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March 2011

Recent Developments: Chevron-Ecuador Dispute

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Two notable decisions were issued this month in the long-standing litigation campaign between Chevron Corporation, a group of Ecuadorian plaintiffs alleging environmental injuries from oil exploration and production activities in Ecuador, and the Republic of Ecuador. The decisions, summarized below, touch on several critical issues that arise predominantly in international litigation.

Chevron's epic legal battle with Ecuador concerning the environmental consequences of Texaco's prior activities in that nation has been well-chronicled; it has been the subject of a feature-length film, several books, and a great deal of written commentary.[1] While a full description of the case is beyond the scope of this update, some background is in order.

In 1993, a putative class of Ecuadorian citizens commenced an action (the "*Aguinda*" action) in the U.S. District Court for the Southern District of New York against Chevron Corporation, seeking billions of dollars in damages as a result of alleged environmental contamination to the Ecuadorian rain forest that the plaintiffs contended was caused by Texaco, Inc., a subsidiary of which had engaged in petroleum exploration and drilling activities in the Oriente region of eastern Ecuador between 1964 and 1992.[2] Texaco promptly moved to dismiss the *Aguinda* action on a number of grounds, including forum non conveniens and the plaintiffs' failure to join the Republic of Ecuador and Petroecuador as indispensable parties. The district court, relying in part upon pledges made by Texaco to submit to the jurisdiction of the Ecuadorian courts in connection with the plaintiffs' claims and to honor, subject to certain defenses set forth in New York law, any judgment rendered on those claims, dismissed the *Aguinda* action on forum non conveniens grounds, and the Second Circuit affirmed.[3]

Two noteworthy developments occurred while the *Aguinda* action was pending. First, in 1995, Texaco entered into a settlement with the Ecuadorian government and Petroecuador, in which Texaco agreed to undertake environmental remediation activities at the former drilling sites in exchange for a release by the Ecuadorian government from any liability. In 1999, while the *Aguinda* parties were litigating Texaco's motion to dismiss on forum grounds, Ecuador enacted the "Environmental Management Act," an act that provided private plaintiffs with the ability to bring an action for damages for the cost of remediation of environmental harms generally, even absent proof of any personal injury or property damages to a specific plaintiff. One of the lawyers for the *Aguinda* plaintiffs later stated that his team had worked with Ecuadorian lawyers to win passage of the law, which he noted was intended to resemble the U.S. Superfund law and was sought specifically in case the *Aguinda* claims ultimately had to be pursued outside the United States. Unsurprisingly, following the Second Circuit's dismissal of the *Aguinda* action on forum grounds, a group of Ecuadorian plaintiffs (including many of the original *Aguinda* plaintiffs) commenced suit against Chevron and Texaco in Lago Agrio, Ecuador. While the transfer of the litigation from New York to Ecuador resulted in Ecuadorian lawyers taking primary

responsibility for the case, the *Aguinda* plaintiffs' New York lawyer – Steven Donziger – "remained very much involved" and became "the fulcrum of the entire effort to use the Lago Agrio litigation to obtain a very large payment from Chevron."[4]

The Lago Agrio litigation was characterized by disputes about the propriety of expert reports, allegations of political interference in the proceedings by Ecuadorian officials (including the President of Ecuador), and changes in the makeup and constitution of the Ecuadorian judiciary. The Lago Agrio court rendered its judgment on February 14, 2011. That judgment awarded the plaintiffs a total of more than US$18 billion. Of this sum, $8.646 billion was characterized as compensatory damages; an additional amount equal to ten percent of the compensatory award was to be paid to the Amazon Defense Fund ("ADF"), an organization purporting to represent the plaintiffs; and punitive damages equal to the amount of the compensatory award were to be imposed unless Chevron issued a "public apology" to the plaintiffs within 15 days – something it did not do.

