11-1150-cv(L)

11-1264-cv(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF AMICI CURIAE THE DOW CHEMICAL COMPANY, SHELL OIL COMPANY, AND DOLE FOOD COMPANY, INC. SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE

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June 30, 2011

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Defendants.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that The Dow Chemical Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state that Shell Oil Company is an indirectly wholly-owned subsidiary of Royal Dutch Shell plc. Royal Dutch Shell plc is a publicly traded company incorporated in England and Wales, and no other publicly traded company owns 10% or more of its stock.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that Dole Food Company, Inc. is a publicly traded company (NYSE: DOLE) that has no parent. No publicly traded company owns 10% or more of its shares.

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STATEMENT OF IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae The Dow Chemical Company, Shell Oil Company, and Dole Food Company, Inc. are corporations with global operations that frequently face attempts to bring litigation against them in U.S. courts for events that occurred abroad and have also faced attempts to enforce in U.S. courts judgments obtained abroad.[1] As a result, amici have an interest in seeing that the doctrine of *forum non conveniens* and the standard for enforcing foreign judgments are applied correctly and consistently. Specifically, amici have an interest in ensuring that courts continue to observe the firmly-established rule that foreign judgments procured by fraud or obtained from judicial systems lacking impartiality or due process cannot be enforced in the United States.

SUMMARY OF ARGUMENT

Not all judicial systems produce reliable judgments. On occasion, a lack of procedural safeguards, unfair substantive law, political or corrupt influences, or a combination of all three render a foreign state's system of justice so lacking in due process or impartial and independent tribunals that its judgments are not worthy of international recognition. U.S. courts have always recognized this unfortunate

[1] No party's counsel authored this brief in whole or in part; no person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

reality and refused to enforce judgments rendered in a system that lacks impartial tribunals or fails to provide basic due process.

Amici have direct experience with judgments arising out of litigation in Nicaragua over claims alleging that farmworkers there were injured by exposure to the pesticide DBCP. In 1995, claims brought in the United States by citizens of various countries, including Nicaragua, were dismissed on grounds of *forum non conveniens*. Five years later, dramatic changes in the political situation in Nicaragua led to the enactment of an unprecedented law specifically targeting amici and a few other American corporations with unique and unfair substantive and procedural provisions, to the assertion of extraordinary political control over the Nicaraguan courts, to the submission of fraudulent evidence to corrupt courts, and ultimately to those courts entering billions of dollars' worth of judgments against U.S. defendants. U.S. courts have concluded that judgments obtained in these proceedings cannot be enforced in the United States. In light of their experience, amici urge this Court to recognize that vigilance in ensuring that foreign judgments are rendered in systems that provide due process and impartial tribunals is a matter of growing importance in a world where international commerce will, with increasingly frequency, be affected by foreign judgments. Continuing to enforce long-established standards is necessary to help protect defendants from corrupt or politically influenced judgments in foreign countries,

and will also provide real incentives for foreign judicial systems seeking international recognition to establish and maintain adequate levels of due process, impartiality, and independence. Likewise, it will discourage those who would otherwise attempt to profit from the institutional weaknesses of some foreign systems.

In this case, defendants and their amicus, EarthRights International, seek to short-circuit the courts' long-standing role in scrutinizing foreign judgments to ensure that they will not be enforced unless they were rendered by impartial tribunals in a system that comports with due process. They ask this Court to conflate two judicial inquiries that have distinct purposes and standards: the inquiry made upon a motion to dismiss for *forum non conveniens* and the inquiry made upon a motion to enforce a foreign judgment.

The threshold "adequate alternative forum" inquiry made during a motion to dismiss on the basis of *forum non conveniens* asks only whether there is a forum in which the plaintiff can realistically litigate his claim. It is not intended to examine every aspect of the alternative forum that may affect whether a proceeding there will ultimately provide the plaintiff the most effective means of securing relief. In particular, it does not and cannot answer the question whether a judgment rendered by that forum in the future will have come from a system that provided due process and impartial tribunals, thus making it enforceable in the U.S.

Even if courts did venture preliminary answers to that question, their tentative conclusions would necessarily need to be revisited upon enforcement of any judgment in light of changed circumstances. Amici's experiences in Nicaragua highlight how such changes can occur. Likewise, in this case the district court focused extensively on changes in political power and influence over the judiciary that took place in Ecuador in the decade since a district court ruled on Chevron's motion to dismiss on the basis of *forum non conveniens*. Thus, conducting a full-fledged due process analysis at the *forum non conveniens* stage would accomplish little and needlessly compel courts to sit in judgment of foreign systems of justice before such an inquiry is required and can be properly focused. That inquiry is properly reserved for when and if a foreign judgment is presented to a U.S. court for enforcement.

