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THE ENFORCEMENT LOOPHOLE: JUDGMENT-RECOGNITION DEFENSES AS A LOOPHOLE TO CORPORATE ACCOUNTABILITY FOR CONDUCT ABROAD

INTRODUCTION

After a major oil spill such as the most recent one in the Gulf of Mexico, many are left with a lingering question: will the contaminator be held accountable? Yet, despite the breadth of news coverage in 2010 focusing on BP, the oil contamination in the Gulf pales in comparison to the “Amazon Chernobyl,” commonly regarded as the worst oil contamination in history.¹ The “Amazon Chernobyl” refers to the oil contamination suffered in Ecuador and Peru due to the dumping of billions of gallons of waste byproduct from drilling into the rivers and streams of the Amazon.² After eighteen years of litigation and an \$8.6 billion judgment against Chevron, the Amazon Chernobyl is now not only the world’s worst oil contamination, but it has also led to the largest judgment ever issued in an environmental case.³

Texaco began drilling in the eastern areas of Ecuador in 1964.⁴ For approximately twenty-six years, Texaco allegedly contributed to the Amazon Chernobyl by dumping over sixteen billion gallons of toxic waste from its oil wells into streams and rivers that thousands of people relied on for drinking water.⁵ In addition to causing widespread contamination in an area equal to the size of Rhode Island, cancers and other oil-related medical problems continue to plague the indigenous population.⁶ Yet, after Chevron purchased Texaco in

¹ Bob Herbert, *Disaster in the Amazon*, N.Y. TIMES, June 4, 2010, <http://www.nytimes.com/2010/06/05/opinion/05herbert.html>.

² Amazon Defense Coalition, *Chevron CEO’s Legacy Marred by Mishandling of Ecuador Environmental Crisis*, BIOTECH WEEK, Oct. 14, 2009.

³ Ben Casselman et al., *Chevron Hit with Record Judgment*, WALL ST. J. (Feb. 15, 2011), <http://online.wsj.com/article/SB10001424052748703584804576144464044068664.html>. The judgment also conditionally granted punitive damages of an additional \$8.6 million unless Chevron publicly apologized to the plaintiffs within fifteen days of the judgment being issued. *Id.*

⁴ *Human Rights Impacts of Oil Pollution: Ecuador*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://www.business-humanrights.org/Documents/Oilpollution/Ecuador/Introduction> (last visited Feb. 19, 2011).

⁵ Complaint to Stay Arbitration at 3, *Yaiguaje v. Chevron*, Nos. 09 Civ. 9958, 10 Civ. 316 (S.D.N.Y. Mar. 16, 2010), 2010 WL 1028349 [hereinafter *Yaiguaje Complaint*].

⁶ *Id.* at 3, 7. According to one estimate by Daniel Rourke, up to 10,000 Ecuadorians are still at risk of contracting cancer in the future in the areas where Texaco operated. Jonathan S. Abady, *Chevron Should Pay*

2001, ChevronTexaco,⁷ the world's fifth-largest corporation,⁸ has employed a multitude of litigation strategies to avoid liability for Texaco's role in the environmental damages, which is estimated to be between \$90 and \$113 billion.⁹ It appears that from the beginning, Chevron never contemplated compensation for the victims of Texaco's contamination—Chevron allegedly did not account for the pending litigation between Texaco and the residents of the Amazonian rainforest when it agreed to purchase Texaco for \$35 billion.¹⁰

The Chevron litigation drama began in 1994: approximately 30,000 affected residents of Ecuador and Peru brought a suit against Texaco before the U.S. District Court for the Southern District of New York in *Aguinda v. Texaco*,¹¹ alleging property damage, personal injuries, and increased risk of disease due to "negligent or otherwise improper oil piping and waste disposal practices."¹² Foreign plaintiffs typically prefer bringing suit in the United States, as opposed to a foreign forum, because of the unique substantive and procedural opportunities that are available in the United States.¹³ These include, to name a few, damages for mental anguish, punitive damages, broad discovery tools, and the right to a jury trial on issues of fact.¹⁴

In 2001, the court in *Aguinda v. Texaco* granted Texaco's renewed motion to dismiss the suit brought by the affected citizens under the doctrine of forum non conveniens ("FNC").¹⁵ The court undertook a detailed analysis to determine whether Ecuador was an adequate alternative forum, one of the

for *Its Pollution in Ecuador*, WALL ST. J. (Oct. 1, 2010), <http://online.wsj.com/article/SB10001424052748704116004575522301163187566.html>.

⁷ Chevron changed its name to ChevronTexaco in 2001, but subsequently changed it back to Chevron in 2005. *Human Rights Impacts of Oil Pollution: Ecuador*, *supra* note 4.

⁸ Norman Lear, *Was Oil Named 'Crude' Because of the Way Oil Companies Do Business?*, HUFFINGTON POST (June 8, 2010, 2:44 PM), http://www.huffingtonpost.com/norman-lear/was-oil-named-crude-becau_b_604741.html.

⁹ Michael D. Goldhaber, *Year 18 of Ecuador vs. Chevron Pollution Suit*, AM. L. DAILY BLOG (Sept. 23, 2010), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202472363613>.

¹⁰ Amazon Defense Coalition, *supra* note 2. Given that Chevron paid an 18% premium on Texaco stock and assumed approximately \$8 billion of Texaco's current debt in the purchase, it is hard to imagine that Chevron ever intended to pay out \$90 billion for Texaco's role in the contamination. *Chevron to Buy Texaco in \$35 Billion Deal*, ABC NEWS (Oct. 16, 2000), <http://abcnews.go.com/Business/story?id=89201&page=1>.

¹¹ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 534, 545 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

¹² *Id.* at 537.

¹³ Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. REV. 959, 971 (2007).

¹⁴ *Id.* at 971–72.

¹⁵ *Aguinda*, 142 F. Supp. 2d at 537.

requirements to succeed on a motion to dismiss based on FNC.¹⁶ In opposing the motion, the *Aguinda* plaintiffs provided evidence that “the Ecuadorian courts were subject to corrupting influences and outside pressures, especially from the military, that rendered them inadequate to dispense independent, impartial justice in these cases.”¹⁷ Nonetheless, the court determined that Ecuador was an adequate forum, still admitting that “no one claims the Ecuadorian judiciary is wholly immune to corruption, inefficiency, or outside pressure.”¹⁸ The court thus recognized the danger of corruption in the judiciary of Ecuador, yet found that “the courts of Ecuador can exercise with respect to the parties and claims here presented that modicum of independence and impartiality necessary to an adequate alternative forum.”¹⁹

The Second Circuit in 2002 affirmed the district court’s dismissal under FNC, holding that Ecuador was a suitable forum for both the plaintiffs from Peru and the plaintiffs from Ecuador.²⁰ In response to the *Aguinda* plaintiffs’ repeated arguments that Ecuadorian courts were subject to corruption and impartiality, the Second Circuit found that the district court’s findings were not an abuse of discretion.²¹

The practical effect of an FNC dismissal is significant: in the overwhelming majority of cases, an FNC dismissal is a clear victory for defendants because it forces plaintiffs to either settle for insignificant amounts or abandon their efforts.²² Yet, against all odds, leaders of the affected Amazonian communities persevered and filed suit in May 2003 against Texaco, by then known as ChevronTexaco, in Lago Agrio, Ecuador.²³

Despite litigating in its “preferred forum” in Lago Agrio, ChevronTexaco has since invoked multiple proceedings outside of Ecuador in an attempt to escape liability, including before the American Arbitration Association

¹⁶ *Id.* at 537, 539.

¹⁷ *Id.* at 543.

¹⁸ *Id.* at 544.

¹⁹ *Id.* at 545–46.

²⁰ *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002). The court modified the judgment in one respect by extending the period during which Texaco was required, as a condition to the dismissal, to waive any defenses based on a statute of limitations. *Id.* at 478–79.

²¹ *Id.* at 478.

²² See Freer, *supra* note 13, at 974.

²³ Cortelyou Kenney, *Disaster in the Amazon: Dodging “Boomerang Suits” in Transactional Human Rights Litigation*, 97 CALIF. L. REV. 857, 858–59 (2009) (reciting case history).

(“AAA”).²⁴ In the AAA proceeding, ChevronTexaco sought a declaration releasing it from liability or, in the alternative, indemnification by the Republic of Ecuador based on a May 1995 release agreement between Texaco and Ecuadorian government agencies, which absolved the company of potential liability in exchange for partial cleanup of contaminated sites.²⁵ While a New York district court ultimately granted a permanent stay of arbitration, one commentator has argued that the fact that the proceedings even took place “pose[d] significant risks to the Lago Agrio plaintiffs” because, despite the similarities to the *Lago Agrio* litigation, the *Lago Agrio* plaintiffs’ interests were not being represented in the attempted arbitration or the litigation.²⁶

Back in Lago Agrio, the unending litigation has continued to unfold over the past eight years. As the trial began to wind down, reports circulated that the plaintiffs were *finally* going to be able to recover.²⁷ Nonetheless, Chevron has made it clear that it has no intention of backing down: in August 2009, Chevron released on its website secretly taped videos demonstrating corrupt activities involving the *Lago Agrio* litigation.²⁸ Two men posing as contractors²⁹ took watches and pens implanted with recording devices into

²⁴ *Id.* at 859. Chevron also instituted a proceeding before the Permanent Court of Arbitration in the Hague in 2009. Press Release, Chevron, Chevron Files International Arbitration Against the Government of Ecuador Over Violations of the United States-Ecuador Bilateral Investment Treaty (Sept. 23, 2009), <http://www.chevron.com/news/press/release/?id=2009-09-23>. The Permanent Court of Arbitration in the Hague ruled in favor of Chevron. Press Release, Chevron, Chevron Wins Arbitration Claim Against the Government of Ecuador: International Tribunal Awards Chevron Approximately \$700 Million (Mar. 30, 2010), <http://www.chevron.com/news/press/release/?id=2010-03-30>.

²⁵ Yaiguaje Complaint, *supra* note 5, at 4–5. According to ChevronTexaco, the contract obligated the Republic of Ecuador to indemnify ChevronTexaco for the costs of any cleanup ordered by the *Lago Agrio* court. *Id.* The Republic brought a motion to stay the AAA arbitration before a New York state court, and ChevronTexaco removed the proceedings to federal court. Kenney, *supra* note 23, at 859.

²⁶ Kenney, *supra* note 23, at 860.

²⁷ See Amazon Defense Coalition, *supra* note 2. A court-appointed Special Master in Ecuador estimated the value of Texaco’s liability to be \$27.3 billion. *Id.* The plaintiffs subsequently submitted to the *Lago Agrio* court a new damages recommendation of \$90 billion and \$113 billion. Goldhaber, *supra* note 9. On February 15, 2011, the Ecuadorian court rendered an \$8.6 billion judgment against Chevron to clean up oil pollution in the Amazon. Casselman et al., *supra* note 3.

²⁸ Press Release, Chevron, Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit (Aug. 31, 2009), <http://www.chevron.com/news/press/release/?id=2009-08-31>.