In 2009, while the Lago Agrio case was pending in Ecuador, Chevron commenced an arbitration proceeding under the United States–Ecuador Bilateral Investment Treaty, claiming that (a) the Ecuadorian courts' handling of the Lago Agrio case violated Chevron's due process rights, and (b) the Lago Agrio litigation violated the settlement agreement that Texaco entered into with Ecuador and Petroecuador. As discussed below, the Republic of Ecuador sought a stay of this arbitration, claiming that Chevron should be prohibited from prosecuting it on grounds of estoppel and/or waiver.

Finally, on February 1, 2011, Chevron commenced suit against the Lago Agrio plaintiffs (the "LAPs"), Donziger and his law firm, one of the environmental consulting firms that assisted the plaintiffs in the Lago Agrio case, and four groups affiliated with the plaintiffs (including ADF). Chevron's complaint included claims under the Civil RICO statute, related state tort claims sounding in tortious interference with contract, fraud, civil conspiracy, unjust enrichment, claims against Donziger and his firm under the New York Judiciary Law concerning their conduct of the case, and a declaration that the Lago Agrio judgment is not entitled to recognition in the United States or anywhere else. In connection with its claim for a declaratory judgment, Chevron sought a preliminary injunction seeking to prohibit the LAPs from enforcing any judgment rendered in the Lago Agrio case outside of Ecuador.

In addition to impacting the course of these cases and the dispute as a whole, the recent decisions in the *Chevron* cases touch on a number of issues of critical importance in international disputes. We summarize them below.

Chevron v. Donziger[5]

As noted above, on February 1, 2011 – just less than two weeks before the Ecuadorian court issued its judgment in the Lago Agrio action – Chevron filed suit against Donziger, the LAPs, and various other parties; as part of this action, Chevron sought a temporary restraining order and preliminary injunction against the defendants to prevent them from attempting to enforce any Ecuadorian judgment rendered against them outside Ecuador. Judge Kaplan granted Chevron's motion in a 127-page decision that, in addition to providing a comprehensive history of the dispute, contains a thorough analysis of several issues that take on heightened importance in international disputes: the ability to enjoin foreign proceedings, international comity, enforceability of foreign judgments, and service of process.

Service of Process

Chevron effected service on the defendants pursuant to Fed. R. Civ. P. 4(f)(3), which authorizes service of process on aliens "by other means not prohibited by international agreement, as the court orders." Specifically, the district court permitted Chevron to effect service on the LAPs (who are primarily residents of the Ecuadorian rain forest, and who might not be easy to serve through standard means) by emailing their lead Ecuadorian counsel. The LAPs objected to this means of service on the ground that Chevron had not demonstrated an inability to serve them in person or in accordance with Ecuadorian law; the district court rejected this argument, clarifying that service under Rule 4(f)(3) is "neither a 'last resort' or 'extraordinary relief,'"[6] that the only prerequisites for its use are a court order directing service in a particular fashion, and that the method of service not violate international law. The court underscored that claims that the method of service violates the law of the state where service has occurred is not a cognizable objection.[7]

The Anti-Enforcement Injunction and International Comity

The district court's analysis of Chevron's motion for a preliminary injunction was somewhat unorthodox. While Second Circuit law prescribes a specific, multi-factor test that must be satisfied in order for a party to obtain a foreign anti-suit injunction (which the injunction sought by Chevron clearly was), the district court did not apply that test at the outset of its analysis. Instead, the court analyzed the motion under the standard test for preliminary injunctive relief. Specifically, the court noted that Chevron was required to demonstrate irreparable injury and either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of the hardships tipping decidedly in its favor.[8]

