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Howard M. Erichson

Fordham University, erichson@law.fordham.edu

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Recommended Citation

Howard M. Erichson, *The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy*, 1 Stan. J. Complex Litig. 417 (2013)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/553

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THE CHEVRON-ECUADOR DISPUTE, FORUM NON CONVENIENS, AND THE PROBLEM OF EX ANTE INADEQUACY

Howard M. Erichson*

The headline and story leave no doubt about Chevron’s preference for United States courts over Ecuador’s courts:

PLAINTIFFS’ LAWYERS FORUM SHOP FRAUDULENT JUDGMENT; AVOID UNITED STATES

The Ecuador judgment is a product of bribery, fraud, and it is illegitimate. Chevron does not believe that the Ecuador judgment is enforceable in any court that observes the rule of law.

If the plaintiffs’ lawyers believed in the integrity of their judgment, they would be seeking enforcement in the United States—where Chevron Corporation resides.¹

These opening lines from Chevron’s website of “facts about Chevron and Texaco in Ecuador” refer to the latest salvo in a long-running environmental dispute concerning a Texaco subsidiary’s Ecuadorian oil-drilling activities. Chevron resisted enforcement in the United States of an Ecuadorian court’s \$18 billion judgment, and the plaintiffs are seeking to enforce the judgment against Chevron in various courts around the world.² Chevron’s account suggests that the plaintiffs’ lawyers are engaged in improper forum-shopping. The plaintiffs’ lawyers, according to Chevron, ought to pursue enforcement of the judgment in

* Professor, Fordham University School of Law. The author thanks Marc Arkin and Benjamin Zipursky for their comments, the participants in the Stanford Journal of Complex Litigation Symposium for their questions and suggestions, and Alexander Wentworth-Ping for his research assistance.

1. CHEVRON, ECUADOR LAWSUIT: FACTS ABOUT CHEVRON AND TEXACO IN ECUADOR, <http://www.chevron.com/ecuador/> (last visited Apr. 4, 2013).

2. The plaintiffs have brought enforcement proceedings in at least Canada, Argentina, Colombia, and Brazil. See Jeff Gray, *Chevron Touts a Win in Ecuador Dispute*, TORONTO GLOBE & MAIL, Feb. 9, 2013, at B5; Jeff Gray, *Chevron, Ecuadorans to Clash in Toronto Court*, TORONTO GLOBE & MAIL, Nov. 26, 2012, at B2; Emily Schmall, *Argentina: Chevron’s Assets are Frozen*, N.Y. TIMES, Nov. 8, 2012, at A9.

the United States.³

The irony is almost too much to bear. At the outset of the litigation nearly twenty years ago, the plaintiffs' lawyers sued in the United States. They brought a class action in the Southern District of New York on behalf of 30,000 inhabitants of the Oriente region of Ecuador.⁴ The plaintiffs' lawyers elected to pursue litigation in the United States rather than in Ecuador apparently because they preferred the advantages of the United States judicial system and because they lacked confidence that they could get a fair hearing in Ecuador.⁵ The plaintiffs contended that the courts of Ecuador "are subject to corrupt influences and are incapable of acting impartially."⁶ Investigative journalist Patrick Radden Keefe, in a *New Yorker* story about attorney Steven Donziger's role in the Ecuador litigation (reprinted in this Issue), described the plaintiffs' lawyers' worries about corruption in the Ecuador courts: "For eight years, Texaco fought to have the lawsuit dismissed, on the ground that it should be tried not in the U.S. but in Ecuador. Donziger and his colleagues feared such a turn: Ecuador's judicial system was notoriously corrupt, and its government relied on oil revenues for a third of its annual budget."⁷

While the plaintiffs sought to litigate in the United States, Texaco insisted that the dispute ought to be litigated in Ecuador. Seeking dismissal on grounds of forum non conveniens and international comity, Texaco argued that "Ecuador's sovereign interests make Ecuador the most appropriate forum for plaintiffs to pursue their claims against all interested parties."⁸ In its brief supporting its motion to dismiss, Texaco emphasized Ecuador's sovereign interests in the dispute: "Those interests include the right to enact laws and establish policies relating to its oil fields, lands, economy, and environmental priorities. Like all nations, Ecuador sets the scope, pace, and standards of development within its borders, and it chooses its priorities in doing so."⁹ According to Texaco, "Ecuador's interests are obvious and substantial because

3. ECUADOR LAWSUIT, *supra* note 1.

4. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002) ("In November 1993, Ecuadorian plaintiffs filed the first of two class action lawsuits against Texaco in the Southern District of New York on behalf of some 30,000 inhabitants of the Oriente region.").

