No. 11-1150

Nos. 11-1150, 11-1264

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants,

(caption continued on next page)

On Appeal From a Preliminary Injunction Issued By
The United States District Court For the Southern District of New York
Case No. 11-cv-691

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF DEFENDANTS-APPELLANTS

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Amicus is a nonprofit corporation which has no parent corporation nor stock held by any publicly held corporation.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a nonprofit organization that litigates and advocates on behalf of victims of human rights and environmental abuses worldwide.[1] ERI litigates transnational cases in U.S. courts, which often involve *forum non conveniens* challenges. *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, No. 08-56187, 2011 U.S. App. LEXIS 11446, ___ F.3d ___ (9th Cir. June 1, 2011); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). ERI also supports litigation outside the United States. ERI therefore has an interest in ensuring that courts correctly decide questions relating to *forum non conveniens* and recognition of foreign judgments, including whether judgments may be enforced in the United States following a *forum non conveniens* dismissal.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Amicus addresses the question of the interrelationship between *forum non conveniens* and the enforcement of foreign judgments. Specifically, *amicus* addresses the standard for assessing the adequacy of a foreign forum under both the *forum non conveniens* doctrine and the determination of enforcement of foreign judgments; the evidence that may be considered to determine the adequacy of a foreign forum; and whether and when a litigant who has prevailed on a *forum non*

[1] No party's counsel authored this brief in whole or in part; no person other than *amicus* contributed money intended to fund preparing or submitting this brief.

conveniens motion may later challenge the adequacy of the foreign jurisdiction in order to defeat enforcement of a judgment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Courts in the United States routinely examine the adequacy of foreign legal systems in two contexts: (i) in connection with the doctrine of *forum non conveniens*, where a litigant, typically a defendant, seeks to have a case dismissed in favor of litigation in another country's courts; and (ii) when determining whether to enforce a judgment issued by a foreign country's courts. In both instances, the adequacy (or inadequacy) test incorporates fundamental due process and impartiality of the foreign courts. As a matter of both law and policy, these tests are equivalent, and should be assessed using the same legal standard and forms of evidence.

While courts applying these tests are typically reluctant to find a foreign legal system to be too corrupt or biased to be adequate, the district court below expressed no such hesitance in finding that Ecuador's court system did not provide due process or impartial tribunals. In applying a lower standard than this Court has applied in *forum non conveniens* cases, the district court erred, because the two adequacy tests must be equivalent (or it should be more difficult to show adequacy in the *forum non conveniens* context). The district court further erred by relying on evidence that is typically found to be insufficient in the *forum non conveniens*

context. For example, although the district court relied on a State Department human rights report criticizing the Ecuadorian judiciary, courts have frequently found foreign forums to be adequate despite equivalent or stronger criticism of their legal systems in similar State Department reports.

Indeed, because a *forum non conveniens* dismissal depends on the adequacy of the foreign forum, a litigant who prevails on a *forum non conveniens* motion cannot be allowed to later challenge the adequacy of the foreign court system in order to deny recognition of a judgment. This is so regardless of whether the foreign judicial system has undergone changes or a decline in quality in the interim. A litigant who gives up the protections of the U.S. judicial system in order to litigate in another country must bear the risk that the other country's courts will not provide due process or impartiality. Regardless of whether the technical requirements of judicial estoppel are met, allowing a subsequent challenge to the adequacy of the foreign courts would undermine the settled expectations of the parties and destroy the judicial efficiency that *forum non conveniens* is intended to promote; indeed, it would raise the possibility of unending litigation and wasted resources. Thus the district court erred in allowing Chevron even to argue that the Ecuadorian courts lack due process or impartiality.

If a litigant who prevails on *forum non conveniens* is ever allowed to challenge the adequacy of the foreign court system, it must do so in a timely

manner. When the first indications of unfairness in the foreign courts arise, the litigant must seek to return to the United States or give up the right to do so. A litigant who sits on its rights cannot expect U.S. courts to provide relief after the opposing party has gone through years of expensive litigation and obtained a judgment in its favor. Again, the district court below erred, because it found the Ecuadorian courts to be inadequate based on evidence that began as long as eight years ago.

