10-1020-CV(L)

10-1026(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPUBLIC OF ECUADOR,
Petitioner-Appellant,
v.
CHEVRON CORP. et al.,
Defendants-Appellees.

DANIEL CARLOS LUSITAND YAIGUAJE et al.
Plaintiffs-Appellants,
v.
CHEVRON CORP. et al.,
Defendants-Appellees.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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July 1, 2010

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Second Circuit Rule 29.1, the Chamber of Commerce of the United States ("Chamber") hereby respectfully moves for leave to file its *amicus curiae* brief in support of Appellees and affirmance of the district court's dismissal of the consolidated cases in which Appellants Ecuador and the Yaiguaji plaintiffs sought to enjoin an arbitration commenced by Appellees Chevron Corporation ("Chevron") Texaco Petroleum Company ("TexPet") pursuant to the Bilateral Investment Treaty between the United States and Ecuador. The Chamber's counsel has been advised by Appellees' counsel that Chevron and TexPet consent to the filing of this *amicus* brief. The Chamber's counsel has been advised by Appellants' counsel that Ecuador and the Yaiguiaji plaintiffs do not consent to the filing of this *amicus* brief.

As the world's largest business federation, the Chamber and its network of over 100 American Chambers of Commerce abroad have many members who export and import goods and services and have ongoing investment activities in foreign countries. The Chamber is also a strong supporter of the United States Bilateral Investment Treaty program under which the United States government negotiates treaties that require other nations to protect United States investments

and give United States investors the right to submit investment disputes arising under the treaty to international arbitration. The treaties serve the United States foreign and economic policy goals of protecting United States foreign investments and encouraging foreign countries to develop market-oriented policies that treat private investment in an open, transparent, and non-discriminatory way.

Access to binding arbitration is one of the most fundamental protections provided by a bilateral investment treaty, because it gives United States investors the assurance of a fair and impartial tribunal to adjudicate any investment disputes that may arise with the foreign state under the treaty. In some countries where local judiciaries are at times slow, ineffective, or even corrupt, United States companies have benefitted significantly from the recourse to investor-state arbitration.

For these reasons, the Chamber and its members have a strong interest in ensuring that United States courts enforce the provisions of bilateral investment treaties that give United States investors the right to compel arbitration of investment disputes with foreign states. The Chamber has an equally strong interest in the outcome of this litigation. The district court rightfully refused the request of Ecuador and the Yaiguaji plaintiffs to stay the arbitration of the dispute between Chevron and Ecuador arising under the United States-Ecuador Bilateral Investment Treaty.

The Chamber's *amicus* brief supports the district court's decision to dismiss the lawsuit by providing useful and relevant information not contained in the parties' briefs, such as the purpose of the United States Bilateral Investment Treaty program and the critical role access to binding arbitration plays in protecting United States investors and ensuring that foreign states honor the obligations they assume in investment treaties with the United States. The Chamber's *amicus* brief also discusses the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and explains why that Convention informs the interpretation of the Federal Arbitration Act. Finally, the *amicus* brief demonstrates how acceptance of Ecuador's extraordinary request for relief from its treaty obligation to arbitrate a dispute with United States investors would undermine United States foreign policy objectives and damage the legal framework for international investment established by United States bilateral investment treaties.

For the foregoing reasons, the motion for leave to file an amicus brief should be granted.

Dated: July 1, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kathleen M. Mueller, certify that on July 1, 2010, a PDF copy by email, and two hard copies by first class mail, of the foregoing Motion for Leave to File an *Amicus Curiae* Brief was served on the following counsel:

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July 1, 2010

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) submits this brief as *amicus curiae* in support of Appellees Chevron Corporation and Texaco Petroleum Company (TexPet).[1]

The Chamber is the world's largest business federation. The Chamber represents more than 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

This is such a case. The Chamber and its network of over 100 American Chambers of Commerce abroad have many members who export and import goods and services and have ongoing investment activities in foreign countries.

