14-826-cv(L)

14-826-cv(CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

(Additional Caption on the Reverse)

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

BRIEF OF BUSINESS ROUNDTABLE AND INTERNATIONAL LAW SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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INTERNATIONAL LAW SCHOLARS PROF. BURKHARD HESS, PROF. JULIAN KU, PROF. MICHAEL RAMSEY AND PROF. JANET WALKER

STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents.

LIST OF INTERNATIONAL LAW SCHOLARS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Business Roundtable has no parent corporation nor stock held by any publicly held corporation.

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INTEREST OF *AMICI CURIAE*

Amici sought consent from all parties to the filing of the brief. Counsel for Defendant-Appellant Steven Donziger and Counsel for the Defendants-Appellants Hugo Gerardo Camacho Naranjo, and Javier Piaguaje Payaguaje have consented to the filing of this brief.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with nearly $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest more than $158 billion annually in research and development – equal to 62 percent of U.S. private R&D spending. Our companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions. Business Roundtable was established in 1972, founded on the belief that in a pluralistic society, businesses should play an active and effective role in the formation of public policy. Uniting and amplifying the diverse business perspectives and voices of America's top CEOs, Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

The question presented in this case is of great importance to Business Roundtable. The Court is asked to determine the propriety of equitable remedies issued by the District Court to remedy the Defendants-Appellants profiting from their conduct that resulted in a foreign judgment procured by fraud. Business Roundtable is very sensitive to the abuse of process in litigation and recognizes the need to promote the international rule of law and facilitate the proper and orderly administration of justice in international trade and investment. Business Roundtable is particularly concerned with any attempt by the Defendants-Appellants to profit from a foreign judgment that was procured by fraud and fear for the repercussions to international trade and investment if the Defendants-Appellants' tactics are not subject to appropriate judicial restraint.

The international law scholars who are filing as *amici curiae*—Prof. Burkhard Hess, Prof. Julian Ku, Prof. Michael Ramsey, and Prof. Janet Walker ("International Law Scholars")—are experts in public international law, private international law, and international litigation. They are filing this brief because the instant case raises important issues regarding the permissibility of equitable remedies under international law and comity and

wish to confirm the propriety and legality of the equitable remedies like the one issued by the District Court in this case.[1]

[1] This brief was not authored in whole or in part by persons other than *amici curiae* and their Counsel. No persons other than *amici curiae* Business Roundtable contributed money to fund the preparation or submission of this brief. Affiliations are provided for identification purposes only.

SUMMARY OF ARGUMENT

Contrary to the position by the Defendants' *Amici International Law Professors* ("*Amici*"), the District Court's relief avoided the comity concerns of *Chevron Corp. v. Naranjo*.[2] *Amici* overstate the relevance of comity concerns. Generally where a statute such as RICO grants significant equitable powers, courts are permitted to exercise those powers notwithstanding comity concerns. In a variety of contexts—including litigation to combat fraud and racketeering—the public interest in providing relief will often outweigh international comity concerns.

International comity does not assume that our judicial measures will cause offense in foreign countries. The fact that a federal district court utilizes procedural or remedial tools not available in other jurisdictions does not mean that such tools will cause offense. In fact, foreign tribunals may find such tools helpful in preventing fraud and racketeering.

International comity does not require equitable remedies to be applied the same in every statutory context or at every procedural stage of litigation. Certain equitable remedies heighten comity concerns, while other remedies pose fewer comity concerns. International comity presumes a balancing of all relevant interests. The Second Circuit has endorsed such a balancing

[2] 667 F.3d 232 (2nd Cir. 2012).

approaching, including reliance on Section 403 of the Restatement (Third) of Foreign Relations.[3] Applying those factors to the instant case, the District Court properly balanced relevant comity interests in ordering relief.

The District Court ordered relief that is consistent with *Naranjo*.[4] The specific comity concerns presented in *Naranjo* do not apply to this case, but the District Court clearly expressed concern for comity and fashioned relief to minimize unreasonable interference with foreign nations. The relief granted permits foreign courts to adjudicate the enforceability of the Ecuadorian judgment, but limits the ability of the Defendants from monetizing their approximately 6.3 percent share of the award.