Finally, even if a litigant has free rein to attack the foreign judiciary to avoid U.S. recognition of a judgment, its abandonment of a U.S. forum results in a waiver of any right to petition the U.S. courts for protection against enforcement in third countries. That is a privilege that is unique to parties in litigation in U.S. courts, and cannot be sought by those who voluntarily give up a U.S. forum in favor of foreign courts.

The district court's approach is a recipe for gamesmanship and legal quagmires. It would encourage litigants to attempt to dismiss cases on *forum non conveniens* grounds regardless of whether they have confidence in the foreign forum, and it would deny recognition to foreign judgments issued by courts under a lower standard than is used to send cases filed in the United States to those same courts.

ARGUMENT

I. As a matter of law and policy, the "adequacy" test for *forum non conveniens* and the "systemic inadequacy" test for enforcement of judgments must be equivalent.

Both the doctrine of *forum non conveniens* and the doctrines governing the enforcement in U.S. courts of foreign money judgments include evaluation of the foreign forum's adequacy. As a matter of law, these tests include the same elements and are functionally equivalent. As a matter of policy, this must be so in order to avoid absurd consequences. This is especially the case where, as here, the litigant who is objecting to the recognition of a foreign judgment, and attacking the adequacy of the foreign justice system, is the same litigant who previously successfully argued that the same foreign courts were adequate for *forum non conveniens* purposes.

New York's Recognition of Foreign Money Judgments law includes, as is generally the case, an exception to recognition for a judgment that "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." N.Y. C.P.L.R. § 5304(a)(1). This "systemic inadequacy" test has two elements: due process and the absence of bias. "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts." *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003). With respect to

due process, the systemic inadequacy test considers whether the "*system* as a whole [is] incompatible with our notions of due process," regardless of whether "the foreign tribunal's procedures exactly match those of New York." *Id.* at 222. This is a high hurdle; the commentary to the Uniform Foreign Money-Judgments Recognition Act, from which the New York statute is derived, states that "a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved."[2] With respect to bias and impartiality, courts have suggested that a finding of systemic inadequacy would require a "sweeping condemnation of [the foreign] judiciary," which is rarely warranted. *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 207 (S.D.N.Y. 2003).

The same factors (and more) are considered in *forum non conveniens* cases. The test for the adequacy of the foreign forum incorporates any concerns for "lack of due process," as well as additional concerns such as corruption or undue delay. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009). Furthermore, in the *forum non conveniens* context, courts also consider whether a foreign forum is "'biased,'" *Monegasque De Reassurances S.A.M. (monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002), although they are similarly "reluctant" to so find. *See id*. Thus the legal inquiry undergirding a finding of adequacy in the

[2] Nat'l Conference of Commissioners on Uniform State Laws, Uniform Foreign Money-Judgments Recognition Act, at 3 (cmt. to Sec. 4), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf.

forum non conveniens context, just like the systemic inadequacy test, incorporates both due process and lack of bias, as well as other elements.

It is logical that the two tests are equivalent; if anything, it should be *more* difficult to show inadequacy in the enforcement context than in the *forum non conveniens* context. This is because justice would be ill-served by a rule that allowed cases to be dismissed from U.S. courts in favor of a foreign forum, but then would deny recognition of any judgment issued by that forum, leaving many litigants with no remedy at all. The converse rule would be reasonable, however; in deference to a plaintiff's choice of forum, a court could certainly apply a higher standard for due process and impartiality in the *forum non conveniens* context than is required by the systemic inadequacy test for recognition of judgments. In contrast, allowing dismissal to a system that does not observe due process or that has biased tribunals would implicate the due process rights of the plaintiffs themselves, who would be compelled to litigate in a system incapable of producing an enforceable judgment. Thus the two doctrines must be treated equivalently, or the systemic inadequacy test must be more forgiving than the *forum non conveniens* adequacy test.

II. The district court erred in applying a higher standard of due process and impartiality than is ordinarily required in the *forum non conveniens* context.

