11-1150-cv(L),

11-1264-cv(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 R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS HUGO GERARDO CAMACHO NARANJO AND JAVIER PIAGUAJE PAYAGUAJE [REDACTED]

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Defendants.

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TABLE OF ABBREVIATIONS

This Brief uses the following abbreviations:

A	Appendix
DJA	Declaratory Judgment Act
Ecuadorian Court	Provincial Court of Justice of Sucumbios, Ecuador
Judgment	Judgment entered by the Ecuadorian Court in *Aguinda v. Chevron Corp.*, No. 002-2003, on February 14, 2011
Recognition Act	New York's Foreign Country Money-Judgments Recognition Act, N.Y. C.P.L.R. § 5301 *et seq.*
ROE	Republic of Ecuador
S.D.N.Y.	United States District Court for the Southern District of New York
SPA	Special Appendix

Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (the "Ecuadorian Plaintiffs"), two plaintiffs in a related civil action against Chevron Corporation ("Chevron")[1] pending in Lago Agrio, Ecuador (the "Lago Litigation"), submit this Brief in support of their appeal from the injunction entered by the lower court on March 7, 2011 (the "Injunction").

INTRODUCTION

The Injunction entered by the lower court is as extraordinary as it is unprecedented: a global anti-foreign-suit injunction that enjoins *Ecuadorian* citizens from taking any steps toward enforcing a Judgment entered by an *Ecuadorian* court under *Ecuadorian* law for environmental destruction in *Ecuador*. With this Injunction, the lower court purported to seize for itself exclusive worldwide jurisdiction to determine the validity of the still non-final Judgment prior to any effort to enforce that Judgment and without any evidence that recognition or enforcement would be sought in the U.S., let alone New York. This, after the judgment debtor, Chevron, fought for nine years to secure a *forum non conveniens* dismissal from the S.D.N.Y. by praising the fairness and impartiality of the Ecuadorian judicial system, and after this Court affirmed the district court's

[1] Chevron merged with Texaco, Inc. in 2001, changed its name to "ChevronTexaco" and, in 2005, changed its name back to "Chevron Corporation." (*See* A7304.) For ease of reference, the various iterations of the company will be referred to as "Chevron." *ROE v. Chevron Corp.*, 638 F.3d 384, 390 n.3 (2d Cir. 2011); A7299-319.

decision that this case has "everything to do with Ecuador and nothing to do with the United States."[2]

The lower court's decision turns international judgment enforcement on its head. If upheld, the decision threatens not only to transform U.S. courts into the world's judgment police, but also to encourage putative judgment debtors to file premature, preemptive declaratory judgment actions in their forum of choice. Chevron has done exactly that, returning to its chosen forum—the same court it once spurned—in a calculated "race to *res judicata*." The lower court needlessly thrust itself into this foreign dispute and exercised jurisdiction over Chevron's declaratory "non-enforcement" claim even though: (1) a *de novo* appeal of the Judgment is pending before an appellate court in Ecuador; (2) the Ecuadorian Plaintiffs could not have filed suit in the S.D.N.Y. seeking recognition of the Judgment; and (3) there is no indication that the Ecuadorian Plaintiffs will *ever* seek to enforce the Judgment in New York, or anywhere else in the U.S. Compounding the harm is the lower court's decision to rush this claim to trial. Thus, two Ecuadorians who have never set foot in New York are being forced to defend their nation's judicial system against an all-out-assault by one of the

[2] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

world's largest multi-national corporations and also to fend off efforts to re-litigate matters already litigated before the courts in Ecuador.

The international ramifications of the lower court's decision cannot be overstated. The Injunction sends the message that U.S.-based companies—including those that purposefully avail themselves of the benefits of operating in foreign nations—may use the DJA and anti-foreign-suit injunctions to avoid application of foreign laws or judgments they perceive to be unjust. It reflects an utter lack of respect for principles of international comity, depriving each sovereign nation's courts of the ability to decide for itself which foreign judgments are entitled to recognition in that country. The decision also smacks of judicial imperialism—suggesting that U.S. courts must decide such cases to protect U.S. corporations from foreign courts. Unfortunately, foreign courts will respond in kind by adopting similar protectionist policies to the detriment of U.S. citizens and business interests, inevitably leading to less predictability in the resolution of international disputes. There is simply no good reason for U.S. courts to be involved in this foreign dispute.

JURISDICTIONAL STATEMENT

This is an appeal from the district court's March 7, 2011 Injunction. The district court asserted jurisdiction pursuant to 28 U.S.C. § 1332. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). *Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 401 (2d Cir. 2000). The Ecuadorian Plaintiffs timely filed their Notice of Appeal on March 24, 2011. Fed. R. App. P. 4(a). Steven Donziger and the Law Offices of Steven R. Donziger (collectively "Donziger") also timely appealed on April 1, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court misapplied this Court's precedent and failed to properly consider principles of international comity when it entered a preemptive anti-foreign-suit injunction enjoining the Ecuadorian Plaintiffs and others from taking any steps toward enforcing the Judgment, thereby reserving for itself exclusive worldwide jurisdiction to determine the validity of the still non-final Judgment.

3. Whether there is an actual controversy under the DJA even though the Judgment is not final and there is no evidence that the Ecuadorian Plaintiffs will ever seek to enforce the Judgment in New York.

4. Whether the district court erred in exercising jurisdiction over Chevron's declaratory judgment claim.

5. Whether the court erred in holding that Chevron is likely to prove that the Judgment is unenforceable under § 5304 of the Recognition Act.

6. Whether Chevron is estopped from arguing that the Ecuadorian judicial system does not provide due process or impartial tribunals as a result of its prior representations concerning the fairness and adequacy of that same system.

7. Whether the district court erred in holding that Chevron will likely establish that the Ecuadorian Plaintiffs are subject to personal jurisdiction in New York.

8. Whether the district court erred in granting injunctive relief notwithstanding evidence of Chevron's unclean hands.

9. Whether the district court erroneously held that Chevron would suffer irreparable harm without the Injunction.*

10. Whether the Injunction is impermissibly vague and overbroad.*

11. Whether the district court erred by failing to give the Ecuadorian Plaintiffs and Donziger a fair opportunity to oppose entry of the Injunction, failing to hold an evidentiary hearing, and prematurely closing the record prior to entering the Injunction.*

12. Whether this Court should reassign this action to a new district judge.*

* Pursuant to Fed. R. App. P. 28(i), the Ecuadorian Plaintiffs incorporate by reference the arguments as to these points as set forth in the Donziger Brief.

STATEMENT OF THE CASE

On February 1, 2011, two weeks before the Ecuadorian Court entered Judgment on the merits of this decades-long saga, Chevron filed suit in the S.D.N.Y. asserting numerous federal and state law causes of action against more than fifty defendants, including the Ecuadorian Plaintiffs and certain of their counsel. (A67.) Count Nine of the Complaint invokes the DJA and demands, *inter alia*, (i) a declaration that any Ecuadorian judgment is unenforceable *under New York law*, and (ii) a permanent anti-foreign-suit injunction prohibiting any attempt to enforce the anticipated Ecuadorian judgment *worldwide*. (A219.) Chevron immediately applied by *ex parte* order to show cause for temporary restraints and a preliminary injunction prohibiting the Ecuadorian Plaintiffs and others from taking steps to "advance[]" enforcement of any judgment entered in Ecuador. (A227.) On February 8, the district court entered Chevron's requested temporary restraints and ordered that opposition to the injunction be submitted by February 11. (A5238.) The Ecuadorian Court rendered Judgment on February 14. (A7294-481.) The district court entered the Injunction on March 7. (SPA1.) The Ecuadorian Plaintiffs timely appealed. (A8820A.) On April 15, the district court granted Chevron's motion to bifurcate Count Nine and set an aggressive schedule requiring trial to begin on November 14.[3] (A8901-24.) On April 22, the

[3] The district court later severed the previously bifurcated Count Nine.

Ecuadorian Plaintiffs moved to recuse the district judge under 28 U.S.C. § 455(a). (A8930.) The court denied that request. (A9627.)

On April 22, the Ecuadorian Plaintiffs moved before this Court for a stay of proceedings and a partial stay of the Injunction pending appeal, to expedite the appeal, and to file an oversized brief. On May 12, this Court entered an Order: (1) granting a partial stay of the Injunction, "insofar as the preliminary injunction restrains activities other than commencing, prosecuting, or receiving benefit from recognition, enforcement, or pre-judgment seizure or attachment proceedings"; (2) expediting the appeal; (3) granting permission to file an oversized brief; and (4) declining to stay proceedings without prejudice to renew the request to the merits panel.

STATEMENT OF FACTS

I. THE *AGUINDA* LITIGATION: CHEVRON FIGHTS TO LITIGATE IN ECUADOR

From 1964 to 1992, Chevron owned an interest in an approximately 1,500 square-mile concession in Ecuador containing numerous oil fields and hundreds of well-sites (the "Concession").[4] (A7294, A8277.) During that time, Chevron carved many hundreds of unlined waste pits into the jungle floor and filled them with toxic drilling muds and other waste, and deliberately discharged billions of gallons of toxic production water directly into the surface waters of the Amazon basin—four million gallons *per day* at its height. (A8283-85, A8347-48.) Internal Chevron memoranda reveal that the company deliberately eschewed modern waste management practices employed in the U.S. in favor of cheaper, outdated, and dangerous methods, and adopted a policy of concealing spills from the public and destroying records of environmental incidents. (A8294-96.) Chevron's reckless "pump and dump" operations violated Ecuadorian law and left poison and pollution across a large swath of the Amazon. (A8282-94.) Toxic, and in many cases carcinogenic, chemicals continue to lace the waters that thousands of indigenous persons and farmers depend on for every facet of their lives. (A7399-7404, A8282-94.) In 1993, the affected communities of the Ecuadorian Amazon

[4] The Concession was owned by a consortium, but between 1964 and June 1990, Chevron was the *sole operator*, and was responsible for the "ways and means" of oil extraction. (A7294, A8277.)

brought suit against Chevron in the S.D.N.Y. (the "*Aguinda*" litigation) seeking money damages and "extensive equitable relief to redress contamination of the water supplies and environment."[5]

A. Chevron Tries to Derail the *Aguinda* Litigation

In May 1995, after *Aguinda* was filed and the possibility of liability became apparent, Chevron launched the first of its many efforts to derail the *Aguinda* litigation. Relying upon its ties to and influence with Ecuadorian government officials, Chevron entered into an agreement with the ROE on terms unconscionably favorable to Chevron. (A7746-59, A7761-67.) Chevron agreed to perform certain environmental remediation work in the Concession in exchange for a release of liability from the ROE. (A8328-37, A4721.)

But the remediation was a sham. Before the remediation contract was even signed, 477 of Chevron's more than 900 unlined waste pits were covered or otherwise hidden, and thereby were excluded from the remediation. (A8333-37.) Ultimately, Chevron performed "remediation" at only a fraction of the affected area—162 pits and six spill areas. (A8333-37.) And that remediation was conducted according to wholly inadequate standards. (A8328-34.) The 5,000 parts per million of total petroleum hydrocarbons ("TPH") standard for soil cleanup contemplated in the contracts was *50 times less* protective than the

[5] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

standard adopted by the majority of U.S. states. (A8328.) To procure a release from the ROE, Chevron claimed that it "completely remediated" the pits it allegedly cleaned up, but samples collected at 54 "completely remediated" pits inspected during the trial revealed that 45 still contain illegal levels of TPH, some as high as *30 times* the legal limit and all but two, more than *twice* the legal limit. (A8334-37.) A subsequent Ecuadorian administration brought charges against a number of former government officials for their roles in this sham remediation and release.[6] (A8137.)

The *Aguinda* Plaintiffs were not a party to Chevron's agreement with the ROE and the plain language of that agreement unequivocally released only claims held by the ROE. (A8087.) Nevertheless, Chevron tried to use the agreement and sham remediation to short-circuit the *Aguinda* litigation. Chevron argued to the S.D.N.Y. "that in light of the settlement between [Chevron] and Ecuador, th[e] Court should dismiss the *Aguinda* Complaint in its entirety." (A9599.) The S.D.N.Y. declined to dismiss on that specious premise.[7] (A9601.)

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[6] The lower court suggested that these charges are part of a conspiracy against Chevron (SPA20-21, SPA43-48), but, as the Third Circuit recently noted, there was nothing nefarious about reporting this alleged misconduct to the Ecuadorian Attorney General. *In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257, at *15 (3d Cir. May 25, 2011).

[7] Chevron made the same argument to the Ecuadorian Court and lost again. *See infra* p. 31. The argument was also rejected by another judge in the S.D.N.Y. in a related case between Chevron and the ROE. *ROE v. ChevronTexaco Corp.*, 376 F.

B. Chevron Secures a *Forum Non Conveniens* Dismissal

For nine years, Chevron argued that the S.D.N.Y. should dismiss the *Aguinda* action in favor of litigating in Ecuador. The centerpiece of that effort was the company's lauding of the fairness and impartiality of the Ecuadorian judicial system—the same system it now claims is corrupt and fails to provide due process. (A4431, A4489-505, A4520-40, A4596.) Chevron knew that Ecuador did not have a perfect legal system, but believed it could use its influence to manipulate any flaws to its benefit—privately meeting with Ecuadorian government officials to assure that the case would be quashed when re-filed in Ecuador.[8] (A7665-66, A7760-67.)

Chevron's praise of the Ecuadorian judicial system resulted in a *forum non conveniens* dismissal from the S.D.N.Y.,[9] but this Court held that dismissal was inappropriate unless Chevron consented to the jurisdiction of the Ecuadorian courts.[10] On remand, Chevron promised to submit to the jurisdiction of the Ecuadorian courts and satisfy any Ecuadorian judgment, subject only to a

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Supp. 2d 334, 374 (S.D.N.Y. 2005). The lower court is apparently the only court to suggest that the release likely precludes the Ecuadorian Plaintiffs' claims. (SPA13.)

[8] As part of its effort, a Texaco executive ghostwrote at least one letter from the Ecuadorian embassy to the U.S. Department of State urging dismissal of the *Aguinda* litigation in the U.S. (A7746.)

[9] *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

[10] *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998).

unilateral reservation that it may invoke the defenses in § 5304 of the Recognition Act. (*See*, *e.g.*, A4614.) The S.D.N.Y. raised additional concerns regarding the impartiality of Ecuador's courts,[11] but Chevron succeeded in assuaging the court's concerns, leading again to dismissal on *forum non conveniens* grounds.[12] This Court affirmed.[13] But phase two of Chevron's plan was unsuccessful: Chevron lost its grip on the Ecuadorian government and was unable to finish off the case once it was re-filed in Ecuador—but not for lack of trying.

II. THE LAGO LITIGATION

Following the *forum non conveniens* dismissal, Chevron likely did not believe it would ever have to litigate the case on the merits. But in 2003, after dismissal of *Aguinda*, the Amazon communities re-filed their claims in the Ecuadorian Court. (A1934.) The case was brought as a "popular action," akin to a class action.[14] (A1934, A8351.) Faced with the prospect of litigating a losing case

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[11] *Aguinda v. Texaco, Inc.*, No. 93-cv-5727, 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000).

[12] *Aguinda*, 142 F. Supp. 2d at 554.

