11-1150-cv(L), 11-1264-cv(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,

(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* BURT NEUBORNE, INEZ MILHOLLAND PROFESSOR OF CIVIL LIBERTIES, NEW YORK UNIVERSITY SCHOOL OF LAW, IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

BURT NEUBORNE
40 Washington Square South
New York, New York 10012
(212) 998-6172
Amicus Curiae

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUNIDA, BEATRIZ MERCEDES GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUNIDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TANGUILL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIAS ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO(s).

CASES

STATUTES AND RULES

TREATISES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Inez Milholland Professor of Civil Liberties at New York University School of Law, where he has taught Constitutional Law, Civil Procedure, Evidence and Federal Courts since 1972. From 1981-86, *amicus* served as National Legal Director of the American Civil Liberties Union and, since 1995, as Legal Director of the Brennan Center for Justice at NYU Law School. For the past fourteen years, *amicus* has participated as a principal counsel, court-appointed lead settlement counsel, and United States representative in connection with a series of transnational class actions seeking to recover Holocaust-era bank deposits from Swiss banks, and compensation for Holocaust-era slave laborers from German corporations.[2]

---

[1] Pursuant to Rule 29(b) Fed. R. App. P., counsel for both appellants and appellee have consented to the filing of this brief. In accordance with Rule 29(5) Fed. R. App. P. and Local Rule 29.1, counsel represents that, with the exception of mechanical assistance in the production and filing of this brief by Emery Celli Brinckerhoff & Abady LLP, no party, counsel for a party, or any person or entity other than amicus curiae, has provided financial or other material assistance, in whole or in part, in connection with the preparation of this brief.

[2] To date, the Swiss bank and German slave labor litigation has played a material role in the distribution of more than $6.5 billion to approximately one million persons throughout the world. The terms of the $1.25 billion Swiss bank settlement are set forth in *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d 139 (E.D.N.Y. 2000). The structure of the Swiss bank settlement and its plan of distribution were approved by this Court in *In re Holocaust Victim Assets Litigation*, 14 Fed. Appx. 132 (2d Cir. 2001), and *In re Holocaust Victim Assets Litigation*, 424 F.3d 132 (2d Cir. 2005). The principal documents in the Swiss bank settlement are available on the official web site maintained by the settlement

In recent years, *amicus* has sought to foster just and efficient judicial resolution of transnational disputes involving overlapping court systems.[3] It is a truism that whether a judicial overlap involves state and federal courts;[4] multiple state courts;[5] or, as here, the courts of more than one sovereign nation,[6] the

---

classes. *See* http://www.swissbankclaims.com. Principal citations in the $5.2 billion German slave labor settlement include *In re Nazi Era Cases Against German Defendants Litig.,*198 F.R.D. 429 (D.N.J. 2000) (describing German Foundation settlement), and *In re Austrian & German Holocaust Litig.,* 250 F.3d 156 (2d Cir. 2001) (mandating dismissal with prejudice of Nazi-era cases pending against German banking defendants to permit establishment of $5.2 billion German Foundation.

[3] During the past year, a*micus* has presented papers at Osgoode Hall in Toronto (proposing common transnational procedures in human rights cases); the European University in Florence (discussing techniques for the harmonization of law within the nation states of the European community); the University of Cape Town (discussing transnational aggregate litigation techniques); and the University of the Witwatersaand in Johannesburg (same).

[4] *See Younger v. Harris*, 401 U.S. 37 (1971) (limiting power of a federal court to enjoin pending state proceedings); *Samuels v. Mackell,* 401 U.S. 66 (1971) (limiting power of federal court to issue declaratory relief disruptive of pending state criminal proceedings); *Steffell v. Thompson*, 415 U.S. 452 (1974) (permitting declaratory judgment in absence of pending state proceeding); *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987) (reversing federal court interference with pending Texas civil proceedings). A corollary principle limits the power of state courts to enjoin federal judicial proceedings. *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

[5] The Constitution's Full Faith & Credit Clause assures that the judicial determinations of one state will be respected in sister-states.

[6] Compare *Hilton v. Guyot*, 159 U.S. 113 (1895) (recognizing defensive power of United States court to refuse to enforce foreign judgment lacking basic attributes of fairness) with *Banco de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (declining to

successful application of the rule of law to complex disputes involving more than one judicial system requires mutual respect, cooperation and self-restraint on the part of judges in the overlapping judicial systems.

