14-826(L)

14-832(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

—against—

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC,

Defendants-Appellants,

(*Complete caption and list of amici inside*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(THE HONORABLE LEWIS A. KAPLAN)

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST[1]

Amici curiae have the consent of all the parties to this appeal to file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

Amici curiae are law professors who practice, teach, and write about all aspects of public international law, including international environmental law, at law schools, colleges, and universities throughout the world. We have no personal stake in the outcome of this case. Our interest is in seeing the international rule of law upheld and applicable international law applied in a manner consistent with Article VI, cl. 2 of the Constitution of the United States and principles enunciated in *The Paquete Habana*, 175 U.S. 677 (1900), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

We seek to call to the attention of the Court of Appeals aspects of public international law that the District Court failed to consider and principles of international comity that the District Court applied incorrectly. We are concerned that the misapplication of principles of international law and comity in this case can have far-reaching and unanticipated effects. These

[1] Pursuant to Fed. R. App. P. 29(c)(5) *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no persons other than *amici* contributed money intended to fund the preparation or submission of the brief.

errors warrant reversal of the District Court's imposition of a perpetual constructive trust purporting to govern the ultimate effect and disposition of litigation for recognition and enforcement of the Ecuadorian judgment in the *Lago Agrio* case by any other court anywhere in the world.

We express no opinion on the underlying statutory and common law claims in this case. We also want to make clear that we are not part of what the District Court ambiguously labels as Donziger's "campaign" or personal "backers." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 385-386 (S.D.N.Y. 2014).

SUMMARY OF ARGUMENT

This case involves important international legal issues associated with the imposition of a worldwide constructive trust by the District Court in this case. In imposing this radical trust for which there is no precedent, the District Court failed to correctly apply principles of international comity and to consider applicable international legal obligations binding on the United States. These failures have resulted in reversible error for the following reasons.

First, the District Court's worldwide equitable constructive trust is inconsistent with the Court's decision in *Chevron v. Naranjo*, 667 F.3d 232 (2d Cir. 2011) because the impermissible extraterritorial impact of the constructive trust is identical to the impact of the preliminary injunction previously vacated by this Court.

Second, the District Court erred in ordering relief that offends international comity. The District Court impermissibly attempts to impose its own terms of exclusive relief in the form of a constructive trust on every other court in the world. It seeks to dictate to the courts of the world what will happen if they recognize and enforce the underlying Ecuadorian judgment. This is an affront to: i) foreign courts that order the Ecuadorian judgment to be recognized and enforced; ii) foreign courts that cannot or would not pronounce on the systemic fitness of a

foreign judiciary; and iii) foreign courts that must or might prefer to order different relief.

Third, the District Court's constructive trust cannot be enforced outside of the United States and is therefore an exercise in futility. Because equity will not do a vain or useless thing, the District Court should be reversed.

Fourth, the District Court's extraterritorial constructive trust breaches the international legal obligation of the United States not to intervene in the domestic and external affairs of other states. The extraterritorial application of the constructive trust directly intrudes in to the administration of Ecuadorian justice both internally and externally in places where its judgment might be recognized and enforced.

ARGUMENTS

I. THE DISTRICT COURT ERRED IN ORDERING RELIEF THAT IS INCONSISTENT WITH *CHEVRON v. NARANJO*

A. The Extraterritorial Impact of the Equitable Relief Ordered by the District Court in this Appeal is Substantially Identical to the Impact of the Preliminary Injunction this Court Previously Vacated

This is the second time in this action that this group of *Amici Curiae* has been before this Court on appeal. Both appearances, unfortunately, involve the same essential error identified by this Court in *Chevron v. Naranjo*, 667 F.3d 232 (2d Cir. 2011): an order of equitable relief by the District Court that purports to bind the courts of every other country "in the world" in a way that offends important considerations of international comity.

In the first appeal, the District Court was reversed for issuing a preliminary injunction purporting to preclude all courts in the world outside of Ecuador from recognizing or enforcing an Ecuadorian judgment entered by the Sucumbíos Provincial Court of Justice in the *Lago Agrio* case against Chevron. The injunction was granted on the basis of Chevron's argument that the Ecuadorian judiciary was so corrupt as to be incapable of producing a fair judgment under the rule of law. *Naranjo*, 667 F.3d 232, 238, 242-44 (2d Cir. 2011). The effect of the preliminary injunction was to interlope and prejudge the case for every other court in the world and to restrain the defendants in this case from "even presenting the issue [for

recognition or enforcement] to the courts of other countries for adjudication under their own laws." *Id*., at 244.

