

**THE TEXACO-CHEVRON CASE IN ECUADOR¹:
LAW AND JUSTICE IN THE AGE OF GLOBALIZATION**

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ABSTRACT: This is the story of an unequal legal battle. It's one that the communities affected by the operations of Texaco in Lago Agrio, Ecuador, have been holding for more than twenty years, to get compensation for damages to the environment, people's health and the ways of life of the local communities, first against Texaco, and after its absorption into Chevron, against this company. This is a litigation that perfectly illustrates three aspects: the conversion of the whole world into a single area of dispute with ramifications in the United States, Ecuador, the Netherlands, Argentina, Canada, and Brazil; the limitations of the current international legal system to the actions of big transnational companies; and finally the enormous inequalities of means between parties and the determination of Chevron, whatever the price, to take all necessary measures not to lose a litigation that is already iconic.

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RESUM: Aquesta és la història d'un combat legal desigual. El que mantenen des de fa ja més de vint anys les comunitats afectades per les operacions de Texaco a Lago Agrio, Equador, per obtenir compensació pels danys causats en el medi ambient, en la salut de les persones i en les formes de vida de les comunitats locals, primer contra Texaco i, després de la seva absorció per Chevron, contra aquesta última empresa. Es tracta d'un litigi que il·lustra a la perfecció tres aspectes: la conversió del món sencer en un únic espai de litigi, amb ramificacions als Estats Units, a Equador, als Països Baixos, a l'Argentina, al Canadà o al Brasil; les limitacions de l' actual ordre jurídic internacional per posar límits a l'actuació de les grans empreses transnacionals; i, finalment, l'enorme desproporció de mitjans entre una i altra banda i la determinació de Chevron d'adoptar totes les mesures que siguin necessàries per no perdre un litigi que és ja emblemàtic, al preu que sigui.

RESUMEN: Esta es la historia de un combate legal desigual. El que mantienen desde hace ya más de veinte años las comunidades afectadas por las operaciones de Texaco en Lago Agrio, Ecuador, para obtener compensación por los daños causados en el medio ambiente, en la salud de las personas y en las formas de vida de las comunidades locales, primero contra Texaco y, tras su absorción por Chevron, contra esta última empresa. Se trata de un litigio que ilustra a la perfección tres aspectos: la conversión del mundo entero en un único espacio de litigio, con ramificaciones en Estados Unidos, en Ecuador, en los Países Bajos, en Argentina, en Canadá o en Brasil; las limitaciones del actual orden jurídico internacional para poner límites a la actuación de las grandes empresas transnacionales; y, por último, la enorme desproporción de medios entre una y otra parte y la determinación de Chevron de adoptar todas las medidas que sean necesarias para no perder un litigio que es ya emblemático, al precio que sea.

KEYWORDS: Environmental Justice — Access to Justice — ATCA — Investment Protection

PARAULES CLAU: Justícia ambiental — Accés a la justícia — ATCA — Protecció d'inversions

PALABRAS CLAVE: Justicia ambiental — Acceso a la justicia — ATCA —
Protección de inversiones

Summary: I. Introduction. II. Factual Background. III. Legal Background. IV. Litigation in the United States (1993-2002). V. Litigation in Ecuador (2003-2013). VI. The Arbitration Tribunal. VII. The Execution of the Judgment in Third Countries. 1. Canada. 2. Argentina. VIII. The Pressure on and Discrediting of the Plaintiffs and their Counsel. IX. Provisional Conclusions. X. Bibliography.

I. INTRODUCTION

This is the story of an unequal legal battle. One that the communities affected by Texaco's operations in Lago Agrio, Ecuador, have been holding for more than twenty years, first against Texaco, and after its absorption by Chevron, against this other company, as successor of the former². The legal battle is to obtain compensation for damages to the environment, people's health and the ways of life of the local communities. In 2012 Ecuador had a GDP of 84,530 million dollars. Chevron grossed 230,640 million dollars and had a net profit of 26,180 million dollars. This lawsuit perfectly illustrates the conversion of the whole world into a single area of dispute, with ramifications in the United States, Ecuador, the Netherlands, Argentina, Canada and Brazil; the limitations of the current international legal order to limit the actions of big transnational companies; and finally the enormous inequality of means between parties and the determination of Chevron, whatever the price, to take all necessary measures not to lose a lawsuit that is already iconic.

