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Yaiguaje v. Chevron Corporation: Testing the Limits of Natural Justice and the Recognition of Foreign Judgments in Canada

Lucien J. Dhooge

YAIGUAJE v. CHEVRON CORPORATION: TESTING THE LIMITS OF NATURAL JUSTICE AND THE RECOGNITION OF FOREIGN JUDGMENTS IN CANADA

*Lucien J. Dhooge**

"[T]he day will soon come when Canadian courts will have to address fairness issues arising out of judgments rendered by courts with systems of justice substantially different from that prevailing in the local forum."[1]

Abstract

This article analyzes Canadian litigation seeking recognition of an $18.2 billion judgment entered against Chevron in Ecuador in 2011 in what has been labeled as the world's largest environmental lawsuit. The article examines Chevron's involvement in Ecuador through its predecessor in interest (Texaco) and the history of proceedings in Ecuador and the United States. The article then discusses the recognition of foreign judgments in Canada with particular emphasis upon the natural justice defense. The article concludes this defense presents significant issues affecting the reputation and credibility of the Canadian judiciary and its liberal approach with respect to recognition of foreign judgments.

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* Sue and John Staton Professor of Law, Scheller College of Business, Georgia Institute of Technology.

1. Ivan F. Ivankovich, *Enforcing U.S. Judgments in Canada: Things are Looking Up,* 15 NW. J. INT'L L. & BUS. 491, 518 (1995).

I. Introduction

On May 30, 2012, forty-seven residents of the Sucumbios province of Ecuador (Plaintiffs) filed a statement of claim against the Chevron Corporation, Chevron Canada Limited and Chevron Canada Finance Limited in the Ontario Superior Court of Justice.[2] The Statement of Claim sought recognition and enforcement of an $18.25 billion judgment entered against Chevron by the Provincial Court of Justice of Nueva Loja in the Sucumbios Province of Ecuador on February 14, 2011 and affirmed by the Appellate Division of the Provincial Court on January 3, 2012.[3]

Filed in Ecuador in May 2003, the Plaintiffs' claims arose from past and ongoing environmental contamination resulting from oil and gas operations conducted by a consortium in which Texaco, Inc. (Texaco) participated from 1964 through 1992.[4] The Ecuadorian

2. Statement of Claim, Yaiguaje v. Chevron Corp., No. CV-12-454778 (Ont. Super. Ct. J., May 30, 2012, Can.) [hereinafter Statement of Claim or Claim]; *see also* David Baker, *Chevron Sued in Canada by Ecuadorians over Pollution,* S.F CHRON., May 31, 2012, *available at* http://www.sfgate.com/2012/05/31/MNOO1OPV2E.DTL. All references to "Chevron" throughout this article will be to Chevron Corporation unless otherwise stated.

3. Statement of Claim, *supra* note 2, ¶ 1(a). *See also* Judgment, Aguinda v. ChevronTexaco Corp., No. 2011-0106 (App. Div. Prov. Ct. J., Jan. 3, 2012, Ecuador); Judgment, Aguinda v. ChevronTexaco Corp., No. 002003 (Prov. Ct. J., Nueva Loja in Lago Agrio, Feb. 14, 2011, Ecuador) [hereinafter Judgment].

4. Complaint at 4-14, Aguinda v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. J., Nueva Loja in Lago Agrio, May 7, 2003, Ecuador) [hereinafter Lago Agrio Complaint or Complaint]. Chevron was named

proceedings have been complicated by allegations of fraud, bribery, corruption, violations of due process, and procedural irregularities[5] and related proceedings in the United States[6] and before the Permanent Court of Arbitration.[7]

The value of the judgment is entirely dependent on its recognition outside of Ecuador as Chevron maintains no assets in the country. Rather than proceed with recognition proceedings in the United States, the Plaintiffs initiated the first proceeding seeking recognition in Canada. Although not Chevron's domicile or the location of its most significant assets, the selection of Canada is nevertheless logical. Developments in Canadian case law in the past ten years have led commentators to characterize Canada as "one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions."[8] This hospitality is consistent with the Plaintiffs' strategy of seeking enforcement in "jurisdictions that offer the path of least resistance to enforcement" and have "the most favorable law and practical circumstances."[9]

This article examines the status of the Ecuadorian judgment pursuant to Canadian law relating to natural justice. The article initially examines the history of Texaco's investment in Ecuador's petroleum industry, the environmental impacts allegedly resulting from this investment, and the history of proceedings in the United States and Ecuador and before the Permanent Court of Arbitration.

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as a defendant as a result of its October 2001 acquisition of Texaco. *Id.* at 8, 19.

5. *See, e.g.,* Appeal of Chevron Corp., Aguinda v. ChevronTexaco Corp., No. 2011-0106, 10-186 (App. Div. Prov. Ct. J., Mar. 21, 2011, Ecuador); *see also infra* notes 48-78 and accompanying text.

6. *See, e.g.,* Complaint at 119-46, Chevron Corp. v. Donziger, No. 11-CV-0691 (S.D.N.Y. Feb. 1, 2011); *see also infra* notes 107-24 and accompanying text.

7. *See* Claimants' Notice of Arbitration at 7-16, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23 (Permanent Ct. of Arbitration, Sept. 23, 2009) [hereinafter Chevron Notice of Arbitration]; *see also infra* notes 123-26 and accompanying text.

8. H. Scott Fairley, *International Issues in National Courts: Recent Developments in Private Litigation: Open Season: Recognition and Enforcement of Foreign Judgments in Canada After Beals v. Saldanha,* 11 ILSA J. INT'L & COMP. L. 305, 316 (2005) (describing this liberal approach as "an overly generous adoption to twentieth and twenty-first century circumstances of the nineteenth century common law doctrine [of comity]"); *see also infra* note 184 and accompanying text.

9. Patton Boggs LLP, Path Forward: Securing and Enforcing Judgment and Reaching Settlement 7-8, 12-13, 17-21 (undated), *available at* http://www.earthrights.org/sites/default/files/documents/Invictus-memo.pdf (detailing Plaintiffs' worldwide enforcement strategy should they secure a judgment in Ecuador).

The article then examines the recognition of foreign judgments in Canada with particular emphasis upon the Canadian Supreme Court's opinions in *Morguard Investments Ltd. v. DeSavoye*[10] and *Beals v. Saldanha*[11]and subsequent provincial opinions. The article then examines natural justice grounds for non-recognition of foreign judgments in Canada and their potential application in this case. Although Chevron may be able to establish a defense based upon natural justice, its burden is substantial and presents significant risks for the company. Additionally, the recognition action presents significant issues potentially affecting the reputation and credibility of the Canadian judiciary.

II. Texaco in Ecuador: A Brief History

Hydrocarbon Exploration and Texaco's Investment

Although a comprehensive history of hydrocarbon exploration in Ecuador and Texaco's operations are beyond the scope of this article, a review of the factual background is necessary in order to place the issues regarding recognition of the Judgment in their proper context. Texaco and Gulf Oil Corporation (Gulf) were invited by the Ecuadorian government to conduct exploratory activities in the Oriente region in March 1964.[12] Texaco and Gulf formed a consortium (Consortium) through their Ecuadorian subsidiaries to conduct this exploration with Texaco serving as the operator.[13] The Consortium discovered oil in commercial quantities in 1967 and began export operations in 1972.

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10. [1990] 3 S.C.R. 1077.

11. [2003] 3 S.C.R. 416.

12. Third Interim Award on Jurisdiction and Admissibility ¶ 3.5, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23 (Permanent Ct. of Arbitration, Feb. 27, 2012) [hereinafter Third Interim Award].

13. The Consortium agreement was between Compania Texaco de Petroleos del Ecuador, a subsidiary of Texaco Ecuador, and Gulf Ecuatoriana de Petroleo, a subsidiary of Gulf Ecuador. *See* Phoenix Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1065 (D. Del. 1987). The Plaintiffs alleged Texaco was responsible for the "design, construction, installation and operation of the infrastructure and necessary equipment for the exploration and exploitation of the crude oil." *See* Lago Agrio Complaint at 5, Aguinda v. ChevronTexaco Corp., *supra* note 4. *But see* Third Interim Award, *supra* note 12, ¶¶ 3.8, 3.9 (stating "[t]hroughout the term of the Consortium's concession, the Ecuadorian Government regulated, approved and, in many instances, mandated the Consortium's activities; and no facilities were constructed, nor wells drilled, nor oil extracted without the Government's oversight and approval" and that "the [Government of Ecuador] and PetroEcuador held full regulatory control over the Consortium").

The Consortium's operations were modified in September 1971 as a result of a new regulatory regime governing concession areas granted to foreign oil companies. These regulations limited the size of concession areas, increased the royalties 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."[14] Texaco and Gulf were required to relinquish a portion of the concession area to the state-owned oil company Compania Estatal Petrolera Ecuatoriana (CEPE) in June 1972.[15] A new concession agreement was executed in August 1973 which granted CEPE participation rights in the Consortium commencing in 1977 which date was subsequently advanced to June 1974.[16] Texaco and Gulf executed an agreement granting CEPE a 25% interest in the Consortium in June 1974.[17] Gulf transferred its remaining 37.5% interest to CEPE in December 1976 in exchange for $82.1 million.[18]

From 1977 to 1990, the Consortium operated with Texaco and CEPE/PetroEcuador as the participants and Texaco as the operator.[19] On July 1, 1990, Petroamazonas, a subsidiary of PetroEcuador, replaced Texaco as the operator.[20] Ecuador did not renew the concession agreement upon its expiration in June 1992.[21] At the time of the termination of Texaco's interest, the Consortium had extracted more than 1.4 billion barrels of oil from the concession area.[22] Ninety percent of the revenues generated by the Consortium during its existence (approximately $23 billion) were paid to the

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14. *Phoenix Canada Oil Co.*, 658 F. Supp. at 1066 (quoting Hydrocarbons Law, arts. 40B, 43, 45 (1971) (Ecuador)).

15. 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).

16. *See id.* at 339 (discussing the effective date of the August 1973 concession agreement and the January 1974 decree commencing CEPE's participation in June 1974).

17. *See* Third Interim Award, *supra* note 12, ¶ 3.6 (discussing the negotiation and execution of the concession agreement).

18. *See id.*

19. *See* Judith Kimerling, *Indigenous People and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco,* 38 N.Y.U. J. INT'L L. & POL. 413, 420 (2006).

20. *See* Third Interim Award, *supra* note 12, ¶ 3.10.

21. *See id.* ¶ 3.11.

22. Complaint at 22, Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) (No. 93 Civ. 7527); *see also* Kimerling, *supra* note 19, at 449-50 (utilizing production estimates from Ecuador's Ministry of Energy and Mines).

Ecuadorian government through revenues, royalties, taxes and subsidies.[23] Texaco received approximately $500 million as a result of its participation in the Consortium.[24]

The Consortium's impact on the environment has been the source of considerable dispute.[25] These impacts were addressed in 1990 when PetroEcuador and Texaco retained two consulting firms to conduct environmental audits.[26] The audits estimated the total cost of environmental remediation to be between $8 million and $13 million.[27] In May 1995, Ecuador (by and through its Ministry of Energy and Mines), PetroEcuador and Texaco entered into an agreement wherein Texaco agreed to perform environmental remediation work on designated sites in return for a release from further obligations relating to the impact of the Consortium's activities.[28] Texaco obtained approval of remediation plans for each designated site from Ecuador and PetroEcuador.[29] Texaco spent $40 million in these efforts from October 1995 through September 1998.[30] The Ecuadorian

23. *See* Third Interim Award, *supra* note 12, ¶ 3.9.

24. *Id.*

25. *See, e.g.,* Lago Agrio Complaint, *supra* note 4, at 11-14 (alleging environmental contamination through the discharge of more than 464.7 million barrels of formation waters); 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 drilling activities and pipeline ruptures). *But see* Doug Cassel, Defrauding Chevron in Ecuador: Doug Cassel's Reply to the Plaintiffs' Legal Team 11-12 (Apr. 10, 2012) (unpublished manuscript, on file with the author) (summarizing findings by Chevron's epidemiological and environmental experts that there was little or no environmental impact or public health concerns relating to ground water, drinking water and soil).

26. *See* Third Interim Award, *supra* note 12, ¶ 3.10; *see also* Texaco, Inc., History of Texaco and Chevron in Ecuador, Remediation (2004), *available at* http://www.texaco.com/sitelets/ecuador/en/remediation/default.aspx.

27. *See* Third Interim Award, *supra* note 12, ¶ 3.10.

28. *Id.* ¶¶ 3.16-3.17.

29. *Id.* ¶¶ 3.20-3.21.

30. *Id.* ¶¶ 3.21, 3.24. For a detailed description of Texaco's remediation activities, *see* 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). The $40 million cost of remediation included two payments of $1 million each for socio-economic projects. *See* Third Interim Award, *supra* note 12, ¶ 3.22. The cost also included payments totaling $3.7 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. *Id.*

government issued numerous *actas* documenting its acceptance of Texaco's remediation efforts during these three years.[31] On September 30, 1998, the Ecuadorian government and PetroEcuador signed the "Act of Final Liberation of Claims and Equipment Delivery" in which they recognized that Texaco had fulfilled its obligations pursuant to the 1995 agreement and released it from current and future liability.[32]

III. 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.[33] 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.[34] The complaint was dismissed on the basis of forum non conveniens in 2001, which dismissal was upheld by the U.S. Court of Appeals for the Second Circuit.[35] The dismissal was

31. Third Interim Award, *supra* note 12, ¶ 3.26.

32. *Id. See also* Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp.2d 334, 342 (S.D.N.Y. 2005) (quoting the Final Act as declaring 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").

33. *See* Complaint, Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) (No. 93 Civ. 7527).

34. *Id.* at 4, 11, 14-15, 17-18. The plaintiffs stated causes of action sounding in negligence, public and private nuisance, strict liability, trespass, and civil conspiracy. *Id.* at 27-35.