Finally, *Amici* argue that the remedy violated international law by intervening in the affairs of other nations. U.S. courts do not recognize such an international rule of non-intervention with respect to equitable relief rendered in civil litigation. Non-intervention under international law applies to coercive actions, not the judicial regulation of private conduct.

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[3] *Gucci America, Inc. v. Weixing Li,* ___ F.3d ___, 2014 WL 4629049, at *14 (2nd Cir. 2014); *Linde v. Arab Bank, PLC,* 706 F.3d 92, 111-12 (2nd Cir. 2013).

[4] 667 F.3d 232 (2nd Cir. 2011).

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED COMITY IN ORDERING RELIEF

A. The District Court's Remedies Avoid International Comity Concerns.

The *Amici* express concern that the District Court committed reversible error by ordering relief that offends international comity. Yet it is clear that the relief sought and granted was tailored to avoid the comity concerns expressed by the Second Circuit in *Naranjo*.[5] On March 4, 2014, the District Court issued an opinion finding that Steven Donziger committed fraud and violated RICO and therefore was not entitled to his 6.3 percent contingency fee, representing approximately $545 million of the $8.646 billion award.[6] The District Court further held that two representatives (the "LAP Representatives") for the Lago Agrio plaintiffs—Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje—also committed fraud.[7] Although the District Court found that Camacho and Piaguaje had "little if any economic interest" in the Ecuadorian judgment, it held that they too should be enjoined from receiving their share of the proceeds from the

[5] *Naranjo*, 667 F.3d at 242-246.
[6] *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362, 555-603 (S.D.N.Y. 2014).
[7] Id. at 555-567.

Ecuadorian judgment.[8] To remedy their fraud and racketeering, the District Court imposed a constructive trust for the benefit of Chevron on all property that Donziger, Camacho, and Piaguaje received or may receive that is traceable to the Ecuadorian judgment.[9] This relief avoided the comity concerns expressed in *Naranjo*.[10] It was taken only after the LAP Representatives' own counsel confirmed that there is "not … a problem" with "enjoining the person who paid the bribe from benefitting from it."[11]

The District Court expressly did not enjoin the Defendants from enforcing the Ecuadorian judgment in courts outside the United States.[12] Nor did the District Court issue any order against the Lago Agrio plaintiffs ("LAPs") and their lawyers, leaving unaffected their rights to enforce and execute the Ecuadorian judgment in the United States or elsewhere.[13] As the *Amici* concede, the LAPs plaintiffs and their lawyers "are free to seek

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[8] *Chevron Corp. v. Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *5 (S.D.N.Y. 2014).

[9] *Donziger*, 974 F.Supp.2d at 640-642; N.Y. Judgment at ¶ 1.

[10] *Donziger*, 974 F.Supp.2d at 385, 643.

[11] *Donziger*, 974 F.Supp.2d at 385; Donziger, 2014 WL 1663119, at *2.

[12] *Donziger*, 2014 WL 1663119, at *8; N.Y. Judgment at ¶¶ 4, 6. Instead, the District Court issued a domestic anti-suit injunction, pointedly avoiding a global anti-suit injunction to avoid the "international comity concerns voiced in *Naranjo*." *Donziger*, 974 F.Supp.2d at 644-45.

[13] *Donziger*, 2014 WL 1663119, at *8 ("The ability of the other LAPs, the ADF, Amazonia and anyone else claiming the right to seek enforcement … is unaffected as long as they do not knowingly act in concert with Donziger or the LAP Representatives.").

recognition and enforcement of the Ecuadorian judgment without regard to the … [District Court's] judgment in this case."[14] That is precisely what they are doing. Consistent with the District Court's opinion and judgment, the LAPs and their lawyers are actively seeking enforcement of the Judgment in Argentina, Brazil, and Canada.[15] Counsel for the LAPs has stated that they're "going to continue with the enforcement actions" in Argentina, Brazil, and Canada and that "no judge in those jurisdictions is under any obligation to abide by Judge Kaplan's ruling."[16]

