AGUINDA v. CHEVRONTEXACO: A PYRRHIC VICTORY FOR THE ENVIRONMENT?

by

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INTRODUCTION

In May 2003, forty-six residents of the 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.[1] 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.[2] The amount of damages sought by the Plaintiffs grew from $6.1 billion in 2004 to $16.3 billion by April 2008 and $27.3 billion by November 2008.[3] 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."[4] The breadth of this statement, the length of time associated with the prosecution of the litigation and the amount of damages have caused *Aguinda* to be labeled as the world's largest environmental lawsuit.[5]

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.[6] 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.[7] The majority of states have addressed this issue through two statutes. Twenty-one states have adopted the Uniform Foreign Money Judgments Recognition Act of 1962 (1962 Act)[8] while ten states have adopted its successor, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (2005 Act).[9] These competing statutes and resulting patchwork of case law have rendered the area of recognition of foreign judgments in the United States unpredictable.[10]

This paper examines the recognition of any potential judgment pursuant to the 1962 and 2005 Acts. The paper 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 the resultant U.S. and Ecuadorian litigation. The paper then examines the grounds for non-recognition in the Acts and their application to any potential judgment that may be rendered in Ecuador. The paper concludes that Chevron may be able to establish several significant defenses to recognition. However, Chevron's burden is substantial and presents significant risks for the company.

TEXACO IN ECUADOR: A BRIEF HISTORY

Hydrocarbon Exploitation and Texaco's Investment

In March 1964, the Ecuadorian government invited Texaco and Gulf Oil Corporation (Gulf) to conduct exploratory activities in the Oriente region.[11] Texaco and Gulf formed a consortium (Consortium) with equal ownership rights through their Ecuadorian subsidiaries to conduct this exploration.[12] 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.[13] 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.[14] Texaco served as the operator on behalf of the Consortium throughout this period of time.[15]

The Consortium underwent significant changes in the 1970s. 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."[16] Texaco and Gulf were required to relinquish a portion of the concession area to the state-owned oil company Compania Estatal Petrolera Ecuatoriana (CEPE).[17] A new concession agreement was executed in August 1973 granting CEPE a 25% interest in the Consortium.[18] Gulf sold its remaining 37.5% interest to CEPE in December 1976.[19]

From 1977 to 1990, the Consortium operated with Texaco and CEPE/Petroecuador as the only participants and Texaco as the operator.[20] On July 1, 1990, Petroamazonas, a subsidiary of Petroecuador, replaced Texaco as the operator.[21] The concession agreement expired on June 6, 1992. Ecuador elected not to renew the agreement and assumed complete control of the concession area.[22] 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 and 1500 kilometers of pipelines and had extracted more than 1.4 billion barrels of oil.[23]

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 26 million gallons of crude oil and toxic wastewater into the surrounding environment.[24] Approximately 2.5 million acres were impacted by oil-related discharges into wetlands, streams and rivers and leeching into soil and groundwater.[25] 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.[26] 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.[27]

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.[28] 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.[29] 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.[30] 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."[31]

Ecuador and Texaco attempted to address these environmental and health issues upon the termination of the Consortium. In May 1995, Texaco, Ecuador and Petroecuador entered into a "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.[32] 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.[33] Texaco began remediation work in 1995 and completed this work in 1998.[34] Texaco spent $40 million in this effort, which included closing and remediating 161 waste pits and 7 overflow areas, plugging and abandoning 18 wells and remediating soil at 36 sites.[35] Texaco also made two payments of $1 million each for socio-economic projects[36] 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.[37] 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 Remediation Agreement and released it from current and future liability.[38]

TEXACO IN ECUADOR: THE RESULTING LITIGATION

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.[39] 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.[40] The plaintiffs alleged numerous tort claims.[41] The claims were ultimately dismissed on the basis of forum non conveniens, which dismissal was upheld by the U.S. Court of Appeals for the Second Circuit.[42] Although detailed discussion of the U.S. litigation is beyond the scope of this paper, 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 viewpoints of the U.S. courts, Texaco and the Ecuadorian government regarding potential forums. The U.S. courts were unanimous in their conclusion that Ecuador was adequate at least for purposes of forum non conveniens analysis. This conclusion was based upon existing precedent[43] as well as independent inquiries.[44] 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.[45] Texaco also noted that the remedies sought by the plaintiffs could only be awarded by Ecuadorian courts.[46]

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 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.[47] According to the Ecuadorian government, private citizens had no right to seek damages for environmental harm to public lands.[48] As a result, the government condemned "the plaintiffs' attorneys in this matter for 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."[49]

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.[50] The plaintiffs were

unable to establish "parental control or direction over the pipe design, waste disposal, and other allegedly negligent practices of the Consortium."[51] 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."[52] 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.[53] 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."[54]

Litigation in Ecuador

The Plaintiffs initiated litigation against Chevron in Ecuador in May 2003. The Plaintiffs based their lawsuit upon provisions of the Ecuadorian Constitution[55] and the Environmental Management Law of 1999 that recognized a "popular action to denounce the breaching of environmental laws . . . and [obtain] damages . . . for the deterioration of . . . health [and] damage to the environment."[56] 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."[57] Additionally, the Complaint sought remittance of ten percent of the cost of remediation work to Frente de Defensa de la Amazonia (Frente).[58] The amount of damages was not specified.

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.[59] Furthermore, the claims were barred by the Remediation Agreement and Final Act.[60] Additionally, Chevron claimed that it was not a proper party to the litigation. 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.[61] Second, Chevron alleged that the Superior Court lacked personal jurisdiction.[62] The third element of this defense was that the Plaintiffs' claims were barred by the applicable statute of limitations.[63] Finally, Chevron contended that the Plaintiffs lacked standing.[64]

The Superior Court deferred ruling on these defenses and commenced trial in October 2003. 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 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.[65] Pursuant to this procedure, the parties requested judicial inspections of 122 well sites to be conducted pursuant to negotiated sampling and analysis plans.[66] Forty-seven of the 122 designated well sites were ultimately inspected.[67] 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.[68] However, Chevron contended that the Plaintiffs' experts failed to report data on more than half of the 465 soil and water samples they collected, submitted only 5 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.[69] 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 Civil Code.[70]

In July 2006, 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. Chevron objected to this order as inconsistent with the previously-agreed procedures and a violation of the Civil Code.[71] 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.[72] In preparing his report, Cabrera visited 48 well sites and 1 production station and reviewed aerial photographs.[73] 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.[74] Chevron disputed these conclusions, took issue with Cabrera's methodology[75] and accused him of disregarding his mandate[76] and misconduct.[77] As a result, Chevron concluded that Cabrera's report was "a fraud on the court,"[78] and its utilization would be a violation of Ecuador's Constitution.[79]

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.[80] Cabrera revised this estimate to $27.3 billion in November 2008.[81] This revision included compensation for cancer deaths resulting from hydrocarbon contamination, groundwater and soil remediation, funding for health care and potable water systems in the region, and an unjust enrichment penalty of $8.3 billion.[82] This damages calculation exceeded Chevron's net earnings in 2008 and was almost twice the amount of net earnings derived from its international operations.[83]

Chevron has vigorously contested Cabrera's damages estimate. Chevron contended that the estimate greatly exceeded the scope of Cabrera's mandate by assessing damages beyond environmental injury.[84] 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 bases 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.[85] The court's failure to strike this portion of the damages assessment was particularly egregious given 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.[86] These shortcomings led Chevron to conclude that the damages assessed for cancer deaths were "completely fabricated."[87] 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.[88]

Those damages estimates within the scope of Cabrera's mandate were, according to Chevron, grossly inflated. 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.[89] This assessment also estimated the cost of remediation of waste pits at $2.2 million per pit when Petroecuador, with the government's approval, was remediating its pits at a cost of $85,000 per pit.[90] 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 sample.[91] Similar estimates with respect to groundwater remediation were not supported by sufficient data.[92] 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."[93]

Chevron also claimed that the Superior Court was influenced by political pressure. The primary source of this pressure was Ecuadorian President Rafael Correa. According to Chevron, President Correa has attempted to influence Cabrera and the court since assuming office in January 2007. 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.[94] Additional sources of pressure include members of Ecuador's Constituent Assembly[95] and protestors allegedly organized by the Plaintiffs.[96] As a result, Chevron concluded that "the thumbs of politics are weighing heavily on the scales of justice."[97]

THE RECOGNITION OF FOREIGN MONEY JUDGMENTS IN THE UNITED STATES

Introduction

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

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.[98] The 1962 Act has been adopted in twenty-one states at the time of preparation of this article.[99]

The 1962 Act applies to final, conclusive and enforceable judgments entered in foreign states.[100] 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."[101] Foreign judgments meeting these requirements are deemed conclusive between the parties and subject to recognition in the same manner as judgments of sister states.[102] 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.[103]

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."[104] The second circumstance is if the foreign court did not have personal jurisdiction over the defendant.[105] The final circumstance is if the foreign court lacked subject matter jurisdiction.[106]

Section 4 sets forth six instances in which states may refuse recognition of foreign judgments. Initially, a foreign judgment need not be recognized if the defendant did not receive notice of the proceedings within sufficient time to permit a defense.[107] The second ground for non-recognition exists when the judgment was obtained through fraud.[108] Non-recognition is also permitted if the claim for relief upon which the judgment was entered is repugnant to the public policy of the state in which recognition is sought.[109] Recognition may also be denied if the foreign judgment conflicts with another final and conclusive

judgment, the foreign proceedings were contrary to an agreement between the parties with respect to an alternative forum or the foreign court was a "seriously inconvenient forum."[110]

The Uniform Foreign-Country Money Judgments Recognition Act

The National Conference of Commissioners on Uniform State Laws updated the 1962 Act in 2005.[111] The 2005 Act applies to final, conclusive and enforceable judgments[112] granting or denying recovery of a sum of money[113] entered in a foreign country.[114] A foreign judgment meeting these requirements is recognizable in the same manner as judgments of sister states.[115] The 2005 Act diverges from the 1962 Act by including definitions of fines and penalties[116] and assigning the burden of proof to the party seeking recognition.[117]