After introducing some factual and legal background (section 1 and 2 of this text respectively), we will see how the dispute has a first phase in the United States under the Alien Tort Claims Act, between 1993 and 2002 (section 3) and a second phase in Ecuador from 2003 to 2013 (section 4), culminating in a favourable sentence to the plaintiffs. Chevron's reactions to the evolution of the process have focused on avoiding the putting into effect of the Ecuadorian courts' judgment by resorting to international

² A chronology of the events, according to Texaco's position, can be seen in <texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx> [accessed on 15 November 2013] and the point of view of the plaintiffs can be seen in <texacotoxico.org/> [accessed on 15 November 2013]. More information on the website: <business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevrolawsuitsreEcuador> [accessed on 15 November 2013]. RCDA has referred to this subject in previous editorial: 'The Procrastinator' (Chevron en Ecuador)", RCDA, Vol. IV Núm. 2 (2013): 1-14. Available at: <http://www.rcda.cat/index.php/rcda/article/viewFile/432/2011>.

arbitration (section 5); challenging the sentence in third party countries, Canada and Argentina so far (section 6) and a complex and multifaceted operation of pressure and discreditation towards the plaintiffs, the highlight of which is the complaint against them for extortion under the RICO Act (section 7).

II. FACTUAL BACKGROUND

Texaco-Gulf operated in Ecuador for almost thirty years, between 1964 and 1992, in the Ecuadorian Amazon region.³ The Ecuadorian state's original concession to the Texaco-Gulf consortium included 1,500,000 hectares for petroleum exploration and exploitation.⁴ However, on 4 August 1973, the state signed a new contract with the petroleum companies limiting the area of the concession to 491,355 ha.

During this period, Texaco drilled 339 wells in 15 petroleum fields and 627 toxic wastewater pits were abandoned, along with other elements of the petroleum infrastructure. Moreover, obsolete and highly polluting technologies were used during these years of exploitation. The deforestation of 2,000,000 hectares of land is attributed to petroleum operations in the northern Ecuadorian Amazon, as well as massive water contamination with toxic substances and heavy metals. The wastes which derived from petroleum operations and accidental crude oil spills have had a major effect on forests, rivers, and estuaries:

“It has also been estimated that the company deliberately dumped tons of toxic drilling and maintenance wastes and 19 billion gallons of produced wastes into the environment without treatment or monitoring, despite oil industry standards that suggest reinjecting the wastes back into the ground. In addition to routine deliberate discharges, accidental spills were common. During the time that Texaco operated the main trans-Ecuadorean pipeline, spills from that line alone sent an estimated 16.8 million gallons of crude into the environment. By comparison, the

³ FAJARDO, P.; DE HEREDIA, M.G., “El Caso Texaco: un trabajo por la restitución de derechos colectivos y de la naturaleza”, in *¿Estado constitucional de derechos? Informe sobre derechos humanos. Ecuador 2009*; Universidad Andina Simón Bolívar, Sede Ecuador. Quito, Ediciones Abya-Yala, pp. 181-182.

⁴ Concessionary contract published in the Official Registry (RO in Spanish) 186, 21 February 1964.

Exxon Valdez spilled 10.8 million gallons into the Prince William Sound in the largest oil spill in the history of the United States.”⁵

Several environmental impact studies have yielded specific data⁶ which have been presented during the legal process in Ecuador. Some highlights include:

- Higher levels of child malnutrition (43%) compared to the population living in areas removed from the petroleum activities (21.5%), with an infant mortality rate of 143/1,000 births.
- The primary cause of death in the area is cancer, at 32% of total deaths, three times higher than Ecuador’s national average of deaths by cancer (12%) and four to five times higher than in Orellana (7.9%) and Sucumbíos (5.6%).
- A rate of spontaneous miscarriages 2.5 times higher in Ecuadorian Amazon communities exposed to petroleum contamination than in similar communities lacking such exposure.
- Widespread death of animals from drinking water contaminated with oil, falling in pits, or by asphyxiation caused by natural gas. The indigenous populations have also lost hunting opportunities, since forest animals are especially sensitive to contamination, noise, and deforestation.
- 75% of the population studied were found to use contaminated water, which causes numerous types of illness. The contaminated water was used for drinking, cooking, and bathing, not out of a lack of awareness of the hazards of the water, but due to a lack of other options.

In addition to environmental impacts, numerous effects on human rights have also been identified in the form of sexual violence, discrimination, loss of lands, forced displacement as well as considerable effects on the culture itself⁷.

