11-1150-cv (L)

11-1264-cv (CON)

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,

(Additional Caption On The Reverse)

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

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FOREIGN TRADE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE CHEVRON CORPORATION

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Defendants.

CORPORATE DISCLOSURE STATEMENT

The National Association of Manufacturers is a non-profit 501(c)(6) corporation organized under the laws of New York. It has no parent company, nor has it issued any stock. The National Foreign Trade Council is a non-profit 501(c)(6) corporation organized under the laws of New York. It has no parent company, nor has it issued any stock.

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large employers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, media, and the general public about the vital role of manufacturing to America's economic future and living standards. The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. NFTC and its affiliates serve more than 300 member companies.[1]

[1] Under Fed. R. App. P. 29(c)(5) and Loc.R. 29.1, no party's counsel authored the brief in whole or in part; and no party, their counsel, or any other person, other than *Amici* and their counsel, contributed money to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The preliminary injunction entered below is entirely consistent with principles of international comity and should be affirmed. The contrary claims of defendants and their *amici* are more than just wrong. They constitute an effort to use international comity as a pretext for preventing a federal court from halting what it found to be a campaign of apparent fraud, orchestrated, in part, in the United States by one or more U.S. citizens, and designed to benefit foreign citizens with significant contacts with the United States. Under international law, the United States has undoubted authority to regulate such conduct. The district court properly exercised that authority to prevent defendants from reaping the benefits of an alleged fraud. Defendants' contention that U.S. courts are powerless to enjoin such conduct, and must instead defer to courts in nations that have no regulatory authority over that conduct—and whose courts would be used to consummate an alleged fraud—is plainly incorrect.

Amici will not repeat the remarkable facts of this case, which are set forth in detail by the district court and plaintiff. Two salient features of the case, however, deserve mention. First, the district court found that "a good deal of the evidence of possible misconduct by Mr. Donziger and others, as well as important evidence regarding the unfairness and inadequacies of the Ecuadorian system and proceedings" comes directly from defendants themselves, "[y]et neither Donziger

nor any of the other key actors has denied Chevron's allegations or attempted here to explain or justify under oath their recorded statements and written admissions." SPA6-7. Second, there is direct evidence that defendants seek to enforce an allegedly fraudulent and corrupt Ecuadorian judgment "in multiple jurisdictions around the world, including by *ex parte* attachments, asset seizures and other means, as promptly as possible, starting before completion of the Ecuadorian appellate process." SPA5.

Thus, on the record before it, the district court confronted a naked effort by defendants to shop the globe for a legal system that would enforce a judgment before the courts of the United States could make any inquiry into whether it is the product of fraud and corruption, and before the courts of Ecuador make a final decision on those questions. Indeed, defendants and their *amici* make no secret of this fact. They argue that courts outside of Ecuador and the United States are free to enforce judgments without regard to whether they emanate from impartial and fair legal systems. *See* Br. for Defendants-Appellants Hugo Gerardo Camacho Naranjo, *et al.* ("LAPsBr.") at 43; Br. of Environmental Defender Law Center in Support of Defendants-Appellants ("EDLC Br.") at 3.

Principles of international comity confer no right to conduct such a forum-shopping campaign, nor do they disable federal courts from halting it. In arguing to the contrary, defendants and their *amici* confuse distinct branches of the doctrine

of "comity." The presumption that U.S. courts should not enjoin parties from conducting parallel *in personam* proceedings in foreign courts grows out of the recognition, under international law, that two or more nations can properly have *concurrent prescriptive jurisdiction—i.e.*, the authority to prescribe governing law to regulate the conduct underlying a particular controversy. A nation can have prescriptive jurisdiction either because the relevant conduct occurred within its territory (or has substantial effects there) or because one or more of the actors are citizens of that nation. As these bases of prescriptive jurisdiction are not mutually exclusive, two nations can have prescriptive authority over the same controversy. It is in such cases that the courts of one nation with prescriptive regulatory authority should ordinarily be reluctant to enjoin judicial proceedings in another nation with such prescriptive authority.

The injunction here does not implicate these concerns. The United States and Ecuador are the only nations with concurrent prescriptive jurisdiction over the conduct at issue in this case. The preliminary injunction, however, does not apply to Ecuadorian courts. It extends only to bystander countries with no prescriptive jurisdiction over the controversy that gives rise to this suit. Therefore, the *China Trade* analysis is inapplicable, and the injunction should be affirmed without regard to its standards.