²⁹ While the two “undercover” contractors claimed to be unaffiliated with Chevron, the U.S. District Court for the Northern District of California issued a subpoena in September of 2010 for one of the “undercover” contractors, Diego Borja, based on evidence that suggests Borja “was not an innocent third party who just happened to learn of the alleged bribery scheme but rather was a long-time associate of Chevron whom Chevron would pay for any favorable testimony.” Order Granting Republic of Ecuador’s Ex Parte Application for the Issuance of a Subpoena, *In re* Republic of Ecuador, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427, at *5 (N.D. Cal. Sept. 15, 2010). Since 2009, Chevron has paid and allegedly continues to pay Borja a monthly stipend of at least \$5000, in addition to paying numerous other expenses for Borja.

meetings where they discussed an alleged bribery scheme with the Ecuadorian Judge Juan Nuñez, who was presiding over the case, and a man named Patricio Garcia, who represented himself to be an official of Ecuador's ruling party.³⁰ Now that the *Aguinda* plaintiffs' fears of corruption have come to fruition, Don Campbell, a Chevron spokesperson, revealed to the public Chevron's strategy for the ongoing litigation, now in its eighteenth year: "We're not paying and we're going to fight this for years if not decades into the future."³¹

This Comment analyzes the "enforcement loophole" that will enable Chevron to fight enforcement of the *Lago Agrio* court's judgment "for decades into the future."³² The enforcement loophole is the corporate defendant's practice of using the standard defenses to foreign country judgment recognition available in the United States for an unintended purpose: to circumvent accountability abroad. After obtaining an FNC dismissal to a foreign tribunal where the corporate defendant has no major assets, the corporate defendant then has the opportunity to tailor the foreign litigation so that it satisfies one of the exceptions to recognition in the United States.³³ As a result, even though foreign-country judgments are generally recognized on nearly the same basis as sister-state judgments,³⁴ the enforcement exceptions afford corporate defendants an opportunity to manipulate the foreign litigation so that the foreign-country judgment is unenforceable in the United States.

Supplemental Memorandum of Law of Defendants Hugo Gerado Camacho Naranjo and Javier Piaguaje Payaguaje in Further Opposition to Chevron Corporation's Motion for a Preliminary Injunction at *5, *Chevron Corp. v. Donziger*, No. 1:11-cv-00691-LAK (S.D.N.Y. Mar. 4, 2011).

³⁰ *Chevron*, *supra* note 28. In one meeting, the two businessmen sought assurances from Judge Nuñez that the Chevron suit would generate business. *Id.* Judge Nuñez responded by stating his plan to rule against Chevron and by claiming that the government would administer the funds for the remediation contracts. *Id.* In another meeting without Judge Nuñez, the two businessmen discussed a bribery scheme with Garcia where they would pay \$3 million in exchange for the environmental remediation contracts: \$1 million for the government, \$1 million for the judge, and \$1 million for the plaintiffs. *Id.* Judge Nuñez has since recused himself from the *Lago Agrio* proceedings. Angel Gonzalez & Ben Casselman, *Chevron Plaintiffs Ask U.S. Court for Action*, WALL ST. J. (Jan. 15, 2010), <http://online.wsj.com/article/SB10001424052748704363504575003153443151606.html>.

³¹ Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.: As Largest Environmental Judgment on Record Looms, the Oil Company Reassures Shareholders It Won't Pay*, WALL ST. J. (July 21, 2009) [hereinafter *Chevron Expects to Fight Ecuador Lawsuit in U.S.*], <http://online.wsj.com/article/SB124804873580263085.html>. After Chevron received its \$8.6 billion Ecuadorian judgment on February 14, 2011, "the company vowed to appeal and said it won't pay the fine or apologize as the judge demanded." Casselman et al., *supra* note 3.

³² *Chevron Expects to Fight Ecuador Lawsuit in U.S.*, *supra* note 31.

³³ *See infra* Part II.

³⁴ *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, Prefatory Note, 13 U.L.A. 391 (1962) [hereinafter UFMJRA].

In other words, current enforcement practice in the United States provides corporate defendants with a last resort for avoiding accountability abroad. For example, despite the *Lago Agrio* \$8.6 billion judgment in the plaintiffs' favor, the plaintiffs' recovery ultimately hinges on whether a court in a country where Chevron has assets, such as the United States, will recognize and enforce the judgment, because Chevron has no major assets in Ecuador.³⁵ Thus, Chevron's goal is to convince a U.S. court not to recognize the judgment, and Chevron's documentation of corrupt activities involving the *Lago Agrio* litigation's former presiding judge appears to be a part of this goal.³⁶ In the opinion of Ecuador's Attorney General, Washington Pesantez, "[i]t seems . . . that Chevron's strategy is to delegitimize the actions of our judges."³⁷ After all, if Chevron is able to "delegitimize" the judiciary of Ecuador by conjuring evidence that it does not provide a "system of jurisprudence likely to secure an impartial administration of justice,"³⁸ the judgment will satisfy one of the exceptions to judgment enforcement in the United States. Chevron will thus have exploited the enforcement loophole, and a U.S. court will deny recognition of the Ecuadorian judgment.³⁹ As unpalatable or improbable as this may sound, Chevron's alleged behavior appears to be representative of corporate litigation strategy in general, to avoid large judgment payouts for tort actions abroad.⁴⁰ Not only does this behavior prevent plaintiffs from recovering any money for years, if ever, but the amount of litigation surrounding such disputes wastes substantial amounts of money and judicial resources.⁴¹

³⁵ *Chevron Expects to Fight Ecuador Lawsuit in U.S.*, *supra* note 31. ("Chevron itself has never operated in Ecuador, and Texaco pulled out in 1992, leaving behind almost no assets for the court to seize in case of a judgment against the company.")

³⁶ Chevron, *supra* note 28.

³⁷ Simon Romero & Clifford Krauss, *Ecuador Oil Pollution Case Only Grows Murkier*, N.Y. TIMES, Oct. 10, 2009, at A4.

³⁸ *Bank Mellat v. Islamic Republic of Iran*, 58 F.3d 1406, 1413 (9th Cir. 1995) (quoting *Hilton v. Guyot*, 159 U.S. 113, 202 (1895)).

³⁹ In fact, Chevron has already sought and obtained a preliminary injunction by a district court in the Southern District of New York, barring plaintiffs from seeking enforcement of the *Lago Agrio* judgment outside of Ecuador. Opinion Granting Motion for Preliminary Injunction at *125-26, *Chevron v. Donziger*, 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 7, 2011).

⁴⁰ See, e.g., *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009); Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 619, 635 (2008).

⁴¹ See M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT'L L. & MGMT. REV. 21, 38, 41-43 (2007).

In Part I, this Comment discusses the background of judgment enforcement in the United States, with an emphasis on the Uniform Foreign Money-Judgments Recognition Act, adopted by a majority of the states in the United States, and the defenses typically raised in judgment-enforcement proceedings. Part II discusses how the current method of judgment enforcement hinders corporate accountability by examining the many hurdles encountered by foreign plaintiffs seeking recovery, and the prevalent corporate litigation strategy in light of the enforcement loophole. Finally, Part III discusses a proposed solution.

I. BACKGROUND OF JUDGMENT ENFORCEMENT

While judgment recognition is dealt with on a statutory basis, courts often rely on common-law notions in their analysis of the issues.⁴² This Part is divided into five Subparts and outlines the current regime of judgment enforcement in the United States. The first Subpart explores comity, a concept heavily relied on by courts in determining whether to enforce a foreign country judgment. The second Subpart discusses the Uniform Foreign Money-Judgments Recognition Act and its various grounds for non-recognition, before the third Subpart examines some of the approaches taken by courts in interpreting judgment-recognition defenses. The fourth Subpart specifically addresses the rise of the concept of “international due process” for interpreting the requirement of due process in the international context. Finally, the fifth Subpart addresses the use of the doctrine of judicial estoppel in judgment-enforcement proceedings where the defendant has previously obtained an FNC dismissal in favor of the tribunal that issued the contested judgment.

A. *Comity and Hilton v. Guyot*

Historically, the general tendency of the United States was to regard foreign country judgments as “relatively conclusive.”⁴³ In *Hilton v. Guyot*,⁴⁴ the Supreme Court modified this tendency by holding that if a country does not regard American judgments as conclusive, then the United States will not enforce that country’s judgments.⁴⁵ This holding, known as the reciprocity

⁴² See, e.g., *Osorio*, 665 F. Supp. 2d at 1311.

⁴³ PETER HAY ET AL., *CONFLICT OF LAWS* 1489–91 (5th ed., 2010). “Relatively conclusive” meant that as long as the foreign court had jurisdiction, the foreign country judgment was conclusive subject to a few exceptions. *Id.*

⁴⁴ *Hilton v. Guyot*, 159 U.S. 113 (1985).

⁴⁵ *Id.* at 228–29.

doctrine, has largely been ignored by federal and state courts in favor of treating foreign-country judgments similarly to sister-state judgments.⁴⁶ A sister-state judgment refers to any judgment, decree, or order by a court of another state in the United States, as distinguished from a foreign-country judgment, which refers to any judgment, decree, or order of a court of another country.⁴⁷

While the Court's reciprocity doctrine did not gain popularity among the lower courts, the Court's definition of comity in *Hilton* did, and it is heavily relied on in the context of foreign country judgment enforcement:⁴⁸

'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.⁴⁹

Comity thus reflects the general policy to maintain good relations with foreign countries through respecting foreign country judgments, and courts have often relied on the concept as support for enforcing foreign country judgments in the United States.⁵⁰ As for the actual law applied during the foreign-country judgment's U.S. enforcement proceeding, while the American Law Institute has proposed a draft federal statute for foreign-country judgments,⁵¹ state law currently applies, as discussed below.⁵²

B. The Uniform Foreign Money-Judgments Recognition Act

In response to concerns about U.S. judgments being recognized abroad and about uniformity across states, thirty-two states in the United States have currently adopted the Uniform Foreign Money-Judgments Recognition Act

⁴⁶ HAY ET AL., *supra* note 43, at 1491–93. The Court in *Hilton* was applying general federal common law, and after the Court's holding in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), general federal common law no longer exists. *Id.* at 80. Therefore, during an enforcement proceeding, even for a federal court sitting in diversity, the state law of the recognizing court applies and the reciprocity holding from *Hilton* is not binding.

⁴⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

⁴⁸ Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 794 (2004).

⁴⁹ *Hilton*, 159 U.S. at 163–64.

⁵⁰ Rosen, *supra* note 48, at 794.

⁵¹ UFMJRA, *supra* note 34.

⁵² HAY ET AL., *supra* note 43, at 1491–93.

(“UFMJRA”) in some form,⁵³ which renders foreign country judgments enforceable on nearly the same basis as sister-state judgments.⁵⁴ The hope is that by enforcing foreign-country judgments at home on a consistent basis, courts abroad will recognize U.S. judgments.⁵⁵ Under UFMJRA, before a party can enforce a foreign-country judgment in the United States, the party must first seek to have the judgment recognized in the state where the party is seeking enforcement.⁵⁶ During the enforcement proceeding, the burden is initially on the plaintiff to prove that “the judgment is final, conclusive, and enforceable where rendered.”⁵⁷ Once the plaintiff has satisfied this burden, the burden shifts to the defendant to establish one of UFMJRA’s various grounds for non-recognition.⁵⁸ The three mandatory grounds for non-recognition in Section 4(a) are:

- (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; or
- (3) the foreign court did not have jurisdiction over the subject matter.⁵⁹

Section 4(b) of UFMJRA lists six discretionary grounds for non-recognition:

- (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
- (2) the judgment was obtained by fraud;
- (3) the [cause of action/claim for relief] on which the judgment is based is repugnant to the public policy of this state;

⁵³ UFMJRA, *supra* note 34. For a list of states that have enacted the UFMJRA, see *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Mar. 26, 2011).

⁵⁴ UFMJRA defines “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.” UFMJRA, *supra* note 34, § 1(2).

⁵⁵ *Id.* § 1.

⁵⁶ *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 3 (D.D.C. 1995) (discussing the standard for recognizing foreign country judgments under UFMJRA).

⁵⁷ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009) (discussing the standard for recognizing foreign-country judgments under UFMJRA).

⁵⁸ UFMJRA, *supra* note 34, § 6.

⁵⁹ *Id.* § 4(a)(1)–(3).

