# CHEVRON'S SOUR LAKE: HOW A DECADES-LONG LEGAL BATTLE EXEMPLIFIES THE NEED FOR CHANGES IN U.S. LAW

By

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As members of the Master's Committee, we certify that we have read the thesis prepared by Madeleine Sligh, titled *Chevron's Sour Lake: How a Decades-Long Legal Battle Exemplifies the Need for Changes in U.S. Law* and recommend that it be accepted as fulfilling the dissertation requirement for the Master's Degree.

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Final approval and acceptance of this thesis is contingent upon the candidate's submission of the final copies of the thesis to the Graduate College.

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## ABSTRACT

In 1993, a group of Ecuadorian plaintiffs filed a complaint against oil giant Texaco in the U.S. Their cause of action? An oil spill the size of Manhattan, an environmental crisis referred to by numerous environmentalists, ecologists, and investigative journalists as the "Rain Forest Chernobyl."[1] This thesis examines the ongoing litigation, a "legal suicide mission,"[2] undertaken by animated American lawyer Steven Donziger on behalf of the indigenous people of the Oriente region. Their opponent, Chevron, acquired Texaco in 2001, and went on to become the second highest producer of oil worldwide.[3]

This thesis aims to explain the tangled and extensive history of this case. It describes the legal mechanisms at work and how they affect the litigation for a non-legal audience, and, unlike most legal literature, it explores the history and the people of the Oriente region, in addition to profiling Steven Donziger, the plaintiffs' attorney. It also analyzes how both parties have used the media as weapons against the opposing party. The final objective of this thesis is to use this case as a lesson for how U.S. law must change in order to best protect not only human rights victims, but also U.S. corporations.


[1] Paul M. Barrett, Law of the Jungle: The $19 Billion Legal Battle Over Oil In The Rain Forest and The Lawyer Who'd Stop at Nothing to Win (Penguin Random House 2014) at 85. See also Maya Steinitz, The Case for an International Court of Civil Justice (Cambridge University Press 2019) at 62, See Link TV: Latin Pulse, Ecuador: The Tribes vs. Chevron-Texaco, available on YouTube (2009) https://www.youtube.com/watch?v=Xj6xqzNQ_W0.
[2] Peter Maass, *Crude World: The Violent Twilight of Oil* (Vintage Books 2009) at 90.
[3] Barrett *supra* note 1 at 56.

## INTRODUCTION

This thesis will examine the arduous and complex litigation surrounding oil giants Texaco and Chevron in their decades-long litigation against the indigenous people of Ecuador. Chapter 1 will focus on the history of this complex litigation and explain, in layman's terms, the legal mechanisms at work. Chapter 2 will discuss the parties themselves including: the indigenous people of Lago Agrio, plaintiffs' attorney Steven Donziger, and the oil companies involved. Chapter 3 will analyze how the media has been heavily involved in legal strategy for both Chevron and the plaintiffs. Chapter 4 will use this litigation to highlight areas of the law that need to change. Specifically, the final chapter will discuss: (1) the incorrect *forum non conveniens* dismissal in *Aguinda I*, and the need for a different standard for the enforcement of judgments rendered after *forum non conveniens* dismissals, (2) the need to broaden the current restrictions for when federal courts can hear Alien Tort Statute cases, (3) the growing trend in international business toward arbitration, how the tribunal erred in re-litigating the case, and how tribunals must be more diligent in investigating whether the parties agreed to arbitrate, (4) the need for a higher standard of review in regards to using evidence in a §1782 international discovery claim in U.S. Courts, and (5), the need for a federal anti-SLAPP statute.

### Methodologies

Researching the laws and how they work involve mainly archival research through the Internet and through books. In addition to reading the countless filings, I opted for the legal Internet resources Westlaw and Lexis in order to complete the in-depth legal research. I, unfortunately, was unable to travel to Ecuador to complete interviews in person with the people of the Oriente region. I conducted the ethnographic portion of my research by reading hundreds of news and magazine

articles about what was going on in the Oriente. These sources were from the U.S., Ecuador, and from large international news' sources. This research aided in compiling my timeline, in gathering information about how Texaco's activity affected the people of the region, and in analyzing how the media influenced the case. In addition to interviewing plaintiffs' attorney Steven Donziger, I also read Paul Barret's *Law of the Jungle*, Peter Maass' *Crude World*, and Maya Steinitz's *The Case for an International Court of Civil Justice*. I relied on these three print resources due to their presentation of both sides of the litigation, and their analysis of the law. I attempted to reach out to Chevron's employees' but to no avail. For their stance on the litigation, I relied mainly on their official press releases. I also watched the documentary *Crude*, the 60 Minutes interview, dozens of interviews and news stories about the situation in the Oriente, and numerous YouTube videos produced by activist groups for both sides.

**Objectives**

Through conducting my research, I developed four main objectives and questions I wanted to answer. First, I wanted to compile an in-depth history of the case, as the timelines I found only extended to the early 2000s. Second, I wanted to explore who prompted this lawsuit; here, I aspired to humanize the parties, and explain how the history of Ecuador and the Oriente region led to this litigation. I also wanted to look into the mind of plaintiffs' attorney Steven Donziger and explore his impact on the case. Third, I aimed to study the media's influence on the trajectory of the litigation. Finally, I wanted to explore how the law should change as a result of the case, and if such a change was even possible.

**Bias**

I think it is important to acknowledge that through my study of this case and the people that I am inherently biased. I think a great injustice occurred in Ecuador and that the law and the U.S. and Ecuadorian justice systems have, unfortunately, failed them. Do I think Chevron is entirely responsible for this conduct? No. Do I think Texaco is? Yes, in cooperation with Ecuadorian government. Do I think Chevron has at least some responsibility in this matter because of their acquisition of Texaco during the original litigation? Without question. Do I think both Chevron and Steven Donziger engaged in some questionable litigation tactics in order to win their case? Yes: these attorneys take zealous advocacy for their clients to the next level. Do I think the law can be changed? I want to tritely say yes, but the realist jurist inside me doubts that this situation can be resolved through the justice system. Unfortunately, I think the end result of all these questions is the same: the people of Ecuador are still suffering as a result of this ongoing litigation, and something must happen to ensure this sort of injustice does not happen again.

## CHAPTER ONE: HISTORY OF THE LITIGATION

### Introduction

> "It was a legal suicide mission. If you want to sue oil companies, you need to patient and fatalistic, because you are unlikely to get to trial; even if you do, after years of pretrial maneuvering, you are likely to lose; and if you happen to win, it will likely require years more to receive court-ordered damages because oil companies can afford to appeal and appeal and appeal."[4] – Peter Maass

According to the United States Court of Appeals for the Second Circuit, "the story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary."[5] The procedural posture and facts of this case are arduous and complex, as they have been litigated for the better part of three decades. Filed the year I was born, there is, quite literally, a lifetime's worth of legal documents, oral arguments, and press coverage surrounding this case. For the purposes of this thesis, I will outline the relevant pieces of the history of the litigation, in addition to explaining the relevant legal framework.

[4] Maass *supra* note 2 at 90.
[5] *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012). *See also* Steinitz *supra* note 1 at 64.

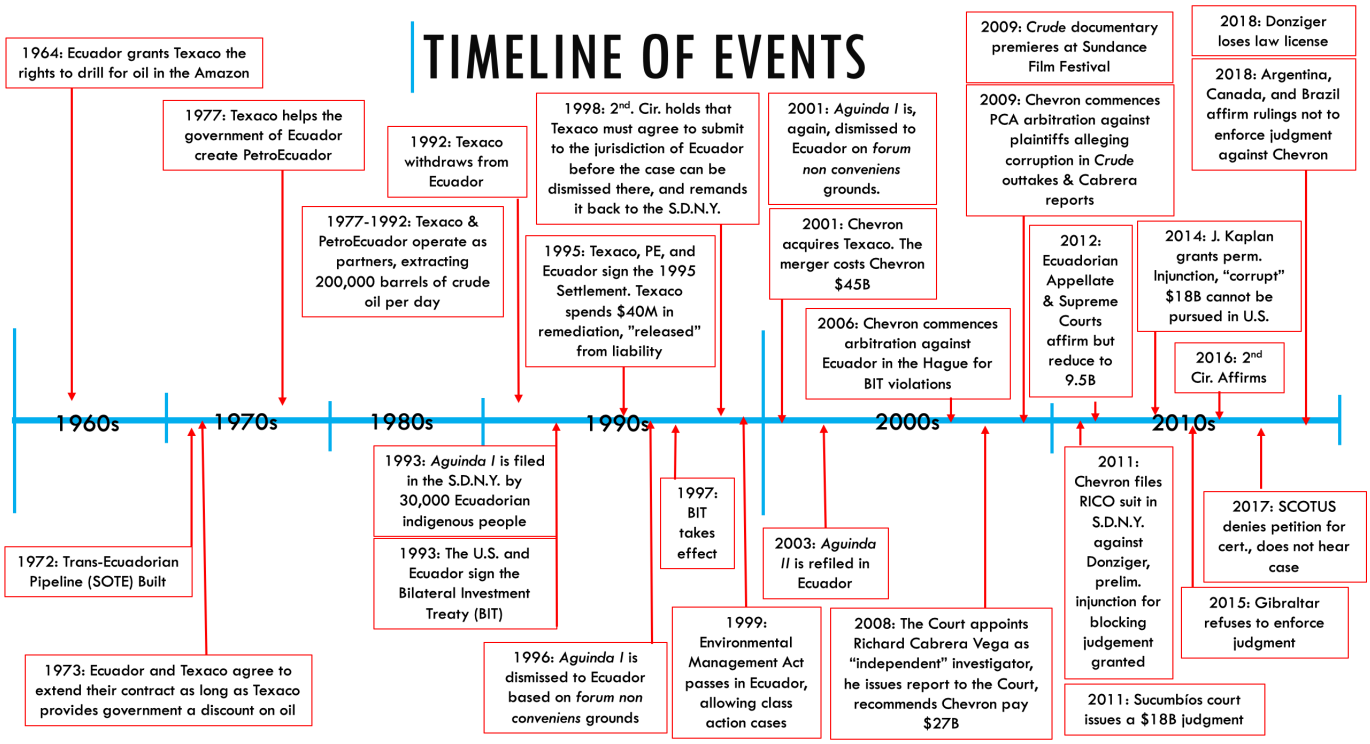


Figure 1: A Timeline of Events[6]

*The Beginnings: Texaco in Ecuador*

In 1964, the Republic of Ecuador granted U.S. oil giant Texaco, and its subsidiary Texas Petroleum Co. (TexPet), license to explore and extract crude oil in the Amazon.[7] The two parties signed a second contract in 1973, which allowed for Texaco to continue their oil endeavors in exchange for providing the government oil at below market prices for domestic consumption.[8] It was also during this period that Texaco participated in the creation and development of EP PetroEcuador, the first Ecuadorian, state owned oil company.[9] From 1977 until 1992, when Texaco withdrew entirely from Ecuador, the two oil companies worked as partners.[10] Together,

[6] Made by the author.
[7] Caroline Simson, *A Cheat Sheet To Chevron's Epic Feud With Ecuador*, LexisNexis (2016), https://www.law360.com/articles/805987/a-cheat-sheet-to-chevron-s-epic-feud-with-ecuador.
[8] *Chevron Corp. v Republic of Ecuador*, 795 F.3d 200, 202 (DC Cir. 2015).
[9] *Hereinafter* PetroEcuador. EP stands for Empresa Publica, or public company.
[10] Chevron Feb. 2010 Press Release, *Court Appointee in Chevron Ecuador Lawsuit Tied to Ecuador State-Owned Oil Company*, Chevron (April 10, 2019), https://www.chevron.com/stories/court-appointeein-chevron-ecuador-lawsuit-tiedto-ecuador-state-owned-oil-company

they extracted approximately 200,000 barrels of crude oil per day.[11] When the government of Ecuador and Texaco were unable to agree to the terms of an extension, Texaco withdrew from the extraction efforts in 1992, leaving PetroEcuador to run the oil business in Ecuador alone. Texaco's operations in Ecuador between 1964 and 1992 resulted in one of the largest environmental disasters of the 20th century, which continues to impact the indigenous communities of the Lago Agrio region today.[12]

*Class Action Lawsuits*

In 1993, several class action suits were filed in the U.S. by two separate groups of 30,000 Ecuadorian and Peruvian indigenous people.[13] Class action lawsuits are filed when large groups of people with the same or similar injuries, caused by either the same product or the same action, sue the defendant as a group.[14] Generally, one claimant must have a claim for an amount over $75,000, and the group of people must be so large that they cannot reasonable be joined; this number is around 40, but it depends on the judge and the case.[15] Traditional class action suits include injuries involving corporate misconduct, consumer fraud, securities fraud, products liability, employment practices, or mass tort litigation.[16] This lawsuit is an example of mass tort litigation, where parties may sue because of a "massive accident, such as an airplane crash, in

[11] YCharts, *Ecuador* Crude Oil Production, https://ycharts.com/indicators/ecuador_crude_oil_production_annual (last visited April 10, 2019). For reference, one barrel of oil holds approximately 42 gallons. *See* American Oil & Gas Historical Society, *History of the 42-Gallon Oil* Barrel, https://aoghs.org/transportation/history-of-the-42-gallon-oil-barrel/ (last visited April 10, 2019).

[12] Clifford Krauss, Big Victory for Chevron Over Claims in Ecuador, The New York Times, 2014. *See also infra* Chapter 2.

[13] This paper will focus on the Ecuadorian plaintiffs. *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), *See Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

[14] *Class Action Cases,* https://litigation.findlaw.com/legal-system/class-action-cases.html (last visited April 10, 2019).

[15] The Margarian Law Firm, *How Many Plaintiffs Do You Need For a Class Action Lawsuit,* https://margarianlaw.com/plaintiffs-class-action-lawsuit/ (last visited April 10, 2019). *See also* Fed. R. Civ. P. 23.

[16] Class Action Cases *supr*a note 14.

which many people are injured."[17] In class action cases, there is a named plaintiff who is at the forefront of the case; they file the case on behalf of the class, or group of people who share the common injury or cause of action. The named plaintiff must not only have claims that are representative of the class, but they also must protect the interests of the class.

This sort of litigation has benefits for both the plaintiffs and the defendants. These types of lawsuits are often brought when many of the injuries are relatively minor, so it would be impractical or impossible for an individual to pursue legal action on their own. Plaintiffs can consolidate attorneys' fees, so those who would not be able to afford to hire an attorney on their own can still seek redress for their injuries. Potential plaintiffs to the class action are entitled to notice, so that those who may not know the lawsuit is happening have the opportunity to opt-in; this notice normally consists of "television, an advertisement in a magazine or newspaper, or a posted flyer… tailored to the court case."[18] If the plaintiffs win, every member of the class action is entitled to something, no matter how small; if every plaintiff was to bring an individual claim, "payment by the defendant would be on a first-come, first-served basis."[19] Unfortunately, this also means that any person fitting the description of the class, no matter if they chose to opt-in, is bound by the judgment. Further, if the defendants win, all plaintiffs in the suit are prevented from filing suit again; this sort of litigation also consolidates their attorneys' efforts and subsequent fees. Finally, it is also beneficial for the hectic court system, as it is a more expedited way to handle many expensive and time-consuming cases with the same or similar evidence.

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[18] *Id.* Class members also have the right to opt out. *See* Fed. R. Civ. P. 23(b)(3).
[19] Class Action Cases *supra* note 14.

***Aguinda I***

*Aguinda v. Texaco*[20] was named after Maria Aguinda, an indigenous tribe member. *Aguinda I* was "filed in the house of Texaco,"[21] the U.S. District Court for the Southern District of New York[22], only a few miles from where Texaco was incorporated.[23] It exemplified a "new kind of class action seeking to hold American corporations responsible for alleged misdeeds overseas."[24] The driving force behind the plaintiffs' legal team was Steven Donziger, an American lawyer, Harvard Law graduate, and former Central American journalist; his combination of charisma, legal know-how, and knowledge of when to involve the media in order to best "market [the case against Texaco] to the American public"[25] made for a lethal combination, one Texaco and Chevron severely underestimated and continue to fight against.[26]

*Plaintiffs' Allegations*

The complaints alleged, in sum, that (1) Texaco was responsible for polluting the rain forests and rivers in Ecuador and Peru between 1964 and 1992, (2) that "Texaco improperly dumped large quantities of toxic by-products of the drilling process into the local rivers, contrary to prevailing industry practice of pumping these substances back into the emptied wells," (3) that Texaco also used other inappropriate means of "eliminating toxic substances, such as burning them, dumping them directly into landfills, and spreading them on the local dirt roads", and (4) "that the Trans–Ecuadoran Pipeline, constructed by Texaco… leaked large quantities of petroleum

[20] Hereinafter *Aguinda I.* It is also important to note that a 1996 verdict incorrectly uses the name Aquinda in the lawsuit. *See Aquinda v. Texaco, Inc.* 945 F. Supp. 625 (1996).
[21] Barrett *supra* note 1 at 48.
[22] Hereinafter S.D.N.Y.
[23] *See infra* Texaco's Defense: Jurisdiction.
[24] Barrett *supra* note 1 at 50.
[25] *Id.* at 47.
[26] *See infra* Steven Donziger: The Man, The Myth, the Legend.

into the environment."[27] The plaintiffs estimate that "Texaco's acts and omissions have resulted in the discharge of oil into the…environment at a rate in excess of 3,000 gallons per day for 20 years," and as a result, the Ecuadorian Amazon is unsafe for flora, fauna, or the indigenous populations.[28]

The plaintiffs claimed that as a result of these practices, they, and the communities they represented, suffered "various physical injuries, including poisoning and the development of pre-cancerous growths."[29] These physical injuries have subsequently developed over time, and now include cancer, birth defects, and myriad other debilitating diseases that come from unclean water and pollution.[30] The actual medical documentation and lab tests for these precancerous growths remain to be seen by any court of law and are primarily based on anecdotal evidence.[31]

As a result, the plaintiffs "sought money damages under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the Alien Tort Claims Act."[32] Further, they sought:

> "extensive equitable relief to redress contamination of the water supplies and environment, including: financing for environmental cleanup to create access to potable water and hunting and fishing grounds; renovating or closing the Trans–Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution."[33]

The plaintiffs estimated the damages would amount in a number exceeding 10 billion dollars.

