International Lawyer

Volume 46 | Number 4 Article 8

2012

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Abstract

Domination of the global business world by U.S. companies has raised many legal issues all over the world. In Ecuador, the issue arises regarding how to hold a U.S. oil company liable for contamination of the indigenous lands and water. Texaco's contamination of the Oriente region of Ecuador raises questions that affect Ecuadorian, international, and U.S. law. In Aguinda v. Chevron, the provincial and appellate courts of Ecuador tackled the issues of procedure and liability for contamination. Now that the lower courts have enacted a substantial judgment against Chevron for its actions, the Ecuadorian and U.S. courts must tackle the issue of whether that judgment is enforceable in the United States. With many similar cases arising in international litigation, a decision by a U.S. court could either lay the stepping-stones for foreign plaintiffs to hold U.S. companies liable or take away any hope for doing so.

Introduction

A history of expansive oil-industry-based contamination in the Oriente region of Ecuador has been termed the "Amazon Chernobyl" because of the shocking extent of damage to the environment and people.[1] But the actual contamination is only one small part of the story behind *Aguinda v. Chevron*.[2] The indigenous people of Ecuador brought suit against Texaco, which subsequently merged with Chevron, for alleged environmental damage and resulting increases in cancer and other illnesses in the region.[3] The close to 30,000 plaintiffs brought suit in the Southern District of New York, but Texaco moved to dismiss under the doctrine of forum non conveniens.[4] Once the court determined that

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1. Christina Weston, Comment, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731, 731 (2011).

2. 142 F.Supp.2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

3. *Id.* at 537-38.

4. *Id.* at 544.

Ecuador would be a more suitable jurisdiction, and the plaintiffs filed suit there, Chevron—who had become the named defendant—began questioning the moral and professional integrity of the Ecuadorian courts.[5] The opposing parties not only fought each other in court, but also outside of court, through accusations of bribery, extortion, and deceptive practices.[6] Furthermore, Chevron has sought other means of settlement outside of the Ecuadorian court system.[7] Because of the dramatic fashion with which this saga has played out, journalists have described the trial as "more like a mystery thriller than a battle of briefs."[8] This case will have important implications for the future of mass-toxic-tort claims stemming from U.S. companies' actions in foreign countries because of the question of enforceability, the issue of the integrity of other nations' court systems, the dramatic backdrop, and the size of the judgment.[9]

I. Factual Background

A. History of Texaco and Chevron in Ecuador

The story behind *Aguinda v. Chevron* started in 1964 when Texaco Petroleum (Texpet) signed a contract to begin an oil operation in Ecuador with the nation's state-run oil company Petroecuador.[10] Texaco operated in Ecuador's oil industry until 1992, when its consortium contract with Petroecuador ended (a year before the *Aguinda* plaintiffs filed suit in New York).[11] Although Texaco began as the defendant in this lawsuit, ChevronTexaco (typically referred to as Chevron), took over as the named defendant when Texaco and Chevron merged in October of 2001.[12] Because of the partnership with Petroecuador and the changes in entity name and form, the actual source of contamination became an important issue for the fact stage of the *Aguinda* case in Ecuador.[13] The American entities—Chevron, Texaco, and Texpet—blamed the Ecuadorian entity Petroecuador.[14] The plaintiffs blamed the American entities.[15] The entity of today blamed

5. Weston, *supra* note 1, at 736.

6. *See id.* at 734-35.

7. *See id.* at 733 (describing Chevron's attempts to reach an end to this process through the American Arbitration Association while the trial went on in Ecuador).

8. Simon Romero & Clifford Kraus, *After 16 Years, Ecuador Oil Pollution Case Only Grows Murkier*, N.Y. Times, Oct. 10, 2009, at A4.

9. *See* Weston, *supra* note 1, at 731 ("[T]he largest judgment ever issued in an environmental case.").

10. *History*, Texaco.com, http://www.texaco.com/sitelets/ecuador/en/history/background.aspx (last visited Jan. 5, 2013).

