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 1 UNITED STATES DISTRICT COURT
 1 SOUTHERN DISTRICT OF NEW YORK
 2 -----X
 2 REPUBLIC OF ECUADOR,
 3
 3 Petitioner,
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 4 v. 09 CV 9958 (LBS)
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 5 CHEVRON CORPORATION and TEXACO
 6 PETROLEUM COMPANY,
 6
 6 Respondent.
 7
 7 -----X
 8 DANIEL CARLOS LUSITANDE
 8 YAIGUAJE, et al,
 9
 9 Plaintiffs,
 10
 10 v. 10 CV 316 (LBS)
 11
 11 CHEVRON CORPORATION and TEXACO
 12 PETROLEUM COMPANY,
 12
 12 Defendants.
 13
 13 -----X
 14
 14 New York, N.Y.
 14 March 10, 2010
 15 2:15 p.m.
 15
 16 Before:
 16 HON. LEONARD B. SAND,
 17
 17 District Judge
 18
 18 APPEARANCES
 19
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9 o0o

10 (Case called)
11 (In open court)

12 THE COURT: Good morning. You may proceed.

13 MR. ABADY: Good morning, your Honor. Jonathan Abady
14 for the plaintiffs. Thanks for hearing us this morning.

15 The first critical point that I want to emphasize to
16 the Court is that we represent the plaintiff, residents and
17 farmers of the Amazon basin community there that are affected
18 by the defendants' practices. We are not the Republic of
19 Ecuador. We have different interests, different claims,
20 different rights and different standing. We are not, contrary
21 to their allegations, stalking horses for the Republic.

22 When we commenced this suit in 1993, the Republic
23 filed an amicus brief in opposition to our case. I think there
24 is some irony, therefore, that we are the third party to
25 address the Court in these proceedings, because the promises

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1 that are at the core of this case were promises that were made
2 to us, and they were also not bilateral promises. They were
3 promises and representations that were made to the Court.
4 These are our claims, our rights, our lawsuit.

5 THE COURT: And your position is that because you are
6 not presently a party to the arbitration, the arbitration
7 cannot go forward.

8 MR. ABADY: Yes.

9 THE COURT: Now, let me ask a few questions, if I may.
10 Do you wish to intervene in the arbitration?

11 MR. ABADY: Absolutely not. We are invested over 17
12 years, seven years of trial in Ecuador.

13 THE COURT: I know that.

14 MR. ABADY: So the answer is no, we do not seek to
15 intervene in that proceeding.

16 THE COURT: Is your position, then, that Chevron
17 cannot pursue arbitration pursuant to the treaty because you're
18 not a party?

19 MR. ABADY: We are seeking an injunction to enjoin
20 Chevron from pursuing the arbitration insofar as it violates
21 the express repeated, unequivocal, unambiguous promises that it
22 made to this Court that this case was going to be adjudicated
23 in Ecuador subject to 5304.

24 THE COURT: I heard that argument, and I think you
25 heard the colloquy yesterday.

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1 MR. ABADY: Yes.

2 THE COURT: So we don't have to --

3 MR. ABADY: Your Honor --

4 THE COURT: Let me just finish. I'll give you a half
5 an hour and I'll try to remain silent, but I think it's more
6 helpful to understand what it is that's on the Court's mind.

7 There's a treaty between the United States and
8 Brazil --

9 MR. ABADY: Ecuador.

10 THE COURT: Ecuador. That treaty confers rights to
11 arbitration. The express purpose of the treaty, message sent
12 to the Senate with the treaty, was that it would encourage
13 investment in Ecuador and the United States by assuring the
14 investors that there would be an independent, neutral tribunal
15 which would protect the investors against imposition unlawfully
16 of liability. Now, what is there which would enable you, your
17 clients, to defeat the rights of the parties to that
18 arbitration?

19 MR. ABADY: Several points I would offer the Court in
20 response to that question. One is that I think the real
21 purposes of the treaty if you examine the language in the
22 treaty itself and the legislative history behind it, is to
23 provide investors a forum and a dispute resolution process so
24 that they are not trapped in a situation where they are being
25 sued in a foreign jurisdiction with no recourse.

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1 That is not the case here. This is a case where the
2 defendants selected Ecuador as the place and the Court approved
3 a very specific paradigm --

4 THE COURT: We spent I think a considerable amount of
5 time yesterday on whether Chevron is bound by the terms of its
6 representation in furtherance of its then motion for dismissal
7 based on forum non conveniens. Now, since that time, Chevron
8 contends that the litigation in Ecuador, the litigation brought
9 by your clients, has been conducted in such a manner as to
10 deprive it of due process. Has that claim been waived?

11 MR. ABADY: It has not been waived specifically. It
12 has been reserved through a very specific mechanism as part of
13 the forum non conveniens dismissal in this case. They have
14 waived the right to litigate those claims in the BIT, and
15 there's an express --

16 THE COURT: Waive it by doing what?

17 MR. ABADY: By agreeing to submit to jurisdiction in
18 Ecuador under very circumscribed circumstances. And what I
19 would say to your Honor is --

20 THE COURT: And the circumscribed -- and have they
21 waived the right to invoke the treaty because of events which
22 have occurred subsequent to the dismissal of the suit in this
23 Court?

24 MR. ABADY: They have not waived their rights in toto
25 to go to the BIT to pursue an arbitration. There are many

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1 issues that they could theoretically conceivably go to the BIT
2 on, but they are precluded and they are foreclosed from going
3 to the BIT to litigate certain issues, and they have an express
4 reservation --

5 THE COURT: Now, let me cut you off, please. I cited
6 yesterday the unanimous holdings in many cases that so long as
7 there is a single arbitrable issue, a stay of arbitration will
8 not be granted. Obviously, before the arbitrators, assuming
9 there is no stay, Ecuador will contend that there are various
10 procedural defects in Chevron's claims for relief, and the
11 Court is not passing on any of those except considering the

12 question whether the claim it has made that the litigation has
13 been conducted in a manner which is inconsistent with due
14 process. I think it's paragraphs 5 to 65. That, then, is the
15 beginning and end of the story.

