

UC Irvine

UC Irvine Previously Published Works

Title

Some Cautionary Notes on the 'Chevronization' of Transnational Litigation

Permalink

<https://escholarship.org/uc/item/7rx064sk>

Author

Whytock, Christopher A

Publication Date

2013-08-06

Peer reviewed

SOME CAUTIONARY NOTES ON THE “CHEVRONIZATION” OF TRANSNATIONAL LITIGATION

Christopher A. Whytock*

INTRODUCTION	467
I. LESSONS ABOUT THE TRANSNATIONAL LITIGATION SYSTEM	468
A. <i>The New Multipolarity in Transnational Litigation</i>	468
B. <i>Increasing Interactions Between the Transnational Litigation System and Other International Legal Subsystems</i>	471
II. IMPLICATIONS FOR LEGAL CHANGE	473
A. <i>Intrinsic Versus Extrinsic Fraud</i>	474
B. <i>Forum Non Conveniens and the Enforcement of Foreign Judgments</i>	477
C. <i>Case-Specific Versus Systemic Due Process Exceptions</i>	480
D. <i>Investor-State Arbitration Versus Conflict of Laws</i>	483
CONCLUSION	485

INTRODUCTION

In 1993, residents of the Lago Agrio region of the Ecuadorian Amazon sued Texaco, Inc. alleging extensive environmental damage and personal injuries caused by Texaco’s oil extraction operations there.¹ The U.S. District Court for the Southern District of New York dismissed the suit on forum non conveniens grounds in favor of the courts of Ecuador, and the U.S. Court of Appeals for the Second Circuit affirmed in 2002.² Meanwhile, Chevron Corp. had acquired Texaco in 2001.³ After the forum non conveniens dismissal, the Lago Agrio plaintiffs sued Chevron in an Ecuadorian court, which entered a \$17.2 billion judgment against Chevron.⁴ Since then, the parties have been

* Professor of Law and Political Science, University of California, Irvine School of Law. This Essay is based on the author’s remarks at the Stanford Journal of Complex Litigation Symposium on Lessons from the Chevron Ecuador Litigation, Stanford Law School, February 8, 2013. The author thanks the organizers for the opportunity to participate.

1. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

2. *Id.*

3. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012).

4. *Id.* at 235-36.

engaged in an extensive litigation and public relations battle over the enforcement of the judgment, a battle that has reached beyond the United States and Ecuador to countries including Argentina, Brazil and Canada. According to the Second Circuit, this story of conflict “must be among the most extensively told [stories] in the history of the American federal judiciary.”⁵

Although the Chevron-Ecuador case raises many interesting legal issues, this Essay sounds a note of caution about the lessons of the case for transnational litigation. On the one hand, the case usefully highlights two important transnational litigation trends: the growing multipolarity of transnational litigation, and the increasing interaction between the transnational litigation system and other international legal sub-systems. Part One argues that in this modest sense, there are significant lessons to be learned from the Chevron-Ecuador case.

On the other hand, I argue in Part Two that the lessons of the Chevron-Ecuador case for law reform are, and should be, limited. Given the case’s high visibility and dramatic facts, judges, scholars and policymakers may be tempted to draw lessons about how the rules governing transnational litigation should be changed. However, the Chevron-Ecuador case is not representative of transnational litigation in general, and therefore does not by itself provide an adequate basis for reform. Legal decisionmakers—including judges—may understandably feel pressure to push the law in a particular direction in order to address perceived imperatives that are specific to the Chevron-Ecuador case. But this would risk bypassing the careful evidence-based policy deliberation needed for sound law reform. Part Two illustrates this risk using examples from the law governing the enforcement of foreign country judgments. The overarching argument is this: Judges, policymakers and scholars should use caution to avoid unduly “Chevronizing” the law of transnational litigation.

I. LESSONS ABOUT THE TRANSNATIONAL LITIGATION SYSTEM

A. *The New Multipolarity in Transnational Litigation*

It is widely believed that the transnational litigation system is centered around the United States, perhaps along with the United Kingdom.⁶ From this perspective, the system appears unipolar or bipolar, with the United States and the United Kingdom acting as the leading providers of courts and law for transnational litigation.⁷

However, as Marcus Quintanilla and I have argued, transnational litigation

5. *Id.* at 234.

6. See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 *SW. J. INT’L L.* 31, 31 (2011) (documenting this conventional wisdom).

7. *Id.*

is increasingly multipolar.⁸ The new multipolarity manifests itself in three ways. First, U.S. courts are no longer as attractive to litigants as they supposedly once were.⁹ Meanwhile, other countries are increasingly drawing litigants to their courts through a combination of ex ante forum selection agreements, and ex post forum shopping.¹⁰ Lord Denning famously quipped that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.”¹¹ However, both empirical trends and anecdotal evidence from practitioners of transnational litigation suggest that the light may not be burning as brightly as it once did.¹² Doctrinally, this is not surprising. Over the years, the Supreme Court has reinvigorated the forum non conveniens doctrine as an anti-forum-shopping device,¹³ restricted personal jurisdiction in transnational suits,¹⁴ limited the extraterritorial application of U.S. statutes,¹⁵ and imposed stricter pleading standards, making it more difficult for plaintiffs to gain access to one of the major attractions of the U.S. legal system: liberal discovery.¹⁶

Second, litigants are likely to bring a growing number of foreign country judgments to U.S. courts for recognition or enforcement.¹⁷ Transnational litigation experts have identified this trend,¹⁸ and preliminary empirical evidence tends to confirm it.¹⁹ This aspect of the new multipolarity follows from the first: if there is more litigation in foreign courts, there will be more foreign judgments, and when those judgments involve U.S.-based defendants or other defendants with significant assets in the United States, judgment creditors may seek enforcement in the United States.²⁰

8. *Id.* at 32.

9. *Id.* at 33

10. *Id.* at 33-34.

11. *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

12. *See* Quintanilla & Whytock, *supra* note 6, at 32-35 (summarizing evidence of decreased transnational litigation in U.S. courts and increased transnational litigation in foreign courts). *See generally* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (presenting evidence that alienage suits in the U.S. district courts declined since the 1980s, and presenting possible doctrinal and strategic explanations for that decline).

13. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *See* Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1564 (2011) (noting increase in forum non conveniens motions).

14. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

15. *Morrison v Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010).

16. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

17. Quintanilla & Whytock, *supra* note 6, at 35-37.

18. *See, e.g.*, GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1078 (4th ed. 2007) (noting growth of foreign judgment enforcement actions in U.S. courts).

19. *See* Quintanilla & Whytock, *supra* note 6, at 36-37.

20. *See id.* (presenting data indicating increase in opinions involving foreign

Third, for those transnational suits that are litigated in U.S. courts, it is increasingly likely that lawyers and judges will encounter issues of foreign law.²¹ Legal scholars have already noted this trend.²² Moreover, recent empirical studies suggest that U.S. judges are ready to apply foreign law when choice-of-law methods call for it,²³ and in at least one federal district there is a growing number of references to Rule 44.1 of the Federal Rules of Civil Procedure, which is the rule that governs determination of foreign law.²⁴

The Chevron-Ecuador case is a vivid illustration of multipolarity in transnational litigation. Although the case was initially filed in the United States, it was dismissed in favor of the courts of Ecuador based on the forum non conveniens doctrine.²⁵ The case was then litigated in Ecuador, resulting in a multi-billion dollar judgment in favor of the plaintiffs (the “Lago Agrio judgment”).²⁶ Thus, the case illustrates both the growing importance of non-U.S. forums for transnational litigation, and one likely explanation for this trend: the application by U.S. courts of doctrines that limit U.S. court access in transnational suits. The Ecuadorian judgment is now being litigated in U.S. courts.²⁷ So far, the judgment creditors have not sought enforcement of the judgment against Chevron’s assets in the United States, but extensive litigation in courts across the country has focused on matters relating to the judgment.²⁸ In that litigation, U.S. lawyers and judges are facing questions of Ecuadorian law and procedure.²⁹ Beyond Ecuadorian and U.S. proceedings, actions to enforce the Ecuadorian judgment have been filed in Argentina, Brazil and Canada.³⁰ Thus, even if the Chevron-Ecuador case is atypical in many ways, it

judgments in the U.S. District Court for the Southern District of New York).

21. *Id.* at 37.

22. See generally Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97 (2003) (extensively discussing this trend).

23. See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 765 (2009) (empirical analysis suggesting that judges are not biased in favor of domestic law).

24. See Quintanilla & Whytock, *supra* note 6, at 38-39 (presenting this data).

25. See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234-35 (2d Cir. 2012) (providing overview of the proceedings).

26. *Id.* at 236.

27. See *id.* at 234 (reversing district court’s decision to grant injunction against enforcement of the Lago Agrio judgment).

28. See *id.* at 236 (describing “dozens of discovery proceedings” launched by Chevron “throughout the United States” resulting in “at least fifty orders and opinions from federal courts across the country”).

29. See, e.g., *id.* at 237 (providing overview of proceedings leading to the Lago Agrio judgment and review of the judgment in appellate proceedings in Ecuador, and addressing issues of Ecuadorian law).

30. Jude Webber, *Chevron Loses Environment Case Appeal*, FIN. TIMES, Jan. 30, 2013, available at <http://www.ft.com/cms/s/0/c55d8f38-6b1b-11e2-8017-00144feab49a.html#axzz2NdiTahES>.

Spring 2013]

“CHEVRONIZATION”

471

illustrates—quite dramatically—the new multipolarity in transnational litigation.

B. *Increasing Interactions Between the Transnational Litigation System and Other International Legal Subsystems*

Beyond growing multipolarity, the Chevron-Ecuador case highlights another trend, albeit one that is not yet as well documented: increasing interactions between the transnational litigation system on the one hand, and other international legal subsystems on the other hand. For example, in September 2009, Chevron initiated arbitration against the Republic of Ecuador pursuant to the bilateral investment treaty between Ecuador and the United States (the “BIT”).³¹ Among other things, Chevron is seeking an award requiring Ecuador to inform the court in the Ecuadorian proceedings that Chevron has been released from liability and that Ecuador or Petroecuador is “exclusively liable for any judgment that may be issued in the Lago Agrio Litigation.”³² The arbitral tribunal has issued interim awards ordering Ecuador “to take all measures to suspend or cause to be suspended the enforcement and recognition within and without Ecuador” of the Lago Agrio judgment.³³

In response to the developments in the BIT arbitration proceedings, the Lago Agrio plaintiffs filed a request for precautionary measures in the Inter-American Commission on Human Rights in February 2012, aiming to prevent Ecuador from taking steps that would impair the plaintiffs’ rights as judgment creditors with respect to the Lago Agrio judgment.³⁴ Specifically, they requested the Commission “to call for precautionary measures from [Ecuador] sufficient to assure the Commission that [Ecuador] will refrain from taking any action that would contravene, undermine, or threaten the human rights [of the plaintiffs] and that to the contrary [Ecuador] will take all appropriate measures to assure the full protection and continued guarantee of those rights.”³⁵ The petition has since been withdrawn.³⁶ However, there was for a moment a possibility that Ecuador would be subject to conflicting orders: a BIT tribunal

31. Claimant’s Notice of Arbitration, Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador, PCA Case No. 2009-23 (Sept. 23, 2009), *available at* <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>.

32. *Id.* at 18.

33. Fourth Interim Award on Interim Measures, Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador, PCA Case No. 2009-23, at 25-26 (Feb. 7, 2013), *available at* <http://www.asil.org/ilib130215.cfm#j2>.

34. Letter from Pablo Fajardo, Julio Prieto, Juan Pablo Saenz and Aaron Marr Page to Dr. Santiago Cantón, Exec. Sec’y, Inter-Am. Comm’n on Human Rights, Org. of Am. States (Feb. 9, 2012), *available at* <http://lettersblogatory.com/wp-content/uploads/2012/02/OAS-Petition.pdf>.

35. *Id.* at 2.