Even if *China Trade* did apply, the district court correctly found that its two-part threshold test is satisfied. The parties here and in any future foreign enforcement actions would be at least substantially the same—and likely identical—because the Ecuadorian-action judgment creditors will have standing to seek, and will be the beneficiaries of, enforcement. Second, this action will be "dispositive" of future foreign enforcement actions. Defendants and their *amici* contend that *China Trade*'s "dispositive" requirement is formalistic and can be satisfied only if (1) the elements of the parallel actions are identical, *and* (2) the foreign courts would have no discretion under international comity to set aside or ignore the U.S. judgment. But that narrow definition would effectively nullify *China Trade* by making it impossible to issue anti-suit injunctions.

Instead, modern practice and longstanding precedent treat "dispositiveness" as a requirement that the substance of the claims and arguments in the two actions be the same. Thus, the inquiry focuses on the *issues* presented in the parallel actions, not the *elements* of U.S. and foreign laws, or the mandatory *res judicata* effect of a U.S. judgment on foreign actions. The court adopted this correct legal analysis, and found that the issues presented in the New York action—whether the Ecuadorian judgment should not be recognized or enforced because it reflected a fundamentally unfair system, and was procured by fraud—would be the same as those at issue in any foreign enforcement actions.

Finally, even if *China Trade*'s threshold test is properly understood to foreclose relief here, this Court should recognize a narrow exception to ensure that federal courts retain the power to prevent the type of irreparable miscarriage of justice that the district court reasonably concluded, on the basis of the evidence before it, was threatened in this case.

ARGUMENT

I. BECAUSE IT DOES NOT INTERFERE WITH ANY OTHER NATION'S PRESCRIPTIVE JURISDICTION OVER THE CONTROVERSY, THE INJUNCTION SHOULD BE UPHELD WITHOUT REGARD TO *CHINA TRADE*'S STANDARDS.

Defendants claim that the injunction must be reversed because it does not satisfy the threshold requirements and other standards this Court established for anti-foreign-suit injunctions in *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987). But while defendants and their *amici* offer rote recitations of the language from *China Trade* and its progeny, they ignore the rationale that underlies its requirements. That rationale makes clear that the *China Trade* standard is inapplicable to the injunction at issue here.

A. The Predicate For Application Of The *China Trade* Standards Is Interference With Another Nation's Prescriptive Jurisdiction.

In *China Trade*, this Court drew heavily on the seminal decision in this area, *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).[2] In his scholarly opinion in that case, Judge Wilkey explained the rationale behind the principle that "parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other." *Id.* at 926-27. This principle, he explained, is a "fundamental corollary" of the concept of concurrent prescriptive jurisdiction, *id.* at 926—*i.e.*, the right, under international law, of two different nations to "prescrib[e] governing law over a particular controversy," *id.* at 922; *see also* Restatement (Third) of the Foreign Relations Law of the United States 230 (1987) ("jurisdiction to prescribe" is "the authority of a state to make its *substantive* law applicable to particular persons or in particular circumstances") (emphasis added) (hereafter "Restatement").

[2] In its two-page discussion of anti-foreign-suit injunctions in *China Trade*, this Court quoted or cited *Laker Airways* no fewer than eight times. *See* 837 F.2d at 35-37. It has since cited the case in numerous cases. *See*, *e.g.*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 120 (2d Cir. 2007); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004); *United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985).

There are two fundamental "bases of concurrent prescriptive jurisdiction: territoriality and nationality." *Laker Airways*, 731 F.2d at 921 (capitalization altered). Each nation has prescriptive power to "control and regulate activities within its boundaries," as well as extraterritorial conduct "which has or is intended to have a substantial effect within the territory." *Id.* at 921-22; *see also United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985) (same). Similarly, "a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state." *Laker Airways*, 731 F.2d at 922; *Davis*, 767 F.2d at 1036 (same, citing *Laker Airways*).

Because people, goods and services frequently cross national boundaries, "two or more states may have legitimate interests in prescribing governing law over a particular controversy." *Laker Airways*, 731 F.2d at 922; *see also Davis*, 767 F.2d at 1036 (United States and Cayman Islands had "concurrent jurisdiction to prescribe" the law governing a U.S. citizen's conduct in the Cayman Islands). It is precisely because two nations can have concurrent prescriptive jurisdiction over the same conduct that "'[p]arallel proceedings on the same *in personam* claim'" are "ordinarily tolerable," and "'should ordinarily be allowed to proceed.'" *China Trade*, 837 F.3d at 36 (quoting *Laker Airways*, 731 F.2d at 926-27). "The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction. *For this reason*,

injunctions restraining litigants from proceeding in courts of independent countries are rarely issued." *Laker Airways*, 731 F.2d at 927 (emphasis added).