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.[118] Section 4 sets forth eight discretionary circumstances by which U.S. courts may refuse recognition of foreign judgments. Four of these grounds are identical to the grounds set forth in Section 4 of the 1962 Act.[119] Two additional grounds for refusing to recognize a foreign judgment are similar to the 1962 Act. Initially, while Section 4 provides that a U.S. court need not recognize a foreign judgment procured through fraud, it clarifies this reference by stating that the fraud must have "deprived the losing party of an adequate opportunity to present its case."[120] Section 4 of the 2005 Act also sets forth public policy as a basis for non-recognition but broadens it to include judgments, causes of action or claims for relief repugnant to the public policy of the enforcing state or the United States.[121] This expansion was in response to judicial interpretations of the 1962 Act refusing to consider public policy challenges to anything other than the cause of action or claim for relief[122] and permitting challenges on the basis of the U.S. interests.[123] Despite the expansion of this exception, the 2005 Act establishes a stringent test for finding a public policy violation, specifically, that recognition of the foreign judgment would "tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine 'that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.'"[124] Significant differences in procedural or substantive law, standing alone, are insufficient.[125]

Two grounds for refusing to recognize a foreign judgment are entirely new. These grounds refer to the specific foreign proceedings resulting in the entry of the judgment. A foreign judgment may be disregarded if it was "rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment."[126] This new basis for denying recognition is intended to allow defendants to challenge the integrity of the specific proceedings rather than that of the entire foreign judicial system.[127] However, challenges to judicial integrity are limited to corruption having an impact on the outcome or a lack of impartiality and fairness.[128] The second new basis for refusing to recognize a foreign judgment, the incompatibility of the foreign proceeding with due process of law, is closely related.[129]

AGUINDA RETURNS TO THE UNITED STATES: MANDATORY AND DISCRETIONARY GROUNDS FOR NON-RECOGNITION

Introduction

This portion of the paper examines the most likely grounds for non-recognition of any judgment that may be entered by the Superior Court. The paper will first examine the mandatory grounds for non-recognition pursuant to the Acts. The paper will then examine the likely discretionary grounds upon which U.S. courts may refuse recognition. Although there are significant obstacles for Chevron to overcome in order to meet its burden of proof, these defenses present significant risks for the Plaintiffs in securing recognition.

Mandatory Grounds for Non-Recognition

Due Process of Law

The Acts deny recognition to foreign judgments rendered under a system that does not provide due process.[130] Due process depends upon the circumstances in each individual case.[131] Nevertheless, this determination begins with an examination of the procedural protections granted by the foreign legal system.[132] 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."[133]

The foreign legal system need not provide due process protections identical to those of the United States.[134] 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.[135] 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.[136] 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.[137] Additional unnecessary protections

include oral testimony, cross examination, and compulsory process.[138] Lengthy delays in foreign legal proceedings also do not constitute a violation of due process.[139] Rather, there must be "serious injustice" or "outrageous departure from . . . the notion of civilized jurisprudence."[140]

U.S. case law provides a starting point for determining the adequacy of a particular state's legal system.[141] 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.[142] However, this case is distinguishable on the bases 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.[143] Nevertheless, these cases 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.[144]

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 "advances a factual position inconsistent with a position take [sic] by it in a prior proceeding, and the prior inconsistent position was adopted by the first court in some manner."[145] 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 Company*, 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.[146] 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 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.[147] 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.[148]

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.[149] These representations were sufficient to convince two U.S. courts to dismiss the litigation utilizing forum non conveniens.[150] A condition of this dismissal was that Texaco "unambiguously agreed in writing to be sued on these claims (or their Ecuadorian equivalents) in Ecuador."[151] As a result, Chevron, as Texaco's successor-in-interest, may be "completely strait-jacketed . . . when they go into a U.S. court to argue that a judgment in a trial they sought over [the Plaintiffs'] objection should not be enforced."[152] 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.[153]

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.[154] The most recent State Department reports regarding Ecuador paint a bleak picture of its judicial system. In its 2008 Human Rights Report, the State Department described continued problems with corruption and the denial of due process.[155] 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."[156] Judges were susceptible to bribery and parceled out cases to lawyers who wrote opinions for the courts.[157] Media, political and economic pressure and bribery also influenced judicial decisions, including the speed in which decisions were rendered.[158]

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."[159] The report identified "[s]ystemic weakness and susceptibility to political or economic pressures in the rule of law" as constituting the most important problem confronting U.S. companies investing in Ecuador.[160] The Ecuadorian judicial system was described as "hampered by processing delays, unpredictable judgments in civil and commercial cases, [and] inconsistent rulings."[161] 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.[162] Of equal concern was uncertain enforcement of contract rights and equal treatment under the law.[163] Corruption remained a serious problem and was impervious to legislative oversight or internal judicial branch mechanisms.[164] These conclusions are consistent with other descriptions of Ecuador's legal system.[165]

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 judicial system have concluded that it comports with fundamental notions of due process. It would be a significant departure from precedent to conclude 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.[166] 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 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.

Personal Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of personal jurisdiction of the court issuing the judgment.[167] Both Acts define those circumstances in which personal jurisdiction will be deemed to exist for purposes of the recognition of a foreign judgment.[168] These grounds are not exclusive, and a U.S. court may recognize other grounds for personal jurisdiction.[169]

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 Texaco Ecuador, were "economically, technically, and administratively subjected to [Texaco], as well as to the policies and directives of its headquarters."[170] As a result, Texaco conceived of or knew and approved of the subsidiaries' exploration and production techniques.[171] 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."[172] The Plaintiffs concluded that the Ecuadorian subsidiaries were fronts for Texaco, who otherwise owned, managed, supervised and controlled them.[173]

These bases for asserting personal jurisdiction over Texaco in Ecuador have not withstood judicial scrutiny in the United States.[174] 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.[175] 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.[176] Texaco and its subsidiaries paid their own taxes and were responsible for their own daily operations.[177] Furthermore, Texaco's subsidiaries, and not Texaco itself, were authorized to exploit hydrocarbon deposits in the Oriente.[178] The actions which were the subject matter of the plaintiff's complaint were intended to accomplish this mandate.[179] 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.[180]

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 "long-standing position" that Ecuador was the appropriate forum for the litigation.[181] Furthermore, the district court and Second Circuit ordered Texaco to accept service of process and consent to being sued in Ecuador.[182]

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.[183] Furthermore, Chevron was not a party to the U.S. litigation and is

thus not bound by the district court's order requiring Texaco to submit to personal jurisdiction in Ecuador.[184] Furthermore, Chevron did not acquire Texaco in 2001 and thus is not subject to its waiver of objections to personal jurisdiction.[185] Finally, there is no provision of Ecuadorian law by which to hold Chevron responsible for Texaco's past conduct in Ecuador.[186]

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 jurisdiction. 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.[187] The inconsistency of these positions may prevent Chevron from resisting the recognition of a judgment entered by the Superior Court based on 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.[188] This includes objections to the exercise of personal jurisdiction by foreign courts.[189] To conclude otherwise would establish a different and stricter standard for procedural rights in foreign countries than in the United States.[190] 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.

Subject Matter Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of subject matter jurisdiction.[191] 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.[192] The second basis for the Plaintiffs' Complaint 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.[193] 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.[194]

The Plaintiffs' asserted bases for subject matter jurisdiction may be challenged on four primary grounds. Initially, Ecuadorian law prior to 1999 granted redress only for individualized harm.[195] Article 86 of Ecuador's Constitution clearly placed responsibility for environmental protection on the government. 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.[196] Ecuadorian citizens were also authorized to intervene in administrative proceedings and request reversal of administrative acts that threatened environmental harm.[197]

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 property.[198] 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.[199] 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."[200] 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.[201]

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."[202] 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 judged for an act or omission which at the time it was committed was not legally classified as a . . . violation, nor . . . . shall a person be judged except in accordance with preexisting laws."[203] This prohibition is reiterated in the Ecuadorian Civil Code, which states that "[t]he law provides only for the future; it has no retroactive effect."[204] 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.[205] 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.[206]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.[207] The Plaintiffs have denied the applicability of these documents to their claims as they were not parties.[208]

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.[209]

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.[210]

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.[211] 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 the 1998 Final Release."[212] 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 government's actions and would suffer a significant detriment as a result of any change in position.

Discretionary Grounds for Non-Recognition

Fraud

The Acts provide that a foreign judgment need not be recognized if it was obtained by extrinsic fraud which deprived a party of an opportunity to present its case.[213] Applying this standard, it is unlikely that Chevron can prove by clear and convincing evidence that it was defrauded of an opportunity to present its case in the Superior Court. The primary focus of Chevron's fraud allegations has been Cabrera's report.[214] Cabrera's report has been subject to three separate prongs of attack. Initially, Cabrera's methodology was subject to significant questions.[215] The second prong was Cabrera's investigation and assessment of damages with respect to topics beyond the scope of his mandate.[216] Finally, the amount of Cabrera's damages estimates raised questions, especially with respect to his assessments for cancer deaths, unjust enrichment and remediation costs.[217]

Clearly, these deficiencies render Cabrera's report suspect. However, there appears to be no extrinsic fraud perpetrated on the Superior Court. Chevron has not been deprived of opportunities to defend the litigation as a result of misconduct attributable to the Plaintiffs. To the contrary, Chevron has had numerous opportunities to challenge Cabrera's veracity and findings through numerous lengthy pleadings accepted for filing by the Superior Court.[218] To the extent any fraud exists in

this case, it may be characterized as intrinsic fraud relating to the credibility of Cabrera and his report. Such issues are not subject to review by a U.S. court in a recognition proceeding.

Even assuming that the issues regarding Cabrera's report more closely resemble deceit, it is unlikely that Chevron can satisfy the fundamental elements of fraud necessary to prevent recognition of any judgment entered by the Superior Court. The elements of fraud for purposes of preventing recognition are identical to those in other types of cases. Thus, Chevron will be required to prove the existence of a material misrepresentation made with knowledge of its falsity or in reckless disregard of the truth with the intent to induce reliance, actual reliance by the party to whom the misrepresentation was made and resultant injury.[219]

It is unlikely that Chevron will be able to convince a U.S. court by clear and convincing evidence that Cabrera's report, deficient though it may be, is the product of material misrepresentations made with knowledge of falsity. Cabrera's methodology and conclusions may be subject to scientific challenge, but any shortcomings are a far cry from a clear and convincing attempt to defraud the Superior Court and deprive Chevron of an opportunity to defend the litigation. Furthermore, although it is undeniable that Cabrera's report was produced with the intent to induce the Superior Court's reliance, it will be difficult to prove actual reliance unless the court expressly adopts the alleged fraudulent portions of the report.

