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## The Recognition Act, Anti-Suit Injunctions, The DJA, and Much More Fun: The Story of the Chevron-Ecuador Litigation and the Resulting Problems of Aggressive Multinational Enforcement Proceedings

Emily Seiderman

*Fordham University School of Law*

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**THE RECOGNITION ACT, ANTI-SUIT  
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FUN: THE STORY OF THE CHEVRON-  
ECUADOR LITIGATION AND THE  
RESULTING PROBLEMS OF AGGRESSIVE  
MULTINATIONAL ENFORCEMENT  
PROCEEDINGS**

*Emily Seiderman\**

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\* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2011, State University of New York at Stony Brook. I would like to thank Professor Marc Arkin for guiding me through the process of writing this Note, and for introducing me to the exciting and complicated world of international litigation. I would also like to thank the editors and staff of the *Fordham Urban Law Journal*, particularly Frank Restagno and Alexander Kahn, for their editorial assistance.

*Oh, the places you'll go! There is fun to be done!  
 There are points to be scored. There are games to be won.  
 And the magical things you can do with that ball  
 will make you the winning-est winner of all.  
 Fame! You'll be famous as famous can be,  
 with the whole wide world watching you win on TV.  
 . . .  
 You'll get mixed up, of course,  
 as you already know.  
 You'll get mixed up  
 with many strange birds as you go.  
 So be sure when you step.  
 Step with care and great tact  
 and remember that Life's  
 a Great Balancing Act.  
 Just never forget to be dexterous and deft.  
 And never mix up your right foot with your left.<sup>1</sup>*

#### INTRODUCTION

International litigation is fraught with procedural issues, from choice of forum and choice of law to *forum non conveniens*, the Foreign Sovereign Immunities Act, anti-suit injunctions, and of course, recognition of foreign judgments. To further complicate things, as the Chevron-Ecuador story will demonstrate, as soon as one of those procedural issues crops up, the rest will inevitably follow.

Indeed, international litigation can become incredibly complicated and drawn out, at great cost to all parties—particularly when there are parallel proceedings.<sup>2</sup> The variety and utility of procedural devices available when a dispute spans multiple countries creates greater opportunity for abuse. If, for example, one forum will not enforce a judgment that a litigant has obtained in a different jurisdiction, that litigant (the judgment-creditor) could try to enforce that judgment in a different forum where the defendant (the judgment-debtor) may have assets. This practice forces the judgment-debtor to defend in multiple places. Likewise, defendants can use tools like *forum non conveniens* or parallel proceedings to drag out the litigation or force the plaintiff into a quick settlement.<sup>3</sup>

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1. DR. SEUSS, OH, THE PLACES YOU'LL GO! (1990).

2. Indeed, parallel proceedings are not uncommon in international litigation. See Walter W. Heiser, *Using Anti-Suit Injunctions to Prevent Interdictory Actions and to Enforce Choice of Court Agreements*, 2011 UTAH L. REV. 855, 855.

3. See *id.* at 859.

The presence of multiple potential fora and complicated questions of choice of law or recognition of foreign judgments create great potential for litigants to be procedurally abusive—particularly when a potentially unfair judgment is involved and the plaintiff attempts to enforce it by any means possible.

The infamous Chevron-Ecuador litigation presents many of the procedural issues that arise in international disputes. During that litigation, a class of plaintiffs from the Lago Agrio region (the judgment-creditors) obtained a multi-billion dollar money judgment in the Republic of Ecuador (ROE) against Chevron (the judgment-debtor), and eventually attempted to enforce that judgment in fora around the world.<sup>4</sup> Chevron brought an action in the Southern District of New York against the judgment-creditor seeking, among other things, a preliminary injunction principally to bar enforcement of the judgment outside of the ROE.<sup>5</sup> Various common law tort and RICO claims created the gravamen of the lawsuit, providing the basis for jurisdiction over all the parties and, hence, the injunction. Judge Kaplan granted Chevron's request for a worldwide injunction against the judgment-creditors pursuant to the anti-suit injunction analysis articulated in *China Trade & Development Corp. v. Choong Yong*.<sup>6</sup> The Second Circuit reversed that judgment in *Chevron Corp. v. Naranjo*, concluding that *China Trade's* anti-suit injunction standard should not apply.<sup>7</sup> The Second Circuit instead asserted that the requested relief was an anti-*enforcement* injunction, and invoked New York's version of the 1962 Uniform Foreign Country Judgments Recognition Act (the Recognition Act).<sup>8</sup> The Second Circuit concluded that a judgment-debtor could not affirmatively bring an anti-enforcement action against a judgment-creditor when the judgment-creditor has not yet tried to collect on that judgment in the United States, despite declaring its intentions to do so in fora outside the United States<sup>9</sup>

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4. See *infra* note 79.

5. See *Donziger*, 768 F. Supp. 2d at 594, 625–26.

6. *Id.* at 648 (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987)).

7. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 243 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

8. *Id.*; see also UNIF. FOREIGN-MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962 & Supp. 2006) [hereinafter RECOGNITION ACT], available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>.

9. See generally *Naranjo*, 667 F.3d at 232.

In reaching its conclusion, the Second Circuit distinguished the facts in *Naranjo* from those in a similar case, *Shell Oil Co. v. Franco*.<sup>10</sup> In *Shell Oil*, the Central District of California issued a declaration of non-enforceability under the DJA and California's codification of the Recognition Act before the judgment-creditor had technically sought enforcement in California,<sup>11</sup> albeit because the judgment-creditor had named the wrong defendant in its prior enforcement action in California.<sup>12</sup> The judgment-debtors claimed that the relevant Nicaraguan judgment would be unenforceable under U.S. law because the Nicaraguan judicial system lacks impartial tribunals<sup>13</sup> and sufficient due process procedures, and the forum lacked personal jurisdiction—each of which is mandatory grounds for non-recognition under California's version of the Recognition Act.<sup>14</sup>

Although the court in *Shell Oil* only granted declaratory relief against enforcement within the United States, and did not attempt to prevent the judgment-creditors from enforcing the judgment in other countries, the decision is still informative; *Shell Oil* suggests that the Second Circuit may have understated its ability to issue declaratory relief against enforcement of the Ecuadorian judgment—at least within the United States.

This problem, particularly as posited by the court in *Chevron Corp. v. Donziger*, raises a number of preliminary questions. What kind of injunction was Chevron seeking, exactly? Was it an anti-enforcement injunction (as the Second Circuit calls it) that should be evaluated in light of the Uniform Foreign-Country Money Judgments Recognition Act? Was it an anti-suit injunction that should be addressed in relation to the existing circuit split on anti-suit injunctions? Preemptive declaratory non-enforcement suits have also been addressed in terms of ripeness, at least in the libel tourism context,<sup>15</sup> adding to the complexity of U.S. judgment recognition law. Hence, is a preemptive action like the preliminary injunction in *Donziger* simply unripe, and therefore inadmissible in federal court? Cases like

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10. *See id.* at 240–41; *see also* *Shell Oil Co. v. Franco (Shell Oil II)*, No. CV 03-8846 NM (PJWx), 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005).

11. *Shell Oil II*, 2005 WL 6184247, at \*3.

12. *Id.*

13. *Id.* at \*1.

14. *Id.* at \*6. *Shell Oil* made other claims in its defense, which included lack of subject matter jurisdiction (dismissed), and that enforcement of the judgment would be repugnant to public policy. *See Shell Oil Co. v. Franco (Shell Oil I)*, No. CV 03-8846 NM (PJWx), 2004 WL 5615656, at \*11–13 (C.D. Cal. May 18, 2004).

15. *See Yahoo! Inc. v. La Lingue Contre le Racisme et l'Antisemitisme (Yahoo! III)*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

*Yahoo! Inc. v. La Lingue Contre le Racisme et l'Antisemitisme*, for example, have looked at actions for a declaratory judgment of non-enforcement occurring before a judgment-creditor tries to enforce a foreign judgment in the United States in terms of ripeness.<sup>16</sup> Although dismissing the action for lack of ripeness does nothing to solve the underlying problem, perhaps it is a threshold inquiry that courts should adopt before proceeding to the merits of the case.

This Note addresses whether a U.S. court can provide a remedy to preclude aggressive, multi-national enforcement of foreign money judgments against a U.S. party. Assuming the foreign money judgment in question is unenforceable under U.S. judgment recognition law, if a judgment-creditor tries to enforce the judgment in the United States, the U.S. judgment-debtor can assert one of many defenses, depending on whether the relevant jurisdiction has codified the Recognition Act or the updated 2005 version (the 2005 Recognition Act).<sup>17</sup> The bigger problem, however, concerns whether U.S. courts can prevent a judgment-creditor from initiating enforcement actions all over the globe, forcing the judgment-debtor to defend in multiple jurisdictions—and possibly forcing the judgment-debtor to settle, if only to put an end to the aggressive enforcement tactics. This problem will be addressed in the context of the Chevron-Ecuador dispute.

Generally speaking, this Note's discussion has four layers of legal analysis: the Recognition Act—specifically, whether defenses to recognition may be used affirmatively to support injunctions; the relevance of the long-existent circuit split over how a court should decide whether to issue an anti-suit injunction; the reach of the DJA; and ripeness. This Note also focuses on each option's policy implications and impact on practitioners. It then discusses whether such an injunction is really the remedy that a judgment-debtor like Chevron seeks, or if there is another way a U.S. court can prevent abusive multi-fora litigation—either in the context of the Chevron-Ecuador litigation specifically, or international litigation in general. Indeed, aside from the lack of clarity regarding how a court should rule in an action like *Donziger*, if none of the arguments that Chevron made are viable, then the question becomes whether there is *any* remedy courts can provide to litigants in their circumstances. If so,

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16. *See id.* at 1211–23.

17. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. II 2007 Supp. pt. 5 (2005 & Supp. 2007) [hereinafter 2005 RECOGNITION ACT], available at [http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra\\_final\\_05.pdf](http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf).

then one might also ask exactly how, or if, they should provide that remedy at all. This Note therefore examines the procedural routes that Chevron attempted to take, whether any of them are viable, and if not, propose an alternative remedy.

Part I discusses the origins of the Chevron-Ecuador litigation, starting with the activity in Ecuador that led to Ecuadorian plaintiffs' initial class action lawsuit. Part I also briefly outlines the relevant Southern District of New York and Second Circuit holdings in this litigation.

Part II summarizes the relevant law in this area, including (1) the recognition of foreign-country judgments in the United States, particularly the Recognition Act; (2) the standards for granting anti-suit injunctions; (3) the factors courts balance in deciding whether to grant a declaratory judgment under the DJA; and (4) ripeness requirements in federal courts.

Part III outlines the decisions of the courts in *Donziger* and *Naranjo* in more detail, and summarizes the conflict between the district court and the Court of Appeals in the Chevron-Ecuador cases. Part III evaluates the relevance of the Ninth Circuit's holdings in *Shell Oil* and *Yahoo!* Part III also outlines the problems created by the Second Circuit's holding in *Naranjo*, and considers whether another standard should have been applied.

Finally, Part IV discusses the problems the *Naranjo* decision creates and evaluates the implications of each possible approach courts could take when facing these circumstances. Part IV agrees that the Recognition Act by itself does not create an affirmative cause of action, but concludes that a federal district court can still enjoin parties from enforcing a judgment if they can prove that the original proceedings were fraudulent and the judgment *would* be unenforceable under the Recognition Act—at least within the United States. Part IV additionally suggests that the Second Circuit should adopt a new test, loosely based on the *China Trade* factors, to determine whether a court may issue an anti-enforcement injunction enjoining a party from enforcing an unfair judgment *outside* the United States—provided that the court has personal jurisdiction over all the parties in question.

## I. ORIGINS OF THE CHEVRON-ECUADOR LITIGATION

The ongoing Chevron-Ecuadorian litigation vividly illustrates the problems courts face when deciding whether to recognize and enforce substantial (and possibly unfair) foreign judgments, dismiss the action

altogether, or issue an injunction of some kind. The history of this litigation is both long and notorious.

Texaco, Inc. and its subsidiary, Texaco Petroleum (TexPet), first engaged in oil exploration and drilling in the Ecuadorian Amazon's Oriente region from 1964 to 1992.<sup>18</sup> The ROE, through a state-owned oil agency known as Petroecuador, also participated in the venture, obtaining a twenty-five percent share in a Consortium with TexPet and Gulf Oil that was originally formed in 1965.<sup>19</sup> Petroecuador bought Gulf Oil's share and became a majority stakeholder in the Consortium in 1974.<sup>20</sup> Petroecuador eventually took over TexPet's interests in the Consortium as well, acquiring complete control over the Consortium in 1992.<sup>21</sup> The oil companies allegedly polluted the area, naturally angering the indigenous population, and dooming both parties to a long, tiresome, and inevitably costly road through a labyrinth of various court systems—both foreign and American.