16 MR. ABADY: Well, if you'll permit me an opportunity,
17 your Honor, to respond to that.

18 THE COURT: Go ahead. Yes.

19 MR. ABADY: I don't believe that is the beginning and
20 end. I believe that the beginning and end of this dispute
21 originates from a slightly different place. But let me just
22 briefly address your concern, which is the concern as to what
23 Chevron is able to do with its due process complaints, its
24 complaints about what is happening in Ecuador, and emphasize to
25 the Court that they foresaw that possibility during the forum

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1 non conveniens dismissal. It was an express discussion between
2 the parties and the Court. 5304(a)(1) specifically reserves
3 exactly that protection for them and that was the first thing
4 your Honor mentioned in the morning yesterday when you came in.
5 It says, quote, "A foreign judgment is not conclusive if the
6 judgment was rendered under a system which does not provide
7 impartial tribunals or procedures compatible with the
8 requirements of due process of law."

9 THE COURT: Yes.

10 MR. ABADY: Everybody knew what was taking place in
11 2002. They specifically reserved their option. It's a
12 forward-looking provision. Everybody realized that this could
13 be a concern, and they expressly said we're going to satisfy
14 any judgment subject to this provision. It gives them the
15 exact forum to litigate exactly these issues. So the provision
16 is there. They elected it, and it was Court-ordered, and the
17 Court relied on it. And that the defendants can get up here
18 and suggest that they didn't make those representations and
19 they weren't relied on by the Court is belied by the record and
20 I'm going to show you your Honor how.

21 But first I want to say where I really think this case
22 originates and what I really think the touchstone and starting
23 point should be. This is a case unlike any other. It is a
24 case of first impression. It is sui generis. There are four
25 components that make this case different than all of the other

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1 cases that have been discussed.

2 The first is that the defendants are purporting to
3 adjudicate the plaintiff's claims in a forum where the
4 plaintiffs cannot participate. Fundamental massive due process
5 violation.

6 THE COURT: Now, plaintiff cannot participate. But
7 you say you are not interested in intervening.

8 MR. ABADY: We're prevented --

9 THE COURT: Are you interested in filing an amicus
10 brief?

11 MR. ABADY: We --

12 THE COURT: Why don't you let me finish?

13 MR. ABADY: I'm sorry, your Honor.

14 THE COURT: You can seek to intervene. I have no idea
15 what the procedural rules of that panel, the tribunal, is. You
16 can file an amicus brief. I presume that the objections to the

17 relief being sought by Chevron will be the subject of argument
18 before the panel, that Ecuador will take the position that that
19 relief is not available to them and so on. All that I think
20 the essential question which I have to decide is, is there a
21 single claim advanced in the petition for arbitration which is
22 arbitrable.

23 MR. ABADY: And, your Honor, if you'll allow me.

24 THE COURT: Yes.

25 MR. ABADY: I don't think that is the governing law
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1 for controlling this particular dispute. And if you'll just
2 let me articulate why I think that is the case.

3 THE COURT: Go ahead.

4 MR. ABADY: The short answer to your question is no,
5 we do not want to intervene in that proceeding, but more
6 importantly, as a matter of law, we cannot intervene in that
7 proceeding. And if that proceeding goes forward, because we
8 have no standing whatsoever to be involved, we're not a party
9 to that treaty, they will not allow it. And, more importantly
10 we don't want to, because we have spent 17 years litigating
11 this case, including seven years in Ecuador with a trial that's
12 now produced more than 200,000 pages of testimony where there
13 are more than 100 judicial field inspections of the
14 contaminated site, where there have been dozens of expert
15 reports, where there has been ample due process given.

16 But let me just --

17 THE COURT: Your position is there's ample due
18 process. And Chevron's position, which it details in those 40
19 paragraphs, are the things which have occurred which in its
20 view deprive it of due process.

21 MR. ABADY: Yes, your Honor.

22 THE COURT: Go ahead.

23 MR. ABADY: And under the circumstances of this
24 particular case, those complaints, those concerns, have a
25 specified, agreed-upon, judicially-approved mechanism under
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1 5304 to be resolved. It's not to commence an arbitration at
2 the eleventh hour after seventeen years of litigation after
3 there's been no judgment in Ecuador. It doesn't empower them.
4 Their rights under the treaty do not give them a license to
5 abrogate their clear promises to the parties and to the Court.
6 And what I think governs this dispute, as I was indicating
7 previously, and what directs the Court to a slightly different
8 body of law is the fact that this attempt is being made to
9 adjudicate our claims in a forum where we cannot be present.

10 The second is, is that there is no arbitration
11 agreement between the plaintiffs and Chevron to litigate the
12 environmental claims in the BIT.

13 The third distinguishing factor here is the repeated
14 promises that were made to litigate environmental claims in
15 Ecuador, and the fourth distinguishing feature is that on
16 reliance of that judicially-mandated forum non conveniens
17 dismissal, we have spent 17 years, seven of which in Ecuador,
18 doing this in a particular way, and we are in what should be
19 the final stages of this litigation.