The district court below erred in its application of the systemic inadequacy

test because it relied upon evidence that would ordinarily not be sufficient to show inadequacy in the *forum non conveniens* context, and because it applied a standard less rigorous than this Court has applied in that context. The district court's approach creates a risk that a judgment issued following a *forum non conveniens* dismissal will be unenforceable. The New York statute, which incorporates the same test as *forum non conveniens*, does not require this approach, nor is it advisable as a matter of policy. Although *amicus* would not be opposed to a more rigorous analysis of the adequacy of a foreign forum in the *forum non conveniens* context as a prospective matter, the recognition of judgments test cannot allow a determination of inadequacy based on a less onerous showing than is required in the *forum non conveniens* context, and courts considering a foreign judgment cannot consider evidence that is typically considered insufficient to show inadequacy of a forum for *forum non conveniens* purposes.

A. This Court has been skeptical of allegations of bias in *forum non conveniens* adequacy challenges, and must apply a similar approach to allegations of systemic inadequacy for enforcement purposes.

This Court has expressed skepticism of allegations of bias leveled by litigants arguing that a foreign forum is inadequate for *forum non conveniens* purposes. The district court here was too quick to credit such allegations, and erred in doing so.

The district court did not precisely identify what features of the Ecuadorian

judicial system it found to be either lacking in due process or suggestive of lack of impartiality, but instead generally found that susceptibility to political influence, especially influence by the President, rendered Ecuadorian judges biased. Although the district court found that the situation has worsened recently, it acknowledged that the Ecuadorian judiciary "has been plagued by corruption and political interference for decades." *Chevron Corp. v. Donziger*, No. 11 Civ. 0691, 2011 U.S. Dist. LEXIS 22729, *113 (S.D.N.Y. Mar. 7, 2011).

This Court has never accepted an allegation, in the *forum non conveniens* context, that a foreign judiciary is sufficiently lacking in impartiality to render the forum inadequate. Indeed, the Court is "reluctant to find foreign courts 'corrupt' or 'biased,'" *Monegasque De Reassurances*, 311 F.3d at 499, and rejected an "attack on [a foreign] justice system" that was supported by two affidavits as well as "newspaper articles . . . that depict the political unrest" in the foreign forum. *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993). This Court has stated that, in order "'to pass value judgments on the adequacy of justice and the integrity of'" an entire judicial system, it is not sufficient to present "'bare denunciations and sweeping generalizations.'" *Monegasque De Reassurances*, 311 F.3d at 499. Indeed, the Court has stated that "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards, so such a finding is

rare." *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) (citation omitted).

In the enforcement of judgments context, this Court has only once found a foreign judiciary to be inadequate. The analysis in that case, *Bridgeway Corp. v. Citibank Corp.*, 201 F.3d 134 (2d Cir. 2000), is consistent with the high bar applied in *forum non conveniens* cases. There, the evidence showed that Liberia had been in a civil war during the litigation at issue, and that the Liberian judiciary was not organized in keeping with the Liberian Constitution; *id.* at 142 & n.3; in fact, the judicial system "collapsed for six months following the outbreak of fighting," and "justices and judges served at the will of the leaders of the warring factions." *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 280, 287 (S.D.N.Y. 1999).

It would be highly incongruous for the federal courts to express reluctance to pass judgment on a foreign judicial system when deciding whether a case should be litigated in a foreign forum, but then be quick to condemn the adequacy of another country's legal system when it comes time to enforce the judgment. But that is precisely what the district court here did; its finding of inadequacy appears to have applied a much lower standard than is used in the *forum non conveniens* context. Far from the active civil war present in *Bridgeway*, the evidence here was closer to the "political unrest" rejected in *Blanco*. (Indeed, other courts have recently dismissed cases to an Ecuadorian forum based on *forum non conveniens*.

See, *e.g.*, *Paolicelli v. Ford Motor Co.*, 289 Fed. Appx. 387, 390, 2008 U.S. App. LEXIS 18049, *4-10 (11th Cir. 2008).) The district court erred in crediting the kind of generalized allegations of bias and corruption that are routinely rejected by courts in the *forum non conveniens* context.