[13] *Aguinda*, 303 F.3d at 476.

[14] The district court incorrectly concluded that the Ecuadorian Plaintiffs could not have brought their claims against Chevron in Ecuador absent the passage of Ecuador's Environmental Management Law ("EML") in 1999, and that the Ecuadorian Plaintiffs' lawyers engaged in improper behavior by lobbying for passage of that law. (SPA16.) Neither assertion is correct. Not only has the "popular action" been a part of Ecuador's Civil Code for many years, but the EML was passed before *Aguinda* was dismissed. Thus, Chevron was aware of the EML and its potential impact while it was arguing that Ecuador was the preferred forum.

on the merits, the record shows that Chevron immediately turned its sights toward scuttling the case at all costs and laying the groundwork for collateral attacks. *See infra* pp. 17-26. For example, Chevron immediately broke its promise and contested jurisdiction in Ecuador once it was safely free from this Court.[15] (A8379.) But despite Chevron's efforts to turn the litigation into a farce, the evidentiary process in Ecuador prevailed—after eight years, a 215,000-page court record, and hundreds of well-site and waste-pit inspections and expert reports, the scope of Chevron's malfeasance became clear.

A. The Litigation Uncovers Overwhelming Evidence of Chevron's Liability

At the heart of the Lago Litigation was a series of approximately 45 "judicial site inspections"—a civil law evidentiary practice whereby, under the supervision of the judge (who joins the parties in the field and presides over the inspection)—the parties' experts collected soil and water samples at former Chevron well-sites and operating stations, attorneys for both sides would make public arguments, and, on occasion, testimonial evidence would be taken. (*See generally* A7294, A8272.)

Indeed, Chevron argued vehemently in *Aguinda* that the Ecuadorian Plaintiffs' claims were cognizable in Ecuador, and thus, there would be no harm in transferring the case there. (A4433.)

[15] As recently observed by this Court: "[I]n seeking affirmance of the district court's *forum non conveniens* dismissal, lawyers from ChevronTexaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint. In so doing, ChevronTexaco bound itself to those concessions." *ROE*, 638 F.3d at 390 n.3.

Soil and water samples from inspections revealed exceedances of at least fifteen different potentially toxic substances. (A8297.) Levels of contamination of one or more toxic substances above Ecuadorian standards (generally more lax than United States standards) were found at *every inspected site*, with exceedances often many multiples above the legal limit. (A8297.) The findings of the parties' experts were memorialized in hundreds of expert reports submitted in connection with particular site inspections. (A8391.)

Chevron's own evidence proved its culpability. Two of Chevron's environmental auditing firms documented Chevron's substandard operation in Ecuador. (A8288-90, A8360.) Significant toxic contamination was found by Chevron's own experts at wells operated solely by Chevron. For example, at "Well Sacha 94," Chevron's own technical expert reported soil contamination several times higher than the Ecuadorian limit. (A8308.) Incredibly, a number of these pits were certified as "completely remediated" by Chevron following its sham cleanup in the mid-1990s. (A8317.)

The evidence also severely undercut Chevron's oft-repeated refrain throughout the Lago Litigation (and in U.S. courts) that the pollution is all Petroecuador's fault.[16] (A7416-18.) Inspection data revealed that, of the

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[16] Separate and apart from what the data reveals, Chevron's argument is irrelevant due to principles of joint and several liability. (A7416.)

approximately 196 total pits examined during the trial, including pits visited during the judicial site inspections and those visited by court-appointed experts, 46 were at sites operated by Chevron *exclusively*—Petroecuador never operated there. (A7416-18.) Samples taken at 42 of these pits—91% of the pits operated *exclusively* by Chevron—revealed substantial contamination. (A8316-17.) At five of these pits, contamination was identified by Chevron's *own* experts. (A8316-17.)

The Ecuadorian Court also was presented with reports from court-appointed experts and outside studies commissioned by non-participants in the trial revealing Chevron's culpability. (A8321.) For example, the investigation of court-appointed expert Dr. Marcelo Muñoz revealed exceedances at each site he tested. (A8323.) Another court-appointed expert, José Ignacio Pilamunga, inspected a well drilled and operated exclusively by Chevron from 1970 to 1990 and concluded that the three pits at the well were not adequately remediated. (A8323.) The Ecuadorian Court also received a great deal of testimony, including eyewitness testimony regarding Chevron's reckless operations. (A8291-93.)

B. Chevron Obstructs the Collection of Scientific Evidence

Chevron obstructed the evidence-gathering process in Ecuador by raising numerous pretextual challenges to halt site inspections, and later objecting to closure of site inspections to delay resolution of the case. (A7779, A7786-87, A7801-12.) Chevron also engaged in misconduct and intimidation to thwart the

inspection of a particular separation station near Lago Agrio. (A7668.) Due to the large volume of oil processed and waste discharged at this station, this was to be one of the most critical site inspections. (A7668.) Faced with the likelihood that its extensive contamination would be exposed publicly, Chevron operatives persuaded a military official to prepare a false report identifying (non-existent) security threats to shut down the inspection and delay the trial. (A7668.) That report was delivered to the court on the eve of the inspection and resulted in its cancellation. (A7668.) Chevron initially denied involvement, but a government investigation confirmed Chevron's role. (A7161-80, A7669.)

C. Chevron's Attacks on the Ecuadorian Court

From the moment Chevron realized it could not make the Lago Litigation disappear through political influence, Chevron began making frontal attacks on the Ecuadorian judiciary as part of a scheme to frustrate the trial and enforcement.

1. Chevron Floods the Ecuadorian Court with Repetitive and Frivolous Motions

To create the illusion of a denial of due process, Chevron systematically abused Ecuadorian procedure by flooding the court with rapid-fire filings of multiple versions of essentially identical motions within *minutes* of each other, often requesting instantaneous rulings or interim appellate relief. (A7680-81, A7947-48, A7956-59.) For example, on one occasion, Chevron filed *eighteen* separate motions requesting relief relating to the same order all within *thirty*

minutes of the court's 6:00 p.m. closing time. (A7681.) The only reason for this vexatious conduct—for which the Ecuadorian Court admonished and sanctioned Chevron (A7477-79)[17]—was to clutter the record and paralyze a court bound by law to formally accept filings into the record within a short, specified time period.[18] (A7681-82.)

2. *Two Chevron Operatives Attempt to Entrap the Judge and Force His Recusal*

On August 31, 2009, Chevron publicly trumpeted the company's release of clandestine video recordings purportedly "reveal[ing] a $3 million bribery scheme implicating" the judge then presiding over the Lago Litigation. (A10144.) Chevron incorrectly represented that the two men, an Ecuadorian, Diego Borja, and an "American businessman," Wayne Hansen, were environmental remediation contractors "pursuing business opportunities in Ecuador" who had happened onto "serious judicial misconduct." (A7676, A10144.) Chevron claimed that the videos, obtained via pen camera, show that the two men were able to coax the judge into revealing that he would rule in favor of the Ecuadorian Plaintiffs.

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[17] *See also* Erin Fuchs, *2 Chevron Attys Sanctioned In $27B Amazon Fight*, http://www.law360.com/articles/205378/2-chevron-attys-sanctioned-in-27b-amazon-fight.

[18] Chevron's strategy ultimately led to the September 2010 recusal of one judge on technical grounds because he was either unable or unwilling to keep up with Chevron's bogus motions. (A7682.)

(A7676, A10144.) The judge denied any wrongdoing, but recused himself to eliminate any appearance of impropriety. (A7676-77.)

Neither Borja nor Hansen were environmental remediation contractors. (A10131, A10147.) At the time of the recordings, Borja was under contract with Chevron, charged with handling litigation-related laboratory samples and moving Chevron laboratory equipment. (A7679, A9791, A10131.) Hansen was a convicted felon and drug-trafficker. (A10147.)

Between August and October of 2009, a childhood friend of Borja recorded conversations in which Borja conceded that the bribery scheme was illusory and that no bribe was offered to Judge Núñez. (A7677, A7696-709.) Borja also asserted that Chevron, among other things, "cooked" the evidence in the Lago Litigation, used labs that were supposedly independent but actually belonged to Chevron, and generally engaged in misconduct that, if publicly revealed, would cause the courts to "close [Chevron] down." (A7679, A7696-709.) Finally, Borja made it very clear that if Chevron did not take good care of him, he would reveal the company's misdeeds to the world. (A7701.)

Chevron apparently took Borja's threats seriously. Borja was plucked from Ecuador shortly after the recordings were made public, and set up in an all-expense paid luxury villa near Chevron's headquarters. (A10145.)

Chevron's many efforts to keep Borja in its good graces seem to have paid off. In 2010, under the supervision of Chevron's counsel, Borja signed two declarations ostensibly renouncing his previously-recorded statements. (A9781, A9791.)

Hansen expressed frustration that he was not receiving the same treatment as Borja—and he also threatened to reveal information damaging to Chevron if the company did not improve his situation. (A9686.) It is unclear whether Hansen's wish was granted, but this much is clear: the ROE filed a 28 U.S.C. § 1782 discovery application against Hansen in his home state of California on September 14, 2010; but by October 2010, Hansen was living a life of leisure in Peru. (A9841.)

3. Chevron Threatens the Judge with Criminal Sanctions

Chevron's assault on the Ecuadorian Court came to a head in December 2010. While the company had long threatened the court that it must comply with Chevron's demands or be deemed in violation of the company's right to due

process, in a filing on December 20, 2010, Chevron went so far as to threaten Ecuadorian Judge Zambrano with *criminal liability* if the company's demands were not met. (A7976.) In another submission filed two days later, Chevron expanded on its earlier threat and declared that Judge Zambrano would be *imprisoned* if he did not comply. (A8012.)

III. CHEVRON TURNS BACK TO THE UNITED STATES

With the evidence of its environmental contamination inescapable, Chevron adopted a strategy to collaterally attack the Lago Litigation in as many fora as possible. It began by filing an AAA arbitration proceeding in an effort to strong-arm the ROE by offering to dismiss the arbitration in exchange for the government's "intervention" in the Lago Litigation; the action was ultimately stayed by the S.D.N.Y.[19] The company also unsuccessfully lobbied Congress to cancel U.S. trade preferences extended to Ecuador under the Andean Trade Preferences Act to force the ROE to quash the Lago Litigation.[20] As one U.S. Congresswoman stated: "Chevron has engaged in a lobbying effort that *looks like little more than extortion* …. Apparently, if it can't get the outcome it wants from

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[19] *ROE v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 469 (S.D.N.Y. 2007).

[20] Michael Isikoff, *Chevron hires lobbyists to squeeze Ecuador in toxic-dumping case. What an Obama win could mean*, Newsweek, July 26, 2008, *available at* http://www.newsweek.com/2008/07/25/a-16-billion-problem.html; *Members of Congress Urge USTR to Ignore Chevron Petition on Ecuador Legal Case*, *available at* http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=490&Itemid=32.

the Ecuadorian court system, Chevron will use the U.S. government to deny trade benefits until Ecuador cries uncle."[21] Similarly, then-Senator Barack Obama stated that "the 30,000 indigenous residents of Ecuador deserve their day in court," and that Chevron should not be permitted "to interfere with a case involving Chevron *that is under consideration by the Ecuadorian judiciary*, particularly one involving environmental, health and human rights issues that have regional importance."[22] (A7740 (emphasis added).) Thereafter, Chevron initiated an arbitration against the ROE under the U.S.-Ecuador Bilateral Investment Treaty ("BIT") requesting that a private arbitration panel order the executive branch of the ROE to compel the judiciary to dismiss the Lago Litigation.[23] (*See* A4669, A4688.) Then, in late 2009, Chevron initiated its next set of collateral attacks designed to lead up to its final strike—this application for declaratory and injunctive relief.

A. Chevron Invokes 28 U.S.C. § 1782 to Collaterally Attack the Lago Litigation

Beginning in December 2009, Chevron embarked on a mission to taint the Lago Litigation with the specter of fraud, pillory the Ecuadorian Plaintiffs'

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[21] *Id.* (emphasis added).

[22] President Obama's words are equally applicable now—the Lago Litigation remains under consideration by the Ecuadorian judiciary, subject to *de novo* review by an appellate panel. (*See infra* p. 34.)

[23] Ironically, Chevron's arbitration claim seeks to compel Ecuador's executive branch to interfere with the trial, yet the thrust of Chevron's declaratory judgment claim is that Ecuador's judiciary is not sufficiently independent from political influence. (A216.)

counsel, and scare off or incapacitate anyone else who would assist the Ecuadorian Plaintiffs.

1. Chevron Capitalizes on U.S. Courts' Unfamiliarity with Ecuadorian Procedure to Undermine an Expert Report Favorable to the Ecuadorian Plaintiffs

Using 28 U.S.C. § 1782, a statute permitting discovery "in aid" of foreign litigation, Chevron aimed to expose purported fraud in the relationship between the Ecuadorian Plaintiffs' legal team and an environmental expert named Richard Cabrera appointed by the Ecuadorian Court to provide a report on the economic value of damages (the "Cabrera Report") (*See, e.g.*, A4752)—one of well over 100 expert reports submitted to the Ecuadorian Court throughout the Lago Litigation. (*See, e.g.,* A7387-92.)

Chevron initiated approximately twenty § 1782 discovery proceedings in sixteen different federal districts, mostly targeting the Ecuadorian Plaintiffs' environmental consultants and current and former legal team.[24] Chevron obtained an unprecedented volume of discovery in those proceedings, while straining the Ecuadorian Plaintiffs' resources by forcing them to simultaneously litigate on an emergent basis in federal districts across the country. (*See*, *e.g.*, A4924.) As early as February 2010, Chevron claimed that an Ecuadorian judgment was imminent,

[24] The Third Circuit recently described Chevron's exploitation of § 1782 as "unique in the annals of American judicial history." *In re Application of Chevron Corp.*, 2011 WL 2023257, at *3 n.7.

and that if courts did not act immediately, all would be lost.[25] The Ecuadorian Court did not render judgment for a full year afterward and, to this day, Chevron continues to take discovery in aid of its pending *de novo* appeal in Ecuador. *See generally*, *In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257 (3d Cir. May 25, 2011).

Chevron argued that the "crime/fraud exception" overcame any privilege otherwise attaching to the documents sought based on the Ecuadorian Plaintiffs' legal team's *ex parte* contacts and coordination with Cabrera. (A3617, A3630, A3642.) A minority of courts agreed (A3617, A3630, A3642), but a great many more declined to adopt Chevron's "fraud" narrative, with some explicitly recognizing that it would be improper for a U.S. court to adjudicate issues of "fraud" that are squarely before the Ecuadorian Court.[26]

Chevron's § 1782 assault was designed to isolate the Ecuadorian Plaintiffs' contacts with Cabrera from the context of Ecuadorian law and procedure. Chevron has identified no provision of the Ecuadorian Civil Code prohibiting a party from

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[25] *See In re Application of Chevron Corp.*, No. 1:10-mi-00076, RJN Ex. C, at 9 (N.D. Ga. Feb. 19, 2010).