This case involves a judicial overlap between the courts of Ecuador and the United States in connection with claims by thousands of indigenous peoples residing in the Ecuadorian jungle that Texaco, a predecessor of appellee Chevron Corporation,[7] unlawfully destroyed their environment in the search for energy. The case was originally filed in a United States court. In 2002, at the behest of Texaco/Chevron, this Court referred the underlying dispute to the courts of Ecuador. *See Aguinda v. Texaco, Inc.,* 945 F. Supp. 626 (S.D.N.Y. 1996) (granting *forum non conveniens* dismissal), vacated and remanded, *Jota v. Texaco, Inc,* 157 F.3d 153 (2d Cir. 1998), on remand, *Aguinda v. Texaco, Inc.,* No. 93-cv-5727, 2000 U.S. Dist LEXIS 745 at *9 (S.D.N.Y. Jan. 31, 2000) (raising questions), *Aguinda v. Texaco, Inc.,* 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (granting *forum non conveniens* dismissal), aff'd, *Aguinda v. Texaco, Inc.,* 303 F.3d 470 (2d Cir.

---

permit United States courts to rule on the legality seizures of property lawful under the socialist legal system of a sister-sovereignty). *See generally China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F2d 33 (2d Cir. 1987) (setting forth restrictive rules governing power of United States courts to enjoin parallel litigation in courts of another sovereign).

[7] Chevron, the appellee herein, merged with Texaco in 2001, to form one of the world's largest energy companies.

2002). Ecuador reacted to the expression of respect and confidence by authorizing aggregate environmental litigation procedures by the alleged victims,[8] and expending substantial judicial resources in seeking to process the aggregate litigation fairly and efficiently (a process that has not yet been completed). Chevron, unhappy with the course of events in Ecuador, now seeks a judicial do-over, claiming that Ecuadorian courts (functioning under a political regime less friendly to foreign energy companies than was the case in 2002) are no longer worthy of respect.

Under *Hilton v. Guyot*, 159 U.S. 113 (1895), allegations that the courts of Ecuador are rife with corruption and were vulnerable to fraudulent manipulation by plaintiffs' counsel and the President of Ecuador entitles Chevron, in appropriate proceedings, to resist efforts to enforce the Ecuadorian judgment in other countries.

---

[8] Ecuador's experimentation with aggregate litigation procedure parallels similar efforts in other jurisdictions. *See Class Proceedings Act*, 1992, S.O. 1992, ch. 6 (Ontario) (last amended 2006); Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 Am L. Comp. L. 311 (2003); John O'Hare & Kevin Browne, *Civil Litigation* 101-02 (2005) (describing Britain's "Group Litigation" Oder); Willem H. van Boom, *Collective Settlement of Mass Litigation in the Netherlands* 117 (Reiner Schulze ed. 2009); Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (2008) (discussing British, Dutch, and German models); Fabrizzio Cafaggi & Han-W. Micklitz eds., *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (2009); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1 (2009); Samuel Issacharoff & Geoffrey Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179 (2009); Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 Annals Am. Acad. Pol. & Soc. Sci., 7 (2009).

What Chevron is not entitled to, however, is a worldwide District Court injunction issued without an evidentiary hearing and prior to the completion of the Ecuadorian appeals process that: (1) heaps scorn on the Ecuadorian judiciary on the basis of an unfairly truncated record and in the absence of a representative of the Republic of Ecuador; (2) proceeds in the absence a representative of the indigenous peoples of Ecuador who have suffered the alleged underlying environmental injury and who will be the beneficiaries of any Ecuadorian judgment; and (3) seeks to pre-empt the ability of judges everywhere else in the world to decide for themselves whether to respect and enforce the final judgment, if any, of the Ecuadorian courts.[9]

The decision below, while well-intentioned, sends an unmistakable message of American judicial arrogance to the rest of the world that can only result in increased levels of reciprocal judicial suspicion and hostility, with negative consequences for the transnational rule of law. Accordingly, *amicus* respectfully submits this brief seeking vacation of the preliminary injunction issued below in order to remove the threat to transnational judicial cooperation that it poses.