11. *Timeline of Events*, Texaco.com, http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx (last visited Jan. 5, 2013).

12. *Id.*

13. Corte Provincial De Justicia De Sucumbios [CPJS] [Provincial Court of Justice of Sucumbios], 3/1/2012, "Aguinda c. Chevron/ indemnizacion," Case No. 2011-0106 (2012-78-6) (Ecuador) (English translation of the decision filed in Chevron Corp. v. Naranjo, 667 F.3d 232, 236 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423, 184 L. Ed. 2d 288 (2012), ECF No. 626-2).

14. *Ecuador Lawsuit – Background*, Chevron.com, http://www.chevron.com/ecuador/background (last visited Jan. 5, 2013).

15. Corte Provincial De Justicia De Sucumbios [CPJS] [Provincial Court of Justice of Sucumbios], 14/2/2011, "Aguinda c. Chevron/ indemnizacion," Case No. 2003-0002 (2011-63-1) (Ecuador) (English translation of the decision filed in Chevron Corp. v. Donzinger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. filed Feb. 28, 2011), ECF No. 146-7).

the entities of the past—Texaco and Texpet.[16] Furthermore, Chevron claimed that it did not assume the liabilities of Texaco, and Texaco claimed it was not responsible for the liabilities of Texpet, a separate entity.[17]

On top of pointing fingers at different entities and parties, Chevron also claimed that it did not hold liability for the contamination of the region because Texaco had remediated mass amounts of damage in the past.[18] According to Texaco, it completed a forty million dollar remediation that was "fully inspected, certified and approved" by the Government of Ecuador.[19] Furthermore, Texaco claimed that experts have shown that Texaco carried out the remediation correctly and completely, leaving a "low health risk" to the inhabitants of the area.[20] But according to Frente de Defensa de la Amazonía and Amazon Watch, two groups supporting the plaintiffs' cause, the "remediation" covered only 16 percent of the pits in question, included fake tests, and did not effectively remove the toxic substances from the area.[21]

B. Evidence Presented at Trial

The entity recognition and success of remediation issues formed the basis for preliminary arguments, but do not come close to the depth and expanse of the arguments over tests, expert opinions, and other evidence. The actual trial included 220,000 pages of "more than 100 expert reports, testimony from dozens of witnesses, scientific data from 54 court-supervised inspections, independent health evaluations, and reams of legal arguments."[22] Chevron presented evidence that tests of the water at remediated sites turned up samples that met Ecuadorian, Environmental Protection Agency (EPA), and World Health Organization (WHO) standards 99 percent of the time.[23] The defendants also stated that tests of the soil at these sites met the Ecuadorian standards 99 percent of the time, but the statement does not mention EPA or WHO standards.[24] Furthermore, Chevron claimed that Dave Russell and Dr. Charles Calmbacher, experts hired by the plaintiff's lawyers, stated that the testing results "did not support the allegations of environmental contamination by Texaco."[25] Chevron went on to say that Calmbacher claimed he did not write or sign the reports filed with the court under his name.[26] The provincial court decided not to consider the Calmbacher reports in its judgment because of the con-

16. *Id.* at 3.

17. *See id.* at 12.

18. *The Fraudulent Case Against Chevron in Ecuador*, CHEVRON.COM, http://www.chevron.com/ecuador/patternoffraud/ (last visited Jan. 5, 2013).

19. *History*, *supra* note 10. *See also Chevron Corp. v. Naranjo*, 667 F.3d 232 (2012) (describing TexPet's remediation project).

20. *History*, *supra* note 10.

21. Amazon Defense Coalition, *Summary of Overwhelming Evidence Against Chevron in Ecuador Trial*, CHEVRONTOXICO.COM, 3 (Jan. 2012), http://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf. Sources published by these two groups state that "83 percent of Chevron's supposedly remediated pits showed illegal levels of TPH," the carcinogen in question throughout the suit. *Id.*

22. *Id.* at 1.

23. *History*, *supra* note 10.