35. Aguinda v. Texaco, Inc., 303 F.3d 470 478-80 (2d Cir. 2002). The U.S. Court of Appeals for the Second Circuit concluded Ecuador was adequate for purposes of forum non conveniens analysis. *Id.* (citing 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)). This conclusion was also based upon the Second Circuit and district court's independent inquiries. *See Aguinda,* 303 F.3d at 478. Ecuador was also an adequate alternative forum due to the absence of impropriety by Texaco or the Consortium in any prior judicial proceeding in Ecuador, the absence of corruption in previous cases, and the existence of close public and political scrutiny, which would prevent the application of undue influence upon the court. *Id.* For its part, the Ecuadorian government contended all natural resources and land, including that upon which the Consortium conducted its operations, were owned by the government,

contingent upon Texaco's agreement to being sued in Ecuador on these or similar claims, accept service of process in Ecuador, and waive any statute of limitations defense for claims expiring between the date of the filing of the U.S. litigation and one year after its dismissal.[36]

Litigation in Ecuador: The Trial and Procedural Issues

The Plaintiffs initiated litigation against Chevron in Ecuador in May 2003. The Plaintiffs based their lawsuit upon provisions of the Ecuadorian Constitution[37] 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."[38] The Plaintiffs requested Chevron remove all contaminants and repair environmental damages caused by their presence.[39] Additionally, the Complaint sought remittance of ten percent of the cost of remediation work to Frente de Defensa de la Amazonia (Frente).[40] The amount of damages was not specified.

Chevron asserted numerous defenses which were summarized in its Motion to Dismiss filed in October 2007. First, Chevron contended that the Environmental Management Law could not be applied

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and any decision by a foreign court was an affront to national sovereignty. *See* Motion to Dismiss for Chevron Corp. at 16, Aguinda v. ChevronTexaco Corp., No. 002-2003 (Super. Ct. J., Nueva Loja in Lago Agrio, Oct. 8, 2007, Ecuador) [hereinafter Chevron Motion to Dismiss]. The Ecuadorian 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." *Id.* (quoting Letter from Edgar Terán, Ecuadorian Ambassador to the United States, to Jed S. Rakoff, U.S. District Court Judge (June 10, 1996)).

36. *Aguinda,* 303 F.3d at 478-80.

37. Constitution arts. 23, 86-88, 90-91 (1998) (Ecuador) (guaranteeing citizens the right to live in a healthy environment, declaring environmental protection and the preservation of biodiversity to be in the public interest, requiring public consultation and approval of decisions affecting 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 Lago Agrio Complaint.

38. Environmental Management Law, Law No. 99-37, arts. 41, 43 (July 30, 1999) (Ecuador).

39. Lago Agrio Complaint, *supra* note 4, at 22-25.

40. *Id.* at 25.

retroactively to the Consortium's operations[41] and was inconsistent with the Ecuadorian government's previously-stated position that the country's natural resources belonged to the nation and thus could not be the subject matter of private litigation.[42] Second, Chevron alleged the claims were barred by the 1994 and 1995 remediation agreements and 1998 release.[43] Chevron also claimed that the Plaintiffs sued the wrong entity by failing to assert claims against Texaco.[44] Other defenses raised by Chevron included the lack of personal jurisdiction, the statute of limitations and standing.[45]

The Superior Court deferred ruling on these defenses and commenced proceedings in October 2003. In order to expedite and simplify the collection and analysis of evidence, the court accepted a joint plan 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.[46] One hundred twenty-two well sites were designated for sampling and analysis, and forty-seven of these sites were ultimately inspected.[47] However, further collection and analysis

41. Chevron Motion to Dismiss, *supra* note 35, at 10-18. Chevron contended the Ecuadorian Constitution, Civil Code and applicable case law prohibited retroactive application of the law. *See* Constitution art. 24.1 (1998) (Ecuador) (stating "[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) (stating "[t]he law provides only for the future; it has no retroactive effect"); Calva v. Petroproduccion, Case No. 349-2000 (Super. Ct., Nuevo Loja, Aug. 20, 2001) (Ecuador) (in which the court held the Environmental Management Law could not be applied retroactively against a production subsidiary of PetroEcuador as private individuals did not possess such rights before 1999).

42. *See supra* note 35 and accompanying text.

43. Chevron Motion to Dismiss, *supra* note 35, at 9.

44. *Id.* at 18-19.

45. Chevron alleged Texaco's consent to personal jurisdiction in Ecuador and waiver of the four year statute of limitations were not binding as Chevron was not a party to the *Aguinda* litigation in the United States and was not Texaco's successor-in-interest. *Id.* at 19-20. The standing defense was based upon the Environmental Management Law, which requires plaintiffs bringing an action on behalf of the public demonstrate individualized harm. *See* Environmental Management Law, Law No. 99-37, art. 43 (July 30, 1999) (Ecuador) (stating "[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").

46. Chevron Motion to Dismiss, *supra* note 35, at 22.

47. *Id.* at 23-24.

became enmeshed in controversies concerning methodology[48] and the credibility of a report submitted by one the Plaintiffs' experts.[49] The joint collection plan was abandoned by the Superior Court in July 2006. Despite having rejected previous similar requests submitted by the Plaintiffs, the court issued an order waiving further inspections by experts appointed by both parties and appointing a single expert to conduct inspections and prepare a report.[50]

The court appointed Richard Cabrera (Cabrera) as the sole expert to determine the existence and source of environmental damage and specify the appropriate remedial work.[51] Based upon his review of 48

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48. Chevron submitted reports on forty-five sites, which purportedly demonstrated that ninety-eight percent of the waste pits remediated by Texaco met the standards established by the Ecuadorian government and ninety-nine percent of the drinking water samples met safety standards established by the World Health Organization and the U.S. Environmental Protection Agency. *See* Chevron Corporation's Rebuttal Brief at 7, Aguinda v. Chevron Texaco Corp., No. 002-2003 (Super. Ct. J., Nueva Loja in Lago Agrio, Sept. 15, 2008, Ecuador) [hereinafter Chevron Rebuttal Brief]. Chevron contended that the Plaintiffs' experts failed to report data on more than half of the 465 soil and water samples they collected and submitted only 5 of these samples to an accredited laboratory for analysis. Chevron Motion to Dismiss, *supra* note 35, at 28-29. Chevron alleged the remaining samples were sent to unaccredited laboratories which reported the presence of contaminants for which it did not test and attributed all metals found in soil samples to the Consortium's activities. *Id.* at 29.

49. The report at issue was prepared by Dr. Charles Calmbacher. Chevron alleged Calmbacher discussed his proposed findings with Plaintiffs' counsel in advance and was instructed what his findings were to be. *See* Chevron Corp. v. Donziger, 768 F. Supp.2d 581, 605-06 (S.D.N.Y. 2011) (in which Calmbacher stated that one of Plaintiffs' representatives "told him that 'he wanted the answer to be that there was contamination and people were injured . . . [b]ecause it makes money. That's what wins his case'"). A related allegation was that the report was authored by the Plaintiffs' litigation team and submitted without Calmbacher's approval as evidenced by his subsequent disavowal of its contents. *Id.* at 606 (concluding that there is "evidence that persons acting on behalf of the [Plaintiffs] prepared reports expressing views contrary to Calmbacher's and submitted those fictitious reports to the . . . court over his name").

50. Chevron objected to this order as inconsistent with the previously-agreed procedures and a violation of the Civil Code. Chevron Motion to Dismiss, *supra* note 35, 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 litigant's requests "whose objective is to alter the meaning of . . . orders . . . or to maliciously prejudice the other party, shall be dismissed and sanctioned").

51. Chevron's Motion to Dismiss, *supra* note 35, at 37. Chevron objected to Cabrera's appointment due to his lack of qualifications in hydrocarbon chemistry, epidemiology, hydrogeology, remediation technologies, and oil

well sites, 1 production station and aerial photographs, Cabrera concluded that eighty percent of the waste pits and one hundred percent of the production station pits needed to be remediated.[52] Chevron objected to Cabrera's methodology[53] and accused him of disregarding his mandate[54] and misconduct.[55] Chevron concluded the

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and gas operations practices. *Id.* at 38. Chevron also alleged the Plaintiffs were provided with advance knowledge regarding Cabrera's appointment and paid him prior to the commencement of his work. Although not conclusive, at least one U.S. court noted there was:

> at least the possibilities that the judge agreed to the global assessment in general and to appoint Cabrera in particular in exchange for the [Plaintiffs'] agreement not to file a complaint against the judge, and Cabrera, the supposedly independent court appointee, was paid money up front and promised future consideration by the [Plaintiffs] in the event they prevailed.

Chevron Corp., 768 F. Supp.2d at 607.

The district court concluded that there was "substantial evidence of irregularity relating to the appointment and independence of Cabrera." *Id.* at 606; *see also* Chevron Corp. v. Donziger, No. 11-CV-00691-LAK, at 32-35 (S.D.N.Y. July 31, 2012) (opinion on partial summary judgment motion) (detailing ex parte communications between Plaintiffs' representatives and the Superior Court regarding Cabrera's appointment in 2006 and 2007).

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

53. *See* Chevron Rebuttal Brief, *supra* note 48, at 4, 11 (expressing "grave concerns" regarding Cabrera's "superficial and inappropriate" methodology and procedures); *see also* Chevron Motion to Dismiss, *supra* note 35, at 40, 43 (accusing Cabrera of conducting limited sampling, extrapolating individual results over the entire area of the Consortium's operations and failing to maintain chain of custody for samples).

54. *See* Chevron Rebuttal Brief, *supra* note 48, at 4-6, 17 (accusing Cabrera of failing to perform a detailed assessment of more than 300 well and production sites in the concession area, evaluating social and economic conditions in the Oriente without judicial authorization, assessing "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 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").

55. *See* Chevron Notice of Arbitration, *supra* note 7, at 12 (accusing Cabrera of employing Plaintiffs' supporters in conducting his fieldwork); *see also* Chevron Rebuttal Brief, *supra* note 48, at 4, 6, 8, 11-14 (accusing Cabrera of manipulating and altering evidence, failing to disclose his methodology, acting in complicity with the Plaintiffs, utilizing unqualified personnel to conduct sampling and testing, barring

utilization of Cabrera's report by the court would be a violation of Ecuador's Constitution.[56]

In April 2008, Cabrera assessed damages of $16.3 billion, which included amounts 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 Ecuador.[57] Cabrera increased this estimate to $27.3 billion in November 2008.[58] The new damages estimate included multi-billion dollar awards for cancer deaths purportedly resulting from hydrocarbon contamination, groundwater and soil remediation, healthcare funding, the construction of potable water systems and an unjust enrichment penalty.[59] The new estimate exceeded Chevron's

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Chevron representatives from locations while sampling was occurring, and collaborating with Plaintiffs' attorneys in the preparation of his report); Chevron Motion to Dismiss, *supra* note 35, at 42-44 (accusing Cabrera of failing to notify Chevron representatives of dates and times for sampling and destroying exculpatory evidence (including clean soil samples) and concluding the inspection process was "marked by rank amateurism, disregard for scientific protocol, and irredeemable bias").

56. 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").

57. CHEVRON CORP., ANNUAL REPORT 47 (2008).

58. *Id.*

59. 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. Chevron alleged the assessment for cancer deaths 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. *See* Chevron Rebuttal Brief, *supra* note 48, at 17. The court's failure to strike this portion of the damages assessment was noteworthy given the fact that similar claims were deemed frivolous in related litigation occurring in the United States. *See infra* notes 108-10 and accompanying text. The unjust enrichment penalty was criticized as lacking a basis in Ecuadorian law and grossly excessive in comparison to the actual profits derived by Texaco from the Consortium's operations. *See* CHEVRON CORP, REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT 7 (2009); *see also supra* note 24 and accompanying text.

net earnings in 2008 and was almost twice the amount of net earnings derived from its international operations.[60]

In addition to its previously-noted objections, Chevron alleged the damages estimates were inflated. Cabrera's estimated $1 billion in soil remediation costs were for locations that he did not visit or waste pits that did not exist.[61] Cabrera's estimate set 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.[62] Cabrera's conclusions further placed responsibility for all environmental impacts upon Texaco and failed to attribute any responsibility to PetroEcuador.[63] Chevron also alleged the estimate relating to the improvement of Ecuador's potable water system was tainted by Cabrera's failure to take a single drinking water sample.[64] According to Chevron, 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."[65]

Cabrera's report was further undermined by evidence that portions were authored by the Plaintiffs' representatives.[66] In apparent concern about this allegation, the Plaintiffs sought new

60. Chevron had net earnings of $23.9 billion in 2008, of which $14.5 billion were derived from its international operations. CHEVRON CORP., ANNUAL REPORT, *supra* note 57, at 34.

61. *See* Chevron Notice of Arbitration, *supra* note 7, at 11; *see also* Chevron's Rebuttal Brief, *supra* note 48, at 6.

62. *See* CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON 10 (2009).

63. *See* Chevron Notice of Arbitration, *supra* note 7, at 11.

64. CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 62, at 10.

65. CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, *supra* note 59, at 3.

66. *See* Chevron Corp. v. Donziger, 768 F. Supp.2d 581, 611 (S.D.N.Y. 2011) (concluding there was a "likelihood" that the Cabrera report was "planned" by some of the Plaintiffs' representatives, written "in substantial part" by persons other than Cabrera and submitted as Cabrera's independent work product without disclosure of its true authorship); *see also* Chevron Corp. v. Donziger, No. 11-CV-00691-LAK, at 38-39 (S.D.N.Y. July 31, 2012) (opinion on partial summary judgment motion) (detailing the authorship of the Cabrera report and concluding that "there is no genuine dispute as to exactly what happened" with respect to the report's authorship and that the report "falsely or, at least, deceptively stated that it had been 'prepared by . . . Cabrera' with the help of '*my* technical team, which consists of *impartial* professionals'").

reports supporting Cabrera's conclusions.[67] However, the new authors completed their work in less than one month without visiting Ecuador, conducting site inspections, taking new samples, or conducting new tests and relied heavily upon data and analysis contained in the Cabrera report.[68]

Chevron also claimed the Superior Court was influenced by political pressure exerted primarily by Ecuadorian President Rafael Correa upon his assumption of office in January 2007. This pressure included statements referring to the Plaintiffs' counsel as "compañeros," offering government support to the Plaintiffs, and pledging to assist in evidence gathering.[69] President Correa also called upon Ecuador's Prosecutor General to indict persons involved in the remediation agreements and release.[70] Pressure was also exerted by the Ecuadorian Attorney General's office,[71] members of Ecuador's

67. *Chevron Corp.*, 768 F. Supp.2d at 611. The district court referred to such efforts as a "cleansing operation." *Id.* at 610.

68. *Id.* at 611; *see also Chevron Corp.*, No. 11-CV-00691-LAK, at 40-42 (detailing the "cleansing" reports, noting that six of the seven experts completed their work without visiting Ecuador to gather data and concluding that at least four of the seven experts relied upon data and conclusions set forth in the Cabrera report).

69. *See, e.g.*, Chevron Rebuttal Brief, *supra* note 48, at 8 (quoting President Correa as offering government support to the Plaintiffs and pledging to assist them in evidence gathering); Chevron Notice of Arbitration, *supra* note 7, at 9-10 (alleging "the Government made clear that any judge who issued opinions contrary to the Government's interests would be subject to dismissal and even possible criminal prosecution" and quoting President Correa as denouncing the "barbarity committed by that multinational corporation [Texaco]"); CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 62, at 2, 7 (quoting a statement by President Correa referring to the Plaintiffs' counsel as "compañeros").

70. *See, e.g., Chevron Corp.*, 768 F. Supp.2d at 615 (quoting President Correa as urging the criminal prosecution of the PetroEcuador officials and Texaco's local counsel as "homeland-selling lawyers"); Chevron Rebuttal Brief, *supra* note 48, at 8 (quoting a statement by President Correa labeling Texaco's representatives 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 62, at 2, 7 (quoting a statement by President Correa calling upon Ecuador's Prosecutor General to indict the "miserable Mafiosi" involved in the remediation agreement and final act). Two Ecuadorian attorneys who had represented Texaco in the negotiation and approval of these documents were criminally charged by the Ecuadorian Prosecutor General in August 2008. *See* Chevron Notice of Arbitration, *supra* note 7, at 13-14.

71. Chevron Notice of Arbitration, *supra* note 7, at 8-9 (quoting correspondence from Ecuadorian Deputy Attorney General Martha Escobar to one of Plaintiffs' attorneys that "the Attorney General's Office and all of us working on the State's defense [a]re searching for a

Constituent Assembly[72] and protestors allegedly organized by the Plaintiffs.[73] These events led Chevron to conclude that "the thumbs of politics are weighing heavily on the scales of justice."[74]

Another concern was the integrity of presiding judge Juan Evangelista Nuñez Sanabria (Nuñez) and his replacement Judge Nicolas Zambrano Lozada (Zambrano). Nuñez was alleged to have made numerous prejudicial statements regarding the outcome of the case even before he had begun reviewing the 145,000 pages of evidence.[75] Additionally, videotaped conversations between Nuñez, private contractors and Ecuadorian government officials in which the potential outcome of the litigation was discussed surfaced in August 2009.[76] Chevron called upon Ecuador's Prosecutor General to conduct

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way to nullify or undermine the value of the remediation contract and the final acta and our greatest difficulty [lies] in the time that has passed").

72. *See* Rebuttal Brief, *supra* note 48, at 8-9 (referencing statements by members of the Constituent Assembly endorsing the Plaintiffs' lawsuit and placing the entire impact of hydrocarbon exploitation on Texaco).

73. CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, *supra* note 62, at 7 (alleging protestors organized by the Plaintiffs assailed the presiding judge on June 14, 2006). Plaintiffs' representative Steven Donziger described these tactics as "something you would never do in the United States, but Ecuador . . . this is how the game is played, it's dirty." *Id.*

74. 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).

75. *See* Chevron Notice of Arbitration, *supra* note 7, at 12.

76. *See* Press Release, Chevron Corporation, Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit 1 (Aug. 31, 2009) (on file with author). The four recorded meetings occurred in May and June 2009 and involved Carlos Patricio Garcia Ortega, a political coordinator for President Correa's Alianza Pais political party; Juan Pablo Novoa Velasco, a lawyer representing the Ecuadorian government; Aulo Gelio Servio Tulio Ávila Cartagena, a lawyer with alleged connections to Nuñez; Pablo Almeida, an environmental remediation contractor; Rubén Dario Miranda Martinez, an assistant to Patricio Garcia; Diego Borja, a former Chevron contractor; and Wayne Hansen, an American businessman. Letter from Thomas F. Cullen, Jr., Attorney, Jones Day, to Washington Pesántez Muñoz, Prosecutor General of Ecuador (Aug. 31, 2009) (on file with author). Nuñez participated in two of these meetings in his chambers in Lago Agrio and in Quito. *Id.* According to Chevron, the videotaped meetings between the Ecuadorian government officials and the contractors established that: (1) the Ecuadorian government was "managing Judge Nuñez"; (2) Chevron would lose the trial; (3) the Ecuadorian government "provided lawyers to help craft the opinion against Chevron"; (4) Judge Nuñez was instructed by President Correa's advisors on how to route the judgment money; and (5) President Correa's Alianza Pais political party would

an investigation, the disqualification of Nuñez from further participation in the case and the voiding of his previous rulings.[77] Nuñez recused himself from the case on September 4, 2009 at the request of the Prosecutor General, and the case was reassigned to Zambrano.[78]

Litigation in Ecuador: The Judgment and Appeal

The Superior Court entered the Judgment awarding more than $17.2 billion in damages against Chevron in February 2011.[79] The Superior Court concluded Texaco violated Ecuadorian law including provisions relating to hydrocarbon operations in the country and the protection of water resources.[80] The court concluded that the evidence supported an award of $8.64 billion for environmental remediation as well as awards for personal injuries and property damage.[81] While disclaiming any reliance on the Cabrera report, the court did consider

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"give the Judge his share of the bribe money." Letter from Thomas F. Cullen, Jr., Attorney, Jones Day, to Washington Pesántez Muñoz, Prosecutor General of Ecuador, *supra* at 2. The two meetings in which Nuñez participated allegedly established that: (1) Chevron was to lose the trial and any subsequent appeal; (2) Nuñez would award damages of approximately $27.3 billion; (3) the Ecuadorian government would receive a portion of the award; and (4) "[t]he American government would tell Chevron: You lost the trial, so pay up." *Id.*

77. *Id. See also* Press Release, Chevron Corporation, Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit, *supra* note 76, at 2 (calling upon the Ecuadorian government to "conduct a full investigation of this matter - focusing not only on the conduct of Judge Nuñez, but also on the very serious indications of political interference in this case").

78. *See* Simon Romero & Clifford Krauss, *Under Pressure, Ecuadorian Judge Steps Aside in Suit Against Chevron,* N.Y. TIMES, Sept. 5, 2009, *available at* http://www.nytimes.com/2009/09/05/world/americas/05ecuador.html. Zambrano was removed from the bench in March 2012 on the basis of allegations of lenient treatment of narcotics traffickers. *See* Press Release, Chevron Corporation, Judge Who Issued $18.2 Billion Ruling Against Chevron Removed from Bench 1 (Mar. 8, 2012) (on file with author).

79. Judgment at 170-86, Aguinda v. ChevronTexaco Corp., No. 002003 (Prov. Ct. J., Nueva Loja in Lago Agrio, Feb. 14, 2011, Ecuador).

80. *Id.* at 62-64, 70.

81. Environmental injuries included soil remediation ($5 billion), groundwater remediation ($600 million), restoration of flora and fauna ($200 million) and delivery of potable water ($150 million). *Id.* at 177-82. Health-related injuries included hydrocarbon exposure ($1.4 billion), increases in the prevalence of cancer ($800 million), and forced displacement as a result of environmental damage ($100 million). *Id.* at 170-71, 183-84.

information in the later-submitted studies.[82] The court also imposed $8.64 billion in punitive damages, which award would be vacated if Chevron issued a public apology within fifteen days of entry of the Judgment.[83] The entire amount of damages was to be placed in a trust to be administered by Frente or its designee and utilized for performance of the remedial measures contemplated by the court's opinion.[84]

The Superior Court rejected several of Chevron's defenses. The court held Chevron's merger with Texaco was a means by which to evade liability for the injuries caused by the Consortium.[85] It was thus appropriate to pierce the veil and disregard corporate formalities.[86] The court similarly pierced the corporate veil between Texaco and its Ecuadorian subsidiary due to a lack of administrative autonomy and separation of assets and the subsidiary's perceived undercapitalization.[87] The court also held the remediation agreements and release were governmental acts and were not binding on Ecuador's citizens.[88] The court determined the application of the Environmental Management Act was not retroactive as it did not create new substantive rights but only created new procedures by which such rights could be asserted.[89] The court refused to attribute any portion of the damages award to PetroEcuador as it was not a party to the litigation and its complicity could not extinguish Chevron's liability for existing injuries.[90]

The Judgment was affirmed on appeal by the Sole Division of the Provincial Court of Justice of Sucumbios in January 2012.[91] The

82. *Id.* at 57-58. Nevertheless, the court concluded there were "no defects in the appointment of expert Cabrera or in the delivery of his report." *Id.* at 50. The court refused to conduct a proceeding investigating claims of fraud and irregularities as the incidents were isolated and would not affect the outcome. *Id.* at 50, 99.

83. *Id.* at 185-86.

84. *Id.* 186-87.

85. *Id.* at 11-13.

86. *Id.* at 13, 15.

87. *Id.* at 20-25.

88. *Id.* at 30-32.

89. The new procedures were the designation of the court possessing jurisdiction and the manner in which such claims were to be presented. *Id.* at 27-28.

90. *Id.* at 123.

91. Judgment, Aguinda v. ChevronTexaco Corp., No. 2011-0106, at 15-16 (App. Div. . Prov. Ct. J., Jan. 3, 2012, Ecuador). The appellate court's only modification was with respect to the Superior Court's finding of mercury contamination as a result of the Consortium's activities. *Id.* at 16.

appellate court rejected Chevron's defenses relating to Texaco's separate corporate existence, the retroactive application of the Environmental Management Act and the remediation agreements and release.[92] The appellate court concluded that the environmental and personal injuries were causally linked to Texaco's hydrocarbon production activities, were "legally proven," and thus not subject to modification.[93] The court affirmed the punitive damages award in order to "discourage [Chevron's] type of procedural conduct . . . thus setting an example of what should not occur in a legal action."[94]

The court declined to address Chevron's allegations of fraud arising from the Plaintiffs' conduct occurring throughout the proceedings.[95] The basis for this refusal was pending litigation in the United States which deprived the court of jurisdiction "to rule on the conduct of attorneys, experts or officers or administrators of justice and similar parties, if this were to be the case."[96] The court also refused to overturn the Judgment on the basis of Chevron's allegation that the Superior Court considered evidence external to the record and had received covert assistance in drafting its opinion due to Chevron's failure to raise these allegations prior to its appeal.[97] It was, in the appellate court's opinion, unlikely that such assistance, if it had been provided, would have proven decisive.[98] Despite these conclusions, the appellate court abstained from further commentary in order to preserve "the parties' rights to present [a] formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States."[99] The appellate court's opinion and clarification order are presently under review by

92. *Id.* at 3, 6-7, 10.

93. *Id.* at 12.

94. *Id.* at 15. The appellate court further held that Chevron had engaged in bad faith throughout the course of the proceedings and in pursuing its appeal. *Id.*

95. *Id.* at 10.

96. *Id. See also infra* notes 119-22 and accompanying text.

97. *See* Clarification Decision at 4, Aguinda v. ChevronTexaco Corp., No. 2011-0106 (App. Div. Prov. Ct. J., Jan. 13, 2012, Ecuador).

98. *Id.* According to the appellate court, it also was not the court's responsibility to "make a pronouncement on the interminable and reciprocal accusations over misconduct of some of the parties' attorneys, experts, or contractors . . . [because these allegations of fraud] could not affect the final result of the lawsuit." *Id.* at 5. Chevron had furthermore failed to identify any "samples, documents, reports, testimonies, interview [*sic*], transcripts and minutes" referenced by the Superior Court that were not in the record. *Id.* at 4.

99. *Id.* at 5.

Ecuador's National Court of Justice pursuant to a cassation petition filed by Chevron on January 20, 2012.[100]

Recognition Proceeding in Canada

Despite the pendency of Chevron's appeal, on May 30, 2012, the Plaintiffs filed their Statement of Claim seeking recognition of the Judgment in Canada.[101] There are three important allegations contained in the Statement of Claim. The Plaintiffs initially allege Texaco's consent to recognize any judgment entered in Ecuador given in 2002 is binding on Chevron.[102] Second, the Plaintiffs allege the facts, findings, and conclusions of law contained in the Judgment are res judicata and not subject to relitigation in Canada.[103] Finally, the Plaintiffs claim Chevron provides administrative, financial, management, and technology support for both of the named subsidiaries and that their management is subject to control by Chevron's executive committee.[104] The subsidiaries' financial performance is consolidated with and reported on behalf of Chevron, and Chevron guarantees their debts.[105] The Plaintiffs do not contend the subsidiaries engaged in wrongdoing but rather that their relationship to Chevron renders their joinder necessary "in order to achieve equity and fairness between the parties and to yield a result that is not 'too flagrantly opposed to justice.'"[106]

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100. *See* Chevron Corp. v. Donziger, No. 11-CV-00691-LAK, at 17-18 (S.D.N.Y. July 31, 2012) (opinion on partial summary judgment motion) (discussing Chevron's cassation petition).

