Supplemental Expert Report, *supra* note 116, at 3.

226. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001).

227. *Id.* at 434.

228. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

229. *Id.* (punitive damages awarded in bad faith case were 145 times the amount of compensatory damages); *Cooper Indus., Inc.*, 532 U.S. at 441-42 (punitive damages awarded in unfair competition case were ninety times the amount of compensatory damages); BMW of N. Am. v. Gore, 517 U.S. 559, 582 (1996) (punitive damages awarded in fraud case were five hundred times the amount of compensatory damages).

the size of the compensatory award increases.[230] Awards in excess of a single digit ratio are also suspect as unconstitutional attempts to redistribute wealth, especially if they are entered against a large nonresident corporation.[231] Equally suspect are large awards purporting to punish a wrongdoer on behalf of nonparty victims.[232]

These standards increase the plaintiffs' burden with respect to recognition. Utilizing Chevron's calculation that ninety percent of the claimed damages do not serve a compensatory purpose, the maximum amount of the compensatory award would total $2.7 billion, and the punitive portion of the award would be $24.5 billion. This ratio exceeds nine times and would thus draw close to the constitutional prohibition upon double digit punitive awards. Furthermore, applying the Court's reasoning in *State Farm Mutual Automobile Insurance Co. v. Campbell,* the ratio should be far less given the size of the compensatory award. Any such punitive award also falls within Justice O'Connor's warning regarding attempts to redistribute wealth through punitive damages awards against large nonresident corporations. This warning is particularly relevant in this case given the descriptions of the purpose of the litigation by plaintiffs' co-counsel and Cabrera. This punitive purpose is further suspect as the litigation seeks billions of dollars on behalf of thousands of unnamed nonparty victims residing in the Oriente. Any U.S. court confronted with a recognition action cannot accept the judgment on its face, but instead will need to carefully review each separate award on a de novo basis.[233] Although it may ultimately prove unsuccessful in denying recognition in whole or in part, this re-examination may provide Chevron with an opportunity to relitigate the merits of the damages portion of the judgment.

Despite these difficulties, recognition of a portion of the monetary award contained within any judgment entered against Chevron cannot be categorically dismissed. Foreign judgments are entitled to a strong presumption of validity in U.S. courts.[234] Fur-

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230. *Campbell*, 538 U.S. at 425.

231. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (O'Connor, J., dissenting) (stating that undue focus on the wealth of the purported wrongdoer and financial disparities between the parties increase "the risk that the award may [be] . . . influenced by prejudice").

232. Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (concluding that such awards "add a near standardless dimension to the punitive damages equation").

233. *See Cooper Indus., Inc.*, 532 U.S. at 435.

234. *See, e.g.*, Samyang Food Co. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 U.S. Dist. LEXIS 25374, at *12 (N.D. Ohio Oct. 21, 2005); Soc'y of Lloyd's v. Anderson, No. 3-03-MC-112-D, 2004 U.S. Dist. LEXIS 7351, at *6-8 (N.D. Tex. Apr. 27, 2004); Kam-Tech Sys. Ltd. v. Yardeny, 774 A.2d 644, 649 (N.J. Super. Ct. App. Div. 2001); Maxwell Schuman & Co. v. Edwards, 663 S.E.2d 329, 331-332 (N.C. Ct. App. 2008).

thermore, the plaintiffs need not meet the differing requirements of all fifty states in order to gain recognition of any judgment entered in Ecuador. Rather, all that is required is for the plaintiffs to meet the requirements for recognition and overcome any objections raised by Chevron in a single state. Once this has been achieved, the resulting state judgment is entitled to full faith and credit throughout the United States.[235]

It thus behooves the plaintiffs to seek recognition in the state with the least restrictive standards in which Chevron assets may be located. This strategy immediately excludes states requiring reciprocity such as Georgia and Massachusetts. However, given Chevron's size and the extensive nature of its operations throughout the United States, it should not be difficult for the plaintiffs to locate at least one jurisdiction in which Chevron possesses assets that does not present insurmountable hurdles to recognition. Given the presumption in favor of recognition of foreign judgments and the fact that the plaintiffs need but prevail only once, it is more likely than not that they will meet their burden of proof with respect to at least a portion of any monetary award entered by the Superior Court.

B. Mandatory Grounds for Non-Recognition

1. Due Process of Law

The Acts deny recognition to foreign judgments entered in the absence of due process.[236] A party resisting recognition must demonstrate that the judgment was rendered under a system that does not provide due process.[237] Due process depends upon the circumstances in each individual case.[238] Nevertheless, this determination

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235. Gul, *supra* note 11, at 83 (concluding that an international litigant need only find a single U.S. jurisdiction willing to recognize his foreign judgment, thereby converting it to a domestic judgment entitled to full faith and credit throughout the United States); *see also* Friedrich K. Juenger, *An International Transaction in the American Conflict of Laws*, 7 FLA. J. INTL. L. 383, 398-99 (1992).

236. *See supra* notes 150, 162 and accompanying text. Despite differences in wording, the effect of the Acts is identical. The 1962 Act denies such judgments recognition on the basis that they are not conclusive. 1962 ACT, *supra* note 7, § 2. The 2005 Act holds such judgments to be conclusive but nevertheless denies them recognition. 2005 ACT, *supra* note 7, § 4, cmt. 4.

237. Soc'y of Lloyd's v. Siemon-Netto, 457 F.3d 94, 105-06 (D.C. Cir. 2006) (reviewing procedures in English courts pursuant to the 1962 Act); Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 994 (10th Cir. 2005) (reviewing procedures in English courts pursuant to the 1962 Act); Soc'y of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 472-73 (E.D. Pa. 2003) (reviewing procedures in English courts pursuant to the 1962 Act).

238. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 479 (7th Cir. 2000); *see also* Soc'y of Lloyd's v. Webb, 156 F. Supp. 2d 632, 641(N.D. Tex. 2001).

begins with an examination of the procedural protections granted by the foreign legal system.[239] The system must provide an opportunity for a "full and fair trial . . . before a court of competent jurisdiction conducting the trial upon regular proceedings," an appearance by the defendant either voluntarily or by citation, and "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries."[240]

The foreign legal system need not provide due process protections identical to those of the United States.[241] To require identical protections would result in the non-recognition of all foreign judgments as no foreign jurisdiction has adopted "every jot and tittle" of U.S. due process.[242] Furthermore, such a requirement would grant every party disappointed with the outcome in the foreign jurisdiction the opportunity to relitigate the merits in a U.S. court.[243] Thus, some procedural protections deemed essential to U.S. notions of due process are not required of foreign legal systems. The 2005 Act identifies these protections as the absence of jury trials and differences in evidentiary rules.[244] Additional unnecessary protections include oral testimony, cross examination, and compul-

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239. *See* Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (examining the fundamental fairness of the English legal system pursuant to the 1962 Act); *see also Ashenden*, 233 F.3d at 477, 480 (examining the fundamental fairness of the English legal system pursuant to the 1962 Act); Kreditverein der Bank Austria Creditanstalt für Niederösterreich und Burgenland v. Nejezchleba, No. 04-72, 2006 U.S. Dist. LEXIS 47011, at *7 (D. Minn. June 30, 2006) (examining the fundamental fairness of the Austrian legal system pursuant to the 1962 Act); *Kam-Tech Sys. Ltd.*, 774 A.2d at 651 (examining the fundamental fairness of the Israeli legal system pursuant to the 1962 Act).

