Gupta / Beck *Issues & Appeals*

May 22, 2015

Catherine O'Hagan Wolfe
Clerk, U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
New York, NY 10007

Re: Post-argument letter brief in *Chevron v. Donziger et al.* (Nos. 14-0826, 14-0832)

Dear Ms. Wolfe:

We submit this letter, per the Court's order of May 12, to address two issues. *First*, we discuss the implications of the arbitration proceedings under the U.S.-Ecuador Bilateral Investment Treaty (BIT)—proceedings initiated by Chevron to collaterally attack the Ecuadorian judgment based on all the same factual allegations made here. We begin by showing why the risk of inconsistent findings is particularly acute in light of recent developments. We then discuss the implications: Suppose that the distinguished panel of international arbitrators rejects Judge Kaplan's version of events and concludes that the Ecuadorian judgment should be enforced, and then a court in London confirms that award. A Canadian enforcement court could then face an unenviable choice between Judge Kaplan's judgment, the English judgment confirming the Hague panel's findings, and the Ecuadorian judgment itself.

What is to be gained by bending the law to provoke such an unpalatable scenario, particularly where Chevron has *four* adequate remedies at law? Those remedies are the BIT and the Constitutional Court proceedings, both of which Chevron itself started, as well as universal enforcement defenses and the Collusion Prosecution Act, both of which allow Chevron to air all its allegations anyway. Given these other viable avenues, this case presents an especially bad vehicle for inventing a new pathway for global collateral attacks. To do so here would inflict a grave injustice on the defendants, reward global forum shopping on a historically unprecedented scale, spark extensive international friction, and open the Second Circuit's floodgates to disappointed litigants from anywhere—all without actually settling the controversy.

Second, we address Chevron's citation of new authority at the lectern—an attempt to once again shift the ground underneath Mr. Donziger and his Ecaudorian clients by refashioning the common-law claim against them. We explain why Chevron's legal theory cannot be salvaged based on its proposed *in rem*/*in personam* distinction. It would be intolerable, from a due-process perspective, to uphold such serious findings against an individual based on a nebulous, ever-shifting legal theory that was never even argued to the trial court.

I. The Implications of the International Arbitration Proceedings

A. ***The Risk of Inconsistent Findings Is Acute.*** Judge Kaplan issued findings that Steven Donziger, an American lawyer, was responsible for bribing an Ecuadorian judge and ghostwriting an Ecuadorian judgment. Those are very serious findings that, if allowed to stand, could do irreversible personal and professional damage to Mr. Donziger and cast a cloud over his clients' hopes for long-delayed remediation of their polluted land and waters. They are also very seriously wrong. As we explained in our briefs, the findings rest almost exclusively on an exceedingly flimsy foundation: the bought-and-paid-for testimony of disgraced former judge Alberto Guerra—and little else. Opening Br. 51–65; 82–84; Reply 23–25.

That foundation was shaky enough as it is, but it has completely fallen apart since the district judge issued his findings. In the the BIT proceeding—which Chevron itself initiated in 2009, well before bringing this case—the parties just completed a three-week trial-type hearing, which commenced on April 20 (the same day as oral argument in this case) and concluded on May 8. Among other things, Guerra himself was subjected to a day and a half of intense cross-examination (the transcript of which has not yet been made public, but is not subject to confidentiality restrictions). That hearing centered on the very same corruption allegations that form the core of Chevron's case here, plus extensive evidence of deliberate environmental contamination (including tens of thousands of soil and water samples) that the district court assiduously excluded below. Among the evidence now before the tribunal is a forensic analysis of Guerra's hard drives, as well as those of Judge Zambrano—and both utterly refute Guerra's account in this case.

Those results are discussed in a report by Ecuador's expert witness, J. Christopher Racich, that is available on the Ecuadorian Embassy's website and attached as Exhibit A (and of which this Court should take judicial notice for the reasons given in our judicial-notice motion filed before argument).[1] The Racich Report is a comprehensive, readable document that summarizes his findings and explains why those of Chevron's forensic expert (Spencer Lynch) do not in any way corroborate—and in fact undermine—the key part of Guerra's story: that he helped ghostwrite the judgment on Pablo Fajardo's computer. Tellingly, Chevron's opposition to our judicial-notice motion barely tries to explain how the forensic evidence is even *consistent with*, much less corroborates, Guerra's story. Dkt. 366, at 15 (devoting one paragraph to this effort).

