UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF ECUADOR, Petitioner, vs. CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY, Respondents.	:	CASE NO. 1:09-cv-9958-LBS

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated January 19, 2010, the accompanying Declaration of Professor W. Michael Reisman, dated January 19, 2010, and all prior papers and proceedings had herein, Chevron Corporation and Texaco Petroleum Company ("Respondents") will move this Court, before the Honorable Leonard B. Sand, on March 10, 2010 at 2:30PM, for an order dismissing the Republic of Ecuador's Petition to Stay Arbitration, and granting such other and further relief as the Court deems appropriate.

PLEASE TAKE FURTHER NOTICE that, pursuant to a Stipulation so ordered by this Court on December 28, 2009, opposition papers, if any, to the Respondents' motion to dismiss, shall be served on undersigned counsel on or before February 10, 2010.

Dated: New York, New York
January 19, 2010

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REPUBLIC OF ECUADOR, Petitioner, vs. CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY, Respondents.	:	CASE NO. 1:09-cv-9958-LBS

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY

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I. PRELIMINARY STATEMENT

The Petition to Stay Arbitration filed by the Republic of Ecuador ("Ecuador") in this Court should be dismissed under Fed. R. Civ. P. 12(b)(6), because the extraordinary and unprecedented relief it seeks is categorically foreclosed by international and federal law and would frustrate the international-law rights of U.S. investors to arbitrate claims arising under a U.S. treaty that was entered into specifically for the protection of such investors. In stark contrast to the earlier litigation in this Court between Ecuador and Respondents Chevron Corp. ("Chevron") and Texaco Petroleum Co. ("TexPet"), here Ecuador ***does not dispute*** the existence or validity of its agreement to arbitrate, which is explicitly set forth in the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, dated May 11, 1997 (the "BIT" or "Treaty"), Art. VI. Thus, this case falls squarely within the well-established principle that an international arbitration must proceed in the absence of a showing that the arbitration "agreement is null and void, inoperative or incapable of being performed." New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38 (implemented by the Federal Arbitration Act, ch. 2, 9 U.S.C. §§ 201 *et seq*.).

Unable to dispute the existence or validity of the arbitration agreement established by the BIT, Ecuador instead seeks to evade its obligation to arbitrate by offering a potpourri of legally irrelevant and misleading allegations in support of an argument that Respondents should be barred by waiver or estoppel from asserting their rights under the Treaty. Ecuador's argument fails as a matter of law. Under well-established legal principles, waiver and estoppel are—at most—procedural issues or potential defenses to be decided by the arbitrators; they are not grounds for interfering with an international arbitration mandated by U.S. treaty. Because Ecuador does not and cannot challenge the validity of the Treaty-established arbitration agreement,

judicial interference with the arbitration would not only run afoul of controlling law but would contradict the protections of the arbitration process that this Nation has repeatedly secured in treaties like the BIT and the New York Convention.

Ecuador is clearly wrong in attempting to portray this case as merely a rehashing of a prior arbitration dispute between the parties. *E.g.*, Pet. ¶¶ 32, 34. In that earlier proceeding, this Court concluded that Ecuador's state-owned oil company, Petroecuador, was not bound by an arbitration clause contained in a private contract to which it was not a signatory. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007) (*ROE III*). The AAA arbitration at issue in that case was entirely different from the BIT arbitration at issue here (the "Treaty Arbitration"), which arises under a different arbitration agreement that Ecuador unquestionably *did* sign, and asserts different claims under a different source of law before a different arbitral forum. Moreover, the Treaty Arbitration involves different facts, including recent extraordinary actions by Ecuador aimed at improperly influencing the outcome of litigation pending against Chevron in Ecuador, such as the issuance of sham criminal indictments against Chevron attorneys and an apparent bribery scheme involving the judge then presiding over the litigation and other government officials.

Ecuador's Petition to Stay Arbitration is an unfounded and unprecedented attempt to evade its international obligation to arbitrate claims with U.S. investors under the BIT. There is no legal authority to support a court-ordered stay of an investment-treaty arbitration such as this one. This Court should dismiss Ecuador's Petition so that Respondents may pursue unimpeded their international-law claims before the arbitral tribunal.[1]

[1] For purposes of a motion to dismiss under Rule 12(b)(6), this Court properly may rely on materials that are attached to the Petition, or any statements or documents incorporated by reference, including documents integral to the Petition or those that Ecuador had actual notice of and necessarily relied on in the Petition. *Rothman v. Gregor*,

II.
SUMMARY OF THE TREATY CLAIM AND OTHER RELEVANT LITIGATION

In the present Treaty Arbitration, which arises out of TexPet's investments in Ecuador, Chevron and TexPet seek to hold Ecuador liable for breaching its Treaty obligations to the United States and its nationals by (1) violating investment agreements with TexPet that are protected by the Treaty; (2) acting inequitably by conducting baseless criminal proceedings against Chevron's attorneys; (3) wrongfully exercising *de facto* jurisdiction over Chevron; and (4) wrongfully denying Chevron its due process rights as a litigant. *Chevron Corp. & Texaco Petroleum Co. v. Ecuador*, UNCITRAL, Notice of Arbitration (Sept. 23, 2009) (the "Treaty Arb. Notice").[2] Chevron's and TexPet's public-international-law claims against Ecuador in the Treaty Arbitration are distinct from (1) the claims for individual damages filed against Texaco Inc. ("Texaco") in another court within this District in 1993, styled *Maria Aguinda, et al. v. Texaco Inc.* (the "*Aguinda* litigation"); (2) the claims for public remediation filed against Chevron in Ecuadorian court in 2003 (the "*Lago Agrio* litigation"); and (3) the claims at issue in the arbitration proceeding stayed by this Court in *ROE III* (the "AAA Arbitration").