Concurrent prescriptive jurisdiction is thus the essential predicate to the comity concerns that underlie the rules and standards governing anti-foreign-suit injunctions. It is because such injunctions cut off "the preexisting right of an independent forum *to regulate*"—and not merely because they may cut off judicial proceedings in another country—that anti-foreign-suit injunctions are an affront to comity. Similarly, concurrent prescriptive jurisdiction gives rise to "[a] second reason cautioning against" such injunctions: "[i]f the foreign court reacts with a similar injunction, no party may be able to obtain any remedy." *Id.* This is because such injunctions effectively stymie the two nations with power to regulate the conduct or transaction at issue.

Concurrent prescriptive jurisdiction also accounts for two other factors that counsel against issuance of anti-foreign-suit injunctions. Because individuals and corporations are expected to order and conduct their affairs in accordance with the legal rules to which they are subject, allowing actions to proceed in the courts of those nations that have prescribed the substantive law governing the affairs of the litigants promotes stability and predictability. *See id.* at 937. By the same token, because of its own prescriptive authority, a nation that refrains from enjoining foreign actions "need not fear that [its] crucial policies [will] be trampled if a

foreign judgment is reached first, since violation of domestic public policy may justify not enforcing the foreign judgment." *Id.* at 929. A nation that declines to enforce a foreign judgment for such reasons is then free to render its own judgment concerning the underlying conduct, and can thus vindicate its own laws, policies and expectations.

B. The Injunction Does Not Interfere With Any Nation's Concurrent Prescriptive Jurisdiction.

Because the injunction in this case does not limit the jurisdiction of any nation with concurrent prescriptive jurisdiction over the underlying controversy, it does not implicate any of foregoing principles of international comity.

The two nations with concurrent prescriptive jurisdiction over the conduct at issue here are the United States and Ecuador. The allegedly fraudulent scheme that "produced the judgment [in Ecuador] was formed or, at least, significantly advanced in New York," SPA103; a principal architect of that alleged fraud "is a member of the New York Bar," *id.*; and the beneficiaries of the alleged fraud have engaged in numerous contracts with New York, *id.* at 95-99. Thus, principles of both territoriality and nationality afford the United States prescriptive authority over the controversy. The same is true with respect to Ecuador, where the alleged fraud was largely perpetrated.

Accordingly, an injunction barring defendants from conducting proceedings *in Ecuador* would implicate the comity concerns underlying the anti-foreign-suit

injunction standards. But Ecuador is excluded from the scope of the injunction. The court enjoined defendants from "directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefits from any action or proceeding, *outside the Republic of Ecuador*." *Id.* at 129 (emphasis added); *see also id.* at 90 n.323 ("no one is attempting here to interfere with Ecuador's adjudication of the underlying dispute or the enforceability of the Ecuadorian judgment in the forum in Ecuador").

Thus, the injunction restrains defendants from commencing proceedings in the "more than 100 countries" outside Ecuador and the United States, where defendants hope to take advantage of *ex parte* asset seizure mechanisms that avoid "relitigation of the merits of the case," *id.* at 61-63 (internal quotation marks omitted), and that supposedly "recognize neither fraud nor systemic inadequacy as grounds for refusing to enforce a foreign judgment." EDLC Br. at 3. These nations, however, have no prescriptive regulatory power over the conduct at issue in this case. If, for example, defendants instituted an asset seizure action in Panama (e.g. to seize a storage tank filled with fuel in which a Chevron subsidiary has an interest), that action would not involve any right of Panama "to make its *substantive* law applicable to" this controversy, Restatement, at 230 (emphasis added), or "to prescribe governing law" "to control and regulate" the activities underlying this suit or "the conduct of its nationals," *Laker Airways*, 731 F.2d at

921-22. The injunction thus would not "cut off the preexisting right of [Panama] to regulate [a controversy] subject to its prescriptive jurisdiction," *Id.* at 927.

Because the injunction does not restrict the jurisdiction of the courts of any foreign sovereign that has *concurrent prescriptive regulatory power* over the conduct at issue in this suit, *China Trade* is inapplicable. This makes sense because, in the absence of any interference with another country's prescriptive jurisdiction, the comity concerns and policies that underlie *China Trade*'s standards are not implicated. Defendants attempt to suggest otherwise, claiming that the injunction "displays a complete lack of respect for foreign courts and offends principles of international comity by denying foreign courts the opportunity to decide if the [Ecuadorian] Judgment is enforceable under their laws." LAPsBr. at 39-40. This claim is mistaken, and attempts to confuse matters by relying on a distinct branch of comity concerning recognition and enforcement of foreign judgments.