That's because Guerra's story was a lie devised to net him a massive payout from Chevron. As with Diego Borja before him (*see* Opening Br. 15-19), "there was no bribe." Dist. Ct. Dkt. 152-2. Nor did any member of the Lago Agrio plaintiffs' team ghostwrite any part of the judgment. The Racich Report confirms that the judgment was created on Zambrano's computer, while "increasing amounts" of text were added "between October 2010 and February 2011," and that it was "edited and saved hundreds of times during this period." Ex. A, at 3. Each time, it was edited on *Zambrano's* computer—not someone else's.[2] If another person had worked on the judgment and given it to Zambrano—whether on "a USB device," "by email or by any other means"—there would be evidence of this in the metadata. And yet "there is no evidence in the

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[1] *See* http://www.ecuador.org/blog/?p=4961.

[2] The report submitted by Chevron's own expert found the same. *See* Lynch Report (Aug. 15, 2014), at 24–25, *available at* http://bit.ly/1HzDjrI. Although that report seeks primarily to highlight inconsistencies between Judge Zambrano's testimony and the forensic evidence (such as which of two office computers he primarily used to write the judgment three years earlier), the report makes very little effort to explain how the evidence is consistent with Guerra's story.

Chevron also attempts to support its speculation with its "unfiled work product" argument: that parts of the 188-page judgment allegedly borrow from documents written by the Ecuadorian legal team that are not in the formal record. But videotapes of the Ecuadorian proceedings show that *both* parties, at judicial site inspections, often submitted documents to the court that did not end up in the official record. *See, e.g.*, Dkt. No. 372-2 at 18–19. Indeed, Chevron does not contest that several of its own motions in the Ecuador trial—which were ruled on by the court—are not in the official record. *Id.*

metadata that the versions of [the judgment] found on Mr. Zambrano's computers were provided by Mr. Guerra, Pablo Fajardo, or anyone else." *Id.* at 3–5. In sum: "the evidence is more consistent with Mr. Zambrano and his assistant writing the Judgment than it is with a third party writing the Judgment and giving it to Mr. Zambrano at the beginning of February 2011," as Guerra claims. *Id.* at 3. Thus, Guerra's testimony "that Zambrano gave him a draft on Fajardo's laptop approximately two weeks before the Judgment was issued so that Guerra could revise it," SPA-265, has now been proved false—and so too have the district court's findings that rest on it.

Although Chevron's counsel asserted at oral argument that these findings "ha[ve]n't been challenged" on appeal (an assertion repeated in its opposition to our judicial-notice motion, Dkt. 366, at 2, 6), we have been emphatic that "Mr. Donziger vigorously contests every one of these allegations," Opening Br. 71, and we have explicitly asked this Court to "vacat[e] the district court's findings in full," Reply 24; *see also* Opening Br. 82–84. Even Chevron acknowledged in its brief (at 2) that we have "attack[ed] the credibility" of Guerra, whose testimony provides the linchpin for its bribery and ghostwriting allegations.

Indeed we have. In our opening brief, we documented how "Chevron has paid Guerra hundreds of thousands of dollars in cash and over a million in benefits" in exchange for his testimony. Opening Br. 54. We detailed some of the many lies he has told to benefit himself. *Id.* at 55–56. We noted that he met with Chevron's lawyers 53 times in three months, for four to six hours each time, in preparation for his testimony. *Id.* at 60. And we pointed out that—despite this exhaustive preparation—Guerra's testimony was *still* internally inconsistent and unreliable. On this record, and even more so in light of the new forensic analysis not available to the district court, it is no exaggeration to say that Mr. Donziger was framed by Chevron on the basis of "a paid witness who admitted to making false statements to sweeten his deal with Chevron," *id.* at 2—and who was (in his words) "rewarded handsomely" for it, A-1369. To reiterate: "If anyone here is guilty of bribery, it isn't Steven Donziger." Opening Br. 2.

