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Will What Happened in Ecuador Stay in Ecuador? How the Existing International Due Process Analysis May Be Ineffective in Keeping Fraudulent Foreign Judgments Out of U.S. Courts

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WILL WHAT HAPPENED IN ECUADOR STAY IN ECUADOR? HOW THE EXISTING INTERNATIONAL DUE PROCESS ANALYSIS MAY BE INEFFECTIVE IN KEEPING FRAUDULENT FOREIGN JUDGMENTS OUT OF U.S. COURTS*

By: Christopher Lento**

ABSTRACT:

Recent evidence in the decades-old Chevron/Ecuador litigation suggests that the $18 billion judgment rendered against Chevron by an Ecuadorian court may have been a product of conspiracy and fraud on an almost unprecedented scale. However, these allegations overshadow fundamental problems in the method by which U.S. courts determine whether judgments ren-

* Judge Lewis Kaplan, in his March 2014 ruling in the Racketeering and Corrupt Influenced Organizations case brought by Chevron against the plaintiff’s attorney Steven Donziger, used the phrase “What Happens in Ecuador Stays in Ecuador” to refer to Donziger’s supposed assumption that evidence of potential fraud in the case to enforce Ecuador’s judgment against Chevron would not be subject to subpoena in the United States. See Chevron v. Donziger, 1:11-cv-00691 LAK-JCF, 126, (S.D.N.Y. 2014) available at http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379.

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dered in foreign jurisdictions may be enforced against defendants in the United States.

Under the current jurisprudential regime, courts that are faced with the question of whether a foreign judgment is enforceable in the United States follow what is termed the “international due process analysis.” In this analysis, the court must render a value judgment on the overall judicial process of the country handing down the original decree, and decide whether the country generally affords due process in judicial proceedings. If so, and if the U.S. court determines that the judicial system in the country of origin is fundamentally fair, the judgment will be upheld by U.S. courts. However, this analysis raises a potentially troublesome issue because under the guise of judicial efficiency, courts are free to focus only on the foreign court system as a whole and disregard the particular proceedings under which the judgment was rendered. In essence, this means that courts may completely ignore claims by defendants that they did not receive due process in foreign proceedings. Further, courts are afforded unbridled discretion to validate foreign judgments without considering credible extrinsic evidence regarding the political system of the country where the judgment originated. Perhaps even more troublesome is the fact that because U.S. courts are not required to examine particular proceedings, this analysis has the potential to increase fraudulent practices by foreign litigants in “fair judicial systems,” who anticipate that unscrupulous tactics will not affect enforceability of their judgments in the U.S.

The Chevron/Ecuador case concerns claims that Texaco, which Chevron acquired in 2001, polluted the Lago Agrio oilfield region of Ecuador by improperly dumping billions of gallons of contaminants in the area. After a court appointed expert reported widespread pollution in the region, an Ecuadorian Court ordered Chevron to pay $18 billion dollars in damages. When the plaintiffs sought to collect the judgment in the U.S., Chevron challenged the ruling by the Ecuadorian Court, eventually uncovering evidence that suggested the judgment was a product of a widespread pattern of fraud and conspiracy, including admissions of bribery by one of the presiding Ecuadorian judges.

Paradoxically, the existing international due process analysis suggests that a U.S. court determining
whether to enforce the judgment should examine Ecuador’s court system as a whole, rather than looking into the particular proceedings under which the original judgment was rendered. This article examines the background and application of the international due process analysis, and suggests that rather than promoting judicial efficiency, the existing analysis actually increases the burden on U.S. courts determining the validity of a foreign judgment, and also may lead to judicial incursions foreign affairs, a territory normally reserved for the Executive and Legislative Branches.

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I. INTRODUCTION

A recent ruling in the Chevron/Ecuador case has revived a contentious debate by a number of widely disparate groups, from oil companies and environmentalists, to foreign affairs experts and judicial commentators.1 The litigation, now over 20 years old, brings a host of legal, ethical and political questions into the spotlight, but in an increasingly global society, perhaps one of the most important questions relates to how the United States will enforce judgments rendered in foreign courts. Surprisingly, the scheme by which the enforceability of these judgments is determined by U.S. courts is sadly lacking. Because of the unclear nature of the legal standards used to examine the validity of judgments rendered abroad, judges may validate foreign judgments rendered in proceedings that potentially contravene our notions of fairness and judicial impartiality, but more importantly, may

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violate constitutional requirements and guarantees. The \textit{Chevron/Ecuador} case provides an illustration of some of the difficult issues that arise when the validity of a foreign judgment is suspect. Although it has recently come to light that the multi-billion dollar judgment rendered against Chevron was most likely a product of a widespread pattern of fraud and bribery, the question remains as to whether litigants, who may have been denied any semblance of a fair and impartial trial in a foreign court, should be denied relief simply because the lens through which we examine a foreign judgment is often colored by our relationship with the country where it was rendered.

II. RECOGNITION OF JUDGMENTS RENDERED IN FOREIGN NATIONS

Both federal and state courts have recently wrestled with the question of the extent to which U.S. courts should consider international law when applying domestic law.\footnote{Jacob Gershman, \textit{Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules}, LAWBLOG, WALL ST. J., (August 16, 2013) available at http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/} Similarly, U.S. courts have increasingly had to contend with issues raised by recognizing judgments rendered in foreign courts, particularly in civil matters. Specifically, in the absence of an existing international legal regime, such as the International Criminal Court or an applicable treaty, what is the extent to which the U.S. judiciary’s deference to the courts of other nations obviates due process in proceedings rendered abroad? Judgments rendered domestically normally pose little, if any, problems because the rights guaranteed by the Constitution are widely understood to require uniform practices that, when followed by the conscientious plaintiff, lead to the recognition of judgments by all other states via the Full Faith and Credit Clause, found at Article IV §1 of the Constitution.\footnote{U.S. CONST. art. IV, § 1.} Taken together, the Full Faith and Credit Clause, and its corollary, the Due Process Clause, suggest that when the parties to a legal controversy have an opportunity for a full and fair hearing by a court of competent jurisdiction, the re-litigation of issues already decided is not only wasteful of judicial resources, but would also impose an unfair burden on the victor in the earlier proceeding.\footnote{Robert Jackson, \textit{Full Faith and Credit: The Lawyer’s Clause of the Constitution} 45 COLUM. L. REV. 1 (1945).} Generally, Article IV §1 of the Constitution addresses the duties that the various states have to honor the “public acts, records, and judicial proceedings of every other state.”\footnote{U.S. CONST. art. IV, § 1.} However, the Supreme Court has noted that there is a difference between the credit owed to a state’s legislative
measures or common law, and the credit owed to judgments, which are generally entitled to greater respect than the laws or statutes of other states.\footnote{Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003).} Therefore, once a judgment is rendered, under the doctrine of \textit{res judicata}, the court sitting in the state where the judgment is sought to be enforced can no longer review whether the original court observed procedural due process requirements, as this kind of review is precluded by the mandatory recognition of the original judgment. Presumably, any procedural defects in the suit would have been reviewed and resolved by the court in the original proceedings, and litigation of these issues would be barred in a subsequent trial. Further, for judgments rendered in domestic courts, a subsequent court’s determination of whether a litigant has already had the opportunity for a full and fair hearing is a fairly straightforward matter. Generally, a comprehensive and shared legal scheme assures that the fairness analysis is for the most part uniform, notwithstanding that proceedings may occur in states thousands of miles apart. Therefore, upon minimal inquiry into the adequacy of the judicial process of the state where a judgment originated, the state where judgment is sought to be enforced is constitutionally bound to give the same effect to judgments as those proceedings would have in the state of their origin.\footnote{28 U.S.C. § 1738 (2006).}

International recognition of judgments between countries is obviously much more problematic. The absence of any internationally recognized analogue of the Full Faith and Credit Clause (other than that provided by international treaty) means that each nation is free to recognize and enforce foreign judgments according to its own law, or to refuse to consider recognition and enforcement altogether. In the United States, the closest approximation of an international version of the Full Faith and Credit Clause is the Act of State Doctrine, which dictates that the propriety of the decisions of other countries relating to their internal affairs will not be questioned in the courts of the United States.\footnote{Underhill v. Hernandez, 168 U.S. 250, 254 (1897).} In its traditional formulation, the doctrine precludes courts of this country from inquiring into the validity of public acts that a recognized foreign sovereign power commits within its own territory.\footnote{Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408 (1964).} While application of the doctrine is not required by statute, it is a principle generally recognized and adhered to by federal courts when examining the decisions of the agencies of foreign sovereigns.\footnote{Id.}

It is important to note that the underlying aim of the Act of State Doctrine is not based in comity, the principle that one nation will extend certain courtesies to other nations through the recognition of the valid-
ity and effect of their executive, legislative, and judicial acts.\textsuperscript{11} Rather
the aim of the Act of State Doctrine is to preserve the separation of
powers between the Judicial and Executive branches.\textsuperscript{12} That is, the
purpose of the doctrine is not to protect other nations’ sovereignty from
interference by the United States, but rather to prevent the Executive
Branch’s prerogative of dictating foreign affairs from being frustrated
by a decision issued by the Judicial Branch.\textsuperscript{13}

The Act of State doctrine gives rise to an additional complica-
tion, which is the fact that conflict of laws is generally regarded as a
matter of state, rather than federal law, with the consequence that
each state is free to make its own decision regarding recognition of a
foreign country’s judgments.\textsuperscript{14} However, although the recognition of
judgments generally has state-specific applicability, the complication
primarily arises when the controversy at hand may implicate foreign
relations. As the Supreme Court noted in \textit{Sabbatino}, a 1964 case that
established that the policy of federal courts would be to honor the Act
of State Doctrine, the Court was “not without other precedent for a
determination that federal law governs; there are enclaves of federal
judge-made law which bind the States”. ...[t]he rules of international
law should not be left to divergent and perhaps parochial state inter-
pretations.”\textsuperscript{15} Under the holding of \textit{Sabbatino}, even though recognition
of foreign judgments in this country is generally governed by state law,
the Separation of Powers, Act of State and Political Question Doctrines
(and their underlying principles) would seemingly restrict state court
judges and also curtail the discretion of federal judges, when the for-

teign relations of the United States could be impaired by the applica-
tion of state judgment recognition law.

III. THE INTERNATIONAL DUE PROCESS ANALYSIS

The \textit{Chevron/Ecuador} case brings these issues screaming into
the spotlight, demanding particular attention to potential domestic en-
forcement of judgments rendered in the courts of other countries. As
the case continues to wind its way through the appeals process, it has
the potential to either reinforce or redefine the existing limits of com-
ity between the United States and Ecuador, as well as raise serious
questions about the extent to which the Judicial Branch can render
decisions that touch upon political relationships before it encroaches

\begin{itemize}
\item \textsuperscript{11} Hilton v. Guyot, 159 U.S. 113, 164 (1895).
\item \textsuperscript{12} See 376 U.S. at 423.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Nicor Int’l Corp. v. El Paso Corp., 318 F. Supp. 2d 1160 (S.D. Fla. 2004).
\item \textsuperscript{15} 376 U.S. at 939.
\end{itemize}
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on the powers of the other branches.\textsuperscript{16} Under the current jurispruden-
tial regime, courts that are faced with the question of whether a for-
eign judgment is enforceable in the United States follow what is
termed the “international due process” analysis.\textsuperscript{17} In this analysis,
rather than re-examining foreign proceedings in which the judgment
was obtained, a U.S. court may render a value judgment on the overall
judicial system of the country handing down the original decree, and
decide whether the country generally affords due process in judicial
proceedings. If so, and the court determines that the court system in
the country of origin is fundamentally fair, the judgment will be up-
held by U.S. courts.\textsuperscript{18}

This analysis raises a potentially troublesome issue because
under the guise of judicial efficiency, courts are free to focus only on
the foreign court system as a whole and disregard procedural issues in
the particular proceedings under which the judgment was rendered. In
essence, this means that courts may completely ignore claims by de-
fendants that they did not receive due process in foreign proceedings.
Professor Montre Carodine, in an in-depth examination of the interna-
tional due process analysis, has noted that rather than examining in-
dividual proceedings, courts are free to rely on “political evidence and
the judges’ own personal perceptions of the foreign countries.”\textsuperscript{19} Under
this analysis, an anomaly may occur wherein courts might enforce
judgments from foreign nations that generally provide due process,
even if the particular proceedings were void of the due process require-
ments that would be guaranteed under the Constitution in domestic
proceedings. However, judges are free to refuse to enforce judgments
from countries that may be considered “unfriendly” to U.S. interests
even if these countries afforded the defendants protections that exceed
constitutional due process requirements.