20 What is the import of these distinctions? Let me just
21 suggest to the Court what I believe the import of these

22 distinctions are. It means that all of the charts and all of
23 the graphs that Mr. Mastro brought in and all of the law that
24 he cited and all the arguments he made are irrelevant. They
25 are inapposite. No U.S. Court has ever permitted a party to do

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1 what the defendants are seeking to do here. That is extinguish
2 almost two decades of litigation by referring the matter to an
3 arbitration where the plaintiffs can't be present after they
4 promised that they were going to litigate the case in Ecuador,
5 and the parties have invested almost seven years of litigation
6 in Ecuador. There's no case that stands for that proposition.

7 THE COURT: May I interrupt --

8 MR. ABADY: Let me just finish one point first.

9 THE COURT: No, let me go first.

10 MR. ABADY: I'm sorry.

11 THE COURT: Let's assume -- I have no view on it, but
12 let's assume that the 40 specific allegations of Chevron as to
13 why the lawsuit in which your clients are plaintiffs were
14 conducted in a manner which deprives it of due process. Would
15 that negate the validity of any judgment rendered in the
16 litigation to which your clients are parties?

17 MR. ABADY: I think it would threaten, it would
18 threaten very seriously and provide the defendants an improper
19 opportunity to collaterally attack a judgment that they agreed
20 would be adjudicated and rendered in Ecuador, subject only
21 to --

22 THE COURT: Chevron is saying that the government of
23 Ecuador, which is a party to the case, has acted in an improper
24 fashion, has arrested its lawyers, have made statements which
25 impair the independence and integrity of the Court and so on

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1 and so forth. Yes? I don't understand why anything which
2 Chevron has done or agreed to prior to these events precludes
3 it from invoking its treaty rights.

4 MR. ABADY: I have at least two responses to that.
5 The first one is possibly going to irritate the Court, because
6 I will repeat that there is an express provision that is
7 forward-looking, that anticipates and contemplates the very
8 issues that you are describing. And under the unique
9 circumstances of this Court, in a forum non conveniens
10 dismissal, where the Second Circuit said you cannot dismiss
11 this case unconditionally, they must submit to jurisdiction,
12 and as that issue evolved between the Second Circuit and the
13 district court, there was an express agreement that they would
14 adjudicate these claims in Ecuador subject only to 5304.
15 There's no prejudice to them because 5304 gives them the forum
16 and a venue post judgment to have their discussion and their
17 arguments about each one of those issues.

18 THE COURT: And what is going to happen in the
19 interval of time between the rendition of a judgment,
20 presumably in your client's favor, and proceedings under 5304?
21 What is going to happen?

22 MR. ABADY: First of all, there is no demonstration
23 that there's even any prejudice to Chevron at this point.
24 There's no judgment that has been rendered.

25 THE COURT: Well, wait a minute. Wait a minute. Are
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1 you saying that there would be no adverse consequences to
2 Chevron on the rendition of a judgment for billions and
3 billions of dollars against it? Is that what you're saying?
4 It's a ludicrous position, but is that what you're advancing?

5 MR. ABADY: No, your Honor.

6 THE COURT: Are you willing to stipulate that you will
7 take no efforts to enforce the judgment until Chevron, the
8 arbitration is completed?

9 MR. ABADY: No, your Honor. We would not and cannot
10 do that.

11 THE COURT: Why can you not?

12 MR. ABADY: Because Chevron, the defendants have
13 agreed that those concerns would be --

14 THE COURT: Please answer my question. Are you
15 willing to agree that no efforts will be made to enforce any
16 judgment that you receive in the ongoing litigation unless and
17 until Chevron, proceeding expeditiously, either arbitrates or
18 seeks other relief?

19 MR. ABADY: I don't believe we can make that
20 stipulation, Judge, for the following reason, and I think this
21 gets to the second part of my answer, which is really an
22 examination and an analysis of the claims in the notice of
23 petition. What are they seeking to do in this notice of
24 petition in this arbitration? If it were a matter disconnected
25 to adjudication of the environmental claims in Ecuador, we

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1 would have no process. They're free to have an international
2 BIT arbitration on many issues, but they cannot relitigate
3 after 17 years and after seven years of trial in Ecuador, they
4 can't relitigate those claims. And if you look at the claims
5 in the arbitration, in the notice of arbitration, it becomes
6 clear what this is.

7 THE COURT: I'm saying, I guess probably for the 20th
8 time in the past two days, that I am not determining the
9 validity of all of their claims. I am not determining whether
10 their claims would justify the relief they are seeking. I am
11 not passing on that. I will say again I am focusing on whether
12 there is a single claim which is arbitrable. And that claim is
13 that the government of Ecuador, a party to the treaty, has
14 acted with respect to the lawsuit in such a way which would
15 constitute a deprivation of due process.

16 MR. ABADY: And my answer to you, your Honor, with
17 tremendous and sincere respect is that our view, and I want to
18 look at the claims with you based on the ones that you've
19 raised --

20 THE COURT: I've looked at one claim. Please, don't
21 look at all of the claims. I think there are claims here for
22 relief which I think I categorized as imaginative. Let's
23 assume that at the hearing, at the arbitration, Chevron
24 convinced the tribunal that the allegations contained in
25 paragraphs 25 to 65, or whatever the number is, are all true

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1 and had the consequence of rendering any judgment issued by
2 that Court as being a deprivation of due process.

3 MR. ABADY: A deprivation of due process claim, the
4 complaints about the judiciary that you are referring to, are
5 not arbitrable claims.

6 THE COURT: Because?

7 MR. ABADY: Because there has been an express
8 reservation for litigation of those claims in a particular way,
9 and if you look at the notice of arbitration, there are really
10 two classes of claims. There are claims that go to attempting
11 to extinguish the environment claims in the Lago Agrio case and
12 there are a series of due process claims that you're alluding
13 to, and all of the due process claims relate, your Honor, to
14 the environmental claims.