The Chamber is a strong supporter of the United States Bilateral Investment Treaties (BIT) program under which the United States government negotiates

[1] Pursuant to Local Rule 29.1, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

treaties that require other nations to protect United States investments and to treat United States investments in an open, transparent and nondiscriminatory way. A bilateral investment treaty also gives United States investors the right to submit investment disputes that arise under the treaty to international arbitration. Access to binding arbitration is perhaps the most fundamental protection provided by a bilateral investment treaty, because it gives United States investors the assurance of a fair and impartial tribunal to adjudicate any investment disputes that may arise with the foreign state under the treaty. In countries where local judiciaries are at times slow, ineffective, or even corrupt, United States companies have benefitted significantly from recourse to investor-state arbitration.

For these reasons, the Chamber and its members have a vital interest in having this court affirm the district court's order refusing to stay the arbitration proceeding involving Chevron and Ecuador and hold more broadly that a federal court may not enjoin any arbitration proceeding commenced by a United States company alleging that a foreign state violated the investor protections of a bilateral investment treaty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Foreign investment abhors uncertainty, instability, and corruption and goes where investors believe they are likely to obtain a return on their investment. Unfortunately, investment in many foreign countries often entails uncertainty and

risk. To be sure, some measure of risk is inherent in investment, but excessive risk generated by the possibility of discriminatory or unfair treatment by a foreign government will drive capital away. This adversely affects United States companies who are denied investment opportunities and access to growing consumer markets in developing countries. It also adversely affects the foreign countries, which must pay a premium to obtain capital investment, if they can obtain it at all.

To protect United States investments abroad and encourage foreign states to adopt market-oriented policies that respect private investment, the United States has entered into bilateral investment treaties with 40 countries, including Ecuador. The treaties provide United States investors with investment protections, and allow United States investors to resolve investment disputes with host nations through binding arbitration before a fair and impartial tribunal. Tens of billions of dollars in United States capital have been invested in developing countries as a consequence of these treaties and the important protections they provide.

Having entered a Bilateral Investment Treaty with the United States to obtain the benefits of United States investment, Ecuador now asks the federal courts for relief from its obligation to arbitrate an investment dispute with two United States companies who allege that Ecuador failed to accord their investment the protection guaranteed by the Treaty. The district court declined to grant this

extraordinary relief, and this court should as well. Any action by a United States court to impede access to arbitration under a United States bilateral investment treaty would not only deprive United States investors of important treaty protections, but also could invite similar attempts by foreign states to impede access to arbitration under United States bilateral investment treaties. This would undermine the ability of United States bilateral investment treaties to serve their intended purpose of protecting United States investors and encouraging foreign countries to development market-oriented policies that treat private investment in an open, transparent and non-discriminatory way.

Federal courts have no such authority to disregard United States treaty obligations and undermine United States foreign policy interests. The injunction Ecuador seeks is not permitted by the Federal Arbitration Act and would contravene the United States' obligations under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is also incompatible with the "emphatic federal policy in favor of arbitral dispute resolution" 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). The district court's refusal to stay the arbitration of the dispute between Chevron and Ecuador under the United States-Ecuador Bilateral Investment Treaty should therefore be affirmed.

ARGUMENT

I. The Provisions of Bilateral Investment Treaties Must Be Enforceable Without Judicial Interference or the Goals of Protecting and Encouraging United States Investment in Foreign Countries Will Be Undermined.

A. Access to an Impartial Arbitral Forum Is Central to the Success of the Bilateral Investment Treaty Regime.

In the twenty-first century, goods, services, and investment capital move across national borders as never before. Last year, the United States imported over $1.9 trillion in goods and services, while its exports totaled approximately $1.57 trillion.[2] In 2008, United States investors owned almost $19,888 billion in foreign assets, while foreign investors owned approximately $23.35 billion in United States assets.[3]

To protect these foreign investments and to promote United States exports, the United States government has negotiated, and is continuing to negotiate, bilateral investment treaties with other countries. The government's goal is to protect United States investment abroad, to encourage other countries to adopt

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[2] Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, U.S. International Trade in Goods and Services Annual Revision for 2009, at 1 exh.1 (June 10, 2010), http://www.bea.gov/newsreleases/international/trade/2010/pdf/trad1310.pdf.