[9] In footnote 10 of the District Court opinion, the Court suggests that a final Ecuadorian judgment may be enforced by persons having no connection with any enjoined party. But in the text related to footnote 10, the District Court states that the beneficiaries of the Ecuadorian judgment may not seek its enforcement merely by changing lawyers.

STATEMENT OF THE CASE

Amicus does not know what has transpired in Ecuador. Suffice it to say that both sides appear to have waged total law on each other. Reciprocal allegations that Chevron sought to procure releases in Ecuador through bribery, intimidation and corruption, and that plaintiffs' counsel and the President of Ecuador sought to improperly influence Ecuadorian judicial officials, are cause for genuine concern. If and when a final judgment issues in Ecuador and an effort is made to enforce the judgment abroad, both parties will have an opportunity to persuade the relevant court, after a full and fair hearing, of the enforceability or non-enforceability of the Ecuadorian judgment under *Hilton v. Guyot*, 159 U.S. 113 (1895).

Until such careful judicial fact-finding takes place, however, *amicus* cautions that demonization of an opponent's tactics and behavior, or of the activities of sitting judges, is all too common in today's hyper-aggressive legal world. One need not travel to Ecuador to hear horror stories by opposing counsel (and their public relations entourages) in bitterly fought cases charging bribery, corruption or judicial misfeasance. The overheated rhetoric used a generation ago in the *Pennzoil* litigation in an effort to paint Pennzoil's lawyers and the Texas state courts as fundamentally unfair and in need of federal judicial superintendence should serve as a cautionary tale. *Pennzoil Co. v. Texaco*, 481 U.S. 1, 15-17 (1987) (reversing federal court injunction against enforcement of Texas judgment).

Once all nine Justices of the Supreme Court had rejected Texaco's ploy in *Pennzoil*, the parade of horribles predicted by Texaco's counsel never came to pass.[10]

In this case, Ecuador has been substituted for Texas as the allegedly rogue jurisdiction in need of federal judicial superintendence. *Amicus* urges the Court to be skeptical about chicken-little stories that the judicial sky is falling in either jurisdiction. The *Rooker-Feldman* doctrine warns courts about purporting to sit in appellate judgment over the decisions of a sister-court system. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). While *Rooker-Feldman* applies solely to overlapping litigation within the United States, its message of mutual respect, judicial self-restraint and cooperation between overlapping judicial systems is equally important in the international sphere.

In any event, the resolution of this appeal does not turn on the facts, such as they are, because the District Court lacked constitutional authority, as a matter of law, to issue the challenged injunction.

---

[10] Texaco eventually sought the protection of a bankruptcy court and eventually settled with Pennzoil for approximately $3 billion. Fifteen years later, Texaco merged with Chevron. *See* Robert Mnookin and Robert Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 Va. L. Rev. 295 (1989).

ARGUMENT

THE DISTRICT COURT LACKED CONSTITUTIONAL AUTHORITY TO ISSUE INJUNCTIVE RELIEF BLOCKING THE ENFORCEMENT OF A HYPOTHETICAL ECUADORIAN JUDGMENT AGAINST CHEVRON ANYWHERE IN THE WORLD

A. The Nature of the Lower Court Proceeding

The District Court and the parties appear to view this case as a dispute about the issuance of a foreign suit injunction under *China Trade & Development Corp. v. M.V. Choong Yong*, 873 F.3d 33 (1987). But the injunction issued by the District Court has almost nothing in common with the usual foreign suit injunction issued by courts engaged in adjudicating a dispute on the merits seeking to block a litigant's effort to seek relief in another judicial forum. When the second judicial forum is located in a sister-sovereignty, *China Trade* recognizes that, given the potential international consequences of an ordinary foreign suit injunction, caution and judicial self-discipline are crucial, even when an American court is simply seeking to assure the efficient and expeditious resolution of a particular controversy.