[26] *See, e.g.*, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047, 2010 WL 3923092, at *11 (D. Colo. Oct. 1, 2010); *Chevron Corp. v. Quarles*, No. 3:10-cv-00686, RJN Ex. D at 2–3 (M.D. Tenn. Sept. 21, 2010); *In re Application of Chevron Corp.*, No. 3:10-mc-30022-MAP, 2010 WL 5437234, at *11 (D. Mass. Dec. 22, 2010); *see also In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257 (3d Cir. May 25, 2011).

communicating *ex parte* with a court-appointed expert, formulating a work plan for the expert, or drafting materials for that expert's adoption as his own. Distinguished Ecuadorian law professors have also attested that nothing in Ecuadorian law prevents a party from meeting with a court-appointed expert *ex parte*, planning the work the expert will perform, and drafting proposed findings for the expert. (A8056-79.)

Indeed, Chevron's technical consultant met with Dr. Marcelo Muñoz, a "neutral," court-appointed expert similar to Cabrera, at a hotel for a "technical planning meeting" to plan the expert report.[27] (A7687-88, 8081, 8133.) This meeting took place *before* Muñoz was formally appointed by the Ecuadorian Court.[28] (A7688, A8081.) Dr. Muñoz also stated that his work plan was "*solicited and approved"* by Chevron's technical consultant. (A8081 (emphasis added).)

Nevertheless, Chevron took advantage of American courts' unfamiliarity with Ecuadorian procedure and the Cabrera Report became the foundation upon which Chevron brought the case back to the U.S., the basis for obtaining the *Crude* outtakes, for attacking the Ecuadorian Plaintiffs' counsel, and for demanding

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[27] Chevron's planning meeting with Dr. Muñoz only became public because in October 2010, Dr. Muñoz complained to the Ecuadorian Court that he had not received payment from Chevron as required under Ecuadorian law because Chevron requested his particular expert function.

[28] Chevron has made much of the fact that the Ecuadorian Plaintiffs' team conducted a planning meeting with Cabrera prior to his appointment. (A67.)

production of the entirety of Donziger's eighteen-year case file, discussed *infra* at p.28. Chevron's unprecedented intrusion into *every aspect* of the Ecuadorian Plaintiffs' legal strategy—right up to the present day—was an ill-gotten gain made possible by Chevron's failure to inform any U.S. court that its own team was meeting with neutral, court-appointed experts in Ecuador as well. Chevron's cries of "fraud" are ultimately irrelevant, however, because the Ecuadorian Court *granted* Chevron's request to exclude the Cabrera report, and that of another expert, Charles William Calmbacher . (A7343; *see infra* p. 32.)

2. *Chevron Struggles to Taint the Ecuadorian Plaintiffs' Supplemental Reports*

By July 2010, Chevron had submitted to the Ecuadorian Court scores of documents obtained through § 1782 proceedings. (*See*, *e.g.*, 7341-45.) Thus, the court was fully aware of the Ecuadorian Plaintiffs' legal team's interactions with Cabrera. Eager to put the Cabrera controversy to rest, the Ecuadorian Plaintiffs petitioned the Ecuadorian Court to allow *both* parties to submit additional information regarding damages. (A4982.) The Ecuadorian Court granted that request and invited the parties to file supplemental damages submissions. (A5000.) The Ecuadorian Court also explicitly noted that it was not obligated to consider the findings set forth in the Cabrera Report. (A5000.) Both parties filed supplemental submissions appending reports prepared by American experts. (A5006, A5044.)

Desperate to label these reports as fraudulent, Chevron quickly filed multiple § 1782 applications seeking discovery from the experts that prepared them. In each of the six § 1782 proceedings in five separate district courts targeting the experts, Chevron argued that the crime/fraud exception should eviscerate any privilege. (*See, e.g.*, A5055.) But *not a single* one of these five courts found that anything remotely fraudulent had occurred with respect to the Ecuadorian Plaintiffs' supplemental damages submission, even where the documents were reviewed *in camera*. (*See, e.g.*, A9537, A9563, A9588.)

3. Prior Proceedings Before this District Judge

Prior to the instant action, Chevron first appeared before the lower court in two of the many § 1782 actions it initiated. The first of these was the *Berlinger* action, where Chevron sought and obtained hundreds of hours of video outtakes from a 2009 film about the Lago Litigation entitled *Crude: The Real Price of Oil*.[29] A portion of these outtakes showed contact between the Ecuadorian Plaintiffs' legal team and Cabrera. (A9254.) The second action before this district judge was the *Donziger* action, which targeted attorney Steven Donziger, who has represented the Ecuadorian Plaintiffs since their case was originally filed in New

[29] *Chevron Corp. v. Berlinger*, 629 F.3d 297, 304 (2d Cir. 2011).

York in 1993.[30] Chevron requested production of essentially Donziger's entire eighteen-year case file.

Chevron's lawyers used carefully selected out-of-context snippets and certain colorful statements by Donziger from *Crude* outtakes they obtained in *Berlinger* to portray Donziger as an extortionist and the Lago Litigation as a scheme. (*See* A673-74.) The Ecuadorian Plaintiffs and Donziger pleaded with the court not to jump to conclusions as to the merits of the Lago Litigation based upon Chevron's highly-edited video outtakes and without the full record before the Ecuadorian Court. (A5087-88, A5091-92.) But the district court did so anyway—accepting Chevron's narrative and condemning the Lago Litigation in the context of a collateral discovery proceeding. (A9310-15.) Ultimately, however, the district court's condemnation of Donziger and the Lago Litigation was gratuitous because the district court did not reach the crime/fraud exception. (A9117.) Instead, the court made the extraordinary determination that Donziger's failure to submit a privilege log concurrently with his motion to quash resulted in a wholesale waiver of the privilege attaching to the Ecuadorian Plaintiffs eighteen-year case file. (A9123.)

This Court upheld the district court's decision, but it did so because "the *severity of the consequences* imposed by the District Court in this case are justified

[30] *In re Application of Chevron Corp.*, No. 10-mc-0002(LAK) (S.D.N.Y.).

almost entirely by the urgency of petitioners' need for the discovery in light of impending criminal proceedings in Ecuador."[31] But this Court stated that, if the urgency related to the criminal proceedings dissipated, the district court should "stay the enforcement of the subpoenas *sua sponte* to permit a more probing (and time-consuming) review of the parties' various arguments with respect to privilege and relevance."[32] As is almost always the case, time proved Chevron's frantic cries of urgency to be overstated: the criminal proceeding did not take place until May 2011, and the Judgment was not rendered in Ecuador until February 14, 2011.[33] (A7294.) Nevertheless, the district court never engaged in a more careful analysis of the Ecuadorian Plaintiffs' privilege claims.

As a result, Donziger was compelled to produce his entire litigation file and sit for *fourteen days* of deposition testimony. (A8982-83.) The district court ordered Donziger's computers to be searched and "imaged" by Chevron's technical consultants and his email accounts and phones to be probed.[34] Donziger's production and testimony is rife with attorney work product, including

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[31] *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393, 395 (2d Cir. 2010) (emphasis added).

[32] *Id*. at 396.

[33] *Chevron Corp. v. Donziger*, No. 10-cv-0691(LAK), RJN Ex. E at 15 (S.D.N.Y. May 2, 2011).

[34] *In re Application of Chevron Corp.*, No. 10-mc-00002(LAK), RJN Ex. F (S.D.N.Y. Jan. 21, 2011).

confidential strategy memoranda and emails among co-counsel up to the present day, that have nothing to do with the alleged "fraud" regarding the Cabrera Report that served as the basis for Chevron's § 1782 application.

B. Chevron's Promise to Fight "Until Hell Freezes Over" Compels the Ecuadorian Plaintiffs to Consider a Multi-Faceted Enforcement Strategy

One of the confidential documents obtained by Chevron in *Donziger* was a strategy memorandum entitled *Invictus*, prepared by counsel approximately one year ago. (A3714.) The *Invictus* memorandum provides a broad and preliminary overview of lawful enforcement options the Ecuadorian Plaintiffs might choose to reach a favorable resolution if an enforceable judgment was issued, with the goal of identifying jurisdictions that might offer more streamlined enforcement proceedings without requiring significant re-litigation of the merits of this eighteen-year litigation. (A3733.) In that context, the memorandum notes that "non-U.S. jurisdictions may, for a variety of reasons, offer the prospect of a more expedient resolution than could be obtained in the U.S." (A3736.) The *Invictus* memorandum draws no final conclusions on the strategy for or location of enforcement proceedings. To the contrary, it suggests that additional research, analysis, and discussion are necessary. (*See, e.g.*, A3733-35.) Viewed completely and in context, *Invictus* is a preliminary think-piece discussing options for securing and enforcing a judgment against an adversary that has: (1) litigated aggressively

in multiple tribunals for eighteen years; (2) pulled all of its assets from the country in which the case is proceeding; and (3) vowed to fight "until hell freezes over" and then to "fight it out on the ice" (A8119.)

IV. THE ECUADORIAN COURT ISSUES ITS 188-PAGE JUDGMENT

On February 14, 2011, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Ecuadorian Court, rendered a comprehensive, 188-page opinion and judgment finding Chevron liable. (A7294.) The court held that the essence of Chevron's conduct itself was essentially undisputed and the extent of the contamination was well-documented in the voluminous court record. (A7355-59, A7371-75, A7406, A7452-68.) The court noted oil industry publications in the record demonstrating that the industry knew the hazards of production water and unlined pits before Chevron commenced operations in Ecuador and that Chevron held patents for safer technology than it used in Ecuador. (A7374-75, A7455-56.) Thus, the damage was "not only foreseeable, but also avoidable" because Chevron had the means to employ safer methods. (A7455-56.)

The court gave substantial consideration to, but ultimately rejected, Chevron's defenses that: (1) Chevron could not be held liable for actions of Texaco; (2) the ROE's release barred the Ecuadorian Plaintiffs' claims; and (3) the existence of a joint tortfeasor, Petroecuador, absolved Chevron from liability. (A7300-16, A7323-27, A7416.) Judge Zambrano also pragmatically addressed the

parties' allegations of misconduct. Without opining on the merits of Chevron's various claims of fraud (and the reams of "evidence" submitted from its § 1782 actions), the court *granted* Chevron's request and *excluded* both the Cabrera and Calmbacher Reports. (A7341-45.) It also rejected Chevron's assertions that the Ecuadorian Plaintiffs' Supplemental Expert Submissions were somehow "tainted" merely because they cited the Cabrera Report. (A7350-51.) The court observed that the Ecuadorian Plaintiffs had not attempted to pass these reports off as anything more than the work of experts *hired by the Plaintiffs* and that the reports would not be treated as "neutral" expert reports under Ecuadorian law. (A7351.) The court also noted that to the extent the experts relied on the Cabrera Report, it was fully disclosed and cited. (A7351.) But the court had little use for these submissions in any event.[35] (A7350-51.) Only two of the reports received any substantive mention and the court's reliance on these reports was *de minimis*. (A7473-74.) The court noted that it was disturbed by statements made by Donziger in the *Crude* outtakes and that Borja's activities and the events surrounding the cancelled site inspection were improper; but the court ultimately concluded that these and the parties' other assertions of misconduct had no bearing on the outcome of the case. (A7344-48.)

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[35] The court rejected the demand by the Ecuadorian Plaintiffs for damages for excess cancer deaths and unjust enrichment, the two highest-value categories opined on in these submissions. (A7477-79.)

After careful analysis, the court awarded approximately $8.6 billion in compensatory damages. (A7294.) Most of this figure relates to the projected cost of soil and groundwater remediation, the delivery of potable water to the region, the need for enhanced healthcare in the region, and the damage to the Amazon communities' way of life and cultural traditions engendered by the decimation of the land and water upon which they depend. (A7440-46, A7476.) The Ecuadorian Court also noted Chevron's unrelenting efforts to "prevent the normal progress of the discovery process or prolong it indefinitely," its attacks on the court, and its shocking disrespect for the judicial process. (A7329.) In light of Chevron's egregious procedural and substantive misconduct and the need to dissuade Chevron and others from similar misconduct in the future, the court assessed punitive damages in the amount of 100% of the remedial damages. (A7479.) But the court gave Chevron the option to avoid punitive damages by issuing a public apology—"a symbolic measure of moral redress" recognized by the Inter-American Court of Human Rights. (A7479.) Chevron refused.

The court ordered the Ecuadorian Plaintiffs' representatives to establish a trust for the damages. (A7479-80.) The trust's default beneficiary is the Amazon Defense Front ("ADF"), the NGO representing the Ecuadorian Plaintiffs' interests, unless other persons are designated by the ADF. (A7479-80.) The Judgment also directed that the "entire endowment shall be earmarked to cover the costs needed

for contracting the persons in charge of carrying out the remediation measures contemplated in [the opinion], and the legal and administrative expenses of the trust." (A7479-80.) These unambiguous directions contradict Chevron's repeated assertion (adopted by the district court) that the Ecuadorian Plaintiffs will not benefit from any award because the ROE will misappropriate the award. (SPA57-58; *see also* A67.) The Judgment expressly states that the ROE "has no part in this suit" and "cannot benefit from it." (A7324.)

Both parties appealed.[36] The Provincial Court of Sucumbios accepted the parties' appellate petitions in March and a panel of three judges is assigned to hear the appeal.[37] The three-judge panel will consider the 215,000-page record *de novo* along with any new evidence the parties submit.[38] The Judgment is not yet enforceable under Ecuadorian law. (A6157.)

V. CHEVRON RETURNS TO THE S.D.N.Y. TO EXTINGUISH THE JUDGMENT

On February 1, 2011, two weeks before the Ecuadorian Court entered the Judgment, Chevron brought this eighteen-year saga full circle—returning to the

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[36] Before appealing, Chevron sought clarification from the trial court on several points. (A8765.) The Ecuadorian Court responded on March 4, 2011. (*Id.*)

[37] *See* Mercedes Alvaro, *Chevron Appeals to Proceed in Ecuador,* Wall St. J., Mar. 16, 2011, *available at* http://online.wsj.com/article/SB10001424052748703899704576204953851810290.html.

[38] Mercedes Alvaro, *New Judges Appointed in Chevron Case*, Wall St. J., Mar. 28, 2011, *available at* http://online.wsj.com/article/SB10001424052748704559904576229082712782822.html.

forum it once rejected in an effort to preemptively extinguish the possibility of judgment enforcement. Chevron's 155-page Complaint alleged that the Lago Litigation was an elaborate scheme to extort money from Chevron. (A101-45.) It sought damages under RICO and various state law tort claims. (A191-218.) It also requested an unprecedented preemptive declaration that the Judgment, which had not yet been issued, was unenforceable and an equally unprecedented global anti-foreign-suit injunction preventing the Ecuadorian Plaintiffs from seeking to enforce the Judgment anywhere in the world. (A219.) Brushing aside complex questions of international comity, estoppel, personal jurisdiction, and the "case or controversy" requirement, the lower court entered a sweeping Injunction enjoining the Ecuadorian Plaintiffs and others "from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the [ROE], for recognition or enforcement of the [Judgment], or any other judgment that may hereafter be rendered in the Lago Agrio Case by that court or by any other court in Ecuador … , or for prejudgment seizure or attachment of assets, outside the [ROE], based upon a Judgment." (SPA125.)

SUMMARY OF THE ARGUMENT

The district court's unprecedented and improper anti-foreign-suit Injunction should be reversed for several reasons.