In the *Aguinda* litigation, private plaintiffs sought to recover individual personal injury and property damages from Texaco.[3] *Id.* ¶ 25. In the *Lago Agrio* case, a different but overlap-

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220 F.3d 81, 88-89 (2d Cir. 2000); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991). Respondents have also submitted a Declaration of Prof. W. Michael Reisman ("Reisman Decl."), which explains from the perspective of a world-renowned expert in public international law and bilateral investment treaties why an injunction would be improper in this case under principles of public international law. Pursuant to Fed. R. Civ. P. 44.1, a court, in determining issues of foreign law, may consider any relevant material or source, including testimony, whether or not admissible under the rules of evidence. *See also Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 700 (S.D.N.Y. 2003); *Anglo Am. Ins. Group, P.L.C. v. CalFed Inc.*, 940 F. Supp. 554, 558 (S.D.N.Y. 1996); *U.S. v. Jurado-Rodriguez*, 907 F. Supp. 568, 574 (E.D.N.Y. 1995) (**"**A court may seek the aid of expert witnesses in interpreting . . . international law.").

[2] Reference to the Treaty Arb. Notice is solely for background purposes; Chevron and TexPet do not rely on the facts set forth in the Notice for purposes of the legal arguments advanced in this motion.

[3] Ecuador expressly alleges in its Petition that Chevron, Texaco Inc., and TexPet are separate corporations. Pet. ¶¶ 2-3. Because Ecuador alleges no facts that would provide any basis for disregarding the separate corporate existence of these entities, they must be treated as independent legal entities for purposes of this motion to dismiss.

ping set of plaintiffs purports to assert public, "community" claims against Chevron (not Texaco or TexPet) in an attempt to force Chevron to pay further public environmental remediation costs on public claims that were already settled with the Ecuadorian governmental entities representing the affected communities. *Id.* ¶¶ 30-34. And in the AAA Arbitration, Chevron and TexPet sought to arbitrate claims against Petroecuador on the basis of the original Joint Operating Agreement relating to TexPet's operations in Ecuador, which this Court ultimately concluded was not binding on Petroecuador. As explained in detail below, the Treaty Arbitration is different in multiple respects from each of the prior litigation matters.

A. The Treaty Arbitration

The U.S.-Ecuador BIT provides U.S. investors such as Chevron and TexPet with the right to bring public-international-law claims against Ecuador for violation of substantive standards of protection set out in the Treaty. Arbitration under the BIT is unique in that it is governed by international law, does not require any contractual relationship between the investor-claimants and the State-respondent, and does not require resort to the domestic courts of either State. An investor may arbitrate its claims directly against the host State by submitting a "consent in writing to the submission of the dispute for settlement by binding arbitration," which constitutes an "agreement in writing" for purposes of the New York Convention. BIT Art. VI(3)(a), (4)(b). The Treaty further provides that the host State consents broadly to arbitrate any disputes arising under the BIT. *Id.* Art. VI(4) ("Each Party hereby consents to the submission of *any* investment dispute for settlement by *binding arbitration* in accordance with the choice specified in the written consent of the national or company[]") (emphasis added); *see* Reisman Decl. ¶ 8.

Respondents' Treaty claim against Ecuador relates to TexPet's historical participation as a minority member of a Consortium with Ecuador and Ecuador's state-owned oil company, Petroecuador, that explored for and produced oil under concession contracts. Treaty Arb. Notice

¶ 1. Through a series of carefully negotiated and implemented settlements in 1995-1998, Ecuador and all relevant Ecuadorian municipalities released TexPet and its affiliates from liability for environmental impact in the former Concession area. *Id.* ¶¶ 1-2, 16-20; *ROE III*, 499 F. Supp. 2d at 456-57. Ecuador and Petroecuador retained responsibility for any remaining impact caused by the Consortium's pre-1992 activities as well as any future impact caused by Petroecuador's own ongoing operations in the former Concession area. Treaty Arb. Notice ¶¶ 2, 21.

Despite the release of TexPet from all public environmental liability, the *Lago Agrio* litigation seeks to shift to Chevron (1) Ecuador's contractual share of liability for any remaining public environmental impacts from the pre-1992 activities of the Consortium; and (2) the responsibility for public environmental impacts caused by Petroecuador's oil operations since 1992, as well as any public harm caused by government-sanctioned colonization and agricultural and industrial exploitation of the Amazonian region. *Id.* The *Lago Agrio* plaintiffs do not assert any individual claims. Their claims seek damages (for the benefit of the Ecuadorian government) for remediation of public lands—exactly the claims from which Respondents were released by Ecuador and the relevant municipalities. *Id.* ¶¶ 3, 30.

In violation of its Treaty obligations, Ecuador has pursued a bad-faith, coordinated strategy with the Lago Agrio plaintiffs to use them as "stalking horses" in an attempt to avoid its own remediation obligations and instead impose liability on Chevron—liability that Ecuador cannot assert directly (even against Texaco or TexPet) because it long ago released any such claims and assumed full responsibility for all remaining environmental remediation. Treaty Arb. Notice ¶¶ 4,10-24, 34. As this Court previously recognized, Ecuador's executive branch publicly has announced its support for the plaintiffs. Transcript of Hearing at 6, Republic of Ecuador v. ChevronTexaco, 04-cv-8378 (S.D.N.Y. Apr. 19, 2007) ("Ecuador can hardly state we are not support-

ing the Lago Agrio plaintiffs when it issues a press statement to the contrary. . . . [I]t's now an established fact."). More recently, Ecuador has engaged in improper attempts to influence the outcome of the *Lago Agrio* litigation. Treaty Arb. Notice ¶¶ 37-55. For example, Ecuador has pursued sham criminal proceedings against two Chevron attorneys in an attempt to interfere with Chevron's defense in the litigation. *Id.* ¶¶ 4, 55. Ecuador's judicial branch has also conducted the *Lago Agrio* litigation in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights, and in apparent corrupt coordination with the executive branch and the *Lago Agrio* plaintiffs. *Id.* ¶¶ 42-55. Ecuador's conduct towards Chevron in this regard violates the BIT and public international law, and Chevron and TexPet have a clear Treaty-based right to bring their claim before an international tribunal.