101. Statement of Claim, *supra* note 2. Chevron Corporation, Chevron Canada Limited and Chevron Canada Finance Limited were named as defendants in the Statement of Claim. Chevron Corporation is a Delaware corporation with its principal place of business located in California. *See* CHEVRON CORP., FORM 10-K (2012). Chevron Canada Limited is a British Columbia corporation headquartered in Vancouver and is a wholly owned subsidiary of Chevron Corporation. CHEVRON CORP., CHEVRON IN CANADA 1 (2011). Chevron Canada Limited is engaged in retail and commercial fueling operations and distribution of lubricants in British Columbia and Alberta and operates a refinery in Burnaby, British Columbia. *Id.* Chevron Canada Finance Limited is a Chevron subsidiary incorporated in Alberta with its principal place of business located in Calgary. BUS. WK., COMPANY OVERVIEW OF CHEVRON CANADA FINANCE, LTD. 1 (2012).

102. Statement of Claim, *supra* note 2, at 5.

103. *Id.* at 6

104. *Id.* at 6-7.

105. *Id.*

106. *Id.* at 7-8.

Related Proceedings in the United States

There are three related proceedings in the United States that may have an effect upon recognition of the Judgment in Canada and other locations in the future. The first proceedings involve claims alleging hydrocarbon pollution caused by the Consortium's operations resulted in the development of cancer by Oriente residents. These claims were dismissed by the U.S. District Court for the Northern District of California in 2007 which concluded the claims were "manufactured by plaintiffs' counsel" and "likely a smaller piece of some larger scheme against defendants."[107] The district court subsequently imposed sanctions on three of plaintiffs' counsel for failure to conduct adequate inquiry with respect to the cancer claims prior to initiating litigation.[108] The district court described the plaintiffs' case as consisting of "bogus claims that should never have been on the books."[109]

Discovery requests initiated by Chevron seeking evidence to be utilized in Ecuador and before the Permanent Court of Arbitration generated a second set of opinions by several U.S. federal courts in 2010 and 2011.[110] The most extensive findings addressing these requests were set forth in *In re the Application of Chevron*

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107. Gonzalez v. Texaco, Inc., No. C 06-02820, 2007 U.S. Dist. LEXIS 56622, at *9 (N.D. Cal. Aug. 3, 2007).

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

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .

FED. R. CIV. P. 11(b)(3).

The district court ordered sanctions in the amount of $45,000. *Gonzalez,* 2007 U.S. Dist. LEXIS 81222, at *41. The plaintiffs' attorneys in the California litigation are different from Plaintiffs' counsel in Ecuador.

109. *Gonzalez,* 2007 U.S. Dist. LEXIS 81222, at *40.

110. These discovery requests were initiated pursuant to 28 U.S.C. §1782 (2010) which provides, in part, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

Corporation.[111] The district court denied a motion to quash subpoenas seeking documents and testimony and concluded there was "evidence of possible fraud and misconduct" by one of Plaintiffs' counsel whose activities "had little to do with the performance of legal services and a great deal to do with political activity, intimidation of the Ecuadorian courts, attempts to procure criminal prosecutions for the purpose of extracting a settlement, and presenting a message to the world media."[112] These findings led the court to conclude discovery was appropriate as these activities were more similar to those of a lobbyist, public relations consultant, media representative and political organizer than an attorney.[113] Furthermore, the court found "more than a little evidence" that some activities came within the crime-fraud exception to the attorney-client privilege and the work product doctrine.[114] The outcome of the Ecuadorian litigation may also have been influenced by politics, judicial intimidation and corruption.[115] According to the court, the Cabrera report was not the work product of a neutral expert, and another expert's report was submitted without the witness' authorization.[116] The district court's

111. 749 F. Supp.2d 141 (S.D.N.Y. 2010).

112. *Id.* at 144, 157-58.

113. *Id.* at 163.

114. *Id.* at 167.

115. *Id.* at 145 (quoting Plaintiffs' counsel as stating ""[y]ou can solve anything with politics as long as the judges are intelligent enough to understand the politics . . . . they don't have to be intelligent enough to understand the law, just as long as they understand the politics"); *see also id.* at 146 (concluding one of Plaintiffs' counsel "attempted to intimidate the Ecuadorian judges [and] obtain political support for the Ecuadorian lawsuit"); *Id.* at 147 (quoting Plaintiffs' counsel as stating "[t]he only language that I believe this judge is going to understand is one of pressure, intimidation and humiliation," that such conduct was necessary as the only method by which to secure a fair trial given that "[t]he judicial system is so utterly weak" and that Ecuadorian judges are "all corrupt! It's - it's their birthright to be corrupt"); *Id.* at 155-56 (discussing the involvement of President Correa in the Ecuadorian litigation); *Id.* at 158-59 (discussing Plaintiffs' suggestion to "organize pressure demonstrations at the court" and the judge's fear of bodily harm should he rule against the Plaintiffs).

116. *Id.* at 144-45, 150, 152 (determining there was substantial evidence that "(1) Cabrera was appointed as a result of Lago Agrio plaintiffs' ex parte contacts with and pressure on the Ecuadorian courts, (2) at least part of his report was written by consultants retained by the Lago Agrio plaintiffs, and (3) the report was passed off as Cabrera's independent work"); *see also id.* at 152 (discussing the submission of an expert witness' report of which the witness subsequently denied authorship). *See also supra* note 48 and accompanying text.

conclusions have been echoed by other U.S. courts in similar discovery proceedings.[117]

In February 2011, Chevron filed a lawsuit in the U.S. District Court for the Southern District of New York in which it accused the Plaintiffs, two of their attorneys, Frente, and an environmental consulting company of colluding with numerous non-party co-conspirators to corrupt the judicial process in Ecuador in order to extort a settlement payment from Chevron.[118] Chevron's lawsuit accused the defendants of pressuring the Ecuadorian court and manufacturing evidence, colluding with the Ecuadorian government to bring sham criminal charges against Chevron's local counsel, distributing false information to the media and federal and state government officials, and obstructing its domestic discovery efforts by making false or misleading representations to federal courts, tampering with witnesses and withholding documents.[119] Chevron alleged these activities violated numerous federal and state laws.[120]

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117. *See, e.g., In re* Application of Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011) (determining that a conflict of interest relating to one of the Plaintiffs' consultants was "sufficient to make a prima facie showing of fraud"); Chevron Corp. v. E-Tech Int'l, No. 10cv1146-IEG (WMc), 2010 U.S. Dist. LEXIS 94396, at *17 (S.D. Cal. Sept. 10, 2010) (holding the crime-fraud exception to the attorney-client privilege to be applicable as "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own"); *In re* Chevron Corp., No. 10-MC-21JH/LFG, 2010 U.S. Dist. LEXIS 119943, at *6 (D.N.M. Sept. 1, 2010) (noting the presence of "inappropriate, unethical and perhaps illegal conduct"); Chevron Corp. v. Camp, No. 1:10mc27, 2010 U.S. Dist. LEXIS 97440, at *16 (W.D.N.C. Aug. 30, 2010) (concluding "that what has blatantly occurred in this matter would in fact be considered fraud by any court . . . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill").

118. Complaint at 17-97, Chevron Corp. v. Donziger, No. 11-CV-0691 (S.D.N.Y. Feb. 1, 2011).

119. *Id.* at 31-73. Specific factual allegations in this regard include utilizing pressure tactics to influence the Superior Court, colluding with Ecuadorian government officials to influence the outcome of the litigation and inducing expert witnesses to prepare and file biased and false reports. *Id.* at 31-46. Chevron also alleged Plaintiffs' counsel met with Cabrera prior to his appointment, staged mock inspections, authored his report, remitted payments for work he did not perform and attempted to "launder" the report once significant questions about the credibility of Cabrera and his report emerged. *Id.* at 46-73. *See also id.* at 73-114.

120. Nine of the named defendants were alleged to have engaged in a pattern of activities in violation of the Racketeer-Influenced and Corrupt Organizations Act (RICO). *Id.* at 119-33; *see also* 18 U.S.C. §1962(c) (2010) (providing it shall be unlawful for "any person employed by or

Chevron sought awards of general, treble and punitive damages as well as equitable relief enjoining the defendants or any of their agents from attempting to obtain recognition or enforcement of the Judgment in any court, tribunal, or administrative agency in the United States or abroad.[121] The case remained pending at the time of the preparation of this article.[122]

Related Proceeding before the Permanent Court of Arbitration

A final related proceeding is Chevron's statement of claims pending against the Republic of Ecuador in the Permanent Court of Arbitration filed in September 2009. Chevron alleged the Ecuadorian government colluded with the Plaintiffs and abused the criminal justice system in violation of the Ecuador-United States Bilateral Investment Treaty.[123] To date, the Court has determined the claims

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associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt"). The specific racketeering activities alleged in the complaint are: (1) extortion in violation of the Hobbs Act (18 U.S.C. §1951 (2010)); (2) extortion in violation of New York state law (N.Y. PENAL LAW §§110.00, 155.05(2)(e), 155.42 (2010)); (3) mail and wire fraud (18 U.S.C. §§ 1341, 1343 (2010)); (4) money laundering (18 U.S.C. §1956(a)(2)(A)(2010)); (5) obstruction of justice (18 U.S.C. §1503 (2010)); and (6) witness tampering (18 U.S.C. §1512 (2010)). *See* Complaint, *Chevron Corp. v. Donziger,* No. 11-CV-0691, at 121-27. These actions were also alleged to constitute a conspiracy in violation of RICO. *Id.* at 17-97; *see also* 18 U.S.C. §1962(d) (2010) (providing that it shall unlawful to conspire to engage in racketeering activities). Ancillary state law claims of fraud, tortious interference with contract, trespass to chattels, unjust enrichment and civil conspiracy were stated against all defendants with the exception of the claim for relief alleging violation of the New York Judiciary Law, which was limited to one of the defendants' attorneys and his law office. Complaint, *Chevron Corp. v. Donziger,* No. 11-CV-0691, at 119-46. The New York Judiciary Law provides, in part, that "[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . is guilty of a misdemeanor and . . . forfeits to the party injured treble damages, to be recovered in a civil action." N.Y. JUDICIARY LAW §487 (2010).

121. Complaint, *Chevron Corp. v. Donziger*, No. 11-CV-0691, at 146-47.

122. The district court dismissed the fraud, tortious interference with contract, trespass to chattels and unjust enrichment claims in May 2012 but refused to dismiss the claims based upon RICO and the New York Judiciary Law. *See* Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2012 U.S. Dist. LEXIS 67207, at *81-82 (S.D.N.Y. May 14, 2012).

123. Chevron Notice of Arbitration, *supra* note 7, at 7-16. Chevron's claims are based upon Ecuador's failure to provide fair, equitable treatment, protection and security, and impairment of investments through

to be admissible, and it possesses jurisdiction.[124] The Court described Chevron's claims as "amongst the gravest accusations which can be advanced by a claimant against a modern State subject to the rule of law" but nevertheless "serious and not advanced in bad faith; nor . . . incredible, frivolous or vexatious."[125] The Court has directed Ecuador on numerous occasions to take all necessary measures to prevent recognition and enforcement of the Judgment in and outside Ecuador.[126] Chevron's claims remained pending at the time of preparation of this article.

IV. The Recognition of Foreign Judgments in Canada

Introduction

Recognition and enforcement of foreign judgments in Canada are governed by provincial law.[127] Thus, there is no single method of recognition and enforcement.[128] Multi-pronged recognition efforts must

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arbitrary and discriminatory measures. *Id.* at 16; *see also* Investment Treaty, U.S.-Ecuador, arts. II(1), II(3)(a-c), II(7), Aug. 27, 1993, S. Treaty Doc. No. 103-15. Chevron seeks an order declaring: (1) there is no continuing liability for any environmental and health impacts associated with Texaco's participation in the Consortium; (2) Ecuador breached the bilateral investment treaty; (3) Texaco and its parent companies, affiliates and successors have been released from liability; (4) Ecuador and PetroEcuador are exclusively liable for any remaining environmental and health impacts; and (5) Ecuador indemnify, protect and defend Chevron from any payment of damages. Chevron also seeks damages in an amount deemed appropriate by the Court. Chevron Notice of Arbitration, *supra* note 7, at 17-18.

124. Third Interim Award, *supra* note 12, ¶¶ 4.95-4.96.

125. *Id.* ¶¶ 4.57-4.58.

126. *See, e.g.,* Second Interim Award on Interim Measures, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, ¶ 3(i-ii) (Permanent Ct. of Arbitration, Feb. 16, 2012); First Interim Award on Interim Measures, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, ¶ 2(i-ii) (Permanent Ct. of Arbitration, Jan. 25, 2012); Order for Interim Measures, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, ¶ (E)(i-ii) (Permanent Ct. of Arbitration, Feb. 9, 2011); Order on Interim Measures, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, ¶ 1(i-ii) (Permanent Ct. of Arbitration, May 14, 2010).

127. MARKUS KOEHNEN & AMANDA KLEIN, THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA 2 (2010).

128. *Id.* at 2; *see also* IGOR ELLYN & EVELYN PEREZ YOUSSOUFIAN, DEVELOPMENTS IN THE ENFORCEMENT OF MONEY JUDGMENTS IN CANADA 3 (2009) (commenting on the absence of "pan-Canadian uniformity" with respect to the recognition and enforcement of foreign judgments).

proceed on a province-by-province basis although all provinces, except Quebec, have mutual registration arrangements.[129]

Canadian law does not permit significant differences between provinces.[130] Differences are resolved and uniformity imposed by the Supreme Court of Canada.[131] However, appeals are only heard with leave of the Court in matters of national importance.[132] Thus, absent an imperative public interest, the primary determinant of private law disputes, including matters concerning foreign judgments, remains the provincial courts.[133] These courts, other than those in Quebec, utilized common law principles derived from the English system and other Commonwealth countries prior to the Canadian Supreme Court's 1990 decision in *Morguard Investments Ltd. v. DeSavoye.*[134]

Morguard Investments Ltd. v. DeSavoye

In *Morguard,* the Supreme Court of Canada was confronted with conflicting approaches to the inter-provincial recognition of judgments.[135] The judgment debtor asserted the continued relevance

129. *See, e.g.,* Reciprocal Enforcement of Judgments Act, R.S.O., ch.R.5 (1990).