Chevron will also be required to demonstrate a causal relationship between misrepresentations made by Cabrera, if any, reliance by the Superior Court and injury suffered by Chevron. This will require that the Superior Court impose liability on Chevron based upon the alleged fraudulent portions of the report. Rejection of the report by the Superior Court or the absence of reliance in entering a judgment against Chevron would break the causal chain. The clearest causal connection would be the unquestioned adoption of the report by the Superior Court and its wholesale incorporation in the final judgment, which is an unlikely result.

Chevron has not limited its fraud allegations to Cabrera and his report but has made allegations against the Superior Court. Although serious, the many alleged procedural irregularities throughout the trial, including those that led to Cabrera's appointment and reports of the U.S. government characterizing the Ecuadorian court system as corrupt do not rise to the level of fraud but are more appropriately classified as due process violations or matters relating to the integrity of the court. It is unlikely that Chevron could meet its burden of proof and demonstrate that the court was engaged in anything other than the objective evaluation of evidence rather than complicity in misconduct. Furthermore, any failure by Chevron to prove that Cabrera's report was fraudulent renders its consideration by the Superior Court non-fraudulent. In any event, none of these occurrences have deprived Chevron of an opportunity to present its case as required by intrinsic fraud.

Public Policy

The 1962 Act permits non-recognition of a foreign judgment if "the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state."[220] The 2005 Act allows a U.S. court to deny recognition if "the judgment or the cause of action [or claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States."[221] Cases referring to the judgment rather than the cause of action have denied recognition if the judgment is "inherently vicious, wicked or immoral and shocking to the prevailing moral sense."[222] Other grounds for non-recognition include if the judgment is "indecent"[223] or undermines public interest or confidence in the administration of justice.[224] These standards are stringent, and the public policy exception rarely results in non-recognition.[225]

Courts have consistently declined to find differences between U.S. and foreign judicial procedures to be sufficient to support a finding of a violation of public policy.[226] Rather, U.S. courts have recognized that there is more than one acceptable method by which civil litigation between private parties may be resolved. However, these cases are distinguishable from the Ecuadorian litigation in one important respect. Specifically, U.S. courts discussing procedural differences based their conclusions on compliance by the foreign courts with their own procedures. A successful rebuttal to the public policy exception requires governing procedures and adherence to such procedures. The absence of procedural conformity is akin to no procedure at all.

Thus, Chevron may be able to successfully invoke the public policy exception due to the Superior Court's departure from the requirements of the Ecuadorian Code of Civil Procedure. A single departure is most likely insufficient. However, several departures such as to constitute a pattern of disregard may call a subsequent judgment into question. Recognition of such a result might appear unfair and undermine confidence in the administration of justice in the United States and abroad.

The Superior Court's multiple deviations from the Code of Civil Procedure raise genuine issues regarding whether recognition would sanction an unfair result and undermine confidence in the administration of justice. These deviations have most notably concerned Cabrera, including the circumstances surrounding his appointment, and the failure to provide adequate supervision of his inspections, permit discovery with respect to his methodology and conclusions and expunge those portions of his report that exceeded his mandate or were unsupported by evidence or Ecuadorian law.[227] The ultimate determination of whether these deviations constitute a pattern of disregard for the Code of Civil Procedure is uncertain. Nevertheless, the number of deviations and their importance to the outcome of the litigation go far in meeting Chevron's burden of proof.

A public policy violation may exist if the party seeking recognition of the foreign judgment engaged in misconduct in the underlying foreign proceeding.[228] Chevron alleged misconduct by the Plaintiffs throughout the litigation. This misconduct included working in conjunction with Cabrera to improperly influence his findings, escorting Cabrera around the concession area during his site inspections, conducting media and lobbying campaigns to promote the Plaintiffs' litigation position, and bringing political pressure to bear on the Superior Court.[229] According to Chevron, these "unscrupulous methods" made the conduct of neutral scientific inquiry into the sources and extent of contamination impossible and caused the Superior Court to abandon due process in favor of procedures heavily tilted in the Plaintiffs' favor.[230]

It is unlikely that Chevron would prevail in asserting the public policy exception on the basis of such alleged misconduct absent greater specificity. Chevron's allegations appear closer to complaints about the Plaintiffs' purported "hometown" advantage and less about specific instances of identifiable misconduct that would support a finding of an "inherently vicious, wicked, immoral or indecent" outcome or one that undermines public interest or confidence in the administration of justice. Even assuming Chevron can identify specific instances of misconduct, it must still demonstrate that such misconduct had an effect on the outcome of the litigation. Chevron may be able to present a circumstantial case with respect to Cabrera's appointment and the preparation of his report. It will be a far more difficult task to prove to a high degree of certainty that such misconduct had a direct and significant effect on the Superior Court such as to taint the outcome of the litigation.

From a substantive standpoint, it may be contended that public policy has been violated if the Superior Court disregards U.S. rules recognizing the separation between parent corporations and their subsidiaries. In order to prevail on their claims against Texaco, the Plaintiffs must demonstrate that Texaco's subsidiaries were "economically, technically, and administratively subjected to [Texaco], as well as to the policies and directives of its headquarters."[231] If such control existed, it may be concluded that Texaco conceived, knew and approved of the subsidiaries' exploration and production techniques.[232] Alternatively, the Plaintiffs could proceed against Texaco if it could prove that its 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."[233]

Differences in substantive corporate law and, in particular, the liability of parent companies for the acts of their subsidiaries, do not create a public policy ground upon which recognition of an Ecuadorian judgment may be denied. Rather, it is that the specific bases upon which an Ecuadorian judgment may enter against Texaco have been rejected by U.S. courts. Rejection of the Plaintiffs' characterization of Texaco's relationship with its subsidiaries has occurred in more than one court examining different aspects of the relationship over a period spanning fourteen years.[234] Any U.S. court confronted with a judgment imposing liability on Texaco would have to disregard this precedent in order to grant recognition. Recognition would also disregard the Plaintiffs' previous stipulation in the U.S. litigation that they had no knowledge, information or documents relating to events occurring in the United States that caused harm in Ecuador.[235]

A further problem exists with respect to Chevron. Chevron has no legal domicile in Ecuador, has never operated there and owns no real or personal property in the state.[236] Furthermore, Chevron did not acquire Texaco in 2001 and is not the successor-in-interest to Texaco's potential liability for environmental contamination.[237] U.S. courts have already held that the Plaintiffs were unable to prove that Texaco and its subsidiaries were interconnected such as to impose liability on Texaco for environmental harm in Ecuador. If the Plaintiffs were unable to demonstrate sufficient interconnectedness between Texaco and its subsidiaries, they will be unable to prove a meaningful nexus between Texaco and Chevron such as to impose liability.

Cabrera's report might also serve as the basis for a public policy challenge. The many shortcomings of the report have been previously discussed.[238] However, four aspects of the report bear repeated reference in the context of public policy. First, Cabrera assessed damages for causes of action and injuries not alleged in the Complaint.[239] Related to this concern is Cabrera's disregard of his mandate as demonstrated by assessing damages for improvement of public services, fostering of indigenous cultures, modernization of Petroecuador's equipment, and disgorgement of "unfair profits."[240]

Cabrera's conclusions relating to cancer deaths and the unjust enrichment penalty also present public policy concerns. The assessment of damages for cancer deaths exceeded Cabrera's mandate and was unsupported by documentation and statistical data.[241] The unjust enrichment penalty was beyond Cabrera's mandate, lacked a basis in Ecuadorian law and was not requested in the Complaint.[242] Any of these shortcomings standing alone may not be sufficient to meet the stringent burden imposed upon public policy challenges. However, the weight of these combined problems, when added to the deviations from the Code of Civil Procedure and controversy surrounding the appointment and conduct of Cabrera, may be sufficient to tip the scales in the direction of non-recognition on public policy grounds.

Due Process of Law

The 2005 Act provides that U.S. courts may refuse to recognize judgments where "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[243] Due process is defined as fundamental fairness in the underlying proceeding resulting in the entry of the foreign judgment.[244] There are three potential due process issues that must be considered in any U.S. recognition proceeding against Chevron.

The first issue relates to the Plaintiffs' standing to assert claims for damages. Standing has been recognized as a constitutional prerequisite for the assertion of claims in the United States.[245] This is especially true in the context of

environmental litigation.[246] Constitutional requirements for standing in U.S. courts consist of: (1) an injury in fact that is concrete, distinct, palpable, and actual or imminent; (2) a causal connection between the injury and the conduct which is the subject matter of the complaint; and (3) a substantial likelihood that the requested relief will remedy the alleged injury.[247] For the reasons noted below, the Plaintiffs fail all three prongs of the standing test.

In order to have standing, the Plaintiffs must possess a legally protected interest.[248] The interest purportedly asserted and protected by the Complaint does not belong to the Plaintiffs. Rather, at the time of the filing of the Complaint, environmental protection was within the exclusive domain of the Ecuadorian government. Article 86 of Ecuador's 1998 Constitution clearly placed responsibility for environmental protection on the government.[249] The Law for Prevention and Control of Environmental Pollution adopted in 1976 only empowered citizens to report activities resulting in environmental contamination to appropriate governmental authorities.[250] Ecuadorian citizens were also authorized to intervene in administrative proceedings and request reversal of administrative acts that threatened environmental harm.[251]

These laws did not permit the maintenance of a popular action to compel environmental remediation or the payment of damages by a former owner or operator of real property.[252] This position was clearly acknowledged in the U.S. litigation. Representatives of the Ecuadorian government asserted that private parties could not seek compensation for environmental harm as it was the "legal owner of the rivers, streams and natural resources and all public lands where the . . . oil producing operations" occurred.[253] The plaintiffs in the U.S. litigation were "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."[254]

Even assuming the existence of a legally protected interest, the Plaintiffs have failed to establish distinct and particularized harm.[255] Instead, the allegations and conclusions set forth in Cabrera's report refer to collective harm. This is not only insufficient to establish standing in the United States but is equally inadequate in Ecuador. The Environmental Management Law requires parties to demonstrate individualized harm.[256] The Plaintiffs failed to plead, identify or prove individualized personal injury or property damage but rather seek compensation for "the broadest of communal environmental harms."[257] Additionally, Frente, which seeks ten percent of the amount awarded by the Superior Court, has suffered no injury whatsoever.