In addition, courts are afforded unbridled discretion with re-
spect to the extrinsic evidence they will consider concerning the fair-
ness of the judicial system of the judgment’s country of origin.\textsuperscript{20} It has
been contended that because the international due process analysis
rests solely with the judiciary, and may be subject to the personal bias
and determinations of the judge, it violates the Separation of Powers
Doctrine because it in effect allows courts to “set” foreign policy in
holdings that will bind subsequent courts considering similar issues.\textsuperscript{21}

\textsuperscript{16} Aguinda v. Texaco, Inc., 142 F. Supp. 534, 545 (S.D.N.Y. 2001), aff’d, 303 F.3d
470 (2d Cir. 2002).
\textsuperscript{17} Soc’y of Lloyds v. Ashenden, 233 F.3d 473, (7th Cir. 2000).
\textsuperscript{18} See id. at 481.
\textsuperscript{19} See Montre Carodine, Political Judging: When Due Process Goes International,
\textsuperscript{20} See id. at 1207.
\textsuperscript{21} See id. at 1206–07.
However, perhaps the most troublesome aspect of the international due process analysis arises because U.S. courts are not required to examine particular proceedings, which means this analysis has the potential to increase fraudulent practices by foreign litigants in “fair judicial systems,” who anticipate that unscrupulous tactics will not affect the enforceability of their judgments in the U.S. For example, American attorneys representing plaintiffs in foreign courts that generally afford fair proceedings have an incentive to exploit this weakness through fraud or bribery, particularly if they believe that their individual proceedings will receive minimal scrutiny. As counterintuitive as it may seem, the existing international due process analysis may afford unscrupulous plaintiffs who choose their forums carefully increased opportunities to tamper with individual proceedings, and then have potentially fraudulent judgments enforced in the U.S. Although this outcome seems implausible, both the Dole and Chevron cases discussed below provide examples in which choosing to file in a “fundamentally fair” country that only generally afforded due process rights might have made a significant difference in the outcome of the case.

IV. THE TRADITIONAL ROLE OF THE JUDICIARY IN FOREIGN AFFAIRS

With all due respect to the memory of the late Reagan-era Speaker of the House Tip O’Neill, “politics” has rapidly become a global concern. With the advent of the internet and communications technology that allows instantaneous dissemination of information, political developments in nearly every country are scrutinized and evaluated on a global scale in real-time as they occur. As business and commerce becomes increasingly globalized, developments in countries the world over have both a concrete and abstract effect on the day-to-day activities of the citizens of the United States. Similar to the so-called “butterfly effect,” where a small change in one system has drastic consequences in a seemingly unrelated system at a later date, political developments in nearly every country are instantly noted,

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22 Former Speaker of the U.S. House Tip O’Neill (b. December 12, 1912, d. January 5, 1994) coined the popular phrase “All Politics is Local,” which stands for the principle that politicians must appeal to the concerns of their local constituents in order to garner success. According to this theory, local issues and mundane concerns drive political success, rather than broad theoretical or global issues or concerns which may only have intangible effects on voters.

transmitted instantaneously via mass communication channels, and the resultant potential global ramifications are calculated, outcomes and effects are anticipated, and measures are put in place to either foster or minimize the impact of these changes. While the “political” branches of the federal government (the Legislative and Executive Branches), have the staff and resources to make determinations of how global events will shape U.S. foreign policy, the Judiciary should theoretically be insulated from the requirement of making or formulating these foreign policy determinations based on constitutional and legal norms. Under the Separation of Powers doctrine, the foreign affairs power is, at least in theory, the exclusive domain of the Executive and Legislative branches. However, it is often the Court itself that sets the limits on the extent to which it may consider questions of foreign affairs, and it does so through purely jurisprudential checks such as the Political Question Doctrine. As in any self-policing system, notwithstanding the appeals system, the judiciary is almost unrestricted in its ability to step outside the bounds of its own self-imposed restrictions in the name of judicial interpretation. As corporations continue to expand and conduct business on a global scale, it is virtually certain that the judiciary will be called upon more and more to determine the validity of judgments rendered in foreign courts. In this specific circumstance, under the existing international due process analysis, courts are able to determine foreign policy, rather than interpret it, to the extent that they may evaluate and render a value judgment on the legal systems of foreign nations.

As noted above, the primary restraint on judicial incursions into the sphere of other branches is the Separation of Powers Doctrine, which is further encapsulated in the judicially created Political Question Doctrine. The doctrine was first suggested in the landmark Marbury v. Madison case, in which Chief Justice John Marshall described a distinct type of Executive action, the political action, wherein an official may exercise discretion. The Court built on this in Mitchell vs. Maurer, noting that a federal court has a special obligation to “satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.” Although the opinion seemed to suggest that the court always has the final say in interpreting the constitution—

25 See Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (“[T]he conduct of . . . foreign relations . . . is committed by the Constitution to the Executive and Legislative [branches] . . . ”).
26 Carodine, supra note 20, at 1196.
28 Mitchell v. Maurer, 293 U. S. 237, 244 (1934).
ally conferred powers of the branches, it might refuse to do so in certain situations where the questions were simply not within the courts’ expertise. Marshall suggested that these questions, although falling squarely within the Court’s power to adjudicate, were better determined by the Executive branch, which is uniquely positioned to make policy decisions. This notion was later refined and expanded in *Baker v. Carr*, where Justice Brennan outlined the factors to be used by the court in determining whether a question is more appropriate for resolution by the political branches.\(^{29}\) Considerations such as a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” “a lack of judicially discoverable and manageable standards for resolving it,” and “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government” are several of the factors that play into the political question determination.\(^{30}\) These factors would all seemingly come into play in the foreign affairs arena, which is unquestionably the province of the Executive and Legislative branches.\(^{31}\) However, realizing the potential to completely sideline the judiciary in questions regarding foreign affairs, the *Baker* Court indicated that invocation of the Political Question Doctrine was at the discretion of the Court. Although all questions involving foreign affairs are potentially political questions, the Court stated that it would be a mistake to “suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”\(^{32}\) Clearly however, there are situations dealing with foreign relations where the question falls into an area “textually . . . commit[ed] . . . to a coordinate political department,” where the court’s involvement might demonstrate “a lack of the respect due coordinate branches of government.”\(^{33}\) In foreign affairs, the Executive is often in the best position to determine the state of relations between the United States and other nations, and depending on the political and economic changes that occur within those nations, foreign relations may necessitate adjustment on a moment’s notice notwithstanding any country’s given political or economic stability. The Judiciary, therefore, often lacks both the expertise and legitimate authority to determine foreign policy, as recognized by the Court itself through application of the Political Question Doctrine, which analysis should also be applicable to the international due process analysis.


\(^{30}\) *See id.*


\(^{32}\) *See* 369 U.S. at 211.

\(^{33}\) *See id.* at 217.
V. UNDERPINNINGS OF RECOGNITION OF FOREIGN MONEY JUDGMENTS

However, courts have arrived at, and seemingly wholeheartedly embraced, the current iteration of the international due process analysis through a series of notable cases. As it stands, the analysis has evolved over time to the extent that it would be almost unrecognizable to its original proponents. The analysis has its roots in the principle of comity, which is the principle that one jurisdiction will extend certain courtesies to other nations through the recognition of the validity and effect of their executive, legislative, and judicial acts. However, the basic hope underlying comity is that other jurisdictions will reciprocate the courtesy shown to them. Many statutes relating to the enforcement of foreign judgments require that the judgments of a particular jurisdiction will be recognized and enforced by a country only to the extent that the originating country would recognize and enforce the judgments rendered by the enforcing country. This concept was perhaps most clearly outlined by the Supreme Court in the 1895 case of Hilton v. Guyot, which involved a French liquidator’s attempt to collect on a judgment obtained in France against an American citizen. In its landmark decision, the Supreme Court ruled in favor of the defendant-debtor, and refused to recognize the French judgment, beginning with a discussion of the doctrine of comity. Comity, the court noted, is neither a matter of absolute obligation on one hand, nor a matter of mere courtesy and good will on the other, but is the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” The court went on to review the treatment of foreign judgments in other countries, and then announced its rule regarding the conclusiveness of foreign judgments:

[W]e are satisfied that, where there has been opportunity for a full and fair trial abroad before a [foreign] court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show ei-

35 See id. at 330.
37 See id. at 163–64.
ther prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.\textsuperscript{38}

Though the French judgment appeared to meet these requirements, the Court nevertheless refused to recognize the judgment based on a lack of reciprocity, because France did not at that time recognize American judgments.\textsuperscript{39} Among western nations, France was one of the last major countries that refused to recognize and enforce foreign judgments in the absence of a complete reexamination of the merits, and only began doing so approximately 70 years after \textit{Hilton} was decided.\textsuperscript{40}

\textit{Hilton}'s comity-based analysis for the recognition and enforcement of foreign judgments survives today, albeit in a drastically altered form. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgments Recognition Act in 1962, and the American Bar Association approved it the same year, and a majority of states have adopted the Uniform Act.\textsuperscript{41} States that have not adopted the Uniform Act usually rely on common law principles, and the Restatement of Foreign Relations Law (Restatement), which is also based on \textit{Hilton}.\textsuperscript{42} Under both the Restatement and the Uniform Act, if a party obtains a judgment outside the United States but wishes to collect on it in the United States, that party must have the judgment “recognized” in order for the judgment to be enforceable.\textsuperscript{43} Courts will typically enforce a judgment that the creditor seeks to have recognized, unless the judgment debtor establishes the applicability of one of the statutory grounds for non-recognition. These grounds are comprised of both mandatory grounds, which absolutely prohibit judicial recognition, and discretionary grounds,

\begin{itemize}
\item \textsuperscript{38} See id. at 202–03.
\item \textsuperscript{39} See id. at 227.
\item \textsuperscript{40} Kurt H. Nadelmann, \textit{French Courts Recognize Foreign Money Judgments: One Down and More to Go}, 13 \textit{Am J. Comp. L.}, 72 (1964).
\item \textsuperscript{41} Carodine, \textit{Political Judging}, supra note 20, at 1166.
\item \textsuperscript{43} Steven M. Richman & Justin B. Richman, \textit{An Overview of Enforcement of Foreign Orders and Judgments in American Courts}, \textit{New Jersey Lawyer}, 13, February 2010.
\end{itemize}
which allow the judge some amount of leeway.\textsuperscript{44} However, grounds that the Act considers “discretionary” include situations such as when the judgment was obtained by fraud or there is substantial doubt about the integrity of the rendering court.\textsuperscript{45} The final discretionary ground in the 2005 iteration of the Act include situations when the specific proceedings are not compatible with the requirements of due process of law.\textsuperscript{46} Remarkably, based on the plain wording of the Act, this suggests that the judge has the discretion to recognize a potentially fraudulent judgment and make it judicially enforceable, or to recognize a judgment in spite of evidence that it was rendered in proceedings devoid of due process. Likewise, in spite of evidence suggesting that the integrity of the rendering court has been compromised, the judge has discretion on whether or not to enforce the judgment, rather than the duty to dismiss the suit for enforcement.

Perhaps most troubling, however, are the “mandatory grounds” for non-recognition which have given rise to the analysis which the courts use today. These grounds suggest that a foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, the foreign court did not have personal jurisdiction over the defendant, or the foreign court did not have jurisdiction over the subject matter.\textsuperscript{47} As it evolved, however, the exception has become the rule: the “mandatory grounds” for non-recognition of a judgment have become the test by which to determine whether a judgment will be recognized. The Hilton Court’s requirements of the opportunity for a full and fair trial before a foreign court of competent jurisdiction conducted upon regular proceedings, the citation or voluntary appearance of the defendant, an impartial system of jurisprudence treating all parties alike, and the lack of prejudice or fraud in the court or the system of laws under which it sits are no longer the primary aspects considered by the court in recognizing foreign judgments. Rather than those considerations, which appear likely to accurately measure the fairness and validity of a foreign judgment, the international due process analysis has been reduced to a single determination by the court as to whether the judgment was rendered “under a system which fails to provide impartial tribunals or procedures compatible with the requirements of due process of law.”\textsuperscript{48}

Under this loose standard, a foreign judgment need only be rendered under a system that generally provides impartial tribunals and proce-
dures compatible with due process of law, as noted above. Significantly, the system does not need to provide due process commensurate with constitutionally guaranteed rights, but rather, the foreign procedures simply have to reflect some vague approximation of due-process. Courts have not required that the system in which the foreign proceedings took place comply with constitutional benchmarks of due-process, but rather, require only that the system generally affords proceedings that are fundamentally fair. If the overall judicial system of the nation rendering the judgment is considered “fair,” then fairness in an individual case is not examined, allowing for potential recognition of foreign judgments rendered in proceedings that would clearly violate due process protections if they took place in a U.S. court.

VI. APPLICATION OF THE INTERNATIONAL DUE PROCESS ANALYSIS

The international due process analysis has been most clearly defined by Judge Posner in the case Society of Lloyd’s v. Ashenden, when he noted that foreign judgments from the United Kingdom need not comport with American notions of due process to be enforceable in the United States. Instead, Judge Posner held that foreign judgments from the United Kingdom and other “civilized” countries need only comply with a much looser standard, noting that the “international concept of due process” is distinct from the notion of due process that has emerged from American case law. Under this analysis, the fact that a foreign court denied an individual judgment debtor due process is inconsequential if the court feels that the country has a fair judicial system, and it may, in the name of comity, enforce the judgment against the judgment debtor. On the other hand, had the judgment creditor obtained the judgment in a country that the court feels has an unjust judicial systems, the court will completely disregard the judgment. The Ashenden court emphasized that the entire “system” must be unfair to preclude recognition, and expressed doubt as to the viability of the “retail approach” which focuses on the particular proceedings. Also troubling is the suggestion that the analysis should only require that the foreign procedures be “compatible” with due process, rather than mirror the fundamental rights that would be constitutionally guaranteed in domestic courts.

