Making Foreign Judgment Law Great Again: The Aftermath of *Chevron v. Donziger*

"Thus, it remains for Congress to modify the statute, or RICO, like the U.S.S. Enterprise, will continue to boldly go where no man has gone before."[1]

I. INTRODUCTION

For many years after its passage, civil litigants predominantly ignored Title IX of the Organized Crime Control Act of 1970, also known as the Racketeer Influenced and Corrupt Organizations Act (RICO).[2] Originally enacted as a result of multiple investigations into the organized crime epidemic of the mid-twentieth century, RICO's original purpose was to help the government eradicate criminal enterprises from infiltrating legitimate businesses.[3] Nevertheless, in the early 1980s, litigants transformed RICO into a weapon for plaintiffs in civil suits, paving the way for future complainants to use RICO's broad language in creative ways.[4]

One particularly divisive aspect of the law is the ability of private parties to obtain equitable relief under RICO.[5] Initially brought to light in *Religious Technology Center v. Wollersheim*,[6] the issue of interpreting RICO's remedy language to encompass private parties has been the basis of a critical, yet

1. Virginia M. Morgan, *Civil RICO: The Legal Galaxy's Black Hole*, 22 AKRON L. REV. 107, 121 (1988).

2. *See* 18 U.S.C. §§ 1961-1968 (2012) (outlining definitions, prohibitions, criminal and civil penalties, and various procedural aspects); PAUL BATISTA, CIVIL RICO PRACTICE MANUAL § 1.01 (3d ed. 2016) (explaining only federal criminal prosecutors, not civil litigants, initially used RICO).

3. *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-15 (1980) (considering government investigations into organized crime catalyst for RICO's enactment); Nathan Koppel, *They Call It RICO, and It Is Sweeping*, WORLD NEWS (Jan. 20, 2011), https://article.wn.com/view/2011/01/20/They_Call_It_RICO_and_It_Is_Sweeping/ [https://perma.cc/5V97-CKZW] (providing pursuit of Mafia in United States primary purpose of RICO).

4. *See* Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991) (labeling RICO "unusually potent weapon" and "litigation equivalent of . . . thermonuclear device"); BATISTA, *supra* note 2, § 1.01 (detailing RICO's changing usage since 1970s).

5. *See* BATISTA, *supra* note 2, § 5.09 (detailing legislative history of allowing injunctive relief under RICO); JEROLD S. SOLOVY ET AL., RICO: A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURT § 72 (Kaija K. Hupila et al. eds., 2011), https://jenner.com/system/assets/assets/5510/original/Civil_20RICO_20201 1_complete.pdf?132311 [https://perma.cc/WW96-79D2] (expressing confusion created by injunctive relief remedy loophole for private RICO plaintiffs).

6. 796 F.2d 1076 (9th Cir. 1986).

widely ignored, circuit split.[7] In fact, very few courts have chosen to directly address the question of whether equitable relief is available for private plaintiffs.[8]

On August 8, 2016, in *Chevron Corp. v. Donziger*,[9] the Court of Appeals for the Second Circuit held that, under certain circumstances, private plaintiffs can obtain equitable relief using civil RICO.[10] Not only did this decision contribute to the already existent circuit split regarding equitable relief, it also afforded private, corporate plaintiffs the ability to avoid foreign verdicts.[11] Moreover, the decision offered insight into the enforcement of international law against corporations in general.[12]

This Note begins by examining RICO's legislative history and discussing RICO's purpose.[13] This discussion also addresses significant court decisions that have contributed to the circuit split on public versus private actors seeking equitable relief under RICO.[14] This Note then delves into a brief examination of Chevron's history as a corporation.[15] Next, this Note provides the litigation history of Chevron's lawsuit in the United States.[16] This discussion then turns to an examination of the most recent Second Circuit decision in *Chevron*, and how it revived and expanded the rights of private parties suing under RICO.[17]

7. *See id.* at 1083 (concluding civil RICO does not allow private parties to obtain injunctive relief). *But see* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 700 (7th Cir. 2001), *rev'd*, 537 U.S. 393 (2003) (concluding private plaintiffs may obtain injunctive relief in civil RICO suit, creating split amongst circuits). While the Supreme Court reversed the Second Circuit's decision, it did not address whether private parties are entitled to injunctive relief in civil RICO actions. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 411 (2003).

8. *See* Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting injunctive relief controversy under RICO but expressing no final opinion); *see also* Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 196-97 (3d Cir. 1990) (failing to directly address whether RICO authorizes injunctive relief).

9. 833 F.3d 74 (2d Cir. 2016).

10. *See id.* at 137 (asserting equitable relief available for private corporate plaintiffs suing under RICO).

11. *See* Kostas D. Katsiris et al., Chevron v. Donziger*: The Second Circuit Holds That RICO and New York Law Authorize Preemptive Strikes Against the Enforcement of Foreign Judgments*, VENABLE LLP (Aug. 22, 2016), https://www.venable.com/chevron-v-donziger-the-second-circuit-holds-that-rico-and-new-york-law-authorize-preemptive-strikes-against-the-enforcement-of-foreign-judgments-08-19-2016 [https://perma.cc/Q33V-JWZ7] (noting Second Circuit's first impression ruling provides plaintiffs with equitable relief under RICO).

12. *See id.* (explaining *Chevron* decision provides private actors "offensive basis for preventing enforcement of foreign judgments"); *see also* Paul Barrett, *Chevron's Pollution Victory Opens Door for Companies to Shirk Foreign Verdicts*, BLOOMBERG BUSINESSWEEK (Aug. 9, 2016), https://www.bloomberg.com/news/articles/2016-08-09/chevron-s-pollution-victory-opens-door-for-companies-to-shirk-foreign-verdicts [https://perma.cc/9Y8V-Z2MM] (suggesting Second Circuit's ruling created standard against corruption and path to liability abroad).

13. *See infra* Section II.A.1 (outlining RICO's history and original purpose).

14. *See infra* Section II.A. (identifying critical case law with respect to equitable relief under RICO).

15. *See infra* Section II.E (examining Chevron's business involvement in Ecuador prior to litigation in Ecuador).

16. *See infra* Section II.F (explaining history and outcome of Chevron's suit in New York district court).

17. *See infra* Section II.G (addressing implications of *Chevron* using equitable relief to shirk Ecuadorian judgment).

The remainder of this Note analyzes the pros and cons of the Second Circuit's decision in *Chevron*, as well as its impact on private corporate actors with respect to international lawsuits.[18] Particularly, this Note examines how the court's liberal reading of RICO may allow corporations to invalidate foreign judgments and avoid legal accountability.[19] This analysis concludes by discussing the Second Circuit's conflicting messages.[20]

II. HISTORY

A. The Racketeer Influenced and Corrupt Organizations Act

1. RICO's Background

In 1956, the Kefauver Committee, commissioned by the Senate to investigate organized crime, unveiled a long-existing problem in the United States: organized crime had infiltrated many legitimate American businesses.[21] By 1960, the Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee), had extensively documented criminal infiltration within labor unions.[22] The McClellan Committee also exposed the structure of the national association of organized crime, known as the Mafia or La Cosa Nostra.[23] Thus, by the time the President's Commission reported its findings on the mafia and other organized crime rings in 1967, it

18. *See infra* Part III (detailing impact of recent *Chevron* ruling on private plaintiffs seeking equitable relief).

19. *See infra* Sections III.B-C (assessing pros and cons of far-reaching *Chevron* effects).

20. *See infra* Section III.D (addressing safeguards preventing private actors from using equitable relief to escape liability).

21. *See* Blakey & Gettings, *supra* note 3, at 1014-15 (detailing RICO's legislative history); Andrew Glass, *Kefauver Crime Committee Launched, May 3, 1950*, POLITICO (May 2, 2016), http://www.politico.com/story/2016/05/kefauver-crime-committee-launched-may-3-1950-222700 [https://perma.cc/NJ72-SLB5] (noting Senate created five-member Kefauver Special Committee to Investigate Organized Crime in Interstate Commerce). The President's 1967 Crime Commission defined organized crime as conspiratorial behavior that, in its "organizational sophistication reached a level where division of labor included positions for an 'enforcer' of violence and a 'corrupter' of the legitimate processes of our society." Blakey & Gettings, *supra* note 3, at 1013 n.15; *see* Robert E. Wood, *Civil RICO*, 19 TEX. TECH L. REV. 463, 464 (1988) (describing RICO's background and enactment).