In 1994, after the ROE bought TexPet out of the Consortium, a group of Ecuadorian plaintiffs (the Aguinda plaintiffs) brought a putative class action against Texaco in the Southern District of New York, alleging that TexPet had committed several environmental abuses, including improper disposal of hazardous waste and destruction of tropical rainforests.<sup>22</sup> A collection of Peruvian plaintiffs, living downstream from the Aguinda plaintiffs, also brought a similar putative class action against Texaco.<sup>23</sup> Both complaints alleged that TexPet's operations in Ecuador between 1964 and 1992 severely polluted the rain forests and rivers in Ecuador and Peru, and that the subsidiary's actions in Ecuador were controlled by Texaco's operations in the United States.<sup>24</sup>

While the litigation in New York was pending, TexPet signed a settlement agreement with the ROE, in which TexPet agreed to “perform specified remedial environmental work in exchange for a

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

19. *Id.*

20. *Id.*

21. *Id.*

22. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 WL 142006, at \*1 (S.D.N.Y. Apr. 11, 1994).

23. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

24. *Aguinda II*, 303 F.3d at 473. A separate class action was also brought in Texas, and was quickly dismissed by the Texas federal court on the grounds of *forum non conveniens* and international comity. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).



release of claims by [the Republic of Ecuador].”<sup>25</sup> The settlement covered any and all claims the ROE or Petroecuador would have against Texaco, TexPet, and related companies in connection with the Consortium.<sup>26</sup> The Ecuadorian government also stated that all the Aguinda plaintiffs’ claims belonged to the ROE, presumably with the intention of putting an end to the Aguinda litigation.<sup>27</sup> Three years later, the ROE entered into an agreement stating that Texaco had complied with the original settlement’s terms, and released TexPet and related companies from liability “for items related to the obligations assumed by TexPet in the Settlement.”<sup>28</sup>

Concerned that the ROE was an indispensable party under Federal Rule of Civil Procedure 19, which could have led to the dismissal of the entire action due to sovereign immunity, the Aguinda plaintiffs also entered into negotiations with the Ecuadorian government.<sup>29</sup> Texaco had sought dismissal on the grounds that “Ecuadorian governmental activity is inextricably intertwined in the events at issue, thus making [the government of Ecuador and its agencies] indispensable parties under [Rule] 19 which have not been joined, and cannot be joined because of sovereign immunity.”<sup>30</sup> At the conclusion of these negotiations, the Aguinda plaintiffs agreed to refrain from making claims against the Ecuadorian government and its affiliates (including Petroecuador), and to refrain from collecting any amount the court might award to Texaco against the Ecuadorian government and its affiliates.<sup>31</sup>

Meanwhile, back in the Southern District of New York, Judge Rakoff granted Texaco’s motion to dismiss on grounds of *forum non conveniens* and international comity.<sup>32</sup> The Court also found the existence of an independently sufficient ground for dismissal—namely, failure to join an indispensable party under Rule 19.<sup>33</sup> Judge Rakoff relied on an earlier decision in the Southern District of Texas,

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25. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev’d and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

26. *Id.*

27. *Id.*

28. *Id.* (internal quotation marks omitted).

29. *Id.* at 598–99.

30. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 WL 142006, at \*9 (S.D.N.Y. Apr. 11, 1994).

31. *Donziger*, 768 F. Supp. 2d at 599.

32. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996), *vacated sub nom.*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

33. *Id.*

which had dismissed an action brought by a group of Ecuadorian plaintiffs against Texaco for *forum non conveniens* and international comity.<sup>34</sup> In the Texas decision, the court applied the traditional *forum non conveniens* analysis articulated in *Piper Aircraft Co. v. Reyno*<sup>35</sup>: first finding an available forum, and then weighing private and public factors. The Texas court found that the majority of the factors—that the witnesses were in Ecuador, the alleged tort took place in Ecuador, the plaintiffs are Ecuadorian, and an Ecuadorian court was unlikely to enforce a judgment from a U.S. court—weighed in favor of finding Ecuador as the proper forum.<sup>36</sup>

Regarding the independent grounds for dismissing the action for failure to join an indispensable party under Rule 19, the Southern District of New York noted that the “extensive equitable relief sought by the plaintiffs—ranging from total environmental ‘clean-up’ of the affected lands in Ecuador to a major alteration of the consortium’s Trans–Ecuador pipeline to the direct monitoring of the affected lands for years to come—cannot possibly be undertaken in the absence of Petroecuador . . . .”<sup>37</sup> Nonetheless, although Petroecuador and the ROE were subject to service of process, neither *could* be joined, because neither could be sued in the United States under the Foreign Sovereign Immunities Act.<sup>38</sup> When a necessary party is immune to suit in the United States, that alone is usually enough to warrant dismissal.<sup>39</sup> Thus, Texaco’s motion was granted.<sup>40</sup>

The plaintiffs appealed Judge Rakoff’s decision to the Second Circuit.<sup>41</sup> The Second Circuit remanded the case for reconsideration, primarily because it wanted Texaco to agree to submit to the jurisdiction of the Ecuadorian court system.<sup>42</sup> Texaco eventually consented to submit to the jurisdiction of Ecuador,<sup>43</sup> and the Second Circuit affirmed the district court’s second dismissal for *forum non conveniens* in 2002.<sup>44</sup>

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34. *Id.* (citing *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994)).

35. *Sequihua*, 847 F. Supp. at 64 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

36. *Id.*

37. *Aguinda*, 945 F. Supp. at 627.

38. *Id.* (citing 28 U.S.C. §§ 1603(b), 1604 (2012)).

39. *Id.* (citing *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547–48 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991)).

40. *Id.*

41. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

42. *Id.* at 159.

43. *See Chevron Corp. v. Salazar*, 807 F. Supp. 2d 189, 193 (S.D.N.Y. 2011).

44. *Aguinda v. Texaco*, 303 F.3d 470, 480 (2d Cir. 2002).

Chevron Corp. (Chevron) appeared on the scene in 2001 when it acquired Texaco—after Texaco left the consortium and settled environmental claims with the ROE.<sup>45</sup> Soon after the dismissal for *forum non conveniens*, the same American lawyers who brought the first two putative class action suits brought another action in Ecuador against Chevron for Texaco’s actions in Ecuador before 1992.<sup>46</sup> The plaintiffs in the litigation—the Lagro Agrio Plaintiffs (LAPs)—included many of the Aguinda plaintiffs.<sup>47</sup> The Ecuadorian provincial court eventually entered a judgment against Chevron in the amount of \$8.646 billion.<sup>48</sup>

The Ecuadorian court’s judgment stated that it would double that amount in punitive damages unless Chevron issued a “public apology” to the LAPs within fifteen days.<sup>49</sup> Chevron did not apologize, and the judgment is now valued at over \$18 billion.<sup>50</sup>

Unfortunately for the LAPs, Chevron had no assets in Ecuador.<sup>51</sup> This hiccup, however, did not discourage them in the least. After the judgment was issued in Ecuador, the LAPs’ attorneys stated that they intended to collect on the judgment as soon as possible in multiple jurisdictions around the world, even before the appeal was heard in the Ecuadorian court system, as was their “right.”<sup>52</sup> Soon afterwards (and here lies the heart of our story), Chevron filed an action in the Southern District of New York seeking a preliminary injunction to halt enforcement of the Ecuadorian judgment until a trial on the merits of the case could be held.<sup>53</sup> Substantively, Chevron’s complaint asserted nine claims seeking damages and an injunction against enforcement of the Lago Agrio judgment.<sup>54</sup> The claims were asserted against fifty-six defendants falling into four groups: Stephen Donziger (the lead attorney for the LAPs) and his firm; Stratus Consulting, Inc. (Stratus) (the company the LAPs hired to comment on the expert report) and two of its employees; four Ecuadorian individuals and

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45. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 600 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011) *rev’d and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 423, 184 (2012).

46. *Id.* at 594.

47. *Id.* at 600.

48. *Id.* at 621.

49. *Id.*

50. *Id.*

51. *Id.* at 660.

52. *Id.* at 594 n.4.

53. *Id.*

54. *Id.* at 625.

entities that have participated in the Lago Agrian litigation in various overlapping ways; and the LAPs themselves.<sup>55</sup>

The first two claims asserted substantive and conspiracy claims under RICO against all defendants except the LAPs.<sup>56</sup> In the third to seventh counts, Chevron asserted against all defendants state tort claims, including fraud, tortious interference with contract, trespass to chattels, unjust enrichment on the ground that any recovery on the Lago Agrio judgment would be inequitable, and a state claim for civil conspiracy alleging that the defendants conspired to commit the substantive violations described above.<sup>57</sup> Against Donziger and his law firm specifically, Chevron asserted violations of the New York Judiciary Law governing the conduct of lawyers.<sup>58</sup> Finally, Chevron also sought a declaration, pursuant to the DJA, that the Lago Agrio judgment is not entitled to recognition or enforcement in the United States or anywhere else.<sup>59</sup> Thus, the preliminary injunction to stop enforcement of the foreign judgment anywhere in the world was merely a prelude to the underlying RICO, common law tort, and other claims (although the RICO claims seem to have been the main concern of those underlying claims, as evidenced by a later suit Chevron brought in the Southern District of New York<sup>60</sup>).

In favor of the preliminary injunction Chevron argued, among other things, that the judgment was unenforceable in the United States because the proceedings in Ecuador did not comport with due process, and the judgment was obtained by fraud.<sup>61</sup> The district court, after concluding that the matter was a sufficient controversy for issuing declaratory relief,<sup>62</sup> in a drastic move issued a worldwide injunction to prevent the LAPs from enforcing the Ecuadorian judgment.<sup>63</sup> The district court justified its ability to issue a worldwide declaratory action by concluding:

A declaratory judgment by this Court as to the enforceability of the Ecuadorian judgment would finally determine the controversy over

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55. *Id.*

56. *Id.*

57. *Id.* at 625–26.

58. *Id.*; see N.Y. JUD. § 487 (McKinney 2005).

59. *Donziger*, 768 F. Supp. 2d at 626.

60. See *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229 (S.D.N.Y. 2012).

61. *Donziger*, 768 F. Supp. 2d at 594.

62. *Id.* at 637–38. The court concluded that the matter was a sufficient controversy because the Ecuadorian court had issued a multibillion-dollar judgment, and the LAP plaintiffs had specifically stated their intention to enforce the judgment worldwide. *Id.*

63. *Id.* at 660.

enforceability, at least for the United States and quite possibly more broadly. Indeed, since equity acts *in personam*, the Court may issue an injunction barring all of the defendants from filing enforcement proceedings in other jurisdictions. Hence, this Court's judgment should finally determine the controversy worldwide.<sup>64</sup>

In deciding whether to issue the injunction, the district court applied the factors articulated in *China Trade*,<sup>65</sup> as well as those articulated by the Second Circuit in *Dow Jones & Co. v. Harrods, Ltd.*<sup>66</sup> to determine whether declaratory judgment was proper under the DJA.<sup>67</sup>

After the *Donziger* decision, Chevron announced its intention to appeal the Ecuadorian court's judgment,<sup>68</sup> which it did in March 2011.<sup>69</sup> Unfortunately for Chevron, the Ecuadorian appellate judges affirmed the judgment.<sup>70</sup>

Then, the Second Circuit reversed the *Donziger* court's decision on appeal.<sup>71</sup> In its opinion, the Second Circuit concluded that the factors in *China Trade* were of "limited relevance"<sup>72</sup> because the action was for an anti-enforcement injunction, rather than an anti-suit injunction, and New York's version of the Recognition Act does not allow for a preemptive anti-enforcement injunction.<sup>73</sup> Because the LAPs had not yet sought to enforce the Ecuadorian judgment in the United States, the court concluded that Chevron had no claim under the Recognition Act.<sup>74</sup> Moreover, the Second Circuit found that

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64. *Id.* at 638.

65. 837 F.2d 33, 35 (2d Cir. 1987). The district court stated that "[i]n this circuit, *China Trade* . . . and its progeny provide the standard for determining when a court may enjoin parties before it from commencing or pursuing litigation in foreign jurisdictions." *Donziger*, 768 F. Supp. 2d at 646.

66. 346 F.3d 357, 359–60 (2d Cir. 2003).

67. *Donziger*, 768 F. Supp. 2d at 637–38, 646–48.

68. Press Release, Chevron, Illegitimate Judgment Against Chevron in Ecuador Lawsuit (Feb. 14, 2011), [http://www.chevron.com/chevron/pressreleases/article/02142011\\_illegitimatejudgmentagainstchevroninecuadorlawsuit.news](http://www.chevron.com/chevron/pressreleases/article/02142011_illegitimatejudgmentagainstchevroninecuadorlawsuit.news).

69. Press Release, Chevron, Chevron Appeals Ecuador Judgment (Mar. 11, 2011), [http://www.chevron.com/chevron/pressreleases/article/03112011\\_chevronappealsecuadorjudgment.news](http://www.chevron.com/chevron/pressreleases/article/03112011_chevronappealsecuadorjudgment.news).

70. Press Release, Chevron, Chevron Condemns Illegitimate Decision by Ecuador Appellate Court (Jan. 3, 2012), [http://www.chevron.com/chevron/pressreleases/article/01032012\\_chevroncondemnsillegitimatedecisionbyecuadorappellatecourt.news](http://www.chevron.com/chevron/pressreleases/article/01032012_chevroncondemnsillegitimatedecisionbyecuadorappellatecourt.news).

71. *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

72. *Id.* at 243.

