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Public Policy and the Recognition of Foreign Judgments in Canada

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PUBLIC POLICY AND THE RECOGNITION OF FOREIGN JUDGMENTS IN CANADA

Lucien J. Dhooge†

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I. Introduction

On May 30, 2012, forty-seven residents of the Sucumbíos 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 seeking recognition and enforcement of an $18.25 billion judgment entered against Chevron by the Provincial Court of Justice of Nueva Loja in the Sucumbíos Province of Ecuador on February 14, 2011, and affirmed by the Appellate Division of that same Provincial Court on January 3, 2012. The recognition of the Judgment outside of Ecuador is crucial, as Chevron maintains insufficient assets in Ecuador for complete satisfaction of Plaintiffs’ award. The Statement of Claim filed in Canada is the first effort seeking such recognition. Although Canada is neither Chevron’s domicile nor the location of its most significant assets, Plaintiffs’ selection of Canada is nevertheless logical, as Canada is “one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions.”

1 Statement of Claim, Yaiguaje v. Chevron Corp., 2012 No. 12-454778 (Can. Ont. Sup. Ct.) [hereinafter Statement of Claim]. All references to “Chevron” throughout this article will be to Chevron Corporation unless otherwise stated.


3 Chevron has approximately $200 million in assets in or originating from Ecuador including a $96.3 million debt owed to it by the Ecuadorian government, funds located in various bank accounts, and licensing fees generated by the use of Chevron trademarks in the country. See Court Orders First Handover of Chevron’s Ecuador Assets, ENVTL. NEWS SERV. (Oct. 17, 2012), http://ens-newswire.com/2012/10/17/court-orders-first-handover-of-chevrons-ecuador-assets/.


5 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). See also infra note 157 and accompanying text. This hospitality is consistent with 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.”
This article examines the status of the Ecuadorian Judgment (Judgment). The article initially explores the history of Texaco’s investment in Ecuador, the environmental impacts allegedly resulting from Texaco’s activities in Ecuador, and the history of resulting litigation in the United States and Ecuador. Section III of the article reviews Plaintiffs’ recognition proceeding in Canada as well as subsequent related litigation in the United States and before the Permanent Court of Arbitration. Section IV examines Canadian law relating to the recognition of foreign judgments, including the Supreme Court of Canada’s opinion in *Beals v. Saldanha*, the public policy defense annunciated in that opinion, and its elaboration in subsequent provincial opinions. Section V analyzes Plaintiffs’ recognition action in Canada within the context of the public policy defense. The article concludes that Chevron may be able to assert a public policy-based defense despite substantial burdens and risks. The recognition action also presents significant issues affecting the reputation and credibility of the Canadian judiciary in general, as well as the liberal approach taken with respect to foreign judgments.

II. Texaco’s Investment in Ecuador and Resultant Litigation

A. Texaco’s Investment in Petroleum Exploration and Production

In March 1964, the Ecuadorian government invited Texaco and Gulf Oil Corporation (Gulf) to conduct exploratory activities in the Oriente region. Texaco and Gulf accepted this invitation and formed a consortium (Consortium) to conduct this exploration. The Consortium discovered commercial quantities

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8 The Consortium agreement was between Compania Texaco de Petroleos del Ecuador, a subsidiary of Texaco del 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).
of oil in 1967 and began export operations in 1972. Texaco served as the Consortium’s operator throughout this period of time.

Effective June 1972, Ecuadorian law limited the size of concession areas granted to foreign oil companies, increased the royalties payable to the government, and established 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.” Texaco and Gulf relinquished a portion of their concession area to the state-owned oil company, Compania Estatal Petrolera Ecuatoriana (CEPE). New concession agreements granting CEPE a 25% interest in the Consortium were executed in August 1973 and June 1974.

Texaco continued its participation in the Consortium as the operator and owner until July 1990 when Petroamazonas, a subsidiary of PetroEcuador, assumed control of operations. Texaco’s role as a participant in the Consortium ended in June 1992 when the concession agreement expired and was not renewed. The Consortium extracted more than 1.4 billion barrels of oil from the commencement of commercial production in 1972.

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10 Complaint at 5, Aguinda v. ChevronTexaco Corp., No. 002-2003 (Sucumbios Provincial Ct. of Justice of Nueva Loja, May 7, 2003) (Ecuador) [hereinafter Lago Agrio Complaint] (alleging 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”). Texaco’s role as operator of the Consortium was not, however, absolute. See Third Interim Award, supra note 7, ¶¶ 3.8, 3.9 (concluding that the Ecuadorian national 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”).


13 See id. at 340; see also Third Interim Award, supra note 7, ¶ 3.6. Gulf sold its remaining interest to CEPE in December 1976 for $82.1 million. Id.

14 See Third Interim Award, supra note 7, ¶ 3.10.

15 See id. ¶ 3.11.
through the expiration of the concession agreement in 1992.\textsuperscript{16} The Ecuadorian government received approximately $23 billion in revenues, royalties, taxes, and subsidies during this period of time, and Texaco received approximately $500 million as a result of the Consortium’s operations.\textsuperscript{17}

The Consortium’s environmental and health impacts are subject to considerable controversy.\textsuperscript{18} In 1990, PetroEcuador and Texaco retained two consulting firms to conduct environmental audits of the Consortium’s facilities.\textsuperscript{19} These audits indicated that the cost of environmental remediation for the Consortium’s facilities was approximately $8 million to $13 million.\textsuperscript{20} In May 1995, the Ecuadorian Ministry of Energy and Mines, PetroEcuador, and Texaco entered into an agreement wherein Texaco agreed to remediate designated sites at its sole expense in return for a release from existing and future claims by Ecuador and PetroEcuador.\textsuperscript{21} Texaco drafted plans for each site, obtained Ecuador and PetroEcuador’s approval, and performed the remediation from October 1995 through September 1998 at a cost of $40 million.\textsuperscript{22} The Ecuadorian government and PetroEcuador signed the “Act of Final Liberation of Claims and Equipment Delivery” on September 30, 1998, in which they certified that Texaco had fulfilled the 1995 agreement and released it from

\begin{itemize}
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} See, e.g., Lago Agrio Complaint, supra note 10, at 11-14 (alleging contamination of land and water resources through discharge of more than 464.7 million barrels of formation waters, increased rates of cancer and other diseases among Oriente residents, and crop and livestock losses). \textit{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 mortality and disease rates in the Oriente were similar to those in areas not subject to long-term oil extraction activities and there was little or no environmental impact or public health concerns resulting from the Consortium’s operations).
  \item \textsuperscript{19} See Third Interim Award, supra note 7, ¶ 3.10.
  \item \textsuperscript{20} See id.
  \item \textsuperscript{21} Id. ¶¶ 3.16-3.17.
  \item \textsuperscript{22} Id. ¶¶ 3.20-3.22, 3.24. Remediation costs included $1 million for socio-economic projects and $3.7 million to the municipalities of Lago Agrio, Shushufindi, Joya de los Sachas, and Francisco de Orellana in return for their dismissal of lawsuits and agreement to release Texaco from future liability. Id. ¶ 3.22.
\end{itemize}
current and future liability.23

B. Environmental Litigation in the United States

Seventy-four Ecuadorians purporting to represent more than 30,000 Oriente residents injured as a result of environmental contamination filed a class action lawsuit against Texaco in the United States District Court for the Southern District of New York in November 1993.24 The district court dismissed the complaint on the basis of forum non conveniens in 2001.25 The district court also concluded that the Ecuadorian plaintiffs had failed to establish “a meaningful nexus” between the United States and the Consortium’s decisions and practices in Ecuador, such as “control or direction over the pipe design, waste disposal, and other allegedly negligent practices.”26 The sole connections the United States had to the Consortium’s decisions and practices were the exercise of general oversight regarding finances, advice on operational decisions previously made in Ecuador, and the provision of technical information on remediation of oil spills.27 Consequently, there was insufficient evidence establishing the parent corporation exercised the necessary direction and control of Texaco’s subsidiaries required to impose liability.28 In 2002, the United States Court of Appeals for the Second Circuit affirmed this dismissal, contingent upon Texaco’s agreement to be sued in Ecuador, accept service of process, and waive any statute of limitations defense for claims expiring between the date of the filing of the complaint in the United States and one year following the complaint’s dismissal.29

23 Id. ¶ 3.26.
26 Id. at 539, 549-50.
27 Id. at 549-50.
28 The district court concluded that “Texaco’s only meaningful involvement in the activities here complained of was its indirect investment in its fourth-tier subsidiary . . . which is not a party here and which conducted its participation in the activities here complained of almost exclusively in Ecuador.” Id. at 548.
29 Aguinda v. Texaco, Inc., 303 F.3d 470, 478-80 (2d Cir. 2002).
C. Environmental Litigation in Ecuador: Procedural Issues and the Trial

Plaintiffs commenced litigation in Ecuador in May 2003. Plaintiffs based their lawsuit upon provisions of the Ecuadorian Constitution and the Environmental Management Law of 1999. Plaintiffs sought remediation of environmental contamination in the concession area and damages in an unspecified amount, 10% of which was to be remitted to Frente de Defensa de la Amazonia (Frente).

Chevron's primary defenses were summarized in its Petition to Dismiss filed in October 2003. These defenses included a claim that Plaintiffs sued the wrong entity by failing to assert claims against Texaco, lack of personal jurisdiction, expiration of the

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30 See Third Interim Award, supra note 7, ¶ 3.34.
31 CONSTITUTION OF THE REPUBLIC OF ECUADOR, August 11, 1998, arts. 23, 86-88, 90-91 (guaranteeing Ecuadorians the right to live in a healthy environment, stating the public's interest in environmental protection and biodiversity, and requiring government regulation of all aspects of the manufacture and distribution of substances injurious to human health and the environment). 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.
32 Ley de Gestión Ambiental [Environmental Management Law], Law No. 99-37, arts. 41, 43 (Ecuador) (recognizing a "popular action to denounce the breaching of environmental laws . . . and [obtain] damages . . . for the deterioration of . . . health [and] damage to the environment").
33 Lago Agrio Complaint, supra note 10, at 22-25.
34 Petition to Dismiss for Chevron Corp. at 10-18, Aguinda v. ChevronTexaco Corp., No. 002-2003 (Sucumbios Provincial Ct. of Justice of Nueva Loja, Oct. 8, 2007) (Ecuador) [hereinafter Chevron Petition to Dismiss].
35 Id. at 18-19. Chevron contended that it did not acquire Texaco in 2001. Rather, Texaco was merged with a wholly-owned subsidiary of Chevron called Keepep, Inc. with Texaco as the surviving corporation. Id. at 19 n.14. All of Texaco's pre-merger shares were cancelled and those of Keepep were converted into new shares of Texaco, resulting in Chevron's complete ownership of the surviving entity. Id. Texaco maintained separate legal status and assumed responsibility for Plaintiffs' alleged injuries. Id. The structure of this type of merger has led at least one U.S. court to conclude that "[a]s a matter of U.S. law, the assertion that Chevron succeeded to Texaco's liabilities by merger is incorrect." Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 600 n.40 (S.D.N.Y. 2011) vacated sub nom., Chevron Corp. v. Naranjo, Nos. 11-1150-cv(L), 11-1264-cv(con), 11-2259-op(con), 2011 WL 4375022 (2nd Cir. 2011), rev'd on other grounds, Chevron Corp. v. Naranjo 667 F.3d 232 (2nd Cir. 2012); see also William J. Rands, Corporate Tax: The Agony and the Ecstasy, 83 Neb. L. Rev. 39, 51 n.76 (2004) (stating that "the reverse triangular merger prevents inchoate liabilities
statute of limitations, and lack of standing.\textsuperscript{36}

The Provincial Court deferred ruling on these defenses and commenced proceedings in October 2003.\textsuperscript{37} The court initially accepted a joint plan for the collection of evidence consisting of judicial inspections of designated sites followed by expert determinations of the causes of any discovered contamination and the cost of remediation.\textsuperscript{38} One hundred and twelve sites were to be inspected pursuant to negotiated sampling and analysis plans.\textsuperscript{39} However, implementation of the joint plan was plagued by controversies concerning methodology\textsuperscript{40} and the credibility of one of Plaintiffs’ experts’ reports.\textsuperscript{41} The plan was abandoned in July

\textsuperscript{36} The consent to personal jurisdiction in Ecuador and waiver of the four-year statute of limitations were binding only on Texaco as the sole party to the U.S. litigation and in the absence of a successor-in-interest relationship between Chevron and Texaco. See Chevron Petition to Dismiss, supra note 34, at 19-20; see also CÓDIGO CIVIL [C.CIV.] art. 2235 (Ecuador) (setting forth the applicable statute of limitations). The standing defense was based upon the Environmental Management Law, which requires plaintiffs to demonstrate individualized harm rather than communal harm. See LEY DE GESTION AMBIENTAL [Environmental Management Law], Law No. 99-37, arts. 41, 43 (Ecuador) (providing that persons “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”).

\textsuperscript{37} See Third Interim Award, supra note 7, ¶¶ 3.37-38.

\textsuperscript{38} Chevron Petition to Dismiss, supra note 34, at 22.

\textsuperscript{39} Id. at 23-24. Forty-seven of the 122 designated sites were ultimately inspected. Id. at 24.