22. *See* Paul Jacobs, *Extracurricular Activities of the McClellan Committee*, 51 CALIF. L. REV. 296, 296 (1963) (providing background and historical context regarding McClellan Committee). The McClellan Committee investigated how criminal activities affected labor management relations in organizations throughout the United States. *Id.*; Blakey & Gettings, *supra* note 3, at 1014-15 (outlining McClellan Committee findings). The infiltration of organized crime into labor unions exemplified how criminal organizations used profits from illegal activity to buy and operate legitimate business enterprises. *See* Blakey & Gettings, *supra* note 3, at 1014-15.

23. *See* Blakey & Gettings, *supra* note 3, at 1015 (assessing various investigations into organized crime). The President's Commission on Law Enforcement and Administration of Justice (President's Commission) affirmed that the Mafia was the center of organized crime. *Id.* at 1013 n.15. Nevertheless, many other ethnic groups outside of the Mafia were involved in organized crime at the time. *Id.*

was well documented that organized crime had permeated American life.[24] The findings of these commissions spurred legislative efforts to address organized crime, eventually resulting in RICO's enactment.[25]

Although plaintiffs have continuously reinterpreted RICO's text throughout the last few decades, RICO's statutory language has remained unchanged since its enactment in 1970.[26] Throughout the last few decades, RICO has become one of the nation's most commanding and far-reaching acts.[27] Nevertheless, upon its inception RICO was primarily utilized by federal criminal prosecutors, and largely ignored by private litigants.[28] It was not until the 1980's that civil plaintiffs began to use RICO's broad language in creative ways, particularly with regards to legal remedies.[29]

24. *See id.* at 1015 (explaining President's Commission "reported . . . methods used by organized crime to acquire control of business concerns"); Morgan, *supra* note 1, at 107 (noting RICO enacted in response to increased concern about influence of organized crime). The President's Commission report highlighted the lack of prosecutorial tools to fight organized crime in the United States. *See* John L. Koenig, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 822 n.4 (1986) (addressing various reactions to RICO).

25. *See* Blakey & Gettings, *supra* note 3, at 1014-15 (citing findings of Kefauver Committee, McClellan Committee, and other RICO foundations). Additionally, public hysteria in response to the increase of organized crime motivated many of these legislative efforts. *See* Koenig, *supra* note 24, at 822 n.4. After compiling a significant amount of data on organized crime through various committees and reports, Congress realized it was critical to solidify a legal response that outlined clear repercussions for participating in organized crime. *Id.* Thus, Congress enacted RICO as a more effective law enforcement tool to combat this specific type of crime. *Id.*

26. *See* BATISTA, *supra* note 2, § 1.01 (addressing lack of change to RICO's text despite changes in perception of use); *see also* 18 U.S.C. § 1962(c) (2012) (outlining illegal conduct through enterprise involvement). At its core, RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

27. *See, e.g.*, Paul A. Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DEL. J. CORP. L. 181, 187 (1983) (analyzing RICO's far-reaching effects); Morgan, *supra* note 1, at 110 (describing specific RICO requirements); Koppel, *supra* note 3 (recognizing RICO used in litigation against influential organized crime families). Paul Batista states that "[g]iven the sweep of the statute's remedial nature, RICO's definition of racketeering activity was broadly worded and deliberately contained no reference to the term 'organized crime' or to the related concepts of crime families and criminal syndicates." Batista, *supra*, at 187. According to Representative Mario Biaggi of New York, Congress viewed RICO as providing flexibility in its application, and thus did not want to limit its application by including a restrictive definition of organized crime. *Id*.

28. *See* BATISTA, *supra* note 2, § 1.01 (explaining RICO initially ignored by civil litigants and federal courts). Even before 1982, criminal suits brought under RICO were rare, averaging only twenty per year. *See* Caroline N. Mitchell et al., *Returning Rico to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 2 (2008). In comparison, between 2001 and 2006, civil plaintiffs filed an average of 759 private civil claims under RICO each year. *Id.* at 3.

29. *See* Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991) (calling "[c]ivil RICO . . . unusually potent weapon"); BATISTA, *supra* note 2, § 1.01 (labeling RICO "weapon of choice for civil plaintiffs" given availability of treble damages). Since the 1980s, RICO has been used in "varied, creative, and—often—exotic or bizarre" contexts, including: by dance club owners to challenge denied business license applications; by a client contending her divorce lawyer defrauded her; and by West Virginia to recover campaign contributions. *See* BATISTA, *supra* note 2, § 1.01; *see also* Morgan, *supra* note 1, at 107 (citing various RICO applications).

As enacted, RICO has two distinct legal components: civil and criminal.[30] Both components have penalties and sanctions that apply to a "person" who operates or acquires an "enterprise" through a "pattern of racketeering activity."[31] Since its inception, the civil section of RICO has allowed the government to obtain equitable relief under § 1964(a).[32] This form of equitable relief, however, has not traditionally been available for private, civil litigants.[33]

In 1970, the American Bar Association and Representative William Steiger proposed adding private relief provisions to RICO.[34] Although Representative Steiger proposed including equitable relief in his modification, Congress amended the final version of RICO to include only damages for private plaintiffs.[35] Despite Congress's rejection of this initial proposal for equitable relief, subsequent court decisions have implicitly and explicitly suggested that injunctive relief is available to private plaintiffs under RICO.[36]

On its face, RICO does not bar private litigants from obtaining equitable relief, and simply states that: "(i) any plaintiff may seek equitable RICO remedies, (ii) the government has standing to seek equitable RICO remedies, and (iii) the government has standing to seek such remedies even if it cannot

Moreover, RICO has been the basis of a diverse range of civil actions, including labor disagreements, pension benefit claims, and wrongful termination actions. *See* Morgan, *supra* note 1, at 107.

30. *See* 18 U.S.C. §§ 1963-1964 (2012) (containing both criminal and civil portions used in variety of actions); Morgan, *supra* note 1, at 107 (stating private, civil component of RICO transforming into something different than intended).

31. 18 U.S.C. § 1962 (describing prohibited acts under RICO); *see* 18 U.S.C. §§ 1963-1964 (outlining criminal penalties and civil remedies). RICO's criminal penalties include imprisonment of up to twenty years—or life depending on the racketeering activity—and forfeiture of any interest acquired or maintained while violating the statute. *See* 18 U.S.C. § 1963(a). RICO's civil remedies include divestment of any interest in any enterprise, restrictions on activities or investments, dissolution or reorganization of any enterprise, and mandatory treble damages. *See* 18 U.S.C. § 1964(a); Morgan, *supra* note 1, at 107 (explaining civil RICO authority regarding damages). Civil RICO is available for use by both the government and private individuals. *See* 18 U.S.C. § 1964(b)-(c). Section 1962 expounds the prohibited activities, including the collection of unlawful debt. *See* 18 U.S.C. § 1962 (delineating outlawed racketeering activities).

32. *See* FRANK J. MARINE & PATRICE M. MULKERN, U.S. DEP'T OF JUSTICE, CIVIL RICO: 18 U.S.C. §§ 1961-1968: A MANUAL FOR FEDERAL ATTORNEYS 16-17 (2007), https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/civrico.pdf [https://perma.cc/6U2E-37BY] (addressing need for civil remedies). In order to obtain equitable relief, the government must prove by a preponderance of evidence that "a defendant committed or intended to commit a RICO violation by establishing the same elements as in a criminal RICO case, except that criminal intent is not required; and . . . there is a reasonable likelihood that the defendant will commit a violation in the future." *Id.* at 2.

33. *See* BATISTA, *supra* note 2, § 5.09 (noting original RICO language did not explicitly allow private equitable relief).

34. *See id.* (clarifying RICO initially interpreted to not allow equitable relief). RICO's initial drafts did not include any relief, much less equitable relief, for private litigants. *Id.*

35. *See id.* (detailing forms of relief available under RICO). In RICO's final adopted version, private plaintiffs may receive treble damages as a potential remedy for RICO infractions. *Id.*

36. *See id.* (discussing arguments for private availability of injunctive relief); Randy M. Mastro et al., *Private Plaintiff's Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REFORM 571, 571-72 (1991) (suggesting use of RICO by private litigants in "equitable reform of labor unions"); *infra* notes 44-46 and accompanying text (discussing cases allowing for private party equitable relief).

demonstrate injury to its 'business or property' necessary for a treble damage award."[37] Despite this seemingly nonrestrictive language, some courts have outright forbidden private plaintiffs from obtaining equitable relief.[38] For instance, in *Religious Technology Center v. Wollersheim*,[39] the Ninth Circuit indicated that because Congress did not pass earlier versions of RICO containing private equitable relief provisions, it intended to ensure that district courts could not grant injunctive relief to private plaintiffs.[40]

Similarly, in *Dan River, Inc. v. Icahn*,[41] the Fourth Circuit suggested that equitable relief is not available to private parties under RICO.[42] The *Dan River* court reasoned that because the statute is completely silent on equitable relief, it is doubtful that there is even an implied ability for private parties to obtain such a remedy.[43] Nevertheless, the Seventh Circuit in *National Organization for Women, Inc. v. Scheidler*[44] reasoned that the text of RICO does in fact authorize private plaintiffs to seek equitable relief.[45] In *Scheidler*, the court determined that the "*Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly 'permits *the government* to bring actions for equitable relief.'"[46]

Although many courts recognize the debate over whether private parties have a claim to equitable relief under RICO, they often fail to fully analyze or address the issue.[47] For example, in *Potomac Electric Power Co. v. Electric Motor & Supply, Inc.*,[48] the Fourth Circuit declined to perform an analysis on the issue of injunctive relief for private plaintiffs, and reserved it for future

37. *See* Mastro et al., s*upra* note 36, at 637-38 (labeling *Religious Technology Center v. Wollersheim* most significant authority on limiting use of equitable relief).