Despite the District Court's effort to tailor relief to avoid comity concerns,[17] the *Amici* argue that the District Court violated international comity by "prejudging the case … for the world" and issuing an order that "purports to bind the courts of every other country in the world."[18] The *Amici* state that courts in other countries will be offended by the District Court's order preventing the Defendants from benefiting from their fraud.[19] The *Amici* argue that the failure to correctly apply international comity is reversible error.[20]

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[14] *Amici* Brief, at 6, n.2.
[15] *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *5.
[16] Id. at *5, n.36.
[17] *Donziger*, 974 F.Supp.2d at 385, 642-644.
[18] *Amici* Brief, at 3-5, 13-14.
[19] *Amici* Brief at 15-19.
[20] Id., at 3.

B. The Role of International Comity is Limited.

The *Amici* overstate the relevance of the international comity. The Second Circuit reviews "a district court's decision to abstain on international comity grounds for abuse of discretion."[21] Generally, where a statute such as RICO grants significant equitable powers, courts are permitted to exercise those powers notwithstanding the comity concerns. As the Supreme Court recently held, to the extent a statute grants courts the power to issue sweeping orders that will "cause a substantial invasion of foreign states' sovereignty and will undermine international comity…[t]hese apprehensions are better directed to that branch of government with authority to amend the [statute]."[22] In response to arguments that extraterritorial injunctions violate international comity, the Second Circuit has stated that the general rule is a "federal court sitting as a court of equity having personal jurisdiction over a party … has power to enjoin him from committing acts elsewhere," and "federal courts can enjoin conduct that 'has or is intended to have a substantial effect within the United States.'"[23]

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[21] *JP Morgan Chase Bank v. Altos Hornos de Mexico,* 412 F.3d 418, 422 (2nd Cir. 2005).
[22] *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2258 (2014).
[23] *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230, 243 (2nd Cir. 2013), *aff'd* 134 S.Ct. 2250 (2014).

International comity is not a legal obligation.[24] Rather, it is "a rule of practice, convenience, and expediency, rather than of law."[25] This practice often gives way in the face of other compelling interests. In *Pravan Banker Assoc., Ltd. v. Banco Popular del Peru,* the Second Circuit stated that "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States."[26] In *United States v. Davis*, the Second Circuit affirmed equitable relief enjoining foreign proceedings to prevent fraud and racketeering because the United States has a "strong national interest in safeguarding the integrity of its criminal process."[27] In *Linde v. Arab Bank, PLC,* the Second Circuit rejected the comity concerns and held that private litigation in cases involving racketeering, fraud or torts "may be so infused with the public interest" that extraterritorial injunctions are appropriate.[28] In *Peregrine Myanmar Ltd. v. Segal,* the defendant's tortious and unfair conduct undertaken in concert with foreign government officials was so egregious that the Second Circuit affirmed extraterritorial injunctive relief without any

[24] *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.,* 412 F.3d 418, 423 (2nd Cir. 2005); *see also Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).
[25] *Pravan Banker Assoc., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2nd Cir. 1997).
[26] Id.
[27] 767 F.2d 1025, 1037 (2nd Cir. 1985).
[28] 706 F.3d 92, 111-12 (2nd Cir. 2013).

comity analysis.[29] Finally, in *Motorola Credit Corp. v. Uzan,* notwithstanding the comity concerns, the Second Circuit recognized the District Court's power to order a constructive trust and to require the transfer of shares to redress the Defendants' fraud.[30] These cases indicate that in a variety of contexts—including litigation to combat racketeering and fraud—the public interest in providing relief will often outweigh international comity concerns. The *Amici* ignore these contrary authorities.

