11-1150-cv(L),

11-1264-cv(CON)

IN THE

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.

(For Continuation of Caption, See Inside Cover)

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

BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF ECUADOR IN SUPPORT OF DEFENDANTS-APPELLANTS' REQUEST FOR REVERSAL

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Defendants.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae the Republic of Ecuador ("the Republic") is a constitutional democracy intent on shedding its colonial past through nearly two decades of aggressive legal reform and social change. The Republic is not alone; virtually every Latin American country is in the midst of modernizing its courts and increasing the quality, independence, and transparency of its respective judicial system. A member of the Organization of American States ("OAS"), the Andean Community ("CAN"), the United Nations ("UN"), and OPEC, among others, the Republic is also a staunch ally and trading partner of the United States.

While the Republic has no interest in either the RICO claims or the underlying Lago Agrio Litigation, it does have a legitimate sovereign interest in ensuring that the judgments of its own courts—which eight years ago Chevron championed as preferable to the U.S. courts—be afforded international respect, just as the United States has an interest in having judgments of its courts respected abroad, including in Ecuador. Indeed, Judge Kaplan's gratuitous belittlement of the Republic's judicial system is a wholesale condemnation of the judicial systems of the entire Latin American region.

As shown below, the undisguised castigation of, and lack of respect afforded, the Ecuadorian justice system by the District Court runs counter not only to long-established jurisprudential norms, but contrasts greatly with the Third Circuit's recent admonition: "Though it is obvious that the Ecuadorian judicial

system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system. American courts, though justifiably proud of our system, understand that other countries may organize their judicial systems as they see fit." *In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257, at *14 (3d Cir. May 25, 2011).

SOURCE OF AUTHORITY TO FILE[1]

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

[1] Pursuant to Fed. R. App. P. 29(c)(5) and Local Rule 29.1, *Amicus Curiae* certifies that no party, party's counsel, or person or entity other than *Amicus Curiae* authored this brief in whole or in part or contributed money intended to fund the preparation or submission of the brief.

ARGUMENT

I. THE UNIFORM FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT ("UNIFORM ACT") WISELY DEFERS TO FOREIGN SYSTEMS OF JUSTICE

A. The Condemnation Of An Entire Legal System Is A Rarity

The standard for non-enforcement of a foreign money judgment under section 4(a)(1) of the Uniform Act[2] is indisputably high, requiring condemnation of the foreign country's entire judicial system. "[S]ince the subsection refers to 'a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law' (CPLR 5304[a][1]), it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds." *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 292 A.D.2d 81, 89 (N.Y. 2002); *see also Society of Lloyd's v. Ashenden*, 233 F. 3d 473, 477 (7th Cir. 2000).

In *Chimexim v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999), the plaintiff sought to enforce a judgment issued by a Romanian tribunal. Then District Judge Chin found that the "Romanian judicial system comport[ed] with the requirements of due process" and granted the plaintiff's motion to enforce the judgment. *Id*. at 214. In considering the question of due process, the court acknowledged that Romania "lag[ged] badly behind many of its neighbors in clearly breaking away from the Communist past." *Id*. at 213 n.6, 214.

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[2] In New York, CPLR 5304(a)(1).

> [T]he record does demonstrate that the Romanian judicial system is far from perfect . . . [C]orruption remains a concern in Romania and there is some evidence that due process guarantees are not always accorded. No judicial system operates flawlessly, however, and unfortunately injustices occur from time to time even in our system. *Id.* at 214.

Judge Chin nonetheless recognized the judgment, since it had not been shown that "Romania's judicial system as a whole [wa]s devoid of impartiality and due process." *Id*. at 214-15.

In granting comity, the court examined the extensive judicial reforms that had taken place since the fall of communism and through the adoption of the Romanian Constitution:

> [T]he Romanian judicial system now has the earmarks of an independent system that is capable of duly administering justice. There is a Constitution that sets forth certain due process guarantees, including procedural due process. There is a Judiciary Law that establishes the judiciary as an independent branch of government. There is judicial tenure for at least some judges. There are three levels of appellate review, and in the instant case [the defendant] has taken advantage of that right to appellate review. *Id*. at 214.

Mindful of enforcement of their own judgments abroad, U.S. courts demonstrate similar deference to the judicial systems of foreign States. *See Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc.*, No. 09-56629, 2009 WL 2190187 (C.D. Cal. 2009), *aff'd*, 2011 WL 1130451 (9th Cir. 2011) (enforcing Chinese judgment); *Samyang Food Co., Ltd. v. Pneumatic Scale Corp*., No. 5:05-CV-636, 2005 WL 2711526 (N.D. Ohio 2005) (Korea); *Compañía Mexicana*

Rediodifusora Franteriza v. Spann, 41. F. Supp. 901, 909 (N.D. Tex. 1941) (Mexico); *Tonga Air Servs., Ltd. v. Fowler*, 118 Wash. 2d 718, 731-32 (Wash. 1992) (Tonga).