49 Soc’y of Lloyd’s v. Turner, 303 F.3d 325, 330 (5th Cir. 2002).
50 Soc’y of Lloyds v. Ashenden 233 F.3d 473, 480–81 (7th Cir. 2000).
51 See id.
52 See id. at 481.
53 See id. at 477.
54 See id.
The anomalies that arose under Ashenden and other related Lloyd’s cases are ironic, because in 1977, the United States and the United Kingdom did attempt to establish a bilateral treaty to govern the recognition of judgments, and the proposal received preliminary approval. However, despite numerous revisions and attempted compromises, the final adoption of this document never occurred, despite the many similarities of the judicial process and a shared legal history. It is almost unthinkable that a country that spawned so many of our legal traditions would give rise to questions regarding the recognition of judgments in which U.S. citizens were deprived of fundamental due process rights, but the Lloyd’s cases were just such a situation.

The Lloyd’s cases concern Lloyd’s of London, established approximately 325 years ago and later incorporated in 1871. Lloyd’s is not an insurance company as we would recognize one in the United States, but rather, is actually a marketplace itself, established as a corporate body under the Act 1871 of the British Parliament. Lloyd’s has historically been made up of individual financial backers, underwriters, and members, which have been traditionally known as “Names.” Names may be either individuals, partnerships of individuals or corporate investors, all of which come together under the aegis of Lloyd’s to pool and spread risk. Lloyd’s generally raises capital through soliciting investments, but in order to invest in Lloyd’s underwriting activities, an individual or corporation must first become a Name by entering into an agency relationship with a Lloyd’s employee, known as “Member’s Agents.” Further, to become a Name, investors must demonstrate a particular level of financial worth, and then must deposit their investment amount in the form of a letter of credit issued in favor of Lloyd’s. The Members Agent then invests this money in one or more “syndicates,” which is the general term for the risk-relationship between the entities that are performing the actions which are sought to be insured, and the group of investors who insure that risk. Syndicates typically write business and insure risks for only one year, at the end of which the syndicate ceases to exist as an ongoing trading entity. However, after the year lapses, there is a lag time of two more years allowed for claims to come in and be settled, and at the end of

the third year, each syndicate closes its accounts, and the Names receive their share of the profits, or pay their share of the losses, and their liability comes to an end. Most importantly, until all claims are received and paid, a syndicate cannot close its accounts and distribute profits, and pending that closure, Names are liable without limit for their shares in the syndicates in which they invest. Each Name pledges his entire personal wealth to back up his share in the syndicate’s insurance policies. Historically, this potential inability of a syndicate to close its accounts in a timely fashion and then distribute profits had drastically reduced the appeal of investing in syndicates. In order to counter this, and generate interest by investors, Lloyd’s instituted the practice of having reserves calculated to cover any outstanding claims that might come in against the syndicates, which allowed Lloyd’s to maintain the schedule of closing accounts and declaring profits (or losses) at the end of the third year. At the time of closing actuaries calculate and set aside estimated reserves to cover the costs of both claims that have been notified but not yet paid, and potential claims which may have been incurred but not reported, and the costs of the reserves are then deducted from the syndicate’s profits, and the syndicate is allowed to close at the end of the third year.

Lloyd’s motto, *Uberrimae fidei*, is Latin for “of the utmost good faith,” which is ironic in the eyes of many after a series of states and individual investors alleged fraud by Lloyd’s on a massive scale, which led to multiple lawsuits and tested the outer limits of both comity and international judgment recognition. Over time, it was discovered that Lloyd’s three-year business model was completely ineffective in dealing with risks that could be categorized as “long tail” risks, where the liabilities related to an occurrence may not become known for years, or perhaps even decades later. These types of risks often led to an insuring syndicate’s reserves being vastly inadequate to cover later claims, which also led to resistance to doing business with Lloyd’s from the perspective of the insured. To maintain the appeal of investing in Lloyd’s on both the Name and insured sides, Lloyd’s developed a scheme called “Reinsurance to Close” that allowed a syndicate to close in any event after three years and declare a result based only on the claims that had been made within the three year time limit. However, it would then package the entire portfolio of policies from that closed syndicate with a set amount of reserves to cover potential future claims against these policies, and pass them on to new syndicates that

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were still active. These active syndicates, now saddled with potential future claims from “inherited” policies, used the calculated reserves to buy reinsurance policies to cover any losses that might arise from any future claims, which effectively shifted the risk from the syndicates to the reinsurer. However, Lloyd’s quickly discovered several problems with this structure. First, calculating the amount of reserves necessary to cover hypothetical future claims is a difficult and often inaccurate process, and so the amount of reinsurance purchased to cover future liability was often grossly inadequate once the claims manifested. Second, because the Names were personally liable without limit if the reinsurance amount was inadequate, the structure was similar to a “Ponzi” scheme, in the sense that early investors were able to take profits while passing risks along to subsequent investors. That is, as the portfolios were transferred forward year after year, the investors in the most recent syndicate became personally liable for all of the latent liabilities of its predecessor syndicates, and unless the reserves (in the form of reinsurance) passed on were adequate to pay potential future claims, the result of using this system was to create a “time bomb” of liability. The system was a perfect breeding ground for fraud, because profits taken as a syndicate closed were directly reduced by the reserves calculated, which in turn influenced the amount of reinsurance purchased. This encouraged intentionally underestimating reserves, which would then require a lower amount of reinsurance to be purchased, and maximize present profits. Further, many of the Names solicited during this time period claim that they were led to believe that the very existence of Reinsurance to Close ended their liability at the end of the three year syndicate period, and that they were completely unaware of the potential liability from inadequate reinsurance.

In the 1980s, when Lloyd’s governing committee learned of the potential future liability posed by the hazards of asbestos and other


pollutants, they realized that many of the most profitable syndicates, which many members of the governing committee had personally invested in, faced losses on a scale that would literally destroy Lloyd’s as a functioning entity. A report was generated that recommended that new Names be actively recruited so that additional assets would be available to meet impending losses, and that recruitment be facilitated by reducing the assets which each Name had to prove in order to establish membership. This would serve to bring in thousands of new Names, which would dilute impending losses by actively passing costs on to the new Names. In 1972 Lloyd’s had begun soliciting Americans to be Names, and continued to do so during the late 1970s and 1980s, but although the governing committee knew of the pending disaster from long-tail asbestos claims, the new Names were not informed of the probable liability they faced. More importantly, they were not told that their liability was both several and unlimited. In essence, expanding the numbers of Names functioned to provide more assets to absorb the impending losses, while allowing insiders to avoid future liability by surreptitiously leaving the at-risk syndicates. In fact, during this period, some of the Names were repeatedly assured of the safety of their investment, and were actually urged to increase their investment in the syndicates.

In the early 1980s, Lloyd’s sought to take measures to protect itself from litigation, and succeeded in obtaining a new ‘private act’ of the British Parliament, entitled the Lloyd’s Act of 1982, which provided Lloyd’s with immunity from legal liability, and further, stripped the ability of the Names to regulate themselves by establishing a governing committee known as the Council of Lloyd’s. Lloyd’s began requiring all Names to sign contracts in which they agreed to comply with the Lloyd’s Act, and which included choice-of-forum and choice-of-law clauses under which they agreed that all legal disputes would be brought in English courts and decided under English law. The Names were not informed of the extent and implications of these changes until much later when losses in the billions of dollars became known. The choice-of-law and choice-of-forum clauses proved to be critical in the litigation in American courts during the 1990s, when the Names became individually liable for the massive losses from the reinsurance scheme. The Lloyd’s Act authorized the Council to appoint

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64 Soc’y of Lloyd’s v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000).
66 See id.
67 See id at 2.
68 See id.
“substitute agents,” who would have the power “to act on behalf of members for the proper regulation of the business of insurance at Lloyd’s.”\textsuperscript{70} When Lloyd’s experienced over $12 billion in losses during the 1980s and early 1990s, and the Names were unable to meet their contribution requirements, Lloyd’s entered into a series of settlement agreements with the Names, under which Lloyd’s and the Names who agreed to settle exchanged mutual releases of liability and waivers of claims.\textsuperscript{71} The majority of the Names accepted the settlement plan in 1996, although a substantial number of the Names refused to do so. In accordance with the settlement plan, all of the Names, including those who rejected the settlement, were offered the opportunity to purchase reinsurance. Significantly, even those Names that did not participate in the settlement agreements were covered by the reinsurance, but the Names who refused to settle were not included in the “mutual waiver of claims.”\textsuperscript{72} Further, there were provisions in the settlement plan that shielded Lloyd’s from being tangled in extended litigation. Specifically, Names could not claim any offset against Lloyd’s and could not dispute the amount of their reinsurance premiums in any lawsuits brought by Lloyd’s to collect the reinsurance premiums. To ensure that these provisions were enforceable against the non-settling Names, the Council appointed a “substitute agent” to sign the reinsurance contract on their behalf pursuant to the Lloyd’s Act.\textsuperscript{73} Non-settling Names sought to challenge Lloyd’s ability to enact the settlement plan, as well as specific provisions of the reinsurance contract in court in the United Kingdom. However, the British courts affirmed Lloyd’s power to enact the settlement plan, and upheld the validity of the clause which prevented the Names from claiming any set-offs from the reinsurance premium, including damages for fraud.\textsuperscript{74} Additionally, the British courts also upheld what was termed a “conclusive evidence” clause of the reinsurance contract, which stated that whatever Lloyd’s determined the premium amount to be was automatically conclusive evidence between the Names and the reinsurer, and the Names would simply be liable for whatever amount Lloyd’s set.\textsuperscript{75}

When Lloyd’s sought to enforce provisions in the contracts against American Names by billing them for mounting losses, the subsequent cases highlighted the fraudulent misrepresentations that Lloyd’s had used in order to generate capital in order to dilute its losses. The defendants in Ashenden were a husband and wife who re-

\textsuperscript{70} Ashenden, 98 C 5335 at 2.
\textsuperscript{71} See id.
\textsuperscript{72} See id. at 2–3.
\textsuperscript{73} See id. at 3.
\textsuperscript{74} See id.
\textsuperscript{75} See id.
sided in Illinois, James and Mary Jane Ashenden. The Ashendens were separately recruited to become Names in 1977 and in 1984 by a Managing Agent, and they initially invested $70,000 after being assured that Lloyd's was an esteemed and time-honored institution that only invested in “conservative risks.”\(^{76}\) The Managing Agent continued to reassure the Ashendens regarding the security of their investment in Lloyd's, and they invested even more in Lloyd's, never having been informed that they faced tremendous impending losses because of asbestos claims. In 1991, Lloyd's called on the Ashendens to help cover increasing losses sustained by the syndicates, who insured policies that had been successively reinsured without adequate reserves, sometimes dating as far back as the 1930s.\(^{77}\) Lloyd’s made demand upon the Ashenden’s letters of credit to cover the losses, and the Ashendens, in addition to over forty other Illinois Names, ultimately sued Lloyd’s and several of its agents in state court, arguing that Lloyd’s had violated Illinois securities and consumer protection laws.\(^{78}\) Lloyd’s removed the case to federal district court, and the district court dismissed the case, ruling that the Names were subject to the choice of law and forum clauses as outlined in the settlement plan.\(^{79}\) Subsequently, Lloyd’s sent the Ashendens copies of the settlement plan, which included “finality statements” that set forth demands from each of them for the balance that they owed from their underwriting liabilities, and from their shares of the reinsurance premium. Lloyd’s demanded $179,430 from James Ashenden and $222,668 from Mary Jane Ashenden, but stated that their individual liabilities would be reduced to $100,000 each if they executed the mutual releases.\(^{80}\) The Ashendens refused the settlement offer, and they instructed their agent not to sign the reinsurance agreements for them. But as noted, Lloyd’s had made the reinsurance payments for all of the Names, including payment on behalf of the non-settling Names, like the Ashendens, who had also refused to sign the reinsurance contract. Lloyd’s then sued those Names, including the Ashendens, in the United Kingdom, and was able to get default judgments because of the waiver and “conclusive evidence” clauses.\(^{81}\) The British court denied the Names leave to appeal, and so the British judgment was final, valid, and enforceable.

Lloyd’s then sought to have the judgments recognized in the United States. Writing for the Seventh Circuit, Judge Posner began

\(^{76}\) See id. at 4.
\(^{77}\) See id.
\(^{79}\) See id.
\(^{80}\) See Ashenden, 98 C 5335 at 4.
\(^{81}\) See id.
his analysis by outlining Illinois’s version of the Uniform Foreign Country Money-Judgments Recognition Act, which allows that a foreign judgment is unenforceable if rendered by a court outside the United States and the judgment was “rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”

The court found the word “system” fatal to the Ashendens’ position. Judge Posner noted that the judgments against the defendants were obtained in Great Britain’s High Court, “which corresponds to our federal district courts; they were affirmed by the Court of Appeal, which corresponds to the Federal Courts of Appeals; and the Appellate Committee of the House of Lords, which corresponds to the U.S. Supreme Court, denied the defendants’ petition for review.”