⁵ HURTIG, A.K.; SAN SEBASTIÁN, M., “Epidemiology vs. epidemiology: the case of oil exploitation in the Amazon basin of Ecuador”, *International Journal of Epidemiology*, Vol. 34, Issue 5, October 2005, p. 1171.

⁶ FAJARDO, P.; DE HEREDIA, M.G., “El Caso Texaco: un trabajo por la restitución de derechos colectivos y de la naturaleza”, in *¿Estado constitucional de derechos?* cit, pp. 188-191. All of this data is rejected by the company on its website: <http://www.texaco.com/sitelets/ecuador/es/PlaintiffsMyths.aspx>. See also the critical commentary authored by a group of scientists and published in a letter in the *Journal of Environmental and Occupational Health* Vol. 11/No 2, Apr/Jun 2005, entitled “Texaco and its Consultants”; <http://chevrontoxico.com/assets/docs/ijoe-h-breilh.pdf>.

⁷ MARTÍN BERISTAIN, C.; PÁEZ ROVIRA, D.; FERNÁNDEZ, I., *Las palabras de la Selva. Estudio psicosocial del impacto de las explotaciones petroleras de Texaco en las comunidades amazónicas de*

III. LEGAL BACKGROUND

In 1964 Ecuador granted the company Texaco Petroleum the rights for petroleum exploration and production in Ecuador's Amazonian region, by means of a concessionary contract established with the local Texaco subsidiary (Texpet).

Texaco assigned half of its holdings in the concession to the company Ecuadorian Oil Gulf Company, thereby forming a consortium in which Texaco provided its services as an operator. In September of 1971, Ecuador created a government entity, the Ecuadorian State Petroleum Corporation (CEPE), which would be replaced in 1989 by a new petroleum company owned by the nation of Ecuador, Petroecuador. On 6 August 1973, Texaco and Gulf signed a new concessionary contract with Ecuador, through CEPE. This new contract replaced the 1964 concessionary contract. It included a substantial reduction in the area included in the concession, and would remain in effect until 1992. The contract also envisaged the progressive incorporation of CEPE into the consortium, until it had acquired holdings of 25%. At the beginning of 1974, CEPE purchased 12.5% of the shares held by Texaco and 12.5% of those held by Gulf. Later, in December of 1976, it purchased the remaining shares held by Gulf, thereby reaching shareholdings in the consortium of 62.5%. Texaco held the remaining 37.5% of the shares, although it continued as the operator of the consortium, meaning that at no point in time did either Gulf or CEPE operate in the area.

The 1973 contract required Texaco to provide a percentage of its crude oil production to the government, at a price set by the government, in order to help satisfy Ecuador's domestic consumption needs. Texaco was allowed to export the remainder of the petroleum it produced for sale at the significantly higher international market price. If Ecuador used any of the petroleum for purposes other than its own internal consumption, Texaco would have the right to receive compensation at the international market price. On 16 December 1977, the nation of Ecuador (through CEPE) and Texaco signed a supplementary agreement with similar terms to the 1973 contract.

Ecuador; Hegoa, Bilbao, 2009; available online at <pdf2.hegoa.efaber.net/entry/content/442/Las_palabras_de_la_selva.pdf> [accessed on 14 November 2013]. See also KIMERLING, J., "Transnational Operations, Bi-National Injustice: Indigenous Amazonian Peoples and Ecuador, Chevrontexaco, and Aguinta v. Texaco", *L'Observateur des Nations Unies*, 2008-1, vol. 24, pp.218-226.

In 1990, Petroecuador assumed the role of operator of the consortium. The parties did not agree to extend the validity period of the 1973 contract, which had an expiration date set for 6 June 1992. Texaco, Petroecuador, and the nation of Ecuador therefore began negotiations to resolve all of the issues related to the 1973 contract and to effect its termination. At that time, Texaco also began shutting down its operations in Ecuador. Between December 1991 and December 1993, Texaco filed seven claims in the Ecuadorian courts for alleged non-compliance with the 1973 and 1977 contracts, mainly related to Ecuador's acquisition of a larger quantity of petroleum at the domestic market price than was actually used for its own consumption. In these claims, Texaco requested over 553 million dollars in compensation for damages.

A Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment⁸ was concluded in 27 August 1993. In keeping with common practice, this treaty's Article III establishes that these investments will not be directly expropriated or nationalised, except when this is done in the public interest, in an equitable manner, and after prompt, adequate, and effective payment.