24. *Id.*

25. *The Fraudulent Case Against Chevron in Ecuador*, *supra* note 18.

26. *Id.*

tention behind them.[27] On top of this allegedly falsified report, Chevron claimed that the plaintiffs' consultant only made "cursory examination of a small handful of sites" and attributed all damage to Chevron instead of separating damage out between the Texpet and Petroecuador consortium and the sole acts of Petroecuador.[28]

On the other hand, the Ecuadorian inhabitants presented evidence from site inspections, expert testimonies, and eye witness accounts regarding the dumping of produced water into the Amazon, unlined waste pits on Chevron sites, oil spills, and the resulting health impacts.[29] Through site inspections, the Ecuadorian plaintiffs' consultants found levels of Total Petroleum Hydrocarbon (TPH) that reached 900 times over the Ecuadorian standard, which is ten times more lenient than U.S. standards for TPH.[30] Rodrigo Perez Pallares, Chevron's "lead representative in Ecuador," conceded that Chevron had dumped "at least 16 billion gallons of produced water" into the rivers and waterways of the area.[31] Furthermore, the plaintiffs' team claimed that Chevron utilized and then abandoned unlined pits that leaked toxins, damaging the environment and the health of the community.[32] Plaintiffs further claimed that Chevron knew of the damaging effects of these unlined pits, but chose not to remedy the situation because of the costs.[33] According to the Amazon Coalition, Chevron's environmental auditors, Fugro McLelland and H.B.T. Agra, admitted that the company did not have a plan to stop or remedy the oil spills that occurred in the region.[34] In judging the mass amounts of evidence, the court did not consider the opinion-based statements of experts because of the contention and commotion surrounding each expert testimony; the court only looked to the technical statements in these expert testimonies.[35]

On top of evidence of the actual contamination, the plaintiffs presented evidence of the long-lasting health and environmental effects from this contamination. The indigenous and impoverished people of the region relied and still rely on the rivers of the area for drinking, cooking, bathing, and fishing.[36] The Amazon Coalition, in summarizing the evidence used in trial, listed numerous known "human carcinogens and toxins" that exist in TPH and other toxic substances found at the inspected sites and stated that the court used materials from the U.S. Agency for Toxic Substances and Disease Registry to assess

27. Corte Provincial De Justicia De Sucumbios [CPJS] [Provincial Court of Justice of Sucumbios], 14/2/2011, "Aguinda c. Chevron/ indemnizacion," Case No. 2003-0002 (2011-63-1), at 50 (Ecuador) (English translation of the decision filed in Chevron Corp. v. Donzinger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. filed Feb. 28, 2011), ECF No. 146-7).

28. *History*, *supra* note 10.

29. *Aguinda c. Chevron*, No. 2003-0002, at 165-74.

30. Amazon Defense Coalition, *supra* note 21, at 3 (noting that nearly 800 samples of actual pits showed an average of 20,033 mg/kg of TPH and nearly 1000 samples of areas around those pits showed an average of 5247 mg/kg of TPH; Ecuadorian laws and regulations allow 1000 mg/kg of TPH).

31. *Id.* at 1.

32. *Id.*

33. *Id.* at 2.

34. *Id.*

35. Corte Provincial De Justicia De Sucumbios [CPJS] [Provincial Court of Justice of Sucumbios], 14/2/2011, "Aguinda c. Chevron/ indemnizacion," Case No. 2003-0002 (2011-63-1), at 39 (Ecuador) (English translation of the decision filed in Chevron Corp. v. Donzinger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. filed Feb. 28, 2011), ECF No. 146-7).

36. Amazon Defense Coalition, *supra* note 21, at 1.

the nature and impact of these substances.[37] The plaintiffs used expert opinions, testimony from alleged victims, and scientific data to show that the substances released into the area by Texaco caused increased cases of cancer and other detrimental health issues.