5. *Id.* at 477-78 (noting plaintiffs' arguments "that Ecuadorian courts are unreceptive to tort claims," "that Ecuadorian courts do not recognize class actions," and "that Ecuadorian courts are subject to corrupt influences and are incapable of acting impartially").

6. *Id.* at 478.

7. Patrick Radden Keefe, *Reversal of Fortune: The Lago Agrio Litigation*, 1 STAN. J. COMPLEX LITIG. 199 (2013) (reprinting Keefe's article, *Reversal of Fortune*, which appeared in the *New Yorker* on January 9, 2012).

8. Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 10, *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999).

9. *Id.*

plaintiffs' claims concern that nation's lands, people, environment, laws, national oil company, and its oil field practices today."¹⁰ Describing in detail Ecuador's court system and litigation procedures, Texaco argued that "Ecuador's judicial system provides a fair and adequate alternative forum."¹¹ In response to plaintiffs' questions about the fairness and impartiality of Ecuador's courts, Texaco argued on appeal that "Ecuador can and does dispense independent and impartial justice."¹²

There is nothing quite like a multi-billion dollar judgment to alter parties' views on the relative merits of judicial systems. On the plaintiffs' side, the lawyers' earlier effort to avoid Ecuador's courts gave way to efforts to enforce the Ecuador judgment. On the defense side, Texaco's effort to avoid United States courts, and its insistence that the dispute must be litigated in Ecuador, gave way to Chevron's¹³ efforts to use United States courts to declare the Ecuador judgment unenforceable. When the Ecuadorian court issued its judgment, Chevron swiftly condemned the ruling: "The Ecuadorian court's judgment is illegitimate and unenforceable. It is the product of fraud and is contrary to the legitimate scientific evidence. . . . Chevron does not believe that today's judgment is enforceable in any court that observes the rule of law."¹⁴

Flip-flopping is not necessarily hypocrisy, nor does it indicate bad lawyering. At the outset, it made strategic sense for the plaintiffs to initiate the litigation in the United States, just as it made sense for the defendants to argue that the litigation belonged in Ecuador. For the plaintiffs, United States courts beckoned for all the usual reasons why plaintiffs often favor the United States –

10. *Id.* at 43.

11. *Id.* at 18. *See also id.* at 18-21 (describing Ecuador's judicial system); 25-30 (arguing that Ecuador constitutes an "adequate alternative forum" for purposes of forum non conveniens).

12. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447 (2011) (quoting Appellee's Brief at 54-56, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)).

13. In 2001, Chevron and Texaco merged, becoming the ChevronTexaco Corporation, which several years later changed its name to Chevron Corporation. In the litigation between Chevron and plaintiffs' attorney Steven Donziger over the handling of the Ecuador lawsuit, the court noted that "[u]nder the terms of the Merger Agreement, Chevron became the owner of all of Texaco's common stock but did not acquire any of Texaco's assets or liabilities." *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 243 (S.D.N.Y. 2012) (citing Section 1.2 of the Merger Agreement). The original litigation was filed in United States courts against Texaco, but the lawsuit in Ecuador was filed against Chevron, and it is Chevron that was hit with the multi-billion dollar judgment. For purposes of understanding the challenges of the doctrine of forum non conveniens—challenges that can arise in other cases uncomplicated by mergers or other entity variations—it makes sense to think of the forum arguments in this litigation as an extended set of arguments by the defending parties.