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[27] *Jota* (2d Cir. 1998).
[28] Gabriel Ashanga Jota et. al, 1994 WL 16495105 (S.D.N.Y.).
[29] *Id. See also* Leonard J. Brooks & Paul Dunn, *Business & Professional Ethics for Directors, Executives, and Accountants* (7th ed., Cengage Learning 2015) at 47.
[30] *Crude*, Joe Berlinger et. al (2009).
[31] Barrett *supra* note 1 at 210.
[32] *Aguinda v. Texaco, Inc*., 303 F.3d 470 (2d Cir. 2002)
[33] *Id.*

*Texaco's Defense: Jurisdiction*

In the many pre-trial motions they submitted, Texaco argued that the jurisdiction, forum, and venue were not proper, and that the case would be better heard in Ecuador, where the witnesses were, the evidence was, and the actual alleged incidents occurred. Texaco pushed for the case to be heard in Ecuador, arguing that "justice demanded the question of pollution liability in Ecuador be adjudicated in Ecuador."[34] When the plaintiffs argued that the country was "too corrupt," Texaco presented State Department reports and other evidence to the contrary.

Here, it is important to distinguish between the three terms relevant to where a case can be litigated: forum, venue, and jurisdiction. In sum, the venue is the geographic location, the forum is the particular court or arbitrator that will hear the case, and the jurisdiction is where the court has the authority to hear the case. While venue is relatively straightforward, there are many aspects to whether a court has jurisdiction to hear a case, and where a plaintiff should file their lawsuit in order to be the most successful case.

Jurisdiction is divided into two main subsections: personal jurisdiction and subject matter jurisdiction. The court must have both in order to hear a lawsuit. Personal jurisdiction is the authority the courts have over a person and is broken down into two different types: specific and general. Specific personal jurisdiction exists when "the injury or dispute in question occurs in the state where the lawsuit is filed."[35] This is not the case in *Aguinda*, so we must move onto the next type, general personal jurisdiction. General personal jurisdiction "allows a court to exercise jurisdiction over a corporate defendant… for lawsuit[s] filed in a state in which the defendant is

[34] Barrett *supra* note 1 at 181.
[35] Ward & Smith, P.A., *Where Can Your Company Be Sued? The Basics Of Personal Jurisdiction* (2019). https://www.wardandsmith.com/articles/where-can-your-company-be-sued-the-basics-of-personal-jurisdiction, *See also BSNF Railway Co. v. Tyrell*, 137 S.Ct. 1549 (2017).

[considered] 'at home.'"[36] In 2017, the Supreme Court held that a corporate defendant is "at home" in only three states: (1) the state in which the business is incorporated; (2) the state in which the business has its principal place of business; and (3), "in an 'exceptional case,' any state in which the corporation's operations are so substantial that it also is 'at home' in that additional state (or states)."[37] Because Texaco is incorporated in New York, the S.D.N.Y. had general personal jurisdiction over the company in 1993.

Subject matter jurisdiction is the other essential type of jurisdiction; it delegates cases to certain courts. In U.S. courts, subject matter jurisdiction distinguishes whether the case should be litigated in state court or federal court, as federal courts have a more limited range of the cases they are allowed to preside over. Namely, in order to litigate in federal court, like the *Aguinda* case was, the case must either have diversity jurisdiction or federal question jurisdiction. Diversity jurisdiction requires a controversy that exceeds in $75,000 and parties that are "diverse" in citizenship of state or incorporation. Diversity for the purposes of determining jurisdiction means that all plaintiffs are citizens of a different state[38] than all the defendants. For corporations, their citizenship rests on where their "principal place of business," or their "nerve center" of the company is.[39] In 2010, The Supreme Court clarified that the corporate headquarters would not be considered the principal place of business if it is not the "the actual center of direction, control, and coordination;" it could not just be "simply an office where the corporation holds its board

[36] Ward & Smith *supra* note 34.
[37] Natalie Holden, *U.S. Supreme Court Narrows Scope of Personal Jurisdiction*, Technology, Manufactoring & Transportation Industry Insider (2017), https://www.tmtindustryinsider.com/2017/06/u-s-supreme-court-narrows-scope-of-personal-jurisdiction/. "The Court applied the tests from *Goodyear* and *Daimler*, stating that these clarified the holding of *International Shoe* to the more narrow test of only allowing a court to assert general jurisdiction over foreign corporations "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id*. *See also Daimler*, 571 U.S. 746 (quoting *Goodyear*, 564 U.S., at 919).
[38] Or in this case, country.
[39] *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

meetings."[40] However, this decision was not made until 2010, so in 1993, Texaco would have been considered "at home" in the S.D.N.Y.[41]

Here, the S.D.N.Y. Court also had subject matter jurisdiction, due to the fact that the claims were brought under the Alien Tort Statute; this statute gives federal courts jurisdiction to hear certain claims of alleged human rights violations.[42] This type of subject matter jurisdiction is called federal question jurisdiction, which deals with an alleged violation of the Constitution, federal law, or treaties that the U.S. is a part of. This case had subject matter jurisdiction because it was brought under the ATS,[43] but the S.D.N.Y. could have heard the case regardless, due to the fact that there was also diversity jurisdiction.

*Texaco's Defense: Joinder*

Texaco also argued that there was improper joinder.[44] Proper joinder ensures that all parties "materially interested in the subject of an action"[45] are present in court and, that "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences."[46] According to Chevron, if they were going to be blamed for causing this damage, two key parties were missing: PetroEcuador, their partner in oil explorations for almost two decades, and the government of Ecuador, who invited and encouraged their explorations.

[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] 28 U.S. Code § 1350.
[44] See *Aquinda supra* note 20.
[45] Fed. R. Civ. P. 19.
[46] *Id*.

Ecuador's presence was, in fact, "held to be necessary to effectuate the extensive equitable relief requested, but impossible to obtain in light of their sovereign immunity."[47] In short, national governments are traditionally immune from criminal prosecution, unless they chose to waive that sovereign immunity privilege. This is especially true in the courts of a foreign nation. This protects states from foreign lawsuits so that countries cannot use their own courts to interfere with the running of another country.[48] Because Ecuador did not waive sovereign immunity in this case, they could not feasibly be sued in the United States.[49]

*Judgment Day*

After almost a decade, and despite the overwhelming evidence that an environmental disaster had indeed occurred[50], *Aguinda I* was dismissed in 1996 prior to trial on procedural grounds; the actual substance of the case and facts presented were not considered in the dismissal.

The two main factors of the dismissal were *forum non conveniens* and international comity. *Forum non conveniens* is a legal principle that acknowledges a more appropriate venue for a case to be heard; here, that forum was the courts of Ecuador. Essentially, the court decided that "despite the fact that Texaco's headquarters was just a few miles from the courthouse"[51] where the case was filed, the judge concluded that the case had "everything to do with Ecuador, and nothing to do with the United States,"[52] therefore the proper forum to hear the case would be Ecuador.

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[47] *Aquinda supra* note 20. Sovereign immunity can also be called state immunity. *See* Xiaodong Yang, *Sovereign Immunity*, Oxford Bibliographies 2016, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0018.xml.
[48] Legal Information Institute, *Sovereign Immunity*, Cornell University, https://www.law.cornell.edu/wex/Sovereign_immunity.
[49] *Aquinda supra* note 20.
[50] *Id*.
[51] Judith Kimerling, LESSONS FROM THE CHEVRON ECUADOR LITIGATION: THE PROPOSED INTERVENOR'S PERSPECTIVE, 1 Stanford J. of Complex Lit. 241, 242 (2013).
[52] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534,537 (S.D.N.Y. 2001).

International comity is "the recognition a nation shows to the legislative, executive or judicial acts of another nation."[53] Effectively, "US courts should defer to the laws of other nations when actions are taken pursuant to those laws.[54] By dismissing the case to Ecuador, the U.S. was handing the Ecuadorian legal system the reigns, to do justice the way they sought fit.

*Appeals and New York's Judgment Laws*

On appeal, in 1998, the Second Circuit remanded the case, holding that "that a *forum non conveniens* dismissal was "inappropriate absent a requirement that Texaco consent to Ecuadorian jurisdiction."[55] In 2001, after much negotiation, Texaco agreed to submit to the jurisdiction of Ecuador, upon the condition that they reserved the right to contest the validity of Ecuadorian courts under the conditions permitted by New York's Uniform Foreign Country Money -- Judgments Recognition Act.[56]

The New York Uniform Foreign Country Money -- Judgments Recognition Act was created to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement in New York."[57] The grounds for non-recognition include (1) lack of jurisdiction over the defendant, (2) lack of notice to the defendant, (3) the judgment was obtained via fraud, (4) the cause of action for which the judgment is based is offensive to public policy, (5) the judgment conflicts with a separate final and conclusive judgment, (6) the proceeding was contrary to an agreement between the parties to

[53] Stefan M. Meisner & Ashley L. McMahon, *Supreme Court Clarifies Principles of International Comity in Vitamin C Ruling*, Antitrust Alert (2018) https://www.antitrustalert.com/2018/06/articles/cartel-enforcement/supreme-court-clarifies-principles-of-international-comity-in-vitamin-c-ruling/.
[54] *Id*.
[55] *Jota* (2d Cir. 1998) at 160-161.
[56] *Chevron Corp. v. Naranjo supra* note 5 at 235.
[57] *Id*.

otherwise settle the dispute in question outside of that court (whether it be in a different court of law or through arbitration or mediation), (7) inconvenient forum, or (8) the judgment is involving defamation and the country does not protect freedom of speech or freedom of the press to the extent that New York law would.[58] Texaco did not know it yet, but they would, in some capacity or another, attempt to argue all of these factors.

As a result of Texaco's consent, District Court dismissed the case again on the ground of *forum non conveniens*[59]; this time the Second Circuit affirmed.[60] These eight exceptions left for contesting foreign judgments have left the door wide open for Chevron to contest any Ecuadorian judgment. While, "[in] theory Chevron agreed to abide by whatever the Ecuadorean courts decided… in reality New York and federal law offer powerful protections against defendants who believe they are the victims of an improper or fraudulent procedure in another country."[61] Texaco's reservations to their consent of jurisdiction served as a harbinger for what future litigation was to come.

**Important Historical Events**

In the decade it took for *Aguinda I* to make its way through the courts, "several important events had transpired."[62] These included: (1) the 1995 Settlement between Texaco, PetroEcuador, and the Government of Ecuador, (2) the Environmental Management Act, (3) the signing of the

[58] NY CPLR § 5304 (2012).
[59] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
[60] *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).
[61] Daniel Fisher, Judge Calls Chevron Verdict Product Of `Egregious Fraud,' Unenforceable, Forbes, Mar. 4, 2014.
[62] L. Mark Walker, *The Contamination of the World's Largest Pollution Judgment*, American Bar Association, Sep. 9, 2013.

Bilateral Investment Treaty between Ecuador and the U.S, and (4) the merger of Chevron and Texaco. These details of these crucial events are outlined below.

*The 1995 Settlement*

When the judge remanded the case to Ecuador, "Texaco had every reason to believe that the plaintiffs' case would disintegrate."[63] This was in large part because of a settlement Texaco made with the government of Ecuador and PetroEcuador a few years prior to the dismissal, via a contract entitled "Contract For Implementing of Environmental Remedial Work and Release From Obligations, Liability and Claims."[64] As a part of the settlement, Texaco agreed to fund environmental remediation projects "in exchange for ... a release from liability for environmental impact falling outside the scope of that settlement."[65] This settlement was "finalized in 1998, after [Texaco]… spent roughly $40 million on the remediation" of approximately 1/3 of the pits.[66] The completion of this work triggered the 1998 Release, which terminated "all rights and obligations between the parties [and any related subsidiaries]… [except] the continuation of the pending lawsuits."[67]

This settlement is Chevron's main defense in their argument that they are not culpable for the damages in the Lago Agrio region; Chevron acquired Texaco in 2001, long after Texaco was "released, absolved, and discharged" by the government of Ecuador and PetroEcuador from any

[63] Manuel A. Gomez, THE GLOBAL CHASE: SEEKING THE RECOGNITION AND ENFORCEMENT OF THE LAGO AGRIO JUDGMENT OUTSIDE OF ECUADOR, 1 Stan. J. Complex Litig. 429, 435 (2013).
[64] Brooks *supra* note 29. *See also* Agreement between the Government of Ecuador, Ecuadorian Gulf Oil Company, and TexPet of August 6, 1973.
[65] *Republic of Ecuador v. Chevron Corp.,* 638 F.3d 384 at 390. It should also be noted that in 2011, PetroEcuador reported that they planned to spend roughly $70 million in repairing the damage they were implicated in through the settlement. No major news outlet or legal document has confirmed that they have, indeed, spent this money on remediation efforts. In fact, some have argued that Donziger and the plaintiffs' team have prevented them from doing so in order to obtain a larger judgment. Again, the author has not been able to confirm independently this information. *See also* Barrett
[66] *Chevron Corp v. Naranjo supra* note 5 at 235.
[67] *Chevron Corp. v Republic of Ecuador* (D.C. 2015).

wrongdoings in the Oriente.[68] The plaintiffs, however, argue that not only is this contract invalid because Texaco did not follow through at the standard expected, but if it is valid, this case would fall under the pending lawsuit exemption in the 1995 agreement[69] Further, they claim that "a settlement with an overly compliant government does not absolve Texaco of responsibility for the harm their activities caused to the individual plaintiffs in the lawsuit."[70] To them, this settlement is irrelevant.

*The Environmental Management Act of 1999*

During *Aguinda I*, Donziger began to formulate a plan in case he was forced to bring the case in Ecuador, one which, in hindsight, he would be glad he followed through with. A major hurdle existed to bringing the case in Ecuador: the Ecuadorian courts did not have a class action mechanism. No group of people had ever come together with a common injury and attempted to hold a defendant responsible. In fact, "until that time, protection of the environment… was a prerogative on the state, and only the executive branch was able to act on behalf of the general population."[71] This was a problem for the plaintiffs, who attempted to represent the interests of not only the environment, but also the affected members of the indigenous populations of the Oriente as a whole.

As a result, Donziger spearheaded the Environmental Management Act,[72] which granted Ecuadorian citizens a "new private right of action for damages for the cost of remediation of

[68] *Republic of Ecuador v. ChevronTexaco Corp*., 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005).
[69] *Id*.
[70] Robert V. Percival, GLOBAL LAW AND THE ENVIRONMENT, 86 Wash. L. Rev. 579, 607–08 (2011).
[71] Gomez *supra* note 63.
[72] Ley No. 37. RO/ 245 de 30 de Julio de 1999, Environmental Management Act of 1999 (Ley de Manejo Ambiental de 1999) (Ecuador) [*hereinafter* "EMA"].

environmental harm."[73] Without this Act, the case could not have been heard in the Ecuadorian court; luckily for the plaintiffs, the Ecuadorian Legislature passed the EMA in 1999.[74] This law allows individuals to represent the "affected indigenous communities with regard to their collective right to a healthy environment," [75] and remains a keystone of Ecuador's environmental legal framework.[76] This is perhaps one of the only good things for the environment to come out of the litigation thus far, although Donziger denies any involvement in the passing of the EMA, and Texaco used the plaintiffs' ingenuity as a building block to their claim that Ecuador was a place where laws could be bought.

*The Bilateral Investment Treaty*

In order to attract U.S. business to Ecuador, the two countries signed the Bilateral Investment Treaty (BIT), which took effect in 1997. The terms of the treaty allowed Ecuador to make a "standing offer to American investors to arbitrate disputes involving investments that existed on or after the treaty's effective date."[77] Investment for purposes of the treaty could include "a claim to money or a claim to performance having economic value and associated with an investment."[78]This was meant to draw U.S. businesses to Ecuador, with the assurance that disputes would be solved through arbitration.

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[73] Anaeli C. Sandoval, *CHEVRON CORPORATION V. DONZIGER*, 768 F. SUPP. 2D 581 (S.D.N.Y. 2011), 4 Wash. & Lee J. Energy, Climate & Env't. 181 (2013).
[74]E&E News, *Chevron in Ecuador: A Timeline of Events* (2011), https://www.eenews.net/special_reports/ecuador/timeline.
[75] Gomez *supra* note 63 at 433.
[76] EMA. *See also* Forest Legality Initiative, Ecuador, 2014, https://forestlegality.org/risk-tool/country/ecuador. *See also* Byron Betancourt Estrella, *Environmental Regulation and Renewable Energies: Ecuador*, Consejo Nacional de Electricidad (CONELEC) 2013, https://www.irena.org/-/media/Files/IRENA/Agency/Events/2013/Jan/11_4/15_Estrella.pdf?la=en&hash=43490E6446EFD699FD04A006318CF69DF396568D.
[77] *Chevron Corp. v Republic of Ecuador* (D.C. 2015).

[78] *Id*.

Arbitration is an "out-of-court resolution of a dispute between parties to a contract, decided by an impartial third party" in a much more efficient and less costly manner.[79] Detailed contracts like the BIT are precise in how potential conflicts will be settled under arbitration; parties agree to the tribunal, where the arbitration will be held, and the arbitrators, who will decide the case, before they sign the contract.

Particularly in international transactions, there are many benefits to choosing to arbitrate. Choosing the venue in advance provides both parties with the peace of mind that potential disputes will be solved in a forum that is convenient and fair for both parties, as opposed to dealing with a different country's legal system. Further, arbitrations are normally decided by three arbitrators; one chosen by the plaintiffs, one chosen by the defendants, and one agreed upon by both parties, limiting potential bias. Arbitration is also much faster than litigation, as "often convoluted rules of evidence and procedure do not apply in arbitration proceedings -- making them less stilted and more easily adapted to the needs of those involved."[80] Where pretrial matters in litigation can take years, "in arbitrations, most matters, such as who will be called as a witness and what documents must be produced, are handled with a simple phone call."[81] Arbitration proceedings can also be conducted in private; their confidential nature often draws large companies. Further final judgments from an arbitral tribunal are much easier to enforce in other countries, as most countries recognize the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.[82] This allows for relatively easy collection of arbitral judgment in 159 countries around the world, including the U.S. and Ecuador.[83]

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[79]American Arbitration Assoiciation, *Arbitration*, https://www.adr.org/Arbitration.
[80]Barbara Kate Repa, *Arbitration Pros and Cons*, Nolo, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html.
[81] *Id*.
[82]N.Y. Arb. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.
[83] New York Arbitration Convention, *The New York Convention*, http://www.newyorkconvention.org.