Chevron has not cited a single case holding that factual findings in a civil case procured in this outrageous manner may be upheld or given any deference whatsoever. Our opening brief (at 83) provided authority explaining that payments to a witness in exchange for his testimony are "absolutely indefensible." Chevron has offered no justification for paying more than a million dollars in cash and benefits to someone making $500 a month at the time. It asserted only (at 31) that "a credible threat to Guerra's safety necessitated his relocation," yet it has not even attempted to justify the extraordinary payments it made (and continues to make) *after* his relocation. If this Court were to condone such reprehensible behavior, it would not only reward Chevron and Guerra in this case (despite developments in the BIT proceeding that further expose Guerra's testimony as false); it would incentivize litigants in future cases to pay unfathomable sums in exchange for favorable, potentially perjured testimony.

Even the district court, despite attempting to erect a fortress around its findings, expressed "skepticism concerning Guerra's testimony, character, and motives," SPA-292, and acknowledged that his lies and inconsistencies "put his credibility in serious doubt, particularly in light of the benefits he has obtained from Chevron." SPA-264. Yet the court ultimately concluded that "circumstantial evidence" proves that "Guerra told the truth regarding the bribe and the essential fact as to whom wrote the judgment." SPA-278; *see also* SPA-293. But that evidence, provided on pages SPA-278–82, has no independent value absent Guerra's testimony, and is thus woefully inadequate to support the district court's bribery and ghostwriting findings.

Here, too, the BIT proceedings help make the point. In its latest filing (which we have filed with this Court, *see* Dkt. 372-2), the Republic of Ecuador spent 50 pages (at 117–168) dismantling Chevron's bribery and ghostwriting case. As the Republic explains, not only did Judge Kaplan ignore the most relevant circumstantial evidence—that Guerra has never been able to produce any draft of the judgment, "any [copies] of the [Lago Agrio] Plaintiffs' allegedly unfiled work product," or "any communications between or among Guerra, Judge Zambrano, or the Plaintiffs, let alone any reflecting an illicit conspiracy"—the court also ignored common sense: that "Chevron claims to have offered Judge Zambrano 'millions to come clean' but Judge Zambrano allegedly declined in favor of a dubious promise of US$ 500,000 in the event the Plaintiffs ever collected on the Judgment, contrary to [Chevron's] claim that Judge Zambrano is corrupt and motivated only by money." ROE Supp. Rejoinder 123–24, 152.

As for Chevron's claim (at 2) that there is "overwhelming contemporaneous documentary evidence corroborating Guerra's testimony," that evidence "is just the cherry-picked set of documents" that Chevron has "managed to force-fit into [its] story." *Id.* at 125. Take, for example, the four deposit slips that mysteriously came to light after Guerra had met with Chevron's lawyers, which he "never mentioned . . . in the numerous recorded conversations he had with Chevron's investigators" before then. *Id.* at 134–35. Despite a bottomless war chest, Chevron made no effort to authenticate two of these slips beyond Guerra's own say-so. Nor did it subject the photocopies (it did not submit any originals) to handwriting analysis to prove that the Selva Viva employee in fact signed them. As for the other two slips, only later did Chevron submit a declaration from a private investigator claiming that an *unnamed third party* (who did not submit a declaration) independently obtained them from the bank. Dist. Ct. Dkt. 1671. It is unthinkable that a company with such limitless litigation resources would settle for this inadequate hearsay declaration as the sole authentication for its most important "corroborating" evidence on its most important allegation—that is, if that allegation had any truth to it.

Chevron's forum shopping has thus created the very real possibility of dueling, inconsistent findings—one from a single American judge, the other by three international arbitrators based on a more developed record—both in proceedings initiated by Chevron.