Posner unequivocally declared that “[t]he courts of England are fair and neutral forums,” and asserted that “a[n]y suggestion that this system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law” borders on the risible.” He further asserted that British courts “are highly regarded for impartiality, professionalism, and scrupulous regard for procedural rights.”

The Seventh Circuit concluded that the Illinois Judgment Recognition Act provided that only the system under which a foreign judgment was entered be “compatible with” American notions of due process, not identical. According to Judge Posner, there was no “serious question” that the United Kingdom’s judicial system comports with the international concept of due process.

The Court rejected the Ashenden’s argument that it should examine the particular proceedings in which Lloyd’s obtained the judgments against them, rather than looking only at the British judicial system generally. However, because of the Illinois Act’s focus on the “system”, Posner concluded that the Act did not call for “a retail approach”, which he stated would be inconsistent with providing a streamlined, expeditious method for collecting judgments rendered by courts in other jurisdictions, and which would, in effect give the judgment creditor a further appeal on the merits. However, Judge Posner went on to state that had the judgment at issue “been rendered by

82 See id.
83 See id.
84 See id.
85 See id.
86 See id.
87 See id.
88 See id.
89 Carodine, supra note 20, at 1183.
90 See Ashenden, 223 F. 3d at 476.
91 See id.
Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question,” the Court may have considered the type of evidence needed to show a denial of international due process.\footnote{See id.}

This statement highlights the major flaw in the international due process analysis, that whether an individual’s claim that due process rights were violated are measured against applicable sets of standards that are wholly at the discretion of the presiding judge, and their personal perception of the country that the judgment was rendered in. It is generally believed that Lloyd’s engaged in fraud on a massive scale, but more disturbing is the fact that because of this fraud, the Ashendens were deprived of rights that, if this situation had occurred in the United States, would have been guaranteed under the Constitution, and the actions of Lloyd’s would have subjected it to criminal prosecution. However, under this analysis, Lloyd’s not only perpetrated fraud, but was then allowed to sue, as judgment creditors, the very people they had defrauded. In the United States, one of the most fundamental requirements of procedural due process is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”\footnote{Mathews v. Eldridge, 424 U.S. 319, 333 (1976).} However, the U.S. court ignored the fact that the British Court entered a judgment against the Ashendens for the reinsurance premiums even though the Ashendens never had any real opportunity to contest these figures. The figures were calculated solely at Lloyd’s discretion, with no other proof of their validity other than the fact that Lloyd’s chose the amount of the assessment, and under the “conclusive evidence” provision, the Court unquestioningly accepted that as the amount of the debt owed. By focusing solely on the Ashenden’s contract with Lloyd’s, the Seventh Circuit enforced a judgment entered by British court without affording the Ashendens any meaningful opportunity to be heard or challenge the claims brought against them. In essence, the Court’s decision meant that the standardized contracts the Ashendens signed when they became Names granted Lloyd’s the power to appoint substitute agents, chosen for the sole purpose of unilaterally waiving the Names’ rights to challenge the very fraud that led them to become Names initially.\footnote{Carodine, supra note 20, at 1184.} The Ashendens were left with no ability to challenge a settlement agreement entered on their behalf, and specifically against their wishes, and moreover, were left with no meaningful opportunity to raise claims of fraud nor any other defenses against Lloyd’s.

The Ashenden case is significant for its clear application of the international due process analysis, which, as it stands, seems to be
fundamentally flawed. It allows for a potential deprivation of due process that when challenged, will look only to whether the entire judicial system is, in the court’s view, fundamentally fair, and courts may pass judgment on other judicial systems with little or no evidentiary bases for their assessments. Judge Posner himself presumed the fairness of the British system without any significant, in-depth procedural analysis. However, he also suggested that courts might label other countries as fundamentally “uncivilized,” and following this holding, might similarly pass judgment on those countries without meaningful analysis. Some authors have suggested that this scheme not only encourages, but indeed requires, courts to look the other way when presented with questionable and possibly fraudulent judgments from favored countries, and this favored status need not reflect the opinion of the Executive branch in any fashion, but rather, the opinion of the court itself.

VII. THE CHEVRON/ECUADOR LITIGATION

The Ashenden case was decided in 2000, but the international due process analysis has been also been playing out to some extent in litigation that dates back into the 1990s. It involves a situation that is reminiscent of the Lloyd’s case, but in this case, rather than misrepresentation and failure to disclose by the plaintiff, the behaviors of the plaintiffs involve widespread fraud and bribery on an almost unprecedented level. The case involves political corruption, fabricated evidence, manipulation and threats against the Ecuadorian judiciary, and other conduct so egregious that the U.S. judge hearing the case to enforce a judgment handed down by the Ecuadorian court found the plaintiff’s attorney, Steven Donziger, liable for coercion, bribery and other violations of the Racketeering Influenced and Corrupt Organizations Act. It is still unknown whether the recent ruling in the federal

95 Ashenden, 233 F.3d at 476–78.
96 See id.
97 Carodine, supra note 20, at 1188.
98 References to fraud, bribery, racketeering and other wrongdoing by plaintiffs’ attorneys in the Chevron/Ecuador litigation are based on Judge Kaplan’s ruling in Chevron v. Donziger, No. 11 Civ. 0691, 17–20, (S.D.N.Y Mar. 4, 2014), available at http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379. It is important to note that this ruling is subject to appeal and plaintiffs’ attorneys may be cleared of any wrongdoing. However, this would not change the fundamental premise of this paper regarding the shortcomings of the existing international due process analysis.
district court could result in proceedings seeking the plaintiff’s attorney’s disbarment, but the District Court, in examining statements by the plaintiff’s attorney, stated, “it is relevant to note that Donziger is a member of the New York Bar. His conduct, whether in the United States or in Ecuador, was subject in every respect to the New York rules governing the conduct of lawyers.”\textsuperscript{100} Although this ruling is recent as of March 2014, even in the face of early evidence that the original suit and the resulting judgment were potentially based on fabricated evidence and fraud, the suit to enforce the judgment has laboriously wound its ways through U.S. courts for years. The \textit{Chevron/Ecuador} litigation is significant because it raises questions about the admissibility of expert testimony and evidence that is rendered or gathered abroad, particularly when used to support damage awards in countries that are subject to frequent regime change, and political or economic instability, leading to unstable governments. These countries are typically governed by regimes that are semi-dictatorial, and often subject to allegations ranging from bureaucratic ineptitude to widespread corruption.\textsuperscript{101} Ecuador, where the judgment was rendered in this case, is currently governed by a regime that is considered both politically and economically unstable. The country is marked by having had eight presidents in the last twelve years; 40\% of its population living in poverty and another 13\% live in extreme poverty; and its current President is a socialist with strong ties to Venezuela’s late president Hugo Chavez.\textsuperscript{102} However, under any theory of natural law or social justice, the fact that the government of a country might be corrupt should not serve to deprive its citizens of remedies in court against U.S. companies who have intentionally and validly wronged them. Likewise, the fact that a country has a beneficent government should not diminish the need to protect the due process rights of U.S. citizens or companies who may be innocent of wrongdoing. As the world moves towards a more global economy, the resulting rise in transnational litigation such as \textit{Chevron/Ecuador} suggests that the international due process analysis’ focus on judging the entire judicial system of a country may require closer examination.

The original \textit{Chevron/Ecuador} lawsuit concerns accusations by approximately 30,000 plaintiffs that Texaco, which Chevron acquired in 2001, dumped billions of gallons of contaminated water in and

\textsuperscript{100} See Chevron, No. 11 Civ. 0691 at 20.


\textsuperscript{102} \textsc{Clarke Seelke}, \textsc{Cong. Research Serv.}, RS21687, \textit{Ecuador: Political and Economic Situation and U.S. Relations} (2008).
around the Ecuadorian region of Lago Agrio.\footnote{Bryan Walsh, An Oily Case: Chevron's Never-Ending, Record-Breaking Lawsuit in Ecuador, \textit{Time}, Jan. 2012, available at http://science.time.com/2012/01/09/an-oily-case-chevrons-never-ending-record-breaking-lawsuit-in-ecuador/.} During the period that the lawsuit has been in the court system, six separate Ecuadorian judges have been involved in the case, and “one federal judge in New York died before he could make a ruling.”\footnote{Id.} The case, perhaps the largest environmental lawsuit in history, aside from the 2010 Deepwater Horizon spill, has once again brought the question of the recognition of international judgments to the foreground. After an Ecuadorian judge rendered an $18 billion damage award against Chevron (later reduced to $9.5 billion), the company vowed to continue fighting the lawsuit, claiming that the plaintiffs’ case had no merit and was based on fabricated evidence and testimony.\footnote{Dominic Rushe and Rory Carroll, Chevron Fined over $8 Billion over Amazon “Contaminations”, \textit{The Guardian}, Mar. 26, 2014, available at http://www.theguardian.com/business/2011/feb/14/chevron-contaminate-ecuador.} Chevron continuously maintained the lawsuit was a scheme by the plaintiff’s attorney, Steven Donziger, to whip up a frenzy of support among the media and environmental groups so that Chevron would eventually settle just to end the case.\footnote{Jessica M. Karmasek, Pressure Placed on Chevron to Settle Ecuador Lawsuit, \textit{Legal Newsline}, May 25, 2011, available at http://legalnewsline.com/issues/class-action/232868-pressure-placed-on-chevron-to-settle-ecuador-lawsuit.} Significantly, Donziger was successful in eliciting substantial financial support, and eventually it was discovered that the plaintiff’s case had been underwritten by a number of investors including a large plaintiff’s firm based in Philadelphia that was not involved in the suit, but which sought to collect a portion of the judgment.\footnote{Daniel Fisher, Chevron’s $27 Billion Problem, \textit{Forbes}, July 13, 2009.}

The plaintiffs’ claims stem from Texaco’s participation in an exploration and production venture with Petroecuador, Ecuador’s state-owned oil company, in the 1970s. Texaco was a minority partner, and representatives from Chevron claimed that “the production operation took place primarily on government lands and was conducted in compliance with Ecuadorian laws and regulations.”\footnote{Chevron in Ecuador, http://www.texaco.com/sitelets/ecuador/en/history/.} Chevron produced approximately 1.7 billion barrels of crude oil, and it alleged that the Government of Ecuador received 95% of the financial proceeds.\footnote{Id.} The resulting oil production and exports were so profitable that Ecuador’s per-capita GDP doubled within a single decade, and even today, oil exports still provide the bulk of public revenues.\footnote{Walsh, supra note 104.
was subsequently removed to the U.S. District Court for the Southern District of Texas in *Sequihua v. Texaco*.* 111* The plaintiffs alleged that, rather than safely disposing of the byproducts of oil exploration and production, Texaco simply dumped the byproducts into large open pits, and left hundreds of these pools behind when the company’s contract ended and it left the country.* 112* The attorneys for the plaintiffs brought claims based on property damage, personal injuries, and “increased risk of disease due to negligent or otherwise improper oil piping and waste disposal practices.”* 113* In addition to monetary relief, the plaintiffs sought an injunction requiring Texaco to “return the land to its former condition” and the imposition of a “trust fund” to be administered by the Court.* 114* Attorneys for Texaco denied these charges, and offered evidence that Texaco’s operations were in line with the law, as well producing evidence that Texaco had completed a $40 million remediation and public works program supervised, inspected and approved by the Government of Ecuador.* 115* Texaco claimed that after it ceased operations, the Government of Ecuador had granted Texaco a full and complete release of all further claims, liabilities and obligations.* 116* The plaintiffs also attempted to tie birth defects and cancer to the waste, while Texaco claimed that there had been no proven health effects from the pollution, and that in any event, they had remediated their share of any pollution and were shielded from liability by the releases from Government of Ecuador.* 117*

The *Sequihua* court subsequently dismissed the suit fewer than five months later on grounds of international comity and *forum non conveniens*. 118 However, in November of 1993, the plaintiff’s filed a concurrent suit in Southern District of New York (the judicial district encompassing Texaco’s corporate headquarters), in which the judge allowed the plaintiffs the opportunity, through discovery and otherwise, to attempt to ascertain the scope of Texaco’s alleged involvement in the pollution, and to prove that the litigation belonged in

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115 *Chevron in Ecuador*, *supra* note 111; *Walsh, supra* note 104.
116 *Chevron in Ecuador, supra* note 111.
117 *Walsh, supra* note 104.
118 *Sequihua 847 F. Supp. 61, 62.*
U.S. courts. This suit, Aguinda v. Texaco, was also subsequently dismissed on the grounds of international comity and forum non conveniens, as well as the failure to join indispensable parties - namely, the Republic of Ecuador, and Petroecuador, the state-run oil company which conducted all operations since Texaco left the country in 1992. However, on appeal in Jota v. Texaco, Inc. (which consolidated the Ecuadorian case with a case filed by Peruvian plaintiffs who lived downstream from the affected area), the Second Circuit Court of Appeals held that the district court’s dismissal on grounds of forum non conveniens and comity was erroneous in the absence of any condition requiring the oil company to submit to jurisdiction in Ecuador, and that the district court’s reasoning regarding the plaintiffs’ failure to join the Republic of Ecuador as an indispensable party was only applicable to the part of the complaint that “sought to enjoin activities currently under Republic’s control.” The Second Circuit, possibly seeking to relieve district courts of complex examinations of jurisdictional issues when transferring to foreign courts, had noted in earlier cases that a conditional dismissal obviated the need for an extensive inquiry into foreign jurisdictional law, reasoning that if the foreign court refused to take jurisdiction, the plaintiff would “still be protected by the conditional nature of the dismissal.” Accordingly, the Court of Appeals remanded the case to the Southern District of New York for proceedings in line with its decision.