15 THE COURT: The petition for arbitration. Yes.

16 MR. ABADY: What I suggest to your Honor is an
17 examination of the notice of arbitration and the claims and the
18 relief, which I think should be read together, but the claims
19 themselves divide into two categories; claims that address and
20 attempt to extinguish and litigate the environmental claims of
21 the Lago Agrio/Aguinda case which they are foreclosed from and
22 these allegedly due process claims, which all relate back to
23 issues involving the Lago Agrio litigation.

24 So what are they? They are attempts to achieve a
25 collateral attack on the very litigation that they have

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1 committed to and that the Court has said you must resolve in
2 Ecuador. If you look at the claims in the petition --

3 THE COURT: You've done that. Okay? We're going
4 around.

5 MR. ABADY: Okay. So that is, I think, the answer
6 that is mandated by the particular agreement that was mandated
7 by the Second Circuit and by this Court, and so what I was
8 saying previously, your Honor, was this is a sui generis case.
9 It is a case unlike any other. The fact that it's a sui
10 generis case and that it's unlike any other doesn't mean that
11 there isn't a controlling body of law. But I will point out to
12 the Court that there is one case from this courthouse that is
13 very similar and that is Farmanfarmaian v. Gulf Oil, where
14 Judge Carter of this Court dismissed the case on forum non
15 conveniens grounds with certain representations just as
16 occurred here and Judge Carter said he envisioned, although it
17 didn't happen in that case, if the party that achieved and won
18 the forum non conveniens dismissal made certain representations
19 that were necessary to that forum non conveniens dismissal and
20 then disavowed those representations and tried to extricate
21 itself from what had been agreed to, that that conduct would be
22 worthy of contempt because it's a violation of the agreements
23 and the representations that allow the forum non conveniens
24 dismissal. That is the case that's closest to what's happening
25 here.

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1 There is a controlling body of law, your Honor, that I
2 suggest to you resolves this case. Mr. Mastro issued a
3 challenge yesterday and said can you find one case that
4 supports the relief that the plaintiffs are requesting? I can
5 give you a half dozen and a whole body of Supreme Court
6 jurisprudence and jurisprudence from this Court that entitles
7 us clearly to summary judgment on our claim, and I am referring

8 to the Supreme Court's decisions in AT&T Technologies v. CWA,
9 First Options of Chicago and Howsam v. Dean Witter and the
10 circuit's decision in John Hancock v. Wilson and Smith v.
11 Enron. All those cases collectively stand for four fundamental
12 propositions. They reaffirm four principles that require in
13 our view a granting of summary judgment. Those cases stand for
14 the four propositions of, one, that arbitration agreements --
15 and this gets to the other question that I think you were
16 concerned with yesterday. One, arbitration agreements are a
17 product of contract. Two, that the gateway or threshold
18 question of arbitrability is a judicial determination,
19 undisputed the gateway question of arbitrability is the Court's
20 determination. Third, that the definition of arbitrability is
21 whether, according to the Supreme Court and the Second Circuit,
22 whether the parties have clearly and unmistakably submitted
23 their dispute for arbitration.

24 The language in Howsam which astonishingly is a case
25 they cite in their brief says the question whether the parties

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1 have submitted a dispute to arbitration i.e., of arbitrability
2 is one for judicial determination unless the parties clearly
3 and unmistakably provide otherwise.

4 THE COURT: None of them dealt with treaties, though?

5 MR. ABADY: No.

6 THE COURT: There's been no case in which a Court has
7 stayed a proceeding pursuant to the treaty?

8 MR. ABADY: Not that I'm aware of. And that's why I
9 say this case is sui generis. But this principle, it seems to
10 me, is indisputable and clearly applies. And I would suggest
11 to you that the case you cited yesterday, your Honor, from the
12 First Department, 2009, Zachario v. Manios, is completely
13 consistent. You quoted a portion of the opinion that said,
14 quote, although some relief requested in the arbitration
15 including specific performance and an accounting appears to
16 fall outside the narrow arbitration clause, that alone is not a
17 basis to stay the arbitration. An application for a stay will
18 not be granted even though the relief sought is broader than
19 the arbitrator can grant if the fashioning of the same relief
20 on the issues sought to be arbitrated remains within the
21 arbitrator's power.

22 This is a case where there's an arbitration agreement.
23 There's another paragraph of that decision, your Honor, the
24 first two paragraphs, which say, quote, exactly like the
25 Supreme Court's holdings and exactly like the law in this

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1 circuit, that says whether a dispute is arbitrable is generally
2 an issue for the Court to decide unless the parties have
3 clearly and unmistakably provided otherwise. Here, since the
4 parties' agreement contains a narrow provision, this particular
5 issue has to be reserved for the Court in the first instance.
6 There can be no dispute. There is no arbitration agreement
7 between the plaintiffs and Chevron to have this dispute
8 litigated in the BIT. Under clear Supreme Court case law --

9 THE COURT: The arbitration agreement is between
10 Chevron and Ecuador.

11 MR. ABADY: Exactly. There is no such agreement, and
12 that's why I said the plaintiff's position and the plaintiff's

13 standing and the plaintiff's rights are completely different
14 than the Republic of Ecuador's. We're not the Republic of
15 Ecuador. And what's sui generis about this case, what is a
16 fundamental offense to notions of due process is they are
17 attempting to adjudicate our claims in a proceeding where we
18 can't participate and significantly under Supreme Court
19 precedent in a situation where there's indisputably no
20 agreement. Because it's unmistakable and clear that we did not
21 agree to submit this dispute to arbitration, the Supreme Court
22 requires that the Court make the threshold determination that
23 this is not arbitrable and the language in Howsam says where
24 that exists, where there's a threshold question of
25 arbitrability which is different than all the questions your

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1 Honor was posing yesterday about waiver and other defenses that
2 can be reserved for the arbitration, where there's a threshold
3 question of arbitrability, the Court has to make that
4 determination and it is not permitted to go to arbitration if
5 the parties didn't clearly and unmistakably submit the claim
6 for arbitration. All the cases that have been cited are cases
7 where there's an arbitration agreement between the parties.
8 There is no agreement between the parties. The plaintiffs
9 could never have agreed to --

10 THE COURT: Chevron alleges that the Ecuadorian
11 government and the plaintiffs have acted in concert in the
12 respects spelled out in those paragraphs to which I keep
13 referring.