There are very limited circumstances under which U.S. courts have granted requests for non-enforcement of foreign judgments. The Republic is aware of only three U.S. decisions denying enforcement because the foreign judicial system failed to provide sufficient due process. Each involved truly egregious circumstances. In *Bridgeway Corporation,* the Southern District denied enforcement of a Liberian judgment where

> [t]he country was in a state of chaos, as the various factions fought. The Liberian Constitution was ignored. Some 200,000 Liberian citizens were killed, more than one million more were left homeless, and approximately 750,000 fled Liberia to seek refuge in other countries. It is difficult to imagine any judicial system functioning properly in these circumstances.[3]

The court also found evidence that "the justices and judges served at the will of the leaders of the warring factions," and the "Liberian judicial *system* simply did not provide for impartial tribunals."[4]

In *Bank Melli Iran*, the Ninth Circuit declined to enforce an Iranian judgment upon finding that the judiciary lacked independence, and U.S. citizens could not have a reasonable expectation of justice. *Bank Melli Iran v. Pahlavi*, 58

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

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

F.3d 1406, 1411-12 (9th Cir. 1995). Similarly, in *Osorio*, a Florida federal court denied recognition of a Nicaraguan judgment because "[it] was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'" *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1351-52 (S.D. Fla. 2009), *aff'd on other grounds,* 635 F.3d 1277 (11th Cir. 2011).

Whatever imperfections may exist in any particular adjudication, Ecuador has adopted a *system* of jurisprudence in which all litigants are afforded due process; judicial reforms have enhanced the fairness and independence of the court processes; and empirical evidence establishes that courts act independently of public opinion and the wishes of the Republic's officeholders.[5]

B. Texaco And Chevron Repeatedly Endorsed The Adequacy Of The Ecuadorian Judicial System

Both Texaco and Chevron praised the Ecuadorian judiciary from 1993 to 2002 in the *Aguinda* courts, arguing that the case should be dismissed on *forum*

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[5] Far from finding Ecuador's justice system bereft of due process protections, in 2008 the Eleventh Circuit *upheld* a dismissal of a case *to Ecuador* on *forum non conveniens* grounds, finding insufficient evidence that "inefficiencies in the Ecuadorian courts . . . render th[e] forum inadequate." *Paolicelli v. Ford Motor Co.*, 289 F. App'x 387, 391 (11th Cir. 2008); *see also Leon v. Millon*, 251 F.3d 1305 (11th Cir. 2001) (finding that strike by Ecuadorian judges and removal of 31 justices of the Ecuadorian Supreme Court did not render Ecuador inadequate forum where judges had returned to work, instability was resolved, and Ecuadorian legal system was again functioning normally).

non conveniens grounds because the Ecuadorian justice system was competent and generally independent.[6] Texaco filed its first motion in 1993, and periodically submitted subsequent affidavits from Ecuadorian law experts praising the Ecuadorian court system.[7] *Aguinda I*, 142 F. Supp. 2d at 544-46. In 1996, the District Court granted Texaco's motion and dismissed the case.[8] However, this Court vacated and remanded, holding such dismissal inappropriate absent defendants' consent to Ecuadorian jurisdiction and agreement to certain other stated conditions. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

On remand, Texaco consented to jurisdiction in Ecuador and submitted *ten* supplemental affidavits from Ecuadorian legal experts extolling the fairness and

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[6] *See, e.g.*, A4489-4491 (Ponce Martinez Affidavit ¶ 2) ("Ecuador's courts provide a totally adequate forum in which the plaintiffs . . . could fairly pursue their claims."), ¶ 5 ("Ecuador's judicial system is neither corrupt nor unfair."); *see also Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544 (S.D.N.Y. 2001) ("*Aguinda I*") (citing affidavits submitted by Texaco). ("A" refers to the Joint Appendix and "SpA" refers to the Special Appendix.)

[7] *See, e.g.*, Ex. 1, Ponce Martinez Affidavit ¶¶ 3-5 ("Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims [and]…the Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner . . . . . The civil procedures utilized in Ecuadorian courts are essentially those used in other civil jurisdictions, such as Spain, France, Germany and Japan. While different from procedures used in common law jurisdictions like the United States, they permit the effective resolution of civil claims."); *see also* A4493-4494 (Pérez Affidavit ¶¶ 7, 9). The Republic is filing contemporaneously with this *amicus* brief a motion for this Court to take judicial notice of Chevron's pleadings in other courts, as well as Ecuadorian legal provisions and similar authoritative documents relied upon herein but which are not otherwise in the record, and to accept for filing an appendix containing such documents. "Ex. __" refers to documents included in that appendix.

[8] *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 626 (S.D.N.Y. 1996).

adequacy of Ecuador's courts and disputing U.S. Department of State ("U.S. DOS") Human Rights reports characterizing the Ecuadorian judiciary as "politicized, inefficient, and sometimes corrupt."[9] Texaco's experts affirmed that "the courts of Ecuador . . . treat all persons who present themselves before them with equality and in a just manner," and that the Ecuadorian judiciary was fully independent.[10]

In 2001, the District Court again dismissed the case on *forum non conveniens* grounds. *Aguinda I*, 142 F. Supp. 2d at 534. On appeal, Chevron, having recently acquired Texaco through merger, joined Texaco on appeal in supporting dismissal on *forum non conveniens* grounds. This Court affirmed. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) ("*Aguinda II*").

