10-1020-cv(L),
10-1026-cv(CON)

United States Court of Appeals
for the
Second Circuit

REPUBLIC OF ECUADOR,

Petitioner-Appellant,

DANIEL CARLOS LUSITAND YAIGUAJE, VENANCIO FREDDY CHIMBO CHEFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALOPIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUIND SALAZAR, CARLOS GREGA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUI AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA,

(For Continuation of Caption See Reverse Side of Cover)

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

– v. –

CHEVRON CORPORATION, TEXACO PETROLEUM COMPANY,

Defendants-Appellees.

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PRELIMINARY STATEMENT

For some twenty-six years, Chevron[1] dumped billions of gallons of toxic waste into Ecuador's Amazon rainforest, destroying the lives and livelihoods of tens of thousands of farmers and indigenous residents. When plaintiffs sued in the Southern District of New York (the *Aguinda* action), Chevron spent nine more years doing everything in its power to transfer the case to Ecuador. After promising to submit to Ecuadorian jurisdiction and to satisfy any Ecuadorian judgment subject to only one specifically-defined defense (NY CPLR 5304) in a post-judgment enforcement action, Chevron got its victory: its *forum non conveniens* motion was granted. As a result, plaintiffs re-filed in Ecuador, in a case now spanning over seven years, and involving testimony from dozens of witnesses, 102 judicial field inspections, 63,000 chemical sampling results, and more than 200,000 pages of evidence.

Now, forty-six years after it began polluting an area of the Amazon as large as Rhode Island, seven years after the case was re-filed in

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[1] Chevron Corporation, Texaco, Inc., ChevronTexaco, and Texaco Petroleum Company are for all relevant purposes the same entity, which plaintiffs will refer to as "Chevron." As Defendants informed this Court in 2001, "Texaco merged with Chevron Inc. on October 9, 2001." A-187. Chevron even asked the Court to take "judicial notice" of this fact. *Id.*; *see* A-631, A-820. "[I]n the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears." *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 550-51 n. 3 (1964); *see also Taylor v. Sturgell*, 128 S.Ct. 2161, 2172 (2008) (where, as here, entities have "pre-existing 'substantive legal relationship[s]'" and are in privity with one another, preclusion is justified).

Ecuador, and notwithstanding its litany of promises and representations in federal court, Chevron seeks to have a private arbitration panel order the Ecuadorian government to tell its judges to go home and shut down the biggest environmental case in the world.

Chevron made a promise to the Southern District and to the Second Circuit. It was the promise that induced these courts to dismiss *Aguinda* and that rescued Chevron from an action it did not want to litigate in the United States. Chevron promised that, if the court dismissed plaintiffs' action on *forum non conveniens* grounds, it would submit to Ecuadorian jurisdiction and satisfy any Ecuadorian judgment, subject only to a CPLR 5304 defense in an enforcement action. A-443, A-379-80, A-437 ¶ 5, A-478, A-599, A-1407-08. It made those promises in a verified interrogatory, a stipulation, and in at least three briefs. *Id*.

But now, in a case of transferor's remorse, Chevron seeks to break its promise. In its latest round of forum shopping, the company has run to an international arbitral body (under the U.S.-Ecuador Bilateral Investment Treaty ("BIT")), seeking a "declaration" of "no liability or responsibility for environmental impact" for its destruction of the Amazonian rainforest, A-98-99 ¶ 76(1), and an "[a]n order and award requiring Ecuador to inform the court in the Lago Agrio Litigation" that

Chevron "has been released from all environmental impact arising out of the former Consortium's activities," A-99 ¶ 76(3).

This is a bait and switch. After agreeing to Ecuadorian jurisdiction as a condition to its *forum non conveniens* motion, Chevron now seeks to extinguish Ecuador's jurisdiction. After agreeing to satisfy *any* Ecuadorian judgment subject only to a single affirmative defense in an enforcement action, Chevron seeks to terminate the Ecuadorian case before there is any judgment at all. And Chevron seeks to do all of this in an arbitral forum where plaintiffs are not even permitted to appear.

When it agreed to satisfy a judgment as a condition for *FNC* dismissal, Chevron did not reserve, *sub silentio*, a right to avoid judgment through a collateral arbitration. Chevron waived that right. Had Chevron preserved the right to attack plaintiffs' case in a forum other than Ecuador, this Court would never have granted Chevron's *FNC* motion. Had Chevron preserved the right to attack plaintiffs' case in a forum where plaintiffs could not even appear, this Court would never have granted Chevron's *FNC* motion. But Chevron made no such reservation. Instead, Chevron made promises: to the Southern District, to the Second Circuit, and to plaintiffs. Those promises induced this Court to transfer the case to Ecuador in 2002,

and induced plaintiffs to spend enormous resources for seven years in one of the largest and most costly cases in Ecuadorian history.

Well-settled principles of judicial, equitable, and collateral estoppel prevent Chevron from such post-hoc, tactical gamesmanship. Chevron promised the Second Circuit to submit to Ecuadorian jurisdiction and to satisfy (subject to CPLR 5304) any Ecuadorian judgment; it *cannot* renege on those promises now. This Court should enjoin Chevron from continuing this duplicitous arbitral proceeding, and reverse the district court.

JURISDICTIONAL STATEMENT

The District Court had original jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and also pursuant to 28 U.S.C. § 1332(a)(4), as the matter in controversy (a) exceeds the sum of $75,000, exclusive of interest and costs, and (b) is between foreign nationals (Plaintiffs), and citizens of a State or of different states (Chevron, TexPet). The District Court had personal jurisdiction over Chevron and TexPet because each is found, regularly transacts business, owns property, and is qualified to do business within the State of New York, and within the Southern District of New York. In addition, Chevron and TexPet have each, in person or through an agent, transacted business within the State of New York from which the claims stated herein arise, and each has conducted activity in this

judicial district. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final judgment dated March 20, 2010. Timely notice of appeal was filed on March 26, 2010.