38. *See id.* at 572, 638 (claiming RICO drastically changed old regulatory scheme).

39. 796 F.2d 1076 (9th Cir. 1986).

40. *See id.* at 1082-84 (finding injunctive relief may not be granted to private plaintiff in civil RICO suit).

41. 701 F.2d 278 (4th Cir. 1983).

42. *See id.* at 290 (stating complaint in case only sought equitable relief under RICO).

43. *See id.* (emphasizing lack of equitable relief provision for private plaintiffs in RICO's language).

44. 267 F.3d 687 (7th Cir. 2001), *rev'd*, 537 U.S. 393 (2003).

45. *See id.* at 695 (suggesting *Wollersheim* misread RICO § 1964(a), (b)). Similarly, the court in *Chambers Development Co., Inc. v. Browning-Ferris Industries* found that RICO should be read liberally to allow injunctive relief in cases brought by private plaintiffs. 590 F. Supp. 1528, 1541 (W.D. Pa. 1984). The *Chambers* opinion provides useful arguments in favor of this proposition, including, "RICO specifically contains a statement of purpose that provides that the act should be liberally construed to effectuate its purposes." *Id.* at 1540. If a private plaintiff could not sue for equitable relief under RICO, then RICO's "purpose would be frustrated." *Id.*

46. *See Scheidler*, 267 F.3d at 696 (quoting *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1082 (9th Cir. 1986)) (explaining flaws in *Wollersheim* reasoning); *see also* BATISTA, *supra* note 2, § 6.07 n.82 (addressing uncertainty of injunctive relief availability after *Scheidler* decision).

47. *See* BATISTA, *supra* note 2, § 6.07 (describing RICO in historical context); *infra* notes 48-51 (providing examples where courts recognized, but did not decide, equitable relief issue).

48. 262 F.3d 260 (4th Cir. 2001).

cases or courts to decide.[49] Similarly, in *Northeast Women's Center, Inc. v. McMonagle*,[50] the Third Circuit suggested that the availability of equitable relief was a controversial issue, but failed to come to a conclusion on the subject.[51]

2. Extraterritoriality of RICO

Another highly debated aspect of RICO concerns its extraterritorial reach.[52] In *RJR Nabisco, Inc. v. European Community*,[53] the Supreme Court held that RICO's provisions may apply to conduct that occurs beyond U.S. borders, but only if such conduct violates an "underlying predicate statute that itself applies extraterritorially."[54] Initially, the district court found that RICO did not apply to any racketeering activity perpetrated beyond United States territory.[55] Nevertheless, the Supreme Court clarified that because many of RICO's predicate offenses—such as money laundering—innately apply to foreign conduct, RICO itself may be applied extraterritorially.[56] In *Nabisco*, the

49. *See id.* at 267 n.4 (deciding not to fully address question of relief availability in civil RICO actions). The Fourth Circuit noted that it was reserving this discussion for other courts because injunctive relief was not feasible under the circumstances, and the case did not depend on a RICO-based analysis. *Id.*

50. 868 F.2d 1342 (3d Cir. 1989).

51. *See id.* at 1355 (noting controversy about whether private plaintiffs receive equitable relief under RICO, but expressing no opinion).

52. *See* James E. Berger & Charlene C. Sun, *International Litigation Update: United States Supreme Court Limits Extraterritorial Reach of RICO Claims*, KING & SPALDING (July 1, 2016), https://s3.amazonaws.com/kslaw-staging/attachments/000/003/905/original/ca070616.pdf?1494907249 [https://perma.cc/LX4L-R67K] (claiming United States Supreme Court finally clarified RICO's extraterritorial reach). Notably, RICO's statutory language does not explicitly address extraterritoriality, even though the statute includes references to foreign activities such as commerce. *See* Julian Simcock, Note, *Recalibrating After* Kiobel*: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act ("Rico") in Litigating International Corporate Abuse*, 15 CUNY L. REV. 443, 459, 465 (2012) (contrasting extraterritorial reach of RICO with Alien Tort Statute).

53. 136 S. Ct. 2090 (2016).

54. *See id.* at 2101-02 (finding presumption against extraterritoriality rebutted); Berger & Sun, *supra* note 52 (addressing RICO's extraterritoriality). After the *Nabisco* decision, "plaintiff[s] seeking redress under RICO must demonstrate a domestic injury within the territory of the United States." Berger & Sun, *supra* note 52.

55. *See Nabisco*, 136 S. Ct. at 2099 (explaining district court's dismissal). In *Nabisco*, the Court began with the necessary presumption against extraterritoriality. *Id.* at 2100-02. Under this presumption, federal laws are construed to apply domestically, but only in the absence of clear congressional intent to the contrary. *Id.* at 2100. RICO's definition of "racketeering activity" includes multiple predicate acts that inherently apply to some international conduct. *Id.* at 2101. Examples of such predicate acts include the prohibitions against assassinating government officials and the taking of hostages. *Id.*; *see* Franklin A. Gevurtz, *Building a Wall Against Private Actions for Overseas Injuries: The Impact of* RJR Nabisco v. European Community, 23 U.C. DAVIS J. INT'L L. & POL'Y 1, 1 (2016) (suggesting *Nabisco* decision, while questionable doctrinally, makes practical policy argument).

56. *See Nabisco*, 136 S. Ct. at 2102, 2105 (noting RICO clearly "applies to foreign racketeering activity"); Thomas Burke et al., *Supreme Court Clarifies Extraterritorial Reach of RICO*, BALLARD SPARH LLP (June 21, 2016), http://www.ballardspahr.com/alertspublications/legalalerts/2016-06-21-supreme-court-clarifies-extraterritorial-reach-of-rico.aspx [https://perma.cc/M874-3HV6] (stating *Nabsico* decision settled many controversial issues regarding extraterritorial reach of RICO).

respondents argued that according to the "traditional rule," a plaintiff injured in a foreign country could bring suit in United States courts.[57] The Court, however, found that this rule provides that courts apply foreign law in determining liability for injuries suffered in a foreign country, and does not stand for the proposition that U.S. courts can recognize causes of action under U.S. law for injuries suffered abroad.[58]

While RICO applies to extraterritorial injuries, after *Nabisco*, civil RICO plaintiffs are required to allege and prove that a *domestic* injury occurred to their business or property.[59] Solely claiming a foreign injury is thus no longer sufficient.[60] Although burdensome, this requirement ensures that foreign plaintiffs seeking recovery for injuries sustained on foreign soil cannot plague U.S. courts.[61]

3. Corporate Liability Under RICO

Plaintiffs regularly bring civil RICO lawsuits against "collective entities" such as corporations.[62] Corporate RICO suits often occur through the application of vicarious liability.[63] Although RICO offers plaintiffs treble damages as a possible remedy, suing corporate entities is often the only way to make a lawsuit worthwhile for many private plaintiffs.[64] Nevertheless, moral concerns exist over whether a legitimate business should be liable for the actions of illegitimate actors.[65]

Also of concern is that the statutory language of RICO prohibits "person[s]"—not "enterprise[s]"—from engaging in criminal conduct.[66]

57. *See Nabisco*, 136 S. Ct. at 2109 (discussing respondents' reasoning for American jurisdiction).

58. *See id*. (outlining flaws in respondents' argument).

59. *See* RJR *Nabisco, Inc. v. Eurpoean Community*, 136 S. Ct. 2090, 2106 (2016) (determining "irrespective of any extraterritorial application," plaintiffs must show domestic injury); Burke et al., *supra* note 56 (detailing requirements for plaintiff's recovery).