Unlike the ordinary foreign suit injunction, however, the world-wide injunction issued by the District Court is not concerned with preserving the ability of an issuing court to adjudicate an underlying dispute on the merits fairly and efficiently. The District Court has not offered to adjudicate the underlying environmental dispute between Chevron and thousands of Ecuadorian indigenous

peoples on the merits, nor could it in the face of the earlier *forum non conveniens* dismissal, and Chevron's failure to re-submit the dispute to an American court. Rather, the District Court's world-wide injunction collaterally attacks the judicial system that is seeking to adjudicate the underlying environmental dispute. If a final Ecuadorian judgment herein (assuming that a final judgment issues) cannot be enforced anywhere in the world because of the District Court's injunction, there is no alternative adjudicatory forum. Unlike the ordinary foreign suit injunction, therefore, where the issue is whether the parties should have access to more than one adjudicatory fora, the injunction below has the effect of paralyzing the only adjudicatory forum, effectively removing the underlying environmental dispute from the rule of law.

Since the District Court's injunction threatens to render a long-standing legal dispute non-justiciable in any judicial forum, the standards governing the issuance of such a drastic court order are far more stringent than the *China Trade* criteria. Indeed, it is possible that the issuance of such a lethal order is beyond the power of any court. At a minimum, no such order can issue in the absence of meticulous compliance with fundamental constitutional norms.

B. The Absence of an Article III Case or Controversy

The District Court recognized that no grant of statutory authority purports to vest an American court with power to issue world-wide injunctions effectively

barring the enforcement of judgments issued by foreign judicial systems. Indeed, the only Congressional enactment relied upon by the District Court in this diversity case is the Declaratory Judgment Act of 1934, which neither creates a cause of action, nor adds to the subject matter jurisdiction of the District Courts. Rather, the Declaratory Judgment Act authorizes a federal court to decide a case or controversy in settings where injunctive relief would not be appropriate, and where no damages have yet been incurred.

The Declaratory Judgment Act does not, however – nor could it – dispense with the Article III requirement of a ripe case or controversy. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) (Declaratory Judgment Act does not dispense with requirement of case or controversy); *Calderon v. Ashmus*, 523 U.S. 740 (1998) (same). Whether the Article III issue is approached as a question of standing, ripeness, or mootness, the Constitution restricts the exercise of federal judicial power to the resolution of crystallized cases and controversies posing a genuine and immediate need for federal judicial resolution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (judicial power rests on necessity of resolving actual dispute); *Warth v. Seldin*, 422 U.S. 490 (1975) (low income residents lack standing to challenge restrictive zoning laws that inhibit the building of low income housing); *Allen v. Wright*, 468 U.S. 737 (1984) (parents of black children in public

school lack Article III standing to compel IRS to enforce ban on tax exemptions for segregated private schools).

Nothing in the fact pattern presented to the District Court reveals the existence of a crystallized case or controversy within the meaning of *Warth* or *Allen v. Wright*. All agree that the current version of the Ecuadorian judgment is neither final, nor enforceable. In the absence of a final judgment – or even a hint that a final judgment is imminent – there is simply no crystallized controversy for a federal court to resolve. Moreover, no indication exists in the record that any person – counsel or one of the Ecuadorian beneficiaries of such a hypothetical Ecuadorian judgment – has any immediate intention of seeking to enforce an Ecuadorian judgment, if one is issued, in New York, or elsewhere in the United States. A strategic memorandum entitled *Invictus*, fantasizing about worldwide efforts to enforce a hypothetical Ecuadorian judgment (if one is ever issued), hardly translates into a crystallized controversy justifying the issuance of equitable relief by a New York federal court. In *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court ruled that persons who had been severely injured by the use of an allegedly unlawful chokehold by the Los Angeles police department lacked standing to seek an injunction against its continued use. Surely, Chevron's need for an injunction against the enforcement of an Ecuadorian judgment that has not even issued is no greater than the victims of the Los Angeles chokehold. *See also*

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 612-13 (1997) (recognizing Article III issues posed by effort to litigate rights of persons who had not yet manifested symptoms).