240. 2005 ACT, *supra* note 7, § 4, cmt. 5 (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)). Similar requirements hold true for the 1962 Act; *see, e.g.*, Soc'y of Lloyd's v. Edelman, No. 03 Civ. 4921, 2005 U.S. Dist. LEXIS 4231, at *12-13 (S.D.N.Y. Mar. 22, 2005) (defining due process required by the 1962 Act as consisting of notice and an opportunity to be heard); *Webb*, 156 F. Supp. 2d at 640 (defining due process required by the 1962 Act as consisting of notice, personal and subject matter jurisdiction, and an opportunity to be heard); Najas Cortés v. Orion Sec., Inc., 842 N.E.2d 162, 168 (Ill. App. Ct. 2005) (defining due process required by the 1962 Act as consisting of notice and an opportunity to be heard).

241. Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987); *see also Kreditverein der Bank Austria*, 2006 U.S. Dist. LEXIS 47011, at *6 (concluding that due process as required by the 1962 Act is "distinct from, and less demanding than, the concept of 'due process' as it has been defined in American case law"); *Webb*, 156 F. Supp. 2d at 641 (concluding that " 'international due process' is a less stringent due process than that required under American jurisprudence"); 2005 ACT, *supra* note 7, § 4, cmt. 5.

242. *Ashenden*, 233 F.3d at 478; *see also Webb*, 156 F. Supp. 2d at 641.

243. *Ashenden*, 233 F.3d at 477; *see also Ingersoll Milling Mach. Co.*, 833 F.2d at 688.

244. 2005 ACT, *supra* note 7, § 4, cmt. 5; *see also* Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991) (holding that the absence of the right to a jury trial did not render the Japanese legal system inadequate); Samyang Food Co. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 U.S. Dist. LEXIS 25374, at *17 (N.D. Ohio Oct. 21, 2005) (holding that the absence of the right to a jury trial did not render the South Korean legal system inadequate).

sory process.[245] Lengthy delays in foreign legal proceedings also do not constitute a violation of due process.[246] Rather, there must be "serious injustice" or "outrageous departure from our own [notion] of civilized jurisprudence."[247] States whose legal systems have been deemed to have engaged in such injustice or departures include Iran, Liberia, Cuba, North Korea and the Democratic Republic of the Congo.[248]

U.S. case law provides a starting point to determining the adequacy of a particular state's legal system.[249] An examination of applicable case law with respect to the adequacy of the Ecuadorian legal system results in a mixed outcome. One court has found that Ecuador's judicial system lacked fundamental due process protections as the military government retained the right to overrule or intervene in judicial matters of national concern and asserted absolute control over all branches of government.[250] However, this case is distinguishable on the basis that it is more than thirty years old; the government changed in this intervening period of time and the determination of the adequacy of the forum related to the application of *forum non conveniens* rather than recognition of an Ecuadorian judgment.

The majority of cases that have examined the Ecuadorian legal system have found it to be adequate.[251] Nevertheless, these cases

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245. *See, e.g., Ingersoll Milling Mach. Co.*, 833 F.2d at 686 (concluding that the absence of oral testimony, cross examination, and compulsory process did not mandate a finding that the Belgian legal system provided inadequate due process protections).

246. *See, e.g., In re* Union Carbide Corporation Gas Plant Disaster, 809 F.2d 195, 199 (2d Cir. 1987) (concluding that lengthy delays and backlogs did not render India inadequate for purposes of *forum non conveniens* analysis); Patrickson v. Dole Food Co., No. 97-01516 HG, 1998 U.S. Dist. LEXIS 23661, at *68 (D. Haw. Sept. 9, 1998) (concluding that lengthy delays and backlogs did not render Costa Rica, Ecuador, Guatemala, and Panama inadequate for purposes of *forum non conveniens* analysis).

247. *Ingersoll Milling Mach. Co.*, 833 F.2d at 687 (holding that a finding of a lack of due process requires "serious injustice"); British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (holding that a finding of a lack of due process requires "outrageous departure from our own motion of 'civilized jurisprudence' "); *see also* Leon v. Millon Air, Inc., 251 F.3d 1305, 1312 (11th Cir. 2001) (holding that a finding of a lack of due process requires "extreme amounts of partiality or inefficiency"); 2005 ACT, *supra* note 7, § 4, cmt. 5 (requiring a finding of a lack of due process to be supported by "serious injustice").

248. *Ashenden*, 233 F.3d at 477 (opining that judgments entered in Cuba, North Korea, Iran, the Democratic Republic of Congo or "some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question" would not be recognizable); *see also* Bridgeway Corp. v. Citibank, 201 F.3d 134, 137-38, 142-44 (2d Cir. 2000) (refusing to recognize a Liberian judgment); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410-13 (9th Cir. 1995) (refusing to recognize an Iranian judgment entered after the Islamic Revolution).

249. Kam-Tech Sys. Ltd. v. Yardeni, 774 A.2d 644, 651-52 (N.J. Super. Ct. App. Div. 2001) (holding that the absence of a judicial determination that a foreign legal system is fundamentally unfair is important to the determination of whether the system affords due process).

250. Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978).

251. *See Leon*, 251 F.3d at 1314 (finding that the lack of financial resources devoted to

may be distinguishable on the basis that they relate to the adequacy of the Ecuadorian judicial system for purposes of determining the application of *forum non conveniens*, a far less consequential determination than whether to recognize a foreign judgment for the ultimate purpose of enforcement in the United States. However, it bears to note that U.S. courts in litigation relating to the Consortium's operations found Ecuador to be an adequate forum for resolution of claims relating to environmental contamination.[252]

Furthermore, the important role of *forum non conveniens* in the U.S. litigation may serve to estop any allegation that Ecuador is an inadequate forum or denies due process. Judicial estoppel arises where a party has "advanced an inconsistent factual position in a prior proceeding, and . . . the prior inconsistent position was adopted by the first court in some manner."[253] This doctrine may be applicable where a party succeeds in obtaining dismissal of a civil action in the United States utilizing *forum non conveniens* and then subsequently resists recognition of the resulting foreign judgment in the United States on the basis that the foreign forum was inadequate.

