11-1150-cv (L)

11-1264 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION

Plaintiff-Appellee,

v.

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 A PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NO. 11-CV-691

BRIEF OF *AMICUS CURIAE* ENVIRONMENTAL DEFENDER LAW CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Environmental Defender Law Center (EDLC) is a nonprofit corporation, which has no parent corporation nor stock held by any publicly held corporation.

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).[1]

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Environmental Defender Law Center (EDLC) is a U.S.-based non-profit organization that since 2004 has arranged free legal representation for people in developing countries who fight for a healthy environment, for their affected communities, and for those who have suffered human rights abuses. EDLC has closely followed, and taken a special interest in, the legal proceedings in this case, as it has in numerous cases around the world involving the intersection of human rights and environmental harm. EDLC's work focuses on empowering and enabling local communities to hold accountable those responsible for environmental destruction and human rights abuses. Accordingly, EDLC has an interest in seeing that laws governing the enforcement of judgments achieved by local communities through such efforts are correctly applied.

[1] No party or counsel thereof authored this brief; no person other than *amicus* contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES ADDRESSED BY *AMICUS CURIAE*

The district court erred in enjoining enforcement of an Ecuadorian judgment anywhere in the world, because a judgment under New York's enforcement standards would not dispose of enforcement actions in other nations. Foreign countries' standards differ from New York's, and their courts are not likely to defer to a New York court's attempt to decide for the world whether an Ecuadorian judgment is enforceable.

SUMMARY OF THE ARGUMENT

The district court's world-wide preliminary injunction barring foreign plaintiffs from enforcing a non-U.S. judgment in any non-U.S. court is an exercise of power that district courts do not possess. Given this Court's severe limits on anti-suit injunctions, it is not a New York court's proper role to prevent Ecuadorian citizens with little if any connection to the U.S. from trying to enforce an Ecuadorian judgment anywhere in the world.

Because a foreign anti-suit injunction intrudes upon the sovereignty of foreign courts, it is an extreme measure that may only be undertaken with great restraint. The injunction here, however, is of unprecedented scope. Not only would it second-guess the decision and fitness of Ecuador's courts, it would purport to bar every other court in the world from coming to its own conclusion about whether

the Ecuadorian judgment could be enforced – even though every nation has its own standards for enforcing foreign judgments, and even though enforcement is a purely local issue that must be decided *in the courts of* the enforcing forum. There is no warrant for a New York court to install itself as a super-appellate court over the Ecuadorian legal system and as the world-wide arbiter of the enforceability of foreign judgments.

An anti-suit injunction is improper unless a judgment here "would be dispositive" in the foreign forum. Rather than determining if that standard had been met, the district applied a more lenient, "likely-to-be-persuasive" standard of its own invention. Moreover, a judgment can only be "dispositive" in a foreign forum if the law is the same, and a foreign court would follow it. Neither is the case here.

The district court's order is based upon New York provisions that bar enforcement where a foreign judgment was rendered in a court system that is systemically inadequate or was procured by fraud. To preclude enforcement everywhere from Australia to Zimbabwe, the court was required to find that these New York standards do not materially differ from the law of *any* potential foreign forum. The district court made no such finding – and could not. A host of countries recognize neither fraud nor systemic inadequacy as grounds for refusing to enforce a foreign judgment. Indeed, many U.S. states would find the type of fraud Chevron

alleges to be insufficient to deny enforcement. Given the multiplicity of enforcement standards throughout the world, no judgment by the district court could be "dispositive" everywhere.

That different nations and U.S. states have different standards is hardly surprising. Enforcing foreign judgments involves a complex balancing of international comity concerns and purely local public policy choices. New York law does not purport to strike that balance for any forum other than New York. The district court erred in purporting to impose New York's standards on every other forum in the world.

The district court's reliance on "fraud" further fails because Chevron's fraud allegations have been fully aired in the Ecuadorian trial court, and are currently being litigated in the Ecuadorian appeal. Accordingly, there can be no serious claim that any enforceable judgment will have been procured by fraud on the court. Regardless, if the Ecuadorian appellate court were to determine that Chevron's fraud arguments lack merit – which is the only circumstance in which the judgment would be enforceable – a foreign court would not be compelled to accept a U.S. district court's contrary finding.

A ruling by the district court also cannot be "dispositive" because foreign courts are unlikely to defer to a New York court's determination of whether a

judgment can be enforced in *their* jurisdiction. Enforceability is an inherently local issue that is determined in the courts of the enforcing forum. Foreign courts would be unlikely to accept that a U.S. district court has the authority to determine the issue for them, and to close their court house doors to claims brought under their own law. Certainly, a U.S. court would not respect such an injunction.