II. Legal Background

Judge Nicolas Zambrano Lozada of The Provincial Court of Justice of Sucumbios published a nearly 200-page decision on February 14, 2011.[38] This decision discussed in great detail numerous procedural issues on top of the exhaustive amounts of evidence presented. The main issues that the court addressed included: (1) jurisdictional issues; (2) factual issues based on evidence of contamination, remediation, and health results; (3) numerous allegations of fraud and deceptive practices; and (4) issues of "procedural misconduct."[39] The court held Chevron liable for contamination of the Oriente region and the resulting health and environmental damages.[40] Because even Chevron representatives admitted that Texaco created contamination in the area, the main points of contention during the trial involved liability and procedural issues. The court addressed whether Chevron would be liable for the contamination, what standard to use to determine liability, how to address the parties' alleged "procedural misconduct" during the trial phases, how to address the parties allegations of fraud, and how to calculate damages based on the conclusions to these questions.[41] Ultimately, the court held Chevron liable for Texaco's actions in Ecuador, it used a combination of subjective and objective standards, applied strict liability, determined that Texaco's actions caused serious environmental and health damage, and that the "procedural misconduct" and other aspects of misconduct would be factored into punitive damages.[42] The Ecuadorian court looked to various standards used in U.S. law in adjudicating this case.[43]

A. The Court's Analysis

Because all parties agreed that Texaco had spilt oil, dumped "produced water," and operated dangerous unlined pits, the questions before the court on this matter were: (1) whether Chevron can be held liable for the contamination; (2) what effects the contamination had on the health, culture, and community of the area; and (3) whether Texaco's actions actually caused these effects. After outlining the specific provisions in the consortium contract, laws, and regulations that Texaco violated in their contaminating actions, the court described its holdings regarding these issues.[44] The court decided to

37. *Id.* at 3.

38. *See Aguinda c. Chevron*, No. 2003-0002, at 2.

39. Amazon Defense Coalition, *supra* note 21, at 1-4.

40. *Aguinda c. Chevron*, No. 2003-0002, at 171.

41. *Id. passim.*

42. *Id.* at 186.

43. *Id. passim.*

44. The Ecuadorian laws violated include the Health Code of 1971, the Water Law of 1972, and the Regulation of Hydrocarbon Operations Law of 1987. *Id.* at 62-64, 66, 70. The provisions of the contract that Texaco violated included a clause that states Texaco could not deprive "the towns of the water volume that is indispensable for them for their domestic and irrigable necessities, neither making difficult the navigation, nor taking the drinkable and purity qualities of the waters, nor preventing fishing." *Id.* at 62.

use a two-part test with subjective and objective elements in order to rule whether Chevron could be held liable for the contamination.[45] The court asked whether a "good oil company" would have acted in a way to produce such results and whether Texaco acted reasonably in its specific circumstances.[46] To judge the first, objective element, the court consulted *Primer of Oil and Gas Production*, a 1962 book published by the American Oil Institute that details the "extreme care" with which produced water should be disposed.[47] This book also proved helpful in judging the second, subjective element because Texaco representatives contributed to the work.[48] Furthermore, Texaco created a patented "reinjection" technique for carefully disposing of produced water, but this technology was not utilized in Ecuador, allegedly because of the high cost and lack of will.[49] To further justify its decision that Texaco did not act reasonably in operating its oil operation as it did, the court discussed evidence showing Texaco was aware that it had violated Ecuadorian law—specifically, fines and penalties Texaco had sustained over the years.[50]

Once the court determined that a reasonable oil company in similar circumstances would not have acted as Texaco did, and that Texaco itself had not acted reasonably in its actions, the court then turned to the question of what further standards to impose upon Texaco. The court, looking to U.S. law, determined that strict liability applied to Texaco's actions and Chevron's liability in this case.[51] The Ecuadorian provincial court looked to U.S. tort analysis and "risk theory" in deciding to impose strict liability on Chevron.[52] Because the oil industry proves inherently dangerous and high-risk, and because the plaintiff's burden of proving fault is high, the court imposed strict liability on Chevron in this case.[53] Similarly, the court looked to U.S. tort analysis in analyzing probable cause to determine that Texaco's actions caused the contamination and health defects of the area.[54]

