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The Rhetoric of Recognition

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*Articles***The Rhetoric of Recognition**

Jeff Todd*

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I. INTRODUCTION

A United States court must refuse to recognize and enforce a foreign money judgment “rendered under a system which does not provide impartial tribunals or procedures.”¹ Though few courts have ever made this finding,² the systemic inadequacy ground has nevertheless received significant attention from

1. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1469 (2011); 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 KAN. L. REV. 609, 635 (2008).

2. Thomas Kelly, Note, *An Unwise and Unmanageable Anachronism: Why the Time Has Come to Eliminate Systemic Inadequacy as a Basis for Nonrecognition of Foreign Judgments*, 42 GEO. J. INT’L L. 555, 559 (2011); Virginia A. Fitt, Note, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT’L L. 1021, 1030–32 (2010); see GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1154 (5th ed. 2011) (“In general, U.S. courts are hesitant to deny the fairness of other countries’ judicial systems.”); Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT’L L. & POL’Y 111, 134 (2007) (“[T]here have been few cases denying recognition of FMJs based on the argument that the judicial system failed to provide procedures compatible with due process.”).

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commentators who attack it for a number of doctrinal and policy reasons. One criticism is that these state laws require courts to make foreign policy and to answer political questions, thus violating the Constitution.³ Many courts hesitate to pass judgment on the judicial system of an entire country,⁴ except for the most politically disfavored, leading to an inconsistent patchwork of authority and a lack of applicable standards.⁵ Further, the systemic inadequacy ground is unnecessary because in almost all cases where systemic inadequacy arises, courts can base nonrecognition on other, less controversial grounds.⁶ A growing number of states are adopting the 2005 Uniform Foreign-Country Money Judgments Recognition Act,⁷ which adds two grounds for dismissal based upon bias or denial of due process in the original proceedings.⁸ The addition of these grounds calls into doubt the need for inquiring into the adequacy of the entire judicial system.⁹

Several professors, practitioners, and student commentators have addressed the doctrinal collision between forum non conveniens (FNC) and the recognition and enforcement laws in two high-profile, multi-billion-dollar sets of toxic tort litigation.¹⁰ The first series of cases are the DBCP pesticide cases involving Nicaraguan plaintiffs against fruit company Dole and the chemical manufacturers. The second group of cases are the environmental damage suits brought by indigenous people of the Lago Agrio region of Ecuador against Texaco and its parent company Chevron in *Chevron Corp. v. Donziger*.¹¹ These

3. Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1190–91, 1206 (2007).

4. Fitt, *supra* note 2, at 1030–32.

5. *Id.* at 1213–14; Kelly, *supra* note 22, at 570, 579–80; Fitt, *supra* note 2, at 1030–32; John S. Baker, Jr. & Agustin Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1, 18–25 (2010); Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 69–70 (2006).

6. Kelly, *supra* note 2, at 565, 575.

7. Karen L. Hart & Marie A. McCrary, *Foreign Judgments*, 80 U.S.L.W. 1682, n.5 (2012), available at <http://www.bellnunnally.com/userfiles/files/KLH%20Getting%20Paid%20Article.pdf> (on file with the *McGeorge Law Review*).

8. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c) (7)–(8) 13 U.L.A. pt. 2 (2005) [hereinafter 2005 RECOGNITION ACT].

9. Carodine, *supra* note 33, at 1234–36; see *infra*, Part III.A (discussing the Uniform Recognition Acts).

10. See, e.g., Suraj Patel, *Delayed Justice: A Case Study of Texaco and the Republic of Ecuador's Operations, Harms, and Possible Redress in the Ecuadorian Amazon*, 26 TUL. ENVTL. L. J. 71 (2012); Whytock & Robertson, *supra* note 1, at 1484–92; Christina Weston, Comment, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731 (2011); Baker & Parise, *supra* note 5, *passim*; Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857, 864 (2009); Heiser, *supra* note 1, *passim*; M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?* 4 BYU INT'L L. & MGMT. REV. 21, 21–22 (2007).

11. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd* *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2012); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd* 303 F.3d 470 (2d Cir. 2002); see Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELY J. INT'L L. 456, *passim* (2010); Lucien J.

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cases were originally filed in the U.S. and were dismissed for FNC to be re-filed abroad after a finding that the courts in plaintiffs' home countries were *adequate*; however, after plaintiffs secured money judgments in their home country, defendants have argued U.S. courts should refuse to recognize and enforce the judgments because that same foreign court system is *inadequate*.¹² The different standards at the FNC and recognition stages have created what Whytock and Robertson characterize as an "access-to-justice gap" for the plaintiffs. This prompted the call for a number of reforms, including that the systemic inadequacy ground be applied differently, if not abolished outright.¹³

This last concern with recognition law as applied in recent cases suggests a theoretical approach that may yield additional perspectives: rhetoric. Mark D. Rosen has argued that the "lack of theoretical sophistication" of the comity doctrine, upon which recognition laws are based, prevents principled answers to doctrinal questions.¹⁴ Rhetorical theory requires that we approach the law not in the abstract but in the context of practice, as the interplay between litigants and courts and even extending to the social and political context.¹⁵ And rhetorical theory takes as its object the text, namely the judicial opinion and the legal sources upon which it is constructed, though not as a pronouncement of the only possible and therefore compelled result, but as a statement which justifies and thereby gains adherence to its holding.¹⁶ Rhetoricians would look beyond the doctrine or policy of the recognition and enforcement laws, beyond what defendants argue, and even beyond what trial courts find, and fix their gaze upon

Dhooge, *Aguinda v. ChevronTexaco: Mandatory Grounds for the Non-Recognition of Foreign judgments for Environmental Injury in the United States*, 19 J. TRANSNAT'L L. & POL'Y 1 (2009) [hereinafter "Dhooge Mandatory"]; see also Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241 (2010). Throughout this Article, the common names "Chevron" for Chevron Corporation and "Texaco" for Texaco, Inc. will be used.

12. E.g., Whytock & Robertson, *supra* note 1, at 1449–50; Casey & Ristroph, *supra* note 10, at 21–22.

13. Whytock & Robertson, *supra* note 1, at 1481; see *infra* discussion in Part III.B–C.

14. Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 856, 870 (2004).

15. See e.g., Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 UMKC L. REV. 667, 677 (2011); NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 6–7 (2005); Francis J. Mootz, *Rhetorical Knowledge in Legal Practice and Theory*, 491 S. CAL. INTERDISC. L. J. 491, 582 (1998); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985); see Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 114 (1993) (The rhetorical conception of law "requires that texts and practices be considered in their cultural context: as purposeful utterances and actions taken by particular individuals, directed to particular audiences.").

16. E.g., MACCORMICK, *supra* note 15, *passim*; Mootz, *supra* note 15, at 568; Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561–62, 1589–90 (1990); Donald H. J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467, 509 (1985); see Jeff Todd, *A Rhetoric of Warning Defects*, 54 SOUTH TEX. L. REV. 343, 347 (2012) ("Rhetoric posits that meaning and power reside in the textual relationship."); KENNETH BURKE, *A GRAMMAR OF MOTIVES* xv, xviii (1945) (claiming that his system of dramatism is appropriate for studying "legal judgments," and that "judicial doctrines offer the best illustration of the concerns we place under the heading of Grammar").

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what appellate courts say—and sometimes, on what they do not say. In both the DBCP and Lago Agrio litigation, the Circuit Courts of Appeals have rejected the systemic inadequacy findings made by the district courts but have avoided addressing those findings.¹⁷

These holdings would seem to be good news for plaintiffs with foreign-money judgments and critics who disfavor the systemic inadequacy ground, but from a rule of law perspective, these decisions are not good for anybody. While rhetoricians reject the notion that there can be only one result in a legal dispute,¹⁸ they nevertheless maintain that legal opinions must be rational and reasonable to be accepted as just.¹⁹ When appellate courts decline to justify their holdings, or when they ignore the established norms of appellate review (applying precedent and statutory construction) their opinions are unreasonable.²⁰ Because those opinions become precedent, or persuasive authority themselves,²¹ the lack of a sound basis for those decisions creates additional confusion on an issue of law already fractured. A rhetorical reading reveals more than an “access-to-justice” gap for plaintiffs; it demonstrates how circuit courts deny justice to all parties and future litigants and create doubts about the integrity of the judicial system.

This Article analyzes the systemic inadequacy ground for nonrecognition in two recent cases to demonstrate that the appellate opinions are unreasonable because they have rejected the ground without addressing it in a rational way. Part II summarizes the views of several rhetorical scholars about the judicial opinion as emerging from the practice of litigation. Ultimately, opinions are accepted as just when the decision-making process is rational and the conclusions are supported through a careful analysis of relevant statutes and case-law—and unacceptable when the process is irrational and the conclusions unsupported. Part III explains the recognition and enforcement law in the U.S., with a focus on the systemic inadequacy ground and the scholarly criticisms of it. Part IV explicates the recognition proceedings in the DBCP and in the Lago Agrio litigation. The Article concludes in Part V that the courts’ avoidance of the systemic inadequacy ground relates to the rhetorical context of the proceedings: because of the political ramifications of insulting foreign sovereigns, the appellate courts avoid addressing the issue. The resulting irony is that the appellate courts insult everyone else by ignoring the states’ recognition statutes,

17. See *supra* notes 8 and 9 and accompanying text.

18. E.g., Wetlaufer, *supra* note 16, at 1589–90; Hermann, *supra* note 16, at 468; Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 293, 298 (1984).

19. E.g., MACCORMICK, *supra* note 15, at 12, 16, 104; Smith, *supra* note 18, at 298.

20. Wetlaufer, *supra* note 16, at 1561; see the discussion on rhetoric and the rule of law as articulated by MacCormick *infra* Part.IIC; see also Jeff Todd, *Undead Precedent: The Curse of a Holding “Limited to Its Facts”*, 40 TEX. TECH L. REV. 67, 72 (2007) (“Courts wish to promote justice and seek to avoid arbitrary decisions-making,” and “[a]dhering to precedent fosters the appearance of certainty and impartiality.”).

21. See Todd, *supra* note 20, at 72; Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It*, 17 PEPP. L. REV. 605, 632–33 (1990).

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twisting the precedent of other courts, rejecting the district court's well-reasoned findings and conclusions, offering inconsistent authority for future litigation, and denying justice to the parties by refusing them the rule of law.

II. RHETORIC AND LAW IN JUDICIAL OPINIONS

One of the curious ironies of the law, which traces its roots to classical rhetoric,²² is that it denies its own rhetoricity. Rather than acknowledge that the result of a given case is shaped by multiple competing discourses to arrive at a *best* answer, a judicial opinion pretends to offer the *right* answer. The reason is simple: the rule of law requires rules of law that are clear, intelligible, consistent, and predictable for the final and conclusive resolution of disputes. To acknowledge that a hard case could go any number of ways—that the relevant statutes and precedents admit to multiple interpretations—invites criticism of the legitimacy not just of the resolution of the case at hand but of the entire process of reaching that decision.

But a rhetorical critic need not question the legitimacy of the entire legal system to engage in the “complex task of legal interpretation” of a particular issue.²³ A commonplace of the law is that it is always something arguable, not something logically certain. Thus, rhetoric, as a method of persuasion that incorporates logic, supports the ideal that justice can be afforded through a final judgment or appellate opinion so long as those decisions are rational and reasonable. When judicial opinions fail to follow the rules of appellate review, when they disregard the established norms for interpreting statutes and precedents, and when they decline to offer an explanation for their conclusions, they deny justice. They fail to provide the parties with reasons to support the finding for or against them, create precedent which injects uncertainty into that issue for future litigants and diminish the rule of law and respect for the integrity of the legal system.

A. *The Law Emerges from Practice: A Rhetorical Understanding of Justice*

One major modern rhetorician, Chaim Perelman, “elucidate[s] principles of justice” for a new rhetoric about how we reason and thence arrive at reasonable action.²⁴ His theory “rests on the idea that gaps exist between reason and justice.”²⁵ Ambiguity in law arises in four contexts: “when there is no applicable

22. MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 1 (2005).

23. See Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 3, 11 (2010).

24. Mootz, *supra* note 15, at 514–18; see CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963) (collecting Perelman's essays about law and rhetoric).

25. Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 572 (1994).

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rule because the case is one of first impression; when the applicable rule is subject to more than one meaning; when an otherwise applicable rule is claimed to be invalid; and, finally, when a conflict exists between two potentially applicable rules.”²⁶ The resolution of legal problems occurs through informal reasoning to arrive at adherence rather than through formal logic to arrive at truth; thus, “ambiguity is never entirely avoidable because the language of legal argument is always open to multiple interpretations.”²⁷

Drawing on the rhetoric of Perelman, as well as the hermeneutics of Hans Georg Gadamer, Francis J. Mootz advances a rhetorical understanding of justice as arising from the context in which litigation occurs.²⁸ He rejects the view of legal positivism (as well as the older natural law tradition), which separates the social element of legal practice from principles of justice.²⁹ Legal positivism distinguishes between theory and practice and between the moral inquiry about law and its application through procedure.³⁰ Accordingly, positivists consider the “substantive justice of a law . . . only when the law is enacted - or [when] a judge [fills] a ‘gap’ in the law.”³¹ They ignore the rhetorical knowledge that emerges from the “myriad argumentative moves made by all concerned over the life of the case.”³²

By erecting an artificial barrier, positivists overlook that these interactions, whether procedures in court or activities outside it, are “the requirements of justice” and thus cannot be separated from the substantive law.³³ Mootz contends that law cannot be “understood abstractly but only in reference to its application to a specific case.”³⁴ Because we can understand justice only through its rhetorical context, “[t]he activity of invention is the critical element of legal practice.”³⁵ Rather than a fixed target, “justice is a quality of becoming,” a set of commonplaces for argumentation to help discussants determine where they stand and to impel them forward.³⁶ Mootz therefore rejects justice as a set of pre-given substantive rules and instead locates it “in the interstices of the practice of re-

26. *Id.* at 573.

27. *Id.* at 572–73; see Hermann, *supra* note 15, at 471–722 (“This process of argumentation aims not at truth but agreement. This is because argument does not lead to a determined solution, but rather acceptable or agreed upon conclusions.”).

28. Mootz, *supra* note 15, *passim*; see White, *supra* note 15, at 695 (“Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language.”)

29. *Id.* at 579.

30. *Id.*

31. Mootz, *supra* note 15, at 579; *Id.*

32. *Id.* at 575–76, 579.

33. *Id.* at 579.

34. *Id.* at 577.

35. *Id.*

36. *Id.* at 580.

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creating the law and taking appropriate action within the context of an individual case.”³⁷ This practice involves not just the litigants, but also “[l]egislators, judges, and juries,”³⁸ and it is to the rhetorical role of judges in “re-creating the law” that this Article turns.

B. *The Rhetoric of the Judicial Opinion and the Need for Reasonableness*

Since classical times, rhetoricians have addressed the importance of precedent in making legal arguments.³⁹ The *topoi*, or topics, are lists of recurring arguments classical rhetoricians conceived as figurative “places” where arguments reside.⁴⁰ One forensic topic is “previous decisions,” or precedent.⁴¹ The ancients “compiled a nearly comprehensive catalogue of all the points that advocates must consider when making arguments based on precedent.”⁴² For example, Aristotle wrote that “[t]he decision may be on the point at issue, or on a point like it, or on the opposite point,” and that it should be widely accepted or accepted by the judges in the case at hand.⁴³ The *Rhetorica ad Herennium* listed the ways that citation to precedent might be faulty, such as “if the judgment to an unlike matter, or one not in dispute, or is of such a kind that previous decision either in greater number or of greater appropriateness [could] be offered by the adversaries.”⁴⁴ The *topoi* continue in contemporary practice in the “relatively standard ways in which lawyers distinguish and connect cases, broaden and narrow precedents, distinguish and construct lines of authority.”⁴⁵

Lawyers are not the only ones who engage in precedential manipulation, however: “once the judge has decided the case before her, she may assume a role as advocate that is in certain respects indistinguishable from the role that was played by the lawyers who argued the case.”⁴⁶ The judge therefore defends her position to a variety of audiences—“appellate courts, the legal community, the losing party, . . . and the public at large”—that the decision is right and the losing

37. *Id.* at 580–81.

38. *Id.*

39. FROST, *supra* note 22, at 1 (2005).

40. *Id.* at 27; see J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW’S STORIES; NARRATIVE AND RHETORIC IN THE LAW* 211 (Peter Brooks & Paul Gewirtz eds., 1996).

41. FROST, *supra* note 22, at 28.

42. *Id.*

43. *Id.* (citing ARISTOTLE, *ON RHETORIC* 164–65).

44. *Id.* (citing ANONYMOUS, *RHETORICA AD HERENNIUM* 143).

45. Balkin, *supra* note 40, at 219. For Balkin, “[d]octrinal categories and distinctions are topics woven into the fabric of the law.” *Id.* For another classical rhetorical approach to handling precedent that applies syllogisms rather than *topoi*, see Kirsten K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 *VT. L. REV.* 483 (2003).

46. Wetlaufer, *supra* note 16, at 1561.

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party's is wrong.⁴⁷ The irony is that this rhetorical endeavor, this appeal to stakeholders in the outcome of the litigation, entails the denial of its own rhetoricity.⁴⁸ Judges downplay the suasive elements of their opinion through moves that are themselves rhetorical: assuming an impersonal voice that is neutral and objective; making highly rational arguments that take the form of deductive, syllogistic proofs; and backing these "by as many authorities as circumstances require."⁴⁹ Judicial opinions "will almost always be written in a tone of impersonality suggesting that the legal materials themselves, rather than the personal desires of the judge, required the result in question."⁵⁰ Through these techniques the judge demonstrates that the right, indeed the inevitable, answer has been found.⁵¹

This view, "that there is a determinate correct decision in 'hard cases,'" prevails in law.⁵² However, legal rhetoricians assume that decisions are indeterminate: "there are prior decisions similar or related by analogy to both sides of almost any difficult or important issue."⁵³ As an institutional and social matter, the view of one side to the litigation must be accepted as right, such as "the correct reading of the statute being interpreted."⁵⁴ Legal arguments are not the same as philosophical ones, however; rather than aim at truth, legal arguments aim at "acceptable or agreed upon conclusions."⁵⁵ Because they seek agreement through argument, the authority of the decision must be "evaluated by the persuasiveness of the reasons given."⁵⁶

From this perspective, the same techniques judges use to show that the case was rightly decided also serve the rhetorical purpose of persuading the audience that the decision is authoritative, and therefore acceptable.

47. *Id.*

48. Mootz, *supra* note 15, at 567 ("[L]egal practice involves the rhetorical suppression of its rhetoricity."); see Davis, *supra* note 15, at 676 ("[T]he law does not see itself, and many scholars investigating law do not see it, as a product of rhetoric or amenable to rhetorical criticism."); Berger, *supra* note 23, at 14 (2010) ("[O]ne of the most remarkable features of the rhetoric of law is the law's continuing denial that it is rhetoric.") (emphasis in original).

49. Wetlaufer, *supra* note 16, at 1561–62; see Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES; NARRATIVE AND RHETORIC IN THE LAW* 187, 188–89, 211 (Peter Brooks & Paul Gewirtz eds., 1996) (noting that judicial opinions "will almost always be written in a tone of impersonality, suggesting that the legal materials themselves rather than the personal desires of the judge, required the result in question....").

50. Levinson, *supra* note 49, at 188.

51. *Id.* at 189; Wetlaufer, *supra* note 16, at 1562; see *id.* at 1589 ("[J]udges seek to persuade their audiences . . . that the case in question has been fairly heard and rightly decided.").

52. Hermann, *supra* note 16, at 468. (quoting D. Kairys, *Legal Reasoning*, *THE POLICIES OF LAW: A PROGRESSIVE CRITIQUE* at 13–14 (1982)).