\textsuperscript{40} Id. at 28-30 (alleging Plaintiffs’ experts failed to report data on more than half of their soil and water samples, refused to utilize accredited laboratories for analysis, attributed all contamination to the Consortium’s activities, and collected samples in areas that were PetroEcuador’s responsibility to remediate). Chevron moved to expunge this evidence from the record, but the Provincial Court failed to conduct a hearing as required by Ecuador’s Civil Code. See CÓDIGO CIVIL [C. CIV.] arts. 256, 258 (Ecuador) (requiring courts to conduct hearings and expunge erroneous expert reports in the event an expert is deemed to have committed material errors).

\textsuperscript{41} The report at issue was prepared by Dr. Charles Calmbacher. According to Chevron, Calmbacher’s finding of environmental damage at two sites was tainted by prior discussion of his proposed findings with Plaintiffs’ counsel, who allegedly instructed him with respect to the outcome of his study. See Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 605-06 (S.D.N.Y. 2011) (stating that one of Plaintiffs’ representatives told Calmbacher 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”). Chevron also claimed that Calmbacher’s report was authored by Plaintiffs’
2006 when the court appointed a single expert to conduct inspections and prepare a report.\textsuperscript{42} The court appointed Richard Cabrera to determine the existence and source of environmental contamination and specify the nature of the work to be completed to remediate such locations.\textsuperscript{43} Cabrera concluded 80% of the waste pits and 100% of the production station pits needed to be remediated.\textsuperscript{44} Chevron objected to Cabrera’s methodology,\textsuperscript{45} accused him of litigation team and submitted to the Provincial Court without his approval, as evidenced by his subsequent disavowal of its contents. \textit{Id.} at 606 (finding evidence that “persons acting on behalf of [Plaintiffs] prepared reports expressing views contrary to Calmbacher’s and submitted those fictitious reports to the . . . court over his name”).

\textsuperscript{42} Chevron objected to this order as inconsistent with the previously agreed procedures and contended that the order was the product of pressure placed upon the court by then-presidential candidate Rafael Correa. \textit{See} Chevron Petition to Dismiss, \textit{supra} note 34, at 37-38; \textit{see also} Claimants’ Notice of Arbitration at 11, Chevron Corp. v. Republic of Ecuador, Case No. 2009-23 (Permanent Ct. Arb. 2012) [hereinafter Chevron Notice of Arbitration].

\textsuperscript{43} Chevron Petition to Dismiss, \textit{supra} note 34, at 37. Chevron claimed Cabrera was an improper choice due to his lack of experience in hydrocarbon chemistry, epidemiology, hydrogeology, remediation technologies, and oil and gas operations. \textit{Id.} at 38. It was subsequently alleged that Plaintiffs had advance knowledge of Cabrera’s appointment and paid him prior to the commencement of his work. \textit{Chevron Corp.}, 768 F. Supp. 2d at 607. The evidence marshaled by Chevron to date led one U.S. court to concede the possibility that “Cabrera, the supposedly independent court appointee, was paid money up front and promised future consideration by the [Plaintiffs] in the event they prevailed.” \textit{Id.} The district court further concluded there was “substantial evidence of irregularity relating to the appointment and independence of Cabrera.” \textit{Id.} at 606; \textit{see also} Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, 257 (S.D.N.Y. 2012) (opinion on partial summary judgment motion) (describing ex parte communications between Plaintiffs’ representatives and the Provincial Court regarding Cabrera’s appointment in 2006 and 2007); Witness Statement of Douglas Beltman ¶ 15, Chevron Corp. v. Donziger, 886 F. Supp. 2d 235 (S.D.N.Y. 2013) [hereinafter Beltman Statement] (in which Stratus Consulting, Inc.’s former executive vice-president stated “Cabrera lacked the skill, qualifications, and experience to conduct or review a multi-disciplinary environmental damages assessment himself”). For a description of Stratus’ involvement in the Ecuadorian litigation, \textit{see infra} note 58 and accompanying text.

\textsuperscript{44} Press Release, Chevron Corporation, Ecuador Lawsuit Report Has Fabricated Evidence, Tainted by Political Pressure 2 (Sept. 15, 2008) (on file with author). Chevron alleged Cabrera’s conclusions were based upon his visits to forty-eight well sites and one production station and his review of aerial photographs. \textit{Id.}

\textsuperscript{45} \textit{See} Chevron Corporation’s Rebuttal Brief at 4, 11, Aguinda v. ChevronTexaco Corp., No. 002-2003 (Sucumbios Provincial Ct. of Justice of Nueva Loja, Sept. 15, 2008) (Ecuador) [hereinafter Chevron Rebuttal Brief] (expressing “grave concerns” regarding Cabrera’s methodology); \textit{see also} Chevron Petition to
misconduct, and contended that utilization of his report would violate Ecuador’s Constitution.

In April 2008, Cabrera assessed Plaintiffs’ damages at $16.3 billion. This assessment included compensation for claims of wrongful death and environmental remediation, amounts sufficient to construct health care facilities and infrastructure for PetroEcuador, and disgorgement of Texaco’s profits earned from its participation in the Consortium. Cabrera revised this estimate to $27.3 billion in November 2008 to include multi-billion dollar awards for cancer deaths, groundwater and soil remediation, additional infrastructure construction, and an unjust enrichment penalty. This damages calculation exceeded Chevron’s 2008 net earnings and was almost twice the amount of its net earnings derived from international operations.

Chevron contended the estimates relating to cancer deaths and unjust enrichment exceeded the scope of Cabrera’s mandate.

Dismiss, supra note 34, at 40, 43 (accusing Cabrera of improperly limiting his sample size, extrapolating individual results over the entire concession area, and failing to maintain chain of custody for samples).

See Chevron Rebuttal Brief, supra note 45, at 4, 6, 8, 11-14 (accusing Cabrera of altering evidence, employing unqualified personnel for sampling and testing, barrng Chevron representatives from locations during sampling, and collaborating with Plaintiffs’ attorneys in the preparation of his report); see also Chevron Petition to Dismiss, supra note 34, at 42-44 (accusing Cabrera of discarding clean soil samples, destroying exculpatory evidence, and describing his inspection process as “rank amateurism” and “irredeemable bias” which could not serve as a “legitimate expert determination of the environmental impact [of hydrocarbon operations in the Oriente] or its source”); Beltman Statement, supra note 43, ¶ 10 (claiming that he was instructed that all aspects of work related to damages assessment “remain absolutely secret”).

Constitution of the Republic of Ecuador, August 11, 1998, arts. 13, 22, 24, 192 (providing, in part, for equal rights for foreigners and Ecuadorians, state liability for the “inadequate administration of justice,” and due process, including equal access to the judiciary and “effective, impartial and expedited protection of . . . rights and interests”).


Id.


Chevron had net earnings of $23.9 billion in 2008, of which $14.5 billion were derived from its international operations. Chevron Corporation Annual Report, supra note 49, at 34.

See Chevron Rebuttal Brief, supra note 45, at 6, 17 (claiming Cabrera
noting that the estimate for cancer deaths also did not identify the alleged victims, types of cancer, or supporting documentation. The unjust enrichment penalty was not provided for by Ecuadorian law, was grossly excessive in comparison to Texaco's Consortium profits, and was not requested in the Complaint. Chevron also contended that the damages estimates within the scope of Cabrera's mandate were inflated. Cabrera's conclusions placed responsibility for all environmental impacts upon Texaco and failed to attribute any responsibility to PetroEcuador. Chevron improperly "assessed billions of dollars to compensate for alleged personal injuries, to improve public services, to foster indigenous cultures, to modernize PetroEcuador's equipment, and to take away alleged 'unfair profits'" and ascribing responsibility for Ecuador's "endemic social problems" to Texaco).

53 [Id. at 17. Douglas Beltman described the damages estimate relating to purported cancer deaths as follows:

Stratus never determined that any individual actually got cancer as a result of oil production. The Cabrera Report cannot be relied upon to conclude that any individual has actually gotten cancer as a result of living near oil operations in the Oriente, that there was any elevated risk of cancer from living near oil operations in the Oriente, or that there is any reliable or valid basis for the damages assessed to Chevron. Beltman Statement, supra note 43, ¶ 53. See also infra notes 94-98 and accompanying text (discussing findings regarding similar claims in related litigation occurring in the United States).

54 See CHEVRON CORP., REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT 7 (2009); see also supra note 18 and accompanying text; Beltman Statement, supra note 43, ¶ 54 ("I have no basis to believe . . . [unjust enrichment] is a valid claim.").

55 Chevron accused Cabrera of including more than $1 billion in soil remediation costs for locations that he did not visit and waste pits that did not exist. See Chevron Notice of Arbitration, supra note 42, at 11. Cabrera also assessed the cost of remediation of waste pits at $2.2 million per pit despite similar remediation by PetroEcuador at a cost of $85,000 per pit. See CHEVRON CORP., TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON 10 (2009). Chevron alleged Cabrera's estimates relating to the improvement of Ecuador's potable water system were tainted by his failure to take a single drinking water sample. Id. See also Beltman Statement, supra note 43, ¶¶ 48-50, 52, 56 (discounting damages assessments for soil, groundwater, and natural resources remediation and the construction of a potable water system and infrastructure improvements as unsupported by "scientific data" and "not accurate, reliable, or valid"). Beltman concluded that he "[could not] say who may have any responsibility for any environmental contamination in the Oriente, what the extent of such contamination may be or what the appropriate damages amounts may be to remediate any such contamination." Id. ¶ 64.

56 See Chevron Notice of Arbitration, supra note 42, at 11; see also Beltman Statement, supra note 43, ¶¶ 33-34 (stating Stratus was instructed that "it was not necessary to allocate any of the responsibility to PetroEcuador for the condition of any of
concluded that Cabrera’s “sole interest was to facilitate the result sought by plaintiffs’ counsel and the Government of Ecuador: a windfall damages judgment against a U.S. oil company that never operated in Ecuador and had nothing to do with the Consortium.”

The credibility was further undermined by evidence indicating Plaintiffs’ representatives had authored significant portions of his report. This revelation led Plaintiffs to seek new reports

the sites in the former concession area,” that “the majority of the sites included in the Cabrera Report’s damages assessment are sites that were not TexPet’s responsibility to clean-up” and that Stratus was instructed “to ignore the ongoing clean-up in the former concession area”.


[T]his is Ecuador, okay... You can say whatever you want and at the end of the day, there’s a thousand people around the courthouse, you’re going to get what you want... [I]f we take our existing evidence on groundwater contamination, which admittedly is right below the source... [a]nd wanted to extrapolate based on nothing other than our, um theory... [w]e can do it. And we can get money for it. Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit.

Id. at 9.

58 See Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 611 (S.D.N.Y. 2011) (finding a “likelihood” that the Cabrera report was “planned” by some of Plaintiffs’ representatives, written “in substantial part” by persons other than Cabrera and submitted to the Provincial Court as Cabrera’s independent work product without disclosure of its true authorship); see also Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, 260 (2012) (opinion on partial summary judgment motion) (concluding the Cabrera 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’”); Beltman Statement, supra note 43, ¶¶ 11, 17, 22, 25 (stating “[a]t no point... did I have an understanding that Cabrera was preparing his own report,” described his authorship of “substantial parts” of the Cabrera report “in the first person as though it was written by Richard Cabrera,” and detailing Stratus’ preparation of eleven of the twenty-four annexes attached to the report and his preparation of additional materials on behalf of Cabrera designed “to increase the damages assessed by billions of dollars”); Letter from the Burford Group, to Steven R. Donziger, et al., 1-2 (Sept. 29, 2011) (on file with author) (describing the alleged authorship of the Cabrera report by Plaintiffs’ representatives as “fraud” and an example of “misrepresentation and disingenuous conduct”); see infra notes 103-06 and accompanying text.
supporting Cabrera’s conclusions.\textsuperscript{59} The credibility of these reports was open to attack on the bases that the new authors completed their work in less than one month, did not visit Ecuador, and did not conduct new tests, but rather relied upon Cabrera’s report.\textsuperscript{60}

Chevron also claimed that Ecuadorian President Rafael Correa and others applied political pressure on the Provincial Court.\textsuperscript{61} In particular, Chevron pointed to President Correa’s order to Ecuador’s Prosecutor General to indict persons involved in the negotiation of the remediation agreements and release.\textsuperscript{62} Additional sources of pressure included the Ecuadorian Attorney General’s office, members of Ecuador’s Constituent Assembly, and protestors allegedly organized by Plaintiffs.\textsuperscript{63}

\textsuperscript{59} Chevron Corp., 768 F. Supp. 2d at 611. The district court described such efforts as a “cleansing operation.” \textit{Id.} at 610.

\textsuperscript{60} \textit{Id.} at 611; see also Chevron Corp., 886 F. Supp. 2d at 261 (finding that six of the seven experts did not visit Ecuador and concluding that four experts relied upon Cabrera’s data and conclusions).

\textsuperscript{61} This pressure included references to Plaintiffs’ counsel as “compañeros” and pledging to assist in evidence gathering. \textit{See, e.g.,} Chevron Rebuttal Brief, \textit{supra} note 45, at 8; Chevron Notice of Arbitration, \textit{supra} note 42, at 9-10 (alleging the possibility of dismissal or criminal prosecution of any judge who issued opinions contrary to the government’s interests and quoting President Correa as denouncing the “barbarity committed by that multinational corporation [Texaco]”).