ARGUMENT

I. Foreign Judgments Arising From Politically Controlled or Corrupt Judicial Systems Are a Real and Increasing Threat to Businesses Engaged in International Commerce.

A. The Problem and Its Recent Growth

As a general principle, the willingness of courts around the world to enforce money judgments legitimately obtained in other nations is a desirable aspect of international comity that can promote fair and efficient international commerce. The hard fact, however, is that not all judicial systems produce trustworthy judgments. In some countries at some times, courts may use procedures or operate

under laws that do not comport with basic principles of due process and thus fail to produce reliable results. Even more troublingly, courts may be subject to political influence or control—or bribery or other forms of corruption—and thus lack the independence and impartiality that are essential to make their judgments worthy of international respect. Moreover, the courts may be corrupt themselves or so institutionally weak (as a result of political interference or for other reasons) that they become particularly susceptible to falsification of evidence or other forms of fraud.

Although the consequences for particular litigants may be substantial, these realities have limited international significance when the matters that come before corrupt, weak or compromised courts are local or the amounts involved are small. In recent years, however, courts in some countries have entered enormous judgments against multinational corporations in private litigation, sometimes involving newly-recognized tort actions or specially-conceived regulatory causes of action and damages rules.[2] Where the ideology and financial interests of ruling political parties favor the entry of such judgments, or where the potential for corruption of judicial officers is significant, the enormous financial stakes make

[2] *See generally* U.S. Chamber Institute for Legal Reform, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases* (June 2010), *available at*

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unjust outcomes all but inevitable in the absence of well-established traditions and mechanisms of judicial independence.

As a practical matter, improper judgments against foreign defendants running into the billions of dollars typically cannot be enforced in the countries in which they are procured because the defendants will have limited assets there. The question thus becomes whether they will be accepted at face value by courts in other countries where the defendants may have substantial or strategically critical assets, including the United States. Particular vigilance is required because, as courts have held, even where a system may appear "on paper and in theory . . . [to have] all the trappings of an independent judiciary," the reality may be that "in practice the judiciary does not act impartially." *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1347-48 (S.D. Fla. 2009), *aff'd on other grounds*, 635 F.3d 1277, 1279 (11th Cir. 2011). Amici's direct experience in recent years gives them a sound basis for stressing to this Court the caution that must be exercised in scrutinizing foreign judgments.

B. The Example of Nicaragua and DBCP

The creation and maintenance of judicial systems that have integrity and independence, though crucial to maintaining the rule of law and establishing the

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http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf.

stability necessary for economic and social progress, is not a simple thing. Unfortunately, weak judicial systems and problems with political interference and corruption can be found in many parts of the world.[3] Amici have special familiarity with the case of personal injury litigation in Nicaraguan courts controlled by the ruling Sandinista Party under an infamous political "pact" of 2000, which has produced immense judgments now clearly demonstrated—after years of litigation in U.S. courts—to lack integrity and to be characterized by rampant fraud.

In 1995, a U.S. court dismissed on grounds of *forum non coveniens* claims brought against U.S.-based companies by citizens of a number of countries, including Nicaragua, who alleged that they had worked on banana farms in the 1960s and 1970s and had sustained injuries from exposure to the pesticide dibromochloropropane, or DBCP. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000). Claims arising in Nicaragua were thus returned to that country for further proceedings.

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[3] *See generally, e.g.*, U.S. Department of State 2010 Country Reports on Human Rights Practices, *available at* http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm (last visited June 25, 2011) (documenting varying degrees of judicial corruption, bribery, or political influence); Transparency International, Global Corruption Barometer 2010, *available at* http://transparency.org/policy_research/surveys_indices/gcb/2010/results (last visited June 30, 2011) ("Corruption levels around the world are seen as increasing over the past three years.").

In the ensuing five years, however, the political situation in Nicaragua changed in ways that had profound implications for the fairness of proceedings in its courts.[4] Most notably, in 2000 the leaders of the two dominant political parties, Daniel Ortega of the Sandinista National Liberation Front (FSLN) and Arnoldo Alemán of the Partido Liberal Constitucionalista, expressly agreed to divide partisan control over key government institutions, resulting in the FSLN exercising virtually unfettered political control over the courts. As a U.S. court later concluded, "Alemán and Ortega [became] capable of exercising control of the Supreme Court on a case by case basis. The justices of the Supreme Court, in turn, [could] direct proceedings in lower courts because they control the appointment and removal of lower court judges." *Osorio*, 665 F. Supp. 2d at 1348.