B. *The Arbitration Represents One of Four Adequate Remedies At Law.*

As these developments in the BIT proceedings illustrate, Chevron cannot possibly show that it has no adequate remedy at law or that it will suffer any irreparable harm without the extraordinary equitable relief requested here. Chevron in fact has *four* adequate legal remedies—three of which it is currently pursuing, and one that it may still pursue if it chooses.

1. BIT Arbitration. As already discussed (and as discussed in our opening brief at 21–22 and 103–04), Chevron initiated the BIT proceeding well before it opted to sue here, and the relief it seeks there is far broader. When Chevron started the proceedings, it requested relief that included not only declaratory relief and an order requiring Ecuador to release Chevron from liability, but also (1) "an order 'requiring Ecuador to indemnify, protect and defend [Chevron] in connection with the Lago Agrio Litigation, including payment . . . of all damages that may be awarded against Chevron'"; and (2) all "attorneys' fees, litigation costs, arbitration costs, 'moral damages,' and interest." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 390 (2d Cir. 2011). Those demands have only mushroomed over time to encompass a wish list that goes well beyond the powers of any federal court. *See* Ex. B (excerpt from January 2015 filing by Chevron).

The district court did not mention this requested relief in finding that Chevron has no adequate legal remedy. SPA-481–86. If granted, however, the relief would redress every alleged and conceivable injury to Chevron (and certainly every injury even theoretically redressed in this case). And because Chevron brought the arbitration and has invested massive resources in pursuing it, Chevron obviously views the forum as capable of providing the relief requested and therefore as adequate. But instead of waiting to see what happens there, Chevron brought a second collateral attack in this case.

In fact, because Chevron can fully litigate its fraud allegations in the BIT forum and obtain broader relief, that proceeding is not just an "adequate remedy" but a superior one. Setting aside legitimate concerns over the power of investor-state arbitral tribunals, any award will rest on a more robust record; is likely to be recognized under international law; and will have the real potential to expedite resolution of this two-decades-long legal fight. That stands in stark contrast to this case, in which the judgment, even if affirmed, won't stop the BIT proceeding, won't halt or reduce enforcement actions, and won't resolve any core factual or legal issues. Far from helping, Judge Kaplan's judgment will (if affirmed) reward Chevron for reneging on its promise to abide by the Ecuadorean judgment and transform a U.S. district judge into a "transnational arbiter [who] dictate[s] to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 242 (2d Cir. 2012).

All that Chevron can legitimately ask for is a final resolution of whether it has to pay the Ecuadorean judgment. The BIT proceeding can provide that answer (and for that matter, as explained below, the Canadian enforcement action or an action in Ecuador under the Collusion Protection Act could too). Chevron does not need more fronts on which to litigate identical issues. And under international law, the BIT results could preclude Chevron from relitigating these issues in the future. "A court precludes relitigation of a specific issue of fact or law made by an international arbitral award if: (a) the award is entitled to recognition … ; (b) the award satisfies the requirements for issue preclusion prescribed for an arbitral award by the law of the forum in which such recognition is sought, and (c) barring relitigation of the issue is consistent with the arbitration agreement and the reasonable expectations of the parties." *Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration*, at § 4-10 Issue Preclusion (Tentative Draft No. 2, Apr. 16, 2012), Ex. C. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, courts of contracting states (such as the U.S. and the Netherlands, where the BIT panel sits) are to "recognize arbitral awards as binding … in accordance with the rules of procedure in the territory where the award is relied upon." *See also Restatement (Second) of Judgments* § 84 (1982); *Universal Am. Barge Corp. v. J-Chem*, 946 F.2d 1131, 1137 (5th Cir. 1991). Thus, if the arbitral tribunal concludes that the Ecuadorean judgment is enforceable, Chevron could not later assert in another proceeding that it is not. But, if the judgment in this matter is allowed to stand, Chevron will almost certainly use it to muddy the waters, parrying any unfavorable result from the BIT arbitration—even though Chevron itself started that proceeding *before* filing this case.