60. Burke et al., *supra* note 56.

61. *See id*. (explaining *Nabisco* settled "controversial questions" regarding RICO's extraterritorial reach).

62. *See* MARINE & MULKERN, *supra* note 32, at 4 (addressing issue of corporate RICO suits negatively affecting shareholders and third parties); Thomas A. Della Croce & Elizabeth D. Silver, *RICO Liability for the Corporate Defendant*, METROPOLITAN CORP. COUNS. (Apr. 17, 2014), www.metrocorpcounsel.com/articles/28527/rico-liability-corporate-defendant [http://perma.cc/9BQP-RAVV] (noting Supreme Court's rule distinguishing "person" from "enterprise").

63. *See* Laura Ginger, *Using RICO to Reach into the Corporate Pocket: Vicarious Civil Liability of the Business Entity Under the Racketeer Influenced and Corrupt Organizations Act*, 93 DICK. L. REV. 465, 465 (1989) (stating corporate entity acts through agents, making "liability . . . necessarily vicarious"). Vicarious liability may exist when "an entity can 'act' only through its human agents and employees, thus its liability is necessarily vicarious, based not upon its 'own' behavior, but upon the behavior of those who act on its behalf." *Id.*

64. *See id*. (arguing corporations often only potential defendant with "deep pockets").

65. *See id*. at 470 (noting corporations intended beneficiaries of RICO, but now targets of RICO suits).

66. 18 U.S.C. § 1961(3)-(4) (2012) (providing definitions of "person" and "enterprise" under RICO); 18 U.S.C. § 1962 (2012) (outlining prohibited conduct under RICO). A "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). On the other hand, an

Notably, having an existing "enterprise" is a critical element of a RICO offense.[67] Since corporations fall under both the definition of "person" and "enterprise," a corporation can be an element of a RICO crime as well as a defendant in RICO litigation.[68]

B. Recognition of Foreign Judgments Against Corporate Entities

Prior to the Second Circuit's decision in *Chevron*, RICO was not traditionally used to invalidate foreign judgments.[69] Unlike domestic interstate judgments, foreign judgments are not subject to the Full Faith and Credit Clause of the U.S. Constitution.[70] As a result, in order for a plaintiff to successfully enforce a foreign judgment within the United States, a domestic court must first recognize the judgment.[71] Historically, United States federal common law governed foreign judgment recognition and enforcement.[72]

It was not until *Erie Railroad Co. v. Tompkins*[73] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*[74] that states began to regulate foreign judgment recognition.[75] Although there is a significant variety of state judgment-

"'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

67. *See* United States v. Turkette, 452 U.S. 576, 583 (1981) (suggesting corporations could fit under both person and enterprise definitions). The Supreme Court in *Turkette* found that the "'enterprise' is not a 'pattern of racketeering activity'" but is "an entity separate and apart from the pattern of activity in which it engages." *Id.* at 583. As such, proving the existence of an enterprise remains a separate element that the government or plaintiff must prove. *See id.*

68. *See* United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982) (determining corporation may simultaneously act like enterprise and defendant under RICO); Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179, 189 (1988) (outlining relevant distinctions between person and enterprise).

69. *See* Katsiris et al., *supra* note 11 (noting *Chevron* court construed RICO to invalidate foreign judgment in United States).

70. *See* Recent Cases, *Foreign Relations Law—Judgment Recognition—Second Circuit Upholds Equitable Relief from a Foreign Judgment Under RICO*—Chevron Corp. v. Donziger, *Nos. 14-0826(L), 14-0832(C), 2016 WL 4173988 (2d Cir. Aug. 8, 2016)*,130 HARV. L. REV. 745, 745 (2016) (examining changes in foreign judgment recognition law).

71. *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 154 (2013) (stating enforcement of foreign judgments in United States often problematic). Issues with foreign judgment enforcement in the United States arise due to a lack of uniformity between state laws. *Id.*

72. *See* Hilton v. Guyot, 159 U.S. 113, 205-06 (1895) (suggesting foreign judgments potentially impeachable for fraud when presented in U.S. courts); Zeynalova, *supra* note 71, at 155 (noting difference between foreign judgment recognition and enforcement). Recognition of a foreign judgment "is in essence to domesticate it, thus making it equal to any other judgment produced by a U.S. court." Zeynalova, *supra* note 71, at 155. Alternatively, enforcement necessitates the assistance of law enforcement and courts within the enforcing jurisdiction. *See id.*

73. 304 U.S. 64 (1938).

74. 313 U.S. 487 (1941).

75. *See* Kevin L. Cope, *Reconceptualizing Recognition Uniformity, in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, 166, 166-67 (Paul B. Stephan ed., 2014) (citing predictability main driver of federalizing foreign judgment enforcement law); Recent Cases, *supra* note 70, at 745 (stating *Erie* and *Klaxon* shifted foreign judgment regulation from federal common law to state law).

recognition law, "there is also a semblance of uniformity . . . because thirty-one states have adopted the Uniform Foreign Money-Judgments Recognition Act" (UFMJRA).[76] UFMJRA pertains to any conclusive and enforceable foreign court monetary judgment, but excludes tax judgments, fines, or other penalties.[77] UFMJRA provides a level of consistency in state courts' enforcement of foreign judgments, which many hoped would lead to the enforcement of U.S. judgments abroad.[78] On the other hand, non-UFMJRA states employ common law principles as outlined in the Restatement (Third) of Foreign Relations of the United States (Restatement).[79]

C. Texaco, Chevron, and Business in Ecuador

Texaco Petroleum's complex history with Ecuador dates back to the mid-1960s, when the company united with Ecuador's military regime to drill for oil in the country's untouched jungles along the Colombian border.[80] Eventually, in 1972, Gulf Oil and Texaco began shipping oil from the Ecuadorian Amazon region.[81] For the next two decades, Texaco and its subsidiaries oversaw oil

76. *See* Zeynalova, *supra* note 71, at 156 (detailing elements and applicability of UFMJRA). UFMJRA codified various common law principles, most notably the decision rendered in *Hilton*. *Id.* at 157. The *Hilton* Court stated that a United States court will not retry the merits of a foreign judgment if, among other elements detailed in the opinion, the foreign tribunal provided a full and fair trial with regular proceedings, and there exists no evidence of fraud. *Id.; see Hilton*, 159 U.S. at 205-06.

77. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a) (UNIF. LAW COMM'N 1962) (outlining mandatory grounds for nonrecognition of foreign judgments). These mandatory elements apply once a plaintiff shows that the foreign judgment was "final and conclusive and enforceable where rendered" and require a defendant to establish that: "the judgment was rendered under a system which does not provide impartial tribunals or procedures"; "the foreign court did not have personal jurisdiction over the defendant"; or "the foreign court did not have jurisdiction over the subject matter." *Id.*; 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, 739 (2011) (addressing mandatory and discretionary grounds for nonrecognition under UFMJRA). If one of the aforementioned circumstances existed when the foreign court rendered judgment, then it may not be recognized by the United States. *See* Weston, *supra*, at 735, 739.

78. *See* Weston, *supra* note 77, at 739 (recognizing desire to increase foreign judgement enforcement to spur similar treatment of U.S. judgments abroad).

79. *See* Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted—A Call for Revised Legislation in Florida*, 4 J. TRANSNAT'L L. & POL'Y 49, 65 (1995) (noting Restatement claims United States most receptive nation to recognizing foreign judgments); Zeynalova, *supra* note 71, at 156 (comparing recognition practices in UFMJRA states and non-UFMJRA states).

80. *See* Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE (Aug. 28, 2014), http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828 [https://perma.cc/7CK9-GVPU] (articulating timeline of Texaco's three-decade operation in Ecuador). During Texaco's thirty-year drilling operation, its oil wells produced an estimated 16 billion gallons of toxic runoff. *Id.*

81. *See* Carly Gillis, *Ecuador Vs. Chevron-Texaco: A Brief History*, COUNTER SPILL (Apr. 27, 2011), http://www.counterspill.org/article/ecuador-vs-chevron-texaco-brief-history [https://perma.cc/JU6B-FVE2] (outlining history of Texaco's involvement in Ecuador). As oil production rapidly increased in Latin America, Texaco became incredibly successful in the industry. *Id.*

extraction in Ecuador.[82] In 1992, Texaco officially left Ecuador, leaving behind an estimated 18 billion gallons of toxic waste and open oil pits filled with blackened sludge.[83] Known as "formation waters," toxic runoff from these oil wells was replete with dangerous carcinogens and metals such as arsenic, chromium, and benzene.[84] Eventually, Texaco shelled out $40 million to clean up a patch of rainforest in exchange for an agreement with the Ecuadorian government, which protected Texaco from future claims.[85]

Chevron inherited Texaco's lengthy legal battle in Ecuador when it acquired Texaco in a 2001 merger.[86] Currently, Chevron openly admits that open-air oil pits plague the Amazon; however, the corporation denies any legal obligation to clean up the mess.[87] Chevron argues that the legal obligation falls on Petroecuador, an Ecuadorian oil company that has managed oil extraction in the affected region since Texaco's departure.[88]

D. The Lawsuit Against Chevron

In 1993, a group of Ecuadorians filed a lawsuit against Texaco for the colossal environmental destruction in the Amazon region between 1964 and 1992.[89] The complaint alleged that this environmental damage led to a health

82. *See* Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe [https://perma.cc/L8C3-5XB6] (detailing historical events underlying decades-long lawsuit).