STATEMENT OF THE ISSUES

1. Having promised this Court to submit to Ecuadorian jurisdiction and satisfy any resulting judgment subject only to a single, defined defense in an enforcement action, is Chevron judicially estopped from evading Ecuadorian jurisdiction and attempting to prevent or attack an Ecuadorian judgment under the BIT?

2. Having promised plaintiffs to submit to Ecuadorian jurisdiction and satisfy any resulting judgment subject only to a single, defined defense in an enforcement action, is Chevron equitably estopped after seven years of a costly litigation from evading Ecuadorian jurisdiction and attempting to prevent or attack an Ecuadorian judgment under the BIT?

3. After this Court first rejected Chevron's attempt to dismiss *Aguinda* because Chevron failed to promise to submit to Ecuadorian jurisdiction, is Chevron collaterally estopped from its attempt now to defeat Ecuadorian jurisdiction under the BIT?

4. May Chevron arbitrate and dismiss plaintiffs' case under the BIT, when plaintiffs never agreed to arbitrate with Chevron anywhere?

STATEMENT OF THE CASE[2]

Chevron's Destruction of the Amazonian Rainforest

From 1964 to 1992, Chevron owned an interest in an approximately 1,500 square-mile concession in Ecuador that contained numerous oil fields and more than 350 well sites. A-116.[3] Beginning in 1964 and continuing at least until June 30, 1990 – when it ceased being operator of the concession area – Chevron engineered and presided over what some experts believe is the worst oil-related environmental disaster in the world. It deliberately dumped many billions of gallons of waste byproduct from oil drilling directly into the rivers and streams of the rainforest covering an area roughly the size of Rhode Island. It gouged more than 900 unlined waste pits out of the jungle floor – pits which to this day leach toxic waste into soils and groundwater. It burned hundreds of millions of cubic feet of gas and waste oil into the atmosphere, poisoning the air and creating "black rain" which inundated the area during tropical thunderstorms. A-116-17.

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[2] On a motion to dismiss, all facts are taken as true and construed in the light most favorable to Plaintiffs, the non-moving party. *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir.2001).

[3] Plaintiffs' Complaint to Stay Arbitration dated January 14, 2010, ¶ 13.

Chevron deliberately dumped into Ecuador's Amazon rainforest many more times the amount of oil spilled by the Exxon Valdez. In the impacted area of Ecuador today, due to the legacy created by Chevron, the natural environment of the Amazon rainforest on which thousands of people depend for their daily sustenance is for the most part poisoned. A-117.

To minimize production costs, Chevron built an oil extraction system that was designed to pollute. First, it discharged billions of gallons of "production water" (the contaminated waste water that is mixed with crude oil as it comes out of the ground) into streams and rivers – four million gallons *per day* at the height of the operation. At Chevron's oil production facilities, the "formation water" was separated from the crude and discharged onto the ground and into the surface waters on a continuous basis, 24 hours per day, seven days per week, over a period of decades. *Id.* ¶ 14.

Second, Chevron built some 916 open-air toxic waste pits in and around its well sites. Chevron cut these pits directly into the floor of the jungle, and they had no lining to prevent their contents from migrating into the soil and groundwater. To the contrary, Chevron designed the waste pits to flow into neighboring streams and rivers. Chevron filled the waste pits with "drilling muds" and waste crude oil and then used them for permanent

storage in violation of established industry standards. "Drilling muds" are a mixture of lubricants and heavy metals, which are combined with the waste oil and formation waters that are the end by-products of the well perforation and maintenance process. Chevron built many of its pits with piping systems used to drain these oil byproducts into nearby streams and rivers. Chevron would also set the pits on fire. In addition, the Company regularly dumped the oil sludge from the waste pits along dirt roads in the region. A-118 ¶ 16.

Chevron's operation was grossly substandard by any measure: it violated, *inter alia*, then-current U.S. industry standards, Ecuadorian environmental law, the Company's contract with Ecuador's government – which prohibited Chevron from using production methods that contaminated the environment – and international law. Even Chevron's own internal audits of its environmental impacts, conducted in the early 1990s by independent outside consultants and placed in evidence in the Lago Agrio trial, found extensive contamination at Chevron's oil production facilities. Consistent with its willful neglect of Ecuador's Amazon and the people who lived there, Chevron also engaged in deliberate malfeasance: a 1972 memo from R.C. Shields, then head of Latin American production for Chevron, issued a blunt directive to Chevron's acting manager in Ecuador to destroy

previous reports of oil spills and to forego documenting future spills in writing unless they were already known to the press or regulatory authorities. A-118-19 ¶¶ 15-17.

Plaintiffs File in the Southern District, but--Touting Ecuador's Courts--Chevron Seeks to Evade American Jurisdiction

In 1993, the Amazon communities filed a federal class-action lawsuit against Chevron in the Southern District of New York, the site of Chevron's global headquarters. Plaintiffs "sought money damages under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the Alien Tort Claims Act," as well as "extensive equitable relief to redress contamination of the water supplies and environment." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

From the lawsuit's inception, and for nine years, Chevron did everything it could to transfer the case away from the Southern District to the courts of Ecuador.[4] Chevron's motion on *forum non conveniens* and international comity grounds rested heavily on its argument that the Ecuadorian courts provided an adequate, fair, and neutral forum.

[4] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated by Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd Aguinda v. Texaco*, 303 F.3d 470, 476 (2d Cir. 2002).

For nine years, Chevron touted the Ecuadorian judicial system, submitting numerous affidavits from experts and its own counsel, and repeating these assertions in extensive briefing. *See, e.g.*, A-211 (Brief for ChevronTexaco, Inc., U.S. Court of Appeals for the Second Circuit dated December 20, 2001 ("Ecuadorian legal norms are similar to those in many European nations.")); A-223-34; A-134-36 (Affidavit of Dr. Alejandro Ponce Martinez dated February 9, 2000 ¶ 2 ("the courts in Ecuador provide a totally adequate forum"), ¶¶ 5-7); A-138 (Affidavit of Dr. Rodrigo Perez Pallares (Texaco's attorney) dated December 1, 1995 ¶ 7 ("the Ecuadorian courts provide an adequate forum for claims such as those asserted by the plaintiffs")); A-336-46 (Affidavit of Dr. Enrique Ponce y Carbo dated December 7, 1995); A-144-47 (Affidavit of Dr. Vicente Bermeo Lanas dated December 11, 1995); A-381 (Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, dated January 11, 1999 ("Ecuador's judicial system provides a fair and adequate alternative forum")); A-382-84; A-460 (Texaco Inc.'s Reply Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity dated January 25, 1999).