Second, there is no causal connection between the Plaintiffs' injuries, if any, and the conduct which is the subject matter of the litigation.[258] The Plaintiffs must demonstrate that their injuries were the direct result of or "fairly traceable" to Chevron's conduct.[259] This difference in language is not relevant as Chevron did not engage in any activity in Ecuador. Chevron's connection to the Plaintiffs' claims commenced, if at all, years after Texaco ended its involvement with the Consortium and had departed Ecuador.

The U.S. Supreme Court has denied standing to plaintiffs whose injuries are the result of the actions of a third party not before the court.[260] This is the exact circumstance that will confront any U.S. court in a recognition proceeding. The Plaintiffs' injuries, to the extent they can be particularized, are not the result of Chevron's actions. Instead, the Plaintiffs' injuries are the result of actions of the Consortium of which Texaco was a member. However, Texaco and other Consortium members are not parties to the Ecuadorian litigation. Thus, the Plaintiffs lack standing to the extent their injuries are attributable to third parties not summoned to appear before the Superior Court.

Finally, the Plaintiffs' requested remedies do not possess redressability, which is defined as the substantial likelihood that the relief will remedy the alleged injury.[261] As there has been no attempt to plead or otherwise prove individualized harm, the most likely outcome of the litigation is a generalized damages award to be divided amongst the Plaintiffs. How such an award addresses each individual Plaintiff's particularized harm remains to be determined. This is especially the case with respect to environmental degradation claims which vary widely depending on the extent of contamination. The manner in which a monetary award is likely to specifically address cancer claims is even less distinct as the names of affected individuals and types of cancer have not been identified. The Plaintiffs' strategy with respect to damages appears to be to secure a lump sum award first and then determine the existence of actual individual injury and appropriate compensation. This plan usurps judicial authority and is a dereliction of duty to the extent it is permitted by the Superior Court. Such a result should not receive the official imprimatur of the U.S. legal system bestowed by recognition.

Most disconnected from actual harm suffered by the Plaintiffs is the claim by Frente and the proposed damages award for unjust enrichment. Frente has suffered no injury that can be redressed but nevertheless seeks ten percent of the total award.[262] The unjust enrichment claim is equally disconnected from actual harm as additional profits allegedly derived by Texaco by permitting environmental contamination to occur in Ecuador were not conferred on Texaco or Chevron by the Plaintiffs. As noted by a U.S. court addressing a similar unjust enrichment claim in related litigation, there is no decision "addressing – much less upholding – a complaint that stretched a personal-injury tort claim into a claim of unjust enrichment simply because the alleged tortfeasor got a benefit that was incidental to the injury."[263] Such a claim is not recognized in U.S. or Ecuadorian law.[264]

Closely related to the standing issue is the attempted retroactive application of the Environmental Management Law. The ex post facto application of penal legislation is constitutionally prohibited in the United States.[265] The Ecuadorian Constitution, Civil Code and applicable case law also prohibit retroactive application of laws in general and the Environmental Management Law in particular.[266] Application of the Environmental Management Law to this case is clearly retroactive as it would grant standing to private individuals where none previously existed.[267]

In addition to violating U.S. and Ecuadorian law, retroactive application of the Environmental Management Law is inconsistent with the fundamental reasons underlying the prohibition upon ex post facto laws. Such application was clearly not intended at the time the Environmental Management Law was adopted. The Law contained no provision indicating that it was to be given such effect. This absence of a clear intention to bestow retroactive effect may serve as a ground for non-recognition of a judgment based on its provisions.[268]

The absence of clear legislative intent also fails to accord Texaco and Chevron fair notice of the requirements of the law and the opportunity to conform their conduct accordingly.[269] Texaco and Chevron's expectations regarding the state of environmental law in Ecuador at the time of the filing of the Complaint would be disrupted by a retroactive application of the Environmental Management Law. These expectations are particularly strong in this case given the previously-referenced Ecuadorian law relating to retroactivity and the passage of time from the termination of Texaco's involvement in the Consortium to the adoption of the Law. Such expectations are subject to protection by due process.[270]

Retroactive application of the Environmental Management Law also deprives Texaco and Chevron of their legitimate expectations arising from the Remediation Agreement and Final Act. Texaco spent $40 million in the performance of its obligations pursuant to the Remediation Agreement in return for a full and final release of liability from the Ecuadorian government, the entity it believed to be the sole party in interest. Chevron undoubtedly reviewed and relied on the Remediation Agreement and Final Act in its decision to acquire Texaco. Nevertheless, four years after its adoption, the Environmental Management Law was cited as a jurisdictional basis for the Plaintiffs' Complaint. Any judgment granting retroactive effect fifteen years after the execution of the Remediation Agreement, twelve years after the issuance of the Final Act and eleven years after the adoption of the Environmental Management Law interferes with Texaco and Chevron's expectations. This interference with a settled transaction upon which the parties have detrimentally relied renders any judgment entered by the Superior Court based on the Environmental Management Law suspect from a due process standpoint.[271]

A further reason for the prohibition upon retroactivity is the prevention of arbitrary and vindictive application of legislation.[272] Retroactive application of the Environmental Management Law to Chevron would be arbitrary and vindictive. Any such application despite the adoption of the Remediation Agreement and Final Act and the passage of time is indicative of motivations other than the even-handed enforcement of the law. Rather, such application is evidence of a change in governmental attitudes toward business and a perceived opportunity to obtain a significant contribution to the cost of environmental remediation from a large multinational enterprise and excuse injuries caused by Petroecuador's ongoing operations. This conclusion is strengthened by the fact that retroactive application would create a penalty in favor of private parties where none previously existed.[273] Such a punitive measure reflects an intent to impose a penalty upon Chevron rather than a purpose to remediate dangerous conditions.[274] U.S. courts must deny recognition to the extent Chevron can demonstrate such an illegitimate purpose.

The final due process issue relates to the size of the potential judgment. The Due Process Clause of the U.S. Constitution imposes substantive limits on the ability of the states to impose and, by extension, recognize punitive damages.[275] Such awards must be reviewed by U.S. courts on a de novo basis.[276] De novo review in this case would not be a relitigation of the merits but would focus on whether the award is punitive in nature and whether its size and purpose violate due process protections. This is a sensible approach as U.S. courts do not enforce domestic punitive damage awards that violate due process. Deference to foreign judgments should not include recognition of foreign punitive awards that would not be recognized if entered by a U.S. court. Due process standards should not be transgressed merely because the judgment under review is the product of foreign litigation.

Awards imposing "grossly excessive" punishments are presumptively unconstitutional.[277] Although the U.S. Supreme 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.[278] 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.[279] Furthermore, the permissible ratio must be smaller as the size of the compensatory award increases.[280]

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 awards. Furthermore, applying the Court's reasoning in *State Farm Mutual Automobile Insurance Company v. Campbell*, the ratio should be far less given the size of the compensatory award.

A significant punitive award may be suspect based upon comparison to past awards.[281] Although *Aguinda* represents perhaps the largest environmental contamination case in world history, the award must still be reasonable from a due process standpoint. Any award that results from this litigation will be the largest ever entered by an Ecuadorian court.[282] It will most likely be the largest foreign judgment ever presented to a U.S. court for recognition. The punitive portion of the award is also likely to be the largest such award ever considered by a U.S. court. Although not rendered illegitimate by its size alone, when combined with other factors, a significant award clearly would violate constitutional restraints upon excessive punishment.

A punitive award in excess of a single digit ratio may also fall within Justice O'Connor's warning regarding attempts to redistribute wealth through significant awards against large nonresident corporations.[283] As "mere abstractions" often

representing "a large accumulation of productive resources," corporations "are unlikely to be viewed with much sympathy."[284] As a result, courts may be tempted to "think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth . . . [and] may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from 'wealthy' corporations to comparatively needier plaintiffs."[285]

Justice O'Connor's warning is of particular relevance in this case. Utilizing Chevron's calculations, a punitive award in the amount sought by the Plaintiffs would be equal to almost half of Ecuador's gross domestic product.[286] The amount is fifty times Texaco's net profits derived from its operations in Ecuador and does not bear a reasonable relation to its ownership interest in the Consortium.[287] If awarded in their entirety, the damages would exceed Chevron's total net earnings by $600 million and its net international earnings by $10 billion.[288]

The description of the purpose of the litigation by Plaintiffs' co-counsel also supports the conclusion that the litigation is, at least in part, an attempt to redistribute wealth.[289] Other possible motivations for the size of the award such as a change in national attitudes toward business and a means by which to excuse environmental damage caused by others or provide assistance to Petroecuador are equally suspect.[290] Regardless of the absence of a "bright line" test for determining under what circumstances consideration of a wrongdoer's financial condition becomes undue or oppressive, it is certain that punishing and deterring wrongdoers through the assessment of punitive damages does not extend to redistributing wealth to residents at the expense of nonresident multinationals.

Awards purporting to punish a wrongdoer on behalf of non-parties are also subject to careful scrutiny.[291] Any judgment that may enter in this case is suspect to the extent it awards billions of dollars in damages to thousands of unnamed non-party victims residing in the Oriente as well as to Frente. Such an award amounts to an unconstitutional taking of property.[292] This conclusion is supported by the fact that defendants who are threatened with punishment for injuring non-party victims have no opportunity defend such a charge through presentation of evidence or confrontation of such individuals.[293] Additionally, to permit punishment under such circumstances would "add a near standardless dimension to the punitive damages equation."[294] Any punitive award would be defensible as long as it could be reasonably attributable to some harm suffered by an unidentified non-party. This result would deprive courts of the opportunity to conduct a meaningful de novo review and is inconsistent with the presumption that excessive awards are unconstitutional.[295]

Any punitive portion of the judgment would implicate two additional due process concerns. First, any punitive award or legal system in which it was entered may not deprive the defendant of "fair notice . . . of the severity of the penalty that a State may impose."[296] Although Chevron clearly is on notice that any damages award in Ecuador could be large, it is also entitled to rely upon Ecuadorian law and the Superior Court to exercise restraint and strike claims lacking proof such as those relating to cancer deaths. Chevron is also entitled to rely on the Superior Court to strike causes of action not recognized by Ecuadorian law such as unjust enrichment. The Superior Court's repeated deviations from Ecuadorian law throughout the trial deprived Chevron of procedural certainty. Chevron is also entitled to rely on the Plaintiffs' estimate of damages as an outer limit to its liability. However, this amount continued to grow from $6.1 billion in 2004 to $16.3 billion by April 2008 and $27.3 billion by November 2008.[297] As a result, Chevron has faced considerable uncertainty throughout the course of the litigation in determining the extent of its liability. This uncertainty may constitute a lack of fair notice regarding the severity of the potential penalty.