130. KOEHNEN & KLEIN, *supra* note 127, at 2.

131. *Id.*

132. Supreme Court Act, R.S.C., §41 (1985).

133. *See* JANET WALKER, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS IN CANADA §64.01[3] (2003). Provincial courts have traditionally viewed recognition and enforcement actions as contractual matters, specifically, the implied obligation of the judgment debtor to pay the amount of the judgment. *See, e.g.,* Pro Swing, Inc. v. Elta Golf, Inc., [2006] 2 S.C.R. 612; Livesley v. Horst, [1924] S.C.R. 605; Rutledge v. U.S. Sav. & Loan Co., [1906] S.C.R. 546; Burchell v. Burchell, [1926] 58 O.L.R. 515 (S.C.); North v. Fisher, [1884] 6 O.R. 206 (High Ct.).

134. [1990] 3 S.C.R. 1077. For a discussion of English common law, *see, e.g.,* Singh v. Rajah of Faridkote, [1894] A.C. 670 (P.C.); Emanuel v. Symon, [1908] 1K.B. 302 (C.A.).

135. The judgment in question was issued by an Alberta court and sought to be enforced in British Columbia. The judgment debtor was the mortgagor of real property located in Alberta. The judgment debtor subsequently moved to British Columbia. The mortgages fell into default, and the lenders commenced foreclosure proceedings in Alberta. Although properly notified of these proceedings, the judgment debtor did not appear or defend the action. The real properties were subsequently sold at a judicial sale, and a money judgment was entered against the judgment debtor for the deficiencies between the value of the properties at judicial sale and the amounts owing on the mortgages. The lenders commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgments. The Supreme Court granted judgment to the lenders which judgment was upheld on appeal by the British Columbia Court of Appeal. The judgment debtor

and applicability of the English approach to recognition. This approach prevented the recognition of judgments unless the defendant was a subject of the foreign country in which the judgment was rendered, resided in the foreign country at the time the civil action was initiated, selected the foreign forum, voluntarily appeared in the foreign forum or was bound by an enforceable forum selection agreement.[136] In contrast, the judgment creditor urged the Supreme Court to adopt a reciprocity approach permitting the enforcement of in personam judgments entered in other Canadian provinces.[137]

Although the concept of territoriality was relevant to the nineteenth century, the Canadian Supreme Court held "[m]odern states . . . cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances."[138] Recognition was based on the "idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states."[139] Particularly instructive in this regard was the U.S. Supreme Court's definition of comity in *Hilton v. Guyot.*[140]

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challenged this decision on the basis that he was not a resident of Alberta and did not attorn to the jurisdiction of its courts. *See* Morguard Invs. Ltd. v. DeSavoye, [1990] 3 S.C.R. 1077, 1083-84.

136. *Id.* at 1094 (citing Emanuel v. Symon, [1908] 1K.B. 302 (C.A.)).

137. *Id.* There was growing support for the concept of reciprocity within the English and Canadian legal systems in the years preceding *Morguard. See, e.g.,* Travers v. Holley, [1953] 2 All. E.R. 794, 800 (C.A.) (recognizing the absence of encroachment upon sovereign and territorial interests of national courts in a domestic relations action "where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with the law of a second country"); Marcotte v. Megson, [1987] 19 B.C.L.R.2d 300 (Cty. Ct.) (upholding the application of reciprocity within Canada in personal actions). *See also* Gilbert D. Kennedy, *Recognition of Judgments In Personam: The Meaning of Reciprocity,* 35 CAN. BAR REV. 123 (1957); Gilbert D. Kennedy, *Reciprocity in the Recognition of Foreign Judgments: The Implications of Travers v. Holley,* 32 CAN. BAR REV. 359 (1954).

138. *Morguard Invs. Ltd.*, 3 S.C.R. at 1095.

139. *Id.* at 1096.

140. 159 U.S. 113 (1895) in which the U.S. Supreme Court defined comity as:

> [n]either a matter of absolute obligation . . . nor of mere courtesy and good will. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.

Id. at 163-64.

This formulation of comity required adjustment to the "changing world order" of the twentieth century.[141] Modern times required the facilitation of the "flow of wealth, skills and people across state lines in a fair and orderly manner."[142] Insistence upon parochial interests in such a highly integrated world would result in injustice and the disruption of normal patterns of life.[143] Rigid insistence on territorial restrictions to recognition and enforcement also "[flew] in the face of the obvious intention of the Constitution to create a single country."[144] Thus, the Court concluded the previous approach to recognition and enforcement was "ripe for reappraisal."[145]

This reappraisal led the Court to conclude that "the courts in one province should give full faith and credit . . . to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately exercised jurisdiction in the action."[146] In addition to traditional means, the exercise of jurisdiction was appropriate where there was a "real and substantial connection" between the original court, the defendant, the cause of action, or the subject matter of the action.[147] In this case, "a more 'real and substantial' connection . . . [could] scarcely be imagined" given the location of the properties, where the contracts were signed, and the residency of all parties at the time of the transaction.[148]

The Court recognized there may be circumstances in the future which would render inter-provincial recognition and enforcement imprudent or create injustice. The Court identified several defenses in

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141. *Morguard Invs. Ltd.*, 3 S.C.R. at 1097.

142. *Id.* at 1096. According to the Court, accommodation of the free flow of wealth, skills and people across national boundaries was "imperative." *Id.* at 1098.

143. *Id.* (citing Arthur T. Von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 HARV. L. REV. 1601, 1603 (1968)). The Court concluded it would be "anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. *Id.* at 1102-03. Such a result was inconvenient, costly and placed the court in the newly selected forum in a position of deciding a case to which it had remote, if any, connection. *Id.* at 1103.

144. *Id.* at 1099.

145. *Id.* at 1098.

146. *Id.* at 1102.

147. *Id.* at 1108. For a discussion of traditional means by which courts may appropriately exercise personal jurisdiction over the parties appearing before them, *see supra* note 136 and accompanying text. For a detailed discussion of the "real and substantial connection" requirement, *see* KOEHNEN & KLEIN, *supra* note 127, at 6-9.

148. *Morguard Invs. Ltd.*, 3 S.C.R. at 1108.

such circumstances. These defenses included forum non conveniens, fraud, or conflict with the law or public policy of the recognizing jurisdiction.[149] Such defenses were not applicable in this case.[150]

Beals v. Saldanha

Morguard left undecided the issue of the proper approach to the recognition of non-Canadian judgments. Provincial courts in the 1990s applied *Morguard* to non-Canadian judgments, but such application was not widespread or uniform.[151] The appropriate approach to non-Canadian judgments was not addressed by the Canadian Supreme Court until 2003 in *Beals v. Saldanha*.[152] The Court closely equated foreign and domestic judgments and thus adopted one of the most liberal recognition and enforcement regimes in the world.

Beals v. Saldanha arose from a Florida state court judgment entered against three residents of Ontario.[153] A majority of the

149. *Id.* at 1110.

150. *Id.*

151. *See e.g.*, Old N. State Brewing Co. v. Newlands Servs., Inc., [1999] 4 W.W.R. 573 (C.A.) (North Carolina judgment); Moses v. Shore Boat Builders, Ltd., [1993] 106 D.L.R.4th 654 (C.A.) (the first Canadian appellate court opinion to apply *Morguard* to a non-Canadian judgment, specifically, an Alaskan judgment); United States v. Ivey, [1996] 30 O.R.3d 370 (C.A.) (Michigan judgment); Arrowmaster, Inc. v. Unique Forming, Ltd., [1994] 17 O.R.3d 407 (Gen. Div.) (applying *Morguard* to an Illinois judgment and, in so doing, endorsing "the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure").

152. [2003] 3 S.C.R. 416.

153. The judgment debtors sold vacant real property located in Florida valued at U.S. $8,000 to two Florida residents. The purchasers began construction of a model home on the property for use in their construction business. A dispute arose when it was discovered that the sales contract erroneously identified the real property subject to the sale, resulting in the purchasers' home being constructed on property that the judgment debtors did not own. The purchasers filed suit against the judgment debtors in Florida state court. Although they initially appeared in the case, the judgment debtors failed to continue their defense on the advice of counsel that a Florida state court judgment was unenforceable in Canada. The Florida court subsequently entered a default judgment against the judgment debtors in the amount of U.S. $210,000 in compensatory damages and U.S. $50,000 in punitive damages. The amount of the judgment with interest had increased to C. $800,000 by the time the purchasers sought recognition in Ontario. The Ontario Court (General Division) declared the judgment unenforceable due to perceived fraud in the assessment of damages. A majority of the Ontario Court of Appeal reversed and held the defenses of fraud and public policy inapplicable to the question of recognition. The judgment

Canadian Supreme Court elected to apply *Morguard* to non-Canadian judgments. The majority found "compelling reasons" to expand *Morguard's* application and no "principled reason not to do so."[154] These "compelling reasons" included the need for order and fairness which ensured security of transactions which "necessarily underlie the modern concept of private international law."[155] Comity and the increasing prevalence of international business transactions and movement of goods and people required modernization of private international law.[156]

After finding the existence of a "real and substantial connection," the Court then proceeded to analyze the applicability of the fraud, public policy and natural justice defenses to recognition.[157] These common law defenses struck the necessary "balance between order and fairness as well as the real and substantial connection test" required by comity.[158]

The natural justice defense required proof that the foreign proceedings were "contrary to Canadian notions of fundamental justice."[159] Canadian courts had a "heightened duty" to protect the interests of defendants from judgments entered as a result of foreign proceedings in which "minimum standards of fairness" were not applied.[160] Such fairness standards required compliance with "basic procedural safeguards such as judicial independence and fair ethical

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debtors sought review in the Canadian Supreme Court. *Beals*, 3 S.C.R. ¶¶ 5-16.

154. *Id.* ¶ 19.

155. *Id.* ¶¶ 26-27 (concluding "the need to accommodate 'the flow of wealth, skills and people across state lines' is as much an imperative internationally as it is interprovincially," quoting *Morguard Invs. Ltd.*, 3 S.C.R. at 1098).

156. *Id.* ¶ 28. (stating that international commerce and the movement of people are "directly relevant to determining . . . the enforcement of monetary judgments," quoting Joost Blom, *The Enforcement of Foreign Judgments: Morguard Goes Forth into the World,* 28 CAN. BUS. L.J. 373, 375 (1997)).

157. The Court held that the judgment debtors voluntarily entered into the transaction and thus could have reasonably expected to defend themselves in Florida when the dispute arose and the litigation was commenced. *Id.* ¶ 36. However, the judgment debtors elected not to continue their defense, challenge the default judgment or have it set aside within one year of its entry as was their right. *Id.* The Court concluded that the judgment debtor's reliance on negligent legal advice did not bar enforcement. *Id.*

158. *Id.* ¶ 40.

159. *Id.* ¶ 59.

160. *Id.* ¶ 60. Despite this heightened duty, the burden of proving a violation of natural justice rests with the party resisting recognition. *Id.*

rules governing the participants in the judicial system."[161] The Court included adequate notice and the opportunity to defend as additional procedural safeguards.[162] Review of such safeguards was mandatory despite the increased difficulty of assessment presented by foreign judgments in comparison to inter-provincial judgments.[163] The defense was further limited to procedural issues and could not be used to re-litigate the merits of the case.[164]

Applying these rules, the Court concluded there was no violation of natural justice in this case as to prevent recognition. The judgment debtors were fully informed of the Florida proceedings and had the opportunity to defend on numerous occasions which they repeatedly declined.[165] Furthermore, the judgment debtors had precise knowledge of the amount of their financial exposure once they received notice of the amount of the judgment and nevertheless failed to act.[166] Other defenses to recognition were equally inapplicable.[167]

Natural Justice and Foreign Judgments Post-Beals

Several Canadian courts have addressed the natural justice defense in the years since *Beals*. The following overview will discuss post-*Beal* cases addressing this defense and conclude with the challenges presented by *Yaiguaje v. Chevron Corporation.*

The courts addressing the natural justice defense have reiterated that it relates only to matters of procedure rather than substantive law and that the burden of proof rests upon the party resisting recognition.[168] These procedures must afford the litigants minimum standards of fairness which include notice of the plaintiffs' claims, identification of the amount of damages and their methods of

161. *Id.* ¶ 62.

162. *Id.* ¶ 65.

163. *Id.* ¶ 62.

164. *Id.* ¶ 64.

165. *Id.* ¶ 69.

166. *Id.*

167. The failure of the judgment debtors to defend the litigation in Florida prevented them from challenging the evidence presented on the question of damages and from presenting evidence that any fraud was undiscoverable. *Id.* ¶¶ 54-55. The public policy defense was inapplicable despite the fact that a Canadian court would not reach a similar conclusion or render a damages award in a similar amount. *Id.* ¶ 76. The allegedly excessive amount of the Florida judgment and its likely unacceptable nature to most Canadians did not prevent recognition. *Id.* ¶ 77.