B. The *Aguinda* Litigation

The *Aguinda* litigation upon which Ecuador relies in its Petition was a different case, between different parties, and based on different claims. In November 1993—before the investment agreements at issue in the Treaty Arbitration had been signed and before the BIT itself had entered into force—a group of Ecuadorian plaintiffs filed a putative class action lawsuit against Texaco in this Court. The *Aguinda* plaintiffs claimed to represent 30,000 members of a class of persons residing in the Oriente region of Ecuador who had allegedly been personally harmed by the Consortium's operations. Complaint, *Aguinda v. Texaco Inc.*, No. 93-CV-7527 (S.D.N.Y. 1994). They primarily sought "damages for injury to [the plaintiffs'] person[s] and property." *See* Pls.' Mem. of Law in Opp'n to Texaco's Mot. to Dismiss for Failure to Join Indispensable Parties at 3, *Aguinda v. Texaco Inc.*, No. 93-CV-7527 (S.D.N.Y. 1994). The sole defendant was Texaco (not TexPet or Chevron). Ecuador was not a party.

In May 2001, Judge Rakoff dismissed the plaintiffs' individual claims on *forum non conveniens* grounds. *Aguinda v. Texaco Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). As a condition

of dismissal, Texaco (not Chevron) "unambiguously agreed in writing to being sued on *these claims* (or their Ecuadorian equivalents) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of this dismissal[4] any statute of limitations-based defenses that may have matured since the filing of the [] Complaints." *Id.* at 539 (emphasis added). Although Ecuador argues here that "Chevron also formally represented to Judge Rakoff on the record that it would satisfy any [Lago Agrio] judgment, reserving only the limited defenses to enforcement set forth in Section 5304 of New York's version of the Uniform Foreign Money-Judgments Recognition Act . . . ," Pet. ¶ 35, it was only Texaco, not Chevron or TexPet, that made the cited statement to the Court. Moreover, that statement (1) had nothing to do with the Treaty or claims against the Ecuadorian government; (2) was not made for the benefit of Ecuador—which was not even a party; (3) was not relied upon by Judge Rakoff or the Second Circuit; (4) was not included in the list of prerequisites for the *forum non conveniens* dismissal; and (5) was premised on the prospect of treatment by the Ecuadorian courts and legal system in accordance with the rule of law and international-law standards of fairness, including the standards articulated in New York's version of the Uniform Foreign Money-Judgments Recognition Act.[5]

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[4] On appeal, the Second Circuit Court of Appeals required that the waiver be extended to one year precisely because of the *individual* nature of the claims: "In the district court, timely claims were brought on behalf of nearly 55,000 plaintiffs. In Ecuador, because class action procedures are not recognized, signed authorizations would need to be obtained for *each individual plaintiff*. This presents a formidable administrative task for which we believe 60 days is inadequate time." *Aguinda v. Texaco Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (emphasis added).

[5] As described in detail in Chevron and TexPet's Treaty Arb. Notice, the Ecuadorian judiciary has deteriorated seriously since 2004—well after the *forum non conveniens* dismissal in the *Aguinda* case. The current judiciary lacks any independence from the political branches, favors the State in significant disputes, and has exhibited an obvious bias against foreign investors in general and Chevron and TexPet in particular. *See* Treaty Arb. Notice ¶¶ 42-55. Ecuador's judicial system clearly has fallen short of the standards set forth in the New York law governing recognition of foreign judgments. *See, e.g.*, NY CPLR § 5304(a)(1) (foreign judgment not conclusive if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

C. The *Lago Agrio* Litigation

In July 1999, Ecuador enacted the Environmental Management Act ("EMA"), which created a new cause of action for communities to enforce "collective environmental rights." Article 43 of the EMA provides that "the judge shall order the party responsible for the harm to pay damages to the community directly affected and to repair the harm and damage caused" and "order the responsible party to pay to the moving party ten percent (10%) of the . . . damages."

In May 2003, after the dismissal of the *Aguinda* litigation, a different but overlapping group of 48 Ecuadorians filed the *Lago Agrio* litigation in the Superior Court of Nueva Loja, Ecuador, against Chevron (not against Texaco or TexPet). Complaint, May 7, 2003, *Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbios; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbios Province,* Superior Court of Nueva Loja. While Ecuador is not a party to the case, the *Lago Agrio* plaintiffs are only nominal plaintiffs who purport to represent the same "affected communities" that Ecuador and its provinces and municipalities previously represented in their settlements with and releases of TexPet.

Although not relevant for purposes of this motion, Respondents note that Ecuador errs in asserting that the *Lago Agrio* litigation involves "essentially the same" plaintiffs and the "exact issues" raised in the *Aguinda* action, and is simply the "refiled . . . *Aguinda* action." Pet. ¶¶ 20, 35. First, it was brought by different plaintiffs against a different defendant. Second, it was brought under the aforementioned EMA, which did not exist in 1993 when the *Aguinda* plaintiffs filed their case in this District. Third, whereas the *Aguinda* plaintiffs explicitly sought individual damages, the *Lago Agrio* plaintiffs do not seek any damages for alleged personal injuries or harm to their own property. Instead, proceeding solely on the basis of a retroactive application of the EMA, they purport to assert public environmental claims and seek damages for the cost to reme-

diate the public environment for the general benefit of the community, claims which previously were released by Ecuador's federal, provincial and municipal governments.

D. The AAA Arbitration and Related Proceedings in This Court

On June 11, 2004, Chevron and TexPet commenced an AAA arbitration against Petroecuador, seeking indemnification and other relief for Petroecuador's breach of the 1965 Joint Operating Agreement ("JOA") relating to TexPet's operations in Ecuador. Ecuador and Petroecuador brought an action in New York Supreme Court seeking a stay of the AAA Arbitration, and that action was removed to this Court. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) ("*ROE I*"). Ecuador's and Petroecuador's "primary argument" in favor of a stay was "that Petroecuador never agreed to arbitrate," and they also relied on "the doctrine of waiver." *Id.* at 351. This Court concluded that "Plaintiffs' waiver argument is not strong enough to overcome the bias in favor of arbitration," *id.* at 364, but nonetheless granted a stay, holding that Petroecuador was not bound by the JOA's arbitration clause because it never signed the JOA and TexPet had no "reasonable expectation . . . that the JOA had continuing validity" under Ecuadorian law. *ROE III*, 499 F. Supp. 2d at 460-61.