36. Lucinda Low, *Remarks*, 106 AM. SOC’Y INT’L L. PROC. 419, 421 (2013).

order to prevent enforcement and a human rights commission order to protect the plaintiffs' rights with respect to the judgment.³⁷

The Chevron-Ecuador case also implicates the international trade system. In September 2012, Chevron filed a petition with the Office of the United States Trade Representative requesting the withdrawal or suspension of certain trade preferences enjoyed by Ecuador under U.S. law.³⁸ The petition is based on Ecuador's purported refusal to abide by the BIT tribunal's interim orders regarding the Lago Agrio judgment.³⁹ Ecuador responded with its own filing, arguing that the Ecuadorian government has complied with the orders but that it has "no power to order the courts to interfere in private-party litigation [between the Lago Agrio plaintiffs and Ecuador] any more than the Government of the United States can order its courts to do so"⁴⁰

Thus, the Chevron-Ecuador case highlights how disputants may use different international legal subsystems strategically to further their objectives when those objectives are frustrated in domestic forums.⁴¹ In addition to the transnational litigation system and the national legal systems of Argentina, Brazil, Canada, Ecuador and the United States, the investor-state arbitration system, a regional human rights system, and the international trade system have been involved. There is not enough evidence to establish whether this type of intersystemic interaction is a major trend in transnational dispute resolution. However, given the proliferation of regional dispute resolution systems, such a trend would not be surprising. Insofar as the growth of these systems leads to fragmentation of international law and procedure, as some have argued,⁴² this trend is likely to increase the complexity of transnational dispute resolution considerably—complexity that transnational litigators will have to grow accustomed to.

37. See Christopher A. Whytock, *The Chevron-Ecuador Case: Three Dimensions of Complexity in Transnational Dispute Resolution*, 106 AM. SOC'Y INT'L L. PROC. 425, 426 (2013) ("Strikingly, Chevron is using the investor-state arbitration system to get Ecuador to do one thing, and the plaintiffs are using a regional human rights system to get Ecuador to do the opposite.").

38. Letter from Edward B. Scott, Vice President and General Counsel, Chevron Corp. to Bennett Harman, Chairman, Andean Subcomm., Trade Pol'y Staff Comm., Office of the United States Trade Rep. (Sept. 17, 2012) available at <http://lettersblogatory.com/wp-content/uploads/2012/09/Chevron-comment.pdf>.

39. *Id.* at 1-2.

40. Letter from Nathalie Cely, Ambassador of the Republic of Ecuador, Washington D.C., to Douglas Bell, Assistant U.S. Trade Rep. for Trade Pol'y and Econ., Office of the U.S. Trade Rep. (Sept. 17, 2012), at 4, available at <http://lettersblogatory.com/wp-content/uploads/2012/09/Ecuador-comments.pdf>.

41. Whytock, *supra* note 37, at 426.

42. See generally *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L682 (Apr. 13, 2006) (by Martti Koskenniemi) (providing overview of fragmentation of international legal system), available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf.

II. IMPLICATIONS FOR LEGAL CHANGE

Even if the Chevron-Ecuador case usefully highlights significant transnational litigation trends, there are reasons to doubt that judges, policymakers, or scholars should draw lessons from the case for legal change. To develop this point, this Part focuses on four issues relating to foreign judgment enforcement—not to advocate particular positions, but to note issues that have been or may be litigated in the case, and that could have an impact on the development of the law even if that impact is not necessarily desirable from a general policy perspective: (1) the distinction between intrinsic and extrinsic fraud as a defense to judgment enforcement; (2) the relationship between forum non conveniens and judgment enforcement; (3) systemic and case-specific exceptions to judgment enforcement; and (4) the use of the investor-state arbitration system to prevent judgment enforcement.

First, some background: In the United States, state law generally provides the rules governing the enforcement of foreign judgments. Most states—thirty-three at last count, plus the District of Columbia and the U.S. Virgin Islands—have adopted legislation based on one of two uniform acts drafted and approved by the Uniform Law Commission: the Uniform Foreign Money-Judgments Recognition Act, which was approved in 1962 (the “1962 Act”),⁴³ or the Uniform Foreign-Country Money Judgments Recognition Act, which was approved in 2005 (the “2005 Act”).⁴⁴ The structure of both uniform acts is a general rule that a court shall recognize a foreign judgment unless an exception applies, followed by a list of exceptions.⁴⁵ And in both uniform acts, there are two types of exceptions: mandatory exceptions, which, if applicable, bar enforcement; and discretionary exceptions, which, if applicable, permit a judge to deny enforcement. The Restatement (Third) of U.S. Foreign Relations Law attempts to restate the common law of foreign judgment enforcement, and

43. UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT (1962) [hereinafter 1962 Act]. As of January 2013, the U.S. Virgin Islands and 15 states have legislation based on the 1962 Act: Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Texas. See *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, NAT’L CONF. OF COMMISSIONERS ON UNIF. STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited June 8, 2013).

44. UNIF. FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005) [hereinafter 2005 Act]. As of January 2013, the District of Columbia and 18 states have adopted legislation based on the 2005 Act: Alabama, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Washington. In addition, legislation based on the 2005 Act has been introduced in Mississippi. See *Legislative Fact Sheet—Foreign Country Money Judgments Recognition Act*, NAT’L CONF. OF COMMISSIONERS ON UNIF. STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited June 8, 2013).

45. See 1962 Act § 3; 2005 Act § 4(a).

it is for the most part consistent with the uniform acts.⁴⁶

A. *Intrinsic Versus Extrinsic Fraud*

It is generally accepted that fraud is a discretionary exception to the general rule of enforcement: a court may (but is not required to) decline enforcement of a foreign country judgment that was obtained by fraud.⁴⁷ The prevailing understanding is that this exception applies only to *extrinsic* fraud, not *intrinsic* fraud.⁴⁸ Extrinsic fraud is “conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case,” such as “when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment.”⁴⁹ Intrinsic fraud, on the

46. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-82 (1987) [hereinafter Foreign Relations Restatement].