Against this new backdrop, in October 2000, the Nicaraguan National Assembly passed a Special Law for the Conduct of Lawsuits Filed By Persons Affected By the Use of Pesticides Manufactured with a DBCP Base, otherwise known as Special Law 364. *See Osorio*, 665 F. Supp. 2d at 1312 & Appx. I (reprinting translation). The law established a new legal regime, applicable only to claims against U.S. manufacturers or distributors of DBCP who had previously

[4] Since 1999, the State Department has annually concluded that Nicaragua lacks an effective civil law system. U.S. Department of State, Country Reports on Human Rights Practices, 1999-2010, *available at* http://www.state.gov/g/drl/rls/hrrpt/ (last visited June 30); *see Osorio*, 665 F. Supp. at 1348.

been sued in the United States (including amici Shell, Dow, and Dole), with features such as extremely short procedural deadlines (three days to answer a complaint, eight days for presentation of evidence, and three days for decision); a requirement of large deposits before defendants are permitted to present evidence; and an "irrefutable" presumption of causation once a plaintiff provides evidence that he worked on a banana plantation and a medical certificate attesting to infertility. *Id*. at 1314-15, 1336.

Factual findings by Judge Victoria Chaney of the California Superior Court in Los Angeles, made in connection with the termination of cases later brought in that court, describe what happened next. Plaintiffs' lawyers and corrupt Nicaraguan judges "conspired and colluded . . . to manufacture evidence and improperly influence the outcome of DBCP cases pending in Nicaragua and the United States to obtain millions of dollars in judgments that would then be enforced in the U.S. and possibly elsewhere." *Tellez v. Dole Food Co., Inc.*, No. BC 312852, slip. op. at ¶ 27 (Cal. Sup. Ct. Mar. 11, 2011) (internal quotation marks omitted).

As Judge Chaney concluded, agents for attorneys from Nicaragua and the U.S. "(1) recruited non-banana farm workers as plaintiffs; (2) coached them to lie about work on banana farms; (3) created fake work certificates; (4) created bogus lab reports [as purported proof of injury]; and (5) interfered with witnesses and

investigators by threats and intimidation." *Id.* ¶ 35. As Judge Chaney noted, "[t]he fraudulent scheme brought by plaintiffs' agents to the court's doorstep resulted from a confluence of social, political, and legal factors in Nicaragua" that resulted in a "highly politicized atmosphere" for DBCP litigation and prompted her to conclude that "Nicaragua's courts are in disarray." *Id.* ¶¶ 68-69, 71. As a result, "Defendants were not afforded a true adversary proceeding or genuine opportunity to present their defense against plaintiffs' claims because of the massive attorney-orchestrated scheme." *Id.* ¶ 35.

The DBCP proceedings were also subject to clearly partial exercises of judicial power by the Nicaraguan courts, showing the effect of the pervasive political control exercised by the FSLN under the 2000 pact. In 2002, for example, Nicaragua's Attorney General sent to the Supreme Court an opinion concluding that various unusual and unfair aspects of Special Law 364 violated Nicaragua's own constitution. *See Osorio*, 665 F. Supp. 2d at 1315-17. The Supreme Court then issued an advisory opinion rejecting that conclusion and sustaining the constitutionality of the law—in part because on its face the law allows defendants to *choose* whether to litigate (i) in Nicaragua under Special Law 364 or (ii) in the United States by refusing to deposit security funds with the Nicaraguan courts and agreeing to waive any *forum non conveniens* defense. *See id*. at 1315 (describing Art. 7), 1317-18.

In actual litigation under the law, however, Nicaraguan courts uniformly refused to allow defendants to "opt out" of proceedings in Nicaragua—simply refusing to acknowledge the Nicaragua Supreme Court's contrary decision on the point. *See id*. at 1318, 1320; *Shell Oil Co. v. Franco*, No. CV 03-8846, 2005 WL 6184247, at *3 (C.D. Cal. Nov. 10, 2005). Appeals on such points, if heard at all, could linger undecided for many years, despite a normal resolution time of six to twelve months. *Osorio*, 665 F. Supp. 2d at 1339-1340.[5] And all this occurred under a system in which, under the 2000 pact, political leaders were able to control the Supreme Court "on a case by case basis," *id*. at 1348, while individual Supreme Court Justices maintained "a feudal relationship with lower court judges," "manage[d] judicial districts as their personal fiefdoms," and could "demand of lower court judges particular actions in individual cases in exchange for their continued patronage," *id*. at 1349-50.