The district court's approach, if followed around the world, would eviscerate the existing system for enforcing judgments. The current regime, in which a judgment creditor chooses the forum in which to seek enforcement, and courts in that forum decide under local law whether to do so, would be replaced by one in which judgment debtors race to their chosen forum to seek a world-wide anti-suit injunction. Comity would suffer.

Moreover, affirmance would effectively transform courts in this Circuit into supra-national courts with the competence to determine the enforceability anywhere in the world of a judgment rendered by the courts of any other nation. The ranks of losing litigants who bring suit here to prevent the enforcement in a third country of a judgment rendered abroad would surely swell, taxing this Circuit's already thin resources. And, the implicit demotion of all non-U.S. courts – such that their judgments could effectively be overturned by a U.S. district court – would constitute an extraordinary affront to other nations' sovereignty, in

disregard of the comity with which U.S. courts are required to treat their sister institutions.

In short, when Chevron convinced this Court to dismiss to a forum outside the U.S. – based on its own calculus that it was more likely to prevail in Ecuador than before a U.S. federal court – it divested the district court of the legal and practical ability to protect Chevron from the enforcement of a judgment against it in third countries. Chevron, of course, can contest the Ecuadorian plaintiffs' efforts to enforce any judgment in any country in which they attempt to do so, under the laws of that country. Moreover, Chevron is currently pursuing arbitration against Ecuador to hold Ecuador liable for all damages awarded in the Lago Agrio litigation, based in part on its claim, similar to that here, that Ecuador has not given Chevron fair judicial treatment. To be sure, Chevron wants other avenues to challenge any judgment. But this Court cannot rewrite its anti-injunction jurisprudence and approve an injunction that so far exceeds the bounds of comity, especially since such an injunction will likely be ignored by the foreign courts whose sovereignty it would usurp.

EDLC respectfully submits that on these grounds alone—though many others exist—the district court's order should be overturned.

ARGUMENT

I. The district court erred by issuing an injunction barring enforcement anywhere in the world of a judgment issued by a foreign court.

A foreign anti-suit injunction is an "extreme measure." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F3d 645, 655 (2d Cir. 2004). Comity principles "weigh heavily" in the decision to impose such an injunction, *id.*, because it "effectively restricts the jurisdiction of the court of a foreign sovereign." *China Trade & Dev. Corp. v. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). Accordingly, an anti-foreign-suit injunction should be granted "only with care and great restraint." *Id.* at 36 (internal citations and quotation marks omitted); Appellants' Opening Brief ("AOB") at 40-41.

In issuing a world-wide injunction that purports to both supersede any ruling by the Ecuadorian appellate court and to preclude enforcement everywhere else, the district court acted without any perceptible "restraint," and did so without conducting the required legal analyses.

When two sovereigns have concurrent *in personam* (i.e. transitory) jurisdiction, parallel proceedings will ordinarily be allowed to proceed in both until a judgment is reached in one that can be pled as *res judicata* in the other. *China Trade*, 837 F.2d at 36. Here, however, the lower court has purported to bar, through a *preliminary* injunction, the initiation of suits to enforce the Ecuadorian

judgment before any final judgment has been rendered here on its enforceability. Moreover, the rationale for denying an injunction is even stronger here, because enforcement actions are inherently local and must be determined in the *fora* in which a judgment is sought to be enforced.

A. An anti-suit injunction is improper because resolution of this case will not dispose of the actions to be enjoined in foreign *fora*.

For a federal court to enjoin parties from pursuing litigation abroad, it is necessary, (though not sufficient), that "resolution of the case before the enjoining court would be dispositive of the enjoined action." *China Trade*, 837 F.2d at 36. The district court failed to properly apply that requirement, and it cannot be met.

1. The district court applied the wrong legal standard.

The district court erred as a matter of law by failing to faithfully apply this Court's "would be dispositive" standard, in at least three respects. First, instead of applying that standard, the district court held only that a decision "likely would be recognized as sufficiently persuasive authority – if not binding on the parties – to dispose of the question of enforceability." SPA 107; *See* AOB at 43. That is not the test.

Second, the district court stated that an injunction would bind all relevant parties and thus "foreclose even the filing of foreign enforcement suits." SPA 107. But "dispositive" refers to whether "resolution of the case", *i.e.* a determination of

the *merits*, will dispose of the foreign litigation. *China Trade*, 837 F.2d at 36; *accord Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 121 (2d Cir. 2007) (first step in "dispositive" analysis is to determine the "substance" of the case before the enjoining court); AOB at 42. If "dispositive" meant the power to bind the parties, then that requirement would merely replicate *China Trade*'s separate threshold requirement that the parties to both suits be the same. *See* 837 F.2d at 36.