73. See N.Y. C.P.L.R. § 5304 (McKinney 2012).

74. *Naranjo*, 667 F.3d at 242.

although Chevron sought the injunction under the far-reaching DJA, the rights conferred by that Act were “procedural only” and “do[] not create an independent cause of action.”<sup>75</sup> In almost every other suit for declaratory judgment, the suit is brought by the judgment-creditor, and the judgment-debtor defends against enforcement pursuant to the Recognition Act.<sup>76</sup> No part of the Act allows for preemptive suits for declaratory action by the judgment-debtor before the judgment-creditor has tried to enforce the judgment in that jurisdiction.<sup>77</sup> Finally, the Second Circuit looked to international comity considerations and concluded that interpreting the Recognition Act to allow courts to grant worldwide injunctions would disrespect other sovereign judicial systems.<sup>78</sup>

Since the Second Circuit’s reversal of Judge Kaplan’s global anti-enforcement injunction, the LAPs have brought actions to enforce the Ecuadorian judgment in Canada, Argentina, and Brazil.<sup>79</sup> Adding another twist to the story, Chevron has recently filed the declaration of a former Ecuadorian judge in the Southern District of New York,<sup>80</sup> in which the judge, Alberto Guerra, described how he and another former judge “allowed the LAPs’ lawyers to ghostwrite their entire 188-page, \$18.2 billion judgment against Chevron in exchange for a promise of \$500,000 from the anticipated recovery.”<sup>81</sup> Thus, if the affidavit is true, it is important to mention that notwithstanding the rulings discussed in this Note, the Ecuadorian judgment would not be

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75. *Id.* at 244–45 (citations omitted).

76. *Id.* at 240.

77. *Id.* The court also said the structure of the Recognition Act was “clear” and did not allow for preemptive suits by the judgment-debtor. *Id.*

78. *Id.* at 242.

79. Eduardo Garcia, *Ecuador Plaintiffs Target Chevron’s Assets in Brazil*, REUTERS, June 27, 2012, <http://www.reuters.com/article/2012/06/28/us-ecuador-chevron-idUSBRE85R01I20120628>; Pablo Gonzalez, *Ecuador to Sue Chevron in Argentina to Enforce Judgment*, BLOOMBERG BUSINESSWEEK (Oct. 31, 2012), <http://www.businessweek.com/news/2012-10-31/ecuador-to-sue-chevron-in-argentina-to-enforce-judgment>; Stephen G.A. Pitel, *Enforcement of the Ecuadorian Judgment Against Chevron in Ontario: The Ontario Law*, OPINIO JURIS (June 1, 2012, 10:30 AM), <http://opiniojuris.org/2012/06/01/enforcement-of-ecuadorian-judgment-against-chevron-in-ontario-the-ontario-law>.

80. See Alberto Guerra Bastidas, Sworn Declaration, (Nov. 12, 2012) [http://www.theamazonpost.com/wp-content/uploads/Declaration-of-A-Guerra\\_English-REDACTED.pdf](http://www.theamazonpost.com/wp-content/uploads/Declaration-of-A-Guerra_English-REDACTED.pdf).

81. Roger Parloff, *Ex-Judge Says He Was Bribed by Ecuadorians’ Suing Chevron*, CNNMONEY (Jan. 28, 2013, 10:47 AM), <http://features.blogs.fortune.cnn.com/2013/01/28/judge-chevron-ecuador>.

recognizable under U.S. law if the LAPs attempt to enforce it in the United States.<sup>82</sup>

## II. RELEVANT LAW

This Part provides the background necessary to understand the issues posed by the *Donziger* and *Naranjo* decisions within the Chevron-Ecuador litigation, which are discussed in further detail in Part III. Part II.A discusses the relevant law on recognition of judgments. Part II.B outlines the relevant domestic law on granting anti-suit injunctions, and their possible application to anti-“enforcement” injunctions (as the Second Circuit calls them, and as this Note refers to them). Part II.C reviews the DJA, and, finally, Part II.D summarizes the applicable law on ripeness requirements in the federal court system and their possible relevance to preemptive requests for anti-enforcement injunctions. Each legal regime is integral to understanding the issues posed by *Donziger* and *Naranjo*, because the courts in both cases examine multiple legal arguments in deciding whether to permit the worldwide preliminary injunction against the LAPs. Both the Southern District of New York and the Second Circuit, for example, discuss the relevance of the anti-suit injunction test, the DJA, and the Recognition Act.<sup>83</sup> Neither discusses whether the action is ripe, but the related *Yahoo!* case<sup>84</sup> also involved a claim for a declaration of non-enforceability of a foreign judgment before a proceeding to enforce that judgment was brought in the United States, and some of judges in the splintered en banc *Yahoo!* opinion did conduct a ripeness analysis.<sup>85</sup>

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82. See RECOGNITION ACT, *supra* note 8, § 4(a)(1) (identifying one of the grounds for non-recognition, namely, when “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”). As noted below, some version of the Recognition Act has been codified by most states. See *infra* notes 101–02 and accompanying text.

83. See *Naranjo*, 667 F.3d at 240–45; *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 632–38, 646–47 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.* *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423, 184 (2012).

84. See *Yahoo! Inc. v. La Lingue Contre le Racisme et l'Antisemitisme (Yahoo! III)*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

85. See *id.* at 1201.

### A. Recognition of Foreign (Money) Judgments in the United States

There is currently no federal statute governing recognition of foreign judgments in the United States.<sup>86</sup> The United States is also not a party to any international treaty or convention on recognition and enforcement of foreign-country judgments.<sup>87</sup> Despite these facts, the United States appears to be the most receptive of any major country to recognition and enforcement of foreign judgments.<sup>88</sup>

Traditionally, state decisional law governs recognition of foreign country judgments.<sup>89</sup> Thus, there is some variation among the several states regarding whether a foreign judgment will be enforced against the judgment-debtor's assets. Regardless of whether a state has codified the Recognition Act or relies on common law, "no state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment-debtor."<sup>90</sup>

In *Hilton v. Guyot*, a landmark decision in U.S. judgment recognition law, the United States Supreme Court based its judgment on the principle of international comity, setting the precedent U.S. courts must follow when determining the extent of recognition and enforceability of foreign court judgments.<sup>91</sup> The Court held that

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86. Edward H. Davis, Jr. & Annette C. Escobar, *A Practitioner's Guide to Enforcement of Foreign Country Money Judgments in the United States*, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 131 (Barton Legum ed., 2005).

87. See Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT'L L. 629, 629–30 (2012); see also ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 472 (3d ed. 2006). Negotiations on this subject at the Hague Conference on Private International Law have broken down, albeit due to disputes over jurisdiction of courts rather than enforcement of judgments. *Id.*

88. See LOWENFELD, *supra* note 87 at 473; see also Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in Its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 290 (2007) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW ch. 8, intro. (1987)). U.S. receptiveness to foreign-country judgments is not often returned, presumably due to the high damage awards in U.S. negligence cases (particularly in products liability suits). DAVID EPSTEIN & CHARLES S. BALDWIN, IV, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY 376 (4th rev. ed. 2010). The liberality and size of American damage awards is an impediment to the United States' ability to enter into multi- or bilateral treaties with other countries, putting the United States at a disadvantage with countries who are parties to such agreements. *Id.*

89. See, e.g., *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121 (N.Y. 1926).

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW ch. 8, intro. note (1987).

91. *Hilton*, 159 U.S. at 163; see EPSTEIN & BALDWIN, IV, *supra* note 88, at 377.



recognition of foreign-country judgments was a matter of the “comity of nations,”<sup>92</sup> and described the principle of comity as follows:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>93</sup>

The Court in *Hilton* also outlined specific situations where comity should be followed, including scenarios in which the foreign proceeding was conducted before a court of “competent jurisdiction” and no fraud could be shown.<sup>94</sup> The Court’s articulation of the principle of international comity has remained the most authoritative passage from *Hilton*, despite the suggestion that it was merely dicta.<sup>95</sup>

In 1962, the National Conference of Commissioners on Uniform State Laws (the Commissioners) created a recommended uniform state statute for recognition of foreign country money judgments in the United States.<sup>96</sup> The 1962 Recognition Act claimed to present “rules that have long been applied by the majority of courts in this country.”<sup>97</sup> Some thirty states, the District of Columbia, and the Virgin Islands have adopted the Recognition Act in some form.<sup>98</sup>

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92. *Hilton*, 159 U.S. at 163.

93. *Id.* at 163–64.

94. The *Hilton* Court described specific situations where comity should be followed:

[W]e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

*Id.* at 202–03.

95. LOWENFELD, *supra* note 87, at 491 n.2.

96. RECOGNITION ACT, *supra* note 8.

97. RECOGNITION ACT, *supra* note 8, Prefatory Note.

98. Graving, *supra* note 88 at 293.

The Act defines a “foreign state” as “any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands,”<sup>99</sup> and “foreign judgment” as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”<sup>100</sup> The Act also states that it applies to “any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.”<sup>101</sup> Generally speaking, unless one of the grounds for non-recognition come in to play, the Act considers a judgment conclusive when it grants or denies a sum of money, which makes it enforceable in the same way other U.S. states must recognize each others’ judgments under the Full Faith and Credit Clause of the U.S. Constitution.<sup>102</sup> The various grounds for non-recognition under the Recognition Act include multiple situations, such as where “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,” there was no personal jurisdiction, or the foreign judgment was obtained by fraud.<sup>103</sup>

In 2005, the Commissioners adopted a revision of the 1962 Act, making a few “perfecting” changes.<sup>104</sup> The 2005 Uniform Foreign-Country Money Judgments Recognition Act, like its predecessor, seeks to promote uniformity and gain wider acceptance of U.S. judgments abroad.<sup>105</sup> Only three states have adopted the 2005 Act.<sup>106</sup> The remaining twenty or so states that have not adopted either the 1962 or the 2005 Act rely on common-law notions of “comity,”<sup>107</sup> along with sections of the Restatement (Third) of Foreign Relations Law.<sup>108</sup> Most states, however, have maintained their codification of the 1962 Recognition Act.<sup>109</sup> New York, one of the busiest states for

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99. RECOGNITION ACT, *supra* note 8, § 1(1).

100. *Id.* § 1(2).

101. *Id.* § 2.

102. *Id.* § 3; *see* U.S. CONST. art. IV, § 1.

103. RECOGNITION ACT, *supra* note 8, § 4 (a)(1)–(2), (b)(2).

104. Graving, *supra* note 88, at 289. Some argue that the 2005 revisions cure a constitutional defect in its 1962 predecessor. *Id.* at 289–90.

105. *Id.* at 290–91; *see* 2005 RECOGNITION ACT, *supra* note 17.

106. *See* Graving, *supra* note 88, at 293.

107. *Id.*

108. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481, 482 (1987).

109. Graving, *supra* note 88, at 293.

international litigation, has adopted the 1962 Act, with significant changes.<sup>110</sup> Most importantly for the purposes of the Chevron-Ecuador litigation, fraud is one of the discretionary grounds for non-recognition under New York's version of the Recognition Act.<sup>111</sup> Further, the 1964 Act provides that it is a mandatory ground for non-recognition 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."<sup>112</sup> Chevron argued in *Donziger* that the Ecuadorian judgment would not be enforceable in the United States because the proceedings in Ecuador did not comport with due process, and that the judgment was obtained by fraud because the LAPs' attorneys (among several other things) "ghostwrote" the appointed expert's report and intimidated the Ecuadorian judges.<sup>113</sup>

### B. Anti-Suit Injunctions

Even before a judgment is reached, one of the most valuable (and possibly irritating) tools available to parties involved in international disputes is the anti-suit injunction. Anti-suit injunctions show up most frequently in parallel proceedings, either internationally or domestically—where a single dispute is litigated simultaneously in front of two or more different courts.<sup>114</sup> Parties often have several choices regarding the country in which to litigate a transnational dispute, and therefore parallel litigation is not uncommon.<sup>115</sup> Most anti-suit injunction cases deal with parallel actions in the United States and another country.<sup>116</sup>

U.S. federal Circuit courts unanimously agree that federal district courts have the power to issue anti-suit injunctions against parties subject to their jurisdiction.<sup>117</sup> The Circuits also agree that anti-suit

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110. *Id.* at 293; see N.Y. C.P.L.R. § 5303 (McKinney 1997).

111. N.Y. C.P.L.R. § 5304(b)(3) (McKinney 1997).

112. *Id.* § 5304(a)(1).

113. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 592, 607, 611–12 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

114. José I. Astigarraga & Scott A. Burr, *Antisuit Injunctions, Anti-Antisuit Injunctions, and Other Worldly Wonders*, in *INTERNATIONAL LITIGATION: STRATEGIES AND PRACTICE* 89 (Barton Legum, ed. 2005).

115. Heiser, *supra* note 2, at 855.

116. *Id.* at 856.