At this point it may be appropriate to discuss a discrepancy initially noted by the Second Circuit Court of Appeals in Jota. The court noted that the litigation had taken a curious turn at this point: the litigation was proceeding under the unusual context of a foreign country, the Republic of Ecuador, initially expressing vigorous opposition to the maintenance of this litigation in a United States court and then, after a change in the government, just as vigorously urging that the litigation proceed here. Remarkably, the court noted that although the Republic of Ecuador had originally considered the suit an affront to their sovereignty, after the regime change the Ecuadorian government had urged that “only the adjudication of jurisdiction in the claim filed by Ecuadorians . . . in a federal court of N.Y. against the Texaco Company, [would] bring to those affected the possibility of finding just treatment and a solution to the serious situation that they are

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120 See Aguinda, 945 F. Supp. at 627.
121 Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).
122 Calavo Growers of California v. Generali Belgium, 632 F.2d 963, 968 (2d Cir. 1980).
123 Id.
124 Jota, 157 F.3d at 155.
This point underscores the fact that the Chevron/Ecuador litigation may stand for one of the great “ironies” in the field of law to date. The attorneys for the Ecuadorian plaintiffs brought suit in the U.S. because of expanded remedies such as punitive damages, expanded procedural opportunities such as broad discovery tools, and the right to a jury trial on issues of fact. The plaintiffs, and eventually the Republic of Ecuador, fought to keep the litigation in the United States, quite possibly because of the potential for a huge monetary award from a sympathetic U.S. jury. Texaco, wanting to avoid the suit altogether, in what may have possibly been one of the largest miscalculations in the history of corporate law, repeatedly brought motions to dismiss under forum non conveniens grounds, seeking to have the case transferred to Ecuador. The practical effect of a forum non conveniens dismissal is significant – in the overwhelming majority of cases, a forum non conveniens dismissal is a clear victory for a defendant because it forces plaintiffs to either settle for insignificant amounts or abandon their efforts, particularly if the courts in the country to which the suit would be transferred do not historically award huge tort judgments.

Texaco was well within reason to assume that, once it established that Ecuador provided a more appropriate forum, the suit would fall by the wayside. Because Ecuador was traditionally pro-defendant, large companies such as Texaco would naturally anticipate that they would be able to take advantage of a better bargaining position and settle the case quickly, or have the case dismissed entirely. The Sequihua court undertook a detailed analysis to determine whether Ecuador was an adequate alternative forum, eventually granting the motion to dismiss on forum non conveniens grounds. The Aguinda Court following the reasoning of the Sequihua court, found the obstacles to maintaining U.S. jurisdiction even more persuasive, and also dismissed on forum non conveniens grounds. As noted above, on appeal, the Second District Court of Appeals reversed and remanded, finding that the failure of the District Court to require Texaco to submit to in personam jurisdiction in Ecuador to be reversible error. During all of the initial U.S. proceedings, the plaintiffs continuously

125 Id. (emphasis added).
126 Id.
127 Sequihua, 847 F. Supp. at 62.
128 Weston, supra note 114, at 741.
130 Sequihua, 847 F. Supp. at 65.
protested the transfer of the litigation to Ecuador. In perhaps the most prescient arguments of the entire litigation, the plaintiffs, who would eventually triumph in Ecuador, introduced evidence showing that “the Ecuadorian courts were subject to corrupting influences and outside pressures, especially from the military, that rendered them inadequate to dispense independent, impartial justice in these cases.”

It was only on remand to the Southern District of New York, that anyone in the judiciary began expressing misgivings about the ability of the Ecuadorian Court system to render a fair decision in this case. Noting that the plaintiffs themselves initially raised issues of lingering corruption in the Ecuadorian court system in their forum non conveniens argument, the District Court stated that the events surrounding the regime change in Ecuador had revived lingering questions about the ability of the Ecuadorian (and Peruvian) courts to “dispense independent, impartial justice in these cases.”

It is interesting to note that the reason the “fairness” of the Ecuadorian court system was at issue during these proceedings is because, like the international due process analysis, the forum non conveniens analysis also requires judges to assess the appropriateness of the alternative forum. The Second Circuit Court of Appeals has clarified the type of finding that district courts are required to make in order to determine the adequacy of alternative foreign forums when foreign law or practice is an issue, and, as in the Chevron/Ecuador litigation, when dismissal is conditional on the alternate forum gaining jurisdiction over the defendant. In those circumstances, the Second Circuit stated that a district court must undertake a full analysis of the foreign laws or practices relevant to its decision to dismiss on forum non conveniens grounds, and closely review all submissions that are related to the adequacy of the forum. The requirement that the dismissal be conditional serves to protect the non-moving party, and allows a court to dismiss on forum non conveniens grounds even if the court is unable to make a definitive determination as to the adequacy of the foreign forum. Further, in making the determination, the court’s justifiable belief in the adequacy of the alternative forum has been held to be a sufficient basis for granting a conditional dismissal.

133 See generally, Sequihua, 847 F. Supp. at 61; Aguinda, 945 F. Supp. at 625; Jota, 157 F.3d at 53.
134 Weston, supra note 116, at 733.
136 Id. at 743.
138 See id. at 247.
139 Id. at 248.
140 See Calavo Growers of California, 632 F.2d at 968.
in favor of a foreign forum.\textsuperscript{141} However, the Second Circuit held that even if the court asserts a justifiable belief in the adequacy of the alternative forum, it is required to cite to the evidence in the record that supports this belief, bearing in mind that it is at all times the movant's burden to persuade the court of the adequacy of any alternative forums.\textsuperscript{142} In essence, the movant must prove that the forum is adequate to such an extent that it gives rise to a justifiable belief on the part of the court, and in cases when the court has concerns regarding the accuracy of its justifiable belief, the conditional dismissal serves to protect the non-moving party.\textsuperscript{143}

The district court, applying the analysis outlined by the Second Circuit, consulted the U.S. Department of State, Ecuador Country Report on Human Rights Practices for 2000, noting that a primary conclusion of the report was that “[t]he most fundamental human rights abuse in Ecuador stems from shortcomings in its politicized, inefficient, and corrupt legal and judicial system.”\textsuperscript{144} Acknowledging the caution and deference that a U.S. court must exercise in approaching the question of the independence and impartiality of a foreign court, the district court reopened the record to receive additional submissions regarding the adequacy of the court system of Ecuador for adjudicating the dispute.\textsuperscript{145}

At this point, with the plaintiffs essentially stipulating in district court that they were unable to produce material evidence of Texaco's involvement in the pollution, Texaco, with almost self-destructive determination, continued to press for transfer of the case to Ecuador, consenting to in personam jurisdiction in Ecuador, waiving statute of limitations and accepting service of process in Ecuador.\textsuperscript{146} This fulfilled the Second Circuit’s requirement that dismissal be conditional on Texaco’s submission to in personam jurisdiction. The district court then outlined its “justifiable belief” in the adequacy of Ecuador as an alternative forum. While noting that “no one claims the Ecuadorian judiciary is wholly immune to corruption, inefficiency, or outside pressure,” the district court ultimately decided that Texaco had carried its burden in proving that Ecuador was an adequate forum, theorizing that “the courts of Ecuador can exercise, with respect to the parties and claims here presented, that modicum of independence and impar-

\textsuperscript{141} See id. at 968 n.6.
\textsuperscript{142} See Bank of Credit & Commerce Int’l Ltd., 273 F.3d at 248.
\textsuperscript{143} See id.
\textsuperscript{145} See Aguinda, 142 F. Supp. 2d at 538 (S.D.N.Y. 2001).
\textsuperscript{146} Id. at 539.
In what was, in hindsight, an ill-fated proclamation, the district court stated that “even the possibility that corruption or undue influence might be brought to bear if this litigation were pursued in Ecuador seems exceedingly remote.”\(^{148}\) The Ecuadorian plaintiffs appealed this decision, but in 2002 the Second Circuit affirmed the District Court’s dismissal under \textit{forum non conveniens}, ruling that the lower court’s decision was not an abuse of discretion, notwithstanding repeated arguments by the plaintiff’s attorneys that Ecuadorian courts were subject to corruption and incapable of impartiality.\(^{149}\)

In 2003, the Ecuadorian plaintiffs re-filed their suit in Ecuador against Chevron Corporation, which was at that point the successor of Texaco.\(^{150}\) Despite continuing attempts by the plaintiffs to try the suit in the media and in the court of public opinion by suggesting that the suit was about a greedy U.S. corporation taking advantage of the powerless citizens of a smaller country, more facts began to emerge. As noted above, Texaco was not in fact running rampant and polluting the land at will; it was simply the minority partner in the oil consortium run by Petroecuador, which was the actual operator. In fact, Texaco’s involvement in the project was governed by a concession agreement, in which all activities were conducted with the oversight and approval of the Government of Ecuador. Evidence was produced showing that at the end of the concession agreement, Texaco had conducted the remediation program as it had been asserting all along, in which producing wells and pits formerly utilized by Texaco were closed, produced water systems were modified, cleared lands were replanted, and contaminated soil remediated.\(^{151}\) The $40 million remediation program began in 1995 and was completed in late summer 1998, and during the process, all remediation activities were inspected and certified by the Ecuadorian government on a site-by-site basis.\(^{152}\) On September 30, 1998, Ecuador’s Minister of Energy and Mines, the President of Petroecuador and the General Manager of Petroproducción, the operating division of Petroecuador, signed the “Final Release of Claims and Delivery of Equipment.”\(^{153}\) This 1998 agreement finalized the govern-

\(^{147}\) Id. at 544–46.
\(^{148}\) Id. at 546.
\(^{149}\) Aguinda., 303 F.3d at 478.
\(^{151}\) Id.
\(^{152}\) \textit{Who Signed-Off On Texaco’s Remediation?}, \textsc{Amazon Post} (July 1, 2009), http://www.theamazonpost.com/news/who-signed-off-on-texaco's-remediation.
ment of Ecuador’s approval and certification of Texaco’s environmental remediation work and stated that Texaco had fully complied with all obligations established in the remediation agreement signed in 1995. In addition, the municipalities in the area of the drilling operations signed a negotiated settlement with Texaco that released the company from any future claims and obligations.\footnote{154} At the end of the concession agreement, two independent audits were also conducted to address the impact of the consortium operations on the soil, water and air, and assess compliance with environmental laws, regulations and generally accepted operating practices. Two internationally recognized consulting firms conducted the audits and each independently concluded that Texaco acted responsibly and that there was no lasting or significant environmental impact from the former consortium operations.\footnote{155} Based on these audits and the remediation efforts, the government of Ecuador subsequently granted Texaco a full release from any and all environmental liability arising from its operations.\footnote{156}

Under almost any situation, an agreement between a government-run company and a corporation would be valid. However, Ecuador, as noted above, has been subject to political and economic turmoil, and although the country had traditionally been pro-defendant, the current President of Ecuador has seemingly demonstrated little respect for the country’s legal obligations, whether to private companies or other nations. Elected in 2006, he began a series of machinations to consolidate power, and shortly after he took office, proposed a series of changes to Ecuador’s constitution in order to extend his term in office.\footnote{157} Further, when Ecuador defaulted on its payment of global debt it owed to the World Bank and other international banks, he simply declared that Ecuador’s national debt was “immoral and illegitimate,” based on the argument that it had been contracted by prior regimes, and pledged to fight creditors in international courts, in order to negotiate a reduction in the debt amount.\footnote{158} Based on the political climate in Ecuador when the suit was brought, it was seemingly no surprise that the regime allowed the suit against Chevron to proceed, despite both the release and the fact that Texaco was a minority consortium

\footnote{154} Id.  
\footnote{155} Id.  
partner, with the government receiving 95% of the profits from production. However, the suit proceeded against Texaco alone, with the state-run Petroecuador notably absent from the proceedings, and with the President of Ecuador consistently calling for Chevron to be subject to punishment, despite the fact that the current regime still enjoys the profits from the operations of from Petroecuador, which has continuously drilled in the disputed area even after claims of vast pollution arose.