For example, in *Pavlov v. Bank of New York Co.*, the U.S. District Court for the Southern District of New York was confronted with a motion to dismiss a class action on behalf of depositors claiming that the defendants facilitated the looting and laundering of assets for several insolvent Russian banks.[254] In resisting the defendants' motion to dismiss on the basis of *forum non conveniens*, the plaintiffs alleged that any judgment entered in Russia would not be recognized in the United States. However, the district court concluded that the defendants' "staunch assertion" regarding

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the judicial system by the Ecuadorian government did not render its courts inadequate); *see also* Clough v. Perenco, L.L.C., No. H-05-3713, 2007 U.S. Dist. LEXIS 61198, at *8-9 (S.D. Tex. Aug. 21, 2007) (finding Ecuador to be an adequate forum despite the absence of the right to a jury trial); Valarezo v. Ecuadorian Line, Inc., No. 00 Civ. 6387 (SAS), 2001 U.S. Dist. LEXIS 8942, at *8-9 (S.D.N.Y. June 29, 2001) (finding Ecuador to be an adequate forum to resolve a suit alleging personal injury occurring aboard a cargo vessel); *Patrickson*, 1998 U.S. Dist. LEXIS 23661, at *60-61 (finding Ecuador to be an adequate forum as it provided its citizens with the right to recover a money judgment from employers for on-the-job injuries, guaranteed all parties the right to a fair trial, and provided for discovery procedures by which to gather evidence, obtain the testimony of witnesses and compel the production of documents); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995) (finding Ecuador to be an adequate forum for the resolution of a mass tort suit for pesticide exposure); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997) (finding Ecuador to be an adequate forum for the resolution of a tort suit relating to exposure to fungicides).

252. *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 544-45 (S.D.N.Y. 2001); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); *see also supra* notes 60, 76 and accompanying text.

253. Wight v. Bankamerica Corp., 219 F.3d 79, 90 (2d Cir. 2000).

254. 135 F. Supp. 2d 426 (S.D.N.Y. 2001).

the adequacy of the Russian legal system would "quite likely" estop them from challenging a Russian money judgment in a subsequent U.S. recognition proceeding.[255] A challenge to recognition on due process grounds "probably would not be heard" if the defendants obtained a dismissal on the basis of *forum non conveniens* "on the premise that [the foreign forum was] adequate."[256]

A similar scenario exists in the *Aguinda.* Chevron may be estopped to deny the adequacy of the Ecuadorian legal system based upon Texaco's representations during the U.S. litigation.[257] These representations were sufficient to convince two U.S. courts to dismiss the litigation utilizing *forum non conveniens.*[258] A condition of this dismissal was that Texaco "unambiguously agreed in writing to being sued on these claims (or their Ecuadorian equivalents) in Ecuador."[259] As a result, Chevron, as Texaco's successor-in-interest, may be "completely strait-jacketed . . . when they go into a US court to argue that a judgment in a trial they sought over [the plaintiffs'] objection should not be enforced."[260] A contrary result would deprive the plaintiffs of all forums and means by which to obtain redress for legitimate grievances in contravention of traditional notions of fundamental fairness.[261]

Another important source for the determining the adequacy of foreign legal systems is reports prepared by U.S. and international bodies. Annual reports prepared by the U.S. State Department have been deemed to be a reliable source of information for determining whether foreign legal systems comport with due process standards.[262] The most recent State Department reports regarding Ecuador paint a bleak picture of its judicial system. In its 2008

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255. *Id.* at 435.

256. *Id.* at 435 & n.52; *see also* Rosemary Do, Note, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua's DBCP Litigation,* 14 SW. J.L. & TRADE AM. 409, 410 (2008) (contending that "U.S. defendants who successfully employ *forum non conveniens* against foreign plaintiffs should not be permitted to block the enforcement of unfavorable, yet valid, foreign judgments").

257. *See supra* notes 61-62 and accompanying text; *see also* Press Release, Texaco Corp., *supra* note 61, at 1 (in which Texaco stated that "[s]imply put, the appropriate forum for this litigation is Ecuador [as] [t]he plaintiffs are in Ecuador; [t]he operations were in Ecuador; [t]he state oil company . . . is in Ecuador; [t]he evidence is in Ecuador; [and] [t]he remedies sought by the plaintiffs can only be obtained in Ecuador").

258. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002); *see also* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

259. *Aguinda,* 142 F. Supp. 2d at 539.

260. Bolton, *supra* note 105, at 7-8 (quoting Steven Donziger).

261. *See* Do, *supra* note 256, at 421.

262. *See, e.g.,* Bridgeway Corp. v. Citibank, 201 F.3d 134, 144 (2d Cir. 2000) (approving the district court's consultation of human rights reports prepared by the U.S. State Department in determining that the Liberian judicial system did not comport with international due process standards).

Human Rights Report, the State Department described continued problems with corruption and the denial of due process.[263] Although the constitution establishes an independent judiciary, the State Department concluded that "in practice the judiciary was at times susceptible to outside pressure and corruption."[264] Judges were susceptible to bribery and parceled out cases to lawyers who wrote opinions for the courts.[265] Media, political and economic pressure and bribery also influenced judicial decisions, including the speed in which decisions were rendered.[266]

Similar conclusions were reached by the State Department in its 2009 Investment Climate Statement relating to Ecuador. This report found that "[b]usiness disputes with U.S. companies can become politicized, especially in sensitive areas such as the energy sector."[267] The report identified "[s]ystemic weakness and susceptibility to political or economic pressures in the rule of law" as constituting "the most important problem faced by U.S. companies investing" in Ecuador.[268] The Ecuadorian judicial system was described as "hampered by processing delays, unpredictable judgments in civil and commercial cases, [and] inconsistent rulings."[269] Unpredictability was exacerbated by the more than 55,000 laws and regulations in force and effect, which are often conflicting and are interpreted by the courts in a contradictory fashion.[270] Of equal concern was uncertain enforcement of contract rights and equal treatment under the law.[271] Corruption remained a serious problem and is impervious to legislative oversight or internal judicial branch mechanisms.[272] These conclusions are consistent with other descriptions of Ecuador's legal system.[273]

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263. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, HUMAN RIGHTS REPORT: ECUADOR (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm.