Third, the "dispositive" test is not met where U.S. litigation would proceed under domestic law while litigation abroad would involve foreign standards. *Paramedics*, 369 F.3d at 653, n.3; *see also Computer Assocs. Intern., Inc. v. Altai, Inc.*, 126 F.3d 365, 372 (2d Cir. 1997) (upholding denial of anti-suit injunction where defendant had already prevailed in U.S. court because the foreign action involved a foreign claim). This alone should have precluded an injunction here, because a foreign court would apply its own law, not New York's, to determine whether the Ecuadorian judgment is enforceable in that jurisdiction. The district court erred in asserting that this case "is very different from cases in which a U.S. decision applying U.S. substantive law would not dispose of a similar foreign action because the foreign action claims relief pursuant to foreign substantive law." SPA 107, n. 380.

It is no answer for the district court to state, as it did, that the New York defenses it applied – "whether the Ecuadorian judgment was rendered by a system so fundamentally unfair and impartial that the judgment should not be recognized or a product of fraud" – are "very common." SPA 107-08. A ruling here is not dispositive in any particular country unless *that* country's laws mirror New York's. To issue a *worldwide injunction*, standards identical to New York's must apply everywhere. The court did not conduct the required analysis. Indeed, it cited only two jurisdictions: Singapore and the U.K. SPA 108, fn. 381. Such a meager review, lacking any systematic consideration of foreign law and any citation to the law of any civil law jurisdiction, is insufficient to meet even the Court's erroneous "very common" test.

2. Many foreign courts apply judgment recognition standards that consider *neither* "fraud" *nor* "systemic inadequacy."

A ruling by the district court based upon New York's enforcement standards would not be "dispositive" because, even assuming the district court correctly applied New York's standards, other jurisdictions' laws materially differ. Such jurisdictions would not recognize the court's "fraud" or "systemic inadequacy" holdings.

The only two *fora* the district court cited as considering systemic inadequacy as a ground to deny enforcement – Singapore and the U.K. – do not do so.[2] And they are not alone among common law countries. Canada, for example, does not consider this factor.[3]

Likewise, Singapore, along with other common law countries and many U.S. states, including California and Illinois, distinguish between intrinsic and extrinsic fraud. In such jurisdictions, Chevron's fraud allegations – even if proven – would be insufficient as a matter of law to preclude enforcement. Intrinsic fraud goes to the merits, such as the provision of fraudulent evidence; extrinsic fraud occurs outside court proceedings, such as the fraudulent inducement of default.[4] The U.S.

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[2] SPA 108, fn. 381. Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23-24 Geo., c. 13, § 1(4)(1) (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1933/13/pdfs/ukpga_19330013_en.pdf. (ADD-7); Singapore Academy of Laws, The Conflict of Laws, Chapter 6, § 4, (ADD-11).

[3] *See* Markus Koehnen and Nicole Vaz, *The Recognition and Enforcement of Foreign Judgments in Canada*, Centre for International Legal Studies (Feb. 2002), http://www.mbmlex.com/Upload/Publication/The%20Recognition%20and%20Enforcement%20of%20Foreign%20Judgements_Koehnen_0202.pdf. (ADD-10) Canada does consider whether "minimum standards of fairness *have been applied*," *Beals v. Saldanha*, [2003] 3 S.C.R. 416, Par. 60 (S. Ct. Can.) (ADD-3) (emphasis added), but that case-by-case approach is far different from the "*systemic* inadequacy" test.

[4] *E.g.* National Conference of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act, ("UFCMJRA"), Approved and Recommended for Enactment in All the States at its Annual Conference Meeting in its One-Hundred-and-Fourteenth Year Pittsburgh, Penn

states that apply this distinction typically do not refuse to enforce judgments that are the product of intrinsic fraud.[5] Other jurisdictions, such as Singapore and Canada, only refuse to do so if the evidence of fraud is new and not discoverable during the initial proceedings.[6] Since Chevron alleges intrinsic fraud, and challenged it in Ecuador, foreclosing any argument that any evidence of alleged

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July 21-28 2005, 11, Comment ¶ 7, http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf; Singapore Academy of Law, The Conflict of Laws, Chapter 6, § 4.11 available at http://www.singaporelaw.sg/content/Conflict.html (ADD-11).

[5]At least 15 states – California, Colorado, Hawaii, Idaho, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington – have enacted the UFCMJRA, a revised version of the Uniform Foreign Money Judgments Recognition Act ("UFMJRA") that New York has adopted. Uniform Law Commission, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act. In those states, courts decline enforcement if the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case. UFCMJRA, Subsection 4(c)(2). This provision "limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud" because intrinsic fraud "should be raised and dealt with in the rendering court." UFCMJRA, 11, Comment ¶ 7. Moreover, this provision did not purport to change the law; rather it is "consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the [UFMJRA] by the courts." *Id.* Thus, other states also recognize the intrinsic/extrinsic distinction. *E.g. Pinnacle Arabians v. Schmidt*, 654 N.E.2d 262, 266 (Ill. App. Ct. 1995) (fraud exception to enforcement of monetary judgments applies only to "extrinsic" fraud where "the unsuccessful party has been prevented from exhibiting fully his case").