\textsuperscript{62} \textit{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”); TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, \textit{supra} note 55, at 7 (quoting President Correa as calling upon Ecuador’s Prosecutor General to indict the “miserable Mafiosi involved in the negotiation of the remediation agreement). Two Ecuadorian attorneys who represented Texaco in the negotiation of the remediation agreement were charged with crimes by the Ecuadorian Prosecutor General in August 2008. \textit{See} Chevron Notice of Arbitration, \textit{supra} note 42, at 13-14.

\textsuperscript{63} \textit{See, e.g.,} TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, \textit{supra} note 55, at 7 (alleging that Plaintiffs organized a courtroom protest on June 14, 2006, and assailed the presiding judge’s chambers); Chevron Notice of Arbitration, \textit{supra} note 42, at 8-9 (quoting correspondence from Ecuadorian Deputy Attorney General Martha Escobar to one of Plaintiffs’ attorneys detailing efforts by the Attorney General’s Office “to nullify or undermine the value of the remediation contract and the final act”); Chevron Rebuttal Brief, \textit{supra} note 45, at 8-9 (referring to the endorsement of the Plaintiffs’ lawsuit by two members of the Constituent Assembly). 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.” \textit{Id.}
D. Litigation in Ecuador: The Judgment and Appeal

In February 2011, the Provincial Court concluded that Texaco violated provisions of Ecuadorian law relating to hydrocarbon operations and water resource protection. These violations supported entry of a judgment against Chevron totaling more than $17.2 billion, including $8.64 billion for environmental remediation and $2.3 billion for personal injuries and property damage. The court also assessed $8.64 billion in punitive damages, which was to be vacated if Chevron issued a public apology within fifteen days of entry of the Judgment. The entire amount of damages was to be placed in a trust to be administered by Frente or its designee to pay for remedial measures.

The Provincial Court addressed some of Chevron's defenses. The court held that Chevron had attempted to evade liability through its merger with Texaco. Given this illicit purpose, the court concluded that it was appropriate to disregard corporate formalities and impose liability for Texaco's actions directly upon Chevron. The court also disregarded any separation between Texaco, Texaco Ecuador and Compania Texaco de Petroleos del Ecuador due to undercapitalization and a perceived lack of both administrative autonomy and separation of assets.

The court refused to enforce the remediation agreement and release between the Ecuadorian government and Texaco on the basis that they were not binding on Ecuador's citizens. It concluded that the application of the Environmental Management

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65 The portion of the award devoted to environmental injuries included soil remediation ($5 billion), groundwater remediation ($600 million), flora and fauna restoration ($200 million) and delivery of potable water ($150 million). Id. at 177-82. Health related damages included hydrocarbon exposure ($1.4 billion) and cancer ($800 million). Property-related damages included forced displacement as a result of hydrocarbon contamination ($100 million). Id. at 170-71, 183-84.

66 Id. at 185-86.

67 Id. at 186-87.

68 Id. at 11-13.

69 Id. at 13, 15.


71 Id. at 30-32.
Act was not retroactive, as it merely identified the court possessing jurisdiction and the procedures by which previously existing substantive rights could be asserted.\textsuperscript{72} The court also refused to condemn the circumstances surrounding the appointment of Cabrera and the delivery of his report and declined to conduct any additional inquiry into these circumstances, as they were most likely isolated and, in the court’s opinion, would not affect the outcome.\textsuperscript{73} Finally, no portion of the damages award could be assessed against PetroEcuador, as it was not a party to the litigation and its complicity, if any, could not extinguish or lessen Chevron’s liability.\textsuperscript{74}

The Sole Division of the Provincial Court of Justice of Sucumbios affirmed the Judgment on appeal in January 2012.\textsuperscript{75} The appellate court rejected Chevron’s previously noted defenses on the same grounds as the Provincial Court.\textsuperscript{76} The environmental and personal injuries resulting from Texaco’s activities were “legally proven,” and thus there was no reason to modify the Provincial Court’s holdings with respect to their type or amounts.\textsuperscript{77} The court also ratified the punitive damages award in order to “discourage [Chevron’s] type of procedural conduct” and set “an example of what should not occur in a legal action.”\textsuperscript{78} Furthermore, the court refused to overturn the Judgment on the basis that Plaintiffs had provided assistance to the Provincial Court in drafting its opinion because Chevron had failed to raise this allegation at trial, and it was unlikely to have been a decisive factor in the outcome.\textsuperscript{79} The appellate court declined to address

\textsuperscript{72} Id. at 27-28.
\textsuperscript{73} Id. at 50, 57-58, 99.
\textsuperscript{74} Id. at 123.
\textsuperscript{75} Aguinda v. ChevronTexaco Corp., No. 2011-0106, at 15-16 (Sucumbios Provincial Ct. of Justice of Nueva Loja, App. Div., Jan. 3, 2012) (Ecuador). The appellate court’s sole modification of the Provincial Court’s opinion was the attribution of mercury contamination as a result of the Consortium’s activities. Id. at 16.
\textsuperscript{76} Aguinda, No. 002-2003 at 3, 6-7, 10
\textsuperscript{77} Id. at 12.
\textsuperscript{78} Id. at 15.
\textsuperscript{79} See Clarification Decision at 4-5, Aguinda v. ChevronTexaco Corp., No. 2011-0106 (Sucumbios Provincial Ct. of Justice of Nueva Loja, App. Div., Jan. 3, 2012) (refusing to “make a pronouncement on the interminable and reciprocal accusations over misconduct of some of the parties’ attorneys, experts, or contractors . . . [as these accusations] could not affect the final result of the lawsuit”).
other allegations of fraud in the proceedings in deference to possible investigation by Ecuadorian criminal authorities and pending litigation in the United States. 80

On January 20, 2012, Chevron filed a cassation petition seeking review of the Judgment by Ecuador’s National Court of Justice. 81 This petition was accepted on February 17, 2012, and the case was still pending at the time of preparation of this article. 82 There have been several new developments in the months since the filing of the appeal, two of which are of primary importance. The first development is the re-election of President Correa to a second term in February 2013. 83 Thus, it is unlikely that political pressure on the Ecuadorian judiciary relating to this litigation will abate in the near future.

The second development is allegations the Provincial Court judge responsible for the Judgment was bribed in return for authorship of his opinion by Plaintiffs’ representatives. These allegations were raised in pending U.S. proceedings arising from the Ecuadorian litigation. In a memorandum filed in January 2013 in U.S. District Court, Chevron alleged that representatives of Plaintiffs paid a former Ecuadorian judge $1,000 per month to draft rulings favorable to Plaintiffs in the Lago Agrio litigation starting in 2008. 84 Chevron further alleged that the trial judge and the former judge accepted $500,000 in proceeds collected from Chevron in return for allowing Plaintiffs’ representatives to author the Judgment. 85 The Judgment was alleged to have been drafted by Plaintiffs’ representatives, edited by the former judge, and

80 Id. at 5.
82 Id.
84 Chevron Motion Memo, supra note 57, at 2, 13 (alleging Plaintiffs’ representatives made these payments in return for “favorable rulings,” “making the case move quickly,” and “ensuring that the orders . . . went the [Plaintiffs’] way”).
85 Id. (alleging the trial judge “cut a deal with [Plaintiffs] allowing them to draft the judgment, which [the former judge] then modestly edited, in exchange for a bribe of $500,000, to be paid out of [Plaintiffs’] judgment proceeds”).
signed by the Provincial Court. Chevron produced the former judge’s affidavit that described his role in the purported plan and identified passages from internal memoranda drafted by Plaintiffs that were not introduced into the record but were incorporated verbatim in the Judgment. Although the veracity of these allegations has yet to be determined, these allegations raise further doubts about the integrity of the Ecuadorian judicial system and the due process afforded to Chevron in the Lago Agrio litigation.

III. Related Litigation in Other Venues

A. Recognition Proceeding in Canada

On May 30, 2012, Plaintiffs filed their Statement of Claim seeking recognition of the Judgment in Canada. Plaintiffs allege Texaco’s consent to recognize any judgment entered in Ecuador is binding on Chevron, and the facts, findings, and conclusions of law contained in the Judgment are res judicata between Chevron and Plaintiffs. Plaintiffs claim Chevron Canada Limited is wholly-owned and exclusively managed by Chevron. Chevron provides administrative, financial, management, and technology support for its Canadian subsidiary, and its management is conducted by individuals and bodies who report directly to

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86 Id.
87 Id. at 18-23 (citing internal memoranda relating to holding Chevron liable for acts of Texaco’s Ecuadorian subsidiaries, the presence of “dangerous, area-wide contamination,” remediation costs, causation and creation of a trust to assist in the allocation of judgment proceeds).
89 Statement of Claim, supra note 1, at 5-6.
90 Id. at 6.
Chevron’s executive committee. The financial performance of Chevron Canada Limited is consolidated with and reported on behalf of Chevron, and Chevron guarantees its debts. According to Plaintiffs, these relationships render joinder of Chevron Canada Limited necessary and support a declaration that its shares be deemed eligible to satisfy the Judgment and support the appointment of a receiver to assume control of Chevron’s ownership interest.

B. Proceedings in the United States

There are four related proceedings in the United States that may affect recognition of the Judgment in Canada. The first case involved claims asserted by Oriente residents alleging that the Consortium’s operations caused them to develop cancer. The United States District Court for the Northern District of California dismissed these claims in 2007. The district court concluded that the claims were baseless and “likely a smaller piece of some larger

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91 Id. at 6-7.
92 Id. at 7.
93 Id. at 7-8, para. 1. The Ontario Superior Court of Justice declined to address the merits of the case and issued a stay order in the litigation on May 1, 2013. Yaiguaje, 2013 ONSC 2527, para. 109. The court concluded that Plaintiffs had “no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy a Judgment against its ultimate parent.” Id. The stay order was based upon the court’s conclusions that: (1) Chevron owned no assets in Ontario at any time; (2) Chevron did not conduct business in Ontario; (3) Chevron does not own the shares of Chevron Canada Limited; and (4) Chevron and Chevron Canada Limited maintain separate boards of directors, budgets, operations and tax returns. Id. para. 89-90, 93, 99-102. These findings brought the court to conclude:

[w]ere I to permit the plaintiffs’ action to proceed to the next step — the filing of statements of defence and the adjudication of the defences Chevron intends to assert against the Ecuadorian Judgment - the evidence disclosed that a bitter, protracted and expensive recognition fight would ensue consuming significant time and judicial resources of this Court . . . . Ontario is not the place for that fight. Ontario courts should be reluctant to dedicate their resources to disputes where, in dollars and cents terms, there is nothing to fight over. In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorian Judgment will have a practical effect.

Id. para. 111. The Superior Court’s order is presently on appeal.

95 Id. at *9.
scheme against defendants." Three of the Oriente residents' attorneys were sanctioned pursuant to Federal Rule of Civil Procedure 11 for their failure to conduct adequate factual investigation prior to commencing litigation. In so doing, the district court described the case as consisting of "bogus claims that should never have been on the books."

A second set of opinions arose from discovery requests initiated by Chevron seeking evidence to be utilized in Ecuador and before the Permanent Court of Arbitration. The most extensive findings addressing the Ecuadorian litigation were made by the United States District Court for the Southern District of New York in In re the Application of Chevron Corporation. In permitting Chevron's requests for documents and testimony, the district court concluded that 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." The district court found politics, intimidation, and

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96 Id.


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 amount of the sanctions was $45,000. Gonzalez, 2007 U.S. Dist. LEXIS 81222, at *41. The plaintiffs' attorneys in the California litigation are different from Plaintiffs' attorneys in Ecuador. See Id. at *4-6.


99 Chevron's requests were initiated pursuant to 28 U.S.C. § 1782, which provides, in part, that "[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." 28 U.S.C. § 1782 (2013).

100 749 F. Supp. 2d 141 (S.D.N.Y. 2010).

101 Id. at 144, 157-58.
corruption may have influenced the outcome of the Ecuadorian litigation. It also determined that the Cabrera report was not the sole work product of a neutral and independent expert, and that another expert’s report was submitted without authorization. The court also found “more than a little evidence” that some of these activities came within the crime-fraud exception to the attorney-client privilege and the work product doctrine. Similar conclusions have been reached by other U.S. courts in related discovery proceedings.

102 Id. at 145 (quoting one of 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 (finding that one of Plaintiffs’ counsel “attempted to intimidate the Ecuadorian judges [and] obtain political support for the . . . lawsuit”); id. at 147 (quoting one of 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 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 158-59 (discussing the organization of “pressure demonstrations at the court”).