117. David J. Levy, *Antisuit Injunctions in Multinational Cases*, in *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS* 163–64 (David J. Levy ed., 2003) (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996)).

injunctions should be used “sparingly.”<sup>118</sup> The Circuits are split, however, on what standard should be used in deciding whether to grant an anti-suit injunction rather than stay their own proceedings or let both actions proceed to judgment. Scholars have called the two sides of the split “liberal” and “restrictive,”<sup>119</sup> or sometimes “liberal” and “conservative.”<sup>120</sup>

The Fifth and Ninth Circuits (and possibly the Seventh Circuit as well) remain on the “liberal” side of the split.<sup>121</sup> These Circuits have held that district courts may issue anti-suit injunctions when litigation in a foreign forum would become vexatious and delay efficient proceedings, rather than focusing on international comity.<sup>122</sup> Regarding the “liberal” side of the Circuit split, the main criticism is that this approach somehow conveys the message that the court issuing the anti-suit injunction is suggesting that it has “so little confidence in the foreign court’s ability to adjudicate a given dispute fairly and efficiently that it is unwilling to even allow the possibility.”<sup>123</sup> It has also been suggested that if anti-suit injunctions are easily available, both courts will be able to issue these injunctions and essentially paralyze the litigation.<sup>124</sup>

On the “conservative” or “restrictive” side of the split are the First, Second, Third, Sixth, Eighth, and District of Columbia Circuits.<sup>125</sup>

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118. *See, e.g.,* *Seattle Totems Hockey Club v. Nat’l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981); *Philip v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958).

119. *See* Levy, *supra* note 117, at 164.

120. Heiser, *supra* note 2, at 857–58.

121. *See* *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.*, 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club*, 652 F.2d 852.

122. *See* *Kaepa*, 76 F.3d at 627 (holding that a district court does not abuse its discretion in issuing an anti-suit injunction “when it has determined that allowing simultaneous prosecution of the same action in a foreign forum . . . would result in inequitable hardship and tend to frustrate and delay the speedy and efficiency determination of the case”) (internal quotation marks omitted); *Seattle Totems Hockey Club*, 652 F.2d 852 (affirming a district court’s anti-suit injunction when it considered “the convenience to the parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and the potential prejudice to one party or the other, and concluded that the equitable balance weighs heavily in favor of plaintiffs” (internal quotation marks omitted)).

123. *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360 (8th Cir. 2007).

124. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354–55 (6th Cir. 1992).

125. *See* *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007); *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004); *Stonington Partners v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118 (3d Cir. 2002); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992);

The general rule in these jurisdictions is to allow parallel proceedings “on the same *in personam* claim” to “proceed simultaneously, at least until judgment is reached in one which can be pled as *res judicata* in the other.”<sup>126</sup> The idea is that international comity would favor *not* issuing an anti-suit injunction out of respect for the sovereignty of other court systems.<sup>127</sup> These Circuits elevate the principle of international comity to a higher level than the “liberal” circuits do, holding that a foreign anti-suit injunction will be granted only to protect the jurisdiction of a U.S. court or important public policies of the forum.<sup>128</sup> Critics of the “conservative” approach argue that where public international issues are not involved, efficiency should be promoted over international comity—after all, parallel proceedings are long, drawn out, and expensive.<sup>129</sup> Moreover, allowing parallel proceedings to go forward inevitably leads to a “race to judgment,” which is completely dependent upon the efficiency and methods of procedure within the parallel jurisdictions.<sup>130</sup>

A modified restrictive approach might mitigate this concern. The Second Circuit, for example, adopted a more flexible version of the conservative approach by factoring in whether adjudications of the same issues in separate actions would lead to a race to judgment.<sup>131</sup> Specifically, the test articulated in *China Trade* begins by inquiring “(1) whether the parties to both suits are the same and (2) whether resolution of the case before the enjoining court would be dispositive of the enjoined action.”<sup>132</sup> Next, the court looks at a variety of other factors, such as the “vexatiousness” of the parallel proceeding, whether the two actions will lead to a race to judgment causing additional expense, “whether the foreign action threatens the

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*China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

126. *Laker Airways*, 731 F.2d at 926–27.

127. See Heiser, *supra* note 2, at 859 (2011).

128. See, e.g., *China Trade*, 837 F.2d at 36–37 (2d Cir. 1987) (noting that avoiding vexatiousness or a race to judgment is not enough to satisfy international comity requirements, adding the jurisdictional and public policy factors); see also *Laker Airways*, 731 F.3d at 934 (enjoining the defendants in that litigation from litigating in a British court to protect its own jurisdiction).

129. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).

130. See Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking A Lesson from the Act of State Doctrine*, 76 GEO. WASH. L. REV. 155, 173 (2007).

131. See *China Trade*, 837 F.2d at 35–36; see also Vertigan, *supra* note 130, at 172–73. Interestingly, the Second Circuit also does not take into account the citizenship of the parties at hand. See Margarita Treviño de Coale, *Stay, Dismiss, Enjoin or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT’L L.J. 79, 107 (1999).

132. *China Trade*, 837 F.2d at 36.

jurisdiction of the enjoining forum, and . . . whether strong public policies of the enjoining forum are threatened by the foreign action.”<sup>133</sup>

The anti-suit injunction Circuit split is relevant because the *Donziger* court applied the *China Trade* factors (the relevant standard in the Second Circuit) in deciding whether to grant an injunction enjoining the LAPs from suing for enforcement.<sup>134</sup> There is no literature on whether anti-suit injunction analysis should apply to claims for anti-enforcement injunctions (particularly before the judgment-creditor has tried to enforce the judgment). After all, parallel proceedings usually apply when there are multiple identical actions going on at the same time in multiple fora. Nor is there literature on whether a court can issue an anti-enforcement action (as the Second Circuit calls it) under the same standards.

### C. The Declaratory Judgment Act

Chevron also argued that the requested injunction was merely a claim for a declaratory judgment.<sup>135</sup> The DJA allows a district court to declare the legal rights or legal relations of an interested party seeking the declaration in a case of actual controversy within that court’s jurisdiction.<sup>136</sup> Any such declaration will have “the force and effect of a final judgment or decree and shall be reviewable as such.”<sup>137</sup> Like the Recognition Act, the rights afforded by the DJA are procedural only,<sup>138</sup> and do not create an independent cause of action.<sup>139</sup> Courts have held consistently that the DJA contains a broad grant of discretion to district courts “to refuse to exercise jurisdiction over a declaratory action that they would be otherwise empowered to hear.”<sup>140</sup>

When there is a valid basis for a declaratory judgment, however, the relevant test to apply in the Second Circuit is the balancing test

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133. *Id.* (quoting *Laker Airways*, 731 F.2d at 927, 937).

134. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 646–47 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev’d and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

135. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012). It seems that Chevron was arguing for everything and anything that could support the injunction.

136. 28 U.S.C. § 2201(a) (2012).

137. *Id.*

138. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

139. *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007).

140. *Dow Jones & Co. v. Harrods, Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).

set forth in *Dow Jones*.<sup>141</sup> In *Dow Jones*, the court looked to a set of factors to guide its decision of whether to exercise the discretion granted by the DJA.<sup>142</sup> Those factors built on an older test the Second Circuit adopted, considering “(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty.”<sup>143</sup> The court noted that other Circuits have built more factors into the test, which include:

- 1) whether the proposed remedy is being used merely for ‘procedural fencing’ or a ‘race to res judicata’; 2) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and 3) whether there is a better or more effective remedy.<sup>144</sup>

The court in *Dow Jones* applied all five of these factors, and since then, the Second Circuit has seen fit to apply all five together as a unified test to determine whether to grant a declaratory judgment.<sup>145</sup> A district court’s application of these factors is typically reviewed for abuse of discretion.<sup>146</sup>

#### D. Ripeness

Although the *Donziger* and *Naranjo* courts did not address the injunction in terms of ripeness, preemptive declaratory non-enforcement actions in other areas (such as in libel tourism cases) have been discussed in terms of ripeness before.<sup>147</sup> In the federal court system, ripeness is drawn from both Article III of the United States Constitution and “prudential reasons for refusing to exercise jurisdiction.”<sup>148</sup> A given action must satisfy two prudential

141. *Id.*

142. *Id.*

143. *Id.* (citing *Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1001 (2d Cir. 1969)).

144. *Id.* at 359–60. The district court in *Dow Jones* pulled those factors from other Circuits. *Id.*; see also *NUCOR Corp. v. Aceros y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577 (7th Cir. 1994); *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984).

145. See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 245 (2d Cir. 2012).

146. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 167 (2d Cir. 2006).

147. See, e.g., *Yahoo! III*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (holding that the court had personal jurisdiction over an Internet service provider’s suit for declaration that a French order to block French access to certain websites was unenforceable in the United States, and eight of the judges addressed ripeness).

148. See U.S. CONST. art. III; *Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

requirements for ripeness: “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.”<sup>149</sup> Courts must generally consider the facts at hand to see if they present the problems of “prematurity and abstractness” that counsel against reaching the merits of a given case.<sup>150</sup>

### III. PROBLEMS POSED BY THE CHEVRON-ECUADOR LITIGATION

This Part lays out the issues posed by the *Donziger* and *Naranjo* decisions in the Chevron-Ecuador litigation. It outlines four possible ways to deal with this Note’s overarching, initial question: whether a U.S. court can (or should be able to) provide any remedy precluding enforcement of an unfair foreign money judgment, particularly before the plaintiffs have tried to enforce the judgment in the United States. Before that question can be answered, however, the preliminary question of what underlying legal analysis applies to this injunction (which was implicitly discussed in *Donziger* and *Naranjo* when the courts applied multiple legal analyses) must be addressed, if only to figure out what exactly happened. If the district court was right, and an anti-enforcement injunction is in reality no different from an anti-suit injunction, then that poses a different set of problems than the Second Circuit’s assertion that the Recognition Act alone applies, but *cannot* apply (even in conjunction with the DJA) unless the LAPs try to enforce the judgment in the United States.

If the anti-enforcement action fails because of lack of ripeness, then theoretically the issue could not have been decided at that time—at least not until the LAPs try to enforce the judgment in the United States. In other words, if the case is unripe until the plaintiffs try to enforce the judgment, then once the plaintiffs try to enforce the judgment in the United States, the Second Circuit is correct that the judgment-debtor may make use of the various grounds for non-recognition listed in New York’s codification of the Recognition Act.<sup>151</sup>

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149. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

150. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972); *see also Yahoo! III*, 433 F.3d at 1211 (en banc) (discussing the standards for ripeness) (quoting *Socialist Labor Party*, 406 U.S. at 588). Much more could be said on the standards governing ripeness in federal courts, but the details provided in this section are sufficient for purposes of this Note’s discussion.

151. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 240 (2d Cir. 2012) (“The sections on which Chevron relies provide *exceptions* from the circumstances in which a holder of a foreign judgment can obtain enforcement of that judgment in New York; they do



The following Parts evaluate the relevant court decisions in the Chevron-Ecuador litigation, as well as some other possible answers to this Note's preliminary question and the implications that those answers would have on the overarching question. Part III.A discusses the problems posed by the *Donziger* decision. Part III.B analyzes the *Naranjo* decision. Part III.C discusses a decision issued by the Ninth Circuit, *Shell Oil Co.*, which is relevant to the *Naranjo* decision because it was cited by the Second Circuit as possibly interpreting the DJA and the Recognition Act to allow the declaration of non-enforceability of a foreign money judgment in the United States before the foreign plaintiffs had (technically) sought enforcement. Part III.D addresses the background to the *Yahoo!* decision, and its possible relevance to the issue at hand.

### A. The *Donziger* Decision

When the *Donziger* court granted the worldwide injunction against the LAPs, it was part of a long and carefully thought-out opinion, detailing the history of the litigation and the various claims Chevron made against the LAPs.<sup>152</sup> In arriving at the decision to grant the worldwide injunction (establishing the history of the litigation, the role of the attorney Donziger, the allegations of corruption, and the UNCITRAL arbitration), Judge Kaplan first discussed the standards for issuing a preliminary injunction.<sup>153</sup> In the Second Circuit, “[a] party seeking a preliminary injunction must establish irreparable harm and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor.”<sup>154</sup> Judge Kaplan determined the evidence established that “the LAPs and their allies intend quickly to pursue multiple enforcement actions and asset seizures, including *ex parte* remedies where possible, around the globe,” and without a preliminary injunction, “Chevron would be forced to defend itself and litigate the enforceability of the Ecuadorian judgment in multiple proceedings.”<sup>155</sup> The court also mentioned that

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not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement.”).

152. See *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

153. *Id.* at 626.

154. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002).

155. *Donziger*, 768 F. Supp. 2d at 626–27.

there was a great risk that Chevron's assets would be seized or attached, disrupting Chevron's supply chain and damaging the goodwill it has with its customers, and concluded that Chevron was threatened with immediate and irreparable injury.<sup>156</sup> Judge Kaplan concluded that the aforementioned threatened harm would be irreparable, and even if the LAPs collected before the validity of the judgment was determined, Chevron would not be able to get the money back.<sup>157</sup> The opinion noted that there would be no remedy for the coercive effect of litigating in multiple places—the damage would have already been done.<sup>158</sup> Plus, the damages would have been “difficult to establish and measure,” meaning that, for both reasons, equitable relief was appropriate.<sup>159</sup>

The *Donzinger* court also found that Chevron had established imminence in light of the relevant law. The LAPs, the court said, may even now seek “preventive measures” in freezing Chevron's assets in other countries.<sup>160</sup> As soon as the appeal had been decided (unless the judgment was overturned), the LAPs could start running all over the world to try to enforce the judgment. Moreover, Judge Kaplan wrote that “[g]iven the history and circumstances of this case, there is substantial reason to believe that the process will move quickly.”<sup>161</sup> Then, the “game would change dramatically.”<sup>162</sup> Indeed, the pendency of a further appeal in Ecuador would not stop recognition and enforcement proceedings here, unless the judgment was found unenforceable in Ecuador.<sup>163</sup>

Next, the district court determined that the availability of appellate remedies and a possible stay in the Ecuador proceedings did not preclude finding the threat of irreparable injury because the showing of likely success on the merits (in proving that Ecuador did not provide impartial tribunals) would “foreclose[] the propriety of assuming that the judgment debtor will receive due process in the appellate process in the rendering nation.”<sup>164</sup> The district court

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156. *Id.* at 627.