[6] Singapore Academy of Law, The Conflict of Laws, Chapter 6, § 4.11 (ADD-11); *Beals*, 3 S.C.R. at para. 50-51 (fraud going to jurisdiction can always be raised to challenge enforcement, but "the merits of a foreign judgment can be

fraud is new, none of these states or countries would refuse to enforce the Ecuador judgment on fraud grounds. Given this, the district court's fraud determination could not be "dispositive." Moreover, since one U.S. state is not compelled to recognize an anti-suit injunction issued in another, even courts in the other U.S. states could decline to follow any injunction that does not reflect their own law. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 934 (D.C. Cir.1984).

In the U.K., the only jurisdiction the court cited other than Singapore, Chevron's fraud allegations would also be discounted. There, a judgment debtor bears the burden to show why the fraud defense was not raised in the original proceeding. Robert E. Lutz, *A Lawyer's Handbook for Enforcing Foreign Judgments in the United States and Abroad*, 426 (2007). Here, of course, it was raised in Ecuador.

Likewise, a district court order would not be dispositive in many civil law countries. In general, civil law jurisdictions typically do not deny recognition of a foreign judgment based on a finding that the rendering court system was systemically inadequate or that the judgment was procured by fraud. Thus, for example, the Codes of Japan, Germany, Switzerland and Italy do not provide for

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challenged for fraud only where the allegations are new [and material] and not the

consideration of either of these factors.[7] The district court erred in assuming that these courts would consider fraud and systemic inadequacy.

Similarly, in 19 Latin American countries, recognition of Ecuadorian judgments is governed by treaties under which questions of "systemic inadequacy" or "fraud" are inapplicable. Ecuador is a party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention"), May 14, 1979, 1439 U.N.T.S. 87, (Addendum "ADD"-2), and the Convention On Private International Law ("Bustamante Code"), Feb. 20, 1928, 86 L.N.T.S. 111 (ADD-1). The Montevideo Convention governs the enforcement of Ecuadorian judgments in 17 Latin American countries.

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subject of prior adjudication."

[7] Minji Soshōhō [Minsohō] [C. Civ. Pro.] 1996, art. 118 (Japan), (Japanese government's unofficial English version) *available at* http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=02&dn=1&x=35&y=21&bu=4&ky=&page=6 (ADD-8); Zivilprozessordnung [ZPO] [C. Civ. Pro.], Dec. 9, 1950, §§ 328, 723 (Ger.) (Charles E. Stewart, unofficial trans., Oceana Publ'ns, 2001) (ADD-9); Bundesgesetz über das Internationale Privatrecht, [Fed. Code on Private Int'l Law] Dec. 18, 1987, SR 291, § 5 arts. 25-32 (Switz.), (unofficial English version) *available at* http://www.umbricht.ch/pdf/SwissPIL.pdf; (ADD-5); C.c. [C. Code] 16 marzo 1942, arts. 16-31 (It.), *available at* http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/codciv.htm (ADD-6).

See Montevideo Convention, Art. 1.[8] The Bustamante Code governs enforcement of Ecuadorian judgments in two others. *See* Bustamante Code, Art. 423.[9]

Both the Montevideo Convention and the Bustamante Code mandate that every civil judgment rendered in a contracting State "shall" have force in the others if certain conditions are met. Montevideo Convention, Arts. 1 & 2; Bustamante Code, Art. 423. In neither case do the conditions require that the rendering court system meet some systemic adequacy standard or that the judgment was not procured by intrinsic fraud. *Id.*[10] The district court erred in implicitly assuming that

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[8] As of June 1, 2011, the United Nations Treaty Collection Database, *available at* http://treaties.un.org/pages/showDetails.aspx?objid=08000002800dc2b1, lists the following parties: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

[9] As of June 1, 2011, the United Nations Treaty Collection Database, *available at* http://treaties.un.org/pages/showDetails.aspx?objid=0800000280168l2b, lists Nicaragua and Cuba as parties to the Bustamante Code, along with Ecuador and twelve other countries that are also parties to the Montevideo Convention. The Montevideo Convention supersedes the Bustamante Code as between Ecuador and these latter states. *See* Montevideo Convention, Art. 1.

[10] The Montevideo Convention requires that: the judgment fulfill the requirements necessary to be deemed authentic in the origin State; it be translated into the official language of the enforcing State; it is presented duly legalized under the law of the enforcing State; the rendering tribunal is competent to try the matter and pass judgment on it in accordance with the law of the enforcing State; the plaintiff has been summoned in due legal form substantially equivalent to that accepted by the law of the enforcing State; the parties had an opportunity to present their defense; the judgment is final or has the force of *res judicata* in the

these 19 nations would enforce such conditions and thereby violate their treaty obligations.[11]

In sum, even if Chevron's fraud and systemic inadequacy allegations were true, neither argument would be universally recognized to preclude enforcement of the Ecuadorian judgment. Since these are the only two bases upon which the district court relied, the court's order could not be dispositive.