Second, punitive awards that are the product of bias or passion cannot withstand constitutional scrutiny.[298] Such influences are antithetical to the rule of law, and awards reached through consideration of such factors violate due process.[299] The political pressure placed upon the Superior Court by the executive branch and procedural confusion surrounding the conduct of the trial, especially relating to the appointment and supervision of Cabrera, further underscore the lack of rationality inherent in the proceedings and the potential existence of bias in the formulation of any judgment.

These contentions do not necessarily lead to the conclusion that a U.S. court will disregard all punitive portions of the Superior Court's judgment. Assuming that Texaco's activities result in liability and such liability can be attributed to Chevron, some punitive award may be appropriate. This conclusion is based upon the degree of reprehensibility associated with the environmental contamination resulting from the Consortium's operations. A punitive award may be appropriate given the physical harm that occurred as a result of oil exploration and production.[300] This harm was not an isolated incident but involved repeated conduct over a twenty-six year period.[301] Conversely, the Plaintiffs face substantial obstacles presented by the requirements that significant awards be supported by conduct evincing indifference or reckless disregard of the health and safety of others and that the harm result from malice, trickery or deceit rather than mere accident.[302] Nevertheless, a more modest award may survive a due process challenge in a U.S. recognition proceeding.

CONCLUSION

The stakes for Chevron in the Ecuadorian litigation are extremely high. It is unlikely that it will escape the litigation 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 and 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.[303]

However, the stakes are equally high for the Plaintiffs. The Plaintiffs have invested seventeen 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 regime 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 government 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.[304]

Given this uncertainty, it is perhaps wisest for all sides to return to an opinion issued sixteen 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."[305] Settlement may be reached only by "voluntary acquiescence of both sides based upon intelligent self-interest."[306] In the judgment of this commentator, the time for the exercise of intelligent self-interest by both parties is long overdue.

Footnotes

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[1] Complaint, Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nueva Loja (Lago Agrio), Ecuador (No. 002-2003) [hereinafter Lago Agrio Complaint or Complaint]. *See also* 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'Y 413, 629, 631 (2006) (setting forth a comprehensive history of the Ecuadorian litigation through 2006).

[2] Lago Agrio Complaint, *supra* note 1, at 9-14. Chevron was named as a defendant as a result of its October 2001 acquisition of Texaco. *Id. at* 8, 19.

[3] CHEVRON CORP., ANNUAL REPORT 47 (2008) (noting that the Plaintiffs claimed $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).

[4] Steven R. Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America*, 11 HUM. RTS. BRIEF 1, 1 (2004).

[5] *See* Simon Romero & Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 15, 2009, *available at* http://www.nytimes.com/2009/05/15/business/global/15chevron.html.

[6] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-88, introductory note (1987). *See also* 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).

[7] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (extending *Erie Railroad Co. v. Tompkins* to conflict of law issues). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 6, §§ 481-88, introductory note.

[8] UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 1(2), 13 U.L.A. 261 (1962) [hereinafter 1962 Act]. The 1962 Act has been adopted by Alaska, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas and Virginia. UNIF. LAW COMM'RS, A FEW FACTS ABOUT THE UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT 1 (2009).

[9] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 2(2), 13 U.L.A. pt. II (2005) [hereinafter 2005 Act]. The 2005 Act has been adopted by California, Colorado, Hawaii, Idaho, Michigan, Montana, New Mexico, Nevada, Oregon and Washington. *See* UNIF. LAW COMM'RS, A FEW FACTS ABOUT THE UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT 1 (2009). The remaining nineteen states rely upon the common law doctrine of comity.

[10] 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 also* 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").

[11] *See* 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).

[12] 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 Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1065 (D. Del. 1987). 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).

[13] Kimerling, *supra* note 1, at 414-15.

[14] *Id.* at 417. Ecuador's gross national product increased from $2.2 billion in 1971 to $5.9 billion in 1977. *Id.*

[15] Lago Agrio Complaint, *supra* note 1, 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 also* Kimerling, *supra* note 1, at 435.

[16] Hydrocarbons Law, arts. 40B, 43, 45 (Sept. 27, 1971) (Ecuador). *See also Phoenix Canada Oil Co.*, 658 F. Supp. at 1066 (discussing the provisions of the Hydrocarbons Law).

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

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

[19] *Id.* (discussing the sale of Gulf's interest to CEPE).

[20] *See* Kimerling, *supra* note 1, at 420.

[21] *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.* at 340-41.

[22] *Id.* at 341. *See also* TEXACO, INC., TEXACO IN ECUADOR, A TIMELINE OF EVENTS 1 (2008).

[23] Complaint at 22, Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994) (No. 93 Civ 7527) [hereinafter New York Complaint]. *See also* Kimerling, *supra* note 1, 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).

[24] *See* Abelowitz, *supra* note 23, 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 also* AMAZON DEFENSE COALITION, RAINFOREST CATASTROPHE: CHEVRON'S FRAUD AND DECEIT IN ECUADOR 4 nn.8, 11 (2006) (estimating that 17.1 million gallons of crude oil were discharged as a result of exploration and drilling activities and as a result of pipeline ruptures).

[25] Abelowitz, *supra* note 23, at 146 (based upon estimates provided by the Rainforest Action Network).

[26] Lago Agrio Complaint, *supra* note 1, at 9. The plaintiffs allege that the Consortium dug and operated 916 open air unlined pits. FRENTE DE DEFENSA DE LA AMAZONIA, ENVIRONMENTAL IMPACTS 1 (2009), *available at* http://chevrontoxico.com/about/environmental-impacts. 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* (CBS television broadcast May 3, 2009).

[27] *See* Lago Agrio Complaint, *supra* note 1, 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"). *See also* FRENTE DE DEFENSA DE LA AMAZONIA, ENVIRONMENTAL IMPACTS, *supra* note 26, at 1 (identifying the "release of contaminants through gas flaring, burning and spreading of oil on roads" as major sources of pollution); Kimerling, *supra* note 1, 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").

[28] Lago Agrio Complaint, *supra* note 1, at 12.

[29] *Id.* at 13.

[30] *Id.*

[31] *Id.* at 14.

[32] Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp.2d 334, 341-42 (S.D.N.Y. 2005) (summarizing the Remediation Agreement).

[33] *Id.* at 342.

[34] *See* Kimerling, *supra* note 1, at 497.

[35] Press Release, Chevron Corporation, Inspection by Environmental Experts Confirms that Texaco Conducted an Effective Cleanup in Full Compliance with its Obligations to the Government 2 (Mar. 24, 2004) (on file with author). 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.*

[36] CHEVRON TEXACO, 2002 CORPORATE RESPONSIBILITY REPORT, LEGACY IN ECUADOR 1 (2002).

[37] *See* Kimerling, *supra* note 1, at 508.

[38] *See Republic of Ecuador*, 376 F. Supp.2d at 342 (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 "proceeded 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"). *See also* 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 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").

[39] *See* New York Complaint, *supra* note 23.

[40] *Id.* at 4, 11, 14-15, 17-18.

[41] 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 (2000).

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

[43] *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. Dist. Ct. App. 1997) (tort litigation arising from fungicide exposure).

[44] *See Aguinda*, 303 F.3d at 478 (concluding 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).

[45] *See* Press Release, ChevronTexaco Corporation, ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation 1 (Aug. 19, 2002) (on file with author). *See also* Press Release, Texaco Corporation, Texaco Statement re: 01/31/00 Order of the U.S. District Court 1 (Jan. 31, 2000) (on file with author).
[46] *See* Press Release, Texaco Corporation, Texaco Statement re: 01/31/00 Order of the U.S. District Court, *supra* note 45, at 1.
[47] *See* Chevron Corporation's Motion to Dismiss at 16, Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nuevo Loja (Lago Agrio), Ecuador (No. 002-2003) [hereinafter Motion to Dismiss].
[48] *Id.*
[49] *Id.* (quoting Letter from Edgar Terán, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (June 10, 1996)).
[50] Aguinda v. Texaco, Inc., 142 F. Supp.2d 534, 539, 550 (S.D.N.Y. 2001).
[51] *Id.* at 549.
[52] *Id.* at 549-50.
[53] The district court concluded that:

> the 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.
[54] *Id.* at 550.
[55] Constitution arts. 23, 86-88, 90-91 (1998) (Ecuador) (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 Complaint.
[56] Environmental Management Law, Law No. 99-37, arts. 41, 43 (July 30, 1999) (Ecuador).
[57] Lago Agrio Complaint, *supra* note 1, at 22-25.
[58] *Id.* at 25.
[59] Motion to Dismiss, *supra* note 47, at 10-18. 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. Environmental Management Law, Law No. 99-37, art. 43 (July 30, 1999) (Ecuador). 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* Constitution art. 24.1 (1998) (Ecuador) (stating that "[n]o one may be judged for an act or omission which at the time it was committed was not legally classified as a . . . violation, nor . . . . shall a person be judged except in accordance with preexisting laws"); CÓDIGO CIVIL [C. CIV.] art. 7 (Ecuador) (providing that "[t]he law provides only for the future; it has no retroactive effect"); Calva v. Petroproduccion, Case No. 349-2000 (Superior Court of Nuevo Loja, Aug. 20, 2001) (Ecuador) (in which the court held 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* Statute on the Legal-Administrative Rules for the Executive Branch, No. 411, art. 115(b) (Mar. 31, 1994) (Ecuador). *See also* Law for Preservation and Control of Environmental Contamination, Supreme Decree No. 374, art. 29 (Mar. 31, 1976) (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 [C. CIV.] art. 2214 (Ecuador). 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.
[60] Motion to Dismiss, *supra* note 47, at 9.
[61] *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. *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).

[62] Motion to Dismiss, *supra* note 47, 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. Motion to Dismiss, *supra* note 47, at 20. There were no other grounds for the exercise of personal jurisdiction as Chevron had never operated in Ecuador. *Id.*

[63] Motion to Dismiss, *supra* note 47, 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 at 478-80. 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 [C. CIV.] art. 2235 (Ecuador).

[64] Motion to Dismiss, *supra* note 47, 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. Environmental Management Law, Law No. 99-37, art. 43 (July 30, 1999) (Ecuador) (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"). 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." Motion to Dismiss, *supra* note 47, at 21.