At argument, the panel asked how long this litigation could last, and when it will end. The short answer is that, although nobody can know the answer, enforcement proceedings in Canada or elsewhere do provide a light at the end of the tunnel. Judge Kaplan's unprecedented decision, by contrast, accomplishes nothing. It won't stop the BIT proceeding, won't stop foreign enforcement actions, and because it never even addressed the environmental evidence, it won't

even provide guidance on underlying, core questions of but-for causation. That is reason enough to reverse Judge Kaplan's decision, as it is merely an advisory opinion.

An affirmance, by contrast, would reward gamesmanship. When a company and a country agree to arbitrate disputes, the company is bound by the decision. Chevron has a right to challenge the Ecuadorean courts in arbitration, and it exercised that right. Having done so, it cannot run back to litigate identical issues in its home court. The pernicious nature of this "heads-I-win, tails-you-lose" strategy is compounded by Chevron's history of forum shopping, including its insistence on moving the litigation to Ecuador in the first place.

2. Enforcement proceedings. Chevron also has available to it a remedy that this Court has already recognized is "far better" and "more obvious" than the relief sought here: "present[ing] its defense to the recognition and enforcement of the Ecuadorian judgment" in enforcement proceedings. *Naranjo*, 667 F.3d at 246. That includes Canada, where an appellate court ruled shortly after trial in this case that, "[a]fter all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits." *Yaiguaje v. Chevron*, 2013 ONCA 758 (Ct. App. Ontario, Dec. 17, 2013).

Why isn't this remedy adequate? The district court's answer—that Chevron would not be spared the costs of defending against enforcement proceedings, SPA-483–84—is no answer at all. The relief granted in this case *does not prevent those costs either*. So, at oral argument, Chevron's counsel refined the answer, asserting that Chevron would be "forced to defend [it]self from judgments all over *the United States* repeatedly." Tr. 41.

That hypothetical harm is not even a cognizable injury under Article III. Chevron has not spent *any* money defending itself from a U.S. enforcement proceeding because there haven't been any. That means that Chevron must prove that this possible *future* injury—defending against enforcement actions from "all over the United States repeatedly"—is "certainly impending" (or was certainly impending at the time of suit). *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013). The only evidence Chevron can point to (at 71–72) is the so-called Invictus Memo cited by the district court (at SPA-483–84). But that is a confidential *internal* thought piece prepared by a law firm five years ago (before the judgment was even issued) exploring various possible enforcement avenues in the event that "an enforceable judgment [was] entered in Ecuador," and noting that ultimate recognition in the U.S. would be "undoubtedly the most desirable outcome." SA5954. That is nowhere near enough to rise to the level of certainly impending. A "specific, concrete threat of immediate litigation" can of course "establish a justiciable controversy," but only if it is actually *communicated* to the plaintiff. *Shields v. Norton*, 289 F.3d 832, 835–37 (5th Cir. 2003). Confidential, internal work product speculating and theorizing about the possibility of enforcement actions comes nowhere close.

3. Collusion Prosecution Act. Then there is Ecuador's Collusion Prosecution Act, a complete remedy that Chevron has still refused to avail itself of (and that the district court did not discuss, *see* SPA-481–86). During oral argument, Chevron's counsel offered only two reasons why this should not be considered an adequate remedy, neither persuasive. Tr. 50–51. The first is waiver. But we emphasized in our briefs that the Collusion Prosecution Act is a "tailor-made remedy" here and listed it as one of Chevron's "several adequate remedies at law." Opening Br. 92; Reply 54–55; *see also* Opening Br. 36–37. And the Act's availability was highlighted by the Ecuador Supreme Court, whose opinion we put before the district court. *See* A-3543 (DX 8095).

The second argument is that this "is not a remedy at all because [of] the specific findings by Judge Kaplan with respect to the judicial process with respect to this kind of a case is shot through with fraud." Tr. 51. Our briefs, however, have already explained that Chevron is estopped from making that argument "by its previous contrary representations to this Court about the adequacy of Ecuador's judiciary," and that the district court's systemic-inadequacy finding is clearly erroneous in any event. Opening Br. 100; *see also id.* at 64–65, 99–110; Reply 35–40. And it is no answer to say, as Chevron repeatedly does, that those promises were made by a "different company" (Texaco) rather than Chevron. Tr. 53–54; *see Republic of Ecuador*, 638 F.3d at 389 n.4; Opening Br. 103–05.