Further, it later came to light that while the forum non conveniens suit was proceeding through the U.S. courts, the plaintiff’s attorneys had been “working with” Ecuadorian legislators to draft legislation in preparation for any possible transfer of the case from the U.S courts to Ecuador. The resulting legislation, Ecuador’s Environmental Management Act of 1999, created a private right of action for the cost of remediation for general environmental harm, laying the groundwork for the eventual action against Chevron in Ecuador. After suit was filed in Ecuador, the Ecuadorian court received damage reports, estimates of the extent of pollution, expert opinions, and eventually appointed an “independent global expert,” who provided a massive report that purportedly assessed the existence and extent of damages. The report, called the Cabrera Report, accused Texaco employees of not only widespread pollution, but deforestation and cultural destruction as well, and recommended damages of up to $16 billion. Ultimately, on February 15, 2011, after years of litigation in Ecuador, the court in Ecuador fined Chevron $9.5 billion over the alleged pollution, which included a 10 percent legally mandated reparations fee.

In the midst of the litigation, Chevron attorneys began discovering proof of discrepancies and misrepresentations by the plaintiff’s attorneys and the court appointed “independent expert” that would eventually lead Chevron to file fraud, extortion and racketeering

161 Chevron Corp. v. Donziger, 1:11-cv-00691-LAK-JCF at 15.
162 Id.
charges against the plaintiff's American attorney, Steven Donziger.\textsuperscript{165} Discovery also led to allegations of manipulating the Ecuadorian judiciary and misrepresentations of the testimony of expert witnesses who testified as to the extent of environmental damages.\textsuperscript{166} In one of the earliest discoveries, a typographical error led to the realization that Donziger’s team fabricated early expert witness reports. In 2004, Donziger hired Charles Calmbacher, a Georgia-based biologist and environmental scientist, to help oversee soil and water tests in Ecuador. Reports signed by Calmbacher, which were submitted to an Ecuadorian court in 2005, showed high levels of toxins at two sites and estimated the contamination would cost more than $40 million to clean up at these sites alone.\textsuperscript{167} However, Chevron attorneys noticed a typographical error in some of these reports: the spelling of Calmbacher’s own name. Chevron attorneys also noticed misspellings of Calmbacher’s name in letters to the Ecuadorian court asking for an extension in filing his reports.\textsuperscript{168} During Calmbacher’s subsequent deposition, he stated that he had flown back to the U.S. early due to illness, and had therefore sent pre-signed pages back to Ecuador with the understanding his findings would be printed over his signature. However, he stated that the reports that were actually filed with the Ecuadorian court did not reflect his actual conclusions, maintaining that he had not seen the final version of the submitted reports until they were produced during a deposition by Chevron attorneys.\textsuperscript{169} He noted while he did find some evidence of contamination, he did not determine that additional remediation was necessary, and did not calculate clean-up costs, concluding that he did not see significant contamination that posed immediate threat to the environment or to humans or wildlife.\textsuperscript{170} His deposition testimony included the statement “I did not reach these conclusions, and I did not write this report.”\textsuperscript{171} Despite amounting to possible fraud by Donziger, Donziger made no denial that falsified reports were submitted and offered no

\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
explanation for the falsified reports, other than to state that Calmbacher’s reports were only a small part of the overall case, and that other tests have shown contamination at dozens of sites.\footnote{172} Shortly after these falsified reports were discovered, Chevron attorneys uncovered evidence suggesting that portions of the Cabrera Report, which was most likely the justification for the Ecuadorian court’s judgment against Chevron, may have been actually provided by the plaintiffs’ attorneys themselves.\footnote{173} In eleven civil actions across the United States, Chevron presented this evidence to federal district judges; judges sitting in Newark, San Diego, Asheville, and Albuquerque ruled that the evidence presented appeared to demonstrate fraud by Donziger, who denied wrongdoing, saying that his “actions were permissible in Ecuador.”\footnote{174} Although Cabrera, the purported author of the report, assured the Ecuadorian court that he was independent and that the plaintiff’s attorneys had nothing to do with the environmental assessment or damage recommendations, Chevron had seemingly uncovered evidence to the contrary. These eleven federal civil actions were filed in cities in which the Ecuadorian plaintiffs’ litigation consultants were based, and materials subpoenaed by Chevron from these litigation consultants suggest that much of the material from the Cabrera Report was generated by these litigation consultants.\footnote{175} A forensic linguist retained by Chevron filed a report concluding that most of the Cabrera report was originally written in English, a language that Cabrera does not speak, and only later translated into Spanish.\footnote{176} Cabrera, a mining engineer, allegedly recommended damages for “cancer deaths,” and “unjust enrichment,” which Chevron claimed would be unlikely areas of expertise to be evaluated by a mining engineer.\footnote{177} Eventually plaintiff’s lawyers acknowledged that they indeed provided significant information to Cabrera, including “proposed findings of fact and economic valuations for the environmental and other damages caused by Texaco’s practices and pollution,” and that Cabrera, evi-
dently persuaded by these submissions, had “adopted the proposals, analyses, and conclusions of the Plaintiffs.”

Subsequently, Chevron attorneys unearthed a second set of revelations, possibly even more damning for the plaintiff’s case. Donziger, attempting to generate public sympathy in the U.S., had a documentary filmed that would allegedly garner support for the plaintiffs and put pressure on Chevron to settle the case. The documentary, *Crude*, released in 2009, detailed the legal struggle of the plaintiffs, and showed interviews from Ecuadorian “experts” and the victims of Texaco’s alleged pollution. *Crude* garnered enormous support for the plaintiffs’ cause, but when Chevron attorneys subpoenaed the outtakes from the movie, the over 600 hours of edited material once again provided evidence that Donziger was engaged in a massive fraud. It became clear that the entire movie was orchestrated by Donziger, who was featured prominently in the film as fighting to protect innocent Ecuadorian victims against the greed and corruption of a massive mega-corporation. However, in the outtakes, Donziger was caught on tape repeatedly expressing disgust for the “utter weakness, corruption, and lack of integrity” of the Ecuadorian courts. In transcripts of the outtakes, Donziger, speaking with his American litigation consultants, after they suggested that there was little evidence of widespread pollution, states “[h]old on a second. . . [T]his is Ecuador. . . . 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. Sorry, but it’s true.” Later he adds, “Because, at the end of the day, this is all for the court, just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win.” In film footage, Donziger at one point barges into a judge’s chambers and intimidates him into reversing a ruling the judge had made in Chevron’s favor. The associated outtake shows Donziger later claiming that this “would never happen in any judicial system that had integrity.”

Possibly most damaging to the plaintiffs’ case are outtakes from the movie showing Donziger and Pablo Fajardo, an Ecuadorian attorney also representing the plaintiffs, and three litigation consultants, meeting with Cabrera in May of 2007, two weeks before Cabrera was even officially appointed as “global expert” by the Ecuadorian court. Attorney Fajardo is shown in the footage presenting a

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178 See id. Parloff, supra note 174.


180 Parloff, supra note 174.

181 See id.

182 See id.
PowerPoint presentation entitled “Plan for the Global Expert Assessment,” and according to transcripts filed in court, states “[a]nd here is where we do want the support of our entire technical team, of experts, scientists, attorneys, political scientists, so that all will contribute to that report, in other words, you see . . . the work isn’t going to be the expert’s. All of us bear the burden.”\textsuperscript{183}

In the face of clear and widespread fraud by Donziger, including possible fabrication of evidence, and suggestions of the Ecuadorian judiciary bowing to pressure entirely generated by a campaign by the plaintiff’s attorneys to manipulate the Ecuadorian court system, it would seem that attempts to enforce the Ecuadorian judgment in the U.S. would have been dismissed immediately. Indeed, in an initial ruling in one of the civil actions noted above, the U.S. Magistrate Judge in Asheville, North Carolina, stated

While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.”\textsuperscript{184}

Other courts subsequently sanctioned attorneys associated with the case: the attorney who had initially filed on behalf of the plaintiffs in New York, Cristobal Bonifaz, after leaving his role in the original litigation, filed a claim for a separate set of plaintiffs against Chevron in federal court in San Francisco. The U.S. District Judge subsequently ordered Bonifaz to pay $45,000 in costs and fees when it was discovered that his plaintiffs did not actually have cancer like the suit claimed.\textsuperscript{185} In the face of so much potential evidence of fraud, Manhattan District Court Judge Lewis Kaplan granted Chevron’s motion to depose Donziger in October 2010, and also compelled Donziger to produce attorney-client communications.\textsuperscript{186} Those documents led Chevron to file a civil suit under the Racketeering Influenced and Corrupt Organizations Act (RICO) in February 2011, accusing the Ecuadorian

\textsuperscript{183} See id.
\textsuperscript{184} Chevron Corp. v. Camp, No. 1:10MC27, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).
plaintiffs and their lawyers of a conspiracy to extort a multibillion-dollar settlement from Chevron.\footnote{Amy Kolz, The Complete Game, AM. LAWYER, at ¶ 7-10 (Jan. 2012).}

However, the suit against Chevron in Ecuador continued to progress through the appeals process there, and the Ecuadorian Court of Appeals eventually affirmed the multi-billion dollar judgment against Chevron, in part because Chevron had failed to “make a public apology.”\footnote{Braden Reddall & Eduardo Garcia, Chevron Appeals $18 Billion Ruling in Ecuador Lawsuit, REUTERS, (Jan. 20, 2012.), http://www.reuters.com/article/2012/01/20/us-chevron-idUSTRE80J1ZJ20120120.} Despite the evidence of widespread fraud in Ecuador, Chevron found it difficult to get resolution in U.S. courts regarding the disposition of the Ecuadorian judgment. However, once the judgment was affirmed in Ecuador, Chevron immediately sought a declaratory judgment that the Ecuadorian judgment was unenforceable, and sought protection under the New York Civil Practice Law and Rules Article 53, which governs the recognition of money judgments imposed in foreign countries.\footnote{N.Y. C.P.L.R. § 5302 (Consol. 2014).} In March 2011, in response to the evidence presented by Chevron, Judge Kaplan issued an injunction to block enforcement of the judgment on a worldwide basis.\footnote{Chevron Corp. v. Donziger, 768 F. Supp.2d 581, 660 (S.D.N.Y. 2011) vacated sub nom. Chevron Corp. v. Naranjo, 11-1150-CV L, 2011 WL4375022 (2d Cir. Sept. 19, 2011) rev’d and remanded sub nom. Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).} However, this injunction was voided by the Second Circuit Court of Appeals in January of 2012, in a unanimous decision by the three-judge panel, who noted that Chevron could only challenge the judgment’s validity defensively, in response to attempted enforcement, and that the Ecuadorian plaintiffs had not yet undertaken enforcement anywhere, and might never undertake in enforcement in New York.\footnote{Chevron Corp. v. Naranjo, 667 F.3d 232, 246 (2d Cir. 2012) cert. denied, 133 S. Ct. 423, 184 L. Ed.2d 288 (U.S. 2012).} However, the Court of Appeals stated that granting the type of “speculative” relief sought by Chevron would “unquestionably provoke extensive friction between legal systems” by encouraging challenges in New York to the legitimacy of courts in foreign countries.\footnote{See id.} Furthermore, the Court noted that Article 53 and the common-law principles that it encapsulated were motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them, and to rule in Chevron’s favor would “turn that framework on its head.”\footnote{See id. at 241.}

More recently, these questions regarding the enforcement of Ecuador’s judgment in the United States and the effect on interna-
tional comity have taken a back seat to rulings in Chevron’s 2011 RICO suit filed against Donziger in the same Manhattan court. Originally, the RICO suit focused on allegations that Donziger and the consultants retained by the plaintiffs authored portions of the Cabrera Report, the report that was provided to the Ecuadorian Court in assessing the existence and extent of pollution in the disputed area and on which the judgment against was based.\textsuperscript{194} However, it was soon revealed that the entire Cabrera Report had been written and provided by the Stratus Company, a Boulder, Colorado consulting firm Donziger hired.\textsuperscript{195} Over the years, Donziger had represented to both Ecuadorian and U.S. courts, the media, and the public that Cabrera, the Ecuadorian court-appointed global expert, had been the author of the report.\textsuperscript{196} Stratus, a co-defendant in the RICO suit, settled the lawsuit with Chevron and disavowed its work in the Chevron suit, stating that its work had been “fatally tainted” by Donziger, and that the Cabrera Report was “not reliable.”\textsuperscript{197} These revelations soon paled in the face of testimony by one of the presiding Ecuadorian judges that he had been bribed in order to rule against Chevron based on the ghostwritten Cabrera Report.\textsuperscript{198} The former judge, Alberto Guerra, testified that he was paid thousands of dollars by attorneys for the plaintiffs to rule against Chevron, and that two of the presiding Ecuadorian judges were each promised $500,000 from the proceeds of the Chevron judgment.\textsuperscript{199} In the face of the evidence advanced in the RICO trial against Donziger, Judge Kaplan recently issued a ruling that can only be considered a major setback for the plaintiff’s case, holding that the monetary judgment against Chevron was a product of bribery, fraud and racketeering perpetrated by Donziger.\textsuperscript{200} In a 485-page opinion, Judge Kaplan did not rule on whether pollution occurred in the disputed area as a result of Texaco’s operations, but did find that the plaintiff’s legal team, led by Donziger, engaged in widespread bribery, conspiracy, and

\textsuperscript{195} Roger Parloff, Judge: $9.5 Billion Ecuadorian Judgment against Chevron was Product of Bribery (March 15, 2014), http://features.blogs.fortune.cnn.com/2014/03/05/judge-9-5-billion-ecuadorian-verdict-against-chevron-was-product-of-bribery/.
\textsuperscript{196} See id.
\textsuperscript{199} See id.
\textsuperscript{200} Parloff, supra note 196.
obstruction of justice, and barring Donziger and his associated from profiting from the “egregious fraud that occurred.”