While there are many benefits to arbitration, there are some negatives. Final judgments are difficult to counteract; the appellate process in arbitration is very limited. Further, arbitrators "tend to favor businesses;" meaning that large corporations who arbitrate a lot of disputes can have an advantage against smaller plaintiffs.[84] These factors would prove particularly problematic for the country of Ecuador in the late 2000s, as Texaco would use the BIT in their war against the plaintiffs.[85]

*The $45 Billion Dollar Merger*

In 2001, Chevron acquired Texaco for 45 billion dollars; with the acquisition came the responsibilities of this lawsuit.[86] At the time, the litigation was considered so insignificant that Chevron allegedly did not inform its shareholders about the litigation when asking for approval for the acquisition.[87] The 2001 merger resulted in the fourth largest oil company in the world, ChevronTexaco.[88]

## ***Aguinda II*** **in Ecuador**

Meanwhile, in 2003, the plaintiffs refiled the lawsuit (hereinafter *Aguinda* II) in Lago Agrio, Ecuador, and it began to make its way through the Ecuadorian legal system. Led by

[84] Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. Times (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.
[85] *See infra* Chevron's Arbitration Attempts.
[86] Barrett *supra* note 1 at 307.
[87] *Id*. at 104.
[88] Gomez *supra* note 63 at 432. *See also* Andrew Ross Sorkin & Neela Banerjee, *Chevron Agrees to Buy Texaco for Stock Valued at $36 Billion*, N.Y. Times (Oct. 16, 2000), http://www.nytimes.com/2000/10/16/business/chevron-agrees-to-buy-texaco-for-stock-valued-at-36-billion.html. Note that after the merger the plaintiffs do not consistently call ChevronTexaco by the new company name. In their filings and in their propaganda, they use Texaco, Chevron, and TexPet interchangeably.

Donziger and his Ecuadorian co-counsel, attorney Pablo Fajardo, the plaintiffs geared up to fight Chevron again, bringing forth the same allegations of environmental harm to the indigenous people of the Oriente.

Chevron, on the other hand had a new defense strategy. Chevron's defense at its core was three-fold:(1) everything Texaco did in Ecuador was legal; (2) Texaco spent $40 million on environmental cleanup; and (3) as a result the "Ecuadoran government released it from further liability to the government."[89] Further, they argued that Chevron had never participated in oil drilling in Ecuador, so they were not liable for the damage done.

The discovery process, where the Lago Agrio court and the parties searched for and gathered evidence, was so extensive that it lasted a decade. By the time a judgment was issued, there were over 200,000 pages of legal documents and evidence in the record.[90] The court ordered "more than one hundred judicial field inspections to be conducted in the former oil fields with the purpose of determining whether the activities of the TexPet Consortium had indeed caused any harm to the environment, and to quantify those damages."[91] After much contention from both parties that the proposed expert witnesses were biased, the Court appointed an independent field expert, Richard Stalin Cabrera Vega.[92] Cabrera's 2008 report was detailed and controversial: "the centerpiece of in Chevron's allegations of fraud and corruption by plaintiffs."[93] The report found the damage to the Oriente region to be widespread and appalling, worthy of over $27 billion dollars of compensation.

[89] Percival *supra* note 70 at 606–07.
[90] Donziger et. al, Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement, https://amlawdaily.typepad.com/chevinvictusreport.pdf , [*hereinafter* Invictus].
[91] Gomez *supra* note 63 at 443–44.
[92] *Id*.
[93] *Id*.

In 2011, almost two decades after the original case was first filed, the Provincial Court of Justice of Sucumbíos issued a 188-page decision highly relying upon Cabrera's report, of which a judgment of 9.5 billion dollars was awarded to the plaintiffs. This amount was to double if Chevron did not immediately acknowledge the damage they had caused and publicly apologize.[94] From the 9.5 billion, "$8.6 billion was intended for groundwater and soil remediation, the restoration of the native flora, fauna, and aquatic life, the implementation of a potable water system, a healthcare system and the rebuilding of ethnic communities and indigenous cultures."[95] Ten percent of the damages "were to be paid to the Amazon Defense Front,"[96] a company set up by the plaintiffs in Gibraltar to disburse the judgment amongst the plaintiffs and their attorneys.[97] This was the moment Donziger and his associates had been waiting decades for. The judgment, according to the plaintiffs, was a long time coming, so much so that:

> "by the time the judge, Nicolás Zambrano, issued his decision, the case had been going on for eighteen years. It had outlasted jurists on two continents. Zambrano was the sixth judge to preside in Ecuador; one federal judge in New York had died before he could rule on the case. The litigation even outlasted Texaco: in 2001, the company was subsumed by Chevron, which inherited the lawsuit. The dispute is now considered one of the nastiest legal contests in memory, a spectacle almost as ugly as the pollution that prompted it."[98]

The 18-billion-dollar judgment made history as "one of the largest judgments ever imposed by a court for environmental pollution."[99] The plaintiffs had won the battle, but they had no idea what more the war had in store for them.

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[94] *See Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 621 (S.D.N.Y. 2011) (breaking down the multi-billion dollar judgment granted by the Lago Agiro's court).
[95] Gomez *supra* note 63 at 443–44.
[96] Pursuant to Article 43 of the EMA. *See also* Gomez *supra* note 63 at 443–44.
[97] Chevron Press Release, *International Tribunal Rules for Chevron in Ecuador Case* (Sep. 7, 2018), https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case.
It is important to note, however, that the Amazon Defense Front was not a named plaintiff in the case, a requirement for the EMA. *See* Gomez *supra* note 63 at 443-44.
[98] Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012).
[99] Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay $9 Billion*, N.Y. Times (Feb. 14, 2011) (quoting David M. Uhlmann). It was later reduced to 9.5 million by the Ecuadorian Supreme Court.

Almost immediately, a Chevron spokesperson "denounced the judgment as "illegitimate," "unenforceable," "the product of fraud," and "contrary to the legitimate scientific evidence,""[100] and began the appellate process in Ecuador. At the center of their appeal in Ecuador was that Cabrera's report was "ghost-written" by the plaintiffs, and that Judge Zambrano was bribed by them. The appellate court and eventually the Ecuadorian Supreme Court disagreed, affirming the judgment in 2012.

**Enforcement Isn't Easy**

So, the plaintiffs had won billions of dollars… now what? Chevron had no assets and therefore no money in Ecuador, meaning that the plaintiffs only hope to see any of this money was to attempt enforcing the judgment rendered in Ecuador in other countries. Chevron had thought of this; by the time the Lago Agrio court had entered their judgment, "Chevron had already moved in at least two different fronts outside of Ecuador to block the enforcement of an imminent adverse judgment."[101] Chevron was protecting themselves, and their assets, on a global scale, first through a U.S. lawsuit, second through arbitration proceedings, and lastly, through other, foreign courts.

*The U.S. & RICO*

Chevron, "risking the wrath of the gods of irony," brought the case back to the very court where *Aguinda I* was filed, just days before the *Aguinda II* judgment was announced.[102] Seeking a preliminary injunction under the Racketeering Influenced and Corrupt Organizations Act (RICO) statute, Chevron hoped to convince a U.S. Court that Donziger and the plaintiffs' attorneys were money-hungry wolves, willing to do anything to obtain a judgment, including flagrantly breaking

[100] Percival *supra* note 70 at 612.
[101] Gomez *supra* note 63 at 444.
[102]Barrett *supra* note 1 at 181.

the law. RICO was designed to prevent criminal business practices or obtaining money through illegal mechanisms, which Chevron argued was a fit for this set of facts. Chevron claimed that Donziger and his legal team belonged with the mafia and mob bosses that this statute was designed to take down, and that the Ecuadorian justice system was the right hand of his corrupt agenda to make Chevron pay.[103]

By obtaining a preliminary injunction, Chevron aimed to prevent the Ecuadorian plaintiffs from collecting the judgment in the U.S. before they could fight it. Chevron insisted that the Ecuadorian courts could not effectively enter a judgment against them, due to the fact that the courts were "fundamentally tainted by fraud."[104] In an almost perfect example of the tables turning, Chevron argued:

> "that the New York court where they had once said the case did not belong provided a fine venue to litigate the rights and wrongs of the rainforest. Chevron branded the judicial proceedings in Ecuador – which in the 1990s, Texaco had sworn would be squeaky-clean—a cesspool of vice. Donziger, who had warned against official impropriety in Ecuador, now defended the trial in Lago as perhaps unconventional by American standards, but essentially fair. With billions at stake, no one worried about consistency. "[105]

The irony was palpable, but U.S. District Court Judge Kaplan ultimately agreed with Chevron, finding "that the case had been in essence a grand act of extortion executed through bribery, money laundering, and coercion."[106] Judge Kaplan, however, went one step further in issuing the preliminary injunction, as it attempted to bar "the enforcement [of the 18 billion dollar judgment], anywhere in the world outside of Ecuador, of any judgment rendered against it by the Ecuadorian court."[107] He stated in his opinion that there was "ample evidence of fraud in the Ecuadorian

[103] *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016).
[104] *Chevron Corp. v. Donziger*.
[105] Barrett *supra* note 1 at 181-182.
[106] Kevin D. Williamson, Green Floyd: Roger Waters and the Great Green Chevron Scam, NATIONAL REVIEW (Oct. 2018).
[107] *Chevron Corp. v. Republic of Ecuador* (D.C. 2015).

proceedings… and that such evidence was sufficiently serious to warrant a preliminary injunction."[108] This injunction was eventually overturned by the 2nd Circuit, citing that Judge Kaplan did not have the authority to rule a judgment anywhere in the world entirely.[109]

When the U.S. District Court heard Chevron's case for a permanent injunction, which would stop the plaintiffs from ever enforcing a judgment in the U.S., Judge Kaplan was again willing to hear Chevron's tales of ghost writers and bribery from the justice system in third world. He was all too eager to express his dislike of not only the corrupt practices in Ecuador, but also the corrupt practices of Steven Donziger. In fact, Judge Kaplan wrote in his opinion that the plaintiffs' actions "include[d] things that normally come only out of Hollywood;"[110] appropriate, given the fact that accredited documentarian Joe Berlinger had released *Crude*, a film about the Lago case, in 2009. In fact, the outtakes of the documentary were obtained through international discovery for this trial, wherein Judge Kaplan found a treasure trove of evidence to fuel Chevron's corruption claims. In 2014, he held "the issue here is not what happened in the Oriente more than twenty years ago and who, if anyone, now is responsible for any wrongs then done… [rather] it is instead… [about] whether a court decision was procured by corrupt means, regardless of whether the cause was just."[111] He continued, holding that the Lago case was, indeed, "obtained by corrupt means" and that the plaintiffs' lawyers would "not be allowed to benefit from that in any way."[112] Chevron had effectively told Donziger and his associates to look for his $18 billion outside of the U.S., because the judgment would not be enforceable here. The 2nd Circuit affirmed this decision

[108] *Id*.
[109] Williamson *supra* note 106, *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *vacated sub nom. Chevron Corp. v. Naranjo*, No. 11-1150-CV L, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), and *rev'd and remanded sub nom. Chevron Corp. v. Naranjo supra* note 5.
[110] *Chevron Corp. v. Donziger*, 768 F.Supp. 2d 633.
[111] *Id.*
[112] *Id*.

in 2016, and in 2017, the Supreme Court denied Donziger's petition for certiorari; they declined to hear the case.[113] The RICO suit ultimately culminated with Donziger having his license to practice law revoked in 2018.[114]

*Chevron's Arbitration Attempts*

Another roadblock to the enforcement of the judgments are the multiple arbitration proceedings Chevron has brought against the country of Ecuador. In 2006, as a result of the BIT, Chevron commenced international arbitration before the Permanent Court of Arbitration (PCA) in The Hague, alleging that Ecuador violated the BIT by failing to resolve the "at least seven lawsuits against the Ecuadorean government seeking over $533 million in damages in connection with the 1973 and 1977 agreements" that Texaco, and subsequently Chevron, filed.[115] Their main cause of action was that Ecuador violated the BIT by failing to resolve the breach of contract lawsuits "in a timely fashion."[116] Ecuador objected, claiming that the tribunal had no jurisdiction because "Chevron's investments in Ecuador had terminated no later than 1995, two years prior to the entry into force of the BIT," and therefore Ecuador had never agreed to arbitrate with Chevron.[117]

The tribunal disagreed, "finding that Chevron's lawsuits were 'investments' within the meaning of the BIT", therefore the dispute was arbitrable.[118] The tribunal held that "Ecuador had delayed disposition of the lawsuits, [and it] ultimately decided against Ecuador on the majority of

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[113] *Id.*, *See also* Michael I. Krauss, *Chevron's (And The Rule of Law's) Triumph: The Supreme Court Declines To Hear Donziger's Appeal*, Forbes (June 20, 2017), https://www.forbes.com/sites/michaelkrauss/2017/06/20/chevrons-and-the-rule-of-laws-triumph-the-supreme-court-declines-to-hear-donzigers-appeal/#5fd8962137ac.
[114] Peter Hayes, *Steve Donziger, Ecuadoran Villagers' Lawyer, Loses License*, Bloomberg Law (Jul. 10, 2018), https://news.bloomberglaw.com/product-liability-and-toxics-law/steve-donziger-ecuadoran-villagers-lawyer-loses-license.
[115] *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Final Award (Aug. 31, 2011), available at http://italaw.com/documents/ChevronEcuadorFinalAward.pdf. [*hereinafter* PCA 2009].
[116] *Chevron Corp. v Republic of Ecuador* (D.C. 2015).
[117] *Id*.
[118] *Id*.

the breach of contract claims, awarding Chevron approximately $96 million."[119] Ecuador challenged the award in the Dutch legal system, but the award was ultimately upheld by the Dutch Supreme Court. Chevron sought to enforce the award in D.C. District Court, where the award was affirmed, appealed by Ecuador, affirmed again, and ultimately denied certiorari by the Supreme Court in 2016, therefore upholding the tribunal's decision.[120]

A separate arbitration was filed in 2009, also heard at the PCA, but in front of a different tribunal; this arbitration was the sister to Chevron's U.S. RICO suit. Chevron claimed that "the plaintiffs had 'promised payments' to an Ecuadoran judge 'in return for being permitted to draft significant portions' of the ruling against the American multi-national."[121]

The tribunal agreed, noting "that Chevron's counsel had rightly claimed its evidence in the case to be 'the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal.'"[122] In August of 2018, they found Ecuador guilty of "'denial of justice' and ordered it to annul its sentence against Chevron."[123] Not only did the "tribunal unanimously [hold] that [the] $9.5 billion pollution judgment by Ecuador's Supreme Court against Chevron 'was procured through fraud, bribery and corruption and was based on claims that had been already settled and released by the Republic of Ecuador years earlier…', it also alluded to the fact that "the oil giant now stands to be awarded hundreds of millions of dollars in costs by The Hague's Permanent Court of Arbitration."[124] The PCA ordered Ecuador to "take immediate steps, of its

[119] *Id*.
[120] Lawrence Hurley, U.S. top court hands Chevron victory in Ecuador pollution case, REUTERS.COM (June 2017).
[121] France 24, *Court scraps multibillion-dollar Ecuador damages against Chevron* (Jul. 9, 2018), https://www.france24.com/en/20180907-court-scraps-multibillion-dollar-ecuador-damages-against-chevron.
[122] Caroline Simson, *Chevron Wants Donziger Jailed in Fight over $9.5B Fine*, Law360 (Sep. 18, 2018).
[123] *Id*.
[124] BBC News, *Chevron wins Ecuador rainforest 'oil dumping' case* (Sep. 2018).

own choosing, to remove the status of enforceability from the Lago Agrio Judgment."[125] As of April 2019, this PCA award has yet to be rendered, and the plaintiffs are still aiming to enforce this judgment, as Ecuador has not taken steps toward removing the enforceability status.[126]

*Foreign Judgment Collections*

When the plaintiffs failed to collect the judgment in the U.S., they moved onto other countries. Donziger and associates were prepared for this; according to the internal memo written by the plaintiffs' attorneys called Invictus, they had a multi-faceted strategy of where to collect the judgment.[127] Their "non-exhaustive list of nations" for international enforcement included 25 countries, with particular emphasis on The Philippines, Singapore, Australia, and other Latin American countries, like Brazil, Argentina, Colombia, and Venezuela.

Donziger's strategy has, so far, failed in all countries the plaintiffs have attempted to collect their judgment in; this is mainly due to the fact that Chevron has counteracted any attempts to collect judgments by placing all assets in their subsidiary companies. So, for example, rather than collecting from Chevron Canada, where all the assets for Chevron in Canada are held, the plaintiffs are forced to collect from the parent U.S. company Chevron in Canada, where they have no funds.[128] This is because the subsidiary companies are considered "separate legal entit[ies] from Chevron Corp., meaning… [their] assets [are not] tangled up in [the] bid to collect on [the] massive Ecuadorian judgment."[129] Although the plaintiffs have argued extensively that they should be able

[125] *See* PCA 2009 *supra* note 115.
[126] *Id*.
[127] Invictus *supra* note 90. This would normally be considered Attorney Work Product, which is confidential. It became public during the discovery process for the RICO case. *See infra* AWP section.
[128] Shayna Posses, *Canadian Justices Leave Chevron Canada Out of $9.5B Fight*, Law360 (Apr. 5, 2019).
[129] *Id*.

to pursue the subsidiaries, so far this has failed, as the foreign courts want to protect their own businesses, in addition to the business Chevron is bringing to their country.