- (4) the judgment conflicts with another final and conclusive judgment;
- (5) 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
- (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.⁶⁰

UFMJRA was revised in 2005 under the title “Uniform Foreign-Country Money Judgments Recognition Act.”⁶¹ Because most states have adopted some variety of the UFMJRA, this Comment focuses on the judgment-enforcement issues encountered by states that have adopted UFMJRA. Additionally, the *Lago Agrio* plaintiffs will most likely bring an enforcement proceeding in a state that has adopted the UFMJRA because Chevron’s principal place of business is in California,⁶² it is incorporated in Delaware,⁶³ and all of the previous U.S. proceedings surrounding the action have been brought in New York—all states that have adopted UFMJRA.⁶⁴

In determining whether the foreign-country judgment satisfies one of the grounds for non-recognition, courts often rely on common-law notions of comity and overarching policies of judgment recognition, some of which can be found in the Second Restatement of Conflict of Laws.⁶⁵ As Judge Posner put it, “The process of collecting a judgment is not meant to require a second

⁶⁰ *Id.* § 4(b)(1)–(6).

⁶¹ *Acts: Foreign-Country Money Judgments Recognition Act (2005)*, UNIFORM L. COMMISSION, <http://www.nccusl.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Mar. 26, 2011). Fifteen states have adopted the revisions. *Legislative Fact Sheet—Uniform Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Feb. 20, 2011).

⁶² Yaiguaje Complaint, *supra* note 5.

⁶³ *Restated Certificate of Incorporation of Chevron Corporation*, CHEVRON (May 30, 2008), <http://www.chevron.com/documents/pdf/certificateofincorporation.pdf>.

⁶⁴ *A Few Facts About the Uniform Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp (listing California and Delaware as states that adopted the UFMJRA); N.Y. C.P.L.R. § 5301 (showing that New York adopted a version of the UFMJRA).

⁶⁵ *See, e.g., Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1322 (S.D. Fla. 2009). “A state’s decision to recognize a foreign judgment will inevitably ‘depend on a variety of circumstances which cannot be reduced to any certain rule’ but it is understood that ‘no nation will suffer the laws of another to interfere with her own to the injury of her citizens’” *Id.* (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

lawsuit, . . . thus converting every successful multinational suit for damages into two suits.”⁶⁶ Rather, a foreign-country judgment that is final, conclusive, and enforceable is “enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.”⁶⁷

C. *Recent Case Law*

While the general goal is to treat foreign-country judgments on the same basis as sister-state judgments, the fundamental difference between the two is that the Full Faith and Credit Clause of the U.S. Constitution does not apply to foreign-country judgments.⁶⁸ Thus, while sister-state judgment recognition is mandated by the Constitution, recognition of foreign-country judgments is not, and the scope of defenses for foreign-country judgment recognition is left free for the lower courts to interpret. Furthermore, under common law in the United States, the plaintiff’s cause of action merges in the sister-state judgment.⁶⁹ As a result, once a judgment is rendered, the underlying claim of the case is res judicata—leaving a money judgment, which is the claim for enforcement elsewhere.⁷⁰ Foreign-country judgments, on the other hand, do not merge with the underlying claim, and the judgment is left open for U.S. courts to review.⁷¹ The following examines the different approaches courts use in reviewing foreign-country judgments and interpreting judgment recognition defenses. All of the cases involve state foreign-country-judgment enforcement statutes that have adopted UFMJRA in some form.

The first mandatory ground for non-recognition of a foreign-country judgment under UFMJRA exists 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*.”⁷² While all sister-state courts exercise jurisdiction based on a unified federal due-process standard,⁷³ it is often particularly difficult to reconcile American due-process concepts with

⁶⁶ Soc’y of Lloyd’s v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

⁶⁷ UFMJRA, *supra* note 34, § 3.

⁶⁸ The Full Faith and Credit Clause gives Congress the power to prescribe the effect of judgments. U.S. CONST. art. 4, § 1. The Full Faith and Credit Statute exercises this power and states that interstate judgments have the “same effect as it has where it was rendered.” 28 U.S.C. § 1738 (2006).

⁶⁹ HAY ET AL., *supra* note 43, at 1436–39.

⁷⁰ *Id.* at 1436–42.

⁷¹ *Id.* at 1442–44.

⁷² UFMJRA, *supra* note 34, § 4(a)(1) (emphasis added).

⁷³ HAY ET AL., *supra* note 43, at 1511 n.2.

foreign proceedings.⁷⁴ In *Bank Melli Iran v. Pahlavi*,⁷⁵ the Ninth Circuit found an Iranian default judgment lacked due process and affirmed the district court's grant of summary judgment on behalf of the former Shah of Iran's sister, a current resident of California.⁷⁶ The Bank argued that, under the Algerian Accords, the U.S. court should enforce the judgment without considering whether there was due process.⁷⁷ The court did not agree.⁷⁸ In determining whether the Shah's sister was able to get due process in Iran, the court stated that the essential components of basic due process are fair treatment from the courts of Iran, ability to personally appear before the courts, ability to acquire proper legal representation in Iran, and ability to acquire local witnesses on her behalf.⁷⁹ Upon finding that such essential components were likely unavailable for the Shah's sister, she was entitled to summary judgment.⁸⁰

In addition, under the first exception of UFMJRA, courts are required to evaluate the impartiality of foreign judicial systems. In *Bridgeway v. Citibank*,⁸¹ the Second Circuit affirmed the district court's grant of summary judgment in favor of Citibank when a Liberian corporation sought enforcement of a final judgment by the Supreme Court of Liberia against Citibank.⁸² One of the issues on appeal was whether Citibank had sufficient admissible evidence to support the district court's holding that the Liberian judiciary, as a matter of law, was unlikely to render impartial justice during its civil war.⁸³ The court found two sources to be supportive of the district court's conclusions: the Sherman Affidavits, which detailed some of Liberia's history, and the U.S. State Department's Country Reports for Liberia for the years 1994 to 1996, which described the Liberian judiciary's handling of cases as corrupt and incompetent.⁸⁴ For example, the appointment of the Liberian Supreme Court justices during its civil war did not follow constitutional requirements because

⁷⁴ See *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000). ("We cannot believe that the Illinois statute is intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law").

⁷⁵ *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

⁷⁶ *Id.* at 1407.

⁷⁷ *Id.* at 1410.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1413.

⁸⁰ *Id.*

⁸¹ *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000).

⁸² *Id.* at 137, 144.

⁸³ *Id.* at 142.

⁸⁴ *Id.* at 142-43.

the appointments were secured on the basis of factional loyalties.⁸⁵ The court thus affirmed, in favor of not enforcing the Liberian judgment in the United States due to impartiality concerns.⁸⁶

While the due-process and impartial-forum defenses principally deal with procedural aspects of the foreign proceeding, the public policy defense for judgment recognition is often considered an “umbrella” for a number of “concerns in international practice which may lead to a denial of recognition.”⁸⁷ While this defense can also be used to deny recognition on the basis of procedural defects in the underlying foreign-country judgment, the defense also covers objections to the substantive outcome of the judgment.⁸⁸ In *Matusevitch v. Telnikoff*,⁸⁹ the district court held that the judgment should not be enforced because it was inconsistent with American constitutional principles when an English Court required the defendant to prove the truth of his statements in a libel action.⁹⁰ Relying on the public-policy exception for non-recognition, the court undertook an analysis of whether the judgment was repugnant to the public policy of the State of Maryland.⁹¹ Finding British libel law contrary to U.S. libel law, the court held that the English judgment was “repugnant to the public policies of the State of Maryland and the United States” and should not be recognized in the United States.⁹² The court therefore looked to the underlying claim of the suit, rather than to the foreign legal system, in evaluating whether the English judgment should have been enforced. Conversely, Judge Posner in *Society of Lloyd’s v. Ashenden*⁹³ took a different approach to the public policy defense, as seen in the Subpart below.

D. *The Rise of the Concept of International Due Process*

Judge Posner coined the term “international due process” in *Ashenden* by interpreting the requirement of due process to mean, in the international

⁸⁵ *Id.* at 142.

⁸⁶ *Id.* at 144.

⁸⁷ HAY ET AL., *supra* note 43, at 1515–18.

⁸⁸ Peter Hay, *Comments on Public Policy in Current American Conflicts Law*, in DIE RICHTIGE ORDNUNG 89, 93 (Deitmar Baetge et al. eds., 2008).

⁸⁹ *Matusevitch v. Telkinoff*, 877 F. Supp. 1 (D.D.C. 1995).

⁹⁰ *Id.* at 4. (“In contrast [to English law], the law in the United States requires the plaintiff to prove that the statements were false and looks to the defendant’s state of mind and intentions.”). The court applied the law of Maryland, which is governed by the 1962 UFMJRA and the 1964 Uniform Enforcement of Foreign Judgments Act. *Id.* at 2.

⁹¹ *Id.* at 3–4.

⁹² *Id.* at 4.

⁹³ *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000).

context, that the foreign procedures are “fundamentally fair” and do not offend basic fairness.⁹⁴ In *Ashenden*, the defendants argued the English money judgments to be unenforceable under the Illinois Uniform Foreign Money-Judgments Act because they were denied due process of law.⁹⁵ In holding that the judgments did not violate international due process, Judge Posner interpreted due process “in the Illinois statute . . . to refer to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.”⁹⁶ Judge Posner, however, avoided determining the evidence required for demonstrating impartial tribunals or procedures compatible with international due process by distinguishing between countries “whose adherence to the rule of law and commitment to the norm of due process are open to serious question” (listing Cuba, North Korea, Iran, Iraq, and Congo) and countries whose legal processes are not open to such question (naming England, the forum of the case).⁹⁷ Judge Posner further advised that to determine whether a nation has adhered to the norm of due process, a federal court should examine any relevant materials or sources, not just evidence admissible under the Federal Rules of Evidence.⁹⁸ For example, Judge Posner would likely agree that U.S. Department of State’s Country Reports could be used to determine whether there was due process.

Other decisions have subsequently followed this “liberal *Ashenden* view,” and it “may well continue to gain in acceptance.”⁹⁹ However, it is important to note the difference in approaches by the *Ashenden* court versus the *Telkinoff* court, despite both dealing with the enforcement of English judgments. In *Ashenden*, Judge Posner looked to the nature of the judicial system to determine if it comported with American notions of fairness, as opposed to the *Telkinoff* court, which looked to the actual judgment.¹⁰⁰ Nonetheless, Judge Posner qualified the holding in *Ashenden* by stating that the situation might be different for judgments from certain nations.¹⁰¹

⁹⁴ *Id.* at 477. The court applied the Illinois Uniform Foreign Money-Judgments Recognition Act. *Id.* at 475. Judge Posner reminds us that the Illinois statute is “a uniform act, not one intended to reflect the idiosyncratic jurisprudence of a particular state.” *Id.* at 476–77.

⁹⁵ *Id.* at 476.

⁹⁶ *Id.* at 476–77.

⁹⁷ *Id.* at 477.

⁹⁸ *Id.*

⁹⁹ Hay, *supra* note 88, at 94.

¹⁰⁰ *Id.* at 93–94.

¹⁰¹ *Ashenden*, 233 F.3d at 477.