C. International Comity Does Not Assume U.S. Judicial Measures Will Cause Foreign Offense.

The *Amici* argue that the District Court's order will offend international comity because it is different from how other courts might handle the matter.[31] But the fact that a federal district court utilizes procedural or remedial tools not available in other jurisdictions does not mean that such tools will cause offense to foreign governments. In *Intel Corp. v. Advanced Micro Devices, Inc.,* the Supreme Court found that a statute authorizing foreign discovery would not offend international comity even if such discovery methods were not permitted in other countries.[32] "A foreign nation may limit discovery within its domain for reasons peculiar to

[29] 89 F.3d 41, 49-51 (2nd Cir. 1996).
[30] 388 F.3d 39, 60-61 (2nd Cir. 2004).
[31] *Amici* Brief at 19-20.
[32] 542 U.S. 241, 261 (2004).

its own legal practices, culture or traditions—reasons that do not necessary signal objection to aid from the United States federal courts."[33] Foreign tribunals may, in fact, find U.S. discovery rules helpful "in obtaining relevant information that the tribunals may find useful, but for reasons having no bearing on international comity, they cannot obtain under their own laws."[34] Likewise, even if a constructive trust is not available in every jurisdiction in the world,[35] many of those jurisdictions may find such a remedy helpful in preventing fraud and racketeering.

D. International Comity Must be Applied Differently in Different Contexts.

The *Amici* argue that "international comity is not tethered to a particular statute or cause of action" and is a doctrine that has been applied "in a large number of variegated cases, across a wide-range of subject matter, involving numerous statutes and common law causes of action."[36] But that does not mean that comity requires equitable remedies to be applied the same in every statutory context or at every procedural stage of litigation. Indeed, the Second Circuit recently recognized the legitimacy of extraterritorial injunctions freezing assets at a final stage of litigation under

[33] Id.
[34] Id. at 262.
[35] *Amici* Brief at 19-20.
[36] *Amici* Brief at 8.

one statute even though such an injunction was prohibited at a preliminary stage under another statute.[37] Comity was a consideration in both contexts, but the reasonableness of equitable relief depends on the circumstances in each particular case.[38] Similarly, even if a declaratory anti-enforcement injunction under the New York Recognition Act offends comity, the District Court could find no such offense to comity when it ordered final relief in the form of a constructive trust under RICO.

Certain equitable remedies heighten comity concerns, while others do not. Due regard for international comity may be appropriate in the context of anti-suit injunctions "because such an order effectively restricts the jurisdiction of the court of a foreign sovereign."[39] Likewise, although it did not "reach issues of international comity," the Second Circuit in *Naranjo* suggested that anti-enforcement injunctions also raise significant comity concerns because they reflect a distrust of other courts' ability to recognize

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[37] *Gucci America, Inc. v. Weixing Li*, ___ F.3d ___, 2014 WL 4629049, at *6-8 (2nd Cir. 2014).

[38] Id. at *13-15 *citing* Restatement (Third) of Foreign Relations § 403 (1987).

[39] *China Trade and Development Corp. v. M.V. Chong Yong*, 837 F.2d 33, 35 (2nd Cir. 1987). Despite these comity concerns, the Second Circuit frequently permits foreign anti-suit injunctions. See *United States v. Davis,* 767 F.2d 1025 (2nd Cir. 1985); *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41 (2nd Cir. 1996).

and enforce foreign judgments.[40] Judicial seizure of property owned by a foreign government is another example of a remedy that will clearly offend international comity, but the Supreme Court nonetheless has upheld such relief to enforce tax liens.[41]

By contrast, some equitable remedies raise fewer international comity concerns. These remedies include the freezing of assets;[42] the granting of discovery requests;[43] the ordering of parties to cease wrongful conduct;[44] and the imposition of sanctions.[45] Federal courts routinely grant such measures notwithstanding the comity concerns that are implicated. The District Court's relief is dramatically different than a global anti-enforcement injunction and implicates few comity concerns.