14. Press Release, *Illegitimate Judgment Against Chevron in Ecuador Lawsuit* (Feb. 14, 2011), http://www.chevron.com/chevron/pressreleases/article/02142011_illegitimatejudgmentagainststchevroninecuadorlawsuit.news (visited Dec. 17, 2012).

jury trials, class actions, liberal discovery, contingent fees, and punitive damages. Despite recent decisions disfavoring plaintiffs on such topics as pleadings,¹⁵ summary judgment,¹⁶ class actions,¹⁷ personal jurisdiction,¹⁸ and punitive damages,¹⁹ United States courts remain quite attractive to plaintiffs in civil proceedings.²⁰ In addition, concerns about corruption in Ecuador weighed against suing in an Ecuadorian forum, given the country's oil-dependence and the defendants' superior resources.²¹ For many of the same reasons concerning the plaintiff advantages of United States litigation, the defendants understandably sought dismissal of the United States lawsuit and touted the logic of shifting the dispute to an Ecuadorian forum. For companies sued in the United States by foreigners for foreign injuries, the motion to dismiss on grounds of forum non conveniens is practically a knee-jerk reaction.²² There is

15. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

16. See *Scott v. Harris*, 550 U.S. 372 (2007).

17. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

18. See *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach. v. Nicastro*, 131 S. Ct. 2780 (2011).

19. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

20. See Lory Barsdate Easton, *Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Aviation Torts Litigation*, 20 *Air & Space L.* 3, 9 (2006) (describing advantages for foreign plaintiffs suing in the United States, relative to suing in other countries, including higher damages awards, jury trial, pretrial discovery, strict liability, contingent fees, and the American rule on legal fees); Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 *WASH. U. GLOBAL STUDIES L. REV.* 527, 529 (2012) ("For a number of reasons, foreign plaintiffs want their cases heard in U.S. courts and, perhaps counter-intuitively, U.S. defendants prefer to resolve matters elsewhere. In fact, the draw to litigate in the United States is so powerful, and the consequences so high, that the issue of location frequently overshadows the merits.").

21. See Keefe, *supra* note 7.

22. See Easton, *supra* note 20, at 9-10. Defendants move for dismissal under the doctrine of forum non conveniens not only because they prefer a foreign forum, but also because they often expect that the case will never be refiled and thus that the dismissal will prove outcome-determinative. Nicholas Fromherz makes the point that a forum non conveniens dismissal likely rings the death knell for a lawsuit. See Fromherz, *supra* note 20, at 543-46; see generally David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 *L.Q. REV.* 398 (1987). Thus, the doctrine may be seen not simply as a forum-selection doctrine, but as a tool for escaping liability. See Fromherz, *supra* note 20, at 541 ("Critics of the forum non conveniens doctrine charge that it is used by U.S. corporations as a tool to escape liability when they are sued in U.S. courts for injuries caused [abroad]. After looking past all of the legal jargon, it is hard to disagree.") (quoting RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 129 (2007)). In this regard, one of the unusual features of the Chevron-Ecuador story is that the plaintiffs successfully pursued their claims in the foreign tribunal after the United States dismissal on grounds of forum non conveniens.

no reason to think that either the plaintiffs or the defendants were misguided in their strategic assessment of the potential forums at the outset. But later, when the Ecuadorian courts had entered and affirmed a plaintiff judgment amid questions about the integrity of the process, the strategic circumstances obviously had changed.

The massive judgment turned this into a story of “Be careful what you wish for.” The defendants successfully demanded that the dispute be litigated in Ecuador rather than the United States, but they did not like the way it turned out. As Michael Goldhaber aptly put it, the defendants experienced “forum shopper’s remorse.”²³

The Chevron flip-flop on forum preference highlights the difficulty of the prediction at the core of forum non conveniens analysis. It is not only that the parties must predict where they would be better off. It is also that the judge must predict how the matter would be handled if it were refiled in the foreign jurisdiction. When a court grants a motion to dismiss on grounds of forum non conveniens, it must find that there is an adequate alternative forum. The Supreme Court laid out this principle in *Gulf Oil Corp. v. Gilbert*: “In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process.”²⁴ The Court spelled out the requirement more clearly in footnote 22 of *Piper Aircraft Co. v. Reyno*:

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.²⁵

In light of the Chevron litigation, it is interesting to note that in the *Piper Aircraft* footnote, the Supreme Court’s single example of an inadequate forum was Ecuador.²⁶

Indeed, by some indicia, Ecuador seems a prime candidate for a finding of inadequacy for purposes of forum non conveniens. In Michael Lii’s empirical

23. Michael D. Goldhaber, *Forum Shopper’s Remorse*, CORP. COUNSEL, Apr. 2010, at 63. See also Whytock & Robertson, *supra* note 12, at 1447.

24. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947).

25. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981) (citing *Gilbert*, 330 U.S. at 506-507).