Whether the adoption of the international due process concept will result in greater receptivity to recognizing and enforcing foreign-country judgments is certainly questionable; however, it suggests a step towards greater deference to foreign judicial systems in determining whether to enforce the judgment. For example, the U.S. District Court for the Central District of California recently recognized and enforced a People's Republic of China's ("PRC") \$6.5 million judgment, citing *Ashenden* as support.¹⁰² The plaintiff in *Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Inc.* first brought suit against the defendant in the United States in the Los Angeles Superior Court alleging damages from a helicopter manufactured and designed by the defendant that crashed into a river in the PRC.¹⁰³ The California state action was stayed based on the defendant's motion under FNC, and the plaintiffs subsequently brought suit in the PRC.¹⁰⁴ Despite having sought an FNC dismissal in favor of adjudication in the PRC, the defendant failed to appear or participate in the PRC judgment, and the plaintiffs sought enforcement of the PRC judgment in *Hubei*.¹⁰⁵

Quoting from *Ashenden* several times, the district court in *Hubei* appeared hesitant to disturb the PRC judgment in finding that none of the UFMJRA exceptions applied and holding that the PRC's use of the Hague Convention for service of process was "compatible with the relaxed notion of due process of law under *Ashenden*."¹⁰⁶ For example, the court held that the defendant could not avail himself of the first mandatory exception of UFMJRA because the exception only applied to challenge the "system" under which the foreign country judgment was rendered and could not be used by the defendant to challenge the actual judgment.¹⁰⁷ The court thus reasoned that, since the defendant did not present any evidence that the PRC court system was partial or that the procedure was incompatible with the requirements of due process, the defendant could not challenge the judgment under this exception.¹⁰⁸ Interestingly, the court did not even mention any of the defendant's arguments, but rather focused on how service of process was proper in order to come to

¹⁰² *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Inc.*, 2009 WL 2190187, at *7-8 (C.D. Cal. July 22, 2009).

¹⁰³ *Id.* at *1-2 (reciting case history).

¹⁰⁴ *Id.* at *2.

¹⁰⁵ *Id.* at *2-4.

¹⁰⁶ *Id.* at *6-7.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *6.

the conclusion that none of the UFMJRA defenses applied.¹⁰⁹ While the court did not expressly say so, its reasoning was likely due to the fact that the defendant had previously moved to dismiss the action in the United States under FNC in favor of having the case heard in the PRC.

In contrast to using *Ashenden* in favor of enforcement, a district court recently relied on Judge Posner's "international due process" concept in refusing to enforce a foreign country money judgment from Nicaragua in *Osorio v. Dole Food Company*.¹¹⁰ The case history of *Osorio* is strikingly similar to that of the *Chevron* case: thousands of Nicaraguan citizens originally brought suit in the United States against various defendants for the use of dibromochloropropane ("DBCP"), an agricultural pesticide that was banned in the United States in 1977 because it had been shown to cause male sterility.¹¹¹ Two of the defendants were Dole Food Company, a Delaware corporation that used the chemical compound on its Nicaraguan banana farms until 1979, and Dow Chemical Company, a Delaware corporation that manufactured DBCP until 1977.¹¹² The court consolidated the cases into *Delgado v. Shell Oil Co.*¹¹³ and then dismissed on FNC grounds, stating that Nicaragua provided adequate remedies for Nicaraguan plaintiffs.¹¹⁴

In response to the FNC dismissal in *Delgado*, the 150 *Osorio* plaintiffs brought suit in Nicaragua against Dole Food Company and Dow Chemical Company for injuries resulting from alleged exposure to DBCP while working on plantation farms in Nicaragua between 1970 and 1982.¹¹⁵ The Nicaraguan trial court granted the *Osorio* plaintiffs a judgment of \$97.4 million under the "Special Law for the Conduct of Lawsuits Filed By Persons Affected By the Use of Pesticides Manufactured with a DBCP Base," also known as "Special Law 364," which was enacted by the Nicaraguan National Assembly shortly after *Delgado*.¹¹⁶ To enforce the judgment, the *Osorio* plaintiffs brought *Osorio v. Dole Food Company* before a circuit court in Miami-Dade County in August 2007, where the defendants then removed the case to a district court in

¹⁰⁹ *Id.* at *6–7.

¹¹⁰ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009), *motion for reconsideration denied*, 2010 WL 571806 (S.D. Fla. 2010).

¹¹¹ *Id.* at 1311–12 (reciting case history).

¹¹² *Id.* (reciting case history).

¹¹³ *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335 (S.D. Tex. 1995).

¹¹⁴ *Id.* at 1362, 1372–73.

¹¹⁵ *Osorio*, 665 F. Supp. 2d at 1311–12.

¹¹⁶ *Id.* at 1312.

the Southern District of Florida.¹¹⁷ In holding that the judgment should not be enforced, the court found that the judgment did not comport with international due process norms from *Ashenden* because Nicaragua's Special Law 364 was discriminatory and provided the plaintiffs with an "irrefutable presumption of causation."¹¹⁸ The court reasoned that "[c]ivilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364."¹¹⁹

The rise of the international due-process concept and its increasing acceptance demonstrates a greater receptivity towards "things foreign," but it is uncertain whether one can expect this to become *the* standard. For instance, despite the U.S. Supreme Court having previously endorsed applying international limitations within domestic law,¹²⁰ would the current Supreme Court ever uphold applying different standards of due process to international cases? Nevertheless, the application of the international due-process concept appears to be a step forward in favor of enforcing foreign-country judgments, and it seems particularly appropriate for enforcement cases where a U.S. court in a previous FNC proceeding relied on the impartiality and adequacy of the foreign tribunal in holding that the case should be dismissed from the United States. As for preventing the defendant from even taking such an inconsistent position in the first place, application of the doctrine of judicial estoppel may be of some assistance and is discussed in the next Subpart.

E. The Use of the Judicial-Estoppel Doctrine in Foreign-Country Judgment-Enforcement Proceedings

Some judgment creditors have attempted to use the doctrine of judicial estoppel in judgment-enforcement proceedings to prevent the defendant from

¹¹⁷ *Id.* at 1321.

¹¹⁸ *Id.* at 1345.

¹¹⁹ *Id.*

¹²⁰ In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Court set international limitations for applying domestic law to foreign affairs on the basis of prescriptive comity in holding that the Sherman Act does not apply to foreign anti-competitive conduct and its foreign effects. *Id.* at 169. Justice Scalia, who wrote for the majority, previously defined prescriptive comity as "the respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). The *Empagran* majority adopted Justice Scalia's "prescriptive comity" notions and concluded that "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169.

avoiding a foreign-country judgment. The Supreme Court described the doctrine of judicial estoppel as that

where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.¹²¹

To invoke the doctrine, the Second Circuit in *Bridgeway Corp. v. Citibank* required the party to demonstrate that “(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner.”¹²² In addition to arguments previously discussed, Bridgeway argued that Citibank should be judicially estopped from raising the question of impartiality of the Liberian courts because Citibank had voluntarily participated in at least a dozen civil cases before Liberian courts.¹²³ The court found that Citibank was not judicially estopped because Citibank did not previously argue that the Liberian courts were impartial—all it did was submit to the jurisdiction of the Liberian court when Bridgeway brought suit against it, and participation is not an admission that the Liberian courts are fair and impartial.¹²⁴

In *Bank Melli Iran v. Pahlavi*,¹²⁵ the Bank also made a judicial-estoppel argument for enforcing the Iranian judgment against Pahlavi in the United States.¹²⁶ In an earlier, unrelated action, Pahlavi had argued for dismissal on FNC grounds, stating that Iran was the proper place for trial.¹²⁷ Citing this earlier action, the Bank argued that Pahlavi should be judicially estopped from claiming that Iran is an unsuitable forum.¹²⁸ However, in the former case, Pahlavi had complained that even though the Iranian government “ha[d] seen fit to nullify fundamental fairness and due process,” that fact should not have permitted the other party to argue against her contention that Iran was the most convenient forum.¹²⁹ Thus, Pahlavi’s previous argument was effectively that

¹²¹ *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

¹²² *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141 (2d Cir. 2000).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

Iran could not take action against her in the United States or in Iran. The court found that this was consistent with her position in this case and did not agree with the Bank that Pahlavi should be judicially estopped from claiming that Iran was an unsuitable forum.¹³⁰

In addition, the *Osorio* plaintiffs argued that the defendants should be judicially estopped from challenging the adequacy of the Nicaraguan judiciary based on the defendants' position in favor of an FNC dismissal in the *Delgado* litigation.¹³¹ The court rejected this argument for various reasons.¹³² First, the *Osorio* plaintiffs did not participate in the *Delgado* litigation, and mutuality of parties is required under the judicial-estoppel doctrine in Florida law.¹³³ Second, when the case was dismissed under FNC, Special Law 364 did not exist, and the court determined that the effect of the law on DBCP litigation "fundamentally altered the legal landscape in Nicaragua."¹³⁴ Since the defendants could not have predicted this, the court found their position, that Nicaragua was an inadequate forum, consistent with their earlier position and therefore held that the defendants should not be estopped from challenging the adequacy of the Nicaraguan forum.¹³⁵

The above holdings demonstrate the issues with applying the doctrine of judicial estoppel in the context of corporations employing the enforcement loophole. Due to the fact that transnational tort litigation is often drawn out for many years, a U.S. court can easily find occurrences that have "altered the legal landscape" and thus rendered the doctrine of judicial estoppel inappropriate. The result for plaintiffs is devastating. Having relied on the U.S. FNC dismissal, plaintiffs expended significant resources to get to the enforcement stage, only to find that their supposed "multi-million dollar" judgment meant nothing. In contrast, defendants were able to sidestep any liability in exchange for litigation costs that paled in comparison to the alleged harm caused.

¹³⁰ *Id.*

¹³¹ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

II. THE CURRENT METHOD OF JUDGMENT ENFORCEMENT AND ITS EFFECTS ON CORPORATE ACCOUNTABILITY AND CORPORATE LITIGATION STRATEGY

Corporate accountability entails holding corporations liable for the social implications of their business practices.¹³⁶ While numerous U.S. laws constrain domestic companies from negatively affecting human health and the environment, holding corporations accountable in the international context is considerably more difficult.¹³⁷ Large multinational corporations often send corporate operations abroad to take advantage of cheaper operating costs.¹³⁸ These corporate activities significantly impact foreign communities, and few regulations curtail their behavior.¹³⁹ Adjudication, and subsequent liability, is often the only form of deterrence for corporations and the only means of protection for those who are harmed by corporations' exploitative behaviors.¹⁴⁰ Nonetheless, the current method of judgment enforcement in the United States encourages corporate defendants to drag suits out for decades by providing defendants with a backup plan. Even if plaintiffs are ultimately able to obtain a foreign-country judgment holding a corporation responsible for its actions abroad, corporate defendants can avoid the enforcement of the judgment in the United States, where the majority, if not all, of their assets are located, by claiming that the judgment is unenforceable under one of UFMJRA's three mandatory and six discretionary defenses to recognition and enforcement.¹⁴¹

The litigation strategy employed by corporate defendants sued in the United States for transnational torts has led commentators to coin the term "boomerang litigation."¹⁴² If the corporation is successful in having the suit dismissed under FNC, the corporation is dealt a lucky hand of cards: if one card does not work to its favor, it can just try another with little or no recourse. The following Subparts address the many tactics employed by corporations such as Chevron. To begin with, relatively few groups of plaintiffs pass the initial hurdle of bringing suit in the alternative foreign forum after the FNC

¹³⁶ See Melody Saint-Saens & Amy J. Bann, *Using National Security to Undermine Corporate Accountability Litigation: The ExxonMobil v. Doe Controversy*, 11 U. MIAMI INT'L & COMP. L. REV. 39, 50 (2003).

¹³⁷ See *id.*

¹³⁸ *Id.* at 51.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *infra* Part II.D.