To fully explain its rationale behind finding Chevron liable, the court then addressed each of Chevron's defenses. Chevron attempted to present evidence that it had not taken on the liabilities of Texaco because it had never actually merged with Texaco.[55] The court easily dispelled with this defense by discussing numerous documents and statements proving the merger between Texaco and Chevron.[56] On top of this evidence, the court looked to U.S. corporate veil piercing statutes and analysis to determine that Chevron could be

45. *Id.* at 81-82.

46. *Id.* at 81.

47. *Id.*

48. *Id.* at 82.

49. Here, the court cited to a correspondence between Texaco employees stating that the officials knew that the methods used in Ecuador were unsafe for the environment and surrounding people but that the alternative was not as "efficient and profitable" as the unlined pits. *Id.* at 161-64.

50. *Id.* at 79-80.

51. *Id.* at 83.

52. *Id.*

53. *Id.* at 83-86.

54. *Id.* at 87-88.

55. Corte Provincial De Justicia De Sucumbios [CPJS] [Provincial Court of Justice of Sucumbios], 14/2/2011, "Aguinda c. Chevron/ indemnizacion," Case No. 2003-0002 (2011-63-1), at 7 (Ecuador) (English translation of the decision filed in Chevron Corp. v. Donzinger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. filed Feb. 28, 2011), ECF No. 146-7).

56. This evidence included public statements, documents of the change of name in the entity, and other documents and statements showing that Chevron and Texaco considered themselves one, new entity. *Id.* at 9-11.

held liable for the past actions of Texaco.[57] The court rejected Chevron's claim that Petroecuador was to blame by stating that Chevron and Petroecuador were joint and severally liable for the contamination, so Chevron would have to seek indemnity or contribution from Petroecuador in a separate suit.[58]

Once the court determined that Chevron was liable for the contamination of the area, that Texaco's actions caused severe environmental and health damages in the area, and after it judged Chevron's defenses, it looked to the question of damages. The court not only contemplated the past health damages, but also "reasonably foreseeable" future damages.[59] Although the court rejected the plaintiffs' arguments for "cultural damages" and "loss of land," it did take into account their arguments for forced displacement when calculating damages.[60] In the end, the general health care award amounted to $800 million.[61] Although the court rejected the plaintiffs' request for forty billion dollars in punitive damages, it did award 100 percent of remedial damages as a punitive damage award.[62] On top of physical evidence and legal tests, the court judged the parties' "procedural misconduct" in calculating the end damages. For example, the court noted that Chevron obstructed the discovery phase by failing to turn over important documents and unfairly prolonged the judicial process through bad-faith delays.[63] This "procedural misconduct," on top of Chevron's numerous and public attacks on the integrity of the Ecuadorian court, factored into the court's award of punitive damages.[64] The final judgment awarded $8.6 billion to the plaintiffs, with an additional $8.6 billion in punitive damages if Chevron did not apologize without fourteen days of the judgment, which they did not.[65]

III. Practical Analysis and Implication

Strictly based on the evidence presented and the application of law, the court made the correct decision in finding Chevron liable for contamination and health damages caused by Texaco's oil operation in Ecuador. Chevron's own representatives conceded that Texaco had dumped toxic oil and other harmful substances into the environment of Ecuador.[66] Furthermore, Chevron moved to remove the case from the United States, so the court's decision that it had jurisdiction over the case was correct and fair.[67] But the court did not take into consideration many elements of the law that might apply to the case at hand and might make the court's judgment more enforceable and legitimate in the eyes of the American courts and public. Since the rendering of the judgment, the main critiques have arisen from questions of the legitimacy and enforceability of the decision.[68] Because