E. International Comity Presumes a Balancing of All Relevant Interests.

The reason comity weighs heavily in some contexts and less so in others is because extraterritorial injunctive relief balances numerous

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[40] *Naranjo*, 667 F.3d at 244.
[41] *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 198-202 (2007).
[42] *Gucci*, __ F.3d at ___, 2014 WL 4629049, at *6-8.
[43] *Intel,* 542 U.S. at 261; *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 543-46 (1987).
[44] *Peregrine*, 89 F.3d at 49-51.
[45] *Linde*, F.3d at 111-12.

interests, and those interests vary from one case to the next.[46] The Second Circuit has not adopted a definitive test for the balancing of comity concerns. Recently, it stated that international comity "invites a weighing of *all* of the relevant interests of *all* of the nations affected by the court's decision."[47] Thus, in *Linde* the Second Circuit balanced (1) "the important U.S. interests at stake in arming private litigants with the weapons available in civil litigation to deter and punish the support of terrorism;" (2) "the comity interests implicated by [foreign governments'] bank secrecy laws;" and (3) the "strong interest" that countries have in "deterring the financial support of terrorism."[48] Balancing those interests, the Second Circuit found that "the interests of other sovereigns in enforcing bank secrecy laws [were] outweighed by the need to impede terrorism financing as embodied in the tort remedies provided by U.S. civil law and the stated commitments of the foreign nations" in deterring the financial support of terrorism.[49]

Another balancing approach suggested in *Gucci* was the Section 403 of the Restatement (Third) of Foreign Relations.[50] The Second Circuit in

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[46] *Hilton*, 159 U.S. at 164; *Gucci,* ___ F.3d at ___, 2014 WL 4629049 at *14.
[47] *Linde,* 706 F.3d at 111 (emphasis original).
[48] Id. at 111-12.
[49] Id. at 112.
[50] *See* Restatement (Third) of Foreign Relations § 403 (1987); *Gucci,* ___ F.3d ___, 2014 WL 4629049, at 14.

Gucci found that in granting equitable relief "district courts may appropriately conduct an analysis using the framework provided by § 403 of the Restatement (Third) of Foreign Relations."[51] Section 403 suggests a number of relevant factors for consideration when issuing orders that implicate international comity:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

[51] *Gucci*, ___ F.3d ___, 2014 WL 4629049, at *14 ("district courts may appropriately conduct a [comity] analysis using the framework provided by § 403 of the Restatement (Third) of Foreign Relations.").

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

F. The District Court Considered Relevant Comity Interests in Ordering Relief

In engaging in such a "holistic, multi-factored analysis," the District Court did not "so obviously offend international comity" that remand is warranted under an abuse of discretion standard.[52] Although the decision in *Gucci* endorsing Section 403 was rendered several months after *Donziger* was issued,[53] it is clear that the District Court considered all the relevant Section 403 factors in granting equitable relief. It considered (a) the

[52] *Linde,* 706 F.3d at 112.

[53] *Donziger* was rendered on March 4, 2014 and the Second Circuit's decision in *Gucci* was rendered on September 17, 2014.

territorial link of the Defendants' wrongful conduct to the United States;[54] (b) the Plaintiff's and the Defendants' connections with the United States;[55] (c) the character of the Defendants' conduct and the important U.S. interests at stake in regulating fraud and racketeering;[56] (d) the Defendants' expectation that equitable relief would be appropriately granted to prevent wrongdoers profiting from their fraud;[57] (e) the universal recognition of the importance of effectively regulating fraud and racketeering;[58] (f) the extent to which courts have traditionally afforded equitable relief from judgments obtained by fraud;[59] (g) the interests of other states;[60] and (h) the likelihood of conflict with regulation by other states.[61] Taking all those considerations into account, the District Court concluded that "if ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it."[62] A balancing of all relevant factors left the District Court with little

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[54] *Donziger*, 974 F.Supp.2d at 385-86, 570-75.
[55] Id. at 588, 597, 617-27; *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *12.
[56] *Donziger*, 974 F.Supp.2d at 384-85, 567.
[57] Id. at 385, 558; *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *2.
[58] *Donziger*, 974 F.Supp.2d at 386, *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *13.
[59] *Donziger*, 974 F.Supp.2d at 555-58.
[60] Id. at 385, 608-17, 643-44; *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *1, 8, 11.
[61] *Donziger*, 974 F.Supp.2d at 385, 608-17, 643-44; N.Y. Judgment, at ¶ 2-6; *Donziger*, ___ F.Supp.2d ___, 2014 WL 1663119, at *1, 8, 11.
[62] *Donziger*, 974 F.Supp.2d at 384.

doubt that the remedies were necessary notwithstanding the comity concerns. There certainly was no abuse of discretion in shaping remedies that balanced sovereign interests while providing effective relief.