In this appeal against the District Court's final judgment, the imposition of a perpetual constructive trust[2] that purports to capture all property of any kind worldwide that is traceable to "the enforcement of the [Ecuadorian judgment] anywhere in the world" has the identical impermissible effect. *Chevron Corp. v. Donziger*, 2014 U.S. Dist. LEXIS 29227 (S.D.N.Y., Mar. 4, 2014). Moreover, the District Court, once again, has found that the Ecuadorian judgment is not entitled to recognition because it was rendered by a corrupt judicial system without impartial tribunals (in addition to its findings of fraud on the part of Donziger). *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 608-617 (S.D.N.Y. 2014). An allusion to Shakespeare's "rose by any other name"[3] is irresistible because it is so apropos. As shown below in detail in Argument II, the impermissible extraterritorial impact of the District Court's equitable relief in both cases – and the

[2] We note that this constructive trust is limited to three defendants: Donziger, Camacho, and Piaguaje. *Chevron Corp. v. Donziger*, 2014 U.S. Dist. LEXIS 29227, 3-4 (S.D.N.Y., Mar. 4, 2014); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014)(the relief ordered only applies to "the three defendants who appeared at trial"). Accordingly, the other 45 successful plaintiffs in the *Lago Agrio* litigation in Ecuador are free to seek recognition and enforcement of the Ecuadorian judgment without regard to the erroneous judgment in this case.

[3] William Shakespeare, *Romeo and Juliet*, Act II, in VII THE DRAMATIC WORKS OF SHAKESPEARE 22 (1839).

resulting breach of principles of international comity and international law – is the same.

B. The District Court Failed in its Attempt to Reconcile the Extraterritorial Impact of its Judgment in this Appeal with Naranjo

1. International Comity is not Statute or Cause of Action Specific

The District Court seeks to reconcile its new intrusive "world wide" equitable relief with *Naranjo* on three grounds. The first two are tightly tied to the New York Recognition Act. First, the District Court insists, "*Naranjo* simply does not apply" to other causes of action outside of Count 9. *Donziger*, 974 F. Supp. 2d at 642-43. This is because "the holding in *Naranjo* was limited to the panel's interpretation of the New York Recognition Act and its determination that the statute could not be used preemptively to attack a judgment." *Id*. Second, the District Court maintains that because "the international comity concerns expressed in *Naranjo* were tied to the panel's discussion of the Recognition Act", the *Naranjo* comity analysis cannot be applied beyond this Act. *Id*.

Attempting to limit the applicability of *Naranjo* in this way is clear error. International comity and its application in law and equity are not, and cannot be, limited to a single statute of the State of New York. International comity is a principle of international relations founded on the fundamental values of independence, respect, and cooperation in a world of over 193 sovereign states.

See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 23, 31-34 (1883). It is an essential general doctrine for legal coordination among states.[4] More specifically for the purpose of this case, international comity is a principle of wide application that "induces every sovereign state to respect the independence and dignity of every other state". *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575 (1926), *quoting The Parlement Belge*, L. R. 5 P. D. 197 (1880). To say that international comity concerns raised by this Court in *Naranjo* can have no application in this case because "the claims in this case involve an entirely different statute, RICO, and non-statutory state law causes of action" misses the point entirely. *Donziger*, 974 F. Supp. 2d at 643. It is beyond doubt that international comity is not tethered to a particular statute or cause of action. International comity has, in fact, been applied for centuries in a large number of variegated cases, across a wide-range of subject matter, involving numerous statutes and common law causes of action.[5]

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[4] *See generally* Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119 (1983).

[5] *See, e.g.,* Donald Earl Childress III, *Comity and Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19 (2008); *Enforcement or Extraterritorial Effect of Judgment of Court of Foreign Country in State Court*, 13 A.L.R.4th 1109 (1982).

2. The Interpretation of Every Statute Has Comity Implications

Moreover, even if one were to adopt the narrow comity tunnel vision of the District Court, the applicability of international comity to this case would remain unchanged. Comity implications, for instance, would still exist for the RICO statute and the relief ordered as a result of its violation.

In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155 (2004), the Supreme Court announced that courts must construe ambiguous statutes in such a way as to "avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164. This is a rule of interpretation that reflects customary international law and binds all countries, including the United States. *Id.* It plainly requires a broad and purposive approach to ensure ambiguity is resolved in favor of comity no matter what statute is involved. The District Court failed to appreciate this and it is another reason why the judgment is inconsistent with the broader comity concerns in *Naranjo*.