The district court found that Chevron satisfied each of these required showings. The court found, based on Donziger's own statements, that the LAPs had a strategy of seeking prompt enforcement of the judgment, and that that strategy was specifically intended to coerce Chevron into settling the case quickly in order to avoid harm to its corporate goodwill and business relationships. The court found further that in the absence of an injunction, the LAPs might achieve this goal through asset seizures that would disrupt Chevron's supply chain and cause it to miss deliveries that would damage its goodwill.[9] The Court found the threat of these injuries to be imminent (based on its findings concerning the enforceability of judgments under Ecuadorian law and the fact that, once enforceable in Ecuador, the judgment would become presumptively enforceable in New York and elsewhere in the United States under the Uniform Foreign Money Judgments Act), and that such injuries would be irreparable, particularly given the potential harm to Chevron's reputation and the fact that any seized assets would almost surely be unrecoverable by Chevron were it to prevail in the case.[10] In considering the potential irreparable injury to Chevron, the district court observed that "injunctions to restrain a multiplicity of suits in cases of vexatious litigation are not only permitted, but favored, by the courts. This is so largely because a multiplicity of suits has an *in terrorem* value – it forces its target to needlessly defend itself in many fora and thus creates settlement pressures above and beyond anything warranted by the merits."[11]

Finally, the district court found that Chevron's ability to seek appellate relief in the Ecuadorian courts was insufficient to neutralize the irreparable injury it faced from immediate enforcement. Previewing its findings concerning Chevron's likelihood of succeeding on the merits, the district court held that, at the least, there was a serious question about whether Ecuadorian judicial proceedings were compatible with due process, and that "the assumption that Chevron will get a fair and proper [appellate] hearing and result in Ecuador cannot properly be made here."[12]

Next, the district court analyzed Chevron's likelihood of succeeding on the merits. It began by taking note of the Supreme Court's 1895 ruling in *Hilton v. Guyot*, which held that "receptivity toward the recognition and enforcement of foreign country money judgments is not without limit," and that recognition of such judgments may be denied where the judgment was rendered by a system that does not accord sufficient due process or where the judgment, even if rendered by a judicial system that affords appropriate safeguards, was procured by fraud.[13] The district court then noted that these concepts of recognition had been incorporated into the Uniform Foreign Country Money Judgments Recognition Act.[14]

Applying these standards, the district court found that Chevron was likely to succeed in proving that any judgment in the Lago Agrio case would not be enforceable in New York. Relying in part upon a report by Alvarez Grau (an experienced attorney and public official in Ecuador), the district court held that the Ecuadorian court system had ceased operating impartially and was plagued by corruption and political interference, and that these problems had worsened since the election of President Correa due to the president's consolidation of control of the courts.[15] The district court found as well that judges had been threatened with violence, removed, and/or prosecuted in response to rulings against the Republic.[16] The district court also took note of the World Bank's conclusion that Ecuador ranked in the bottom eight percent of nations in its application of the rule of law, below both Liberia and North Korea.[17]

In addition to the systemic problems affecting the Ecuadorian courts' ability to adjudicate the case fairly and consistently with accepted notions of due process, the district court also concluded that there was "ample evidence of fraud" in the Ecuadorian proceedings. This conclusion was based primarily on evidence that a key expert report, prepared to quantify damages resulting from the alleged environmental harms, had been forged, and that a subsequent effort had been made to "cleanse" the report afterward.[18] The court found that the irregularities surrounding the preparation of the expert report were "impossible to separate" from the judgment itself.[19]

Based on these findings and its conclusion that the case presented an appropriate case for declaratory relief, the district court found that the standard for preliminary injunctive relief had been satisfied.

The district court next turned to the defendants' argument that the court should exercise its discretion to deny Chevron's motion for injunctive relief based on principles of abstention and international comity. The court made short work of the abstention argument, finding that *Younger* abstention – the form of abstention urged by the defendants – had no application in cases involving foreign proceedings.[20] In response to defendants' comity argument, the district court took note of the Second Circuit's rule in *China Trade & Development Corp. v. Chong Yong*, which provides a seven-factor legal test for determining whether a party may obtain an injunction against foreign proceedings.[21] Applying the *China Trade* test, the district court found that the mandatory threshold tests (identity of the parties and whether resolution of the case in the enjoining forum would dispose of the issues in the case to be enjoined) were satisfied. Further, it found that three of the five discretionary factors were satisfied: 1) the foreign actions would be vexatious since the enforcement proceedings were designed to harass Chevron into settling; 2) the foreign proceedings would result in inefficiency; and 3) they would threaten important American public policy (*i.e.*, the policy interest in preventing American citizens from judgments entered against in tribunals where due process is not afforded).[22] Thus, the district court found that the *China Trade* factors supported its decision to enjoin the LAPs from seeking to enforce any Ecuadorian judgment outside Ecuador.