First, the district court incorrectly held that a single U.S. district judge may issue an anticipatory anti-foreign-suit Injunction claiming for itself the authority to determine the validity and enforceability of a still non-final foreign judgment for every tribunal the world over. The Injunction offends principles of international comity because it assumes that no other court can fairly adjudicate the claimed rights of judgment debtors such as Chevron and purports to deny foreign courts the opportunity to decide if the Judgment is enforceable under their laws.

Second, the district court also erred in exercising jurisdiction over Chevron's declaratory judgment claim. The pendency of a *de novo* appeal in Ecuador means that there is no ripe case or controversy to decide. There is also no actual or concrete threat of future enforcement proceedings in New York that would permit a New York court to thrust itself into this foreign dispute to rule upon a defense to enforcement under New York law. And none of the factors courts must consider to invoke DJA jurisdiction weigh in favor of jurisdiction here.

Third, the district court incorrectly concluded that Chevron will likely demonstrate that the Judgment is unenforceable under the Recognition Act. Chevron is estopped from challenging the impartiality of the Ecuadorian court

system because, for nearly a decade, Chevron touted the fairness and impartiality of the Ecuadorian judicial system to obtain a *forum non conveniens* dismissal. The Ecuadorian judicial system is as fair and impartial now as when Chevron made its earlier representations and Chevron cannot demonstrate the system is partial. Nor can Chevron prove that the Judgment was procured by fraud on the Ecuadorian Court.

Fourth, the Ecuadorian Plaintiffs' contacts with New York are insufficient to subject them to general or specific jurisdiction. The Ecuadorian Plaintiffs, who live in the Ecuadorian Amazon and have never even been to New York, are not subject to jurisdiction merely by defending their interests in New York litigation through New York counsel or by engaging New York counsel to assist with foreign litigation.

Fifth, the district court erred in granting Chevron extraordinary equitable relief notwithstanding the company's unclean hands.

STANDARD OF REVIEW

The issuance of a preliminary injunction is generally reviewed for abuse of discretion.[39] A district court abuses its discretion when its decision (1) rests on an error of law; (2) rests on a clearly erroneous factual finding; or (3) "though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions."[40] Courts often apply a heightened level of appellate review to anti-foreign-suit injunctions given the important considerations of international comity.[41] Under this "intermediate level of scrutiny," only a "modest degree of deference [is given] to the trier's exercise of discretion, but [the appellate court] will not hesitate to act upon [its] independent judgment if it appears that a mistake has been made."[42] The issue of whether a case presents a justiciable controversy is reviewed *de novo*.[43] Questions of statutory interpretation and construction and mixed questions of law and fact also

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[39] *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010).

[40] *SEC v. Dorozhko*, 574 F.3d 42, 45 (2d Cir. 2009).

[41] *See Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004).

[42] *Id.*

[43] *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998); *see also E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 177 (2d Cir. 2001).

are reviewed *de novo*.[44] A district court's decision regarding personal jurisdiction is reviewed *de novo* for legal conclusions and clear error for factual findings.[45]

ARGUMENT[46]

I. THE DISTRICT COURT ERRED BY ENTERING A PREEMPTIVE ANTI-FOREIGN-SUIT INJUNCTION ATTEMPTING TO RESERVE EXCLUSIVE JURISDICTION FOR ITSELF TO DETERMINE THE WORLDWIDE ENFORCEABILITY OF A FOREIGN JUDGMENT

At the heart of this appeal is an improper and unprecedented preemptive anti-foreign-suit injunction. In issuing the Injunction, the district court effectively asserted *exclusive worldwide jurisdiction* to determine the Judgment's enforceability. Together with its improper assertion of jurisdiction under the DJA, the Injunction ostensibly permits a single U.S. district judge to determine the validity and enforceability of the Judgment for every tribunal the world over prior to any effort to enforce the still non-final Judgment and absent any evidence that recognition or enforcement could be, or will be, sought in the U.S., let alone New York. The Injunction displays a complete lack of respect for foreign courts and offends principles of international comity by denying foreign courts the

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[44] *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir. 2007); *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 204 (2d Cir. 2007).

[45] *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 22 (2d Cir. 2004).

[46] Pursuant to Fed. R. App. P. 28(i), the Ecuadorian Plaintiffs hereby incorporate the Donziger Brief in its entirety, including the Statement of the Case, the Statement of the Facts, and all legal arguments.

opportunity to decide if the Judgment is enforceable under their laws. Neither the lower court nor Chevron cited a single case in which a U.S. court has entered such sweeping relief.

This Court has cautioned "that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'"[47] Other circuits have similarly declared that anti-foreign-suit injunctions "should be issued only in the most extreme cases"[48] or "the most compelling circumstances."[49] And preemptive or "'anticipatory' injunctions, issued before the subsequent suit is under way, are to be used in [only] the *rarest* of circumstances."[50] This is because anti-foreign-suit injunctions strip foreign sovereigns of jurisdiction to resolve disputes in accordance with their own laws and policies[51] and "convey[ ] the message, intended or not, that the issuing court has so little confidence in the … ability [of foreign courts] to adjudicate a given dispute fairly and efficiently that it

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[47] *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 653 (2d Cir. 2004) (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987)); *see also Quaak*, 361 F.3d at 17; *Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 444 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003).

[48] *Gau Shan Co. Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992).

[49] *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 927 (D.C. Cir. 1984).

[50] *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 159 (3d Cir. 2001) (emphasis added).

[51] *China Trade*, 837 F.2d at 35; *see also* David D. Siegel, New York Practice § 472 (4th ed. 2010) (comity "means that each sovereign … can decide for itself which foreign country judgments it will recognize and which it won't").

is unwilling even to allow the possibility."[52] This case presents neither the "rarest," "most compelling," nor "most extreme circumstances" required to justify a preemptive anti-foreign-suit injunction.

In *China Trade*, this Court adopted a two-step analysis to determine whether a party may be enjoined from proceeding with foreign litigation.[53] If the party seeking the anti-foreign-suit injunction satisfies two threshold requirements, the district court must then consider five discretionary factors to determine whether to take the extraordinary step of granting the injunction. The Injunction must be reversed because (i) Chevron failed to satisfy *either* threshold requirement and (ii) the remaining *China Trade* factors weigh strongly against the issuance of an anti-foreign-suit injunction.

A. Chevron Failed to Satisfy *China Trade's* Threshold Requirements

A party requesting an anti-foreign-suit injunction must establish: (1) "resolution of the case before the enjoining court [is] dispositive of the action[s] to be enjoined";[54] and (2) the parties in the domestic and foreign litigations are "the

[52] *Gau Shan*, 956 F.2d at 1355 (describing anti-foreign-suit injunctions as "even more destructive of international comity than, for example, refusals to enforce foreign judgments").

[53] *China Trade*, 837 F.2d at 35.

[54] *Id*.

same"[55] or at least "sufficiently similar."[56] Chevron did not—and cannot—satisfy either threshold requirement.

The district court erroneously concluded that resolution of Chevron's declaratory judgment claim would be dispositive of all future enforcement proceedings. It reasoned that it could *make* its decision dispositive by issuing a permanent anti-foreign-suit injunction because such an injunction would "foreclose even the filing of foreign enforcement suits." (SPA107.) This circular reasoning is unsupported by case law for obvious reasons—acceptance of this logic would eviscerate this threshold requirement from the *China Trade* analysis altogether. The relevant question is whether resolution of the underlying causes of action will *dispose of* the foreign actions to be enjoined, not whether courts can abuse their power to *make* their decisions dispositive.

The district court also summarily concluded that a "determination here that the [Judgment] is not entitled to enforcement … *ought to dispose* also of any foreign enforcement actions that might be filed" because the defenses to enforcement provided by New York law are "very common." (SPA107-08 (emphasis added).) The court's hasty conclusion is flawed in several respects.

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[55] *Id.*

[56] *Paramedics*, 369 F.2d at 652. Where, as here, a related foreign suit is not yet pending when an application for an anti-foreign-suit injunction is made, the district court must necessarily speculate as to whether these threshold requirements will be established.

First, it is irrelevant whether the court's decision "ought to dispose" or is "likely [to] be recognized as sufficiently persuasive authority." (SPA107.) "[S]ufficiently persuasive" is not the standard; the court's decision must be *dispositive* of all enjoined foreign actions.[57]

The district court's conclusory determination that the Recognition Act's defenses to enforcement are "very common" is also insufficient to establish that the lower court's decision under New York law will be dispositive of all other enforcement actions. The district court's analysis on this point consists of citations to websites purportedly reproducing the foreign judgment enforcement statutes of the United Kingdom and Singapore. But *neither* of the statutes cited by the district court contains a defense similar to § 5304(a)(1), which mandates non-recognition of judgments emanating from "system[s] which do[] not provide impartial tribunals or procedures compatible with the requirements of due process of law."[58] Thus, the district court's analysis proves that a determination of the Judgment's enforceability under *New York law* will not necessarily be dispositive of future enforcement proceedings under other countries' enforcement statutes.

Even if every foreign nation had laws identical to the Recognition Act—and they do not—those countries' courts retain discretion to decide whether to enforce

[57] *China Trade*, 837 F.2d at 36.

[58] N.Y. C.P.L.R. § 5304(a)(1).

the Judgment based on their own laws and policies.[59] Each foreign court must be permitted to determine whether recognition is consistent with *that country's principles and policies*—not those that are important to a single U.S. district court.[60] A contrary rule would allow U.S. courts to impose their policies and norms on the rest of the world—judicial imperialism in its worst form.

Nor is it at all clear that foreign courts would accept the district court's decision as *res judicata*. (SPA107.)[61] Aside from the lack of identical laws governing recognition of foreign judgments, foreign courts also will likely be

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[59] *See, e.g.*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Karaha II")*, 500 F.3d 111, 124 (2d Cir. 2007) (holding that even in the context of recognition of international arbitral awards which, unlike foreign judgments, are governed by a uniform standard for recognition, "[f]ederal courts in which enforcement of a foreign arbitral award is sought cannot dictate to other 'secondary jurisdictions' under the New York Convention whether the award should be confirmed or enforced in those jurisdictions"); *see also* Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration,* in *Pervasive Problems in International Arbitration* 203, 214 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) ("[E]ach legal system is equally entitled to sovereign rights and to the discretion to recognize and enforce foreign arbitral awards on the basis of its own standards of review…. Each legal system should decide for itself and on the basis of its own standards of public policy whether or not to recognize and enforce foreign arbitral awards.").

[60] *See, e.g., Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542, 545 (7th Cir. 1960); *Rauland Borg Corp. v. TCS Mgmt. Group, Inc.*, No. 93-cv-6096, 1995 U.S. Dist. LEXIS 893, at *11 (N.D. Ill. Jan. 26, 1995).

[61] The case relied on by the district court for this point, *Paramedics Electromedicina*, 369 F.3d at 653-54, is inapposite. Indeed, this Court noted that "a foreign court *might not give res judicata effect to a United States judgment*, particularly since United States courts may choose to give *res judicata* effect to foreign judgments on the basis of comity, but are not obliged to do so." *Id*. at 654 (internal citations omitted) (emphasis added).

presented with conflicting rulings on the alleged "fraud" from the courts of Ecuador and the district court. In any event, the district court "should have left the *res judicata* effect of its order to the determination of the [foreign] forum[s]" because its "determination that its order was sufficient for *res judicata* purposes would not necessarily be binding on [those] courts."[62] For these reasons, and because foreign enforcement proceedings will undoubtedly involve issues that will not and cannot be raised or ruled upon in this action, those proceedings must be allowed to proceed in the appropriate foreign fora without interference from U.S. courts.

Chevron also failed to establish the second threshold requirement of *China Trade*—that the "real parties in interest" are the same in both this litigation and any future foreign enforcement proceedings.[63] The district court concluded, without analysis, that "the real parties in interest necessarily would be the same in any foreign enforcement actions that might be filed … [because] the [Ecuadorian Plaintiffs and additional named plaintiffs] and the ADF … are the beneficiaries of the judgment and hence are the parties entitled to sue for enforcement." (SPA106.)

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[62] *Gen. Elec.*, 270 F.3d at 159; *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Karaha I")*, 335 F.3d 357, 367-68 (5th Cir. 2003); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997).

[63] *Motorola Credit Corp. v. Uzan*, No. 02-cv-666(JSR), 2003 U.S. Dist. LEXIS 111, at *6 (S.D.N.Y. Jan. 7, 2003).

But the Judgment's beneficiaries cannot be identified as easily as the district court suggests. The Judgment provides that the damages awarded will be placed in the control of a commercial trust to be established for the benefit of all residents of the regions affected by Chevron's contamination. To date, that trust has not yet been established[64] and the beneficiaries of the trust have not been finally determined. Consequently, the identities of the persons or entities with the power to administer the trust and to benefit from it remain unresolved. Thus, the district court erred in holding that the parties in this action will be "the same" as in any future enforcement action.

B. The Additional *China Trade* Factors Weigh Strongly Against Issuance of an Anti-Foreign-Suit Injunction

China Trade requires courts to consider whether the foreign litigation would:

> (1) frustrat[e] … a policy in the enjoining forum; (2) … be vexatious; (3) … threat[en] … the issuing court's ... jurisdiction; (4) … prejudice other equitable considerations; or (5) … result in delay, inconvenience, expense, inconsistency, or a race to judgment.[65]

"[T]he discretionary *China Trade* factors will tend to weigh in favor of an anti-foreign-suit injunction that is sought to protect a federal judgment," but issues of comity must be given greater weight when, as here, a final judgment has not yet

[64] Clearly the district court cannot have personal jurisdiction over an entity that has not yet been established.

[65] *China Trade*, 837 F.2d at 35.

issued in the federal litigation.[66] The district court erred in determining that these factors weigh in favor of an anti-foreign-suit injunction.

1. *The Second, Fourth, and Fifth* China Trade *Factors Do Not Weigh in Favor of the Injunction*

The district court erroneously held that "the second, fourth, and fifth factors strongly counsel in favor of an injunction" because "[t]he contemplated foreign actions would be vexatious" and the "[a]djudication of enforceability of the judgment in multiple foreign actions likely would result in delay, inconvenience, expense, inconsistency, and a race to judgment." (SPA108.)[67] Foreign litigation is generally only considered vexatious if it causes "inequitable hardship" or "frustrate[s] and delay[s] the speedy and efficient determination of the cause."[68] Chevron—one of the largest and most profitable corporations in the world—can hardly complain that it would suffer from "inequitable hardship" if required to defend against enforcement actions in multiple fora—particularly when it created the situation it now protests, shifting the case to Ecuador and vowing never to satisfy a judgment. Indeed, it was Chevron who initiated *twenty* separate actions pursuant to 28 U.S.C. § 1782 in sixteen federal districts within the span of thirteen

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[66] *Karaha II*, 500 F.3d at 120.

[67] The district court's two-sentence analysis failed to separately address the fourth *China Trade* factor, *i.e.*, whether foreign litigation would "prejudice other equitable considerations." *China Trade*, 837 F.2d at 35.