Recognition and enforcement is not an exercise of regulatory power over primary conduct, but essentially an act of reciprocity. This is why the Restatement treats the concepts of jurisdiction to prescribe and enforcement of foreign judgments as entirely distinct. *See* Restatement, at 235-303 (jurisdiction to prescribe); *id.* at 591-641 (foreign judgments and awards). As discussed above, the presumption against anti-foreign-suit injunctions is a function of prescriptive

jurisdiction, not principles of recognition and enforcement. Indeed, as *Laker Airways* explained, one reason a court should refrain from issuing such an injunction is because it will later have the power to decide whether to enforce a judgment that arises out of parallel foreign proceedings. As this case vividly illustrates, however, that power would be lost if U.S. courts must not only presumptively refrain from enjoining parallel *in personam* judicial proceedings in nations with prescriptive authority, but must also refrain from enjoining subsequent enforcement actions in nations that have no such prescriptive authority.

Thus, because concurrent prescriptive authority is the central justification for the presumption against anti-foreign-suit injunctions, the fact that the injunction here does not interfere with the exercise of such authority means that the presumption does not apply. Defendants' *amicus* seeks to confuse matters by arguing that U.S. courts do "not 'share' prescriptive jurisdiction over whether an Ecuadorian judgment is enforceable in a foreign court." EDCL Br. at 25. As we have just explained, prescriptive jurisdiction is distinct from recognition and enforcement of a foreign judgment. It is the power to prescribe substantive law governing primary conduct—substantive law that governs a controversy and gives rise to a judgment. The United States plainly has prescriptive authority over the controversy here, and the unspecified foreign countries where defendants might seek to enforce an Ecuadorian judgment just as plainly do not.

There is thus no disrespect to foreign courts nor offense to international comity where the court of a nation with prescriptive regulatory authority over a controversy enjoins parties before it—not foreign courts themselves, as defendants' *amici* hyperbolically suggest, *see*, *e.g.*, Br. of Int'l Law Professors at 21, 24—to ensure that enforcement of any judgment arising out of that controversy is determined in accordance with its nation's law or the laws of another nation that has concurrent prescriptive jurisdiction. Nations with prescriptive regulatory authority over a controversy plainly have greater rights to determine the validity of a judgment resolving that controversy than bystander nations with no territorial or nationality connection to the controversy that would empower them to exercise prescriptive regulatory authority over it.[3] Indeed, it is telling that defendants and their *amici* cite no decision in which a court refrained, based on comity principles,

[3] Recognition of this obvious fact would not "transform courts in this Circuit into supra-national courts with the competence to determine the enforceability anywhere in the world of a judgment rendered by the courts of any other nation." EDLC Br. at 5. Where the United States lacks prescriptive jurisdiction, it would have no basis to enjoin worldwide enforcement of a judgment rendered by a country that possessed such jurisdiction. Thus, if Australian and Indian nationals pursue parallel litigation in their respective countries over a contract dispute that has no substantial territorial effects here, the United States would have no prescriptive jurisdiction over the controversy, and no basis for enjoining worldwide enforcement of any Indian or Australian judgment at the behest of either party. Nor would it offend U.S. sovereignty if an Indian court enjoined the parties from seeking to enforce an Australian judgment in the United States while the Indian court determined whether that judgment was the product of fraud.

from enjoining efforts to enforce a foreign judgment in a nation with no prescriptive authority over the conduct giving rise to the underlying controversy.

The injunction's restriction on enforcement efforts is also fully consistent with the other international comity factors relevant to anti-foreign-suit injunctions. The injunction does not engender a risk of retaliatory injunctions by other nations that would leave the parties without a remedy. Lacking the requisite territorial or nationality nexus to the parties and underlying controversy, the courts of nations outside Ecuador have neither the incentive nor any legitimate authority to enjoin the parties from continuing the litigation in the United States and Ecuador. The suggestion that affirmance of the injunction in this case would prompt judgment debtors to "race to their chosen forum to seek a world-wide anti-suit injunction," EDLC Br. at 5, is thus fanciful. Similarly, the injunction is fully consistent with the interests of stability and predictability. It leaves the parties subject to the laws, rules and remedies of Ecuador and the United States, in accordance with their settled and legitimate expectations.

In short, the injunction does not implicate any of the relevant principles of international comity that animate the *China Trade* test and is instead fully consistent with those principles. Accordingly, the injunction should be upheld without consideration of the *China Trade* standards.

II. THE INJUNCTION SATISFIES *CHINA TRADE*'S THRESHOLD TEST.

Even if the *China Trade* test does apply, it is satisfied here. That case established two threshold requirements for anti-foreign-suit injunctions: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." 837 F.2d at 35. The court's conclusion that both requirements were met, SPA105-08, involves no error of law or clearly erroneous factual finding. It should therefore be upheld under the governing abuse of discretion standard. *See Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001).