53. *Id.*; see Berger, *supra* note 23, at 10 ("[R]hetoric reminds us that in 'hard cases,' the legal language rarely 'fits' and the legal rules rarely compel the result."); Smith, *supra* note 18, at 298 ("Few cases present an 'all or nothing' situation.").

54. Hermann, *supra* note 16, at 508.

55. *Id.* at 472.

56. *Id.* at 509.

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As Dean Mootz writes:

Ultimately, judicial consideration of the case and issuance of a written opinion mark a distinct rhetorical practice shaped by the judge's effort first to persuade herself and then to persuade the parties in the litigation and the hypothetical collection of all reasonable lawyers. In some high profile cases, the judge might even view the audience of her opinion as the citizenry at large.⁵⁷

While viewing law as rhetoric rejects the possibility of one right result, it nevertheless "reaffirms [the law's] integrity and legitimacy as a practice of securing reasonable adherence."⁵⁸ Litigants may not expect a "single, unquestionably correct result," but they "nonetheless value rationality."⁵⁹ Gerald B. Wetlaufer calls this the problem of legitimacy.⁶⁰ Decisions that demonstrate their impartiality and adherence to statutes and precedent sustain the rule of law because they are perceived as "fair, right, and legitimate," while those that do not adhere to precedent diminish the rule of law.⁶¹

C. *Rhetoric and the Rule of Law: The Need for Judicial Opinions to Demonstrate Predictability and Consistency in the Treatment of Legal Sources*

Neil MacCormick also recognized that law is "[the] site of bitter and drawn-out arguments and disputes," arguments "cast doubt even on what have hitherto seemed law's most cherished certainties."⁶² Yet, certainty in law is not about finding absolute truth; rather, the rule of law requires predictability. "[P]re-announced rules that are clear and intelligible," offer consistency and coherence articulated in "a great body of carefully recorded precedents" so that persons can have a framework for their lives.⁶³ Justice requires that current cases should be decided like previous, relevant cases. For the legal system to be impartial, it must avoid "frivolous variation in the pattern of decision-making from one judge or court to another."⁶⁴ Justice therefore demands justification: judicial decisions must be supported by reasoning stated explicitly in the judicial opinion.⁶⁵

57. Mootz, *supra* note 15, at 571.

58. *Id.* at 568.

59. Smith, *supra* note 18, at 293.

60. Wetlaufer, *supra* note 16, at 1561.

61. *Id.*

62. MACCORMICK, *supra* note 15, at 13.

63. *Id.* at 12, 16.

64. *Id.* at 143.

65. *Id.* at 144.

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In the process of litigation, the parties present “rival possible meanings” about how the law supports their case; the court concludes which is stronger and reaches a decision.⁶⁶ The decision turns on the “understanding of a statutory or other binding text.”⁶⁷ For example, when applying a statute, the court must interpret some or all of its terms, plus interpret and evaluate the facts to see “if they really fit the statute.”⁶⁸ MacCormick contends that “[r]easons can and should be given for preferred interpretations that are decisive in the case.”⁶⁹ If the statutory provision has been interpreted a certain way by one court in the legal system, then it ought to be interpreted the same way by other courts in that system.⁷⁰ “To decide the case and justify [the] decision, . . . reasons should be given for the preferred alternative, the preferred line of decision for this and like cases.”⁷¹ Though the rhetorician recognizes that justification of a decision is not always conclusive in favor of one interpretation over another, justifications are necessary to show that the ruling is supported by, and does not contradict, “established rules of law.”⁷²

Thus conceived, judicial tools that help achieve consistency like the canons of statutory construction and the doctrine of *stare decisis* reinforce the rhetorical soundness of an opinion. For example, they offer individuals certainty in the law because they allow “people to rationally order their conduct and affairs.”⁷³ And consistency in the application of the law allows courts to “treat similarly situated litigants equally.”⁷⁴ Applying these tools demonstrates to parties, other courts, and all readers that the court adheres to “reasoned policy choices.”⁷⁵ In the words of the Supreme Court, *stare decisis* “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”⁷⁶

66. *Id.* at 123.

67. *Id.* at 122.

68. *Id.* at 42.

69. *Id.*

70. *Id.* at 128 “The proposed solution [of] the case, and the legal interpretation which governs it, have to be constructed in a manner that shows its consistency with pre-established law according to the [favored] interpretation of [the court].” *Id.* at 53.

71. *Id.* at 102–03.

72. *Id.* at 104.

73. Todd, *supra* note 20, at 70 (quoting *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000)); see Adam W. Kiracofe, Note, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz’s Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 574 (2004).

74. Todd, *supra* note 20, at 70 (citing Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 369 (1988)).

75. See Kiracofe, *supra* note 73, at 575.

76. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986); see Todd, *supra* note 20, at 71 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (Justice Harlan likewise offered one justification for not lightly overruling past decisions is “the necessity of maintaining public faith in the judiciary as a course of impersonal and reasoned judgments.”)).

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D. *Analyzing Judicial Opinions: Uncovering the Silenced Voices and Hidden Ambiguities*

In analyzing judicial opinions, the rhetorician must consider not only how judges treat legal sources but also how they obfuscate or avoid them. By emphasizing finality, courts minimize or even exclude some voices and therefore reject the possibility of a different outcome. James Boyd White writes that judicial opinions are too often the “bureaucratic expression of ends-means rationality” that tend toward reduction: by focusing on the end result, the opinion presents only those means which help attain the end result.⁷⁷ While the tendency in law is to exclude that which does not lead to certainty in results, a rhetorical approach to law corrects this reduction by providing terms that bring into “our zone of attention and field of discourse what others . . . cut out.”⁷⁸ By doing so the legal rhetorician not only recognizes but embraces the “radical uncertainty of most forms of knowledge.”⁷⁹ Rhetorical criticism therefore begins with the questions: “[W]hat voices does the law allow to be heard, what relations does it establish among them? With what voice, or voices, does the law itself speak?”⁸⁰

In like fashion, Kenneth Burke seeks a multiplicity of perspectives, even conflicting ones, to “*reveal the strategic spots at which ambiguities necessarily arise.*”⁸¹ Burke calls his rhetorical system dramatism.⁸² While an analytical method based upon a literary genre may seem to have limited utility in a practical field like law, Burke like other rhetoricians, situates knowledge as arising from human interaction and verbal exchange.⁸³ Drama therefore offers an apt metaphor, because it is an art, like other literary genres, constructed of dialogue and weighted with symbolism, but one that depends upon performance by flesh-and-blood actors on a physical stage driving toward some denouement or resolution.⁸⁴ Conceived as drama, litigation is a performance among numerous actors that leads to a judgment and perhaps a judicial opinion, where the

77. Davis, *supra* note 15, at 697, 699.

78. *Id.*

79. *Id.*

80. *Id.* at 697–98.

81. BURKE, *supra* note 16, at xviii (emphasis in original);

82. *Id.* at xxii; WILLIAM H. RUECKERT, *KENNETH BURKE AND THE DRAMA OF HUMAN RELATIONS* xv (2d ed. 1982) (“[D]ramatism becomes Burke’s final and coherent way of viewing man and the universe.”).

83. BURKE, *supra* note 16, at 33 (“Dialectically considered (that is, ‘dramatistically’ considered) men are not only *in nature*. The cultural accretions made possible by the language motive become a ‘second nature’ with them. Here again we confront the ambiguities of substance, since symbolic communication is not a merely external instrument, but also intrinsic to men as agents.”) (emphasis in original); see Davis, *supra* note 15, at 677 (writing that legal rhetoricians conceive of rhetoric as an exploration of the meaning-making process through which justice is achieved).

84. BURKE, *supra* note 16, at 7 (“Thus, when the curtain rises to disclose a given stage-set, this stage-set contains, simultaneously, implicitly, all that the narrative is to draw out as a sequence, explicitly. Or, if you will, the stage-set contains the action *ambiguously* (as regards the norms of action)—and in the course of the play’s development this ambiguity is converted into a corresponding *articulacy*.”) (emphasis in original).

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ambiguities of all the potential results are eventually given one decisive interpretation. Judicial opinions thus direct the attention toward the right result.⁸⁵ But in the selection of one reality, the judicial opinion also contains the deflection away from other possibilities.⁸⁶ For Burke, “words are agents of power; . . . they are value-laden, ideologically motivated, and morally and emotionally weighted instruments of purpose, persuasion, and representation”⁸⁷ So it is to the words of the judicial opinion itself that the critic must turn⁸⁸ to study and clarify these other possibilities, “the resources of ambiguity.”⁸⁹

Judges engage in a number of strategies to avoid deciding cases on the basis of controversial moral and political grounds.⁹⁰ Laura E. Little argues that “judges may choose a resolution of the controversy that is less likely to require a change in dominant social thinking or to foster especially potent animosity on the part of a particular group.”⁹¹ Especially when construing legislative and constitutional provisions that deal with the court’s power, as with jurisdictional statutes, courts avoid candor.⁹² Some avoidance strategies that remove, reduce or downplay the judge’s responsibility for a decision involve word choice and grammatical constructions, such as writing in the agentive passive voice or employing nominalizations.⁹³ Another way that writers distance themselves from a text is abdication to other authority:

Thus, when a court protests strenuously that its holding is mandated by some authority other than itself, one may ask why the court wishes to avoid direct responsibility for the ruling. Language pointing to responsibility borne by another branch of government—the states, Congress, the executive—may of course suggest no more than the court’s commitment to judicial restraint or denunciation of the positivist

85. KENNETH BURKE, *Terministic Screens*, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 44, 44–46 (1966).

86. BURKE, *supra* note 16, at 17 (“[O]ne may deflect attention from scenic matters by situating the motives of an act in the agent . . . : or conversely, one may deflect attention from the criticism of personal motives by deriving an act or attitude not from traits of the agent from the nature of the situation.”); Delia B. Conti, *Narrative Theory and the Law: A Rhetorician’s Invitation to the Legal Academy*, 39 DUQ. L. REV. 457, 466 (2001).

87. GREIG E. HENDERSON, KENNETH BURKE: LITERATURE AND LANGUAGE AS SYMBOLIC ACTION 118 (1988); *see* Conti, *supra* note 86, at 466 ([E]very utterance is an invitation to persuade.”).

88. BURKE, *supra* note 16, at xv, xviii–xix, ; *see id.* at 33 (“[T]he dramatic analysis of motives has its *point of departure* in the subject of verbal action (in thought, speech, and document).”) (emphasis in original); Jeff Todd, *Phantom Torts Forum Non Conveniens Blocking Statutes: Irony and Metonym in Nicaraguan Special Law 364*, 42 U. MIAMI INTER-AM. L. REV. 291, *passim* (2012) (applying Burke’s master tropes of irony and metonymy to analyze judicial opinions that treated forum non conveniens blocking statutes).

89. BURKE, *supra* note 16, at xix.

90. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 86 (1998).

91. *Id.*

92. *Id.* at 135.

93. *Id.* at 97–98.

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concept. . . . Or the court may believe that formality and detachment are necessary to preserve the appearance of propriety and impartiality. When the attempted detachment is pronounced, however, one may conclude that the substance of the decision or its likely consequences make the court uncomfortable.⁹⁴

From an analysis of judicial opinions, Little noted the “pervasiveness of all obfuscatory devices.”⁹⁵

III. FOREIGN MONEY JUDGMENTS AND THE SYSTEMIC INADEQUACY GROUND FOR NONRECOGNITION

For the prevailing plaintiff in a foreign court, the judgment means success in battle, not victory in war. Defendants, even multinational corporations, often have no assets in those countries. Plaintiffs must therefore seek recognition and enforcement in the court of a country where the defendants have assets. For US corporations, this often means a US court.⁹⁶ While foreign money judgments are entitled to a presumption of validity, the law also provides several grounds upon which a court can, and in some instances must, deny recognition.⁹⁷ One of these grounds, that the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, has come under severe scrutiny by numerous critics.

A. *The (Non)Recognition and Enforcement of Foreign Money Judgments*

1. *A Primer on the Recognition Acts*

The Supreme Court addressed the recognition and enforcement of foreign money judgments over a century ago in *Hilton v. Guyot*.⁹⁸ It referred to comity, “the recognition which one nation allows within its territory to the . . . 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.”⁹⁹ Because comity “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other” comity counsels against rejecting the acts of another sovereign’s

94. *Id.* at 102–03.

95. *Id.* at 140.

96. Weston, *supra* note 10, at 736.

97. See Dhooge *Mandatory*, *supra* note 11, at 39 (“Foreign judgments are entitled to a strong presumption of validity in U.S. courts.”).

98. 159 U.S. 113 (1895).

99. *Id.* at 164.

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courts.¹⁰⁰ Yet, this presumes that the foreign proceedings were conducted “under a system of jurisprudence likely to secure an impartial administration of justice” and that there is nothing to show prejudice “in the system of laws under which [the foreign court] was sitting,” among other considerations.¹⁰¹ If such grounds exist, then the foreign judgment might be impeached.¹⁰²

Although current recognition law have their basis in *Hilton*, state law controls the recognition and enforcement of foreign money judgements under the *Erie* doctrine.¹⁰³ Most states have codified the Uniform Foreign Money Judgment Recognition Act of 1962 (1962 Recognition Act),¹⁰⁴ although a growing number of states have adopted the more recent Uniform Foreign-Country Money Judgments Recognition Act of 2005 (2005 Recognition Act).¹⁰⁵ Those states that have adopted neither of the Acts base recognition and enforcement on *Hilton* and the Restatement (Third) of Foreign Relations Law, which, as noted above, are substantially similar to the Acts.¹⁰⁶ The grounds for nonrecognition (though not the case-law interpreting them) are therefore nearly the same in every state, with a few variations that will be discussed below.¹⁰⁷

A US court can enter an order requiring the judgment debtor (the defendant in the foreign proceedings) to pay the judgment creditor (the plaintiff).¹⁰⁸ However, the Acts apply only to certain types of foreign judgments: those that are “final, conclusive, and enforceable.”¹⁰⁹ To understand the Acts, we must distinguish between recognition and enforcement: enforcement occurs only after the judgment is recognized.¹¹⁰ Enforcement means that the “legal procedures of the state to ensure that the judgment debtor complies with the judgment are

100. *Id.* at 163–64; *see* Dhooge *Mandatory*, *supra* note 11, at 39 (“Foreign judgments are entitled to a strong presumption of validity in U.S. courts.”).

101. *Hilton*, 159 U.S. at 202–03.

102. *Id.* at 203; *see* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995) (“Nations are not inexorably bound to enforce judgments obtained in each other’s courts.”).

103. Dhooge *Mandatory*, *supra* note 11, 24 (citing *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938)); Heiser, *supra* note 7, at 634.

104. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT 13 U.L.A. pt. 2 (1962) [hereinafter “1962 RECOGNITION ACT”].

105. 2005 RECOGNITION ACT. As of February 2013, thirty-three jurisdictions had enacted either the 1962 Act or the 2005 Act, with eighteen subsequently enacting legislation based on the latter. An additional state has enacted the 2005 Act and another has introduced new legislation based on the 2005 Act. UNIFORM LAW COMMISSION, *available at* <http://www.uniformlaws.org/Acts.aspx?title=recognition> (last visited Feb. 26, 2013) (on file with the *McGeorge Law Review*).

106. Whytock & Robertson, *supra* note 1, at 1464–65; Dhooge *Mandatory*, *supra* note 9, at 24 n.143; Heiser, *supra* note 1, at 634–35; *see* *Hilton*, 159 U.S. at 164–64.

107. Heiser, *supra* note 1, at 634–35.

108. *Id.*

109. Dhooge *Mandatory*, *supra* note 11, at 25 (citing 1962 RECOGNITION ACT § 2), 26 (citing 2005 RECOGNITION ACT § 3(a)(2)).

110. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b (“The judgment of a foreign state may not be enforced unless it is entitled to recognition.”).

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available to the judgment creditor to assist in the collection of the judgment.”¹¹¹ Courts can enforce any judgment entered by a foreign court that is final—even if it is on appeal in the foreign country—and grants money damages rather than equitable relief, taxes, fines, or matrimonial support.¹¹² So long as these criteria are met, the judgment is conclusive and therefore entitled to the same full faith and credit that a U.S. court gives to a judgment entered in a sister state; in other words, it is entitled to recognition as though required by the Full Faith and Credit Clause of the U.S. Constitution.¹¹³

In certain circumstances, however, a foreign judgment will be deemed non-conclusive—or under the 2005 Act non-recognizable—and thus not subject to enforcement. Some of the grounds for nonrecognition are mandatory while others are discretionary. If the defendant makes a showing under any one of the former, the court must make a finding of non-conclusiveness/nonrecognition, but if the defendant makes a showing under any of the latter, the court has discretion to make that finding.¹¹⁴ The mandatory grounds are the same under both Acts:

- (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.¹¹⁵

The six discretionary grounds from the 1962 Act are essentially the same in the 2005 Act:

- (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] . . . on which the judgment is based is repugnant to the public policy of this state;
- (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

111. 2005 Recognition Act § 3 cmt. 3; Dhooge *Mandatory*, *supra* note 11, at 25.

112. Dhooge *Mandatory*, *supra* note 11, at 25.

113. Baker & Parise, *supra* note 5, at 36; Heiser, *supra* note 1, at 635.

114. Whytock & Robertson, *supra* note 1, at 1465–66.

115. 1962 RECOGNITION ACT § 4(a)(1)–(3); 2005 RECOGNITION ACT § 4(b)(1)–(3).

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- (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.¹¹⁶

The 2005 Act adds two discretionary grounds:

- (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
- (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.¹¹⁷

One final factor from *Hilton v. Guyot* is reciprocity: comity does not require enforcement of a foreign judgment if the foreign country would not likewise enforce a US judgment.¹¹⁸ Both Acts have rejected reciprocity, but at least eight states—including some that have adopted one of the two Acts—have some type of reciprocity as a ground.¹¹⁹

Although judgment debtors seem to have an arsenal of twelve separate grounds, most of them are not available in the context of transnational mass tort litigation. First, assuming that reciprocity or the lack of integrity and due process in the specific proceedings might be at issue, the judgment creditors can avoid US states that require reciprocity or that have enacted the 2005 Act.¹²⁰ They can choose to seek recognition in any other state that has personal jurisdiction over the judgment debtors and where they have assets, which for multinational corporations means many if not every state.¹²¹ Even if plaintiffs cannot enforce the judgment because the corporation has no assets in that state, plaintiffs can still have the judgment recognized by a US court, which makes the judgment enforceable under the Full Faith and Credit Clause in any other US state, including those where the corporations do have assets.¹²²

Judgment debtors may try to seek preemptive nonrecognition in the most defendant-friendly states. While the plaintiff as judgment creditor typically files an action to have the foreign money judgment recognized, judgment debtors in several instances have sought injunctions against enforcement.¹²³ One author in

116. 1962 RECOGNITION ACT § 4(b)(1)-(6); see 2005 RECOGNITION ACT § 4(c)(1)-(6).

117. 2005 RECOGNITION ACT § 4(c)(7)-(8).

118. Whytock & Robertson, *supra* note 1, at 1464 (citing 159 U.S. at 214).

119. *Id.* at 1468-69.

120. Dhooge *Mandatory*, *supra* note 11, at 40; see Baker & Parise, *supra* note 5, at 18 (“[P]laintiff-friendly states effectively set the standards for interstate tort litigation.”).

121. See Dhooge *Mandatory*, *supra* note 11, at 40.

122. *Id.* at 40; Carodine, *supra* note 3, at 1242.

123. Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (*per curiam*); Investorshub.com, Inc. v. Mina Mar Group, Inc., Case No. 4:11cv9-RH/WS, 2011 U.S. Dist. LEXIS 87566 (N.D. Fla. June 20, 2011); Ehrenfeld v. Mahfouz, No. 04 Civ. 9641(RCC), 2006 U.S. Dist. LEXIS 23423 (S.D.N.Y. Apr. 26, 2006), *aff’d* 518 F.3d 102 (2d Cir. 2008); Shell Oil Co. v. Franco, No. CV 03 8846 NM

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2007 opined that it is “not clear” whether these actions even come within the scope of the Recognition Acts.¹²⁴ The Recognition Acts do not address declaratory judgments, and they define their scope by reference to the conclusiveness or recognizability of the foreign money judgment itself.¹²⁵ Except for the Second Circuit in the Lago Agrio litigation discussed *infra*, no courts have tackled the question squarely. The closest may be a plurality of the Ninth Circuit sitting en banc in *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, in which Yahoo! brought suit under the Declaratory Judgment Act (DJA) to have a French injunction (not a foreign money judgment) prohibiting it from linking to Nazi memorabilia auction sites declared non-recognizable under the public policy ground.¹²⁶ Judge W.A. Fletcher wrote that the 1962 Recognition Act adopted by California “is not directly applicable to this case, for it does not authorize enforcement of injunctions. But neither does the Uniform Act prevent enforcement of injunctions, for its savings clause specifies that the Act does not foreclose enforcement of foreign judgments ‘in situations not covered by [the Act].’”¹²⁷ Because the Uniform Act did not apply, he opined that the court should “look to general principles of comity” articulated in the Restatement (Third) of the Foreign Relations Law of the United States.¹²⁸ Three judges found the issue was not ripe and three others that the courts of California lacked personal jurisdiction, so by a vote of six-to-five the court reversed the district court’s anti-enforcement injunction.¹²⁹

No court has held that preemptive nonrecognition is forbidden by the Recognition Acts. Indeed, judgment debtors in several cases have prevailed as plaintiffs against the judgment debtor.¹³⁰ One oft-cited case is *Matusevitch v. Telnikoff*, where the court found that Telnikoff’s English defamation judgment against Matusevitch was not entitled to recognition because it was repugnant to the public policies of Maryland and the United States as a matter of law and granted summary judgment in favor of Matusevitch.¹³¹ A more recent case is *Investorshub.com, Inc. v. Mina Mar Group, Inc.*, where the judgment debtor from a Canadian defamation action brought an action under the DJA.¹³² After the

(PJWX), 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005); *Younis Bros. & Co. v. Cigna Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 747 (E.D. Pa. 2001); *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995); *Drake v. Brady*, No. A08-2137, 2009, Minn. App. Unpub. LEXIS 1049 (Minn. Ct. App. Sept. 15, 2009).

124. Luthin, *supra* note 2, at 134. Another article addressing preemptive nonrecognition in 2006 questioned whether one attempt at preemptive nonrecognition was “the vanguard of a new trend or an exceptional kamikaze mission.” Gul, *supra* note 5, at 97.

125. Luthin, *supra* note 2, at 134.

126. 433 F.3d at 1201–02, 1204.

127. *Id.* at 1213 (citing CAL. CIV. PROC. CODE §§ 1713.1(2), 1713.7).

128. *Id.*

129. *Id.* at 1201.

130. See notes 133–37 and accompanying text.

131. 877 F. Supp. 1., 2 (D.D.C. 1995).

132. 2011 U.S. Dist. LEXIS 87566.

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parties so stipulated, the district court declared that the case could not be enforced in the U.S. pursuant to Florida's Recognition Act.¹³³ The court in *Shell Oil Co. v. Franco*, a case brought by the judgment debtor under the DJA,¹³⁴ found that the Nicaraguan court in DBCP litigation did not have personal jurisdiction over Shell and entered an injunction against enforcement.¹³⁵

Even when the judgment creditors have failed in their attempt at preemptive nonrecognition, it is for reasons unrelated to the applicability of the Recognition Act. For example, in *Drake v. Brady*, the judgment debtors offered no proof that the Canadian court lacked personal jurisdiction over them under Canadian law.¹³⁶ In a case affirmed by the Second Circuit, *Ehrenfeld v. Mahfouz*, the judgment debtor sought a declaratory judgment that an English defamation judgment was unenforceable under the New York Recognition Act.¹³⁷ The trial court found that it lacked personal jurisdiction over the judgment creditor, and that finding was affirmed.¹³⁸ Neither court addressed whether the New York Recognition Act allowed for, or even applied to, the suit.

While preemptive recognition seems a smart tactic for judgment debtors in transnational toxic tort cases, the lack of personal jurisdiction in *Ehrenfeld* and *Yahoo!* suggests why they likely will not have an unlimited choice of fora for preemptive nonrecognition: no state would have personal jurisdiction over these foreign plaintiffs.¹³⁹ The only exception would be if the foreign judgment resulted from an action previously filed in the U.S. but dismissed under FNC. Then, the judgment debtor could seek nonrecognition in the state where the plaintiffs first filed their US suits. States where the DBCP cases were filed in the 1980s and 1990s like Texas and Florida, and New York where the Lago Agrio litigation was first filed, have not adopted the proceeding-specific grounds for nonrecognition in the 2005 Act.¹⁴⁰

Commentators have suggested that many of the other nonrecognition grounds do not apply for cases that had previously been dismissed for FNC.¹⁴¹ In an FNC proceeding, the court determines which of two fora is more convenient for

133. *Id.* at *5–7.

134. 2005 U.S. Dist. LEXIS 47557.

135. *Id.* at *20. The court in *Younis Brothers* likewise entered an injunction against enforcing a Liberian judgment, but made no reference to a state Recognition Act. 167 F. Supp. 2d at 747.

136. 2009 Minn. App. Unpub. LEXIS at *12–13.

137. Case No. 04 Civ. 9641 (RCC), 2006 U.S. Dist. LEXIS 23423 (S.D.N.Y. Apr. 26, 2006), *aff'd* 518 F.3d 102 (2d Cir. 2008).

138. 518 F.3d at 103, 106.

139. *See* Luthin, *supra* note 2, at 135 (“[P]rocedures designed to render [foreign money judgments] unenforceable definitely raise issues of whether a court has personal jurisdiction over the judgment creditor.”).

140. *See* TEX. CIV. PRAC. & REM. CODE § 36.005; FLA. CODE § 55.605 (West Supp. 2013); N.Y. CODE P. L. R. 5304 (Consol. 2013).

141. Heiser, *supra* note 1, at 636 (“Most of the provisions of the UFMJRA do not come into play when a plaintiff seeks to enforce a foreign judgment rendered after the plaintiff’s action was dismissed by a U.S. court based on *forum none conveniens*.”).

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litigating the dispute: the US court or the court of a foreign country, often the plaintiff's home.¹⁴² To make this determination, a court weighs two sets of factors: the private interest factors that deal with the parties' concerns, like access to sources of proof, and the public interest factors that deal with court concerns, like the congestion of dockets and the need to apply foreign law.¹⁴³ Before even weighing these factors, however, the court has to ensure that the foreign courts are "both available and adequate."¹⁴⁴ The Supreme Court in *Piper Aircraft Co. v. Reyno* considers an alternative forum available if the defendant is amenable to process in that jurisdiction.¹⁴⁵ This is a low hurdle for defendants, who will have consented to personal jurisdiction in the foreign forum; plus, US courts can condition dismissal on a return jurisdiction clause if the foreign court lacked subject matter jurisdiction, thus ruling out the second and third mandatory grounds.¹⁴⁶ Because the defendant as movant seeks litigation in the foreign forum, the defendant cannot argue lack of notice, conflict with another judgment, previous settlement, or the serious inconvenience of the foreign forum. Accordingly, the only discretionary grounds likely to arise are that the cause of action upon which the judgment is based violates the public policy of the state or that the judgment was obtained by fraud.¹⁴⁷

2. *The Systemic Inadequacy Ground*

The sole mandatory ground that remains is that the judgment was rendered in a system that does not provide impartial tribunals or procedures compatible with the requirements of due process.¹⁴⁸ The key to this provision is "system." Judge

142. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–509 (1947); see *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Because of the removal and venue transfer statutes that were enacted after *Gilbert* and *Koster*, the doctrine of forum non conveniens in federal courts now only applies to lawsuits where one of the litigants is from a foreign country. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 313 (2002).

143. The private interest factors are "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. Another private interest factor is the enforceability of any judgment obtained. *Id.* The public interest factors are administrative difficulties from the congestion of court dockets; "the local interest in having localized controversies decided at home"; the burden placed on a jury required to decide a case with no connection to the community; and the appropriateness of having the dispute tried in a forum familiar with the governing law rather than having another court untangle conflicts of law and apply foreign laws. *Id.* at 508–09.

144. Whytock & Robertson, *supra* note 11, at 1456; Heiser, *supra* note 1, at 614. For a discussion of how availability and adequacy are perceived differently in the common law U.S. and the civil law systems of Latin American countries, see Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65 (2003-04).

145. *Piper*, 454 U.S. at 254 n.22.

146. Heiser, *supra* note 1, at 614–15.

147. *Id.* at 636.

148. Unif. Foreign-Country Money Judgments Recognition Act § 4(b)(2005).

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Posner in *Society of Lloyd's v. Ashenden* even italicized this word in the Illinois Recognition Act to emphasize that the analysis considers only the adequacy of the foreign country's judicial system as a whole rather than impartiality or lack of due process in individual proceedings.¹⁴⁹ He rejected plaintiffs' request for an inquiry into questionable elements of the specific proceedings, rejecting a "retail approach" that would be the equivalent of a "second lawsuit."¹⁵⁰ Other courts have followed this interpretation, and it is embraced in the comments to the 2005 Recognition Act.¹⁵¹

Walter Heiser divides this ground into two separate questions: whether the nation has an impartial judiciary, and whether it provides procedures compatible with due process.¹⁵² The due process question is difficult for the judgment creditor to prove because the foreign proceedings need satisfy only an "international standard of due process," not the rigorous standards required by the Due Process clauses of the US Constitution.¹⁵³ Thus, the foreign procedures must be "fundamentally fair" and not offend "basic fairness";¹⁵⁴ the foreign courts need not adopt "every jot and tittle" of US due process.¹⁵⁵ Courts have affirmed basic fairness

even though the foreign procedure did not include the right to cross-examine witnesses, prohibited the defendants from raising certain defenses and counterclaims, prohibited discovery as to the amount claimed by the plaintiff, lacked a verbatim transcript, or conditioned leave to defend on the deposit of an amount equal to the prayer in the complaint.¹⁵⁶

They have also found that lengthy delays in the foreign legal proceedings do not violate due process, nor does international due process require oral testimony or compulsory process.¹⁵⁷

Courts only find systemic inadequacy when there is "'serious injustice' or 'outrageous departure from our own [notion] of civilized jurisprudence,'"¹⁵⁸

149. 233 F.3d 473, 476 (7th Cir. 2000).

150. *Id.* at 477.

151. Whytock & Robertson, *supra* note 1, at 1467 (citing 2005 RECOGNITION ACT § 4 cmt. 5, U.L.A. pt. 2, at 27 (Supp. 2011)).

152. Heiser, *supra* note 1, at 638–39; see Kelly, *supra* note 2, at 563.

153. Heiser, *supra* note 1, at 639–40. Although personal and subject matter jurisdiction are due process grounds in U.S. civil procedure, those grounds are treated in separate provisions of the Uniform Acts. *Id.* at 639. As noted above, these grounds are unlikely to be present in a boomerang suit.

154. Ashenden, 233 F.3d at 476–78; Heiser, *supra* note 1, at 639–40.

155. See Dhooge *Mandatory*, *supra* note 11, at 41.

156. Heiser, *supra* note 1, at 640–41 (citations omitted).

157. Dhooge *Mandatory*, *supra* note 11, at 41–42.

158. See *id.* (citing *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 687 (7th Cir. 1987); *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974)).

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which leads to the second type of systemic inadequacy, impartiality of the foreign judiciary. Here, “the appropriate inquiry is whether the judicial system is an independent branch of the foreign country’s government and is capable of administering, and does in fact administer justice in a fair manner.”¹⁵⁹ The U.S. court must find that the foreign tribunal is corrupt and biased or incapable of acting impartially with respect to the defendant.¹⁶⁰ Judge Posner in *Ashenden* suggested that nations “whose adherence to the rule of law and commitment to the norm of due process are open to serious question” could be found inadequate, such as Cuba, North Korea, Iran, Iraq, and Congo.¹⁶¹ He contrasted those countries with the courts of the country at issue before him, England, which he characterized as “the very fount from which our system developed; a system which has procedures and goals which closely parallel our own.”¹⁶²

The entire judicial system of a country has been found inadequate in two notable cases. In *Bank Melli Iran v. Pahlavi*, the bank sued the sister of the deposed and exiled Shah of Iran to collect on promissory notes.¹⁶³ When she failed to appear, the court entered a default judgment of \$32,000,000 against her, and the bank sought recognition and enforcement in California, where Pahlavi lived.¹⁶⁴ The Ninth Circuit affirmed the trial court’s granting Pahlavi’s motion for summary judgment on the ground that the courts of Iran deny due process: “[t]he evidence in this case indicated that Pahlavi could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf.”¹⁶⁵ The evidence showed that Americans in general, and members of the Shah’s family in particular, could not get a fair trial in Iran because of strong anti-American sentiments by the Islamist regime that deposed the Shah.¹⁶⁶ The court listed several facts that supported the trial court’s findings: trials are not held in public, they are highly politicized, the regime does not believe in an independent judiciary, judges are subject to continuing scrutiny and threat of sanction, and unrestrained revolutionary courts can take over civil actions.¹⁶⁷

In *Bridgeway Corp. v. Citibank*, a Liberian company filed suit against Citibank when it liquidated the bank account and paid devalued Liberian dollars rather than US dollars because of civil war in that country.¹⁶⁸ The company won a

159. Heiser, *supra* note 1, at 639.

160. *Id.*

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

162. *Id.* at 476 (citation and internal quotations omitted).

163. Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995).

164. *Id.*

165. *Id.* at 1413.

166. *Id.* at 1411–13. Indeed, Americans faced physical danger in traveling to Iran. *Id.* at 1411.

167. *Id.* at 1411–12.

168. 45 F. Supp. 2d 276, 280–81 (S.D.N.Y. 1999), *aff’d* 201 F.3d 134 (2d Cir. 2000).

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breach of contract lawsuit in Liberian court, which was affirmed by the Liberian Supreme Court, and the company sought to enforce in the U.S.¹⁶⁹ At the time of the Liberian lawsuit, the nation was embroiled in a civil war so that a “bleak picture” of the judiciary emerged.¹⁷⁰ Rather than follow constitutional procedures, factions controlling various parts of the country determined the appointment and removal of judges.¹⁷¹ The courts that did exist were barely functioning, “hampered by inefficiency and corruption” when they were, and “subject to political, social, familial, and financial suasion.”¹⁷² This situation continued even after the war ended.¹⁷³ The district court concluded that the judgment was unenforceable as a matter of law: “[o]n the record before the Court, a reasonable factfinder could only conclude that, at the time the judgment at issue here was rendered, the Liberian judicial system was not fair and impartial and did not comport with the requirements of due process.”¹⁷⁴ The Second Circuit affirmed that Citibank was entitled to judgment as a matter of law.¹⁷⁵

US courts consider a wide range of sources in determining systemic inadequacy because this consideration is neither a question of fact nor a question of law, “but it is a question about the law of a foreign nation, and in answering such questions a federal court is not limited to the consideration of evidence that would be admissible under the Federal Rules of Evidence; any relevant material or source may be consulted.”¹⁷⁶ Rule 44.1 of the Federal Rules of Civil Procedure gives a court broad freedom to consider any relevant material about foreign law, including unsworn testimony of the opinion letter of a foreign lawyer, evidence from non-lawyers, and judicial notice of the words of foreign statutes.¹⁷⁷ Thus, courts rely upon expert witnesses, which may include declarations from US diplomats to those countries as well as legal scholars and judges from those countries.¹⁷⁸ Courts also cite legal sources, both US cases and scholarship as well as the law of foreign nations, which are often attached to expert reports.¹⁷⁹ Another routine source is the annual Country Reports prepared by the US State Department, which includes sections about the effectiveness of the judiciary and

169. *Id.* at 280–81.

170. *Id.* at 280.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 287; see N.Y. C. P. L. R. 5304(a) (Consol. 2013) (systemic inadequacy ground).

175. *Bridgeway*, 201 F.3d at 142.

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

177. *Davies*, *supra* note 142, at 354–55.

178. See *e.g.*, *Bank Mellī Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995) (quoting declaration of Laurence Pope, a State Department official); *Bridgeway*, 45 F. Supp. 2d at 279 (citing sworn statement of H. Varney G. Sherman, a Liberian attorney and former president of the Liberian National Bar Association).

179. See *e.g.*, *Pahlavi*, 58 F.3d at 1412 (taking judicial notice of Circuit Court opinions that had found that a fair trial in Iran was not possible); *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206, 207 n.2 (S.D.N.Y. 1999) (citing law review articles about Romania).

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its susceptibility to bias and politicization.¹⁸⁰ Other reports from US governmental agencies, as well as the reports of non-governmental organizations and even media sources detailing the history and politics of the country, are also considered.¹⁸¹

For example, the Second Circuit in *Bridgeway* found that Citibank “ha[d] come forward with sufficiently powerful and un-contradicted documentary evidence describing the chaos within the Liberian judicial system during the period of interest to this case to have met [its] burdens and to be entitled to judgment as a matter of law.”¹⁸² Citibank had relied upon two sources: affidavits of H. Varney G. Sherman, Citibank’s Liberian counsel, and several years’ of the US State Department Country Reports for Liberia.¹⁸³ The court did not address the admissibility of the affidavit because it was not contested; it did note that Sherman’s description of the courts as being subject to political influence supported the district court’s conclusions.¹⁸⁴ The court also found the Country Reports admissible under Federal Rule of Evidence 803(8)(C), which permits “factual findings resulting from an investigation made pursuant to authority granted by law.”¹⁸⁵ The court finally rejected Bridgeway’s objection to the district court’s taking judicial notice of historical facts drawn from sources like an encyclopedia and CNN news reports, finding that they “were merely background history.”¹⁸⁶

B. *Criticisms of the Systemic Inadequacy Ground*

1. *It Violates the Constitution by Requiring Courts to Engage in Acts of State and to Answer Political Questions*

Montre Carodine offers a forceful argument against the systemic inadequacy ground: it violates the separation of powers under the Constitution because applying an international standard for due process forces courts to make foreign

180. *E.g.*, *Pahlavi*, 58 F.3d at 1411–12; *Bridgeway*, 45 F. Supp. 2d at 280; *see Dhooge Mandatory*, *supra* note 9, at 44. To access the Country Reports, *see* U.S. Dep’t of State, Human Rights Reports, *available at* <http://www.state.gov/j/drl/rls/hrrpt/> (last accessed Feb. 26, 2013) (on file with the *McGeorge Law Review*).

181. *E.g.*, *Pahlavi*, 58 F.3d at 1411 (citing consular information sheets that gave travel warnings from 1981 through 1993 and warned of anti-American sentiments); *Bridgeway*, 45 F. Supp. 2d at 278 n.2 (taking judicial notice of online materials such as CNN News Reports and the Encarta Multimedia Encyclopedia entry for Liberia); *S. C. Chimexim*, 36 F. Supp. 2d at 207 n.2 (citing Judicial Overview of Central and Eastern Europe by the American Bar Association Central and East European Law Initiative (CEELI) (1996)); Daniel N. Nelson, *Romania*, ENCARTA MULTIMEDIA ENCYCLOPEDIA (Microsoft 1997); *see Dhooge Mandatory*, *supra* note 11, at 44–45.

182. *Bridgeway*, 201 F.3d at 141–42.

183. *Id.* at 142.

184. *Id.* at 142 n.3 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 cmt. b (1987)).