103 Id. at 144-45, 150, 152 (concluding 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”).

104 Id. at 152. See also supra note 41 and accompanying text.


106 See, e.g., In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011) (commenting that a conflict of interest relating to one of the Plaintiffs’ consultants was “sufficient to make a prima facie showing of fraud that satisfies the first element of the showing necessary to apply the crime-fraud exception to the attorney-client privilege”); In re Chevron Corp., No. 11-24599-CV, 2012 U.S. Dist. LEXIS 123315, at *6-7 (S.D. Fla. June 12, 2012) (finding that Chevron had obtained “mounds of evidence . . . that suggests that the judgment itself was . . . ghostwritten”); Chevron Corp. v. E-Tech Int’l, No. 10cv1146-IEG, 2010 U.S. Dist. LEXIS 94396, at *17 (S.D. Cal. Sept. 10, 2010) (applying the crime-fraud exception to the attorney-client privilege 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) (describing the conduct of the Plaintiffs’ representatives as sending “shockwaves through the nation’s legal communities” and “inappropriate, unethical and perhaps illegal”); Chevron Corp. v. Camp, No. 1:10mc27, 2010 U.S. Dist. LEXIS 97440, at *16 (W.D.N.C. Aug. 30, 2010) (concluding that “the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any
More recent litigation filed by Chevron in the United States District Court for the Southern District of New York in February 2011 accuses Plaintiffs, two of their attorneys, Frente, and an environmental consulting company of colluding with non-party co-conspirators to corrupt the Provincial Court and extort a settlement payment from Chevron.\(^\text{107}\) The primary set of allegations accused the group of pressuring the Ecuadorean court and manufacturing evidence.\(^\text{108}\) A second set of allegations accused the group of colluding with the Ecuadorean government to bring sham criminal charges against Chevron's local counsel.\(^\text{109}\) A third set of allegations claimed that the group launched attacks upon Chevron utilizing false media reports and statements to U.S. federal and state government officials and federal courts, tampered with witnesses, and withheld documents.\(^\text{110}\) These activities were


\(^{108}\) Complaint, Chevron Corp. v. Donziger, No. 11-CV-0691, at 31-73 (alleging utilization of pressure tactics to influence the Provincial Court, collusion with Ecuadorean government officials, inducement of expert witnesses to prepare and file biased and false reports and misconduct associated with the preparation and authorship of the Cabrera report).

\(^{109}\) Id. at 73-78.

\(^{110}\) Id. at 78-114. There is evidence that media reports and other public statements have had an effect upon investors and other interested groups. See, e.g., Simon Billenness & Sanford Lewis, An Analysis of the Financial and Operational Risks to Chevron Corporation from Aguinda v. ChevronTexaco 3 (May 2011) (concluding Chevron's litigation strategy “may lead some investors to question the adequacy of the company’s public statements and disclosures and whether the board and management are fulfilling their fiduciary duties to properly manage this significant risk to the company’s business and value”); Letter from Jonas Kron et al., Vice-President, Trillium Asset Management Corporation, to Office of Chief Counsel, U.S. Securities and Exchange Commission 1-2, 4 (May 19, 2011) (on file with author) (requesting a review of statements contained within Chevron’s 2010 annual report in order to determine if there has been adequate disclosure or material misrepresentations regarding the effect of the Judgment upon Chevron’s business interests); Letter from Thomas P. DiNapoli, et al., Comptroller, State of New York, to Chevron Corporation 1-2 (undated) (on file with author) (requesting Chevron’s board of directors disclose to shareholders “the risks to its business and its operations from any enforcement of the Judgment”) and “[r]e-evaluate
alleged to violate federal and state laws and entitle Chevron to awards of general, treble, and punitive damages. The case remained pending at the time of the preparation of this article.

Finally, in February 2013, forty-two members of the Huaorani people, a group residing in the Oriente region of Ecuador, initiated

whether endless litigation is the best strategy”). But see Complaint at 2, 25-45, Chevron Corp. v. DiNapoli, N.Y. State Comm’n on Pub. Ethics (undated) (claiming DiNapoli violated New York state laws governing the ethics of public officials through numerous improper contacts with Plaintiffs’ representatives including alleged receipt of a $60,000 campaign contribution from persons affiliated with Plaintiffs).

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). Complaint, Chevron Corp. v. Donziger, No. 11-0691, at 119-33; see also 18 U.S.C. § 1961(5) (2013) (defining “pattern of racketeering activity” as consisting of “at least two acts of racketeering activity, one of which has occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity”). The specific racketeering activities alleged in the complaint were: (1) extortion in violation of the Hobbs Act (18 U.S.C. § 1951 (2013)); (2) extortion in violation of New York state law (N.Y. PENAL LAW §§ 110.00, 155.05(2)(e), 155.42 (2013)); (3) mail and wire fraud (18 U.S.C. §§ 1341, 1343 (2013)); (4) money laundering (18 U.S.C. § 1956(a)(2)(A)(2013)); (5) obstruction of justice (18 U.S.C. § 1503 (2013)); and (6) witness tampering (18 U.S.C. § 1512 (2013)). 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) (2013) (providing that it shall be unlawful to conspire to engage in racketeering activities). State law claims of fraud, tortious interference with contract, trespass to chattels, unjust enrichment, and civil conspiracy were asserted against all defendants with the exception of a 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 . . . is 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. JUD. LAW § 487 (2010).

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

See Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 230, 262 (S.D.N.Y. 2012) (granting defendants’ motion to dismiss the claims sounding in fraud, tortious interference with contract, trespass to chattel, and unjust enrichment, but refusing to dismiss the remaining claims, including those based upon RICO and the New York Judiciary Law). Chevron’s voluminous filings in this case, including 6,000,000 pages of motions and related material and a 15,000 page privilege log, have caused the defendants to characterize the proceedings as progressing at “a ridiculous, out of control pace” that deprives them of their due process rights consistent with Chevron’s “we will bury you strategy.” Letter from Craig Smyser et al., Attorneys for Defendants, to Lewis A. Kaplan, U.S. District Court Judge, U.S. District Court for the Southern District of New York 1-3 (Mar. 1, 2013) (on file with author).
litigation against one of Plaintiffs’ attorneys, Frente and twenty other unnamed parties (named defendants). The complaint alleges that the named defendants were not the lawful representatives of the Huaorani people during the Lago Agrio proceedings because of the absence of a signed retainer agreement. Despite the absence of such an agreement, the Huaorani plaintiffs claim that the defendants owe a fiduciary duty to protect the Huaorani’s interest in the Judgment, provide notification of enforcement efforts, respect the interests of third parties in any proceeds that may be collected, provide an accounting of the proceeds of any attempts to settle, and provide remittance of the Huaorani’s “rightful portion.” The complaint expresses concern that the named defendants will wrongfully dissipate proceeds derived from the judgment through funnelling of monies to “off-shore havens beyond the reach of U.S. Courts,” payments to investors who have purchased more than $10 million in interests in return for litigation financing, and seizure by the Ecuadorian government, which may claim as much as 90% of the proceeds. Plaintiffs seek a judicial declaration establishing their

115 Id. ¶¶ 54-55.
116 Id. ¶ 55.
117 Id. ¶¶ 65-68; see also Daniel Fisher, Litigation-Finance Contract Reveals How Investors Back Lawsuits, FORBES, June 7, 2011, http://www.forbes.com/sites/danielfisher/2011/06/07/litigation-finance-contract-reveals-how-investors-back-lawsuits (claiming Treca Financial Solutions, a Cayman Islands entity, and affiliated with Burford Capital, a publicly traded investment firm based on the British island of Guernsey, invested $4 million in the Ecuadorian litigation in November 2010 in exchange for a 1.5% stake in any collected proceeds with the possibility of increasing its stake to 5.5% with an investment of an additional $11 million); Roger Parloff, Have you got a piece of this lawsuit?, FORTUNE, June 28, 2011, http://featuresblogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit (claiming that the agreement between the Plaintiffs and Burford created a “distribution waterfall” in which Plaintiffs would not receive proceeds until “eight tiers of funders, attorneys, and ‘advisers’ . . . have fed at the trough”). This financing was utilized to retain the law firm of Patton Boggs to act on behalf of Plaintiffs. Paul M. Barrett, Back a Lawsuit, Get a Return, BUS. WK., Jan. 12, 2012, http://www.businessweek.com/magazine/back-a-lawsuit-get-a-return-01122012.html. Burford sold its interest to a third party in December 2010. Press Release, Burford Capital, Burford Reports Continued Activity and Entry into the U.K. Market 4 (Dec. 12, 2011) (on file with author). In September 2011, Burford accused the Plaintiffs of engaging in fraudulent conduct with respect to the preparation of the Cabrera report. See Letter from the Burford Group to Steven R. Donziger, et al., supra note 58, at 1-3 (describing the alleged authorship of the Cabrera report by Plaintiffs’ representatives as a
right to proceeds derived from the Judgment, an accounting for and imposition of a constructive trust upon any such proceeds, and damages for breach of fiduciary duty and unjust enrichment.\textsuperscript{118} These claims remained pending at the time of preparation of this article.

\textbf{C. Proceedings before the Permanent Court of Arbitration}

A final related proceeding is Chevron’s claims against the Republic of Ecuador in the Permanent Court of Arbitration. Filed in September 2009, Chevron’s complaint alleged that the Ecuadorian government’s collusion with Plaintiffs and abuse of the criminal justice system violated the Ecuador-United States Bilateral Investment Treaty.\textsuperscript{119} The court determined that the claims were admissible, and consequently possessed jurisdiction in February 2012.\textsuperscript{120} Chevron’s claims have been described by the material breach of the funding agreement through “misrepresentations... other material failures... [and] fraud,” alleging the existence of a “multi-month scheme to deceive and defraud in order to secure desperately needed funding from Treca, all the while concealing material information and misrepresenting critical facts in the fear that we would have walked away had we known the true state of affairs,” and concluding “it is now clear that you were willing to do and say anything to attract new funding”). See also Roger Parloff, \textit{Investment Fund: We were Defrauded in Suit Against Chevron}, \textit{FORTUNE}, Jan. 10, 2013, http://finance.fortune.cnn.com/2013/01/10/burford-capital-chevron-ecuador. In December 2011, Burford announced that “[f]urther developments have led [it] to conclude that no further financing will be provided.” Press Release, Burford Capital, \textit{supra}, at 4. Burford’s remaining stake in the outcome of the Ecuadorian litigation was relinquished to Chevron in April 2013. See Roger Parloff, \textit{Litigation Finance Firm in Chevron Case Says It was Duped by Patton Boggs}, \textit{FORTUNE}, Apr. 17, 2013, http://features.blogs.fortune.cnn.com/2013/04/17/burford-patton-boggs-chevron-suit.

\textsuperscript{118} Complaint, Donziger, No. 151372/2013, ¶¶ 74-118.

\textsuperscript{119} Chevron Notice of Arbitration, \textit{supra} note 42, at 7-16. Chevron alleged Ecuador failed to provide fair and equitable treatment and effective means by which to assert claims, impaired investments through arbitrary and discriminatory measures, and failed to accord national treatment. \textit{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 relief providing that: (1) Texaco has no further liability for environmental and health impacts associated with the Consortium; (2) Ecuador’s actions are in breach of the bilateral investment treaty; (3) Texaco and all related entities were released from liability effective in September 1998; (4) Ecuador and PetroEcuador are exclusively liable for any remaining environmental and health impacts in the Oriente; and (5) Ecuador indemnify, protect and defend Chevron from any payment of damages. Chevron Notice of Arbitration, \textit{supra} note 42, at 17-18.

\textsuperscript{120} See Third Interim Award, \textit{supra} note 7, ¶¶ 4.95-4.96.
court as “serious and not . . . incredible, frivolous or vexatious.” The court has repeatedly directed Ecuador to take all judicial, legislative and executive measures necessary to suspend or cause to be suspended the recognition and enforcement of the Judgment within and without Ecuador during the pendency of its proceedings. In February 2013, the court held that Ecuador’s continued efforts to enforce the judgment in Canada, as well as related proceedings in Brazil and Argentina, violated previous orders regarding maintenance of the status quo and required the issuance of an order directed at Ecuador to show cause why it should not be required to compensate Chevron for any resultant harm. The show cause order and Chevron’s claims remained pending at the time of preparation of this article.

IV. The Recognition of Foreign Judgments in Canada

A. Background

Recognition and enforcement of judgments in Canada are governed by provincial law. Recognition proceedings are

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121 Id. ¶ 4.58.


123 See Fourth Interim Award on Interim Measures, Chevron Corp. v. Republic of Ecuador, PCA Case N. 2009-23, ¶¶ 79, 81 (Perm. Ct. Arb., Feb. 7, 2013). The court found Ecuador had failed to prevent the Judgment from becoming “final, enforceable and subject to execution” in violation of previous orders on interim measures, which failures could not be excused based upon its disagreement with such interim awards or constraints under Ecuadorian law. Id. ¶ 78-79. Ecuador’s non-compliance presented risks to Chevron that were “difficult now to exaggerate” and “imperil[ed] to a very significant extent the overall fairness and the efficacy of these arbitration proceedings.” Id. ¶ 85.


resolved on a province-by-province basis although all provinces, except Quebec, have mutual registration arrangements.\textsuperscript{126} The Supreme Court of Canada is empowered to resolve significant differences between provinces.\textsuperscript{127} However, appeals are only heard with leave of the court in matters of national importance.\textsuperscript{128} As a result, disputes concerning foreign judgments are primarily resolved by provincial courts.\textsuperscript{129} These courts, other than those in Quebec, traditionally utilized common law principles derived from the English system and other Commonwealth countries.\textsuperscript{130} Reliance upon these principles was overturned by the Supreme Court of Canada’s 1990 decision in \textit{Morguard Investments Ltd. v. DeSavoye}.\textsuperscript{131}

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\textsuperscript{126} See, e.g., Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5 (Can.), applied by O. Reg. 298/99 (Can.).
\textsuperscript{127} KOEHNEN & KLEIN, supra note 125, at 2.
\textsuperscript{128} Supreme Court Act, R.S.C. 1985, c. S-26 § 40 (Can.).
\textsuperscript{129} See Janet Walker, Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Canada, DEBTOR-CREDITOR LAW 64-1 (Theodore Eisenberg ed., 2003).
\textsuperscript{130} For a discussion of English common law, see, e.g., Singh v. Rajah of Faridkote, [1894] A.C. 670 (P.C.); Emanuel v. Symon, (1907) [1908] 1 K.B. 302 (C.A.). There was growing support for reciprocity within the English and Canadian legal systems beginning in the 1950s. See, e.g., Travers v. Holley, [1953] 2 All. E.R. 794, 800 (C.A.) (holding that the sovereign and territorial interests of national courts are not infringed “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 reciprocity of judgments within Canada in personal actions). See also Gilbert D. Kennedy, Reciprocity in the Recognition of Foreign Judgments: The Implications of Travers v. Holley, 32 CAN. BAR REV. 359 (1954).
\textsuperscript{131} [1990] 3 S.C.R. 1077 (recognizing a judgment entered by an Alberta court in British Columbia). Recognition was based on 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.” \textit{Id.} at 1096. Failure to extend comity to judgments on an interprovincial basis would result in injustice, disrupt normal patterns of life, and was inconsistent with the intention of the Canadian Constitution to create a single country. \textit{Id.} at 1096, 1099. These concerns 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.” \textit{Id.} at 1102. The Court identified forum non conveniens, fraud, and public policy as defenses to inter-provincial recognition. \textit{Id.} at 1110.
\end{flushleft}
B. The Public Policy Defense to the Recognition of Foreign Judgments

*Morguard* left undecided the issue of the proper approach to the recognition of non-Canadian judgments.132 Some provincial courts applied *Morguard* to non-Canadian judgments, but such application was not uniform.133 This issue was addressed at the national level in *Beals v. Saldanha*,134 in which the Supreme Court of Canada closely equated foreign and domestic judgments.