A. The Parties Are The Same In Enforcement Matters

The court correctly found that the parties would be the same. In assessing this factor, this Court requires trial courts to determine whether "substantial similarity and affiliation" exists between parties in the parallel actions. *Paramedics Electromedicina Comercial, LLC v. GE Med. Sys. Info. Techs., Inc.* 369 F.3d 645, 652 (2d Cir. 2004). This factor is satisfied even where parties are not precisely identical, so long as "the real parties in interest are the same in both matters." *Id.* (internal quotation marks omitted). Applying this test, the court found that "the real parties in interest necessarily would be the same in any foreign enforcement actions that might be filed," and defendants "are the beneficiaries of

the judgment and hence are the parties entitled to sue for enforcement." SPA106-07.

Defendants suggest that the identity of the judgment creditors cannot be determined because a trust that will be established by the Ecuadorian judgment has not yet been instituted. LAPsBr. 45-45. But that is insufficient to prove that the court's findings were clearly erroneous. Defendants themselves claim that they and their communities suffered injury, and the damages calculated reflect those alleged injuries. As such, they are beneficiaries of the Ecuadorian judgment. Plainly, they will be entitled to seek enforcement, and will benefit from collection on the judgment. Therefore, far from being clearly erroneous, the court's findings are correct, and should not be reversed.

B. Resolution Of The Case By The District Court Will Be Dispositive

The district court was also correct in finding that resolution of the U.S. action would be dispositive of foreign enforcement actions. The court held that "[a] decision by this Court holding that the judgment is unenforceable and enjoining its enforcement would bind all of the parties that potentially could enforce the judgment and therefore should foreclose even the filing of foreign enforcement suits." SPA107. The court further explained that "even if enforcement actions were filed in violation of an injunction, a decision by this Court with respect to the enforceability of the Ecuadorian judgment likely would

be recognized as sufficiently persuasive authority [...] to dispose of the question of enforceability in the foreign *fora*." *Id.*

Claiming that the court's reasoning "eviscerate[s]" *China Trade*'s "dispositiveness" requirement, defendants argue that, to be "dispositive," (1) the elements of the U.S. action must be "identical to" those of the foreign law, and (2) foreign courts must be required to accept the U.S. judgment as a mandatory matter—that is, the existence of any *discretion* on the part of foreign courts precludes a "dispositive" finding. LAPsBr. at 43-44; *see also* EDLC Br. at 8-16 ("dispositive" requirement satisfied only where "a determination on the *merits* will dispose of the foreign litigation"; and "the 'dispositive' test is not met where U.S. litigation would proceed under domestic law while litigation abroad would involve foreign standards."); Br. of Int'l Law Professors at 20-23 (claiming that foreign courts "judge the matter of recognition and enforcement independently of the District Court's preliminary injunction" and that "no treaty or agreement between the United States and other states requires or permits the result hoped for by the District Court"). Defendants and their supporting *amici* are incorrect.

1. The Defendants' Theory Would Nullify *China Trade*.

As an initial matter, defendant's formalistic approach would nullify *China Trade* by making it impossible to satisfy the threshold test. Defendants are not the first to make this argument; district courts have previously rejected it. For

example, in a recent case, the defendant argued that a U.S. action would not be "dispositive" of a French action because "it is almost inevitable that a French court will need to address the issues of preclusion, res judicata effect and French constitutional law." *In re Vivendi Universal, S.A., Sec. Litig.*, No. 02-Civ-5571, 2009 U.S. Dist. LEXIS 110283, at *37-38 (S.D.N.Y. Nov. 29, 2009). Although the court denied the injunction on other grounds, it squarely rejected this proposition, holding that

> the "dispositive" test in *China Trade* cannot be applied in the formalistic sense suggested by Vivendi. Technically speaking, no action by a United States court can ever be dispositive of a foreign court's decision because that court's determination about whether to give *res judicata* effect to a U.S. judgment is governed by comity principles, which always give a foreign court discretion to determine whether to enforce a U.S. judgment (absent a treaty stating otherwise).

Id. at *40. Therefore, that court reasoned, "if *China Trade*'s requirement that the action in the enjoining court be dispositive of the action to be enjoined meant what Vivendi suggests it does, the requirement could never be satisfied when one party seeks to enjoin a proceeding in a foreign country." *Id.*

That analysis is sound, and this Court should reject defendants' invitation to nullify *China Trade*.

2. The "Dispositive" Factor Requires An Inquiry Into Whether The Issues Presented In The Two Cases Are Substantially The Same.

Contrary to defendants view, the term "dispositive" has a well-established meaning under *China Trade*. As both recent practice and longstanding precedent reveal, the requirement entails an inquiry into whether the issues presented in parallel cases are (or would be) substantially the same. This is *not*, as defendants would have it, an inquiry into whether different statutes are mirror images, or whether a foreign court is bound by *res judicata*. Here, the court applied the correct legal test, and its finding that the issues presented in the U.S. action would be substantially the same as those in any foreign enforcement action is not clearly erroneous.

a. The "Dispositive" Factor Requires That "The Substance Of The Claims And Arguments Raised In The Two Actions Is The Same."