Conclusions

Judge Kaplan's decision represents an unusually clear illustration of how the U.S. judiciary can shape and influence foreign proceedings. Foreign anti-suit injunctions, while long accepted under U.S. law, implicate particularly delicate issues relating to sovereignty and international comity. Such injunctions are typically sought at the beginning of a case, not after judgment has been entered. And particularly where Texaco (Chevron's corporate predecessor for purposes of the case) had expressly agreed to litigate the claims in Ecuador as a condition for the dismissal of the initial litigation on forum non conveniens grounds, its motion for an injunction to prevent the judgment from that very litigation from being enforced abroad constituted a very aggressive tactic that illustrates the unusual nature of the dispute, the Ecuadorian proceedings, and the high stakes at play. Chevron could have waited until the LAPs sought to enforce their judgment in the U.S. or elsewhere, and then made the arguments it made to the district court as defenses to those enforcement proceedings; doing so would have represented a prudent defense. By seeking the injunction it did, however, Chevron used those defenses offensively and sought – successfully – to ensure that the judgment could not be enforced even in those jurisdictions where U.S. principles governing the enforcement of judgments are not observed or applied with the same rigor as they are in the United States. The district court's judgment is notable in that, by granting the requested injunction, it has attempted to ensure that the Ecuadorian judgment cannot be enforced in ***any*** jurisdiction on the basis of its finding that U.S. enforcement standards were unlikely to be met.

The district court's decision is also notable in that it contained a detailed examination of the Ecuadorian judiciary and the effect of political forces on that judiciary. Even among cases where U.S. courts are required to examine and make conclusions about the suitability of another nation's courts to fairly and competently resolve a dispute, the district court's analysis applied a uniquely high degree of scrutiny, and made unusually unequivocal conclusions about the Ecuadorian system. Those conclusions, set forth as they are in a published judicial decision from a court that handles a high number of international cases (and that may well in the future handle additional cases involving Ecuador), are almost sure to be used in the future, at least barring changes in the Ecuadorian government that render those findings inapplicable to future cases.

Finally, the decision is notable in that it announced – with no citation to supporting authority of any kind – a "strong interest in protecting [U.S. citizens] from judgments entered in systems that do not accord their litigants the essentials of due process or as a result of fraud, particularly fraud organized and conducted in part within the United States."[23] To suggest that the United States has such a strong interest is, of course, unsurprising. It is an entirely different matter for a U.S. court to suggest, as the district court did, that such a policy interest could justify (even as a secondary factor, which it is under *China Trade*) the issuance of what amounts to a worldwide injunction prohibiting a party from enforcing a judgment of a duly constituted national court. While the extraordinary nature of the *Chevron* case may well result in the district court's decision being cabined to its facts, the specific relief it granted suggests a willingness on the part of U.S. courts to take affirmative steps to protect U.S. parties from unfair foreign court judgments. That is a role that U.S. courts have traditionally been hesitant to take, given the concomitant impact that such robust action can have on international comity and the risk that foreign courts may seek in turn to resist enforcing U.S. judgments.