Not only did Texaco and Chevron praise the Ecuadorian justice system from 1993 through 2002, but, as recently as July 2006 Chevron argued to a California federal court that it should dismiss or stay another environmental case brought by Ecuadorian plaintiffs there in deference to a prospective ruling in Ecuador. In support, Chevron specifically cited the *Aguinda* ruling with approval, reconfirming that Ecuador continued to constitute the preferable forum to decide all environmental damage claims. *See* Ex. 2 at 7; Ex. 3 at 1-2, 5, 9-10.

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[9] *See Aguinda I*, 142 F. Supp. 2d at 544-45.

[10] *See, e.g.*, A7588-7589 (Ponce y Carbo Affidavit ¶¶ 15, 17); A4491-4492 (Ponce Martinez Affidavit ¶¶ 5, 7); A7595 (Perez-Arteta Affidavit ¶¶ 4, 7).

Additionally, TexPet's own long-time Lago Agrio Litigation counsel, Dr. Alejandro Ponce Martínez, affirmed in a February 2006 affidavit to the Inter-American Commission on Human Rights that "more than 12,000 cases had been settled" by the Ecuadorian Supreme Court from about 1997 through December 2004 without any credible allegation that "one single case" had been decided "for political reasons." Ex. 4 ¶ 10.

Given Chevron's repeated representations from 1993 through 2006 that an Ecuadorian court constitutes a fair, impartial, and adequate forum to adjudicate the matter, Chevron bears a particularly heavy burden in belatedly portraying the Ecuadorian judicial system as suddenly bereft of basic fairness.

II. ECUADORIAN LAW GUARANTEES DUE PROCESS FOR ALL LITIGANTS

The Ecuadorian judicial and legal systems are predicated on fundamental principles of justice and due process deeply rooted in the Ecuadorian Constitution. "The procedural system is a means for achieving justice. Procedural rules shall abide by the principles of . . . efficiency . . . procedural economy, *and make effective the guarantees of due process*." Ex. 14, 2008 Constitution, Article 169 (emphasis added); *see also* Ex. 15, Organic Code of the Judiciary, Article 18.

The Constitution enforces these principles by rendering the State liable for the "inadequate administration of justice . . . and *any violation of the principles and rules of due process.*" Ex. 14, Article 11(9); *see also* Ex. 15, Articles 15, 32. It holds judges *personally* liable for any damage caused to the parties by delay,

neglect, denial of justice, or violation of law. Ex. 14, Article 172. Similar sanctions, including criminal liability, are prescribed against anyone who infringes upon the independence of the Judiciary. *Id.*, Article 168(1); Ex. 15, Article 8.

Litigants in Ecuador are afforded every procedural right known to modern judicial systems, including the right of appeal, Ex. 14, Article 86(3), which includes direct appeal as well as "cassation" and "revision," both of which constitute "extraordinary" means of controlling the legality of judicial decisions and correcting judicial error. Ex. 15, Articles 10, 15, 32, 186-188, 192; *see also* Ex. 17, Cassation Law, Article 1; Ex. 18, Code of Criminal Proceedings, Article 30; A6179-6180 (Coronel Jones Affidavit ¶¶ 50-51); *see also* A6179-6180 (Garro Declaration ¶ 18). Procedural rules must be construed so as to ensure compliance with constitutional guarantees of due process and respect for a party's right to defense. Ex. 15, Article 29. Where due process violations are raised on appeal, the 2008 Constitution also allows an "extraordinary action for protection" against the trial court judgment. Ex. 14, Article 437. Significantly, a departure from a litigant's due process rights—such as a court's failure to identify the laws or principles on which a judgment is based and explain how they apply to the facts of the case—renders a judgment null and void as a matter of law and subjects the responsible judge to sanctions. *Id.*, Article 76(7)(l).

III. EMPIRICAL DATA DEMONSTRATE THE IMPARTIALITY AND INDEPENDENCE OF THE ECUADORIAN COURTS

Empirical data establish that the courts exercise a great deal of independence from the Government. Published statistics of the Office of the Procurador General del Estado ("PGE"), Ecuador's Attorney General, demonstrate that for the period 2000 to 2007, the State as litigant actually *lost* to private litigants more than it won. *See* A6547-6549 (Arias Report ¶¶ 44-46). Instances abound in which the Republic's courts have ruled *against* the Government and *against* positions advocated by the President of Ecuador—often *in favor* of a foreign or multinational entity. *See* A6583-6587 (*id.* ¶¶ 138-155) (citing and discussing numerous cases). Just last year, Ecuador's Internal Revenue Service lost multimillion-dollar cases to two foreign oil companies before Ecuadorian courts, one of which (Repsol) had international arbitral claims pending against the Republic at the time.[11]

Chevron's own record of success against the Government in the Ecuadorian courts constitutes further evidence of an independent judiciary. In 2000, a Texaco subsidiary (and other foreign oil companies) won major income tax cases against the Government.[12] In 2002, Texaco prevailed against Government motions to

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[11] Ex. 5, Official Communication from Ecuador's Internal Revenue Service (May 31, 2011) (listing all national tax cases lost in previous three years, including against Andes Petroleum, a Chinese company, and Repsol, a Spanish company).