3. International Comity Concerns are Implicated

The third ground upon which the District Court seeks to reconcile its judgment with *Naranjo* is by way of an assertion that international comity concerns are not "implicated here." *Donziger*, 974 F. Supp. 2d at 643-44. The District Court takes comity head on. Its opinion states that because the final judgment here does not "set aside the Ecuadorian Judgment" or "grant [a]

worldwide injunction" it therefore "does not 'disrespect the legal system … of the country in which the judgment was issued' or those of 'other countries'" in which the Ecuadorian judgment might be recognized and enforced. *Id*. at 644. This is clearly erroneous as demonstrated in this brief's next argument.

II. THE DISTRICT COURT ERRED IN ORDERING RELIEF THAT OFFENDS INTERNATIONAL COMITY

On March 4, 2014, the District Court produced a 343-page opinion to announce its findings and explain its judgment in this action. *Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). On the same day, it entered its "Judgment as to Donziger Defendants and Defendants Camacho and Piaguje." *Donziger*, 2014 U.S. Dist. LEXIS 29227 (S.D.N.Y., Mar. 4, 2014). Among other things, the District Court's judgment, in two nearly identical paragraphs for the different defendants, purports to impose:

> a constructive trust for the benefit of Chevron on all property … that [the defendants Donzinger, Camacho and Piaguaje], and each of them, has … or … may receive, … or to which [the defendants Donzinger, Camacho and Piaguaje], and each of them, now has, or hereafter obtains, any right, title, or interest, … *that is traceable to the Judgment [entered by the Ecuadorian Sucumbíos Provincial Court of Justice in the Lago Agrio case] or the enforcement of the Judgment anywhere in the world*. [The defendants

> Donzinger, Camacho and Piaguaje], and each of them, shall transfer and forthwith assign to Chevron all such property ….

Chevron Corp. v. Donziger, 2014 U.S. Dist. LEXIS 29227, at paras. 1 and 2 (emphasis added). In a gesture to Second Circuit's forceful comments about comity in *Naranjo*, the District Court's judgment recites that:

> Nothing herein enjoins [the defendants Donziger, Camacho and Piaguaje] from … filing or prosecuting any action for recognition or enforcement of the Judgment [entered by the Ecuadorian Sucumbíos Provincial Court of Justice in the Lago Agrio case] … in courts outside the United States …."

Donziger, 2014 U.S. Dist. LEXIS 29227, at para. 6.

In *Naranjo*, this Court was clear that international comity was relevant to the disposition of the case. *Naranjo*, 667 F.3d 232, 243 (2d Cir. 2011). This Court discussed the relevance of "grave" concerns about international comity in these terms:

> … It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations. That inquiry may

be necessary, however, *when a party seeks to invoke the authority of our courts to enforce a foreign judgment*.[6]

But when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems.

Chevron v. Naranjo, 667 F.3d 232, 244 (2d Cir. 2012)(emphasis added).

However, this Court did not "reach issues of international comity." *Id*. at 244. The Court found that the New York Recognition Act did not allow the District Court to declare the Ecuadorian judgment non-recognizable or enjoin the

[6] The language highlighted by *amici* in this paragraph appears to disapprove of Chevron's continuing preemptive legal strategy and of the District Court's preemptive ruling that the lack of systemic fitness in the Ecuadorian legal system renders the *Lago Agrio* judgment unenforceable. *See Donziger*, 974 F. Supp. 2d at 608-617. The systemic fitness defense does not arise under the language in *Naranjo* until *enforcement of a foreign judgment* is sought in the United States. To this day, no party in this case has sought to invoke the authority of any U.S. court to enforce the foreign judgment obtained in Ecuador.

Ecuadorian judgment creditors from seeking to enforce the judgment in every court of the world outside of Ecuador. It needed to go no further. In this appeal, the Court's significant comity concerns are now ripe to address.