II. THE DISTRICT COURT PROPERLY DISTINGUISHED THE COMITY CONCERNS RAISED IN *NARANJO*.

The Second Circuit's decision in *Chevron v. Naranjo* is referenced frequently in this case, and that is particularly true with respect to international comity. But it is important to emphasize that the Second Circuit in *Naranjo* expressly did not "reach issues of international comity."[63] Its discussion of comity is nonbinding, persuasive *dicta*. The Second Circuit in *Naranjo* found that the statute in question—the New York Recognition Act—offered no legal basis for the declaratory anti-enforcement injunction the District Court granted in that case.[64] The Second Circuit's comity discussion was offered to help explain the purpose of that statute and why it did not authorize declaratory relief.[65] This case, of course, addresses a different statute, different causes of action, and different remedies. Despite these differences, the District Court tailored its relief in light of the comity concerns raised in *Naranjo*.

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[63] *Naranjo,* 667 F.3d at 244.
[64] Id. at 239-244.
[65] Id. at 242.

Contrary to the *Amici's* suggestion, the District Court did not say that comity was irrelevant to this case; it said that *Naranjo*'s specific comity concerns relating to a declaratory anti-enforcement injunction did not apply to this case. "Comity and respect for other nations are important," the District Court emphasized, and "considerations of comity … have shaped the relief sought here."[66] International comity was not ignored in this case; the comity concerns in *Naranjo* were simply distinguished. As outlined above, comity is applied differently in different contexts, and the Second Circuit's "holistic, multi-factored [comity] analysis"[67] presumes that the relevant interests at stake will differ depending on the law and facts of each case.

The *Amici* argue that the "narrow comity tunnel vision" adopted by the District Court is improper because with comity "courts must construe ambiguous statutes in such a way as to 'avoid unreasonable interference with the sovereign authority of other nations."[68] The District Court expressed concern for comity and fashioned relief to minimize unreasonable interference with other nations' sovereignty. The entire point of imposing a

[66] *Donziger*, 974 F.Supp.2d at 384-85.
[67] *Linde,* 706 F.3d at 112.
[68] *Amici* Brief at 9, quoting *F. Hoffmann-La Roche, Ltd. v. Empagran*, 542 U.S. 155, 164 (2004).

constructive trust in lieu of an anti-suit or anti-enforcement injunction was to avoid unreasonable interference.

The *Amici* also disagree with the District Court's finding that it displayed respect to other countries because it did not grant "a worldwide injunction barring any efforts to enforce the Judgment in other countries."[69] The *Amici* argue that a constructive trust has the same effect as an anti-enforcement injunction because it "seeks to dictate to the courts of the entire world what will happen if they recognize and enforce the Ecuadorian judgment."[70] This argument is similar to that raised by the Defendants who argued that the District Court's judgment "exacerbates the very comity concerns raised in *Naranjo*."[71] The District Court had a direct answer to such concerns: "This Court's Judgment does not interfere with any foreign court's enforcement of the Lago Agrio Judgment, places no restrictions on the LAP's attempt to enforce the Lago Agrio Judgment in foreign courts, and does not preclude parties not before the Court from profiting from any such enforcement. This Court's carefully cabined relief … is entirely consistent with *Naranjo*."[72]

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[69] *Donziger,* 974 F.Supp.2d at 644.
[70] *Amici* Brief, at 9-10, 13-14.
[71] *Donziger,* ___ F.Supp.2d ___, 2014 WL 1663119, at *11.
[72] *Id*.