Rather than the formalistic definition defendants suggest, courts have adopted a "dispositiveness" test that focuses instead on whether "the substance of the claims and arguments raised in the two actions is the same." *Id.* (citing *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, No. 03--4148, 2006 U.S. Dist. LEXIS 3, at *8 (S.D.N.Y. Jan. 3, 2006) (decisions on plaintiffs' abuse of control and fiduciary duty claims under U.S. law dispositive of similar claims in Brazil under Brazilian law because the Brazilian case "touched matters" covered by the decision); *SG Avipro Fin. Ltd. v. Cameroon Airlines*, No. 05-655, 2005 U.S. Dist.

LEXIS 11117, at *6 (S.D.N.Y. June 8, 2005) (determination regarding validity of agreement and whether defendant was required to arbitrate disputes under U.S. law was dispositive of Cameroon action because the issues before the courts in both actions were the same); *Aruba Hotel Enters. N.V. v. Belfonti*, 611 F. Supp. 2d 203, 215 (D. Conn. 2009) (dispositiveness requirement satisfied because "it is the view of this court that a judgment from this court should have *res judicata* effect on the Aruban courts because the cases involve the same transactions and the issues are the same"); *A.P. Moller-Maersk A/S v. Ocean Express Miami*, 590 F. Supp. 2d 526, 533 (S.D.N.Y. 2008) (U.S. action on delivery contract dispositive of Panamanian and Guatemalan actions between the same parties relating to the same contract); *MasterCard v. Argencard*, No. 01-3027, 2002 U.S. Dist. LEXIS 4625, at *31 (S.D.N.Y. Mar. 20, 2002) (dispositiveness requirement satisfied because "MasterCard seeks in part a declaration under the License Agreement that it may revoke Argencard's exclusivity, which is precisely the main issue raised by Argencard in the Argentine action")).

Similarly, in a recent case involving parallel U.S. and Brazilian actions, the court held the "dispositive" requirement was satisfied because

> [a]ny preliminary or final injunction relating to these matters will be compromised by contrary orders from a foreign court. . . . [and] the proceedings in Brazil pertain to precisely the same issues that are at the heart of the action here, namely, whether the trademarks in Brazil belong to Software AG and whether Consist can continue to provide maintenance for Software AG products.

Software AG, Inc. v. Consist Software Solutions, Inc., No. 08-389, 2008 U.S. Dist. LEXIS 19347, *68 (S.D.N.Y. Feb. 21, 2008), *aff'd*, 323 F. App'x 11 (2d Cir. 2009).

b. Longstanding Precedent Confirms That The Correct Focus Is On Whether The Issues Are Substantially The Same.

Moreover, longstanding precedent demonstrates that the threshold "dispositive" requirement refers to the "substance of the claims and arguments." The two-part threshold test *China Trade* adopted grew out of a series of decisions from the 1940s establishing that courts may "enjoin further prosecution of a proceeding […] that involves the *same issues and the same parties*." *Triangle Conduit & Cable Co. v. Nat'l Elec. Prods. Corp.*, 138 F.2d 46, 47 (3d Cir. 1943) (emphasis added); *see also*, *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 928 (3d Cir. 1941) ("the English Court of Chancery had the power at the time our government was established to enjoin parties before it from proceeding in another court in a controversy involving the same issues [and parties], and that the federal district courts, as courts of equity, have similar power."). Following *Triangle*, this Court held that a district court may "preserve its jurisdiction by enjoining

proceedings involving *the same issues and the same parties*." *Cresta Blanca Wine Co. v. E. Wine Corp.*, 143 F.2d 1012, 1014 (2d Cir. 1944) (emphasis added).

Later, courts adapted the two-part threshold analysis articulated in these early decisions to cases involving anti-foreign-suit injunctions. *See, e.g., Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir. 1981); *W. Elec. Co., Inc. v. Milgo Elec. Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978). The word "dispositive" eventually replaced the phrase "same issues." *See Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 798 (S.D.N.Y. 1984) (citing *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982)); *see also*, *Am. Home Assurance Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984) (adopting *Garpeg* test); *China Trade*, 837 F.2d at 35-36 (adopting threshold test articulated in *Garpeg* and *American Home Assurance*). The courts never suggested, however, that the change in wording was substantive.