[68] *Karaha I*, 335 F.3d at 366.

months—all while litigating the underlying action in Ecuador. Nor is there any reasonable argument that foreign enforcement actions would "frustrate or delay" proceedings before the district court. Moreover, it is Chevron, not the Ecuadorian Plaintiffs, that is engaged in a blatant attempt to "race to judgment" in an effort to foreclose enforcement of the Judgment anywhere outside its chosen forum.

The district court also erred by relying almost exclusively on these factors in enjoining the not-yet-filed enforcement proceedings. This Court has noted that these factors are the least important because allowing parallel foreign proceedings is the rule, not the exception.[69]

Complaints concerning "vexatiousness" and the expense of litigating in multiple fora "are likely to be present whenever parallel actions are proceeding concurrently," so granting an injunction on "these additional factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions."[70]

This is especially true in the context of judgment enforcement. Far from being "vexatious" or somehow untoward, it is common to initiate multiple enforcement actions to satisfy a judgment.[71] There is no rule that the Ecuadorian Plaintiffs are obligated to enforce the Judgment in New York or any other single

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[69] *China Trade*, 837 F.2d at 36.

[70] *Id.*; *see also Gau Shan*, 956 F.2d at 1355.

[71] *See, e.g.*, *Karaha I*, 335 F.3d at 366.

forum. Indeed, it is a plaintiff's prerogative to seek out substantive or procedural advantages offered by filing in other fora.[72]

2. *No U.S. Policy Interests Justify the Injunction*

The district court's finding that the Injunction was needed to prevent the Ecuadorian Plaintiffs from "evading" important U.S. policy interests (SPA109) is belied by the fact that the same court held a decade ago "that these cases have ... nothing to do with the United States."[73] The purported policy interest invoked by the district court—"protecting [U.S.] citizens from judgments entered in systems that do not accord their litigants the essentials of due process" (SPA109)—does not justify the issuance of the Injunction.[74] The propriety of the Injunction has nothing to do with the adequacy of the Ecuadorian judiciary and everything to do with the courts of every sovereign nation where Chevron does business and has assets. The district court declared, as a matter of policy, that U.S. courts are the only courts in the world capable of determining whether a judgment against a U.S. citizen is

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[72] *Laker Airways*, 731 F.2d at 931; *see also Gau Shan*, 956 F.2d at 1357; *Paramount Pictures, Inc. v. Blumenthal*, 11 N.Y.S.2d 768, 772 (N.Y. App. Div. 1939).

[73] *Aguinda*, 142 F. Supp. 2d at 537.

[74] *Gau Shan*, 956 F.2d at 1358 ("[O]nly the evasion of the most compelling public policies of the forum will support the issuance of an antisuit injunction."); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002).

entitled to recognition. Not only is there no evidence supporting this notion, but such a protectionist precedent is extremely dangerous.[75]

Two of this Court's sister circuits have rejected similar "rules based on nationality" as the justification for anti-foreign-suit injunctions because they "tend to promote nationalism and discrimination at the expense of international comity."[76] A contrary rule would allow U.S. courts to "use corporate nationality as a pretext to interject themselves in foreign proceedings involving United States corporations and subsidiaries."[77] The district court has done exactly that—thrusting itself into a foreign dispute that has "nothing to do with the United States."[78] Moreover, protectionist policies of this nature also could have far-reaching effects, encouraging other nations' courts to rely on similar policies to

[75] *Dow Jones*, 237 F. Supp. 2d at 415, 427-29 (rejecting argument that American courts should employ anti-foreign-suit injunctions to "rescue … a domestic litigant from a conjured travesty of law" because "the courts of one nation" should not "sit in judgment of the adequacy of due process and the quality of justice rendered in the courts of other sovereigns").

[76] *Gau Shan*, 956 F.2d at 1358; *see also Laker Airways*, 731 F.2d at 935-36.

[77] *Laker Airways*, 731 F.2d at 936.

[78] *Aguinda*, 142 F. Supp. 2d at 537; *see also Berkshire Furniture Co., Inc. v. Glattstein*, 921 F. Supp. 1559, 1561-62 (W.D. Ky. 1995) ("If Plaintiff has suffered a grievous wrong or if Defendants have perpetrated such a fraud, the Court assumes that a Malaysian court would recognize this and offer the appropriate relief. To assume otherwise would require an arrogance that this Court does not possess.").

issue anti-foreign-suit injunctions to protect their own citizens. "Reciprocity and cooperation can only suffer as a result."[79]

To the extent that protection of a U.S. corporation could ever be a legitimate reason to enjoin foreign enforcement proceedings, that interest is not substantial enough in this case to overcome the presumption against anticipatory anti-foreign-suit injunctions. The district court's jurisdiction is limited to determining the enforceability of a foreign judgment under New York law and, thus, "it is not the district court's burden or [this Court's burden] to protect [Chevron] from all the legal hardships it might undergo in a foreign country as a result of this foreign [judgment] or the international … dispute that spawned it."[80]

Chevron cannot feign surprise that it may be subject to foreign enforcement proceedings. Chevron has significant assets in at least thirty foreign nations because the company knowingly and willingly availed itself of the opportunity to do business in those nations to maximize its profits. Having decided to maintain significant operations outside of the U.S. and having reaped the benefits of doing so, Chevron cannot now claim that it should not be subject to enforcement actions under the laws of those countries.[81]

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[79] *Gau Shan*, 956 F.2d at 1355.

[80] *Karaha I*, 335 F.3d at 369.

[81] *See, e.g.*, *Quaak*, 361 F.3d at 22.

3. *Foreign Enforcement Proceedings Will Not Threaten the District Court's Jurisdiction*

The district court's conclusion that foreign enforcement proceedings "would 'undermine federal jurisdiction to determine whether [the Judgment] should be invalidated on the bas[e]s' advanced by Chevron" is not supported by any identifiable threat to the court's jurisdiction. (SPA109.) The mere possibility or existence of concurrent litigation does not threaten a court's jurisdiction.[82] To the contrary, threats to a district court's jurisdiction are "quite unusual"[83] and, thus, "one court will not try to restrain proceedings before the other."[84]

Concurrent litigation may constitute a sufficient threat to a court's jurisdiction to justify an anti-foreign-suit injunction in only three limited scenarios. First, parallel actions in which the basis for the district court's jurisdiction is *in rem* or *quasi in rem*.[85] Second, an interdictory foreign suit filed solely to terminate the U.S. action.[86] Third, a foreign proceeding aimed at invalidating a final federal judgment.[87] None of these three scenarios is present here. Therefore, "[c]ontrary to the district court's conclusions, legal action [abroad], regardless of its

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[82] *Quaak*, 361 F.3d at 17 (noting that there is a "presumption in favor of concurrent jurisdiction").

[83] *Gau Shan*, 956 F.2d at 1356.

[84] *Computer Assocs.*, 126 F.3d at 372.

[85] *China Trade*, 837 F.2d at 36.

[86] *Id.* at 37; *Laker Airways*, 731 F.2d at 915.

[87] *Karaha II*, 500 F.3d at 126.

legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdiction for that matter, to enforce a foreign [judgment]."[88]

II. THE DISTRICT COURT ERRED BY EXERCISING JURISDICTION OVER CHEVRON'S CLAIM FOR DECLARATORY RELIEF.

A. There Is No Actual Controversy

An actual controversy exists only when a dispute has "taken on fixed and final shape"[89] and is no longer "a mere possibility, or even probability of some contingency."[90] This requirement limits federal jurisdiction "to real conflicts so as to preclude the courts from gratuitously rendering advisory opinions with regard to events in dispute that have not matured to a point sufficiently concrete to demand immediate adjudication and thus that may never materialize as actual controversies."[91] "[C]oncerns about contingencies that may or may not come to pass" do not establish a controversy under the DJA.[92] Because any possible controversy regarding the enforceability of the Judgment in New York is purely hypothetical, there is no jurisdiction under the DJA.[93]

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[88] *Karaha I*, 335 F.3d at 372.

[89] *Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 244 (1952).

[90] *Dow Jones*, 237 F. Supp. 2d at 407.

[91] *Id.* at 406.

[92] *Id.* at 408.

[93] *Id.* at 407.

1. The Judgment Is Not Final or Enforceable

The Recognition Act provides that the Judgment is unenforceable in New York until it is "final, conclusive, and enforceable where rendered"—in this case, Ecuador. (SPA142.) As this Court recognized, "[t]he Ecuadorian courts have not issued—and may never issue—a final judgment against Chevron."[94] Both Chevron and the lower court acknowledge that the Judgment is and will remain non-final and unenforceable in Ecuador while the appeal in Ecuador is pending. (SPA74, A6157.)

"[N]o 'actual controversy' exists where a party seeks a declaratory judgment invalidating a potential future foreign judgment."[95] Courts, including one affirmed by this Court, uniformly have refused to entertain claims for declaratory relief identical to Chevron's because "the mere prospect" that a final and enforceable judgment "may be rendered at some indefinite point in the future" is not an actual controversy.[96] The district court attempted to distinguish these cases based on the entry of the Judgment (SPA89), but this is a distinction without a difference. Chevron's appeal in Ecuador is pending before an intermediate appellate court where it will be reviewed *de novo*. (A6123.) Chevron has submitted voluminous

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[94] *ROE*, 638 F.3d at 399.

[95] *Dole Food Co., Inc. v. Gutierrez*, No. CV039416, 2004 WL 3737123, at *14 (C.D. Cal. July 13, 2004).

[96] *Dow Jones*, 237 F. Supp. 2d at 408; *see also Dole*, 2004 WL 3737123, at *15; *Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 1333, 1338 (N.D. Ill. 1996).

briefing asserting every possible defense, including the same claims of fraud it is asserting here. The Ecuadorian appellate court may affirm, modify, or reverse the Judgment in its entirety. (A6123.) Thus, there is no actual case or controversy.

2. *Plaintiffs Never Threatened Enforcement in New York*

Even if the Judgment is affirmed in Ecuador, there would still be no case or controversy *under New York law*. Relying solely upon out-of-context quotations from the year-old *Invictus* memorandum, the district court summarily concluded that the Ecuadorian Plaintiffs' purported intent to enforce the Judgment created an actual controversy sufficient for the court to exercise jurisdiction. (SPA89.) But it is not enough that the Ecuadorian Plaintiffs will—like any plaintiffs would—seek to enforce the Judgment. Rather, the pertinent question is whether this enforcement activity will occur in New York. Chevron seeks a declaration that the Judgment is unenforceable based on defenses under *New York's* Recognition Act, which provides a procedural vehicle for a judgment creditor to enforce a foreign judgment in *New York*. Nothing in the statute permits recognition (or non-recognition) of a judgment beyond the territorial boundaries of New York. Thus, there could not possibly be a ripe, actual case or controversy for a declaration

under New York law absent a concrete and imminent threat that Plaintiffs will initiate enforcement proceedings in New York.[97]

Nothing in the record—including the *Invictus* memorandum—indicates a threat of enforcement in New York. To the contrary, the memorandum suggested enforcement in the U.S. was unlikely: "non-U.S. jurisdictions may, for a variety of reasons, offer the prospect of a more expedient resolution than could be obtained in the U.S." (A3733.) Because Invictus never identified particular jurisdictions where enforcement would be sought, the memorandum can hardly be viewed as a concrete threat of litigation—and certainly not a threat to enforce a potential judgment in New York.

B. The District Court Erred by Exercising Jurisdiction over Chevron's Claim for Declaratory Relief

Even if an actual controversy exists—and it does not—the district court erred in exercising jurisdiction over Chevron's declaratory claim. In *Dow Jones*, this Court identified five factors courts must consider when determining whether to exercise jurisdiction over claims for declaratory relief:

> (i) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (ii)

[97] *See Dole*, 2004 WL 3737123, at *15 (finding no actual controversy because "even if the Managua Defendants obtain a judgment against Dole, it is uncertain whether they will attempt to enforce that judgment in the United States—much less California"); *Dow Jones*, 237 F. Supp. 2d at 408; *see also Shields v. Norton*, 289 F.3d 832, 837 (5th Cir. 2002); *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 562 (2d Cir. 1991).

> "whether a judgment would finalize the controversy and offer relief from uncertainty"; (iii) "whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'"; (iv) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (v) "whether there is a better or more effective remedy."[98]

Contrary to the district court's flawed analysis, which relies almost entirely on its apparent intent to enter an unlawful permanent anti-foreign-suit injunction to make its decision dispositive,[99] each of the *Dow Jones* factors weighs *against* exercising jurisdiction.

1. Chevron's Claim Will Not Finalize the Controversy or Serve a Useful Purpose in Settling the Legal Issues Involved

A headlong rush to put Ecuador's judicial system on trial can serve no useful purpose where the Judgment remains non-final and unenforceable with a *de novo* appeal still pending in Ecuador. *See supra* Arg. II.A.1. Regardless, deciding Chevron's declaratory judgment claim will still not serve a useful purpose or "finally determine the controversy over enforceability" between the parties. (SPA90.) It will only determine enforceability under *New York law*; it will not resolve future enforcement proceedings implicating different countries' laws. *See supra* Arg. I.A. Each foreign jurisdiction must determine whether recognition is

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[98] *New York Times Co. v. Gonzales*, 459 F.3d 160, 167 (2d Cir. 2006) (quoting *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357 (2d Cir. 2003)).

[99] *See supra* Arg. I.A.

consistent with that country's laws and policies.[100] There also is no reason to anticipate that foreign courts would be bound by the district court's declaration of unenforceability based on American laws, principles, and policies.[101] *See supra* Arg. I.B.2.

Nor is there any merit to the district court's suggestion that it would *make* its ruling (under New York law) resolve the controversy worldwide by entering an improper permanent anti-foreign-suit injunction "barring all of the defendants from filing enforcement proceedings in other jurisdictions." (SPA90.) No case supports this approach.[102] If permitted, this flawed approach would eliminate the first two *Dow Jones* factors. *See supra* Arg. I.A.

2. *Chevron's Claim Will Increase Friction Among Sovereign Legal Systems and Encroach on the Domain of Foreign Courts*

The district court's determination to "finally determine the controversy worldwide" encroaches on the domain of the courts of *every* other sovereign nation

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[100] *See Dow Jones*, 237 F. Supp. 2d at 439 (holding that while a declaration of unenforceability under U.S. law "arguably may settle … rights and remove uncertainties concerning the enforceability of a damage award … in the United States, it is unlikely to do much … beyond this country").

[101] *Id.* at 438-39 ("[A]ny extraterritorial order [a district court] might issue will neither be self-executing nor in and of itself binding on or recognized by foreign tribunals.").

[102] "Just as much as [the district court] may preemptively declare a foreign judgment … to have no effect in the United States and enjoin parties from proceeding overseas, a foreign tribunal may just as cavalierly ignore [the district court's] order." *Id.* at 439.

where Chevron has assets. If upheld, the district court's jurisdictional power grab will have the practical effect of stripping foreign courts of jurisdiction to resolve disputes based on their own laws and policies. *See supra* Arg. I.A., I.B.2.