168. *See* Minn. Valley Alfalfa Producers Coop. v. Baloun, [2005] A.J. No. 174, ¶ 24 (Q.B.); *see also* Sincies Chiementin S.p.A. v. King, [2010] O.J. No. 5124, ¶ 82 (S.C.).

calculation, an opportunity to respond, and full appellate review.[169] Failure to challenge the fundamental fairness of the foreign proceeding at either the trial or appellate levels may prevent an attack upon the fairness of the proceeding in a subsequent recognition action.[170]

Although Canadian courts have been reluctant to utilize the natural justice defense, two Canadian courts have identified instances where utilization of the defense may be appropriate. In *Litecubes, L.L.C. v. Northern Light Products, Inc.*, the Supreme Court of British Columbia stated that the failure of a foreign court to timely determine challenges to its jurisdiction such that the defendant would risk the entry of a default judgment may be considered by local courts in determining the applicability of the natural justice defense.[171] However, the court concluded it did not need to determine this issue as the defendant had not challenged the fairness of the proceedings before the foreign court.[172]

A second circumstance implicating the natural justice defense is the existence of judicial bias. In *Ultracuts Franchises, Inc. v. Wal-Mart Canada Corporation*, the Manitoba Court of the Queen's Bench was confronted with a challenge to recognition of an Arkansas judgment on the basis of judicial bias.[173] The court defined bias sufficient to meet the requirements of the natural justice defense as "a state of mind that is in some way predisposed to a particular result; or that is closed with regard to particular issues."[174] Proof of actual bias was not required as the court deemed it impossible to determine whether the decision-maker approached the case with a "truly biased state of mind."[175] Rather, particular conduct may give rise to a

169. *See, e.g.*, S. Pac. Imps., Inc. v. Ho, [2009] B.C.J. No. 733, ¶ 40 (C.A.); Marcus Food Co. v. DiPanfilo, [2012] 109 O.R.3d 535, ¶ 22 (S.C.); Bank of Mong. v. Taskin, [2011] O.J. No. 4572, ¶ 46 (S.C.).

170. *See, e.g.*, Cook Nook Hazelton Lanes, Ltd. v. Trudeau Corp., [2003] O.J. No. 3354, ¶ 19 (S.C.).

171. [2009] B.C.J. No. 262, ¶ 44 (S.C.).

172. *Id.*

173. [2005] 196 Man. R.2d 163 (Q.B.). The defendant's bias claim was based on four separate grounds. These were: (1) judges in Arkansas are elected rather than appointed; (2) Wal-Mart is a powerful corporation possessing undue influence in Arkansas; (3) the trial court judge and one of the appellate court judges owned shares of Wal-Mart at the time of their decisions; and (4) the two judges in question failed to disclose their shareholdings. *Id.*¶ 3.

174. *Id.* ¶ 17.

175. *Id.* ¶ 17. *But see* Oakwell Eng'g, Ltd. v. Enernorth Indus., Inc., [2006] 81 O.R.3d 288, ¶ 22 (C.A.) (holding that "*Beals* makes it clear, in my view, that . . . the party asserting bias must prove actual corruption or bias").

reasonable apprehension of bias.[176] Reasonable apprehension requires proof that not only is the apprehension of bias reasonable but also that the person considering the alleged bias is reasonable and possesses "knowledge of all the relevant circumstances, including the 'traditions of integrity and impartiality,'" and the "social reality" that may influence a case.[177] The burden of proof rests with the party claiming bias and is high given that such an allegation calls into question not only the integrity of the judge but also the administration of justice.[178] The serious nature of such an allegation also requires that the party alleging bias afford the judge whose conduct is at issue the opportunity to take corrective action including recusal unless such a request is demonstratively futile.[179]

The burden upon a party alleging judicial bias is further heightened by the presumption that judges will faithfully execute their oaths of office in a fair and impartial manner.[180] This presumption may be overcome only by "cogent evidence."[181] Such evidence may consist of scholarly studies of the judicial system, reviews of outcomes of claims against the party alleging bias, an analysis of past claims in which bias was demonstrated, and testimony of people employed by the judicial system and others.[182] Innuendo and evidence of corruption in the judicial system in general

176. *Ultracuts Franchises, Inc.*, 196 Man. R.2d 163, ¶ 17 (citing Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259, ¶ 60; R. v. R.D.S., [1997] 3 S.C.R. 484, ¶¶ 31, 111).

177. *Id.* (citing *R. v. R.D.S.*, 3 S.C.R. 484, ¶¶ 111-12).

178. *Id.* (citing *Wewaykum Indian Band*, 2 S.C.R. 259, ¶¶ 76-77; *R. v. R.D.S.*, 3 S.C.R. 484, ¶¶ 113-14).

179. *Id.* ¶¶ 82, 88-89 (citing Robertson v. Edmonton (City) Police Serv., [2004] A.J. No. 805, ¶ 118 (Q.B.)). According to the court, this prerequisite "respects the jurisdiction of the tribunal and the adjudicator, . . . prevents unnecessary interference [by the reviewing court] . . . . [is] faster and cheaper, ... will have a tempering effect on the type of allegations of bias that are made . . . . and . . . [will] place on the record the facts relevant to the bias application." *Id.* ¶ 83 (quoting *Robertson*, A.J. No. 805, ¶ 120).

180. *Id.* ¶¶ 17, 50 (citing United States v. Morgan, 313 U.S. 409, 421 (1941) in which the Court stated judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances").

181. *Id.* ¶ 17. However, the Manitoba Court of the Queen's Bench also referred to the burden on the party alleging bias as "convincing evidence," "clear evidence," and "substantial evidence." *Id.* ¶¶ 17, 50, 52.

182. *Id.* ¶ 74.

without specific application to the case at issue are insufficient to meet this evidentiary burden.[183]

One of the legacies of *Beals* and its progeny is liberality in the recognition and enforcement of foreign judgments.[184] However, past recognition actions have not addressed difficult cases but rather have concerned U.S. court judgments, [185] judgments of courts with a shared legal heritage[186] or a perceived level of reliability.[187] Canadian courts

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183. *Id.* ¶ 79. Ultracuts' claim of judicial bias ultimately failed due to its reliance on innuendo and inability to produce studies, outcomes and testimony. *See also* Oakwell Eng'g, Ltd. v. Enernorth Indus., Inc., [2006] 81 O.R.3d 288, ¶ 23 (C.A.).

184. *See, e.g.*, ELLYN & YOUSSOUFIAN, *supra* note 128, at 1 (describing Ontario courts as "very receptive to the enforcement of final and conclusive foreign money judgments"); Richard Frimpong Oppong, *Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond,* 39 U. BRIT COLUM. L. REV. 257, 257 (2006) (describing the liberalization of the recognition and enforcement of foreign judgments in Canada as a "quiet revolution"); Allison M. Sears, *Beals v. Saldanha: The International Implications of Morguard Made Clear,* 68 SASK. L. REV. 223, 238 (2005) (describing Canada as taking "a generous approach to the enforceability of international judgments"); Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far* 22 (Univ. of Pittsburgh School of Law, Working Paper No. 26, 2005) (describing the Canadian approach to the recognition and enforcement of foreign judgments as a "liberal approach . . . that is appropriate in a modern business climate").

185. *See, e.g.*, Davidson v. Lesenko, [2008] 452 A.R. 269 (Q.B.) (California judgment); Bad Ass Coffee Co. of Haw., Inc. v. Bad Ass Enters., Inc., [2007] 427 A.R. 241 (Q.B.) (Utah judgment); Minn. Valley Alfalfa Producers Coop. v. Baloun, [2005] A.J. No. 174 (Q.B.) (Minnesota judgment); Nunes v. Collins, [2012] B.C.J. No. 835 (S.C.) (Nevada judgment); Litecubes, L.L.C. v. N. Light Prods., Inc., [2009] B.C.J. No. 262 (S.C.) (Missouri judgment); Marx v. Balak, [2008] B.C.J. No. 252 (S.C.) (Utah judgment); Suncom, Inc. v. Andrew Stone Casino Promotions, Inc., [2007] B.C.J. No. 2818 (S.C.) (Nevada judgment); Garner Estate v. Garner, [2007] 68 B.C.L.R.4th 150 (S.C.) (Oregon judgment); Lang v. Lapp, [2010] 11 B.C.L.R.5th 280 (C.A.) (California judgment); *Ultracuts Franchises, Inc.*, 196 Man. R.2d 163 (Arkansas judgment); Marcus Food Co. v. DiPanfilo, [2012] 109 O.R.3d 535 (S.C.) (Kansas judgment); Disney Enters., Inc. v. Click Enters., Inc., [2006] 267 D.L.R.4th 291 (S.C.) (New York judgment). One commentator has concluded that the relative ease with which the Canadian Supreme Court adopted its liberal approach to recognition was due "largely to the similarity between the Canadian and American legal systems." Sears, *supra* note 184, at 219.

186. *See, e.g.*, Soc'y of Lloyd's v. Berezowski, [2006] 405 A.R. 220 (Q.B.) (English judgment).

187. *See, e.g.*, Grundstuecksverwaltungsgesellschaft MBH & Co. v. Hanne, [2011] 505 A.R. 364 (C.A.) (German judgment); Commerzbank Aktiengesellschaft v. Hanne, [2006] 400 A.R. 255 (Q.B.) (German

have not been confronted by an extraordinarily large judgment entered by a court in the developing world as is presented by *Yaiguaje v. Chevron Corporation.* The approach taken by the Ontario courts and, ultimately, the Canadian Supreme Court, will have a lasting impact upon the reputation and credibility of the judiciary and will require greater elaboration of the natural justice defense.[188]

V. NATURAL JUSTICE AND *YAIGUAJE v. CHEVRON CORPORATION*

Introduction

The natural justice defense may be most effectively applied to deny recognition of the Judgment in Canada in two separate circumstances. An initial challenge to recognition may be posed as a result of the numerous and significant procedural irregularities that plagued the Superior Court proceedings. A second challenge to recognition arises from evidence demonstrating the absence of independence, bias and conflict of interest. The following section of the article examines these grounds for denying recognition of the Judgment in Canada.

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judgment); Sincies Chiementin S.p.A. v. King, [2010] O.J. No. 5124 (O.S.C.J.) (Italian judgment); *Oakwell Eng'g, Ltd.,* 81 O.R.3d 288 (Singaporean judgment); Cook Nook Hazelton Lanes, Ltd. v. Trudeau Corp., [2003] O.J. No. 3354 (S.C.) (French judgment).

188. *See, e.g.,* Tanya J. Monestier, *Foreign Judgments at Common Law: Rethinking the Enforcement Rules,* 28 DALHOUSIE L.J. 163, 180 (2005) (noting "foreign means foreign - the [*Beals*] test, in theory, would apply equally and indiscriminately to judgments from the U.S., Ghana, Uzbekistan, Romania and Burkina Faso"); Antonin I. Pribetic, *"Strangers in a Strange Land"- Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario,* J. TRANSNAT'L L. & POL'Y 347, 388 (2004) (concluding the lack of clarity in the Canadian recognition rules after the decision in *Beals* "begs the question whether . . . 'hard cases' will continue to put pressure on the traditional doctrine that an enforceable foreign judgment is conclusive on the merits"). One commentator prophetically summarized the dilemma confronting Canadian courts as has now come to pass in *Yaiguaje v. Chevron Corporation* as follows:

> [o]ne is left wondering, how far does the principle of international comity extend? Would the Court have been so eager to enforce a judgment from a system more alien to Canada's than that of our neighbour to the south? It will be interesting to see how courts will apply the dicta from *Beals* when they are faced with judgments emanating from foreign states whose judicial processes and protections are less congruent with Canada's.

Sears, *supra* note 184, at 242-43.

Procedural Irregularities

Any discussion of procedural irregularities must start with the proposition that Canadian law does not require foreign proceedings to be identical to those utilized in Canada in order for recognition to occur. Courts have disregarded differences in evidentiary rules including whether certain evidence would be admissible or inadmissible in a similar Canadian proceeding.[189] Procedural rules beyond evidentiary matters do not need to be identical or even nearly identical for a court to recognize and allow enforcement of a foreign judgment within Canada.[190] Procedural rules are of little or no interest to Canadian courts in recognition actions even in the event of irregularities resulting from the foreign court's non-compliance with its own applicable procedures.[191]

The sole exception to the inconsequential nature of procedural rules is the existence of a fundamental flaw in the foreign proceedings.[192] Several Canadian courts have narrowly defined these fundamental flaws to include inadequate notice, denial of the right to be heard, and bias.[193] Utilizing this narrow standard, the likelihood of successful utilization of the natural justice defense is unlikely with respect to notice and denial of the right to be heard. Chevron clearly had notice of the Plaintiffs' claims dating back to their original filing against Texaco in the United States in 1993. These claims remained pending at the time of Chevron's acquisition of Texaco in 2001. Chevron was further notified of the claims after their re-filing in Ecuador in 2003. Chevron's defenses to these claims, although disregarded, were clearly heard in the course of the eight years in which the litigation was pending before the trial court and additional

189. *See, e.g.,* Soc'y of Lloyd's v. Meinzer, [2001] 55 O.R. 3d, ¶ 21 (C.A.); KOEHNEN & KLEIN, *supra* note 127, at 35.

190. *Marcus Food Co.,* 109 O.R.3d 535, ¶ 24 (holding "[t]he procedural rules and safeguards that exist in Ontario are not the only ones that comply with the principles of natural justice").

191. *See, e.g.,* Pro Swing, Inc. v. Elta Golf, Inc., [2006] 2 S.C.R. 612, ¶ 12; WALKER, *supra* note 140, §64.05[2] (rejecting consideration of procedural irregularities as embroiling the enforcing court in an impermissible "review of the decision-making process of the issuing court").

192. *See* KOEHNEN & KLEIN, *supra* note 127, at 35.