III. ARGUMENT

Ecuador has failed to plead a plausible claim for relief in its Petition. It seeks to enjoin the Treaty Arbitration on the alleged bases that (1) "Chevron" waived its right to arbitrate Treaty claims against Ecuador in the *Aguinda* litigation, Pet. ¶¶ 35-36; (2) "Chevron" is judicially estopped from arbitrating those claims as a result of purported representations that it made in the *Aguinda* litigation, *id.*; and (3) the Treaty Arbitration may affect the *Lago Agrio* plaintiffs, who are not parties to the arbitration, *id.* ¶¶ 37-38, 40.

To survive a motion to dismiss under Federal Rule 12(b)(6), "a complaint must contain sufficient factual matter … to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Spain v. Deutsche Bank*, No. 08 Civ. 10809, 2009 U.S. Dist. LEXIS 88168, at *4 (S.D.N.Y. Sept. 17, 2009) (Sand, J.) (granting Rule 12(b)(6) motion to dismiss). The Court need not credit the Petition's "bare assertions" or "legal conclusions" in deciding the motion. *Iqbal*, 129 S. Ct. at 1949, 1951. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

Assuming for purposes of this motion that all of the facts alleged by Ecuador are true (which they are not), Ecuador's Petition fails to state a claim upon which relief can be granted, and it therefore should be dismissed.[6]

A. Because the Arbitration Claim Against Ecuador Arises Under a Treaty With the United States, and Because Ecuador Does Not and Cannot Challenge the Validity of the Arbitration Agreement Contained in That Treaty, the Court Lacks Authority to Issue a Stay

The fact that Chevron's and TexPet's Treaty claim arises under a bilateral investment treaty between Ecuador and the United States requires dismissal of Ecuador's petition to stay the arbitration. Neither the Federal Arbitration Act ("FAA") nor the applicable treaties authorize federal courts to entertain original actions seeking to enjoin international investment-treaty arbitrations. And even if such authority existed in narrow circumstances, it would be absent here, because the FAA requires federal courts (on request) to *compel* arbitration by parties to an international arbitration agreement unless the "agreement is null and void, inoperative or incapable of

[6] In view of their desire for expeditious resolution of Ecuador's meritless attempt to stay the Treaty Arbitration, Chevron and TexPet do not contest personal jurisdiction for the limited purposes of this action, but reserve their right to raise, and do not waive, their personal jurisdiction defenses to any other action or any claim of a different nature brought against them in New York.

being performed." New York Convention, Art. II(3) ; *see* 9 U.S.C. §§ 201, 206, 208. Under the BIT, Ecuador and the United States indisputably have consented in their sovereign capacities to arbitrate disputes with—and on the initiative of—investors that are nationals of the other party. Ecuador's Petition does not allege that the Treaty's arbitration clause is null and void, inoperative, or incapable of being performed. Therefore, the narrow grounds under which a federal court may decline to compel arbitration are not present here.

1. *Federal Law Does Not Authorize Original Actions to Enjoin International Investment-Treaty Arbitrations*

In this action, Ecuador attempts to invoke the jurisdiction of this Court to obtain "an order pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and § 4 in particular, staying" the Treaty Arbitration. Pet. at 1. Ecuador also claims that its action "arises under or relates to" the New York Convention and the BIT. *Id.* ¶ 4. To the contrary, however, neither the FAA nor the treaties invoked by Ecuador authorize an original action to enjoin an arbitration under an investment treaty to which the United States is a signatory.

Ecuador's reliance on the FAA is entirely misplaced. The purpose of the FAA with respect to all arbitration was to "revers[e] centuries of judicial hostility to arbitration agreements," and "to allow parties to avoid the costliness and delays of litigation," by placing "arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Further, the FAA's codification of the New York Convention evinces the "strong federal policy favoring arbitration of disputes," *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999), a presumption that "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

Ecuador nonetheless asserts that Section 4 of the FAA "in particular" provides support for the unprecedented anti-arbitration injunction that it seeks. That assertion turns the FAA on its head. Far from creating a cause of action to *enjoin* an arbitration, Section 4 of the FAA is intended to *foster* arbitration, and authorizes only "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to obtain "an order *directing that such arbitration proceed* . . . ." 9 U.S.C. § 4 (emphasis added). As this Court has recognized, therefore, "'the FAA does not provide for petitions . . . brought by the party seeking to stay arbitration.'" *ROE I*, 376 F. Supp. 2d at 349 (quoting *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003)). Ecuador's attempt to invoke the FAA as grounds for the relief it seeks is entirely baseless.

Ecuador also claims that its action "arises under or relates to" the New York Convention and the BIT. Pet. ¶ 4. Neither of those treaties, however, authorizes or permits an action to enjoin an international investment-treaty arbitration. To the contrary, they provide only for the *enforcement* of international arbitration agreements like the one at issue here. The New York Convention's provisions governing the enforceability of arbitration agreements are clear:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

New York Convention, Art. II(1). Moreover, the Convention provides that the court of a contracting State "shall, at the request of one of the parties, *refer the parties to arbitration*, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Id.* Art. II(3) (emphasis added); *see* Reisman Decl. ¶ 6. Just like the FAA, therefore, the Convention contains no authorization for original actions to *enjoin* arbitrations.

The BIT is equally lacking in support for Ecuador's suit. In that Treaty, the United States and Ecuador consented to submit investment disputes for "binding arbitration" in accordance with the UNCITRAL Arbitration Rules, BIT Art. VI, § 3(a)(iii), and they agreed that their consent to arbitrate would constitute an "agreement in writing" for purposes of Article II of the New York Convention. BIT Art. 6, § 4(b). Thus, the BIT explicitly invokes the New York Convention, thereby making applicable the same enforcement provisions discussed above, which provide no basis for Ecuador's suit. Reisman Decl. ¶ 7.