Chevron's First FNC Motion Fails, Because Chevron Fails to Consent to Ecuadorian Jurisdiction

The district court granted Chevron's motion to dismiss on *forum non conveniens* and international comity grounds. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996). This Court, however, vacated and remanded, holding that a *forum non conveniens* dismissal would be inappropriate *unless* Texaco first consented to Ecuadorian jurisdiction. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998). This Court held:

> '[I]n order to grant a motion to dismiss for forum non conveniens, a court must satisfy itself [among other things] that the litigation may be conducted elsewhere against all defendants.' . . . Accordingly, dismissal for *forum non conveniens* is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action.

Id. (citation omitted).

On Remand, Chevron Promises to Consent to Ecuadorian Jurisdiction and Satisfy Any Ecuadorian Judgment Subject Only to a CPLR 5304 Defense

On remand, Chevron made a series of promises designed to ensure that the case would be transferred to Ecuador. On multiple occasions, Chevron promised to satisfy any Ecuadorian final judgment, subject only to a single, defined defense (CPLR 5304) in an enforcement action.

Promise #1:

Plaintiffs submitted interrogatories to Chevron concerning its alleged willingness to try the *Aguinda* case in Ecuador. Plaintiffs asked: "Will [Chevron] fully satisfy any judgment entered against it . . . by an Ecuadorian court if the claims made herein by Maria Aguinda and other members of the putative class are dismissed without prejudice and re-filed in Ecuador?" In a verified response, Chevron stated: "[Chevron] . . . *will* satisfy a final judgment . . . in the event th[e] [*Aguinda*] action[is] dismissed by this Court on grounds of *forum non conveniens* or international comity and if plaintiffs refile claims in Ecuador. [Chevron] reserves its right to contest any such judgments under [CPLR 5301 *et seq*.]." A-443 (emphasis added).[5] In a number of interrogatory responses, Chevron also referred plaintiffs to its moving *FNC* brief to be filed on January 11, 1999, where it promised to explicate further its willingness to satisfy a judgment in Ecuador.

[5] Texaco's Objections and Resps. to Pls.' Interrogs. Regarding Proposed Alternative Fora (Dec. 28, 1998) (Verified Response to Interrogatory #2.).

Promise #2:

In that January 11, 1999 moving brief to the district court, Chevron did explicate further. In an attempt to induce the court to transfer the case to Ecuador, Chevron flatly represented:

> *If this Court dismisses* these cases on forum non conveniens or comity grounds, Texaco *will agree* as follows: . . . fourth, Texaco *will satisfy* judgments that might be entered in plaintiffs' favor, subject to Texaco's rights under New York's Recognition of Foreign Country Money Judgments Act [CPLR 5304].

(Emphasis added.)[6] Nowhere did Chevron state or even imply that it reserved the right to attack or prevent an Ecuadorian judgment by filing a BIT Arbitration.

Promise #3:

Bolstering this unambiguous representation, Chevron's moving brief also cited its written "Agreements Regarding Conditions of Dismissal" ("Texaco Agreement") which it stated was "to be signed and filed with the Court in *Aguinda*" if the Court conditionally dismissed the case. A-380 n.7 (citing Apps. 18 and 19, A-431-40; A-1537). The Texaco Agreement once again represented that it "agrees to satisfy a final judgment . . . in favor of a named plaintiff in Aguinda, subject to Texaco Inc.'s reservation of its right

[6] A-379-380 (Texaco's Mem. Of Law Supp. Renew. Mots. To Dismiss (Jan. 11, 1999)) (emphasis added).

to contest any such judgment under New York's Recognition of Foreign Country Money Judgments Act." A-437 ¶ 5. Both Chevron and the district court in *Aguinda* repeatedly relied upon the Texaco Agreements. *See, e.g.*, A-451 (Texaco's Reply Mem. Of Law Supp. Renewed Mots. To Dismiss *Aguinda* and *Jota* (Jan. 25, 1999)); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539, 550 n.5 (S.D.N.Y. 2001).

Promise #4:

Plaintiffs nevertheless remained suspicious that Chevron was not telling the truth, *i.e.*, that it was secretly planning to attack an Ecuadorian judgment after the *FNC* motion was granted and the case was safely out of the hands of a United States district judge. A-478. In response to these concerns, Chevron made a *fourth* unambiguous representation to the court in its reply brief, stating: Chevron "has agreed to satisfy *any* judgment in plaintiffs' favor, reserving its right to contest their validity *only* in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act." A-478 & n.13.[7]

Again, nowhere in either its moving brief or reply brief did Chevron reserve the right to attack or prevent an Ecuadorian judgment by filing a BIT Arbitration.

[7] Texaco's Reply Mem. Of Law Supp. Renewed Mots. To Dismiss *Aguinda* and *Jota* (Jan. 25, 1999) (emphasis added).

Chevron Knew What It Was Doing

Chevron's repeated representations and promises to plaintiffs and to the district court were not idle comments, but a considered and deliberate strategy by sophisticated counsel designed to escape federal court jurisdiction and send the case to Ecuador.

At the time Chevron was touting the Ecuadorian legal system in the Southern District, it was fully aware that Ecuador did not have a perfect legal system.[8] Chevron went to Ecuador with its eyes open, but its promises to the district court, to this Court, and to plaintiffs were not ill-considered. For Chevron still reserved for itself an escape hatch in case of misconduct, fraud, or other problems that could affect the Ecuadorian litigation in the future. That escape hatch was "New York's Recognition of Foreign Country Money Judgments Act," *i.e.*, CPLR 5304. A-478 & n.13.