B. The District Court erred by accepting evidence that is not typically accepted in *forum non conveniens* determinations of adequacy.

The district court also erred in the kinds of evidence it considered and the weight it gave to that evidence. The district court relied upon several sources of evidence: 1) an expert declaration submitted by Chevron, mostly relying on newspaper articles; 2) the out-of-court statements of Steven Donziger, counsel for the Ecuadorians in the underlying litigation (and himself a defendant here); 3) the World Bank's Worldwide Governance Indicators; and 4) the U.S. Department of State's Country Reports on Human Rights Practices. *Id.* at 79-80. Similar evidence has been rejected in the *forum non conveniens* context; if this Court and other courts do not accept evidence of inadequacy for *forum non conveniens* purposes, it makes little sense to credit the same evidence for enforcement purposes.

1. Expert declarations relying on newspaper articles

Although expert declarations are frequently submitted in *forum non conveniens* cases, declarations showing a generalized picture of corruption or bias

are frequently discounted. For example, in *Monegasque de Reassurances*, the district court rejected an expert declaration alleging Ukrainian courts to be corrupt, which relied in part on an editorial in the New York Times, *see* 158 F. Supp. 2d 377, 384 (S.D.N.Y. 2001), and this Court characterized the submission as "meager and conclusory." 311 F.3d at 499.

In *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417 (7th Cir. 2009), the Seventh Circuit considered a case where *all* parties' experts "lamented a public perception of corruption in the Bulgarian courts," and the plaintiffs' expert "claimed that the Bulgarian legal system was incapable of providing a fair hearing." *Id.* at 421. Again, however, the court considered this evidence to be "generalized, anecdotal complaints of corruption" that were insufficient to find the forum inadequate. *Id.* at 422.

2. Statements of a party's counsel

Amicus has found no case where a court has relied on the unsworn statements of a party's counsel, apparently lacking in personal knowledge, regarding the adequacy of a foreign forum's judiciary. No court would entertain such statements as evidence of inadequacy for *forum non conveniens* purposes. But that is precisely what the district court here did. As counsel for the Ecuadorians, Mr. Donziger opposed *forum non conveniens* dismissal to Ecuador, arguing that the "Ecuadorian courts are subject to corrupt influences and are

incapable of acting impartially." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002). This Court rejected Mr. Donziger's argument, *see id.*, but he continued to express his doubts about the Ecuadorian legal system—an entirely consistent position. But now, after Mr. Donziger's clients won a judgment in the courts that he criticized, the district court has given Mr. Donziger's criticisms evidentiary weight to support a finding of systemic inadequacy.

In addition to relying on incompetent evidence, the district court's approach creates an impossible situation for attorneys opposing a *forum non conveniens* motion: if they argue that the foreign forum is inadequate, and lose, they risk having their own words later used against them in efforts to block recognition of a resulting foreign judgment. Such a perverse scheme should not be countenanced.

3. World Bank Worldwide Governance indicators

As the Ecuadorians have demonstrated in their brief, the use of the World Bank's "Rule of Law" indicator is highly misleading in this context, because most of the factors in that aggregate indicator have nothing to do with judicial administration. *See* Redacted Br. for Defts.-Appellants Hugo Gerardo Camacho Naranjo & Javier Piaguaje Payaguaje ("Ecuadorians' Br.") at 69-70. Additionally, *amicus* has not located any case, in any jurisdiction, in which this indicator has been used to suggest that a foreign forum is inadequate. In another case, a court disregarded "a World Bank report that characterizes Indonesia as 'as among the

most corrupt countries in the world,'" finding that "such allegations of corruption fail to render Indonesia an inadequate forum." *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 487 n.5 & 488 (S.D. Tex. 2002).