3. The district court erred in considering "fraud" because Chevron has litigated its fraud allegations in Ecuador.

Chevron litigated the alleged fraud in the Ecuadorian trial court and continues to do so in the Ecuadorian appeal. *See* AOB at 32, 34. Accordingly, as in *Constandinou v. Constandinou*, Chevron's fraud arguments must be rejected under

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rendering State; and it is not contrary to the public policy of the State in which recognition is sought. (ADD-2).

The Bustamante Code requires that: the rendering court has competence to take cognizance of the matter and pass judgment on it, in accordance with the rules of this Code; the parties have been summoned either personally or through their legal representative; the judgment does not conflict with the public policy or laws of the executing country; it is executory in the rendering State; it be authoritatively translated; and the document in which it is contained fulfills the requirements to be considered authentic in the State from which it proceeds, and those which the executing State requires for authenticity. (ADD-1).

[11] There are any number of other ways in which enforcement standards could differ from country-by-country. The district court, for example, made no finding that all nations have identical standards regarding: 1) what constitutes fraud even putting aside the extrinsic/intrinsic distinction; 2) what constitutes systemic inadequacy; and 3) judicial estoppel with respect to whether Chevron would be bound by its former argument that Ecuadorian courts are adequate.

N.Y.C.P.L.R. 5304(b)(3) because they "are nothing more than an attempt to reopen the merits of the [foreign] action." 695 N.Y.S. 844 (N.Y. App. Div. 1999); AOB at 32, 76-79.

Indeed, the fact that Chevron is currently litigating its fraud arguments in its Ecuadorian appeal would preclude both an injunction and application of N.Y.C.P.L.R. 5304(b)(3), even if there was fraud on the trial court. An injunction is "inappropriate" if there is an adequate remedy at law. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995). Here, the Ecuadorian judgment could only be enforceable after the initial appeal. SPA 58-59; AOB at 34, 54. If Chevron wins that appeal, there is no judgment to enforce. Since Chevron has a legal remedy in the Ecuadorian appeal, there is no basis for an injunction. *See Campaniello Imps., Ltd. v. Saporiti Italia S.p.A.,* 117 F.3d 655, 661-63 (2d Cir.1997) (holding that district court properly dismissed direct attack seeking rescission of prior judgment on the basis of fraud, in part because plaintiff had remedies at law). If, on the other hand, the Ecuadorian appellate court rejects Chevron's fraud argument, Chevron would be barred from raising it here, since *res judicata* precludes the parties from relitigating issues that were raised in the prior action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In short, Chevron's fraud allegations are simply irrelevant.

The district court relied on Chevron's contention that Ecuador does not provide impartial tribunals to reject the notion that the Ecuadorian appellate court provides an adequate remedy at law. SPA 76-77. But that highlights rather than answers *amicus*' point. Because the fraud issues have been raised in the Ecuadorian appeal, Chevron's "fraud" argument depends on its "systemic inadequacy" argument; fraud provides no independent basis to issue an injunction.

Even if the district court had not misapplied the "fraud" prong, a finding that the Ecuadorian judgment was procured by fraud would not be "dispositive" because a foreign court considering enforcement would be confronted with two irreconcilable decisions: the district court's order and the Ecuadorian appellate court's decision. Nothing would compel a foreign tribunal to follow a New York court's decision; at most, it would be forced to choose between the two. *See generally*, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 399 (2d Cir. 2011) (noting that any conflict between a judgment in the Ecuadorian court and a finding in the arbitration brought by Chevron against Ecuador "could be resolved in any resulting proceedings to enforce the judgment.") Indeed, since an Ecuadorian appellate court surely has a greater interest than a New York court in determining whether there was fraud on an Ecuadorian trial court and is better positioned to do so, foreign courts are more likely to accept the Ecuadorian

appellate court's ruling. This is especially so since a New York court has discretion whether to even consider fraud, N.Y.C.P.L.R. 5304(b) (Consol. 2011), and since a foreign court is unlikely to welcome a U.S. court's attempt to arrogate for itself the power of an apex Ecuadorian appellate court to determine that issue.

4. The district court's order is not dispositive because foreign courts are unlikely to follow it.

In *China Trade*, this Court noted, (but did not decide), that the "dispositive" prong might not be met because "there is some question as to whether the Korean courts would recognize a judgment of the southern district." 837 F.2d at 36. Here, even if foreign law and New York's were the same, there is ample reason to believe that a foreign court would ignore the district court's judgment.