185. *Id.* at 143–44 (citing *Pahlavi*, 58 F.3d at 1411).

186. *Id.* at 144.

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policy.¹⁸⁷ First, she likens this ground to the state statute in *Zschernig v. Miller* that the Supreme Court struck down “as an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”¹⁸⁸ That statute prohibited foreigners from inheriting property without engaging in an analysis of the inheritance rights in the foreign country.¹⁸⁹ The Supreme Court found that the statute made “unavoidable judicial criticism of nations established on a more authoritarian basis than our own,”¹⁹⁰ and held such foreign policy-making by states is prohibited.¹⁹¹ The systemic inadequacy ground for nonrecognition is another state statute requiring state courts to make their own foreign policy, so Carodine concludes that it too violates the act of state doctrine.¹⁹²

For federal courts with diversity jurisdiction, the systemic inadequacy ground also violates the political question doctrine.¹⁹³ This is a judicially created doctrine of restraint also rooted in the separation of powers under the Constitution: courts will decline to consider questions that are better left to the political branches.¹⁹⁴ The Supreme Court has held that questions of foreign relations are inherently political and therefore best left to the Executive and Legislative branches.¹⁹⁵

2. *It Lacks Coherent Standards of Applicability*

While problematic from a doctrinal perspective, the presence of political questions also creates problems in application because courts hesitate to find systemic inadequacy except for the most politically disfavored or geopolitically insignificant countries.¹⁹⁶ Andreas Lowenfeld has noted that “judges might also be reluctant to label an entire country as unfair,” offering the example of the

187. Carodine, *supra* note 3, at 1163–64, 1190–91.

188. *Id.* at 1192 (quoting *Zschernig v. Miller*, 389 U.S. 429, 432 (1968)).

189. 389 U.S. at 430–31.

190. *Id.* at 440.

191. Carodine, *supra* note 3, at 1193.

192. *Id.* at 1195; *see* Kelly, *supra* note 2, at 580–81; *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424–25 (2003) (striking down California’s Holocaust Victim Insurance Relief Act as interfering with President’s conduct of foreign affairs).

193. Carodine, *supra* note 3, at 1206.

194. *Id.* at 1195–96, 98.

195. *Id.* at 1197; *see* Gul, *supra* note 5, at 79 (“Particularly problematic is that *Hilton* comity principles force U.S. courts to make political judgments about foreign nations and their treatment of U.S. citizens. These decisions might be more appropriately left to the political branches.”).

196. Kelly, *supra* note 2, at 579–80 (claiming that courts find systemic inadequacy on in “avowed enemies” of the US like Iran or “countries of limited geopolitical significance” like Liberia and Nicaragua); Fitt, *supra* note 2, at 1031 (“American courts have occasionally refused to enforce foreign judgments on the grounds of bias or corruption, but such action is typically reserved for only the most chaotic and unjust systems.”); *see* *In re Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002) (“[Courts] have been reluctant to find foreign courts ‘corrupt’ or biased.”).

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Ukraine as a hard call but Iran as an easy one.¹⁹⁷ This latter example suggests that, rather than engage in meaningful analysis, judges might play on stereotypes for some countries.¹⁹⁸ For countries at the margins, however, courts “seem to bend over backward” to avoid a finding of systemic inadequacy.¹⁹⁹ Carodine suggests that courts might even reward countries that are trying to reform their judiciary to be more like the United States.²⁰⁰

Not all courts break upon the lines of political alignment. The Third Circuit in *In Sik Choi v. Hyung Soo Kim* applied New Jersey law and found that procedures in South Korea—not North Korea from Judge Posner’s list of bad countries—did not comport with due process.²⁰¹ Choi obtained an order of execution on a promissory note against Kim, who was abroad at the time.²⁰² The Third Circuit assumed without deciding that the order of execution was a foreign money judgment.²⁰³ It then analyzed the specific notice provisions of South Korean law to find that they did not allow Kim to have notice and an opportunity to be heard.²⁰⁴ The concurring judge would have affirmed the district court’s grant of summary judgment on an alternate basis: Choi’s order was not a judgment subject to recognition and enforcement.²⁰⁵

That a court can refuse to recognize a judgment obtained in US-friendly South Korea, and on the basis that one law rather than the entire judicial system violates international standards for due process, demonstrates how the systemic inadequacy ground requires judges to determine lack of due process “without giving them a concrete standard for doing so.”²⁰⁶ While scholars note that the recognition laws are remarkably consistent,²⁰⁷ they nevertheless recognize problems in a system based on a “patchwork of recommended practices, restatements, and both state and federal case law.”²⁰⁸ The systemic inadequacy

197. Carodine, *supra* note 3, at 1213 (citing *Discussion of Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, 82 A.L.I. PROC. 94 (2005)).

198. *Id.* at 1214; see Kelly, *supra* note 2, at 557 (“In fact, sweeping generalizations about the judicial systems of foreign nations are not just allowed under current U.S. law, they are required.”).

199. Gul, *supra* note 5, at 82 (“To their credit, state courts seem cognizant of the special implications of actions seeking to enforce foreign judgments, and seem to bend over backward to avoid parochialism.”).

200. Carodine, *supra* note 3, at 1217–20 (discussing *S.C. Chimexim*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999)) (praising Romania for its reform efforts without assessing the fairness of the judiciary).

201. 50 F.3d 244, 248, 250 (3d Cir. 1995).

202. *Id.* at 246.

203. *Id.* at 248.

204. *Id.* at 248–50.

205. *Id.* at 250 (Lewis, J., concurring).

206. Kelly, *supra* note 2, at 570; Luthin, *supra* note 2, at 119 (characterizing the language of the 1962 Recognition Act as “confusing and ambiguous. . .”).

207. Heiser, *supra* note 1, at 634–35.

208. Gul, *supra* note 5, at 69–70; see Baker & Parise, *supra* note 5, at 18; Luthin, *supra* note 2, at 120 (“These issues have created several layers of non-uniform state law language, implementation, and application in recognizing and enforcing FMJs.”).

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ground in particular “has rarely been interpreted, applied, or questioned,”²⁰⁹ so even looking at extra-jurisdictional cases, courts have few opinions upon which to rely for guidance.²¹⁰ The approach is often piece-meal and tailored rather than coherent and predictable.²¹¹ One student commentator wrote, “[d]espite the word ‘uniform’ in the statutes’ titles, their enforcement [by US courts] is anything but.”²¹² Saad Gul has characterized the recognition laws in general as offering “somewhat misty standards of substantial justice.”²¹³

3. *It Is Often Unnecessary*

Besides lacking a concrete standard, the systemic inadequacy ground is often unnecessary because courts can rely upon an alternative basis for nonrecognition in almost all cases where there is also systemic inadequacy.²¹⁴ In fact, “judges have chosen to hinge nonrecognition upon less controversial bases such as lack of jurisdiction, fraud, or the public policy exception.”²¹⁵ The 2005 Recognition Act, which a growing number of states have adopted, minimizes the need for the systemic inadequacy ground by providing two grounds based upon bias or lack of due process in the specific proceedings as opposed to the entire judicial system.²¹⁶

4. *Its Interplay with FNC Creates an “Access-to-Justice” Gap*

One final criticism addressed by numerous commentators involves the application of the systemic inadequacy ground to foreign judgments that had their genesis in US courts—or similar cases brought against the same corporate defendants—where the cases were dismissed for FNC. The basic approach to an FNC determination was described in Part II(B)(2), *supra*, and a detailed explication of FNC is beyond the scope of this Article—and has been quite extensively treated by a number of scholars.²¹⁷ Accordingly, this subsection

209. Kelly, *supra* note 2, at 559.

210. See Luthin, *supra* note 2, at 134 (“Indeed, there have been few cases denying recognition of FMJs based on the argument that the judicial system failed to provide procedures compatible with due process.”).

211. Gul, *supra* note 5, at 85; *but see* Luthin, *supra* note 2, at 134 (“[T]his may be one of the few areas of constitutional implications arising from the enforcement of FMJs that appears to be uniform.”).

212. Luthin, *supra* note 2, at 136.

213. Gul, *supra* note 5, at 73; *see* Fitt, *supra* note 2, at 1041 (“[F]oreign court recipients of American judicial deference should, at a minimum, be free from systemic bias or corruption. Yet the current formulation of forum non conveniens and the parallel enforcement of foreign judgments are not adequately designed to create such assurances.”).

214. Kelly, *supra* note 2, at 575.

215. *Id.* at 565.

216. Carodine, *supra* note 3, at 1234–36; Kelly, *supra* note 2, at 565.

217. *See e.g.*, Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010); Martin Davies, *supra* note 142, *passim*.

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analyzes an issue that is considered in both FNC and enforcement proceedings: the adequacy of the foreign court.

Before balancing the private and public interest factors as part of the FNC analysis, the court must first find that the foreign country's courts are available and adequate.²¹⁸ Adequacy presents a low hurdle for defendants because the standards for adequacy are lenient, plaintiff-focused, and *ex ante*.²¹⁹ The defendant need merely prove that the parties will not be deprived of some remedy nor be treated unfairly.²²⁰ The Court in *Piper Aircraft* held that the possibility of a change in substantive law that is unfavorable for the plaintiffs "should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."²²¹ An unfavorable change in law "may be given substantial weight" only if the remedy provided "is no remedy at all."²²² A foreign court must be "'adequate' enough to provide plaintiffs with a meaningful remedy, or at least a remedy that is not clearly inadequate or unsatisfactory."²²³ Accordingly, while a lack of subject matter jurisdiction in the foreign court makes dismissal inappropriate, the likelihood of smaller damage awards and of fewer—and more difficult to prove—theories of liability does not.²²⁴ Based on the *Piper Aircraft* standard, courts have rejected the arguments of plaintiffs that, unlike the US, their home countries did not have strict liability or punitive damages, did not provide for jury trials, and did not allow contingency fee contracts.²²⁵ They likewise rejected arguments about the foreign country's inability to handle complex cases, both because of laws geared toward the resolution of individual disputes and because of the lack of financial resources.²²⁶

Of relevance to future attempts to recognize and enforce a foreign money judgment, plaintiffs argued that the foreign courts were inadequate because they were corrupt and politicized.²²⁷ At the time the DBCP and Lago Agrio defendants argued for an FNC dismissal, and therefore "praised" the foreign judiciaries as adequate, "courts in those countries were known to be corrupt."²²⁸ A number of

218. Whytock & Robertson, *supra* note 1, at 1456; Heiser, *supra* note 1, at 614.

219. Whytock & Robertson, *supra* note 1, at 1456–60.

220. Davies, *supra* note 142, at 319–20; *see* Whytock and Robertson, *supra* note 1, at 1456–60.

221. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

222. *Piper*, 454 U.S. at 254.

223. Garro, *supra* note 144, at 65.

224. *Piper*, 454 U.S. at 254–55, 255 n.22. In an action based upon an aircraft crash that killed several people, the Court held that the courts of Scotland were adequate even though Scotland does not recognize strict liability and limits the type of recovery for wrongful death. *Id.* at 240, 254–55. By way of contrast, the Court cited *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, where the district court refused to dismiss because it was unclear whether Ecuadoran courts would hear the case and because Ecuador offered no remedy for the unjust enrichment and tort claims asserted. *Id.* at 254–255 n.22 (citing 78 F.R.D. 445 (Del. 1978)).

225. *E.g.*, Todd, *supra* note 88, at 300–03.

226. *E.g.*, *id.* at 302–03.

227. Whytock & Robertson, *supra* note 1, at 1457.

228. Baker & Parise, *supra* note 5, at 10–11; *see id.* at 13 ("Many of Latin America's judiciaries have

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factors contributed to this, such as low pay for judges and the possibility of the judge's removal at the political whim of the executive. A complaint directed at courts and judges in many Latin American countries in the 1980s was corruption, "political intervention, the failure to protect basic human rights and outright collusion with authoritarian governments."²²⁹ The two countries at issue in this Article, Nicaragua and Ecuador, "rank among the judiciaries with the most corruption."²³⁰ Both Nicaragua and Ecuador "are among a group of countries where corruption has worsened as populist regimes politicized the judiciaries."²³¹ Especially in highly publicized cases in which the government has a stake, the judiciary in countries like Ecuador and Nicaragua "are vulnerable to the pressure exerted by the Executive branch."²³²

Despite reports by scholars, the US State Department, various non-governmental organizations, and the mass media of judicial corruption and politicization, US courts hesitated to declare the judicial systems of other countries inadequate. They either refused to inquire into these aspects of the judiciary, or they applied only minimal scrutiny to ascertain whether corruption would preclude fair proceedings for the individual plaintiffs, thereby rejecting general accusations of corruption.²³³ For example, in *Delgado v. Shell Oil Co.*, Judge Sim Lake downplayed plaintiffs' affidavit and media reports about a political dispute between the President and legislature of Nicaragua over the appointment of Nicaraguan Supreme Court justices because that dispute had been resolved and did not demonstrate a problem with the trial courts.²³⁴ In the Lago Agrio plaintiffs' first attempt at a US trial, *Aguinda v. Texaco, Inc.*, Judge Jed Rakoff rejected plaintiffs' expert affidavit and Country Reports about Ecuador because they contained "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."²³⁵

long had reputations among their own citizens as corrupt and subject to political influence."); Whytock & Robertson, *supra* note 1, at 1485 ("In the Dole case, the plaintiffs agreed that the Nicaraguan judiciary was highly politicized, but emphasized that the defendants had certainly known about the issue at the time it sought to dismiss the case in favor of a Nicaraguan forum."); Dhooge *Mandatory*, *supra* note 11, at 44–46 (noting that even though U.S. courts in the *Aguinda* litigation had concerns as far back as 2000, the representations of Texaco "were sufficient to convince two U.S. courts to dismiss the litigation..."); *see also* Fitt, *supra* note 2, at 1038 ("stating that "[q]uantitative evidence has also confirmed" corruption in many Latin American countries).

229. Baker & Parise, *supra* note 5, at 13 (quoting Linn Hammergren, *Fighting Judicial Corruption: A Comparative Perspective from Latin America*, in *Global Corruption Report 2007: Corruption in Judicial Systems* 138 (2007), available at www.transparency.org/publication/gcr/gcr2007).

230. *Id.*

231. *Id.*

232. Garro, *supra* note 144, at 84–85.

233. Whytock & Robertson, *supra* note 1, at 1458–59; Heiser, *supra* note 1, at 616; Davies, *supra* note 142, at 354–56 (writing how courts are entitled to rely upon a broad range of sources in the FNC analysis).

234. 890 F. Supp. at 1357.

235. 142 F. Supp. 2d at 538, 544–45.

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With a low threshold for proving availability and adequacy, and with the public and private interest factors leaning toward the foreign country, courts routinely granted dismissal.²³⁶ Dismissal was outcome determinative in defendant's favor, with cases sometimes not even refiled, and settlements only a fraction of what they would have been in the U.S.²³⁷ This started to change around the turn of the century. The foreign countries passed retaliatory legislation.²³⁸ Some statutes, including those enacted in both Nicaragua and Ecuador, empowered the courts to entertain the tort cases brought by their citizens by including choice-of-law provisions that provided US-style procedural and evidentiary mechanisms, added strict liability, and increased damages to a level comparable to recoveries in the U.S.²³⁹ In addition to these retaliatory statutes, "a growing number of countries are recognizing aggregate litigation and moving away from prohibitions on contingency fee arrangements and punitive damages. . . ."²⁴⁰ Also, there has been an increasing availability of third-party litigation financing.²⁴¹

Plaintiffs who had originally filed in the U.S. but had their cases dismissed for trial in their home countries are now returning—sometimes to the same court that entered dismissal—for recognition and enforcement of judgments.²⁴² They find that the exact same evidence that they offered to show systemic corruption and politicization, which the US courts held was irrelevant in the decision to dismiss for FNC, has now become determinative in the decision not to recognize and enforce their judgments.²⁴³ The fact that the same court relying upon the same evidence can reach a different conclusion about adequacy is not inconsistent. In contrast to FNC, the systemic inadequacy standard for recognition and enforcement is "stricter, defendant-focused, and ex-post."²⁴⁴ According to many commentators, however, consistency does not equal justice; in fact, the interaction of these two doctrines violates the principle of corrective justice that

236. Heiser, *supra* note 1, at 619.

237. Todd, *supra* note 88, at 304; Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 184 (2000); see Baker & Parise, *supra* note 5, at 9 ("The eventual enforcement of a foreign judgment was always a possibility implicit in the dismissals for FNC, but that result rarely occurred.")

238. Baker & Parise, *supra* note 5, at 5–6.

239. Todd, *supra* note 88, at 307–10; Baker & Parise, *supra* note 5, at 5–6; Heiser, *supra* note 1, at 622, 628–34; Drimmer & Lamoree, *supra* note 11, at 502–03. See generally Garro, *supra* note 144; Anderson, *supra* note 237.

240. Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 35 (2011) (citing Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 193–94 (2009)).

241. Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 161 (2011).

227. Casey & Ristroph, *supra* note 10, at 21–22.

243. *Id.*

244. Whytock & Robertson, *supra* note 1, at 1449–50.

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for every violation of a right, there must be a remedy.²⁴⁵ Countries that are not dictatorships but that have a judiciary dominated by the legislative or executive branches (including many Latin American countries) offer enough due process to dismiss for FNC but not enough to enforce judgments.²⁴⁶ Critics have characterized the result of this collision between two different standards as a loophole for defendants and as an “access-to-justice” gap for plaintiffs.²⁴⁷

C. Proposed Solutions for the Systemic Inadequacy Ground

For cases that had previously been dismissed from the U.S., many commentators have recommended changes to the FNC analysis to avoid the need for enforcement and the potential for nonrecognition.²⁴⁸ Changing FNC will not answer the multi-billion-dollar question, though, which is what to do about foreign money judgments already awarded, such as to the judgment debtors in the DBCP and Lago Agrio cases. Changes to FNC will have a declining impact because the last several years have seen fewer alienage filings in US federal district courts, and a corresponding increase in judgment debtors seeking recognition of their foreign money judgments in the U.S.²⁴⁹

At the enforcement stage of cases previously dismissed from the U.S., another suggestion is to judicially estop the judgment debtors from challenging systemic inadequacy.²⁵⁰ This suggestion suffers from several shortcomings, particularly with the Nicaraguan cases that proceeded pursuant to retaliatory legislation that was enacted after the cases were dismissed from the U.S.²⁵¹ Nor

245. *Id.* at 1482.

246. Casey & Ristroph, *supra* note 10, at 46–47.

247. Whytock & Robertson, *supra* note 1, at 1481; Casey & Ristroph, *supra* note 10, at 44; *see generally* Weston, *supra* note 7. Other criticisms include the costs and lack of efficiency for multiple proceedings instead of a single trial; the lack of finality because of the potential for decades-long litigation; reliance on the part of plaintiffs that defendants will recognize the adequacy of the foreign forum; the lessening of tort liability as a deterrent to harmful conduct; and harm to comity and international relations. Whytock & Robertson, *supra* note 1, at 1482–91.

248. Robertson, *supra* note 207, at 1087 (federal legislation and treaties); Kenney, *supra* note 7, at 865 (more aggressive dismissal conditions on defendants); Baker & Parise, *supra* note 5, at 30–31 (apply the law of the foreign forum in the US proceedings). *But see* Jennifer L. Woulfe, Note, *Where Forum Non Conveniens and Preemptive Jurisdiction Collide: An Analytical Look at Latin American Preemptive Jurisdiction Laws in the United States*, 30 ST. LOUIS U. PUB. L. REV. 171 (2010) (advocating that courts retain current FNC standards).