International comity, *comitas gentium*, as it is used in international law connotes a form of accommodation characterized by mutual respect and good neighborliness. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 28 (6th ed., 2003). Comity is expressed similarly in the United States. It "dictates that American courts . . . respect . . . the integrity and competence of foreign tribunals." *Roby v. Corporation of Lloyds,* 996 F.2d 1353, 1363 (2d Cir. 1993)(citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)). It recognizes the strong "local interest in having localized controversies decided at home." *Piper Aircraft v. Reyno,* 454 U.S. 235, 241 (1981)(quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)). It takes account of what is at stake in purporting to project the equity jurisdiction of U.S. courts into foreign legal systems – the creation of an affront to other states. *Breman v. Zapata*, 407 U.S. 1, 12 (1972); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1078 (S.D.N.Y. 1992); *Murty v. Aga Khan*, 92 F.R.D. 478, 482 (E.D.N.Y. 1981).

As with the preliminary injunction, the District Court prejudges the case again for the world. This time, however, the District Court attempts to impose its own terms of exclusive relief in the form of a constructive trust on every other

court in the world. As in the last appeal, the District Court positions itself as an exclusive transnational arbiter. It seeks to dictate to the courts of the entire world what will happen if they recognize and enforce the Ecuadorian judgment.[7] The District Court's judgment here disrespects independent decisions of the courts of other sovereigns by: i) presumptively dictating the only applicable remedy in a suit for recognition and enforcement being tried independently in a foreign court, and ii) through the purported exclusive right to capture any and all property awarded to the Ecuadorian judgment debtors by the courts of other countries. Both are blatant breaches of international comity. *Cf In Re: Request for Judicial Assistance from the District Court in Svitavy, Czech Republic*, 748 F. Supp. 2d 522, 527 (E. D. Va. 2010); *Crane v. Poetic Prods.*, 593 F. Supp. 2d 585, 596 (S.D.N.Y. 2009); *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 387-88 (D.N.J. 2001).

[7] As set out above, the District Court makes clear in it judgment, as it must because of *Naranjo*, that it remains the right of every court in the world to pronounce on whether or not the Ecuadorian judgment should be recognized or enforced. This is smoke and mirrors, however, because waiting in the wings is the preordained and externally imposed constructive trust remedy ordered by the District Court. Indeed, the District Court is explicit that it views the exercise of defendant's recognition and enforcement rights in other jurisdictions as "entirely unnecessary and thus vexatious" and "subjecting Chevron to … added burdens". *Donziger*, 974 F. Supp. 2d at 637-38. The constructive trust, then, is apparently the stick to ensure that what other courts in other countries do in terms of recognition and enforcement can be safely ignored.

A. The Judgment is Offensive to Foreign Courts that Order the Ecuadorian Judgment to be Recognized, Enforced, and Satisfied

The radical extraterritorial relief granted by the District Court will almost certainly be viewed as an offensive effrontery (or worse) by those courts that determine, under their own laws, as is their right, that the Ecuadorian judgment-creditors are entitled to have their judgment recognized, enforced, and satisfied. Under well establish principles of private international law the law of the forum provides its own rules, free from outside interference, "to determine *if* a foreign judgment should be recognized and enforced in the forum." Moreover, "[i]n terms of the defences to enforcement, the question of whether a judgment was procured by fraud or involved [other defects] are to be determined *exclusively* according to the standards of the forum …." RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 187-88 (2012)(emphasis added), citing *Owens Bank Ltd v. Bracco* [1992] 2 AC 443 (HL); *Yoon v. Song* (2000) 158 FLR 295 (SCNSW). It follows that a non-forum state cannot impose extrinsic relief in a case where the forum determines that a foreign judgment should in fact be recognized, enforced, and satisfied under its own law. To try to do so, as the District Court has here, is a clear affront to international comity.

B. The Judgment is Offensive to Foreign Courts that Cannot or Would Not Pronounce on the Lack of Systemic Fitness of a Foreign Judiciary[8]

It is a fact that rules governing recognition and enforcement are not uniform worldwide. Internationally, a wide variety of approaches to judgment recognition and enforcement questions exist. *See* RUSSELL WEAVER & FRANÇOIS LICHÈRE EDS., RECOGNITION AND ENFORCEMENT OF JUDGMENTS: COMPARATIVE AND INTERNATIONAL PERSPECTIVE (2010); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 311 (2011). Unlike the United States, for instance, the courts of a number of countries are not prepared to pronounce on the fitness of another country's judicial system as a ground of mandatory non-recognition. An incomplete survey demonstrates that the systemic fitness of a foreign judiciary is not a ground on which a court can deny enforcement in the following jurisdictions: i) Germany, Zivilprozessordnung [ZPO] [C. Civ. Pro.], Dec. 9, 1950, §§ 328, 723 (Ger.); ii) Japan, Minji Soshoho [Minsoho] [C. Civ. Pro.] 1996, art. 118 (Japan); iii) Singapore, Singapore Academy of Laws, The Conflict of Laws, Chapter 6, § 4; iv) Switzerland, Bundesgesetz über das Internationale Privatrecht, [Fed. Code on Private Int'l Law]

[8] This section of the brief draws on the able work of Stuart G. Gross in the BRIEF OF *AMICUS CURIAE* ENVIRONMENTAL DEFENDER LAW CENTER filed in *Chevron v. Naranjo*, 2011 WL 2440847 (C.A.2) (Appellate Brief).