In December of 2006, the Chevron Corporation and Texaco Petroleum Company agreed to go to arbitration against Ecuador for denial-of-justice violations related to the cited Article III of the bilateral investment treaty, since their seven claims had not been taken up before the Ecuadorian courts. Meanwhile, the suit against Texaco for contamination derived from the petroleum operations in the Ecuadorian Amazon had been presented in the U.S. federal courts.

On 1 December 2008, the arbitration tribunal decided to consider Texaco's claims, and on 30 March 2010 it issued a partial binding award in favour of the plaintiff companies, determining that a denial of justice had occurred, ruling in favour of the plaintiffs and requiring Ecuador to compensate the companies⁹. On 22 December 2010, the tribunal awarded Chevron and the Texaco Petroleum Company approximately 700 million U.S.

⁸ Available at <http://www.sice.oas.org/bits/usecu_e.asp>; [accessed on 13 November 2013].

⁹ *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, 134, 342 (Mar. 30, 2010), <<http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>>. On this decision, BURKE, J., "Defining Investor Confidence: Avoiding Interpretive Uncertainty in *Chevron Corp. v. Ecuador*", 34 *B.C. Int'l & Comp. L. Rev.* 463 (2011), <<http://lawdigitalcommons.bc.edu/iclr/vol34/iss2/5>> [accessed on 11 February 2014].; WIRTH, J., "'Effective Means' Means? The Legacy of *Chevron v. Ecuador*", 52 *Colum. J. Transnat'l L.* 325 2013-2014, pp. 325-367.

dollars. On 31 August 2011, after an appeal by Ecuador, this amount was reduced to 96 million dollars.

On 7 July 2010, Ecuador brought an action for nullification of the various rulings before the The Hague District Court. The position of Ecuador was based on two main arguments. First, the delay of the legal proceedings due to lack of interest of the company to push them, by not carrying out the administrative procedures requested by the Ecuadorian judges. Second, the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, of 27 August 1993 entered into force in 1997, five years after Texaco left the country, so retroactive use of the treaty could not be done, because, according to its Article XII it “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter”.

However, the violation of the bilateral investment treaty was again alleged in other judicial proceedings in Ecuador, as will be discussed below.

IV. LITIGATION IN THE UNITED STATES (1993-2002)

As Texaco was no longer operating in Ecuador, a class-action suit representing 30,000 Ecuadorian citizens from the Oriente region¹⁰ (*Aguinda v. Texaco*) was presented before the New York federal courts in November 1993, under the Alien Tort Claims Act (ATCA)¹¹. Successful use of the ATCA to claim reparations derived from human rights violations began with the well-known *Filártiga* case in 1980.¹² This decision opened up the U.S. federal courts for defending the rights recognised under international law.

¹⁰ Rural workers and indigenous people of five nationalities (Siona, Secoya, Cofán, Wuaorani and Kichwa), as well as two others that had already disappeared (Tetetes and Sansahuaris). In 1993, a lawsuit in similar terms was presented by another group of Ecuadorian citizens before the courts of Texas and was dismissed under the doctrine of *fórum non conveniens*; *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

¹¹ The ATCA was adopted in 1789. Its brief text contains the following: “1350. Alien’s action for tort. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Act of 24 September 1789*, ch. 20, § 9 (b), 1 Stat. 79; 25 June 1948, ch 646, § 1, 62 Stat. 934; 28 U.S.C. § 1350 (2004).

¹² In which Dr. Joel Filártiga, an opponent of the Stroessner regime in Paraguay, presented a claim for the 1976 kidnapping, torture, and killing of his son at the hands of Norberto Peña Irala, the police inspector general of the city of Asunción. In 1980, the Court of Appeals ruled that the ATCA was applicable to the case and that a torturer could be tried in the United States for acts committed in a foreign country; *Filártiga v. Peña-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980).

The pleading alleged that Texaco's operations in the region between 1964 and 1992, through its subsidiary Texaco Petroleum Company ("Texpet"), had polluted and destroyed rivers and forests in an area of 14,000 square kilometres, and that these operations were directed and controlled by the parent company in the U.S.A. The remedy sought was the funds necessary for redressing the contamination of the waters and the environment, for the recovery of access to drinking water, for the reintroduction of fish and game, and for the creation of funds for medical care and the development of tracking and overview operations, among other aspects¹³. However, the responsibility was not exclusively Texpet's. As described above, in 1974 the Republic of Ecuador acquired Gulf Oil's rights through its national petroleum company, Petroecuador, and became a majority partner in the consortium in 1976. In any event, Texpet was the only ground operator until 30 June 1990, when Petroecuador took over operations until 6 June 1992.