26. The Court cited *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978), with the following parenthetical: “court refuses to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted.” *Piper Aircraft*, 454 U.S. at 255 n.22.

examination of the adequate alternative forum requirement, he found a statistically significant correlation between findings of inadequacy and low scores for rule of law and control of corruption.²⁷ Ecuador scores poorly in World Bank indicators for rule of law and control of corruption, the scores on which Lii's study relied.²⁸ For years, Ecuador's judicial system has been the subject of concerns about corruption.²⁹

In the Chevron litigation, although the U.S. district court granted dismissal on grounds of forum non conveniens and this ruling was ultimately upheld on appeal,³⁰ the courts took seriously the argument that Ecuadorian courts might lack the integrity to qualify as an adequate alternative forum. The Southern District of New York deferred ruling on the forum non conveniens motion to give the plaintiffs an opportunity to pursue their argument that the courts of Ecuador were insufficiently independent and impartial to provide due process.³¹ The district judge ordered supplemental briefing on this question and then made detailed findings, finding the Ecuadorian judicial system an adequate alternative forum, which the Second Circuit found was not an abuse of discretion.³²

After the litigation in Ecuador reached judgment, serious questions emerged about the integrity of the Ecuadorian judicial process in the case. An international arbitration panel ordered the Republic of Ecuador "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador" of the judgment against Chevron.³³ The Southern District of New York found significant evidence of problems,

27. Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 542 (2009).

28. *Worldwide Governance Indicators, Country Data Report for Ecuador 1996-2011*, WORLD BANK, <http://info.worldbank.org/governance/wgi/pdf/c66.pdf> (last visited Dec. 18, 2012).

29. *See, e.g., Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311-14 (11th Cir. 2001); UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, ECUADOR 1 (2011), available at <http://www.state.gov/documents/organization/186722.pdf> (reporting that "[c]orruption was endemic, especially in the judicial sector, and officials engaged in corrupt practices with impunity," and referring to "corruption and denial of due process within the judicial system" and "a dysfunctional judiciary"); Edgardo Buscaglia, *An Economic and Jurimetric Analysis of Official Corruption in the Courts: A Governance-Based Approach*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/pdf/crime/gpacpublications/cicp12.pdf> (2001) (measuring variables to explain corrupt judicial practices in Argentina, Ecuador, and Venezuela).

30. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002).

31. *Id.* at 475 ("The district court deferred ruling on Texaco's motion to dismiss 'in order to give plaintiffs the chance to reopen an issue they had previously abandoned, *i.e.*, whether the courts of Ecuador (and/or) Peru are sufficiently independent and impartial to provide' due process.").

32. *Id.* (citing *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544-46 (S.D.N.Y. 2001)).

33. *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 248 (2012).

finding among other things that “uncontradicted evidence demonstrates that the report and subsequent responses filed in [the independent expert’s] name were tainted by fraud.”³⁴ That court recently stated that “Chevron has established at least probable cause to believe there was fraud or other criminal activity in the procurement of the Judgment and in other respects relating to the Lago Agrio litigation in which that Judgment was rendered.”³⁵ Specifically, the court found at least probable cause to suspect that representatives of the plaintiffs “bribed the Ecuadorian judge to obtain the result they wanted and, as part of the deal, wrote the Judgment to which the judge put his name,” that they “coerced the then-presiding Ecuadorian judge to terminate judicial inspections” and to appoint their candidate as evaluator, and that the supposedly independent expert report “was planned and written, at least in major part and quite possibly entirely, by lawyers and consultants retained on behalf of the [plaintiffs] though it was signed by Cabrera and filed as if it were his independent work.”³⁶ These are serious charges, and if correct, constitute reasons not to enforce the judgment. But should they make us rethink the propriety of the *forum non conveniens* dismissal?

The concerns that emerged about the integrity of the Ecuadorian judicial process in the Chevron litigation naturally lead to second-guessing the *forum non conveniens* dismissal. If the U.S. court had found Ecuador an inadequate forum to begin with, then the subsequent problems could have been avoided. Years of bitterly fought enforcement proceedings and international discovery disputes, accompanied by massive legal expenses, might have been largely avoided had that early decision gone differently. One is tempted to say, in light of how things played out, that the federal court in New York ought not to have dismissed the case. But just because the litigation played out in a way that raises questions about the integrity of the foreign process, it does not mean that the *forum non conveniens* motion should have been denied in the first place.