*Beals* involved a Florida state court judgment entered against Ontario residents.135 The Supreme Court of Canada found "compelling reasons" to expand *Morguard*'s application to non-Canadian judgments and no "principled reason not to do so."136 These reasons included the need to secure transactions which "necessarily underlie the modern concept of private international law."137 The court concluded that comity, the growing number of

132 *Morguard* dealt with the recognition of a judgment obtained in Alberta and sought to be enforced in British Columbia. *Id.* Although the case did not directly address foreign judgments, many courts applied the real and substantial connection test articulated by *Morguard*. Walker, supra note 129, at 64-18.


135 The judgment debtors sold vacant real property located in Florida valued at U.S. $8,000 to two Florida residents upon which the purchasers constructed a model home for use in their construction business. *Beals*, 3 S.C.R. 416, para. 5-16. The property subject to the sale was misidentified in the contract, which resulted in construction of the model home on property that was not owned by the judgment debtors. *Id.* The purchasers filed suit in Florida state court. *Id.* The judgment debtors initially appeared in the case but abandoned their defense on the advice of counsel that a Florida state court judgment was unenforceable in Canada. *Id.* 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. *Id.* The purchasers sought recognition in Canada, but the Ontario Court (General Division) declared the judgment unenforceable on the basis that the damages had been fraudulently calculated. *Id.* This result was reversed by the Ontario Court of Appeal based upon its conclusion that fraud and public policy were not applicable to petitions for recognition. *Beals*, 3 S.C.R. 416, para. 5-16. The judgment debtors sought review in the Supreme Court of Canada. *Id.*

136 *Id.* para. 19.

137 *Id.* para. 26-27 (concluding the need to accommodate "the flow of wealth, skills
international business transactions, and increased movement of goods and people required modernization of private international law through liberal recognition policies.\(^{138}\) After finding the existence of a "real and substantial connection" between the judgment debtors and the State of Florida,\(^{139}\) the court then analyzed theapplicability of the public policy defense to recognition. The public policy defense prevents the recognition of foreign judgments that are "contrary to the Canadian concept of justice."\(^{140}\) According to the Court, the crucial issue was whether the foreign law upon which the judgment was based is contrary to basic morality.\(^{141}\) Given the serious nature of impeachment of foreign law, the Court concluded that the defense is not "a remedy to be lightly used" and should have "a narrow application."\(^{142}\) The fact that a Canadian court would not reach a similar conclusion or render a damages award in a similar amount did not, without more, render the foreign judgment unrecognizable.\(^{143}\) Thus, the alleged excessiveness of the Florida judgment and its likely unacceptable nature to most Canadians did not support application of the public policy defense.\(^{144}\)

In the decade following *Beals*, Canadian courts addressing the public policy defense have reaffirmed its holding that the defense is limited to challenges directed at foreign laws that violate the

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\(^{138}\) Id. para. 28. (stating that international commerce and the movement of people are "directly relevant to determining the appropriate response of private international law to particular issues, such as 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)).

\(^{139}\) Id. para. 33.

\(^{140}\) Id. para. 71.


\(^{142}\) Id. para. 75.

\(^{143}\) Id. para. 76.

\(^{144}\) Id. para. 77. The fraud defense was inapplicable as the judgment debtors failed to defend the litigation in Florida and were prevented from challenging the evidence presented on the question of damages. *Id.* para. 54-55. There was no violation of natural justice as the judgment debtors were fully informed of the Florida proceedings, had the opportunity to defend themselves and had precise knowledge of the amount of their financial exposure once they received notice of the amount of judgment. *Id.* para. 69.
fundamental morality of the Canadian legal system. Differences between foreign laws and Canadian law do not alone provide the “necessary moral opprobrium” required for application of the public policy defense. Rather, the foreign law upon which the judgment is based must violate principles running “through the fabric of society to the extent that it is not consonant with [the Canadian] system of justice and general moral outlook [such as] to countenance the conduct, no matter how legal it may have been where it occurred.” Courts may raise public policy issues on their own initiative in their role as “the guardians of Canadian constitutional values.”

The public policy defense has been most often cited with respect to foreign penal judgments and awards of punitive damages. The Canadian Supreme Court has held that penal orders are imposed pursuant to public law and are outside the realm of private international law. Although states are free to impose punishments, penalties, and taxes, other states are not obligated to assist in their collection. This refusal to assist in collection applies equally to Canadian courts which are not


146 Bad Ass Coffee Co. of Haw., Inc. v. Bad Ass Enters., Inc., 2007 ABQB 581 (Can.). The court noted that if every statement of Canadian law were treated as an expression of public policy for the purpose of preventing recognition of foreign judgments, “little would be left of the principle of judicial comity.” Id. para. 75.


149 A penal law is defined as:

[a] law that imposes a punishment for a breach of a duty to the state - as opposed to a remedial law, which secures compensation for a breach of a duty owed to a private person . . . . Liability that is restitutionary in nature and that is not imposed with a view to punishment of the party responsible is not regarded as penal in nature.


151 Id.
permitted to entertain an action for "the enforcement of a foreign penal, revenue, or other public law [or]... a foreign judgment ordering the payment of taxes or penalties that gives effect to the sovereign will of a foreign power."\textsuperscript{152}

Penal judgments do not include awards of punitive damages. Recognition of a foreign punitive damages award may not be barred merely because such an award or amount would not be available in Canada.\textsuperscript{153} Even though the award may have been granted utilizing different criteria and may appear "alarming" in amount, such differences are irrelevant for the purposes of recognition.\textsuperscript{154} However, this result assumes that the procedure resulting in the award conformed to the requirements of due process, including fundamental fairness, adequate notice, and an opportunity to defend a claim.\textsuperscript{155} Additionally, at least one court has expressed concern about foreign damages awards, punitive or otherwise, that do not distinguish between the claims upon which they are based and the recipients.\textsuperscript{156}

As these cases demonstrate, one of the legacies of Beals is liberal recognition of foreign judgments.\textsuperscript{157} However, in the ten years since Beals, Canadian recognition actions have exclusively involved U.S. court judgments,\textsuperscript{158} judgments of courts with a

\textsuperscript{152} Id.

\textsuperscript{153} See, e.g., Bank of Mongolia v. Taskin, 2011 ONSC 6083, para. 51 (Can.).

\textsuperscript{154} See, e.g., Dexia Credit Local v. Rogan, 2008 BCSC 1406, para. 33, 41 (Can.); Suncom, Inc. v. Andrew Stone Casino Promotions, Inc., 2007 BCSC 1904, para. 30 (Can.).

\textsuperscript{155} See, e.g., Dexia Credit Local, 2008 BCSC 1406, para. 41; Suncom, Inc., 2007 BCSC 1904, para. 31.

\textsuperscript{156} S. Pac. Imp., Inc. v. Ho, 2009 BCCA 163, para. 53 (Can.).


\textsuperscript{158} See, e.g., Davidson v. Lesenko, 2008 ABQB 349 (Can.) (California judgment); Bad Ass Coffee Co. of Haw., Inc. v. Bad Ass Enters., Inc., 2007 ABQB 581 (Can.) (Utah judgment); Minn. Valley Alfalfa Producers Coop. v. Baloun, 2005 ABQB 114 (Can.) (Minnesota judgment); Nunes v. Collins, 2012 BCSC 622 (Can.) (Nevada judgment);
shared legal heritage, or judgments of courts from a national legal system with a perceived level of reliability. Canadian courts have not reviewed judgments originating in the developing world of the magnitude presented by *Yaiguaje v. Chevron Corporation*. The approach taken by the courts called upon to address this recognition request will have a lasting impact upon the reputation and credibility of the Canadian judiciary and will require greater elaboration of the public policy defense.

V. The Public Policy Defense and *Yaiguaje v. Chevron Corporation*

A. Background

The public policy defense may prove to be an effective means through which Chevron may challenge recognition of the Judgment in Canadian appellate courts. The amount of the Judgment, the fact that a significant portion of it may be characterized as penal or punitive, and its lack of consistency with

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159 See, e.g., Soc’y of Lloyd’s v. Berezowski, 2006 ABQB 625 (Can.) (English judgment).


161 See Sears, supra note 157, at 242-43 (“It will be interesting to see how courts will [decide cases] when they are faced with judgments emanating from foreign states whose judicial processes and protections are less congruent with Canada’s.”).

fundamental morality present several opportunities for Canadian courts to deny recognition. The controversy regarding who in fact is entitled to proceeds derived from the Judgment presents another ground for non-recognition. The disregard of separateness between Texaco, Chevron and their subsidiaries may violate fundamental principles of Canadian corporate law or, at the least, require an interpretation of such principles for which there is no precedent. Recognition may also be interpreted as countenancing Plaintiffs’ misconduct as alleged by Chevron and affirmed, in part, by the opinions of U.S. federal courts.

Applying the public policy defense, the most significant challenge to recognition in Canada is undoubtedly the amount and nature of the Judgment itself. The amount of the Judgment is grossly excessive and far larger than any previously-recognized judgment in Canadian history.¹⁶³ However, courts confronting large damages awards in recognition proceedings have held that the public policy defense was not intended to bar enforcement of a foreign judgment “for the sole reason that the claim in the foreign jurisdiction would not yield comparable damages in Canada.”¹⁶⁴ This reasoning has been interpreted to permit recognition of a large foreign damages award even though the level of such an award has never been reached in Canada and the considerations utilized in its calculation are substantially different.¹⁶⁵ This reasoning is founded upon two fundamental considerations. Initially, courts have been reluctant to impose Canadian standards on the quantum of damages simply due to the presence of the judgment debtor in the province.¹⁶⁶ This reluctance is especially acute in cases where the judgment debtor


¹⁶⁴ Beals v. Saldanha, [2003] 3 S.C.R. 416, para. 76 (Can.). *See also* Bank of Mongolia v. Taskin, 2011 ONSC 6083, para. 51 (Can.) (“[T]he public policy defense is not meant to bar enforcement of a judgment on the basis that the claim in the foreign jurisdiction would not yield comparable damages”).

¹⁶⁵ *See* Dexia Credit Local v. Rogan, 2008 BCSC 1406, para. 33 (Can.) (permitting recognition of a U.S. punitive damages award despite the fact that such awards have “never reached the levels that they have in the United States, and even though the considerations in calculating a punitive damage award are substantially different between the United States and Canada”).

relocated to Canada after the cause of action in the foreign jurisdiction arose. A second consideration is that the large judgments presented for recognition to date have been rendered after compliance with due process, including notice, a hearing, the presentation of evidence, and a neutral decision-maker. Utilizing this reasoning, provincial courts have recognized large damages awards without considerable difficulty. The following section of the article examines these and other grounds for denying recognition of the Judgment in Canada.

B. The Penal Nature of the Judgment

Like most other national courts, Canadian courts will not enforce judgments based on foreign penal or other public laws. The Supreme Court of Canada has defined a penal law as one that "imposes a punishment for a breach of duty to the state as opposed to a remedial law, which secures compensation for a breach of duty owed to a private person." This breach of duty moves penal awards outside of the realm of private international law and into public international law, a realm in which Canada is not obliged to offer assistance in collection. A judgment that is "restitutionary in nature and that is not imposed with a view to punishment of the party responsible is not regarded as penal in nature" and is subject to recognition.