Every sovereign nation has a substantial interest in regulating access to its own courts. *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985). An anti-suit injunction is "facially obstructive" of that interest. *Id.* Since no nation's courts are obliged to enforce foreign interests that are prejudicial to those of the forum, *Laker Airways*, 731 F.2d at 937, no court need respect another nation's decision that the court shall not apply its own laws. *See id.* at 915, 939. "[P]rinciples of comity do not prevent proceeding in the face of a foreign injunction." *Id.* at 939. The inherently local nature of an enforcement proceeding, along with the facts that this injunction exceeds the bounds of comity and would not be followed by an

American court if issued abroad all demonstrate that this injunction fails even under the district court's erroneous likely-to-be-persuasive standard.

a. The enforceability of a foreign judgment is a local issue that only the enforcing country's courts are competent to decide.

Laws governing the enforcement of foreign judgments often turn on considerations that are inherently local. These laws are, therefore, appropriately applied only by the courts of the countries that enacted them. The district court's injunction conflicts with comity principles. *Bigio v. Coca-Cola Corp.*, 239 F.3d 440, 454 (2d Cir. 2000) (comity may take form of discretionary act to decline jurisdiction in case properly adjudicated in foreign state). Moreover, the district court's holding that a decision here likely would be persuasive is mistaken. SPA 107. Even assuming that non-U.S. courts would deny enforcement of the Ecuadorian judgment based on the same standard as that applied by the district court (many would not), it is unlikely that the non-U.S. courts would give substantial weight (if any) to the district court's determination that the judgment did not meet that standard.

The local nature of laws governing enforcement of foreign judgments is evident in a number of categories of common provisions, including those: (1) denying recognition if enforcement would violate the enforcing country's public

policy; (2) denying recognition if the rendering court would not have had jurisdiction under the enforcing country's laws; (3) denying enforcement if reciprocity is not ensured; and (4) governing the procedures that must be followed in order to attain recognition of a foreign judgment, particularly, the specific courts in which actions for the recognition and enforcement of a foreign judgment must be brought.

Provisions denying enforcement of a foreign judgment if doing so would contravene the enforcing country's public policy exist in many of the laws discussed above, as well as many more.[12] Thus, for example, in a widely known case, Germany's highest court affirmed a lower court's decision refusing to enforce a California punitive damages award.[13] The court found that if such awards were enforceable in German courts, the entire domestic structure of liability in Germany would be undermined.[14] It would be remarkable if a court would ever defer to the determination of another nation's courts as to whether a particular judgment conflicts with its own country's public policy.

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[12] *See, e.g.,* Montevideo Convention, Art. 2(h); Bustamante Code, § 423(3); Minsohō, Art. 118(iii); ZPO, § 328(1)(4); Bundesgesetz über das Internationale Privatrecht, Art. 27(a); C.c. (It.) Arts. 16-31.

[13] Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, Entscheidungen des Bundesgerichtschofes in Zivilsachen [BGHZ] 118, 312 (Ger.), *excerpts reproduced* at 32 I.L.M. 1327. (ADD-4).

[14] *Id.* at V(3)(e)(bb), 32 ILM 1327, 1345.

Similarly, many countries have an inherently *local* provision that prevents enforcement if, under the enforcing country's law, the issuing court lacked personal or subject matter jurisdiction.[15] Indeed, in reaction to concerns among some countries over the perceived "judicial hegemonialism" of U.S. courts, which are seen as willing to "assert jurisdiction without regard to other countries," Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 Mich. J. Int'l L. 1003, 1058 (2006), courts in these countries have come to see such provisions as a principal means of protecting their citizens from perceived over-reaching by foreign courts. *See* Samuel P. Baumgartner, *Is Transnational Litigation Different*, 25 U. Pa. Int'l Econ. L. 1297, 1340-1344 (2004). Given this purpose, it is hard to imagine a foreign court ceding the authority to make this determination to a foreign court.

Many countries' courts also deny enforcement if reciprocity is not ensured, *i.e.* if the rendering jurisdiction would not enforce a judgment from the courts where enforcement is sought.[16] These provisions ensure a basic tit-for-tat fairness in the treatment of the country's citizens. It is not likely that the courts of a country in which such a provision applies would abdicate the responsibility to determine that such fairness exists to the courts of the third state.

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[15] *See, e.g.,* Montevideo Convention, Art. 2(d); Minsohō, Art. 118(ii); ZPO, § 328(1)(1); Bundesgesetz über das Internationale Privatrecht, Art. 25(1)(a), 26; C.c. (It.), Arts. 16-31.