The Worldwide Governance Indicators measure *perceptions*, not objective facts; the indicators "captur[e] governance perceptions as reported by survey respondents, nongovernmental organizations, commercial business information providers, and public sector organizations worldwide."[3] Courts have discounted measurements based on perceptions such as these in *forum non conveniens* analysis. For example, one recent decision dismisses "surveys about public *perceptions* of corruption" because they do not "offer concrete proof of corruption." *In re Air Crash Disaster over Makassar Strait, Sulawesi*, No. 09-cv-3805, 2011 U.S. Dist. LEXIS 2647, *15 (N.D. Ill. Jan. 11, 2011); *see also Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 832 (C.D. Cal. 2009) ("The Transparency International report only analyzes respondents' perceived corruption, and thus is not indicative of actual corruption."), *rev'd on other grounds*, No. 08-56187, 2011 U.S. App. LEXIS 11446, ___ F.3d ___ (9th Cir. June 1, 2011).

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[3] Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, The World Bank Development Research Group Macroeconomics and Growth Team, "The Worldwide Governance Indicators: Methodology and Analytical Issues," at 2 (Policy Research Working Paper No. 5430, Sept. 2010), *available at* http://info.worldbank.org/governance/wgi/pdf/WGI.pdf.

4. State Department human rights reports

Reliance on the State Department's human rights reports to determine the adequacy of a foreign forum is not inappropriate; this Court did so in *Bridgeway*, 201 F.3d at 143-44. The problem with the district court's analysis in this respect is that the report for Ecuador is not indicative of greater inadequacy than other countries that have been accepted as adequate in the *forum non conveniens* context. As noted above, in *Bridgeway*, the State Department report at issue presented relevant objective facts, such as the fact that the Liberian judicial system collapsed for six months. *See* 45 F. Supp. 2d at 287. By contrast, with respect to Ecuador, the relevant report presents generalized allegations of political pressure and corruption; similar reports have often been rejected in the *forum non conveniens* context.

For example, in *MBI Group, Inc. v. Credit Foncier du Cameroon*, 558 F. Supp. 2d 21 (D.D.C. 2008), the court considered a State Department report indicating that the Cameroonian "'judiciary remained highly subject to executive influence, and corruption and inefficiency remained serious problems.'" *Id.* at 29. Nonetheless, the court dismissed the report as "generalized allegations regarding the state of Cameroon's judiciary," and found Cameroon to be an adequate forum. *Id.* at 30. In *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996), the D.C. Circuit similarly rejected "reliance on a State Department report expressing

'concern about the impartiality' of the Jordanian court system." *Id.* at 678. In *Irwin v. World Wildlife Fund, Inc.*, 448 F. Supp. 2d 29 (D.D.C. 2006), the court similarly rejected reliance on a State Department report "which said that 'the [Gabonese] judiciary remained subject to government influence' and that the Gabonese legal system is 'slow, inefficient and subject to corruption.'" *Id.* at 34. In *Gonzales*, the court considered a State Department report that stated that "'low salaries encourage widespread corruption, and [Indonesian] judges are subject to considerable pressure from government authorities, who often exert influence over the outcome of numerous cases,'" 196 F. Supp. 2d at 487 n.5, but nonetheless found Indonesia to be an adequate forum, *id.* at 488.

In fact, an examination of recent *forum non conveniens* cases reveals numerous other examples of courts, including this Court, finding foreign forums to be adequate where the most recent State Department reports find equally bad, or considerably worse, conditions as compared with the Ecuador report on which the district court below relied. For example:

- *Peru*: 2009 report:[4] "NGOs and other analysts complained that the judiciary was politicized and corrupt . . . World Bank indicators reflected that government corruption was a serious problem . . . . Allegations of

[4] U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, 2009 Country Reports on Human Rights Practices: Peru § 1(e) (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136123.htm.

widespread corruption in the judicial system continued. Experts voiced concerns about increasing politicization of the judiciary during the current administration." *Compare Carijano*, 2011 U.S. App. LEXIS 11446 at *13-16 (affirming rejection of allegations that Peruvian courts were inadequate due to corruption and lack of judicial independence).