[65] Motion to Dismiss, *supra* note 47, at 22.

[66] *Id.* at 23-24.

[67] *Id.* at 24.

[68] *Id.* at 25.

[69] Motion to Dismiss, *supra* note 47, at 28-29. 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 also* TEXACO, INC., PLAINTIFFS' MYTHS, DISTORTIONS AND FABRICATIONS 1 (2008) (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).

[70] Motion to Dismiss, *supra* note 47, at 29-30. *See also* CÓDIGO CIVIL [C. CIV.] 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).

[71] Motion to Dismiss, *supra* note 47, at 37-38. *See also* CÓDIGO CIVIL [C. CIV.] arts. 252, 292 (Ecuador) (stating that the parties may "by mutual agreement select the expert or request the appointment of more than one expert to carry out [expert examination], which agreement shall be binding on the judge" and that a litigant's request "whose objective is to alter the meaning of . . . orders . . . or to maliciously prejudice the other party, shall be dismissed and sanctioned").

[72] Motion to Dismiss, *supra* note 47, 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.

[73] Chevron Corporation's Rebuttal Brief at 10, Aguinda v. ChevronTexaco Corp., Superior Court of Justice of Nuevo Loja (Lago Agrio), Ecuador (No. 002-2003) [hereinafter Rebuttal Brief].

[74] Press Release, Chevron Corporation, Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure 2 (Sept. 15, 2008) (on file with author).

[75] *See* Rebuttal Brief, *supra* note 73, 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* Motion to Dismiss, *supra* note 47, 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 chain of custody documentation for samples); Interview by Members of the Media with Charles James, General Counsel, Chevron Corporation, in San Ramon, Cal. (Sept. 15, 2008) (accusing Cabrera of failing to take water samples in the course of his inspection of well sites and production stations)

[76] *See* Rebuttal Brief, *supra* note 73, at 5 (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* Motion to Dismiss, *supra* note 47, at 40 (accusing Cabrera of assessing social and economic conditions in the Oriente in violation of his mandate).

[77] *See* Rebuttal Brief, *supra* note 73, 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).

[78] Interview by Members of the Media with Charles James, General Counsel, Chevron Corporation, *supra* note 75.

[79] Constitution arts. 13, 22, 24, 192 (1998) (Ecuador) (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 person is entitled to due process, including "the right to access to 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 . . . effect to the guarantees of due process").

[80] CHEVRON CORP., ANNUAL REPORT, *supra* note 3, at 47.

[81] *Id.*

[82] FRENTE DE DEFENSA DE LA AMAZONIA, $27 BILLION DAMAGES ASSESSMENT, 1-2 (2009), *available at* http://chevrontoxico.com/abouthistoric-trial/27-billion-damages-assessment.html.

[83] Chevron had net earnings of $23.93 billion in 2008, of which $14.58 were derived from its international operations. CHEVRON CORP., ANNUAL REPORT, *supra* note 3, at 34.

[84] *See* Rebuttal Brief, *supra* note 73, at 6, 17 (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").

[85] *See* Rebuttal Brief, *supra* note 73, at 17.

[86] *See* Gonzalez v. Texaco, Inc., 2007 U.S. Dist. LEXIS 56622, at *9 (N.D. Cal. Aug. 3, 2007) (concluding that cancer claims allegedly caused by hydrocarbon contamination in the Oriente were "manufactured by plaintiffs' counsel" and "likely a smaller piece of some larger scheme against defendants"). The court subsequently imposed sanctions on three of the plaintiffs' attorneys for failing to conduct adequate inquiry with respect to the cancer claims prior to initiating litigation. *See* Gonzalez v. Texaco, Inc., 2007 U.S. Dist. LEXIS 81222, at *33 (N.D. Cal. Oct. 16, 2007) *See also* CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT 6 (2009).

[87] Press Release, Chevron Corporation, Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure, *supra* note 74, at 3.

[88] *See* CHEVRON CORP, REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86, at 7. Chevron claimed that Texaco's total profits over the twenty-eight year life of the Consortium were $490 million. *Id.*

[89] *See* Rebuttal Brief, *supra* note 73, at 6. *See also* CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON 10 (2009).

[90] *See* CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 89, 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 73, at 5.

[91] CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 89, at 10.

[92] *Id.*

[93] CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86, at 3.

[94] *See* Rebuttal Brief, *supra* note 73, 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"); CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 89, at 2, 7 (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); Clare Bolton, *Rumble in the Jungle*, LATIN LAWYER, Mar. 28, 2008, 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).

[95] *See* Rebuttal Brief, *supra* note 73, at 8-9 (referring to statements by two members of the Constituent Assembly endorsing the Plaintiffs' lawsuit and placing responsibility for the economic, social and cultural impacts of hydrocarbon exploitation entirely on Texaco).

[96] CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 89, 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).

[97] Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/27/AR2009042703717 (quoting Chevron spokesman James Craig).

[98] 1962 Act, *supra* note 8, prefatory note.

[99] *See supra* note 8 and accompanying text.
[100] 1962 Act, *supra* note 8, § 2.
[101] *Id.* § 1(2).
[102] *Id.* § 3.
[103] *Id.* § 7.
[104] *Id.* § 4(a)(1).
[105] *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).
[106] *Id.* § 4(a)(3).
[107] *Id.* § 4(b)(1).
[108] *Id.* § 4(b)(2).
[109] *Id.* § 4(b)(3).
[110] *Id.* § 4(b)(4-6). Non-recognition on the basis that the foreign court was a "seriously inconvenient forum" is restricted to cases in which personal jurisdiction is based on personal service and the court in which recognition is sought believes that "the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens." *Id.* § 4(b)(6).
[111] NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, SUMMARY OF THE UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT 2 (2005) (stating that the 2005 Act is not "a radically new act. . . . [but rather] a necessary upgrade for the twenty-first century").
[112] 2005 Act, *supra* note 9, § 3(a)(2).
[113] *Id.* § 3(a)(1).
[114] *Id.* § 2(1-2).
[115] *Id.* § 7(1-2).
[116] *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 cmts. 4, 11.
[117] *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).
[118] 2005 Act, *supra* note 9, § 4(b)(1-3). *See also supra* notes 104-06 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 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 9, § 4 cmt. 5. The U.S. Supreme Court's holding in *Hilton v. Guyot* 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 its full effect.

Id. (citing Hilton v. Guyot, 159 U.S. 113, 202 (1895)).
[119] These grounds are lack of notice, conflict between the foreign judgment and another final and conclusive judgment, the proceeding was contrary to an agreement between the parties, or the foreign court was "a seriously inconvenient forum." 2005 Act, *supra* note 9, § 4(c)(1, 4-6).
[120] *Id.* § 4(c)(2). The comments to Section 4 further clarify this provision by stating that the fraud must be extrinsic fraud that deprived the losing party of an adequate opportunity to present its case rather than intrinsic fraud, such as false testimony of a witness or the admission of a forged document into evidence. *Id.* § 4 cmt. 7.

[121] *Id.* § 4(c)(3).
[122] *Id.* § 4 cmt. 8 (citing Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (rejecting a challenge to a usurious interest rate on a promissory note) and Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (rejecting a challenge to recognition of a post-judgment settlement)).
[123] *Id.* (citing Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (denying recognition to a British libel judgment as a violation of the First Amendment)).
[124] *Id.* (citing Hunt v. BP Exploration Co., 492 F. Supp. 885, 901 (N.D. Tex. 1980)).
[125] *Id.*
[126] *Id.* § 4(c)(7).
[127] *Id.* § 4 cmt. 11.
[128] *Id.*
[129] *Id.* § 4 cmt. 12.
[130] *Compare* 2005 Act, *supra* note 9, § 4(b)(1) *and* 1962 Act, *supra* note 9, § 4(a)(1). *See also* Society of Lloyd's v. Siemon-Netto, 457 F.3d 94, 106 (D.C. Cir. 2006) (reviewing procedures in English courts pursuant to the 1962 Act); Society of Lloyd's v. Reinhart, 402 F.3d 982,994 (10th Cir. 2005) (reviewing procedures in English courts pursuant to the 1962 Act); Society of Lloyd's v. Mullin, 255 F. Supp.2d 468, 472 (E.D. Pa. 2003) (reviewing procedures in English courts pursuant to the 1962 Act).
[131] Society of Lloyd's v. Ashenden, 233 F.3d 473, 479 (7th Cir. 2000). *See also* Society of Lloyd's v. Webb, 156 F. Supp.2d 632, 641(N.D. Tex. 2001).
[132] *See* Society 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 fur Niederosterreich 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. v. Yardeni, 774 A.2d 644, 651 (N.J. Super. Ct. App. Div. 2001) (examining the fundamental fairness of the Israeli legal system pursuant to the 1962 Act).
[133] 2005 Act, *supra* note 9, § 4, cmt. 5 (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)). Similar requirements hold true for the 1962 Act. *See, e.g.*, Society 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); Cortes v. Orion Secs., 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).
[134] Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 688 (7th Cir. 1987). *See also Kreditverein der Bank Austria Creditanstalt fur Niederosterreich und Burgenland*, 2006 U.S. Dist. LEXIS 47011, at *7 (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 9, § 4, cmt. 5.
[135] *Ashenden*, 233 F.3d at 478. *See also Webb*, 156 F. Supp.2d at 641.
[136] *Ashenden*, 233 F.3d at 477. *See also Ingersoll Milling Mach. Co*., 833 F.2d at 688.
[137] 2005 Act, *supra* note 9, § 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).
[138] *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).
[139] *See, e.g.*, In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 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).
[140] 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"). *See also 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 notion of civilized jurisprudence"); 2005 Act, *supra* note 9, § 4, cmt. 5 (requiring a finding of a lack of due process to be supported by "serious injustice").