CPLR 5304 provides that, in an enforcement action, "A foreign country judgment is not conclusive if," *inter alia*:

> (a)(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> . . . .

[8] *See, e.g.*, U.S. Dep't of State. Ecuador: Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 2000. February 23, 2001, available at http://www.state.gov/g/drl/rls/hrrpt/2000/wha/766.htm ("The Constitution provides for an independent judiciary; however, in practice the judiciary is susceptible to outside pressure and corruption.").

> (b)(3) the judgment was obtained by fraud;
>
> (b)(4) the cause of action on which the judgment is based is repugnant to the public policy of this state; [or]
>
> . . . .
>
> (b)(6) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.

CPLR 5304. Thus, if and when plaintiffs secured a judgment in Ecuador, Chevron still reserved the ability in an enforcement action to defend itself on the grounds that due process was not followed (CPLR 5304(a)(1)), or that "the judgment was obtained by fraud" (CPLR 5304(b)(3)) or was against New York "public policy" (CPLR 5304(b)(4)). Whatever horribles that could occur in the future in an Ecuadorian case, Chevron, represented by sophisticated counsel, *prospectively* reserved to itself this particular, defined avenue to defend itself on due process and other specified grounds. Chevron also reserved the ability, in an enforcement proceeding, to claim that the parties had settled the litigation out of court. CPLR 5304(b)(6).

An enforcement action subject to a CPLR 5304 defense, of course, would be brought by the plaintiffs. Plaintiffs would have an opportunity to rebut Chevron's allegations. An enforcement action would also be brought *after*, not before, judgment was entered.

What Chevron did *not* do, however, was reserve the right to attack or prevent an Ecuadorian judgment by arbitration under the BIT. The U.S.–Ecuador Bilateral Investment Treaty came into force in 1997.[9] It existed and was known to Chevron. A BIT proceeding, of course, is quite different from an enforcement action. First, a BIT action can not and would not be brought by the plaintiffs here. To the contrary, under BIT rules, the plaintiffs can not even appear before the BIT. Second, unlike an enforcement action, which is a post-judgment proceeding, this BIT Arbitration was brought prior to judgment. Third, having access to a BIT Arbitration places Chevron in a better position in an Ecuadorian case than in a United States case, because Chevron cannot have BIT Arbitration on the basis of allegations against its own country's courts and government.

A BIT reservation by Chevron would certainly have presented quite a different picture to plaintiffs and to the district court. However, neither plaintiffs nor the court had occasion to consider or address the issue, because Chevron never raised it anywhere, even once.

[9] http://www.state.gov/documents/organization/43558.pdf

Based on Chevron's Representations, the District Court and the Second Circuit Grant the FNC Motion

Relying on Chevron's representations, the district court then dismissed the case on *forum non conveniens* grounds. *Aguinda*, 142 F.Supp.2d at 538-39. Because "Texaco ha[d] . . . unambiguously agreed in writing to being sued on these claims (or their Ecuadorian equivalents) in Ecuador, [and] to accept service of process in Ecuador," the court granted Chevron's *FNC* motion. *Id.* at 539. The district court expressly cited the filed "Texaco Agreements" (Appendix 18), which contained Chevron's commitment to satisfy any final Ecuadorian judgment subject only to a CPLR 5304 defense. *Id.*[10]

The *Aguinda* plaintiffs appealed again. In its appellate brief, "ChevronTexaco," as it now called itself[11] — again repeated its consent to jurisdiction in Ecuador, and to the "other dismissal conditions in order to

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[10] *Aguinda*, 142 F. Supp. 2d at 539 (citing A-351 (Texaco Inc.'s Memorandum of Law In Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 12-13); A-431-40 (Texaco App., Ex. 18 Texaco Inc.'s Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions); A-1357 (transcript of hearing on defendant's renewed motion to dismiss, Feb. 1, 1999, at 5)). After the dismissal, Chevron also signed a stipulation promising to submit to the jurisdiction of the Ecuadorian court. A-1408.

[11] Texaco merged with Chevron Corp. on October 9, 2001, and the merged entity initially changed its name to ChevronTexaco, Corp. A-631 (Chevron Corporation and Texaco Inc. Joint Proxy Statement/Prospectus (Aug. 27, 2001)). In 2005, ChevronTexaco Corp. changed its name back to "Chevron Corp." A-820 (Chevron Press Release, "ChevronTexaco Corporation Changes Name to Chevron Corporation, Unveils a New Image" (May 9, 2005)).

facilitate litigation in plaintiffs' home courts." A-178 (Br. for Def.-Appellee (Dec. 20, 2001)). In so doing, ChevronTexaco specifically cited the pages of the district court record that contained the Texaco Agreement, including its waiver of other defenses to enforcement of any Ecuadorian judgment. *Id*. A-192 (citing, *inter alia*, JA4991-5002, which contain the Texaco Agreement).[12]

On this record, this Court affirmed the district court's second *forum non conveniens* dismissal. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). ChevronTexaco lauded the decision, stating in a press release that it was "pleased with the ruling of the U.S. Court of Appeals affirming the lower court's dismissal," which "vindicate[d] ChevronTexaco's long-standing position and the arguments we have made to the court: The appropriate forum for this litigation is Ecuador." A-269.[13]

Chevron Fails to Reserve Any Right to File a BIT Arbitration

At no point, either in its verified interrogatory response, A-443; its moving brief to the district court, A-379-80; the Texaco Agreement, A-437 ¶ 5; its reply brief to the district court, A-478; or its brief to the Second

[12] After the district court dismissed *Aguinda* on FNC grounds, Chevron stipulated (once again) that it would agree to jurisdiction in Ecuador if plaintiffs re-filed their case there. A-1407-08.

[13] A-269 (ChevronTexaco Press Release, *ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation* (Aug. 19, 2002)).