Although the plaintiffs continue to seek enforcement in Argentina, Brazil, Canada, the U.S., and even Gibraltar, Chevron has yet to pay.[130] Argentinian, Brazilian, and Canadian courts have so far protected the assets in Chevron's subsidiary companies, holding that the plaintiffs can exclusively look for their judgment in the parent Chevron, if at all. In 2017, an Argentinian court refused to recognize the judgment, citing lack of jurisdiction; an appellate court affirmed this decision in July 2018.[131] In November 2017, "Brazil's Superior Court of Justice unanimously rejected an attempt to enforce the Ecuadorian judgment in Brazil."[132] According to Chevron, "Brazil's Deputy Prosecutor General stated the judgment was 'issued in an irregular manner, especially under deplorable acts of corruption.'"[133] A Canadian court in January of 2017 declined the case for similar reasons and an appellate court upheld this decision in May 2018.[134] Litigation in the Canadian courts is still ongoing, but as of April 2019, "Canada's Supreme Court has declined to review a decision that [the plaintiffs] can[not] go after a Canadian Chevron subsidiary's assets to satisfy an embattled $9.5 billion pollution judgment."[135]

[130] France24 *supra* note 121.
[131] Chevron Press Release, *Argentine Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron* (Nov. 1, 2017), https://www.chevron.com/stories/argentine-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron.
[132] Chevron Press Release*, Brazil's High Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron* (Nov. 30, 2017), https://www.chevron.com/stories/brazils-high-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron.
[133] Chevron Press Release, *Canadian Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron Subsidiary* (Jan. 20, 2017), https://www.chevron.com/stories/canadian-court-rejects-attempt-to-enforce-fraudulent-ecuadorian-judgment-against-chevron-subsidiary.
[134] *Id*., *See also Yaiguaje v. Chevron*, 2013 ONCA 758 at para 57.
[135] Posses *supra* note 128.

The plaintiffs "remained undeterred, saying they'll continue enforcement efforts against the parent company."[136] This steadfast determination to enforce the Ecuadorian judgment has proved consequential for the plaintiffs' wallets. In December 2015:

> "the Supreme Court of Gibraltar issued a judgment against Amazonia Recovery Ltd., a Gibraltar-based company set up by the plaintiffs' attorneys to receive and distribute funds resulting from the Ecuadorian judgment, awarding Chevron $28 million in damages, and issued a permanent injunction against Amazonia to prevent the company from assisting or supporting the case against Chevron in any way. The court issued a similar ruling in May 2018 against directors of Amazonia, Frente de Defensa de la Amazonia, Ecuadorian attorney Pablo Fajardo, and Servicios Fromboliere for their role in attempting to enforce the ruling, this time awarding $38 million in damages to Chevron."[137]

Chevron's retaliation campaign does not end there. As of April 2019, Chevron is continuing to seek money from the plaintiffs' attorneys to cover their costs and legal fees, a number "up to $32 million."[138]

**Conclusion**

The history of this case is vast, complex, and never-ending. News articles appear regularly with updates about pending and upcoming litigation. The end is not in sight for Ecuadorians waiting for a judgment that may never come.

[136] *Id*.
[137] Chevron Press Release *supra* note 97.
[138] Amazon Defense Coalition, *Chevron Demands Victims of Its Amazon Pollution Pay $33 Million for Court Costs in Ecuador Environmental Case* (Apr. 3, 2018), http://www.csrwire.com/press_releases/40897-Chevron-Demands-Victims-of-Its-Amazon-Pollution-Pay-33-Million-for-Court-Costs-in-Ecuador-Environmental-Case.

## CHAPTER TWO: HUMANIZING THE PARTIES

### Introduction

In order to best understand the full magnitude of this litigation, we must talk about the people it affects. The plaintiffs are often portrayed as parading behind Donziger on a quest for money from a large corporation; a strategy Chevron intentionally implements. This thesis, however, will look beyond the legal jargon and strategic maneuvering of the courtroom. This chapter will discuss the Oriente region, the indigenous people that live there, and how Texaco's actions affected their way of life. It will further illuminate the person behind the litigation, Steven Donziger, in an attempt to see through Chevron's portrayal of him as the corrupt plaintiffs' attorney. It is only through understanding all aspects of this case that one can learn from the mistakes; learning about the people behind the plaintiffs is an essential component.

### A Profile of the Oriente

" 'What would happen in Texas if there was a spill like that?' [Donald] Moncayo asked, pointing at the black lake in front of us.
I said it would be cleaned up, quickly.
'We've been waiting seventeen years,' he replied."
– Peter Maas, on his trip to Lago Agrio in 2009.[139]

The setting for this Hollywood-esque story takes place in a very real and very harsh environment, the Oriente rainforest in Ecuador. "[140] Prior to the 1960s, roads barely penetrated an area of dense, undisturbed rain forest the size of Rhode Island. This stretch of jungle was so isolated that its inhabitants, consisting mainly of "tens of thousands of… Cofán, Huaorani, Secoya,

[139] Maass *supra* note 2 at 86-87.
[140] *Id*. at 81.

Siona and Quichua" indigenous tribes, lived for many years in complete isolation, with the exception of rare travelers, "who did not all have the benefit of surviving their explorations."[141]


Figure 2: Map of the Regions of Ecuador[142]

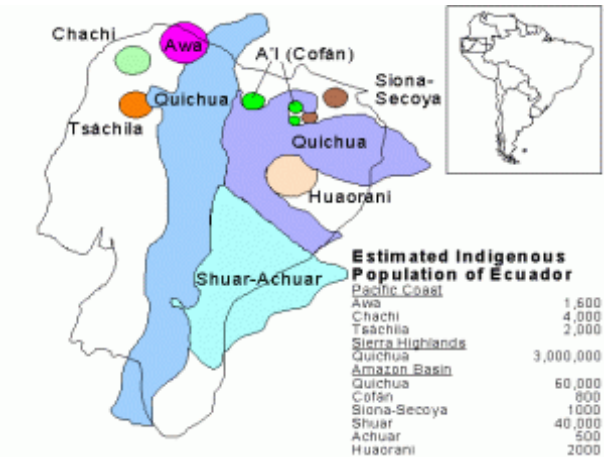


Figure 3: Map of the Indigenous Populations of Ecuador[143]

It was not until the 1960s, when American geologists helicoptered their way into the depths of the jungle, that this region began its trek into the 20th century. The Ecuadorian government encouraged development and Texaco's quest for oil, in hopes that it would bring some much-needed capital and infrastructure to the small and remote South American state. Oil was deemed to be the "salvation of Ecuador's economy, the product that would, at last, pull the nation out of chronic poverty and underdevelopment."[144] The Ecuadorian government did not include

[141] *Id.*

[142] Map of Ecuador. Quest Connect,(2006) http://www.questconnect.org/no_andes_ecuador_home.htm
[143] Indigenous Population in Ecuador. Delplog, (2012) http://blogs.covchurch.org/delp/?p=1822

[144] Judith Kimerling, INDIGENOUS PEOPLES AND THE OIL FRONTIER IN AMAZONIA: THE CASE OF ECUADOR, CHEVRONTEXACO, AND AGUINDA V. TEXACO, 38 N.Y.U. J. Int'l L. & Pol. 413, 414–15 (2006).

indigenous communities in this decision to drill for oil in their lands; according to Ecuadorian law at that time, "the indigenous people own[ed] the land but the government own[ed] the minerals beneath it."[145] This gross violation of human rights' has been publicly deemed a mistake on the part of the Ecuadorian government, one that was a result of pressure from U.S. relations with Latin America in the 20th century; this tension caused the Ecuadorian government to act against their own people.

*Texaco's Development of the Region*

The first exports of the extracted oil began in 1972, when "Texaco completed construction of a 313-mile pipeline to transport crude oil out of the remote Amazon region, across the Andes Mountains, to the Pacific coast."[146] This was the Trans-Ecuadorian Pipeline System, or the Sistema Oleducto Trans-Ecuatoriano, known better by its Spanish acronym, SOTE. The government was so thrilled by the completion of SOTE that the first barrel of "Amazon Crude was paraded through the streets of the capital, Quito, like a hero… in some neighborhoods, residents could get drops of crude to commemorate the occasion."[147] It was such a momentous occasion that "after the parade, the oil drum was placed on an altar-like structure at the Eloy Alfaro Military Academy."[148]

[145]Maass *supra* note 2 at 98.
[146] Kimerling *supra* note 144 at 415 (2006).
[147] *Id*.
[148] *Id.*

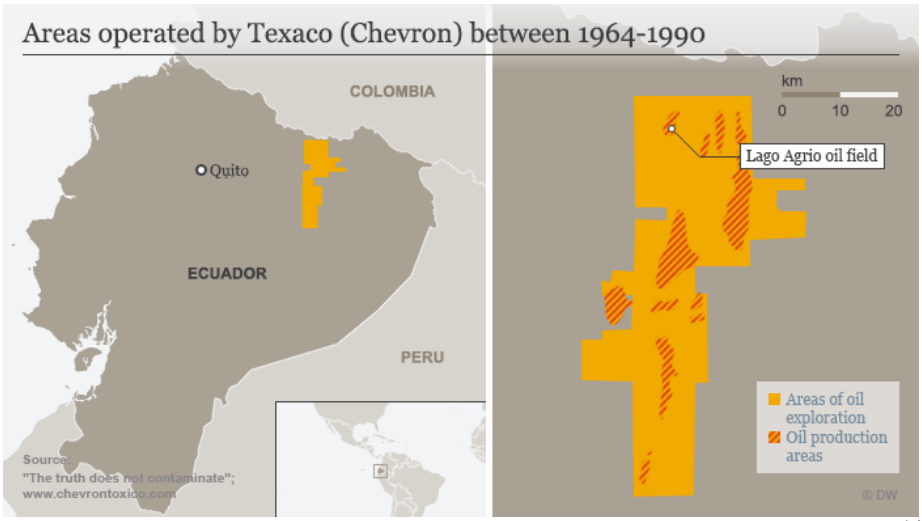

Figure 4: A Map of the Areas Operated By Texaco between 1964-1990[149]

As a result of Texaco's findings, development of the region became centered around oil and the company. The region grew from a few thousand inhabitants to 500,000, most all of whom had some connection to Texaco.[150] This is exemplified by the name of the regional capital, Lago Agrio, which provides a sort of morbid irony on two different levels. First, "in a nod to the corporate creator" and catalyst for the development of the Oriente, Lago Agrio "is the Spanish translation of the name of the American town where Texaco was born: Sour Lake."[151] Second, and on a more sour note, no one could have predicted how poignant that name would be in describing a town plagued by environmental pollution and tainted water.

Ecuador's quest for income came with more than a population boom in the Amazon; some unprecedented environmental consequences now plague the country. Although "the Hydrocarbon Law of 1971 required the 'protection of the flora and fauna and other natural resources' and prohibited 'contamination of waters atmosphere and lands,'… these [legal] obligations were not

[149]Claudia Garcia, *A slippery decision: Chevron oil pollution in Ecuador*, Deutsche Welle (Sep. 8, 2016), https://www.dw.com/en/a-slippery-decision-chevron-oil-pollution-in-ecuador/a-18697563.
[150] Kimerling *supra* note 144.
[151] *Id.*

fleshed out with specific regulations until the 1990s, long after Texaco had left the country."[152] In fact, "for decades, they were empty platitudes," and Texaco knew it.[153] Now the Ecuadorian Constitution, "guarantee[s] its citizens a 'right to live in an environment free of contamination," but this version of the Constitution was leftist President Rafael Correa's, implemented in 2008, perhaps in response to the horrible contamination in the Oriente.

*The Consequences of Texaco's Actions*

Because Texaco was not monitored or regulated in their drilling practices, they admittedly did not keep to the same standards that they would have had they been drilling for oil in Texas.[154] The biggest example of this is the fact that they did not line their pits with titanium as they would have if they were keeping to their normal business practices.[155] More than 300 pits should have been lined with titanium in order to prevent leakage; instead toxins from oil waste seeped into the ground, poisoning the plants, animals, and groundwater that trickles into the foliage.[156]

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[152] Barrett *supra* note 1 at 28, *See also* Oil & Gas Journal, *New Hydrocarbon Law Scheduled in Ecuador* (June 21, 1993), *See* Constitution of the Republic of Ecuador (translated), http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.
[153] Barrett *supra* note 1 at 28.
[154] Maass *supra* note 2 at 86-87. *See also* Barrett *supra* note 1 at 28-29 (discussing internal Texaco debates on whether to line waste pits to cut down on contamination) A full record of this was never released due to Texaco wanting to keep company policy confidential. *Id*.
[155] *Barrett supra* note 1 at 28.
[156] This actual number is highly contested. Chevron and Texaco both estimate around 430 pits exist. In the original complaint for *Aguinda I*, the plaintiffs also estimated around 400 pits were in the Amazon. On their current website, however, they estimate 916 unlined pits are in the Oriente. The Ecuadorian judgment echoes this number, but Chevron argues that the report this number was based on, and subsequently the judgment, were obtained via fraudulent methods. Like many other things in this case, it is hard to believe which is real. For Chevron's estimate, *see TexPet's Remidiation and Revegetation of Oilfield Pits in the Ecuadorian Amazon,* http://theamazonpost.com/chevron-ecuador/wp-content/uploads/Remediation-Brochure.pdf, for the Plaintiffs estimate, *see ChevronToxico: The Campaign for Justice in Ecuador*, https://chevrontoxico.com.

(Left) Figure 5: Native Frogs Live Covered in Oil as a result of the pollution.[157]
(Right) Figure 6: An oil pit. The yellow tape reads "Peligro" or "Danger".[158]

As a result of these practices, the oil seeped into the water supply. Texaco also burned the oil waste "without temperature or emissions controls,"[159] resulting in air pollution. [160] The area began to smell of gasoline and fumes, and people began to get sick. The oil giant "chose to use illegal environmental practices that contaminated the Amazon waterways and harmed many of the 30,000 people who depend on the tainted waters for drinking, cooking, bathing, cleaning, and fishing."[161]

As Texaco provided more and more jobs, communities grew around the pollution, "not realizing how [the proximity to oil] would affect [their] health."[162] People built their houses in between open, unlined pits, and on top of ones that had been covered. Small villages engulfed the pits. When it rained, "greasy black fluid would run from the former pits into the nearby streams…

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[157] Jade Vasquez, An End to Corporate Impunity: Making Chevron Accountable for Environmental Disaster, Council on Hemispheric Affairs (Nov. 7, 2012), http://www.coha.org/an-end-to-corporate-impunity-making-chevron-accountable-for-environmental-disaster/.
[158]El Universo, *Canadá rechazó demanda de Ecuador contra Chevron por $ 9.500 millones*, Reuters (Apr. 4, 2019), https://www.eluniverso.com/noticias/2019/04/04/nota/7269053/canada-rechazo-demanda-ecuador-contra-chevron-9500-millones

[159] Anna-Karin Hurtig & Miguel San Sebastian, *Incidence of Childhood Leukemia and Oil Exploitation in the Amazon Basin of Ecuador*, 10 Int. J. Occup. Environ. Health 2004 at 245-250, https://chevroninecuador.org/assets/docs/childhood-leukemia.pdf

[160] Barrett *supra* note 1 at 144.
[161] 60 Minutes, *Amazon Crude* (2009).
[162] Barrett *supra* note 1 at 144.

the same streams from which [families] drew their water for drinking and cooking."[163] The locals called the rivers "black blankets"[164] but continued to use them for everyday things; they had "no choice… [but to bathe in] water… [that was] shiny with oil."

(Left) Figure 7: Oil contaminates the rivers in the Amazon.[165]
(Right) Figure 8: An indigenous woman washes her laundry in the oil contaminated waters. [166]

(Left) Figure 9: Florinda Yela, 75, "outside her house which sits above the contaminated oil pit left by Texaco (now Chevron) near Lago Agrio, Ecuador."[167]
(Right) Figure 10: Abandoned Barrels with the Texaco Logo in the Oriente[168]

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[163] *Id.*
[164]60 Minutes *supra* note 161, *See also* Vasquez *supra* note 157.

[165] Pablo Gomez Barrios, Delegación ecuatoriana visita Canadá por el caso Chevron/Texaco en Ecuador, Radio Canadá Internacional (Sep. 16, 2016), http://www.rcinet.ca/es/2016/09/16/delegacion-ecuatoriana-visita-canada-por-el-caso-chevrontexaco-en-ecuador/.
[166]BBC Mundo, *En fotos: el case Chevron-Lago Agrio* (Feb 15, 2011), https://www.bbc.com/mundo/noticias/2011/02/110215_galeria_ecuador_petroleo_mz
[167]Caroline Bennett, *Chevron's Toxic Legacy in Ecuador's Amazon*, Rainforest Action Network (Apr. 15, 2010), https://www.flickr.com/photos/rainforestactionnetwork/4858077513
[168]Vistazo, *Ecuador Deberá Indemnizar A Chevron, Determina La Hayal* (Sep. 7, 2018), https://www.vistazo.com/seccion/pais/actualidad-nacional/ecuador-debera-indemnizar-chevron-determina-la-haya.

There are many allegations of indigenous people, particularly children and the elderly, that have developed cancer as a result of the pollution.[169] There are also claims of women having miscarriages and becoming infertile due to consuming this water and living in these conditions.[170] These reports, unfortunately, like every other aspect of this case, are hotly contested and mirrored in a cloak of obscurity.[171] Although there are many books, articles, and videos that report stories from the indigenous people that developed a variety of maladies, no formal evidence was submitted to the court confirming a link to cancer from oil pollution.[172] Many of these people were not even seen by a doctor to confirm their illnesses, as many did not have the means to travel to a hospital.[173] It is, however, difficult to disregard the "billions of gallons of untreated toxic waste, gas, and oil released into the environment, [and the] increasing rate of disease in the Amazon as a coincidence."[174]

*PetroEcuador's Operations*

Texaco, however, had long since left and forgotten the country by the time these claims came to a court of law. After they could not agree to the terms of an extension to their contract with the government of Ecuador, they passed their torch to PetroEcuador, a state-owned oil company that they spearheaded; Texaco "created" the state-owned oil company specifically to run operations with .[175] Although they technically had a partnership for many years, "Texaco was the 'operator,' meaning it managed all activities… [and because] Ecuador's government [at that time]

[169] 60 Minutes *supra* note 161, *Crude supra* note 30.
[170] *Id*.
[171] *See generally 60* Minutes *supra* note 161, *Crude supra* note 30, Romero *supra* note 99, Barrett *supra* note 1.
[172] Barrett *supra* note 1 at 210.
[173] *Id*.
[174] Vasquez *supra* note 157, *see also* Sociedad de Lucha contra el Cáncer. Cáncer en regiones del Ecuador. Quito, Ecuador: SOLCA, 2001.
[175] Vasquez *supra* note 157, *see also* Sociedad de Lucha contra el Cáncer. Cáncer en regiones del Ecuador. Quito, Ecuador: SOLCA, 2001.

had almost no expertise in the oil industry it rarely questioned anything Texaco did."[176] Texaco not only set the standards for PetroEcuador's operations, their standards did not include environmental or human health protections; Texaco left the Ecuadorian personnel in the dark about environmental matters and safety issues. In fact, "oil field workers who were trained by Texaco were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun or covered their hair with plastic caps overnight. To remove the crude, they washed their hair with diesel."[177] In fact, there were many rumors "attributing medicinal qualities to Amazon crude," which, "considering its status at that time as the harbinger of a great future for the nation and Texaco's neglect of environmental and human health concerns… was not entirely surprising."[178] Unfortunately, the opposite appears to be true.