[141] 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).
[142] Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455 (D. Del. 1978).
[143] *See Leon*, 251 F.3d at 1314 (finding that the lack of financial resources devoted to 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 *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 (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. Dist. Ct. App. 1997) (finding Ecuador to be an adequate forum for the resolution of a tort suit relating to exposure to fungicides).
[144] *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).
[145] Wight v. Bankamerica Corp., 219 F.3d 79, 90 (2d Cir. 2000).
[146] 135 F. Supp.2d 426 (S.D.N.Y. 2001).
[147] *Id.* at 435.
[148] *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").
[149] *See supra* notes 45-46 and accompanying text. *See also* Press Release, Texaco Corporation, Texaco Statement re: 01/31/00 Order of the U.S. District Court, *supra* note 45, 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").
[150] 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).
[151] *Aguinda*, 142 F. Supp.2d at 539.
[152] Bolton, *supra* note 94, at 7-8 (quoting Steven R. Donziger).
[153] Do, *supra* note 148, at 421.
[154] *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).
[155] U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, HUMAN RIGHTS REPORT: ECUADOR 1 (2008).
[156] *Id.* at 5.
[157] *Id.*
[158] *Id.*
[159] U.S. DEP'T OF STATE, BUREAU OF ECON., ENERGY AND BUS. AFFAIRS, INVESTMENT CLIMATE STATEMENT: ECUADOR 1 (2009).
[160] *Id.* at 5.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *See, e.g.*, ECUADOR, ANTI-CORRUPTION NATIONAL PLAN, TOWARD ACHIEVING NATIONAL HONESTY 1, 3, 7, 9-10, 12-13, 15-24 (1999) (describing 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"). 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 10-12, 19-20.
[166] *See, e.g.*, Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (5th Cir. 2002) (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); 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).

[167] *Compare* 2005 Act, *supra* note 9, § 4(b)(2) *and* 1962 Act, *supra* note 8, § 4(a)(2).

[168] *Compare* 2005 Act, *supra* note 9, § 5(a)(1-6) *and* 1962 Act, *supra* note 8, § 5(a)(1-6).

[169] *Compare* 2005 Act, *supra* note 9, § 5(b) *and* 1962 Act, *supra* note 8, § 5(b).

[170] Lago Agrio Complaint, *supra* note 1, at 6.

[171] *Id.*

[172] *Id.* at 15.

[173] *Id.*

[174] *See supra* notes 50-54 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).

[175] 658 F. Supp. 1061 (D. Del. 1987).

[176] *Id.* at 1085

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Press Release, ChevronTexaco Corporation, ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation, *supra* note 45, at 1.

[182] 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 Ecuadorean courts").

[183] *See* Motion to Dismiss, *supra* note 47, at 20.

[184] *Id.*

[185] *See supra* note 61 and accompanying text.

[186] Motion to Dismiss, *supra* note 47, at 19 n.14.

[187] *See supra* notes 59-64, 69-71, 77-79, 84-97 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.

[188] *See* Society 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).

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

[190] *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).

[191] *Compare* 2005 Act, *supra* note 9, § 4(b)(3) *and* 1962 Act, *supra* note 8, § 4(a)(3).

[192] Lago Agrio Complaint, *supra* note 1, at 20. Article 86 of Ecuador's Constitution provided that:

> [t]he State will protect the right of the population to live in an ecologically stable and healthy environment that guarantees sustainable development. It will watch so that this right is not affected and will guarantee the preservation of nature. These rights are declared of public interest and themselves regular according to the law:
>
> 1. The preservation of the environment, the conservation of ecosystems, the biodiversity and the integrity of the genetic patrimony of the country.
>
> 2. The prevention of environmental contamination, the recovery of the natural spaces degraded, the sustainable management of the natural resources and the requirements that private and public activities should comply with these ends.

> 3. The establishment of a national system of protected natural areas that guarantee the conservation of the biodiversity and the maintenance of the ecological services according to international covenants and treaties.

Constitution art. 86 (1998) (Ecuador).

[193] Lago Agrio Complaint, *supra* note 1, at 21. *See also* CÓDIGO CIVIL [C. CIV.] art. 2260 (Ecuador).

[194] Lago Agrio Complaint, *supra* note 1, at 21-22. *See also* Law No. 99-37, art. 43 (July 30, 1999) (Ecuador).

[195] CÓDIGO CIVIL [C. CIV.] arts. 2214, 2236 (Ecuador) (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).

[196] Law for Prevention and Control of Environmental Pollution, art. 29 (May 31, 1976) (Ecuador).

[197] Statute on the Legal-Administrative Rules for the Executive Branch, art. 115(b) (Mar. 31, 1994) (Ecuador).

[198] *See* Constitution art. 19 (1998) (Ecuador) (prohibiting the exercise of the power of representation on behalf of the people). *See also* Code of Civ. P. art. 47 (Ecuador) (prohibiting the initiation of litigation on behalf of another person absent a grant of the power of representation).

[199] Letter from Edgar Téran, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge, *supra* note 49.

[200] *Id.*

[201] *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.*, Schmidt v. Espy, 513 U.S. 801 (1994); 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.

[202] Motion to Dismiss, *supra* note 47, at 16. The distinction between procedural and substantive law is crucial as purely procedural rules are exempt from prohibitions upon retroactivity. CÓDIGO CIVIL [C. CIV.] art. 7 (Ecuador).

[203] Constitution art. 24(1) (1998) (Ecuador).

[204] CÓDIGO CIVIL [C. CIV.] art. 7 (Ecuador).

[205] No. 349-2000 (Superior Court of Nueva Loja, Aug. 20, 2001) (Ecuador).

[206] *Id.*

[207] *See supra* note 32-38 and accompanying text.

[208] *60 Minutes, Amazon Crude, supra* note 26 (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").

[209] For a U.S. equivalent, *see* Satsky v. Paramount Commc'ns, 7 F.3d 1464, 1470 (10th Cir. 1993) (holding that "when a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment").

[210] *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).

[211] *Id.*

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

[213] *Compare* 2005 Act, *supra* note 6, § 4(c)(2) *and* 1962 Act, *supra* note 6, § 4(b)(2). *See also* Society of Lloyd's v. Hamilton, 501 F. Supp.2d 248, 252 (D. Mass. 2007) (holding that actionable fraud must be fraud on the court); Society of Lloyd's v. Edelman, No. 03 Civ. 4921 (WHP), 2005 U.S. Dist. LEXIS 4231, at *14 (S.D.N.Y. Mar. 22, 2005) (holding that "[t]he proper inquiry is not whether the underlying relationship that gives rise to plaintiff's claims is tinged with fraud, but whether the foreign judgment itself was obtained by fraud"); Society of Lloyd's v. Anderson, No. 3-03-MC-112-D, 2004 U.S. Dist. LEXIS 7351, at *13 (N.D. Tex. Apr. 27, 2004) (concluding that "the only type of fraud that will support non-recognition is 'extrinsic fraud,'" which the court defined as "fraud in the underlying judicial proceeding that deprived the unsuccessful party of an adequate opportunity to present its case"); Norkan Lodge Co. v. Gillum, 587 F. Supp. 1457, 1461 (N.D. Tex. 1984) (holding that the fraudulent behavior must prevent the complaining party "from making a full and fair defense").

[214] *See supra* notes 84-93 and accompanying text. *See also* CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86, at 1 (characterizing Cabrera's conclusions as "indefensible and evidently intended to defraud Chevron of tens of billions of dollars").

[215] *See supra* notes 75-77, 85-87, 89-92 and accompanying text.

[216] *See supra* notes 76, 84-85, 88 and accompanying text.

[217] *See supra* notes 84-93 and accompanying text.

[218] *See e.g.*, CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86; Rebuttal Brief, *supra* note 73; Motion to Dismiss, *supra* note 47.
[219] Society of Lloyd's v. Abramson, No. 3:03-MC-001-P, 2004 U.S. Dist. LEXIS 16092, at *13-14 (N.D. Tex. Mar. 29, 2004).
[220] 1962 Act, *supra* note 8, § 4(b)(3). This language has been interpreted literally to require the cause of action or claim for relief to violate state public policy. *See, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 478 (2d Cir. 2007) (interpreting New York's adaptation of the 1962 Act); Society of Lloyd's v. Siemon-Netto, 457 F.3d 94, 101 (D.C. Cir. 2006) (interpreting the District of Columbia's adaptation of the 1962 Act); Society of Lloyd's v. Reinhart, 402 F.3d 982, 995 (10th Cir. 2005) (interpreting New Mexico's adaptation of the 1962 Act); Sw. Livestock and Trucking Co. v. Ramon, 169 F.3d 317, 321 (5th Cir. 2000) (interpreting Texas' adaptation of the 1962 Act); Society of Lloyd's v. Webb, 156 F. Supp.2d 632, 643 (N.D. Tex. 2001) (interpreting Texas' adaptation of the 1962 Act); Matusevitch v. Telnikoff, 877 F. Supp. 1, 3 (D.D.C. 1995) (interpreting Maryland's adaptation of the 1962 Act).
[221] 2005 Act, *supra* note 9, § 4(c)(3).
[222] *See, e.g., Sarl Louis Feraud Int'l,* 489 F.3d at 479 (interpreting New York's adaptation of the 1962 Act); Society of Lloyd's v. Edelman, No. 03 Civ. 4921 (WHP), 2005 U.S. Dist. LEXIS 4231, at *16 (S.D.N.Y. Mar. 22, 2005) (interpreting New York's adaptation of the 1962 Act); Java Oil Ltd. v. Sullivan, 86 Cal. Rptr.3d 177, 184 (Cal. Ct. App. 2008) (interpreting California's adaptation of the 1962 Act); Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650 (N.Y. 2006) (interpreting New York's adaptation of the 1962 Act).
[223] *See, e.g.,* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (refusing to recognize a foreign judgment "to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought"); McCord v. Jet Spray Int'l Corp., 874 F. Supp. 436, 439 (D. Mass. 1994) (denying recognition pursuant to Massachusetts' adaptation of the 1962 Act "where the foreign judgment is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought").
[224] *See, e.g.*, Somportex v. Philadelphia Chewing Gum, 453 F.2d 435, 443 (3d Cir. 1971) (holding that a foreign judgment violates public policy if it "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security of individual rights of personal liberty or of private property"); Erbe Elektromedizin GMBH v. Canady, 545 F. Supp.2d 491, 497 (W.D. Pa. 2008) (determining that Pennsylvania's version of the 1962 Act would be violated by recognition of a foreign judgment that "tends to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel"); Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980) (determining that public policy is violated if recognition of the judgment would injure public health, morals or confidence in the administration of law or undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel").
[225] *Sarl Louis Feraud Int'l,* 489 F.3d at 479.
[226] *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 866 (D.C. Cir. 1981) (holding that "it would be a mistake to find failure to follow the Federal Rules by a foreign nation to be ipso facto a violation of American public policy"); Milhoux v. Linder, 902 P.2d 856, 861 (Colo. Ct. App. 1995) (refusing to apply the public policy exception even in cases of "markedly" different judicial procedures in the foreign forum).
[227] *See supra* notes 71-72, 75-79, 84-93 and accompanying text.
[228] Jaffe v. Accredited Sur. and Cas. Co., 294 F.3d 584, 594 (4th Cir. 2002) (interpreting the public policy exception in Virginia's adaptation of the 1962 Act to prevent parties from profiting from their own wrongdoing or consent to such wrongdoing).
[229] *See* Rebuttal Brief, *supra* note 73, at 13 (alleging that "Cabrera acted in complicity with the plaintiffs to promote their litigation position and propose the type of fantastical monetary award that has long driven plaintiffs' media and lobbying campaign, in the absence of any scientific or legal support for their allegations"); CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 89, at 10 (alleging that Cabrera "cut-and-paste[d]" portions of the Plaintiffs' rebuttal into his supplemental report" in order to support $9 billion in additional damages); Interview by Members of the Media with Charles James, General Counsel, Chevron Corporation, *supra* note 75, at 2-3 (alleging that Cabrera "fabricated evidence, ignored court orders and acted in collusion with the plaintiffs" and "worked in close consort with the plaintiffs in preparing his reports").
[230] Motion to Dismiss, *supra* note 47, at 7. *See also* Rebuttal Brief, *supra* note 73, at 13.
[231] Lago Agrio Complaint, *supra* note 1, at 6.
[232] *Id.*
[233] *Id.* at 15.
[234] *See supra* notes 50-53, 174-80 and accompanying text.
[235] *See supra* note 54 and accompanying text.
[236] *See* Motion to Dismiss, *supra* note 47, at 20.
[237] *See supra* note 61 and accompanying text.