249. Quintanilla & Whytock, *supra* note 224, at 33–37 (detailing the decline in alienage filings in US federal courts in the 1990s and 2000s and concurrent increase in actions for the enforcement of foreign money judgments in the Southern District of New York); *see also* Casey & Ristroph, *supra* note 10, at 51 (“As plaintiffs achieve victories in Latin American courts, more judgment enforcement cases are likely to find their way to U.S. courts.”).

250. Whytock & Robertson, *supra* note 1, at 1500–01; Heiser, *supra* note 1, at 641–42.

251. *E.g.*, Whytock & Robertson, *supra* note 1, at 1500–01; Heiser, *supra* note 1, at 660–61; *see id.* at 641–42 (writing that judicial estoppel protects the integrity of the courts and the judicial process by preventing a party who has successfully asserted a position in a prior legal proceeding from taking a contrary position in a later proceeding).

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should equitable relief be available for plaintiffs who themselves and through their attorneys had a hand in drafting and procuring that retaliatory legislation, and who have taken an active role in applying political pressure to the foreign courts.²⁵² Plus, as noted above, an increasing number of foreign plaintiffs are turning first to their own courts, so estoppel would not apply to their attempts to enforce.

While one obvious solution would seem to be legislation at the federal level to unify recognition and enforcement practice, that option is not available for a host of Constitutional reasons. Further, treaty negotiations have failed to result in an international standard for recognition and enforcement that could override state law.²⁵³ However, the systemic inadequacy ground may be unlawful under the United States Constitution because of the separation of powers, so some commentators propose eliminating the ground altogether.²⁵⁴ The 2005 Recognition Act, which a growing number of states have enacted, added two discretionary grounds for nonrecognition if the *specific* proceedings in the foreign country denied due process or were tainted by judicial corruption.²⁵⁵ Not only does this inquiry provide a more focused standard, it also vitiates the need for an amorphous systemic inadequacy inquiry.²⁵⁶

Because recognition and enforcement are a patchwork of state laws, the states' legislatures may not outright repeal this ground; nevertheless, the courts and other governmental entities can minimize it. The courts could more readily apply the act of state and political question doctrines to abstain from considering the ground altogether.²⁵⁷ Additionally, the US Department of State could remove the political question from the courts by creating an authoritative list of the countries it believes have corrupt judiciaries that deny due process, making the determination an easy call.²⁵⁸

252. Drimmer & Lamoree, *supra* note 11, at 489–512 (detailing how plaintiffs and their attorneys in the DBCP and Lago Agrio litigation have met *ex parte* with judges, enlisted the aid of the executive branch, staged mass protests in the capital cities, and helped to draft and enact the retaliatory legislation); *see, e.g.*, James F. Flanagan, *Confrontation, Equity, and the Minamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL OF RTS. J. 1193, 1243 (2006) (“The equitable maxims of ‘unclean hands,’ ‘equity favors the vigilant,’ and ‘he who seeks equity must do equity,’ all focus on the movant’s role and may disqualify him from relief if his conduct was responsible for the harm.”).

253. *See generally* Gul, *supra* note 5.

254. Carodine, *supra* note 3, at 1165; Kelly, *supra* note 2, at 582.

255. Carodine, *supra* note 3, at 1233–36.

256. *Id.*; *see* Kelly, *supra* note 2, at 576–77.

257. Carodine, *supra* note 3, at 1190–91; Kelly, *supra* note 2, at 582.

258. *See* Carodine, *supra* note 3, at 1165; Kelly, *supra* note 2, at 582 (recommending that the US State Department could make its Country Reports less reliable as evidence by including disclaimers in them).

IV. SYSTEMIC INADEQUACY AS APPLIED: THE DBCP AND LAGO AGRIO
LITIGATION AND THE AVOIDANCE OF THIS GROUND

Mootz writes that “law is never understood abstractly but only in reference to its application to a specific case.”²⁵⁹ Accordingly, this Article turns to the systemic inadequacy ground as it has been applied in two recent cases, which have received considerable attention from scholars who theorize that systemic inadequacy unfairly denies plaintiffs access to justice. An analysis of the cases proves that this ground has had no impact on the recognition of the DBCP or Lago Agrio judgments. There has been a lack of justice, however, because the circuit courts have rejected the district court’s application of this ground, but have done so without sound reasons.²⁶⁰ The appellate courts have either ignored their own standards and precedent, or have twisted the readings of cases and statutes.²⁶¹

A. *DBCP Litigation and Attempted Enforcement of a Nicaraguan Judgment in Osorio v. Dole Food Company*

1. *Background on DBCP Litigation in the 1980s and 1990s*

Scholars, the mass media, and the director of not one but two films have told and retold the story of DBCP litigation for over twenty years.²⁶² It begins with the nematode, a worm so small one needs a microscope to see it. It attacks the roots of crops and causes significant damage.²⁶³ DBCP is the active ingredient in

259. Mootz, *supra* note 13, at 577.

260. See Parts IV.A.3–4 and IV.B.3-4

261. *Id.*

262. This author published an article on this topic twenty years after one of his law school professors published the first. Compare Todd, *supra* note 88, with Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351 (1992). DBCP litigation in Los Angeles County made the front page of the Wall Street Journal a few years ago, continuing a trend started in the mid-1990s in the New York Times. Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL STREET J. (Aug. 19, 2009), <http://online.wsj.com/article/SB125061508138340501.html> (on file with the *McGeorge Law Review*); Diana Jean Schemo, *U.S. Pesticide Kills Foreign Fruit Pickers’ Hopes*, N.Y. TIMES (Dec. 6, 1995), <http://www.nytimes.com/1995/12/06/world/us-pesticide-kills-foreign-fruit-pickers-hopes.html>. (on file with the *McGeorge Law Review*). For an analysis of the perceptions of plaintiffs in media coverage about DBCP litigation, see Anne Bloom, “*Milking the Cash Cow*” and *Other Stories: Media Coverage of Transnational Workers’ Rights Litigation*, 30 VT. L. REV. 179, 190–196 (2006). Fredrick Gertten directed the documentary *Bananas!** that covered the trial in *Tellez v. Dole Food Co.*, No. BC 312852 (L.A. Super. Ct. Mar. 7, 2008). See *BANANAS!**, <http://www.bananasthemovie.com> (on file with the *McGeorge Law Review*). Dole sued Gertten for defamation after the film was screened at the Los Angeles Film Festival, but then dismissed the suit. Drimmer & Lamoree, *supra* note 11, at 492–93, 493 n.193. Gertten has subsequently made another documentary about that defamation lawsuit, *Big Boys Gone Bananas!**; *BIG BOYS GONE BANANAS!**, <http://www.bigboysgonebananas.com> (on file with the *McGeorge Law Review*);

263. Sharon Frey, Comment, *DBCP: A Lesson in Groundwater Management*, 5 UCLA J. ENVTL. L. & POL’Y 81, 81 (1985).

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nematocides that controlled the pest effectively and resulted in larger crop yields.²⁶⁴ DBCP was used on a variety of crops throughout the world, but its use on banana farms in the Philippines, West Africa, and Latin America—in particular, Nicaragua in the 1970s—generated the most lawsuits.²⁶⁵ After the U.S. Environmental Protection Agency canceled the registration for DBCP in 1979 because significant exposure to the chemical can cause sterility in men, foreign field workers started filing lawsuits in the United States against the manufacturers of the pesticide and the major fruit companies that had contracted with the farms where they worked.²⁶⁶

As the example of *Delgado* shows, these lawsuits did not make it far in the U.S. because they were routinely dismissed on FNC grounds.²⁶⁷ For many of these lawsuits, dismissal was outcome determinative; many actions were never refiled in the home country, and even those that were did not make it to trial.²⁶⁸ At best, plaintiffs could settle their claims, but only for a fraction of what they could have received in U.S. litigation.²⁶⁹ Several Latin American countries responded with blocking statutes, some of which were specifically enacted in response to DBCP litigation. Nicaragua's blocking statute, Special Law 364, caused the largest impact.²⁷⁰ Plaintiffs' lawyers, in conjunction with a "union" of banana farm workers affected by DBCP, helped draft Special Law 364 and then lobbied the Nicaraguan legislature to pass it.²⁷¹ It aimed to coerce defendants into not seeking an FNC dismissal through the irony of proclaiming the courts of Nicaragua open to DBCP litigation—but with conditions so onerous that no defendant would choose Nicaragua over the U.S.²⁷² Among other provisions, this retroactive law required the posting of millions of dollars of bonds to litigate; it made strict liability available by creating an irrefutable presumption of causation for any plaintiff who could show exposure and sterility; it curtailed proceedings so that defendants had only three days to answer the complaint and eight days for

264. *See id.*

265. Todd, *supra* note 88, at 297–98.

266. *Id.* at 298; *see, e.g., Delgado*, 231 F.3d 165 at 165, 169–170; *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990) (stating that Costa Rican plaintiffs asserted claims against Dow and Shell); *Sibaja v. Dow Chemical Co.*, 757 F. 2d 1215, 1216 (11th Cir. 1985) (same).

267. Todd, *supra* 88, at 300; *see also* 890 F. Supp. 1324, 1335 (1995).

252. *See* Todd, *supra* note 88, at 304; Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 153 (2005).

269. *Id.*; Anderson, *supra* note 248, at 184.

270. The formal title of Special Law 364 is Special Law for the Conduct of Lawsuits Filed by Persons Affected by the Use of Pesticides Manufactured with a DBCP Base. *Osorio*, 665 F. Supp. 2d at 1353–55, app. I. An English translation of Special Law 364 is attached as an appendix in *Osorio. Id.*,

271. Drimmer & Lamoree, *supra* note 11, at 490.

272. *Osorio*, 665 F. Supp. 2d at 1325 (citing Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 24 (2003–04)).

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discovery; and it established a schedule of damages, with \$100,000 U.S. as the minimum.²⁷³

While one purpose was to prevent lawsuits pending in the U.S. from being dismissed to Nicaragua, Special Law 364 had provisions that nevertheless encouraged new plaintiffs to file claims in Nicaragua, which they did. Within a few years of passage, 7,000 plaintiffs filed over four hundred cases.²⁷⁴ By 2009, Nicaraguan courts had rendered thirty-two judgments totaling over \$2 billion, with claims for billions more pending.²⁷⁵ Because those defendants no longer have assets in Nicaragua, the plaintiffs sought to recognize and enforce one of those judgments in the U.S., including one proceeding where the courts considered the systemic inadequacy ground: *Osorio v. Dole Food Co.*²⁷⁶ Two hundred and one plaintiffs filed the underlying lawsuit in *Osorio* pursuant to Special Law 364 in February 2002 in Chinandega, Nicaragua.²⁷⁷ The plaintiffs asserted that, during their work on Dole-contracted banana farms in the 1970s, they were exposed to DBCP manufactured by Dow, Shell, and Occidental.²⁷⁸ In 2005, the trial court entered judgment in favor of 150 of the 201 plaintiffs, awarding a total of \$97.4 million, or an average award of \$647, 000.²⁷⁹

2. *The District Court Denies Enforcement*

The prevailing plaintiffs sought recognition in the Circuit Court of Miami-Dade County in August 2007, but the defendants removed to the Federal District Court for the Southern District of Florida.²⁸⁰ Florida's Recognition Act tracks the 1962 Act except that it includes reciprocity and has a separate provision for defamation actions.²⁸¹

273. *Id.* at 1353–55; *see also* Heiser, *supra* note 1, at 631–33.

274. Todd, *supra* note 88, at 331–12; *see also* Heiser, *supra* note 1, at 633 (“[T]he provisions that remove financial barriers to suit by plaintiffs in Nicaragua by authorizing free legal assistance and waiver of costs, as well as the provisions dealing with causation and damages, appear designed to encourage Nicaraguan plaintiffs to commence their lawsuits in the Nicaraguan courts.”).

275. Todd, *supra* note 8, at 312.

276. 665 F. Supp. 2d 1307; *see id.* at 1312 (“Dole used DBCP on its banana farms in Nicaragua until the farms were expropriated by the Sandinista regime that came to power in 1979.”) Another group of Nicaraguan judgment creditors had sought recognition and enforcement in California of a \$489.4 million judgment rendered under Special Law 364, but recognition was denied on other grounds, so no trial or appellate court addressed systemic inadequacy. *Franco v. The Dow Chemical Co.*, 2003 U.S. Dist. LEXIS 26639, Case No. CV 03-5094 NM (PjWx) (C.D. Cal. Oct. 20, 2003); *Shell Oil Co. v. Franco*, 2005 WL 6184247, No. CV 03 8846 NM at *2 (PjWx) (C.D. Cal. Nov. 10, 2005).

277. 665 F. Supp. 2d at 1318. None of the plaintiffs were parties to the Delgado litigation.

278. *Id.* at 1311–12. Judge Huck had earlier dismissed Occidental and Shell from the lawsuit because they were not subject to personal jurisdiction in Nicaragua. *Id.* at 1311 n.1.

279. *Id.*

280. *Id.* at 1321.

281. FLA. STAT. § 55.605 (West 2006).

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The remaining judgment debtors, Dole and Dow, argued that the court should not enforce the judgment because:

(1) the Nicaraguan trial court lacked personal and subject matter jurisdiction over the Defendants, (2) the underlying judgment was rendered under a system which does not provide procedures compatible with the international concept of due process of law, (3) the cause of action or claim of relief on which the judgment is based is repugnant to the public policy of the State of Florida, and (4) the judgment was rendered under a system without impartial tribunals.²⁸²

In their first argument, the defendants combined two different mandatory grounds for nonrecognition, the lack of personal and subject matter jurisdiction, into one.²⁸³ They approached the systemic inadequacy grounds similarly to Professor Heiser's interpretation of it as two separate considerations, with argument (2) relating to due process and argument (4) relating to corruption and politicization.²⁸⁴ The remaining argument, that the "cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state," is one of the discretionary grounds.²⁸⁵ After considering the evidence, including a four-day hearing in which "[b]oth sides submitted substantial expert testimony and documentary evidence. . . on the Nicaraguan judicial system, Special Law 364, and the specific Nicaraguan trial proceedings in this case," Judge Huck found for Dole and Dow on all four grounds.²⁸⁶

He treated each argument in turn. Of importance to personal and subject matter jurisdiction, Special Law 364 requires the posting of a bond as a "procedural prerequisite for being able to take part in the lawsuit," and if defendants do not do so within ninety days, they "must subject themselves unconditionally to the jurisdiction of the courts of the United States of America."²⁸⁷ The Supreme Court of Nicaragua affirmed the constitutionality of this provision because it gave defendants the right to opt out of litigation in Nicaragua and instead choose a U.S. forum.²⁸⁸ Because both Dole and Dow had refused to post the bond, Judge Huck found that the defendants had "effectively

282. *Osorio*, 665 F. Supp. 2d at 1321. Shell and Occidental had already been granted summary judgment because they were not subject to personal jurisdiction in Nicaragua. *Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2009 U.S. Dist. LEXIS 713 at *3 (S.D. Fla. Jan. 5, 2009).

283. *Osorio*, 665 F. Supp. 2d at 1321; *see also* FLA. STAT. § 55.605(1)(b)–(c).

284. *Id.* § 55.605(1)(a); *Osorio*, 665 F. Supp. 2d at 1321; *see also* Heiser, *supra* note 1, at 638–39.

285. *Osorio*, 665 F. Supp. 2d at 1321; FLA. STAT. § 55.605(2)(c). Dole and Dow also asserted that the judgment was obtained by fraud, but the trial court bifurcated the proceedings and reserved the fraud ground for a later hearing if necessary. *Osorio*, 665 F. Supp. 2d at 1312, n.3; *see* FLA. STAT. § 55.605(2)(b).

286. *Osorio*, 665 F. Supp. 2d at 1321–22.

287. *Id.* at 1326.

288. Consultation to the Judges of the Supreme Court of Justice of Nicaragua, 53 (Nicar. Oct. 16, 2003). A complete translation of the opinion is available in the Appendix to Saint Dahl, *supra* note 272, at 53–57.

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invoked their opt-out rights,” which divested the trial court of both personal and subject matter jurisdiction and mandated nonrecognition under Section 55.605(1)(b)–(c).²⁸⁹ Judge Huck devoted a significant portion of his analysis to the due process aspect of Section 55.605(1)(a).²⁹⁰ Rather than look at whether the Nicaraguan judiciary as a whole provides procedures that are fundamentally fair, the court evaluated only the provisions of Special Law 364, the only theory of liability upon which the underlying judgment was based.²⁹¹ After summarizing the medical and scientific evidence about DBCP and sterility, Judge Huck concluded that “the international due process norms described in *Ashenden* do not permit awarding damages, especially of the magnitude awarded here, without proof of causation.”²⁹² He also examined the other provisions of Special Law 364 and concluded that, both on their face and as applied by the Nicaraguan trial court, they unfairly targeted certain foreign defendants and thereby denied them due process.²⁹³ The court limited its analysis of the public policy ground “to Defendants’ challenges to the portions of Special Law 364 which the Court has already concluded are inconsistent with the international concept of due process.”²⁹⁴ For the same reasons that these provisions failed to comport with the international standard, they deprived defendants of due process under Florida’s Constitution, thus supporting nonrecognition under the discretionary ground of section 55.605(2)(c).²⁹⁵

The court concluded by analyzing the impartiality of the Nicaraguan judiciary, the other consideration for mandatory nonrecognition under section 55.605(1)(a).²⁹⁶ The court relied upon the United States Department of State Country Reports from 1999 through 2008, which “have concluded that Nicaragua lacks an effective civil law system.”²⁹⁷ *Osorio* was filed in Nicaragua in 2002, and that same year the State Department concluded that “[j]udge’s political sympathies, acceptance of bribes, or influence from political leaders reportedly often influenced judicial actions and findings.”²⁹⁸ And in 2005, the year that the *Osorio* judgment was issued, the State Department suggested that the situation had deteriorated because they used the same language from 2002 but dropped the “reportedly.”²⁹⁹ The court turned to other sources that seconded the Country

289. *Osorio*, 665 F. Supp. 2d at 1326 (citing FLA. STAT. § 55.605(1)(b)–(c)).

290. *See generally Osorio*, 665 F. Supp. 2d 1307.

291. *Id.* at 1343.

292. *Id.* at 1335.

293. *Id.* at 1335–43.

294. *Id.* at 1345.

295. *Id.* (citing FLA. CONST. art. I, § 9 (“No person shall be deprived of life, liberty or property without due process of law . . .”), § 21 (“[J]ustice shall be administered without sale, denial or delay.”)), *id.* at 1347.

296. *Id.* at 1347–48.

297. *Id.* at 1348.

298. *Id.*

299. *Id.*

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Reports, like the reports of non-governmental organizations, to find “that the unanimous view among United States government organizations and officials (including United States ambassadors to Nicaragua), foreign governments, international organizations, and credible Nicaraguan authorities, is that the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice.”³⁰⁰

The court found that two of defendants’ experts on the Nicaraguan judiciary were well-qualified and their testimony was especially credible. The first was Omar Garcia-Bolivar, a Latin American specialist who served as part of the United States Agency for International Development’s assessment process under the Central American Free Trade Agreement. The second was Gabriel Antonio Alvarez Arguello, a Nicaraguan lawyer and law professor.³⁰¹ Garcia-Bolivar testified that politicians regularly determined the outcome of trials and that lower court judges are subject to the political whim of Supreme Court justices, who run their judicial districts like “fiefdoms.”³⁰² Professor Alvarez testified that, while the formal structure of the judiciary is respectable on paper, “in practice its decisions are commonly driven by partisan interests.”³⁰³ Plaintiffs’ experts did not rebut the conclusions of these experts and the other independent evidence of corruption and politicization.³⁰⁴

Like the judiciary of Liberia, which was described in *Bridgeway*, the judiciary of Nicaragua ignored the national constitution, and “corruption and incompetent handling of cases were prevalent.”³⁰⁵ Consistent with the approach of other courts, the court based its conclusion on “the operation of the Nicaraguan judicial system as a whole, and not the particulars of this case.”³⁰⁶ The court nevertheless called Special Law 364 and its application to the case “Exhibit A evidencing the lack of independent tribunals in Nicaragua.”³⁰⁷

The passage of Special Law 364 is itself evidence of political interference in Nicaragua’s judicial process. The law requires judges to enforce a set of procedures that the Nicaraguan Attorney General found were unconstitutional; indeed, the Nicaraguan Supreme Court upheld Special Law 364 only because the defendants could voluntarily exempt themselves from it.³⁰⁸

Based on the mandatory grounds, Judge Huck concluded that “the judgment is not considered conclusive, and cannot be enforced under the Florida

300. *Id.* at 1348–49.