Republic of Ecuador v. Chevron Corporation[24]

Just ten days after the district court issued its injunction in the *Donziger* proceeding, the Court of Appeals for the Second Circuit issued its ruling on Ecuador's appeal of the district court's refusal to stay the BIT arbitration. As noted above, in September 2009, Chevron commenced arbitration against

Ecuador under the BIT. The arbitration asserted two claims: (1) that any judgment against Chevron in the Lago Agrio litigation would violate the settlement agreement that Tex-Pet entered into with Ecuador, and (2) that Ecuador interfered in the Lago Agrio proceedings by announcing its support for the LAPs, by seeking to interfere with Chevron's defense, and because the Ecuadorian judiciary had conducted the case "in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights."[25] In the BIT arbitration, Chevron and Tex-Pet seek (a) a declaration that they have no liability or responsibility for environmental impacts, (b) a declaration that Ecuador has breached the BIT and its release with Tex-Pet, (c) an order requiring Ecuador to tell the Ecuadorian court that Chevron has been released from all liabilities, (d) a declaration that Ecuador and Petroecuador are exclusively liable for any judgment issued in the Lago Agrio case, (e) indemnification from Ecuador for any judgment entered against it in the Lago Agrio case, and (f) its legal fees.[26]

In December 2009, Ecuador petitioned the Southern District of New York for an order staying the arbitration. Ecuador's petition was based on its claim that Chevron's commencement of the arbitration essentially constituted a renunciation of its agreement – made as a condition of the district court's dismissal of the *Aguinda* action on forum grounds – to submit to jurisdiction in Ecuador (which Texaco had argued constituted a more appropriate forum), to accept service of process, to waive any statute of limitations defense, and to satisfy any resulting Ecuadorian judgment (the last promise being subject to an express reservation to contest the validity of the judgment on grounds permitted under New York's Recognition of Foreign Money Judgments Act).[27] More specifically, Ecuador claimed that these promises estopped Chevron from commencing the arbitration or constituted a waiver by Chevron of any right to bring the arbitration.[28]

The district court denied Ecuador's motion for a stay of the arbitration.[29] At the outset of its analysis, the Court of Appeals noted that it is an open question in the Second Circuit whether a court may stay BIT arbitrations, but noted that it did not need to resolve that question in order to rule on the appeal.[30] The Court of Appeals then considered the threshold question of whether Ecuador's waiver and estoppel claims were required to be resolved by the arbitral tribunal, or instead by the Court. Noting that BIT arbitration is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the Court first analyzed whether the parties had agreed in writing to arbitrate their claims. Finding that Ecuador's accession to the BIT "constitutes a standing offer to arbitrate disputes covered by the Treaty," the Court concluded that Chevron's written demand for arbitration "completes the 'agreement in writing'" required to enforce an arbitration agreement.[31]

Having determined that the parties had made a valid arbitration agreement, the Court of Appeals set out to determine whether the tribunal should be permitted to decide the questions of waiver and estoppel that Ecuador claimed divested the tribunal of jurisdiction. The Court of Appeals began by noting the difference between questions of arbitrability (which are to be decided by the Court, absent clear and unmistakable evidence that the parties agreed to remit such questions to the arbitrator) and "gateway matters" (*i.e.*, potentially dispositive matters that must be addressed at the outset of the arbitration, but which constitute merits questions rather than questions of arbitral jurisdiction), which are for the arbitrators to decide, finding that "waiver and estoppel generally fall into that latter group of issues presumptively for the arbitrator."[32] While Ecuador argued that its waiver and estoppel arguments "undermin[ed] the [arbitration] agreement itself," as opposed to merely preventing Chevron from taking advantage of that agreement, the Court found those arguments unavailing. Specifically, the Court found that, because Ecuador's arguments "go to Chevron's ability to initiate

arbitration," they were properly characterized as questions of arbitrability.[33] As noted above, questions of arbitrability are presumptively for the Court to decide unless there is clear and unmistakable evidence that the parties agreed to submit those questions to the arbitrator.

The Court of Appeals found that Ecuador had, in fact, agreed to submit questions of arbitrability to the arbitral tribunal. Specifically, the Court of Appeals held that, because the parties had agreed to arbitrate under the UNCITRAL Rules, which encompass the doctrine of competence-competence by authorizing the arbitration tribunal to rule on its own jurisdiction, the parties had necessarily agreed to remit questions of arbitrability to the tribunal, thus reversing the presumption in U.S. law providing that the question of arbitrability is for the court.[34] The Court of Appeals concluded its analysis by holding that "because both parties have consented to having questions of arbitrability, including Ecuador's waiver and estoppel claims, determined by the arbitral panel in the first instance, we do not reach their merits here. Nor can we stay arbitration on those grounds."[35] The Court of Appeals thus ruled that the UNCITRAL tribunal – not a U.S. court – was required to determine whether Chevron's arbitration claim was barred by estoppel or waiver.