83. *See id.* (describing environmental devastation after Texaco's withdrawal from Lago Agrio region in Ecuador). Texaco caused this environmental disaster by failing to complete a standard reinjection process for oil wells to protect the habitat, and instead left the toxic liquid in large pits. *See id.* Texaco's legacy in Ecuador has been deemed a "rain-forest Chernobyl." *Id.* In response to critics, Texaco argued that because it comprised 37% of an oil company consortium in Ecuador, it was only required to clean up 37% of the environmental damage. *See id.*

84. *See* Zaitchik, *supra* note 80 (suggesting Texaco dumped excess waste into jungle habitat).

85. *See id.* (detailing remediation contract between Texaco and Ecuador). *See generally* CONTRACT FOR IMPLEMENTING OF ENVIRONMENTAL REMEDIAL WORK AND RELEASE FROM OBLIGATIONS, LIABILITY AND CLAIMS (1995) (outlining Texaco's responsibilities and protections).

86. *See* Ronald D. White, *Chevron Is Still Going Strong After 135 Years*, L.A. TIMES (Oct. 12, 2014), http://www.latimes.com/business/la-fi-stock-spotlight-chevron-20141013-story.html [https://perma.cc/K7ZX-3CP5] (presenting Chevron's lengthy history including current financial and legal standing).

87. *See* Keefe, *supra* note 82 (noting Chevron claims no adverse health effects resulted from oil extraction in Ecuador). The contaminated land in the Amazon rainforest, including the oil pits, was roughly the size of Rhode Island. *See* Zaitchik, *supra* note 80 (citing Chevron judgment most scrutinized in annals of class action law).

88. *See* Keefe, *supra* note 82 (outlining chain of ownership amongst oil companies in Ecuador).

89. *See Texaco/Chevron Lawsuits (re Ecuador*), BUS. & HUM. RTS. RESOURCE CTR., https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador [https://perma.cc/84SQ-QYS3] [hereinafter Texaco/Chevron Lawsuits] (detailing various class action lawsuits against Chevron and Texaco for polluting Ecuadorian rainforests and rivers). The plaintiffs filed the initial lawsuit in U.S. federal court. *Id.* A year after the Ecuadorian group filed the complaint in *Aguinda v. Texaco*, Peruvian citizens also affected by Texaco's operations filed a class action lawsuit in U.S. federal court. *See id.* In 2002, both lawsuits were dismissed for forum non conveniens. *Id.* Interestingly, Chevron countersued in the very same court more than a decade later. *See* Zaitchik, *supra* note 80 (characterizing "seesaw between sovereign legal systems" unprecedented). *See id.*

crisis in the region, resulting in birth defects, miscarriages, and cancer.[90] The plaintiffs, widely known as the "afectados" or affected ones, consisted of both indigenous Ecuadorians and uneducated settlers.[91]

Although the U.S. court dismissed the initial 1993 lawsuit, in 2003 Ecuadorians brought a similar class action lawsuit against Chevron in their home country.[92] In 2008, after judicial inspections of the contaminated locations began, an independent expert recommended that Chevron pay $27 billion for the damage Texaco caused to the environment and civilians of Lago Agrio.[93] After years of disputes, on February 14, 2011, Judge Zambrano ruled that Chevron, having acquired Texaco, was responsible for the severe environmental contamination.[94] The Ecuadorian court ordered Chevron to pay over $18 billion in damages.[95] In response to the shocking victory, Steven Donziger, the plaintiffs' lead attorney, stated that this decision was "the first time that a small developing country . . . had power over a multinational American company."[96]

E. Chevron's Countersuit Against Plaintiffs' Lawyers in the United States

On February 1, 2011, Chevron filed a RICO suit against the plaintiffs' lawyers and representatives, including Steven Donziger, in New York federal

90. *See* Gillis, *supra* note 81 (outlining history of Chevron and Texaco's involvement in Ecuador); Keefe, *supra* note 82 (detailing health issues caused by environmental hazards). A 1994 study facilitated by the Centre for Economic and Social Rights confirmed that health issues were increasing in the Lago Agrio region of Ecuador. Gillis, *supra* note 81; Keefe, *supra* note 82 (detailing historical events underlying decades-long lawsuit). The plaintiffs also claimed that Texaco's actions caused "dead livestock, sick fish, and the near-extinction of several tribes." Keefe, *supra* note 82.

91. *See* Keefe, *supra* note 82 (stating plaintiffs represented by Ecuadorian and American lawyers working for contingency fees).

92. *See Texaco/Chevron Lawsuits*, *supra* note 89 (describing legal proceedings in Ecuador throughout second lawsuit). The 2003 lawsuit against Chevron alleged extreme environmental damage, increased cancer rates, and other serious health issues as a result of Chevron's operations in the region. *See id.*

93. *See id*. (describing independent expert's initial damage estimate of $7-16 billion and later estimation of $27 billion). In September 2010, the plaintiffs provided an additional damages assessment that increased projected costs to over $100 billion. *See id*.; *see also* Alonso Soto, *Expert Asks Ecuador Court to Fine Chevron $27 Billion*, REUTERS (Nov. 27, 2008), https://www.reuters.com/article/us-ecuador-chevron-suit/expert-asks-ecuador-court-to-fine-chevron-27-billion-idUSTRE4AP97H20081127 [https://perma.cc/9WMX-TL9K] (citing Chevron's rejection of environmental expert's $27 billion damages estimate).

94. *See* Keefe, *supra* note 82 (suggesting plaintiffs' struggle resulted from Chevron's drawn out litigation). Chevron appealed the decision, and on January 3, 2012, the Provincial Court of Justice of Sucumbios upheld the lower court's decision against Chevron. *See Texaco/Chevron Lawsuits*, *supra* note 89. Chevron then appealed the decision to Ecuador's National Court of Justice, and again went to the Provincial Court to try and block the Ecuadorian Government from enforcing the judgment. *See id.* Eventually, on November 12, 2013, the Supreme Court of Ecuador upheld the judgement, but decreased the damages to $9.51 billion. *Id.*

95. *See Texaco/Chevron Lawsuits*, *supra* note 89 (noting "Chevron reportedly lobbied the [U.S.] Government to end trade preferences with Ecuador over . . . lawsuit"). Chevron was required to pay $8.6 billion in clean-up and damages costs, "with the damages increasing to $18 billion if Chevron [did] not issue a public apology." *Id.*

96. *See* Keefe, *supra* note 82 (calling Donziger key figure in Chevron lawsuit).

court.[97] In his lengthy decision, U.S. District Judge Lewin Kaplan found clear and convincing evidence that Steven Donziger and his legal team used bribery, extortion, and fraud to obtain the $18 billion judgment against Chevron in 2011.[98] Additionally, Judge Kaplan found sufficient evidence that Donziger inflated the monetary damages figure, provided falsified expert reports, and paid Judge Zambrano $500,000 so that Donzinger's trial team could draft the final decision themselves.[99] After reviewing the evidence, Judge Kaplan issued an injunction barring the Ecuadorian plaintiffs from enforcing the $18 billion Ecuadorian ruling against Chevron.[100]

After Judge Kaplan's unfavorable ruling, Donziger appealed the contested case to the U.S. Court of Appeals for the Second Circuit.[101] In his argument, Donziger focused on four main legal issues including: the availability of equitable relief through RICO; equitable relief through New York common law; principles of international comity barring relief; and holding clients

97. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 383, 644 (S.D.N.Y. 2014) (finding Donziger used corrupt means to obtain judgment against Chevron in Ecuador); Paul Barrett, *The Case That Could Redefine Mass Litigation Over Oil Spills, Work Hazards*, BLOOMBERG (Apr. 20, 2015), http://www.bloomberg.com/news/articles/2015-04-20/can-corporations-use-rico-law-to-combat-plaintiffs-lawyers- [https://perma.cc/CK2H-RNZB] (detailing Chevron's countersuit against Donziger and clients in federal court). Notably, Chevron's "sole witness to its central charge of bribery was a corrupt Ecuadorean ex-judge named Alberto Guerra, whose entire family ha[d] been naturalized and relocated on Chevron's dime." Zaitchik, *supra* note 80 (claiming Chevron's case rested on witness "living under . . . corporate protection plan").