Two portions of the Judgment may be subject to non-
recognition because of their penal nature. First, the award of $8.64 billion in punitive damages is penal as it represents 60% of Chevron's net earnings, a grossly excessive amount that is neither reflective of Chevron's level of involvement in Ecuador nor reflective of its complicity in environmental contamination occurring there. In addition, the Provincial Court held that this award would be vacated if Chevron issued a public apology within fifteen days of entry of the Judgment. Thus, the penal nature of this award is also clear to the extent that payment was not linked to, or intended to provide, compensation to Plaintiffs, but rather could be excused only through a public apology to the entire Ecuadorian citizenry. Awards that are truly "restitutionary" in nature are payable regardless of apologies to either the injured parties or the general public. The willingness of the Provincial Court to excuse payment of this portion of the Judgment in exchange for Chevron's public apology makes that portion of the Judgment resemble punishment for a breach of a duty to the state rather than compensation for a breach of duty to Plaintiffs. Furthermore, the effect of this apology would have been to waive Chevron's right to appeal the Judgment, at least on the basis of liability. Consequently, the punitive damages portion of the Judgment is clearly penal to the extent that Chevron was to be "punished" for exercising its right to appeal. The nature of this portion of the Judgment was further confirmed by the Provincial Court on appeal when it held that the punitive damages award was not compensatory or intended to punish Chevron for environmental contamination, but rather to "discourage [Chevron's] type of procedural conduct... thus setting an example of what should not occur in a legal action."

174 See supra note 51 and accompanying text.
176 See Cassel, supra note 18.
177 See id.
178 See id. at 16 (concluding that this portion of the Judgment violates due process and "forces Chevron either to waive its right to appeal, or to pay a multi-billion dollar penalty as the price for exercising that right"). Cassel concludes that "[n]o other court in the world has ever awarded such a 'conditional punitive' damages award, and none should." Id.
179 Aguinda v. ChevronTexaco Corp., No. 2011-0106, at 15 (Sucumbios Provincial
Those portions of the Judgment for which the Provincial Court assessed damages outside the scope of environmental degradation caused by the Consortium’s operations are also penal. These damages, totaling $2.3 billion, included awards for hydrocarbon exposure, cancer, and forced displacement. These damages are not compensatory in nature, as the Provincial Court completely failed to assess the purported injury suffered by each individual plaintiff, determine whether these injuries were the direct result of the Consortium’s activities, and award a specific amount of damages to individual plaintiffs. However, offending portions of a judgment rendered unrecognizable by the public policy defense may be severed. Thus, the characterization of any portion of the Judgment as penal does not prevent recognition of the remaining portions. Nevertheless, such a characterization would reduce the total amount of the Judgment subject to recognition by at least $8.64 billion, perhaps even as much as $11 billion.

C. The Punitive Damages Portion of the Judgment

A Canadian court called upon to recognize the Judgment must concern itself with the punitive portion of the damages award. An initial question is whether a Canadian court can recognize an award that is not permitted by the local law under which it was originally entered. Punitive damages awards are unavailable under Ecuadorian law. The Ecuadorian Civil Code limits damages to compensatory awards, consequential damages, and lost


181 This argument could be extended to any individual award within the Judgment for which the Provincial Court failed to assess the individual injuries, causation as a result of the Consortium’s activities, and a specific amount of damages sufficient to compensate each individual plaintiff.


 Plaintiffs were apparently aware of this fact but pursued punitive damages nonetheless. The absence of legal authority for this award is further evident in the haste with which the Provincial Court was willing to excuse its payment upon receipt of an apology. It is fair to conclude that the punitive portion of the Judgment was merely "a convenient innovation, designed simply to double the damages award against a foreign company with deep pockets."

Canadian courts should not ratify results that are unavailable or unclear under local law. This is especially true in this case given the enormity of the award, its potentially devastating effect upon the judgment debtor, and Plaintiffs' arguably bad faith in seeking such an award. These factors, when combined with the absence of due process and a flawed judicial system, also militate against accession to the Judgment. Rather, the punitive portion of the Judgment should be examined utilizing standards available to domestic courts.

Recognition of the punitive portion of the Judgment faces significant obstacles under Canadian standards. As in the United States, punitive damages have been a topic of considerable controversy. A substantial portion of this controversy has been devoted to the conduct that should be subject to such awards, procedural considerations, and the absence of monetary limits to punitive damages. Canadian courts and scholars have debated
the anomaly of "a civil court . . . impos[ing] what is in effect a fine for conduct it finds to be worthy of punishment, and then remit[ting] the fine, not to the State Treasury, but to an individual plaintiff who will, by definition, be overcompensated." 191 As a result of this debate, requests for punitive damages receive "the most careful consideration" and discretion in their award is to be "most cautiously exercised." 192 Punitive damages are to be awarded "only in exceptional cases and with restraint." 193 Such awards are proper only if there is a demonstrated need for "denunciation, deterrence and retribution." 194

The most comprehensive explication of the standards to be utilized in awarding punitive damages was set forth in Whiten v. Pilot Insurance Company. 195 In addition to re-emphasizing their purpose and exceptionality, the Supreme Court of Canada identified four guiding principles with respect to punitive damages awards. First, the defendant's conduct must be of such a nature as to merit judicial condemnation. 196 Such conduct is largely restricted to intentional torts. 197 Second, an award of punitive damages must be rationally related to the purposes of such awards as well as the facts of the specific case. 198 Any award above and beyond the lowest possible award that would serve the purposes of punitive damages is irrational. 199 The third principle is

191 Id.
194 Honda Can, Inc., 2008 SCC 39, para. 69; see also Fidler, 2006 SCC 30, para. 61; Whiten, 2002 SCC 18, para. 68 (describing denunciation, deterrence, and retribution as "the means by which the jury or judge expresses its outrage at the egregious conduct").
195 2002 SCC 18 (Can.).
196 Id. para. 67.
197 Id.
198 Id. para. 71.
199 Id. However, it is rational to award punitive damages to "relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a license fee to earn greater profits through outrageous disregard of the legal or equitable rights of others." Id. para. 72. It is important to note in this regard that the Supreme Court of Canada rejected the use of caps, fixed ratios between compensatory and punitive damages, and other "mechanical or formulaic" approaches on the grounds that they
Proportionality takes into account the entirety of the award, including compensatory, consequential, and punitive damages, as well as other punishments related to the defendant’s misconduct, and determines whether the total amount of the award is rationally related to the objectives of denunciation, deterrence, and retribution. Excessive damages awards and related punishments are deemed disproportionate, irrational, and impermissibly provide the plaintiff with double recoveries or windfalls. Finally, punitive damage awards are subject to appellate court intervention if they “exceed the outer boundaries of a rational and measured response to the facts of the case.”

Applying the reasoning in Whiten, any Canadian court considering the punitive portion of the Judgment will first need to determine whether Chevron’s conduct is of such a nature as to merit judicial condemnation. The standard applicable to this determination was first described in 1989 in Vorvis v. Insurance Corporation of British Columbia. The Vorvis standard permits an award of punitive damages only if the conduct at issue is of a “harsh, vindictive, reprehensible and malicious nature,” “extreme,” and “deserving of full condemnation and punishment.” Subsequent decisions of the Supreme Court of Canada have elaborated upon this standard by describing it as requiring a marked departure from ordinary standards of decency existing only in “exceptional cases that can be described as malicious, oppressive or high-handed,” and restricted to “advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.”

The question for resolution is whether Chevron’s conduct was

improperly focus on plaintiff’s loss rather than defendant’s misconduct and do not sufficiently allow for “the many variables that ought to be taken into account in arriving at a just award.” Whiten, 2002 SCC 18, para. 73 (Can.).

200 Id. at para 74.
201 Id.
202 Id. at para. 94.
203 Id. at para. 76.
204 [1989] 1 S.C.R. 1085 (Can.).
205 Id. at 1108.
206 Fidler v. Sun Life Assurance Co. of Can., 2006 SCC 30, para. 62 (Can.).
207 Honda Can., Inc. v. Keays, 2008 SCC 39, para. 62 (Can.).
of a "harsh, vindictive, and malicious nature," "extreme," and "deserving of full condemnation and punishment." Although Chevron’s litigation tactics in Ecuador may be described as "hard ball," they were arguably no different than those employed by Plaintiffs.\(^{208}\) Chevron’s approach to the litigation was further justified given that the company’s financial well-being and perhaps very existence were at risk because of the amount of damages Plaintiffs were seeking. In any event, Chevron’s post-litigation conduct is less relevant than the conduct that preceded the filing of the litigation and that prompted Plaintiffs to seek punitive damages.

Chevron’s pre-litigation actions fall short of the requisite degree of maliciousness and vindictiveness to justify an award of punitive damages. Chevron did not engage in intentional conduct, or any conduct for that matter, designed to injure the environment in Ecuador.\(^{209}\) Any responsibility for environmental injury lies with the Consortium and its participants,\(^{210}\) specifically, Texaco and PetroEcuador, both of which are separate entities from Chevron.\(^{211}\) However, neither of these entities was named as defendants in the litigation.\(^{212}\) Furthermore, Texaco performed environmental remediation and was released from further liability in September 1998, three years before its merger transaction with Keepep and Chevron.\(^{213}\) Chevron was entitled to rely upon this release in its decision to acquire Texaco despite the efforts of the Ecuadorian government and Provincial Court to negate its clear meaning and intent. Finally, although Chevron’s defense of the litigation to date has been aggressive, the arguments advanced on its behalf have been in good faith, as evidenced by the opinions of U.S. courts and the Permanent Court of Arbitration.\(^{214}\) This determination is crucial in distinguishing Chevron’s defense from

\(^{208}\) Clifford Krauss, Consultant Recants in Chevron Pollution Case in Ecuador, N.Y. TIMES, Apr. 13, 2013, at B6.

\(^{209}\) See generally Chevron Notice of Arbitration, supra note 42, ¶¶ 33-34.

\(^{210}\) See id. ¶¶ 31, 33-34.

\(^{211}\) See supra note 35 and accompanying text.

\(^{212}\) See Aguinda v. ChevronTexaco Corp., No. 002-2003 at 20-25 (Sucumbios Provincial Ct. of Justice of Nueva Loja, Feb. 14, 2011); see supra text accompanying note 74.

\(^{213}\) See supra notes 7, 22-23 and accompanying text.

\(^{214}\) See supra notes 100-12, 119-23 and accompanying text.
the actions of the insurer in *Whiten*, who refused to pay a claim on a fire insurance policy by advancing a completely unsupported argument that the fire was the result of the insured’s arson and then forced the dispute to proceed to trial after a two year delay, thereby impoverishing the insured.\textsuperscript{215} Despite such malicious and vindictive circumstances, the Supreme Court of Canada deemed a punitive award of $1 million to be rational and proportionate, a conclusion which cannot be reached with respect to the amount of the Judgment.\textsuperscript{216}

The second consideration in any review of a punitive damages award is whether it is rationally related to the purposes for such awards as well as the facts of the specific case. The rationality requirement is intended to prevent punitive damages awards “assessed at figures seemingly plucked out of the air” that result from civil proceedings where the usual protections afforded criminal defendants are unavailable to a civil defendant.\textsuperscript{217} The determination of rationality focuses on the defendant’s alleged misconduct and not on the plaintiff’s claimed loss.\textsuperscript{218} The Supreme Court of Canada has instructed courts to examine seven factors relating to the defendant’s conduct in determining whether an award of punitive damages is rationally related to the purposes of such awards.\textsuperscript{219} These factors are: (1) whether the conduct was planned or deliberate; (2) the defendant’s intent and motive; (3) the period of time over which the conduct persisted; (4) whether the defendant concealed its misconduct; (5) the defendant’s awareness of wrongdoing; (6) whether the defendant profited from the conduct; and (7) whether the interest at stake was “deeply personal to the plaintiff or a thing that was irreplaceable.”\textsuperscript{220}

Application of the seven factors leads to the conclusion that the punitive portion of the Judgment is not rationally related to the

\textsuperscript{215} Whiten v. Pilot Ins. Co., 2002 SCC 30, para. 112 (Can.).

\textsuperscript{216} Id. para. 128.

\textsuperscript{217} Id. para. 39. The Supreme Court referred to such results as “palm tree justice” in which plaintiffs are “handed a financial windfall serendipitously just because, coincidentally with their claim, the court desires to punish the defendant and deter others from similar outrageous conduct.” Id.

\textsuperscript{218} Id. para. 73. See also Honda Can., Inc., v. Keays, 2008 SCC 39, para. 69 (Can.)

\textsuperscript{219} Whiten, 2002 SCC 30, para. 113.

\textsuperscript{220} Id.
purposes of such awards. As previously noted,\textsuperscript{221} Chevron is not responsible for the errors and omissions of either Texaco or the Consortium occurring anywhere from three to thirty-seven years before Keepep’s merger with Texaco. However, the punitive portion of the Judgment fails to satisfy the rational relationship standard, even assuming the Consortium’s conduct, and Texaco’s conduct in particular, is attributable to Chevron.

While two of the seven factors are favorable to Plaintiffs, the remaining five factors are either neutral or favor Chevron.\textsuperscript{222} Although the Consortium’s operations consisted of intentional acts, it is unlikely that the adverse environmental and health impacts were deliberately planned.\textsuperscript{223} It is equally unlikely that the Consortium deliberately targeted Oriente residents in an attempt to destroy their environment, negatively impact their health, and prevent them from continuing their livelihoods.\textsuperscript{224} Clearly the Consortium did not conceal its activities from the Oriente residents or the Ecuadorian government. The Ecuadorian government was not only a participant in the Consortium through PetroEcuador, but also regulated, approved, and oversaw the Consortium’s operations.\textsuperscript{225} Far from concealment, the Consortium’s operations and associated impacts were conducted with the full knowledge and complicity of the Ecuadorian government.\textsuperscript{226} Texaco, PetroEcuador, and the government were

\textsuperscript{221} See Chevron Corp. v. Donzinger, 768 F. Supp. 2d 581, 600 (S.D.N.Y. 2011); \textit{supra} text accompanying notes 35, 211.