157. *Id.*

158. *Id.*

159. *Id.* at 628 (citing *Register.com v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (internal quotation marks omitted)).

160. *Id.* at 630.

161. *Id.* at 629.

162. *Id.* at 630.

163. *Id.*

164. *Id.* at 631.

discussed the balance of hardships, and determined that the balance tipped in favor of Chevron.<sup>165</sup>

Turning to the likelihood of success on the merits, the district court determined that the Ecuadorian judgment was not entitled to recognition or enforcement and that Chevron showed the requisite likelihood of success on its claim that Ecuador did not provide impartial tribunals and due process.<sup>166</sup> The court looked to New York's codification of the Recognition Act in Article 53 of the Civil Practice Law and Rules.<sup>167</sup>

Regarding recognition and enforcement, Judge Kaplan summed up the body of law in that area starting with *Hilton*.<sup>168</sup> He noted that “[i]n determining whether a foreign legal system ‘provide[s] impartial tribunals [and] procedures compatible with due process of law,’ a court considers not only the structure and design of the judicial system at issue, but also ‘its practice during the period in question.’”<sup>169</sup> The court concluded that the Ecuadorian court had not provided for impartial tribunals. In coming to that decision, the court looked to a report from Vladimiro Alvarez Grau (the Alvarez Report), prepared in September 2010. The court described Alvarez as “an impressively credentialed expert who has practiced law in Ecuador for nearly forty years and has held numerous elected and appointed public offices and legal academic positions in that country.”<sup>170</sup> The Alvarez Report concluded that the Ecuadorian court system habitually failed to act impartially—that the President has control and threatens and pressures the judges.<sup>171</sup> The court also made much of the fact that Donziger himself, in opposing Texaco's motion for *forum non conveniens* in the original action in the Southern District of New

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165. *Id.* According to the court, Chevron would suffer greater harm from the mistaken denial of a preliminary injunction here than would the LAPs if the injunction were granted. If the injunction were mistakenly denied, the LAPs would enforce the judgment, creating the aforementioned irreparable injury. A stay pending the decision of the Ecuador National Court of Justice would not alter the conclusion because if Chevron established a likelihood of success in proving that Ecuador did not provide for impartial tribunals, then there is no reason to grant a stay, and a stay would place a huge bond at the disposal of the Ecuadorian court system. *Id.*

166. *Id.* at 632–33.

167. N.Y. C.P.L.R. §§ 5304(a)–(b) (McKinney 1997); *see also* RECOGNITION ACT, *supra* note 8, §§ 4(a)–(b).

168. *Donziger*, 768 F. Supp. 2d at 632–33.

169. *Id.* at 633 (citing *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d Cir. 2000)).

170. *Id.* at 616 n.163.

171. *Id.* at 633–34.

York, had described the Ecuadorian court system as corrupt, declaring that it was the judges' "birthright . . . to be corrupt!"<sup>172</sup> And yet, here he was, extolling the virtues of the Ecuadorian justice system in an attempt to enforce the Ecuadorian court's multi-billion dollar judgment.

The district court also looked to independent commentators (quoted in the Alvarez Report) as well as other independent sources.<sup>173</sup> The district concluded that Chevron was likely to prevail on the contention that the judgment was rendered in a system that "does not provide impartial tribunals or procedures compatible with the requirements of due process of law,"<sup>174</sup> and that it had demonstrated serious questions going to the merits of that issue.

The district court also determined that there was ample evidence that the judgment was fraudulent.<sup>175</sup> The LAPs had submitted forged expert reports; indeed, their counsel ghostwrote much of Cabrera's (the supposed independent expert's) report and had other improper contacts with Cabrera.<sup>176</sup> The LAPs did issue "cleansing reports" after the improper contacts with Cabrera were revealed.<sup>177</sup> Those reports, however, substantially relied on Cabrera's findings, and because the judge in Ecuador considered some of the reports in issuing the judgment, it would be impossible to separate the tainted

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172. *Id.* at 634 (internal quotation marks omitted). It is worth emphasizing, however, that it was Texaco (as Chevron's predecessor) who wanted the case dismissed for *forum non conveniens* in the first place because Ecuador was allegedly the better place for the LAPs to assert their claims, only to have Chevron later complain about the fraudulent Ecuadorian court system in New York once it had ruled in the LAPs' favor. *See supra* Part I. Thus, the irony lies on both sides—Chevron (or Texaco, depending on the time period) got exactly what it had asked for, but not as expected. Indeed, Texaco probably never expected a suit to be filed in Ecuador—at least not a class action of this magnitude. Even if a suit had been filed in Ecuador, it has been noted that at the time, the Ecuadorian government (and hence court system) would have been favorable to Texaco's interests. *See* Suraj Patel, *Delayed Justice: A Case Study of Texaco and the Republic of Ecuador's Operations, Harms, and Possible Redress in the Ecuadorian Amazon*, 26 TUL. ENVTL. L.J. 71, 85 (2012). Unfortunately for Chevron when it acquired the litigation later down the road, along with a change in power, there was also a change in Ecuador's view of the litigation. *Id.* at 84 ("Soon after the desired dismissal [by Judge Rakoff], Ecuador's new government under President Abdalá Bucaram reversed its opposition to the lawsuit and joined the plaintiffs in asking the court to reconsider the dismissal.") (internal quotation marks and citation omitted). As this story shows, international litigation does not always go as planned—it is subject to a given jurisdiction's political climate and its tendency to change quickly and drastically.

173. *Id.*

174. *Id.* at 636 (internal quotation marks omitted).

175. *See id.* at 637.

176. *Id.*

177. *Id.*

report from the final judgment in Ecuador.<sup>178</sup> Thus, the *Donziger* court held that Chevron had raised substantial questions as to whether the judgment in Ecuador was a result of fraud.<sup>179</sup>

Finally, the *Donziger* court held that this case was appropriate for declaratory judgment.<sup>180</sup> Applying the factors articulated in *Dow Jones*,<sup>181</sup> the court held that this was clearly a case of actual controversy; the Ecuadorian court had issued a multibillion-dollar judgment against Chevron, and the LAPs had specifically articulated their intention to enforce that judgment all over the world “as soon as possible and certainly no later than when the initial appeal is decided, which could occur in a matter of days once the court’s clarifications issue.”<sup>182</sup>

The court also held that a declaratory judgment would resolve the controversy over the judgment’s enforceability, at least within the United States and “quite possibly more broadly” (although it did not articulate *why* a declaratory judgment in the United States would resolve the controversy “more broadly”).<sup>183</sup> It is important to note that the court’s analysis thus far was based upon U.S. law—i.e., whether a *U.S. court* would enforce the judgment. The court still had to make a final jump from why the judgment was unenforceable in the United States to asserting that it had the power to bind the judgment-creditors from trying to enforce that judgment *outside* the United States. The *Donziger* court noted that because equity acts *in personam*, the court could issue an injunction barring the LAPs from enforcing the judgment anywhere in the world without making a determination on another court’s sovereignty.<sup>184</sup> In other words, the district court in *Donziger* could bind the LAPs without freezing the ability of a foreign court system to hear an enforcement proceeding because the court had personal jurisdiction over all of the parties.

Granting the injunction would certainly cause some friction between nations, the court acknowledged, but “[w]hen a sovereign country renders a judgment and parties attempt to enforce that judgment abroad, the fact that the judgment and the forum in which it was rendered are open to attack in the forum where enforcement is

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178. *Id.*

179. *Id.* at 637.

180. *Id.*

181. *Id.*

182. *Id.* at 638.

183. *Id.*

184. *Id.*

sought is inherent in the international scheme.”<sup>185</sup> The LAPs sought to benefit from seeking enforcement in multiple countries, presumably to force Chevron into a quick settlement.<sup>186</sup> “In this circumstance, there is no better remedy because the alternative is litigation all over the world, deciding enforceability jurisdiction by jurisdiction,” and the evidence raised substantial doubt about the fairness of the proceedings in Ecuador.<sup>187</sup>

After the *Donziger* court established that Chevron would likely be able to establish personal jurisdiction over the LAPs,<sup>188</sup> it finally turned the propriety of issuing an injunction against the LAPs from trying to enforce the judgment in foreign jurisdictions while the underlying merits of the case were being tried in the Southern District of New York.<sup>189</sup> The court concluded that the factors articulated in *China Trade* provided the proper standard for determining whether the injunction should be granted.<sup>190</sup> *China Trade* has two threshold requirements: 1) the parties in the litigation are the same, and 2) resolution of the case before the enjoining court should be dispositive of the actions to be enjoined in the foreign forum.<sup>191</sup> If those conditions are met, then the court considers five factors in determining whether to issue an injunction:

1) the frustration of a policy in the enjoining forum; 2) [whether] the foreign action would be vexatious; 3) [any] threat to the issuing court’s in rem or quasi in rem jurisdiction; 4) [whether] the proceedings in the other forum prejudice other equitable considerations; or 5) [whether] adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.<sup>192</sup>

The court determined that the first two threshold requirements were met, and that the second, fourth, and fifth factors all weighed in favor of an injunction.<sup>193</sup> It appears that the district court addressed

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185. *Id.* The court also noted that they were not interfering with Ecuador’s adjudication of the underlying dispute or the judgment’s enforceability in Ecuador. *Id.* at 638 n.323.

186. *Id.* at 629, 638.

187. *Id.* at 638.

188. *See id.* at 639–45.

189. *Id.* at 646.

190. *See id.* (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d. Cir. 1987)).

191. *See China Trade*, 937 F.2d at 36.

192. *Id.* at 35 (quoting *Am. Home Assur. Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984)).

193. *See Donziger*, 768 F. Supp. 2d at 648.

every possible legal standard that could have applied to deciding whether to grant anti-“enforcement” actions such as these, which is why the *Donziger* opinion, as well as the Second Circuit opinion (which is discussed in the next section) are so interesting—and also troublesome.

### B. The *Naranjo* Decision

The Second Circuit was probably horrified when the worldwide anti-enforcement injunction came up on appeal. In reversing the district court from a unanimous bench, Judge Lynch first discussed the standards for review of a preliminary injunction.<sup>194</sup> The opinion stated that a court of appeals must reverse a district court’s grant of a preliminary injunction when there has been an abuse of discretion, or if the district court proceeded on the basis of an erroneous interpretation of the law.<sup>195</sup> Thus, a district court, by applying the wrong standard, will have committed an abuse of discretion.<sup>196</sup> The Second Circuit found that Chevron, and the district court, based the anti-enforcement injunction on New York’s codification of the Recognition Act.<sup>197</sup> The Second Circuit concluded that reliance on the Recognition Act was improper, stating that:

Whatever the merits of Chevron’s complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavoidable: The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor . . . . The sections on which Chevron relies provide *exceptions* from the circumstances in which a holder of a foreign judgment can obtain enforcement of that judgment in New York; they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement.<sup>198</sup>

The Second Circuit also asserted that the Recognition Act was meant “to *provide* for the enforcement of judgments, not to prevent them.”<sup>199</sup> The point of the Act, after all, was to facilitate trust between nations.<sup>200</sup>

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194. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239 (2d Cir. 2012).

195. *Donovan v. Bierwirth*, 680 F.2d 263, 269 (2d Cir. 1982).

196. *Naranjo*, 667 F.3d at 239 (2d Cir. 2012).

197. *Id.*

198. *Id.* at 240.

199. *Id.* at 241.

200. *Id.*

As a result, the Second Circuit focused a great deal on comity considerations, stating that issuing such an injunction would violate international comity. New York should not serve as “a transnational arbiter” to decide which judgments should be respected and which ones should not.<sup>201</sup> The court went on to say that even though both sides called this injunction an anti-suit injunction, *China Trade’s* anti-suit injunction balancing test had “limited relevance” because the injunction here was an anti-*enforcement* injunction.<sup>202</sup> Chevron was preemptively trying to declare the judgment unenforceable before the LAPs tried to enforce it in the Second Circuit, and therefore *China Trade* should not have governed the claim.<sup>203</sup>

The court then returned to the principle of international comity. Judge Lynch asserted that “when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver.”<sup>204</sup> Indeed, it was a “weighty matter” for one judicial system to declare another country’s judicial system unfair and corrupt.<sup>205</sup> The *Donzinger* court did not discuss the legal rules that would prevent the LAPs from enforcing somewhere else.<sup>206</sup> Moreover, nothing in the Recognition Act allowed a court to enjoin a judgment-creditor from enforcing a judgment that was granted in a foreign forum in another foreign forum.<sup>207</sup>

Finally, the Second Circuit addressed the issue of declaratory judgment. Chevron had also tried to characterize the injunction as a simple declaratory judgment under the DJA (confusingly, they had tried to argue that the injunction was pursuant to both the DJA and *China Trade*), and by doing so, had “implicitly acknowledge[d] the Recognition Act’s limitations . . . .”<sup>208</sup> Although district courts have discretion to declare legal rights and relations, that discretion must rely on a valid legal predicate.<sup>209</sup> The court pointed out that like the Recognition Act, the DJA is “procedural only,”<sup>210</sup> and “does not

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201. *Id.* at 242.