264. *Id.*

265. *Id.*

266. *Id.*

267. U.S. DEP'T OF STATE, BUREAU OF ECON., ENERGY & BUS. AFFAIRS, INVESTMENT CLIMATE STATEMENT - ECUADOR (2009), *available at* http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *See* Kimerling, *supra* note 2, at 569. Judith Kimerling mentions that Ecuador's 1999 Anti-Corruption National Plan describes corruption as 'systematized,' 'a thousand faced monster' affecting all Ecuadorian and foreign residents and a threat to democracy that results in 'unfairness and inequality in judicial resolutions.' *Id.* at 569-70. Additional problems included lack of independent controls and professionalism, intervention by politicians in pending cases, slow processing of lawsuits and the absence of information accessible to all parties. *Id.* at 570 & n.427. *See also* ECUADOR AND THE LAWSUIT, *supra* note 115, at 8 (quoting Ecuadorian President Rafael Correa as stating that Ecuador is " 'not living under the

U.S. courts directly involved in the *Aguinda* litigation acknowledged these concerns as far back as 2000. The district court expressed significant reservations about the Ecuadorian judicial system based upon its review of the State Department's 1998 Human Rights Report.[274] Nevertheless, it discounted these concerns and disregarded statements in the 1999 and 2000 Human Rights Reports by noting that the allegations of politicization, inefficiency and corruption largely related to cases involving confrontations between law enforcement and political protestors.[275] Additionally, numerous courts had found Ecuador to be an adequate forum, and no court had reached a contrary conclusion since Ecuador became a democratic constitutional republic in 1979.[276] Finally, the district court concluded that the public scrutiny and political debate associated with the case in Ecuador rendered the possibility of corruption or undue influence "exceedingly remote."[277] This prediction proved flawed but not for the reason anticipated by the district court, specifically, improper interference by Texaco in the judicial process. Rather, if any conclusion may be reached, it is that Texaco, and ultimately Chevron, have been victims of undue influence and bias throughout the litigation.

The issue of whether the Ecuadorian judicial system provides a level of due process sufficient to meet international standards for the purpose of recognizing the Superior Court's judgment is a close question. Undoubtedly, the system provides far fewer protections than the United States. However, any differences, assuming no substantial injustice or outrageous departure from fundamental fairness has occurred, are not determinative. Furthermore, the single case finding Ecuador to be an inadequate forum is more than thirty years old and relates to a government no longer in power. The remaining few cases considering the Ecuadorian judi-

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rule of law', and that 'the Executive Branch could exert pressure on the Judicial Branch to get the courts to 'respond to the needs of the country' ").

274. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (JSR), 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000) (noting the State Department's characterization of the Ecuadorian judicial system as "politicized, inefficient, and corrupt"). In his opinion, Judge Rakoff stated:

> [w]hile the evidence set forth in the report in support of this strong statement largely relates to criminal cases, the Court does not believe that, even in the very different context of the instant lawsuits, it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit these cases.

Id.

275. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 544-45 (S.D.N.Y. 2001).

276. *Id.* at 545 (citing Patrickson v. Dole Food Co., No. 97-01516 HG, 1998 U.S. Dist. LEXIS 23661, at *68 (D. Haw. Sept. 9, 1998); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D. Tex. 1995); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. 4th DCA 1997)).

277. *Aguinda*, 142 F. Supp. 2d at 545.

cial system have concluded that it comports with fundamental notions of due process. It would be a significant departure from precedent to decree that Ecuador's legal system did not satisfy due process. Furthermore, the system bears little resemblance to other legal systems deemed inadequate by U.S. courts. Finally, the failure to recognize the compensatory portion of a monetary judgment entered by the Superior Court would leave the Plaintiffs without a remedy.

These considerations must be offset against several factors. Recent allegations of political interference in the litigation by the Correa administration are cause for significant concern. Second, the cases finding Ecuador to be an adequate forum were *forum non conveniens* cases rather than cases in which a plaintiff sought recognition of an Ecuadorian judgment. Furthermore, it is unlikely that a U.S. court would estop Chevron from asserting a due process defense if the underlying judgment was the product of fundamental unfairness. Recent U.S. government reports also have concluded that the Ecuadorian judicial system continues to be plagued by issues that go directly to the heart of due process. Nevertheless, based upon the lack of irreparable harm given the replacement of Nuñez as the trial judge, U.S. case law finding Ecuador to be an adequate forum, the successful assertion of *forum non conveniens* by Texaco in the U.S. litigation and the high burden placed upon Chevron to demonstrate fundamental unfairness, it is likely that a U.S. court confronted with this issue in a recognition proceeding will determine that Ecuador's legal system as a whole is not so fundamentally flawed as to deny Chevron due process.

2. Personal Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of personal jurisdiction of the court issuing the judgment.[278] Both Acts define those circumstances in which personal jurisdiction will be deemed to exist for purposes of the recognition of a foreign judgment.[279] These grounds are not exclusive, and a U.S. court may recognize other grounds for personal jurisdiction.[280]

The basis for personal jurisdiction over Texaco consisted of two separate allegations. Initially, the plaintiffs alleged that the Texaco entities participating in the Consortium, specifically, Compania Texaco de Petroleos del Ecuador and its parent company Tex-

278. *See supra* notes 151, 162 and accompanying text. Despite differences in wording, the effect of the Acts is identical. *See supra* note 236 and accompanying text.

279. *See supra* notes 151, 162 and accompanying text.

280. 2005 ACT, *supra* note 7, § 5(b); *see also* 1962 ACT, *supra* note 7, § 5(b).

aco Ecuador, were "economically, technically, and administratively subjected to [Texaco], as well as to the policies and directives of its headquarters."[281] As a result, Texaco conceived of or knew and approved of the subsidiaries' exploration and production techniques.[282] Secondly, the plaintiffs alleged that Texaco's Ecuadorian subsidiaries were formed with "minimum working capital and stock, infinitely less than the real volume of their operations . . . with the evident purpose of limiting the impact of any claims derived from its activities in the country."[283] The plaintiffs concluded that the Ecuadorian subsidiaries were fronts for Texaco, who otherwise owned, managed, supervised and controlled them.[284]

These bases for asserting personal jurisdiction over Texaco in Ecuador have not withstood judicial scrutiny in the United States.[285] This failure to establish a meaningful nexus is not limited to the *Aguinda* litigation. Fourteen years prior to the district court's opinion determining the separateness of Texaco and its Ecuadorian subsidiaries, another U.S. district court reached a similar conclusion. In *Phoenix Canada Oil Co. v. Texaco, Inc.*, the U.S. District Court for the District of Delaware refused to find Texaco liable for actions of its Ecuadorian subsidiaries resulting in claims of breach of contract, unjust enrichment and intentional infliction of economic distress.[286] The court found that the boards of directors of Texaco's Ecuadorian subsidiaries were separate from Texaco's board, and each entity kept separate books, records, bank accounts and principal places of business.[287] Texaco and its subsidiaries paid their own taxes and were responsible for their own daily op-

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281. Lago Agrio Complaint, *supra* note 2, at 6.