301. *Osorio*, 665 F. Supp. 2d at 1349–50.

302. *Id.* at 1349.

303. *Id.* at 1350.

304. *Id.*

305. *Id.* at 1349 (citing 45 F. Supp. 2d at 287).

306. *Id.* at 1351.

307. *Id.* at 1351.

308. *Id.*

Recognition Act.”³⁰⁹ He likewise declined to enforce the judgment on the public policy ground, and ordered that the judgment “be neither recognized nor enforced.”³¹⁰

3. *The Eleventh Circuit Affirms—Except for the Holding on Systemic Inadequacy*

The Court of Appeals for the Eleventh Circuit affirmed the district court’s finding that the Nicaraguan judgment was not entitled to recognition and enforcement.³¹¹ It did so only on the grounds of lack of personal and subject matter jurisdiction, lack of due process, and repugnance to the public policy of Florida.³¹² The Eleventh Circuit wrote that “we do not address the broader issue of whether Nicaragua as a whole ‘does not provide impartial tribunals’ and decline to adopt the district court’s holding on that question.”³¹³

4. *Rhetorical Analysis of the Eleventh Circuit’s Opinion—Or, More Precisely, What the Court Does Not Say*

The brevity of the above summary suggests the shortcoming of the Eleventh Circuit’s opinion: that quote constitutes the extent of the Court’s writing on this point.³¹⁴ To paraphrase James Boyd White, judges tend to exclude that which does not lead to certainty in results, so the rhetorical critic asks what voices were silenced.³¹⁵ Here, those voices were other judicial opinions, even those of the Eleventh Circuit. The court did not cite any authority to justify its refusal to affirm this ground, not even a standard of review—indeed, it offered no explanation or rationale at all.³¹⁶ Yet rhetoricians measure the justice of an opinion by the explicit justifications in that opinion: the judge needs to demonstrate how the holding is supported by established rules of law and that it does not contradict them.³¹⁷ The Eleventh Circuit’s reversal of the systemic inadequacy finding is inconsistent with other authority because the legal interpretations and factual findings made by Judge Huck comport with the leading cases and the scholarly comment on the systemic inadequacy ground.³¹⁸ To maintain its preferred holding, the court therefore had to ignore authority

309. *Id.* at 1352.

310. *Id.*

311. *Osorio v. Dow Chemical Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011).

312. *Id.* at 1278–79.

313. *Id.* at 1279.

314. *Id.*

315. *See White, supra* note 15, at 695.

316. *See id.*; *Osorio*, 635 F.3d at 1279.

317. *See, e.g., Mootz, supra* note 15, at 571.

318. *See supra* Part III.A.2.

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because all of it is to the contrary.³¹⁹ Instead of offering persuasive reasons, the court relied upon its position of power to force the holding.³²⁰ Even though the judgment was affirmed because of the other three grounds, the court's refusal to cite and adhere to authority calls into question the legitimacy of the opinion and thereby diminishes the rule of law.³²¹

The Eleventh Circuit does not identify the error or errors of the trial court.³²² Was there an error of law? Of fact? Both? After all, the systemic inadequacy inquiry involves considerations of both law and fact.³²³ Nor does the court even articulate a standard of review, particularly one that allows it to reject a trial court's holding without addressing why.³²⁴ The parties and anyone who reads the opinion are left to speculate. So let us engage in that speculation and take as our starting point the standards of review in the Eleventh Circuit. The Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo* and applies the same legal standards that controlled the district court's decision.³²⁵ Accordingly, the court reviews the district court's interpretation and application of the law *de novo*.³²⁶ That the court declined to adopt Judge Huck's "holding" suggests an error of law.³²⁷ An analysis of his opinion shows that there was no such error.³²⁸

Under the *Erie* doctrine, federal courts apply the law of the state in which they sit to determine whether to recognize and enforce a foreign money judgment.³²⁹ Judge Huck applied the Florida Recognition Act, including its provision mandating as inconclusive a judgment rendered under a system with impartial tribunals.³³⁰ Because it cited to the Florida Recognition Act provisions in affirming the findings about lack of due process, lack of personal and subject matter jurisdiction, and violation of public policy, the Eleventh Circuit must agree that Judge Huck applied the correct statutory law.³³¹

Perhaps the legal error was in splitting this first ground into two different considerations. Courts and scholars, including Professor Heiser (to whom Judge

319. The one exception would be if it had cited either act of state or political question doctrine as raised by Carodine, *see* discussion accompanying notes 174–182, *supra*, but that would have entailed taking a risk as opposed to playing it safe. *See infra* Part V.

320. *Osorio*, 635 F.3d at 1279.

321. *See* discussion accompanying *supra* notes 56–61,

322. *Osorio*, 635 F.3d at 1279.

323. *See Soc'y of Lloyds*, 233 F.3d at 477.

324. *Osorio*, 635 F.3d at 1279.

325. *Billings v. UNUM Life Ins. Co. of Am.*, 459 F.3d 1088, 1092 (11th Cir. 2006).

326. *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1336 (11th Cir. 2005).

327. *Osorio*, 635 F.3d, at 1279.

328. *See generally* 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

329. *See, e.g., Dhooge Mandatory*, *supra* note 11, at 265 n.129.

330. *Osorio*, 635 F.3d, at 1322–23 (citing FLA. STAT. § 55.605).

331. *Id.* at 1278 (citing FLA. STAT. §§ 55.605).

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Huck cites), approach this ground the same way.³³² When it listed the “four independent grounds for nonrecognition under the Act,” the Eleventh Circuit easily could have pointed out that two of them should have been treated as one.³³³ This error would be harmless, however, because the plain language of the Florida Recognition Act itself allows for two considerations: “a system which does not provide impartial tribunals *or* procedures compatible with the requirements of due process of law.”³³⁴ That Judge Huck treated these considerations in separate places in the opinion seems irrelevant.

A more serious legal error might be his interpretation of what a “system with impartial tribunals” means under the Florida Recognition Act.³³⁵ No Florida opinions have interpreted this ground. Judge Huck cited only one opinion, *Bridgeway*, and characterized the ground as mandating generalizations about the Nicaraguan judiciary as a whole.³³⁶ That interpretation was articulated in *Ashenden*, has been followed by numerous courts, and is recognized by scholars.³³⁷ Maybe the Eleventh Circuit desired a break with other courts and thought that the standard should be more focused on impartiality in the particular proceedings. Nothing in Florida case law suggests that its Recognition Act should be interpreted differently than other jurisdictions’ Recognition Acts. In fact, at least one Florida court cited the Recognition Act of another state and characterized it as “the same.”³³⁸ Even so, Judge Huck did actually address impartiality in the particular proceedings.³³⁹

Another possible legal error relates to the sources of proof relied upon to establish the impartiality of the Nicaraguan judiciary. Judge Huck cited the written and oral opinions of two experts, who themselves attached numerous legal and media sources. He also cited the U.S. State Department Country Reports on Nicaragua as well as the reports of other organizations.³⁴⁰ These are the types of sources that other federal courts have cited in addressing systemic inadequacy, and such sources are specifically allowed under Federal Rule of Civil Procedure 44.1 and Federal Rule of Evidence 803(8)(C).³⁴¹

332. *See, e.g.*, *Shell Oil Co. v. Franco*, Case No. CV 03-8846 NM (PJWx), 2004 U.S. Dist. LEXIS 31125 at *2, *17 (C.D. Cal. May 18, 2004) (considering California’s section 1713(a)(1) in a motion for summary judgment), which mirrors Florida’s section 55.605(1)(a), as a claim for lack of impartial tribunals and a claim for lack of due process; Heiser, *supra* note 1, at 638–39; Kelly, *supra* note 2, at 563; *Osorio*, 665 F. Supp. 2d at 1325 (citing Heiser, *supra* note 1, at 622–23).

333. *Osorio*, 635 F.3d at 1278.

334. FLA. STAT. § 55.605(1)(a) (emphasis added).

335. *See Osorio*, 665 F. Supp. 2d at 1349.

336. *Id.* (citing 45 F. Supp. 2d at 287).

337. *See* discussion accompanying *supra* notes 138–140.

338. *Israel v. Flick Mortg. Investors, Inc.*, 23 So. 3d 1196, 1198 n.1 (Fla. Dist. Ct. App. 3d Dist. 2008) (citing the Texas Recognition Act, TEX. CIV. PRAC. & REM. CODE §§ 36.001–008).

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

340. *Id.* at 1348–50.

341. *See supra* notes 163–173; *see also Franco*, 2004 U.S. Dist. LEXIS 31125 at *13–14 (in motion to

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Rather than the types of sources, the error might be the sufficiency of those sources to support the conclusion of systemic inadequacy. Of course, this is more speculation because the court did not detail the evidence relevant to the point or explain how—or even if—the finding was factually insufficient.³⁴² The Eleventh Circuit reviews findings of fact under a clearly erroneous standard.³⁴³ “The law is well settled that ‘[i]f the district court’s account of the evidence is plausible in light of *the record viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.’”³⁴⁴ Even if the evidence conflicts, the appellate court may not reverse.³⁴⁵ Indeed, where the court credited the testimony of one of two or more witnesses who told equally coherent and plausible stories, that finding “can virtually never be clear error.”³⁴⁶ Under this deferential standard, the appellate court could not have found error. Judge Huck had the opinions of two experts, themselves supported by numerous legal and media sources, about impartiality in Nicaragua.³⁴⁷ Plaintiffs too brought forward expert testimony, which he considered but rejected.³⁴⁸ Multiple years’ Country Reports, bolstered by the reports of other entities, supported judicial politicization and corruption during the years that *Osorio* was tried in Nicaragua.³⁴⁹ This equals, if not exceeds, the volume of information considered by federal courts that have found a system of impartial tribunals in the foreign country.³⁵⁰

Rather than persuade through reason, the Eleventh Circuit relied upon its power in the federal judicial hierarchy to gain adherence. The opinion was not authored and signed by a single judge, but was instead *per curiam*, which is the corporate “we” of the entire court. Only an appellate court can issue an opinion that speaks with the voice of the entire court—but then it should do so only when the matter is clear.³⁵¹ The opinion therefore enjoys its authority through force rather than through persuasion, because the Eleventh Circuit did not have to justify itself to the inferior court, which has no basis to question the negation of

dismiss, referring to statements by US Ambassador to Nicaragua and in US State Department reports about bribery, corruption, and politicization of the judiciary in Nicaragua).

342. See 5 AM. JUR. 2D APPELLATE REVIEW § 773.

343. *Billings*, 459 F.3d at 1092 (citing Fed. R. Civ. P. 52(a)).

344. *Holton*, 425 F.3d at 1354 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

345. *Anderson*, 470 U.S. at 573.

346. *Id.* at 575.

347. *Id.* at 1349–50.

348. *Id.* at 1350–51.

349. *Id.* at 1348–50.

350. See, e.g., *Bridgeway*, 201 F.3d at 141–42 (affirming finding based upon affidavits of one person and several years’ worth of US State Department Country Reports that Liberia lacked a system that provided impartial tribunals).

351. *Montana v. Hall*, 481 U.S. 400, 409 (Marshall, J., dissenting) (“*Per curiam* is a Latin phrase meaning ‘[b]y the court’, which should distinguish an opinion of the *whole* Court from an opinion written by any one Justice. . . . Such an opinion does not speak for the entire Court on a matter so clear that the Court can and should speak with one voice.”).

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its findings of fact and conclusions of law.³⁵² Because the judgment was affirmed on two other mandatory grounds and one discretionary ground, plaintiffs had reason to seek Supreme Court review only on those three, and Dole had no reason to challenge the rejected holding.³⁵³

B. Lago Agrio Litigation and Chevron's Suit to Have an Ecuadoran Judgment Declared Unenforceable

As with the tale of DBCP litigation, scholars, the mass media, and even one filmmaker have chronicled the Lago Agrio saga.³⁵⁴ Based on the sheer volume of judicial opinions alone, the Second Circuit wrote, "The story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary."³⁵⁵ The attempts to tell the story have become part of the litigation itself, with Chevron gaining access to over six hundred hours of outtakes from the movie *Crude*, outtakes that formed part of the basis for the district court to enter a preliminary injunction against enforcement of the \$17.2 billion Ecuadorean judgment.³⁵⁶ In vacating the injunction, the Second Circuit ignored these outtakes, and all of the evidence submitted by Chevron, and the other cases on point, and instead relied upon an unprincipled reading of New York's Recognition Act to hold that equitable relief was not an option.³⁵⁷

352. See Levinson, *supra* note 49, at 195.

353. *Osorio v. Dow Chem. Co.*, 132 S. Ct. 1045 (2012) (denying plaintiffs' petition for writ of certiorari).

354. One could potentially write a lengthy bibliography just on *Aguinda* and *Donziger*, but a good example of the scholarly interest in this litigation is Dhooge, who published separate articles on the potential nonrecognition based the mandatory and on the discretionary grounds. See generally Dhooge *Mandatory*, *supra* note 11 (citing the most recent scholarship on this topic). This litigation has been featured in two general interest magazines. Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe (on file with the *McGeorge Law Review*); William Langewiesche, *Jungle Law*, VANITY FAIR (May 2007), <http://www.vanityfair.com/politics/features/2007/05/texaco200705> (last visited Feb. 28, 2013) (on file with the *McGeorge Law Review*). Joe Berlinger directed the documentary *Crude*, which focuses on plaintiffs' attorneys, Stephen Donziger and Pablo Fajardo, and their involvement in the proceedings in Ecuador. The movie streams on Netflix, and the production notes for the movie are online. *Production Notes*, CRUDE, available at <http://www.crudethemovie.com/blog/wp-content/uploads/2009/08/CRUDE-Press-Kit-081909.pdf> (on file with the *McGeorge Law Review*). *Id.*; *Camacho Naranjo*, 667 F.3d at 236.

355. *Camacho Naranjo*, 667 F.3d at 234.

356. *Id.* at 236–37. For one commentator's discussion of the filmmaker's privilege relating to Chevron's discovery proceedings under 28 U.S.C. § 1782, see Tom Isler, Comment, *Chevron Corp. v. Berlinger and the Future of the Journalists' Privilege for Documentary Filmmakers*, 160 U. PA. L. REV. 865 (2012).

357. *Camacho Naranjo*, 667 F.3d at 239, 246.

*2013 / The Rhetoric of Recognition**1. Background: Texaco's Operations in Ecuador, Plaintiffs' Failed Attempt at a US Lawsuit, and Their Success in Ecuadoran Courts*

Texaco Petroleum Company (TexPet), a subsidiary of Texaco, began oil exploration in Ecuador in 1964, and in 1965 it started a petroleum concession for a consortium that it owned in equal shares with Gulf Coil Corporation.³⁵⁸ The consortium eventually came to include the Republic of Ecuador itself, which through its state-owned oil company Petroecuador acquired Gulf's interests in 1974.³⁵⁹ In 1990, Petroecuador assumed TexPet's operation of a trans-Ecuadoran oil pipeline and drilling activities.³⁶⁰ TexPet relinquished its interests in the consortium two years later, leaving Petroecuador as the sole owner and operator.³⁶¹

As discussed above, plaintiffs brought a putative class action in the Southern District of New York in 1993, *Aguinda v. Texaco, Inc.*,³⁶² and alleged that Texaco, through the consortium, leaked oil from the pipeline, deliberately sprayed oil on the roads, and stored petroleum wastes in open pits.³⁶³ These actions led to the pollution of "the rain forests and rivers" as well as potential adverse health effects to residents.³⁶⁴ The plaintiffs sought money damages as well as equitable relief like funding for environmental remediation, renovating or closing the trans-Ecuador pipeline, establishing standards for future oil development, and medical monitoring.³⁶⁵ The court never addressed the merits of the complaint: after two rounds of FNC proceedings, the trial court entered dismissal and the Second Circuit affirmed.³⁶⁶

As with the Nicaraguan DBCP cases, *Aguinda* did not die following dismissal but was refiled in Ecuador in 2003.³⁶⁷ The suit went to trial under Article 43 of an Ecuadoran law, legislation drafted and procured by Bonifaz and other plaintiffs' lawyers that was enacted in 1999.³⁶⁸ Like Special Law 364, Article 43 provided the Ecuadorean courts with a vehicle to handle the

358. *Donziger*, 768 F. Supp. 2d at 597.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Aguinda*, 303 F.3d at 473. Another lawsuit was consolidated with *Aguinda*. *Id.* (citing *Jota v. Texaco, Inc.*, Dkt. No. 94 Civ. 9266 (S.D.N.Y. filed Dec. 28, 1994)). Peruvians living downstream also brought actions against Texaco that were consolidated with *Aguinda*. *Aguinda*, 142 F. Supp. 2d at 536–37 (citing *Ashanga v. Texaco, Inc.*, 94 Civ. 9266).

363. 142 F. Supp. 2d 534; *see Donziger*, 768 F. Supp. 2d at 597.

364. *Aguinda*, 303 F.3d at 473.

365. *Id.* at 473–74.

366. *Aguinda*, 142 F. Supp. 2d at 538 (citing *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *reconsid. denied*, 175 F.R.D. 50 (S.D.N.Y. 1997), *rev'd Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998)); 142 F. Supp. 2d at 536, *aff'd* 303 F.3d at 472.

367. *Donziger*, 768 F. Supp. 2d at 600.

368. *Id.*

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complicated case and the plaintiffs with a shot to recover billions in damages.³⁶⁹ Rather than a class action, it proceeded as something analogous to a citizen's attorney general suit, with the same named plaintiffs pursuing damages for environmental remediation on behalf of Ecuador as well as compensation for medical treatment.³⁷⁰ The defendant also changed: Chevron had acquired Texaco in 2001, and the latter remains a wholly-owned subsidiary of Chevron.³⁷¹ The court-appointed neutral expert opined that the court should award \$27 billion (US) damages; the trial court instead entered judgment for approximately \$8.6 billion, a figure that was doubled to \$17.2 billion when Chevron declined to apologize within two weeks of the judgment, as well as costs to the Amazon Defense Front to administer the proceeds.³⁷² Of note, the lion's share of this judgment goes directly to the government of Ecuador for remediation of groundwater, drinking water, and soil, as well as damages to flora and fauna and delivery of health care.³⁷³

2. *Chevron Seeks Preemptive Nonrecognition and a Worldwide Injunction, Which the District Court Grants in Chevron Corp. v. Donziger*

Chevron responded by itself filing a preemptive suit in the Southern District of New York against the plaintiffs and their attorneys, alleging claims under the Racketeering Inclusion and Corrupt Practices Act; state tort claims including fraud; state claims for civil conspiracy; violations of the New York Judiciary Law by Donziger and his law firm; and "a declaratory judgment, pursuant to the federal Declaratory Judgment Act, that the Lago Agrio judgment is not entitled to recognition or enforcement in the United States or anywhere else."³⁷⁴ Based on outtakes from the movie *Crude* and computer files belonging to plaintiff's attorney Stephen Donziger that were gained from the Section 1782 actions, Chevron sought a preliminary injunction to prevent plaintiffs and their attorneys from having the judgment enforced anywhere in the world.³⁷⁵

In the Second Circuit, "[a] party seeking a preliminary injunction must establish irreparable harm and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor."³⁷⁶ Judge Lewis A. Kaplan found that Chevron

369. *Id.* at 599–600; see Drimmer & Lamoree, *supra* note 11, at 502–03.