202. *Id.* at 243.

203. *China Trade* is limited only to situations where parties try to litigate the same suit in multiple (foreign) jurisdictions. *Id.*

204. *Id.* at 244.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)).



create an independent cause of action.”<sup>211</sup> Because the Recognition Act could not provide a valid legal predicate, the DJA was not available to Chevron as a procedural tool.<sup>212</sup> Further, while the cases referring to the Recognition Act and the DJA together were limited, none allowed the DJA to be used to declare the unenforceability of a judgment before the judgment-creditor sought to enforce it.<sup>213</sup>

The court also referred to *Basic v. Fitzroy Engineering, Ltd.*<sup>214</sup> In *Basic*, a judgment-debtor requested declaratory relief (under the DJA) that a foreign judgment was unenforceable.<sup>215</sup> The court there instructed the plaintiff to pursue an “obvious alternative remedy”<sup>216</sup>: wait until the putative judgment-creditor brought an enforcement action under the relevant state’s version of the Recognition act, and raise applicable defenses at that time.<sup>217</sup> The *Naranjo* court, influenced by the Northern District of Illinois’ analysis in *Basic*, found that the *Dow Jones* test was of limited relevance, just like *China Trade*.<sup>218</sup>

The Second Circuit thus concluded that a “better remedy” was indeed available: Chevron could wait until the plaintiffs tried to enforce the action in the United States, and then assert its defenses under the Recognition Act.<sup>219</sup> After all, there was no specific indication that the LAPs, although they had indicated an intention to enforce the judgment, would choose New York as the place to do so.

### C. *Shell Oil*

The Second Circuit, in conducting its analysis, distinguished the facts in *Chevron* from *Shell Oil Co. v. Franco*, a case that allowed for a preemptive declaration under the Recognition Act by a judgment-debtor.<sup>220</sup> *Shell Oil* is the closest comparable case to the Chevron-Ecuador litigation—it even involves an oil company and some rogue

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211. *Id.* (quoting *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007)).

212. *Id.* at 245.

213. *Id.* at 245.

214. 949 F. Supp. 1333 (N.D. Ill. 1996).

215. *Id.* at 1341.

216. *Id.*

217. *Id.*

218. *Naranjo*, 667 F.3d at 245. Even though the DJA was held unavailable, the Second Circuit still engaged in the *Dow Jones* analysis and concluded that such an injunction would not finalize the issue on enforceability in anywhere except New York. *Id.* at 246.

219. *Id.* at 246.

220. *Shell Oil Co. v. Franco (Shell Oil II)*, No. CV 03-8846 NM (PJWx), 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005).

Central American plaintiffs. In *Shell Oil*, a group of Nicaraguan plaintiffs had obtained a judgment in Nicaragua for exposure to DBCP, a nematocide used to control infestation of crops.<sup>221</sup> The plaintiffs filed suit in Nicaragua for damages from exposure to DBCP.<sup>222</sup> The Nicaraguan claimants (Claimants) obtained a \$489.4 million judgment against four companies, one of which was Shell Oil.<sup>223</sup> The Claimants tried to enforce the judgment in the Central District of California against all four defendants.<sup>224</sup> The Claimants accidentally, however, named “Shell Chemical Company” as a defendant instead of Shell Oil Company, which the Claimants conceded and dismissed on appeal.<sup>225</sup> Shell Oil then filed an action for declaratory relief in the Central District of California, seeking a declaration that the Nicaraguan judgment was unenforceable.<sup>226</sup>

The California district court first addressed whether Shell Oil’s action was ripe. In determining ripeness, the court concluded that there was a substantial controversy between the parties.<sup>227</sup> The Claimants had obtained a multimillion-dollar judgment against Shell Oil in Nicaragua, and had made it clear that they were going to enforce the judgment from their initial attempt to do so in the same jurisdiction.<sup>228</sup> There was every reason to believe that they would attempt to enforce the judgment now that they had realized their mistake.<sup>229</sup> Next, the court analyzed whether the Nicaraguan judgment was enforceable in California.<sup>230</sup> The district court concluded that, under California’s codification of the Recognition Act and relevant standards for summary judgment, the Nicaraguan court lacked personal jurisdiction over Shell Oil (one of the grounds for non-recognition)<sup>231</sup> and there was no genuine issue of material fact remaining to be decided.<sup>232</sup> Thus, a declaratory judgment that the

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221. *Id.* at \*3.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at \*4.

228. *Id.*

229. *Id.*

230. *Id.* at \*5.

231. *Id.* at \*6.

232. *Id.* at \*13.

Nicaraguan judgment was unenforceable in the United States was proper.<sup>233</sup>

The Second Circuit, however, distinguished *Shell Oil* because unlike the Nicaraguan Claimants, the LAPs had not yet tried to enforce the Ecuadorian judgment in New York. Despite some ambiguity in the California district court's reasoning, the Second Circuit stated "to the extent that *Shell [Oil]* stands for the proposition that the Recognition Act can be used by judgment-debtors as a procedural lever to seek affirmative invalidation of foreign judgments before their enforcement is sought, we decline to follow it."<sup>234</sup>

#### D. Ripeness and Libel Tourism

While the Central District of California in *Shell Oil* considered whether a money judgment-debtor could bring an affirmative action in the United States before the judgment-creditor had technically tried to enforce the judgment,<sup>235</sup> the Ninth Circuit examined the ripeness issue with regard to *non-money* judgments. In *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme (Yahoo! III)*, eight judges out of a divided en banc court discussed a preemptive suit for non-enforceability under the First Amendment of a French court's judgment.<sup>236</sup> The underlying action involved the organizations La Ligue Contre le Racisme et l'Antisemitisme (LICRA) and L'Union des Etudiants Juifs de France (UEJF), which sued Yahoo!, an Internet service provider, for making available to French citizens various websites selling Nazi paraphernalia and displaying Nazi symbols in violation of French law.<sup>237</sup> The French court issued an interim order, requiring Yahoo! to take the websites down or block French access to those sites.<sup>238</sup> Yahoo! objected, and responded that there was no technical solution to that order.<sup>239</sup> The company filed suit against LICRA in California federal district court, seeking a declaration that the interim orders were not recognizable or enforceable in the United States.<sup>240</sup> The district court held that it had

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233. *Id.* (citing CAL. CIV. PROC. CODE § 1713.4(a)(2) (repealed 2007); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482 (1987)).

234. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 241 (2d Cir. 2012).

235. *Shell Oil II*, 2005 WL 6184247, at \*4.

236. 433 F.3d 1199 (9th Cir. 2006) (en banc).

237. *Id.* at 1202.

238. *Id.* at 1202–03.

239. *Id.* at 1203.

240. *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme (Yahoo! I)*, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001).

personal jurisdiction over LICRA and UEJF, denying their motion to dismiss for lack of personal jurisdiction.<sup>241</sup> Several months later, in another “thoughtful opinion,” as described by the Ninth Circuit,<sup>242</sup> the district court concluded that the suit was ripe, that abstention was not warranted, and that “the First Amendment precludes enforcement within the United States.”<sup>243</sup>

In an incredibly fractured en banc opinion, the Ninth Circuit majority reversed the district court. The majority found that the district court did have personal jurisdiction over LICRA and UEJF.<sup>244</sup> Of that majority, three judges wanted to dismiss the case for lack of ripeness, and five judges concluded that the case was ripe for adjudication under the requirements articulated in *Abbott Laboratories*.<sup>245</sup> In applying the two-part *Abbott Laboratories* test, the three judges who wished to dismiss the case for lack of ripeness looked at the precise legal question to be answered in applying the fitness for judicial resolution prong from *Abbott Laboratories*, as well as the factual record.<sup>246</sup> They concluded that there was no federal statute on the recognition of foreign-country judgments, and that California’s version of the Recognition Act did not cover injunctions.<sup>247</sup> Thus, the judges felt compelled to consider international comity, and the general principle followed by California courts that an American court will not enforce a foreign judgment if that judgment is “repugnant to the public policy of the United States . . . .”<sup>248</sup>

It was difficult to tell, however, whether the French judgment would be repugnant to the public policy of the United States—adding to the prematurity and speculative nature of the suit. The three judges further noted that it was unclear whether, or exactly *how*, Yahoo! had complied with the French court’s orders, which would be highly relevant to whether enforcement of the judgment would be

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241. *Id.* at 1180.

242. *See Yahoo! III*, 433 F.3d at 1204 (en banc).

243. *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme (Yahoo! II)*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001), *rev’d*, 379 F.3d 1120 (9th Cir. 2004), *on reh’g en banc*, 433 F.3d 1199 (9th Cir. 2006), *rev’d and remanded*, 433 F.3d 1199 (9th Cir. 2006).

244. *Yahoo! III*, 433 F.3d at 1201.

245. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

246. *Id.* at 1212.

247. *Id.* at 1212–13.

248. *Id.* (noting that California courts routinely cite RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987)).

repugnant to public policy.<sup>249</sup> “Without a finding that further compliance with the French court’s orders would necessarily result in restrictions on access by users in the United States,” the court reasoned, “the only question in this case is whether California public policy and the First Amendment require unrestricted access by Internet users *in France*. In other words, the only question would involve a determination of whether the First Amendment has extraterritorial application,”<sup>250</sup> the extent of which was very unclear. Thus, the question was not fit for judicial resolution.

Turning to the hardship of the parties, the three judges concluded that “[t]he core of Yahoo!’s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France.”<sup>251</sup> However, as was discussed in the fitness for judicial resolution prong, the existence of a right to extraterritorially apply U.S. constitutional rights to free speech was not clear. The judges found that because it was incredibly unlikely that any monetary penalty could actually be enforced against Yahoo!, and because the extent to which Yahoo! would have to restrict American users was quite speculative, the level of harm was not sufficient to render the suit ripe.<sup>252</sup>

The *Yahoo! III* court eventually decided to dismiss the case, even though the opinion addressing the ripeness issue was written by just three judges.<sup>253</sup> Indeed, “[w]hen the votes of the three judges who conclude that the suit is unripe are combined with the votes of the three dissenting judges who conclude that there is no personal jurisdiction over LICRA and UEJF, there are six votes to dismiss Yahoo!’s suit.”<sup>254</sup> Still, the question remains whether Chevron’s suit and its request for an anti-enforcement injunction should have been analyzed within the context of the two-part *Abbott Labs* test.

#### IV. DISCUSSION

The Second Circuit’s decision in *Naranjo* still leaves some unanswered questions and unsettled law. As a case study, it is a wonderful example of the complexities and ironies that accompany international litigation. But for practitioners, it creates a number of

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249. *Id.* at 1216.

250. *Id.* at 1217.

251. *Id.* at 1221.

252. *Id.*

253. *Id.* at 1224.

254. *Id.*

procedural hurdles to overcome when combating aggressive multinational enforcement proceedings.

Practically speaking, it is clear that even if the LAPs tried to enforce the Ecuadorian judgment in the United States, it would probably be unenforceable in any state that has codified a version of the Recognition Act.<sup>255</sup> The Guerra report states that the LAPs' attorneys ghostwrote the Ecuadorian court's multibillion-dollar judgment.<sup>256</sup> It has been suggested that transnational tort cases in particular are susceptible to litigation impropriety,<sup>257</sup> and the Chevron-Ecuador litigation is a good illustration of that observation.

Chevron was asking for an unusual injunction. Indeed, the *Naranjo* and *Donziger* opinions indicate that the courts in those cases were not sure how to address the issue because they applied multiple legal analyses: the DJA,<sup>258</sup> the Recognition Act, and the applicable standards in New York for granting anti-suit injunctions.<sup>259</sup> Moreover, other cases evaluating preemptive suits for non-enforcement have addressed whether the action is ripe pursuant to Article III of the federal Constitution—mostly in the context of libel tourism.<sup>260</sup> The various problems with the Second Circuit's decision in *Naranjo* and the Southern District of New York's in *Donziger* (Parts IV.A and IV.B) are discussed in turn. Part IV.C discusses whether a ripeness analysis is relevant, and if so, whether that conclusion has any bearing on the underlying problem of aggressive multinational enforcement proceedings. Part IV.D discusses alternative approaches

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255. The judgment would probably fall in the “does not provide improper tribunals” and “obtained by fraud” categories of the Recognition Act, which would render the judgment as not conclusive and unrecognizable. See RECOGNITION ACT, *supra* note 8, § 4(a)(1), (b)(1). New York's codification of the Recognition Act provides the same grounds for non-recognition. See N.Y. C.P.L.R. § 5304(a)(1), (b)(3) (McKinney 1997).

256. See Bastidas, *supra* note 80.

257. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 457–58 (2011).

258. 28 U.S.C. § 2201 (2012).

259. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987). For further discussion of the standards for granting anti-suit injunctions in New York, see *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 646–48 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

260. See, e.g., *Yahoo! III*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (holding that the court had personal jurisdiction over an Internet service provider's suit for declaration that a French order to block French access to certain websites was unenforceable in the United States, with eight of the en banc judges addressing whether the action was ripe).

and proposes a solution that would involve crafting a new injunction using a modified anti-suit injunction analysis.