[12] Ex. 7, *TexPet v. Ministry of Energy and Mines*, S. Ct./Tax Div., No. 12-93 (Oct. 17, 2000).

dismiss three civil cases pending in the Superior Court of Quito.[13] In 2007, Texaco received a $1.5 million court judgment against the Government.[14] In 2008, when President Correa had already been in office for a year and the Republic was in the throes of the Constituent Assembly process that Chevron decries, an Ecuadorian appellate court reversed the dismissal of another multi-million-dollar Texaco case against the Government.[15] And most recently, on June 1, 2011, an Ecuadorian court dismissed the indictment of two Chevron attorneys on charges of material misrepresentations, notwithstanding Judge Kaplan's expressed belief that the indictment had been driven by politics.[16]

Chevron dismisses its civil litigation successes in Ecuador as not comparable to the Lago Agrio Litigation "because none of them involve hot-button political issues," arguing that "Ecuador's courts are not independent when the cases have political implications."[17] While Chevron's position is belied by high-profile cases decided in favor of foreign interests, in making this statement, Chevron implicitly concedes (as it must since it surely does not complain about its litigation victories)

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[13] Ex. 8, Order of Superior Ct., No. 152-93 (May 22, 2002); Ex. 9, Order of Superior Ct., No. 153-93 (May 22, 2002); Ex. 10, Order of Superior Ct., No. 154-93 (May 21, 2002).

[14] Ex. 11, Order of 1st Civ. Ct. of Pichincha (Feb. 26, 2007).

[15] Ex. 12, Order of S. Ct. 2nd Div., No. 46-2007 (Jan. 22, 2008).

[16] Ex. 13, Decision of NCJ, First Criminal Chamber, No. 150-209WO (June 1, 2011).

[17] Hurley, *Oil and Gas: Ecuador's U.S. Ambassador Speaks Out on Chevron Case*, NEW YORK TIMES (Mar. 10, 2011) *available at* http://www.nytimes.com/gwire/2011/03/10/10greenwire-ecuadors-us-ambassador-speaks-out-on-chevron-c-86771.html.

that the Ecuadorian judicial system *as a whole* provides fair tribunals, which is the only inquiry before this Court.[18] Whatever complaints Chevron may have regarding one particular type of case (rather than the overall "system" of justice) are simply not before this Court. *See* discussion *infra* at Part I.A.

IV. TWO DECADES OF JUDICIAL REFORMS HAVE ONLY STRENGTHENED THE ECUADORIAN COURTS' INDEPENDENCE AND COMPETENCE

For nearly two decades, the Republic—with the assistance of the UN, NGOs, and monitors from neighboring States—has devoted substantial resources to foster a more qualified and independent judiciary than existed when Texaco and Chevron argued that the Ecuadorian courts represented an adequate alternative forum to adjudicate the underlying environmental case.[19] In an assessment of reform efforts throughout the region, the Center for Strategic and International Studies explains, "[j]udicial reform has long been seen as a prerequisite for the consolidation of democracy and for sustainable development in Latin America . . . . [M]any countries in the region have undertaken programs and projects to overhaul their judicial systems and institutions."[20] Most importantly, these reforms are ongoing and cumulative: "In dealing with the dilemma of reform, Latin America

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[18] Texaco's own legal expert acknowledged that "the current situation of the Administration of Justice in Ecuador cannot be assessed through the use of specific experiences, which lead to conclusions that would imply generalizations. Neither can conclusive judgments be made based on hearsay information." Ex. 6, Corral Affidavit ¶¶ 1, 3.

[19] *Aguinda II*, 303 F.3d at 478.

[20] Ex. 22, DeShazo and Vargas, *Judicial Reform in Latin America*, 1, CSIS: Policy Papers on the Americas (Sept. 2006).

has passed through at least two phases and may now be entering a third . . . . The stages are in some sense cumulative—the transition upwards has not involved discarding the earlier solutions, but instead redefined the conditions for their success."[21]

In her expert report, Dra. Alicia Arias, an independent court reformer, chronologically details the long list of Ecuador's judicial reform efforts, starting in the early 1990s. A6533-6575 (Arias Report ¶¶ 1-121). Ecuador has sought to convert its courts from strictly inquisitorial to a more adversarial system and to open the courts to previously marginalized sectors of society, which resulted in an explosion of litigation from 1990 through 1996.[22] The resultant delays—endemic to the region but exacerbated in Ecuador due to the successful outreach—were aggressively addressed by a series of second-stage reforms aimed at expediting case resolution. Ecuador has labored to increase the skill, qualifications, and experience of its bench and to provide it with the fundamental working tools of the legal profession, including adequate facilities, computerization, and a court staff equipped to handle burgeoning caseloads capably. Such efforts require significant funds and a dedicated judicial administration staff. The Republic consequently increased its judicial budget by 73.6% between 2002 and 2005, during which time it grew from approximately $81.5 million to $141.3 million. A6576-6577 (*id.* ¶

[21] Ex. 23, Hammergren, *Fifteen Years of Judicial Reform in Latin America*, 7, UNDP (Mar. 2002).

[22] A6574-A6576 (Arias Report ¶¶ 117, 123); Ex. 24, Dakolias, *Court Performance Around the World* (1999) at 118.