193. *See, e.g.,* S. Pac. Imps., Inc. v. Ho, [2009] B.C.J. No. 733, ¶ 40 (C.A.) (service of process, opportunity to respond and full appellate review); Suncom, Inc. v. Andrew Stone Casino Promotions, Inc., [20007] B.C.J. No. 2818, ¶ 31 (S.C.) (notice and opportunity to defend); Cortes v. Yorktown Sec., Inc., [2007] B.C.W.L.D. 2086 (S.C.) (adequacy of notice); Arcadia Int'l L.L.C. v. Janmeja, [2008] N.S.J. No. 147 (S.C.) (adequacy of notice); Bank of Mong. v. Taskin, [2011] O.J. No. 4572, ¶¶ 44-46 (S.C.) (notice, opportunity to defend and knowledge of the amount of damages).

year for appellate review. Chevron was not limited in any manner in the number of pleadings filed in response to the Plaintiffs' claims at trial and on appeal. These pleadings number in the thousands of pages including exhibits. Additionally, Chevron's right to adduce evidence and present it to the trial and appellate courts was equally unimpaired. The presence of possible bias in the proceedings presents a much stronger defense to recognition than notice and the right to be heard.[194]

Other courts considering foreign judgments have utilized broader language to describe the procedural irregularities sufficient to prevent recognition. The standards established by these courts have been described as requiring "minimum standards of fairness" and "due process"[195] and the avoidance of "flagrant" breaches of natural justice.[196] These standards include the inability to present defenses relating to jurisdiction and delays by the foreign court in considering such defenses without the risk of entry of a default judgment.[197]

The possibility of a successful use of the natural justice defense increases significantly if this broader approach is utilized in reviewing the procedures that resulted in the Judgment. The totality of the circumstances resulting in the entry of the Judgment reveals a pattern of significant departure from applicable procedural rules commencing early in the Ecuadorian proceedings with the Superior Court's failure to timely rule on Chevron's motion to dismiss.[198] Further procedural irregularities surrounded the abrupt abandonment of the joint evidence collection plan, appointment of Cabrera, and failure to conduct hearings regarding this appointment and the integrity of his collection procedures and resultant report.[199] The procedural failures and lack of judicial oversight with respect to Cabrera's activities are particularly egregious given the allegations of violation of his mandate in assessing damages beyond environmental injury, improper

194. *See infra* notes 226-57 and accompanying text.

195. Beals v. Saldanha, [2003] 3 S.C.R. 416, ¶¶ 60, 64; Skippings Rutley v. Darragh, [2008] B.C.J. No. 287, ¶ 13 (S.C.).

196. Angba v. Marie, [2004] F.C.J. No. 2126, ¶ 17 (Fed. Ct.).

197. Litecubes, L.L.C. v. N. Light Prods., Inc., [2009] B.C.J. No. 262 ¶ 44 (S.C.). The British Columbia Supreme Court held in this regard that:

> [e]vidence of whether or not the defendant had a procedural opportunity for a period of attornment immunity in the foreign court, to enable it to contest jurisdiction and to not run the risk of a default judgment, may be something the local courts will want to consider in determining [the natural justice defense].

Id.

198. *Id.*

199. *See supra* notes 50-56 and accompanying text.

collaboration with Plaintiffs' representatives in violation of his independent status and disputed authorship of his report.[200] Despite the gravity of these claims, the Superior Court refused to investigate their veracity in a meaningful fashion.[201] An additional procedural deficiency exists in the Superior Court's penalization of the right to appeal by doubling the amount of damages unless Chevron waived such right and issued a public apology within fifteen days of the entry of the Judgment.[202] The Provincial Court endorsed these irregularities on appeal in its decisions declining to investigate the Superior Court's departures from applicable procedures and affirming the Judgment.[203] Arguably any of these anomalies standing alone could result in a decision to decline recognition of the Judgment in Canada on the basis of an expanded approach to natural justice in the context of foreign court procedures. The weight of these irregularities when considered as a whole is most likely sufficient to overcome the disinterest of Canadian courts in foreign procedures and prevent recognition of the Judgment.

The Ecuadorian Judicial System

Chevron may also elect to initiate a broader attack on the operation of the Ecuadorian judicial system. This attack would most likely focus on two closely related factors, specifically, the absence of judicial independence and bias. The combination of these factors may be sufficient to overcome the traditional reluctance of Canadian courts to "reach deeply into the structure of the domestic court's justice system."[204] This reluctance may be further eroded by the incongruity of the Canadian and Ecuadorian legal systems. Recognition opinions to date have addressed foreign judgments originating from jurisdictions with similar provenance or deemed inherently reliable.[205] By contrast, the Ecuadorian system does not share a similar heritage nor is entitled to a presumption of reliability equivalent to other considered jurisdictions. Assumptions of independence and the absence of bias and conflict of interest regarding foreign judicial systems contained in previous opinions cannot be made in this case.[206]

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200. *See supra* notes 54, 65-66, 113, 116-17 and accompanying text.

201. *See supra* note 82 and accompanying text.

202. *See supra* note 83 and accompanying text.

203. *See supra* notes 93-99 and accompanying text.

204. Pro Swing, Inc. v. Elta Golf, Inc., [2006] 2 S.C.R. 612, ¶ 13.

205. *See supra* notes 185-87 and accompanying text.

206. *See* Beals v. Saldanha, [2003] 3 S.C.R. 416, ¶ 62 (noting that the assessment of "basic procedural safeguards such as judicial independence and fair ethical rules . . . . is easier when the foreign legal system is either similar to or familiar to Canadian courts").

The judicial independence necessary for the recognition of a foreign judgment is lacking in this case more than in any previous circumstance confronting Canadian courts. From a macro-level, the Ecuadorian judicial system has been plagued by a perceived lack of independence since the Ecuadorian Congress and then-President Lucio Gutiérrez purged the country's three highest judicial tribunals including the Supreme Court in 2004 and 2005.[207] The newly-appointed Supreme Court declared the power to appoint and re-appoint lower court judges to four year terms in November 2005.[208] The effect of this declaration was to make re-appointment contingent upon "whether [judges'] rulings demonstrated their loyalty to the positions held by the higher-court judges who appointed them."[209]

This lack of independence further deteriorated upon President Correa's assumption of office in November 2006. The judiciary was again purged through the removal of all of the judges sitting on the Constitutional Tribunal and their replacement with appointees deemed loyal to President Correa.[210] Ecuador's new constitution adopted the following spring declared the supremacy of the legislative branch over the judiciary, which primacy was upheld by the Constitutional Tribunal.[211] In addition to these manipulations of the judicial system, the Correa administration has been accused of threatening judges with violence, removal and prosecution in instances where they have ruled against the government's interests.[212] These developments have led commentators to conclude the rule of law is not respected in Ecuador in cases where the political interests of the Correa administration are at stake.[213] These conclusions have

207. VLADIMIRO ALVAREZ GRAU, REPORT ON THE ECUADORIAN JUDICIAL SYSTEM¶¶ 30-33 (Sept. 2010), *cited in* Chevron Corp. v. Donziger, 768 F. Supp.2d 581, 617 (S.D.N.Y. 2011) [hereinafter Alvarez Report]. Alvarez has been described as "an impressively credentialed expert" with forty years of experience as a practicing attorney, elected and appointed government official and academic in Ecuador. *Donziger,* 768 F. Supp.2d at 616 n.163.

208. Alvarez Report, *supra* note 207, ¶ 33.

209. *Id.*

210. *Id.* ¶¶ 37-40.

211. *Id.* ¶ 44.

212. *Id.* ¶¶ 56-59.

213. *Id.* ¶¶ 62, 69, 82, 87 (quoting former legislators, judges and attorneys as describing the judicial system in Ecuador as "completely collapsed," lacking "integrity and firmness in applying the law and administering justice," in a state of "institutional crisis," operating under "ruinous" political influence, and exemplified by "corruption at every step, delays all around, alarming incompetence, undue pressure and influence . . . to the point that at this time justice in Ecuador is just one more item up

been echoed in reports of international organizations[214] and national governments[215] and one judicial opinion in the United States.[216]

Specific examples of this lack of independence arose throughout the Lago Agrio litigation and subsequent appeal. Chevron claimed the Superior Court lacked independence as early as July 2006 when it abandoned the joint evidence collection plan at the behest of the Correa campaign and as a result of pressure exerted by the Plaintiffs

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for sale"). Based upon his analysis and interviews conducted in preparation of his report, Alvarez concluded:

> [t]he cumulative effect of the political pressure on the Judiciary cannot be overstated . . . . The situation has become so dire that, in those cases where President Correa or others in his administration express a view, the judge must either rule accordingly or face the high likelihood of public condemnation, removal from office, and even criminal prosecution . . . . It is not possible to rely on the independence of the Judicial Branch, because it no longer acts impartially, with integrity and firmness in applying the law and administering justice. Rather, on the contrary, members of the Judiciary are subject to constant pressure, temptations and threats that influence their decisions.

Id. ¶¶ 82, 87.

214. *See, e.g.*, WORLD BANK, WORLDWIDE GOVERNANCE INDICATOR (2009), *available at* http://info.worldbank.org/wgi/sc_country.asp (ranking Ecuador in the eighth percentile of the 213 economies studied with respect to the rule of law); WORLD ECON. FORUM, GLOBAL COMPETITIVENESS REPORT, tbl. 1.06 (2011), *available at* http://reports.weforum.org/global-competitiveness-2011-2012 (ranking Ecuador 130th out of 142 countries surveyed for judicial independence).

215. *See, e.g.*, U.S. DEP'T OF STATE, HUMAN RIGHTS REPORT: ECUADOR § 1(e) (2010), *available at* http://www.state.gov./i/drl/rls/hrrpt/2010/wha/154504.htm (concluding that "[w]hile the Constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption . . . . Judges occasionally reached decisions based on media influence or political and economic pressures"); U.S. DEP'T OF STATE, INVESTMENT CLIMATE STATEMENT FOR ECUADOR (2010), *available at* http://www.state.gov/e/eeb/rls/othr/ics/2010/138060.htm (concluding that "[s]ystemic weakness in the judicial system and its susceptibility to political and economic pressures constitute important problems faced by U.S. companies investing in or trading with Ecuador . . . . Concerns have been raised in the media and by the private sector that Ecuadorian courts may be susceptible to outside pressure.").

216. *See* Chevron Corp. v. Donziger, 768 F. Supp.2d 581, 633, 636 (S.D.N.Y. 2011) (in which the court concluded "there is abundant evidence . . . that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least at the time period relevant here, especially in cases such as this" and "Chevron is . . . likely to prevail on its contention" regarding the absence of impartial tribunals and procedures compatible with the requirements of due process of law).

regarding the filing of a complaint alleging judicial misconduct.[217] Further lack of independence may be inferred from the Superior Court's disregard of objections to Cabrera's collection and analysis procedures, which included allegations of significant departures from accepted methodologies, violations of the mandate governing his appointment, and manipulation and alteration of evidence.[218] This lack of independence in the supervision of Cabrera resulted in the outcome desired by the Correa administration, specifically, disregard of the remediation agreements and release and assessment of a multi-billion dollar award placing the blame for all injuries incurred as a result of the Consortium's operations entirely on Chevron.[219] The appellate court ensured this result remained in place through its cursory examination of the circumstances surrounding Cabrera's appointment and refusal to investigate Chevron's claims of fraud, misconduct and procedural irregularities.[220]

The Superior Court's lack of independence was not limited to Cabrera and his activities. President Correa exerted pressure on the court through numerous public statements supportive of the Plaintiffs' cause and condemning Chevron, offering government support in evidence collection, and instigating the criminal prosecution of individuals involved in the negotiation of the remediation agreements and release.[221] The pressure placed upon the Superior Court was intensified by actions and statements of the Ecuadorian Attorney General's office and members of the Constituent Assembly.[222] The message to the Superior Court from these actions was unmistakably clear. This message was certainly not lost on the Plaintiffs as demonstrated by the comments of one of their representatives acknowledging the importance of politics, pressure, intimidation, and humiliation to the outcome of the case.[223]

The alleged lack of independence could perhaps be dismissed as no more than expressions of disappointment and frustration by an unsuccessful litigant. However, these allegations have been affirmed by two separate and independent tribunals. The most comprehensive findings in this regard are contained in *In re Application of Chevron Corporation* in which the district court concluded politics, intimidation and corruption may have influenced the appointment of

217. *See supra* notes 50-51 and accompanying text.

218. *See supra* notes 53-55 and accompanying text.

219. *See supra* notes 54, 59 and accompanying text.

220. *See supra* note 82 and accompanying text.

221. *See supra* notes 69-70 and accompanying text.

222. *See supra* notes 71-72 and accompanying text.

223. *See supra* note 115 and accompanying text.

Cabrera and the outcome of the litigation.[224] Additional support for these allegations may be found in the Third Interim Award in *Chevron Corporation v. Republic of Ecuador* in which the Permanent Court of Arbitration found Chevron's claims of government collusion with the Plaintiffs and abuse of the criminal justice system not to be interposed in bad faith nor frivolous or vexatious.[225] Although the outcome of this arbitration as well as a related judicial proceeding in the United States remain to be determined, the findings of these tribunals lends credence to Chevron's claims of political interference with the operation of an independent judiciary in this case.

Judicial Bias

A more difficult burden rests on Chevron to establish a reasonable apprehension of bias sufficient to prevent recognition of the Judgment. The issue to be addressed is whether a reasonable person well-informed of the facts at issue and viewing them realistically and practically would conclude that it is more likely than not that the decision-maker did not decide the case in a fair manner.[226] Any finding of bias must be supported by evidence produced by the proponent alternatively characterized as "cogent," "convincing," and "substantial."[227] Despite these obstacles, Chevron can meet its burden in this case.

Initially, the evidence of lack of judicial independence lends itself to an argument that the Judgment was also a product of bias. The deference to pressures brought to bear by other branches of the Ecuadorian government and the Plaintiffs supports a conclusion that the Judgment was not the product of impartial and neutral consideration of the evidence but rather was the result of a process significantly tilted in favor of a finding of liability.[228] The evidence in support of such a conclusion is significant. The disregard of the mutually-agreed upon joint evidence collection process, the unilateral appointment of Cabrera and subsequent disregard of problems with his methodology, analysis and conclusions readily lends itself to a conclusion that the Superior Court was motivated by something other than the fair dispensation of justice.[229] The failure of the appellate

224. 749 F. Supp.2d 141, 144-45, 147, 150, 152. *See also supra* notes 114-15 and accompanying text.