The doctrine of *forum non conveniens* asks whether, notwithstanding that the plaintiffs’ chosen forum possesses the power to adjudicate, a particular

34. *Id.* at 289; *see also id.* at 290 (“Certainly the uncontradicted evidence relating to the Cabrera report and its relationship to the Judgment is disturbing.”); *id.* at 292 (“As the foregoing demonstrates, the LAPs’ procurement of the termination of judicial inspections, the adoption of the global assessment, and the appointment of Cabrera all unquestionably were tainted. The secret participation of the LAP team in Cabrera’s activities and its secret drafting of the bulk of Cabrera’s report were tainted as well. Moreover, there are serious questions concerning the preparation of the Judgment itself in view of the identity between some portions of the Judgment and the Unfiled Fusion Memo, especially in light of the undisputed pattern of *ex parte* advocacy in the Lago Agrio litigation and the undisputed instance of the LAP team’s coercion of and duress on one of the judges to obtain a desired result.”).

35. *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 WL 1087236, at *2 (S.D.N.Y. Mar. 15, 2013).

36. *Id.*

dispute more appropriately belongs in another country's legal system. Despite the sound of its name,³⁷ the doctrine of *forum non conveniens* is best understood not primarily as a doctrine of *convenience* but rather as a doctrine of *allocation of adjudicatory authority*.³⁸ Early descriptions of the doctrine focused on whether the plaintiff's chosen forum was deliberately inconvenient for the defendant,³⁹ but the developed doctrine has more to do with allocation of power.⁴⁰ The question is whether the chosen forum is inappropriate; inconvenience is one aspect of inappropriateness. Any notion that the doctrine is primarily about convenience is belied by the fact that its users frequently argue in favor of the forum that is *less* convenient for themselves.⁴¹ In *Piper Aircraft*, the families of the Scottish air crash victims sued in the United States, and the United States manufacturers sought dismissal in favor of a Scottish forum.⁴² In the Chevron-Ecuador dispute, Ecuadorian plaintiffs sued in the United States, and the United States oil company sought dismissal in favor of an Ecuadorian forum.⁴³ In these cases and many others, no party used the doctrine of *forum non conveniens* to advance its own convenience. Rather,

37. *Forum non conveniens* sounds as if it should translate from Latin to English as "inconvenient forum," and indeed this is how some translate it. See, e.g., ALM LEGAL DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=779> (last accessed May 28, 2013) (defining *forum non conveniens* as "Latin for a forum which is not convenient"). But the Latin *conveniens*, a participle of *convenire*, denotes coming together, suitability, or agreement. See NOTRE DAME LATIN DICTIONARY, <http://www.archives.nd.edu/cgi-bin/lookup.pl?stem=conven&ending=iens> (last accessed May 28, 2013). Even as a matter of translation, the phrase *forum non conveniens* should invoke notions of suitability broader than mere inconvenience.

38. See Whytock & Robertson, *supra* note 12, at 1453 ("The *forum non conveniens* doctrine provides guidelines for allocating adjudicative authority between countries [in cases where more than one country's courts are available]."); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981) (describing Scotland's "very strong interest in this litigation" and concluding that "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (noting the "local interest in having localized controversies decided at home"); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 786 (1985) (recommending "decreased reliance on *forum non conveniens* as a means of allocating political authority").

39. See *Gulf Oil Corp.*, 330 U.S. at 507-08; see also Whytock & Robertson, *supra* note 12, at 1454 (citing early statements of the doctrine that emphasized inconvenience and vexatiousness).

40. See Whytock & Robertson, *supra* note 12, at 1454.

41. See Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 525 (1993) ("I dismiss objections grounded in general 'convenience' claims that all parties raise in these cases. Ironically, the foreign plaintiff claims that the United States is the more 'convenient' place to litigate, while the United States defendant argues for the foreign forum.")

42. *Piper Aircraft*, 454 U.S. 235.

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

each sought a strategic advantage through forum selection.⁴⁴ The job for the court, in deciding the forum non conveniens motion, is to decide whether the plaintiff's chosen forum is inappropriate as a matter of allocating adjudicatory responsibility.