370. See *Donziger*, 768 F. Supp. 2d at 600, 645.

371. *Id.* at 594 n.2.

372. *Id.* at 603 n.60, 620–21.

373. *Id.* at 621.

374. *Id.* at 625–26.

375. *Id.* at 594–95; *Camacho Naranjo*, 667 F.3d at 234; see *id.* at 236–37 (citing 28 U.S.C. § 1782).

376. *Donziger*, 768 F. Supp. 2d at 626 (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)).

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satisfied this standard.³⁷⁷ As to the immediate and irreparable injury, plaintiffs had a worldwide strategy of pursuing multiple enforcement actions and asset seizures, many of them *ex parte*.³⁷⁸ Statements by Donziger and the “Invictus” memorandum prepared by the Patton Boggs law firm revealed that the plaintiffs considered Chevron’s size its weakness.³⁷⁹ It operates in over one hundred countries and has tankers that dock around the world, including in countries that would be sympathetic to the plaintiffs.³⁸⁰ By attaching ships and seeking enforcement, they could disrupt Chevron’s logistics and harass Chevron into settling quickly rather than fighting a lengthy enforcement action in the U.S.³⁸¹ Plus, given that the plaintiffs are indigenous peoples in Ecuador, Chevron would not be able to recover anything it paid if it were to prevail in the lawsuit.³⁸² Plaintiffs have declined to stipulate that they will not seek enforcement while Chevron’s action is pending.³⁸³

Judge Kaplan also found that Chevron would likely succeed on the merits of its claims, namely that it could win a declaratory judgment that the foreign judgment is not entitled to recognition and enforcement under New York’s Recognition Act, which follows the 1962 Recognition Act with minor differences.³⁸⁴ Chevron argued two grounds for nonrecognition: systemic inadequacy and fraud.³⁸⁵ While bound to apply New York law under the *Erie* doctrine, Judge Kaplan noted that these two grounds are part of the Uniform Recognition Acts adopted in most states and has been recognized in *Hilton v. Guyot* and in the Restatement (Third) of Foreign Relations Law.³⁸⁶

Judge Kaplan addressed the mandatory systemic inadequacy ground first.³⁸⁷ Based in part on the expert report of Vladimiro Alvarez Grau, an attorney from Ecuador who has held numerous elected and appointed public offices and legal academic positions, he concluded that “[t]he Ecuadorian judiciary has been in a state of severe institutional crisis for some time. Matters have deteriorated recently.”³⁸⁸ Since the election of President Rafael Correa, the appointment and removal of judges has been through political rather than constitutional means.³⁸⁹

377. *Id.* at 592, 660.

378. *Id.*

379. *Id.* at 623.

380. *Id.*

381. *Id.* at 626–27.

382. *Id.* at 627.

383. *Id.* at 631; *see Chevron Corp. v. Donziger*, No. 11 Civ 0691 (LAK), 2012 U.S. Dist. LEXIS 107693 * 101–02 (S.D.N.Y. July 31, 2012) (confirming that plaintiffs have made no meaningful statements that they will not seek recognition and enforcement).

384. *Donziger*, 768 F. Supp. 2d at 636, 637 (citing N.Y. C.P.L.R. §§ 5301 *et seq.*).

385. *Id.* at 632–33.

386. *Id.*

387. *Id.* at 632.

388. *Donziger*, 768 F. Supp. 2d at 616, 616 n.163.

389. *Id.* at 617.

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In a number of recent cases, “judges have been threatened with violence, removed, and/or prosecuted when they ruled against the government’s interests.”³⁹⁰ Public officials within Ecuador and numerous independent commentators have concluded “that the rule of law is not respected in Ecuador in cases that have become politicized.”³⁹¹ And this case has become politicized: after meeting with Donziger, President Correa visited the trial proceedings and publicly announced his support of the plaintiffs.³⁹²

Other sources of evidence were the reports of government and non-governmental organizations.³⁹³ The World Bank’s Worldwide Governance Indicators showed that in 2009 Ecuador ranked in the bottom of the world with respect to rule of law, behind even Liberia and North Korea.³⁹⁴ The State Department’s Country Reports for the prior three years also showed that Ecuadoran judges sometimes decided cases in response to outside pressure and corruption.³⁹⁵ Judge Kaplan concluded that “there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this.”³⁹⁶

Judge Kaplan also found that Chevron would likely be able to prove fraud in the Ecuadoran proceedings.³⁹⁷ Of most significance, counsel for plaintiffs met with the supposedly independent expert Cabrera before his appointment by the court, made illicit payments to him, and ghost-wrote some if not all of his damages assessment report.³⁹⁸ They did not notify the court of their involvement and made misrepresentations about their relationship to the court.³⁹⁹ When the Section 1782 proceedings threatened to reveal the relationship, they undertook to “cleanse” the Cabrera report by hiring new consultants who wrote a new assessment—based on the initial Cabrera report.⁴⁰⁰ Based on these findings, Judge Kaplan entered the worldwide anti-enforcement preliminary injunction requested by Chevron.⁴⁰¹

390. *Id.* at 618.

391. *Id.* at 619.

392. *E.g.*, Drimmer & Lamoree, *supra* note 11, at 507–08. Other evidence of political pressure includes criminal charges that were brought, dropped, and then re-initiated against Chevron’s local counsel in Ecuador. *Id.* at 508.

393. *See Donziger*, 768 F. Supp. 2d at 620.

394. *Id.*

395. *Id.*

396. *Id.* at 633.

397. *Id.* at 635–36.

398. *Id.* at 636.

399. *Id.*

400. *Id.*

401. *Id.* at 660. Whether Chevron would be able to prevail also depended upon whether the court had personal jurisdiction over the plaintiffs and their counsel. *Id.* at 639. Judge Kaplan found that minimum contacts was satisfied because the plaintiffs had previously filed suit in New York after retaining New York attorneys,

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3. *The Second Circuit Reverses in Chevron Corp. v. Camacho Naranjo, Rejecting Preemptive Nonrecognition Under the Recognition Act*

The Second Circuit reversed and dismissed the injunction.⁴⁰² The court nowhere addressed the findings of systemic inadequacy or fraud except in the occasional footnote; rather, it held that “[j]udgment-debtors can challenge a foreign judgment’s validity under the Recognition Act only defensively, in response to an attempted enforcement.”⁴⁰³ The court wrote:

Whatever the merits of Chevron’s complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavailable: The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor. The structure of the Act is clear. The sections on which Chevron relies provide *exceptions* from the circumstances in which a holder of a foreign judgment can obtain enforcement of that judgment in New York; they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement.⁴⁰⁴

The court cited cases applying New York and other states’ recognition acts and noted that nearly every one of them addressed the systemic inadequacy and fraud grounds only when raised by judgment-debtors as affirmative defenses.⁴⁰⁵ Its own research revealed only one case in which a judgment-debtor was allowed to use the Recognition Act preemptively: *Shell Oil Co. v. Franco*.⁴⁰⁶ In that case, Shell sought a declaratory judgment that a Nicaraguan DBCP judgment against it was unenforceable.⁴⁰⁷ During the proceedings in Nicaragua, plaintiffs mistakenly sued the distinct entity the Shell Chemical Company instead of the Shell Oil Company. The district court for the Central District of California granted the injunction on the ground that the Nicaraguan court lacked personal jurisdiction

and they were also subject to New York jurisdiction because of the connections of their agent, Donziger, himself a New York attorney. *Id.* at 639–44. He also balanced the factors of fair play and substantial justice and found that jurisdiction over the plaintiffs and their attorneys was reasonable. *Id.* at 644–45. The court also rejected a number of other arguments raised by plaintiffs and their counsel, such as whether an injunction under the Declaratory Judgment Act is allowed. *Id.* at 637–38.

402. *Camacho Naranjo*, 667 F.3d at 234.

403. *Id.*

404. *Id.* at 240.

405. *Id.* at 240, 240 n.12 (citing *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D.Fla. 2009) (Nicaragua); *Kensington Int’l Ltd. v. Republic of Congo*, 461 F.3d 238 (2d Cir. 2006) (Congo); *Soc’y of Loyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (England); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276 (S.D.N.Y. 1999) (Liberia); *S.C. Chimexim S.A. v. Velco Enters, Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999) (Romania); *Bank Melli v. Pahlavi*, 58 F.3d 1406 (58 F.3d 1406) (9th Cir. 1995) (Iran); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (West Germany)).

406. *Id.* at 240 (citing *Shell Oil Co. v. Franco*, 2005 U.S. Dist. LEXIS 47557, 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005)).

407. *Id.*

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over Shell Oil.⁴⁰⁸ The Second Circuit distinguished *Franco* because the Nicaraguan plaintiffs had already and unsuccessfully sought enforcement in California, while the Lago Agrio plaintiffs had not sought enforcement anywhere.⁴⁰⁹

The Second Circuit then went on to hold that it declined to follow *Franco* to the extent that it supports the proposition that the Recognition Act can be used preemptively.⁴¹⁰ “Challenges to the validity of foreign judgments under the Recognition Act can occur only after a bona fide judgment-creditor seeks enforcement in an ‘action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense,’ and not before.”⁴¹¹ To allow otherwise would contravene the policy behind the Recognition Act and the common law principles behind it, which are to provide for the “generous” enforcement of foreign judgments.⁴¹² The court concluded that there was “no legal basis for the injunction that Chevron seeks, and, on these facts, there will be no such basis until judgment-creditors affirmatively seek to enforce their judgment in a court governed by New York or similar law.”⁴¹³

The court rejected other reasons for upholding the preemptive use of New York’s Recognition Act.⁴¹⁴ The parties had argued over whether considerations of international comity weighed in favor of or against the injunction.⁴¹⁵ Because the availability of an anti-enforcement injunction was governed by the Recognition Act, which the court had held does not allow for such injunctions, the Second Circuit found that “the injunction collapses before we reach issues of international comity.”⁴¹⁶ Another reason was that the DJA is “procedural only” and does not provide a court discretion to declare rights that do not exist under the law.⁴¹⁷ Because the Recognition Act could not provide a legal predicate, the DJA did not provide authority for issuing the injunction.⁴¹⁸ The court found few cases where the DJA and the Recognition Act were used together, and “none in which a court undertook to use the DJA to declare the unenforceability of a foreign judgment before the putative judgment-creditor could seek it.”⁴¹⁹ The Second Circuit found that the better approach was for Chevron to present its

408. *Id.*; *Franco*, 2005 U.S. Dist. LEXIS 47557 at *2.

409. *Camacho Naranjo*, 667 F.3d at 240.

410. *Id.* at 241.

411. *Id.* (quoting N.Y. C.L.P.R. § 5303).

412. *Id.* (citing *Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75, 80 (2010)).

413. *Id.* at 242.

414. *See id.* at 243.

415. *Id.* (citing *Donziger*, 768 F. Supp. 2d at 646–48).

416. *Id.* at 244.

417. *Id.* at 244.

418. *Id.* at 244–45.

419. *Id.* at 245.

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defense to recognition and enforcement if and when the Lago Agrio plaintiffs seek enforcement in New York.⁴²⁰ The case was remanded, and, except for the DJA claim, Chevron's suit continues as of the writing of this Article.⁴²¹

4. *Rhetorical Analysis: Avoidance and Obfuscation*

The appellate opinion directs the attention toward its preferred outcome: with no authority to support preemptive nonrecognition, the policy of the Recognition Act mandates only a defensive use. The rhetorical critic recognizes that, in directing the attention toward this result, the Second Circuit also deflects attention away from other possibilities by ignoring authority that has recognized the potential for preemptive nonrecognition—which in several cases has been granted.⁴²² If a statutory provision has been interpreted one way by courts in the system, then it needs to be interpreted the same way by other courts in that system.⁴²³ A number of federal courts have allowed preemptive nonrecognition based on readings of similar Recognition Acts, even saying that the state's Recognition Act does not apply to certain judgments.⁴²⁴ For the Second Circuit's interpretation to be valid, it needs to demonstrate that its result is consistent with these opinions rather than ignore them.⁴²⁵ Instead, it distinguishes only one case through a misreading, *Franco*, before turning to a construction of the New York Recognition Act based on policy rather than statutory text.⁴²⁶ Rather than engage the controlling law itself—which would reveal a result contrary to its holding—the court avoids it.⁴²⁷ By avoiding relevant precedent and obfuscating the statutory text, the court calls the integrity and legitimacy of this opinion's adherence to the rule of law into doubt.⁴²⁸

The Second Circuit characterizes Chevron's action for preemptive nonrecognition as something so novel that there is little authority on point.⁴²⁹ As discussed above, however, at least two commentators have addressed preemptive nonrecognition. One devoted an entire section to this issue, stating that it was merely “*not clear* whether the scope of the Recognition Act is specifically limited to claims of enforcement and recognition or if it also includes the

420. *Id.* at 246 (citing *Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 1333, 1341 (N.D. Ill. 1996)).

421. See Steven Mufson, *How Patton Boggs Got Mired in an Epic Legal Battle with Chevron over Jungle Oil Pits*, WASHINGTON POST (June 29, 2013) (profiling how the district court has allowed Chevron discovery into the allegedly improper acts of another of plaintiffs' attorneys, the Patton Boggs firm).

422. See *supra* notes 81–89 and accompanying text.

423. See *supra* notes 66–72 and accompanying text.

424. See *supra* notes 132–37 and accompanying text.

425. See *id.*

426. See *supra* notes 394–97 and accompanying text.

427. *Id.*

428. See *supra* notes 56–61 and accompanying text.

429. See *supra* note 403 and accompanying text.

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declaratory judgment proceedings that seek to render a [foreign money judgment] unenforceable.⁴³⁰ After all, the Recognition Acts themselves say nothing about declaratory judgments.⁴³¹ The other commentator questioned whether Yahoo!'s attempt at preemptive nonrecognition was "the vanguard of a new trend or an exceptional kamikaze mission."⁴³² The answer is something in between, with at least seven instances—eight if you include Chevron—since 1995 in which judgment creditors sought to preempt enforcement of the foreign judgment against them, and prevailed in a few of those cases.⁴³³

The Second Circuit claimed that "research has discovered only one out-of-circuit district court case that has allowed a judgment-debtor to use the Recognition Act to make such a preemptive declaration," which was *Franco*.⁴³⁴ Unless the court used ridiculously precise and restrictive search terms, there is no explanation for failing to uncover a case like *Investorshub.com*, where the district court granted an injunction against US enforcement in a DJA suit brought by the judgment debtor.⁴³⁵ Not much research is needed to find *Matusevitch*—which is featured in at least two transnational litigation casebooks and is cited in eighty-three law review articles—in which the district court refused recognition to a foreign judgment based on a suit brought by the judgment debtor.⁴³⁶ The Second Circuit could have drawn noteworthy distinctions between those cases and the instant one, such as the stipulation to nonrecognition in the U.S. in *Investorshub* or the earlier procedurally improper attempt by the judgment debtor in *Matusevitch* to enforce, or that neither opinion addressed specifically whether preemptive nonrecognition was allowed under the state's Recognition Act.⁴³⁷ Because the court did not discuss or even locate those cases—which this author found in a half-hour of playing with different search term combinations on Lexis⁴³⁸—it creates the impression that Chevron's claim was not given due consideration.

The court put another unnecessary limitation on the cases it considered: only those where the injunction was granted. In cases like *Ehrenfeld* and *Drake*, the claimants' lack of success had nothing to do with the inapplicability of the

430. Luthin, *supra* note 2, at 134 (emphasis added).

431. *Id.*

432. Gul, *supra* note 5, at 97.

433. Yahoo! v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1201 (9th Cir. 2006); *Investorshub.com*, 2011 U.S. Dist. LEXIS 87566; *Ehrenfeld v. Mahfouz*, 2006 U.S. Dist. LEXIS 23423 at *1 (S.D.N.Y. Apr. 26, 2006); *Franco*, 2005 WL 6184247 at *2; *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 2 (D.D.C. 1995); *Drake v. Brady*, 2009 Minn. App. Unpub. LEXIS 1049 at *1–2 (Sept. 15, 2009).

434. *Camacho Naranjo*, 667 F.3d at 240.

435. 2011 U.S. Dist. LEXIS 87566.

436. 877 F. Supp. 1, 2; BORN & RUTLEDGE, *supra* note 2, at 1136–38; THOMAS E. CHARBONNEAU, CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION 327–31 (2005).

437. See *supra* notes 131–33, 418–19 and accompanying text.

438. *Investorshub*, *Yahoo!*, *Matusevitch*, and *Drake* were found with searches like [nonrecogni! /s procedure and foreign /s money /s judgment] and [foreign /s money /s judgment /p declaratory /s judgment].

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Recognition Act but related to other reasons like lack of personal jurisdiction over the judgment creditor or the debtor's failure to cite authority supporting the grounds for nonrecognition.⁴³⁹ *Yahoo!* is particularly instructive because three of the eleven judges held that the California Recognition Act did not even apply, and an additional five judges implicitly agreed because they would have allowed the district court to enter an injunction in favor of the plaintiff/judgment creditor.⁴⁴⁰ Again, *Yahoo!* is distinguishable because the Act did not apply since the French judgment was an injunction rather than a money judgment.⁴⁴¹ But the rationale is one that provides guidance: some judgments may not fall within the scope of the Recognition Act, thus allowing judgment creditors in a DJA action to secure an injunction based on considerations of comity.⁴⁴²

While courts wish to avoid ambiguity, it arises at strategic spots, so courts must sometimes distinguish contrary authority. Thus, the Second Circuit cannot avoid factually and procedurally similar *Franco*, where a multinational corporation sought a preliminary injunction under the DJA against Latin American judgment creditors,⁴⁴³ but the Second Circuit's cramped reading of that opinion suggests that there is no substantive difference between that case and this. The court wrote that the district court in that case granted the injunction after "deeming the plaintiffs' first failed attempt at enforcement sufficient to trigger the nonrecognition exceptions of California's Recognition Act."⁴⁴⁴ The first failed attempt at nonrecognition was but one factor the *Franco* court considered.⁴⁴⁵ It noted the size of the judgment was "in excess of \$480 million."⁴⁴⁶ It also pointed out that the judgment creditors had not explained why they would not seek a second attempt at enforcement, "nor have they disclaimed an intent to seek enforcement against Shell Oil."⁴⁴⁷ The Lago Agrio plaintiffs likewise have a large judgment (ten times the half-billion-dollar award in *Franco*); they have refused to stipulate that they will not seek enforcement during the pendency of the proceedings in New York; and the evidence before Judge Kaplan shows that they do plan to seek immediate enforcement—just not in New York.⁴⁴⁸ Making distinctions on frivolous differences suggests a lack of impartiality.⁴⁴⁹

439. See *supra* notes 136–38 and accompanying text.

440. See *supra* notes 125–29 and accompanying text.

441. *Id.*

442. *Id.*

443. 2005 U.S. Dist. LEXIS 47557 at *6–13.

444. 667 F.3d at 240 (citing *Franco*, 2005 WL 6184247 at *4).

445. 2005 WL 6184247 at *4.

446. *Id.*

447. 2005 WL 6184247 at *4.