- *Jamaica*: 2006 report:[5] "The judiciary's lack of sufficient staff and resources hindered due process . . . Trials in many cases were delayed for years, and other cases were dismissed because files could not be located or had been destroyed." *Compare Seales v. Panamanian Aviation Co.*, No. CV-07-2901, 2008 U.S. Dist. LEXIS 14429, *15 (E.D.N.Y. Feb. 26, 2008) (rejecting suggestion that "delays and administrative difficulties in the Jamaican courts would deprive [plaintiff] of an adequate remedy"), *aff'd*, 356 Fed. Appx. 461 (2d Cir. 2009).
- *Nigeria*: 2006 report:[6] "[T]he judicial branch remained susceptible to executive and legislative branch pressure. Political leaders influenced the judiciary, particularly at the state and local levels. Understaffing,

[5] U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, 2006 Country Reports on Human Rights Practices: Jamaica § 1(e) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78897.htm.

[6] U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, 2006 Country Reports on Human Rights Practices: Nigeria §§ 1(e) & 3 (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78751.htm.

underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately. Citizens encountered . . . frequent requests from judicial officials for small bribes to expedite cases. . . . Corruption was massive, widespread, and pervasive, at all levels of the government and society." *Compare BFI Group Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274, 283 (S.D.N.Y. 2007) (rejecting concerns that "Nigerian courts will not fairly and correctly adjudicate the case"); *aff'd*, 298 Fed. Appx. 87 (2d Cir. 2008).

- *Ukraine*: 2001 report:[7] "[I]n practice the judiciary is subject to considerable political interference from the executive branch and also suffers from corruption and inefficiency . . . . The judiciary lacks sufficient staff and funds, which engenders inefficiency and corruption and increases its dependence on the executive, since the court receives all its funding from the Ministry of Justice." *Compare Monegasque de Reassurances*, 311 F. 3d at 499 (rejecting claims of corruption in the Ukrainian courts).

While *amicus* believes that U.S. courts are often too quick to dismiss concerns of political influence or corruption in foreign forums in the *forum non conveniens* analysis, it is untenable to reject evidence of such problems when sending a case to

[7] U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, 2001 Country Reports on Human Rights Practices: Ukraine §§ 1(e) (2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8361.htm.

another country and then to rely on the same evidence when deciding whether to enforce that country's judgments. This Court should not accept the district court's reliance on this evidence unless it is also prepared to accept similar evidence in *forum non conveniens* cases, and to find many foreign forums inadequate for *forum non conveniens* purposes.

III. Where a litigant has previously defeated challenges to the adequacy of a foreign forum in a *forum non conveniens* motion, that litigant is constrained from relying on the protections of U.S. courts against a resulting foreign judgment.

The interplay between the *forum non conveniens* adequacy test and the enforcement of judgments test is particularly relevant in a case such as this one, where a litigant successfully ousted the original chosen forum and defeated challenges to the adequacy of a foreign forum. The Ecuadorians have persuasively argued that Chevron is now judicially estopped from attacking the adequacy of Ecuador's judicial system. *See* Ecuadorians' Br. at 61-67. But regardless of whether judicial estoppel applies, in a case such as this one, it would undermine judicial efficiency and settled expectations and create perverse incentives to allow that same litigant to subsequently attack the adequacy of the foreign forum when an adverse judgment is imminent, or after it is issued.

The district court erred by allowing Chevron to challenge the adequacy of the Ecuadorian court system, and further erred by allowing such a challenge many years after the allegedly inadequate conditions arose. Finally, even if Chevron is

entitled to argue that the Ecuadorian courts are inadequate for the purpose of denying recognition of a judgment by U.S. courts, it has waived any right to petition the U.S. courts to protect it against enforcement proceedings in third countries.

A. A *forum non conveniens* dismissal, ousting a U.S. forum, is a calculated risk; judicial efficiency and settled expectations demand that a successful *forum non conveniens* movant bears the risk of a lack of due process or impartiality.

Plaintiffs often choose to litigate in the United States because of this country's stability and the impartiality of its tribunals. When a defendant urges the court to dismiss on *forum non conveniens*, the defendant takes a calculated risk that its preferred forum will not similarly provide due process or unbiased courts. This is particularly so where, as here, the defendant prevails over objections by the plaintiff that the foreign forum lacks due process and impartiality. Because such a risk is not present in the United States, it is appropriate for the movant to bear this risk.