Circuit, A-599; did Chevron state, suggest, or in any way imply that it had reserved *any* right to attack or prevent an Ecuadorian judgment before a BIT tribunal. To the contrary, Chevron repeatedly agreed to consent to Ecuadorian jurisdiction, and to satisfy any Ecuadorian judgment subject only to a CPLR 5304 defense in an enforcement proceeding. *See id.*

Relying on Chevron's Promises, for Seven Years, Plaintiffs Litigate One of the Largest Cases in Ecuadorian History, Revealing Overwhelming Evidence of Chevron's Illegal Conduct

After final dismissal of the *Aguinda* action in 2002, plaintiffs re-filed the case in Lago Agrio, Ecuador. The case began in 2003. It has been highly contested and vigorously defended by Chevron. The record contains more than *200,000* pages of evidence, roughly 63,000 chemical sampling results produced by laboratories contracted by both parties and the court expert, testimony from dozens of witnesses, and 102 judicial field inspections of former Chevron well and production sites conducted over a five-year period under the auspices of the court. Soil samples from the production wells and separation stations inspected reveal extensive contamination in violation of Ecuadorian law. A-123-24 ¶ 28.

Notwithstanding the overwhelming evidence against it, Chevron remained committed to fight the litigation for as long as possible, by whatever means necessary. In a 2007 press release, Chevron promised

plaintiffs a "lifetime" of appellate and collateral litigation if they persisted in pursuing their claims. A-271. Or, as a Chevron spokesperson put it more recently, the Company would "fight" the *Aguinda* case "until hell freezes over" and then "fight it out on the ice."[14]

In an About-Face, Chevron Files a Private Arbitration to Avoid Its Chosen Forum of Ecuador

Chevron is attempting to make good on its threat. Recognizing the enormity of the evidence, and the possibility that it may lose the Lago Agrio trial, Chevron last year hired new lawyers and adopted a new litigation strategy: to defeat Ecuadorian jurisdiction, attack the Lago Agrio Court, and pre-empt any Ecuadorian judgment.

On September 23, 2009, Chevron filed a "notice of arbitration," allegedly pursuant to the U.S.-Ecuador Bilateral Investment Treaty. A-80-100. Chevron has asked this private arbitration panel to order the government of Ecuador simply to tell the judge to dismiss the Lago Agrio litigation. A-99 ¶ 76(3). Chevron's prayer for relief seeks, *inter alia*,

- a "declaration" that Chevron and its affiliates "have no liability or responsibility for environmental impact";

[14] John Otis, *Chevron vs. Ecuadorean activists*, The Global Post, May 3, 2009, http://www.globalpost.com/dispatch/the-americas/090429/chevron-ecuador?page=0,2

- a "declaration" that Chevron and its affiliates "have . . . no responsibility . . . for performing any . . . environmental remediation";

- "[a]n order and award requiring Ecuador to inform the court in the Lago Agrio Litigation" that Chevron and its affiliates "have been released from all environmental impact" arising out of their activities in Ecuador;

- a "declaration" that Ecuador "is exclusively liable for any judgment that may be issued in the Lago Agrio Litigation";

- "[a]n award for all damages caused to" Chevron and its affiliates, "including attorneys' fees incurred by" Chevron and its affiliates "in defending the Lago Agrio Litigation"; and

- "An award of moral damages to compensate" Chevron and its affiliates "for the non-pecuniary harm that they have suffered."

A-98-99 (Claimants' Notice of Arbitration (September 23, 2009), at ¶¶ 76(1), 76(3), 76(4), 76(5), 76(6), 76(7)). In short, Chevron is seeking an order through the arbitral panel requiring the Republic's President to violate Ecuador's Constitution, interfere with the country's independent judiciary, and quash a trial brought by Ecuadorian citizens against Chevron in the very court in which Chevron sought to have the claims heard.

Chevron's dubious basis for this extraordinary application is (1) that because the Republic of Ecuador released Chevron from environmental claims (a release, incidentally, that had nothing to do with third-party

claims),[15] Chevron was also released *sub silentio* by plaintiffs, A-85-87 ¶¶ 14-21, and (2) Chevron's due process rights were violated in Ecuador in a number of respects, requiring dismissal of the Lago Agrio case, A-89-96 ¶¶ 35-65. Of course, before *this* Court, Chevron had reserved a different place (an enforcement court) and time (post-judgment) to address both its claims of release (CPLR 5304(b)(6)) and of due process (CPLR 5304(a)(1)).

Only companies and countries with investment disputes may appear before the BIT panel. U.S.-Ecuador BIT Art. VI(1).[16] Plaintiffs in this case may not. Notwithstanding its promises to this Court, Chevron would thus attempt to have a private arbitral panel order the dismissal of a seventeen-year litigation by 30,000 plaintiffs involving an oil disaster 10 times the size of the Exxon-Valdez, in a forum where plaintiffs cannot appear.

This action followed.

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[15] *See* A-1418-19; A-1482 (Memorandum of Understanding "shall apply without prejudice to the rights possibly held by third parties"); *see also Republic of Ecuador v. ChevronTexaco Corp*., 376 F. Supp. 2d 334, 374 (S.D.N.Y. 2005) ("it is highly unlikely that a settlement entered into while *Aguinda* was pending would have neglected to mention the third-party claims being contemporaneously made in *Aguinda* if it had been intended to release those claims or to create an obligation to indemnify against them").

[16] http://www.state.gov/documents/organization/43558.pdf

The Opinion Below

In a short ruling, the district court essentially ignored plaintiffs' claims, focusing almost exclusively on Ecuador's petition against Chevron. The court held that "there is at least one arbitrable issue" as between Chevron and *Ecuador*, A-2140, and therefore (citing two inapposite New York cases), the arbitration could proceed in its entirety. *Id.* The court did not hold that plaintiffs agreed to arbitrate their case under the BIT. For reasons that are not clear, the court also did not pass upon "the merits of all the waiver and estoppel arguments put forward." A-2140. The court also did not address whether Chevron's promises to this Court estop Chevron from seeking to evade an Ecuadorian judgment. Without further reasoning, the court denied plaintiffs' motion for summary judgment and granted Chevron's motion to dismiss. A-2141.

