No. 14-826

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Chevron Corporation,

Plaintiff-Appellee,

vs.

Hugo Gerardo Camacho Naranjo,
Javier Piaguaje Payaguaje, Steven Donziger,
The Law Offices of Steven R. Donziger,
Donziger & Associates, PLLC et al.

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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# *AMICI CURIAE* BRIEF OF KEITH S. ROSENN, FRANCISCO REYES, AND RAUL NUNEZ OJEDA IN SUPPORT OF THE PLAINTIFF-APPELLEE AND AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 29 and Second Circuit Local Rule 29.1, Professors Keith Rosenn, Francisco Reyes, and Raul Nunez Ojeda respectfully submit this *amici curiae* brief in support of the Plaintiff-Appellee and in response to the *amici curiae* brief submitted Professor Richard Janda, Juan C. Pinto, and Carolina Cruz Vinaccia (the "Janda Brief").[1] All parties have consented to the filing of this brief.

## STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE*

Professor Keith S. Rosenn has been teaching Latin American Law and Comparative Law since 1965, first as a professor at Ohio State University Law School, and since 1979, at the University of Miami School of Law, where he also chairs the LLM Program for Foreign Lawyers and the LLM in Inter-American Law. He is a member of the Board of Directors of the American Society for the Comparative Study of Law, an honorary member of the Inter-American Academy of International and Comparative Law, an associate member of the International Academy of Comparative Law, and has been a member of the Board of Editors of the American Journal of Comparative Law from 1965-79 and 1981-2012. He is

[1] Under Fed. R. App. P. 29(c)(5), Professors Rosenn, Reyes, and Nunez Ojeda certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than Professors Rosen, Reyes, and Nunez Ojeda contributed money intended to fund the preparation or submission of the brief.

the author of many books and articles on Latin American and comparative law and has several times served as a court-appointed expert on Latin American law.

Professor Francisco Reyes is a visiting professor at the University of Arizona's James E. Rogers College of Law. Mr. Reyes has also been a Visiting Professor at the Paul M. Hebert Law Center of Louisiana State University, Stetson College of Law, Instituto Tecnológico Autónomo de México, Universidade Agostinho Neto de Angola, and Universidad Catolica Argentina. He is a member of the International Academy of Commercial and Consumer Law. He is the author of several books and articles in the fields of Business Associations and Bankruptcy written in English, Spanish and Portuguese. His publications include the two-volume Latin American Company Law (with Boris Kozolchyk), in 2013.

Professor Raúl Nuñez Ojeda is a professor of procedural law at the University of Chile and Pontificia Universidad Católica de Valparaíso. He is a member of the Forum for Civil Procedure Reform, a member of the Chilean Institute of Procedural law, an advisor to the Chilean Ministry of Defense, and an advisor to the National Economic Advisory Office. He has authored and co-authored several books and articles on civil procedure.

This brief is desirable because it responds to the issues raised in the Janda Brief and ensures that the Second Circuit has a proper understanding of how the scope of appellate review in Ecuador applied to the facts of this case.

Professor Rosenn, Professor Reyes, and Professor Nunez Ojeda do not have an interest in the outcome of this case. All parties have consented to the filing of this brief.

## ARGUMENT

The Janda Brief begins with the assertion that in Civil Law jurisdictions, such as Ecuador, "an appeal examines both the legal and factual issues of the case, resulting in a new, fully reasoned decision that replaces the original judgment." (Janda Brief at 4.) For this proposition it does not cite any Ecuadorian authority. Instead it cites to page 121 of John Merryman and Rogelio Pérez-Perdomo's well-known book, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, which says nothing about the appellate decision replacing the original judgment. What Professors Merryman and Pérez-Perdomo actually wrote is:

> In the civil law tradition, the right of appeal includes the right to reconsideration of the factual as well as the legal issues. Although the tendency commonly is to rely on the trial record as the factual basis for reconsideration of the case, in many jurisdictions the parties have the right to introduce new evidence at the appellate level. The appellate bench is expected to consider all the evidence itself and to arrive at an independent determination of what the facts are and what their significance is. It is also required to prepare its own fully reasoned opinion, in which it discusses both factual and legal issues.

As a theoretical matter, we essentially agree with the statement by Professors Merryman and Pérez-Perdomo that in the civil law tradition the appellate court

may reconsider both factual and legal issues. But that does not mean that every civil law appeal results in a "new, fully reasoned decision that replaces the original judgment." (Janda Brief at 4.)