The poisonous combination of political influence and outright fraud involved in Nicaraguan DBCP cases allowed plaintiffs and their counsel to secure billions of dollars in judgments against U.S. corporations, none of which received meaningful process in the Nicaraguan courts. *Osorio*, 665 F. Supp. 2d at 1351.

[5] One appellate court ruled that a defendant could not pursue its jurisdictional challenge on appeal because it had not made the deposit required to participate in the case—even though making the deposit would, under the law, have signified a

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This includes repeated large judgments against amicus Shell, even though no plaintiff has ever been able to offer a shred of evidence that Shell ever sold or marketed its DBCP product in Nicaragua, shipped DBCP to Nicaragua, sold DBCP for use in Nicaragua, or directed *any business activity* toward the country. *See Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2009 WL 48189, at *12 (S.D. Fla. Jan. 5, 2009); *Franco*, 2005 WL 6184247, at *13.

In October 2009, a U.S. federal court refused to enforce a Nicaraguan DBCP judgment, relying on multiple grounds of defense under Florida's version of the Uniform Foreign Country Money Judgments Recognition Act. *See Osorio*, 665 F. Supp. 2d at 1311-12 nn.1 & 3, 1349, 1347-1352 (concluding, without reaching defenses based on fraud, that the $93 million Nicaraguan judgment was not enforceable because Nicaraguan courts were not impartial but "dominated by political forces," the judgment was rendered under a system that failed to provide due process, the Nicaraguan court lacked personal and/or subject matter jurisdiction over defendants, and the judgment was repugnant to public policy). By that time, however, more than 10,000 plaintiffs had filed at least 200 DBCP lawsuits under Special Law 364, and Nicaraguan courts had issued judgments totaling $2 billion in damages. *Osorio*, 665 F. Supp. 2d at 1312-1313. Plaintiffs'

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choice to try the case in the Nicaraguan courts. *See Osorio*, 665 F. Supp. 2d at 1339.

counsel have sought to enforce certain of those judgments in various foreign courts, including those of the United States, Venezuela, Ecuador, and Colombia. Moreover, approximately $15 billion in claims remain pending in Nicaraguan courts today. Thus, despite making overwhelming factual showings and prevailing in *Osorio* and other U.S. cases, DBCP defendants continue to face the spectre of contesting enforcement actions throughout the world.

The combination of political influence and judicial corruption that drove DBCP litigation in Nicaragua is a textbook example of circumstances that can make foreign judgments unworthy of acceptance in U.S. courts. Similarly, in *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000), a Liberian judgment was held unenforceable because political domination of the courts, rather than due process, dictated judicial outcomes. The Ninth Circuit likewise declined to enforce a foreign judgment after concluding that the "highly politicized" nature of the judiciary in Iran at the time the judgment was entered barred the possibility of impartial tribunals. *See Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995). And evidence of corruption in the court system and "the pressure those judges face from other governmental authorities" convinced another court not to recognize an Indonesian court decision. *In re Perry H. Koplik & Sons, Inc.*, 357 B.R. 231, 241, 243 (Bankr. S.D.N.Y. 2006).

The allegations in the present case bear a considerable resemblance to the experience of amici in Nicaragua. Here, too, Chevron alleges that collaboration among political leaders and plaintiffs' counsel resulted in legislation creating a special cause of action under which the plaintiffs have secured bountiful judgments. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 778052, at *5-6 (S.D.N.Y. Mar. 7, 2011). Here, too, plaintiffs' counsel allegedly faked evidence supporting their claims. *See, e.g., id.* at *13. And here, too, political influence over national courts allegedly made it impossible to secure an impartial judgment. *See id.* at *20-22 (describing President Correa's influence over the judiciary). Such allegations must be given careful consideration in reviewing the district court's decision to grant Chevron preliminary relief.

II. U.S. Courts Must Be Vigilant in Honoring Well-Established Defenses to the Enforcement of Foreign Judgments.

This discussion of the Nicaraguan DBCP litigation makes clear that there can be serious questions about the procedural and substantive integrity of judgments rendered by foreign courts. For that very reason, courts in this country have long recognized that they must not enforce judgments obtained by fraud or imposed by legal regimes that fail to provide due process or impartial tribunals. As the district court here recognized, these defenses to enforcement are firmly established as a matter of materially uniform federal and state law. *See Hilton v. Guyot*, 159 U.S. 113, 202, 205-206 (1895); *Chevron*, 2011 WL 778052, at *31;

Uniform Foreign Country Money Judgments Recognition Act §§ 4(a)(1) (impartial tribunals and due process), 4(b)(2) (fraud). Both on principle and based on their own experience, amici urge this Court to recognize that continued vigilance in this regard is critical to protect both true legal comity and international commerce.