98. *See Chevron Corp.*, 974 F. Supp. 2d at 599-600; *see also* Joseph Ax, *Ecuador $9.5 Billion Ruling Against Chevron Was Corrupt: U.S. Judge*, REUTERS (Mar. 19, 2014), https://www.reuters.com/article/us-chevron-ecuador/ecuador-9-5-billion-ruling-against-chevron-was-corrupt-u-s-judge-idUSBREA231CZ20140304 [https://perma.cc/PF79-HZHF] (discussing Judge Kaplan's finding Donziger could not use "Robin Hood" defense to justify violations). Judge Kaplan analyzed evidence such as coded emails, secret payments, and backdoor meetings with Ecuadorian judges. *See id.* Nevertheless, the judge stated that while Chevron may have legal responsibility for the environmental damage, this responsibility was irrelevant to whether fraud occurred in obtaining the judgment. *Id.*

99. *See Chevron Corp.*, 974 F. Supp. 2d at 576-77, 583-86; *see also* Recent Cases, *supra* note 70, at 746 (claiming Ecuadorian litigation extremely scandalous).

100. *Chevron Corp.*, 974 F. Supp. 2d at 641-42; *see* Recent Cases, *supra* note 70, at 746-47; *see also* Weston, *supra* note 77, at 736 (addressing enforcement loophole allows corporate defendant to circumvent accountability abroad). In using the enforcement loophole, corporations attempt to delegitimize foreign country judgments to halt their enforcement in the United States. Weston, *supra* note 77, at 736. Chevron used this loophole by attempting to prove the corrupt nature of the Ecuadorian judiciary. *See id.* By showing that the Ecuadorian court system could not impartially administer justice, Chevron effectively satisfied one of the exceptions to foreign judgment enforcement in the United States. *Id.*; *see* Hilton v. Guyot, 159 U.S. 113, 202 (1895) (articulating circumstances under which foreign judgment becomes unenforceable in United States).

101. Chevron Corp. v. Donziger, 833 F.3d 74, 82 (2d Cir. 2016); Barrett, *supra* note 97 (noting importance of *Chevron* case in Second Circuit); Michael I. Krauss, Chevron v. Donziger*: The Epic Battle for the Rule of Law Hits the Second Circuit*, FORBES (Apr. 21, 2015), http://www.forbes.com/sites/michaelkrauss/2015/04/21/chevron-v-donziger-the-epic-battle-for-the-rule-of-law-hits-the-second-circuit/&refURL=&referrer= [https://perma.cc/NWH4-UXFF] (calling question before court whether private party can use RICO to avoid foreign judgment); William E. Thomson et al., *Rule of Law Trumps Rhetoric in Chevron's 2nd Circ. Win*, LAW 360 (Aug. 19, 2016), https://www.law360.com/articles/830169/rule-of-law-trumps-rhetoric-in-chevron-s-2nd-circ-win [https://perma.cc/JC7E-N7XR] (pointing to Donziger's failure to challenge evidence again on appeal).

accountable for their attorney's misconduct.[102] Additionally, over a dozen human rights groups contributed to an amicus brief in an attempt to persuade the Second Circuit to overturn Judge Kaplan's ruling.[103] This extensive brief suggested that democracy itself was at stake.[104] In particular, the human rights organizations argued that the rights to free expression, access to courts, and political participation would be severely threatened if private parties use RICO "against public interest groups and activists who engage in First Amendment-protected activities to seek to hold those private parties accountable."[105]

Nonetheless, in an extensive 127-page opinion, the Second Circuit upheld the lower court's ruling, holding that a private plaintiff, such as a corporation, may use RICO to obtain an injunction against an overseas judgment.[106] In coming to this landmark decision, U.S. Circuit Judge Amalya Kearse reasoned that the purpose of civil RICO is not only "to compensate victims but to turn them into prosecutors" or "private attorneys general."[107] Specifically, the court concluded that:

> § 1964, subsection (a) gives the federal courts jurisdiction to hear RICO claims and sets out general remedies, including injunctive relief; subsection (b) makes it clear that the court, on the application of the Attorney General, has authority to grant temporary injunctive relief even before there is a final adjudication;

102. *See* Thomson et al., *supra* note 101. The first question the Second Circuit had to address on appeal was whether RICO allowed private plaintiffs to obtain equitable relief. *Id.* The court also had to address whether New York common law gave victims of fraudulent foreign judgments equitable relief. *Id.* The third legal question was whether international comity and related principles "bar relief where U.S. courts have personal jurisdiction over the perpetrators, and the relief is domestic in nature." *Id.* The final issue required the Second Circuit to determine whether clients are liable for their attorney's misconduct abroad. *See id.*

103. *See* Paul Paz y Miño, *Human Rights Organizations File Amicus Brief Opposing* Chevron *RICO Decision*, AMAZON WATCH (July 15, 2014), http://amazonwatch.org/news/2014/0715-human-rights-organizations-file-amicus-brief [https://perma.cc/495T-PHY4] (citing seventeen civil society groups compiled briefs and forty-three groups signed open letter).

104. *See id.* (suggesting outcome of *Chevron* case affects future of access to First Amendment rights).

105. *See id.* (defining pressing need for reversal of Judge Kaplan's lower court decision). The brief also focused on the increasing power of corporations to silence groups such as those signing on to the brief. *See id.*

106. *See Chevron Corp.*, 833 F.3d at 137; Katsiris et al., *supra* note 11 (stating Donziger argued New York District Court could not enjoin enforcement of judgment); David J. Stander, Donziger *Ruling – Circuit Split as Second Circuit Holds Equitable Relief Is Available to a Private Plaintiff Under Civil RICO*, STANDER L. RICO REP. (Aug. 15, 2016), https://ricoconsultingattorney.wordpress.com/2016/08/15/donziger-ruling-circuit-split-as-second-circuit-holds-equitable-relief-is-available-to-a-private-plaintiff-under-civil-rico/ [https://perma.cc/64 4U-ZUPJ] (labeling court decision unambiguous statement allotting federal courts power to grant injunctive RICO relief).

107. *See* Chevron Corp. v. Donzinger, 833 F.3d 74, 85 (2d Cir. 2016); Barrett, *supra* note 12 (suggesting Second Circuit decision affects corporations hoping to avoid foreign judgments under RICO). Notably, Chevron did not seek monetary damages from Attorney Donziger and his Ecuadorian clients. Barrett, *supra* note 12. This was partly because suing for monetary damages would have required a jury trial, and Chevron may have been concerned that a jury would be sympathetic to a single lawyer facing a powerful corporate entity on behalf of disadvantaged clients. *Id.*

> and subsection (c) provides a private right of action for any person injured in his business or property by reason of a violation of § 1962.[108]

In addressing the remaining legal questions raised on appeal, the Second Circuit established that New York common law allows for equitable relief from foreign verdicts achieved through fraudulent means.[109] Additionally, the court further clarified that Chevron did not have a viable remedy at law, and thus could seek equitable relief in the form of an injunction.[110] The court also held that "international comity" does not specifically bar equitable relief from an invalid foreign judgment.[111]

III. ANALYSIS

The *Chevron* decision is significant not only for its nontraditional interpretation of RICO, but also for the legal and moral implications of its reasoning.[112] In *Chevron*, the Second Circuit unequivocally affirmed "that a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of § 1962."[113] Under this reasoning, the Second Circuit views RICO as an expansive tool that may be used in conjunction with the UFMJRA to prevent the enforcement of fraudulent foreign judgments.[114]

108. *Chevron Corp.*, 833 F.3d at 138.

109. *See id.* at 140 (holding court may grant equitable relief despite judgment entered in different jurisdiction). The Second Circuit clarified that where a court has jurisdiction over the parties to the lawsuit, the court may grant equitable in personam relief even if a foreign court rendered the fraudulent judgment. *Id.* at 141.

110. *See id.* at 140-42 (concluding New York UFMJRA allows district court to grant equitable relief against fraudulent judgment enforcement).