[3] Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, U.S. Net International Investment Position at Yearend 2008 (June 26, 200), http://www.bea.gov/newsreleases/international/intinv/2009/intinv08.htm.

market-oriented policies that treat private investment in "an open, transparent, and non-discriminatory way," and to support the "development of international law standards consistent with these objectives." Office of the U.S. Trade Representative, Bilateral Investment Treaties, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (last viewed June 30, 2101).

There are currently bilateral investment treaties in force between the United States and 40 countries, including Ecuador.[4] Although the treaties are not identical, they generally provide United States companies or nationals investing or planning to invest in one of these countries with several protections, including:

- A requirement that the host country treat United States investors and their covered investments as favorably as it treats its own investors and investments or investors and investments from other countries;
- Clear limits on the expropriation of investments and provisions for payment of compensation when expropriation takes place; and
- The right to submit an investment dispute with the government of the host country to international arbitration.

Id.

The right to submit investment disputes to international arbitration is critical to the fulfillment of the BIT's objectives. By providing a timely recourse to an impartial tribunal, the arbitration provisions transform BITs from "mere political

[4] Trade Compliance Ctr., Bilateral Investment Treaties, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last viewed June 30, 2010).

declarations (albeit with some implications on the diplomatic level)" to a "set of rules enforceable against states." C. Brower & S. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 Chi. J. Int'l L. 471, 477 (2009). This set of enforceable rules gives United States investors increased assurance that the foreign sovereign will abide by its treaty promises to treat them fairly and not expropriate their property without compensation. The increased certainty "reduces the political risk of foreign investment, lowers the risk premium connected to it, and therefore makes investment projects more cost-efficient." *Id.* The beneficiaries are not only the United States investors who have expanded investment opportunities abroad, but also the foreign state which is able to obtain capital, products and services it might not otherwise have and at lower costs. *Id.*

Access to an impartial arbitral forum is necessary to the enforcement of the Bilateral Investment Treaty regime, because international arbitrators perform a role that the courts of the treaty states are not well-positioned to fill. "The problem with most state courts is that they are not – or at least are not perceived to be – sufficiently neutral in resolving disputes between foreign investors and host states." *Id*. at 479. Some developing countries do not have independent courts that decide cases in accordance with pre-established rules of law, while courts in other countries may be slow, ineffective, or even corrupt. *Id.*; *see also*, *e.g.*, *Osorio* v. *Dole Food Co.*, 665 F. Supp. 2d 1307, 1351 (S.D. Fla. 2009) (declining to enforce

judgment against United States corporations rendered by a Nicaraguan court that did not comport with "the international concept of due process," arose from "proceedings that the Nicaraguan trial court did not have jurisdiction to conduct," and "applied a law that unfairly discriminates against a handful of foreign defendants"). Any effort to impede recourse to arbitration thus directly undermines these treaties and reduces the utility to the United States of the expenditure of diplomatic resources to negotiate them.

B. In the Bilateral Investment Treaty with the United States, Ecuador Agreed To Protect United States Investments and Arbitrate Investment Disputes Arising Under the Treaty.

Ecuador entered the Bilateral Investment Treaty with the United States for the same reason the other 39 countries have, viz., to obtain the benefits of international investment. Ecuador recognized that its Treaty-based promises to protect United States investment "will stimulate the flow of private capital" and that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment." Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Preamble (Aug. 27, 1993), *available at* www.state.gov/documents/organization/43558.pdf. Ecuador therefore agreed,

among other things, that United States "investment"[5] shall "be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." *Id.* Art. II(3)(a). Ecuador also agreed to "observe any obligation it may have entered into with regard to investments" (*id.* Art. II(3)(c)), and to "provide effective means of asserting claims and enforcing rights with respect to investment [and] investment agreements" (*id.* Art. II(7)).