\textsuperscript{222} The two factors favorable to Plaintiffs are the period of time over which the conduct persisted (specifically, March 1964 through completion of the environmental remediation by Texaco in September 1998) and the personal and irreplaceable nature of the interests at stake (specifically, the environment, health, and livelihood of affected residents of the Oriente to the extent such interests were, in fact, demonstrably and negatively impacted by the Consortium’s operations).

\textsuperscript{223} See Third Interim Award, \textit{supra} note 7, ¶ 3.8 (“Throughout 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.”).

\textsuperscript{224} See \textit{id.} (“Specifically, section 46 of the 1973 Concession Agreement imposed obligations on the Consortium in regard to the preservation of natural resources.”); see \textit{also id.} ¶ 3.10 (“In 1990 (when Petroamazonas assumed the role of operation), TexPet and the Respondent agreed to conduct an environmental audit of the Consortium’s oil fields.”).

\textsuperscript{225} See \textit{supra} note 7, ¶ 3.8 and accompanying text.

\textsuperscript{226} Id.
undoubtedly aware that the Consortium’s activities were having an indeterminate impact on the Oriente and its residents.\textsuperscript{227} Whether those impacts are the result of wrongdoing, as required by \textit{Whiten}, or the result of normal operations of the hydrocarbon extraction industry over a thirty-four year period is debatable. Furthermore, unlike the defendant in \textit{Whiten}, Texaco acknowledged the presence of environmental injury, negotiated an agreement with the government to remediate such injury, and did so at significant cost and with the government’s complete approval.\textsuperscript{228} This remediation effort is a strong counterpoint to any arguments regarding Texaco’s intent and motive, concealment of its activities, and its wrongdoing.

Finally, the profits factor is neutral in this case. Although Texaco earned approximately $500 million as a result of its participation in the Consortium, it returned $40 million of these revenues to Ecuador through expenditures incurred in its environmental remediation efforts.\textsuperscript{229} The excessive nature of the punitive portion of the Judgment, more than seventeen times Texaco’s revenues, further neutralizes the impact of this factor. Rather than having a rational relationship to alleged misconduct, it appears Chevron has been subjected to \textit{Whiten}’s “palm tree justice” with arbitrary damages amounts “seemingly plucked out of the air.”\textsuperscript{230}

There is one additional factor in this case that was not present and thus not addressed in \textit{Whiten}, but which is an important consideration for any Canadian court faced with a request to recognize the Judgment. This additional factor is the alleged misconduct of some of Plaintiffs’ representatives during the proceedings in Ecuador\textsuperscript{231} and the affirmation of some of these allegations by numerous independent tribunals.\textsuperscript{232} Canadian courts should not be precluded from examining the conduct of plaintiffs seeking recognition of punitive damages awards. Such examination should occur in cases where there are credible reports

\textsuperscript{227} See supra note 7, ¶ 3.10.
\textsuperscript{228} See supra notes 19-23 and accompanying text.
\textsuperscript{229} See supra notes 17, 22 and accompanying text.
\textsuperscript{230} Whiten v. Pilot Ins. Co., 2002 SCC 18, para. 39 (Can.).
\textsuperscript{231} See supra notes 43, 58, 84-86, 102-10 and accompanying text.
\textsuperscript{232} See supra notes 43, 58, 101-106 and accompanying text.
of specific misconduct made in good faith, such misconduct has been verified by other independent tribunals, the misconduct has directly contributed to an award of punitive damages, and the amount of such an award is significant. Whether Canadian courts should be required to make a positive factual finding with respect to each of these criteria or accord them varying weights in a balancing test is beyond the scope of this article. It suffices to say that such inquiries should not be precluded in cases with the frequency and types of misconduct alleged to have occurred in Ecuador, and that recognition of the Judgment may be interpreted as approval of this misconduct.

Closely related to the rationality requirement is consideration of the proportionality of the award, a test that takes into account all other damages and punishments related to the defendant’s misconduct. This requirement is intended to prevent duplication in the award of damages.\textsuperscript{233} Punitive damages should only be awarded “in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence,” or where the defendant would otherwise be unpunished.\textsuperscript{234} A punitive damages award may be lessened or eliminated on appeal to the extent that a defendant has suffered “other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question.”\textsuperscript{235}

There is little doubt in this case that the compensatory portions of the Judgment are more than sufficient to achieve the goal of punishment and deterrence. The Judgment is $8.56 billion without the punitive damages award.\textsuperscript{236} This amount is more than seventeen times the amount of income derived by Texaco from the Consortium’s operations.\textsuperscript{237} This percentage increases to more than thirty-four times Texaco’s earnings if the punitive damages

\textsuperscript{233} Honda Can., Inc. v. Keays, 2008 SCC 39, para. 70 (Can.).

\textsuperscript{234} Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, 1208 (Can.). See also Whiten, 2002 SCC 18, para. 123 (“[P]unitive damages are awarded ‘if, but only if’ all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.”).

\textsuperscript{235} Whiten, 2002 SCC 18, para. 109, 123.

\textsuperscript{236} See supra notes 65-66 and accompanying text.

\textsuperscript{237} See supra note 17 and accompanying text.
award is included.238 This award is also significant in relation to Chevron's financial standing. The award, as a portion of Chevron's net income, comprehensive income, cash and cash equivalents, and total assets is 31.7%, 33.8%, 54.1%, and 4% respectively.239 These percentages increase to 63.7%, 68%, 108.8%, and 8.2% if the punitive portion of the award is included in the Judgment.240

This award, with or without the punitive portion, is not only the largest award in a civil action in Ecuador and the largest judgment for which recognition has been sought in Canada, but is also one of the largest entered against a private party in any civil action in world history.241 Under such circumstances, it cannot be successfully contended that the award is insufficient to accomplish the goal of punishment and deterrence or that elimination of the punitive damages portion of the Judgment would allow Chevron to escape punishment. To the contrary, an order recognizing the Judgment in its entirety, without elimination or significant reduction of the punitive damages award, would provide Plaintiffs with a windfall and duplicate the retribution, denunciation, and deterrence already provided for in the Judgment. This assumes that Chevron should even be subject to punishment and retribution given Plaintiffs' attempts to hold it accountable for the Consortium's conduct despite Chevron's complete absence from Ecuador.242

D. Determining the Beneficiaries of the Judgment

Another consideration that may prevent recognition is the issue of determining to whom the Judgment is payable. One court has expressed concern regarding foreign damages awards that do not distinguish between the claims upon which they are based and the

238 Id.
239 CHEVRON, CHEVRON ANNUAL REPORT 31-33 (2011). In 2011, Chevron had net income of $26.9 billion, comprehensive income attributable to its operations of $25.3 billion, cash and cash equivalents totaling $15.8 billion, and total assets of $209.4 billion.
240 Id.
242 See Chevron Notice of Arbitration, supra note 42, ¶ 34.
recipients. In *South Pacific Imports, Inc. v. Ho*, the British Columbia Court of Appeals refused to recognize a California state court judgment on the basis that it did not specifically identify the parties to whom it was payable. The successful plaintiffs in *South Pacific Imports* were an individual and a business, but the judgment failed to distinguish between their claims and whether the judgment was payable jointly, severally, or jointly and severally. These failures led the court to conclude that the judgment violated the “well-established principle that to be enforceable, orders must be clear and specific enough so that the defendant will know what is expected from him or her.”

The uncertainty surrounding entitlement to the proceeds of the Judgment is far greater in this case than the uncertainty in *South Pacific Imports*. The Judgment provides that the entire amount of the proceeds is to be placed in a Frente administered trust to be administered and expended on the remedial measures identified in the Provincial Court’s opinion. However, the Judgment completely fails to distinguish between the claims of the potentially hundreds of individuals purportedly represented by Plaintiffs. The Judgment also fails to set forth specific amounts payable to each actual and potential individual claimant. Rather, Chevron is instructed to simply hand over billions of dollars to an organization within Plaintiffs’ control to be distributed in an undetermined manner without any judicial supervision. It is also uncertain whether the Provincial Court’s instructions are consistent with the Correa administration’s plans for the Judgment proceeds. It is unclear if the Provincial Court would resist pressure from the Correa administration regarding disposition of the proceeds, given the absence of judicial independence in Ecuador and the government’s power to remove

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244 Id. paras. 53, 56.
245 Id. para. 53.
246 Id. para. 52 (citing Pro Swing, Inc. v. Elta Golf, Inc., 2006 SCC 52, para. 30 (Can.).
247 See supra note 67 and accompanying text.
248 See supra notes 64-67 and accompanying text.
249 See supra notes 64-67 and accompanying text.
250 See supra note 67 and accompanying text.
and punish individual judges who do not conform their actions to the government’s will or reach desired conclusions.

Two additional factors are cause for even greater concern. Plaintiffs’ representatives did not produce a comprehensive set of fee agreements with their purported clients. The absence of a comprehensive list prevents Chevron from knowing not only the names of every person claiming a portion of the proceeds, but also the amount of each individual claim and the purported injury suffered by each individual. Instead, the Provincial Court has instructed Chevron to pay billions of dollars in damages for undisclosed injuries to unknown persons in amounts to be determined at a later date. This is hardly a “clear and specific” order such that Chevron knows what is expected of it.

The second factor is the dispute among Plaintiffs as to the disposition of the proceeds. This dispute is most vividly on display in the litigation initiated by the Huaorani people in New York state court. The Huaorani plaintiffs have denied representation of their interests in the Lago Agrio litigation due to the absence of a signed retainer agreement. The Huaorani plaintiffs, and potentially others, have claimed Plaintiffs or the Ecuadorian government plan on improperly controlling the proceeds derived from recognition and enforcement of the Judgment. The Huaorani’s claims, as well as other claims which may arise in the future, add further confusion to the identity of the parties entitled to share in the Judgment and place Chevron at risk of further litigation should proceeds be improperly distributed amongst the Plaintiffs in either a voluntary or involuntary manner.

E. Piercing the Corporate Veil

A final significant public policy challenge worthy of mention is the Judgment’s disregard for separation between Chevron, Texaco, and its subsidiaries. In an undated memorandum discussing global enforcement strategies, Plaintiffs concluded that their interests could be furthered by filing multiple enforcement

251 See supra note 115 and accompanying text.
252 See supra note 67 and accompanying text.
253 See supra note 114, ¶ 58.
254 See supra note 117 and accompanying text.
actions against Chevron-related entities on a worldwide basis.\textsuperscript{255} This strategy would be most effective in states with a "flexible interpretation of the ‘piercing the corporate veil’ doctrine” as to permit “reverse veil-piercing” to hold Chevron-related entities liable for Chevron’s actions.\textsuperscript{256} According to Plaintiffs, reverse veil-piercing would enable them to seize the assets of a Chevron subsidiary to satisfy the Judgment against Chevron.\textsuperscript{257} While acknowledging that reverse veil-piercing is rare, Plaintiffs also noted that it is guided by the same equitable principles applicable to traditional veil-piercing, is committed to the discretion of the court, and is highly fact-specific.\textsuperscript{258}

Academic literature defines “outsider reverse piercing” as an attempt by a party with a claim against an individual or corporation to seek repayment from the assets of a corporation owned or substantially controlled by the judgment debtor.\textsuperscript{259} The primary purpose of such an effort is to “increase the ease of collecting on [the] judgment by skipping the intermediary step of seizing the defendant’s interest in the corporation.”\textsuperscript{260} The doctrine originated in the case of Kingston Dry Dock Co. v. Lake Champlain Transportation Co. in which the judgment creditor sought collection of an outstanding debt for repair work by attaching the assets of a subsidiary of the judgment debtor.\textsuperscript{261} The United States Court of Appeals for the Second Circuit denied the judgment creditor’s application and noted that reverse piercing, to the extent it was a viable method to collect judgments, was appropriate only in “rare” circumstances.\textsuperscript{262} The central issue to the application of the doctrine was the extent of control and influence the subsidiary exercised over the parent company with

\begin{footnotes}
\item \textsuperscript{255} See PATRON BOGGS LLP, supra note 5, at 23.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id.
\item \textsuperscript{260} Richardson, supra note 259, at 1605-06.
\item \textsuperscript{261} Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2d Cir. 1929).
\item \textsuperscript{262} Id. at 267.
\end{footnotes}
regard to the specific action giving rise to the debt. 263 Reverse piercing was inapplicable in that case as there was no evidence that the subsidiary controlled the parent company or participated in the decision that gave rise to the debt. 264 U.S. courts have remained deeply divided on the appropriateness of reverse piercing in the eighty-four years since *Kingston*. 265

It is unlikely that the reverse piercing sought in this case will be successful from a public policy standpoint. Unlike the United States, Canada has no recognized body of case law sanctioning