¹⁴² Casey & Ristroph, *supra* note 41, at 21.

dismissal.¹⁴³ While corporations have money to burn on expensive litigation costs rather than on implementing measures to increase accountability, plaintiffs often run out of money after the FNC dismissal or settle for insignificant amounts.¹⁴⁴ The first Subpart thus examines the many issues resulting from an FNC dismissal. The second Subpart discusses how some plaintiffs encounter an additional hurdle by being precluded from bringing suit in the alternative forum due to “blocking statutes,” retaliatory statutes enacted by some Latin American countries that are designed to discourage FNC dismissals.¹⁴⁵ The third Subpart discusses courts’ use of stipulated conditions to FNC dismissals in an attempt to curb a corporation’s evasive litigation tactics, and it looks at how corporations have dealt with such conditions. Finally, the last Subpart discusses the tactics employed by corporations during litigation in the alternative forum and discusses the use of the enforcement loophole.

A. *Forum Non Conveniens*

The doctrine of FNC is often a corporation’s most effective tool for defeating a plaintiff’s suit without having to adjudicate on the merits.¹⁴⁶ While this Comment does not advocate the abolition of the FNC doctrine, it does seek to examine the concerns raised by an FNC dismissal and the role judgment enforcement should play in addressing these concerns.

A corporation can bring a motion to dismiss under FNC in federal and most state courts.¹⁴⁷ However, while only three states do not recognize the doctrine

¹⁴³ *Id.* at 27. The majority of foreign plaintiffs either decide not to sue in the alternative forum or settle for a fraction of what they hoped to recover in litigation. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 335 (1994).

¹⁴⁴ *Id.* For example, after the court in *Delgado v. Shell Oil Company* granted defendant’s motion to dismiss under FNC, most of the plaintiffs “subsequently settled for only a fraction of what the plaintiffs reasonably could have anticipated to recover if the case remained in . . . court.” Heiser, *supra* note 40, at 621.

¹⁴⁵ See *infra* Part III.B. On the other hand, enactment of blocking statutes has in a few instances benefited the plaintiffs in the FNC stage of the proceedings. *Id.* Under a blocking statute, a foreign country will dismiss the suit for lack of jurisdiction if the plaintiff has previously been dismissed from the United States under FNC. *Id.* Thus, if a foreign country has a blocking statute, then technically the plaintiff does not have an alternative forum and whether there is an alternative forum is the first determination for a court undergoing an FNC analysis. *Id.* However, only a handful of U.S. courts have retained jurisdiction and denied motions to dismiss for FNC under this line of reasoning. *Id.*

¹⁴⁶ Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1300 (2007).

¹⁴⁷ *Id.* at 1301.

of FNC,¹⁴⁸ some states have significantly limited the applications of FNC.¹⁴⁹ For example, in 1990, the Supreme Court of Texas held that the Texas legislature statutorily abolished the doctrine in *Dow Chemical Co. v. Castro Alfaro* and affirmed the court of appeals' refusal to dismiss on FNC grounds where plaintiffs brought suit for personal injuries suffered from exposure to a pesticide manufactured by defendants.¹⁵⁰ While the Texas legislature has since amended its statute to allow an FNC dismissal to be invoked against non-resident plaintiffs, application of the doctrine is precluded where the plaintiff is a "legal resident" of Texas.¹⁵¹

In Justice Doggett's concurring opinion in *Dow Chemical*, he discusses the importance of corporate accountability for torts committed abroad and the destructive role of FNC.¹⁵² In light of the world's current rate of globalization, "[t]he misconduct of even a few multinational corporations can affect untold millions around the world."¹⁵³ The doctrine of FNC reflects the struggle encountered by U.S. courts between immunizing multinational corporations in the United States through dismissal on the one hand,¹⁵⁴ and depriving developing nations the opportunity to vindicate torts committed at home through retaining the litigation in the United States on the other hand.¹⁵⁵ In Justice Doggett's opinion, through dismissing suits under the FNC doctrine, the United States permits corporations to use a "double-standard" for its actions abroad.¹⁵⁶ Justice Doggett provides numerous examples where U.S. corporations have used foreign countries as an industrial "garbage can" by continuing to heavily market products and chemicals abroad after they have been banned domestically.¹⁵⁷ For instance, American companies exported to Africa, Asia, and South America nearly 2.4 million pieces of sleepwear after the United States imposed a domestic ban on selling the sleepwear due to its

¹⁴⁸ PETER HAY, RUSSELL J. WEINTRAUB & PATRICK J. BORCHERS, CONFLICT OF LAW: CASES AND CONTROVERSIES 201 n.6 (2009). The three states are Oregon, Montana, and Idaho. *Id.* Despite having not recognized it, none of the three has expressly rejected it. *Id.*

¹⁴⁹ *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 674 (Tex. 1990).

¹⁵⁰ *Id.*

¹⁵¹ TEX. CIV. PRAC. & REM. CODE ANN. § 71.05(e) (2003).

¹⁵² *Dow Chem. Co.*, 786 S.W.2d at 680–89. (Doggett, J., concurring).

¹⁵³ *Id.* at 688.

¹⁵⁴ *Id.*

¹⁵⁵ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).

¹⁵⁶ *Dow Chem. Co.*, 786 S.W.2d at 687–89 (Doggett, J., concurring).

¹⁵⁷ *Id.*

treatment with the cancer-causing chemical TRIS.¹⁵⁸ In addition, after the United States banned the pesticide DBCP, the chemical at issue in *Osorio*, Dole continued to use it for three years on its banana farms in Nicaragua.¹⁵⁹

In coming to the conclusion that abolishing FNC is the best way to achieve international comity, Justice Doggett reasoned that the developing world will become increasingly distrustful and outraged if U.S. courts continue to permit corporations to use it as the ““industrial world’s garbage can”” through immunizing corporations from suit in the United States.¹⁶⁰ But, as stated before, not all believe that abolishing the FNC doctrine is the answer. District Judge Keenan, in contrast, granted the corporate defendant’s motion to dismiss under FNC in *In re Union Carbide Corp. Gas Plant Disaster*,¹⁶¹ reasoning that retaining the litigation in the United States would “deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people.”¹⁶²

In 1984, lethal gas escaped from a chemical plant operated by Union Carbide India Limited in Bhopal, India, killing more than 2000 people and injuring over 200,000 people.¹⁶³ All actions brought by Indian plaintiffs in the United States were consolidated before the U.S. District Court of the Southern District of New York in *In re Union Carbide Corp. Gas Plant Disaster*.¹⁶⁴ In support of the dismissal, Judge Keenan associated the failure to dismiss under FNC with imperialism, where “an established sovereign inflict[s] its rules, its standards and values on a developing nation.”¹⁶⁵ Thus, Justice Doggett’s opinion and Judge Keenan’s opinion portray the two ends of the spectrum in evaluating the different concerns raised by an FNC dismissal. While providing injured foreign plaintiffs with a forum in which to recover is certainly desirable, depriving a country of the opportunity to vindicate harms occurred at home is not. Enforcement of the foreign-country judgment in the United States is the key to reconciling Doggett and Keenan’s divergent views without having

¹⁵⁸ *Id.* at 688.

¹⁵⁹ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009)

¹⁶⁰ *Dow Chem. Co.*, 786 S.W.2d at 687 (Doggett, J., concurring) (quoting Dana J. Jacob, *Hazardous Experts from a Human Rights Perspective*, 14 Sw. U. L. REV. 81, 101 (1983)) (quoting Hon. Michael D. Barnes, Rep. MD).

¹⁶¹ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d*, 809 F.2d 195 (2d Cir. 1987).

¹⁶² *Id.* at 867.

¹⁶³ *Id.* at 844.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 867.

to abolish the doctrine of FNC: not only does it provide the foreign country the opportunity to vindicate its own citizens' rights, but it holds corporations accountable by requiring them to pay the injured plaintiffs.

Nonetheless, it is apparent that the current foreign-country judgment-enforcement scheme in the United States has failed to live up to its potential for solving some of the issues raised by an FNC dismissal. For example, the claims against the defendants in *Dow Chemical Co. v. Castro Alfaro* that upset Justice Doggett so deeply are the same underlying claims of the Nicaraguan judgment in *Osorio*, in which the Florida district court judge refused to enforce the Nicaraguan judgment against the corporate defendants.¹⁶⁶ Rather than showing deference to the foreign judicial system's efforts to vindicate harms against its own nationals, the judge in *Osorio* undertook a detailed analysis of the foreign litigation in coming to the conclusion that the Nicaraguan judgment should not be enforced.¹⁶⁷ Thus, despite the plaintiffs having overcome the many hurdles imposed after an FNC dismissal, current judgment-enforcement practice foreclosed the plaintiffs' attempts to hold the corporate defendants Dole and Dow accountable for harm caused.

B. Retaliatory Legislation by Latin American Countries

In response to the increased use of the FNC doctrine, some Latin American countries have responded by enacting retaliatory statutes that either preclude domestic courts from hearing any action that has been dismissed under FNC or enable domestic courts to apply similar tort liability and damages as that of the foreign court which dismissed the action under FNC.¹⁶⁸ The former is referred to as a blocking statute. It is designed to affect a U.S. court's FNC analysis as to whether there is an alternative forum—the first determination for assessing the appropriateness of an FNC dismissal—and has created an additional hurdle for many plaintiffs to overcome after an FNC dismissal.¹⁶⁹

These blocking statutes are intended to discourage U.S. courts from granting an FNC dismissal by eliminating the plaintiff's alternate forum: when a plaintiff brings suit in the alternative country following an FNC dismissal,

¹⁶⁶ Compare *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 688 (Tex. 1990) (Doggett, J., concurring), with *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

¹⁶⁷ *Osorio*, 665 F. Supp. 2d at 1351.

¹⁶⁸ Heiser, *supra* note 40, at 622.

¹⁶⁹ *Id.*

that country's court will dismiss the suit for lack of jurisdiction.¹⁷⁰ While a handful of U.S. courts have denied motions to dismiss for FNC under this line of reasoning,¹⁷¹ some courts have concluded nonetheless that the alternative country is an adequate forum, despite the blocking statutes, as long as the defendants consent to jurisdiction.¹⁷² As a result, while blocking statutes may have an effect on a corporations' use of FNC as a defense tactic by discouraging U.S. courts from applying it,¹⁷³ the statutes have also prevented some plaintiffs from ever having the opportunity to adjudicate their claims on the merits.¹⁷⁴

The second type of retaliatory legislation enacted by some Latin American countries is a statute enabling domestic courts to apply similar tort liability and damages as that of the foreign country that dismissed the action under FNC.¹⁷⁵ Special Law No. 364, the Nicaraguan law in dispute in *Osoario*, is an example of such retaliatory legislation.¹⁷⁶

The effect of this second type of retaliatory legislation on plaintiffs is significant. While it provides similar American recovery standards and offers plaintiffs a choice of fora by not precluding those plaintiffs that first brought suit in the United States, it damages the plaintiffs' probability of having the judgment recognized and enforced by a U.S. court in the event that the defendant does not have sufficient assets in the foreign forum, which is frequently the case. This is exactly what happened in *Osoario*: the plaintiffs had to bring action against defendants Dole and Dow in the United States to recover under the Nicaraguan judgment, and the U.S. court refused to enforce the judgment upon finding that Special Law 364 violated both due process and

¹⁷⁰ *Id.* at 623.

¹⁷¹ *E.g., In re Bridgestone/Firestone Inc.*, 190 F. Supp. 2d 1125, 1125–32 (S.D. Ind. 2002) (finding Venezuela to be an unavailable forum due to Venezuela's blocking statutes); *Canales Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 741 (E.D. La. 2002) (finding Costa Rica, Honduras, and the Philippines to be unavailable fora where each country had a blocking statute).

¹⁷² *E.g., Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 689 (S.D. Tex. 2004) (finding that Venezuela is an available alternative forum); *Paulownia Plantations de Panama Corp. v. Rajamannan*, 793 N.W.2d 128, 675 (Minn. 2009) (finding that Panama is an available alternative forum).

¹⁷³ *See Heiser, supra* note 40, at 659–61.