125). Ecuador also created the National Judicial Council to take over administration of the courts, which has afforded the judges more time to devote to dispute resolution. The Council also investigates and, where appropriate, sanctions judicial misconduct. A6557 (*id*. ¶ 62(k)). In contrast to Chevron's current position, Texaco was highly complimentary of the National Judicial Council when it sought dismissal of *Aguinda* in favor of an Ecuadorian forum.[23]

While the Republic appreciates that more should be done, these reforms have steadily increased the efficiency of the Judiciary. The Ecuadorian Supreme Court's clearance rate—the rate at which the court resolves filed cases—jumped from 55% in 2006 to more than 120% in 2007 and 2008. A6581 (Arias Report ¶ 135). A World Bank study that sampled Ecuador's first instance courts in six judicial districts demonstrated similar results, with the clearance rate increasing in these courts from about 48.4% in 1998 to more than 101% in 2001. A6580-6581 (*id*. ¶ 133).

Since 2004, the Republic has aggressively accelerated its judicial reform agenda. As a result, the Republic's judges have been selected transparently based on objective merits criteria applied through an internationally-lauded qualification

[23] *See* A7604-7605 (Vaca Affidavit ¶¶ 2-4 (praising the National Judicial Council for "exercis[ing] continuous and efficient control of the Administration of Justice in Ecuador to fight corruption")); Ex. 6, Corral Affidavit ¶ 7 ("The National Judicial Council has demonstrated, in recent cases, to be a competent organization capable of sanctioning and removing judges whose conduct is irregular or damaging to the public interest and to the reasonable administration of justice. Judges who have demonstrated improper conduct or irregular behavior have been removed.").

process. *See* A6565-6567 (*id*. ¶¶ 88-94); A6610-6617 (Albuja Report ¶¶ 8-36); A6630-6631 (Albuja Rebuttal Report ¶¶ 37-42); A6642-6643 (Albuja Third Report ¶¶ 37-40); A6350-6351 (Eguiguren Report ¶¶ 8-13). In May 2011, the Republic went through a referendum process that aimed, among other things, at initiating a reformation and reorganization of the National Judicial Council. Specifically, the referendum sought to strengthen this institution by adopting a new procedure for appointing its members, who will be comprised of all major representatives of the Judiciary as well as the other branches of Government. The implementation of the reforms, which the Ecuadorian people approved in the referendum, will correct structural deficiencies in the Council.[24]

To find that Ecuador's judiciary systematically fails to afford its litigants due process would not only ignore (1) Texaco's and Chevron's earlier assertions to the contrary, (2) the legal protections afforded to litigants under Ecuadorian law, and (3) the massive infusion of resources into the justice system, but (4) it would instead condemn judgments from Ecuador (and perhaps from an entire region that is home to approximately 600 million people) as worthless and unenforceable pieces of paper without regard to the facts of the case.

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[24] The referendum will also make Ecuador's judicial selection process more akin to that used in the United States, Spain, France, Chile, and Mexico. Where U.S. law provides for the President to nominate and the Senate to confirm judicial nominees, thereby involving two of the three political branches in the selection process, Ecuador will be adopting a system whereby one representative each from the Executive, the Congress, and civil society will make future judicial selections. Like before, the selection criteria and process will be fully transparent.

V. THE DISTRICT COURT'S ANALYSIS OF THE BONA FIDES OF THE ECUADORIAN JUSTICE SYSTEM IS FAULTY

A. Dr. Alvarez Is Not An Independent Expert On The Ecuadorian Judiciary

Dr. Vladimiro Álvarez Grau, whom the District Court regarded as "impressively credentialed," is known in Ecuador as a vocal and politically-driven conservative critic of President Correa—as is evident in his weekly editorials in the nation's leading newspapers.[25] Dr. Alvarez parrots lay press reports and his own editorials, as well as those authored by other political opponents of the administration, to conclude, in the words the District Court adopted, "that the Ecuadorian judicial system 'no longer acts impartially, with integrity and firmness in applying the law and administering justice.'" SpA81-82. In reality, the Republic is a highly participatory democracy, whose political system is characterized by open and impassioned political debate. The very fact that opposition party members and media editorialists have a platform to publicly excoriate a sitting President reflects both the abundance of political freedom and the limits of Executive power in Ecuador. Chevron and Dr. Alvarez, however, exploit this debate by adopting every published snippet critical of the Government and elevating it to a constitutional violation. None of the cited editorials or

[25] *See* A4174-4175, A4180-4181 (Alvarez Report ¶¶ 5, 20-21). Dr. Alvarez, a corporate attorney, who has not litigated before the Ecuadorian courts in at least four years, is hardly the most appropriate person to opine on the functioning of litigation therein.

purportedly "independent" reports would be admissible as valid evidence of misgovernment in Ecuador or in the courts of this nation.

By contrast, the expert reports submitted by the Republic in a related arbitration—and submitted in the District Court by one of the RICO defendants in opposition to Chevron's motion for preliminary injunction—directly refute Dr. Alvarez's allegations. The Republic's experts' conclusions "differ materially from Alvarez with respect to the inferences they draw." SpA85 at n.305. Unlike Dr. Alvarez, the Republic's trio of experts, Dr. Albuja, Dr. Eguiguren, and Dra. Arias, engage in concrete legal, constitutional, and policy analysis—not the mere stitching together of editorial conclusions—to support their opinions.