282. *Id.*

283. *Id.* at 15.

284. *Id.*

285. *See supra* notes 66-70 and accompanying text. The relationship between a parent corporation and its foreign subsidiaries for purposes of inferring actions of the subsidiaries to the parent has been described as follows:

> When a wrong [has been] committed by a multinational in the host country, claims are made against the specific entity whose operations caused the harm. The corporate veil separates each corporate entity so that the parent is screened from the liability of a subsidiary or a joint-venture partner from liability of the joint venture's operations. Entities are separated by separate legal personality which is a "legal construct that separates each corporate entity from the other corporate entities within the same corporate 'family tree.'" The corporate veil is pierced only by a demonstration of the requisite amount of control . . . exercised by one corporate entity over another, thereby making the controlling entity liable for the operations of the other.

Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701, 727-28 (2004) (citations omitted).

286. 658 F. Supp. 1061 (D. Del. 1987).

287. *Id.* at 1085.

erations.[288] Furthermore, Texaco's subsidiaries, and not Texaco itself, were authorized to exploit hydrocarbon deposits in the Oriente.[289] The actions which were the subject matter of the plaintiff's complaint were intended to accomplish this mandate.[290] Based on these facts, it could not be concluded that Texaco exercised complete domination or control over its Ecuadorian subsidiaries, and thus Texaco could not be liable for their acts or omissions.[291]

This opinion is important for several reasons. First, it demonstrates that the conclusion that Texaco was separate from its Ecuadorian subsidiaries was reached by more than one court. Second, the opinion establishes this separateness in more than one context. Texaco and its Ecuadorian subsidiaries were separate not only with respect to environmental management but also in matters relating to contract negotiation and performance. Finally, the *Phoenix Canada Oil* determination of separateness is perhaps more important than that reached in the *Aguinda* litigation as it was a contemporaneous determination coinciding with Texaco's actual operations in Ecuador rather than an after the fact conclusion reached nine years after the termination of Texaco's participation in the Consortium.

However, Texaco's own actions served to bring it within the personal jurisdiction of the Ecuadorian judicial system. Texaco acknowledged that the Second Circuit's dismissal of the U.S. litigation on the basis of *forum non conveniens* vindicated its "longstanding position" that Ecuador was the appropriate forum for the litigation.[292] Furthermore, the district court and Second Circuit ordered Texaco to accept service of process and consent to being sued in Ecuador.[293]

Despite this conclusion, the crucial issue for any U.S. court considering whether to recognize the Superior Court's judgment is whether Texaco's actions are binding on Chevron. Chevron has no legal domicile in Ecuador, has never operated there and owns no real or personal property in the state.[294] Furthermore, Chevron was not a party to the U.S. litigation and is thus not bound by the

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288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. Press Release, ChevronTexaco Corp., *supra* note 61.
293. Aguinda v. Texaco, Inc., 303 F.3d 470, 478-80 (2d Cir. 2002); *see also* Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718, at *6 (S.D.N.Y. Apr. 11, 1994) (conditioning dismissal on Texaco's "binding acceptance of personal jurisdiction over it in Ecuadoran [sic] courts").
294. *See* Defendant's Motion to Dismiss, *supra* note 53, at 20.

district court's order requiring Texaco to submit to personal jurisdiction in Ecuador.[295] Furthermore, Chevron did not acquire Texaco in 2001 and thus is not subject to its waiver of objections to personal jurisdiction.[296] Finally, there is no provision of Ecuadorian law by which to hold Chevron responsible for Texaco's past conduct in Ecuador.[297]

If the plaintiffs were unable to demonstrate sufficient interconnectedness between Texaco and its subsidiaries in the U.S. litigation, it remains to be seen whether they will be able to prove a meaningful nexus between Texaco, its subsidiaries and Chevron such as to support a finding of liability. The plaintiffs have two significant obstacles to overcome in this regard. First, there was an absence of a sufficient connection between Texaco and its subsidiaries such as to subject Texaco to personal jurisdiction in Ecuador absent its explicit consent. If personal jurisdiction could not be obtained over Texaco through its subsidiaries, it cannot be obtained over Chevron, which is yet another layer removed from Texaco's Ecuadorian subsidiaries.

Second, even assuming personal jurisdiction could be asserted over Texaco through the actions of its subsidiaries, it is difficult to envision how such jurisdiction could be expanded to encompass Chevron. Regardless of how the transaction is characterized, Chevron did not acquire Texaco until 2001. The acquisition occurred nine years after the termination of the Consortium, six years after the execution of the Remediation Agreement and three years after the Final Act. Furthermore, as demonstrated by the filing of the U.S. litigation in 1993, the plaintiffs' claims arose from occurrences before Chevron acquired Texaco. Ecuador's jurisdictional reach ended either with Texaco's subsidiaries or with Texaco itself and does not extend as far as Chevron from both a corporate and chronological standpoint.

However, two doctrines may prevent Chevron from successfully challenging recognition of any judgment entered by the Superior Court. Initially, as previously noted with respect to due process objections to recognition, Chevron may be estopped to deny Ecuadorian jurisdiction. Although it contested personal jurisdiction throughout the course of the litigation in Ecuador, it also vigorously defended the litigation on the merits.[298] The inconsistency of

295. *Id.*

296. *See supra* note 89 and accompanying text.

297. Defendant's Motion to Dismiss, *supra* note 53, at 19.

298. *See supra* notes 86-92, 97-101, 105-09, 114-30 and accompanying text. However, Chevron may have been compelled to defend the merits of the litigation based upon the Superior Court's failure to timely address the arguments set forth in its responsive pleadings. *See supra* note 138 and accompanying text.

these positions may prevent Chevron from resisting the recognition of a judgment entered by the Superior Court due to the absence of personal jurisdiction.

Second, Chevron's defense of the Ecuadorian litigation on the merits may constitute a waiver of its objection to personal jurisdiction. Procedural rights in foreign proceedings are subject to waiver to the same extent as procedural rights in domestic proceedings.[299] This includes objections to the exercise of personal jurisdiction by foreign courts.[300] To conclude otherwise would establish a different and stricter standard for procedural rights in foreign countries than in the United States.[301] Thus, Chevron's defense of the merits of the Ecuadorian litigation should be given force and effect in a U.S. recognition proceeding. It is quite possible that a U.S. court will conclude that Chevron waived its objections to Ecuador's assertion of personal jurisdiction, thus preventing this defense from being utilized as a bar to recognition.