The lower court's dismissal of the friction its decision will generate between the courts of the U.S. and Ecuador as "unavoidable" and "inherent in the international scheme" was just as egregious. (SPA90.) There was nothing "unavoidable" about the lower court's decision. The lower court was not compelled to stand in judgment of Ecuador's courts by "the international scheme." Rather, the lower court *chose* to intrude upon a wholly foreign dispute[103] to protect Chevron[104] before Ecuador's judiciary has rendered a final and enforceable judgment and also before the Ecuadorian Plaintiffs sought to enforce such a judgment in the U.S. (or anywhere else). Real—and in this case, avoidable—consequences result from such unrestrained assertions of judicial power, including the potential for "tit-for-tat … retaliation against American foreign interests."[105]

3. *Chevron's Claim Is a Blatant Attempt to "Race to* Res Judicata*" in Its Preferred Forum*

It is difficult to conceive of a more egregious example of "procedural gamesmanship" aimed at a "race to *res judicata*" than Chevron's declaratory

[103] *Aguinda*, 142 F. Supp. 2d at 537.

[104] *See supra* Arg. I.B.2.

[105] *Dow Jones*, 237 F. Supp. 2d at 429; *Laker Airways*, 731 F.2d at 927; *Gau Shan*, 956 F.2d at 1355.

judgment claim. Through a series of actions under 28 U.S.C. § 1782, Chevron determined that the lower court would be favorably disposed to the unprecedented declaratory relief requested in this action. Chevron then raced to obtain that relief from its preferred forum even before the Judgment issued in Ecuador.

4. There Is a Better and More Effective Remedy

The district court also erred in its analysis of the last factor—concluding that its exercise of jurisdiction over Chevron's claim is the "better remedy" because the alternative is multiple enforcement proceedings. (SPA90.) Again, the district court based its analysis on its incorrect belief that its ruling will be dispositive of all future enforcement efforts. *See supra* Arg. I.A. The "better remedy" is to allow the judgment enforcement process to proceed as it ordinarily does: if the Judgment becomes final, allow the judgment creditors to choose the forum where enforcement is sought, not the judgment debtors, and allow foreign jurisdictions to apply their own laws and policies.

III. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT CHEVRON WILL ESTABLISH THAT THE ECUADORIAN JUDGMENT IS UNENFORCEABLE UNDER THE RECOGNITION ACT

A. The Recognition Act Does Not Apply

For the reasons stated in Arg. II.A.1., *supra*, the Recognition Act does not (and may never) apply because the Judgment is not "final, conclusive and enforceable" [106] in Ecuador.[107] (SPA142.)

B. The District Court Erroneously Concluded That Chevron Likely Will Establish That the Ecuadorian Judicial System Does Not Provide Due Process or Impartial Tribunals

1. Chevron Is Estopped From Arguing That the Ecuadorian Judicial System Does Not Provide Due Process or Impartial Tribunals

For nine years, Chevron fought relentlessly for dismissal of the *Aguinda* litigation on *forum non conveniens* grounds, arguing that Ecuador's courts were best suited to adjudicate the claims. In the face of official reports stating that Ecuador suffers "'from shortcomings in [its] politicized, inefficient, and corrupt

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[106] *Mayekawa Mfg. Co., LTD. v. Sasaki*, 888 P.2d 183, 187-88 (Wash. Ct. App. 1995); *see also Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1323 (2d Cir. 1973); *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 213 (S.D.N.Y. 1999); *Manco Contracting Co. (W.L.L.) v. Bezdikian*, 195 P.3d 604, 606 (Cal. 2008).

[107] Nothing in the Recognition Act permits judgment debtors like Chevron to bring an affirmative claim for a declaration that a judgment is non-recognizable and unenforceable within New York, much less beyond its territorial boundaries.

legal and judicial system,'"[108] Chevron steadfastly maintained that Ecuador's judicial system would provide an adequate, fair, and impartial forum.[109] Ultimately, the S.D.N.Y. agreed and this Court affirmed.[110] Things did not go as Chevron planned in Ecuador, and now Chevron is suffering from "buyer's remorse." But having successfully obtained a dismissal by extolling the fairness and impartiality of Ecuador's judicial system, Chevron is estopped from now claiming that the Judgment is unenforceable because that same system supposedly "does not provide impartial tribunals or procedures compatible with the requirements of due process of law." (SPA143.)

"Judicial estoppel prevents a party who secured a judgment in his favor by virtue of assuming a given position in a prior legal proceeding from assuming an inconsistent position in a later action."[111] The doctrine's purpose "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing

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[108] *Aguinda*, 2000 U.S. Dist. LEXIS 745, at *8-9 (quoting U.S. Department of State, Ecuador Country Report on Human Rights Practices ("State Department Report") for 1998).

[109] (*See, e.g.*, A4538; A4431 (arguing that "Ecuador's Constitution guarantees due process and equal protection, and its courts provide important procedural and substantive rights").)

[110] *Aguinda*, 142 F. Supp. 2d at 545-46, *aff'd*, 303 F.3d at 480.

[111] *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997).

positions according to the exigencies of the moment."[112] Its application turns on "the balance of equities"[113] including whether (1) the position of the party to be estopped is "clearly inconsistent" with its earlier position, (2) the party successfully asserted its earlier position, and (3) failing to estop the party would reward it with an unfair advantage or impose an unfair detriment on the opposing party.[114] Each of these considerations demands application of judicial estoppel against Chevron.

The lower court rejected the Ecuadorian Plaintiffs' estoppel argument for two reasons, neither of which withstands scrutiny. The lower court's primary basis for denying the estoppel defense—that the statements relied upon by the Ecuadorian Plaintiffs were "made by Texaco, not Chevron"—was rejected by this Court in a related appeal[115] and also by the Ecuadorian Court, which devoted approximately twenty pages of the Judgment to analyzing this defense. (SPA109, A7299-319.) The lower court also erroneously concluded that "there is no inconsistency" between arguing that Ecuador's system provided impartial tribunals

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[112] *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotations and citations omitted).

[113] *Id.* at 751.

[114] *Id*. at 750-51.

[115] *ROE*, 638 F.3d at 390 n.3, n.4.

in 1998-2001 but did not from 2003-2010. (SPA110.) This conclusion is belied by the facts and the law.

Chevron's current position is plainly inconsistent with its position in *Aguinda*. To convince a skeptical district court to allow the case to go to Ecuador, Chevron submitted numerous briefs and affidavits extolling the virtues of the Ecuadorian court system. (*See, e.g.*, A4493, A7585.) Even after an attempted military coup in Ecuador in January 2000, Chevron never wavered from its position that Ecuador's courts would provide a fair and impartial forum. Shortly after the attempted coup, the S.D.N.Y. expressed serious concerns "about the ability of the Ecuadorian ... courts to dispense independent, impartial justice in these cases," and ordered supplemental briefing addressing whether the Ecuadorian courts "might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed" and refiled in Ecuador.[116] Chevron submitted supplemental briefs and affidavits from practicing Ecuadorian lawyers and former justices of the Supreme Court of Ecuador, once again lauding the fairness of the Ecuadorian judiciary:

- "Ecuador's courts would fairly resolve the claims that the plaintiffs in the *Aguinda* and *Jota* actions have attempted to assert in the United States." (A4492.)
- "Despite isolated problems … Ecuador's judicial system is neither corrupt nor unfair." (A7588.)

[116] *Aguinda*, 2000 U.S. Dist. LEXIS 745, at *5, *10.

- "Ecuador's courts continue generally to conduct and adjudicate cases filed by or against multinationals and oil companies in a fair and impartial manner." (A7600.)
- "The tribunals and courts of Justice of Ecuador have processed and continue to process lawsuits against multi-national foreign companies, including petroleum companies…. [T]he courts of Ecuador, in the complex and delicate task of administering justice, treat all persons who present themselves before them with equality and in a just manner." (A7605.)
- "The history of corruption-free litigation against TexPet, combined with the public scrutiny these cases will receive, assure a fair adjudication if plaintiffs refile their claims in Ecuador…."[117]

Chevron repeated all these claims to this Court on appeal, comparing "Ecuadorian legal norms … to those in many European nations" and noting that "Ecuador's Constitution guarantees due process and equal protection, and its courts provide important procedural and substantive rights." (A4431-38, A4443-54.)

Chevron's position has also shifted regarding particular evidence. Previously, Chevron argued that "[t]he specific instances cited in [the 1998 State Department Report] are not characteristic of Ecuador's judicial system, as a whole." (A7598.) Chevron further argued that the Reports, which identified problems of judicial corruption and politicization, "have limited probative value" because the Reports "do not focus on civil litigation" and, instead, "address human rights violations and 'largely relate to criminal cases.'"[118] Now, Chevron (and the

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[117] *Aguinda*, No. 93-cv-7527, RJN Ex. A at 3 (S.D.N.Y. Apr. 24, 2000).

[118] *Id.* at 12 (quoting *Aguinda*, 2000 U.S. Dist. LEXIS 745, at *9).

district court) heavily relies on the near-identical language in the current versions of those reports as "[o]verwhelming evidence" of Ecuador's lack of impartiality. (A299, SPA55.)

Similarly, Chevron previously took great pains to explain away anecdotal evidence as "isolated problem[s]" that are not characteristic of Ecuador's system.[119] Now, Chevron has taken the opposite tack, relying upon several anecdotal, isolated instances to paint the entire Ecuadorian judiciary as inadequate. (A4197-208.) Chevron has even shifted positions as to the applicability of a particular case. The court in *Bridgeway Corp. v. Citibank* declined to enforce a Liberian judgment because the country was in the midst of a civil war and "justices and judges served at the will of the leaders of warring factions" while "[t]he Liberian Constitution was ignored."[120] In *Aguinda*, Chevron argued that Ecuador's judicial system was the "opposite" of the "dysfunctional foreign legal system" in *Bridgeway*. (A4453.) Chevron now cites *Bridgeway* as *support* for its claim that the Judgment is unenforceable. (A299-300.) In short, Chevron's current position is completely at odds with its arguments in *Aguinda*.

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[119] *Aguinda*, No. 93-cv-7527, RJN Ex. A at 18 (S.D.N.Y. Apr. 24, 2000). For example, Chevron argued that a pending litigation in which a U.S. based multi-national corporation was fighting recognition of an Ecuadorian judgment on grounds *identical* to those Chevron now raises suggested nothing more than "an isolated problem."

[120] 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

Allowing Chevron to shift its position at the eleventh hour of this long-running litigation rewards the company with an unfair advantage and imposes an unfair detriment on the Ecuadorian Plaintiffs.[121] Chevron was fully aware of any weaknesses in Ecuador's system of justice when it fought for a *forum non conveniens* dismissal. Chevron believed that it could exploit those weaknesses[122] and lost—the Ecuadorian Plaintiffs should not be punished for Chevron's miscalculation.[123] After eighteen years, Chevron's game of jurisdictional musical chairs must end.[124]

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[121] *See New Hampshire*, 532 U.S. at 751; *Pavlov v. Bank of N.Y. Co., Inc.*, 135 F. Supp. 2d 426, 435 (S.D.N.Y. 2001) (Kaplan, J.), *rev'd in part on other grounds*, 25 F. App'x 70 (2d Cir. 2002) (noting that plaintiffs' concern of potentially having to re-litigate substantial portions of their case if they later sought U.S. enforcement of the judgment was overblown because "[i]n view of BNY's staunch assertion here that the Russian legal system provides an adequate alternative forum, it quite likely would be estopped"); *Blacklink Transp. Consultants PTY Ltd. v. Von Summer*, No. 105638/07, 2008 WL 89958, at *3 (N.Y. Sup. Ct. Jan. 9, 2008) ("Having knowingly and voluntarily played the game under Australian rules, defendant may not now cry foul [under C.P.L.R. 5304(a)(1)] …. Under the guise of a due process analysis … defendant is attempting to relitigate matters that were appropriately decided by the Australian courts, or to litigate issues that she could have raised there. Due process does not require a transoceanic second bite of the proverbial apple."); *Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc.*, No. 09-56629, 2011 U.S. App. LEXIS 6428 (9th Cir. Mar. 29, 2011) ("[A]ccepting RHC's argument that the [Chinese] judgment is no[t] … enforceable would create the perception that the California court was misled in granting RHC's *forum non conveniens* motion and would impose an unfair detriment on Hubei.") (internal quotations omitted).

[122] *See infra* Arg. V.

[123] Chevron's unilateral "reservation of its right to contest" the Judgment under the Recognition Act (A4660) does not allow it to avoid responsibility for its

2. *Ecuador's Judiciary Is As Fair As When Chevron Lauded Its Fairness and Impartiality*

The record evidence, divorced from Chevron's "spin" and mischaracterizations, demonstrates that the Ecuadorian system is as fair and impartial today as when Chevron heralded that system to obtain the *forum non conveniens* dismissal of the *Aguinda* litigation. First, there are virtually no differences between the statements contained in the U.S. State Department Reports for Ecuador between 1996 and 2011. A few examples prove the point:

- 2007-2009 Reports: "While the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption." (A2138, A2152, A2167.)
- 2004 Report: "The Constitution provides for an independent judiciary; however, in practice, the judiciary was susceptible to outside pressure and corruption."[125]
- 2001 Report: "The Constitution provides for an independent judiciary; however, in practice, the judiciary was susceptible to outside pressure and corruption."[126]

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representations to the court or the doctrine of judicial estoppel. *See, e.g.*, *Hubei*, 2011 U.S. App. LEXIS 6428, at *3.

[124] For all the same reasons that Chevron is judicially estopped from challenging the Ecuadorian Judgment pursuant to C.P.L.R. § 5304(a)(1), Chevron is also equitably estopped from making that argument. *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 725 (2d Cir. 2001). The Ecuadorian Plaintiffs have expended significant time and resources litigating their claims in the forum of Chevron's choice and would be the victims of an extreme injustice if Chevron is permitted to challenge the Judgment on this ground.

[125] 2004 State Department Report, *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41759.htm.

- 1999 Report: "The most fundamental human rights abuse stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial system."[127]

Near identical statements appear in every Report since 1996. If anything, these statements have improved over time. For example, beginning in 2006, and continuing through 2010, every Report states: "[c]ivilian courts . . . [are] generally considered independent and impartial." (A2138, A2153, A2168.) The key change, however, is not in the Reports; it is in Chevron's motivations.

Nor has there been any significant change in the independence of the Ecuadorian judiciary as measured by the World Bank's Worldwide Governance Indicator ("WGI"). The district court accepted at face value that the WGI showed "that Ecuador ranks in the bottom eight percent of countries with respect to the rule of law" and that the "rule of law" ranking appears to have dropped between 2004 and 2009. (SPA84.) But the WGI "rule of law" ranking is not a measurement of judicial independence or due process; it is an aggregate compilation of approximately twenty separate indices measuring factors ranging from kidnapping of foreigners to intellectual property protection to access to water for agriculture.[128]

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[126] 2001 State Department Report, *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8356.htm.

[127] 1999 State Department Report, *available at* http://www.state.gov/g/drl/rls/hrrpt/1999/385.htm.

[128] Worldwide Governance Indicators, Rule of Law, http://info.worldbank.org/governance/wgi/pdf/rl.pdf (last visited June 2, 2011).