An injunction prohibiting judicial proceedings in foreign courts raises grave comity concerns because it attempts to "preclude the courts of every other nation from ever considering the effect of [a] foreign judgment."[73] A court granting an order of attachment, constructive trust, or share transfer against the Defendants raises far fewer comity concerns because it does not prevent foreign courts from adjudicating the question of the enforceability of Ecuador's judgment. Such remedies simply limit the freedom of the Defendants from monetizing their approximately 6.3 percent share of any foreign award that may in the future recognize and enforce the Ecuadorian judgment. Such an order shows no disrespect to the jurisdiction of other courts.

III. THE DISTRICT COURT ORDER DOES NOT PRECLUDE FOREIGN COURTS FROM MAKING AN INDEPENDENT DETERMINATION.

The *Amici* argue that the District Court's opinion will not preclude foreign courts from making an independent determination about whether to recognize and enforce the Ecuadorian judgment.[74] They make this statement to support a futility argument,[75] but it directly undermines their earlier arguments that the order will prejudge the case for every other court in the

[73] *Naranjo*, 667 F.3d at 244.
[74] *Amici* Brief, at 21-22.
[75] Id. at 21-24.

world.[76] The District Court's order was fashioned to permit foreign courts to adjudicate the enforceability of the Ecuadorian judgment and limit the ability of three judgment creditors from executing and monetizing their portion of the award.[77] In no case, however, will the order limit the ability of foreign courts to independently review the enforceability of the Ecuadorian judgment, as those courts are currently doing in Argentina, Brazil, and Canada.[78]

As for the futility argument, the District Court's order could be effectuated in a variety of ways, either domestically or abroad. Among the options for enforcement is a foreign court using the order to impose a partial lien upon any foreign award.[79] A second option is with respect to the Defendants efforts to attach the $106 million arbitration award Chevron won against Ecuador.[80] Another option is domestic enforcement of the order. In

[76] Id. at 5-7.
[77] *Donziger,* 974 F.Supp.2d at 385.
[78] Id. at 541.
[79] This is a practice U.S. courts fully recognize. See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 452 (2006); *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54 (S.D.N.Y. 2013).
[80] *Indigenous Villagers Plan to Seizer Chevron's $106 Million Arbitral Award in Ecuador*, CSRWire Press Release, (Sept. 30, 2014).

any event, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured."[81] That does not render their decisions futile.

IV. THE DISTRICT COURT ORDER DOES NOT INTERVENE IN THE AFFAIRS OF OTHER STATES.

The *Amici* argue that the District Court violated international law by intervening in the domestic and external affairs of other nations "by purporting to capture all property that might be awarded by the courts of other countries that … recognize and enforce the Ecuadorian judgment."[82] There is no support for such an international rule of non-intervention in the jurisprudence of our courts, and the *Amici* offer none.

Under international law, the principle of non-intervention applies to forcible or coercive actions by one state against another state. The threshold prohibiting interventions is high, and typically requires either military force or other physically coercive measures that put pressure on a State to change its practices or policies.[83] It has nothing to do with the actions by a domestic court regulating the conduct of private individuals within its jurisdiction. Courts in the United States and other countries commonly issue countless

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[81] *Chafin v. Chafin*, 133 S.Ct. 1017, 1025 (2013).
[82] *Amici* Brief, at 25-31.
[83] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* 1986 I.C.J. 14, 106 (June 27); *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda),* 2005 I.C.J. 168, 227 (Dec. 19).

orders, judgments, and injunctions directed at foreign citizens, subjects or corporations. Such domestic judicial activity has never been thought to implicate the principle of non-intervention.

CONCLUSION

The District Court's remedies were fashioned to avoid unreasonable interference with other nation's sovereignty and were specifically fashioned to avoid the comity concerns raised in *Chevron Corp. v. Naranjo*. The Ecuadorian plaintiffs not subject to the order are free to attempt to enforce the Ecuadorian judgment, and are actively doing so in countries throughout the world. Balancing all of the relevant comity interests in this case, the District Court properly enjoined the Defendants from profiting from their fraud.

Dated: October 8, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,984 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 4,984 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of Business Roundtable and International Law Scholars as *Amici Curiae* to be served on all counsel of record in this appeal via the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1.

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