First, a clear understanding that foreign judgments will never be honored in this country if they are tainted by fraud, political domination of the courts, corruption, or fundamental unfairness helps provide proper incentives both for foreign legal systems and, importantly, for parties, counsel, and foreign officials who might otherwise be tempted to subvert or abuse them. Modern international litigation conceived and directed by enterprising and amply financed plaintiffs' counsel can generate multi-billion-dollar claims. At that level of potential reward, even a small chance of enforcement provides a powerful incentive to corrupt or mislead vulnerable foreign courts. Any sense that courts in this country might not be alert to rejecting judgments lacking in integrity—or, even worse, that they are disinclined to look behind the form of justice to see an unjust reality—would therefore serve to undermine justice in many parts of the world. Meaningful pre-enforcement scrutiny by courts here and in other respected national systems can actually help promote and protect the development of foreign court systems that are genuinely fair, independent, and worthy of international respect.

Second, insisting that a foreign judgment be the product of an impartial court system, fair laws and procedures, and a lack of fraud before honoring it in U.S. courts poses no threat to legitimate foreign judicial proceedings. To the contrary, the United States continues to enforce, properly and routinely, money judgments from the many foreign legal systems with basic integrity and adequate safeguards against fraud and corruption. Refusing to enforce judgments from foreign systems that lack impartiality or fail to accord basic due process poses no threat to comity or fairness, but rather embodies and enhances respect for international legal norms.

Third, vigilant adherence to the established exceptions to enforceability remains the only way for U.S. courts to honor general principles of international comity, reciprocity, and legal and commercial efficiency while at the same time guarding against having their own authority abused. Only a willingness to examine the facts of particular cases and the characteristics of the system in which a foreign judgment was rendered can ensure proper differentiation between those judgments that merit enforcement and those that do not.

Fourth, judicial vigilance is the *only* mechanism that can protect persons or entities involved in international commerce from corrupt or politically dictated foreign judgments secured through private tort or regulatory litigation. International enterprises cannot effectively control or even manage the risk of such judgments through commercial contracts, arbitration agreements, or investment

treaty mechanisms. While parties to international commercial contracts routinely provide for arbitration in lieu of litigation in foreign courts—often precisely because they know that the courts of a particular country are simply not reliable for various reasons—tort or regulatory litigation does not arise under a contract, and in such cases there is typically no mechanism for opting out of proceedings commenced by a local plaintiff in a corrupt or politically controlled judicial system. Treaty mechanisms provide private parties with uncertain prospects for relief under any circumstances; and some countries, such as Nicaragua, may not have active investment treaties with the United States while others, such as Ecuador, may seek to withdraw from them. Indeed, companies cannot control their risk even by avoiding commercial contact with a particular nation altogether, as is amply demonstrated by Shell's experience in Nicaragua. U.S. courts have consistently found that Shell did no business there whatsoever. Moreover, only careful scrutiny by U.S. courts asked to consider enforcing foreign judgments can protect against another danger: Aggressive counsel may seek to exploit the special international legal status of facially regular domestic judicial decrees to demand large settlements from multi-national companies where the evidence, fairly considered, would support nothing of the kind.

In sum, in recent years enterprising counsel have seized on the idea of private tort or regulatory litigation potentially generating huge damage awards;

taken it to foreign countries with legal systems that lack independence, impartiality, or fair laws or procedures and are vulnerable to or characterized by corruption, political influence, and/or fraud; and then sought to exploit the resulting judgments through enforcement efforts in the United States or elsewhere where multi-national companies have assets. That strategy should fail as a legal matter, because courts here and elsewhere have long refused to enforce foreign judgments that were rendered by legal systems that do not reliably provide impartial tribunals, or that are tainted by unfair procedures or laws, or that have been procured by fraud. As a practical matter, however, only continued clear and forceful adherence to those standards will stop this new abuse, and in particular the use of *threatened* enforcement, or related pre-judgment attachments or other procedures, to seek to force large settlements. Any other approach will put at substantial risk not only the enterprises with substantial U.S. assets that have been targeted by these new schemes, but also international commerce itself and the hard-won system of respect and reciprocal enforcement of *legitimate* judgments on which that commerce in part depends.

III. The Inquiry Upon a Motion To Dismiss for *Forum Non Conveniens* Is Not the Same As the Inquiry Upon a Motion To Enforce a Foreign Judgment.