¹⁷⁴ *See, e.g., Morales*, 313 F. Supp. 2d at 689 (finding that Venezuela is an available alternative forum even though the courts in Venezuela would have dismissed the cases under the blocking statutes); *Rajamannan*, 793 N.W.2d at 136–37 (finding that Panama is an available alternative forum even though the courts in Panama would have dismissed the cases under the blocking statutes).

¹⁷⁵ *Heiser, supra* note 40, at 622.

¹⁷⁶ *Id.* at 631.

Florida's public policy.¹⁷⁷ Thus, while Special Law 364 was designed to assist injured plaintiffs in recovery, it had the opposite effect for the *Osorio* plaintiffs and damaged their chances of ever being compensated for their injuries.¹⁷⁸

Retaliatory legislation is an attempt by foreign countries to counter the adverse effects of FNC dismissals. One commentator has suggested that the legislation may help discourage corporate defendants from using FNC as a defense tactic in transnational tort litigation because a U.S. defendant may perceive no benefit to an FNC dismissal where the foreign country's laws mirror U.S. tort liability and damages.¹⁷⁹ But, for the retaliatory legislation to act as a deterrent, the U.S. must enforce the foreign country judgment against the defendant's assets, and, as *Osorio* demonstrates, current U.S. judgment enforcement once again fails to foot the bill. It instead provides corporate defendants with the ability to fight enforcement and circumvent any accountability.

C. Stipulated Conditions in FNC Dismissals

In the unlikely event that plaintiffs are successful in bringing an action before the alternative forum, corporations can, and often do, draw the trial out for years as they continue to employ their evasive litigation strategies. Courts have attempted to limit corporate defendants by stipulating conditions in FNC dismissals.¹⁸⁰ Conditional dismissals under FNC often revolve around the doctrine's threshold issue of whether there is an adequate alternative forum available.¹⁸¹ Under this line of reasoning, defendants are often required to consent to jurisdiction in the foreign forum and waive any applicable statute-of-limitations defenses.¹⁸² Some courts have even attempted to deal with the

¹⁷⁷ See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

¹⁷⁸ As a point of comparison, prior to *Osorio*, one commentator, Walter Heiser, analyzed possible enforcement defenses regarding judgments rendered under Special Law 364. Heiser, *supra* note 40, at 656–57. Recognizing that the law's irrebuttable presumption in favor of causation may raise due process concerns, the commentator nonetheless found that “[g]iven the limited and discretionary nature of UFMJRA’s public policy exception, and the recognition that a foreign law need not be identical to domestic law, a Nicaraguan judgment based on Special Law No. 364’s irrebuttable presumption as to causation will likely be enforced by a United States Court.” *Id.* at 657.

¹⁷⁹ *Id.* at 659–61.

¹⁸⁰ See Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed upon Proceeding in a Foreign Forum by Federal Court in Dismissing Action Under Forum Non Conveniens*, 89 A.L.R. Fed. 238 (1988).

¹⁸¹ *Id.* at 291.

¹⁸² *E.g.*, *Banco de Seguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 266 (S.D.N.Y. 2007) (granting defendants’ motions to dismiss for FNC on the condition that defendants accept service of

enforcement loophole through requiring the defendant to agree to satisfy any foreign country judgment rendered by the alternate forum.¹⁸³

Nonetheless, corporate defendants often manage to side-step the conditions. The corporate defendant's first option is to appeal the conditions as Union Carbide Corporation ("UCC") did in *In re Union Carbide Corp. Gas Plant Disaster*.¹⁸⁴ The lower court granted the FNC dismissal on three conditions, one of which was that the defendant must agree to satisfy any judgment issued by an Indian court against it "where such judgment and affirmance comport with the minimal requirements of due process."¹⁸⁵ Following the plaintiffs' appeal to the Second Circuit, the Second Circuit deleted the condition,¹⁸⁶ finding that it contained ambiguous "due process" language and was based on the erroneous legal assumption that plaintiffs might not be able to enforce an Indian judgment against UCC in the United States.¹⁸⁷ The Second Circuit reasoned that New York's judgment-enforcement statute fully served the district court's purpose behind the condition of ensuring that defendants satisfy any ultimate Indian judgment.¹⁸⁸

The corporate defendant's second option is to simply ignore stipulated conditions as the defendants in *Osorio*, *Dole* and *Dow*, did in Nicaragua by fighting jurisdiction in the foreign proceeding.¹⁸⁹ In *Delgado*, the underlying FNC dismissal proceeding that predated *Osorio*, the court granted the FNC dismissal with the condition that the defendants, who included *Dole* and *Dow*,¹⁹⁰ waive all jurisdictional defenses because, without such a condition, the

process in Uruguay, consent to jurisdiction of Uruguay, and waive any statute-of-limitations defense); Thomas, *supra* note 180, at 241.

¹⁸³ See Thomas, *supra* note 180, at 254.

¹⁸⁴ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 809 F.2d 195, 197 (2d Cir. 1987).

¹⁸⁵ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).

¹⁸⁶ *Id.* at 205–06.

¹⁸⁷ *Id.* at 205.

¹⁸⁸ *Id.* New York has enacted a version of the UFMJRA. N.Y. C.P.L.R. § 5301. The government of India reached a settlement with Union Carbide India Limited in February of 1989 for \$470 million to be paid to the government, which would be responsible for compensating the victims, and the Supreme Court of India approved the settlement as just and reasonable. HAY, WEINTRAUB & BORCHERS, *supra* note 148, at 199 n.1. However, after almost twenty-seven years since the disaster, the recompense has proved to be insufficient and some victims are still waiting to be compensated. Suchandana Gupta, *Bhopal Gas Tragedy: All Papers in Order, but Denied Their Due*, TIMES OF INDIA (Dec. 1, 2009, 5:25 AM), <http://timesofindia.indiatimes.com/india/Bhopal-Gas-Tragedy-All-papers-in-order-but-denied-their-due/articleshow/5286523.cms>.

¹⁸⁹ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1307 (S.D. Fla. 2009).

¹⁹⁰ *Id.* at 1312 (reciting factual history).

alternative fora would not be available.¹⁹¹ As a result, while none of the *Osorio* plaintiffs were plaintiffs in *Delgado*,¹⁹² the *Osorio* plaintiffs' best chance for recovery was to bring suit in Nicaragua in light of the *Delgado* holding. Nonetheless, after the *Osorio* plaintiffs brought action against Dole and Dow under Special Law No. 364, the defendants contested the trial court's jurisdiction on the grounds that they wished to exercise opt-out rights under Article 7 of Special Law 364 in exchange for waiving any FNC arguments in U.S. courts.¹⁹³ It appears that Dole and Dow were having second thoughts regarding their chosen forum and wished to return to the United States.

Furthermore, corporate defendants can sidestep dismissal conditions through instituting "boomerang litigation"—for example, by filing arbitration actions similar to what Chevron did in the AAA and The Hague.¹⁹⁴ Despite Chevron having consented in writing to jurisdiction in Ecuador,¹⁹⁵ the issue has gone from an Ecuadorian trial court, to the AAA, to a New York state court, to a New York federal district court, to The Hague, and again back to a New York federal district court.¹⁹⁶ And, rest assured, it will not stop there: the enforcement proceedings have yet to come.

D. The Corporate Defendant's Last Resort: The Enforcement Loophole

The enforcement loophole is the corporate defendant's last resort for avoiding accountability: when all else fails and the plaintiffs finally receive a foreign-country judgment, the corporation can fight enforcement of that judgment in the United States. As previously discussed, UFMJRA provides three mandatory and six discretionary bases for non-recognition of a foreign-country judgment.¹⁹⁷ While the statute is designed to "inform[] foreign nations of particular situations in which their judgments would definitely be recognized,"¹⁹⁸ the statute also provides corporate defendants with situations where a court will refuse to recognize the judgment. Due to the fact that foreign proceedings, like U.S. proceedings, may drag out for years,¹⁹⁹ the

¹⁹¹ *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1372 (S.D. Tex. 1995).

¹⁹² *Osorio*, 665 F. Supp. 2d at 1312.

¹⁹³ *Id.* at 1318.

¹⁹⁴ See *supra* Introduction.

¹⁹⁵ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 534, 545 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

¹⁹⁶ Yaiguaje Complaint, *supra* note 5, at 3–5.

¹⁹⁷ UFMJRA, *supra* note 34, § 4(a)–(b).

¹⁹⁸ *Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1249 (N.D. Cal. 1977).

¹⁹⁹ For example, the *Lago Agrio* litigation has been ongoing since 2003. See Luis Ángel Saavedra, *Chevron Strikes Back*, LATINAMERICAN PRESS (Feb. 24, 2011), www.lapress.org/articles.asp?art=6316.

corporate defendant can easily compile a significant amount of evidence tailored towards these nine bases for non-recognition in preparation for a U.S. judgment-enforcement proceeding.

As previously discussed, relatively few plaintiffs make it to the enforcement stage in transnational tort litigation. The plaintiffs in *Osorio* were some of the lucky few to get that far, but nonetheless, Dole and Dow have so far avoided enforcement by capitalizing on the exceptions under Florida's judgment-recognition act.²⁰⁰ For example, despite the Nicaraguan trial court having denied the defendants' jurisdictional challenges,²⁰¹ the defendants raised the same jurisdictional argument before the court in *Osorio*.²⁰² Upon coming to the conclusion that the Nicaraguan trial court had misinterpreted Article 7 of Special Law 364, the *Osorio* court agreed with the defendants that they had invoked their opt-out rights under Article 7, divesting the Nicaraguan trial court of jurisdiction.²⁰³ Defendants thus successfully exploited the enforcement loophole: despite having consented to jurisdiction in Nicaragua during the FNC proceeding, defendants manufactured the Nicaraguan litigation so that it fell under Florida's lack-of-jurisdiction exception to enforcement and then reopened the jurisdiction issue, which was already adjudicated by the Nicaraguan trial court, for review by the *Osorio* court.

The *Osorio* plaintiffs attempted to circumvent the defendants' use of the enforcement loophole by arguing that the "defendants [had] intentionally sabotaged their own defense in Nicaragua [by failing to make certain motions or present certain evidence] to artificially manufacture a defense to enforcement on due process grounds in a later enforcement action."²⁰⁴ Despite the plaintiffs' allegations seeming plausible given the existence of the enforcement loophole, the *Osorio* court rejected the plaintiffs' arguments by reasoning that, even if the defendants had raised the motions or presented the evidence to the Nicaraguan trial court, neither would have affected the trial's outcome.²⁰⁵ However, the court's reasoning ignores the overarching issue that, rather than take the trial in the foreign tribunal seriously through raising necessary motions and presenting applicable evidence, the defendants

²⁰⁰ Florida has enacted the UFMJRA. *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, *supra* note 53.

²⁰¹ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1318 (S.D. Fla. 2009).

²⁰² *Id.* at 1326.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1344.

²⁰⁵ *Id.*

manipulated the trial to provide a U.S. court with additional support that they were deprived of due process during the foreign country proceedings.

Furthermore, the court's opinion in *Osorio* demonstrates the differences between a court's analysis of the alternative forum in the FNC stage of the proceedings and a court's analysis of the alternative forum in the enforcement stage of the proceedings. In determining whether Nicaragua was an available and adequate alternative forum in *Delgado* (the preceding FNC dismissal proceeding), the court found that even where there was a current standoff between the president, national assembly, and legislature regarding certain constitutional reforms, Nicaragua was an available forum to the plaintiffs.²⁰⁶ The court further found that Nicaraguan courts would not treat plaintiffs unfairly or deprive them of remedies based on a single affidavit submitted by an associate justice of the Supreme Court of Nicaragua.²⁰⁷ In comparison, the *Osorio* court undertook an extensive analysis of Nicaragua's law and trial-court proceedings to find that Nicaragua's trial-court proceedings lacked due process²⁰⁸ and were not impartial.²⁰⁹ Even though the plaintiffs had demonstrated that Nicaraguan laws on paper provided for an impartial judiciary, the *Osorio* court nonetheless held that the Nicaraguan court was not an impartial judiciary because "[p]laintiffs [had] not shown that the Nicaraguan judiciary *actually* operates independently and impartially" where defendants had provided evidence that it did not.²¹⁰ In coming to this conclusion, the *Osorio* court examined not only the *Osorio* proceedings in Nicaragua,²¹¹ but U.S. State Department reports,²¹² reports from other foreign governments and international organizations,²¹³ and expert testimony,²¹⁴ to name a few.