263 Id.
264 See id.
265 Some courts have embraced the doctrine as a legitimate method of judgment collection under certain circumstances. These courts have relaxed the restrictions set forth in *Kingston* or acknowledged that reverse piercing is akin to traditional applications of the piercing doctrine. See, e.g., State v. Easton, 647 N.Y.S.2d. 904, 909 (N.Y. Sup. Ct. 1995) (concluding that “conceptually ‘reverse’ piercing is not inconsistent with nor antithetical to the salutary purposes of traditional piercing” and “[t]he direction of the piercing is immaterial where the general rule [of control and use] has been met”); W.G. Platts v. Platts, 298 P.2d 1107, 1110-11 (Wash. 1956) (rejecting *Kingston* and holding that reverse piercing does not require the subsidiary to be involved in the conduct that was the subject matter of the litigation against the parent corporation). Other courts, however, have severely limited the doctrine. See, e.g., Floyd v. IRS, 151 F.3d 1295, 1299 (10th Cir. 1995) (rejecting reverse piercing on the basis that it grants priority to creditors of an individual shareholder at the expense of business creditors who could not have foreseen the risk and damages the ability of businesses to obtain credit); Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1576-77 (10th Cir. 1990) (holding that the corporate form should be preserved, reverse piercing impermissibly bypasses traditional judgment collection procedures, innocent shareholders would be injured as a result of reverse piercing, and that there was no demonstrated exigency requiring the recognition of a new method of judgment collection). A third group of courts have permitted reverse piercing but under widely-differing circumstances. See, e.g., *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) (restricting reverse piercing to alter ego trusts); McCall Stock Farms, Inc. v. United States, 14 F.3d 1562, 1568-69 (Fed. Cir. 1993) (permitting reverse piercing where one party was the alter ego of another party even in the absence of fraud); Zahra Spiritual Trust v. United States, 910 F.2d 240, 245 (5th Cir. 1990) (permitting reverse piercing in the event of improper intermingling of personal and corporate assets); United States v. Bosaljon, No. CIV. 07-4111, 2010 U.S. Dist. LEXIS 26980, at *12 (D.S.D. Mar. 22, 2010) (permitting reverse piercing only when “no innocent individual would be harmed thereby”); LFC Mktg. Group, Inc. v. Loomis, 8 P.3d 841, 847 (Nev. 2000) (permitting reverse piercing where innocent shareholders of the corporation would not be negatively impacted); Sweeney, Cohn, Stahl & Vaccaro v. Kane, 6 A.D.3d 72, 78 (N.Y. App. Div. 2004) (allowing reverse piercing when the corporation knew about the outstanding debt when it formed and was formed in order to avoid satisfaction of any resulting judgment).
Canadian courts have applied the "alter ego" theory in traditional veil-piercing cases when the company is a "mere 'agent' or 'puppet' of its controlling shareholder or parent corporation." The Supreme Court of Canada has acknowledged that cases lifting the veil in such circumstances have followed "no consistent principle," and that the separate entities principle will be disregarded when it would yield a result "too flagrantly opposed to justice, convenience[,] or the interests of the Revenue."

However, difficulty in defining precisely when the corporate veil may be lifted "does not mean that a court is free to act as it pleases on some loosely defined 'just and equitable' standard." For example, the Ontario Supreme Court has applied a strict approach requiring "complete control" and utilization of the subsidiary as "nothing more than a conduit used by the parent to avoid liability" or accompanying fraud in order to justify disregard for the separate entities doctrine. The "complete control" element requires "complete domination," lack of independent function, and ownership. A "typical" relationship that consists of ownership and shared membership on a board of directors that simultaneously maintains independent management and separate and distinct businesses does not meet this standard. The fraud element requires a determination of whether conduct has occurred that would "unjustly deprive claimants of their rights." The party against whom such a claim has been made must be a

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267 See Kosmopoulos, 1 S.C.R. para. 12.

268 Id. (quoting LAWRENCE CECIL BARTLETT GOWER, MODERN COMPANY LAW 112 (4th ed. 1979)).


270 Id. para. 25.

271 Id. para. 27

272 Id.

273 Id. para. 25.
participant in the alleged fraud.\textsuperscript{274}

The action seeking recognition of the Judgment is not a proper circumstance for reverse piercing, assuming Canadian courts would allow such a claim in the absence of a recognized body of case law and apply the same principles utilized in traditional piercing cases. There is no evidence that the subsidiaries controlled Chevron or participated in the activities that gave rise to the Judgment.\textsuperscript{275} The allegations of whole ownership, management, support, and reporting in the Statement of Claim may be sufficient for traditional piercing from the subsidiary to the parent corporation but do not permit reverse piercing from the parent corporation to the subsidiary.\textsuperscript{276} The Statement of Claim does not contain any allegations of fraud by Chevron or Chevron Canada Limited.\textsuperscript{277}

It is equally unlikely that the portion of the Judgment imposing liability upon Chevron for the Consortium’s operations in Ecuador will be recognized by a Canadian court. The Judgment disregards the corporate separateness of Texaco and Chevron by placing liability upon Chevron for the Consortium’s operations.\textsuperscript{278} In so doing, the Provincial Court pierced the corporate veil and declared that the Chevron and Texaco merger transaction was an illicit attempt to evade liability for environmental damage caused by the Consortium.\textsuperscript{279} The Provincial Court also pierced the corporate veil between Texaco and its Ecuadorian subsidiaries.\textsuperscript{280}

The piercing of the corporate veil between Texaco and its Ecuadorian subsidiaries is contrary to the findings and conclusions of other independent tribunals. The separate nature of Texaco and its Ecuadorian subsidiaries was established in 2001, when a U.S. district court held that there was insufficient evidence to establish direction and control of Texaco’s subsidiaries such as to impose

\textsuperscript{274} Id.
\textsuperscript{275} See Statement of Claim, \textit{supra} note 1, \S 21
\textsuperscript{276} Id. \S\S 15-17.
\textsuperscript{277} The Statement further provides that “[t]he plaintiffs do not allege any wrongdoing against Chevron Canada.” Id. \S 21.
\textsuperscript{278} See \textit{supra} notes 87-88.
\textsuperscript{279} See id.
\textsuperscript{280} See \textit{supra} note 93 and accompanying text.
liability upon the parent corporation in the United States.\textsuperscript{281} If Texaco cannot be held liable for the activities of its Ecuadorian subsidiaries, it is difficult to see how Chevron could be held responsible given that its liability, if any, is the direct result of its business relationship with Texaco.\textsuperscript{282} This lack of evidence was recognized by Plaintiffs as early as July 1995, when they stipulated that they had "no knowledge, information, or documents having any tendency to prove" or "lead to the discovery of information or documents" that might prove "events relating to the harm alleged by plaintiffs occurring in the United States [including directions, communications, discussions, assistance, or guidance] . . . and the extent, if any, to which conduct in the United States caused actionable harm."\textsuperscript{283} This admission should be given its full legal effect to overcome any claim that Texaco or Chevron is responsible for the Consortium’s activities conducted through Texaco’s Ecuadorian subsidiaries.

The piercing of the corporate veil between Chevron and Texaco is also contrary to the findings and conclusions of other neutral tribunals. In 2011, the United States District Court for the Southern District of New York held that "[a]s a matter of U.S. law, the assertion that Chevron succeeded to Texaco's liabilities by merger is incorrect."\textsuperscript{284} This conclusion was reaffirmed by the Permanent Court of Arbitration in its Third Interim Order issued in February 2012.\textsuperscript{285} The court noted that Chevron’s involvement with Texaco commenced "long after the events said to give rise to Chevron’s liability and occurring at a time when Texaco (not Chevron) was . . . [the] parent company."\textsuperscript{286} The court further held that Chevron and Texaco maintained "distinct legal personalities and corporate histories."\textsuperscript{287} The "legal reasons" for the amalgamation of Chevron with Texaco in the Ecuadorian litigation

\textsuperscript{281} Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 549 (S.D.N.Y. 2001); see also \textit{supra} notes 26-28 and accompanying text.
\textsuperscript{282} \textit{See} Statement of Claim, \textit{supra} note 1, ¶ 3.
\textsuperscript{283} \textit{Aguinda}, 142 F. Supp. 2d at 550.
\textsuperscript{284} Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 600 n.40 (S.D.N.Y. 2011).
\textsuperscript{285} Third Interim Order, \textit{supra} note 7, ¶ 4.25.
\textsuperscript{286} \textit{Id}.
\textsuperscript{287} \textit{Id}.
thus remained "unclear to the Tribunal."\textsuperscript{288} The findings and conclusions of these tribunals provide additional support for the refusal of any Canadian court to hold Chevron accountable for the actions of Texaco's subsidiaries, recognize the Judgment, or enforce it through the seizure of assets of Chevron's completely unrelated Canadian subsidiaries.

Additionally, the portions of the Judgment permitting such piercing are essentially equitable in nature.\textsuperscript{289} However, foreign non-money judgments are not recognizable under current Canadian law. In \textit{Pro Swing, Inc. v. Elta Golf, Inc.}, the Supreme Court of Canada refused to recognize a non-money judgment issued by the United States District Court for the Northern District of Ohio and sought to be enforced in the Ontario Superior Court of Justice.\textsuperscript{290} The court acknowledged that "modern-day commercial transactions require prompt reactions and effective remedies."\textsuperscript{291} These "reactions and remedies" led the court to state that "the time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments."\textsuperscript{292} However, the court held that changes to the common law must be made with caution and "accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the [non-money judgment] orders do not disturb the structure and integrity of the Canadian legal system."\textsuperscript{293} The court concluded that the matter before it was not the proper case in which to effectuate a change in the common law.\textsuperscript{294} Likewise, the equitable portions of the Judgment are not the proper case in which to effectuate a change in Canadian common law for the multitude of reasons previously noted.\textsuperscript{295}

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} See \textit{BLACK'S LAW DICTIONARY} 484 (5th ed. 1979) (defining "equitable relief" as consisting of a remedy other than money damages).

\textsuperscript{290} Pro Swing, Inc. v. Elta Golf, Inc., [2006] 2 S.C.R. 612 (Can.).

\textsuperscript{291} \textit{Id.} para. 1.

\textsuperscript{292} \textit{Id.} para. 15. The court further noted that "[t]he case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling." \textit{Id.} para. 1.

\textsuperscript{293} \textit{Id.} paras. 1, 15.

\textsuperscript{294} \textit{Id.} para. 1.

\textsuperscript{295} See \textit{supra} notes 289-93 and accompanying text.
Reverse piercing as a remedy is also an equitable doctrine. Given this nature, it should only be applied sparingly when legal remedies are "unavailable or inadequate to protect the interests of creditors who are seeking to pierce the corporate veil." Given Canadian courts' adherence to both corporate separateness and restrictions upon traditional veil-piercing resembling those in the United States, it is reasonable to assume that Canadian courts would view reverse piercing, to the extent that it is recognized at all, as an equitable remedy.

Domestic equitable considerations may prevent reverse piercing in this case. Plaintiffs have numerous adequate legal remedies available to them. Plaintiffs have a substantial money judgment against one of the largest multinational corporations in the world. The Judgment debtor maintains substantial assets across the globe capable of satisfying, at least in part, the Judgment. These assets may be directly levied upon through recognition actions wherever they may be found. This includes the United States, Chevron's domicile, which Plaintiffs have studiously (and perhaps astutely) avoided to date. The presence of multiple adequate legal remedies renders it unnecessary to utilize an equitable remedy in which corporate separateness is disregarded and assets of independent subsidiaries are seized to satisfy debts arising from activities in which they were uninvolved.

Finally, reverse piercing would usurp the rights of creditors of Chevron Canada Limited. Reverse piercing would subject...
creditors of these entities to risks that they could not have reasonably anticipated, given the absence of a clearly expressed doctrine permitting such piercing in Canadian law. It is unlikely that these creditors expected assets loaned to these entities to be liquidated to satisfy a debt of their separate parent corporation arising from activities in another jurisdiction completely unrelated to their Canadian operations. Reverse piercing would also impermissibly give Plaintiffs priority over consensual creditors by granting them preferential access to corporate assets. The possibility of such priority could not possibly have been known to or investigated by these creditors prior to the closing of the underlying transactions. Reverse piercing may also raise due process concerns for secured creditors with respect to the disposition of their collateral. The presence of this class of innocent victims differentiates reverse piercing from traditional piercing cases. It also militates against a Canadian court exercising its equitable powers and permitting reverse piercing in this case.

VI. Conclusion

The stakes for the Canadian judicial system arising from this recognition proceeding are high. Canadian courts will be required to reconcile Canada’s liberal recognition approach with the many obstacles and deficiencies within the Judgment. On a positive note, Plaintiffs’ recognition action presents an opportunity to revise the defenses to recognition for judgments emanating from

(concluding that reverse piercing is not appropriate unless the moving party can prove by clear and convincing evidence that innocent shareholders will not be negatively impacted).

301 See Richardson, supra note 259, at 1627 (“[A] loaning institution would not expect assets loaned to a corporation alone to be sold off to pay the debts of its owner”).

302 Id.

303 Id. at 1628.

304 Id.; see also In re Hamilton, 186 B.R. 991, 1000 (D. Col. 1995) (discussing due process concerns arising from the attachment of collateralized assets through reverse piercing and the lack of notice to secured creditors of the potential dissolution of the corporation and liquidation of its assets).

305 See Richardson, supra note 259, at 1625 (noting that the “deceptive fiction beneath reverse piercing is that it is identical to the traditional situation and can thus be handled in the same manner, a fallacy fueled by a myopic focus on the principal parties”).
the developing world.\textsuperscript{306} One such revision would require courts to recognize foreign judgments "only to the extent that similar or comparable damages would have been awarded by the enforcing court."\textsuperscript{307} The Canadian judiciary will be called upon to rethink its liberal approach to recognition in the cold, hard light of a tainted judgment emanating from a flawed judicial system in a remote corner of the developing world.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{306}] See \textit{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").
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