By the time Texaco vacated Ecuador in 1992, the government had gained some industry experience as Texaco had sent the new generation of oil engineers to the U.S. for training.[179] Unfortunately, "PetroEcuador was not much better than its American godfather."[180] Rather than "investing in better technology and safer practices… the company cut corners as much as Texaco did."[181] The government was billions of dollars in debt, largely thanks to loans it took out believing that they would be able to pay them off with oil money, so a rapid profit was prioritized over safety. When natural disasters and other unpredictable environmental issues occurred, the government became unable to meet those payments. The government "needed every penny it could squeeze from its oil company… to pay off foreign debts and fund usual government operations."[182] As a result, PetroEcuador does not fall far from Texaco's tree.

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[176] Maass *supra* note 2 at 87.
[177] Kimerling *supra* note 51 at 248–49.
[178] *Id*.
[179] *Id*.
[180] Maass *supra* note 2 at 88.
[181] *Id*.
[182] *Id*.

In 2003, SOTE gained a twin, which continues to transport 500,000 barrels of oil every day to the coast of Ecuador; ironically "the largest portion of exports go to California," home of Chevron.[183] The pipelines are "akin to aortas connected to a network of steel veins that move oil from the wells and processing stations spread over the humid flatlands."[184] As the indigenous communities grew, they engulfed both the old Texaco pipelines and the new PetroEcuador pipelines. Unfortunately, this means that the pipelines are not located "underground or routed away from roads and people." Instead, they "rest on rickety pylons one or two feet high and just a few feet—or sometimes inches—from the roads."[185] People swerving into these pipes cause accidents "all the time," although "collisions are not necessary to create spills, because the pipelines are old and poorly maintained, [so] they leak constantly."[186]

(Left) Figure 11: Children walk along the pipelines to walk places in their towns.[187]
(Right) Figure 12: SOTE provides an unfortunate laundry line.[188]

[183] *Id*.
[184] *Id.* at 83.
[185] *Id.*
[186] *Id.*
[187] Public Radio International, *Ecuadorian locals still seeking damages from Chevron for environmental damage* (June 17, 2013), https://www.pri.org/stories/2013-06-17/ecuadorian-locals-still-seeking-damages-chevron-environmental-damage.
[188] Johan Bävman, *Daily Life Along The Pipeline SOTE* (2019), http://www.johanbavman.se/daily-life-along-the-pipeline-sote/

*The Oriente Now*

The fact that Texaco caused severe environmental damage is not contested.[189] Even Judge Kaplan noted that:

> The [U.S. District] Court assumes that there is pollution in the Oriente. On that assumption, Texaco and perhaps even Chevron – though it never drilled for oil in Ecuador – might bear some responsibility. In any case, improvement of conditions for the residents of the Oriente appears to be both desirable and overdue.[190]

This goes far "beyond anything Chevron would admit," but is the reality.[191] Donziger described what he saw on his first visit to the Oriente in 1993 as an "apocalyptic disaster in the rainforest."[192] The indigenous people of the Oriente continue to survive in this disaster zone. They continue watch how this affects their communities and continue to wait for a judgment. There are still hundreds of pits of oil waste left by Texaco, which leak horrible toxins into the environment.[193] The members of this community have, quite literally, grown up in the pollution, and have adapted ways to live. Maria Aguinda became the lead plaintiff because Donziger was horrified at the way that she "cleaned the oil [that coated her] feet with gasoline-soaked rags."[194] She is a representation of the thousands of people who have adapted to an inhospitable area. The headache inducing smell of oil and gasoline in these communities is a way of life here, as the area is covered in oil from the pipes and waste from the pits.[195] Without a major cleanup, there is no end in sight for this pollution. Oil does not just dissipate over time. Oil has a "strange property… [one] may hastily bury it in the ground, but it does not disappear. Two things can happen. It may sink deeper, poisoning the

[189] *Chevron Corp. v. Donziger*, 768 F.Supp. 2d 633.
[190] *Id*.
[191] Barrett *supra* note 1 at 262.
[192] *Id*.
[193] *See supra* footnote 156.
[194] Barrett *supra* note 1 at 48.
[195] Maass *supra* note 2 at 89.

groundwater, or it may rise to the surface, poisoning the water there. Or it may do both. We may wish to forget about oil, but oil will not let us."[196]

Figure 13: In some places, the oil has permeated the ground, causing people who step in it to sink.[197]

The longer that lawyers argue in foreign courts about the enforcement of a judgment, the longer the members of this community are forced to wait for the day that their lands are cleaned up so they can live a healthy lifestyle. The drawn-out litigation "ha[s] yet to improve either the ecology of the jungle or the health of its inhabitants… the spongy gunk remain[s] everywhere."[198] Maria Aguinda "was in her late teens when Texaco began its operations in the Oriente. She is, as of [2019], in her late sixties."[199] Time is passing, nothing is happening, and the indigenous people of the Oriente have no choice but to wait.

[196] *Id*. at 86.
[197] Business and Human Rights Resource Centre, *Human rights impacts of oil pollution: Ecuador, Impacts on health, livelihoods,* environment, https://www.business-humanrights.org/en/human-rights-impacts-of-oil-pollution-ecuador-22
[198] *Id*.
[199] Steinitz *supra* note 1 at 70.

**Steven Donziger: The Man, the Myth, the Legend**

"This case is not about me… the communities are not going away, they're resilient, the lawyers are not going away, they're resilient, and we are going to continue to fight this battle until that judgment is collected and the people get what they deserve, which is their lands cleaned up, as well as compensation for all the damage that they have had to endure and suffer through for decades. They deserve that, and that's what they are going to get."[200] – Steven Donziger

Figure 14: Steven Donziger in Ecuador.[201]

The first thing one reads about Steven Donziger is his height. This is affirmed by the dozens of pictures of him towering over the indigenous people he defends in court. The second thing people notice is his charismatic nature, of which I can attest to; when I talked to him on the phone in January of 2019, I noticed this immediately. Without question, Donziger could convince a man on a typical day in Southern Arizona that he needed an umbrella. He is knowledgeable, persuasive, and quick on his feet: the walking, talking definition of zealous advocacy for his clients.

Donziger became the face of this massive case almost immediately out of Harvard Law School, where he graduated with former U.S. President Barack Obama. Before law school, he was an investigative journalist that spent years in Latin America. He ability to summon "righteous fury… seemingly at will"[202] in support of his clients earned him the reputation of a "performance

[200] *Id*.
[201] Steven Donziger, *About Steve* (2019), http://stevendonziger.com/about-steve/.
[202] Barrett *supra* note 1 at 8.

artist with a law degree"[203] and "Herculean tenacity."[204] Many are not quite sure "whether he [is] a missionary or a masochist… or both."[205] His "guerilla warfare" style of law means he is willing to go to any length for his clients, something Texaco highly underestimated.[206]

With being the front man of the case comes many responsibilities; unfortunately for Donziger, those include being Chevron's punching bag. He talks in many interviews about how although he is "a very resilient person... [he is] being attacked by a major American oil company that is trying to destroy [his] life."[207] Donziger says that Chevron "created a caricature around me" for the media and proceeded to "attack" it.[208] He argues that they "needed a human face to distract from the people in Ecuador that they are killing."[209] Even major news outlets have acknowledged the "Demonize Donziger" strategy of avoiding corporate liability.[210] He acknowledges this as a "intelligent, clever, albeit disgusting strategy."[211]

He is not wrong; Chevron has openly admitted that they are using many strategies to fight off the judgment not only for this case, but also from potential others.[212] Former Chevron VP stated that there is a docket of "lots of people who have brought lots of lawsuits against Chevron who all believe, 'you've got a lot of money… why don't you just give me some?"[213] By admitting their wrongdoing in the Amazon, they are opening the door for liabilities in the dozens of other countries they operate in.[214] In fact, this was a part of Donziger's master plan: a model of sorts for holding

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[203] *Id.* at 5.
[204] Donziger Law, *About*, (quoting Business Week, 2019), https://www.donzigerlaw.com/full-bio
[205] Maass *supra* note 2 at 90
[206] *Id*.
[207] About Steve *supra* note 201.
[208] Phone Interview with Donziger (Jan. 25, 2019).
[209] *Id*.
[210] Mike Curley, *Donziger Slams Chevron Contempt Bid in 9.5 Ecuador Case*, Law 360 (Nov. 1, 2018).
[211] Interview *supra* note 208.
[212] *Id*.
[213] Barrett *supra* note 1 at 142.
[214] *Id.* at 143.

large corporations who do wrong in third world countries responsible for their actions. He knows that:

> "one of the reasons Chevron is fighting so hard is they know if the indigenous people of Ecuador get a monetary recovery…if they actually get the money, it will inspire people all over the world who were victimized by this company and by other oil and mining companies who suffer the effects of pollution…it will encourage them to use the same model we did to get a recovery… Chevron is fighting really hard to kill off not only this lawsuit but the idea behind the lawsuit."[215]

Unfortunately for Donziger, Chevron was preparing a model of their own, as they hoped the case would serve "as an example of how companies can fight back if they have the nerve and the cash."[216]

Chevron was not going down without a fight, but neither was Donziger. If anything, Chevron's model has emboldened him to use a wide variety of legal strategies in order to gain both political and media favor. He argued that the plaintiffs could "have the best proof in the world, and if we don't have a political plan, we will surely lose."[217] As a result, Donziger can describe the "dirty tricks, outright lies, intimidation employed by Chevron to evade justice in Ecuador and to sabotage the trial" with the drop of a hat. He has argued the same script for over 25 years.

Donziger is facing more heat than he ever expected; between the RICO case and his license to practice law being suspended, he could be in a lot of hot water. He argues that the RICO case was "inherently illegitimate" and that [he has] not been properly protected by the justice system."[218] He believes he is facing "the most vicious, well-funded retaliation campaign ever to destroy [him]."[219] This campaign includes "weaponizing the bar association" against him, even

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[215]TeleSUR English, *Steven Donziger, 25 Years of Chevron Case* (Nov. 3, 2018), https://www.youtube.com/watch?v=lCudgAmCX-k.
[216] The Wall Street Journal, *Legal Fraud of the Century* (Mar. 4, 2014), https://www.wsj.com/articles/legal-fraud-of-the-century-1393978989?ns=prod/accounts-wsj.
[217] Barrett *supra* note 1 at 108.
[218] Interview *supra* note 208.
[219] About Steve *supra* note 201.

though he "has not had a client complain in 25 years" and [220] filing lawsuit after lawsuit because "they know [he does not have] the money to defend [himself].[221]

Donziger knows a case like this is unprecedented in many ways. The Ecuadorian case "is probably one of the most intensely litigated environmental cases in the world," Donziger stated. He also acknowledges that there are certain exceptions to traditional legal practicum when it comes to this litigation, what he calls the "Chevron or Steven Donziger exception to the law."[222] He argues that "the law is not obeyed when it comes to me or Chevron."[223]

Donziger has no shame in saying what he thinks and calling things out the way he sees them, although he admits he has "involved views because [he has] been living this for so many years."[224] According to him, this entire case is a "corporate scandal that reaches into upper echelons of judiciary and New York corporate world."[225] He also states that "Chevron's rage at [him] appears to have left it entirely unhinged, living in a fantasy world — and one with a terrifying lack of due process."[226] He argues that "when it comes to corporate power issues and fighting this judgment that came out of Ecuador, they do not follow the law, [decisions are] political to the extreme."[227] He claims Judge Kaplan has a bias toward Chevron because they are a large American corporation, and he was a Clinton appointee.[228] In fact, he states that "judges in America, no matter their political opinion… [have] virtually no disagreement about economic issues, particularly ones when you have a small country imposing a multi-billion dollar judgment on an American oil

[220] *Id*.
[221] Interview *supra* note 208.
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] *Id*.
[226] Curley *supra* note 210.
[227] Interview *supra* note 208.
[228] *Id*.

company."[229] He asserts that the "global judicial system is rigged to favor wealth and power generally" and that Chevron's extreme manipulation tactics, "are [all issues] being raised to delay [the inevitable] day of reckoning."[230]

Ultimately, Donziger believes this case is a representation of the "failure of civil justice system, because it has taken 25 years with no solution."[231] He states there have been "over 150 judges in Ecuador, Canada, in the US, who have overseen some aspect of this case without there being a final decision. That is a total insult to the indigenous people of Ecuador."[232] They describe the litigation as "Chevron abusing the process because they [have] determined it's cheaper to pay millions and millions of dollars to lawyers to delay the case than to pay the people they harmed for clean up." He states there is still "a tremendous amount of enthusiasm" amongst the people in Ecuador, and that they will continue to pursue this judgment;[233] "Ecuador won't surrender to Chevron which is why Chevron keeps attacking." [234]

**The Dark Side of Donziger**

While Donziger is, without question, a zealous advocate for his Ecuadorian indigenous clients, much of his behavior throughout the litigation has caused an uproar through the international legal community. To begin, as a non-Ecuadorian, Donziger is not even allowed to practice law in the country of Ecuador; but "technicalities did not deter Donziger…[he] cited no statute or precedent, [only] his own ferocious indignation" in chambers or in a courtroom in Lago

[229] *Id*.
[230] *Id*.
[231] *Id*.
[232] *Id*.
[233] *Id*.
[234] TeleSUR English *supra* note 215.

Agrio.[235] He also chose not to sue the Ecuadorian government or PetroEcuador, preferring the story of a large American corporation versus villagers in Ecuador, a decision Texaco, and subsequently Chevron, has questioned since the beginning of the case.[236] Further, none of the indigenous people were properly evaluated by a doctor, nor was there evidence entered into the record on the effects of oil pollution on health, either generally or to specific cases in Ecuador.[237] All evidence was anecdotal rather than scientific, which left many wondering how valid the claims of oil causing cancer was.[238] What did Donziger not want on the record and why would he not make sure this sort of evidence was heard?

Donziger's fishy legal choices have been documented through video evidence in the *Crude* outtakes, and subsequently through evidence on the record. The discovery of the outtakes led to "numerous scenes showing Steven Donziger and other members of the plaintiffs' legal team engag[ing] in ethically questionable behavior that further compromised the integrity of the Ecuadorean proceedings."[239] Judge Kaplan outlined this behavior, which included:

> "coded emails among Donziger and his colleagues describing their private interactions with and machinations directed at judges and a court-appointed expert, their payments to a supposedly neutral expert out of a secret account, a lawyer who invited a film crew to innumerable private strategy meetings and even to *ex parte* meetings with judges, an Ecuadorian judge who claims to have written the multibillion-dollar decision but who was so inexperienced and uncomfortable with civil cases that he had someone else (a former judge who had been removed from the bench) draft some civil decisions for him, an 18-year-old typist who supposedly did Internet research in American, English, and French law for the same judge, who knew only Spanish, and much more.[240]

[235] Barrett *supra* note 1 at 6.
[236] *Aquinda supra* note 20.
[237] Barrett *supra* note 1 at 210.
[238] *Id*.
[239] Jeff Todd, *Ecospeak in Transnational Environmental Tort Proceedings*, 63 U. Kan. L. Rev. 335, 356–57 (2015).
[240] *Id*.

More and more evidence was uncovered as Donziger's RICO trial progressed. Among the most abhorrent was the affidavit of former Ecuadorean judge Alberto Guerra, who presided over the Lago Agrio case between 2003 and 2004.[241] In his affidavit, he "made grave allegations of corruption that involved him, the plaintiffs' counsel, and his successor Honorable Nicolás Zambrano, who was in charge of the Superior Court of Nueva Loja when the final decision of the case was issued."[242] He described in great detail how he was the ghostwriter for all decisions issued by Judge Zambrano in the Lago Agrio case; "he also explained how he had helped the plaintiffs' counsel to move the case forward, and how he had received a monthly stipend in exchange for his illegal work, which included editing the final judgment against Chevron."[243]

The evidence uncovered about Cabrera's report was not better. Judge Kaplan found that the plaintiffs attorneys':

> "coerced one judge, first to use a court-appointed, supposedly impartial, "global expert" to make an overall damages assessment and, then, to appoint to that important role a man whom Donziger hand-picked and paid to 'totally play ball' with the LAPs [Lago Agrio Plaintiffs]. They then paid a Colorado consulting firm [Stratus] secretly to write all or most of the global expert's report, falsely presented the report as the work of the court-appointed and supposedly impartial expert, and told half-truths or worse to U.S. courts in attempts to prevent exposure of that and other wrongdoing. Ultimately, the LAP team wrote the Lago Agrio court's Judgment themselves and promised $500,000 to the Ecuadorian judge to rule in their favor and sign their judgment. If ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it."[244]

These corrupt actions taint the Ecuadorian judgment, much like oil pollutes and permeates through the groundwater in Lago Agrio. When reviewed by the 2nd Circuit, Judge Kearse stated "the record reveal[ed] 'a parade of corrupt actions' by Donziger and his associates, including coercion and

[241] Gomez *supra* note 63 at 438. *See also* Declaration of Alberto Guerra Bastidas at PP 23-27, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 746-3 (Ex. C).
[242] Gomez *supra* note 63 at 438. *See also* Declaration of Alberto Guerra Bastidas at PP 23-27, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 746-3 (Ex. C).
[243] Gomez *supra* note 63 at 438. *See also* Declaration of Alberto Guerra Bastidas at PP 23-27, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 746-3 (Ex. C).
[244] Todd *supra* note 239.

fraud, culminating in the bribe offer."[245] She continued by declaring that "Chevron's $8.646 billion judgment debt ... is clearly traceable to the Lago Agrio plaintiffs' legal team's corrupt conduct."[246] This conduct has prevented the plaintiffs from pursing their judgment in the U.S. and has resulted in the loss of Donziger's law license. Again, this does not deter Donziger from fighting for enforcement. Although right now Donziger's tenacity is on the right side of the human rights' fence, if the Lago court had ruled for Chevron, Donziger would still, without question, be fighting for his judgment.