14 MR. ABADY: And that's why I said, your Honor, I mean,
15 it is offensive for them to so suggest. They say, quote, in
16 their opening, in one of their briefs on this issue that the
17 Republic of Ecuador instigated this litigation. That's an
18 absolute mischaracterization of the facts. The Republic of
19 Ecuador didn't instigate this litigation. This litigation was
20 started in 1993. The Republic of Ecuador filed an amicus brief
21 against the plaintiffs in this action. Is there some symmetry
22 between the relief the Republic is seeking in this proceeding
23 and what we are seeking? Yes. That doesn't mean that we're
24 colluding. That doesn't diminish the extent to which we have a
25 different basis for standing, a different series of claims and

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1 different rights. Our standing and our rights are grounded in
2 well-recognized, clearly-established principles of estoppel.
3 They made representations, the defendants, to the Court and to
4 us, that these claims were going to be litigated under a
5 certain regimen. They are now violating those promises
6 clearly.

7 THE COURT: Based entirely on subsequent events, the
8 events spelled out in those paragraphs.

9 MR. ABADY: Of course. And they foresaw that that was
10 a possibility. It wasn't as if -- these were big boys. These
11 are some of the biggest law firms in the world that are
12 representing them. They all saw this issue coming and they
13 have a specific reservation for exactly this issue.

14 The notice of arbitration, your Honor, I suggest to
15 you is a wolf in sheep's clothing. The sheep's clothing are
16 characterizing this as an international law claim, when in fact
17 what it is is an attempt to extinguish and devour the Lago

18 Agrio litigation. And if you look at both the claims for
19 relief, the ones that you are referring to, and the relief
20 being requested, which is a declaration of no liability, a
21 release from all responsibility for the environmental claims,
22 and if you look at the claims themselves, even the ones that
23 ostensibly sound in due process or are complaints about the
24 Ecuadorian judiciary, they all go back to complaints against
25 the Lago Agrio litigation.

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1 This is the only arbitration, your Honor, just as a
2 point of fact, this is the only arbitration that Chevron is
3 commencing right now and they're claiming because the process
4 in Ecuador is corrupt. For ten years they argued vociferously
5 and ferociously that this was the right forum. They're now
6 citing the CPI, corruption perception index, as an example of
7 why the forum is bad. They're involved with no less than five
8 other countries right now where the CPI is lower than it is in
9 Ecuador, including Chad, Venezuela, Cambodia. They're in all
10 those litigations.

11 This entire arbitration should be appreciated and seen
12 for what it really is. It is a collateral attack on the Lago
13 Agrio litigation, the Aguinda litigation which they committed
14 to resolve in a very specific way. And if you look at the
15 representations that they made during the course of this
16 litigation, it is absolutely, abundantly clear what they were
17 doing, that they knew what they were doing and that they were
18 reserving the concerns and complaints that you're identifying
19 now for 5304.

20 Let me just suggest to the Court that the record is
21 replete with their representations that they, that they are
22 agreeing to 5304 as the vehicle to resolve this. Exhibits 5,
23 15, 7, 6, 8 and 28 all contain representations orally, under
24 oath during hearings, verified interrogatory answers and
25 multiple filings in the courts. Judge Rakoff said in his

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1 opinion at page 539, the agreement to subject these defendants
2 to jurisdiction in Ecuador was unambiguous and in writing. And
3 what I'm suggesting to the Court is they are not subjecting
4 themselves to jurisdiction. They are violating that promise
5 because they are seek to go adjudicate the very same claims
6 that are the subject of this ongoing proceeding in another
7 forum. It's a direct violation. This Court is empowered under
8 Howsam and its progeny to determine the threshold issue of
9 arbitrability and disallow them from disavowing and abrogating
10 the promises that they made to this Court.

11 In order to understand how egregious it is that they
12 could come in here and suggest that they didn't make those
13 representations, you have to look at the actual chronology.
14 The first dismissal in this case was by Judge Rakoff. It was
15 unconditional. The Second Circuit reversed him and said you
16 cannot do this unconditionally. On remand, Texaco, anxious to
17 get the dismissal on forum non conveniens grounds, came in and
18 said we will submit to jurisdiction. The plaintiffs then said
19 we have a concern that you are not going to abide by any
20 judgment rendered in this jurisdiction. We didn't want to be
21 there. They wanted to be there. And Texaco came back in
22 multiple filings in responses to interrogatories and in briefs

23 before the Second Circuit and said we are going to satisfy any
24 judgment subject only to the provisions of 5304.
25 One example, Exhibit 8 --