Finally, the laws applicable in many countries are very particular regarding the processes that must be followed to attain recognition and enforcement of a foreign judgment there, including designation of particular courts in which enforcement and recognition must be sought. Thus, for example, § 722(1) of the German CCP provides that a foreign judgment can only be executed in Germany if it has been pronounced enforceable, and §722(2) limits to certain courts the authority to make such a pronouncement. Similarly Article 29 of the Swiss CPIL provides that an "application for recognition or enforcement must be submitted to the authority having jurisdiction in the canton in which the foreign decision is to be invoked."

These and similar provisions strongly suggest that the enforcement of judgments is inherently local. Thus, other countries' courts would not, as the district court suggested, defer to a U.S. court's findings as to the Ecuadorian judgment's enforceability, even if the district court had applied each individual country's enforcement standards. Rather, these courts would determine that issue for themselves. This is especially so given that such standards differ so widely from the standard which the district court applied.

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[16] *See, e.g.,* Minsohō, Art. 118(iv); ZPO, § 328(1)(5).

b. There is no reason to believe that a foreign court would defer to a U.S. ruling that purports to close that court's doors.

The circumstances of this case make it particularly doubtful that a foreign court would surrender its jurisdiction. First, a foreign court would be unlikely to extend comity to a U.S. judgment that itself "come[s] burdened with the failure . . . to recognize comity." *See Laker Airways*, 731 F.2d at 939. An order by a New York court purporting to tell every court in the world who may bring suit and who may not, regarding an issue that must be decided in local courts under local law, usurps the jurisdiction of other courts. There is little reason to believe that a foreign court would defer to it.

Second, given foreign courts' suspicion of U.S. personal jurisdiction standards, and the fact that personal jurisdiction is so heavily disputed here even under those liberal standards, AOB at 79-87, foreign courts are unlikely to assume that the district court had the authority to bind the Lago Agrio plaintiffs.

Third, foreign courts would be unlikely to recognize any injunction because such recognition would not be reciprocal. If a foreign court purported to tell a U.S. court who could bring suit under U.S. law, our courts would ignore it. In *Societe Nationale Ind. Aero. v. U.S. District Court*, the Supreme Court refused to defer to a French law prohibiting participation in foreign discovery, since it represented an

"extraordinary exercise" of jurisdiction over a U.S. court. 482 U.S. 522, 544-45, n.29 (1987). A foreign court limit on who can bring an action to enforce a judgment from a third country would intrude upon U.S. sovereignty far more than a discovery limit.

A U.S. court need not stay its own proceedings in response to a foreign anti-suit injunction. *Laker Airways*, 731 F.2d at 933-34, 935. A foreign nation's decision that a U.S. court shall not apply its own laws usurps U.S. judicial functions, and courts may not extend comity to it. *Id.* at 938-39. Nor need a U.S. court defer to another nation's "attempts to carve out exclusive jurisdiction over concurrent actions." *Id.* at 930, 954. In fact, this is precisely what U.S. courts *will* issue anti-suit injunctions to prevent foreign courts from doing. *Id.* at 917-21, 930; *China Trade*, 837 F.2d at 36-37. Yet this is also precisely what the district court did here.

Indeed, what the district court has attempted is even worse than what justified a defensive anti-suit injunction in *Laker Airways*. A United States court does not "share" prescriptive jurisdiction over whether an Ecuadorian judgment is enforceable in a foreign court. 731 F.2d at 954. Moreover, in *Laker Airways*, the court refused to defer even though the case involved a foreign court enjoining *one*

of its own nationals from suing in the *U.S.* *Id.* at 934-36. The district court, however, went much further, enjoining *foreign nationals* from suing in any foreign nation. If a foreign court purported to tell a U.S. court that a third-country's nationals could not sue here, that order would be entitled to even *less* deference than the foreign order that the *Laker Airways* court sought to prevent.

Moreover, in *Laker Airways*, the Court refused to defer to the U.S. defendants' efforts in the U.K. to obtain an injunction precluding the U.S. litigation, in part because the defendants' arguments in the U.K. did not address the U.S. law at issue in the U.S. litigation. *Id.* at 944-45. So too here. The district court enjoined enforcement of the Ecuador judgment anywhere in the world, based upon Chevron's arguments under New York law. AOB at 7. Under *Laker Airways*, a U.S. court would not respect such an injunction.

B. The district court lacks any unique interest that would support a worldwide injunction.

Contrary to the district court's claim, SPA 109, U.S. courts have no cognizable interest in affording special protections to U.S. corporations that face judgments entered in systemically inadequate legal systems. AOB at 50-51; *Laker Airways*, 731 F.2d at 936. Indeed, providing such protections for a country's own citizens, when a court would not do so for others, is the kind of nationalistic

favoritism that affronts international comity. *Id.* Moreover, U.S. courts have a markedly inferior interest in determining whether an Ecuadorian judgment is enforceable in a third country than the courts of that country. The district court had no basis to preclude other courts from deciding those issues for themselves under local law.