47. See 1962 Act § 4(b)(2) (“[a] foreign judgment need not be recognized if . . . the judgment was obtained by fraud”); 2005 Act § 4(c)(2) (“[a] court of this state need not recognize a foreign-country judgment if . . . the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case”); Foreign Relations Restatement § 482 (1987) (“[a] court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment was obtained by fraud”). See also *Hilton v. Guyot*, 159 U.S. 113, 158-59 (1895) (implying exception where there is “fraud in procuring the judgment” or the judgment was “affected by fraud”). The ALI’s proposed federal Foreign Judgments Recognition and Enforcement Act would make fraud a mandatory exception to enforcement. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ACT: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(a)(v) (2006) (“[a] foreign judgment shall not be recognized or enforced . . . [if] the judgment was obtained by fraud that had the effect of depriving the party resisting recognition or enforcement of adequate opportunity to present its case to the court”) [hereinafter ALI Act].

48. See 2005 Act § 4 cmt. 7 (“[i]ntrinsic fraud does not provide a basis for denying recognition” and this is “consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud . . . is sufficient under the 1962 Act”); ALI Act § 5 cmt. g (intrinsic fraud “will normally not defeat recognition or enforcement”); Foreign Relations Restatement § 482 cmt. e (noting that fraud defense traditionally was limited to “extrinsic fraud”). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115 cmt. d (1971) (noting “usual rule” that only “fraud which deprives the complainant of an opportunity to present adequately his claim or defense” will provide relief against judgment) [hereinafter Conflicts Restatement].

49. 2005 Act § 4 cmt. 7. See also ALI Act § 5 cmt. g (extrinsic fraud includes “a judgment obtained by default upon the basis of a false affidavit that the defendant had been duly served with the initiating process, or based on a forged confession of judgment”); Foreign Relations Restatement § 482 cmt. e (extrinsic fraud is a “fraudulent action by the prevailing party that deprived the losing party of adequate opportunity to present its case to the court”). Cf. Conflicts Restatement § 115 cmt. d (referring to fraud that “may operate to deprive the complainant of an opportunity to present his claim or defense” that “may occur when the complainant is kept away from the trial either because he was prevented of learning of the action against him by the wrongful conduct of the other party or because he relied upon the other party’s false promise to discontinue the action or to inform him of the

Spring 2013]

“CHEVRONIZATION”

475

other hand, is fraud that occurs in the foreign judicial proceeding itself, “such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding.”⁵⁰

Thus, Section 4(c)(2) of the 2005 Act provides that “[a] court of this state need not recognize a foreign-country judgment if . . . the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.”⁵¹ As the comments to Section 4 explain, this section “limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud.”⁵² The fraud exception in the 1962 Act simply refers to a judgment “obtained by fraud,”⁵³ but the comments to Section 4 of the 2005 Act note that courts interpreting the 1962 Act have found that only extrinsic fraud is sufficient to invoke the exception.⁵⁴

The policy behind the limitation to extrinsic fraud is that “the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.”⁵⁵ Parties should be encouraged to raise allegations of fraud on a timely basis rather than waiting until judgment enforcement proceedings in another jurisdiction, and the rendering court that itself oversaw the proceedings should be able to assess claims of intrinsic fraud more accurately and efficiently than a distant court that has no direct knowledge of the proceedings and instead must rely primarily on the parties’ allegations in subsequent enforcement proceedings. If a judgment debtor alleges intrinsic fraud, the proper procedure is for those allegations to be addressed to the rendering court or on appeal to a higher court with jurisdiction over the rendering court, and for the U.S. court to stay enforcement proceedings pending resolution in the rendering country’s

time when the case would be called for trial, or when the complainant is induced by the fraud of the adverse party not to contest a fraudulent claim or defense”).

50. 2005 Act § 4 cmt. 7. *See also* ALI Act § 5 cmt. g (judgment debtor alleges intrinsic fraud when it alleges “that a witness in the foreign proceeding gave false testimony or that a forged document was introduced in the foreign proceeding”) and reporter’s note 6 (judgment debtor alleges intrinsic fraud when it alleges “that the rendering court acted upon perjured testimony or falsified documents”); Foreign Relations Restatement § 482 cmt. e (judgment debtor alleges intrinsic fraud when it alleges “that the judgment was based on perjured testimony or falsified documents”). *Cf.* Conflicts Restatement § 115 cmt. d (referring to fraud that occurs “during the trial itself, such as when the judgment is obtained by false or perjured testimony, by the production of false documents or by a conspiracy between the successful party and the witnesses”).

51. 2005 Act § 4(c)(2).

52. 2005 Act § 4 cmt. 7.

53. 1962 Act § 4(b)(2).

54. 2005 Act § 4 cmt. 7.

55. 2005 Act § 4 cmt. 7. *See also* ALI Act § 5 cmt. g (assertions of intrinsic fraud “should have been raised in the rendering court”); Foreign Relations Restatement § 482 cmt. e (“The distinction between extrinsic fraud for purposes of recognition of foreign judgments is based on the view that a challenge on grounds of intrinsic fraud should be addressed to the rendering court.”).

legal system of the allegations of fraud.⁵⁶

Most of Chevron's allegations of fraud—as serious as they may be—would seem to be most fairly characterized as allegations of intrinsic fraud. They are more akin to false testimony and forged documents and conspiracy between a party and witnesses than to depriving a party from being able to present its case.⁵⁷ However, the Restatement (Second) of Judgments comments that this and other formal distinctions regarding different types of fraud are neither persuasive nor consistently applied.⁵⁸ Moreover, some of Chevron's allegations of fraud in the foreign proceedings could be framed as depriving Chevron of an adequate opportunity to present its case, as Chevron's counsel attempted to do⁵⁹—although such a framing would probably depend on a showing by Chevron that, notwithstanding reasonable precautions, it was unable to detect the fraud during the foreign proceedings and therefore was unable to raise objections there.⁶⁰

56. See ALI Act § 5 reporter's note 6 ("If the foreign judgment can still be reopened or set aside on the basis of the assertion of fraud, the court in the United States where recognition or enforcement is sought should stay the action for enforcement in order to give the judgment debtor a reasonable opportunity to apply to the rendering court to reopen the original proceeding, subject in appropriate cases to the posting of security by the judgment debtor."); 2005 Act § 8 ("If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so"); Foreign Relations Restatement § 482 cmt. e ("If the judgment could be set aside in the rendering state, the court in the United States where enforcement is sought should stay the action for enforcement in order to give the judgment debtor a reasonable opportunity to petition the rendering court to set the judgment aside, subject, in appropriate cases, to the giving of security.").