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1 THE COURT: Which says?
2 MR. ABADY: Which says --
3 THE COURT: They reserved under that, and the first
4 provision of that is the defense that the proceedings which led
5 to the judgment were not in --
6 MR. ABADY: Yes, your Honor. And I think you need to
7 see the specificity with which they made the representation.
8 THE COURT: So that the issue of whether or not the
9 judgment was or not enforceable or was the product of a
10 deprivation of due rights, has been preserved and the question
11 is whether those rights which Chevron specifically reserved can
12 be brought in the arbitration?
13 MR. ABADY: Yes, your Honor. And you framed the
14 question yesterday. I would frame it slightly differently.
15 THE COURT: Yes?
16 MR. ABADY: You framed the question what is the most
17 suitable -- it's not a question of whether Chevron has the
18 right to make these complaints about the Ecuadorian judiciary,
19 it's really a question of what the most suitable forum is. I
20 would suggest respectfully to the court it's not really a
21 question of what is most suitable, it is what is part of the
22 record, what has been mandated as a result of course of
23 dealings here between the district court and the Second Circuit
24 Court of Appeals which issued a decision saying this.
25 And what Texaco said in response, Exhibit 8 to the

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1 Bloom declaration, a filing by Chevron/Texaco, under the
2 heading, Texaco has not decided to contest any possible
3 negative ruling. Plaintiffs misstate Texaco's position on
4 satisfying adverse judgments, if any, that might be entered by
5 courts in Ecuador or approved in plaintiff's favor. They state
6 that Texaco, quote, has decided to contest any possible
7 negative ruling of the Ecuadorian Court. This is not Texaco's
8 position. Rather, Texaco has agreed to satisfy any judgments
9 in plaintiff's favor reserving its rights to contest their
10 validity only in the limited circumstances, only in the limited
11 circumstances permitted by New York's recognition of Foreign
12 Country and Judgments Act.
13 It's a promise and a warrant that was made at least
14 five times in formal interrogatory responses, in filings to the
15 Court, and Mr. Mastro suggested to you yesterday that the Court
16 didn't rely on that. That is an abject misrepresentation.
17 Judge Rakoff in his decision at 142 Supp. 2nd at pages 539 and
18 550 said Texaco has now agreed to submit in writing
19 unambiguously to jurisdiction in Ecuador and in footnote five,
20 on page 550 of his decision, he specifically references
21 appendix 18 which contains Chevron's warranty that they are
22 going to respect any judgment subject only to the provisions
23 and they're going to satisfy any judgment subject only to the
24 provisions.

And then, and then Chevron Texaco submits a brief to
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1 the Second Circuit Court of Appeals and they make the same
2 representation to the Court and they make a reference to
3 specific portions of the record, specifically JA4291 to 5002
4 which again are the agreements where they warrant and represent
5 that they're going to satisfy any judgment subject only to
6 what's available to them in 5304. That is the law of this
7 case. Those are the promises that they made. That is what we
8 relied upon. They're judicially estopped because of
9 representations to the Court.

10 THE COURT: How did you rely on it?

11 MR. ABADY: We relied on it, your Honor, by litigating
12 this case in Ecuador for seven years at a dramatic and extreme
13 cost. The Republic is not a party to that. There are private
14 lawyers out there that have been working seven years on the
15 trial and 17 years in total on this litigation. The idea that
16 it's a sham proceeding is ridiculous.

17 I'll use one demonstrative example. Mr. Mastro had
18 several. Here on the table is a five-volume study that was
19 produced and report that was produced in this litigation for
20 one contaminated site. There are 100 -- there are over 100
21 contaminated sites. And so during the course of a seven-year
22 trial there are 100 sites, over 100 sites with that level of
23 detail, that quantum of evidence that has been produced. That
24 is what they are seeking to avoid by launching this BIT
25 arbitration which I again emphasize to the Court is a wolf in

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1 sheep's clothing.

2 If you look at the actual arbitration, it is not an
3 adjudication or an attempt to adjudicate international claims.
4 Everything is related to the Lago Agrio case. Even the due
5 process claims all get back to complaints about things that
6 happened during this proceeding. This Court must, I believe,
7 under Howsam enforce the promises that were made. They are
8 judicially estopped, they are equitably estopped and they are
9 collaterally estopped because they're now seeking on collateral
10 estoppel avoid their agreement to subject themselves to
11 jurisdiction on this dispute.

12 THE COURT: I think I understand your position.
13 Anything further?

14 MR. ABADY: Thank you for hearing me, your Honor. The
15 only thing I would say in closing is that in addition to the
16 legal arguments, I do think we should be mindful of the human
17 dimension behind this case. This is a 17-year litigation with
18 people who have been dramatically affected. They are entitled
19 not just to their day in court, their weeks in court, they are
20 entitled to some final resolution. Chevron and the defendants
21 are not entitled at this point to go back on the promises that
22 they made and delay this litigation forever.

23 THE COURT: Thank you.

24 MR. MASTRO: Your Honor, I promise to be
25 uncharacteristically brief, if you'll just give me five

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1 minutes, your Honor.

2 THE COURT: Five minutes. I'm looking at the clock.
3 You have five minutes.

4 MR. MASTRO: Your Honor, I want to follow up,
5 Mr. Abady got very impassioned said some things about me. I'm
6 not going to respond to those, your Honor. But I am going to
7 say there is a human dynamic here, your Honor, a very real one,
8 including for the Chevron attorneys who are facing bogus
9 criminal charges because of what the Republic of Ecuador is
10 doing right now.

11 Your Honor, let me put this in some perspective,
12 because we heard both Mr. Abady just say and then we heard
13 yesterday the Republic of Ecuador's lawyers say as if speaking
14 off the same script that this is an attempt to relitigate the
15 environmental case. Your Honor knows better. And I know it
16 gets confusing sometimes with these counsel. Mr. Abady was
17 last here in the 1990s before Judge Rakoff representing the
18 Republic of Ecuador, not these individual plaintiffs. But,
19 your Honor, we're not seeking to relitigate the environmental
20 case. Our clients are seeking to arbitrate their rights under
21 international law against the Republic of Ecuador to ensure due
22 process and fair treatment, because of the acts of the Republic
23 of Ecuador most recently that have denied them their treaty
24 rights and the other commitments that the Republic of Ecuador
25 made. And, your Honor, therefore, what comes out of this, what

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1 comes out of this is yes, they've litigated, those individuals,
2 their environmental claims. But as your Honor knows, there are
3 sweeping releases and indemnifications that the Republic of
4 Ecuador gave to TexPet and Texaco in '95 and '98 after TexPet
5 actually spent millions to remediate. And, your Honor, that's
6 at the core of what's going on here.