This Court has already expressed substantial doubt about the type of claim that Ecuador now advances. In *ROE I*, the Court observed that "Plaintiffs do not request the Court to refer the parties to arbitration, but rather ask the Court to prevent arbitration . . . . It is not at all clear that an action seeking such relief 'fall[s] under the [New York] Convention.'" 376 F. Supp. 2d at 348. After examining the caselaw, the Court concluded: "There appears to be little or no basis in Second Circuit case law for invocation of the New York Convention . . . by a party seeking to *avoid* arbitration, rather than compel or aid it." *Id.* at 349 (emphasis in original). In *ROE I*, however, the Court was addressing an issue of subject matter jurisdiction, not the question whether a cause of action existed, and the Court concluded that jurisdiction was present because the case had been removed from state court by Chevron and TexPet, and thus the parties invoking federal jurisdiction were "seeking to allow arbitration to continue." *Id.* Here, by contrast, Ecuador has invoked this Court's jurisdiction to *prevent* an international investment-treaty arbitration from continuing, but has failed to identify any source of law authorizing such interference with an international tribunal proceeding under the authority of a U.S. treaty.

Indeed, in a recent case, *Ghassabian v. Hematian*, No. 08 Civ. 4400 (SAS), 2008 WL 3982885 (S.D.N.Y. Aug. 27, 2008), the court considered a petition to stay arbitration "base[d]

solely upon the New York Convention and its implementing statutes," and concluded that because it "makes no mention of actions to restrain a pending or ongoing arbitration," "the New York Convention does not create a cause of action to stay arbitration." *Id.* at *2. The court further held that because the FAA contains an "enumerated list of judicial powers" that does not include the power to stay arbitration, the FAA likewise creates no such cause of action. *Id.*[7]

Because Ecuador can assert no independent cause of action to stay arbitration under the FAA, the Convention, or the BIT, and because it raises no issue regarding the validity or scope of the BIT's arbitration clause, Ecuador's unprecedented and baseless suit must be dismissed.

2. *International-Investment-Treaty Arbitrations Must Be Permitted to Proceed in the Absence of a Challenge to the Validity of the Arbitration Agreement, and Ecuador Has Failed to Raise Any Such Challenge Here*

Because Chevron's and TexPet's claim arises as a result of an undisputed treaty pledge by Ecuador to the United States, and because Ecuador's Petition does not challenge the validity of that pledge, the courts would lack authority to enjoin the Treaty Arbitration even if such relief were available in some circumstances. *See* Reisman Decl. ¶ 6-7, 19-22. The New York Convention provides that the court of a contracting State "*shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Id.* Art. II(3) (emphasis added); Reisman Decl. ¶ 6-7; *see also* 9 U.S.C. § 208 (general FAA provisions apply to enforcement of New York Convention to extent not inconsistent therewith); *id.* § 4 (upon request, court "shall make an order directing the parties to proceed to arbitration" when "the making of the agreement for arbitration or the failure to

[7] The court in *Oppenheimer & Co. v. Deutsche Bank AG*, No. 09 Civ. 8154 (LAP), 2009 WL 4884158, at *2 (S.D.N.Y. Dec. 16, 2009), stated that the Second Circuit "has yet to state expressly whether a district court has the power to stay arbitration proceedings." In *Oppenheimer*, the court acknowledged the *Ghassabian* decision, but "assume[d] without deciding that the Court has the power to stay arbitration in 'appropriate circumstances.'" *Id.* at *3. *Oppenheimer* did not involve an international treaty arbitration, however, and did not indicate that an action to stay such an arbitration would be cognizable.

comply therewith is not in issue"). Plainly, a court cannot *enjoin* an arbitral proceeding that it must *compel* upon request of a party if the other party fails to participate.

Here, Ecuador does not allege that the arbitration agreement is null and void, inoperative, or incapable of being performed.[8] Rather, it alleges that Chevron and TexPet waived or are somehow judicially estopped from relying on their right to arbitrate under the Treaty. Those grounds do not fall within the narrow scope of Article II of the New York Convention and therefore cannot justify issuance of a stay of the Treaty Arbitration (even assuming *arguendo* that such a stay might be permissible in other circumstances). Reisman Decl. ¶ 7-9, 19-22.

Ecuador also does not challenge the arbitrability of the parties' Treaty dispute. Any such challenge would not be a proper basis for an injunction in any event, because such a challenge would be for the arbitral panel in the first instance. *See* Reisman Decl. ¶¶ 10-18. Under the BIT, Ecuador expressly "consents to the submission of *any* investment dispute for settlement by binding arbitration in accordance with the choice specified" by the investor-claimants. BIT Art. VI(4) (emphasis added). And the BIT explicitly provides for arbitration "in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." BIT Art. VI(3)(a)(iii). Those Rules in turn specify that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction." UNCITRAL Arb. Rules, Art. 21(1). Ecuador's and the United States' incorporation of the UNCITRAL Rules into their consent to arbitrate under the Treaty reflects their sovereign intent that an arbitration tribunal be

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[8] Even if Ecuador were to challenge the validity of its explicit agreement to arbitrate as expressed in the Treaty, such a challenge would raise a non-justiciable political question outside a federal court's Article III jurisdiction. *See Clark v. Allen*, 331 U.S. 503, 514 (1947) ("the question whether a state is in a position to perform its treaty obligations is essentially a political question"); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) ("'when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department'") (citation omitted); *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940) (federal courts "have uniformly held that it is not for the judiciary to determine whether a treaty has been broken . . . and, accordingly, have consistently declined jurisdiction of such matters"); *see generally Goldwater v. Carter*, 444 U.S. 996 (1979).

permitted to decide whether particular disputes are arbitrable. *See, e.g.*, *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator").[9]

Even with respect to purely domestic and private arbitration agreements, the Federal Arbitration Act makes clear that an arbitration must proceed if the court "is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (citation omitted). As the Supreme Court has explained, limiting the judicial role to consideration of "only issues relating to the making and performance of the agreement to arbitrate" is necessary to "honor the plain meaning of the [Federal Arbitration Act] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Id.* at 404. Those principles apply *a fortiori* in the context of international arbitrations, where the presumption in favor of arbitration "applies with special force." *Mitsubishi Motors*, 473 U.S. at 631. *See also ROE I*, 376 F. Supp. 2d at 363. Here, there is no dispute about the validity of the arbitration agreement, and thus no basis for a federal court to intervene.