57. See *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636-37 (S.D.N.Y. 2011) (summarizing Chevron's allegations of fraud).

58. See RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982) ("Aside from not being very persuasive, these various distinctions are not consistently applied.") [hereinafter *Judgments Restatement*]. The *Judgments Restatement*, however, is not directly on point. It restates the law of a U.S. forum regarding its own judgments, not the law of a U.S. forum regarding the judgments of other jurisdictions that may have their own law governing fraud.

59. See, e.g., Brief for Plaintiff-Appellee at 62, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (No. 11-1150-cv(L)), 2011 WL 2603734 (arguing that "blackmail and intimidation tactics against the judge and corrupting an independent agent of the court charged with making crucial technical recommendations is 'extrinsic fraud'"). This malleability of allegations of fraud is one reason for the *Judgments Restatement's* skepticism about the intrinsic/extrinsic fraud distinction. See *Judgments Restatement* § 70 cmt. c (noting that the "distinction was obliterated by decisions in which it was reasoned that offering fabricated evidence 'prevented' the other party from contesting the proposition for which the fabricated evidence was offered as proof").

60. See *Judgments Restatement* § 70 cmt. d (to obtain relief based on allegation of fraud, judgment debtor must, among other things, establish that "he adequate pursued means for discovering the truth available to him in the original action" and "must show due diligence after judgment, in that he discovered the fraud as soon as might reasonably have been expected").

Spring 2013]

“CHEVRONIZATION”

477

This may be a relatively small legal opening. But given the stakes and the seriousness of Chevron’s allegations about irregularities in the foreign proceedings, it would not be surprising for a U.S. judge to use this opening to conclude that the fraud exception should apply in this case.⁶¹ This would have the effect of either significantly stretching the concept of extrinsic fraud not only in this case but for future cases, or perhaps moving away from the distinction altogether, thus changing the law even more significantly. In short, this is one area of the law of transnational litigation which, if litigated as zealously as other issues have been litigated in the case, could see some change in the form of a dilution of the extrinsic fraud limitation—not so much because of a general and well thought out rejection of the policy rationale for the limitation, but in order to craft a remedy that seems necessary in light of the facts and what is at stake in this particular case.

Although I do not have a firm position on the issue, my intuition is that there are not clear and compelling policy reasons to tinker with this aspect of U.S. judgment enforcement doctrine and that claims of intrinsic fraud ordinarily should be addressed in the court most familiar with the proceedings in which the fraud is alleged to have occurred. If the rendering legal system is incapable of doing so fairly, for example because the court is biased or politicized or otherwise fails to provide due process, then other exceptions to judgment enforcement will be available—such as the systemic due process exception (or, depending on the state, the case-specific due process exception or the corruption exception) discussed below.

B. *Forum Non Conveniens and the Enforcement of Foreign Judgments*

Beyond the limited scope of the fraud exception to foreign judgment enforcement, Chevron faces another potential legal difficulty: Chevron argues that the Ecuadorian judiciary suffers from inadequacies that should preclude enforcement; but Texaco argued earlier that Ecuador was an adequate alternative forum that was more appropriate for deciding the plaintiffs’ claims against it than a U.S. court.⁶² The case began when plaintiffs sued Texaco in the U.S. District Court for the Southern District of New York in 1993.⁶³ In 2001, Texaco successfully moved to dismiss the suit in favor of Ecuador on forum non conveniens grounds, arguing that the Ecuadorian legal system was available and adequate, and would be more appropriate than a U.S. court for

61. In proceedings in the U.S. District Court for the Southern District of New York, Judge Kaplan appeared sympathetic to Chevron’s fraud argument, but concluded only that “Chevron has raised substantial questions that present a fair ground for litigation as to whether the Ecuadorian judgment is a result of fraud” *Donziger*, 768 F. Supp. at 636-37.

62. *See Naranjo*, 667 F.3d at 235.

63. *Id.* at 235.

adjudicating the dispute.⁶⁴ On appeal, Texaco argued that “Ecuador provides plaintiffs with an adequate alternative forum,” that “Ecuador can and does dispense independent and impartial justice,” and that the record provided “practical proof that litigants can and do obtain fair treatment and relief in Ecuador’s courts,” including in cases arising out of the oil contamination alleged by plaintiffs.⁶⁵ The Court of Appeals affirmed the dismissal in 2002.⁶⁶ As one of its arguments against the enforceability of the Ecuadorian judgment, Chevron now argues that the Ecuadorian judiciary suffers from inadequacies that should preclude enforcement.⁶⁷

The Second Circuit has indicated that Chevron is bound by Texaco’s positions during the *forum non conveniens* stage of the proceedings.⁶⁸ Moreover, plaintiffs and commentators have argued that Chevron should be estopped from changing its position to argue at the enforcement stage that the Ecuadorian judiciary is inadequate.⁶⁹ However, as Cassandra Burke Robertson and I have argued in some detail in a recent article on the relationship between the *forum non conveniens* doctrine and judgment enforcement, there are several reasons why such estoppel arguments are unlikely to succeed.⁷⁰ First, the judicial adequacy standard at the *forum non conveniens* stage is very lenient: the dominant approach, and the one endorsed by the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno*, only requires that there be some remedy potentially available in the foreign court and that the defendant is amendable to suit there.⁷¹ Defendants routinely ensure that the second requirement is satisfied by giving their consent to suit in the foreign court.⁷² Thus, this is an easy standard to satisfy. At the enforcement stage, on the other hand, the

64. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

65. Appellee’s Brief at 54-56, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d. Cir. 2001) (No. 2001-7756).

66. *Aguinda*, 303 F.3d at 473 (“We modify the judgments in one respect . . . but otherwise affirm the dismissal of the actions by reason of *forum non conveniens*.”).