57. *Id.* at 13, 16, 20-22, 24-25.
58. *Id.* at 123.
59. *Id.* at 76.
60. *Id.* at 152-54.
61. *Id.* at 184.
62. *Id.* at 185-86.
63. *Id.* at 35-36.
64. *Id.* at 185.
65. Chevron Corp. v. Naranjo, 667 F.3d 232, 236 (2d Cir.), *cert. denied*, 133 S. Ct. 423 (2012).
66. *Aguinda c. Chevron*, No. 2003-0002, at 163.
67. *Id.* at 17-18.
68. CNN Wire Staff, *Chevron Appeals $8.6 Billion Ruling*, CNN (Jan. 21, 2012, 7:39 AM), http://www.cnn.com/2012/01/21/world/americas/ecuador-chevron-lawsuit/index.html.

of other cases that have come under similar critiques, the Ecuadorian court should have foreseen this issue and attempted to eradicate it through the decision. First, the court did not discuss any international treaties on environmental law or human rights that would apply to the case at hand. Second, the court did not take all the steps that it could to eradicate the widespread distrust of the system and parties that were promulgated by both parties' attacks on the integrity of individuals and the court.

A. INTERNATIONAL TREATIES ON THE ENVIRONMENT AND HUMAN RIGHTS

Several international treaties on environmental law, as well as human rights, apply to this case. Because of the vast impacts on the lives of the individuals in the Oriente region, human rights questions regarding the deprivation of health and safety apply to Texaco's actions in its oil operation. Various nations of the world have signed numerous international treaties on the oil industry, contamination of indigenous land, and other topics that apply to this case, but the United States has signed none of the main treaties on this subject matter.[69] Because the United States has not signed these agreements between other nations, the standards set forth by the treaties are not enforceable against the United States.[70] But the Ecuadorian court in *Aguinda* missed an opportunity to increase its judgment's legitimacy and enforceability by including references to these international treaties and agreements. For example, in 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the United Nation's Economic and Social Council's Commission on Human Rights published a report regarding how important the environment and its effects on human rights had become to the United Nations.[71] This report also summarizes other major international agreements and publications that discuss the link between environmental issues and human rights.[72] The Special Rapporteur who wrote this report on behalf of the Sub-Commission emphasized the importance of the human rights issues intertwined with environmental issues in regards to indigenous com-

69. *See* Carmen Otero García-Castrillón, *International Litigation Trends in Environmental Liability: A European Union-United States Comparative Perspective*, 7 J. PRIVATE INT'L L. 551, 557-58 (2011).

70. *See id.* at 577.

71. Special Rapporteur on the Prevention of Discrimination and Protection of Minorities, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (by Fatma Zohra Ksentini).

72. This summary lists Articles 22, 25, and 28 of the Universal Declaration of Human Rights; Article 18 of the Proclamation of Tehran; Articles 1, 7, 11, 12, and 15 of the International Covenant on Economic, Social and Cultural rights; Articles 1, 7, 17, and 20 of the International Covenant on Civil and Political Rights; Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Articles 5, 7, 10, 11, 12, and 14 of the Convention on the Elimination of All Forms of Discrimination against Women; and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their families. *Id.* ¶¶ 34-46; *see* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 22, 25, 28 (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, arts. 1, 7, 11, 12, 15 (Dec. 16, 1966); International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, arts. 1, 7, 17, 20 (Dec. 9, 1966); International Convention on the Elimination of All Forms of Racial Discrimination, Annex to G.A. Res. 2106 (XX), U.N. Doc. A/6014, art. 5 (Dec. 21, 1965); Convention on the Elimination of All Forms of Discrimination Against Women, Annex to G.A. Res. 34/180, U.N. Doc. A/34/46, arts. 5, 7, 10-12, 14 (Dec. 18, 1979); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