Dec. 18, 1987, SR 291, § 5 arts. 25-32 (Switz.); v) U.K., Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23-24 Geo., c. 13, § 1(4)(1) (Eng.).

Moreover, the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1439 U.N.T.S. 91 (1986), governs the recognition and enforcement of Ecuadorian judgments in 18 countries that are party to the Convention.[9] Article 2 provides that "foreign judgments" of a rendering state "shall have external validity" in all states party to the Convention if eight conditions are met. None of those conditions require the systemic fitness of the rendering state's legal system and *it cannot be considered* in determining the external validity of a judgment.

Likewise, even if a systemic fitness may be raised as a defense, other countries may have different or require higher standards of proof that a country's entire legal system is so unfit that its judgments must not be recognized, than that applied by the District Court and set out in the Restatement on foreign relations law. *See Donziger*, 974 F. Supp. 2d at 609, n. 1584, quoting *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)("in evaluating the law of a foreign nation, courts 'are not limited to the consideration of evidence the would be admissible under the Federal Rules of Evidence; any relevant source or material

[9] *See*, *United Nations Treaty Collection*, available at: https://treaties.un.org/pages/ParticipationStatus.aspx.

may be consulted'"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482, comment b (a court can find that a foreign legal system is corrupt "without formal proof or argument, on the basis of general knowledge and judicial notice."). As in *Naranjo*, the District Court's opinion nowhere addresses the legal rules and standards that would govern non-recognition "under the laws of France, Russia, Brazil, Singapore, Saudi Arabia or any of the scores of countries, with widely varying legal systems …." *Naranjo*, 667 F.3d at 244. Attempting to foist a remedy permitted under the law of the United States (no matter how good it may be viewed in the U.S.) on the rest of the world by way of a worldwide constructive trust also offends international comity.

Similarly, the laws of other countries differ materially with respect to non-recognition on account of fraud.[10] In some countries that distinguish between intrinsic and extrinsic fraud, proof of Chevron's intrinsic fraud allegations (the fraudulent procurement of the judgment) would not be sufficient to preclude legal recognition or enforcement of the Ecuadorian judgment. In Canada and Singapore, for instance, alleged intrinsic fraud that was discoverable and challenged during the trial in Ecuador, as it was here, would not be allowed as a basis to challenge

[10] The District Court is apparently unaware of this aspect of international legal pluralism when it states that "[t]he wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law". *Donziger*, 974 F. Supp. 2d at 386.

recognition or enforcement. *Beals v. Saldanha*, [2003] 3 S.C.R. 416, at paras. 50-51 ("the merits of a foreign judgment can be challenged for fraud only where the allegations are new … and not the subject of prior adjudication"); Singapore Academy of Laws, The Conflict of Laws, Chapter 6, § 4.11. For those countries bound by Article 2 of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1439 U.N.T.S. 91, 91-92, a judgment procured by alleged intrinsic fraud cannot serve as a reason for denying the external validity of the judgment.

The District Court erred in imposing a constructive trust to capture property in recognition and enforcement actions in other countries that would not allow (or apply in the same way) Chevron's systemic fitness and/or fraud defenses. To create a constructive trust in this way offends international comity.

C. The Judgment is Offensive to Courts That Might Prefer or Would Have to Order Different Relief

International comity is further implicated because the worldwide constructive trust aspect of the District Court's judgment also insults the independence of those courts that might rule the Ecuadorian judgment is not entitled to recognition or enforcement. Those courts might decide, as is their right, that other relief is more appropriate or take exception to the apparent U.S. intrusion. More significantly, those courts could be constrained in imposing this sort of

constructive trust by their own laws. For instance, U.K. courts do not recognise remedial constructive trusts. *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453. And, tracing cannot convert – by itself – what would ordinarily be a personal remedy into one with proprietary characteristics. *Foskett v McKeown* [2001] 1 AC 102.