4. Constitutional Court of Ecuador. Finally, Chevron is already pursuing yet another adequate legal remedy—an "action for protection," seeking nullification of the judgment on due-process grounds by the Constitutional Court of Ecuador. *See* http://bit.ly/1FEzl1u (court's announcement that it will hear Chevron's petition, No. 105-14-EP). Indeed, as Chevron recently conceded in the BIT proceeding, its petition to the court encompasses all of the same corruption allegations it is advancing on multiple fronts: in Chevron's words, "those same claims are currently before the Constitutional Court." Dkt. 353-2, at 115. If successful, Chevron would have no need for a collateral attack of any kind, nor would it have to defend itself in enforcement proceedings. Chevron's only response is systemic inadequacy, which fails for the reasons just mentioned.

II. *Marshall v. Holmes* and Chevron's Latest Common-Law Theory

At oral argument, Chevron seized on an 1891 Supreme Court case, *Marshall v. Holmes*, 141 U.S. 589 (1891)—a case it never cited in its hundreds of pages of briefing—as the basis for the latest iteration of its ever-shifting common-law claim. *See* Tr. 44, 61. Recall that the district judge made a highly irregular "constructive amendment" to Chevron's complaint, *after trial*, to add an equitable claim "for relief from the judgment." SPA-475. At the lectern, though, Chevron's counsel pivoted 180 degrees. Chevron now contends that this common-law claim is *not* a claim for relief from the judgment at all. As we explained in our briefing, forcing a defendant to play a game of whack-a-mole against such nebulous, fluctuating claims raises intolerable due-process problems—particularly in a case with such serious allegations of misconduct against an individual. *See* Opening Br. 93; Reply 30–31.[3] In any event, even assuming that Chevron's newest claim is actually in the case, it fails in multiple ways.

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[3] This is now the *fourth* time that Chevron's chameleon common-law claim has changed appearances. After Chevron's attempt to ground a worldwide injunction in common-law principles proved unsuccessful in *Naranjo*, the district judge kept Chevron's common-law fraud claim in the case through trial based on a theory of third-party reliance. *See Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 256–57 (S.D.N.Y. 2012). Judge Kaplan acknowledged that this Court has repeatedly held that injury based on "reliance by third parties is not actionable in New York" but declined to follow those holdings and looked instead to what he called "old but square holdings by the New York Court of Appeals supporting fraud claims based on third-party reliance." *Id.* at 256–57 & n.151 (citing three 19th-century cases). Only after trial did the judge lose confidence in his analysis and decline to rely on Chevron's fraud claim, SPA 420-21—the *only* common-law claim pled in the complaint and addressed in the parties' post-trial briefs. Chevron Br. (Dist. Ct. Dkt. No. 1847), at 213–47; 346–51; Donz. Reply (Dist. Ct. Dkt. 1857), at 22–27. Instead, the district judge *sua sponte* amended Chevron's complaint to add a new

1. Chevron lacks a cause of action to preemptively attack a foreign-country money judgment. Chevron's new argument is that "this is not a collateral attack on the judgment" because "the review operates on the parties, it doesn't operate on the other courts," Tr. 43–44—even though the district court itself characterized the claim as one "for relief from the judgment," SPA 334, and even though *all* of Chevron's alleged harm flows from the judgment and *all* of the relief issued is "traceable to the Judgment or the enforcement of the Judgment anywhere in the world." SPA 590. Chevron thus contends that an otherwise impermissible collateral attack on a foreign court's judgment may be sustained merely by changing the label—that is, by recharacterizing it as an attack on the *persons* who hold some interest in that judgment.