111. *See id.* at 145 (describing Second Circuit's declination to morally enforce judgment against Chevron); Thomson et al., *supra* note 101 (noting Second Circuit rejected idea international comity barred equitable remedies). Although the principle of international comity is nonbinding, it embodies the general desire to maintain solid relations with other nations by respecting their judicial decisions. Weston, *supra* note 77, at 737-38 (recognizing historical tendency in United States to assume relative conclusiveness of foreign judgments). Courts often utilize the concept of comity in determining whether a judgment should be enforced. *Id.* at 738.

112. *See* Barrett, *supra* note 12 (noting likelihood of other corporations mimicking Chevron's strategy to avoid accountability abroad). One such implication of the *Chevron* decision is the possibility of corporations using RICO to avoid liability for legal wrongs committed outside of the United States. *See* Weston, *supra* note 77, at 750 (detailing effects of judgment enforcement regulation on corporate accountability and litigation tactics). "Corporate accountability entails holding corporations liable for the social implications of their business practices," which is particularly important when corporate entities conduct business in other countries. *Id.*

113. *See* Stander, *supra* note 106 (addressing circuit split regarding equitable relief after *Chevron* decision).

114. *See* Recent Cases, *supra* note 70, at 752 (examining impact of Second Circuit decision on federal statutory law regarding foreign judgment recognition); Katsiris et al., *supra* note 11 (suggesting Second Circuit decision will "encourage preemptive strikes against foreign judgments").

The Second Circuit's decision in *Chevron* caught the attention of corporations, activists, courts, and scholars due to the influence the decision could have on future lawsuits.[115] More specifically, the decision vastly expanded the application of RICO, and called into question the availability of equitable relief for private actors.[116] In effect, the Second Circuit interpreted the RICO statute—originally created to deter organized crime—as a weapon to dispute foreign verdicts in federal courts.[117] *Chevron* affected multiple legal realms, but most importantly it impacted foreign judgment recognition law, standards against foreign-based corruption perpetrated by American lawyers, and corporate accountability beyond U.S. borders.[118] Notably, the decision has far-reaching and potentially negative effects on oil spill and work hazard litigations.[119]

A. Judgment Recognition

In *Chevron*, the court applied RICO in a way that federalizes foreign judgment recognition.[120] The court did so by reevaluating RICO, which was originally unrelated to judgment recognition.[121] One positive aspect of federalizing judgment recognition law is increased uniformity, allowing the United States to "speak[] with one voice in foreign affairs."[122] The Second

115. *See* Barrett, *supra* note 12 (postulating *Chevron* precedent may lead to far-reaching effects on future litigation).

116. *See supra* note 106 and accompanying text (outlining effect of *Chevron* decision on availability of equitable relief under RICO).

117. *See* Recent Cases, *supra* note 70, at 745-46 (stating Second Circuit decision gave Chevron ability to sue "foreign-judgment creditors' attorney" under RICO). Chevron successfully sued for "preemptive equitable relief," which resulted in a nationwide injunction against any attempt to enforce the initial Ecuadorian judgment. Chevron Corp. v. Donziger, 833 F.3d 74, 151 (2d Cir. 2016) (furthering controversial and uncertain nature of RICO's applicability to private pleas of injunctive relief); Recent Cases, *supra* note 70, at 746.

118. *See* Thompson, *supra* note 101 (expressing immense impact of *Chevron* decision on "civil RICO actions, transnational litigation and attorney ethics").

119. *See* Barrett, *supra* note 97 (suggesting court's use of RICO deters future corrupt attorneys from seeking foreign verdicts against corporations).

120. *See Chevron Corp.*, 833 F.3d at 137 (claiming RICO authorizes federal courts to use "equity powers"); Zeynalova, *supra* note 71, at 153-54 (outlining challenges associated with state-made judgment recognition law). The most common challenge with state-based foreign judgment recognition system is the lack of uniformity among states, which prohibits the United States from communicating with a unified voice in judgment-based international negotiations. *See* Zeynalova, *supra* note 71, at 154. With respect to international judgment-enforcement agreements, the United States "still hesitates to surrender its ability to act unilaterally by refusing to make important concessions that could require real changes to domestic legislation." *Id.* at 187 (noting United States keener on arbitration agreements without binding effect).

121. *See* Recent Cases, *supra* note 70, at 750 (suggesting Second Circuit relied on recognizing "federal interest[s] in foreign affairs"). *Chevron* "represents an alternative approach to federalization that does not depend on new legislation or an expansion of freestanding federal common law, but on extant statutes." *Id.* at 750.

122. *See id.* at 749 (observing lack of uniformity in judgment recognition regulation could affect enforcement of U.S. judgments abroad). Enhancing the uniformity of foreign judgments in the United States may increase the chances that U.S. court judgments are enforced abroad. *Id.* This is critical because such uniformity has "the potential to bring about a reciprocal increase of foreign enforcement of U.S. court

Circuit effectively suggested a new approach to judgment recognition: using a federal statute to address questions of foreign judgment validity.[123] In the lengthy opinion, the *Chevron* court revitalized foreign judgment regulation by unearthing RICO as an unlikely, yet powerful, source for federalization.[124] This shift is particularly important because it may increase uniformity in judgment enforcement and thus improve U.S. relationships abroad.[125] Furthermore, RICO's predicate statutes and fraud provisions make it "an ideal instrument for victims of corrupt foreign proceedings," and therefore, quite useful in assessing the validity of a foreign judgment.[126] On the other hand, in order to use RICO in favor of judgment nonrecognition, judgment debtors, like corporations, must show that they have experienced a domestic injury and that the judgment creditors committed a predicate violation.[127] To avoid confusion regarding the source of foreign judgment regulation, it is critical for the legislative branch to formulate comprehensive and clear laws.[128]

B. Avoiding Liability Abroad

After *Chevron*, the critical question is whether the "court's application of RICO may prove narrow in practice," or whether it will allow other private actors to expand upon the court's decision to shirk foreign liability abroad.[129] Regardless of the decision's impact on future legal practice, its influence can be

judgments by assuring other countries' courts of the reliability of America's foreign judgment law." *See* Zeynalova, *supra* note 71, at 205 (explaining current U.S. judgment recognition law leads to widespread international confusion).

123. *See* Recent Cases, *supra* note 70, at 746 (outlining Second Circuit's new approach to foreign judgment applicability).

124. *See id.* (claiming Second Circuit refurbished RICO in *Chevron*); Weston, *supra* note 77, at 750-51 (stating Second Circuit's use of RICO difficult to replicate in future court proceedings).

125. *See* Weston, *supra* note 77, at 769 (admitting in practice UFMJRA not consistent given mandatory and discretionary defenses to enforcement). One positive aspect of federalizing foreign judgment law in the United States is that it would discourage state forum shopping. *See* Cope, *supra* note 75, at 174 (debating functionality of state-based judgment recognition law). Opponents of foreign judgment federalization claim that "displacement of the current state law regime would undermine federalist interests or reduce the states' authority over their laws." *See* Zeynalova, *supra* note 71, at 195 (explaining opponents' arguments actually illuminate complications associated with state-based foreign judgment enforcement law).

126. *See* Recent Cases, *supra* note 70, at 752 (addressing challenges associated with using RICO to assess foreign judgment validity).

127. *See supra* note 32 (explaining requirements for successful RICO claim).

128. *See* Zeynalova, *supra* note 71, at 205 (stating legislative branch failed to create useful foreign judgment recognition legislation). The fact that the United States is not a party to any bilateral or multilateral judgment enforcement treaty exacerbates the need for congressional action in this field. *See id.* at 155 n.27 (expressing state law governs due to lack of treaty participation and continued congressional inaction); *see also* Martinez, *supra* note 79, at 53 (suggesting Congress possesses constitutional power to enact foreign judgment enforcement legislation).

129. *Compare* Recent Cases, *supra* note 70, at 746 (exploring narrowness of court's application of RICO), *with* Barrett, *supra* note 97 (stating corporate entities may benefit from recent *Chevron* decision).

viewed in diametrically opposed ways.[130] The Second Circuit either set a harsh but helpful standard against corruption in legal proceedings, or created an open door for private international actors to effectively avoid accountability for foreign wrongdoings.[131] Under the latter line of reasoning, this decision could give rise to devastating consequences, particularly on impoverished communities across the globe that do not have access to legal resources.[132] Specifically, the *Chevron* decision could discourage affected groups and advocates from even attempting to hold corporations accountable for foreign wrongdoings.[133]

C. Standard Against Corruption

Although the *Chevron* decision may provide another avenue for corporations to avoid liability abroad, it also has the positive effect of sending a strong message to American lawyers practicing overseas that fraud committed on foreign soil will not yield legal benefits in the United States.[134] The Second Circuit's adoption of a tough standard against corruption sent a clear and assertive message: Dishonoring U.S. law in foreign legal proceedings will not be tolerated.[135] In doing so, the Second Circuit specifically allowed Chevron to

130. *See* Barrett, *supra* note 97 (predicting Second Circuit decision will include dual message regarding corruption and RICO).