The Court of Appeals next moved to Ecuador's claim that Chevron, by commencing the BIT arbitration, breached the promises that Texaco made to the lower court in order to secure dismissal of the *Aguinda* action (as defined) on forum non conveniens grounds. The Court rejected these claims, which sounded in equitable estoppel, judicial estoppel, and collateral estoppel. It first noted that, because Chevron's arbitration claim involved different parties and raised different claims than the Lago Agrio proceedings, there was no inherent conflict between the two proceedings.[36] The Court also found that there was no conflict between Texaco's promises and Chevron's commencement of the arbitration.[37] As noted above, Texaco's promise to pay any judgment resulting from the Lago Agrio proceeding was expressly conditioned on Texaco's right to contest that judgment on any ground available under the Article 53 of the New York Civil Practice Law and Rules, which governs enforcement of foreign money judgments. Because the arbitration claim was based on the fact that any Ecuadorian judgment would not be enforceable on a ground encompassed within Article 53 – namely that it was obtained by fraud or rendered under a system that does not provide impartial tribunals or procedures compatible with due process – the Court of Appeals found that the arbitration claim was not inconsistent with Texaco's earlier promise to the lower court. The Court thus rejected each of Ecuador's estoppel claims.

The Second Circuit's decision in *Republic of Ecuador* demonstrates the Second Circuit's robust commitment to enforcing arbitration agreements – already evident from recent decisions[38] – insofar as the Court closely scrutinized Ecuador's claims. It also demonstrates that the Court of Appeals will treat BIT arbitration – in which the agreement to arbitrate is essentially derived from a treaty – no differently than it treats more conventional bilateral arbitration agreements. Finally, the Court of Appeals' decision is noteworthy in that it established, for the first time as Circuit law, that the grant of authority in the UNCITRAL Rules permitting arbitrators to rule on their own jurisdiction was sufficient to place questions concerning arbitrability beyond judicial review. Given that New York federal courts are frequently called upon to compel UNCITRAL arbitrations and to enforce UNCITRAL awards, this ruling bolsters the concept of competence-competence in the Second Circuit, and should facilitate the prompt enforcement of UNCITRAL arbitration agreements.[39]

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1 For recent media coverage of the dispute from a non-legal perspective, *see* "Jungle Justice," *Bloomberg Businessweek*, Mar. 14-20, 2011, at 56.

2 Texaco's operations in Ecuador were undertaken by Texaco Petroleum Company ("Tex-Pet"), a fourth-tier subsidiary of Texaco, Inc. In 1965, Tex-Pet undertook its operations in Ecuador through a consortium that was owned in equal shares by Tex-Pet and GulfOil Corp. In 1974, the Ecuadorian state-owned oil company assumed GulfOil's interests in the consortium; Petroecuador and the Republic of Ecuador became the majority owner of the consortium in 1976, and Petroecuador became the sole owner of the consortium in 1992. Chevron acquired all the stock of Texaco, Inc. in 2001.

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

4 *Donziger*, 2011 WL 778052, at *6.

5 *Chevron Corp. v. Donziger*, No. 11 Civ. 0691(LAK), 2011 WL 778052 (S.D.N.Y. Mar. 7, 2011).

6 *Id., at* *36.

7 The New York Court of Appeals held similarly in *Morgenthau v. Avion Res., Ltd.*, 11 N.Y.3d 383, 869 N.Y.S.2d 886 (2008), explaining that "principles of comity do not warrant the importation of another country's service of process rules." *Id., at* 388.

8 *Chevron Id,,* at *26.