After a twenty-year legal battle and possibly hundreds of millions of dollars in legal fees, the ruling by Judge has seemingly galvanized Chevron, which is pursuing Donziger and his associates with all of its legal might, and is now suing him for $32 million in legal fees resulting from the successful RICO case against him. Once viewed as a tenacious maverick who was something akin to a hero for going up against a gigantic multinational corporation, Donziger is now on the defensive, challenging the legitimacy of the most recent district court ruling, calling the court proceedings it “deeply flawed,” and claiming to be the victim of a “well-funded corporate retaliation campaign.”

However, Chevron claims it is trying to hold Donziger accountable for bringing a fraudulent lawsuit against the company. Aside from seeking legal fees from Donziger, Chevron is seeking to bring suits against others involved in facilitating the Ecuador litigation as well. On March 14, 2014, a Judge sitting in Gibraltar held that Chevron can proceed in a tort suit against Russ DeLeon, Harvard Law classmate of Donziger, and online-poker tycoon. Chevron alleges that DeLeon helped pay for the documentary Crude, and invested millions in the litigation in Ecuador, which Chevron claim eventually became a racketeering conspiracy. According to evidence, Deleon was entitled to collect $600 million if Chevron paid the judgment, and the Gibraltar Court found at least a prima facie case that DeLeon and his funding vehicle were “fully involved in the conspiracy, continuing to fund it well after they were aware of fraudulent activities.” Further, on March 31, 2014, Chevron brought fraud charges against Patton Boggs.
a Washington D.C. law firm, that the plaintiffs hired in an attempt to collect the judgment from Chevron.208 Chevron claims that attorneys at Patton Boggs had knowledge that the Cabrera Report was written by Donziger’s consultants at Stratus, and misled both the court and public about the report’s origin; in essence claiming that Patton Boggs not only had knowledge of, but furthered the racketeering conspiracy against Chevron.209 On May 7, 2014 Patton Boggs agreed to pay Chevron $15 million to settle the fraud allegations, and agreed to cooperate with Chevron in discovery related to the case, while expressing regret over its involvement in the matter.210

VIII. CHEVRON/ECUADOR UNDER THE INTERNATIONAL DUE PROCESS ANALYSIS

The high-profile nature of the case, and the subsequent Ecuadorian judgment seemingly squarely implicates application the international due process analysis. Because the March 2014 ruling did not consider the actual question of the existence of, or Chevron’s responsibility for, pollution in the Lago Agrio oilfield region, the litigation will most likely continue to wind its way the Ecuadorian and U.S. court systems. Although the allegations of fraud and bribery overshadow the entire litigation, the case it has the potential to clarify the international due process doctrine and judges’ roles in affecting foreign policy in the foreign judgment recognition and enforcement context. As stated earlier, the international due process analysis, as applied in these cases, may violate separation of powers principles because it requires courts to pass judgments on other countries, and so allows courts to actively engage in international politics, and their holdings must then be followed by lower courts considering similar claims.211 As noted, Judge Posner held that the court may divide countries into two categories, “civilized countries” and “uncivilized countries.”212 Where countries were effectively considered “uncivilized” by the courts, meaning that they did not provide for impartial tribunals or

211 Carodine, supra note 20, at 1206.
212 Soc’y of Lloyds v. Ashenden, 233 F.3d at 481 (7th Cir. 2000).
procedures compatible with due process of law, the courts are comfortable passing judgment on those countries and finding that the judgments at issue were unenforceable. In the “uncivilized country” cases, the courts essentially ignored the individual proceedings that resulted in the foreign judgment and instead looked to “evidence” regarding the quality of the foreign judicial system and the U.S. judges’, sometimes personal, perceptions of those countries. Notably, one of these “uncivilized country” cases was recently decided by the Southern District of Florida. In Osorio v. Dole Food Co., the court refused to recognize and enforce a $97 million Nicaraguan judgment for several reasons, one of which was that the Nicaraguan judicial system did not comport with the concept of international due process. The plaintiffs in the Dole case were represented by Los Angeles-based attorney Juan Dominguez. Examining the Nicaraguan court system that handled the original suits by the plaintiffs, the California Court refused to recognize the Nicaraguan judgment, “[i]n view of the persuasive evidence that direct political interference and judicial corruption in Nicaragua is widespread.” The court was careful to note that its decision was based on the overall Nicaraguan judicial system, “not the particulars of this case.”

The Chevron/Ecuador litigation could ultimately assist in further developing the parameters of the international due process analysis. In the 2000 remand to the District Court of the Southern District of New York, Judge Rakoff examined the appropriateness of Ecuadorian court system in the forum non conveniens analysis, noting that the events in Ecuador had “revived lingering questions about the ability of the Ecuadorian courts to dispense independent, impartial justice in these cases.” Significantly, Judge Rakoff consulted an annual report produced by the U.S. State Department that undertakes to assess “whether the judicial institutions of various nations provide at least a modicum of fundamental fairness to litigants.” One of the primary conclusions of the report, entitled The Country Report for Ecuador, U.S. Department of State, Ecuador Country Report on Human Rights Practices for 1998, dated February 26, 1999, found that “[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in [its] politicized, inefficient, and corrupt legal and judicial system.” However, as noted above, the Second Circuit had held that it

214 Id. at 1351.
215 See id.
217 See id. at 2.
218 See id.
remains the burden of the movants to demonstrate the adequacy of the proposed forum in a forum non conveniens analysis, and so Judge Rakoff invited the Chevron litigants themselves to submit briefs on the fairness of the Ecuadorian courts in order to assess whether a fair trial might be obtained there.\footnote{See id. at 3.}

During subsequent proceedings to determine the enforceability of the Ecuadorian judgment, Judge Kaplan noted that the case was “extraordinary,” not only because of the staggering amount of money at stake but also because Chevron had raised serious arguments about “the fairness and integrity of the judicial system of Ecuador,” thus implicating “considerations of international comity.”\footnote{Chevron Corp. v. Donziger, 768 F.Supp.2d at 595.} An important point at issue in the 2011 district court proceedings was whether Chevron was likely to have been successful on the merits with respect to its claim that the Ecuadorian judicial system does not comport with the international concept of due process.\footnote{See id. at 584.}

In his ruling, Judge Kaplan noted, “there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here and especially in cases such as this.”\footnote{See id. at 633.} The District Court considered evidence of Ecuador’s deficiencies of judicial process as reported in the “Alvarez Report” prepared by Vladimiro Alvarez Grau.\footnote{See id. at 633–34.} Alvarez, according to the Court, was a highly credentialed and experienced attorney from Ecuador who had practiced law in Ecuador for over 40 years and had held various prominent posts there, including as an elected official and legal academic.\footnote{Id. at 616 n.163.} In an overview of the Ecuadoran political and judicial systems, Alvarez focused in particular on the relevant time period for the Chevron litigation, which was between 2003 when the lawsuit in Ecuador began and 2011 when the monetary judgment was entered by the Ecuadorian provincial court.\footnote{Id. at 635, n.305.} Based on the report the Court noted that the judicial system in Ecuador was already “troubled” when socialist President Rafael Correa, who publicly supported the Ecuadorian plaintiffs’ claims, rose to power. The judiciary had been in a “state of severe institutional crisis” for a long time and had recently “deteriorated.”\footnote{Id. at 616.} Judge Kaplan found that President Correa had heavily influenced the judicial system in this case, and that he “interfered in matters that were pending before the judiciary

\footnote{See id. at 3.\footnote{Chevron Corp. v. Donziger, 768 F.Supp.2d at 595.\footnote{See id. at 584.\footnote{See id. at 633.\footnote{See id. at 633–34.\footnote{Id. at 616 n.163.\footnote{Id. at 635, n.305.\footnote{Id. at 616.}}}}}}
and that were of particular interest Ecuadorian government.”\textsuperscript{227} According to Judge Kaplan, in “a number of recent cases, judges have been threatened with violence, removed, and/or prosecuted when they ruled against the government’s interests.”\textsuperscript{228} Also relevant to Judge Kaplan’s determination was the fact that a number of independent commentators lamented the state of affairs in Ecuador, and concluded that there was no respect for the rule of law, and that there was no independent judiciary.\textsuperscript{229} However, Judge Kaplan also looked to sources such as World Bank and U.S. State Department documents, which supported these findings.\textsuperscript{230} In 2009, the World Bank gave Ecuador a low ranking for respect for the rule of law; and the U.S. State Department recognized that there were times when the judges in Ecuador decided cases on the basis of outside influences, particularly when dealing with matters of interest to the government.\textsuperscript{231} Taken in the aggregate, the judicial system in Ecuador seemed scarcely more than a political tool used to accomplish the goals of the government without regard to an evenhanded or just application of the law, when the judge rendered the Chevron judgment.

Immediately after Judge Kaplan’s 2011 decision, the Ecuadorian ambassador to Washington launched a defense of his country’s judicial system, taking issue with Judge Kaplan’s conclusions and expressed “consternation that a U.S. court has elected to pass judgment on Ecuador’s courts.”\textsuperscript{232} In response to Judge Kaplan’s assertion that “here is abundant evidence before the court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law,” the Ambassador claimed that the Judge’s opinion “does not accurately reflect upon or credit the independence of the Ecuadorian judiciary.”\textsuperscript{233} However, Judge Kaplan seems to have given some weight to external guidance such as the Country Report from the U.S Department of State, and so may have a strong justification for his evaluation of the foreign court system. A systematic approach in evaluating the court system of another country, which is based on guidance from the Executive Branch, seems more likely to withstand scrutiny than an approach that is based on the determination based solely on the judge’s perceptions. While the Second Circuit Court of Appeals ultimately overturned Judge Kaplan’s decision because of the far reaching

\textsuperscript{227} Id. at 618.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 619.
\textsuperscript{230} Id. at 620.
\textsuperscript{231} Id.
\textsuperscript{233} Id.
nature of his global injunction on the enforcement of the Ecuadorian court’s judgment, the Second Circuit’s affirmation of the purpose of the Recognition Act seems to serve as a clear reminder of the restraint and delicacy that comity principles would warrant in politically charged transnational cases such as this. Unlike the forum non conveniens analysis, in which the judge may rely on arguments from the litigants themselves to determine the adequacy of a foreign forum, it would seem that judges performing the international due process analysis should seek external guidance from other branches, and rely solely on that guidance when determining the adequacy of a foreign court system. Limiting the analysis to external guidance from the other branches may serve as the most appropriate method to make these determinations, and allow judges to avoid the implication that their determination might be colored by personal perceptions. This method has allowed courts to sidestep concerns regarding comity in the past.

Judge Kaplan applied the international due process analysis in his March 2014 opinion in the RICO case against Donziger. Basing his analysis in part on the language of the Restatement (Third) of the Foreign Relations Law of the United States, Judge Kaplan noted that “United States courts may not give comity to or recognize the judgment of a foreign state if ‘the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law.’” Noting that “Courts essentially are tasked with one question: whether the foreign procedures are “fundamentally fair” and “do not offend against basic fairness,” Judge Kaplan remarked on the delicate nature of this determination, stating that “the Court is far from eager to pass judgment as to the fairness of the judicial system of another country, but it of course is obliged to do so.”

For a second time in a ruling, Judge Kaplan examined the writings of Grau regarding the state of the Ecuadorian courts, and based his opinion partly on that evidence, as well as Donziger’s statements that the Ecuadorian judiciary lacked integrity, and the U.S. State Departments Human Rights Reports, Judge Kaplan held that “the judicial system was not fair or impartial and did not comport with the requirements of due process. The Ecuadorian decisions therefore are not entitled to recognition here.”