Defendants and their amicus, EarthRights International, urge this Court to undermine long-established protections against the enforcement of foreign

judgments obtained without due process or in a forum lacking impartial tribunals by conflating two fundamentally different judicial inquiries: (1) whether a case should be transferred for the convenience of the parties to a foreign jurisdiction and (2) whether a judgment obtained in a foreign jurisdiction is enforceable in a U.S. court. According to them, once a defendant successfully has moved for dismissal based on *forum non conveniens*, it should be banned from insisting that any judgment rendered by the foreign forum should meet established standards before it can be enforced. That position is supported by neither law nor logic. As a matter of law, the *forum non conveniens* inquiry's "adequate alternative forum" test is not designed (as defendants would have it) to be a broad-ranging inquiry into every aspect of the foreign forum that would ensure the plaintiff can secure an easily enforced judgment. As a matter of logic, expanding the *forum non conveniens* inquiry as defendants and their amicus suggest would be impractical and needlessly undermine principles of comity.

A. The "Adequate Alternative Forum" Inquiry in *Forum Non Conveniens* Analysis Is Limited To Asking Only Whether There Is a Forum in Which the Plaintiff Can Realistically Litigate a Claim.

The question whether an adequate alternative forum exists is a minimal inquiry meant only to ensure that a plaintiff can pursue some remedy that is not "clearly unsatisfactory." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). In almost all cases, this low threshold is satisfied where "defendants are

amenable to service of process" and the alternative forum "permits litigation of the subject matter of the dispute." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003).

In some cases, courts have utilized a somewhat more plaintiff-oriented adequacy inquiry to reject forums that will not practically provide plaintiff with the opportunity realistically to litigate his claim. For example, courts have found forums inadequate where a plaintiff is at serious risk of physical harm should he bring his claim there. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198-99 (S.D.N.Y. 1996) (denying *forum non conveniens* motion where plaintiff had already received political asylum after fleeing alternative forum and "would be putting himself in grave danger were he to return to Ghana to prosecute this action"); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985) (mem.) (holding alternative forum inadequate because "if the plaintiffs return to Iran to prosecute this claim, they would probably be shot"). Similarly, courts have found that alternative forums that have a vested interest in the litigation may be inadequate. *See In re Assucurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 355 (S.D.N.Y. 2002) (denying *forum non conveniens* motion where defendant sought to litigate claims in private dispute-resolution forum that *defendant* operated). Courts have also indicated that extraordinary delays in litigation, which would effectively prevent the plaintiff

from litigating his claim, can render a forum inadequate. *See Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 247 (2d Cir. 2001); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990).

As these cases make clear, even stretched to its limit, the adequate alternative forum inquiry asks only if the *plaintiff* can realistically litigate his grievance in the foreign forum. The inquiry is fundamentally plaintiff-oriented and asks whether the plaintiff, if sent to the foreign forum (which is often his home country), will have an adequate opportunity to have his claim heard.

Whether a judgment rendered in a foreign forum is ultimately enforceable in the U.S.—and the inquiry into whether the rendering forum provides due process and impartial tribunals—is simply not part of the adequacy inquiry.[6] If the due process or impartial tribunals inquiry that is used in judging enforceability were front-loaded into the *forum non conveniens* analysis, courts would refuse to grant motions to dismiss on the basis of *forum non conveniens* when a defendant expresses serious doubt about whether the alternative forum comports with due

[6] Both the Supreme Court and this Court have listed the enforceability of a foreign judgment as one of the private-interest factors that can be balanced in the last step of a *forum non conveniens* inquiry rather than an issue to be considered at the threshold adequacy inquiry. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 F. App'x 87, 92 (2d Cir. 2008).

process or has impartial tribunals. But that is not the law. Federal courts, including this one, have dismissed cases on the basis of *forum non conveniens* even where a defendant makes clear its concerns that the foreign forum might not ultimately provide due process or an impartial tribunal. For example, in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987), the defendant was so concerned "that the Indian courts, while providing an adequate alternative forum, do not observe due process standards" that it asked this Court to authorize the district court judge to retain authority over the matter "to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of [defendant's] right to due process." *Id.* at 204-05. This Court rejected that request[7] and dismissed as unfounded defendant's fears about facing a judgment obtained without due process. As the Court explained, the concern about a lack of due process did not render the Indian forum inadequate. Instead, "[a]ny denial by the Indian courts of

[7] EarthRights also argues that a defendant in a foreign proceeding should "immediately seek relief from a U.S. court upon learning of the conditions in the foreign court that constitute a lack of due process or impartiality" or else "forfeit" its right to challenge the foreign judgment. (Br. of Amicus Curiae EarthRights Int'l in Supp. of Defs.-Appellants 22.) *Union Carbide*'s stinging criticism of the defendant's request that the U.S. court monitor the foreign proceedings applies equally to EarthRight's suggestion that defendants in foreign proceedings hurry to U.S. courts and ask for relief. *Union Carbide*, 809 F.2d at 205. In addition, a U.S. court would often lack personal jurisdiction over plaintiffs in a foreign suit even if

(Continued…)

due process can be raised . . . as a defense to the plaintiffs' later attempt to enforce a resulting judgment." *Id.* at 205.