Likewise, in many civil law systems the constructive trust, as a legal remedy used here, simply does not exist and the alternate legal pathway to recovery is different and more limited. *See* Emile van der Does de Willebois & Jean-Pierre Brun, *Using Civil Remedies in Corruption and Asset Recovery Cases*, 45 CASE W. RES. J. INT'L L. 615, 626-629 (2013); *McKenna v. Wallis*, 344 F.2d 432, 437 (5th Cir. 1964), *vacated sub nom.*, *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966)("the law of the forum here [Louisiana] differs importantly from the law of the rest of the States: the civil law does not recognize resulting trusts or constructive trusts, not at least as these great tools of justice are effectively used in other states to rectify the effects of bad faith.")(Wisdom, J., dissenting).

The District Court has committed the same fundamental error as with the preliminary injunction. Despite ordering relief by another name (and despite trying to inoculate the judgment from the basic defect that resulted in reversal in *Naranjo*), the extraterritorial constructive trust established by the judgment contravenes international comity. This aspect of the judgment must be reversed.

III. THE DISTRICT COURT'S ATTEMPT TO CAPTURE EXTRATERRITORIAL PROPERTY TIED TO THE RECOGNITION AND ENFORCEMENT OF THE ECUADORIAN JUDGMENT BY A FOREIGN COURT IS FUTILE

Somewhat surprisingly, the District Court ignores the elephant in the room. If anything about this case seems abundantly clear it is that no constructive trust imposed here will preclude the courts of any other country from making an independent determination about whether to recognize and enforce the Ecuadorian judgment and what relief, if any, is appropriate. It is hoary international legal doctrine indeed that teaches that no state is bound to respect the judgments of the courts of another state absent agreement, especially when made in regard to non-residents. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §22 at 30-31 (5th ed., 1857). As Chief Justice Marshall wrote in 1812:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).[11]

In the instant case, *amici* believe that courts in many other states are likely to look with extreme disfavor on the District Court's attempt to project a constructive trust extraterritorially and to be strongly disinclined to abide by its terms. Indeed, *amici* are of the view that the decision of the District Court to impose the constructive trust as it has, world-wide in scope, is much more likely to antagonize the courts of other states than to be treated as any sort of persuasive authority.

Be that as it may, the fact remains that equitable constructive trust imposed by judicial fiat of the District Court cannot preclude the courts in other states from making their own independent determinations about recognition and enforceability and what appropriate relief, if any, is warranted. That is the self-evident essence of the international legal system within which states operate.[12]

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[11] Of course, the absoluteness referred to by Marshall has been significantly circumscribed over the last 200 years through practice and agreement by states. As observed: "States have increasingly used their power to limit their power . . . ." Elihu Lauterpacht, *Sovereignty – Myth or Reality*, 73 Int. Aff. 137, 149 (1997).

[12] For a strikingly similar analysis of the situation *within* the federal system of the United States, *see* DAN B. DOBBS, REMEDIES: DAMAGES, EQUITY, RESTITUTION 63-64 (1973)(judges in State B are "not obliged to pay the slightest heed to [an] injunction" issued in State A).

For instance, Chevron has significant operations and assets in Australia.[13] Australian courts would certainly judge the matter of recognition and enforcement (and any available defenses) independently of what the District Court has done in New York. *See Society of Lloyd's v. White*, [2004] VCSA 101 (4 June 2004). Both Australian Courts and the Australian Parliament have been hostile to recognizing the exercise of excessive jurisdiction by foreign courts. *See Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth). *See also* P.E. NYGH AND MARTIN DAVIES, CONFLICT OF LAWS IN AUSTRALIA 198-202 (2010); Deborah Senz and Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB.J.INT'L L. 69 (2001). It is certain that under the various Australian *Foreign Judgments Acts*,[14] no court would recognize the constructive trust that has been imposed to benefit Chevron because these Acts are limited to money judgments. The District Court's constructive trust would not serve as a defense for Chevron at common law in Australia because foreign equitable relief is only potentially enforceable if it seeks to restrain an act within the forum issuing

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[13] *See* Chevron Australia, http://www.chevronaustralia.com/home.aspx.