One must keep in mind that the civil law has two models of appeal: the full scale appeal (*novum judicium*) and the restricted appeal (*revisio prioris instantiae*). The former stems from Roman Law and through French law spread to a number of European countries. This full-scale model of appeal authorizes the appellate tribunal to conduct a full re-trial, permitting the parties to introduce new evidence, new claims, and new defenses. Perhaps the most extreme example of this model is France, where the appellate courts will not even decide on the basis of the record compiled by the trial court.[2] The restricted model of appeal, which was established by Austria in its 1895 Civil Procedure Ordinance, the so-called Klein Code, is revision of the judgment. This model was through Spain transmitted to the majority of Latin American systems of civil procedure (albeit in certain cases

[2] Ugo A. Mattei, Teemu Ruskola & Antonio Gidi, *Schlesinger's Comparative Law: Cases-Text-Materials* 501 (7th ed. 2009). However, other civil law countries that have adopted the French model limit the scope of review to the record created by the trial court unless there is some exceptional circumstance that requires acceptance of evidence not presented below. In Germany, as a result of a reform adopted in 2001, the court of appeals must accept the factual determinations of the trial court "insofar as there is no clear indication of doubt of the correctness or completeness of the fact determinations material to the decision and therefore indication for a new fact determination." *Ibid.*

permitting acceptance of new evidence on appeal in exceptional cases).[3] Presently, in the majority of Latin American civil procedural systems appeal takes the form of revision of the judgment rather than the adoption of an entirely new judgment. Hence, only in the French model of the full scale appeal is there actually a new trial before the appellate tribunal whose judgment truly replaces the original decision.[4]

Certainly, what happened in Ecuador with the appeal of the Lago Agrio judgment against Chevron was not a trial de novo that replaced the judgment of the trial court. A review of the perfunctory opinion of the appellate tribunal makes clear that the tribunal conducted nothing resembling a trial de novo. Instead, it relied heavily, if not entirely, upon the "factual" record assembled by the lower court.

Judge Kaplan's recent opinion found that much of the evidence contained in the trial record was fraudulent or falsified. The Ecuadorian trial court relied

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[3] Enrique Vescovi, *Los Recursos Judicial Y Demas Medios De Impugnacion En America* 101-02 (Depalma: Buenos Aires, 1988). *See also* Jaume Sole Riera, *El Recurso De Apelacion Civil* 39-46 (J.M. Bosch: Barcelona, 2d ed. 1998).

[4] The Janda brief cites the work of John Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 856-57 (1985), three times in an effort to emphasize the characteristics of the appellate model in the Civil Law tradition. (Janda Brief at 12, 17, 19.) Yet before 2001, the German appellate procedure was the classic full scale appeal and not the restricted appeal that exists in the majority of Latin American countries. Esparza Leibar Iñaki, *La Instancia de Apelación Civil: Estudio Comparativo Entre España y Alemania* 57 (Valencia, 2007).

heavily upon an expert's report that had been ghostwritten for him by the Plaintiffs. Several of the orders issued by the trial judge had been ghostwritten for him by another judge in the employ of the Plaintiffs' Attorneys. The trial judge himself had been bribed and his opinion relied upon falsified evidence as well as forged expert reports.

Judge Kaplan conducted an extensive hearing into the manner in which the record $18.5 billion judgment against Chevron was obtained. He even heard testimony from two of the Ecuadorian judges involved in the fraudulent scheme. If Judge Kaplan's findings are correct, there was plainly a denial of due process in obtaining the original judgment.

This fundamental denial of due process was not cured by the decision of the appellate tribunal. This tribunal explicitly declined to consider such matters, even though they go to the heart of the accuracy of the trial judge's determinations of law and fact. The appellate decision never evaluates any evidence presented by Chevron regarding the misconduct at the trial stage, and one would have expected any appellate tribunal engaged in a factual review that included evidence of misconduct to specifically address at least some of the relevant evidence in its decision.