munities, like that of the Oriente.[73] While some of these agreements—such as the 1960 Convention on Third-Party Liability in the Field of Nuclear Energy, the 1963 Brussels Convention, and the 1963 and 1997 Conventions on Civil Liability for Nuclear Damage—only speak to environmental issues in general, others—such as the 1969, 1976, 1992, and 2000 International Conventions on Civil Liability for Oil Pollution Damage—speak to oil contamination specifically.[74] Although applying only to maritime oil pollution, such specific conventions on oil pollution include many ideas that the court could have used to reinforce its decision. For example, the 1969 Convention imposes strict liability for ship owners whose ships are involved in maritime oil pollution.[75] This fact could have helped the people and courts of the United States respect the Ecuadorian court's decision to apply strict liability. Although these treaties and agreements bind neither the courts of Ecuador nor the United States, their impacts on international environmental law could aid the Ecuadorian court in gaining respect for its decision. Since the judgment, Chevron has claimed that the Ecuadorian court has no power to enforce the judgment, claiming that the decision was unfair and corrupt.[76] By backing up the court's decisions with respected international materials, the court could have gained some respect and better ensured that the judgment would be enforced in the United States and that Chevron would pay the awarded damages.

B. Claims of Fraud, Bribery, and Other Devious Activity

On top of citing to international materials on environmental law, the court should have better addressed the issues of bribery, forgery, and fraud. While the court did address Chevron's attacks on the integrity of the court in assessing punitive damages and did not consider the expert opinions of contested expert witnesses, it could have gone further to eradicate the drama that surrounded the case. A vast majority of news stories covering the case focused on "[t]he two mysterious businessmen who used watches and pens implanted with bugging devices" to record conversations in which the plaintiffs' representatives allegedly bribed the judge hearing the case.[77] Once this news came out and spread across South America and the United States, additional reports emerged that the "mysterious businessmen" were "entrapped in a dirty-tricks campaign by Chevron."[78] The men, namely Patricio García, claimed that Chevron developed an espionage strategy for helping its cause.[79] Furthermore, Chevron accused the plaintiffs' attorneys of forging some of the plaintiffs' signatures when adding them to the complaints.[80] Chevron claims that María

73. *Id.* ¶ 75.

74. Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, 956 U.N.T.S. 251; Convention of 31st January 1963 Supplementary to the Paris Convention of 29th July 1960, *available at* http://www.oecd-nea.org/law/nlbrussels.html; Convention on Civil Liability for Nuclear Damage, May 21, 1963, *available at* http://www.iaea.org/Publications/Documents/Conventions/liability.html; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter 1969 Convention].

75. 1969 Convention, *supra* note 74, art. III.

76. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 595 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir.), *cert. denied*, 133 S. Ct. 423 (2012).

77. Romero & Krauss, *supra* note 4, at A4.

78. *Id.*

79. *Id.*

80. *The Fraudulent Case Against Chevron in Ecuador*, *supra* note 18.

Aguínda, the named plaintiff, admitted to believing she was signing an unrelated document when she signed onto the lawsuit and that the lawyers forged twenty of the forty-eight plaintiffs' signatures.[81] On top of claiming that the plaintiffs' lawyers had bribed the judge, Chevron claimed that the lawyers also had blackmailed him.[82] Chevron alleged that the plaintiffs' representatives wrote reports for expert witnesses to present as their own and that they even ghostwrote the actual opinion.[83] To defend its legitimacy and integrity, the court should have addressed these issues more in the opinion by discussing the weight of the evidence, how it affected the decision, and other proof of legitimacy. The Ecuadorian court lacked the hindsight available today, but similar cases then published and Chevron's continuous attacks on the Ecuadorian court's legitimacy should have prompted the court to take extra steps.[84]

C. Ramifications

Once the Ecuadorian courts had rendered decisions at the provincial, superior, and appellate court levels, the focal point for the media shifted from the bribes and fraud to the enforceability of the decision. On top of seeking redress through other means such as arbitration, Chevron then claimed that the Ecuadorian court could not enforce its decision on Chevron's assets.[85] Chevron went so far as to seek and win a temporary order from a U.S. court to delay the enforcement of any judgment published in Ecuador.[86] Chevron also asked the Ecuadorian court to wait to enforce the decision, which the plaintiffs' spokesperson claimed would violate Ecuadorian law.[87] The U.S. Supreme Court has refused to consider Chevron's appeal to block the judgment.[88]