67. *See Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011) (noting Chevron’s argument that “the Ecuadorian judgment in this case ‘was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law’”).

68. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389-90 (2d Cir. 2011) (rejecting Chevron’s argument “that it is not bound by the promises made by its predecessors in interest Texaco and ChevronTexaco, Inc.,” and concluding that Texaco’s promises at the *forum non conveniens* stage are “enforceable against Chevron in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards”).

69. *Donziger*, 768 F. Supp. 2d at 648.

70. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011). Indeed, the argument has already been rejected by the Southern District of New York. *Donziger*, 768 F. Supp. 2d at 648-49.

71. Whytock & Robertson, *supra* note 70, at 1472-74.

72. *Id.*

Spring 2013]

“CHEVRONIZATION”

479

foreign judicial system must satisfy a stricter standard: it must “provide impartial tribunals” and “procedures compatible with the requirements of due process of law”—otherwise, a U.S. court may not enforce a judgment produced by that system.⁷³ Therefore, an argument that a judicial system is adequate for forum non conveniens dismissal purposes is not necessarily inconsistent with an argument that the same judicial system is inadequate for enforcement purposes.⁷⁴ Second, the assertion that the Ecuadorian legal system was inadequate at the time of the proceedings leading to the Lago Agrio judgment is not necessarily inconsistent with the claim that it was adequate at the time of the forum non conveniens dismissal in 2001, because the conditions in Ecuador may have changed.⁷⁵

As Professor Robertson and I argue in our article, the problem is that this mismatch of foreign judicial adequacy standards may in some cases produce an access-to-justice gap. Access to justice requires not only court access, but also a potential remedy. But if the forum non conveniens doctrine is applied to deny the plaintiff court access in one forum and, in the same dispute, the judgment enforcement doctrine is applied to deny the plaintiff a remedy based on a judgment from another forum, the plaintiff may be denied meaningful access to justice.⁷⁶ We therefore propose a variety of doctrinal changes to reduce the likelihood of this sort of access-to-justice gap.⁷⁷

However, the Chevron-Ecuador case probably does not present a good opportunity to undertake such a project. If, as Chevron alleges, plaintiffs’ counsel actively promoted and took advantage of corruption in the Ecuadorian judiciary, it would seem unfair to limit Chevron’s ability to pursue defenses against enforcement based on those allegations simply because Texaco earlier argued that the Ecuadorian system was adequate. Moreover, because under existing law claims of foreign judicial adequacy at the forum non conveniens stage are not necessarily inconsistent with claims of foreign judicial inadequacy at the enforcement stage, it would seem unfair to apply our proposals retroactively in this case.⁷⁸

73. 2005 Act § 4(b)(1).

74. Whytock & Robertson, *supra* note 70, at 1501-02. However, Texaco may have argued more than it had to under the prevailing forum non conveniens standard, and to the extent it argued that Ecuador provided impartial tribunals or procedures compatible with the requirements of due process of law, Chevron might find it more difficult to escape estoppel based on differences between the two foreign judicial adequacy standards.

75. The U.S. District Court for the Southern District of New York has rejected plaintiffs’ estoppel argument for this reason. *Donziger*, 768 F. Supp. 2d at 648-49 (S.D.N.Y. 2011).

76. Whytock & Robertson, *supra* note 70, at 1450.

77. *See id.* at pt. III (setting forth the proposals).

78. *See id.* at 1514 (recommending that “the proposed standards be applied only prospectively” so that they are in place at the forum non conveniens dismissal stage).

C. Case-Specific Versus Systemic Due Process Exceptions

Interactions with the forum non conveniens doctrine aside, it is widely accepted that there is a mandatory systemic due process exception to foreign judgment enforcement. For example, Section 4(b)(1) of the 2005 Act provides that “[a] court of this state may not recognize a foreign-country judgment if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”⁷⁹ As the comments to the 2005 Act explain, “[t]he focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure.”⁸⁰ This exception “requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness”—in other words, it focuses on “the foreign country’s judicial system as a whole.”⁸¹ Traditionally, the failure of due process in a particular case has not been sufficient to establish an exception.⁸²

This traditional limitation is based on the pro-enforcement policy of U.S. judgment enforcement law. For example, the American Law Institute rejected a case-specific due process exception, explaining that “[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of this Act.”⁸³ Similarly, as the Seventh Circuit has argued, a case-specific approach would be “inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions” and “would in effect . . . [allow] a further appeal on the merits . . . thus converting every successful multinational suit for damages into two suits”⁸⁴ Moreover, in principle, if the foreign judicial system is systemically adequate, it should be able to address allegations of case-specific

79. 2005 Act § 4(b)(1). *See also* ALI Act § 5(a)(i) (“[a] foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that . . . the judgment was rendered under a system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness”); 1962 Act § 4(a)(1) (“[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”); Foreign Relations Restatement § 482(1) (“[a] court in the United States may not recognize a judgment of the court 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”).

80. 2005 Act § 4 cmt. 5.

81. 2005 Act § 4 cmt. 11.

82. *See* 1962 Act § 4 (providing systemic but not case-specific due process exception).

83. *See* ALI Act § 5 cmt. c.

84. *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

deficiencies through procedures analogous to those that exist in the U.S. legal system for the same purposes—such as rehearing and appellate procedures.⁸⁵ In that sense, case-specific exceptions may be redundant to the systemic due process exception.