The case led to numerous rulings in the U.S. courts between 1992 and 2002, most of which were related to procedural issues. The cases were assigned to Judge Vincent Broderick. In 1993, Texaco presented a motion for inadmissibility in the Aguinda case based upon, among other arguments, *forum non conveniens*¹⁴. In his 1994 decision, Judge Broderick indicated a favourable view regarding the applicability of *forum non conveniens*,¹⁵ although he reserved his decision regarding this issue as he considered it premature, ordering new investigations regarding the control of the parent Texaco company over the activities in Ecuador. The judge also considered that dismissal of the

¹³ On this first phase: LAMBERT, L., "At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts", *Journal of Transnational Law & Policy*, Vol. 10:1, Fall 2000, pp. 109-132; KIMERLING, J., "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco", 38 *NYU Journal of International Law and Politics*, 413 (2005-2006).

¹⁴ "*Forum non conveniens* is a discretionary device permitting a court in rare instances to "dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim. In assessing whether *forum non conveniens* dismissal is appropriate, courts engage in a two-step process: The first step is to determine if an adequate alternative forum exists. [...] If so, courts must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake. [...]. The defendant has the burden to establish that an adequate alternative forum exists and then to show that the pertinent factors "tilt[] strongly in favor of trial in the foreign forum." [...]. "The claimant's choice of forum should rarely be disturbed." [...]" [omitted references] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir. 2000).

¹⁵ "Disputes over class membership, determination of individualised or common damages, and the need for large amounts of testimony with interpreters, perhaps often in local dialects, would make effective adjudication in New York problematic at best." *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994).

claim on the basis of *forum non conveniens* should be conditional on Texaco's acceptance of the jurisdiction of Ecuador. In a November 1996 decision, Judge Jed Rakoff, who replaced Broderick, accepted dismissal on these grounds, among others,¹⁶ although no reference was made to the acceptance of Ecuadorian jurisdiction by Texaco.¹⁷

In 1998, the Second Circuit Court of Appeals overturned this decision due partially to the fact that Texaco as such did not act in Ecuador, but rather through a subsidiary, and therefore could not be directly sued under Ecuadorian jurisdiction. Consequently, the Court of Appeals decided that the district court must confirm whether or not Texaco was prepared to submit to the Ecuadorian courts, in the event that the *forum non conveniens* exception was ruled to be applicable.¹⁸ After various procedural occurrences, the District Court and the Court of Appeals confirmed the decision to apply the doctrine of *forum non conveniens* in 2001 and 2002,¹⁹ and Texaco was committed to accepting Ecuador's jurisdiction. Furthermore, any judicial decision handed down in Ecuador in the matter could be executed against Texaco in the U.S.A.²⁰

While this litigation was pending in the U.S., Texpet reached an agreement with its partner Petroecuador on 4 May 1995, where it agreed to perform environmental recovery work in exchange for being released from Ecuador's claims. This agreement covered Texpet, Texaco, and other associated companies, and was considered to represent a response to all claims made by the government and Petroecuador in relation to the environmental impact derived from the consortium's operations. Soon thereafter, on 30 September 1998, Ecuador, under the Government of the President Jamil Mahuad,

¹⁶ He also considered the fact that Ecuador and the company Petroecuador, in the consortium with Texaco, were not named as defendants. He later denied the request to appear in the case in support of the plaintiffs, but without renouncing his sovereign immunity; *Aguinda v. Texaco, Inc.*, 175 F.R.D 50 (S.D.N.Y. 1997).

¹⁷ *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), 627-628.

¹⁸ *Jota v. Texaco Inc.*, 157 F. 3d 153 (2d Cir. 1998).

¹⁹ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Aguinda v. Texaco Inc.*, 303 F. 3d 470 (2d Cir. 2002).

²⁰ "What is particularly ironic about Chevron's legal posture is that, if the company had not fought having the case tried in U.S. courts under the ATS, it is highly likely that it would have prevailed on the merits, particularly in the wake of the *Sosa* decision. Chevron's legal strategy seems to have been driven by the assumption that the risk of a foreign court effectively holding it liable was minuscule. Yet as global environmental law flourishes, countries throughout the world now are upgrading their judicial systems, making such assumptions increasingly questionable." PERCIVAL, R.V., "Liability for Environmental Harm and Emerging Global Environmental Law"; *Maryland Journal of International Law*, Vol.25 (2010), p.59.

signed an agreement with Texpet indicating that the environmental reparations work, which cost 40 million dollars to implement, had been completed, releasing the company Texpet and its subsidiaries, including its successors, from any further responsibility or claims.²¹

At the same time, an agreement between the government of Ecuador and the plaintiffs allowed them to receive Ecuador's support for their claims, in exchange for renouncing to any claims against the State of Ecuador or Petroecuador and its subsidiaries, and for assuming the costs of any possible action against these parties by Texaco.