Chevron's sole support for this *in rem/in personam* distinction is *Marshall*, which held that a federal court had diversity jurisdiction to entertain a collateral attack on a Louisiana state-court judgment. But *Marshall* cannot save the day for Chevron. For starters, *Marshall* was removed to federal court from the Louisiana state courts and was expressly premised on "provisions of the Louisiana Code of Practice authorizing an action to annul a judgment obtained through fraud, bribery, forgery of documents, etc." 141 U.S. at 598. Thus, the federal court sitting in diversity was granting relief that would have been available in state court *via state statute*. This Court has twice emphasized this critical feature of *Marshall*. *See United States v. Gleeson*, 90 F. 778, 778 (2d Cir. 1898) (explaining that *Marshall* was "a suit arising in Louisiana, the Code of which state apparently authorize[d] such an action"); *Griffith v. Bank of N.Y.*, 147 F.2d 899, 904 n.4 (2d Cir. 1945) (noting that *Marshall* "may be explained on the ground of the additional remedy provided by Louisiana statute").

Here, by contrast, no provision of New York's law authorizes an affirmative cause of action to collaterally attack a foreign-country money judgment, and this Court held in *Naranjo* that New York's Recognition Act—and "the common-law principles it encapsulates"—forecloses just such an action. 667 F.3d at 241, 243. It would turn the international judgment-enforcement framework "on its head," this Court explained, to create "causes of action by which disappointed litigants in foreign cases can ask a New York court to restrain efforts to enforce those foreign judgments against them." *Id.* at 241, 243. The fundamental common-law rule that foreign money judgments may not be preemptively attacked—they are deemed conclusive, subject only to the *defenses* that may be raised in enforcement actions—is not only part of "the law of nations" but also "part of our law." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).[4]

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common-law claim—a "non-statutory claim for relief from the Judgment," SPA 330—without locating it in any source of law (state or federal) or explaining how it could survive *Erie* (if federal law) or *Naranjo* (if state law).

[4] This long settled common-law rule also explains why RICO cannot plausibly be read to authorize global collateral attacks. As explained in our opening brief (at 99), "when an interpretation of a broad, general statute" like RICO would "abrogate a common law principle" or "implicate foreign relations," this Court has required "a clear expression of congressional intent." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco*, 268 F.3d 103, 127–28 (2d Cir. 2001); *see also Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 724 (5th Cir. 2008) (applying functional test to assess whether a complaint alleging RICO and common-law fraud constitutes an impermissible collateral attack on foreign proceedings).

It should therefore come as no surprise that no court anywhere has applied Chevron's *in rem/in personam* distinction to enjoin enforcement or collection on a foreign money judgment—and certainly not where, as here, so many alternative forums are available in which the judgment-debtor can have all of its allegations heard. As Judge Wesley remarked at oral argument, there is no "case where there's been a collateral attack on a foreign state's judgment"—whether characterized as *in rem* or *in personam*—and Chevron's counsel couldn't point to one. Tr. 42–43. That is no accident.

Indeed, Chevron's theory has been squarely rejected. In *Harrison v. Triplex Gold Mines*, the plaintiffs brought a "bill in equity" seeking "an injunction restraining the defendants individually and collectively from enforcing decrees of the Supreme Court of Ontario, Canada, entered against the plaintiffs." 33 F.2d 667, 668 (1st Cir. 1929). Refusing to "lend [itself] to such a proceeding"—"the main object" of which was "to prevent the defendants . . . from receiving the benefit of litigation long contested" in another country—the First Circuit dismissed the case. *Id.* at 672. The court noted that this was not an enforcement action—"the successful litigants in the Ontario action [were] not seeking the aid of this court to enforce any rights or decrees obtained there"—and that "[n]o cases have been cited and none have been found which would sustain the jurisdiction of this court to declare null and void the orders and decrees of a court of general jurisdiction in Canada." *Id.* Then, turning to the argument that the case was brought *in personam* rather than *in rem*, the First Circuit easily rejected that argument and held: "This is only another way of attempting to reach the same result as that already discussed." *Id.*

2. Chevron's *in rem/in personam* distinction fails on its own terms. Even if Chevron could somehow skate past the lack of an affirmative cause of action and the longstanding bar on attacking foreign-country money judgments, its *in rem/in personam* distinction still founders. Chevron's argument hinges on *Marshall*'s holding that the federal court (in addition to having jurisdiction over the dispute) had the power to grant the relief requested under the Louisiana Code. The Court reasoned that, although a federal court "cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that [the judgment-creditor] shall not enjoy the inequitable advantage obtained by his judgments." 141 U.S. at 599. The Court held that such relief "would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court." *Id.* at 600.