3. Subject Matter Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of subject matter jurisdiction.[302] Neither Act defines those circumstances in which subject matter jurisdiction will be deemed to exist for purposes of recognition. As a result, this determination is based on the local law of the foreign jurisdiction.

The plaintiffs based their Complaint on three separate grounds. Initially, the plaintiffs alleged that their right to seek environmental remediation was protected by Article 86 of the Ecuadorian Constitution.[303] The second basis for the plaintiffs' Com-

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299. *See* Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 994 (10th Cir. 2005) (concluding that the waiver of procedural rights in foreign jurisdictions is "clearly permitted" in the context of a domestic action for recognition).

300. Dart v. Balaam, 953 S.W.2d 478, 481 (Tex. App. 1997).

301. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 834 (2004) (stating that "[i]t would be strange if the law that permits American citizens to waive constitutional rights did not allow them to waive nonconstitutional analogues of those rights in respect of foreign countries"); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003).

302. *See supra* note 152 and accompanying text. Despite differences in wording, the effect of the Acts is identical. Specifically, a denial of recognition of foreign judgments entered by a court lacking subject matter jurisdiction. *See supra* note 236 and accompanying text.

303. Lago Agrio Complaint, *supra* note 2, at 20-21. Article 86 of Ecuador's Constitution provided:

> [T]he State shall protect the right of the population to live in a healthy and ecologically balanced environment, that guarantees sustainable development. It shall provide oversight to make sure that this right is not affected and shall guarantee the preservation of nature. [These rights are] declared of public interest and shall be regulated in conformity with the

plaint was Article 2260 of the Ecuadorian Civil Code, which grants a popular action to affected individuals to demand cessation of injurious activities, including those contributing to environmental degradation.[304] Finally, the Complaint was based on the Environmental Management Law, which grants affected individuals or groups of individuals the right to initiate litigation to compel remediation and recover damages for general environmental harm.[305]

The plaintiffs' asserted bases for subject matter jurisdiction may be challenged on four primary grounds. Before 1999, Ecuadorian law granted redress only for individualized harm.[306] Article 86 of Ecuador's Constitution clearly placed responsibility for environmental protection on the government.[307] The Law for the Prevention and Control of Environmental Pollution (adopted in 1976) only empowered citizens to report activities resulting in environmental contamination to appropriate governmental authorities.[308] Ecuadorian citizens were also authorized to intervene in administrative proceedings and request reversal of administrative acts that threatened environmental harm.[309]

Ecuadorian law did not recognize "popular actions" brought on behalf of large groups of people seeking damages for environmental contamination from a former owner or operator of real proper-

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law:

> 1. The preservation of the environment, the conservation of ecosystems, biodiversity and the integrity of the genetic patrimony of the country.
> 2. The prevention of environmental pollution, the recuperation of degraded natural spaces, the sustainable management of natural resources and the requirements that public and private activities should comply with to achieve these goals.
> 3. The founding of a national system of protected natural areas that guarantee the conservation of biodiversity and the maintenance of ecological services in conformity with international agreements and treaties.

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

304. Lago Agrio Complaint, *supra* note 2, at 21; *see also* CÓDIGO CIVIL art. 2236.

305. Lago Agrio Complaint, *supra* note 2, at 21-22; *see also* LEY DE GESTIÓN AMBIENTAL [Environmental Management Law], Law No. 99-37, art. 41, 43.

306. Lago Agrio Complaint, *supra* note 2, at 20-21 (referring to CÓDIGO CIVIL arts. 2214, 2236 (permitting monetary recovery for specific personal injuries and property damage suffered by an individual from the person whose intentional or negligent act was the cause of the loss and permitting private actions against current owners and operators of property to enjoin a nuisance)) *See also* Defendant's Motion to Dismiss, *supra* note 53, at 15.

307. CONSTITUTIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 86.

308. Defendant's Motion to Dismiss, *supra* note 53, at 15 (discussing LEY DE PREVENCIÓN Y CONTROL DE CONTAMINACIÓN AMBIENTAL [Law for Prevention and Control of Environmental Contamination], Supreme Decree No. 374, art. 29).

309. *Id.* (discussing ESTATUTO DEL RÉGIMEN JURÍDICO ADMINISTRATIVO DE LA FUNCIÓN EJECUTIVA [Statute on the Legal-Administrative Rules for the Executive Branch], art. 115(b) (1994)).

ty.[310] Such remedies were the exclusive province of the Ecuadorian government as was clearly acknowledged in the U.S. litigation. Ecuadorian government representatives asserted that private parties could not seek compensation as the government was the "legal owner of the rivers, streams and natural resources and all public lands where the . . . oil producing operations" occurred.[311] The plaintiffs in the U.S. litigation were thus "attempting to usurp rights that [belong] to the government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law."[312] However, this argument may be weakened to the extent that the Ecuadorian government changed its position and claimed that the plaintiffs possessed private rights of action that could be determined by a U.S. court.[313]

The sole jurisdictional basis for the plaintiffs' collective monetary claims is the Environmental Management Law. However, this law cannot be utilized against Texaco let alone Chevron. The Environmental Management Law was adopted seven years after Texaco ceased its participation in the Consortium, four years after the Remediation Agreement and one year after the Final Act.

In creating new rights and an accompanying claim for relief, the Environmental Management Law is not merely a procedural mechanism but also represents a substantive change in the law.[314] As such, it cannot be given retroactive effect and serve as a jurisdictional basis for the Complaint. Such a result is prohibited by three separate sources of Ecuadorian law. Article 24 of the Constitution provided, in part, that "[n]o one may be punished for an act or omission that at the time of perpetration was not classified as a . . . infraction, nor . . . . [may one punish] a person in a manner that is not in conformance with the preexisting laws."[315] This prohibition is reiterated in the Ecuadorian Civil Code, which states that "[t]he law provides only for the future; it has no retroactive

310. *See id.*

311. *Id.* at 16 (quoting Letter from Edgar Téran, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge).

312. *Id.*

313. *See* Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998). Although there appears to be no U.S. precedent regarding the effect of a change in litigation position by a foreign sovereign regarding subject matter jurisdiction upon a U.S. judicial proceeding, the U.S. Supreme Court has permitted judicial reconsideration based upon a change in the U.S. government's position. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994). A similar result seems likely in cases involving foreign governments given the enhanced respect for sovereignty to which they are due in U.S. courts.