V. LITIGATION IN ECUADOR (2003-2013)

In 2003, through the Amazon Defence Coalition, the victims filed a class action suit against Texaco (which meanwhile had been acquired by Chevron in 2001) in Lago Agrio, Ecuador. The complaint alleged serious environmental contamination in the locations where Texaco performed petroleum exploitation activities in the Napo concession, in an area of more than 500,000 hectares, thereby causing increased cancer rates and other serious illnesses in the area's residents. The claim was filed under the framework for civil actions contained in the civil code²² and the Environmental Management Law passed in 1999²³.

²¹ Later, however, this agreement was disputed, in the context of criminal proceedings, and two of Texpet's attorneys were prosecuted in Ecuador for alleged involvement in the falsification of documents.

²² Articles 2241 and 2256 of the earlier text of the Civil Code, currently articles 2214 and 2229, respectively, according to the new Codification published in the Official Registry of 24 June 2005.

²³ Articles 41 and 43 of the Environmental Management Law; Law No. 37, published in Official Registry No. 245 of 30 July 1999. In particular, Article 43, related to civil actions states:

“Art. 43) Natural or legal persons or human groups, linked by a common interest and directly affected by the damaging acts or omissions may present actions for damages and losses and for damages caused to health or the environment, including to biodiversity and its constitutive elements, before the appropriate judge. Without prejudice to the other legal actions that may exist, the judge will order those responsible for the damages to pay compensation in favour of the collective group directly affected and for reparation of the damages and losses caused. Those responsible for the damages will also be ordered to pay ten percent (10%) of the value of the compensation in favour of the claimant.

Without prejudice to said payments, and in the event that the community directly affected is unidentifiable or if the group consists of the entire community, the judge will order that the appropriate payment for civil reparations be made to the institution that must undertake the work of reparation in conformity with this Law.

In any event, the judge will determine in the judgment, in conformity with the expert reports solicited, the amount required to rectify of the damages produced and the amount to be delivered to those who make up the community directly affected. The judge will also establish the natural or legal person who should receive the payment and perform the rectification work.

The plaintiffs demanded from the Chevron Texaco Corporation:

“1. The elimination or removal of the contaminating elements that still threaten the environment and the health of the residents. The judgment must therefore provide for: a) The removal and adequate treatment and disposal of the waste and contaminating materials that still exist in the pools or pits opened by TEXACO and which have been simply capped, covered, or inadequately treated; b) The clean up of the rivers, estuaries, lakes, wetlands, and natural and artificial watercourses, and the appropriate disposal of all of waste materials; c) The removal of all of the structural elements and machinery that remain on the ground surface at the closed, shut-down, or abandoned well stations and substations, as well as the ducts, pipes, inlets and other similar elements related to these wells; and, d) The general clean up of the land, plantations, crop areas, street, roads, and buildings where contaminating wastes produced or generated as a consequence of the operations directed by TEXACO are located, including the tanks for contaminating wastes built as part of the poorly executed environmental clean up work; 2. The repair of the environmental damages caused, in accordance with the stipulations of article 43 of the Environmental Management Law.”²⁴

Chevron, meanwhile, presented a series of rebuttals. First and foremost, it denied the jurisdiction and authority of the Ecuadorian court. Chevron also alleged that the company was not the successor to Texaco and that the Environmental Management Law could not be applied retroactively. Finally, it cast doubt on the legitimacy of the plaintiffs for their lack of any connection with the Chevron Texaco Corporation and because the supposed ecological damages in the Amazon region, in the area that the Petroecuador-Texaco consortium operated, which they claimed were unjustifiably attributed to the Texaco Petroleum Corporation, were legally subject to settlement agreements that had been signed and granted. Finally, the company stated that it had not caused any damage to the plaintiffs, that it was not required to answer for third parties, and that it had no obligation to pay any reparations. The company also used the arguments that the claims made against it were not supported by any credible,

Claims for damages and losses originating in environmental impacts will be handled via the verbal process.” (Unofficial translation).