Only a few of those twenty indices primarily measure factors involving the judiciary's independence, such as the Cingranelli-Richards Human Rights Database and the WMO Global Insight Business Conditions and Risk Indicators.[129] Both of these indices show that Ecuador has received near identical scores every year since the late nineties.[130]

The district court (and Chevron) also ignored indices documenting Ecuador's recent improvements in addressing government corruption. Transparency International annually publishes a Corruption Perceptions Index ("CPI"), rating corruption in dozens of countries using a variety of metrics. In 2001, the CPI rated Ecuador a 2.3 out of a possible 10, and ranked it 79 out of 92 countries analyzed (the 14th percentile). (A7715A.) In 2010, Ecuador received a raw score of 2.5 and was ranked 127 out of 178 countries analyzed (the 28th percentile). (A7715H.) Likewise, Ecuador's "control of corruption" score in the 2002 WGI was a percentile ranking of 9.7 and in 2009 was a percentile ranking of 17.6.[131] Thus, the *objective* evidence in fact demonstrates that the independence of Ecuador's judicial system has at least remained the same and quite likely improved since Chevron fought to litigate the case in Ecuador.

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[129] *Id.*

[130] Worldwide Governance Indicators, Rule of Law, http://info.worldbank.org/governance/wgi/pdf/c66.pdf (last visited June 2, 2011).

[131] Worldwide Governance Indicators, Control of Corruption, http://info.worldbank.org/governance/wgi/sc_chart.asp (last visited June 2, 2011).

The district court also improperly accepted Chevron's hearsay-laden report from Vladimiro Alvarez Grau (the "Alvarez Report") as proof that the Ecuadorian judicial system suffers from "corruption and political interference" that "has worsened" since the election of President Correa. (SPA81-82.) Alvarez, a former politician and newspaper columnist who opposes President Correa and his policies, is hardly the neutral, authoritative voice of reason portrayed by the court. (SPA49-55.) Nevertheless, the district court violated "settled law in this Circuit" when it blindly accepted the Alvarez Report, but brushed aside or ignored opposition reports complimentary of the Ecuadorian system without even an evidentiary hearing.[132] A hearing, or even a basic examination of the reports, would show that they directly contradict the Alvarez Report.[133] (A6599-600.)

Moreover, Alvarez's various conclusions consist largely of his embellished interpretations of newspaper articles and editorials critical of the ROE and President Correa. For example, citing Alvarez, the district court stated that "judges have been threatened with violence … for ruling against the ROE." (SPA82.) But the article cited does not reveal a threat of violence. (A4278.) Instead, the article

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[132] *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) ("[M]otions for preliminary injunctions should not be decided on the basis of affidavits when disputed issues of fact exist." (internal quotations omitted)).

[133] (*See*, *e.g.*, A6583 ("[T]he judicial branch today is also far more independent than it has ever been, as it functions independently from the political branches."); A6354 ("[I]t cannot be validly maintained that the Constituent Assembly has any direct control over the judiciary."); *see generally* A6319-652.)

indicates that President Correa urged Ecuadorian citizens to protest against the "usual mafias" of Guayaquil—not to do physical violence to the Ecuadorian judiciary. (A4278.) These types of interpretative readings of news articles by a former Ecuadorian politician should not and cannot be the basis by which U.S. federal courts decide whether a foreign nation complies with minimum standards of due process.[134]

Nor do President Correa's public statements, tour of Chevron's polluted sites, or meetings with counsel in any way demonstrate that the Ecuadorian legal system fails to provide due process. Indeed, President Correa's actions and statements are similar to those of President Obama following the Deepwater Horizon disaster.[135] Similarly, the ROE's decision to prosecute those who conspired to provide Chevron with a release of liability from the ROE in exchange for a sham remediation, as well as President Correa's public comments regarding the prosecution, prove neither a lack of due process nor fraud. (SPA82-83.) The Third Circuit recently stated that these same assertions do not demonstrate any impropriety: "[I]t is not uncommon to see a shift in priorities along with a change

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[134] *See In re Application of Chevron Corp.*, 2011 WL 2023257, at *14; *Palacios v. Coca-Cola Co.*, 757 F. Supp. 2d 347, 360 (S.D.N.Y. 2010) (noting that submission of news articles detailing accounts of purported corruption and violence "differ in kind from the systemic judicial breakdowns that have prompted other courts to question forum adequacy").

[135] (A7661-A7662.)

in the presidential administration[, nor] is [it] uncommon for an American president to comment on ongoing criminal prosecutions and even urge that alleged wrongdoers be prosecuted in accord with the president's priorities."[136] Moreover, President Correa's alleged actions with regard to this particular case are certainly not evidence that the entire Ecuadorian judicial system is flawed. Indeed, the district court's qualified conclusion that Ecuadorian judicial system does not provide impartial tribunals in "highly politicized case[s]" was itself an error of law.[137] (SPA83). Not only are these acts wholly insufficient to establish an inadequate judicial *system*, but individual acts by a foreign sovereign within its own territorial boundaries should not be second-guessed by federal courts.[138]

Lastly, the district court's reliance on Donziger's statements during the taping of *Crude* is illogical. Chevron has dedicated incredible time and effort to portray Donziger as an extortionist—the head of an elaborate scheme. The district court adopted that view. Yet, Chevron and the district court were all too eager to use Donziger's on-camera comments as proof-positive of the inadequacies of the

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[136] *In re Application of Chevron Corp.*, 2011 WL 2023257, at *13.

[137] Section 5304(a)(1) only applies to a "system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." (SPA143.) The statute "cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds." *CBIC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 743 N.Y.S.2d 408, 415 (N.Y. App. Div. 2002); *see also Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

[138] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

Ecuadorian legal system. (A5090.) Donziger is not an expert on international law, due process, or Ecuador's legal system. He has been involved in exactly one case in Ecuador. Thus, his on-camera statements are not probative.

None of this "evidence" is sufficient to establish that Ecuador's judicial system and procedures are "incompatible" with the basic requirements of due process. (*See* SPA143.) Due process under § 5304(a)(1) only "refer[s] to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations."[139] Even where "corruption remains a concern," courts have found that those jurisdictions provide basic due process.[140] Courts have rejected attacks under § 5304(a)(1) even when "'[s]erious shortcomings do remain … including: illegal behavior, particularly corruption by government officials; a common attitude at the higher levels of the power structure that the government and the state are above the law; and only weak institutional reform processes concerning both the law-making and law-enforcing processes.'"[141]

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[139] *Ashenden*, 233 F.3d at 477; *see also CBIC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003) ("C.P.L.R. § 5304(a)(1) does not demand that the foreign tribunal's procedures exactly match those of New York.").

[140] *Chimexim,* 36 F. Supp. 2d at 214.

[141] *Id*. at 214 n.7 (quoting Carnegie Endowment for International Peace 1996, at 53).

Nor is the current state of the Ecuadorian judiciary at all comparable to those few systems that U.S. courts have held do not provide basic levels of fairness.[142] Ecuador is not in a "state of chaos" due to a civil war;[143] its citizens are not murdered or left homeless;[144] its judiciary is not subject to a brutal regime that does not allow either freedom of the press or an independent judiciary.[145] To the contrary, Ecuador's judicial system indisputably provides access to the courts, public trials, a constitutionally independent judiciary, a right of appeal, and basic procedural rights.[146] "No judicial system operates flawlessly … and unfortunately injustices occur from time to time even in our own system[,]" but so long as the legal system provides basic guarantees, such as free access to justice, a day in

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[142] *See Bridgeway*, 45 F. Supp. 2d at 287; *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995) (declining to enforce an Iranian judgment only after concluding that Iranian "trials [were] rarely held in public, that they [were] highly politicized, and that the [Iranian] regime does not believe in the independence of the judiciary.").

[143] *Bridgeway*, 45 F. Supp. 2d at 287.

[144] *Id.*

[145] *Pahlavi*, 58 F.3d at 1412.

[146] *See* A6319-652, *In re Application of Chevron Corp.*, 2011 WL 2023257, at *14 ("Though it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system."); *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1313-14 (11th Cir. 2011) (same); *Clough v. Perenco, L.L.C.*, No. H-05-3713, 2007 WL 2409357, at *3 (S.D. Tex. Aug. 21, 2007) (same); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 64 (S.D. Tex. 1994) (same); *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So.2d 1111, 1117 (Fla. App. Div. 1997) (same).

court, and a right to appeal then the basic requirements of due process are satisfied.[147]

C. The District Court Erroneously Held That Chevron is Likely To Establish That The Ecuadorian Judgment Was "Obtained By Fraud" Under N.Y. C.P.L.R. § 5304(b)(3)

The district court's determination that Chevron raised "serious questions" as to whether the Judgment was procured by "fraud in the Ecuadorian proceedings" (SPA86) was based upon a "misapprehension of the scope of the statutory exception" provided in § 5304(b)(3).[148] To serve as a basis of non-recognition, the "fraud" contemplated by § 5304(b)(3) "must relate to matters other than issues that could have been litigated and must be a fraud on the court."[149] The exception does not offer the losing party a second bite at the apple.[150] Parties are not permitted to re-litigate claims of fraud in an enforcement proceeding that were already litigated in the foreign court that considered them in the underlying dispute.[151] A contrary interpretation would plainly be improper and beyond the scope of the statute

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[147] *Chimexim*, 36 F. Supp. 2d at 214.

[148] *Fairchild, Arabatzis & Smith*, *Inc. v. Prometco (Produce & Metals) Co.,* 470 F. Supp. 610, 615 (S.D.N.Y. 1979).

[149] *Id.*; *see also Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986).

[150] *Blacklink*, 2008 WL 89958, at *3.

[151] *Thomas & Agnes Carvel Found. v. Carvel*, 736 F. Supp. 2d 730, 752 (S.D.N.Y. 2010); *see also In re Application of Chevron Corp.*, 2011 WL 2023257, at *12-*13 (positing that "the Lago Agrio Court's findings [may be] entitled to issue preclusive or claim preclusive effect … [because] the Lago Agrio Court did not consider the Cabrera Report in issuing its judgment.").

because it would compel U.S. courts hearing enforcement actions to serve as appeals courts from foreign court decisions, a role which U.S. courts have long rejected as offensive to principles of comity.[152] The district court did exactly that when it allowed Chevron to re-litigate the same claims of fraud that were litigated and are still being litigated before the Ecuadorian courts.

Viewed against the proper standard, none of the "facts" relied on by the district court are sufficient to demonstrate "clear and convincing evidence"[153] of "fraud on the court" in Ecuador. Over the past year, Chevron pursued approximately twenty 28 U.S.C. § 1782 actions seeking discovery regarding the purported "fraud." Chevron bombarded the Ecuadorian Court with the fruits of those proceedings and made various claims of fraud. The Ecuadorian Court considered those claims and now the appellate court in Ecuador is considering them *de novo*. The district court relied solely upon the purportedly fraudulent submission of the Calmbacher and Cabrera reports, as well as the Ecuadorian

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[152] *Id.*; *CIBC*, 792 N.E.2d at 159 ("[The purpose of the Recognition Act was] to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement [in New York.]"); *see also Ashenden*, 233 F.3d at 477 (holding that "a retail approach … would [] be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the judgment creditor a further appeal on the merits").

[153] *Clarkson Co., LTD. v. Shaheen*, 544 F.2d 624, 631 (2d Cir. 1976) ("Clear and convincing evidence of fraud is required in order successfully to attack a foreign judgment.").

Plaintiffs' supplemental damages reports, to the Ecuadorian court. (SPA86-88.) But Chevron litigated its fraud claims relating to those reports in Ecuador and the Ecuadorian Court was aware of and ruled on those claims—a fact that is fatal to any claim of "fraud on the court" under § 5304(b)(3).

Moreover, the Ecuadorian Court ultimately granted Chevron's motion and "disregarded the Calmbacher and Cabrera reports in determining the judgment." (A7342-44.) Further, the court noted that *all* of the parties' various expert submissions were so in conflict that it would rely on them, at most, for data rather than their ultimate conclusions, and it had particularly little use for the Ecuadorian Plaintiffs' supplemental submissions—the Court only referenced two in its opinion. (A7387, A7472-78.) Nevertheless, the district court assumed, without any support, that "it likely is impossible to separate the tainted Cabrera process from the final judgment." (SPA87.)[154] This is exactly the type of second-guessing of foreign courts that is not appropriate under § 5304.[155] Thus, even if the

[154] The district court improperly relied on its conclusion that Ecuadorian courts do not provide impartial tribunals under § 5304(a)(1) as support for Chevron's claims of "fraud" under § 5304(b)(3). Nothing in the Recognition Act or the case law interpreting that statute indicates that a court's findings as to the fairness and impartiality of the Ecuadorian *system* of justice under § 5304(a)(1) is at all relevant to whether there was a fraud on the court under § 5304(b)(3).

[155] *Carvel*, 736 F. Supp. 2d at 752; *see also Farrow Mortg. Servs. Pty. Ltd. v. Singh*, No. CA 937171, 1995 WL 809561, at *3 (Mass. Dist. Ct. Mar. 30, 1995) (rejecting "[d]efendant's fraud claim [because it] was already raised and considered by the Australian court").

submission of these reports could somehow be deemed a "fraud on the court"—and it cannot—the Ecuadorian Judgment most certainly was not "procured by" these reports within the meaning of § 5304(b)(3).

IV. THERE IS NO PERSONAL JURISDICTION OVER THE ECUADORIAN PLAINTIFFS

The district court incorrectly concluded that it possessed both general and specific personal jurisdiction over the Ecuadorian Plaintiffs under C.P.L.R. §§ 301 and 302.

A. The District Court Erred in Applying N.Y. C.P.L.R. § 301 to Foreign Individuals Not Engaged in Commercial Activity

The Ecuadorian Plaintiffs are two Ecuadorian nationals who have never been to New York, and it is inconceivable that they have such continuous and systematic contacts with this state that they may be sued in New York on *any* claim. But that is exactly what the district court has held. Picture the following hypothetical scenario: a resident of California travels to Ecuador and has a car accident with one of the Ecuadorian Plaintiffs along a stretch of road in the Amazon jungle. According to the district court, the Californian could sue the Ecuadorian Plaintiff in New York and he would be expected to appear—all because he retained counsel that happens to have a New York office. No New York case supports this outrageous result.

The district court relied on *ABKCO Indus., Inc. v. Lennon*,[156] a case that held that the "doing business" test of § 301 may apply to individuals. (SPA95.) New York courts have split as to the precise issue in *ABKCO*,[157] but, more importantly, they have not extended *ABKCO* to apply to individuals who are engaged in *non-commercial* activity.[158] The district court appears to be the first court to have done so—reaching the unprecedented conclusion that retaining New York counsel suffices to establish the "functional equivalent of [a] New York office" for two individuals from the Amazon. (SPA96.) Because it is undisputed that the Ecuadorian Plaintiffs and their representatives are not alleged to have engaged in commerce in New York, general personal jurisdiction under § 301 cannot apply here.

[156] 384 N.Y.S.2d 783-84 (N.Y. App. Div. 1976).

[157] The district court, unlike this Court and others, did not even acknowledge the split among New York courts. *See, e.g.*, *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985).

[158] *See, e.g.*, *Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 586 (N.Y. App. Div. 1981) (holding that *ABKCO*'s "premise is incorrect" and, regardless, § 301 does not apply to individuals not engaged in commercial activity in the state).