In light of the *Lago Agrio* judgment in favor of plaintiffs, Chevron will now have its opportunity to seize on the enforcement loophole. With the aid of secretly-taped videos involving formerly presiding Judge Nuñez and alleged bribes, and U.S. State Department reports describing the Ecuadorian

²⁰⁶ *Delgado v. Shell Oil, Inc.*, 890 F. Supp. 1324, 1357 (S.D. Tex. 1995).

²⁰⁷ *Id.* at 1362.

²⁰⁸ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1326–46 (S.D. Fla. 2009).

²⁰⁹ *See id.* at 1347–51.

²¹⁰ *Id.* at 1349.

²¹¹ *See id.* at 1351.

²¹² *Id.* at 1348.

²¹³ *Id.* at 1348–49.

²¹⁴ *Id.* at 1349–51.

judiciary as corrupt,²¹⁵ Chevron will have ample opportunity to capitalize on not only the fraud exception, but on the due-process and impartial-forum exception as well, in fighting enforcement under the current system.

III. PROPOSED SOLUTION

Corporations such as Chevron should not be allowed to manipulate the U.S. judicial system to avoid accountability for their behavior abroad. While the doctrine of FNC developed with the principal policy interest of conserving judicial resources,²¹⁶ the current regime of judgment enforcement has frustrated such a purpose by providing corporate defendants with a guideline for how to avoid enforcement. FNC certainly has issues of its own: many commentators criticize it as being incoherent, arbitrary, and unconstitutional, and some advocate abandoning the doctrine altogether.²¹⁷ Nonetheless, the downfalls of the doctrine appear to be a necessary evil to “prevent[] forum shopping by those plaintiffs seeking the most favorable law and promote[] the efficient administration of justice by ensuring that the dispute is heard in a forum with a sufficient connection to the case.”²¹⁸ Enforcement of the foreign-country judgment in the United States is the key to solving many of the issues raised by an FNC dismissal because not only is it consistent with the dismissing court’s initial assessment as to the adequacy and desirability of adjudication in the foreign tribunal, but it also holds corporations accountable by requiring them to satisfy the judgment.

²¹⁵ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 534, 545 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002). In *Aguinda*, reports from the U.S. Department of State and the Government of Ecuador were submitted to the court to support plaintiffs’ arguments that the Ecuadorian courts were not impartial forums. *Id.* at 544. The court found them to be “of little use” because “they largely consisted (perhaps understandably) of broad, conclusory assertions as to the relative corruptibility or incorruptibility of the Ecuadorian courts, with scant reference to specifics, evidence, or application to the instant cases.” *Id.* Contrastingly, U.S. Department of State reports are often relied on in enforcement proceedings in finding that a foreign tribunal was not impartial. *See, e.g.*, *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142–43 (2d Cir. 2000) (relying on U.S. State Department Country Reports for Liberia to support the holding in favor of not enforcing the Liberian judgment in the United States due to impartiality concerns); *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1347–48 (S.D. Fla. 2009) (examining U.S. State Department Country Reports for Nicaragua to support the holding that Nicaragua was not an impartial forum).

²¹⁶ *Casey & Ristroph*, *supra* note 41, at 41.

²¹⁷ *See, e.g.*, Elizabeth L. Tear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1152 (2006).

²¹⁸ Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 823–24 (2008).

As previously mentioned, during an enforcement proceeding for a U.S. interstate judgment, the underlying claim is merged into the judgment and the second U.S. court can thus only evaluate the judgment.²¹⁹ As a result, even where the second court finds the claim to be offensive, the second court must enforce the judgment because the issue is *res judicata* and the plaintiff is barred from raising any issues that the plaintiff either did raise or could have raised in the first proceeding.²²⁰ In contrast, the U.S. judicial system does not apply the same merger policies and *res judicata* effect to foreign-country judgments as the United States does in interstate settings.²²¹

One rationale in favor of stricter review in the international context, leaving aside the notion that interstate recognition is constitutionally mandated under the Full Faith and Credit Clause, is that there is no supreme world court to review the propriety of foreign-country judgments, whereas the U.S. Supreme Court has the capacity to review interstate judgments. Under this line of reasoning, it is necessary for an enforcing court to have the capacity to review a claim to ensure the propriety of the foreign country's judgment. However, where a court has previously litigated the adequacy of a foreign tribunal in an FNC proceeding, the necessity of such stringent review is lacking.

The underlying premise of this Comment's proposed solution is to exclude relitigation at the enforcement stage of issues considered at the FNC dismissal stage. When a defendant moves for an FNC dismissal, the defendant and the granting court make the general assessment in favor of the foreign system. If the dismissal includes the conclusion that the foreign system is adequate, anything that was knowable at the time and could have been raised or was raised is *res judicata*. Otherwise, to allow a corporate defendant to backtrack on its view of the foreign judicial system encourages the corporation to use complex litigation strategies for avoiding a huge payout and wastes substantial judicial resources.

In the event that the *Lago Agrio* plaintiffs reach the enforcement stage in the United States, Chevron will likely argue that the *Lago Agrio* judgment should not be enforced because "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," the first mandatory ground for non-

²¹⁹ HAY ET AL., *supra* note 43, at 1436–42.

²²⁰ *Id.* at 1439–42.

²²¹ *Id.* at 1442–44.

recognition in UFMJRA.²²² This first mandatory exception to recognition has two components under which a defendant may argue: first, that the tribunal was not impartial; and second, that the procedures used during the trial were incompatible with requirements of due process of law.

As to the first component, Chevron possesses evidence documenting alleged bribes to support an argument that the Ecuadorian tribunal was not impartial. However, under this Comment's proposed solution, Chevron would be precluded from arguing that the foreign system was inadequate or not impartial based on anything that was knowable or foreseeable at the time of the FNC dismissal in *Aguinda*. At the time of *Aguinda*, U.S. State Department Reports described Ecuador's legal and judicial systems as "politicized, inefficient, and sometimes corrupt."²²³ In the face of such evidence, Chevron took the position that Ecuador could nonetheless provide "an adequate legal forum"²²⁴ and the district court agreed by finding that, even though "no one claims the Ecuadorian judiciary is wholly immune to corruption,"²²⁵ the judicial system of Ecuador could exercise the "modicum of independence and impartiality necessary to an adequate alternative forum" in adjudicating the plaintiffs' claims.²²⁶ Both Chevron and the U.S. district court thus recognized the possibility of corruption and undue influence and were willing to take the chance. Having made this general assessment in favor of Ecuador's judicial system, the issue became *res judicata*, precluding Chevron from asserting otherwise.

On the one hand, it was arguably unforeseeable that the presiding judge in the *Lago Agrio* litigation would participate in a bribery scandal and the evidence provides support of the Ecuadorian government's control over its judiciary. However, after the secret tapes surfaced, Judge Nuñez recused himself from the litigation,²²⁷ and the opportunity for Chevron to seek appeal is available within the Ecuadorian judicial system.²²⁸ Therefore, despite the compromising evidence, the facts as they currently stand would not reach the threshold under this Comment's proposed solution for reopening the issue of

²²² UFMJRA, *supra* note 34, § 4(a)(1).

²²³ *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 545 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

²²⁴ Brief for Appellee at 39, *Aguinda*, 142 F. Supp. 2d 534 (No. 2002-7756).

²²⁵ *Aguinda*, 142 F. Supp. 2d at 544.

²²⁶ *Id.* at 545–46.

²²⁷ Gonzalez & Casselman, *supra* note 30.

²²⁸ Yaiguaje Complaint, *supra* note 5, at 16. ("The losing party will have the option of availing itself of two layers of appeal in Ecuador . . .").

the judicial system's adequacy during the enforcement proceeding. A difficult, remaining concern is the issue of what *would* reach the threshold, enabling a defendant to reargue the adequacy of a foreign tribunal's judicial system. After all, it would be undesirable to leave a defendant utterly defenseless in the event of military overthrows or outbreaks of war in the alternative forum.

During the FNC proceeding stage, courts are extremely hesitant to "assume that the courts of a sister democracy are unable to dispense justice," and something more than bald assertion is required to overcome this presumption."²²⁹ Contrastingly, courts during the enforcement-proceeding stage, as demonstrated by the previous discussion on *Osorio*, seem to be much quicker to find that a foreign tribunal lacks due process or impartiality.²³⁰ However, in light of the desirability of showing the utmost respect to foreign countries and their judicial systems, courts in enforcement proceedings should show the same degree of hesitancy during the enforcement stage as they do in the FNC stage for evaluating impartiality and due process concerns in foreign proceedings. Therefore, just as a court would not dismiss under FNC to a forum that was engaged in war or had recently been occupied during a military coup,²³¹ a court during an enforcement proceeding would not enforce a judgment rendered under similar instances of instability. Bringing in line an enforcing court's analysis with that of the court that granted the FNC dismissal would show respect to the foreign country tribunal that expended significant resources in adjudicating the dispute, while ensuring that a defendant is not left utterly defenseless to an alternative forum's judgment after obtaining an FNC dismissal.

As for the second component to the first mandatory ground for non-recognition, defendants often argue that the procedure under which the case was tried was incompatible with the requirements of due process. This is where Posner's notion of international due process arises.²³² For example, the defendants in *Osorio* argued that numerous provisions of Special Law 364 failed to provide them with "basic fairness" and thus were incompatible with

²²⁹ *Aguinda*, 142 F. Supp. 2d at 544 (quoting *Aguinda v. Texaco*, No. 93 Civ. 7527, 1994 WL 142006, at *2 (S.D.N.Y. Apr. 11, 1994)).

²³⁰ *See supra* Part II.D (regarding the differences between the *Delgado* court's analysis and the *Osorio* court's analysis of Nicaragua as an available and alternative forum).

²³¹ *E.g.*, *Canadian Overseas Ores Ltd. v. Compania*, 528 F. Supp. 1337, 1341-43 (S.D.N.Y. 1982) (refusing to dismiss under FNC where a military junta was currently in power in Chile and thus raised serious questions about the Chilean judiciary's independence).

²³² *See supra* Part II.D.

the requirements of due process.²³³ Evaluating this argument, the *Osorio* court applied Posner's definition of international due process and analyzed whether an irrefutable presumption of causation under the Special Law 364 constituted a procedure consistent with due process and whether the remaining provisions of the law constituted discriminatory treatment of foreign defendants.²³⁴ As a result, while Posner in *Ashenden* mainly looked to the nature of the judicial system to determine if it comported with American notions of fairness, the *Osorio* court, in contrast, looked to the underlying claim, holding that the Nicaraguan judgment was inconsistent with due process where Special Law 364 contained an irrefutable presumption of causation. The *Osorio* court's analysis is comparable to that of the *Telkinoff* court in which the court held that an English judgment was inconsistent with due process because the English court required the defendant to prove the truth of his statements in a libel action.