[238] *See supra* notes 75-79, 84-93 and accompanying text.
[239] *See supra* notes 80-82, 84 and accompanying text.
[240] *Id.*
[241] *See supra* notes 85-87 and accompanying text.
[242] *See supra* note 88 and accompanying text.
[243] 2005 Act, *supra* note 9, § 4(c)(8).
[244] *Id.* § 4 cmt. 12. Ecuadorian law contains a similar definition of due process. *See* Constitution art. 24 (1998) (Ecuador) (guaranteeing "due process for [e]very person," including "the right to access to the judicial organs and to obtain the effective, impartial and expedited protection of their rights and interests, without in any case remaining defenseless"). These rights extend to foreigners as well as Ecuadorians. *Id.* art. 13.
[245] U.S. CONST. art. III, § 2 (providing that the judicial power extends to cases and controversies, including those "between a state, or the citizens thereof, and foreign states, citizens or subjects"). *See also* McConnell v. Fed. Election Comm., 540 U.S. 93, 225 (2003); Loritz v. U.S. Court of Appeals for the Ninth Circuit, 382 F.3d 990, 991 (9th Cir. 2004); Stratman v. Watt, 656 F.2d 1321, 1324 (9th Cir. 1981).
[246] *See, e.g.*, Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 517 (2007) (standing of states, local governments and private organizations with respect to the regulation of greenhouse gases pursuant to the Clean Air Act); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000) (private standing pursuant to the Clean Water Act); Bennett v. Spear, 520 U.S. 154, 162 (1997) (private standing pursuant to the Endangered Species Act); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (private standing pursuant to the Endangered Species Act).
[247] *McConnell*, 540 U.S. at 225-26.
[248] Morgan v. McCotter, 365 F.3d 882, 887-88 (10th Cir. 2004) (holding that to establish standing, the plaintiff must suffer an invasion of a legally protected interest).
[249] Constitution art. 86 (1998) (Ecuador).
[250] Law for Prevention and Control of Environmental Pollution, art. 29 (May 31, 1976 (Ecuador).
[251] Statute on the Legal-Administrative Rules for the Executive Branch, art. 115(b) (Mar. 31, 1994) (Ecuador).
[252] Constitution art. 19 (1998) (Ecuador) (prohibiting the exercise of the power of representation on behalf of the people). *See also* Code of Civil Procedure art. 47 (Ecuador) (prohibiting the initiation of litigation on behalf of another person absent a grant of the power of representation).
[253] Letter from Edgar Téran, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge, *supra* note 49.
[254] *Id.*
[255] McConnell v. Fed. Election Comm., 540 U.S. 93, 225-26 (2003). *See also* Morgan v. McCotter, 365 F.3d 882, 888 (10th Cir. 2004); Stratman v. Watt, 656 F.2d 1321, 1324 (9th Cir. 1981).
[256] Environmental Management Law, Law No. 99-37, art. 43 (Ecuador) (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").
[257] Motion to Dismiss, *supra* note 47, at 21.
[258] Jenkins v. United States, 386 F.3d 415, 417 (2d Cir. 2004) (holding that Article III, Section 2 of the U.S. Constitution imposes an irreducible minimum of standing, which includes causation).
[259] *McConnell* 540 U.S. at 225 (requiring that the plaintiff's injuries be "fairly traceable" to the defendant's conduct). *See also* Loritz v. U.S. Court of Appeals for the Ninth Circuit, 382 F.3d 990, 992 (9th Cir. 2004); *Morgan*, 365 F.3d at 888; *Stratman*, 656 F.2d at 1324.
[260] *McConnell* 540 U.S. at 225.
[261] *Id. See also Jenkins*, 386 F.3d at 417 (coining the term "redressability" and describing it as part of the "irreducible constitutional minimum of standing").
[262] *See supra* note 58 and accompanying text.
[263] Doe v. Texaco, Inc., No. C 06-02820 WHA, 2006 U.S. Dist. LEXIS 53930, at *7-8 (N.D. Cal. July 21, 2006).
[264] *See supra* note 88 and accompanying text.
[265] U.S. CONST. art. I, § 9, cl. 3 (providing "[n]o Bill of Attainder or ex post facto Law shall be passed"). *See also* Johnson v. U.S., 529 U.S. 694, 699 (2000); Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); U.S. v. Pfeifer, 371 F.3d 430, 436 (8th Cir. 2004).
[266] *See supra* notes 203-05 and accompanying text.
[267] *Landgraf*, 511 U.S. at 270 (deeming a statute to be retroactive in application if it "attaches new consequences to events completed before its enactment"). *See also* Soc'y for Propagation of the Gospel v. Wheeler, 2 Gall. 105, 22 F. Cas. 756 (No. 13,156) (CCNH 1814) (in which Justice Story defined a retroactive statute as one "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past").
[268] *Landgraf*, 511 U.S. at 270 (declining to give a statute retroactive effect in the absence of clear legislative intent).

[269] *Id.* at 265 (concluding that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted" and that "[f]or this reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal").
[270] *Id.* at 266. *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).
[271] *Landgraf*, 511 U.S. at 266 (holding that "retroactive statutes raise particular concerns . . . . [given] the Legislature's unmatched powers to allow it to sweep away settled expectations suddenly and without individualized consideration"); *See also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (holding that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions").
[272] Weaver v. Graham. 450 U.S. 24, 28-29 (1981) (holding that the prohibition upon ex post facto laws "restricts governmental power by restraining arbitrary and potentially vindictive legislation"). *See also* Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring). Justice Stevens observed that:

> [l]egislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.

Id. at 513-14.
[273] Johnson v. United States, 529 U.S. 694, 699 (2000) (holding that ex post facto and due process concerns are implicated when retroactive application of legislation "raises the penalty from whatever the law provided when [the individual] acted").
[274] *See* James v. United States, 366 U.S. 213, 247 n.3 (1961) (stating that retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").
[275] Cooperman Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001).
[276] *Id.* at 434.
[277] *Id.*
[278] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).
[279] *Id.* at 425 (punitive damages of $145 million awarded in bad faith case were one hundred forty-five times the amount of compensatory damages); *Cooperman Indus., Inc.*, 532 U.S. at 441-42 (punitive damages of $4.5 million 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 of $2 million awarded in fraud case were five hundred times the amount of compensatory damages).
[280] *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 426.
[281] *See, e.g., BMW of N. Am.*, 517 U.S. at 594 (Breyer, J., concurring) (determining whether a punitive damages award is extraordinary by historical standards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting) (reviewing state history in order to determine the reasonableness of a punitive damages award).
[282] CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86, at 1.
[283] *TXO Prod. Corp.*, 509 U.S. at 464 (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 against large corporations").
[284] *Id.* at 491.
[285] *Id.*
[286] CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 86, at 1.
[287] *See supra* notes 12-23, 88 and accompanying text.
[288] *See supra* note 83 and accompanying text.
[289] *See supra* notes 4, 97 and accompanying text.
[290] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003) (striking down a punitive damages award in litigation that was intended to serve as a platform to expose and punish the perceived deficiencies of the defendant's operations throughout the United States).
[291] Philip Morris, USA v. Williams, 549 U.S. 346, 353 (2007).
[292] *Id.* at 353.
[293] *Id.* at 353-54.
[294] *Id.* at 354.
[295] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) (requiring reviewing courts to conduct "meaningful" and "searching" reviews of punitive damage awards and further stating that judicial review must "impose a 'meaningful constraint' on factfinder discretion . . . [so as] to ensur[e] that punitive damages awards are not

grossly out of proportion to the severity of the offense [but rather] have some understandable relationship to some measure of harm").

[296] BMW of N. Am. v. Gore, 517 U.S. 559, 574 (1996).

[297] *See supra* note 3 and accompanying text.

[298] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 9 (1991). *See also TXO Prod. Corp*., 509 U.S. at 467 (Kennedy, J., concurring) (holding that punitive awards that reflect "bias, passion, or prejudice . . . rather than a rational concern for deterrence and retribution [violate the Constitution] no matter what the absolute or relative size of the award").

[299] *Pac. Mut. Life Ins. Co.*, 499 U.S. at 41 (Kennedy, J., concurring). *See also TXO Prod. Corp*., 509 U.S. at 475 (O'Connor, J., dissenting).

[300] *BMW of N. Am.*, 517 U.S. at 576-77 (holding that reprehensibility for determining the reasonableness of a punitive damages award may be determined, in part, by whether the harm was physical or merely economic).

[301] *Id.* (holding that reprehensibility for determining the reasonableness of a punitive damages award may be determined, in part, by whether the conduct involved repeated actions or was an isolated incident).

[302] *Id.*

[303] *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 94, at 8 (quoting Steven R. 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").

[304] Masters, *supra* note 303, at E1 (quoting Steven R. Donziger 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").

[305] 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).

[306] *Id.*