If a dispute, in this sense, *belongs* in a foreign judicial system, but there are questions about the integrity of that foreign judicial system, is it better to protect against the risk of corrupt adjudication by denying forum non conveniens dismissal on the grounds that the foreign system is not an adequate alternative forum? Or is it better to dismiss the action, provide the foreign judicial system the opportunity to proceed with adjudicating the dispute if the plaintiffs refile there, and reserve for later the question of whether enforcement of a resulting judgment may be resisted on account of corruption?

Putting the question in terms of the Chevron-Ecuador litigation, did the United States court act properly by dismissing the case notwithstanding concerns about the Ecuadorian court system? There were sound reasons for the court to conclude that a dispute over environmental harms in the Oriente region, as a matter of allocation of adjudicatory responsibility, belonged in Ecuador. The dispute centered on allegations of harm to Ecuador's environment and resulting harms to Ecuadorian citizens. It implicated questions not only of protection of the Ecuadorian environment but also of the Republic of Ecuador's control over its natural resources. The Southern District of New York's determination that the forum non conveniens factors pointed to Ecuador seems eminently reasonable.⁴⁵ But questions were raised about the integrity of the Ecuadorian judicial system at the time of the forum non conveniens motion. After a court grants a forum non conveniens dismissal, is there something incongruous about later refusing to enforce an Ecuadorian judgment if evidence emerges concerning fraud or corruption?

I suggest that the best course, *ex ante*, is for the United States court to dismiss the case on grounds of forum non conveniens, notwithstanding questions about the foreign court system. If it turns out that the subsequent litigation in the foreign country is tainted by fraud or corruption, then the judgment may be challenged, *ex post*, in enforcement proceedings. In other words, it makes sense to maintain a low threshold for the adequacy of the alternative forum for purposes of forum non conveniens,⁴⁶ even as we permit challenges to the recognition of judgments on grounds of fraud and

44. See Silberman, *supra* note 41, at 525 ("In reality, plaintiffs engage in forum shopping and defendants engage in reverse forum shopping, each seeking to turn to their own advantage the laws and procedures in the respective forums.").

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

46. A low threshold is consistent with the Supreme Court's statement of the requirement, see *Piper Aircraft*, 454 U.S. at 255 n.22, as well as with the general treatment by United States courts. See Fromherz, *supra* note 20, at 532 ("[U]nless the alternative forum is truly horrendous, it will clear this hurdle.").

corruption.⁴⁷

Christopher Whytock and Cassandra Robertson, in their article *Forum Non Conveniens and the Enforcement of Foreign Judgments*,⁴⁸ offer a potential solution to the incongruity of refusals to enforce corrupt judgments after the foreign jurisdiction was declared an adequate alternative forum. Focusing on systemic as opposed to case-specific challenges, they point out the inconsistency between the adequacy standard for forum non conveniens and the adequacy standard for enforcement of a judgment. Whytock and Robertson propose that the forum non conveniens adequacy standard should be raised to match the standard for enforcement. If this were achieved, they argue, then defendants who seek dismissal under forum non conveniens could be estopped from arguing systemic inadequacy when a plaintiff later attempts to enforce a judgment.

I view the problem differently, at least insofar as the forum non conveniens standard is concerned. There is an important distinction between the ex ante perspective of forum non conveniens and the ex post perspective of judgment enforcement. As Ronald Brand puts it, “What is appropriate in determining the most appropriate forum for the initial trial in the case is one matter. What is appropriate in determining whether, in light of all relevant circumstances, that forum’s decision should be given full faith and credit is something very different.”⁴⁹ Although challenges to the recognition of judgments may relate to either systemic inadequacy or case-specific problems of fraud or corruption, they entail a backwards look that differs from the determination of facial adequacy on a forum non conveniens inquiry.

Ex ante determinations of inadequacy are not only difficult as a practical matter, but also problematic as a matter of deference to the varied legal systems of the world. If private and public interest factors favor the foreign forum – that is, if the evidence is in the foreign country and if the foreign country and its citizens have the greatest interest in the dispute – then the dispute is sensibly allocated to that country’s courts as a matter of adjudicatory responsibility. When a dispute belongs to another country in this sense, it is troubling for a United States judge to say that the foreign country’s dispute resolution system,

47. The Uniform Foreign-Country Money Judgments Recognition Act, as revised in 2005, permits discretionary non-recognition of a foreign judgment if “the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.” UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(2) (2005). The original 1962 Recognition Act also permitted discretionary denial of recognition for judgments “obtained by fraud.” UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(2). See RONALD A. BRAND, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 20-21 (2012); see also *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (naming “fraud in procuring the judgment” as a possible basis for nonrecognition).