The Janda Brief misleadingly contends that the appellate court's refusal to consider such critical issues as corruption of the fact-finding process is attributable

to the fact that "Civil Law jurisdictions favor direct attacks such as the right of appeal and the recourse in cassation or revision on questions of law, over the collateral attacks favored in the common law tradition." (Janda Brief at 10.)[5] The Janda Brief's argument makes no sense on the facts of this case. Professor Merryman's point is:

> In the common law world, and particularly in the United States, certain types of technical procedural defects, even though basically harmless and easily curable in the ordinary course of proceedings, can be raised effectively as defenses against the enforcement of a final judgment. The civil law attitude is, in general, that attacks on judgments should be restricted as much as possible to direct attacks, with collateral attacks limited to those instances in which it clearly appears that the procedural defects were of the sort that could not have been adequately corrected in the course of the proceeding itself. (page 129 of the 1969 paperback edition)

A collateral attack is "an objection to the enforcement of a judgment that has become final either because all avenues of appeal have been exhausted or because the opportunity to appeal has been lost through the lapse of time," while a direct attack is an appeal of the judgment. Chevron's appeal to the Provincial Court of Justice of Sucumbios was a direct attack on the trial court's judgment, not a collateral attack. Therefore, contrary to the Janda Brief's contention (*see* Janda Brief at 11), we should be surprised by the Ecuadorian appellate tribunal's failure

[5] For that proposition, the brief again cites to Professor Merryman, but this time to pages 121-24 of the original version of *The Civil Law Tradition* published in 1969, since the passage is omitted from the second and third editions of the book.

to consider the allegations of ghostwriting and submission of forged and fraudulent damage estimates. This is particularly true in a case where the appellate tribunal reached precisely the same inordinate damage calculations as the trial judge.

Curiously, the Janda Brief ignores aspects of the judgment and the appeal that are shocking to one trained in the Civil Law tradition. In the Civil Law tradition, civil courts do not award punitive damages.[6] Indeed, the German Supreme Court has even refused to enforce a punitive damage award in a foreign judgment because such damages violate public policy.[7] Yet in this case, with no statutory basis whatsoever, the trial judge awarded the astonishing sum of $8 billion dollars in punitive damages. Even more astonishingly, this award was to be forgiven if the Defendant issued a public apology.

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[6] *See, e.g.*, Laura Victoria García Matamoros & María Carolina Herrera Lozano, *El Concepto de los Daños Punitivos o Punitive Damages*, Estudio de Socio-Jurídico, Bogotá, at 225 ("the application of the punitive damages theory would give rise to a violation of Colombian law, as under this theory there is no need to prove the occurrence of a loss in order for punitive damages to be assessed (...). Therefore, the reason for this type of compensation is associated with a punitive nature (…), whereas under Colombian Civil Liability theory the motives for compensation are not focused on a criminal function…"). One exception is Argentina, which in 2008 added Section 52 to its Consumer Protection Law, Law No. 24.240 of 1993, permitting Argentine judges in suitable cases to require a defendant to pay a "civil fine" to a successful plaintiff.

[7] The case is noted in Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany: The 1992 Decision of the German Supreme Court*, 40 Am. J. Comp. L. 729, 730-31 (1992).

Equally astonishing from the perspective of the Civil Law tradition is that punitive damages were awarded by the trial judge even though such damages had not been requested in the complaint. A fundamental principle of Latin American civil procedure is that a judge may not award relief to a plaintiff that has not been requested in the complaint. Such relief is said to be *ultra petita* and is deemed to be beyond the power of the trial judge. Enrique Vescovi, *Elementos Para Una Teoria General Del Proceso Civil Latin Americano* 16-17 (1978).[8] Despite this dramatic judicial departure from the Civil Law tradition, the appellate tribunal upheld the award of punitive damages.

By permitting the retroactive application of the 1999 Environmental Management Act ("EMA") to conduct that occurred long before the statute was adopted, the trial judge also violated another fundamental tenet of Latin America's Civil Law tradition—the prohibition against retroactive application of legislation except in criminal matters where the change favors the defendant. This principle is

[8] The first sentence of Art. 27 of Ecuador's Organic Code of the Judicial Function provides: "Judges shall decide solely in accordance with the elements presented by the parties." *See also* Article 281 of the Colombian Code of Civil Procedure ("The decision rendered by the court must be consistent with the facts and claims contained in the lawsuit…". Pursuant to the same provision, "the defendant can neither be sentenced for a higher amount or a matter different to those set forth in the lawsuit nor for a cause different from that which was invoked in the same lawsuit…"); Hernando Morales Molina, *Curso de Derecho Procesal Civil*, Bogotá, Editorial ABC., at 525.

found in virtually all Latin American Constitutions and/or Civil Codes.[9] It also appears in Article 7 of the Civil Code of Ecuador, which also creates an exception to the general rule for statutes that "concern the substantiation and the solemnities of lawsuits."