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[9] In *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 350-52 (S.D.N.Y. 2007), *aff'd on other grounds*, 584 F.3d 396 (2d Cir. 2009), the court held that it could review the arbitral panel's arbitrability ruling in the course of deciding whether to confirm the arbitral award in an UNCITRAL arbitration. Under *Telenor*, in the context of an action seeking judicial confirmation of an award, a party to the arbitration is entitled to challenge the arbitrability of the dispute only "if the party (1) presents 'some evidence' in support of its claim; and (2) has unequivocally denied that an agreement [to arbitrate] was made." 524 F. Supp. 2d at 350. *Telenor* clearly provides no support for Ecuador's action here. First, Ecuador seeks judicial intervention to halt an international-treaty arbitration, relief that *Telenor* does not purport to authorize. The FAA expressly contemplates a judicial role at the confirmation stage, but as discussed above it does not authorize original actions to enjoin international arbitrations. Second, Ecuador's petition does not "unequivocally den[y] that an agreement was made." Third, *Telenor* involved a private arbitration agreement governed by New York law, *id.* at 353, whereas in this case the Treaty is governed by public international law. BIT Art. II(3)(a), VIII(b).

Chevron and TexPet are aware of no case in which a federal court has enjoined a treaty-based arbitration when, as here, there is no allegation of the invalidity or inoperability of the arbitration clause. Federal courts have intervened only to determine the validity of an alleged arbitration agreement, under the rule that "no arbitration may be compelled in the absence of an agreement to arbitrate." *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003) (citation and quotation omitted). But a treaty case in which there is no dispute about the validity of the treaty's arbitration provision is not subject to the concerns about validity that arise in contract-based arbitration disputes. *See, e.g.*, *Telenor*, 524 F. Supp. 2d at 344-56 (citing concerns with respect to the right to jury trial, selection of local governing law, and other expectations of the parties in entering into a private arbitration agreement). Because Ecuador's asserted bases for a stay of arbitration do not raise issues of validity that may be adjudicated by a federal court under the FAA and the New York Convention, Ecuador's Petition should be dismissed. *See* Reisman Decl. ¶¶ 19, 22.

B. Even if the Court Had Authority to Issue a Stay, It Should Abstain From Doing So Here

Even if it would be permissible in some circumstances for a court to enjoin an investment-treaty arbitration, moreover, the Court should abstain from doing so here. Abstention is consistent with the principle that, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The fact that the arbitral tribunal has express authority under the Treaty to determine arbitrability—and that the parties to the Treaty arbitration are now collaborating to constitute a tribunal that will be able to exercise that authority in the near future—counsels strongly against judi-

cial intervention. Furthermore, U.S. and New York law do not govern and are not applicable to Chevron's and TexPet's Treaty claims, so this Court has no particular connection to the dispute that could support intervention. The fact that there is no real nexus between the Treaty Arbitration and this jurisdiction further counsels abstention in deference to the treaty-arbitration process.

Indeed, federal courts in the Second Circuit have frequently sought to prevent *other* jurisdictions from proceeding with litigation that would obstruct the arbitration process where a valid arbitration agreement exists. *See, e.g., Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 62-65 (2d Cir. 2007); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004). When the parties to foreign litigation are the same as those bound by an arbitration agreement, and when the disputes at issue in the litigation would be resolved by the arbitration, the Second Circuit has held it appropriate for a U.S. federal court to issue an anti-suit injunction. *Id.* at 652. The parties here are identical to those in the Treaty Arbitration, and as discussed below, all of Ecuador's arguments in its Petition are either procedural or go to the merits of the Treaty arbitration claim. Ecuador filed its Petition to Stay Arbitration for the sole purpose of evading its obligation to arbitrate under the Treaty. In these circumstances, for the Court to grant Ecuador's requested stay would repudiate the principles relied upon in the Second Circuit's anti-suit injunction jurisprudence.

C. Ecuador's Asserted Grounds for a Stay Are Procedural Issues or Defenses to the Merits of Chevron and TexPet's Treaty Claim, and Thus Must Be Decided by the Arbitral Tribunal

Under well-established law, the arguments proffered by Ecuador as purported grounds for enjoining the arbitration are nothing more than procedural issues or defenses to the arbitration that must be left to the arbitral panel for decision. Ecuador argues that the arbitration should be stayed because Chevron and TexPet allegedly waived, or are estopped from asserting, their international-law rights under the BIT, and because the *Lago Agrio* plaintiffs are not and cannot be

parties to the arbitration. As numerous courts have held, such arguments raise defenses to an arbitration claim, and therefore should be decided in the arbitration rather than by a court.

The Supreme Court has made clear that "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Thus, "the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* (citation omitted). *See also Bell v. Cendant Corp.*, 293 F.3d 563, 569 (2d Cir. 2002) ("'Ordinarily a defense of waiver brought in opposition to a motion to compel arbitration . . . is a matter to be decided by the arbitrator.'") (quoting *S&R Co. v. Latona Trucking, Inc.*, 159 F.3d 80, 82–83 (2d Cir. 1998)).