Ecuador further agreed that in "the event of an investment dispute" under the Treaty, a United States national or company may choose to submit the dispute for resolution through one of several mechanisms, including "binding arbitration" in "accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." *Id.*, Art. VI(2), VI(3)(iii). By entering into the Treaty, Ecuador consented in advance to such "binding arbitration" at the behest of a United States national or company, *id.* Art. VI(4), and agreed that its consent in the Treaty would constitute an "'agreement in writing' for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *id.*, Art. VI(4).

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[5] "'[I]nvestment'" is broadly defined to include "every kind of investment," such as "equity, debt, and service and investment contracts," and includes, "tangible and intangible property," a "company or shares of stock or other interests," a "claim to money," "intellectual property," and "any right conferred by law or contract." United States-Ecuador BIT, Art. I(a).

Having agreed to submit investment disputes under the Treaty to binding arbitration when requested by a United States investor, Ecuador now asks this court to relieve it of its treaty obligation. Claiming that arbitrating Chevron and TexPet's treaty claims will impose "unnecessary costs" and place "'an unwarranted strain'" on its sovereign right to govern (Ecuador Br. at 55), Ecuador asks this court to enjoin the arbitration that is central to the agreement between Ecuador and the United States. Ecuador is not entitled to this extraordinary relief.

II. The Federal Arbitration Act Does Not Authorize a Federal Court to Enjoin an International Arbitration Initiated under a Bilateral Investment Treaty.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force* Dec. 29, 1970, 21 U.S.T. 2517, requires the United States to recognize foreign arbitration agreements (*id*. II.1) and mandates that United States courts, when faced with a case involving a matter the parties have agreed to submit to arbitration, "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. The Federal Arbitration Act (FAA) provisions enacted by Congress to implement the Convention similarly grant district courts the power to "direct that arbitration be held in accordance with the agreement," 9 U.S.C. § 206, and to confirm arbitral awards, *id.* § 207. But nothing in the Convention or the FAA grants federal courts

the authority to *enjoin* international arbitrations commenced under a valid agreement, such as the United States-Ecuador BIT at issue here.

As Chevron and TexPet explain (Br. at 39), under traditional canons of statutory construction, a court should not infer additional remedies beyond those Congress expressly provided in the FAA. As addressed below, the concerns underlying those canons apply with even more force in this case, where one party seeks to avoid obligations it voluntarily assumed in a treaty with the United States, and the statute on which that party relies was enacted to implement the United States' independent treaty obligation to recognize and enforce international arbitration agreements.

A. The Federal Arbitration Act Does Not Allow Ecuador to Avoid Its Obligation to Arbitrate Disputes Arising Under its Bilateral Investment Treaty with the United States.

Chevron and TexPet initiated an arbitration under the United States-Ecuador BIT alleging that Ecuador violated the Treaty by (1) failing to honor a series of agreements limiting the companies' environmental liability for prior oil drilling activity, and (2) denying fair treatment and due process in the *Lago Agrio* litigation in Ecuador that seeks to impose additional environmental liability on the companies. *See* Chevron Br. at 18-20. These claims fall squarely within the Treaty's arbitration clause, which defines an "investment dispute" to include, among other things:

> a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; . . . or (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment.

United States-Ecuador BIT, Art. VI(1). In entering the Treaty, Ecuador specifically consented to submit such "investment dispute" to binding arbitration at the request of a United States investor covered under the Treaty. *Id.*, Art. VI(4).