C. The district court's approach would overturn the accepted international system for enforcing judgments.

In assessing comity, this Court must consider what would happen if all courts acted as the district court did here. *See Laker Airways*, 731 F.2d at 941. The district court's approach would destroy the existing international judgment enforcement regime. Currently, a judgment creditor chooses the forum in which to attempt to enforce, and courts in that forum determine whether the judgment is entitled to respect under local law. *See* AOB at 48-49; Lutz, *A Lawyer's Handbook* at 423. By contrast, if courts felt free to issue injunctions like the district court's, a judgment debtor would be entitled to shop the world for the most favorable forum to challenge the judgment, and that forum could preclude enforcement everywhere else. The current international regime would be replaced by a regime in which a forum – chosen by the judgment debtor – has free rein to act as a super-appellate court over the courts of sister nations.

This would cause competition and ill-will between courts that is the antithesis of comity. First, a judgment creditor faced with this possibility of losing a judgment would seek, either in the judgment forum or elsewhere, to enjoin the judgment debtor from itself seeking an injunction barring enforcement. The parties would race to acquire diametrically opposed anti-suit injunctions. Second, the debtor would often seek an anti-enforcement injunction in his home forum. If successful, such efforts would be perceived, perhaps justifiably, as courts acting based upon "chauvinism and discrimination" to protect their own nationals. *Laker Airways*, 731 F.2d at 936. All of this is a recipe for tension and recrimination between courts and nations.

Indeed, in the *forum non conveniens* context, U.S. courts are reluctant to brand a foreign jurisdiction as inherently biased. *Monegasque De Reassurances S.A.M. (monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002). This is so even though the only consequence would be that the U.S. court retains jurisdiction over a case properly before it. The comity implications are multiplied when the consequence is that a judgment already issued would be effectively unenforceable the world-over.

Needless to say, under this new regime, a foreign court would be free to trample upon the sovereignty of U.S. courts just as much as those of other nations. Our courts, and political branches, would surely bristle if another nation's courts purported to overturn a U.S. judgment by issuing an order precluding the litigants from enforcing it anywhere in the world. And, as noted above, a foreign court order that sought to preclude a U.S. court from enforcing a judgment of another foreign court would intrude upon U.S. sovereignty and would not be respected.

D. The district court's order would open the floodgates for similar litigation.

Judgments that are unenforceable under New York law, or that the losing party thinks are unenforceable, are issued every day in courts throughout the world. If the district court's world-wide injunction is permitted to stand, courts in the Second Circuit will become the forum of first resort for any judgment debtor seeking to prevent enforcement in any third country, so long as there is personal jurisdiction over the judgment creditor or his counsel.

New York would be particularly attractive to defendants who lose in Ecuador. Indeed, since the injunction is based in part on the conclusion that Ecuador's judiciary is inadequate, affirmance would strongly suggest that district

courts should grant similar injunctions barring enforcement of Ecuadorian judgments.

There is no warrant to establish the courts of this Circuit as an international apex appellate court for determining the validity and world-wide enforceability of foreign judgments; nor any reason to so tax this Circuit's resources.

II. Chevron has other avenues to challenge the Ecuadorian judgment.

As the above discussion makes clear, the practical and legal effect of Chevron's *forum non conveniens* dismissal was that Chevron voluntarily left the protective ambit of the U.S. courts. But while a federal court cannot grant the relief Chevron seeks, Chevron does have other options. Like any judgment debtor, Chevron may challenge the enforcement of a judgment in any forum in which the creditors attempt to enforce that judgment. Moreover, Chevron may resort to political and diplomatic channels; indeed, Chevron has access to these avenues that the typical judgment debtor does not. Thus, Chevron has already lobbied Congress to pressure Ecuador, albeit unsuccessfully, AOB at 21-22, and with its vast lobbying budget, it will surely continue to seek political intervention. In addition, Chevron currently seeks to hold Ecuador liable for all damages awarded in the Lago Agrio litigation through an investor-state arbitration mechanism that the U.S.

and Ecuador have provided. *See Republic of Ecuador*, 638 F.3d at 390. Therein, Chevron's claim is based in part on arguments – similar to those it makes here – that Ecuador has not given Chevron fair judicial treatment. *Id.*[17]

Whatever the merits of Chevron's claims, however, the bottom line is that the district court lacks the authority to determine for all of the world's nations whether they should recognize a judgment issued in Ecuador. No court has ever recognized the sweeping power asserted by the district court, and this Court should not approve the unprecedented remedy it created for Chevron here.

CONCLUSION

For the foregoing reasons, this Court should dissolve the district court's preliminary injunction.

DATED: June 9, 2011

Respectfully submitted,
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[17] *Amicus* does not suggest that Chevron actually has a valid claim in that arbitration even if it could prove its allegations.

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

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

DATED: June 9, 2011

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CERTIFICATE OF SERVICE

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

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

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