Indeed, there is little difference between the meaning of "same issues" (*Triangle* and *Cresta Blanca*) and "the substance of the claims and arguments raised in the two actions is the same." (*Vivendi*). In the absence of any clear intent to change the threshold test for anti-suit injunctions, the threshold "dispositive" factor is properly understood to require an inquiry into whether the issues presented in parallel cases are the same.

3. The Existence Of Different Legal Standards Or Elements Does Not Affect The "Dispositive" Inquiry Unless The Rights At Issue Exist Only Under A Particular State's Laws

Finally, defendants and their *amici* suggest that the "'dispositive' test is not met where U.S. litigation would proceed under domestic law while litigation abroad would involve foreign standards" or where the legal standards "materially differ." EDLC Br. at 9-16; *see also*, LAPsBr. at 44-45 (arguing that "dispositive" test cannot be satisfied if there exists the possibility that a U.S. court decision would not be accorded *res judicata* effect by a foreign court). But *China Trade* does not require that different countries' laws be identical. Differences in foreign law are material only when the issue being litigated exists solely under the territorial laws of a particular state.

a. *China Trade* Does Not Require Different Countries' Laws To Be Identical

First, for the reasons stated above, and contrary to what defendants' *amici* suggest, the *China Trade* test does not require the laws of two countries to be identical. Far from advancing an appropriate basis for the issuance of anti-foreign-suit injunctions, such a state of affairs would nullify the test because it is self-evident that the laws of foreign nations are almost never identical. This is especially true of states with markedly different legal systems, but even common law jurisdictions (including the common law of different U.S. states) will experience a great deal of variation among laws. It is thus not correct that "[a]

ruling here is not dispositive in any particular country unless *that* country's laws mirror" the U.S. jurisdiction. EDLC Br. at 10.[4]

Courts address this question not by engaging in a formalistic recital of the elements and different burdens of proof in the different *laws*, but instead by looking to the *issues* raised in the two cases. *See, e.g., Suchodolski Assocs.*, 2006 U.S. Dist. LEXIS 3, at *8 . For example, the *Vivendi* court found that the U.S. action would be "dispositive" under *China Trade* even though the parallel French and American actions involved application of those countries' securities laws, which are plainly different in many ways. *Vivendi*, 2009 U.S. Dist. LEXIS 110283, at *35-48. For similar reasons, this Court affirmed an anti-suit injunction in a case that included a claim for "'moral damages'" arising only under Brazilian law. *Paramedics*, 369 F. 3d at 653.

Therefore, the material question here is whether the *issues* that would be raised in an enforcement proceeding would be essentially the same as those in the U.S. action—not whether the different countries' statutes "mirror" the relevant U.S. laws. That test is plainly satisfied here. As the district court reasoned, the central issue in the U.S. action will be reflected in foreign enforcement actions: "whether the Ecuadorian judgment was rendered by a system so fundamentally

[4] In any event, foreign recognition laws are substantially similar if not identical to U.S. law. *See* ECF 311-3 at FLA454-96 (filed June 24, 2011).

unfair and []partial that the judgment should not be recognized [as] a product of fraud." SPA107 (alterations added). That is obviously the case, and this fact finding is certainly not clearly erroneous. Therefore, this Court should affirm.

b. This Action Does Not Involve Unique Rights Existing Solely Under The Laws Of A Particular State

It is also well-established that a U.S. action would not be dispositive where parties' rights exist solely under the territorial law of a particular state. Relying heavily on intellectual property decisions, defendants and their *amici* suggest that this longstanding rule prohibits an anti-suit injunction here. LAPsBr. at 45 & n.62 (citing *Computer Assocs., Int'l v. Altai*, 126 F.3d 365, 370 (2d Cir. 1997)); EDLC Br. at 9 (same). But that is erroneous.

Contrary to what defendants suggest, *Altai* and related cases apply only to circumstances in which the *rights* at issue in a lawsuit exist solely under the territorial law of a particular state. This is particularly evident in intellectual property disputes, where rights are restricted to the territory of those states that have granted or recognized the particular rights. Thus, in simultaneous copyright actions brought in the United States and France, a decision respecting the validity of the U.S. copyright cannot be dispositive of whether the copyright is valid in France. *Altai*, 126 F.3d at 372 ("the French action would in no way affect the decision rendered by a court of the United States. In short, the action in this

country involved […] United States copyright, and the French action involves [French] copyright.").

Similarly, parallel litigation regarding the validity of patents in different countries would not satisfy the "dispositive" requirement because the validity of a patent in one country has no bearing on whether the patent is valid in another. As one court explained:

> Even if all the U.S. patents here in suit were found to be invalid, the validity of the United Kingdom patents (including the one having the U.S. counterpart) would still have to be determined under United Kingdom law [and l]ikewise a finding of non-infringement of the U.S. patent would have no bearing on whether U.S.-made modems infringe United Kingdom patents as determined under United Kingdom law. Still open also would be the question of whether United Kingdom-made modems infringe the United Kingdom patents.