The trial court supposedly circumvented this problem by concluding that the EMA effectuated only procedural changes rather than substantive changes. However, the trial judge then proceeded to rely on the EMA for the proposition that it created a cause of action enabling private parties to sue for damages to the environment. This was critical to the Plaintiffs' case because prior to adoption of this statute they had no right to bring a collective action for damages to the environment. In addition, the court granted the Plaintiffs an additional award of money equal to 10% of the damages awarded based on Article 43 of the EMA. It is hard to characterize increasing liability to a defendant by 10% as "procedural." What the trial judge did to avoid the fundamental problem of retroactivity by

[9] *See, e.g.*, Article 58 of the Colombia Political Constitution, which reads as follows: "Private property and the other rights acquired in accordance with civil laws may not be ignored or infringed upon by subsequent laws. When, in the application of a law passed on account of public necessity or social interest and recognized as essential, a conflict should occur about the rights of individuals, the private interest will yield to the public or social interest." Furthermore, Article 29-Subsection 2 of the same Constitution provides that "No one may be judged except in accordance with the relevant previously written laws before a competent judge or tribunal following all appropriate formalities in each trial".

categorizing the EMA as procedural strains credulity. Even more surprisingly, the appellate tribunal accepted this procedural characterization of the statute without ever delving into the substance of the retroactivity claim.

Still another strange aspect of the trial court's decision from the standpoint of a comparative lawyer is its brazen disregard of the settlement of all claims for environmental damages caused by Tex-Pet, Texaco's Ecuadorian subsidiary. This settlement was reached in 1995-96 with the Republic of Ecuador and the local governments, who were plainly asserting diffuse claims representing the interests of the general population. The trial court asserted that these releases did not preclude the Plaintiffs in this case from asserting precisely the same diffuse interests in the environment because these releases were not "governmental acts." According to the trial court, these governmental acts were not "governmental acts" because they were entered into with private parties. The appellate tribunal affirmed on precisely the ground.

The rationale of both Ecuadorian courts seems to be that to settle the environmental litigation properly, Tex-Pet should have insisted that the settlement be enacted by public statute or decree to protect itself against the possibility that at some future date the legislature would enact a statute creating an action enabling private parties to sue for environmental damages and that a court might someday allow that statute to be applied retroactively to that same environmental damage.

This makes no sense, particularly since the collective interest that the Plaintiffs were seeking to vindicate is the same collective interest vindicated by the central and local governments in the prior litigation. It is difficult to square either opinion of the Ecuadorian courts with the fundamental civil and common principle of res judicata.

## CONCLUSION

The Ecuadorian appellate tribunal may have been authorized to determine the facts and application of the law to those facts, but in practice it relied entirely upon the factual record compiled by the trial court. It also relied almost entirely upon the legal reasoning of the trial court.

The factual record, especially the damage estimates and the legal reasoning of the trial court, was irreparably tainted by fraud, forged expert reports, and bribery. The Janda Brief blithely concludes: "Indeed, once all of the evidence concerning allegedly tainted proceedings was put to one side and the central questions of liability and scope of damages were reviewed, the evidentiary and legal issues were entirely manageable for the appellate panel." (Janda Brief at 21). This is akin to a medical board saying, "If we put aside the evidence that the patient has Ebola, giving him two aspirin is an appropriate cure."

The Janda Brief's ultimate conclusion—"There is, therefore, no chain of causation between the alleged procedural taints at trial and the ultimate decision of

the Ecuadorian judiciary"—does not meet the straight face test. The failure to address these so-called "procedural taints at trial" in the appellate process cannot be reconciled with universal principles of due process.

Dated: October 8, 2014

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B)-(C), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation for an *amicus* brief under Fed. R. App. P. 32(a)(7)(B) (setting the maximum length for a party's principal brief at 14,000 words) and Fed. R. App. P. 29(d) (setting the maximum length of an *amicus* brief at one-half the maximum length for a party's principal brief) because this brief contains, according to the word count of the word processing system used to prepare this brief, 3,200 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman font.

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## CERTIFICATE OF SERVICE

It is hereby certified that on October 8, 2014, the foregoing brief was electronically filed with the Clerk of the Court by using the Court's ECF system. Counsel for the Defendants-Appellants and counsel for the Plaintiff-Appellee are registered in this case on ECF and will be served with the brief via the ECF system.

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