448. See *supra* Part IV.B.

449. MacCormick, *supra* note 15, at 143.

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MacCormick writes that justice requires that cases should be decided like previous cases that are relevant;⁴⁵⁰ indeed, cases that differ in their relevant facts need not be cited because they are not even precedent.⁴⁵¹ Rather than address the preemptive nonrecognition opinions (except for *Franco*), the Second Circuit cited several others to support its assertion that the proper procedure is for a judgment creditor to seek enforcement first and then for the judgment debtor to challenge it by affirmative defense.⁴⁵² While it is true that the parties in those cases happened to follow that procedure, none of those opinions addressed whether or not the given state's Recognition Act mandated it. All the Second Circuit did was note the *typical* process for enforcing foreign money judgments; that does not mean it is the *only* way that the Recognition Act applies.⁴⁵³ Indeed, the Recognition Act comes into play in other procedural contexts, such as when the judgment creditor is sued and seeks recognition of the foreign money judgment for collateral estoppel or *res judicata* purposes.⁴⁵⁴ These opinions where the Recognition Act was raised in a typical proceeding are therefore irrelevant to the issue.⁴⁵⁵

Another problem was how the court approached interpretation of the Recognition Act itself. In other cases where the party challenges not just the application to the evidence but the interpretation of the Recognition Act, the judges quote entire portions of the statute and engage in a lengthy analysis of the specific terms.⁴⁵⁶ The Second Circuit instead leads and closes with the policy of the New York Recognition Act: because it was meant to ensure that New York fora remain "generous" for foreign judgments, the grounds for nonrecognition can be raised defensively only, so the approach in *Franco* is not permitted.⁴⁵⁷ Yet policy should bolster rather than substitute for a reading of the statutory text

450. *See id.*; *supra* notes 62–65 and accompanying text..

451. Todd, *supra* note 20, at 75.

452. 667 F.3d at 240 n.12.

453. *Yahoo!*, 433 F.3d at 1213 ("In a typical enforcement case, the party in whose favor the foreign judgment was granted comes to an American court affirmatively seeking enforcement. . . . However, this is not the typical case, for the successful plaintiffs in the French court do not seek enforcement. Rather, Yahoo!, the unsuccessful defendant in France, seeks a declaratory judgment that the French court's interim orders are unenforceable anywhere in this country.").

454. *See, e.g.*, *Southwest Livestock and Trucking Co., Inc. v. Ramon*, 169 F.3d 317, 318–20 (5th Cir. 1999) (reversing trial court's determination that Mexican judgment was not entitled to recognition as defense against judgment debtors' action against lender for violation of Texas usury laws and RICO); RESTATEMENT (3D) FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b.

455. That it relied on this and other merely persuasive authority to support its conclusions counters any argument that the court was not bound to cite authority from outside the Second Circuit and New York State, because then ignoring contrary but relevant extrajudicial authority only magnifies the perception of bias. *See Aldisert, supra* note 18, at 632–33 (distinguishing precedent from persuasive authority).

456. *See, e.g.*, *Soc'y of Lloyds*, 233 F.3d at 481–82 (interpreting the Illinois Recognition Act as allowing a single procedure for recognizing and enforcing a foreign money judgment); *Southwest Livestock and Trucking Co., Inc.*, 169 F.3d at 320–23, 320 n.2 (quoting the grounds for nonrecognition and then explicating the meaning of "cause of action" in the public policy ground).

457. *Camacho Naranjo*, 667 F.3d at 239, 241.

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itself. As MacCormick writes, judges often allude to justice or public policy as a criterion of evaluation.⁴⁵⁸ Such an appeal “seems conclusory rather than argumentative. It states the result of an evaluation without showing the working of it.”⁴⁵⁹ Professor Little characterized such abdication to higher authority, that the result is mandated by the state, as an avoidance strategy.⁴⁶⁰

When applying a statute, the courts must interpret its terms, and reasons should be given for preferred interpretations that are decisive.⁴⁶¹ The Second Circuit quotes only two of three relevant sections of the Act, and then only parts of them.⁴⁶² It leads with Section 5302: “The Recognition Act supports the enforcement of foreign judgments that are ‘final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.’”⁴⁶³ It then skips Section 5303, the provision dealing with recognition and enforcement, and moves to Section 5304, the grounds for nonrecognition.⁴⁶⁴ Rather than quote that section, it characterizes those grounds as “exceptions”—thus suggesting they are appropriate only in response to the judgment creditor first seeking recognition—and then quotes only portions of Section 5304.⁴⁶⁵ The court then returns to a partial quote of Section 5303 to support the policy argument that challenges to the validity of the judgment can be brought only after recognition.⁴⁶⁶

It would be nitpicky to criticize the Second Circuit for not following to the letter the judicial canons of statutory construction. But in ignoring even the most basic rules about interpreting statutes, the court creates a perception that its conclusions are not based in law. Three canons are particularly relevant. First, courts cannot read anything out of a statute but must instead give “significance and effect . . . to every word, phrase, sentence, and part of an act.”⁴⁶⁷ Second, “identical words used in different parts of the same act are intended to have the same meaning.”⁴⁶⁸ Finally, “courts should, if reasonably possible to do so,

458. MacCormick, *supra* note 15, at 112.

459. *Id.*

460. Little, *supra* note 90, at 102–03.

461. *See supra* notes 66–70 and accompanying text.

462. *See Camacho Naranjo*, 667 F.3d at 239–41.

463. *Id.* at 239.

464. *Id.*

465. *Id.* at 239–40.

466. *Id.* at 241.

467. 73 AM. JUR. (2D) STATUTES § 111 (“Courts, generally, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. To the contrary, it is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of an act.”); *see id.* at 107 (“In interpreting a statute, the court can neither insert language that has been left out nor omit language that has been inserted.”).

468. *Id.* § 140.

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interpret the statute or the provision being construed so as to give it efficient operation and effect as a whole.”⁴⁶⁹

Applying just these three, we see that the persuasiveness of the court’s reasoning from policy grounds lacks authority. In quoting Section 5302, the Second Circuit ignored the italicized portion: “*This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.*”⁴⁷⁰ Rather than “support[ing] the enforcement of foreign judgments,”⁴⁷¹ the provision actually narrows the scope of the Recognition Act only to certain foreign judgments: ones that are “final, conclusive, and enforceable.”⁴⁷² The enforceability of judgments is not addressed until Section 5303, most of which the Second Circuit ignores:

Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.⁴⁷³

Thus, only “conclusive” judgments are enforceable, and Section 5304 may affect whether a judgment is conclusive.⁴⁷⁴ The first mandatory ground, systemic inadequacy, is addressed in Section 5304(a): “**No recognition.** *A foreign country judgment is **not conclusive** if (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.*”⁴⁷⁵ This section therefore specifies which foreign judgments are not conclusive under the Act.⁴⁷⁶

A reading based on the full text of the relevant statutes results in an interpretation that could support Judge Kaplan. Because a judgment rendered under a system that does not provide impartial tribunals is not conclusive under Section 5304, it is not entitled to enforcement under Section 5303, and therefore the Recognition Act does not apply to it under Section 5302.⁴⁷⁷ To determine whether to grant the injunction, Judge Kaplan had to determine whether the Lago Agrio plaintiffs’ judgment was enforceable under the Recognition Act. Having determined that it was not conclusive and therefore not enforceable, the

469. *Id.* § 155.

470. N.Y. CLS CPLR § 5302 (emphasis added); *Camacho Naranjo*, 667 F.3d at 239.

471. *See Camacho Naranjo*, 667 F.3d at 239.

472. N.Y. CLS CPLR § 5302.

473. N.Y. CLS CPLR § 5303 (emphasis added).

474. *Id.*

475. *Id.* § 5304(a) (emphasis added).

476. *Id.*

477. *See supra* notes 454–460 and accompanying text.

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Recognition Act did not apply, so he could rely upon principles of comity and the DJA to enter the anti-enforcement injunction.⁴⁷⁸ Referring to the policy of the New York Recognition Act as articulated by the courts of New York is certainly proper—and with a more detailed analysis might override this construction—but avoiding the text of the statute itself and the relevant case law calls into question the integrity and legitimacy of the opinion.⁴⁷⁹

V. CONCLUDING OBSERVATIONS ON THE RHETORIC OF (NON)RECOGNITION

Scholars have decried the systemic inadequacy ground, particularly as applied to these two cases, yet that ground had no adverse effect on the judgment creditors. But this rhetorical analysis has revealed that the ground did affect the reasoning of the appellate courts and had a negative impact on the rule of law and on the parties themselves.

With such high-profile cases, both courts could have engaged in a thorough analysis of all the sources it considered conflicting and offered definitive judicial statements. The Eleventh Circuit in particular could have based its rejection of the systemic inadequacy finding on a Constitutional ground, the act of state doctrine, which has been articulated by the Supreme Court and proffered by scholars. Or the Eleventh Circuit might have advanced a new interpretation of the systemic inadequacy ground or the type and amount of evidence needed to prove it. In *Camacho Naranjo*, the Second Circuit might have cited and distinguished all the other cases on preemptive nonrecognition and then engaged in a thorough reading of the Recognition Act.

The reason why neither court took bold action is likely because these cases are so high-profile, and courts prefer to avoid controversy.⁴⁸⁰ Jonathan C. Drimmer and Sarah R. Lamoree have detailed the political action taken by the parties in both the DBCP and Lago Agrio litigation, which includes the involvement of the governments of Nicaragua and Ecuador.⁴⁸¹ Each country enacted legislation specifically in aid of the plaintiffs, and President Correa has come out publicly in support of the Lago Agrio plaintiffs and of enforcing the judgment.⁴⁸² Indeed, the government of Ecuador stands to gain the most from successful enforcement, which provides billions in soil and water remediation yet imposes no liability for the actions of the state-owned Petroecuador.⁴⁸³ While the Eleventh Circuit said nothing, the Second Circuit seemed well aware of the

478. *Donziger*, 768 F. Supp. 2d, § II; see also Luthin, *supra* note 2, at 134 (“The Recognition Act . . . define[s] the defines scope n terms of the [foreign money judgment] itself. . . . [I]f the [foreign money judgment] c omports with the requirements of the Act, then it is covered by the Act.”).

479. See *supra* notes 49–53 and accompanying text.

480. See *supra* Part IV.

481. See Drimmer, *supra* note 11, at 489–512.

482. *Id.*

483. See *Donziger*, 768 F. Supp. 2d at 353; Patel, *supra* note 10, at 103.

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implications for international relations of labeling another's country's judiciary as impartial and corrupt.⁴⁸⁴ For example, it opined that allowing preemptive nonrecognition "would unquestionably provoke extensive friction between legal systems by encouraging challenges to the legitimacy of foreign courts in cases in which the enforceability of the foreign judgment might otherwise never be presented in New York."⁴⁸⁵ It also wrote that comity cautioned against using a court of New York "as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs."⁴⁸⁶ The court did not apply the systemic inadequacy ground because it clearly wished to avoid doing so, and its holding therefore has everything to do with the ground.

But in deferring to the governments of foreign countries, these two courts ignored other stakeholders in the drama, such as the states that have enacted recognition laws and US courts that have interpreted them. To support its reversal of the district court's finding, the Eleventh Circuit would have had to distinguish or decline to adopt the approach in the Second, Seventh, and Ninth Circuits. To do so ignores that Florida courts have characterized the Recognition Acts of other states as substantially the same as Florida's and therefore relied upon extrajurisdictional authority. While rhetoricians acknowledge such ambiguity, that other courts can and have come out differently, judges avoid it because they want the appearance of the right and inevitable result. Or, the court would have had to inject the US Constitution into this issue of state law, thus inviting Supreme Court review. Instead, the Eleventh Circuit avoided politics altogether through the distancing device of a *per curiam* opinion devoid of reference to any authority on scope of review or the soundness of the district court's approach.⁴⁸⁷

The Second Circuit likewise would have had to acknowledge that it stands alone in holding that the Recognition Act forbids preemptive nonrecognition if it had to distinguish the numerous state and federal court opinions, including the Ninth Circuit, that seem to allow it, so it avoided those cases altogether.⁴⁸⁸ In light of the controversy of this political topic, the court chose not to engage but instead obfuscated, clinging to vague policy rather than detailed statutory construction.⁴⁸⁹ It abdicated to the higher authority of the New York Recognition Act without explicating that Act, which by its terms does not compel employing the grounds for nonrecognition only in defense.⁴⁹⁰

484. See *Camacho Naranjo*, 667 F. 3d at 246.

485. *Id.*

486. *Id.* at 242.

487. See generally *Osorio*, 635 F.3d 1277.

488. See generally *Camacho Naranjo*, 667 F.3d 232.

489. *Id.*

490. *Id.* at 253–255.

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These opinions also create irrational and inconsistent authority, whether precedential or persuasive, for future litigation. The Eleventh Circuit rejected the systemic inadequacy ground and the result was still the same: no recognition and enforcement.⁴⁹¹ Accordingly, the holding did not change the result for these parties, but what about future litigants? “A reviewing court abdicates its role in providing future guidance where it affirms a trial court decision without disclosing its rationale for doing so.”⁴⁹² We cannot assume that all cases arising from Nicaragua will be based on “legislation that *de facto* guarantees the denial of due process” and that deprives the trial court of personal and subject matter jurisdiction.⁴⁹³ For a point of law that is seldom applied, Judge Huck’s opinion could have had tremendous value as precedent for judgment debtors, or even as persuasive authority since most states have adopted either the 1962 or 2005 Recognition Acts, both of which have the systemic inadequacy ground.⁴⁹⁴ Now, judgment debtors cannot cite to a thorough and well-reasoned opinion. And the opinion reaches beyond Nicaraguan judgments: judgment creditors from every nation now have authority to challenge any trial court that follows the same approach to systemic inadequacy as Judge Huck, even though it is the approach that other courts have followed. Because the Eleventh Circuit did not specify the error, both the interpretation of systemic inadequacy and the types and amount of evidence to prove it are called into question.

The opinion also creates a problem for judgment creditors, however. Those from Nicaragua might request a US court to take judicial notice of the rejection of Judge Huck’s finding of systemic inadequacy to support the proposition that Nicaragua in fact has impartial tribunals. But the Eleventh Circuit did not substitute its own findings of fact, so there is nothing of which to take judicial notice.⁴⁹⁵ Further, because the court described no rules of law that controlled its rejection of the systemic inadequacy finding, the opinion contains no specific doctrine and therefore should have zero value as binding or even persuasive authority.⁴⁹⁶ Nor does the court’s statement satisfy the definition of dictum because it does not concern a rule of law or legal proposition, and it was essential to the determination of the case.⁴⁹⁷ With so little judicial authority on this ground, judgment creditors will likely cite it anyway, thus adding another conflicting voice to the patchwork of opinions on state recognition laws. Because this ground is still the law, judgment creditors from other developing nations also

491. *See Osorio*, 635 F.3d 1277 at 1278–79.

492. 5 AM. JUR. 2D APPELLATE REVIEW § 773.

493. Baker & Parise, *supra* note 5, at 10–11.

494. *See supra* notes 105–09 and accompanying text.

495. *See generally Osorio*, 635 F.3d 1277

496. *Id.*; Todd, *supra* note 20, at 78–79; Maltz, *supra* note 74, at 366–83.

497. Todd, *supra* note 20, at 79 (citing BLACK’S LAW DICTIONARY 454 (6th ed. 1990) (defining dictum as “[s]tatements and comments in an opinion concerning some rule of law or legal proposition not . . . essential to determination of the case.”)).

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face uncertainty, especially if they attempt to enforce in Florida or any state in the Eleventh Circuit, because they do not know, nor do they have a reasoned way of knowing, what the specific error was.⁴⁹⁸

Because of its desire to avoid passing judgment on the Ecuadoran judiciary, the opinion in *Camacho Naranjo* likewise confuses future enforcement proceedings in the U.S. It deprives judgment debtors of the possibility of preemptive nonrecognition in the Second Circuit, and, as the only opinion that has squarely addressed the issue, potentially in other jurisdictions as well. Some state and federal courts have been receptive to preemptive nonrecognition, however.⁴⁹⁹ To the extent they can obtain personal jurisdiction outside the Second Circuit, judgment debtors will go elsewhere and challenge *Camacho Naranjo* when it is inevitably raised by the judgment creditors. Because that case did little to distinguish seemingly contrary authority, and because its interpretation of the New York Recognition Act is based on policy rather than its specific terms, judgment creditors might win this challenge.⁵⁰⁰ This could result in a circuit split, but on an issue of multiple states' laws that the Supreme Court may be unwilling to review.⁵⁰¹

Perhaps the most glaring defect in both opinions is that it denies the rule of law to the parties themselves.⁵⁰² Win or lose, each party comes to the court with the expectation that the decisions on their contested points will accord with the relevant legal authority and that they will be treated consistently with other persons who have litigated similar claims. While the outcome in *Osorio* would not change because of the other grounds for nonrecognition, the parties nevertheless contested one statutory ground that they developed through considerable evidence on both sides, for which they received a detailed conclusion from the district court, but which the Eleventh Circuit casually tossed aside.⁵⁰³ By declining to offer even a hint as to why, the court showed a lack of respect. Further, it diminished the legitimacy of the outcome: if no reason need be given to find a ground unsupportable, then are the reasons for the other grounds supportable? The parties can rightly wonder whether the judge in re-creating the law afforded them justice when it refused to give them justifications.

This same question arises with the parties in *Camacho Naranjo*.⁵⁰⁴ While the Second Circuit at least adopted specific doctrine and offered a rationale for its

498. See MacCormick, *supra* note 15, at 12, 16.

499. See *supra* notes 132–37 and accompanying text.

500. See generally *Camacho Naranjo*, 667 F.3d 232.

501. See *United States v. S. A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 816 n.12 (1984) (“[W]e generally accord great deference to the interpretation and application of state law by the Courts of Appeals.”).

502. See generally *Camacho Naranjo*, 667 F.3d 232; *Osorio*, 635 F.3d 1277.

503. See generally *Osorio*, 635 F.3d 1277.

504. 667 F.3d 232.

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holding,⁵⁰⁵ neither the doctrine nor rationale was reasonable because the court ignored or misread relevant authority and declined to examine the controlling authority of the New York Recognition Act. Unlike the parties in *Osorio*, though, the Second Circuit's opinion had a practical effect on the parties: with the preliminary injunction against worldwide enforcement dismissed, the Lago Agrio plaintiffs have initiated their "Invictus" plan.⁵⁰⁶ They have already gone to the courts of several nations such as Canada, Brazil, Columbia, and Argentina, thus forcing Chevron to defend multiple enforcement actions rather than one.⁵⁰⁷ An Argentine trial court ordered approximately \$2 billion of assets of a Chevron subsidiary frozen, thus disrupting Chevron's worldwide operations.⁵⁰⁸ If the Second Circuit had identified and distinguished the other cases where preemptive nonrecognition was allowed and engaged in a more thorough analysis of the New York Recognition Act, then its opinion, though arguable, would be reasonable. Even though Chevron would never like this outcome, the court would have demonstrated that it had at least considered Chevron's stance before reversing the injunction. Instead, Chevron can perceive that its adherence was not secured through reason, so the foreign enforcement proceedings and asset seizures are the result of a denial of justice by the courts of its own country.

Judge Posner has written, "We should not be so naïve as to infer the nature of the judicial process from the rhetoric of judicial opinions."⁵⁰⁹ Yet we can examine the rhetoric of judicial opinions for their impact on the integrity of the judicial process when well-reasoned trial court opinions are disregarded without sound basis—or any basis at all.

505. See Maltz, *supra* note 74, at 376–83.

506. Emily Schmall, *Argentina: Chevron's Assets Are Frozen*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/world/americas/argentina-chevrans-assets-are-frozen.html?_r=0 (last visited Feb. 27, 2013) (on file with the *McGeorge Law Review*).

507. *Id.*

508. *Id.*; Pablo Gonzalez, *Ecuador to Sue Chevron in Argentina to Enforce Judgment*, BLOOMBERG BUSINESSWEEK (Oct. 31, 2012), <http://www.businessweek.com/news/2012-10-31/ecuador-to-sue-chevron-in-argentina-to-enforce-judgment> (last visited Feb. 27, 2013) (on file with the *McGeorge Law Review*).

509. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988).