W. Elec. Co., , 450 F. Supp. at 838 (enunciating same test later adopted by *China Trade*, and holding that U.S. action in parallel patent litigation would not be "dispositive").

Yet this limitation does not even apply in every case *involving* intellectual property. For example, a U.S. action may be dispositive in a case involving competing claims to foreign patents if the issue presented to the U.S. court involves contracts relating to those patents, rather than patent validity. *Medtronic, Inc.*, 518 F. Supp. at 955 (applying same test later adopted in *China Trade*, and noting that "[w]here patents are the issue, the subject matter is not the same" but

"[t]he issue … does not involve the patents. Rather, it involves ... a contract between the parties. [Therefore t]he issue is the same and resolution of the issue would be dispositive"). Thus, the pertinent question is whether the rights at issue exist in different countries.

Defendants point to nothing to indicate that the rights at issue in the New York action exist solely under U.S. territorial law. Chevron is not seeking to invalidate a foreign patent or copyright. Instead, it seeks a declaration that the Ecuadorian judgment was rendered by a fundamentally unfair system , and that the judgment was procured by fraud. SPA107. Unlike patents or copyrights, those concepts—and the right to remedy—are not unique to particular states. Indeed, at least one court has already found that a U.S. action would be dispositive in a case involving substantial allegations of fraud. *Am. Home Assurance*, 603 F. Supp. at 640-43 (misrepresentation and fraud in procuring reinsurance contracts).

In short, the district court's finding that this action would be "dispositive" of future enforcement actions was not clearly erroneous. Chevron has explained at length, moreover, why the additional *China Trade* factors support the injunction, *see* Chevron Br. at 43-48—a showing *amici* will not repeat. Accordingly, the injunction should be affirmed even if *China Trade* governs.

III. IF *CHINA TRADE*'S THRESHOLD TEST IS NOT SATISFIED, THE COURT SHOULD RECOGNIZE A NARROW EXCEPTION TO ITS REQUIREMENTS.

Even if *China Trade*'s threshold requirements are not met here—and they plainly are—the injunction should still be upheld. *China Trade*'s threshold test and its identification of additional factors reflects a laudable, and so far successful, effort to guide the lower courts' exercise of their equitable discretion to ensure respect for relevant principles of international comity. In policing lower court adherence to those standards, however, this Court should not lose sight of the fundamental fact that, even in the anti-foreign-suit context, injunctions are appropriate when "required to prevent an irreparable miscarriage of justice." *Laker Airways*, 731 F.2d at 927.

"In the context of anti-suit injunctions, deference to the foreign proceeding may be denied because of the litigant's unconscionable evasion of the domestic laws, and not necessarily because of the inherent obnoxiousness of the forum laws to which the litigant has resorted." *Id.* at 931 n.71. In this case, the record contains evidence from defendants themselves, much of it unrefuted, that the judgment they seek to enforce is the product of both "unconscionable" behavior and a legal system rendered "inherent[ly] obnoxious[]" by corruption. Moreover, the record contains evidence that defendants' plan to enforce this allegedly tainted judgment "in multiple jurisdictions around the world," SPA5, was a tactic designed

"for commercial advantage rather than honest adjudication," *Laker Airways*, 731 F.2d at 928 (internal quotation marks and citation omitted), and that "threatened . . . a potential *fait accompli*" that would have "virtually eliminated" the district court's ability to assess the validity of the judgment, *id.* at 930-31.

To be sure, these facts properly weigh in favor of an injunction as part of the analysis of the additional factors identified in *China Trade*. Assuming, however, that the "dispositiveness" inquiry is properly understood to pretermit such consideration here, the Court should create a narrow exception to that threshold requirement. Such an exception would apply where, as here, the plaintiff seeking preliminary relief provides credible evidence in support of allegations that (1) a foreign judgment against it was procured through fraud and/or corruption, undertaken by persons and/or achieved through conduct subject to the prescriptive regulatory authority of the United States; and (2) that planned enforcement efforts outside the judgment-rendering country are designed to foreclose judicial review by U.S. courts of the validity of that judgment. Such a narrow exception will ensure that courts remain capable of preventing "irreparable miscarriage[s] of justice," *Laker Airways*, 731 F.2d at 927, will trench lightly, if at all, on any principles of international comity.

CONCLUSION

For the reasons stated above, the Court should affirm.

June 30, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(c) and 32(a)(7)(B) because this brief contains 6,911 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the requirements of Federal Rule of Appellate Procedure 29(c), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 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.

DATED: June 30, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 30, 2011. I further certify that the foregoing was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

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