7 We are holding the Republic of Ecuador to its
8 obligations, its obligations to take responsibility for what
9 happened there, its obligations to live up to its past
10 agreements, it's obligations to indemnity and just as
11 importantly its obligations to remediate.

12 THE COURT: I have to interrupt you to emphasize
13 again. I am not looking to issues relating to the contractual
14 obligations of Ecuador. It will be, assuming that the stay is
15 denied, it will be an issue which the arbitrability of which
16 will be determined by the tribunal itself, assuming a stay is
17 denied.

18 MR. MASTRO: Understood, your Honor, understood. I
19 just wanted to make the point, your Honor, that our clients are
20 actually here trying to hold the Republic of Ecuador
21 responsible for not only ultimately that they are going to be
22 responsible to pay for any judgment, but also to remediate. I
23 would have expected the plaintiffs to be here supporting us
24 because we're actually here seeking to make sure that there
25 will be payment by the Republic of Ecuador, that there will be

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1 remediation finally by the Republic of Ecuador. I'm surprised
2 that they come in here attacking our clients when the fact of
3 the matter is, they should be suing the Republic of Ecuador.
4 That's the party that's run the consortium for the past few
5 decades. That's the one that's made \$70 billion off those
6 drilling activities. Yet for some reason those plaintiffs
7 won't go near the Republic.

8 This is exactly why, your Honor, all these questions

9 should be going to arbitration. Howsam is right on point.
10 Howsam says that all of these procedural defenses are to go to
11 the arbitrators to decide, especially when the parties under an
12 international treaty chose the UNCITRAL rules to do that.

13 Finally, your Honor, the notion that Texaco somehow
14 would have waived the implicit due process protections in the
15 future and could only litigate under 5304 in the future for
16 enforcement, your Honor, it makes an absurdity of that.
17 Because, your Honor, as your Honor knows, it's Hornbook law
18 that under the restatement of conflicts and under the
19 restatement of foreign judgments, and I will give your Honor
20 the cites, they'll go anywhere in the world they want to --
21 enforce, and wherever they go, when they seek to enforce that
22 multibillion dollar judgment and as one of their attorneys has
23 been quoted in the press as saying wreak havoc on Chevron, the
24 law of the forum where they go is going to control the
25 enforcement. It's not going to be respect of some alleged

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1 promise made in the past. The forum state's laws control.
2 Your Honor, that is exactly why this is a red herring issue.
3 It's a red herring issue because the fact of the matter is no
4 one was waiving their implicit due process rights in the
5 future, and that's why we need the arbitration, your Honor,
6 because we need a neutral and fair forum. And I thank your
7 Honor for all of the consideration.

8 THE COURT: Anything further?

9 Mr. MITCHELL: Your Honor, may I have five minutes,
10 and you can clock me.

11 THE COURT: Yes. I'm looking at the clock.

12 Mr. MITCHELL: One of your Honor's questions has been
13 are we trying to indicate a preference for seeking a 5304
14 versus an arbitration as if it's a choice between the two of
15 them and we've responded no, we're not seeking a choice, we're
16 trying to enforce the only one that's operable. A hard
17 question that you could ask the Chevron attorneys, and you've
18 asked a share of good hard ones for us, which we actually
19 appreciate, is are they trying to use both. If they invoke
20 arbitration under the treaty, are they now saying okay, we'll
21 give up our 5304 opportunity, because we agree with the judge,
22 it was just a question of which one of these two. We'll give
23 up that opportunity. If your Honor asks them that question, I
24 will make a bet in open court that they will not say oh, yes,
25 we're willing to give up Section 5304 defense. One point.

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1 Secondly, it's come out time and time again the true
2 nature, we talked about it yesterday, remedies and I'm not
3 going to go into that again. Chevron is no longer an investor
4 in Ecuador. It no longer has any business in Ecuador. It's
5 defending a lawsuit, but it has no business. It now brings an
6 action and tries to bring an action to arbitration to clean up
7 the Ecuadorian judiciary. Are they some good government group?

8 THE COURT: I think your five minutes is up.

9 Mr. MITCHELL: Okay. Thank you, your Honor.

10 THE COURT: The Court will take a ten-minute recess.

11 MR. MASTRO: Thank you, your Honor.
12 (Recess).

13 THE COURT: Be seated. The Court is about to render

14 its judgment and order on the various motions that are pending
15 before it. I want to state at the outset that I would
16 appreciate it if a transcript of yesterday and today could be
17 completed as soon as possible, and I direct that a copy of the
18 hearing and the order and judgment which I'm about to render be
19 sent to the arbitrators, because it is very important that
20 there be a clear understanding of what I am deciding and what I
21 am not deciding, leaving various matters for determination by
22 the tribunal.

23 As background, Chevron and Texaco, hereinafter
24 referred to as Chevron, has commenced an arbitration proceeding
25 before a tribunal pursuant to the treaty between the United

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1 States and Ecuador. Ecuador has filed a motion to stay the
2 arbitration and Chevron has moved to dismiss that motion. The
3 three judges to hear the arbitration have been designated and
4 the parties have designated their representatives before the
5 arbitration panel.