[14] *Foreign Judgments Act* 1991 (Cth); *Foreign Judgments Act* 1954 (ACT); *Foreign Judgments Act* 1955 (NT); *Foreign Judgments Act* 1973 (NSW); *Reciprocal Enforcement of Judgments Act* (Qld); *Foreign Judgments Act* 1971 (SA); *Foreign Judgments Act* 1963 (Tas); *Foreign Judgments Act* 1962 (Vic); *Foreign Judgments Act* 1963 (WA).

that relief. *James North & Sons, Ltd. v. North Cape Textiles, Ltd.* [1984] 1 WLR 1428; *Rosler v. Hilbery* [1925] Ch 250.

As this example shows, the District Court's equitable relief in the form of a constructive trust is likely to be a futile act outside of the United States. It is, of course, hornbook law that equity will not do a "vain or useless thing." 27A AM. JUR. 2D *Equity* § 91. *See New York Times Co. v. United States,* 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("It is a traditional axiom of equity that a court of equity will not do a useless thing"); *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 145 F.2d 215, 223 (2d Cir. 1944), *rev'd on other grounds*, 325 U.S. 797, 65 S.Ct. 1533; *Pennington v. Ziman,* 216 N.Y.S.2d 1, 2 (1st Dep't 1961) (equity does not suffer a vain order to be made); *Burke v. Kingsley Books, Inc.,* 167 N.Y.S.2d 615, 619 (N.Y. County 1957) ("That a court of equity will not do a useless or vain thing is an ancient maxim of hornbook learning and general recognition.") (internal quotation and citation omitted); 67A N.Y. Jur. 2d Injunctions § 38 (2005) ("A court will not stultify itself by issuing [equitable relief] which obviously could not, for practical reasons, be enforced or accomplish anything."). In the present case, that is precisely what has happened because compliance with the constructive trust outside of the United States cannot be compelled. Accordingly, its extraterritorial reach should be reversed.

IV. THE DISTRICT COURT'S CONSTRUCTIVE TRUST BREACHES THE FUNDAMENTAL INTERNATIONAL LEGAL OBLIGATION OF THE UNITED STATES NOT TO INTERVENE IN THE DOMESTIC AFFAIRS OF OTHER STATES

International law is predicated on adherence to the fundamental rule which recognizes that states occupy a defined territory and may effectively exercise jurisdiction (subject to the increasing limitations of international law) over all matters and persons in that territory to the exclusion of all other states. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9)(Merits). Often conceived of as part of state sovereignty, these norms remain fundamental because respect for independence, autonomy and equality is crucial in securing international peace, order and cooperation. *Le Louis*, 2 Dod. 210, 243-44 (Adm. 1817).

In support of these important norms, customary international law has for centuries prohibited a state from intervening in the domestic affairs of another state. *See, e.g.,* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §20 at 28-29 (5th ed., 1857); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §63, at 91-92 (Richard Henry Dana, ed.)(8th ed., 1866); L. OPPENHEIM, I INTERNATIONAL LAW: A TREATISE 181-191 (1905); CHARLES CHENEY HYDE, I INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES §69 at 116-118 (1922). This principle of non-intervention has also long precluded interference by one state in the relations between two or more other

states without consent. Article 8 of the *Convention on Rights and Duties of States* (the Montevideo Convention), to which both the United States and Ecuador are party, specifically provides that "[n]o state has the right to intervene in the internal or external affairs of another." Article 8, *Convention on the Rights and Duties of States*, 49 Stat. 3097, 165 L.N.T.S. 19 (Dec. 26, 1933).

In the *Spanish Zone of Morocco Claims* arbitration, Arbitrator Huber emphasized:

> territorial sovereignty constitutes such a fundamental feature of modern public [international] law that foreign intervention in the relations between the State and the individuals under its territorial sovereignty can only be admitted by way of exception.

Affaire des biens britanniques au Maroc espagnol Espagne contre Royaume-Uni. La Haye, 1er mai 1925 (Great Britain v. Spain), II R.I.A.A. 615 (1949)(as translated by Hersch Lauterpacht in H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY §18 at 95 n.2 (1933).

Contemporary exceptions (which remain contested) relate to the ability to intervene "benignly" with a physical presence to, for instance, protect nationals or

broader humanitarian values.[15] None of these exceptions conceivably apply in this case. Moreover, even when an exception might legitimize an intervention under international law, such an intervention is ordinarily viewed as a hostile act, precisely because it constitutes an attack upon the independence, autonomy and equality of the state that is the subject of intervention. The prohibition on intervention by one state in the domestic affairs of other states continues to be governed today by customary international law, as well as by Articles 2(4) and 2(7) of the *United Nations Charter*.