Under this Comment's proposed solution, a U.S. court would not be permitted to pass judgment on another foreign country's laws where the case had previously been dismissed under FNC. When a court dismisses under FNC, the dismissing U.S. court has made the assessment that the foreign tribunal comports with the minimum level of due process required and has subsequently passed on a significant burden to the foreign tribunal. In addition, it should be remembered that the FNC dismissal is based on the defendant's wishes: the FNC-granting court declines to hear a case over which it has jurisdiction based on the defendant's motion. The defendant thus voluntarily assumes the risk that it may not receive the same degree of due process as it would while trying the case in the United States. Therefore, in assessing whether a system's procedures are compatible with due process when there has been a previous FNC dismissal, the court should only look to the nature of the foreign system, as the *Ashenden* court did, rather than looking to the underlying claim, as the *Telkinoff* court did.

Furthermore, absent some unforeseeable and fundamental change to the legal landscape, a defendant should be judicially estopped from arguing that a foreign system's procedures are incompatible with due process when the defendant argued otherwise in an FNC proceeding. The Supreme Court described the doctrine of judicial estoppel's uniformly recognized purpose as being "to protect the integrity of the judicial process" through preventing

²³³ *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1326–27 (S.D. Fla. 2009).

²³⁴ *Id.* at 1327–35.

parties from deliberately switching positions to gain a legal advantage.²³⁵ Thus, under this line of reasoning, a corporate defendant would be prohibited from claiming that a foreign tribunal's procedures were incompatible with due process where it had previously argued in the United States that the foreign tribunal's procedures were adequate during an FNC proceeding. Application of the doctrine in this context would fulfill the doctrine's purpose by protecting the integrity of the judicial process and preventing inconsistent court decisions.²³⁶

As previously discussed, there are many issues with applying the doctrine of judicial estoppel in the context of an enforcement proceeding because a U.S. court can easily find occurrences that have "altered the legal landscape" when a corporate defendant drags a trial out for many years.²³⁷ Additionally, the plaintiffs in the enforcement proceeding are not always the same plaintiffs that obtained the FNC dismissal when a corporation's negligence has injured many in a foreign country, and courts will often find the doctrine inapplicable as a result.²³⁸ However, if the court in the enforcement proceeding is only permitted to evaluate the foreign system generally, rather than evaluating the underlying claim as the *Osorio* and *Telkinoff* courts did, it may help raise the bar for what constitutes an occurrence altering the legal landscape and further help prevent a U.S. court from passing judgment on the laws of other countries.²³⁹

²³⁵ *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). The Court listed several factors for determining whether the doctrine of judicial estoppel should be applied:

First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750–51 (citations omitted).

²³⁶ *Id.* at 749–50.

²³⁷ See *supra* Part II.C.

²³⁸ E.g., *Osorio*, 665 F. Supp. 2d at 1343–44 (finding, among other reasons, that "[d]efendants were not estopped from challenging the validity of Nicaraguan judgments based on their *forum non conveniens* position in the *Delgado* litigation because the plaintiffs in *Delgado* and *Osorio* are different").

²³⁹ Another potential issue with the application of judicial estoppel in this context is that a court could find a defendant's previous argument that the foreign system was adequate to be not "clearly inconsistent" with the argument that its procedures are incompatible with due process because the U.S. Supreme Court in *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981), stated the requirement of an adequate alternative forum is ordinarily satisfied when "the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 255 n.22 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947)). However, when a defendant argues against a plaintiff's assertions that the alternative forum is not impartial during an FNC proceeding, such as

Furthermore, a court could apply principles from the doctrine of offensive non-mutual collateral estoppel²⁴⁰ when the plaintiffs in the enforcement proceedings differ from the plaintiffs in the FNC-dismissal proceedings. Everyone can agree that encouraging all injured plaintiffs to first bring suit in the United States, where there has previously been an FNC dismissal on the same cause of action, before bringing suit in the foreign tribunal would waste substantial amounts of time, plaintiffs' money, and judicial resources. As a result, it seems counterintuitive to punish those plaintiffs, who heeded the advice of U.S. courts by bringing the suit in the foreign tribunal rather than the United States, through allowing corporate defendants to take legal positions that are inconsistent with their FNC position. Through applying principles of offensive non-mutual collateral estoppel where a plaintiff asserts the doctrine of judicial estoppel, defendants would be prevented from relitigating issues of fact already litigated by the defendants in the FNC proceeding, saving judicial resources and encouraging plaintiffs to bring suit in the alternative foreign tribunal where there is a previous FNC dismissal.

While it is undesirable to pass judgment on the laws of foreign countries, it is also undesirable to leave U.S. defendants vulnerable to discriminatory or disparate treatment by foreign courts. For example, the plaintiffs in *Osorio* attempted to enforce a Nicaraguan judgment of \$97.4 million.²⁴¹ Upon evaluating the damage provisions of Special Law 364, the law passed specifically to handle the DBCP litigation after the FNC dismissal in *Delgado*, the *Osorio* court found that the damages provided under the law were so disproportionate to the damages typically awarded in Nicaraguan litigation that it was unreasonably discriminatory to foreign defendants.²⁴² On the one hand, not only does such disparate and discriminatory treatment of a defendant violate notions of due process—even under Posner's relaxed definition of international due process—such treatment would also likely violate a state's public policy, one of the six, non-mandatory grounds for non-recognition under UFMJRA. But, on the other hand, it is arguably understandable, if not

ChevronTexaco did in *Aguinda*, a court should be able to find that asserting otherwise during an enforcement proceeding is "clearly inconsistent" with the defendant's previous position.

²⁴⁰ Collateral estoppel, also known as issue preclusion, precludes a defendant from asserting claims during case two that have been previously adjudicated in case one. 47 AM. JUR. 2D *Judgments* § 464 (2006). Traditionally, issue preclusion required mutuality of parties, meaning that the party asserting issue preclusion must have been a party to case one. 50 C.J.S. *Judgments* § 1097 (1997). However, there is a clear trend in favor of permitting the use of non-mutual offensive collateral estoppel in light of the U.S. Supreme Court's holding in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

²⁴¹ *Osorio*, 665 F. Supp. 2d at 1319.

²⁴² *Id.* at 1337–38.

foreseeable, that a foreign country would pass laws favoring its own citizens and discriminating against corporate defendants in the aftermath of corporate negligence and a U.S. court's refusal to hear cases on the matter.

One way that a U.S. court can temper the danger of abuse without completely throwing out a foreign tribunal's efforts altogether would be to apply principles emanating from the doctrine of remittitur. Remittitur is a doctrine long used by trial courts to reduce an award of damages by a jury—conditioned on plaintiff's acceptance of the lower award amount—where the court finds it to be excessive and otherwise require a new trial.²⁴³ In other words, remittitur is said to be appropriate “where the verdict is so large as to shock the conscience of the court.”²⁴⁴ While it requires the plaintiff to agree to the decreased judgment amount, it has the advantage of avoiding the expense and time commitment of a new trial.²⁴⁵

Through applying the principles upon which remittitur is based, an enforcing court would be willing to recognize a judgment that “shock[s] the conscience of the court,”²⁴⁶ and thus violates public policy, as long as the judgment-creditor would agree to a reduction removing the portion offending public policy. The reduction of the judgment is possible, even though such a reduction would not be in the interstate setting, because foreign-country judgments do not merge. Due to there being no merger between the claim and the judgment, the enforcing court is able to examine the claim underlying the foreign country judgment, enabling it to remove the offensive portions. While it would be an adjustment from traditional applications of remittitur, it similarly avoids the expense of a new trial and provides the added benefit of protecting corporate defendants from discriminatory foreign court practices. Furthermore, the plaintiffs would have no legitimate cause for complaint because the judgment size reduction would require the consent of the plaintiffs.

CONCLUSION

U.S. corporations' activities abroad significantly impact foreign communities, and few regulations exist to curtail their behavior. As a result, adjudication, and subsequent liability, is often the only way to deter

²⁴³ 11 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2815 (2d ed. 1995).

²⁴⁴ *Id.* (quoting *Abrams v. Lightolier*, 841 F. Supp. 584, 593 (D.N.J. 1994)).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

corporations from negatively affecting human health and the environment while capitalizing on foreign markets. Nonetheless, it appears that current transnational tort litigation often fails to foot the bill for holding corporations accountable in light of the available tactics corporate defendants employ during litigation. While much of the blame for this has previously been focused on the doctrine of FNC, the current foreign-country judgment-enforcement scheme in the United States is also at fault because it supplies corporate defendants with a backup plan that rewards evasive and time-consuming litigation tactics. The UFMJRA was designed to provide uniformity and consistency to U.S. judgment enforcement. Nonetheless, its three mandatory and six discretionary defenses to enforcement in the United States provide corporate defendants with an outline for manufacturing litigation abroad so that any foreign country judgment rendered against them will never be enforced against their assets in the United States. As a result, regardless of the efforts put forth in the foreign proceedings by both foreign plaintiffs and the foreign tribunal, judgment-enforcement defenses are being used by corporate defendants as a loophole to accountability, and foreign plaintiffs are deprived of ever being compensated for injuries caused by corporate malfeasance.

Chevron's current litigation strategy to avoid liability for Texaco's role in the Amazon Chernobyl exemplifies the many issues resulting from the enforcement loophole. Under this Comment's proposal, in the event that the *Lago Agrio* plaintiffs reach the enforcement stage in the United States, a U.S. court would only evaluate the nature of Ecuador's judicial system, as opposed to the underlying claims, in determining whether the Ecuadorian judgment satisfies one of the three mandatory and six discretionary defenses to enforcement. Given that the *Aguinda* court, in dismissing the case under FNC, determined that the Ecuadorian tribunal comported with the minimum level of due process required and passed on a significant burden to Ecuador that has spanned the last eight years, the issue of Ecuador's judicial system's adequacy under the first mandatory exception is *res judicata*. In addition, Chevron would be judicially estopped from claiming that Ecuador's procedures during the *Lago Agrio* litigation were incompatible with due process because it had previously argued in *Aguinda* that Ecuador's procedures were adequate in response to the plaintiffs' several objections to the adequacy of Ecuador's judicial system.²⁴⁷

²⁴⁷ Brief for Appellee at 39, *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 544 (S.D.N.Y. 2001) (No. 2002-7756) (claiming that Ecuador provided an adequate alternative forum).

It is possible that a court could find some unforeseeable occurrence has changed the Ecuadorian judiciary's landscape since the FNC dismissal in 2001. Nonetheless, the U.S. enforcing court should employ the same degree of hesitancy as it does in the FNC-dismissal stage for evaluating a foreign country's judicial system. Furthermore, in the event that the ultimate Ecuadorian judgment "shocks the conscience" of the U.S. enforcing court and violates the state's public policy, the enforcing court could apply principles of remittitur to remove the offensive portions of the judgment, subject to agreement by the plaintiffs, and avoid throwing out the significant judicial resources expended by enforcing the reduced judgment.

BP's behavior in the Gulf of Mexico highlights the necessity of holding corporations accountable for behavior that is reckless and inept regarding life and the environment. Applying this Comment's proposal is not only beneficial because it attempts to hold corporations accountable, but also because it has the potential to solve many of the concerns raised by an FNC dismissal. Under current judgment-enforcement scheme of the United States, the enforcement loophole is a corporate defendant's safety net when all other evasive litigation tactics fail: by providing broad exceptions to enforcement, it encourages corporate defendants to drag transnational litigation out for years after receiving an FNC dismissal, and, in the rare event that foreign plaintiffs do not first run out of money or give up, it enables corporate defendants to use the U.S. judicial system as a last resort for avoiding foreign-country judgments. In order to prevent corporate defendants' misuse of judgment enforcement and preserve the integrity of the U.S. judicial system where there has been a previous FNC dismissal, this Comment's proposal to promote enforcement of the foreign-country judgment is the necessary key because it avoids inconsistent court decisions and passing judgment on another country's tribunals, while holding corporations accountable for their behavior.

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