Litigants take calculated risks all the time. When a calculated risk fails, the litigant invariably suffers consequences. The Supreme Court, on several occasions, has underscored the importance of letting a calculated risk lie, of not reopening it later to re-litigation. Commenting on settlements, for example, the Supreme Court has held that "[t]he one who pays possibly might pay less if he resorts to the factfinder instead of making the settlement. But he might pay more.

That is the calculated risk he takes." *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 25 (1974).

When a litigant prevails on *forum non conveniens*, the parties' expectations are that the case will be litigated in the foreign forum. Certainly, the plaintiffs who did not choose that forum can rightfully expect that the movant will not later challenge its adequacy and object to recognition of a judgment. Furthermore, judicial efficiency demands that the prevailing *forum non conveniens* movant be compelled to live with the consequences of its election; parties cannot elect to change forums every time they believe the legal system that they chose is treating them unfairly. To allow such maneuvers would open the floodgates to never-ending re-litigation of claims every time a calculated risk goes wrong. It would sanction the notion that it is permissible to waste significant resources of litigants and courts in multiple legal systems and would allow cases to drag on indefinitely. It would destroy the notion of finality. This strategy should be disallowed for the same reasons underpinning the law of the case doctrine: in order to prevent "the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *United States v. Bates*, 614 F.3d 490, 494 (8th Cir. 2010).

Here, Chevron calculated that Ecuador would be a more favorable forum in which to defend against the Ecuadorians' claims than the stable, indisputably

adequate forum of the Southern District of New York. Chevron knew that by ousting the United States forum in exchange for the less stable forum of Ecuador, it was surrendering the protection of the New York courts and assuming the risks inherent in Ecuador's less stable judicial system. The district court erred by even considering allowing Chevron to avoid the consequences of its calculated risk.

B. If a litigant is allowed to challenge the forum that it chose, and oust that forum's jurisdiction, it must do so in a timely manner.

Assuming that a party who prevails on a *forum non conveniens* motion can later challenge the adequacy of its chosen forum, such a move must be done in a timely manner. An aggrieved litigant cannot wait until a judgment is imminent or issued before making its collateral attack. Indeed, because this strategy entails re-litigation of the entire case, such a litigant must immediately seek relief from a U.S. court upon learning of the conditions in the foreign court that constitute a lack of due process or impartiality. Failure to do so results in forfeiture of any rights the litigant may have.

A subsequent challenge to the adequacy of a foreign forum by a successful *forum non conveniens* movant, if allowed at all, can only be allowed on the basis of changed circumstances. Indeed, this was the rationale of the district court below. *Chevron Corp. v. Donziger*, 2011 U.S. Dist. LEXIS 22729 at *158. Although *amicus* believes that this rationale is insufficient because the movant should bear the risk of unfavorable changes, two things are clear even if this rationale could be

accepted. First, if the adequacy of the foreign justice system has declined, the defendant is not simply exempted from all liability; at most, the defendant must concede to re-litigate the claims in the original U.S. forum. Any other result would represent a denial of due process to the plaintiffs, who chose an adequate forum to begin with, had it ousted in favor of a foreign forum, and then lost their claims in that forum due a decline in its court system. Second, such re-litigation must occur as soon as is practicable; otherwise it wastes considerable resources of the parties and the courts, and allows a litigant to game the system.

"[F]orfeiture is the failure to make the timely assertion of a right," *United States v. Olano*, 507 U.S. 725, 733 (1993), and forfeiture therefore should apply where a litigant declines to assert any claim that a foreign court system is inadequate as soon as possible. The equitable doctrine of laches also applies here. If a litigant seeks reliance on the equitable powers of a court, the court should apply the maxim "*vigilantibus non dormientibus aequitas subvenit*, meaning equity aids the vigilant, not those who sleep on their rights." *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998) (internal quotation marks omitted). Where a party waits years to raise a claim that a foreign forum is inadequate, it forces the opposing party to waste time in litigation; such "unreasonable and inexcusable delay that" results in "prejudice to" the opposing party cannot be countenanced. *Id.* (internal quotation marks omitted).