As regards the customary law of non-intervention, which governs the instant case (along with Article 8 of the *Montevideo Convention* in which the United States expressly committed itself to non-intervention as a principle of positive law),[16] the International Court of Justice (ICJ) stated in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (the *Nicaragua* case) that:

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[15] Both classic and contemporary publicists admit to limited exceptions to the norm prohibiting intervention. *See, e.g.*, HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW 929-940 (3rd ed., 1993); OPPENHEIM, I INTERNATIONAL LAW: A TREATISE 181-191 (1905).

[16] Article 2(7) may also apply as a rule of non-intervention in this case. *See Certain Questions Concerning Diplomatic Relations* (Honduras v. Brazil), Application Instituting Proceeding by the Republic of Honduras against the Federal Republic of Brazil at ¶¶ 5, 8 and 16. (available at: http://www.icj-cij.org/docket/files/147/15935.pdf). *See also* Schermers, *Aspects of Sovereignty*, in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE 185-192 (GERARD (continued…)

> [t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. . . . The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial state practice.

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicagaragua v. United States of America), [1986] I.C.J. Rep. 14, at 106. Later in the *Nicaragua* case, the ICJ took up the content of the principle of non-intervention. In general terms, the ICJ states that "the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States" which "each State is permitted by the principle of State sovereignty, to decide freely. . . ." *Id*.

Unlawful intervention has taken many forms, ranging from the use of force to more subtle but insidious attacks on the political and legal independence of a state. At bottom, though, an intervention is illegal when one state presumes to take action in relation to another state's domestic matters in order to alter those domestic matters legally or politically. International civil litigation under the

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KREIJEN, ED., 2002)(Article 2(7) precludes intervention by states *and* the United Nations).

Sherman Antitrust Act[17] provides a paradigmatic example[18] of a widely perceived and claimed violation of the principle of non-intervention.

It is well known that many states have long complained about the legality of the extraterritorial assertion of jurisdiction in U.S. antitrust proceedings on the basis of illegal intervention. GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 584-586 (3rd ed., 1996). States protest that U.S. courts violate "the territorial sovereignty of other States . . . by purporting to exercise jurisdiction in respect of persons, matters or conduct outside the United States by reason of some alleged impact on business within the United States." AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1035-36 (4th ed., 1997)(examples of protests by Australia, Canada, the Philippines, South Africa, and the United Kingdom). The attempt to intervene through antitrust law in other states has resulted in the enactment of retaliatory blocking legislation as a counter-measure by U.S. trading partners and an out-right refusal to recognize and enforce U.S. antitrust judgments. *See* D. Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB.J.INT'L L. 69 (2001).

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[17] See in particular, 15 U.S.C. §§ 1, 2 & 7.

[18] Another example is found in more recent international protests about illegal intervention related to the Helms-Burton Act, 22 U.S.C. §§ 6021–6091.

Turning to the extraterritorial constructive trust imposed by the District Court in the instant case, it is clear that it constitutes an internationally unlawful attempt to intervene in the domestic legal affairs of Ecuador. First, it is important to remember the posture of this case. This is not an action by successful foreign litigants for the recognition and enforcement of a foreign judgment in the United States. Rather, the unsuccessful foreign defendant, Chevron, has commenced a pre-emptive action against foreign nationals, over their objection, in a U.S. court. It is in this context that the District Court has interposed itself and asserted what is in essence worldwide exclusive jurisdiction to determine for the whole world the remedies the must be applied in connection with its own determination that the Ecuadorian judgment is not deserving of recognition – an undoubtedly unwanted intrusion into the internal administration of Ecuadorian justice.

Second, in practical effect, the extraterritorial application of the constructive trust directly intrudes into the external administration of Ecuadorian justice because: i) recognition and enforcement of Ecuadorian judgments, ii) defenses thereto, and iii) appropriate remedies, if any, are issues *each country* is entitled to decide freely, without outside interference. Here, the District Court's constructive trust interferes with Ecuador's relationship with every state in the world in which the judgment might be recognized and enforced, except the United States. It does this by purporting to capture all property that might be awarded by the courts of

other countries that rule it is proper to recognize and enforce the Ecuadorian judgment. This sort of intrusion into the international relationship between Ecuador and other states puts the United States in violation of a key international obligation because each state is permitted to decide freely whether a foreign judgment should be recognized and enforced and the consequences that flow from such a determination. For this reason this Court should reverse the District Court.

CONCLUSION

For the forgoing reasons, the judgment of the District Court should be reversed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,897 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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