[245] 2016 WL 4384292.
[246] *Id*.

## CHAPTER 3: THE MEDIA FRENZY… FAKE NEWS?

### Introduction

Throughout the decades of litigation involving this case has been a swarm of media headlines, ranging from newspaper articles, magazine spreads, and websites, to celebrity coverage and multiple books and documentaries. This case has been covered by the likes of 60 Minutes, Vanity Fair, The New York Times, Forbes, and many, many more. There have been countless books, articles, and even a documentary, *Crude*, that followed the case during the Ecuadorian legal proceedings. Celebrities from all over the world have taken an interest in the environmental damage in the Oriente. Even Brad Pitt and George Clooney have fought over the rights of who would get to produce a movie based on this case.[247] It should come as "no surprise [then] that the Chevron-Ecuador saga has garnered the worldwide attention of [not only] the media," but also academic literature.[248] There have been "numerous reports, newspaper articles and documentaries [which] have been published around the world since the beginnings of the case in the early nineties."[249]

The media is inherently intertwined with this case, and it, unfortunately, yet predictably, changes its tune at the drop of a hat. The media seems to agree with Donziger and the plaintiffs' lawyers one minute, and with the following 'wave of judgments, agree with Chevron the next. The media frenzy is inherently intertwined with the lawyers' legal strategies to involve them, and as

[247] Roger Parloff, *Brad Pitt edges out George Clooney for film rights to Chevron-Donziger story*, Fortune (Apr. 27, 2015), http://fortune.com/2015/04/27/brad-pitt-george-clooney-film-rights-chevron-donziger/
[248] Gomez *supra* note 63 at 433–34.
[249] *Id*.

such, the media has played a crucial role in highlighting aspects of this case that the subsequent attorneys wanted to be highlighted.

**Media & Legal Strategy: ChevronToxico & The Amazon Post**

An inherent part of the media strategies of each side are the party-run campaigns running propaganda against their opponents. The reach of this propaganda has slowly grown from press releases and interviews to websites, Twitter, and YouTube videos. These play an inherent role in how the media and the public perceive the case and are updated regularly any time there is news relevant to the case.

The plaintiffs' control the cleverly named ChevronToxico website to propagate anti-Chevron articles into the media.[250] Subtitled the Campaign for Justice in Ecuador,"[251] the website outlines "the true story of Chevron's Ecuador disaster."[252] There, you can find hundreds of stories, pictures, and videos substantiating the plaintiffs' claims and denouncing Chevron in every way possible. This website actually started as TexacoToxico, and transitioned to ChevroninEcuador, and eventually ChevronToxico when the 2001 merger occurred.

Some other websites, like Amazon Watch and the Corporate Social Responsibility Wire, also regularly contribute to this campaign.[253] Amazon Watch in particular has created a five-part animated series on Chevron entitled *The Adventures of Donny Rico*, where they point out what they believe are the obvious flaws in the case by asking the character, a New York mobster like

[250] *See generally* ChevronToxico *supra* note 156.
[251] *Id*.
[252] *Id*.
[253] *See generally* Amazon Watch, amazonwatch.org, *see generally* The Corporate Responsibility Newswire, csrwire.com.

the ones RICO were meant to prosecute.[254] Using expletives and a thick New York accent, Donny Rico explains how "Chevron makes it a crime to defend the environment"[255] and how "if you're a big corporation… [you] can make certain problems go away… [by] being the victim."[256] The series also animates Judge Kaplan in cahoots with Donny Rico; the two cheekily state that they have "got just the 'ting for a big corporation [that has] got problems with pollution, spills, [and] hazardous gloop… RICO their a**es."[257]


Figure 15: Donny Rico, a character the plaintiffs created. His New York accent is supposed to represent corrupt corporations in the U.S. He "doesn't like what you're insuinatin', pal."[258]

Not to be outdone by Donziger, Chevron its own propaganda campaign. Between the Chevron-run website The Amazon Post, subtitled "Chevron's Views and Opinions on The Ecuador

[254] *See generally* AmazonWatch, *Chevron in Ecuador* YouTube playlist, https://www.youtube.com/watch?v=G3nPxc31Qt4&list=PLK0pnfmoVNcGCcZ5PLuFmawXY3Osvz89C&index=3
[255] AmazonWatch, Donny Rico & Chevron make it a crime to defend the environment, Youtube (Jan. 20, 2014)
[256] AmazonWatch, *Donny Rico Episode #3: Legal Tender (Chevron Legal "Thuggery" Against Ecuadorians*, Youtube (June 24, 2014), https://www.youtube.com/watch?v=G3nPxc31Qt4&list=PLK0pnfmoVNcEo6hnKVxzqJm8LK3v3vPcb&index=5
[257] AmazonWatch, *Donny Rico Episode #5: Be the Victim*, Youtube (Apr. 25, 2015) https://www.youtube.com/watch?v=G3nPxc31Qt4&list=PLK0pnfmoVNcGCcZ5PLuFmawXY3Osvz89C&index=3
[258] AmazonWatch, Donny Rico Episode #2: Who's Bribin' Who? (in Chevron's "case" against Ecuadorians) (May 28, 2014), https://www.youtube.com/watch?v=U_kAifa3q4c&list=PLK0pnfmoVNcGCcZ5PLuFmawXY3Osvz89C&index=2

Lawsuit"[259], their company press releases, and their own YouTube videos, Chevron has an equally detailed account of the events in Ecuador from their perspective. The Amazon Post has edited over outtakes from *Crude* and called the videos catchy names, like "'The Legal Fraud of the Century' in 3 Minutes"[260] and "Confessions of a Fraud," starring Steven Donziger.[261] They even examine the plaintiffs' evidence, calling it "science fiction."[262]


Figure 16: A Still from The Amazon Post's "'The Legal Fraud of the Century' in 3 Minutes." Donziger, middle, is quoted saying "Facts do not exist. Facts are created."[263]

Both the plaintiffs' and Chevron's websites are integral in generating media hype and circulating fake news to the public in an effort to garner support for their case. Ironically, both accuse the

[259] *See generally* The Amazon Post: Chevron's Views and Opinions on The Ecuador Lawsuit," http://theamazonpost.com /
[260] The Amazon Post, *Chevron/Ecuador: The "Legal Fraud of the Century" in 3 Minutes*, YouTube (Mar. 25, 2015), https://www.youtube.com/watch?v=9YhNMKNBsfE. This video title is quoting the famous Wall Street Journal article, *see* Legal Fraud of the Century *supra* note 216.
[261] The Amazon Post, *Confessions of a Fraud,* http://theamazonpost.com/tag/confessions-of-a-fraud
[262] The Amazon Post, *Science Fiction: Donziger's Own Experts Admit to Fabricating Scientific Evidence,* YouTube (Sep. 3, 2013), https://www.youtube.com/watch?v=ugtMBkqmXbQ
[263] Chevron/Ecuador: The "Legal Fraud of the Century" in 3 Minutes *supra* note 260.

others of misleading the courts and the public through the media; the mismanaged of this case has led to a media-based arms race with mutually assured destruction as the likely outcome.

**Toxic Tours**

"I wish Judge Kaplan could take a toxic tour. Then he would see the real Chevron… it would change his mind." – Donald Moncayo[264]

The media has played such an integral role in the span of the litigation that the plaintiffs' and defense lawyers have set up their own "toxic tours" for journalists or celebrities coming to document the woes of the Oriente firsthand. These tours differ drastically, depending on which team is taking you around. In fact, perhaps the only things these "tours" have in common are the method of transportation, a 4x4 in the middle of the jungle, and the humid Amazonian air. Donziger and his Ecuadorian associates, who have toured around celebrities like Brad Pitt, Angelina Jolie, Sting, and many more, have planned stops at the worst pits[265]. A few journalists and celebrities documented an indigenous marketplace full of trinkets and souvenirs, seemingly set up exclusively for their visit. There are pavilions of people who have been trained to talk about the horrors Texaco put them through. "Tourists" listen to the translator tell their stories while looking at pictures of babies with birth defects and cancer patients. Normally there are lots of cameras who follow the celebrity participants. Journalists and celebrities who write articles and make statements are told to "try to mention the word Texaco as much as possible."[266]

And it's not just Western celebrities posing for Instagram. The most important tour of all was given to former Ecuadorian President Rafael Correa (2007-2017). In 2014, during the middle

[264] Barrett *supra* note 1 at 218.
[265] Barrett *supra* note 1 at 215.
[266] *See Crude supra* note 30 (Donziger tells Trudie Styler to mention Texaco by name as much as possible), *see also* Sipho Kings, *Ecuador digs deep to fight oil tyranny*, Mail & Guardian (instructing Mia Farrow to do the same), https://mg.co.za/article/2014-02-13-ecuador-digs-deep-to-fight-oil-tyranny.

of the Ecuadorian litigation, he dipped his gloved hand in oil, and solemnly demonstrated the "dirty hand of Chevron" to the hundreds of press members and the thousands following the coverage around the world.[267] By proclaiming it "one of humanity's most serious disasters … far greater than either the Exxon Valdez Alaska oil spill or the Mexican Gulf BP spill," all with the symbolic black hand raised, he made it obvious that the whole weight of the Ecuadorian government was behind Donziger and his associates.[268]

(Left) Figure 17: Plaintiffs' lawyer Pablo Fajardo leads a Toxic Tour. Fajardo went to law school with the intention of helping fight the case in Ecuador, as he is from the Oriente region. His activism led to him winning countless human rights' awards.[269]
(Right) Figure 18: President Rafael Correa, "Anybody can come here to the Ecuadorean Amazon and dip their own hands in the lagoons of oil left by Texaco more than 20 years ago and their hands will come out full of oil."[270]

The gloved hand dipped in oil had been used as a symbol by the plaintiffs' lawyers in media advertising long before President Correa came to the Oriente, and to have it adopted by the Ecuadorian president sparked an international campaign, which is now utilized by celebrities, journalists, and other important figureheads anytime they are in the Oriente. The "Dirty Hand

[267] Kings *supra* note 266.
[268] Sally Burch, *Ecuador's Campaign: "The Dirty Hand of Chevron"*, PopularResistance.org (Oct. 2, 2013), https://popularresistance.org/ecuadors-campaign-the-dirty-hand-of-chevron/.
[269] BBC Mundo *supra* note 166.
[270] Greenleft Weekly, Chevron wins case against Ecuador's indigenous people over oil spill (Aug. 12, 2016) https://www.greenleft.org.au/content/chevron-wins-case-against-ecuadors-indigenous-people-over-oil-spill.

International Campaign" was now an integral part of any toxic tour, and in turn, any news article, press release, or footage of Ecuador made copious use of the symbol.[271] The plaintiffs' lawyers' goal of publicizing the pollution in Ecuador is furthered any time one of these pictures is posted, tweeted, shared, or liked.[272]

(Left)Figure 19: President Rafael Correa on his visit the Oriente in 2014.[273]
(Right) Figure 20: Actress Mia Farrow on a visit to the Oriente in 2014.[274]

(Left) Figure 21: Rene Santos, vocalist of Puerto Rican band Calle 13, on his visit in 2014.[275]
(Right) Figure 22: Activist and environmentalist Donald Moncayo in 2011.[276]

[271]Garcia *supra* note 149, Kings *supra* note 266.
[272] Garcia *supra* note 149.
[273] Phelim McAleer, Mia Farrow's dirty profits—a hidden payoff in corrupt Ecuador trial, N.Y. Post (Oct. 5, 2014) https://nypost.com/2014/10/05/mia-farrows-dirty-profits-a-hidden-payoff-in-corrupt-ecuador-trial/
[274] Garcia *supra* note 149.
[275] UPI Staff, *Ecuador to clean up decades-old Amazon oil pollution*, United Press International (Mar. 19, 2019) https://www.upi.com/Ecuador-to-start-cleanup-of-decades-old-Amazon-oil-pollution/5931551893715/.
[276] El País, *Chevron loses US battle to block Ecuadorian judgment* (Oct 11, 2012) https://elpais.com/elpais/2012/10/11/inenglish/1349962505_709885.html?rel=mas.

(Left) Figure 23: Actress Darryl Hannah in 2007.[277]
(Right) Figure 24: Actor Danny Glover in 2013.[278]

Chevron combats this publicity with its own version of the toxic tour, showing the work Texaco put in to "clean up the countryside" and, in turn, villainizing the state owned PetroEcuador. Instead of taking the visitors to the worst locations, they logically visit the cleanest, showing places that have been repaired through the millions of dollars they remind each visitor Texaco spent on remediation.[279] They took their visitors to farms, showcasing the healthy vegetation and animals.[280] There is not an indigenous community member or a camera in sight.[281]

### *Crude*

"When I go to fill up my gas tank with cheap and abundant gasoline in [the U.S.], someone is paying a price for that." – Joe Berlinger, Director of the award-winning documentary *Crude.*[282]

[277]Daily Mail Reporter, *Ecuador court orders U.S. oil company Chevron to pay $8bn in environmental damages*, Daily Mail (Feb. 14, 2011). https://www.dailymail.co.uk/news/article-1357082/Court-Ecuador-orders-U-S-oil-company-Chevron-pay-8bn-environmental-damages.html
[278]Rodrigo Buendia, AFP, Getty Images, https://www.gettyimages.com/detail/news-photo/actor-danny-glover-shows-his-oil-covered-hand-at-aguarico-4-news-photo/187012712.
[279] Barrett *supra* note 1 at 215.
[280] *Id*.
[281] *Id*.
[282] Link TV *supra* note 1.

Outside of the party's own propaganda, there have been a myriad of articles, interviews, pictures, and videos; most notably is the 2009 documentary *Crude*. The film follows Donziger, his associates, and the people of Lago Agrio through the discovery portion of *Aguinda II* in Ecuador. *Crude* is a great introduction to the people of Lago Agrio; we can see people crowding in barren rooms in the Amazon to talk about how this pollution has impacted their lives. Many say they did not know it would hurt them. Person after person talks about their family members who have died of cancer. The pollution has impacted every aspect of their lives. No matter what one thinks of Steven Donziger or Chevron, the footage is haunting.

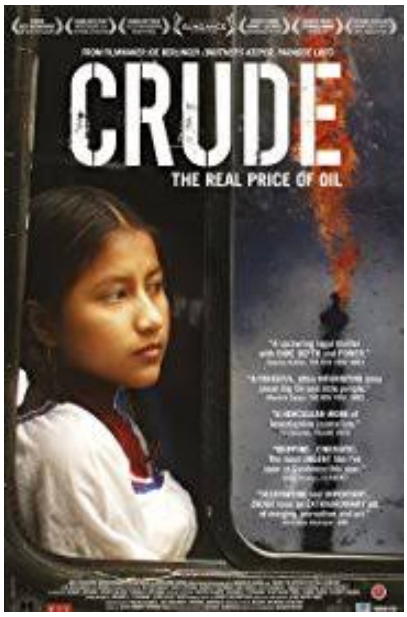


Figure 25: The poster for the movie *Crude.*[283] The New York Times called it "The Silent Spring of Ecuador's Increasingly Aggressive Environmental Movement."[284]

*Crude* premiered at the renowned Sundance Film Festival and went on to win a subsequent fourteen awards across different film festivals. When asked why he made *Crude,* director Joe

[283] *Crude supra* note 30.
[284] Barrett *supra* note 1 at 42.

Berlinger responded that "it occurred to [him] that white people have treated indigenous people abysmally for the last 700 years," citing everything from the Spanish conquistadors to the way the U.S. was formed by "wip[ing] out the indigenous population[s]."[285] He went on further to explain that "multinational corporations…particularly in the extractive industries, in the third world, in places like the rainforests of Ecuador… [are] the modern day continuation of this terrible treatment of indigenous people."[286] He stated that:

> "We are eradicating the very people who we should be cherishing. We're at a very unique time in our history… where we all are aware of the environment being out of balance, we're aware that we need to figure out how to live in harmony with nature, and at the same time we should be cherishing the people and harvesting the knowledge of people who know how to tread lightly on the Earth, which are the indigenous people, and yet we have been engaged in a cultural genocide of these people for the past six centuries."[287]

Berlinger claims the film "does not really take a position in the lawsuit… because [he is] not a judge, or a lawyer, or a scientist."[288] For him, the focus is on the original damage and extraction of oil, as he argues "there is no moral justification for what was done."[289] The biggest crime he sees is that "this area… [was] opened up for oil exploration without taking the local population into account."[290] He, unfortunately, is not wrong; the indigenous people of that region during the 1960s did not have the rights to their land.[291]

*Chevron in Crude*

*"*In the United States we used to say how much pollution can we clean up? And now, what we ask ourselves is how much pollution do we need to clean up for this to be safe for human health."
-Sara McMillan, Chevron's Chief Environmental Scientist in the 2009 Documentary *Crude*.[292]

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[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*.
[290] *Id*.
[291] *See supra* Chapter 2.
[292] *Crude supra* note 30.