The issue of the enforceability of foreign court decisions in mass toxic tort claims has rarely been addressed by U.S. courts.[89] But, this area of the law has gained more attention recently because of large companies' attempts to avoid liability for mass toxic tort claims. Several recent cases have concerned scenarios similar to *Aguinda*, in which a group of plaintiffs brings a mass toxic tort claim against a large U.S. company, the company moves to transfer the case to a foreign country, and then the U.S. company claims that the foreign court's adverse decision is not enforceable.[90] Lawyers and reporters have dubbed this fact sequence the "enforcement loophole"—meaning, "the corporate defendant's practice

81. *Id.*

82. *Donziger*, 768 F. Supp. 2d at 611-12.

83. *Id.* at 636-37.

84. *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009), *aff'd sub nom* Osorio v. Dow Chemical Co., 635 F.3d 1277 (11th Cir. 2011). *See also* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995).

85. *Donziger*, 768 F. Supp. 2d at 624, 625-26.

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

87. Mercedes Alvaro, *Law Journal: Chevron Appeals Ecuador Ruling in Amazon Case*, WALL ST. J., Jan. 23, 2012, at B7.

88. Chevron Corp. v. Naranjo, 133 S. Ct. 423 (2012); *see also* CNN Wire Staff, *Supreme Court Won't Consider Blocking $18B Judgment Against Chevron*, CNN (Oct. 24, 2010, 10:43 AM), http://www.cnn.com/2012/10/10/world/americas/chevron-ecuador-lawsuit/index.html.

89. Paul V. Majkowski, *The Recognition of "Ordinary" Mass Toxic Torts*, MASS TORTS LITIG. (A.B.A. Section of Litig., Mass Torts Litig. Comm., Chicago, IL), May 21, 2012, at 14, 17.

90. *See id.* (citing Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 382-84 (E.D. La. 1997), and Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991)).

of using the standard defenses to foreign country judgment recognition available in the United States for an unintended purpose: to circumvent accountability abroad."[91] A U.S. court can render a foreign judgment unenforceable if the U.S. court is unsatisfied with the procedures or characteristics of the court in question, or if the U.S. court believes the decision to be unfair for other reasons.[92]

Historically, it has been fairly easy for large U.S. companies to win a decision of unenforceability because "it is often particularly difficult to reconcile American due-process concepts with foreign proceedings."[93]

IV. Conclusion

The enforceability of the Ecuadorian judgment in *Aguinda* is important because the decision has the potential ramification of increasing mass toxic tort claims against large U.S. companies if a U.S. court rules the *Aguinda* judgment enforceable. But a U.S. court decision rendering the Ecuadorian judgment unenforceable could have the opposite effect. A U.S. court decision denying the enforceability of a foreign court's decision could have serious implications not only for the courts of Ecuador, but also for those of other foreign nations. Stating that a foreign country's legal system is inferior, corrupt, unfair, or immoral and thus "entitled to no respect from the courts" of the United States "is a particularly weighty matter."[94] With such strong factual evidence of Texaco's contamination of the Oriente region of Ecuador, serious implications for international law would develop if Chevron escaped liability and the damages awarded by Ecuadorian courts.[95]

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91. Weston, *supra* note 1, at 735.

92. The eight reasons include:

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant;

(3) the foreign court did not have jurisdiction over the subject matter;

(4) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(5) the judgment was obtained by fraud;

(6) the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of the United States;

(7) the judgment conflicts with another final and conclusive judgment;

(8) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(9) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 4(c)-(d), 13 U.L.A. 261 (1962).

93. Weston, *supra* note 1, at 741-42.

94. Majkowski, *supra* note 89, at 15.

95. Since 2005, the American Law Institute has been working on a federal statute regarding the recognition of foreign judgments. No actual legislation has been proposed to Congress, but hearings have been held in Congress. *See id.* at 244.