235 See Bridgeway Corp. v. Citibank, 201 F.3d 134, 142 (2d Cir. 2000).
237 Id. at 418 & n.1585.
238 Id. at 419.
After the *Chevron/Ecuador* litigation, the question that remains is whether the international due process analysis gives rise to more problems than it solves. Going forward, it seems counterproductive to insist that the judiciary be required to examine the entire judicial system of a foreign country, when it should perhaps more properly examine claims that individual proceedings violate due process. It may be argued that the international due process analysis required that Judge Kaplan reach beyond his constitutionally delineated role and engage in a foreign affairs-based analysis that is beyond the competence of state and federal judges.\(^{239}\) As noted above, it is quite possible that the analysis requires action that is unsuitable for judges, who are responsible for settling disputes between individual parties, but not for formulating international policies or engaging in a type of decision making in which the Executive Branch should engage.\(^{240}\) As evidenced by the fact that the Ambassador for a foreign sovereign was compelled to defend his country’s judiciary based on the ruling of a U.S. judge, this analysis may give rise to foreign affairs complications outside the purview of the judiciary. The international due process analysis in a published opinion in a high-profile case such as *Chevron/Ecuador* forces the judiciary to make judgments that may be construed as a condemnation of a country’s entire government. Further, the court’s decision might certainly generate “consternation” to the extent that it complicated foreign relations. It is not hard to imagine that after the Ecuadorian Ambassador had been forced to defend his country’s judicial system in the media, that our own ambassadors would have been expelled from the Ecuador had there still been ambassadors remaining in the country.\(^{241}\)

A ruling based on particular proceedings, rather than a ruling based on the fairness of a foreign court system as a whole might better shield U.S. Courts from entanglement with foreign concerns. In essence, the balancing test that should be used to determine the validity of foreign judgments is one that is not unfamiliar to jurisprudence, as it is the one originally found in *Hilton v. Guyot*, in which the Supreme Court specifically contemplated a due process analysis that would involve an individualized assessment of the foreign proceedings to determine if they were fundamentally fair.\(^{242}\) The *Hilton* Court established the test, and it is only a vagary of time and judicial fiat that completely altered the considerations to the extent that the mandatory exception would become the benchmark. Examining the elements of the *Hilton*

\(^{239}\) Carodine, *supra* note 20, at 1205.

\(^{240}\) *Id.*


\(^{242}\) See Hilton, 159 U.S. at 113.
decision may clarify this assertion. The court noted that “[W]e are satisfied that [. . .] firstly, where there has been opportunity for a full and fair trial abroad before a [foreign] court of competent jurisdiction. . .” speaks directly to the requirement of a “full and fair trial.”

A plain reading of this sentence would seem to indicate that the statement covers both the specific proceedings and the general court system of the foreign jurisdiction. The sentence “full and fair trial” would seem to speak to the individual proceedings, and “before a foreign court of competent jurisdiction” would speak to the general validity of the foreign court system. To argue that “opportunity for a full and fair trial” references only opportunities for impartial trials generally or periodically seems illogical, as it would be so ambiguous as to allow almost any judgment to stand. Under this line of reasoning a foreign state that historically gave the opportunity for a fair trial that had recently been taken over by a dictatorship might qualify as having given the opportunity for a full and fair trial. It would appear that U.S. courts must look at individual proceedings to some extent to measure whether a foreign court generally affords due process rights. As it stands, presiding U.S. judges have to research the current political system of countries on a case-by-case basis before it could be considered in evaluating judgments. If judges are free to determine the fairness of an entire foreign court system based on judicial discretion, it would seem that the particular proceedings in the original judgment court would be some of the most appropriate evidence by which to determine the fairness of the foreign system. If not, what is the evidence that should be used, and are the individual members of the judiciary the appropriate parties to be making these value judgments? The analysis, as it stands, does not seem to operate under guidelines that are clear enough to actually aid judges in making these determinations.

Secondly, the Hilton Court’s requirement of “conducting the trial upon regular proceedings” can speak only to the individual proceedings. This mandates an evaluation of the general court procedures balanced against the particulars of the specific trial at issue, and further requires an examination of whether the trial took place “after due citation or voluntary appearance of the defendant.” It seems plain that this requirement mandates examining the fulfillment of the due process requirements of the individual proceedings. The Hilton court clearly spoke to the system as a whole when it looks to “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries,” but the following sentence examines whether “there is nothing to show

\[243\] Id. at 202.
\[244\] Id.
\[245\] Id.
either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.”

This directly asks the court to consider reasons why these particular proceedings should not be enforced, as long as the court system itself offers the opportunity for the fair administration of justice.

The Hilton court next provided the balance, when it noted that the merits should not be tried anew, as on a new trial or on appeal, simply because the debtor asserts some mistake of law or fact. This seems to caution the court to limit the examination of the individual proceedings to ensure only that they meet the minimum standards of fairness and due process, but in no way should this be construed to advocate turning a blind eye to the fairness of the individual proceedings, or focusing only on the foreign court system as a whole at the expense of examining the possibility of fraud in the individual proceedings. Examinations of the individual proceedings are not analyses that are outside the bounds of the court’s competence. On a daily basis, courts are called on to balance the actions of governmental or private interests against individual rights that might be abridged by these actions, and to balance the asserted interests against the burdens of providing adequate due process. However, analyzing entire judicial and political systems in lieu of examining claims of fraud or due process violations during particular proceedings should be outside the realm of the judiciary.

Judge Kaplan noted that the Chevron case was remarkable because of the extent to which it implicated comity. However, if the international due process analysis can be said to have its foundation in furthering the aims of comity, it may be failing on that front also. Comity does not seem to be served when the lack of integrity of the Judiciary or the interference of the country’s President in the judicial process are brought to light in a judicial proceeding. Had Judge Kaplan issued the injunction based on evidence of pervasive fraud by the plaintiff’s attorney, after a careful examination of the individual proceedings and without reference to the fairness of the Ecuadorian court system, it certainly would have promoted comity more efficiently than pointing out the flaws in another country’s entire judicial system. If the injunction had been based on the individual proceedings, Ecuador would have been hard pressed to seriously implicate concerns of comity, because, as the Magistrate Judge in North Carolina noted, “the court must believe that the concept of fraud is universal, and that

246 Id.
247 Id. at 203.
248 Chevron Corp. v. Donziger, 768 F.Supp.2d at 595.
249 Id. at 617.
what has blatantly occurred in this matter would in fact be considered
fraud by any court. If comity is the concern, examining individual
proceedings would allow Ecuador to save face by categorizing cases as
an isolated abuse of discretion, and preserve the reputation of its judi-
cracy as a whole. As in the Dole case, there is no reason to implicate
another country's entire judicial system if the interests of comity un-
derlie foreign relations, because in like fashion, the plaintiff's attor-
neys in Dole were eventually discovered to have engaged in such
massive fraud that they were recommended for criminal charges by a
state Supreme Court Judge in California.

A finding that an entire country's judicial system is fundamen-
tally unfair is far broader than a judgment regarding a particular act
of the government, or indeed, particular acts of the litigants. In some
respects, the refusal to enforce the judgments of another country, be-
cause of a judicial determination that the entire country's court system
is subject to political influence or bias, is far more troubling than a
decision in a particular case that a specific foreign official acted unlaw-
fully. Such a far-reaching opinion would seem to be more appropriately
made by the Executive Branch. To avoid implicating the judiciary in
foreign affairs, Professor Carodine suggests changing the existing due
process analysis to shift the determination that a foreign country's
judgments are not worthy of enforcement to the Executive Branch,
which could possibly outline its decisions in a format similar to the
U.S. State Department Country Reports. These determinations
would control enforcement of judgments rendered in that country,
rather than determinations by the judiciary. However, if a country
renders a judgment that was not on the list, and was subsequently
sought to be enforced in the United States, then courts would only
then consider whether the court in the foreign proceedings at issue
afforded the litigants due process in those particular proceedings.
This would promote judicial efficiency by serving as a gatekeeping
mechanism, precluding judgments from countries with questionable
court systems from being enforced through U.S. courts altogether, and
shielding U.S. courts from political controversy.

Claims that the international due process analysis furthers the
goal of “judicial efficiency” may be subject to question when one looks
at cases like Ashenden, or Chevron/Ecuador, which has tied up the

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252 Carodine, supra note 20, at 1224.
253 Id. at 1225.
courts for decades. Proponents of the analysis would most likely be hard pressed to point to instances where the analysis resulted in quicker resolution of cases, or avoided protracted litigation, and as transnational litigation becomes more frequent as we move to a global society, it may be wiser to change the analysis. Judgments from countries with courts that do not provide due process in proceedings, as determined by the Executive Branch, would not be entitled to recognition by U.S. courts. Judgments from countries that generally provide due process, as determined by the Executive Branch, could be made, subject to review, upon allegations of specific instances of due process violations. These reviews would be confined to examining only the due process violations complained of, and nothing more.

As it stands, the proposal that the international due process analysis prevents parties from re-litigating in the U.S. court system is questionable at best, when examined in the light of *Chevron/Ecuador*. The argument that forcing courts to review individual proceedings would result in shifting the risks and costs from the entity that chose to enter into transactions with foreign entities to the U.S. courts is also subject to challenge. If the Executive Branch were to unequivocally state that certain countries were of a category that their judgments were unenforceable, then there would be no risk or costs to the courts, as judgments rendered by those countries would be precluded from U.S. courts completely. If litigants in countries with court systems that were not at all implicated by the Executive Branch complained of due process violations, courts would only then be obliged to determine whether due process was provided. For example, if the U.S. had placed Ecuador in the list of countries whose judgments were not recognized in the United States, the *Chevron* plaintiffs would most likely not have wasted time seeking enforcement in the U.S., and the court system would have avoided over two decades of legal wrangling by the parties. Alternately, if Ecuador was of the category of countries whose judgments were recognized, the overwhelming evidence of fraud in these individual proceedings may have led to the complaint being dismissed much more quickly.

Rather than promoting judicial efficiency, the international due process analysis seems to impose an even greater burden on judicial resources. A quick review of the *Ashenden* opinion, as well as multiple *Chevron* opinions demonstrates that courts are unlikely to ignore the individual proceedings and rule only on the court system of the judgment court alone. In order to understand the framework for the judgment rendered in the foreign court, both the general court system of the country where the judgment was rendered and the particular proceedings are examined, in almost excruciating detail. To suggest that the retail approach is not viable seems to have missed the mark, as judges are seemingly compelled to examine both the retail and
wholesale nature of the proceedings before them, which does not lead to judicial efficiency. For example, after reviewing the facts, Judge Kaplan rendered his March 2014 ruling in a 485-page opinion with 1,842 citations.\[254\] The international due process comprised the equivalent of three pages out of the entire opinion.\[255\] If – as Judge Kaplan pointed out, based on the wording of the Restatement (Third) – because the “judicial system was not fair or impartial,” the decisions of Ecuador are “not entitled to recognition here,”\[256\] the entire case could have been resolved in a few sentences. However, the analysis does not seem to be effective at lightening the workload of the already overburdened court system by avoiding a retrial of the initial claims litigated in the foreign court.

Further, utilizing the international due process analysis in a high-profile case may lead to increased attempts to try a case in the media or in the court of public opinion. For example, in his March 2014 ruling, Judge Kaplan noted that Donziger was a “master of public and media relations” and that “an extensive public relations and media campaign has been part of his strategy.”\[257\] This has proven to be true even after Judge Kaplan’s ruling. In a recent article, in an attempt to continue to garner support from the public, Donziger was booked to speak at his alma-mater, Harvard Law School, where it has been suggested that he was “tak[ing] his case to the Ivy League Court of Appeal.”\[258\] Despite Judge Kaplan’s careful review of caselaw and the facts in a nearly 500-page opinion, in promoting Donziger’s appearance at Harvard, the Human Rights Program at Harvard claimed that Chevron secured “a controversial ruling from a U.S. federal judge in a non-jury trial that Ecuador’s entire judicial system is unworthy of respect, and that the case was marred by fraud.”\[259\] Focusing on the international due process analysis contained on 3 out of the entire 485 pages of Judge Kaplan’s opinion, the promoters of Donziger’s speech may have been attempting to suggest that the ruling was made without consideration of Donziger’s fraud as the primary factor. Judge Kaplan himself noted that he was “obligated” to pass judgment of the “fairness of the judicial system of another country.”\[260\] However, this

\[255\] Id. at 417–19.
\[256\] Id. at 419.
\[257\] Id.
obligation may subject an otherwise thorough and thoughtful opinion to suggestions that it was rendered by a judge with profound disrespect for an entire country’s judicial system. In fact, Donziger has vowed to appeal Judge Kaplan’s decision, calling the ruling “appalling”, and claiming that Judge Kaplan has let his “implacable hostility towards . . . [Donziger’s] Ecuadorian clients and their country infect his view of the case.” It is unlikely that omitting the requirement of performing the international due process analysis in the March 2014 ruling would have prevented from Donziger’s resulting claims of bias on the part of Judge Kaplan. However, omitting the international due process analysis and focusing only on the particular allegations of fraud by Donziger may have shielded Judge Kaplan from claims that he “made disparaging remarks about Ecuador’s judicial system,” or that he found “Ecuador’s entire judicial system is unworthy of respect.”

The Chevron litigation is remarkable for a number of reasons, as Judge Kaplan noted, not the least of which is that it highlights problems with existing international due process analysis in its current form. In the face of overwhelming evidence of fraud on the part of the plaintiffs, it is possible that Judge Kaplan could have disposed of the case without implicating the Ecuadorian court system at all. As the litigation continues to wind its way through the appeals process, the sheer drama of the case overshadows questions regarding the U.S. judiciary’s role in foreign affairs, how comity may best be furthered when enforcing foreign judgments, and the appropriateness of the judiciary evaluating the reputation of a foreign sovereign’s courts. Hopefully, the boundaries of the international due process analysis will be clarified, as well as the role of U.S. judges in navigating the controversial international political issues that are implicated in foreign judgment recognition cases will be more fully defined.

263 Id.
264 See HUMAN RIGHTS PROGRAM WEBSITE, supra note 314.