The United States-Ecuador BIT, like all treaties, is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. When a treaty "affect[s] the rights of parties litigating in court," it "as much binds those rights and is as much to be regarded by the court as an act of congress." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

In an attempt to avoid its obligation to arbitrate under the Treaty, Ecuador asks the court to recast Chevron and TexPet's treaty claims as defenses to the *Lago Agrio* plaintiffs' tort and environmental claims arising under Ecuadoran law that Chevron chose to litigate in the courts of Ecuador. *See* Ecuador Br. at 26-33. The court should not permit Ecuador to avoid its treaty obligations with this sleight of hand.

Chevron and TexPet's treaty claims are distinct from the claims and defenses in the *Lago Agrio* litigation because the BIT confers legal protections on United States investments in Ecuador that are in *addition to, and independent of,*

the protections provided under the domestic laws of Ecuador and the United States. Indeed, the United States and foreign states enter into such treaties for the specific purpose of providing additional legal protections and "a more open and secure environment for investment" than may exist under the legal systems of the treaty states, including Ecuador. Trade Compliance Ctr., Bilateral Investment Treaties, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_002631.asp (last viewed June 30, 2010); *see also supra* at 5-8.

According to the United States Department of State, the investment climate in Ecuador has become "increasingly uncertain." Bureau of Econ., Energy & Bus. Affairs, U.S. Dep't of State, 2010 Investment Climate Statement – Ecuador (Mar. 2010), http://state.gov/e/eeb/rls/othr/ics/2010/138060.htm. United States companies doing business in Ecuador face "legal complexity resulting from the inconsistent application and interpretation of its existing investment laws," which "complicates enforcement of contracts and increases the risk of doing business in Ecuador." *Id.* Moreover, government officials "have used regulatory schemes and questionable legal maneuvers to affect foreign company operations in the country," and business disputes with United States companies have "become politicized, especially in sensitive areas such as the energy sector." *Id.* Thus, the independent legal protections afforded by the United States-Ecuador BIT are particularly important to United States companies investing in Ecuador.

Of course, the mere fact that the BIT treaty protections are independent of Ecuador law does not mean that the *Lago Agrio* litigation in Ecuador is irrelevant to Chevron and TexPet's treaty claims. The conduct of Ecuador and Chevron in that litigation may be relevant to questions such as whether Ecuador has complied with its treaty obligations to "accord fair and equitable treatment" to Chevron's investments (United States-Ecuador BIT, Art. II.3(a)), to "observe any obligation it may have entered into with regard to investments" (*id*. II.3(c)), and to "provide effective means of asserting claims and enforcing rights with respect to . . . investment agreements" (*id*. II.7). But under the express terms of the Treaty, questions about the merits of Chevron's claims and Ecuador's defenses are to be resolved by the arbitrators, not the United States courts. *See*, *e.g.*, *id.*, Art. VI (Ecuador consents to resolve investment disputes, including alleged violations of rights conferred by the Treaty, to arbitration in accordance with UNCITRAL arbitration rules); U.N. Comm'n on Int'l Trade Law, *UNCITRAL Arbitration Rules*, Art. 19 (allowing respondent to raise defenses to the arbitration claims) & *id.*, Art. 21 (granting arbitral tribunal "the power to rule on objections that it has no jurisdiction").

B. The Federal Arbitration Act Does Not Authorize Courts to Issue Injunctions Undermining the Terms of United States International Agreements.

The FAA does not authorize courts to undermine the benefits of the United States-Ecuador BIT by enjoining a pending arbitration proceeding based on the court's evaluation of Ecuador's estoppel or waiver arguments under the laws of Ecuador or the United States. Enjoining arbitration on those grounds would arrogate to the federal courts the authority to resolve treaty claims or defenses that are committed to arbitration under the United States-Ecuador BIT and would violate the United States' obligations under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That Convention requires the United States to

> 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.

U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Award, Art. II.1, *entered into force*, Dec. 29, 1970, 21 U.S.T. 2517. When a United States court is faced with an action raising a matter that the parties have agreed to submit to international arbitration, its role under the Convention is severely limited. The court "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.