Similarly, the Ninth Circuit has recognized that the two inquiries focus on different issues. As a result, as that court explained, there is no inconsistency where a defendant asserts, on the one hand, that a foreign sovereign entity has an adequate remedy in its own courts (in fact, that the courts are highly favorable to that sovereign as a plaintiff), but on the other hand also claims that any judgment obtained against her in those courts lacked due process and should not be enforced in the United States. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995). After all, a defendant may have sound reasons (such as access to crucial evidence and witnesses) for seeking to dismiss litigation to another forum *even if*, it harbors grave doubts about a foreign judicial system. Nothing about *forum non conveniens* analysis is meant to make a defendant choose between access to evidence and insisting on established norms of due process and impartial tribunals.

The difference between the focus of the *forum non conveniens* inquiry and the inquiry into enforceability of a judgment can be highlighted by a hypothetical. Assume that a plaintiff's home forum passes a law so biased in favor of plaintiffs as to offend any notion of due process. That plaintiff-friendly law certainly does

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the defendant sought redress in the United States. *See, e.g., Dow Chem. Co. v. Calderon*, 422 F.3d 827, 836 (9th Cir. 2005).

not make it difficult for plaintiffs to have their claim heard in their home courts and thus provides no basis for finding that there is not an "adequate alternative forum" for plaintiffs. But at the same time, the law may result in judgments from that country that are unenforceable abroad.

To use a concrete example, assume that Special Law 364, discussed above, had been the law in Nicaragua when amici moved to dismiss cases brought by foreign plaintiffs in the United States on the basis of *forum non conveniens*. Special Law 364's onerous provisions—including its "irrefutable presumption" of causation and requirement that defendants post millions of dollars in deposits just to defend themselves—would not have curtailed *plaintiffs'* ability to litigate their claims in Nicaragua, and thus nothing about the law could foreclose a finding that there was an adequate alternative forum. Yet that does not mean a judgment rendered under Special Law 364 should be enforced in the United States or elsewhere without further review.

B. Shoehorning a Full Evaluation of a Foreign Judicial System into a *Forum Non Conveniens* Analysis Is Impractical and Would Needlessly Undermine Principles of Comity.

The vast expansion of the adequate alternative forum inquiry sought by defendants and their amicus also raises practical problems. The broad-ranging due process inquiry would require district courts to conduct in-depth analyses of foreign judicial systems at great expense to the parties, efficient judicial

administration, and the interests of comity. And in exchange for these up-front costs, plaintiffs would receive zero certainty as to the enforceability of any foreign judgment, because a change in circumstances in the alternative forum after a *forum non conveniens* dismissal can always render a judgment unenforceable.

1. Any examination of impartiality and due process in a foreign forum would be quickly outdated and would have to be revisited upon enforcement.

Attempting to front-load a full inquiry into the due process and impartiality afforded by a foreign system into a *forum non conveniens* analysis does not guarantee that the parties' claims will be litigated in a forum that complies with due process or that has impartial tribunals. Any up-front decision regarding the state of a foreign judicial system on a *forum non conveniens* motion would necessarily be limited to addressing the judicial system *based on information available at the time* and could not possibly establish the characteristics of that system in the future. Changes in the political system or substantive foreign law could quickly produce a dramatic change in the legal landscape that could deprive a defendant of due process. To use the Nicaraguan example described above, Nicaragua adopted Special Law 364 in 2000, five years after a number of claims arising from Nicaragua had been dismissed from the U.S. on the basis of *forum*

non conveniens.[8] Courts and parties cannot foresee such dramatic changes in the law, and it would be pointless for them to attempt to do so. Any supposed efficiencies that defendants' amicus thinks could be achieved by front-loading a full inquiry into a foreign judicial system into the *forum non conveniens* analysis would be chimerical as the lapse in time between a *forum non conveniens* ruling and litigation about enforcing a judgment would invariably provide different grounds for arguing about due process or impartial tribunals.