The District Court also relied on what it called "numerous independent commentators—quoted in Dr. Alvarez's report—[who] have concluded that the Ecuadorian legal system is highly politicized and has little respect for the rule of law." SpA54-55, SpA84. The opinions of these "independent commentators" are, in reality, saturated with opinion but devoid of factual support or legal analysis. *See generally* A6636-6638 (Albuja Third Report ¶¶ 9-15).

B. The 2004 Dismissal Of The Supreme Court Was Met With Swift Reforms That Were Praised By The International Community

Chevron and Dr. Alvarez make much of the 2004 dismissal of Ecuador's Supreme Court, colorfully designating it a "judicial purge." But these events hardly marked the Republic's Waterloo with respect to democracy and the rule of law. As a matter of historical fact, there is no dispute that then-President Gutiérrez

engineered the December 2004 dismissal to stave off his own impending impeachment.[26] The people of Ecuador responded to this unjustified dismissal with a demand for swift corrective action, which in turn became the springboard for judicial improvements.

In May 2005, Congress enacted a sweeping reform of the Organic Law of the Judiciary to strengthen the Judiciary and bolster its independence.[27] The reform was the result of a robust democratic dialogue in which Ecuador's civil society, including reform-minded NGOs like the *Red de Justicia* (an umbrella group comprised of forty-seven international NGOs) played a significant role. Central to this reform was the implementation of a transparent, merit-based judicial selection procedure, systematically and institutionally insulated from political or economic influence, in which new Supreme Court judges were selected based upon their individual educational and professional merits.[28] By contrast, many U.S. state court judges are politically elected or otherwise nominated and approved by the political branches of state government.[29]

Upon invitation, the UN, the OAS, and the CAN appointed special independent representatives who closely monitored the three-stage Supreme Court selection process in which more than 300 candidates participated. Candidates

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[26] *See* Ex. 25, IACHR Annual Report 2005, ¶ 138.

[27] Ex. 19, Organic Law of the Judicial Branch.

[28] *See* A6611-6617 (Albuja Expert Report ¶¶ 11-36).

[29] Ironically, the Republic is moving toward a U.S-style selection method in which political bodies have a role in the selection of the judges. *See* discussion *supra* at n.24.

submitted to two separate qualification stages, including the opportunity for citizen challenges through public hearings. Thereafter, a bipartisan Selection Committee evaluated each candidate's professional capacity by reference to various objectively-administered examinations, including a written professional skills examination and the candidates' professional and academic backgrounds.[30] Local media and web sites provided round-the-clock coverage of the entire process. Many of the recently-discharged Supreme Court judges were returned to their duties following merits re-qualification and re-appointment. The international community praised the new selection process as a model for the Hemisphere.[31]

Critically, during this time period the Republic's trial and appellate courts carried on without interruption or change in their duties. Thus, the brief suspension of the Supreme Court did not affect, for example, the Sucumbios Provincial Court where the Lago Agrio Litigation was pending.

C. The History Of The Constitutional And Electoral Tribunals Is Irrelevant

The District Court's apparent concern about President Correa's alleged "control over the Constitutional and Electoral Courts," SpA82, is misdirected. Under the 1998 Constitution, the Judicial Branch consisted of the Supreme Court

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[30] *See* A6611-6612, A6616 (Albuja Expert Report ¶¶ 14-17, 34); A6630-6631 (Albuja Rebuttal Report ¶¶ 38-40).

[31] *See* Ex. 26, Despouy, Follow-Up Mission to Ecuador UN Report (Jan. 31, 2006) ¶¶ 18, 26, 31; Ex. 25, IACHR Annual Report 2005, ¶ 160; Ex. 27, U.S. DOS Press Statement (Nov. 30, 2005); Ex. 28, CAN Press Release, *Monitoring Concludes Successfully in Ecuador* (Dec. 1, 2005); Ex. 29, Statement of Spanish Government (Nov. 30, 2005).

of Justice, the Superior Courts in each province, and the inferior local and municipal judicial tribunals.[32] The Electoral and Constitutional Tribunals—which now do not even exist—were never part of the independent Judiciary but were instead specialized politically constituted tribunals. As such, they never had jurisdiction over the Lago Agrio Litigation.

Under the 1998 Constitution, and in contrast to the courts of the Judicial Branch, these two tribunals were *designed* to function as inherently political bodies mirroring competing political interests within the State. As a consequence, Congress selected their members (who were denominated "Vocales," not "Jueces" or "Magistrados," in Spanish),[33] and, in keeping with their more overtly political role, members of the Electoral and Constitutional Tribunals held office for four-year terms, after which they had to be re-elected by Congress.[34]

On the other hand, the Judicial Branch had no part in, and was not affected in any way by, the reorganization process that dissolved these specialized tribunals. Likewise, President Correa never ordered the removal of any members of Congress, the Constitutional Tribunal, or the Electoral Tribunal. Notably, none of the members of these tribunals was even affiliated with President Correa's Alianza País political movement.

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32 Ex. 16, 1998 Constitution, Article 198.

33 *Id.* Articles 209, 275.

34 *Id.* Article 209.