Here, the district court erred by allowing Chevron to mount its attack on the Ecuadorian courts only when an adverse judgment was imminent, and years after the conditions Chevron complains of arose. The district court suggested, based on Chevron's evidence and argument, that Ecuador was not an adequate forum "during the entire period since the Lago Agrio litigation began in 2003." *Chevron Corp. v. Donziger*, 2011 U.S. Dist. LEXIS 22729 at *158. If this is the case, the district court should not have allowed such an untimely reversal of position; it failed even to require any showing of timeliness on Chevron's part.

If the district court has the authority it now claims to permit Chevron to avoid the consequences of its calculated risk and mount a collateral attack on its chosen forum, then the district court had that same authority since 2003. And if it had that same authority earlier, then it was incumbent upon Chevron to raise the issue much earlier, rather than waste millions of dollars in resources in both the United States and Ecuador and undermine judicial efficiency.

Under the district court's perverse approach to transnational litigation, a defendant can seek to oust a U.S. forum in favor of a foreign jurisdiction that may well lack due process and impartiality. For multinational corporations, biased courts more often than not work in their favor, so this is often a good risk for such litigants to take. The defendant can force the plaintiffs to litigate in the foreign forum for years, betting on a win. But if that gamble does not pay off, and a loss is

imminent or realized, the defendant can then return to the U.S. courts and mount its collateral attack.

Allowing this strategy sanctions the misuse of the judicial process and undermines its integrity. The district court's error should be reversed.

C. Even if a litigant can object to recognition of a judgment in the U.S., it has waived the right to appeal to U.S. courts for protection against enforcement elsewhere.

Even if a litigant who prevailed on *forum non conveniens* is subsequently permitted to attack the adequacy of a foreign court system in order to block recognition of a judgment in the United States, that litigant should be held to have waived any protection that U.S. courts might offer against enforcement elsewhere. In this case, Chevron has waived the right to seek the protection of a U.S. court against foreign enforcement proceedings.

If a case is litigated in U.S. courts, the U.S. judicial system will determine whether a judgment issues; consequently, a U.S. court can protect litigants against foreign enforcement proceedings. In such a case there is no danger of enforcement of a judgment resulting from a lack of due process or impartiality. The right to seek an anti-foreign-suit injunction from U.S. courts is a privilege of those who litigate in the United States. In *China Trade & Development Corp. v. M.V. Choon Yong*, 837 F.2d 33 (2d Cir. 1987), the U.S. court considered enjoining foreign litigation only when the underlying matter was being litigated in U.S. courts, *id.* at

34, not where the petitioner had elected to litigate the underlying case in a foreign jurisdiction. This Court subsequently described the *China Trade* test as being "intended to protect *federal judgments*," not to protect litigants who had abandoned the federal courts in the underlying litigation. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 120 (2d Cir. 2007).

If a litigant voluntarily ousts the U.S. forum, the doctrine of waiver applies. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733. Litigants who abandon a U.S. forum likewise abandon the protection that forum might provide against enforcement proceedings in third countries, in the same way that they abandon the rights and privileges of the Federal Rules of Civil Procedure. Even if it can still seek to block recognition of a foreign judgment by U.S. courts, a litigant cannot expect that U.S. courts will be available to protect it against proceedings in third countries after it knowingly and voluntarily abandons the U.S. forum in a successful *forum non conveniens* motion.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to hold that the same standards and evidence govern the determination of adequacy of a foreign forum for recognition of judgments as in the *forum non conveniens* context, and that a litigant who prevails on a *forum non conveniens* motion cannot later challenge the

adequacy of the foreign judicial system, regardless of changed circumstances, or seek the protections of a U.S. court against enforcement proceedings in third countries.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(d) AND FED. R. APP. P. 32(a)(7)(A) and (B)

I certify that, pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(A) and (B), the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and is no more than half the maximum length allowed pursuant to Fed. R. App. P. 32(a)(7)(A) and (B), according to WordPerfect, the word-processor used to create the brief.

DATED: June 9, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 9, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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