SUMMARY OF THE ARGUMENT

Chevron repeatedly promised to consent to Ecuadorian jurisdiction and satisfy any Ecuadorian judgment subject only to a CPLR 5304 defense in an enforcement proceeding. Those promises induced this Court to grant its *FNC* motion, and plaintiffs to re-file and for seven years litigate one of the largest cases in Ecuadorian history. Chevron is now judicially, equitably, and collaterally estopped from evading Ecuadorian jurisdiction and attempting to prevent or attack an Ecuadorian judgment before a BIT tribunal.

In addition, plaintiffs never agreed to arbitrate their case against Chevron under the BIT. Plaintiffs never agreed to arbitrate their case against Chevron anywhere. As a result, Chevron may not arbitrate, much less dismiss, plaintiffs' case before a BIT tribunal.

The Court reviews the district court's ruling *de novo* on an undisputed record. The Court should reverse the district court's grant of the motion to dismiss, and grant summary judgment to plaintiffs on this undisputed record.

ARGUMENT

I. The Standard of Review

This Court's "standard of review for both motions to dismiss and motions for summary judgment is *de novo*." *Chambers v. Time Warner, Inc*., 282 F.3d 147, 152 (2d Cir.2002) (motion to dismiss); *Mario v. P & C Food Markets, Inc*., 313 F.3d 758, 763 (2d Cir.2002) (summary judgment).). "[I]f a district court's findings rest on an erroneous review of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). On a motion to dismiss or for judgment on the pleadings, the reviewing court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir.2001).

II. Chevron is Estopped From Evading Ecuadorian Jurisdiction and From Attacking or Preventing an Ecuadorian Judgment in the BIT

Chevron is judicially, equitably, and collaterally estopped from attempting to prevent or attack an Ecuadorian judgment in the BIT.

A. Chevron is Judicially Estopped From Attacking or Preventing an Ecuadorian Judgment in a BIT Arbitration

Chevron is judicially estopped from attempting to prevent or attack an Ecuadorian judgment in the BIT. "[W[here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal citations and quotations omitted). "Judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000)); 18 Moore's Federal Practice § 134.30 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18B C. Wright, A. Miller, & E. Cooper,

Federal Practice and Procedure § 4477 (2d ed. 2010) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

The purpose of the doctrine is "to protect the integrity of the judicial process," by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750 (internal citations and quotations omitted). "In order for judicial estoppel to be invoked, (1) the party against whom it is asserted [Chevron] must have advanced an inconsistent position in a prior proceeding, and (2) the inconsistent position must have been adopted by the court [the Southern District, the Second Circuit] in some ma[nn]er." *Peralta v. Vazquez*, 467 F.3d 98, 105 (2d Cir. 2006); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6-8 (2d Cir. 1999) (estopping inconsistent position in disability case); *Whalen v. Chase Manhattan Bank*, 14 Fed. Appx. 120, 2001 WL 823545, at *2 (2d Cir. July 17, 2001); *Simon v. Satellite Glass Corp.*, 128 F.3d 68, 73-74 (2d Cir. 1997). Plaintiffs plainly meet this test.

First, Chevron "agreed to satisfy *any* judgment in plaintiffs' favor, reserving its right to contest their validity *only* in the limited circumstances permitted by New York's Recognition of Foreign Country

Money Judgments Act." A-478 (emphasis added). Chevron stated this position in a verified interrogatory response, A-478; its moving brief to the district court, A-379-80; the Texaco Agreement, A-437 ¶ 5; its reply brief to the district court, A-478; and by reference in its brief to the Second Circuit, A-599. This promise *specifically* contemplated the possibility of a subsequent claim based on due process concerns that could have arisen at the foreign trial. *See, e.g.*, CPLR 5304(a)(1) ("[a] foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.").

Second, Chevron's representations induced a significant, and hard-fought victory for Chevron: the dismissal of the *Aguinda* case. No more would Chevron be held to account in the district of its corporate headquarters, and no more would Chevron face the possibility of justice in a United States federal court. We know Chevron's representations induced the *FNC* dismissal because when Chevron first appeared before this Court in 1998, the Court refused to grant the motion absent these representations from Chevron. *Jota*, 157 F.3d at 155, 159. Only after this Court's vacatur did Chevron make a series of promises that later induced the Southern

District and this Court to grant the *FNC* motion. *Aguinda*, 142 F. Supp. 2d at 539; *Aguinda*, 303 F.3d 470.

Now, over seven years later, Chevron seeks to extinguish Ecuadorian jurisdiction, terminate the Lago Agrio case, and prevent any judgment from being entered in Ecuador. There is no question Chevron has "deliberately chang[ed] positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750. In its own words, Chevron now seeks "[a]n order and award requiring Ecuador to inform the court in the Lago Agrio Litigation" that Chevron and its affiliates "have been released from all environmental impact" arising out of their activities in Ecuador. A-98-99 ¶¶ 76(1), 76(3), 76(4), 76(5), 76(6), 76(7). Or as Chevron put it just last week in a preliminary argument before the BIT tribunal: "The mere *existence* of the Lago Agrio proceedings is a violation of our right." Transcript of May 10, 2010 Proceeding, at 91 (emphasis added).

Plaintiffs have met the elements of a judicial estoppel claim. *See Peralta*, 467 F.3d at 105; *Mitchell*, 190 F.3d at 6-8; *Whalen*, 2001 WL 823545, at *2; *Simon*, 128 F.3d at 73-74. In addition, the Court should consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 751. The unfair

prejudice to plaintiffs cannot be overstated here. As a result of the *FNC* dismissal, plaintiffs' case in the Southern District was dismissed, plaintiffs re-filed in Ecuador, and for over seven years, plaintiffs have now incurred enormous costs and expended massive resources in one of the biggest, longest, and most expensive litigations in the history of Ecuador, involving some 63,000 chemical samples, over 100 field inspections, dozens of witnesses, and an astonishing trial record of more than 200,000 pages. Only now, after plaintiffs and the courts relied on its promises, representations and commitments, does Chevron renege and seek to prevent and attack any Ecuadorian judgment.