6 We assume that this Court has a power to grant a stay,
7 recognizing that there is a split between the judges of this
8 Court whether it has the power to stay an arbitration event.
9 Judge Scheindlin in *Ghassavin v. Hemation*, 2008 WL 3982885,
10 (S.D.N.Y. 2009), has held that there is no federal authority to
11 stay an arbitration. Judge Preska, writing in *Oppenheimer &*
12 *Company, Inc. v. Deutsche Bank AG*, 2009 WL 4884158, (S.D.N.Y.
13 2008) has expressed the view that Judge Scheindlin's case is
14 an, quote, "outlier," close quote.

15 As I have said, the Court will assume for purposes of
16 this argument that the Court has the power to stay an
17 arbitration under certain circumstances. Numerous cases have
18 held that there's a strong presumption in favor of arbitration.
19 We believe that this is particularly true where the arbitration
20 is pursuant to an international treaty, here a treaty between
21 Ecuador and the United States. The explicitly stated purposes
22 of the treaty were to encourage investment by Americans in
23 Ecuador and Ecuadorians in the United States by assuring
24 investors that an independent, neutral tribunal exists to
25 arbitrate claims here that Ecuador is seeking to impose

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1 liability unlawfully. It is Chevron's claims that this is what
2 Ecuador is now in the process of doing. Thus a motion to a
3 stay here strikes at the core purpose of the treaty between
4 Ecuador and the United States.

5 Turning, then, to the merits of this particular
6 motion, and assuming, as I've said, without deciding that I do
7 have authority under New York law to stay arbitration, even
8 assuming that authority, New York law dictates that, quote, "A
9 Court will not stay arbitration ... unless the entire
10 controversy is non-arbitrable. If there is at least one
11 arbitrable issue, arbitration should proceed." The quote is
12 from *National Grains Mutual Insurance Co. v. Vitebskaya*, 1
13 Misc.3d 774, 776, N.Y.S.2d 220 (N.Y. Sup. 2003).

14 The New York Court of Appeals has held that, quote,
15 "An application for a stay will not be granted ... even though
16 the relief sought is broader than the arbitrator can grant, if
17 the fashioning of some relief on the issues sought to be
18 arbitrated remains within the arbitrator's power." Silverman

19 v. Benmor Coats, Inc., 61 N.Y.2d 299, 309, 473 N.Y.S.2d 774,
20 461 N.E.2d 1261 (1984).

21 Without passing on the merits of all the waiver and
22 estoppel arguments put forward, the Court finds that there is
23 at least one arbitrable issue presented in Chevron's BIT
24 arbitration petition. Some of the claims in the petition were
25 neither waived through litigation nor could have been waived

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1 through any representation made to this Court. Examples
2 include Chevron's claim that two Chevron lawyers were
3 inappropriately criminally indicted and sanctioned, which
4 appears at paragraphs 50 and 56 of the petition, and Chevron's
5 claims this entitles it to, quote, "moral damages," close
6 quote, as a result of President Correa and the Ecuadorian
7 government's public campaign against Chevron and its attorneys.

8 The petition contains at paragraphs 2 through 65 the
9 specific grounds asserted by Chevron why a judgment rendered
10 against it pursuant to the litigation now pending in the
11 Ecuadorian Court would not be one rendered in accordance with
12 due process. Accordingly, a stay of arbitration is
13 inappropriate and is hereby denied, and it is for the
14 arbitrable panel to decide which claims are properly before it
15 and which claims for relief are properly before it.

16 I emphasize, although I've said it repeatedly, that I
17 am returning only the arbitrability of the due process claim,
18 and I am expressing no opinion with respect to any other claim
19 or with respect to any claim for relief. Those matters are for
20 the arbitrators.

21 There are also significant issues that have been
22 raised concerning the timing of proceedings before the
23 arbitrators, specifically, whether the arbitration can commence
24 prior to the rendering of a decision in the suit now pending,
25 and that is one of the many, many issues for the arbitration

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1 panel to determine, giving consideration to the interests of
2 the parties in matters of timing, which seems to be a great
3 concern.

4 The motion for a stay -- the motion to dismiss the
5 motion for a stay is granted. I deny as well the application
6 made by Ecuador for summary judgment, and the application for a
7 preliminary injunction. The motion by the -- pronounce the
8 name for me, of the plaintiffs?

9 MR. ABADY: Yaiguaje.

10 THE COURT: Yaiguaje plaintiffs motion for summary
11 judgment is denied. Plaintiffs has advised the Court that they
12 have no interest in having their views made known to the
13 arbitration panel either by intervening or appearing as an
14 amicus, or any other way having their views known, but their
15 views are fully stated in the transcript of the proceedings
16 this morning, a copy of which I've directed be furnished to the
17 arbitration panel.

18 with respect to the proceedings for discovery in, is
19 it Georgia? what state is that in?

20 MR. BLOOM: Denver and Georgia.

21 THE COURT: In Georgia. The judge who issued the
22 subpoena provided in his order ample opportunities for the
23 parties to object and so there is no need for this Court to

24 Sand Hearing Transcript.txt
25 issue any stay. And the Court so orders.
Anything further?
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1 MR. MASTRO: Your Honor, just one point of
2 clarification. We had also moved to dismiss the Yaiguaje
3 plaintiffs' complaint. Your Honor addressed the denial of
4 their summary judgment motion.
5 THE COURT: Yes.
6 MR. MASTRO: But I just wanted to make sure the record
7 was clear on your Honor's ruling on our motion to also dismiss
8 the Yaiguaje plaintiffs' complaint.
9 THE COURT: Yes, it's granted.
10 MR. MASTRO: Thank you, your Honor.
11 THE COURT: Thank you all.
12 (Adjourned)
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