Nevertheless, the U.S. Chamber of Commerce is advocating for case-specific exceptions.⁸⁶ If the judgment creditors in the Chevron-Ecuador case were to seek enforcement of the Lago Agrio judgment in a U.S. court, whether a case-specific defense against enforcement is available would ordinarily depend on the law of foreign judgment enforcement in effect in the state where enforcement is sought.⁸⁷ But even where a case-specific exception is available—for example, in 2005 Act states—Chevron probably will have little need to rely upon it, given the likelihood that it would be able to prove the applicability of the better-established systemic due process exception.⁸⁸ Moreover, other cases held out as demonstrating the need for case-specific exceptions—such as the judgments of Nicaraguan courts in *Shell Oil Company v. Franco* and *Osorio v. Dole Food Company*—would seem to be stronger evidence of the suitability of the traditional approach than for new case-specific exceptions, because in each case the judgments were found to be unenforceable in the United States on grounds other than the applicability of case-specific exceptions.⁸⁹

85. Whytock & Robertson, *supra* note 70, at 1502 (arguing that “[i]f . . . the [foreign] judiciary is systemically adequate, then the case-specific inquiry should be unnecessary at the enforcement stage, because [the foreign judiciary] should be able to address case-specific inadequacies internally, through its own rehearing r appellate processes”).

86. See, e.g., WILLIAM E. THOMPSON & PERLETTE MICHÈLE JURA, U.S. CHAMBER INST. FOR LEGAL REFORM, CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS 11 (2011) (arguing for case-specific exceptions in addition to systemic exception), available at <http://www.instituteforlegalreform.com/doc/confronting-the-new-breed-of-transnational-litigation-abusive-foreign-judgments>.

87. In the Chevron-Ecuador case, one possible wrinkle to this analysis is raised by the Second Circuit’s finding that Chevron is bound by Texaco’s agreement, as a condition for the grant of its motion to dismiss the suit in favor of the courts of Ecuador, that it would satisfy any judgments in plaintiffs’ favor, subject only to the exceptions in New York’s Recognition of Foreign Country Money Judgments Act. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 (2d Cir. 2011). On this basis, it is possible that jurisdictions other than New York might entertain only exceptions to enforcement recognized by the New York act (which do not include case-specific failures of due process).

88. In proceedings in the U.S. District Court for the Southern District of New York, Judge Kaplan already has found that Chevron is likely to succeed on its claim that the Ecuadorian judicial system does not provide impartial tribunals and due process and that the systemic due process exception to enforcement therefore applies. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011).

89. See *Shell Oil Co. v. Franco*, No. CV 03-8845 NM (PJWx), 2005 WL 6184247, at *1 (C.D. Cal. 2005) (denying enforcement of \$489.4 million Nicaraguan judgment against Shell Oil); *Osorio v. Dole Food Co.*, 655 F. Supp. 2d 1307 (S.D. Fla. 2009) (denying enforcement of \$97 million Nicaraguan judgment against Dole Food Co.). See also THOMPSON & JURA, *supra* note 86, at 3 (citing the Dole case).

This less than satisfying connection between evidence and policy positions notwithstanding, the Uniform Law Commission—and the states—are moving in the direction of case-specific exceptions. Breaking from the 1962 Act’s approach, Section 4(c) of the 2005 Act contains two new discretionary case-specific exceptions: “[a] court of this state need not recognize a foreign-country judgment if . . . (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”⁹⁰ States have rapidly been adopting legislation based on the 2005 Act; today there are already more 2005 Act states than 1962 Act states.⁹¹

In addition, the ALI Act includes a case-specific exception barring enforcement if “the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question.”⁹² The drafters acknowledge that “[t]he defense of possible corruption in the rendering court is one that has not traditionally been an explicit ground for nonrecognition or nonenforcement by courts in the United States.” But they explain that “concerns about corruption in the judiciaries of certain countries and the effect of corruption in the particular case led to inclusion of this additional defense.”⁹³ Like the *Dole* and *Shell* cases before it, *Chevron* will surely be held out as evidence of a need to adopt case-specific exceptions to enforcement, but in a way that may risk bypassing careful evidence-based policy analysis and consideration of the broader implications for transnational litigation.

To be perfectly clear, the issue here is not whether a judgment debtor should be required to satisfy a judgment produced by a process that is corrupt or violates fundamental principles of fairness. Rather, the issue is which forum should determine whether a judgment was produced by such a process. As with other issues relating to foreign judgment enforcement, the answer is not obvious. But if a foreign legal system is systemically adequate, it should be able to resolve case-specific issues itself; and if it is not systemically adequate, then the judgment debtor could rely on the systemic due process exception.⁹⁴

90. 2005 Act § 4(c)(7)-(8).

91. See the figures presented *supra* notes 43-44.

92. ALI Act § 5(a)(ii).

93. ALI Act § 5 cmt. d.

94. “[A] forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.” 2005 Act § 4 cmt. 13. This comment reinforces the sense that the case-specific exception is redundant—in situations where appeal would be inadequate, it would seem that the systemic due process exception would provide the grounds for non-enforcement.

Spring 2013]

“CHEVRONIZATION”

483

Any further shift away from the traditional systemic approach and toward case-specific approaches should be based on careful consideration of the relevant policies rather than driven by exceptional cases—particularly exceptional cases such as *Shell* and *Dole* that resulted in non-enforcement anyway, without resort to case-specific exceptions.

D. *Investor-State Arbitration Versus Conflict of Laws*

As noted above, in September 2009, Chevron initiated arbitration against the Republic of Ecuador pursuant to the Ecuador-United States BIT.⁹⁵ Among other things, Chevron is seeking an order and award requiring Ecuador to inform the court in the Ecuadorian proceedings that Chevron has been released from liability and that Ecuador or Petroecuador is “exclusively liable for any judgment that may be issued in the Lago Agrio Litigation.”⁹⁶ The arbitral tribunal has issued interim awards ordering Ecuador “to take all measures to suspend or cause to be suspended the enforcement and recognition within and without Ecuador” of the Lago Agrio judgment.⁹⁷ In February 2013, the tribunal found that Ecuador was in violation of those awards.⁹⁸

As one experienced practitioner puts it, “While we think of BIT claims as mechanisms whereby foreign investors can directly seek and recover damages from host states, the [Chevron-Ecuador] case is striking for its emphasis on non-monetary relief. Indeed, its principal goal appears to be to prevent recognition and enforcement of any award outside Ecuador . . . [and to obtain] declaratory relief that Chevron and Texaco have no liability.”⁹⁹ Given the stakes and the seriousness of Chevron’s allegations regarding the Ecuadorian proceedings, it is no surprise that the panel of arbitrators in the case has been inclined to provide this sort of relief—at least pending a final award on the merits.