But this only scratches the surface of prejudice. For Chevron seeks not only to undo seven years of litigation, but to start anew in a forum where plaintiffs cannot even appear, the ultimate insult to due process. Had Chevron asserted this "right" back in 1997, 1998, 1999, 2000, 2001, or 2002, when it repeatedly sought *FNC* dismissal, the *Aguinda* case would never have been dismissed. There is no chance this Court would have permitted Chevron first to transfer plaintiffs' federal case to Ecuador, then to perform a bait and switch, and attempt to extinguish it in a BIT Arbitration, when plaintiffs (i) never agreed to arbitration anywhere, and (ii) could not appear in the BIT Arbitration to protect their rights and assert their claims.

This Court has the power and the duty to enforce the promises and representations of litigants before it. Chevron fooled the Court. Chevron did what it could and said what it needed to escape this Court's jurisdiction, and is now doing what it can to escape the Ecuadorian forum it claimed it so desperately wanted. But "[j]udicial estoppel is designed to prevent a party who plays fast and loose with the courts from gaining unfair advantage through the deliberate adoption of inconsistent positions in successive suits." *Wight v. Bankamerica Corp.*, 219 F.3d 79, 89 (2d Cir.2000). If Chevron wants to attack the fairness of the Ecuadorian proceeding, it will have that opportunity in an enforcement proceeding. CPLR 5304(a)(1). If Chevron wants to pretend it was released by plaintiffs from the Lago Agrio claims, it can do so in Lago Agrio, and will also have that opportunity in a post-judgment enforcement proceeding. CPLR 5304(b)(6). But Chevron cannot and should not be permitted to attempt to extinguish plaintiffs' claims under the BIT. *New Hampshire*, 532 U.S. at 749.

Plaintiffs' summary judgment motion should be granted.

B. Chevron is Equitably Estopped From Attacking or Preventing an Ecuadorian Judgment in a BIT Arbitration

Chevron is also equitably estopped from attacking or preventing an Ecuadorian judgment in the BIT Arbitration. Under the doctrine of equitable estoppel "a party may be estopped from pursuing a claim or defense where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely on it; 2) and the other party reasonably relies upon it; 3) to her detriment." *Kosakow v. New Rochelle Radiology Assocs*., 274 F.3d 706, 725 (2d Cir. 2001) (collecting cases).

That is this case. Chevron made promises not just to the Court, but to plaintiffs. Chevron misrepresented its intention to "satisfy any judgment in plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act." A-478. Chevron had good reason to "believe that [plaintiffs] w[ould] rely on" the representation. And plaintiffs did reasonably rely on the representation to their detriment, re-filing their action in Ecuador, and expending enormous time and resources prosecuting the case in Ecuador for over seven years. In Chevron's view, all of that effort, all those years, and all of the money spent prosecuting the case should count for nothing, because the BIT Arbitration is to be the new venue

to start anew, and to terminate plaintiffs' case outright. As set forth in Chevron's Notice of Arbitration, Ecuador is simply "to inform the court in the Lago Agrio litigation" that this seven-year old case is over. A-99 (¶ 76(3)).

Plaintiffs would suffer enormous prejudice of wasting nearly seven years of Ecuadorian litigation only to have their case purportedly adjudicated in an international arbitration where they have no standing to participate in the proceedings. Plaintiffs' summary judgment motion should be granted.

C. Chevron is Collaterally Estopped From Attempting to Escape Ecuadorian Jurisdiction via the BIT

Chevron is also collaterally estopped from escaping Ecuadorian jurisdiction over the Lago Agrio case. The elements of collateral estoppel require that "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (internal citations and quotations omitted). Each element is met here.

As part of its first motion to dismiss *Aguinda* on *forum non*

conveniens grounds, Chevron took the position that *Aguinda* could be dismissed without making any commitment to subject itself to jurisdiction in its preferred forum, Ecuador. This Court disagreed. It required Chevron, *inter alia*, to agree to submit to Ecuadorian jurisdiction in plaintiffs' case as a condition of *FNC* dismissal. *Jota*, 157 F.3d at 155, 159. Chevron had a full and fair opportunity to litigate this issue, and it lost. *See id*. As the Second Circuit made clear, the resolution of this issue was necessary for Chevron to receive the dismissal of the *Aguinda* case, a necessary condition to support the valid final judgment.

But now, all these years later, Chevron seeks to re-litigate the issue through the back door, by asking the BIT Arbitrators to eliminate Ecuadorian jurisdiction over the Lago Agrio case. Chevron is seven years too late. Having litigated and lost the issue in New York, it cannot litigate the issue again: Chevron must continue to submit itself to Ecuadorian jurisdiction and is collaterally estopped from claiming otherwise.[17]

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[17] Of course, this Court has the inherent authority under, *inter alia*, the All Writs Act, to enforce its own orders and enforce the conditions of a *FNC* dismissal. *See, e.g.*, 28 U.S.C. § 1651 (1982) (courts have authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *Farmanfarmaian v. Gulf Oil Corp.*, 437 F. Supp. 910, 920 (S.D.N.Y. 1977) (defendant's refusal to subject itself to a foreign jurisdiction after dismissal on *forum non conveniens* grounds "would be tantamount to contempt, and a defendant who acted in such a manner would be subject to serious penalty"); *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985).

III. Because *Plaintiffs* Never Agreed to Arbitration, Their Case Cannot be Arbitrated under the BIT

Plaintiffs never agreed to arbitrate any of their claims with Chevron. That is undisputed. As a result, Chevron may not arbitrate plaintiffs' case before a BIT tribunal.[18]

While Chevron has nominally commenced its arbitration against Ecuador, the relief it seeks is to extinguish plaintiffs' suit in Lago Agrio. A-98-99 (Request for Relief at ¶¶ 76(1), 76(3), 76(4), 76(5), 76(6), 76(7)). Chevron seeks, *inter alia*, "[a]n order and award requiring Ecuador to inform the court in the Lago Agrio Litigation" that Chevron and its affiliates "have been released from all environmental impact" arising out of their activities in Ecuador, and a "declaration" that Chevron and its affiliates "have no liability or responsibility for environmental impact . . . or for performing any . . . environmental remediation." *Id.* at ¶¶ 76(1), 76(3). In short, Chevron seeks to terminate plaintiffs' Lago Agrio case in an arbitration proceeding to which plaintiffs have not consented.