At most, the fact pattern before the District Court revealed a potential case or controversy that has not yet become ripe for Article III adjudication. In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), the Supreme Court declined to rule prospectively on the constitutionality of the Hatch Act, holding that the employees subject to its restrictions must await a concrete case or controversy. Similarly, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court refused to permit a corporation to challenge an administrative proceeding until the proceeding had run its course and presented the parties with a crystallized case or controversy. *See also Reno v. Catholic Social Services, Inc.,* 509 U.S. 43 (1993) (declining on Article III ripeness grounds to rule on lawfulness of restrictive interpretation of immigration statute by INS).[11] Chevron's complaint

[11] The Supreme Court has recognized that analysis of the Article III issue overlaps with questions of whether the preconditions for equitable relief have been met. *Lyons, supra* at 111-12. Even if one assumes (erroneously) the existence of an Article III case or controversy, no basis existed for the issuance of an injunction by the District Court, both because no enforcement proceedings were imminent, and because the procedures in connection with any future enforcement action would constitute an adequate remedy at law. It is hard to take seriously the assertion that Chevron, one of the world's wealthiest corporations, would suffer irreparable injury by being forced to present its defenses to enforcement in more than one forum.

poses an even less compelling case for judicial action than the federal workers in *Mitchell*, the corporate plaintiff in *Abbott Laboratories*, or the aliens in *Reno*.

It is possible, of course, to push the limits of Article III in settings where failure to permit generous access to the courts might imperil the robust exercise of First Amendment rights. *Flast v. Cohen*, 392 U.S. 83 (1968); *Holder v. Humanitarian Law Project*, 130 S.Ct ____ (2010). But, in a setting like this one, where the potential international consequences of a worldwide injunction against the enforcement of a hypothetical Ecuadorian judgment would be so severe, and where the consequences to Chevron are so minimal, no basis – or power - exists to dilute the traditional Article III requirements of a crystallized case or controversy and a genuine showing of imminent harm.

C. The Violation of the Act of State Doctrine

Under the doctrine of separation of powers, American courts do not have a foreign policy.[12] They are precluded by the Act of State doctrine from purporting to pass judgment on the legality of the acts of a foreign sovereign performed on its

[12] *See, e.g., First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972) ("'The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative-'the political'-departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" (quoting *Oetjen v. Central Leather Co.,* 246 U.S. 297 (1918)).

own territory.[13] The District Court's entry of a worldwide injunction effectively barring the enforcement of a facially-valid judgment of a sister-sovereignty cannot be squared with the Act of State doctrine. *Banco de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (declining to permit United States courts to rule on the legality of seizures of property lawful under the socialist legal system of a sister-sovereignty, but arguably in violation of international law).

Although the District Court injunction is nominally aimed at efforts by counsel to enforce it, the real target of the injunction is the Ecuadorian judiciary and the judgment itself, which the District Court viewed as fundamentally corrupt and unworthy of respect. Indeed, the District Court noted that merely changing lawyers would not render the Ecuadorian judgment enforceable. Ironically, if an Ecuadorian government had nationalized Chevron's assets with no pretense of respect for the rule of law, the Act of State doctrine would preclude an American court from passing on the validity of the seizure. Under *Sabbatino*, American courts are obliged to enforce claims resting on such unlawful property seizures. American courts are somewhat better off when the allegedly unlawful foreign

[13] The classic statement of the Act of State doctrine occurs in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

behavior is judicial, as opposed to legislative. Under *Hilton v. Guyot*, an American court may refuse to lend its coercive authority to the enforcement of a foreign judgment procured by fraud, or pursuant to fundamentally unfair procedures. Such a narrow defensive power is, however, a far cry from the District Court's assertion of an affirmative power to pass worldwide appellate judgment on the validity of a facially-valid judgment issued by the courts of a sister-sovereignty.

The Act of State doctrine does not require American courts to tolerate the actions of a foreign sovereign that violate core concepts of human dignity protected by universally accepted customary international law.[14] But a garden-variety commercial dispute over the fairness of another country's judicial system hardly qualifies as a justification for passing world-wide legal judgment on the validity of a decision of the courts of Ecuador, even before the decision is announced.

D. The Violation of Procedural Due Process of Law

The District Court leveled substantial criticism at the seemingly freewheeling procedures followed by plaintiffs' counsel and the Ecuadorian courts in permitting *ex parte* interaction and communication by the parties with judges

[14] *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Alien Tort Act permits federal judicial remedies for acts of foreign officials in violation of core aspects of customary international law). *See also W.S. Kirkpatrick & Co. v. Environmental Techtronics, Int'l,* 493 U.S. 400 (1990) (Act of State doctrine does not bar litigation casting aspersions on acts of foreign government, as long as legality not challenged).