### A. Problems with the *Naranjo* Decision

The Second Circuit's decision that courts should dismiss a motion for a preliminary anti-enforcement injunction because the Recognition Act applies—and not the standards for granting anti-suit injunctions—is problematic from both a legal and policy standpoint.

The *Naranjo* court held that N.Y. C.P.L.R. Article 53 (New York's version of the Recognition Act) was unavailable to Chevron due to a procedural restriction: Article 53 provides defenses to recognition and cannot act as an affirmative cause of action.<sup>261</sup> Assuming the Second Circuit was correct, *China Trade* is indeed of “limited relevance.”<sup>262</sup> Instead, the Recognition Act applies, but cannot provide a basis for non-liability standing alone.<sup>263</sup>

Although the Second Circuit was able to shed some light on how to interpret the Recognition Act—at least within the Second Circuit, if not other Circuits—the opinion poses several problems as a matter of law and policy. The *Naranjo* decision provides judgment-creditors who have potentially unfair judgments in hand with a roadmap, telling them precisely what to do if they want to enforce a judgment that would not pass muster in the United States. To make sure the judgment-debtor has no remedy from defending in multiple fora, judgment-creditors must simply avoid the United States, and proceed in countries where the defendant has assets and the local justice system would be less squeamish about recognizing a questionable award. This roadmap effectively leads to a form of harassment, creating the kind of vexatious proceedings that the anti-suit injunction standards arguably exist to prevent.<sup>264</sup> It is a strange case where the

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261. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 240 (2d Cir. 2012); N.Y. C.P.L.R. § 5304 (McKinney 1997), construed in David D. Siegel, *Supplementary Practice Commentaries: CPLR 5303:1. Recognition and Procedure for Enforcement*, N.Y. C.P.L.R. § 5303 (McKinney Supp. 2013).

262. *Naranjo*, 667 F.3d at 243.

263. See *id.* at 240 (“Whatever the merits of Chevron’s complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavailable: The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor.”).

264. See Treviño de Coale, *supra* note 131, at 86 (“[T]he magnitude of the undesirable effects of parallel litigation,’ such as the cost, duplication and unfairness of requiring a party to litigate in an unfamiliar forum, have persuaded U.S. courts to restrict parallel litigation through the doctrines of forum non conveniens, international comity, and lis alibi pendens, and antisuit injunctions.”)(footnotes

*China Trade* factors seem like they should apply, but do not because there is not yet an enforcement proceeding in the United States.

Although the factors for granting anti-suit injunctions seem to mirror Chevron's situation, the Second Circuit was probably right that *China Trade* and its progeny were of limited relevance. The very wording of the *China Trade* test indicates that it applies only to parallel proceedings—i.e., to multiple proceedings that have already begun.<sup>265</sup> Here, when the injunction was originally sought, the LAPs had not commenced any enforcement proceedings (they merely threatened to begin them).<sup>266</sup> Moreover, a threshold requirement of *China Trade* requires that resolution of the case in the enjoining forum would be dispositive of the actions enjoined in the foreign forum.<sup>267</sup> Is New York judgment recognition law dispositive of proceedings in Canada, for example? Or Argentina? The answer is most likely no.

Another question raised by the *Naranjo* opinion is whether the picture changed after enforcement proceedings commenced in other countries. Would the Second Circuit have affirmed the district court's injunction in *Donziger* if the proceedings in Brazil or Canada or Argentina had already begun when the district court issued its opinion? The answer, arguably, is that while it may have had some bearing on the Second Circuit's decision in *Naranjo* (which is unlikely, considering how concerned the Second Circuit was about international comity), it would not have made any difference to the overarching problem discussed in this Note. Particularly because the Second Circuit's solution for Chevron was to wait to assert the Recognition Act's defenses for when the judgment-creditor brought an enforcement proceeding in the United States, the fact that proceedings had begun in another country makes no difference. An enforcement proceeding still has not occurred in the United States, and therefore the Recognition Act provides no relief. In future cases,

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omitted) (quoting Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM L. & POL'Y J. 1, 9 (1995))).

265. See *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (requiring that, among other things, the parties in the other forum be identical, and that the foreign proceedings are vexatious, assuming that there is another proceeding that has already begun).

266. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 594 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

267. *China Trade*, 837 F.2d at 36.



the judgment-debtor will still be forced to defend in multiple countries and hope that some kind of enforcement proceeding will be filed in the United States, allowing the judgment-debtor to utilize the Recognition Act's defenses.

Nevertheless, these issues do not mean that *China Trade* is completely irrelevant. The LAPs have tried to bring identical enforcement proceedings in multiple fora outside the United States.<sup>268</sup> The proceedings are oppressive and vexatious. The situation looks like something that should be evaluated under *China Trade*, but it technically cannot apply because there is no parallel proceeding in the United States. Even at the time *Naranjo* was decided, none of the enforcement actions had begun. Chevron was still appealing the judgment in Ecuador, although the LAPs were planning on trying to enforce the judgment in multiple fora before those proceedings were complete.<sup>269</sup>

The issue of the DJA is slightly more nuanced. *Shell Oil*, which was discussed in *Naranjo*, involved a declaration of non-enforceability within the United States. In issuing declaratory judgment, the court in *Shell Oil* determined that a Nicaraguan judgment would be unenforceable in the United States because it was unenforceable under California's version of the Recognition Act.<sup>270</sup> Thus, the DJA could have at least provided a remedy *within the United States*. Parties bring declarations of non-liability all the time, and there is no reason why the district court could not have declared the judgment unenforceable in the United States, like the court did in *Shell Oil*. The court in *Donziger*, however, was deciding not whether to grant a motion for declaratory judgment, but rather, whether to issue a preliminary anti-enforcement injunction.<sup>271</sup> The opinion was unclear about what standard applied because such an injunction had never been issued before. Regardless, looking to the Recognition Act in determining whether to issue a declaratory judgment worldwide is not a proper remedy, because U.S. law cannot determine a judgment's enforceability in another country's legal system without violating international comity.<sup>272</sup>

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268. See sources cited *supra* note 79.

269. See *Donziger*, 768 F. Supp. 2d at 594. One of the LAPs' principal lawyers stated, "[W]e're coming back immediately, as soon as we can, to get that judgment enforced. We are not waiting for the appeals process, as is our right." *Id.* at 594 n.4.

270. CAL. CIV. PROC. CODE § 1717 (West 2007); see *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWX), 2005 WL 6184247, at \*13, (C.D. Cal. Nov. 10, 2005).

271. *Donziger*, 768 F. Supp. 2d at 594-95.

272. See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 242-43 (2d Cir. 2012) ("Nothing in the language, history, or purposes of the [Recognition] Act suggests that it creates

### B. Problems with the *Donziger* Decision

The *Donziger* opinion presents a set of problems separate from the *Naranjo* opinion as a matter of both law and policy. Legally speaking, although the *Donziger* court raised a number of good arguments for why the harm would be irreparable and why the foreign proceedings were vexatious, it simply lacked the procedural device with which to attach the injunction. As mentioned previously, the Second Circuit was probably correct that the Recognition Act, on its own, cannot provide a basis for non-liability.<sup>273</sup> The anti-suit injunction test is only applicable to existing parallel proceedings.

The DJA, however, is an equally unsatisfying solution for a judgment-debtor in Chevron's position. The DJA is procedural only, and as with the Recognition Act, courts must reference substantive law when issuing a declaratory judgment.<sup>274</sup> The district court in *Donziger* was essentially grasping for a procedural hook that it felt *must* exist, but instead found a variety of arguments that were all insufficient.

Although courts should be able to issue declaratory judgments on enforceability within the United States, it is unlikely that a court would be able to declare a foreign judgment unenforceable anywhere in the *world*.<sup>275</sup> Nevertheless, the reason the judge in *Donziger* had no qualms with issuing an anti-enforcement injunction as far as comity was concerned was because the injunction was binding on the parties, and not foreign court systems.<sup>276</sup> It was also a preliminary injunction, meant to stop the LAPs from enforcing the judgment until a trial on the merits could be held.<sup>277</sup> The injunction was not necessarily intended to be a permanent one, declaring that the entire world must adhere to U.S. judgment recognition law. There was substantial evidence of fraudulent proceedings in Ecuador and evidence that the LAPs had manipulated those proceedings.<sup>278</sup> Perhaps the Second

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causes of action by which disappointed litigants in foreign cases can ask a New York court to . . . preempt the courts of other countries from making their own decisions about the enforceability of such judgments.”).

273. See *supra* Part IV.A.

274. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

275. International comity likely prevents directing foreign court systems' judgments, as noted in the *Naranjo* opinion. See *Naranjo*, 667 F.3d at 242; *supra* Part II.A.

276. See *Donziger*, 768 F. Supp. 2d at 638 (“Indeed, since equity acts *in personam*, the Court may issue an injunction barring all of the defendants from filing enforcement proceedings in other jurisdictions.”).

277. *Id.* at 594.

278. See *supra* notes 79–82 and accompanying text.

Circuit was understating its ability to do anything for Chevron—but again, if the procedural device does not exist, no amount of policy will help a judgment-debtor.

Another potential issue with the *Donziger* decision is the possibility that such an injunction is too protective of U.S. litigants. What interest does the Southern District of New York have in preventing Chevron from being forced to litigate all over the world, other than the fact that Chevron is based in the United States? Would this be a form of protective jurisdiction? Although anti-suit injunctions, for example, are already a form of protective judicial procedures,<sup>279</sup> it is arguably not a U.S. court's responsibility to protect judgment-debtors like Chevron from abusive multinational litigation—unless the judgment contradicts a strongly-held public policy of the forum. Perhaps defending in multiple fora is simply the price a large company pays for doing business in countries where notions of constitutionally required due process do not necessarily exist. That argument, combined with the international comity concerns (the idea that issuing such an injunction would fail to accord the respect that a foreign court system deserves<sup>280</sup>), makes the feasibility of such an injunction look very weak.

### C. The Ripeness Analysis

As far as ripeness goes, even if ripeness is what courts should be evaluating, then the Recognition Act/*China Trade*/DJA discussion is still pertinent. The court in *Yahoo! III*<sup>281</sup> noted that when reviewing the first prong of the *Abbott Labs* test, courts generally look to both the facts of the case and the substantive legal issue at hand.<sup>282</sup> Whether a court may attach an anti-enforcement injunction to the Recognition Act certainly speaks to the question of whether the issue is fit for judicial resolution, which essentially leads us down the same road travelled by the court in *Naranjo*. If the Recognition Act is unavailable as a procedural remedy to justify an anti-enforcement injunction, then the action cannot be fit for judicial resolution until the judgment-creditors have tried to enforce the judgment in the

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279. See Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT'L L. 283, 320 (2005) (“Enjoining unrelated foreign proceedings that adversely affect national policies or the jurisdiction of the court may be analyzed as an aspect of the court’s well-established jurisdiction to issue ‘protective’ anti-suit injunctions.”).

280. See *supra* notes 91–95 and accompanying text on *Hilton v. Guyot*.

281. 433 F.3d 1199 (9th Cir. 2006) (en banc).

282. *Id.* at 1212.

United States. In effect, the circle comes back to the problems and questions raised by the *Naranjo* decision discussed in Part IV.A. Thus, addressing the ripeness question does not lead to any real, final conclusions for the purposes of this Note's overarching question. Instead, adding a ripeness layer to the inquiry will merely add to the procedural difficulties a litigant will face when requesting an anti-enforcement injunction.

#### D. So, What is the Remedy?

The question now, of course (after the various arguments used in *Donziger* and *Naranjo* have been ruled out), is how can the problem be solved? What tools are left for a court to use when a judgment-debtor is faced with multiple proceedings in different countries to enforce an allegedly unfair foreign judgment?

A principal problem in international litigation is the lack of a set standard for cases such as these. Chevron was certainly asking for something unusual. As the Second Circuit noted, *Shell Oil* was the closest comparison, and in *Shell Oil* the motion for declaratory judgment was granted primarily because the judgment-creditors previously tried to enforce the judgment, but had named the wrong defendant.<sup>283</sup> The *Naranjo* opinion is also the only opinion that refers to the legality of an "anti-enforcement injunction" in this situation.<sup>284</sup> Nonetheless, the fact that the courts in *Donziger* and *Naranjo* refer to multiple lines of legal analysis in their struggle to find an answer to this problem indicates how complicated international litigation proceedings can be.

International law, as a general matter, does not provide any remedy for abusive enforcement proceedings either. The United States is not subject to any treaty on recognition of judgments,<sup>285</sup> and thus no law exists (at least, no law that is binding in the United States) on multiple enforcement proceedings and whether they can be stopped or consolidated in some way. There the anti-suit injunction standards present additional issues. The conservative side of the anti-suit injunction Circuit split requires that parallel proceedings should

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283. See generally *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWX), 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005).

284. See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012) (referring to the injunction as an anti-enforcement injunction). *But cf.* *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733 (D.C. Cir. 2012) (referring to an "anti-enforcement injunction" issued by the Supreme Court of Belize), *cert. denied*, 133 S. Ct. 274 (2012).

285. See *supra* note 87 and accompanying text.

generally be allowed to continue,<sup>286</sup> which arguably leads to a “race to judgment.”<sup>287</sup> Perhaps the anti-suit injunction standards are no longer helpful in a world where parallel proceedings are common and every international dispute is consumed with a plethora of procedural issues.