But there is a bigger looming policy question: Is it a good thing to make the investor-state arbitration system available as a mechanism for enjoining the enforcement of domestic court judgments? Again, there is a risk that case-specific imperatives may cause careful policy deliberation to be short-circuited.

To be sure, a plausible argument might be made that, at least in some circumstances, investor-state arbitration should be available to block the enforcement of domestic court judgments. One argument is that the existing

95. Claimant’s Notice of Arbitration, *Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador*, PCA Case No. 2009-23 (Sept. 23, 2009), available at <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>.

96. *Id.* at 18.

97. Fourth Interim Award on Interim Measures, *Chevron Corp. and Texaco Petrol. Co. v. Republic of Ecuador*, PCA Case No. 2009-23, at 25-26 (Feb. 7, 2013), available at <http://www.asil.org/ilib130215.cfm#j2>.

98. *Id.* at 31.

99. Low, *supra* note 36, at 420.

system for judgment enforcement, which is based on a highly decentralized conflict-of-laws framework, can be very messy and uncertain. A judgment creditor identifies a jurisdiction where the judgment debtor has assets, and seeks enforcement there under the judgment enforcement law of that jurisdiction. In the Chevron-Ecuador case, this is already under way. The judgment creditors have filed enforcement actions in Argentina, Brazil, and Ontario, Canada.¹⁰⁰ What judgment debtor in Chevron's shoes wouldn't prefer a more centralized solution?

However, there are at least two concerns that should be fully addressed before rushing to investor-state arbitration as a solution. First, the arbitral tribunal's order that Ecuador "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio Case"¹⁰¹ obviously has an adverse impact on the judgment creditors—the Lago Agrio plaintiffs. Yet the Lago Agrio plaintiffs are not parties to the arbitral proceedings. In its Third Interim Award on Jurisdiction and Admissibility, the arbitral tribunal noted the *Monetary Gold* principle, according to which a tribunal should not exercise jurisdiction if the decision would determine the rights and obligations of a non-party, but held that it was not applicable.¹⁰² Thus, parties who will be directly and seriously affected by the arbitral tribunal's decision are not parties to the process that could determine the fate of the judgment under which they are beneficiaries. Second, as Ralph Steinhardt has argued, arbitral awards ordering a state to suspend enforcement of a judgment issued by one of its courts would seem to be in tension with principles of judicial independence.¹⁰³ As a matter of general policy, would the United States, for example, be comfortable with a system where, pursuant to an investor-state arbitral award, the United States may be required to nullify a decision of its independent judicial branch? As Steinhardt argues, this concern may be especially acute when a domestic court's judgment is implementing other obligations of states, such as international human rights obligations.¹⁰⁴ One might argue that this isn't what's happening in the Chevron-Ecuador case—but that itself would highlight the need to be cautious about proposals for legal change that are driven by alleged facts in a particular case but not necessarily sensible from a more general policy perspective.

My point is not that the existing conflict-of-laws system is ideal, and my point is not that there categorically should not be a role for the investor-state arbitration system in the realm of judgment enforcement. But there is reason

100. Webber, *supra* note 30.

101. Order for Interim Measures (Feb. 9, 2011) at 3; First Award on Interim Measures (Jan. 25, 2012) at 16.

102. Third Interim Award on Jurisdiction and Admissibility, ¶ 4.60 (Feb. 27, 2012).

103. Ralph G. Steinhardt, *Remarks*, 106 AM. SOC'Y INT'L L. 422, 422 (2013).

104. *Id.*

Spring 2013]

“CHEVRONIZATION”

485

for skepticism. The risk is that a movement in this direction in the Chevron-Ecuador case may be driven by case-specific imperatives rather than objective general policy analysis with widespread participation by different affected constituencies, and that this use of investor-state arbitration would nevertheless become a new model for avoiding judgments.

CONCLUSION

If Chevron’s factual allegations about the Ecuadorian proceedings are correct, it would not very easy to get comfortable with an outcome whereby the Ecuadorian judgment would be enforced. The facts alleged by Chevron push forcefully toward non-enforcement. This push toward a particular outcome based on the allegations in this particular case puts pressure on the law and on legal decision-makers on each of the four issues discussed in this Essay: the fraud exception, the relationship between forum non conveniens and judgment enforcement, the scope of the due process exception, and the relationship between investor-state arbitration and judgment enforcement.

Given the stakes and the allegations, combined with Chevron’s skilled, aggressive, and well-funded legal team, there is a significant chance that the Chevron-Ecuador case will produce, and may already have produced, significant change in the law of transnational litigation. But it is far from clear that this is a good thing for the law of transnational litigation in general. In any event, existing defenses against enforcement—including the systemic due process exception—may already provide a basis for the outcome Chevron is seeking, so legal change may be unnecessary even from its perspective. Indeed, this is surely one reason why the plaintiffs have not sought enforcement in the United States.

Thus, while the Chevron-Ecuador case usefully illustrates significant transnational litigation trends, its lessons for legal change are, and should be, limited. As Chief Justice Roberts has argued: “Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: ‘Hard cases make bad law.’”¹⁰⁵ Hard cases also risk making bad policy. This risk would seem to be especially great when the stakes are extremely high and the

105. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting). “Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.” *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Cf. BRYAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 403 (3d ed. 2011) (explaining that the phrase “hard cases make bad law” “refers to the danger that a decision operating harshly on the defendant may lead a court to make an unwarranted exception or otherwise alter the law”).

486 *STANFORD JOURNAL OF COMPLEX LITIGATION* [Vol. 1:199

alleged facts are as serious as they are in the Chevron-Ecuador case. Of course, the lawyers for the parties in this dispute need to represent their clients appropriately. But to avoid inappropriately “Chevronizing” the law of transnational litigation, judges, scholars and policymakers should be cautious about drawing lessons from the case about desirable directions for law reform.