and court-appointed experts. But the procedures utilized in the District Court were hardly a model of procedural fairness. Whether viewed under Rule 19 of the Fed. R. Civ. P., or the due process clause, the District Court failed to assure adequate representation for two crucially-interested sets of parties – the thousands of indigenous peoples who will be the true beneficiaries of any Ecuadorian judgment aimed at restoring their ravaged environment; and the Ecuadorian judges who have sought to process this litigation fairly despite massive pressure by both sides. At a minimum, both Rule 19 and procedural due process of law require that adequate representation be provided for the beneficiaries of the Ecuadorian judgment, as well as the Ecuadorian judges who are the targets of the District Court's scorn. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Martin v. Wilks*, 490 U.S. 755 (1989); *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996); *Amchem Products v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999).

The only parties actually before the District Court were Chevron, whose interests are diametrically opposed to the beneficiaries of the Ecuadorian judgment; one or more defendant-lawyers and defendant-experts who are alleged to have acted unlawfully in procuring the judgment; and two Ecuadorian named-plaintiffs, so-called LAPS, who appear through counsel, but resist *in personam* jurisdiction. While the complaint purports (pursuant to fanciful theories of *in personam* jurisdiction) to join other Ecuadorian LAPS as defendants (even though

they have never set foot in the United States), no serious effort was made by the District Court to assure a voice for the thousands of indigenous beneficiaries of the Ecuadorian judgment who have no contact with the parties actually before the District Court. Given the possible conflicts of interest that may arise between the named lawyer-defendants (who are accused of unlawful and unethical behavior that jeopardizes the judgment), the named LAPS, who are also accused of improper actions, and the indigenous Ecuadorian beneficiaries of the judgment, no serious argument can be made that the lawyer-defendants or even the LAPS can adequately serve as the sole representatives of the interests of the beneficiaries of the Ecuadorian judgment. Indeed, the potential conflict is far worse than the conflict deemed disqualifying in *Amchem*.

Similarly, no effort was made by the District Court to assure the presence of a voice that could speak for the Ecuadorian judges who have labored on this case for almost a decade under difficult circumstances. When an American federal judge is subjected to a mandamus proceeding, we recognize that counsel for the parties cannot adequately represent the judicial interest. Accordingly, we guaranty the judge separate counsel, and a separate voice in the mandamus proceeding. *See Austrian & German Holocaust Litig.,* 250 F.3d 156 (2d Cir. 2001) (trial judge represented independently by David Boise at public expense). Chevron's frontal attack on the integrity and independence of Ecuadorian judges in this proceeding

calls for a similar separate voice. The obvious source of that voice is the Republic of Ecuador itself, which should have been deemed a Rule 19 party in the court below. *See Republic of Philippines v. Pimentel,* 553 U.S. 851(2008) (Republic of Philippines Rule 19 party in connection with litigation concerning Marcos family assets).[15] Where, as here, a federal judge goes to the very limits of the Act of State doctrine – and beyond - in questioning the integrity and judgment of a sister court system, both Rule 19 and the due process clause require the presence of a voice whose sole responsibility is to defend the courts of Ecuador.

CONCLUSION

For the above-stated reasons, *amicus* urges that the injunction below be vacated and the complaint dismissed.

Dated: June 9, 2011
New York, New York

Respectfully submitted,

_____/s/_____

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172
burt.neuborne@nyu.edu

[15] Although the District Court contacted the United States government before proceeding, the Court apparently made no effort to invite participation by the Republic of Ecuador.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief of *Amicus Curiae* in Support of Defendants-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 4,528 words.

/s/ Burt Neuborne
Burt Neuborne

June 9, 2011

CERTIFICATE OF PARTIES' CONSENT TO FILING OF BRIEF

Amicus Curiae file this brief supporting Defendants-Appellants with the consent of Defendants-Appellants and Plaintiffs-Appellees.

/s/ Burt Neuborne
Burt Neuborne

June 9, 2011

ANTI-VIRUS CERTIFICATION

I, Burt Neuborne, hereby certify that the above Brief of *Amicus Curiae* in Support of Defendants-Appellants, submitted in PDF form via the Court's CM/ECF System in the above referenced case was scanned using ESET Smart Security 4 and found to be VIRUS FREE.

/s/ Burt S. Neuborne
Burt S. Neuborne

June 9, 2011