*Crude* makes mincemeat of Chevron. Quoting McMillan while flashing pictures of the environmental degradation and the indigenous population, *Crude* shows the ludicrous parallel between a company that denies damage of any kind, and the people who live and experience the results of their stubbornness. "We do know that skin rashes are certainly an issue in the region…" McMillan stumbles to get her words precise and neutral. She continues: "we believe those are due to the fact that there is no sewage treatment anywhere in the area. There is an enormous amount of fecal bacteria in the water… this is not good water to drink or bathe in but for the most part it has nothing to do with oil, it has to do with poor sanitation."[293] She argues that the science behind what is going on in the Amazon is bad, and that "the public may tend to think if you see something in the environment it must mean that it [is] very bad," but in reality we are exposed to some of those same toxins every day. Kent Robinson, a spokesperson for Chevron argues that the plaintiffs "have turned a blind eye for 17 years to PetroEcuador. We would argue that they are doing more damage in Ecuador than Texaco has ever." [294]

*The Crude Outtakes*

Steven Donziger: "You can never underestimate the power of personal relationships in this business."
Cameraman: "What business is that?"
Donziger answers, smiling. "The business of getting press coverage as part of a legal strategy."
He pauses. "The business of plaintiffs' law. To make f***ing money."— the outtakes of *Crude.*[295]

While the documentary itself eviscerated Chevron's "good name", it came with a silver lining. In a bit of a fishing expedition for their multiple cases against Donziger, Chevron

[293] *Id*.
[294] *Id.* at 1:40:00
[295] The Amazon Post, *Donziger: 'To Make F**king Money'--Crude Film Outtake* (Jan. 20, 2011) available at: https://www.youtube.com/watch?v=-UWOzCycdg8

subpoenaed footage that did not make it into the final documentary, based on somewhat dubious legal grounds.[296] The *Crude* outtakes were every bit as damning as Chevron predicted. The footage showed, "with unflattering frankness, inappropriate, unethical and perhaps illegal conduct."[297] Scene after scene of the raw footage depicted:

> "plaintiffs' counsel meeting with a member of the team of court-appointed damages experts who were supposed to be neutral, plaintiffs' lawyers engaging in self-professed 'pressure tactics' to persuade a judge to block inspection of a laboratory being used by plaintiffs, and meeting with the President of Ecuador. [Chevron] argued that these scenes supported their [PCA] claim[s] that the raw footage would demonstrate that the court-appointed expert was biased toward plaintiffs and that the Ecuadorian government and judicial system had been improperly influenced by plaintiffs."[298]

The release of this footage sent "shockwaves through the nation's legal communities,"[299] and has continued to impact litigation on U.S. and foreign soil. Despite the judgment in Ecuador, courts in the U.S. have determined that "what has blatantly occurred in this matter would in fact be considered fraud by any court" and "if such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."[300]

*Conclusion*

We live in an era of fake news, and this litigation is no exception to that rule. The myriad of truths, half-truths, and outright lies the two parties have flooded the airwaves and courtrooms

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[296] *See infra:* The Outtakes: Coming to a §1782 claim near you

[297] CIVIL NO. 10-MC-21JH/LFG, CIVIL NO. 10-MC-22 JH/LFG. (D.N.M. Sep. 1, 2010). *See also* Scott Edelman et. al, *Obtaining U.S. Discovery to Litigate in Foreign or International Tribunals Pursuant to 28 U.S.C. § 1782*, Gibson Dunn, https://www.gibsondunn.com/wp-content/uploads/documents/publications/WebcastSlides-Transnational-Litigation-01.29.2015.pdf

[298] Edward M. Spiro & Judith L. Mogul, U.S. DISCOVERY IN FOREIGN PROCEEDINGS: SECTION §1782 AND CHEVRON IN ECUADOR, 244 N.Y.L.J. 25 (Aug. 5, 2010), https://www.maglaw.com/publications/articles/2010-08-05-u-s-discovery-in-foreign-proceedings-section-1782-and-chevron-in-ecuador/_res/id=Attachments/index=0/070081010Morvillo.pdf.

[299] 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010). *See also* Edelman et. al *supra* note 297.

[300] W.D.N.C. Aug. 30, 2010.

with have made it nearly impossible to believe anything about this case. The media frenzy surrounding the litigation has played a crucial role in the legal strategy of the plaintiffs and of Chevron. Entire websites and social media pages are created by attorneys to distract and attack the opposing party. Toxic tours were created to show people the damage in the Amazon, and they are manipulated to make the opposing party look as bad as possible. Even the documentary *Crude* portrays both the plaintiffs and Chevron in a bad light, highlighting the cutthroat nature of court tactics behind the litigation. The websites, social media, news articles, documentaries, and even in person tours work together in furthering the case outside of the courtroom by reaching the public, who in turn raise awareness and place political pressure on their representatives. When litigation lasts for this long, the only way to stay relevant is through the media. Sometimes the court of public opinion reigns supreme.

## CHAPTER FOUR: LESSONS LEARNED

"By looking at the parties' constant effort to maintain their fight in multiple fronts, one can easily characterize the Chevron-Ecuador saga as the judicial version of a Hydra, the mythical monster with the body of a serpent and many heads that could never be harmed, and which severed heads would grow back endless times. Like in the legend of the Hydra, the Chevron-Ecuador case not only resists going away, but also and seems to grow more every day."[301] – Manuel Gomez

### Introduction

In November, the *Aguinda* case will celebrate its 26th birthday, although there is not much to celebrate. Donziger has no license to practice law and is facing sanctions, Chevron is spending millions of dollars on legal fees,[302] and, most importantly, the people of the Oriente are still living in a toxic wasteland. In order to create some sort of silver lining, this chapter will outline ways in which U.S. law can learn from this massive transnational lawsuit. It will consider both the effects on the plaintiffs, but also the defendants Chevron, if such laws were to be implemented. Specifically, this chapter will discuss: (1) the incorrect *forum non conveniens* dismissal in *Aguinda I*, and the need to hear cases with legitimate evidence of corruption rendered after *forum non conveniens* dismissals, (2) the need to broaden the current restrictions for when federal courts can hear Alien Tort Statute cases, (3) the growing trend in international business toward arbitration, how the tribunal erred in re-litigating the case, and how tribunals must be more diligent in

[301] Gomez *supra* note 63 at 432.
[302] Again, this number is highly contested. As of 2014, Chevron was pursing a $32.3 million dollar judgment to cover their legal fees. *See* Nate Raymond, *Chevron seeks $32 million in legal fees in Ecuador case*, Reuters (Mar. 14, 2014), https://www.reuters.com/article/us-chevron-ecuador/chevron-seeks-32-million-in-legal-fees-in-ecuador-case-idUSBREA2I1PS20140319. In the RICO case, Chevron won $800,000 in attorneys' fees from Donziger. *See* Michael I . Krauss, *The Ecuador Saga Continues: Steven Donziger now owes Chevron more than $800,000*, Forbes (Mar. 14, 2018) https://www.forbes.com/sites/michaelkrauss/2018/03/14/the-ecuador-saga-contiues-steven-donziger-now-owes-chevron-more-than-800000/#80c3f7f49498. The plaintiffs claim Chevron has spent upwards of $2 billion dollars in legal fees for over 60 law firms. *See* Rex Weyler, *Chevron's SLAPP suit against Ecuadorians: corporate intimidation*, Greenpeace (May 11, 2018), https://www.greenpeace.org/international/story/16448/chevrons-slapp-suit-against-ecuadorians-corporate-intimidation/.

investigating whether the parties agreed to arbitrate, (4) the need for a higher standard of review in regards to using evidence in a §1782 international discovery claim in U.S. Courts, and (5), the need for a federal anti-SLAPP statute.

**Ecuador was an Alternate, But Not an Adequate Forum**

The S.D.N.Y. court erred in granting a *forum non conveniens* dismissal in *Aguinda I*. Although *Piper Aircraft Co.* currently provides that "so long as there was a remedy available in the alternate forum, it did not matter if the remedy was clearly insufficient,"[303] the Court should weigh whether the remedy is adequate and if they are willing to enforce a judgment from the alternate forum before dismissing a case on *forum non conveniens* grounds.

The court where the case is heard, or the forum, can be crucial to the outcome of the case. Different states have different laws, different circuits have different precedents, and the outcome of a case can drastically change based on where it is filed. Part of this is political; some courts, by the nature of the judges that sit on their benches, tend to lean toward the right or the left. Some states, like Delaware, have stricter laws to protect businesses and some states are more willing to sympathize with an injured plaintiff.

The strategic choice of where the plaintiffs' lawyer chooses to file a civil case is often referred to as forum shopping. Forum shopping occurs when certain plaintiffs look for laws or judges in states or even other countries that better suit what they are asking for, and subsequently file the case there, often without an obvious connection to the location.[304] Although generally

[303] Legal Information Institute, *Forum non Conveniens,* Cornell Law School https://www.law.cornell.edu/wex/forum_non_conveniens, *See also* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).
[304] *See* Russel J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, (2002)("'[F]orum shopping' is not an activity that should be associated with questionable ethics or doubtful legality. It is part of a lawyer's job to bring suit in the forum that is best for the client's interests."). *Id*.

portrayed in a negative light, a zealous lawyer will think about where they should file their claim in order to have the best outcome for their client.

*Forum non conveniens* is a legal mechanism designed to prevent forum shopping and ensure cases are heard in the proper forum. *Forum non conveniens* objections are raised before the substantive aspects of the trial starts. Most of the time this is obvious; a Texan defendant and a Maryland plaintiff who had an incident occur in New York could file a case in Texas, but it would make much more sense to have the case heard in the S.D.N.Y., as this is where the incident occurred, where the witnesses would be, and where the evidence is.

*The Aguinda I Forum Non Conveniens Dismissal Was Improper*

In order to determine whether a *forum non conveniens* dismissal is proper, the court invokes two tests. The first is a balancing test, weighing public and private factors. The private factors include, (1) ease of access to evidence, (2) ease of obtaining witnesses, (3) enforceability of judgment, (4) interest of the two parties in their connections with the respective forums, and (5) the plaintiff's chosen court would be burdensome to the defendant.[305] If a court finds the fifth factor to be true, it is sufficient enough to dismiss the case on the grounds of *forum non conveniens*.[306]

Here, the public factors pulled toward litigation in the U.S. While the access to evidence and obtaining witnesses would be more difficult stateside, the plaintiffs chose to file there, meaning that their attorneys felt that it was more important the case be heard in the Southern District of New York than in Ecuador. Further, the judgment would be able to be enforced, as Texaco had assets in the U.S., and Texaco was incorporated, therefore "at home" in the state of New York, so it was not burdensome to them. If anything, it was more burdensome for the

[305] Legal Information Institute *supra* note 303.
[306] *Id*.

plaintiffs, and yet they still chose to file their case in that particular forum. That choice should have been respected.

The public factors also tipped the scales in favor of litigation in the U.S. The four public factors included: "(1) whether the trial would involve multiple sets of laws, thus potentially confusing a jury, (2) having juries who may have a connection to the case, (3) local interest in having local interests heard at home, (4) having the trial in a place where state laws govern."[307]

Here, the plaintiffs wanted to sue under the ATS, which meant they would be applying U.S. law to an international incident. If they were to sue in Ecuador, there would be no jury to confuse or to have a connection to the case, as only a judge would preside over this litigation. There was certainly an interest in having Ecuadorian laws govern a case where Ecuadorian citizens were suffering from pollution; the cause of this pollution, however, was an American company, who would be punished more thoroughly in the U.S. than in Ecuador.

Even if the court had determined there were enough factors on both sides to move on to the next step, the adequate alternative inquiry test should have kept the litigation in the U.S. This test is simple; the defendant must offer an alternate forum, and it "must have the ability to provide a remedy to the plaintiff."[308] Here, that was not the case. Class action cases could not be brought in Ecuador at the time that this dismissal was being considered; only after the plaintiffs helped lobby for a change in Ecuadorian law did the court have an ability to hear the case. Even the Supreme Court in *Piper Aircraft*, the case that clarifies that an adequate forum must have a remedy, noted Ecuador as the "single example of an inadequate forum."[309] There, the Court "cited *Phoenix*

[307] *Id*.
[308] *Id*.
[309] Howard Erichson, The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy, 1 Stan. J. Complex Litig. 417 (2013).

*Canada Oil Co. v. Texaco, Inc,*[310] [nothing that] the court refuses to dismiss, where alternative forum is Ecuador, [as] it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims.[311] At the time of the dismissal, there was no feasible way for the Ecuadorian courts to provide a remedy, a serious oversight by the S.D.N.Y. courts; "this dismissal was widely viewed as Texaco's escape from liability."[312]

*Corruption Concerns*

Even if a judge deemed the case was better suited in Ecuador, the fact that there was a question regarding legitimacy of the court system there means the judge had a responsibility to make sure the case was properly heard. There were many numerous warning signs that should have alerted the judge that Ecuador could be an improper venue. Donziger actually raised this very argument in *Aguinda I*. He claimed "Ecuador's judicial system was notoriously corrupt, and its government relied on oil revenues for a third of its annual budget… politically, there was no way that Texaco was going to be held accountable in Ecuador."[313] He noted that "the country did not have jury trials, so enormous discretionary power [was] invested in judges, who, for the most part, are poorly paid civil servants… [and he] worried that they might be susceptible to bribery."[314] Further, in the U.S. judicial system, lawyers are cannot meet with a judge outside the presence of opposing counsel; "in Ecuador at the time no such rules applied, making it difficult to monitor

[310] 78 F.R.D. 445 (D. Del. 1978).
[311] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1552&context=faculty_scholarship *PiperAircrqft,* 454 U.S. at 255 n.22.
[312] Percival *supra* note 70 at 606.
[313] Keefe *supra* note 98.
[314] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534,537 (S.D.N.Y. 2001).

whether a judge had been subjected to improper influence."[315] In another example of brutal irony, Donziger now faces charges for this exact sort of conduct.[316]

Texaco, however, denied these claims, saying that Ecuador was capable of offering a fair trial, and "insisting that the country's legal norms were 'similar to those in many European nations.'"[317] They did, however, contradict this on appeal, where in order to agree to submit to the judgment of an Ecuadorian court, they reserved the right to contest to the validity of the courts. They only did so after the multibillion-dollar judgment, because their plan was to discourage litigation through an inconvenient forum.[318]

*Enforcing Foreign Judgments After Forum Non Conveniens Dismissals*

While the U.S. cannot hear every case under the sun, if there are legitimate concerns of corruption in a foreign judgment after a *forum non conveniens* dismissal, perhaps the U.S. should hear the case again on the merits. *Forum non conveniens* is intended to prevent forum shopping, not to decide cases without ever hearing their merits. When procedural law leads to negative substantive effects, there is a problem within the procedure that must be changed. This is the type of policy that should be implementing when looking at foreign judgments that have been rendered due to a *forum non conveniens* dismissal. This case, however, may be unable to be solved through different *forum non conveniens* policy. If Chevron had won in Ecuador, the case would still be plagued with corruption and back in U.S. Courts. Donziger would be shouting his same 'Ecuador is corrupt' argument and Chevron would be reiterating Texaco's sentiments that the courts are fine. With 18 billion dollars is at stake, corruption is a minor concern.

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[315] *Id*.
[316] *See Chevron Corp. v. Donziger*.
[317] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534,537 (S.D.N.Y. 2001).
[318] *Chevron Corp. v. Naranjo supra* note 5.

**Alien Tort Statute Protections Under the *Forum Non Conveniens* Doctrine**

Because the ATS was designed to allow human rights violations to be litigated in U.S. federal courts, special protections should be given these cases when the defendants argue for a *forum non conveniens* dismissal. Further, the current framework for if courts can hear ATS cases is too narrow, as it was created to hear international human rights cases from foreign plaintiffs, which often occur entirely outside the U.S. By restricting ATS cases to have some conduct happen within the U.S., the Court has erred in enforcing the framers' original intentions for the ATS. Instead, the ATS should be broadened to hear cases of human rights violations that occur at the hands of a U.S. defendant outside of the U.S., thus protecting the efficiency of U.S. courts while simultaneously holding U.S. corporations responsible for their actions abroad.

*ATS in Aguinda I*

Originally passed by Congress in the Judiciary Act of 1789, the ATS "has been described as a provision 'unlike any other in American law' and 'unknown to any other legal system in the world.'"[319] The Supreme Court stated that the ATS "was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable."[320] The U.S. created this statute specifically for "disputes between U.S. citizens and citizens of foreign nations" in order to properly litigate human rights violations that happen abroad.[321]

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[319] Stephen P. Mulligan, *The Alien Tort Statute (ATS): A Primer*, Congressional Research Service (June 1, 2018), available at: https://crsreports.congress.gov/product/pdf/R/R44947/4.

[320] *Id*. *See also* Jesner *v. Arab Bank*, PLC, 138 S. Ct. 1386, 1406 (2018).

[321] *See* Mulligan *supra* note 319. *See also* U.S. CONST. art. III, § 2 (extending federal judicial power to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); Judiciary Act, 1 Stat. at 78 § 11 (providing for alienage jurisdiction to federal courts under a $500 amount in controversy requirement). *Id*.

The ATS allows federal district courts with jurisdiction over the defendant to hear cases, as long as they meet four factors. The case must be: "(1) a civil action (2) by an alien[322] (3) for a tort (4) committed in violation of the law of nations or a treaty of the United States."[323] These four elements are met in *Aguinda I*. First *Aguinda I* was a civil case, not criminal. The second factor allows for cases to be heard under the ATS as long as they were brought "only by aliens."[324] "The ATS does not provide jurisdiction for suits alleging torts in violation of the law of nations by U.S. nationals."[325] Because the plaintiffs were citizens of Ecuador, this element was met. The third element was met because *Aguinda I* was a tort claim; "as a general matter, a tort is 'a civil wrong, other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages[.]'"[326] Here, that civil wrong was polluting the Oriente. The last factor is a bit more complicated, as it involved not only U.S. law, but international law. The ATS:

> "requires that the tort asserted be considered a violation of either the 'law of nations' or a treaty ratified by the United States. The term 'law of nations' is now often understood to refer to 'customary international law.'[327] As a general matter, customary international law is international law that is derived from 'a general and consistent practice of States followed by them from a sense of legal obligation.' State practices that form the basis for customary international law are often referred to as international 'norms.' But the process of identifying what norms are actionable under the ATS is a complex judicial function that

[322] An "alien" is defined elsewhere in federal law to be "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). https://crsreports.congress.gov/product/pdf/R/R44947/4

[323] Mulligan *supra* note 319.
[324] *Id*.

[325] *Id*. See, e.g., *Yousuf v. Samantar*, 552 F.3d 371, 375 n. 1 (4th Cir. 2009) ("To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens, federal subject-matter jurisdiction may be lacking."); *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) ("The ATS admits no cause of action by non-aliens."). *Id*.
[326] Tort, BLACK'S LAW DICTIONARY (10th ed. 2014).
[327] *See Agent Orange*, 517 F.3d at 116 ("[T]he law of nations has become synonymous with the term 'customary international law[.]'") *Id*.