B. The District Court Erred In Ruling That Retaining New York Counsel or Participating in New York Litigation Constitutes Sufficient Contacts for Personal Jurisdiction

An attorney-client relationship with New York counsel, without more, does not confer jurisdiction on the client under either §§ 301 or 302.[159] A non-domiciliary client is subject to jurisdiction in New York *if the client*—not the attorney—purposefully avails itself of the New York forum.[160] Neither the district court nor Chevron cited facts sufficient to establish that the Ecuadorian Plaintiffs (as opposed to their counsel) purposefully availed themselves of this forum. Nothing in the record suggests that the Ecuadorian Plaintiffs controlled or directed counsel's activities in New York.[161] Indeed, Chevron's submissions are devoid of proof, or even an allegation, that the Ecuadorian Plaintiffs ever communicated or met with counsel in New York, executed any agreements in New York, directed any communication to New York, or reached into New York for any other purpose. (A83.) To the contrary, New York counsel consistently traveled to and worked in

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[159] *See Kargo, Inc. v. Pegaso PCS, S.A. de C.V.*, No. 05-cv-10528, 2008 WL 2930546, at *4-5 (S.D.N.Y. July 29, 2008); *Banker v. Esperanza Health Sys., Ltd.*, No. 05-cv-4115, 2006 WL 47669 at *1, *4 (S.D.N.Y. Jan. 9, 2006).

[160] *Fischbarg v. Doucet*, 9 N.Y.3d 375, 385 (N.Y. 2007) (finding jurisdiction because clients retained counsel by telephone in New York and developed an ongoing-attorney client relationship with numerous direct communications into New York by email, mail, and fax); *Barclays Am./Bus. Credit, Inc. v. Boulware*, 542 N.Y.S.2d 587, 588 (N.Y. App. Div. 1989) (explaining that respondent proactively reached into New York).

[161] *See Ross v. UKI, Ltd.*, No. 02-cv-9297, 2004 WL 384885, at *6 (S.D.N.Y. Mar. 1, 2004).

Ecuador. This falls far short of establishing the extensive contacts that were found to constitute "purposeful availment" under New York law.[162]

Nor does participating in other litigation in New York suffice to subject a party to personal jurisdiction because acts "intended to further [a party's] assertion of rights under [a foreign country's laws]" are the "antithesis of purposeful activity in New York."[163] Thus, the Ecuadorian Plaintiffs' efforts to enjoin Chevron's BIT arbitration, as well as their "voluntary appearance" in Chevron's § 1782 actions are not sufficient to confer jurisdiction.[164] Finally, any contacts attributable to the *Aguinda* litigation are stale and irrelevant.[165] It would stretch New York law to its breaking point to exercise personal jurisdiction over two Ecuadorian nationals who have never stepped foot in New York based on a decades-old case that was dismissed because it had "nothing to do with the United States."[166]

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[162] *See Fischbarg*, 9 N.Y.3d at 385; *Barclays*, 542 N.Y.S.2d at 588.

[163] *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 509 (N.Y. 2007); *Pan Atl. Group, Inc. v. Quantum Chem. Co.*, No. 90-cv-5155, 1990 WL 180160, at *3 (S.D.N.Y. Nov. 8, 1990); *see also Andros Compania Maritima S.A. v. Intertanker Ltd.*, 714 F. Supp. 669, 675-76 (S.D.N.Y. 1989).

[164] *See Pan Atl.*, 1990 WL 180160, at *4.

[165] *See Whitaker v. Fresno Telsat, Inc.*, 87 F. Supp. 2d 227, 234 (S.D.N.Y. 1999); *Indem. Ins. Co. of N. Am. v. K-Line Am., Inc.*, No. 06-cv-0615, 2007 U.S. Dist. LEXIS 43567, at *26-27 (S.D.N.Y. June 14, 2007).

[166] *Aguinda*, 142 F. Supp. 2d at 537.

C. The District Court Erred in Finding That Chevron's Claim Under the Recognition Act Arose from the Ecuadorian Plaintiffs' Alleged New York Activity

Because the Ecuadorian Plaintiffs' purported activities in New York have no relation to Chevron's claim under the Recognition Act, there is no basis for jurisdiction regarding that claim under § 302(a)(1).[167] There must be "some articulable nexus" or "substantial relationship between the transaction [in New York] and the claim asserted" to establish § 302(a)(1) jurisdiction.[168]

Chevron claims that (1) the Ecuadorian judicial system does not provide impartial tribunals; (2) the Ecuadorian Judgment was "obtained by fraud" on the Ecuadorian Court; and (3) Chevron was not subject to jurisdiction in Ecuador. (A216-17; *see also* SPA144.) None of these claims arise from or have any nexus to the Ecuadorian Plaintiffs' alleged activities in New York. The Ecuadorian Plaintiffs' activities are wholly irrelevant to whether Chevron is subject to the Ecuadorian Court's jurisdiction or whether the Ecuadorian judicial system provides due process or impartial tribunals.[169]

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[167] *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 23-24 (2d Cir. 2004).

[168] *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006) (internal quotations omitted); *see also Johnson v. Ward*, 4 N.Y.3d 516, 520 (2005); *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1333 (Fed. Cir. 2001); *Faherty v. Spice Entm't, Inc.*, No. 04-cv-2826, 2005 WL 2036018, at *6 (S.D.N.Y. Aug. 23, 2005).

[169] *See, e.g.*, *CIBC*, 743 N.Y.S.2d at 415.

Nor did the purported fraud on the Ecuadorian Court have any nexus to the Ecuadorian Plaintiffs' activities in New York—defending their interests in collateral New York litigation *through* New York counsel and engaging New York counsel to assist with the litigation in Ecuador. Chevron's claim that the Judgment was "obtained by fraud" under § 5304(b)(3) stems primarily from the alleged fraudulent submission of the Cabrera and Calmbacher reports to the court in Ecuador. (SPA86-87, A125-27, A137, A7341.) Obviously, these claims do not arise from or relate to the Ecuadorian Plaintiffs' indirect participation in New York litigation that occurred after the submission of those reports.[170] Moreover, there is no "substantial relationship" between the Ecuadorian Plaintiffs' simple act of retaining Donziger and the alleged "fraud on the court." As noted, there is no evidence (or even an allegation) that the Ecuadorian Plaintiffs controlled, directed, or participated in Donziger's New York activities. Thus, Donziger's alleged activities in New York are not attributable to the Ecuadorian Plaintiffs. But even if they were, the alleged "fraud" occurred in Ecuador and perhaps Colorado, where Stratus is located—not New York. (A125-27, A137.)

[170] *See Ehrenfeld*, 9 N.Y.3d at 509 n.6 (holding that indictment by New York grand jury and being named as defendant in several New York lawsuits was insufficient to support jurisdiction because claim did not arise out of those actions).

D. The District Court's Exercise of Jurisdiction Over the Ecuadorian Plaintiffs Violates Due Process

Due process requires that a foreign litigant have "minimum contacts" to the forum state and that the exercise of personal jurisdiction over the litigant is "reasonable."[171] "Minimum contacts" with the forum state requires either "continuous and systematic contacts with the forum"[172] or "purposeful[] avail[ment] ... of the privilege of conducting activities within the forum."[173] Therefore, for the same reasons that Chevron cannot establish personal jurisdiction under §§ 301 and 302, Chevron cannot establish "minimum contacts" sufficient to satisfy due process.[174] *See supra* Part IV.A-B.

The district court's exercise of jurisdiction over the Ecuadorian Plaintiffs was also unreasonable and failed to comport with "traditional notions of fair play and substantial justice."[175] In determining the reasonableness of jurisdiction over an alien defendant, courts consider: (1) "the burden on the defendant"; (2) "the interest of the forum state in adjudicating the controversy"; (3) "the interest of the

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[171] *See Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010).

[172] *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

[173] *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 109 (1987).

[174] *See Cyberscan Tech., Inc. v. Sema Ltd.*, No. 06-cv-526(GEL), 2006 WL 3690651, at *6 (S.D.N.Y. Dec. 13, 2006).

[175] *See Chloé*, 616 F.3d at 164.

plaintiff in obtaining convenient and effective relief"; (4) "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [state] court."[176]

These factors demonstrate that the exercise of jurisdiction over the Ecuadorian Plaintiffs is unreasonable and contrary to principles of due process. Requiring these two Ecuadorians with no real contacts to this forum to appear in New York to defend the entire Ecuadorian judicial system and combat Chevron's efforts to re-litigate a decade-long litigation imposes a tremendous burden. Moreover, New York has *no* interest in adjudicating this action—ten years ago the S.D.N.Y. dismissed the action (and this Court affirmed) because this case has "everything to do with Ecuador and nothing to do with the United States."[177] Lastly, the district court's exercise of jurisdiction and intent to "finally determine the controversy worldwide" (SPA90) will undoubtedly encroach upon other sovereigns by denying their courts the opportunity to decide if the Judgment is enforceable under their own laws and policies. *See supra* Arg. I.A., II.B.2. Indeed, many of the countries where Chevron may be subject to enforcement

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[176] *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 128-29 (E.D.N.Y. 2000) (citing *Asahi*, 480 U.S. at 113, 115; *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985).

[177] *Aguinda*, 142 F. Supp. 2d at 537.

feature legal systems that differ greatly from the U.S.[178] Accordingly, the district court's exercise of jurisdiction over the Ecuadorian Plaintiffs is unreasonable and violates principles of due process.

V. EQUITABLE RELIEF SHOULD HAVE BEEN DENIED BECAUSE OF CHEVRON'S UNCLEAN HANDS

Chevron is not entitled to equitable relief because it comes to this Court with unclean hands. The unclean hands doctrine prevents a court from exercising its equitable powers in favor of "one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage" related to the subject matter at issue.[179] The doctrine derives from the principle that "he who seeks equity must do equity."[180] This mandate applies with equal force to proceedings for injunctive relief as to other proceedings.[181] Because the relief injunctions afford is both equitable and extraordinary, and especially where (as here) the relief sought is of

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[178] *See Nat'l Asbestos Workers Med. Fund v. Philip Morris*, 86 F. Supp. 2d 137, 141 (E.D.N.Y. 2000); *Simon*, 86 F. Supp. 2d at 134; *see also Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

[179] *PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004) (quoting *Bein v. Heath*, 47 U.S. 228, 247 (1848)).

[180] *Sanofi-Synthelabo v. Apotex Inc.*, 488 F. Supp. 2d 317, 348 (S.D.N.Y. 2006) (quoting *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947)); *see also Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998).

[181] *See, e.g.*, *Stokley-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 2d 510, 534 (S.D.N.Y. 2009); *Intershoe, Inc. v. Filanto S.P.A.*, 97 F. Supp. 2d 471, 473 (S.D.N.Y. 2000).

unprecedented magnitude, the behavior of the party seeking such relief demands close scrutiny.[182]

Here, there is ample evidence that Chevron has: (1) colluded with Ecuadorian government officials to undermine the Lago Litigation;[183] (2) blocked the collection of scientific evidence at well-sites where Chevron anticipated damaging results;[184] (3) orchestrated a scheme to entrap a judge presiding over the Lago Litigation;[185] (4) operated a sham laboratory to "cook" the results of environmental testing;[186] (5) paid a witness exorbitant sums of money and lavish perks;[187] and (6) engaged in an array of procedural misconduct designed to stonewall the Lago Litigation, including filing frivolous motions, interfering with site inspections, and threatening a judge with criminal sanctions, and even imprisonment, to coerce him to rule in Chevron's favor.[188] Courts have an

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[182] *Shondel v. McDermott*, 775 F.2d 859, 868 (7th Cir. 1985) (denying request for injunction due to unclean hands and explaining that "a preliminary injunction [is] extraordinary because it is often a very costly remedy … yet it is ordered on the basis of only a summary inquiry into the merits of the plaintiff's suit").

[183] *See supra* pp. 9-11.

[184] *See supra* pp. 16-17.

[185] *See supra* p. 18-19.

[186] *See supra* p. 19.

[187] *See supra* pp. 19-20.

[188] *See supra* pp. 17-21.

affirmative duty to consider evidence of such egregious behavior at any time and even *sua sponte*.[189]

At a minimum, this Court should remand with instructions that the district court consider this evidence because the district court's justification for declining to do so—the Ecuadorian Plaintiffs' supposed "waiver" of the unclean hands defense—finds no support in law. The district court contrived a "waiver" argument premised upon the Ecuadorian Plaintiffs' failure to submit that evidence before the arbitrary one-week deadline the court set for opposition to Chevron's motion for a preliminary injunction. (SPA122, SPA134.) This "waiver" defies principles of law and equity. The district court had a duty to consider, at any stage in the proceedings and whether formally pleaded by the parties or not, if a party's unclean hands should bar the equitable relief it seeks.[190] The admissibility of evidence demonstrating unclean hands "does not depend upon the diligence or want of diligence of a party to the case," but rather, "*whenever in the course of the proceeding* the court is informed in any way that the plaintiff is without clean

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[189] *Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co.*, 146 F.2d 165, 168 (8th Cir. 1945); *see also Bishop v. Bishop*, 257 F.2d 495, 500 (3d Cir. 1958); *Gaudiosi v. Mellon*, 269 F.2d 873, 879 (3d Cir. 1959); *Goldstein v. Delgratia Mining Corp.*, 176 F.R.D. 454, 458 n.4 (S.D.N.Y. 1997) (noting application of unclean hands "has nothing to do with the rights or liabilities of the parties … and the court may even raise it *sua sponte*") (citing *Art Metal Works v. Abraham & Straus, Inc.*, 70 F.2d 641, 646 (2d Cir. 1934) (Hand, J., dissenting).)

[190] *See supra* note 189.

hands … the court should inquire into the facts of its own accord, and if it finds the charge to be true relief should not be granted."[191]

In any event, there has been no waiver here. The Ecuadorian Plaintiffs argued and presented evidence of Chevron's unclean hands in three separate submissions, all proffered in advance of the district court's entry of the Injunction. (*See generally* A4298, A5241, A7673, SPA134.)

Because the district court refused to consider the Ecuadorian Plaintiffs' submissions regarding Chevron's unclean hands, it is now up to this Court to ensure that Chevron is not able to parlay over a decade's worth of misdeeds into unprecedented equitable relief. This Court can assess this unclean hands evidence and reverse the unprecedented injunctive relief granted to Chevron.[192] At a minimum, the district court should be directed to examine the evidence of Chevron's behavior—evidence that even the district court long—and rightly—suspected was forthcoming. (SPA135 ("THE COURT:…I don't for a minute assume *a priori* that anyone's hands in this matter are clean. Anybody's.").)

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[191] *Frank Adam*, 146 F.2d at 167 (emphasis added).

[192] *See Gaudiosi*, 269 F.2d at 879; *Bishop*, 257 F.2d at 500.

CONCLUSION

With its unprecedented Injunction, the district court improperly reserved for itself exclusive worldwide jurisdiction to determine the validity of a foreign judgment entered in favor of foreign citizens under foreign law in a case that has "nothing to do with the United States." It exercised this unabashed assertion of power without any evidence that the Ecuadorian Plaintiffs will ever seek recognition of the Judgment in New York. The lower court's decision is destructive of international comity, stretches the DJA beyond its limit, and turns the law of international judgment enforcement on its head. For these reasons and those set forth above, this Court should reverse and vacate the Injunction and exercise its discretion to reassign this case to another district judge.

Respectfully submitted,

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Dated: June 2, 2011

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