D. The Constituent Assembly Drafted A New Constitution Through The Most Participatory Democratic Exercise In Ecuador's History, Resulting In A Constitution That Restricts Executive Powers

With the electoral prerequisites for a national Constitutional referendum duly in place, open and democratic elections were held on April 15, 2007, resulting in an 82% vote by the people of Ecuador in favor of convening a Constituent Assembly to draft a new Constitution.[35] As the 2005 reform had ushered in a new era of transparency with respect to judicial selection in Ecuador, so the Constituent Assembly implemented measures fostering government transparency, robust citizen debate, and meaningful citizen participation in the democratic process. These measures were similarly monitored and enthusiastically supported by the international community.[36] The entire 2007-2008 Constituent Assembly process was broadcast live, with citizens able to participate in-person and online and to submit proposals. All documents were continuously available online. The Republic has embraced and maintained these resulting modernizations. For example, records of proceedings of the National Assembly, as the former National Congress was denominated under the new Constitution, are fully digitized with

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[35] A6626 (Albuja Rebuttal Report ¶ 23).

[36] Ex. 30, OAS Press Release, *Head of OAS Hails Ecuador's Commitment to Change and Dialogue* (Nov. 30, 2007); Ex. 31, Carter Center Press Release, *Carter Center to Observe Ecuador's Constitutional Referendum* (Sept. 8, 2008).

bills, legislative reports, and legislative history available online.[37] Similarly, the courts are being fully computerized, with their dockets and rulings now online.[38]

When the Constituent Assembly first convened on November 29, 2007, to draft a new Constitution, it issued Mandate No. 1, which expressed the full authority vested in it by the people of Ecuador.[39] The Constituent Assembly was empowered to "exercise[] its authority by issuance of 'constitutional mandates,' laws, orders, resolutions and other decisions it adopts in use of its authority," which would be hierarchically superior to those of all other State organs, including those of the Executive Branch.[40] While the Constituent Assembly was exercising the legislative authority vested in it by the national referendum, Congress entered into recess.[41] Contrary to the District Court's dicta, the Constituent Assembly did not "declare[] [its] supremacy over the judiciary." SpA52. In fact, Mandate No. 1 expressly confirmed that the Supreme Court, National Council of the Judiciary, Constitutional Tribunal, and Electoral Tribunal would continue exercising their

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37 *See* www.asambleanacional.gov.ec.

38 The process is ongoing with the courts of Pichincha, Guayas, Loja, Azuay, Tungurahua, and Imbabura online. *See* www.funcionjudicial-pichincha.gov.ec/consultas/causas.php; www.funcionjudicial-guayas.gov.ec/temp.htm; www.funcionjudicial-loja.gov.ec/buscador2.php; www.funcionjudicial-tungurahua.gov.ec/consultas/causas.php; www.funcionjudicial-imbabura.gov.ec/consultas/causas.php.

39 Ex. 20, Constituent Assembly, Mandate No. 1 (Nov. 30, 2007), Art. 1 ("The Constitutional Convention, by popular mandate on April 15, 2007, assumes and exercises ITS FULL POWERS.").

40 *Id*. Article 2.

41 *Id*. Article 7.

respective duties, which they did without interference.[42] Mandate No. 1 is not extraordinary or materially different from the governing statutes of any constituent assembly tasked with drafting a new constitution, since legislative powers must necessarily be exercised in the drafting of a new constitution.[43]

On September 29, 2008, by referendum, the people of Ecuador overwhelmingly approved the new Constitution by 63.93%, as monitored by the international community.[44] While the District Court adopted Dr. Alvarez's contrary conclusions, SpA52-53, the 2008 Constitution actually strengthened the independence of the Judiciary, weakened the Executive vis-à-vis the other branches, and reinforced the separation of powers among the branches of government.

For example, the 2008 Constitution *broadened* the circumstances under which the National Assembly (formerly the Congress) can remove or censure the President. While the previous Constitution allowed for removal of the President

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42 *Id*. Article 9.

43 *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 373-74, 395-96 (1995) (noting that "constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures," and describing the common attributes of constituent assemblies, including those of the U.S. Constitutional Congress, which likewise characterize the Ecuadorian Constituent Assembly). For example, Nepal elected a Constituent Assembly at about the same time as Ecuador and likewise had as its main functions "[t]o prepare a draft of [the] constitution and ratify it after discussion," [t]o conform the issues to be decided through referendum," and "[t]o work as legislative-parliament." Ex. 33, Constituent Assembly of Nepal Home Page, http://www.can.gov.np/en, last visited May 24, 2011.

44 Ex. 32, Carter Center, *Final Report on Ecuador's Constitutional Referendum* (Oct. 25, 2008) at 3.

only upon a two-thirds vote, and then only after impeachment proceedings that could be initiated solely for mental incapacity or graft, the new Constitution grants the National Assembly the authority to:

- Remove the President if the National Assembly declares the President to be mentally or physically unfit for office under Article 120.2;
- Initiate impeachment proceedings against the President under Article 129 upon a one-third vote and approval of the Constitutional Court for (i) offenses committed against the security of the State; and (ii) offenses of graft, bribery, embezzlement, or other illegal enrichment;
- Censure or remove the President, if as a result of Article 129 impeachment proceedings, two-thirds of the National Assembly so votes; and if evidence of criminal conduct is uncovered during these proceedings, the National Assembly can refer the matter to the competent judicial authority; and
- Remove the President under Article 130.1 upon two-thirds vote for arrogating powers not granted to the President under the Constitution, with prior approval of the Constitutional Court.