As a policy matter (and pointing to the political undertones of the Chevron-Ecuador litigation), there are certainly plenty of academics and environmental groups who support the LAPs’ cause.<sup>288</sup> Aside from anger at the allegations of environmental damage, some organizations have gone so far as to say that the damage in Ecuador rises to the level of human rights abuses.<sup>289</sup> On the other hand, this particular method of retribution for Chevron’s alleged wrongdoing is a bit unconventional. The LAPs’ allegations deal with land and environmental abuses, implying that the ROE should be bringing this action against Chevron (if Chevron should be held liable). Notably, the ROE had already settled claims with Texaco before Chevron’s

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286. See *Laker Airways Ltd. V. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984) (noting that the general rule on the conservative side of the Circuit split is to allow parallel proceedings “on the same *in personam* claim” to “proceed simultaneously, at least until judgment is reached in one which can be pled as *res judicata* in the other”).

287. Vertigan, *supra* note 130, at 173.

288. See Lauren McCaskill, *When Oil Attacks: Litigation Options for Nigerian Plaintiffs in U.S. Federal Courts*, 22 HEALTH MATRIX 535 (2013) (describing the damage the oil companies have done and examining litigation options available to Nigerian plaintiffs by comparing the Chevron-Ecuador events to events in the Niger Delta and speculating on how Chevron might defend against Nigerians, suggesting a common law tort action against Chevron); Patel, *supra* note 172 (summarizing the Texaco/TexPet/Chevron story up until the Second Circuit proceedings in *Naranjo*, emphasizing “the problem of shoddy environmental performance in oil exploitation” and asserting that the Aguinda cases provide a “strong incentive” for corporations not to engage in those exploitations); *Amazon Watch Campaign*, CHEVRONTOXICO, <http://chevrontoxico.com/about/amazon-watch-campaign/> (last visited Nov. 4, 2013) (AmazonWatch is a nonprofit organization that seeks to “protect the rainforests and the indigenous peoples in the Amazon Basin,” and it has launched a “Clean Up Ecuador Campaign.”); *About Us*, AMAZONWATCH, <http://amazonwatch.org/about> (last visited Nov. 4, 2013). For a website detailing the Clean Up Ecuador Campaign’s goals and tactics, see *Amazon Watch Campaign*, CHEVRONTOXICO, <http://chevrontoxico.com/about/amazon-watch-campaign/> (last visited Nov. 4, 2013). The team suing Chevron also maintains a blog, which links the reader to various nonprofit groups that presumably have supported its actions in the past, and invites its readers to follow the blog on various social networking sites. See CHEVRON PIT, <http://thechevronpit.blogspot.com> (last visited Nov. 4, 2013).

289. See *Chevron Pollution and Three Decades of Neglect*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/chevron-pollution-and-three-decades-of-neglect> (last visited Nov. 4, 2013).

involvement.<sup>290</sup> Thus, the situation raises the additional underlying question of whether attorneys like Steven Donziger (particularly in light of Alberto Guerra's sworn affidavit<sup>291</sup>) are taking advantage of litigants like the LAPs, using the cloak of moral justice to hopefully obtain a contingency fee at the end of the road.<sup>292</sup> Should lawyers be allowed to use multiple enforcement proceedings in this way?

Both practically and procedurally, the DJA, *China Trade*, and the Recognition Act are all insufficient, standing alone, to provide some a remedy for aggressive multinational proceedings to enforce an apparently unfair judgment. Each argument has its own weaknesses, which is probably why Chevron attempted to make *all* of them, and why the Second Circuit was able to dismiss each in turn. But, as unique as the Chevron-Ecuador litigation may be, in a world of increasing multinational litigation, aggressive and almost harassing enforcement proceedings are not likely to disappear. So what can litigants and courts do besides spend a great deal of time talking about international comity? After all, courts on both sides of the anti-suit injunction split agree that "comity" is an "elusive concept" and not easily defined.<sup>293</sup> It is simple enough to talk about the respect a court should accord to the legal systems of a foreign nation, but it is quite another task (and a much more difficult one) for courts to articulate a clear standard when actually applying comity to the facts of a specific case.<sup>294</sup>

To name one attempted solution, judgment-debtors who feel victimized by an unfair judgment could do what Chevron tried to do in a later action, which was to find a way to obtain specific jurisdiction over each judgment-creditor individually, and bring all of the parties together in a single suit.<sup>295</sup> Then, the court could find something to which to attach an injunction. In Chevron's case, Chevron could use the claims brought under RICO, arguing for the injunction based on a

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290. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012). Texaco was actually the original defendant in this litigation before Chevron acquired all of Texaco's shares. *See id.* at 594.

291. *See Bastidas*, *supra* note 80.

292. Donziger is the lead attorney for the LAPs. *See Donziger*, 768 F. Supp. 2d at 594 (noting that Chevron claimed that the judgment in Ecuador "was obtained by fraud led in major degree by a New York City lawyer, Steven Donziger").

293. Heiser, *supra* note 2, at 860.

294. *Id.* at 860; *see also* *Quaak v. KPMG Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004) (referring to comity as "a protean concept of jurisdictional respect").

295. *See Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 236–37 (S.D.N.Y. 2012).

common law theory of unjust enrichment—and Chevron has actually tried to make this argument.<sup>296</sup> The unjust enrichment claim was deemed unripe, however, because the judgment-creditors had not yet collected on the judgment anywhere inside or outside the United States.<sup>297</sup> Under New York law, a judgment does not create any vested property interest.<sup>298</sup> Thus, one remedy (albeit an unpalatable one) would have been to wait until the LAPs collected part of the judgment in another forum, and then enjoin them from collecting the rest. That “remedy,” however, would still require Chevron to appear and defend in those jurisdictions, so it does not solve the overarching problem put forth in this Note. Chevron would also have to deliver part of the judgment, which would only be recovered if the district court awarded damages for the unjust enrichment claim.

The best solution is to create a new standard—but not one completely unknown. The federal Circuits should fashion a new type of injunction based on the *China Trade* factors, requiring that the U.S. court have personal jurisdiction over all of the parties through an underlying claim, such as in the RICO action mentioned above. Academics have suggested that anti-suit injunctions should be issued when the foreign action is interdictory in nature,<sup>299</sup> which certainly applies here, so it makes sense to adopt a modified *China Trade* test to anti-enforcement injunctions, particularly when abuse of enforcement proceedings appear imminent.

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296. *See id.* In that action (not to be confused with the preliminary injunction action of the same name), Chevron’s claims included:

[A]ssertions that Steven Donziger, a New York lawyer, and others based in the United States, here conceived, substantially executed, largely funded, and significantly directed a scheme to extort and defraud Chevron, a U.S. company, by, among other things, (1) bringing a baseless lawsuit in Ecuador; (2) fabricating (principally in the United States) evidence for use in that lawsuit in order to obtain an unwarranted judgment there; (3) exerting pressure on Chevron to coerce it to pay money not only by means of the Ecuadorian litigation and Judgment, but also by subjecting Chevron to public attacks in the United States and elsewhere based on false and misleading statements, (4) inducing U.S. public officials to investigate Chevron on the basis of false claims, and (5) making false statements to U.S. courts and intimidating and tampering with witnesses in U.S. court proceedings to prevent Chevron from obtaining evidence of the fraud.

*Id.* at 236–37. Chevron’s complaint stated nine causes of action, including substantive and conspiracy claims under RICO, common law tort claims, unjust enrichment, and state law civil conspiracy claims. *Id.* at 237.

297. *Id.* at 259.

298. *See id.* at 259–60 (citing *In re Calloway*, 423 B.R. 627, 629–30 (Bankr. W.D.N.Y. 2010)).

299. *See generally* Heiser, *supra* note 2 (also arguing that anti-suit injunctions should be granted to enforce choice of court agreements).

When deciding whether to grant an anti-enforcement injunction (notwithstanding whether enforcement proceedings have begun in the United States), courts should, as a threshold matter, determine (1) whether personal jurisdiction exists over all the parties, and (2) whether the U.S. court has a substantial interest in resolving the dispute. The second threshold prong will exist to prevent courts from issuing anti-enforcement injunctions when the United States has little or nothing to do with the case. In the Chevron-Ecuador litigation, for example, the Southern District of New York served as the forum for an earlier tort action brought by the LAPs (then called the “Aguinda plaintiffs”) that was dismissed for *forum non conveniens*.<sup>300</sup> More importantly, the Southern District of New York was also the forum for the underlying RICO action to which the court in *Donziger* sought to attach the anti-enforcement injunction.<sup>301</sup> To satisfy the second threshold requirement, the litigation as a whole must therefore have some contact with the United States. Mere fortuitous jurisdiction over the parties (if the LAPs happened to be domiciled in New York) is not enough. The injunction also may not be attached to a separate and completely unrelated suit.

Next, if both threshold prongs are met, courts should consider whether (a) the enforcement proceedings are likely to occur or have occurred already, (b) the judgment would be unenforceable in the United States based on U.S. recognition law, (c) the judgment-debtor would suffer irreparable harm from those proceedings, and (d) the multi-forum enforcement proceedings violate public policy. Naturally the factors are likely to overlap, and the circumstances in which such a test is likely to be applied are quite narrow. However, the narrowness of this test should hopefully assuage the concerns of those who are already uncomfortable with issuing anti-suit injunctions.

#### CONCLUSION: THE AFTERMATH OF *NARANJO*

Since the Guerra affidavit was released, the LAPs’ case has become essentially worthless to *Donziger*. Chevron has sued various persons and entities associated with the LAPs’ case, including Patton

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300. See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff’d as modified*, 303 F.3d 470 (2d Cir. 2002).

301. See *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 625 (S.D.N.Y. 2011), *vacated sub nom.*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev’d and remanded sub nom.*, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).



Boggs, L.L.P., a large law firm based in Washington, D.C.<sup>302</sup> Patton Boggs had joined Donziger in the suit against Chevron on a partial contingency basis in 2010.<sup>303</sup> Chevron's specific claim against Patton Boggs is for fraud and malicious prosecution during the course of the litigation.<sup>304</sup>

Chevron has also convinced multiple parties to renounce Donziger and "admit" that the proceedings in Ecuador were fraudulent in exchange for being dropped from Chevron's RICO suit.<sup>305</sup> Even before Chevron sued Patton Boggs, Buford Capital—the publicly traded fund that financed Patton Boggs' representation—stated that Patton Boggs had given them a misleading analysis of the case.<sup>306</sup> Stratus Consulting (the company Donziger hired to comment on the expert report in Ecuador) has recanted its scientific findings and conclusions in exchange for being dropped from the racketeering suit as well.<sup>307</sup> Finally, a Canadian court has dismissed one of the LAPs' enforcement actions, mostly because Chevron has no assets in Ontario.<sup>308</sup>

Again, plenty of environmentalists and academics would like to see Chevron pay for its wrongdoing in the Amazon, regardless of the lengths taken to achieve that payment. The litigation, however, has become entirely unmanageable. Multiple firms on the case have asked to withdraw, and one such firm has noted poetically that due to Chevron's army of lawyers, the case has "degenerated into a Dickensian farce."<sup>309</sup>

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302. See Steve LeVine, *One of the Nastiest Fights in Big Oil Just Got Nastier*, QUARTZ (May 10, 2013), <http://qz.com/83402/chevron-ecuador-fight-with-patton-boggs-just-got-nastier>.

303. *Id.*

304. *Id.*

305. *Id.*

306. See Roger Parloff, *Litigation Finance Firm in Chevron Case Says it Was Duped by Patton Boggs*, CNNMONEY (Apr. 17, 2013, 1:16 PM), <http://features.blogs.fortune.cnn.com/2013/04/17/burford-patton-boggs-chevron-suit>.

307. *Id.*

308. See Daniel Fisher, *Chevron Plaintiffs Lose a Crucial Round in Battle to Enforce \$18 Billion Judgment*, FORBES (May 2, 2013, 2:53 PM), <http://www.forbes.com/sites/danielfisher/2013/05/02/chevron-plaintiffs-lose-a-crucial-round-in-battle-to-enforce-18-billion-judgment>. The judge in Canada stated, "The jurisdiction where Chevron owns assets is only a short distance from this courthouse—in less than an hour's drive one can cross a bridge [into the United States]," and that "[t]here is nothing in Ontario to fight over." *Id.* (internal quotation marks omitted). The court was essentially saying that the LAPs must trek to the U.S. if they want to enforce their judgment. *Id.*

309. Daniel Fisher, *Donziger's Woes Increase as Lawyers Seek to Withdraw From Chevron Case*, FORBES (May 4, 2013, 10:36 AM), <http://www.forbes.com/sites/>

The way the Chevron-Ecuador story has unfolded begs the question of how much time and money was spent at the expense of so many individuals and entities—all in an attempt to take advantage of a polluted rainforest and its inhabitants. Given that there is little remedy in international law and a similar pattern of litigation is bound to happen again, federal courts should adopt a new test for issuing anti-enforcement injunctions to prevent aggressive, multinational enforcement proceedings when the above-described factors are met. Such a test would create a balance between international comity concerns and the interest in both preventing proceedings to enforce a fraudulent judgment from occurring and providing an avenue for judgment-debtors to pursue when they are, or may become, subject to such proceedings.