And changes in the substantive law of the foreign forum are not the only means by which a defendant could quickly see its due process protections slip away or the tribunals of the forum lose their impartiality. Cases in point are the drastic shifts in political power and political control of the judiciary in Nicaragua surrounding the Ortega-Aleman "pact" of 2000, described above, and those that evidently occurred in Ecuador affecting the Lago Agrio case that is the subject of this appeal. For example, the district court here found that in December 2004—soon after defendants in this action filed their case in Ecuador—"then-President Gutierrez[] unconstitutionally replaced 27 of the 31 justices of the Supreme Court with new justices elected by Congress. Just five months later, President Gutierrez declared a state of emergency and removed all of the Supreme Court justices,

[8] *See Delgado*, 890 F. Supp. at 1362. None of the plaintiffs in the *Osorio* enforcement proceeding was previously a plaintiff in *Delgado*. *Osorio*, 665 F. (Continued…)

including those recently elected." *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 77805, at *20 (S.D.N.Y. Mar. 7, 2011). Not long after, newly elected President Correa "commanded the Supreme Electoral Tribunal, *with threats of violence*, to set a date for a plebiscite to create a Constituent Assembly to draft a new Constitution." *Id.* (emphasis added). When congressional representatives challenged the constitutionality of the proceedings, they were dismissed. *Id.* When the dismissed congressional representatives successfully challenged their dismissal in the Constitutional Tribunal, a newly appointed congressional majority "unconstitutionally removed all of the judges of the Constitutional Tribunal and appointed new judges." *Id.* Like the developments that affected DBCP litigation in Nicaragua from 2000 on, such events are plainly beyond the ken of both the court and the parties at the *forum non conveniens* stage.

EarthRights asserts that defendants who have sought to dismiss a case on *forum non conveniens* grounds should be held to their "calculated risk." (Br. of Amicus Curiae EarthRights Int'l in Supp. of Defs.-Appellants 20.) But that entirely mischaracterizes the *forum non conveniens* decision. This Court has already squarely rejected the notion that a *forum non conveniens* motion somehow constitutes an unqualified and irrevocable endorsement of a foreign judicial system and the waiver of a defendant's ability to insist on ordinary due process

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Supp. 2d at 1312.

protections. *See In re Union Carbide Corp.*, 809 F.2d at 205 ("Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country."); *see also Osorio*, 665 F. Supp. 2d at 1343-44 (defendants were not estopped from challenging the validity of Nicaraguan judgments because, since dismissal, the "legal landscape in Nicaragua" had been "fundamentally altered").

2. Inquiries into the integrity of foreign judicial systems, while required in the enforcement context, should not be unnecessarily multiplied.

"It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process." *Bank Melli*, 58 F.3d at 1410. Once a foreign judgment has been rendered, the obligation to enforce only those judgments that have been obtained with due process and rendered by judicial systems with impartial tribunals necessarily requires U.S. courts to assess the integrity of the relevant foreign system. At the same time, however, principles of comity counsel against unnecessarily multiplying the number of circumstances in which courts undertake such an assessment, particularly before a foreign court has had the opportunity to pass on the merits of a dispute. Accordingly, respect for the sovereignty of foreign nations and their systems of justice has always constrained the adequacy inquiry on *forum non conveniens*, where a searching inquiry into the overall fitness of a

foreign system is not in fact necessary. *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981-82 (2d Cir. 1993) ("[W]e have repeatedly emphasized [on *forum non conveniens* motions] that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system in another sovereign nation." (internal quotation marks omitted)); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 864 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987) ("It would be sadly paternalistic, if not misguided . . . to attempt to evaluate the regulations and standards imposed in a foreign country" for purposes of *forum non conveniens*). There is no reason to jettison this well-settled principle now, and the current legal regime of a limited adequacy inquiry upon a *forum non conveniens* motion furthers interests of comity in at least two ways.

First, waiting until an enforcement action to address due process and impartial tribunal challenges drastically reduces the frequency with which courts must evaluate foreign judiciaries. Settlement, foreign enforcement of judgments, and judgments for the defense substantially limit the number of plaintiffs who return to the United States with judgments to enforce.

Second, waiting until enforcement permits a more concrete and properly focused inquiry. As described above, changed circumstances will often require a court evaluate the fairness and integrity of the rendering forum regardless of what

was litigated during an earlier *forum non conveniens* motion. In addition, avoiding an *ex ante* evaluation of the integrity and impartiality of a foreign judicial system saves courts from having to speculate about how broad institutional and social forces will affect a country going forward. The familiar *ex post* analysis undertaken during enforcement of the foreign judgment, on the other hand, is performed with a complete record relating to the proceedings that actually occurred, including the effect of any social or political events that alter the legal landscape of a foreign country.

CONCLUSION

For the foregoing reasons, amici urge affirmance of the judgment below.

June 30, 2011

Respectfully submitted,

__/s_____

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CERTIFICATE OF COMPLIANCE

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__/s_____
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Dated: June 30, 2011

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