Similarly, issues of estoppel and *res judicata* are "procedural issue[s] for the arbitrator to decide." *In re Application of Local 333, United Marine Div., etc.*, 671 F. Supp. 309, 312 (S.D.N.Y. 1987) (collateral estoppel is procedural question for arbitrator); *see United States Fire Ins. Co. v. National Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996) (issue-preclusive effect of prior judgment was for arbitrators to decide); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135-36 (2d Cir. 1996) ("claim of preclusion is a legal defense to" claim asserted in arbitration, and thus "is itself a component of the dispute on the merits" to be addressed by arbitrator); *British Ins. Co. v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 520–21 (S.D.N.Y. 2000) ("it is a clearly established principle of arbitration law" that "it is up to the arbitrators, not the court, to decide the validity of time-bar defenses," and the "same is true of the defense of estoppel"); *Air Line Pilots v. United Air Lines*, 83 L.R.R.M. (BNA) 2070, 2072 (E.D.N.Y. 1973) (extent to which principles of *res judicata* apply is procedural question for arbitrator).

Ecuador's waiver and estoppel arguments are particularly appropriate for resolution by

the arbitral panel here, because they do not relate specifically to Chevron's and TexPet's right to arbitrate. Instead, they are defenses that (if valid) would apply to Chevron's and TexPet's right to obtain relief in any forum. Accordingly, the Court should dismiss Ecuador's petition on the additional ground that the proffered defenses are properly resolved in the arbitration.

D. In Any Event, Ecuador's Waiver, Estoppel, and Absent-Party Arguments Fail as a Matter of Law

As discussed above, Ecuador's claims of waiver, judicial estoppel, and the like should be resolved only by the arbitral panel. Even if the Court were to reach the merits of those claims, however, they would fail as a matter of law.[10]

1. *As a Matter of Law, Texaco's Purported "Representations" in Aguinda Did Not Waive Chevron and TexPet's Right to Arbitrate*

Federal courts are guided by a strong federal policy favoring arbitration, and waiver of the right to arbitrate "is not to be lightly inferred." *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968); *accord Leadertex Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995). "The key to a waiver analysis is prejudice." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (per curiam), *cert. denied*, 538 U.S. 922 (2003). Courts only find waiver of a right to arbitrate "when the party against whom waiver is asserted has engaged in substantial litigation activity resulting in prejudice to the party asserting waiver." *Brownstone Inv. Group v. Levey*, 514 F. Supp. 2d 536, 550 (S.D.N.Y. 2007). Ecuador has not alleged that it suffered any prejudice sufficient to warrant a finding of waiver, nor is any other element of a waiver defense present here.

First, neither Ecuador, nor Chevron, nor TexPet was a party to the *Aguinda* litigation in

[10] The merits of Ecuador's defenses to a Treaty claim should be determined under public international law—which governs the Treaty—not the domestic laws of New York, the United States, or Ecuador. BIT Art. II(3)(a), VIII(b). Chevron and TexPet do not concede the applicability of New York law to Ecuador's defenses. For purposes of this motion and this argument, however, Chevron and TexPet will demonstrate that, were it to apply, New York law would require the dismissal of those defenses.

which the representations alleged to constitute a waiver of the right to arbitrate were made. *See* Pet. ¶¶ 16, 21, 35-36. The representations on which Ecuador seeks to rely in order to block arbitration under the US-Ecuador BIT were made only by Texaco, not by Chevron or TexPet, the only claimants in the Treaty Arbitration. Ecuador attempts to mask this fatal flaw in its argument by referring to Texaco, TexPet, and Chevron jointly as "Chevron"—without pleading a legal theory to justify attributing purported representations by one entity to another. *Id.* Ecuador has not alleged that Chevron or TexPet made a single representation in the prior litigation, much less a representation on which Ecuador then relied. It would be a breathtaking leap for the Court to infer a waiver of Chevron's and TexPet's rights to arbitrate based on Texaco's representations in prior litigation which did not involve any of the parties to the Treaty Arbitration.

Second, the rights and obligations at issue in the Treaty Arbitration arise from an international treaty, and thus were not at issue in (nor were they waived in) the domestic proceedings, which arise under local law. Chevron and TexPet contend in the Treaty Arbitration that Ecuador's conduct in connection with the *Lago Agrio* litigation violates the Treaty and international law. The *Aguinda* plaintiffs, by contrast, sought compensation from Texaco for personal injuries and damage to their own private property allegedly caused by TexPet's operations in Ecuador. And the *Lago Agrio* plaintiffs purport to seek damages (for the benefit of Ecuadorian governmental units) from Chevron for environmental remediation of publicly owned former Consortium sites. Neither Chevron, nor TexPet, nor Texaco has ever expressly or impliedly suggested in any of the various litigation matters that it would forfeit any rights under international law, including the right to arbitrate disputes with Ecuador under the BIT.[11]

[11] Far from waiving rights under international law, Texaco's reservation of rights under NY CPLR § 5304 in fact preserved Texaco's rights under the BIT and analogous provisions. *See, e.g.*, NY CPLR § 5304(a)(1).

Third, there is no allegation that there has been any undue delay in the commencement of the Treaty Arbitration, or that Ecuador has been subject to any previous litigation on the public-international-law issues at stake in the Treaty Arbitration and thereby incurred unnecessary monetary expenses or had its legal position compromised. Ecuador has merely made the type of "blanket assertion [ ] of entitlement to relief" on its waiver defense that is insufficient to avoid dismissal under *Twombly*. 550 U.S. at 555 n.3.[12]

Ecuador has previously attempted—and failed—to convince this Court that the conduct of Texaco in the *Aguinda* litigation somehow amounted to a waiver of Chevron's and TexPet's rights to arbitrate a dispute with the Republic of Ecuador. *See ROE I*, 376 F. Supp. 2d at 363-66. The Court held in *ROE I* that Ecuador failed to demonstrate a waiver "sufficiently clearly to preclude arbitration under the relevant legal standard." 376 F. Supp. 2d at 363. If the Court were to find that it has jurisdiction to reach the waiver issue here, the outcome would be the same.