9 *Id., at* *27.

10 *Id., at* *28.

11 *Id., at* *27.

12 *Id., at* *29.

13 *Id., at* *31.

14 *Id.* The Uniform Foreign Country Money Judgments Recognition Act is codified in New York in Article 53 of the Civil Practice Law and Rules.

15 *Chevron Id., at* *32.

16 *Id.*

17 *Id., at* *33.

18 *Id., at* *34.

19 *Id.*

20 *Id., at* *40.

21 Under *China Trade*, a party seeking a foreign anti-suit injunction must demonstrate at the threshold that (1) the parties in the two proceedings are the same, and (2) resolution of the case in the enjoining court would be dispositive of the actions to be enjoined. If these two threshold criteria are met, the court must consider the following factors in determining whether to issue the injunction: (3) the foreign suit's frustration of a policy in the enjoining forum, (4) whether the foreign action is vexatious, (5) whether the foreign proceeding threatens the enjoining court's jurisdiction, (6) whether the foreign proceedings prejudice equitable considerations, and (7) whether continued parallel proceedings would result in delay, inconvenience, expense, inconsistency, or a race to the courthouse. For a full discussion of anti-suit injunctions, *see* James E. Berger & Charlene C. Sun, *International Jurisdictional Stand-offs and Foreign Anti-Suit Injunctions,* INTERNATIONAL LITIGATION QUARTERLY, Spring 2010, at 1.

22 *See Chevron, at* *41-42.

23 *Id., at* *42.

24 *Republic of Ecuador v. Chevron Corp.*, ___ F.3d ____, 2001 WL 905118 (2d Cir. Mar. 17, 2011).

[25] *Id., at* *2.

[26] *Id.*

[27] *Id., at* *3.

[28] *Id., at* *4.

[29] *Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958, 10 Civ. 316, 2010 WL 1028349, at *2 (S.D.N.Y. Mar. 16, 2010). This proceeding was not handled by Judge Kaplan. Judge Leonard Sand was the presiding judge.

[30] *Id., at* *3.

[31] *Id., at* *5.

[32] *Id., at* *6.

[33] *Id.*

[34] *Id., at* *7.

[35] *Id., at* *8.

[36] *Id., at* *9.

[37] *Id.*

[38] *See, e.g., T. Co. Metals v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010) (holding that the parties' agreement to arbitrate under the ICDR Rules, which authorize the arbitral tribunal to rule on its own jurisdiction, constituted "a clear and unmistakable expression [by the parties] of their intent to allocate to the arbitrator the task of interpreting the scope of his powers and duties under Article 30(1)."); *Contec Corp. v. Remote Solution, Ltd.*, 398 F.3d 205, 211 (2005) (finding that parties' incorporation of AAA Rules constituted evidence of clear and unmistakable intent to delegate questions of arbitrability to arbitrators).

[39] A district court in the Second Circuit had previously ruled that the grant of authority in the UNCITRAL Rules was not sufficient to foreclose judicial determinations of arbitrability. *See Telenor Mobile Commc'n AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009). By holding that the UNCITRAL Rules are sufficiently clear to provide evidence of the "clear and unmistakable" intent to submit questions of arbitrability to arbitration (and thus to foreclose judicial determinations of that issue), the Court of Appeals' ruling brings Second Circuit law into harmony with the other federal courts that have considered the issue. *See Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, 202 F.3d 280, 1999 WL 1079625, at *2 (9th Cir. Nov. 30, 1999) (holding that by incorporating the UNCITRAL rules, specifically Article 21(1), into their agreements, the parties agreed that the arbitration panel, rather than the district court, should decide the arbitrability of the dispute); *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 79 (D.D.C. 2009) ("Just as incorporation of the AAA rules provided 'clear and unmistakable evidence' that the parties intended the arbitrator, not a court, to determine arbitrability . . . incorporation of the UNCITRAL rules demonstrates that the parties intended the arbitrator to determine whether plaintiffs' RICO claims can be arbitrated.").