While the President is empowered to dissolve the National Assembly, that exercise requires the same grounds as those that authorize the National Assembly to remove the President, and subject to the same restrictions.[45]

The 2008 Constitution also grants the Judiciary broadened powers over the Executive. The renamed National Court of Justice (formerly the Supreme Court) has jurisdiction to hear all cases initiated against public servants, including impeachment proceedings over the President, pursuant to Article 129. In addition, the new Constitutional Court is granted the authority to rule on the National Assembly's request to remove the President for, among other causes, arrogating powers not granted by the Constitution. In addition, the Constitutional Court's jurisdiction over constitutional issues allows it to declare any act by the President or the National Assembly unconstitutional. It is Ecuador's equivalent of *Marbury v. Madison*.

The new Constitution reduced the National Court of Justice from thirty-one Justices to twenty-one.[46] This reduction reflected Ecuador's adoption of a judicial system patterned after systems like those in Spain, which rely more heavily on Associate Justices than on Justices.[47] The change was motivated by the desire to increase the efficiency of the overall judicial system by granting each Justice an

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45 Ex. 14, Articles 130, 148; *see also* Ex. 33, European Union Election Observation Report (Oct. 17, 2008) at 9.

46 Ex. 14, Article 182.

47 A6646 (Albuja Third Report ¶ 53).

unlimited number of Associate Justices.[48] In contrast, under the 1998 Constitution, the Organic Law of the Judiciary had capped the number of Supreme Court Surrogate Justices at a total of twenty-one.[49] To avoid any possible favoritism in removal or selection, the Constituent Assembly settled on a lottery process to reduce the existing 31-Justice Supreme Court to a 21-Justice interim National Court. This was thought to be the most democratic and transparent system for designating the interim Justices and was designed to ensure continuity and stability in the interim Court.

E. The District Court Relied On The Same U.S. State Department Reports That Chevron Disparaged In *Aguinda*

The District Court's reliance on the generalized criticisms of the Ecuadorian judiciary contained in 2007, 2008, and 2009 reports from the U.S. DOS, cited by Chevron, is misplaced. PI at 51, 80. While the Republic does not dispute that the cited phrases appear in these reports, Chevron fails to acknowledge that the 2009 U.S. DOS Human Rights Report for Ecuador also states, with respect to "Civil Judicial Procedures and Remedies," that "[c]ivilian courts and the Administrative Conflicts Tribunal [are] generally considered independent and impartial."[50] In 2000, the *Aguinda* plaintiffs invoked the 1999 DOS report in their ultimately unsuccessful effort to persuade the District Court, and this Court, to *retain* the environmental case in the U.S. courts, rather than dismissing it in favor of an

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48 *Id*.

49 *Id*.

50 A2168 (U.S. DOS, *2009 Human Rights Report: Ecuador*).

Ecuadorian court. And it was *Chevron* that at the time dismissed these reports as unreliable. According to Chevron's experts, these State Department reports were irrelevant, uninformed, or otherwise erroneous in the context of civil claims.[51] Relying on Chevron's submissions, the District Court ruled in *Aguinda* that the State Department reports were entitled to little weight, agreeing instead with Chevron that Ecuador constituted an adequate alternative forum:

> While the State Department nonetheless continues to describe Ecuador's legal and judicial systems as "politicized, inefficient, and sometimes corrupt" . . . this is based, as the Country Reports make clear, on cases largely involving confrontations between police and political protestors. By contrast, *not one* of the cases described by the 1999 and 2000 Country Reports as evidence of such conclusions remotely resembles the kind of controversy here at issue.
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> Accordingly, the Court is satisfied on the basis of the record before it that the courts of Ecuador can exercise with respect to the parties and claims here presented that modicum of independence and impartiality necessary to an adequate alternative forum.[52]

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[51] *See*, *e.g.*, A7588-7589 (Ponce y Carbo Affidavit ¶¶ 15, 17) ("I have reviewed the [U.S. DOS] 1998 Report on Ecuador…. Despite isolated problems that may have occurred in individual criminal proceedings, Ecuador's judicial system is neither corrupt nor unfair. Such isolated problems are not characteristic of Ecuador's judicial system as a whole."); A7596 (Pérez Affidavit ¶¶ 2-3) ("I . . . have reviewed the [U.S. DOS] 1998 Report on Ecuador . . . . Notwithstanding the description of events contained in that report, Ecuador's judicial system as a whole is neither corrupt nor unfair.").

[52] *Aguinda I*, 142 F. Supp. 2d at 545-56.

The comments in the more current State Department reports that Chevron and its expert now cite are no more compelling or relevant today than were their precursors in 2002. One decade ago, Chevron successfully argued that the reports should *not* form the basis of a finding regarding the credibility and adequacy of the Ecuadorian courts because they are not based on empirical data at all, but rather, on anecdotal—and unreliable—evidence. It is far too late for Chevron to rely on the very reports that it previously insisted (and this Court found) carry no weight at all.

CONCLUSION

For the foregoing reasons, the District Court's Order granting Chevron's motion for a preliminary injunction should be reversed.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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