> was the subject of much debate and was addressed by the Supreme Court in [the 2004 case] *Sosa v. Alvarez-Machain*."[328]

*Sosa* held that the ATS only allows federal courts to hear a "narrow set" of claims for violations of international law. It created a two-step test for determining whether claims fall under ATS liability; "first, courts must determine whether the claim is based on violation of an international law norm that is 'specific, universal, and obligatory.'[329] If step one is satisfied, courts must then "determine whether allowing the case to proceed is an "appropriate" exercise of judicial discretion."[330] Courts have used this two-step test to conclude that "the ATS does not reach conduct that occurred entirely in the territory of a foreign nation."[331] This "presumption against extraterritoriality… [was] intended to avoid unintended clashes between U.S. and foreign law that could result in international discord."[332]

While *Sosa* and *Kiobel* were not law until 2014, under this current set of rules, the *Aguinda I* case could not be heard before the District Court today, as the conduct occurred entirely in Ecuador. This is outrageous for many reasons. First, the intent behind the ATS was to serve as an example in the international justice community by allowing aliens to bring international human rights violations to U.S. courts. Second, this is an obvious attempt to shield American corporations

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[328]Mulligan *supra* note 319. For more on the sources of international law and the development of customary international law and norms, *see* Michael John Garcia, *International Law and Agreements: Their Effect upon U.S. Law*, CRS Report RL32528. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

[329] *See Sosa v. Alvarez-Machain* 542 U.S. 692, 732 (2004) (*quoting In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)

[330] *See id*. at 738.

[331] *See Kiobel v. Royal Dutch Petro. Co*., 569 U.S. 108, 120 (2013) (discussing the "dramatically narrowing effect on the applicability of the [ATS] as a jurisdictional basis for bringing claims of human rights violations in United States courts."); Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 265 (2014) ("Arguably the largest barrier that victims of transnational human rights abuses now face in the United States is Kiobel[.]"). *Id*.

[332] Mulligan *supra* note 319.

from facing their heinous actions abroad. The restrictions of not hearing ATS cases where the conduct occurred entirely outside of the U.S. must be broadened, and there should be certain protections for cases brought under the ATS in regards to *forum non conveniens* dismissals.

**Chevron's Use of An Arbitral Tribunal to Counteract Ecuador's Judgment**

By filing the 2009 PCA arbitration, Chevron asked an arbitral tribunal to re-litigate a case heard by the highest court of Ecuador, and in doing so, violated Ecuador's sovereignty and allowed Chevron to avoid corporate liability. Because arbitration is becoming a much more popular dispute resolution mechanism, tribunals must carefully investigate whether the parties agreed to arbitrate the dispute and whether the dispute has already been decided in another court.

When Chevron brought the 2009 PCA claim, the plaintiffs' main argument to the tribunal was that Chevron attempted to "usurp the authority of the Ecuadorian judiciary," by arguing a case in arbitration that had already been awarded 18 billion dollars by Ecuador's highest court.[333] When the question of whether the case could be heard before a tribunal came to the D.C. Circuit Court, they held that Ecuador "ceded that authority… by signing the BIT."[334] In fact, the Court held that by signing the BIT, "Ecuador agreed to allow independent and neutral arbitrators to determine whether an investor company could take advantage of the substantive and procedural protections in the BIT."[335] Chevron followed procedures laid out in the BIT to request arbitration, and the tribunal determined that it had jurisdiction.[336] Further, the PCA took into consideration the D.C. Circuit courts that had heard and rejected Ecuador's argument that Chevron "did not have the right

[333] *Chevron Corp. v. Donziger*., *see also* PCA 2009 *supra* note 115.
[334] *Chevron Corp. v. Donziger*., *see also* PCA 2009 *supra* note 115.
[335] *Chevron Corp. v. Donziger*., *see also* PCA 2009 *supra* note 115.
[336] *Chevron Corp. v. Donziger*., *see also* PCA 2009 *supra* note 115.

to avail itself of the BIT's arbitration clause" and found nothing that led it to believe that those courts had erred in their judgments.[337]

However, it should not be, and is not, the place of a tribunal to ask a country's highest court to cancel their judgment for a case between private parties. Arbitration was not designed as, and is not intended as, a form of appellate review. There is no second shot at a favorable judgment just because you don't like the first result. This could even be considered a new type of forum shopping, as corporations or other defendants who have a judgment against them could attempt to counteract that judgment by filing arbitration disputes.

Further, this case has been decided in Ecuador, and the fact that the tribunal essentially gets to litigate the case again by bringing an arbitration against the plaintiffs violates *res judicata*, also known as claim preclusion. Translated literally into "a matter judged," claim preclusion "is the principle that a cause of action may not be relitigated once it has been judged on the merits."[338] Claim preclusion exists to prevent re-litigation, promote fairness, and preserve the time and resources of courts. [339]

Continuing to draw out this case is inherently benefitting Chevron, who has stated publicly that they are in a waiting game with the plaintiffs.[340] Allowing the case to drag on and on, according to the plaintiffs, is admittedly "Chevron's main defense strategy… that this thing never ends. They [are] try[ing] to zap our resources and zap our will, and in these… years there has been a lot of suffering."[341] It is simply poor public policy to allow corporations to escape liability through

[337] *See* PCA 2009 *supra* note 115. *See also* Legal Information Institute, *Res Judicata*, Cornell Law School, https://www.law.cornell.edu/wex/res_judicata. *See* Chevron Corp. v Republic of Ecuador (D.C. 2015).
[338] *Res Judicata supra* note 337.
[339] *Id*.
[340] Paul M. Barrett, *Canada Says 'No Thanks' to Chevron Pollution Suit*, Bloomberg Business Week (May 2, 2013), https://www.bloomberg.com/news/articles/2013-05-02/canada-says-no-thanks-to-chevron-pollution-suit.
[341] *Crude supra* note 30 at 1:40 (*quoting* Steven Donziger).

arbitration. At this point, the tribunal is harboring Chevron from facing judgments in a case that has already been decided.

Arbitration is not inherently bad; U.S. corporations should be able to contract with governments and have the disputes be resolved in a neutral forum under terms they agree to. The problem here is that neither the plaintiffs or Ecuador agreed to these terms; this entire saga started years before the BIT was implemented and neither agreed to pursue this series of claims in arbitration. Their courts had already litigated this case for a decade, and the tribunal overstepped by hearing an arbitration. Forcing the plaintiffs and the government of Ecuador into a dispute that has already been litigated and in tribunal that they did not consent to is bad public policy. In the future, arbitral tribunals should weigh more carefully claims they arbitrate in order to respect the sovereignty of courts who have already litigated claims and promote fairness for both parties, who have already had their bite at the apple.

**The Dangers of 28 U.S.C. §1782 International Discovery Evidence in U.S. Courts**

There is a discrepancy between the standards for obtaining evidence through discovery in U.S. courts and obtaining evidence through a §1782 claim, also known as international discovery. Because the standard of review is lower for international discovery than it is for discovery in the U.S., standards must be adjusted, and evidence must be reviewed so that defendants in U.S. courts who are facing evidence obtained through international discovery are appropriately protected by the First Amendment.

*The Outtakes: Coming to a §1782 Claim Near You*

When Chevron filed the 2009 PCA arbitration, they also filed motions under 28 U.S.C. §1782.[342] This statute, entitled "Assistance to Foreign and International Tribunals and to Litigants before such Tribunals," allows for international discovery of testimonial or documentary evidence. In essence, the district court of a region where a person resides can "order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."[343] In order to meet the requirements for this statute one only needs to show that (1) they are an "interested person" in a foreign proceeding, (2) the proceeding is before a foreign tribunal, and (3) the person from whom the information is sought is in the district of the court where the application is filed.[344] However, a person may not be compelled to give his statement or "to produce a document or other thing in violation of any legally applicable privilege."[345] Since 2010, there have been "more than 50 orders and opinions involving Section §1782, and Chevron alone has brought over 23 actions pursuant to the statute."[346]

Courts have described the: "twin aims of Section §1782: to provide equitable and efficient discovery procedures in US courts for the benefit of participants in adjudicative proceedings outside the US, and to encourage other countries to provide similar means of assistance to US

[342] *See* PCA 2009 *supra* note 115.
[343] 28 U.S.C. §1782.
[344] Tony Abdollahi, *The Hague Convention: A Medium for International* Discovery, 40 N.C. J. OF INT'L L. & COM. REG. 771 (2015).
[345] *Id*. at 29.
[346] Edelman et. al *supra* note 297. Actions were brought in the following states: California, Colorado, Florida, Georgia, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Tennessee, Texas, Vermont, Virginia, and Washington, D.C. *Id* at 61.

courts."[347] Section §1782 is clearly contentious: the Supreme Court is divided over the statute and appellate courts cannot agree on whether an arbitral tribunal is even eligible to be a foreign tribunal.[348] Although here it is a weapon in Chevron's war against paying the judgment, it has been used to benefit the little guy in the past. NGOs and other international claimants have used this mechanism to obtain information from U.S. citizens in the past to uncover corrupt business practices and human rights abuses.[349]

Despite this, Chevron succeeded in their motions, and subsequently forced the plaintiffs to hand over a variety of evidence. This included Donziger's personal computer hard drive and other internal documents. It also included "internal documents of the Plaintiffs' scientific experts and consultants…bank account information… and testimony from former insiders including financiers, attorneys, scientific experts, and consultants."[350] Notably, one of the §1782 motions was filed in the Southern District of New York and heard before none other than Judge Kaplan; he determined the §1782 motion that included the outtakes of the documentary *Crude.*

In response, the plaintiffs filed many motions to fight these orders. The plaintiffs argued that Kaplan should recuse himself from the case, due to the fact that he was biased from Chevron's RICO case. He refused. The plaintiffs argued that the raw footage and outtakes fell under the freedom of the press protections granted to journalists. Kaplan disagreed, noting that "the subjects of the documentary had signed releases expressly disclaiming any expectation of confidentiality,"

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[347] Edelman et. al *supra* note 297. *See also Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996); *S.Rep. No. 88–1580 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3783* (legislative history accompanying 1964 amendments to Section §1782).

[348] See Breyer, J., Dissenting: *Intel Corp. v. Advanced Micro Devices, Inc*. 542 U.S. 241 (2004).
[349] *See Akebia Therapeutics, Inc. v. FibroGen, Inc.*, 793 F.3d 1108 (9th Cir. 2015), *See Medeiros v. Int'l Game Tech.*, No. 216CV00877JADNJK, 2016 WL 1611591, at *1 (D. Nev. Apr. 22, 2016), *See In re Gianasso*, No. C 12-80029 MISC SI, 2012 WL 651647, at *1 (N.D. Cal. Feb. 28, 2012).
[350] Edelman et. al *supra* note 297.

therefore, "the filmmaker possessed an 'uncontrolled right' to make public all or any part of the material, and that the *Crude* outtakes were thus non-confidential.[351] Further, the court held that because "footage included in an earlier version of *Crude* offered on Netflix, but deleted from the final version sold in the United States (at the direction of class action plaintiffs' counsel)" showed some incriminating behavior, and the court thought there would be more.[352] The Plaintiffs stated that the emails were attorney work product, and thus protected under attorney client privilege. The courts did not budge. As a result of the motions, they also forced Donziger testify about his behavior in Ecuador; Judge Kaplan held that the need to depose Donziger was "extremely great," even though deposing opposing council is practically unheard of.[353]

The problem with international discovery is that this evidence from the 2009 PCA arbitration has been used in the fight against Donziger stateside. In particular, if Chevron was to subpoena the outtakes from *Crude* for the first time in U.S. courts, they would be considered nonconfidential press materials, which are "protected by qualified journalists' privilege."[354] In *Gonzales,* the court provided that a "civil litigant seeking compelled disclosure of materials from nonparty press entity may overcome the privilege upon showing that materials are of likely relevance to significant issue in the case, and are not reasonably obtainable from other available sources" but the standard for overcoming the privilege is more demanding than in an arbitration or international forum.[355] These standards should be equal, if not more protected in U.S. courts, as the Bill of Rights places an important emphasis on freedom of the press. It is important that U.S. citizens receive protections in arbitral or international proceedings, particularly if the evidence

[351] Spiro & Mogul *supra* note 298.
[352] (D.N.M. Sep. 2, 2010)
[353] Michael Goldhaber, *EXCLUSIVE: Chevron in Ecuador — More of the Tapes the Plaintiffs Don't Want You to See*, Law.com (Nov. 9, 2010), https://www.law.com/almID/1202474598298/.
[354] *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999).
[355] *Id*.

used in international discovery is going to be used against them in a U.S. court, as is the case here. Further, it is important the U.S. courts examine this evidence taken through a §1782 claim and hold it to a standard of review equal to what it would be in U.S. courts.

In my interview with Donziger, we talked some about how this case was a trailblazer. When it comes to the use of *Crude* in court, this arbitration is no exception. Not only is using arbitration to re-litigate claims wrong, using international discovery, and then applying that evidence in a U.S. court, is wrong. U.S. law needs to adopt a test for whether evidence brought in a §1782 claim can be used in a separate U.S. claim.

**The Need for a Federal Anti-SLAPP Statute**

There is no reason for this case to have lasted almost three decades, except for the fact that Chevron continues to file SLAPP (Strategic Lawsuit Against Public Participation) cases in order to keep the plaintiffs busy.[356] Chevron has filed hundreds of these suits, even attempting to silence advocacy groups like Greenpeace from speaking out against the judgment in Ecuador.[357] The purpose of filing these frivolous claims is not to win them, but rather to "intimidate, harass, demonize, and bankrupt the weaker opponent."[358] While SLAPP lawsuits have an actual cause of action, their "claims for defamation, tortious interference or related theories – [are] a secondary motivation at best."[359] Many states have special protections for SLAPP cases, but "corporations [can] still [forum] shop around for lax jurisdictions and sympathetic judges."[360]

[356] *See* Weyler *supra* note 302, *see also* Barrett *supra* note 1, *see* Edelman et. al *supra* note 297.
[357] Weyler *supra* note 302.
[358] *Id*.
[359] Media Law Research Center, *Anti-SLAPP Statutes and Commentary* (2019), http://www.medialaw.org/component/k2/item/3494.
[360] *Id*.

While many states have anti-SLAPP statutes, there is currently no federal statute, thus leaving corporations the ability file a suit in federal court, have federal law apply, and then proceed to harass and "demonize" plaintiffs' in federal court.[361]Adopting a federal anti-SLAPP statute would "allow for early dismissals of meritless lawsuits filed against people for the exercise of First Amendment rights."[362] It would also help eliminate:

> "retaliatory lawsuits brought to intimidate and silence opponents and critics who had spoken out in the public sphere... about a matter of public concern related to health, safety, environmental, economic or community well-being, the government, a public official or public figure or a good, product or service in the marketplace."[363]

Currently, the American Legislative Exchange Council has a Public Participation Protection Act, which serves as anti-SLAPP model legislation; this legislation draws from current state anti-SLAPP statutes. Adopting this act would allow for "special motions to dismiss against lawsuits brought in response to a defendant exercising their rights to free speech, petition, or association, including communicating in a public form about a matter of public concern." The Act would also allow "judges to award costs and attorney fees to prevailing parties or against parties whose special motions to dismiss are frivolous."[364]

The law should prevent potential litigants from filing retaliatory lawsuits, in turn promoting greater efficiency in the courts and protecting potential defendants who do not have the time or resources to litigate these claims, and thus remain silent on the issue. Efficiency, so that issues are not drawn out for decades, and protections for victims of corporations filing frivolous lawsuits to

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[361] *Id.* It is also important to note that the "SPEAK FREE Act of 2015 (H.R. 2304) was introduced in Congress on May 13, 2015 but was not passed. It would have provided a mechanism for the quick dismissal of Strategic Lawsuits Against Public Participation pending in federal court." *Id*. It should also be noted that "two state anti-SLAPP statutes have been struck down as unconstitutional. The Washington State statute was declared unconstitutional in 2015. The Minnesota anti-SLAPP statute was declared unconstitutional in 2017." *Id*.
[362] Media Law Research Center *supra* note 359.
[363] *Id*.
[364] *Id*.

silence potential victims, are perhaps two of the most important lessons U.S. law can take from *Aguinda*. Demonizing an advocate should not be a way to navigate around the enforcement of a judgment.

## CONCLUSION

"Simply tell us how much to make the check for, so we can see if we can reach an agreement today." – a representative from Chevron in *Crude* in 2009.[365] Ironic, because the plaintiffs offered to settle in the U.S. for 140 million in 1999, and Texaco did not even counteroffer.[366]

The *Aguinda* saga is one of sadness, greed, and perseverance, framed within a network of judges, arbitrators, lawyers, and laws that have failed them. If the case had, in fact, been settled in 1999, things would have been better for every party involved. The unfortunate truth, no matter from whose perspective, is that the indigenous people of Ecuador are suffering. Without question, there is a horrid injury that has hurt and affected this community in ways no one can understand without living it. The other unfortunate truth is that greed is the theme throughout this decades long litigation. If Texaco and Chevron, or even the funders behind the plaintiffs, paid half of what they contributed to their attorneys' fees to cleaning up the Oriente, things would be long since settled. Unfortunately, the world does not work that way.

From this litigation we can learn a few things, and subsequently, the law can change for the betterment of others. Judgments rendered after *forum non conveniens* dismissals should be relitigated on the merits if there are allegations of corruption. The current restrictions for when federal courts can hear Alien Tort Statute cases are too narrow and must be broadened to protect international human rights victims. The growing trend in international business toward arbitration is good, but the tribunal erred in re-litigating the case, and accordingly, arbitral tribunals must be more diligent in investigating whether the parties agreed to arbitrate. There is a need for a higher standard of review when using evidence obtained in a §1782 international discovery claim in U.S. Courts. Finally, a federal anti-SLAPP statute should be adopted and enforced to prevent

[365] *Crude supra* note 30 at 1:20:27.
[366] Barrett *supra* note 1 at 307.

harassment and frivolous lawsuits. Whether these changes would help the plaintiffs now is clear. Although the plaintiffs have already obtained "justice" in Ecuador, there may be no remedy the judicial system can provide for them.

Chevron once said that they would fight this case "until hell freezes over… and then we will fight on the ice."[367] Unfortunately for them, it will likely never ice over in the Amazon, but they may have to fight in molten temperatures due to global warming. Instead of focusing on cleaning up the Amazon, both parties are focused on tainted verdicts and billions of dollars, at the cost of the indigenous people of Lago Agrio.

[367] Barrett *supra* note 1 at 354.