The limited role of the courts under the Convention should inform the interpretation of chapter 2 of the FAA, which Congress enacted to implement the Convention in United States courts. 9 U.S.C. § 201. As noted above, these FAA statutory provisions give courts the authority to compel arbitration, *id.* § 206, and confirm arbitral awards, *id.* § 207, but they do not grant any authority to enjoin international arbitrations. That is not surprising given that the Convention and implementing FAA provisions reflect the "emphatic federal policy in favor of arbitral dispute resolution" that applies "with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631. Under that policy, issues of arbitrability are resolved in favor of arbitration to ensure that courts do not undermine the benefits of arbitration. *Id.* at 626.

Ecuador's attempt to enjoin an arbitration commenced under the United States-Ecuador BIT is therefore incompatible with the federal policy reflected in the FAA and the Convention. For that reason, Ecuador's reliance on the All Writs Act is equally misplaced. As Chevron and TexPet fully and correctly explain (Br. at 37-40), the All Writs Act does not apply when the relief requested is governed by a specific statutory scheme like the FAA. The All Writs Act is only a "residual source of authority to issue writs that are not otherwise covered by statute. Where a

statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985).

Thus, the All Writs Act provides no authority for a court to enjoin an arbitration commenced under a United States treaty such as the United States-Ecuador BIT at issue here. "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (interpreting the Carriage of Goods by Sea Act not to nullify foreign arbitration clauses in maritime bills of lading to avoid conflict with Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Whether contained in an agreement between private parties or a treaty executed by sovereign states, a "provision specifying in advance the forum in which disputes shall be litigated and the law to be applied" is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). The refusal of the United States courts to enforce such arbitration agreements not only frustrates these purposes, but also invites

"unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" in the courts of different countries. *Id.* at 516-17. This can lead to a "legal no-man's land" that "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517.

The United States Bilateral Investment Treaty program is specifically designed to remedy these problems in international law and commerce. The United States government negotiates BITs to give United States investors the security of knowing their foreign investments will be protected under the rules specified in the Treaty and any investment disputes arising under the Treaty will be subject to arbitration before a fair and impartial tribunal. *See supra* at 5-8. If United States courts do not enforce the Treaty's arbitration provisions, it may be seen as an invitation to the courts of foreign states to do likewise. Plainly, this would undermine the ability of United States bilateral investment treaties to serve their intended purpose of protecting United States investors and encouraging foreign countries to develop market-oriented policies that treat private investment in an open, transparent and non-discriminatory way. Accordingly, this court should hold Ecuador to the obligations it assumed in the Bilateral Investment Treaty with the United States.

CONCLUSION

The district court's refusal to enjoin the arbitration initiated by Chevron and TexPet under the Treaty should be affirmed.

Dated: July 1, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief of *Amicus Curiae* in Support of Defendants-Appellees complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 4,084 words.

/s/ Carter G/ Phillips
Carter G. Phillips

July 1, 2010

STATEMENT OF PARTIES' CONSENT TO FILING OF BRIEF

Amicus Curiae file this brief supporting Defendants-Appellees with the consent of the Defendants-Appellees, but without the consent of the Petitioner-Appellant and the Plaintiff-Appellants.

/s/ Carter G. Phillips
Carter G. Phillips

July 1, 2010

ANTI-VIRUS CERTIFICATION

Case Name: Republic of Ecuador v. Chevron Corp. et al.

Docket Number: 10-1020-cv(L)

I, Kathleen M. Mueller, hereby certify that the Brief of *Amicus Curiae* in Support of Defendants-Appellees submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case was scanned using McAfee v. 8.5i, Virus Scan Enterprise 8.5.0i and found to be VIRUS FREE.

/s/ Kathleen M. Mueller
Kathleen M. Mueller

July 1, 2010

CERTIFICATE OF SERVICE

I, Kathleen M. Mueller, certify that on July 1, 2010, a PDF copy by email, and two hard copies by first class mail, of the foregoing Brief of *Amicus Curiae* in Support of Defendant-Appellees was served on the following counsel:

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