131. *See id.* (pointing out dichotomy in opinions regarding *Chevron* case); Barrett, *supra* note 12 (discussing multiple ways one can read *Chevron* opinion).

132. *See* Weston, *supra* note 77, at 750 (arguing corporate activities can have disastrous impact on foreign communities). For underprivileged communities affected by inhumane or illegal business practices, adjudication and corporate liability are the only avenues for protection. *Id.* This is particularly important because corporations send operations abroad to avoid regulations. *Id.* Unfortunately, "[w]hile the layers of legal argument pile up, the scientific and ethical issues get drowned out, as do the voices of the indigenous communities living in toxic zones." *See* Zaitchik, *supra* note 80 (recognizing most critical and moral issues get lost in complexities of lengthy litigation).

133. *See* Zaitchik, *supra* note 80 (noting "Corporate America" will benefit from Ecuadorian villagers' losses). Donziger stated that he "provided a path to success for communities around the globe who have billions in legal claims, but no resources." *Id.* Nevertheless, Donziger believes United States corporations are hoping that Chevron's Second Circuit victory will quiet these global communities, thus allowing companies to act without regard to legal ramifications. *See id.* Corporations like Chevron will strategically "purchase impunity" through lengthy RICO-based litigation until the original victims or plaintiffs are dead. *Id.*

134. *See* Chevron v. Donziger, 974 F. Supp. 2d 362, 406-07 (S.D.N.Y. 2014) (commenting on Donziger's use of "scientific wild ass guesses"). The Second Circuit repeatedly noted additional instances in which Donziger failed to challenge accusations of fraud. Chevron Corp. v. Donziger, 833 F.3d 74, 149 (2d Cir. 2016); Thomson et al., *supra* note 101 (claiming Second Circuit repeatedly noted Donziger's failure to challenge evidence of fraud).

135. *See* Weston, *supra* note 77, at 735 (discussing Chevron's strategy of fighting judgment with corruption argument and enforcement loopholes); Zeynalova, *supra* note 71, at 195-96 (explaining courts' use of UFMJRA to reject foreign judgments from countries where fair justice unavailable). By allowing Chevron to use their RICO argument, the district court suggested that the UFMJRA provisions, specifically those that prohibit judgments obtained by fraud, were not enough to combat the fraudulent Ecuadorian judgment. *See Chevron*, 974 F. Supp. 2d at 603-04.

go beyond the fraud provisions of the UMFRJA and use RICO as a shield against the Ecuadorian judgment.[136]

D. Moving Forward

The *Chevron* decision comes after decades of legal battles between the affected Ecuadorians and the Chevron and Texaco companies.[137] Although this ruling was an intense disappointment to the citizens of Lago Agrio, Attorney Donziger, and numerous human rights and environmental organizations, it is possible that the future holds even more legal confrontations.[138] Donziger appealed to the Supreme Court of the United States in an attempt to reverse the Second Circuit's decision, but the Court refused to hear his appeal.[139] Although Attorney Donziger can attempt to enforce the Ecuadorian judgment in countries other than the United States, the *Chevron* decision effectively prevents him from instigating any enforcement actions within the United States.[140] Consequently, after decades of fighting for justice, the court system has proved to be a fruitless avenue for the Lago Agrio plaintiffs.[141] Not only are the aggrieved Ecuadorian citizens unable to collect compensation for the harms they suffered, the Second Circuit decision now opens the door for companies like Chevron to avoid accountability for future violations of international, environmental, and human rights norms.[142]

As the rift between courts on the issue continues to expand, the Supreme Court will likely examine the controversial question of RICO's remedies as applied to private parties in the near future.[143] Furthermore, the potentially

136. *See Chevron Corp.*, 833 F.3d at 137 (discussing court's use of RICO); Zeynalova, *supra* note 71, at 195-96 (noting where corruption or bribery prevalent, courts may invalidate judgment under UFMJRA).

137. *See* Keefe, *supra* note 82 (detailing lengthy *Chevron* legal battle in various countries and courts).

138. *See* Weston, *supra* note 77, at 735 (pointing to Chevron's desire to fight judgment for "decades into . . . future"); Barrett, *supra* note 12 (addressing caveats for Donziger after unfavorable Second Circuit decision).

139. Donziger v. Chevron Corp., 137 S. Ct. 2268 (2017) (mem.) (denying petition for writ of certiorari); *see* Barrett, *supra* note 12. Many considered it unlikely that the Supreme Court would take the case given the lengthy and detailed twenty-three-year record. Barrett, *supra* note 12. Although the *Chevron* case furthered an already existent circuit split, the Supreme Court may choose a less peculiar and prolonged case to clarify the applicability of RICO. *See id.*

140. *See* Chevron Corp. v. Donziger, 833 F.3d 74, 143-44 (2d Cir. 2016) (failing to directly address validity of Lago Agrio judgment); *see also* Recent Cases, *supra* note 70, at 750 (clarifying *Chevron* decision prevents Donziger from bringing enforcement proceedings in United States territory).

141. *See* Barrett, *supra* note 97 (explaining Chevron has no assets in Ecuador for Lago Agrio plaintiffs to seize).

142. *See* Weston, *supra* note 77, at 735-36 (suggesting enforcement loophole will inhibit enforcement of Ecuador judgment for decades). Through the Second Circuit's decision, Chevron has effectively used the corporate enforcement loophole as it "satisfie[d] one of the exceptions to recognition in the United States"—RICO's established fraud provision. *Id.*

143. *See id.* at 747 (outlining takeaways from *Chevron* case for private plaintiffs suing under civil RICO). The Seventh Circuit has found that equitable relief applies to private plaintiffs suing under RICO's civil provisions, while the Ninth Circuit has held that equitable relief is not available under those circumstances. *See*

destructive implication of this decision—the ability of powerful private entities to use RICO as a way to avoid judgments abroad—will be put to the test under this newly minted interpretation of the statute.[144]

E. Checks Still in Place Despite Second Circuit's Liberal Reading of RICO

Despite the potential negative implications of the Second Circuit's ruling, RICO's language enumerates critical safeguards in the face of diminished corporate international liability.[145] As previously mentioned, RICO claimants must prove domestic injury and a predicate act.[146] Additionally, "preemptive suits brought under RICO will require a showing of personal jurisdiction," which may not be as straightforward as it was in *Chevron*.[147] Although the Second Circuit refashioned RICO into a more liberal statute than Congress intended it to be, future corporate defendants will have to make a strong case to prove that foreign judgments against them were obtained fraudulently.[148]

IV. CONCLUSION

In *Chevron v. Donziger*, the Second Circuit crafted a complex and potentially conflicting dual message. On one hand, the court set a powerful standard against corruption, showing that fraudulent judgments obtained abroad will not be enforced within the United States. Yet, on the other hand, the court transformed RICO, a federal statute once meant to combat widespread crime *within* the United States, into a corporate tool to combat unfavorable judgments abroad.

In the interest of legal fairness, the *Chevron* decision appears to create a just standard: when plaintiffs obtain a foreign judgment through fraud, corporations should be able to combat the judgment using a federal statute in its home country. As such, Chevron was not required to pay the Ecuadorian court's $9 billion judgement, given that the corporation did not have access to a fair legal proceeding. Nevertheless, in the interest of justice and morality, this decision yet again deprives the Lago Agrio plaintiffs of the possibility to regain what was once theirs. Two decades later, the Ecuadorian jungle remains laden with contamination, and the original victims, the indigenous people of Lago

supra notes 39-46 and accompanying text (summarizing basis of circuit split including differing court opinions).

144. *See* Katsiris et al., *supra* note 11 (outlining critical international implications of Second Circuit decision).

145. *See* Zeynalova, *supra* note 71, at 154-57 (addressing necessary elements to foreign judgment recognition).

146. *See supra* notes 54-55 and accompanying text (explaining domestic injury and predicate acts elements).

147. *See* Recent Cases, *supra* note 70, at 752 (suggesting *Chevron* RICO suit more straightforward given fraudulent activity took place in New York).

148. *See id.* (noting judgment debtors using RICO must jump through hurdle of extraterritoriality).

Agrio, continue to suffer. Given the highly polarized interests at stake—those of a global corporate giant and those of the Ecuadorian villagers fighting for their livelihoods—this decision is particularly difficult to reconcile.

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