2. *As a Matter of Law, Chevron and TexPet Are Not Judicially Estopped From Arbitrating Their Claims Against Ecuador*

In the Second Circuit, a party invoking judicial estoppel must show that (1) *the party against whom estoppel is asserted* took an *inconsistent* position in a prior proceeding; and (2) that position was adopted by the court in some manner. *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993) (emphasis added). Courts limit the doctrine of judicial estoppel

[12] Any allegation of undue delay would, in any event, be meritless. Chevron and TexPet brought this Treaty Arbitration after recent, bad-faith conduct by Ecuador in breach of its Treaty obligations, including repeated, ongoing efforts to support the plaintiffs in the *Lago Agrio* litigation, to unduly influence the disposition of that case, and to deny Chevron a fair trial. Ecuador's recent misconduct includes the issuance of sham criminal indictments of Chevron attorneys in 2008, a court-appointed expert's baseless assertion in 2008 of $27 billion in damages, statements in 2009 by governmental officials (including the judge then presiding over the Lago Agrio litigation) demonstrating bias and pre-judgment of the outcome, and evidence disclosed in 2009 of a related bribery scheme apparently involving the judge and other governmental officials. Treaty Arb. Notice ¶¶ 46-55.

to situations in which the risk of inconsistent results (with its corresponding impact on judicial integrity) is certain. *Id*.

Ecuador argues that "Chevron" obtained the *forum non conveniens* dismissal of *Aguinda* on the basis of a "representation" to Judge Rakoff that it would satisfy any ultimate judgment, reserving only the defenses to enforcement of a foreign award. Pet. ¶ 35. But Ecuador's argument has no legal basis. First, as discussed above with respect to waiver, Texaco—not Chevron or TexPet—consented to jurisdiction in Ecuador. Thus, in this case, "the part[ies] against whom estoppel is asserted" (Chevron and TexPet) did not take any position (inconsistent or otherwise) in the earlier litigation, because they were not even parties to the *Aguinda* action. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997) (citing *Bates*, 997 F.2d at 1028, 1037-38) ("Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding. . . .").

Second, the positions taken by Chevron, TexPet, and Texaco are not inconsistent. As discussed above, *see* section III.D.1, *supra*, Chevron, Texaco, and TexPet have never expressly or impliedly suggested that they would forfeit any rights arising under international law. Moreover, even in the representation cited by Ecuador, Texaco expressly reserved the right under NY CPLR § 5304 to contest any judgment "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." NY CPLR § 5304(a)(1). Therefore, Chevron's and TexPet's initiation of the Treaty Arbitration is not inconsistent with any of Texaco's earlier representations to Judge Rakoff.[13]

[13] Furthermore, while Texaco agreed to submit to the jurisdiction of the Ecuadorian and Peruvian courts in specified circumstances, it did not consent to jurisdiction with respect to *all conceivable* claims. Rather, it consented to litigate in Ecuador and Peru "these claims (or their Ecuadorian [or Peruvian] equivalents)." *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d at 539; *see also* Stip. and Order at 1-2, *Aguinda v. Texaco Inc.*, 93 Civ. 7527 (JSR) (S.D.N.Y. June 21, 2001) (listing the conditions upon which "the claims set forth in the Complaints in these actions may be

Third, Ecuador has not alleged that any court relied on Texaco's submission that it would agree to satisfy a final judgment subject to NY CPLR § 5304. In granting dismissal, the Court explicitly relied on Texaco's (1) limited consent to be sued in Ecuador, (2) limited waiver of a statute of limitations defense, and (3) agreement to the use of all discovery that had been completed to date. *Aguinda*, 142 F. Supp. 2d at 538-43; *Aguinda*, 303 F.3d at 475-78; Stip. and Order at 1-2, *Aguinda v. Texaco Inc.*, 93 Civ. 7527 (JSR) (S.D.N.Y. June 21, 2001) (listing the three conditions upon which "the claims set forth in the Complaints in these actions may be refiled in the civil courts of Ecuador"). Absent judicial reliance on the purported representation, Ecuador's estoppel argument fails as a matter of law. *Bates*, 997 F.2d at 1038. *See also Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999); *Longview Equity Fund, LP v. McAndrew*, No. 06 Civ. 4304 (GEL), 2007 WL 186769, at *3 (S.D.N.Y. Jan. 23, 2007).

3. *Ecuador's Absent-Parties Argument Provides No Legal Basis for a Stay*

Ecuador asserts in conclusory fashion that the Treaty Arbitration is a "ploy" to obtain relief against the *Lago Agrio* plaintiffs and notes that there is no mechanism for adding those plaintiffs as parties to the arbitration. Pet. ¶ 40. To the extent Ecuador is suggesting that the absence of the nominal *Lago Agrio* plaintiffs provides legal grounds for a stay, that suggestion is wholly without merit. *See Moses H. Cone*, 460 U.S. at 20 & n.23 ("Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."). Nowhere in its Petition does Ecuador point to any legal principle—under the Treaty, international law, or the laws of New York or anywhere else—that would authorize a stay of Chevron's and TexPet's claims due

refiled in the civil courts of Ecuador"). As discussed in Parts II.B and C above, the claims in the *Lago Agrio* litigation are not the same as or equivalent to those asserted in the *Aguinda* action.

to the absence of third parties, much less third parties purporting to assert public claims with the assistance of, and for the benefit of, Ecuador itself.

IV.
CONCLUSION

In pleading defenses of waiver, judicial estoppel, and failure to add a party, Ecuador has failed to articulate a single legal ground that would authorize a federal court to stay this investment-treaty arbitration. No statute, treaty, or line of cases supports Ecuador's novel and unprecedented attempt to secure court intervention in this case, because the FAA does not permit a federal court to stay a BIT arbitration when the underlying agreement to arbitrate is not invalid—*i.e.*, null and void, inoperative, or incapable of being performed. The arguments in Ecuador's Petition to Stay Arbitration are (at most) defenses to Chevron's and TexPet's Treaty claims, and therefore must be adjudicated by the arbitral tribunal currently being constituted to determine those claims. Because Ecuador's Petition has no basis in the law, it must be dismissed.

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