314. Defendant's Motion to Dismiss, *supra* note 53, at 16. The distinction between procedural and substantive law is crucial as purely procedural rules are exempt from prohibitions upon retroactivity. *Id.* (discussing CÓDIGO CIVIL art. 7).

315. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 24(1).

effect."[316] Finally, Ecuadorian case law has concluded that the Environmental Management Law cannot be given retroactive effect. In *Calva v. Petroproduccion,* the Superior Court of Nueva Loja held that the Environmental Management Law could not be applied to Petroecuador's production subsidiary with regard to environmental contamination occurring prior to its enactment.[317] The primary reason for this conclusion was that the Environmental Management Law constituted a substantive change in Ecuadorian law by creating an individual claim for relief where none previously existed.[318] The *Calva* decision is particularly important as it was issued by the same court designated to resolve the plaintiffs' claims against Chevron.

Even assuming the plaintiffs' claims were to survive a challenge on the basis of retroactivity, the Superior Court was deprived of subject matter jurisdiction by the Remediation Agreement and the Final Act. These documents purported to resolve all claims for environmental contamination resulting from Texaco's participation in the Consortium.[319] The plaintiffs have denied the applicability of these documents to their claims as they were not parties.[320]

The resolution of the issues concerning the effect of these documents is not as simple as merely asserting that the plaintiffs are not bound as they were not signatories. Rather, the effect of the documents turns on whether the Plaintiffs had a right to initiate a popular action seeking remediation and damages on behalf of residents of the Oriente prior to the adoption of the Environmental Management Law. If such a right did exist separate and apart from the rights of the government, then the plaintiffs are correct that the documents have no effect upon their independent right to initiate litigation. However, if the claims in the Complaint did not exist prior to 1999, then the documents are binding upon the plaintiffs. Under such circumstances, the Remediation Agreement and the Final Act represent a choice by the Ecuadorian government to settle and release common public rights. This choice is binding upon all Ecuadorian citizens regardless of their personal participation or lack thereof.[321]

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316. CÓDIGO CIVIL art. 7.

317. Defendant's Motion to Dismiss, *supra* note 53, at 17, (referring to Calva v. Petroproduccion, No. 349-2000 (Superior Court of Nueva Loja, Aug. 20, 2001) (Ecuador)).

318. Defendant's Motion to Dismiss, *supra* note 53, at 17.

319. *See supra* notes 47-54 and accompanying text.

320. *60 Minutes, Amazon Crude, supra* note 1 (in which Plaintiffs' co-counsel Steven Donziger stated "our clients never released Texaco. And that's a critical distinction. That was an agreement between the government and Texaco. We were not part of that agreement, and we're not bound by that agreement").

321. For a U.S. equivalent, see Satsky v. Paramount Communications, 7 F.3d 1464, 1470 (10th Cir. 1993) (holding that "[w]hen a state litigates common public rights, the citi-

An interpretation of the Ecuadorian Constitution and Civil Code reserving governmental sovereignty over environmental issues is important for two additional reasons. Such an interpretation supports the conclusion that the plaintiffs cannot utilize the Environmental Management Law to pursue their claims against Chevron. If the Ecuadorian government possessed such sovereignty and subsequently chose to exercise it in a manner that released Texaco from liability, then the government cannot have bestowed the right to proceed against Chevron upon the general public through the subsequently adopted Environmental Management Law.[322]

The second important point relates to any interpretation of the Environmental Management Law that is inconsistent with state sovereignty over environmental issues. Specifically, should the Environmental Management Law be interpreted as bestowing upon the plaintiffs the right to pursue Texaco despite the Remediation Agreement and Final Act, Ecuador must indemnify Chevron for the costs of any judgment awarded to the plaintiffs.[323] This conclusion is based upon the notion that "at least some of the claims brought in the Lago Agrio action effectively *are* claims by Ecuador, prosecuted on Ecuador's behalf by individual plaintiffs acting as private attorneys general under [the Environmental Management Law], and that such claims were intended to be included in the 1995 Settlement and 1998 Final Release."[324] The Ecuadorian government is free to legislate, interpret its laws or alter its legal positions as it sees fit. However, such actions should have financial consequences, especially when private parties have relied on previous governmental actions and would suffer a significant detriment as a result of any change in position.

Finally, an analysis of subject matter jurisdiction must include consideration of the effect of the applicable statute of limitations. Article 2235 of the Ecuadorian Civil Code imposes a statute of limitations on intentional and unintentional torts of four years from "the date on which the act was perpetrated."[325] An act is deemed perpetrated when "completed, 'regardless of the date on which the

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zens of that state are represented in such litigation by the state and are bound by the judgment").

322. *See* Republic of Ecuador v. ChevronTexaco Corp., 426 F. Supp. 2d 159, 163 (S.D.N.Y. 2006) (discussing the contention that Ecuador could not grant rights to the Plaintiffs through the Environmental Management Law that the government had previously bargained away in its settlement with Texaco).

323. *Id.*

324. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 376 (S.D.N.Y. 2005).

325. Defendant's Motion to Dismiss, *supra* note 53, at 20 (citing CÓDIGO CIVIL art. 2235).

plaintiffs knew or could have known that they suffered harm.' "[326]

As a condition to the invocation of *forum non conveniens*, the expiration of the limitations period was tolled by the Second Circuit Court of Appeals for a period of time from the filing date of the U.S. litigation in November 1993 to one year after the final order of dismissal, specifically, August 2003.[327] The plaintiffs filed their complaint in Ecuador in May 2003 and were within this extended limitations period. However, applying the four year statute of limitations as extended by the Second Circuit to the Complaint leads to the conclusion that the only portion of the Consortium's activities within the statute occurred after November 1989. This would include the last three years of the Consortium's operations and Texaco's subsequent remediation efforts. Furthermore, to the extent Chevron and Texaco are recognized as separate entities, the tolling of the statute of limitations is not binding on Chevron.[328] As a result, the statute of limitations with respect to any claim against Chevron expired in September 2002, four years after the completion of environmental remediation and signature of the Final Act.

Nevertheless, a defense based on the statute of limitations may fail even assuming Chevron and Texaco are separate entities. Regardless of its merits, the statute of limitations is not a designated defense to recognition of a foreign judgment pursuant to either Act. As a result, at least one court has found that it had no authority to review the issue.[329] The assumption underlying this holding is that the statute of limitations defense is not contained within the subject matter jurisdiction defense to recognition. The same reasoning may hold true for the other shortcomings identified in this section of the article. As a result, a U.S. judicial determination that the Superior Court possessed subject matter jurisdiction with respect to the plaintiffs' claims would not be a surprising result.