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[18] The District Court correctly assumed that it had the power under the Federal Arbitration Act to enjoin Chevron from arbitrating non-arbitrable claims. A-2138-39 (citing *Oppenheimer & Co. Inc. v. Deutsche Bank AG*, No. 09 Civ. 8154, 2009 WL 4884158 (S.D.N.Y. Dec. 16, 2009)). As this Court has noted, without deciding the issue, "a number of courts have held that, in appropriate circumstances, § 4 of the FAA may be applied to stay or enjoin arbitration proceedings." *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 266 (2d Cir. 1996), *abrogated on other grounds*, *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009).

The threshold or "gateway" question of "arbitrability . . . is undeniably an issue for judicial determination." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 53 (2d Cir. 2001) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.") (internal quotations and citations omitted); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999) ("In considering whether a particular dispute is arbitrable, a court must first decide whether the parties agreed to arbitrate.") (internal quotations and citations omitted).

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Supreme Court reiterated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *question of arbitrability*, is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.") (internal quotation marks omitted) (emphasis in original).

Plaintiffs never "clearly and unmistakably" agreed to have their

environmental claims resolved in a BIT Arbitration. Plaintiffs never agreed to any arbitration at all. Chevron has dumped thousands of pages into the record in this case, but nowhere is there any arbitration agreement between any of the plaintiffs and Chevron. To the contrary, the only agreement in this record is Chevron's agreement to submit to Ecuadorian jurisdiction and satisfy an Ecuadorian judgment subject only to a CPLR 5304 defense in an enforcement action brought by plaintiffs.

What is even more startling about Chevron's attempt to arbitrate plaintiffs' case, is that plaintiffs cannot even appear at the arbitration. Only companies and countries with investment disputes can appear before the BIT. The indigenous farmers and tribes of the Amazon whose lives and land were destroyed by Chevron cannot. It is as if an American employee brought a discrimination suit against her British employer in the Southern District, then the employer "arbitrated" the case in a BIT proceeding against the United States, asking the United States to order the federal court to dismiss her discrimination case. The effort is absurd.

The district court, which treated plaintiffs almost as an afterthought, simply failed to decide the threshold question of arbitrability. The district court never found that *plaintiffs* agreed to arbitrate their case

under the BIT, but permitted plaintiffs' case to be arbitrated under the BIT anyway. There is no precedent for such a ruling.

Rather than find that plaintiffs' case in Lago Agrio was arbitrable, the court found (albeit, incorrectly) that at least one claim between Chevron and *Ecuador* was arbitrable. But this misses the point. Even if, for example, the prosecution of two Chevron attorneys were somehow an arbitrable event as between Ecuador and Chevron, A-2114, that would not permit Chevron to seek to dismiss *plaintiffs' case* in the arbitration.

The District Court cited two New York state cases for the limited proposition that "[i]f there is a[t] least one arbitrable issue, arbitration should proceed." A-2114 (citing *National Grange Mut. Ins. Co. v. Vitebskaya*, 766 N.Y.S.2d 320 (N.Y.Sup. Ct. 2003); *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 302 (1984)). These cases, which even Chevron did not cite below, miss the point.

First, and most important, neither case allows for arbitration where there is no agreement to arbitrate in the first place. *See, e.g.*, *National Grange*, 1 Misc. 3d at 777 (a party "cannot be compelled to arbitrate a claim that the parties never agreed to arbitrate"; court granted request for "permanent stay of arbitration . . . in its entirety"); *Silverman*, 61 N.Y.2d at

307 (requiring clarity "that a valid agreement to arbitrate has been made and complied with"). Here, plaintiffs "never agreed to arbitrate" in the first place. *National Grange*, 1 Misc. 3d at 777. Because there is no arbitral issue at all as between plaintiffs and Chevron, the New York cases are not relevant here.

Second, Chevron is estopped from bringing plaintiffs' case under the BIT as a result of its many promises to the Southern District and this Court, *see* § I, *supra*, an issue to which those two New York cases do not speak at all.

Third, New York law does not even apply here; Chapter Two of the Federal Arbitration Act applies. *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogenerational Int'l, Inc.*, 198 F.3d 88, 95-96 (2d Cir. 1999); *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005). Under federal precedent, the district court must evaluate the arbitrability of each claim, whether or not other claims are arbitrable. *Collins & Aikman Prods. Co. v. Building Systems Inc.*, 58 F.3d 16, 20 (2d. Cir. 1995) ("BSI contends that, because one of the claims is clearly arbitrable, and because all of the claims are related to a single set of facts, federal policy disfavors a bifurcation of proceedings in which some claims are presented to arbitrators and some are decided by a court of law. This argument is frivolous. The

Supreme Court has directly addressed and soundly rejected it."); *see* Ecuador Br. § I(B). Finally, none of these issues even as between Chevron and Ecuador is arbitrable.

Plaintiffs did not agree to arbitrate its case before the BIT tribunal. Therefore plaintiffs' case cannot be extinguished by the BIT tribunal. Plaintiffs' summary judgment motion should be granted, and Chevron should be enjoined from litigating and attempting to extinguish plaintiffs' case in the BIT Arbitration.

CONCLUSION

For the reasons stated above, the Court should grant plaintiffs summary judgment, reverse the district court's grant of Chevron's motion to dismiss, and grant such other relief that the Court may deem just and proper.

Dated: May 17, 2010
New York, New York

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 8,663 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 17, 2010

STATE OF NEW YORK)

SS.

COUNTY OF NEW YORK)

JAMIE PRICE, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or 7 West 36th Street, 10th Floor, New York, New York 10018.

That on the 17th Day of May, 2010 , deponent personally served via email the

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upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

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See Second Circuit Local Rule 25(a)6

CASE NAME: Republic of Ecuador, Daniel Carlos Lusitand Yaiguaje, et al. v. Chevron Corp.

DOCKET NUMBER: 10-1020-cv(L), 10-1026-cv(CON)

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