48. 111 COLUM. L. REV. 1444 (2011).

49. Ronald A. Brand, *Access-to-Justice Analysis on a Due Process Platform*, 112 COLUM. L. REV. SIDEBAR 76, 81 (2012).

which resolves the disputes that arise in that country week after week, is not good enough.

To avoid this sort of paternalism, the standard of adequacy for forum non conveniens ought to be low. If the country has a functioning court system that is empowered to hear the dispute, and if the defendants can be sued there,⁵⁰ then it should be rare for a court to find the forum inadequate. Not every legal system looks like that of the United States – indeed, for better or for worse, the U.S. legal system is exceptional in more ways than one can count – but difference and even flat-out inferiority should not be a basis for denying foreign legal systems the opportunity to adjudicate disputes of primary interest to their own citizens. The test is not whether we feel comfortable with the forum, or whether its courts resemble our own.⁵¹

In the context of an Alien Tort Statute⁵² (“ATS”) lawsuit arising out of conduct in Nigeria, the Supreme Court recently emphasized that United States courts are not the world’s moral guardians.⁵³ Chief Justice Roberts, treating the case as an application of the presumption against extraterritoriality, drove home this point: “[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”⁵⁴ As Justice Story put it, “No nation has ever yet pretended to be the *custos morum* of the whole world”⁵⁵ Justice Breyer, concurring, would leave more room for ATS jurisdiction in cases implicating United States parties or interests, even if the conduct occurred abroad.⁵⁶ Interestingly, however, he

50. If there is any question about the timeliness of the suit or about a defendant’s amenability to personal jurisdiction, the defendant should be expected to waive these defenses as a condition for a forum non conveniens dismissal. In the Ecuador litigation, the Second Circuit initially vacated the forum non conveniens dismissal and remanded to the Southern District of New York because dismissal was improper “absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts.” *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998). After Texaco consented to personal jurisdiction and waived statute of limitations defenses, the district court granted the renewed motion to dismiss, and the Second Circuit affirmed. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 475 (2d Cir. 2002).

51. For an example of a finding of adequacy despite significant deviations from procedural fairness standards that would prevail in the United States, see *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 220 (5th Cir. 2009) (“Experts from both parties agreed that the [Saudi Arabian Board of Grievances] does not give full weight to testimony given by women and non-Muslims, and considers testimony of Saudi nationals to be more credible than non-nationals. Despite these concerns, the district court did not find that the Board was an inadequate forum, and proceeded to the next step of the forum non conveniens analysis.”).

52. 28 U.S.C. § 1350.

53. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013).

54. *Id.*, at 1668 (quoting *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C. Mass. 1822) (No. 15,551)).

55. *Id.*

56. *Id.* at 1671 (Breyer, J., concurring) (declining to invoke the presumption against extraterritoriality).

defends his position by quoting the very same passage from Justice Story: “I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that Congress adopted the present statute at a time when, as Justice Story put it, ‘No nation ha[d] ever yet pretended to be the *custos morum* of the whole world.’”⁵⁷ The majority and concurrence take different views on the relevance of a defendant’s United States citizenship for purposes of ATS jurisdiction, but they share the view that it is not the role of the courts of the United States to be the justice-dispensers of the world. Moreover, even for cases in which he would find that United States courts have jurisdiction under the ATS, Justice Breyer points out the importance of *forum non conveniens* as a back-up doctrine to minimize international friction.⁵⁸

In our increasingly interdependent world, to what extent should the courts of the United States rule the globe? The doctrine of *forum non conveniens* provides a means for courts to exercise a modicum of humility, to defer to other legal systems in appropriate cases. On this issue, we must be careful not to take the wrong lesson from the Chevron-Ecuador dispute. From the outset, there were fears that Ecuador’s courts were vulnerable to corruption, and it seems that those fears may have been well-founded even if they played out differently than the parties expected. This may well provide a sound basis on which to resist enforcement of the resulting judgment. But at its core, this was an Ecuadorian dispute. The courts of Ecuador were entitled to a shot at resolving it, and United States courts should be loath to label a foreign legal system facially inadequate to handle disputes that most appropriately belong in that country’s courts.

57. *Id.* at 1673

58. *Id.* at 1674, 1677.