But, as this Court has recognized, "[t]he continued validity of that proposition" in *Marshall*—even as to the limited circumstances of that case, which did not involve a foreign judgment—"is at least questionable." *Smith v. Alleghany Corp.*, 394 F.2d 381, 386 n.1 (2d Cir. 1868). And the Supreme Court itself has lodged an even stronger critique (in an opinion by Justice Frankfurter)—stressing that *Marshall*'s "foundation" (and that of other decisions in which "federal courts have enjoined litigants from enforcing judgments fraudulently obtained in the state courts") is "very doubtful." *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 145 (1941).

Chevron now asks this Court to expand this "questionable" and "very doubtful" distinction to cover judgments from all over the globe and, in effect, authorize the very cause of action rejected in *Naranjo*. But, again, "[t]his is only another way of attempting to reach the same result"—an impermissible order preemptively restraining enforcement and collection on the judgment of a foreign nation's court system. *Harrison*, 33 F.3d at 672. Even in the domestic context, this Court's cases have recognized how formalistic the proposed distinction is, holding that a suit against a judgment-creditor—"[n]otwithstanding that it [may take] the form of a tort

claim"—is nevertheless "a collateral attack" because "its essential and necessary nature is an equitable proceeding collaterally attacking the judgment." *Griffith*, 147 F.2d at 901. That analysis illustrates how easily *Naranjo* could be circumvented if this Court were to accept Chevron's argument: A disgruntled litigant need only camouflage its collateral attack as an *in personam* tort claim and *Naranjo* would cease to have any effect.

Chevron's argument is also more extreme than the position this Court rejected in *M.W. Zack Metal Co. v. International Navigation Corp.*, 675 F.2d 525 (2d Cir. 1982), in which a judgment-creditor (not a judgment-debtor) brought an action in New York alleging fraud on a German court. *Id.* Because the plaintiff in that case had *won* the foreign-country money judgment, he did not have available to him the "far better remedy" described in *Naranjo*, 667 F.3d at 246: defending against an enforcement action (not to mention the other avenues available to Chevron here). Even still, this Court dismissed the suit because the plaintiff had "ample opportunity" to raise his allegations in Germany. *Id.* at 529. In doing so, this Court rejected the dissent's suggestion that American judges could open the door to entertaining collateral attacks "in whatever way their own predilections led them." *Id.* at 532 (Cardamone, J., dissenting).

3. Even if Chevron had a common-law claim, it would fail for lack of "but for" causation. Finally, even if Chevron could get past all of the problems listed above, it would still have to identify a cause of action and satisfy its elements. That Chevron *still* hasn't identified the contours of its common-law claim says all there is to say about whether this proceeding satisfied due process. Even if equity somehow supplied a cause of action to attack a foreign judgment, Chevron still has not shown that its alleged injuries would not have occurred "but for" the alleged fraud—a basic requirement of any independent action, and one that the district court simply omitted. SPA-346–47. The complaint in *Marshall* itself alleged that "the judgments in question would not have been rendered against [her] *but for* the use in evidence of the letter alleged to be forged." 141 U.S. at 596 (emphasis added). It did so because *any* independent action for relief from a judgment requires proof that the alleged fraud "changed the outcome of the original action." *United States v. Beggerly*, 524 U.S. 38, 47 n.4 (1998). Chevron has not provided that proof here, nor can it do so given the district court's exclusion of all environmental evidence and the intermediate court's *de novo* review and substitute judgment. Opening Br. 73-75; Reply Br. 44–45. Thus, it is not surprising that, just as Chevron has steadfastly resisted engaging RICO's and Article III's causation requirements, it has done the same with respect to the common law.

Respectfully submitted,

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