CONCLUSION

The stakes for Chevron in the Ecuadorian litigation are extremely high. It is unlikely that Chevron will escape the litigation

326. Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 U.S. Dist. LEXIS 77251, at *4 (N.D. Cal. Oct. 11, 2006) (discussing the Ecuadorian statute of limitations for intentional and unintentional torts and the accrual of causes of action).

327. Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002).

328. Defendant's Motion to Dismiss, *supra* note 53, at 20.

329. Soc'y of Lloyd's v. Anderson, No. 3-03-MC-112-D, 2004 U.S. Dist. LEXIS 7351, at *9 (N.D. Tex. Apr. 27, 2004) (refusing to consider the defendant's argument that the claim upon which an English judgment was based was barred from recognition by the six year statute of limitations applicable to breach of contract actions in England).

unscathed. Although the ultimate judgment will most likely be less than the $27.3 billion claimed by the plaintiffs, it would not be surprising if the judgment was measured in billions rather than millions of dollars. Such an outcome will not bankrupt the company but will nevertheless deal Chevron a significant blow. In addition to the financial consequences is the incalculable loss of business reputation and goodwill. Although the case has not yet received the media exposure of other business-related environmental disasters, Chevron should tread lightly in order to avoid the indelible stain of permanent linkage of its name with environmental catastrophe as exemplified by Union Carbide and Bhopal and Exxon and the *Valdez*.

Texaco, and subsequently, Chevron's strategic choices throughout the litigation have led to a series of unforeseeable results. A nine year battle to dismiss the case in the United States ultimately proved successful only to result in the unanticipated filing of new litigation in Ecuador. Success in the United States also created a significant body of case law and admissions by Texaco affirming the adequacy of the Ecuadorian forum. Although initially willing to proceed in an orderly fashion to determine the existence and extent of environmental contamination attributable to the Consortium, the Superior Court subsequently jettisoned procedural protections as evidenced by its abandonment of the agreed upon sampling protocol, the appointment of a single expert whose methodology and damages assessments are subject to serious question, and refusal to determine whether the plaintiffs' claims and Chevron are properly before the court. Furthermore, a government that negotiated a full and final settlement of claims in return for the performance of specified environmental remediation and initially appeared sympathetic to Chevron has now allied itself with the plaintiffs' interests.

As a result, Chevron finds itself most likely faced with the uncertain prospect of proceeding through the Ecuadorian appellate court system while at the same time defending recognition actions throughout the United States. Absent reversal in Ecuador, Chevron is at a distinct strategic disadvantage. The plaintiffs arguably have fifty separate chances to secure recognition. A success in any one of these efforts may open the door to widespread recognition through operation of the Full Faith and Credit Clause. The provisions mandating the non-recognition of foreign judgments set forth in the Acts do not provide absolute protection and may prove to be a thin and undoubtedly costly reed upon which to base a national litigation strategy. Further pressure exists as a result of the close scrutiny that the case has received by multinational corporations,

who are seeking guidance with respect to the strategy of utilizing *forum non conveniens* to dismiss environmental and human rights claims in favor of forums in the developing world.[330]

However, the stakes are equally high for the plaintiffs. The plaintiffs have invested sixteen years in this litigation in courtrooms in three different states and Ecuador. In the meantime, hydrocarbon exploration and production activities continue to take a toll on the Oriente and its residents. Although likely to obtain a favorable judgment from the Superior Court, the amount may be less than that suggested by Cabrera. Obtaining this judgment is only half the battle. Given the likelihood of a time-consuming appeal, the possibility that the plaintiffs will receive compensation in the near future is remote.

In a manner similar to Chevron, the plaintiffs' strategic choices throughout the litigation have led to a series of unpredictable results. Unsuccessful in its nine-year battle to maintain the litigation in the United States, the plaintiffs nevertheless may benefit from U.S. judicial determinations regarding the adequacy of the Ecuadorian legal system in subsequent recognition proceedings. The plaintiffs have however become a victim of their own success in Ecuador. Their prodding led the Superior Court to abandon procedural protections in favor of an ad hoc process fraught with controversy and resulting in an oversized damages estimate that the plaintiffs could not have possibly predicted at the time of the filing of the Complaint in 2003. Furthermore, government opposition to the litigation has been replaced by the uncomfortable embrace of a new and partisan Ecuadorian administration eager to demonize multinational enterprises as the cause of the country's many economic and social woes.

Although favorable to the ultimate outcome in Ecuador, these developments do not bode well for recognition actions in the United States. The sheer size of the damages award, whatever it may be, will raise judicial skepticism and cast a shadow on its individual elements. U.S. courts will undoubtedly examine the procedures by which the Superior Court arrived at its award. U.S. courts may also question prior characterizations of the adequacy of the Ecuadorian legal system given the passage of time, the change in gov-

330. *See, e.g.*, Brooke A. Masters, *Case in Ecuador Viewed as Key Pollution Fight: U.S. Legal Team Suing Chevron Texaco*, WASH. POST, May 6, 2003, at E1 (stating that the case is a test of multinational strategy to dismiss U.S. litigation in favor of foreign forums where plaintiffs lack the money or expertise to file suit or where recognition of resultant judgments can be resisted in the United States); *see also* Bolton, *supra* note 105, at 8 (quoting Steven Donziger as stating that "[t]his case is a bellwether case for the energy industry in Latin America, which will probably confront many more cases of this nature and magnitude in years to come").

ernment and the significantly higher stakes associated with the recognition of judgments as compared to *forum non conveniens* determinations. Although the plaintiffs arguably have fifty separate chances at securing recognition, a misstep in any recognition proceeding may create an unfavorable precedent for proceedings in other courts. Finally, as previously noted, the case is being closely watched by environmentalists and human rights advocates.[331]

Given this uncertainty, it is perhaps wisest for all sides to return to an opinion issued fifteen years ago by the original judge assigned to the *Aguinda* litigation in the United States. In denying the plaintiffs' motion to adopt compulsory settlement procedures, Judge Vincent L. Broderick stated that "[c]ourts cannot . . . coerce settlements in litigation, and must instead utilize their powers of adjudication where appropriate if agreement is lacking."[332] Settlement may be reached only by "voluntary acquiescence of both sides based upon intelligent self-interest."[333] In the judgment of this commentator, the time for the exercise of intelligent self-interest by both parties is long overdue.

331. Masters, *supra* note 330, at E1 (quoting legal experts as characterizing the case as "groundbreaking" and "establishing a new way for environmental activists to force multinational corporations to pay for what activists say is environmental devastation").

332. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 18364, at *5-6 (S.D.N.Y. Dec. 17, 1994).

333. *Id.* at *6.