225. Third Interim Award, *supra* note 12 ¶¶ 4.57-4.58. *See also supra* notes 124-27 and accompanying text.

226. Ultracuts Franchises, Inc. v. Wal-Mart Canada Corp., [2005] 196 Man. R.2d 163 ¶ 17 (Q.B.).

227. *Id.* ¶¶ 17, 51-52.

228. *See supra* notes 69-72, 115, 221-23 and accompanying text.

229. *See supra* notes 50-51, 53-55, 59, 82, 217-20 and accompanying text.

court to thoroughly investigate these allegations is not only relevant to the existence of an independent judicial system but also must be considered in the context of whether Chevron was afforded a neutral forum untainted by a pre-determined outcome.[230] Additional support for this conclusion may be found in the portion of the Judgment conditioning Chevron's liability for half of the award on its issuance of a public apology.[231] The general perceptions of the Ecuadorian judicial system by knowledgeable experts, international organizations and country-specific sources further supports the contention that the Judgment was a product of bias.[232]

The existence of bias in this case is strengthened by the presence of two additional factors. The initial factor is the existence of videotaped conversations between Nuñez, government officials and third parties in which the possible outcome of the case was discussed, the involvement of the Ecuadorian government throughout the proceedings was confirmed and a possible payoff to Nuñez was proposed.[233] These discussions were in addition to previous statements made by Nuñez regarding the outcome of the litigation prior to the completion of his review of the evidence.[234] Although Nuñez eventually recused himself from the case, his successor proved equally susceptible to outside influences in the administration of justice.[235]

An additional factor strengthening the presence of bias is the numerous determinations by independent courts regarding the Ecuadorian proceedings. These courts have painted an unflattering portrait of the conduct of the Superior Court and one of the Plaintiffs' representatives. Three separate U.S. courts have described the proceedings in Ecuador as tainted by fraud,[236] and another characterized the conduct it examined as "inappropriate, unethical and perhaps illegal."[237] The federal court with the closest relationship to the proceedings, the U.S. District Court for the Southern District

230. *See supra* notes 82, 220 and accompanying text.

231. *See supra* note 83, 202 and accompanying text.

232. *See supra* notes 207-16 and accompanying text.

233. *See supra* note 76 and accompanying text.

234. *See supra* note 75 and accompanying text.

235. *See supra* note 78 and accompanying text.

236. *See In re* Application of Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011); Chevron Corp. v. E-Tech Int'l, No.cv1146-IEG (WMc), 2010 U.S. Dist. LEXIS 94396, at *17 (S.D. Cal. Sept. 10, 2010); Chevron Corp. v. Camp, No. 1:10mc27, 2010 U.S. Dist. LEXIS 97440, at *16 (W.D.N.C. Aug. 30, 2010). *See also supra* note 117 and accompanying text.

237. *In re* Chevron Corp., No. 0-MC-21JH/LFG, 2010 U.S. Dist. LEXIS 119943, at *6 (D.N.M. Sept. 1, 2010). *See also supra* note 131 and accompanying text.

of New York, has made extensive findings regarding the judicial process in Ecuador in this case. These findings include "possible fraud and misconduct," "political activity [and] intimidation of the Ecuadorian courts," and corruption.[238] The presence of these assessments by independent tribunals sets this recognition proceeding apart from others conducted by Canadian courts and is of substantial assistance to Chevron in meeting its burden of proving the existence of a reasonable apprehension of bias. Any bias argument advanced in this proceeding would not be supported merely by allegations and evidence provided by the proponent but also would be supported by findings of neutral tribunals from a jurisdiction closely resembling Canada with respect to procedures and notions of due process.

The presence of these factors distinguishes this case from the detailed examination and ultimate rejection of judicial bias in the context of a recognition proceeding set forth in *Ultracuts Franchises, Inc. v. Wal-Mart Canada Corporation.* An additional four distinguishing factors are present in this case. Initially, unlike the decision in *Ultracuts,* the party seeking recognition admitted that the Judgment was the product of a corrupt judicial system.[239]

A second distinguishing factor is the inapplicability of the presumption of impartiality. The court in *Ultracuts* refused to find a reasonable apprehension of bias in part based upon the assumption that judges are "people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[240] This assumption has led Canadian courts to be hesitant in finding bias. Such assumption and resultant hesitancy is not appropriate in this case. Any Canadian court called upon to grant recognition to the Judgment will not be reviewing a U.S. court decision but will instead be asked to affirm the product of a deeply flawed judicial system dissimilar to the Canadian system and located in the developing world. The flaws existing in this system and on full display throughout the proceedings before the Superior Court are not imaginary nor the product of an overly aggressive litigation strategy. To the contrary, the problems plaguing the conduct of the litigation including the possibility of judicial bias, are well-documented and supported by numerous independent authorities including international organizations, the U.S. government and U.S. and international tribunals. The presence of such evidence distinguishes this case from the general and unsupported allegation of bias unsuccessfully advanced in *Ultracuts.* This is not to conclude that all

238. *In re* Application of Chevron Corp., 749 F. Supp.2d 141, 144-45, 147, 157-58 (S.D.N.Y. 2010).

239. *See supra* note 115 and accompanying text.

240. Ultracuts Franchises, Inc. v. Wal-Mart Canada Corp., [2005] 196 Man. R.2d 163 ¶ 50 (Q.B.).

judicial decisions issued by courts in the developing world are inherently suspect and should not be afforded the presumption in favor of judicial impartiality. Rather, it is to conclude that, in this case, the presumption is inapplicable given the combination of well-documented allegations of procedural irregularities, the lack of judicial independence, and their confirmation by numerous independent and well-regarded sources.

A third distinguishing factor is the presence of a direct pecuniary interest in the outcome of the litigation. The court in *Ultracuts* acknowledged that a financial or pecuniary interest in a party or the subject matter of a claim could serve to disqualify a judge in a given case.[241] However, the interest was required to be "direct."[242] The fact that a judge has a shareholding interest in a party to the litigation without more does not satisfy the "direct interest" standard.[243] The financial interest of the Superior Court in the outcome of the litigation was well beyond a shareholding interest and in fact could not be any more direct. The failure of the Superior Court to decide the case in a manner consistent with the viewpoint of the Correa administration could have resulted in the removal of Nuñez or Zambrano from office and criminal prosecution.[244] This possibility was reinforced by actions and statements of the Ecuadorian Attorney General's office and members of the Constituent Assembly.[245] This possibility was also documented by a wide variety of independent and well-respected sources.[246] An additional direct financial interest was present in the discussions concerning a possible payoff of Nuñez from proceeds of any judgment that he might enter in the case.[247] The presence of these factors creates a distinct possibility of a direct pecuniary interest and a reasonable apprehension of bias in the outcome of the litigation. It also clearly distinguishes the court's refusal to deny recognition to a judgment due to the shareholdings of two of the ten judges involved in the three levels of hearings at issue in *Ultracuts*.

The court's refusal to deny recognition to the judgment in *Ultracuts* due to the shareholdings of two of the ten judges involved in the decision process is important for another reason as well. Any possible bias was mitigated by the fact that the ultimate determination of the case rested on the decisions of multiple judges at

241. *Id.* ¶ 18.

242. *Id.* ¶ 33.

243. *Id.* ¶ 27.

244. Alvarez Report, *supra* note 207, ¶¶ 56-59.

245. *See supra* notes 71-72 and accompanying text.

246. *See supra* notes 207-16 and accompanying text.

247. *See supra* note 76 and accompanying text.

three different levels of review.[248] The court noted that the decision of the Arkansas Supreme Court upholding the result against Ultracuts was unanimous and was authored by a member of the court who was not a Wal-Mart shareholder.[249] This was not a case where the allegedly tainted judge cast the deciding vote in a split decision.[250] It could not be reasonably inferred under such circumstances that any bias of the single shareholding member of the court, should such exist, tainted the conclusions reached by the other five members of the appellate panel.[251] However, such was not the circumstance in Ecuador where a single trial judge possessing plenary power was solely responsible for the outcome of the litigation subject to review by another single appellate judge. The *Ultracuts* court concluded that "[w]here six judges on an American court of appeal hear and unanimously decide a case, it is difficult to imagine any reasonable person believing that one judge would have been able to sway all of his colleagues to decide the case in a biased manner."[252] By contrast, it is not so difficult to imagine bias by a single decision-maker lacking independence and operating in a legal system as flawed as the one presently existing in Ecuador.

It may be contended that the persuasiveness of these arguments is undercut by two factors cited with approval in *Ultracuts*. *Ultracuts* requires bias claims to be supported by factual evidence which "could take the form of scientific studies of the court system, a review of the outcome of claims against the company, an analysis of past decisions demonstrating some bias, evidence of people involved in the justice system . . . [or] evidence from employees of the company."[253] Chevron has arguably satisfied this burden through citation of the numerous incidents of procedural irregularities, political interference with judicial processes and the previously-mentioned judicial bias. The conclusions drawn from these incidents are reinforced by studies of international organizations and the U.S. government and findings of several U.S. courts. Although these studies and findings are not necessarily "scientific," they are more than adequate to support a conclusion of judicial bias. Furthermore, the Alvarez Report clearly constitutes "evidence of people involved in the justice system." In any event, *Ultracuts* does not require that evidence of bias be supported by scientific studies and outcome analyses but only that such evidence

248. *Ultracuts Franchises, Inc.*, 196 Man. R.2d 163, ¶ 59.

249. *Id.*

250. *Id.* (citing Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259, ¶ 93).

251. *Id.*

252. *Id.* ¶ 60.

253. *Id.* ¶ 74.

is "factual." This is a burden Chevron has clearly met in this case especially in comparison to the unsupported allegations of bias rejected in *Ultracuts*.

The second factor is efforts by the party resisting recognition to disqualify the presiding judge. *Ultracuts* describes the "current Canadian practice . . . [as providing] that a litigant who wishes to raise the issue of a judge's bias should make the application to the judge himself or herself."[254] This prerequisite respects the court's jurisdiction, prevents interference in trial court decisions by appellate courts, is cheaper and faster, tempers the frequency and type of complaints by requiring direct confrontation of the adjudicator and places on the circumstances surrounding the alleged bias on the record.[255] This approach also permits the judge accused of bias the opportunity to respond.[256] Admittedly such direct in-court challenges did not occur in the Ecuadorian litigation prior to the release of the videotapes purporting to demonstrate Nuñez's predetermination of the merits of the case.

However, *Ultracuts* excuses litigants from moving for recusal if they can demonstrate that to do so would have been futile.[257] Such a motion undoubtedly would have been futile in this case. The Superior Court was unlikely to consider a motion to recuse based upon its demonstrated disregard for compliance with applicable procedures throughout the trial. Political pressures to reach a desired result and the possibility of removal and prosecution would also clearly influence any decision by Nuñez to step aside. The court in *Ultracuts* also assumed the potential for bias would be eliminated should a motion to recuse be successful. Such would not have been the case had Chevron filed and prevailed upon a motion to recuse Nuñez given that his replacement would be subject to the same pressures to reach the result desired by the Ecuadorian government. That Nuñez's replacement was ultimately removed from the bench albeit for conduct in a different case demonstrates that any motion to recuse would have been futile given the inescapability of bias in this type of case.

Despite these two possible shortcomings, a Canadian court could conclude there is a reasonable apprehension of judicial bias in this case as to defeat the Plaintiffs' action for recognition. The circumstances supporting a finding of bias have been considered by numerous reasonable and informed persons and institutions. These persons and institutions have reached similar conclusions regarding

254. *Id.* ¶ 82.

255. *Id.* ¶ 83.

256. *Id.* ¶ 88.

257. *Id.* ¶ 89.

the Ecuadorian judicial system in general and its operation in this case in particular. Furthermore, the "social reality" emphasized in *Ultracuts* leads to the conclusion that the Ecuadorian judicial system as presently constituted is subject to political pressure, manipulation and bias in high profile cases such as the Lago Agrio litigation. The reasonable likelihood of bias when combined with the lack of judicial independence in general and as specific to this case is sufficient to deny recognition of the Judgment on the basis of natural justice.

VI. Conclusion

The stakes for the Canadian judicial system arising from the Statement of Claim are high. Canada is the first jurisdiction to confront the issue of recognition in proceedings which present numerous difficult and novel legal questions. Courts will be unable to assume that the issuing court and judicial system are inherently reliable given their incongruence with Canadian procedural safeguards and substantive standards.[258] Instead courts called upon to determine the outcome of the Plaintiffs' recognition request will be required to reconcile Canada's liberal approach and the many obstacles and deficiencies within the Judgment and the Ecuadorian judicial system. This will require revisiting, clarifying and revising defenses to recognition, including the natural justice defense.[259] The Plaintiffs' recognition action presents an opportunity to account for judgments emanating from the developing world which will inevitably be presented for recognition in Canada. By contrast, unwavering adherence to the liberal approach to recognition would result in an unfair outcome and cast a negative light on the Canadian judicial system. This choice may belong to the Canadian Supreme Court in the not so distant future.

258. *See* Sears, *supra* note 184, at 242-43.

259. *See* JEAN GABRIEL CASTEL & JANET WALKER, CANADIAN CONFLICT OF LAWS 14-27 (5th ed. 2002) (commenting that revision of the defenses to recognition is necessary "so as to protect persons . . . who have been sued in foreign courts from particular kinds of unfairness that can arise in cross-border litigation, and so as to prevent abuse from occurring as a result of liberal rules for the enforcement of judgments"); *see also* Monestier, *supra* note 188, at 193 (concluding that "modified defenses are a necessary corollary of liberalized enforcement rules").