²⁴ Ruling, Trial No. 2003-0002. Judge: Nicolas Zambrano Lozada, Provincial Court of Justice of Sucumbios – Single Chamber of the Provincial Court of Justice of Sucumbios. Nueva Loja, 14 February 2011, p.2. Translations of this decision presented here are not official.

scientifically based proof, and that in any event the period of prescription for the acts had expired.

For ten years now the proceedings have been plagued by procedural incidents as well as accusations and denials of illegal activities on both sides, in both the U.S.A.²⁵ and in Ecuador.²⁶

For example, based upon accusations of corruption, supported by recordings made in secret by a Chevron manager, the original judge in Ecuador, Dr. Juan Nuñez, was removed from the case and a new judge was assigned.

In 2008 an expert designated by the judge, the engineer Richard Cabrera, led a team that detected hydrocarbons at levels considered to be unsafe according to national standards in 44 percent of the water samples they analysed. They also found cadmium, barium, lead, and other heavy metals in the sludge in wastewater pits, and said that 80 percent of these would have to be cleaned up. The team also provided scientific studies that found cancer rates almost double Ecuador's average, with the most common types being cancer of the uterus and leukaemia. Cabrera's report recommended to the court that Chevron should pay an amount of 27 billion dollars in reparations. However, based upon the constant filing of motions to revoke Cabrera's nomination and Chevron's accusations of his collusion with the plaintiffs, the judge decided to omit consideration of Richard Cabrera's report in his judgment.

Furthermore, the documentary film *Crude* was released in 2009.²⁷ In response, Chevron presented a petition before the court in August 2010, requesting dismissal of the case based upon allegations of fraud committed by the plaintiffs, after having obtained access through the U.S. courts to material related to the documentary that was not used in the final version, material that was used out of context by the company in many video set-ups.

²⁵ Chevron tried to challenge the open process in Ecuador in the U.S. courts, alleging that Ecuador had released the company from all liability. However, Ecuador had made it very clear in this release that the rights of third parties were preserved, and all of the U.S. courts were aware of this when Chevron tried to extend the release of liability to third-party claims.

²⁶ JOSEPH, S. "Protracted lawfare: the tale of Chevron Texaco in the Amazon", *Journal of Human Rights and the Environment*, Vol. 3 No. 1, March 2012, pp. 78-80.

²⁷ The documentary *Crude, The Real Price of Oil*, by Joe Berlinguer, has been shown at numerous independent film festivals and has received almost thirty awards; <crudethemovie.com./>.

In September 2010, the plaintiffs presented a new evaluation of damages and losses, of between 90 and 113 billion dollars. In this same month, the judge closed the period allowed for the submission of evidence for the trial.

Finally, on 14 February 2011, the President of the Provincial Court of Justice of Sucumbíos announced a judgment in favour of the plaintiffs. The ruling ordered Chevron to pay more than 8.6 billion dollars in environmental reparations, plus 10% compensation to the plaintiffs, which would be increased to 19 billion if Chevron did not promptly issue a public apology. In the ruling, the judge considered that the act of the merger between the Chevron subsidiary Keepep Inc and Texaco brought with it a transfer of Texaco's rights, but also its obligations, to Chevron. In regard to the alleged separation between Texaco and Texpet, its Ecuadorian affiliate, the judge considered as justified the need

“to entirely lift the corporate veil that separates Texaco Inc. and its fourth-level subsidiary, Texaco Petroleum Company (Texpet), since it has been proven that it was a company with capital much lower than its volume of its operations, which required constant authorisations and investments from the parent company to carry out its normal flow of commercial activity, that the executives were the same in both companies, and principally the manifest fact that failing to lift the corporate veil would imply a manifest injustice.” (p.26)

In relation to the existence of settlements, the judgment stated the following:

“... the Presidency observes that said settlements were effective as stated in the inquiry, by which the government of Ecuador released Texpet and its parent company, Texaco Inc., from all liability for environmental damages that may have originated in the concession. There is not a single piece of legal evidence in the files indicating that the government of Ecuador had planned this claim or any other against Texaco Inc. in relation to environmental damages in the Napo concession, nor that it had acted as a procedural party in this trial. Neither is there a legal basis to sustain that the existence of this settlement serves to deprive the plaintiffs of their fundamental right to bring actions and petitions and for these to be resolved.” (p.30)

According to the judge:

“In this way, the legal basis upon which the collective right of the plaintiffs to present this action has been established to the court's satisfaction; it is summarised in the fundamental substantive right, irrevocable and indispensable, of action and

petition, and secondly, in the regulations of the civil code to support the right to request reparation for damages, and thirdly, in the active legitimation of the plaintiffs to be heard in this process in defence of collective rights.” (p.33)

In relation to applicable law, the judgment cites the validity of the Regulations for Hydrocarbons Exploration and Exploitation (Supreme Decree 1185, Official Registry No. 530 of 9 April 1974), which establishes that it is the operator’s obligation to “take all measures and precautions required as the case may require in order to perform its activities in a manner that prevents damages or hazards to persons, property, natural resources, and sites of archaeological, religious, or tourist interest” (art. 41). Moreover, the 1964 concessionary agreement itself expressly safeguards the rights of third parties and the company’s commitment to perform its operations without causing difficulties for navigation, obstructing fishing or depriving the waters of their qualities of drinkability and purity.

The judgment also considered the 1971 Health Code to be applicable to the case (Official Registry No. 158, 8 February 1971). It is applicable to public and private activities and includes regulations, among others, related to the prohibition of discharging substances into the environment, that are hazardous to human health including industrial waste.

The judgment also noted:

“Similarly, the Law of Hydrocarbons published in the Official Registry No. 322 of 1 October 1971 is also applicable, which contains an express stipulation imposing the obligation to “adopt the measures necessary to protect flora and fauna and other natural resources”, and “to avoid contamination of waters, the atmosphere, and the soils” (see article 29, letters s and t), stipulations which are similar to those found in the later codification of the Law of Hydrocarbons, published in Official Registry No. 616 of 14 August 1974 (article 30, letters s and t), and in Official Record No. 711 of 15 November 1978, (article 31, letters s and t), being a constant in the hydrocarbon-related legislation in force in Ecuador.” (pp.63-64)

Finally, the Water Law is equally applicable (Official Registry of 30 May 1972), which in its article 22 prohibits “all contamination of waters that affects human health or the development of flora or fauna,” which is applicable to all use rights granted by means of administrative concessions.

The ruling applied these norms because the first barrel of petroleum from the Ecuadorian Amazon was not exploited until 1972, and the region “until then was known to be an area free from all industry and human contamination, except for the ancestral activities of the peoples who lived there, in a manner such that we can [...] reasonably affirm that there is no doubt regarding the quality of purity of the waters up until that year” (p. 64).

In the judge’s view, the absence of regulations establishing environmental standards does not imply that there were no laws applicable to the case, such as those cited, although he did cede to Chevron that current standards could not be applied to operations carried out in previous years. In fact, the same judgment cites specific sanctions imposed on Texpet by the authorities as a consequence of their operations failing to comply with legal mandates.

In terms of culpability, the judgment expresses that this covers both intentional liability, when the subject desires the action to occur, as well as culpability “when the agent causes damage unintentionally, but while operating with imprudence, negligence, or ignorance, as well as in violation of legal norms or regulations” (pp. 76-77). The judge also stated, applying earlier judicial decisions, that as activities entailing risk are involved, strict liability should be considered, “as the benefits that derive from such activity have as a counterbalance the rectification of damages caused to individuals or their property” (p. 83).

In consideration of the acts examined, the judge made use of a broad concept of environmental damage, characterised as “any and all loss, diminishment, detriment, harm, damage, caused or inflicted upon the environment or any of its natural or cultural components” (p. 94). Next, he extracts his own conclusions from the more than one hundred expert reports brought to the process, considering that the contamination in the area of the concession affected 7,392,000 cubic meters (p.125). The judge also recognised the non-existence of personalised medical reports that provided evidence for illnesses suffered by specific persons, but after analysing various epidemiological reports as well as a large quantity of testimony from the victims²⁸, he estimated that “the natural water sources in the concession area have been contaminated by the

²⁸ See MARTÍN BERISTAIN, C.; PÁEZ ROVIRA, D.; and FERNÁNDEZ, I., *Las palabras de la Selva. Estudio psicosocial del impacto de las explotaciones petroleras de Texaco en las comunidades amazónicas de Ecuador*; cit.

hydrocarbon activities of the defendant company, and because of the hazardous nature of the substances dumped and all of the means of possible exposure, this contamination puts the health and life of the people in general and the ecosystem at risk” (p. 147). Furthermore, the impact on the indigenous people is referred to specifically in these terms:

“It is considered that the only impact suffered by the indigenous people that can be considered as environmental damage is the cultural damage provoked by the forced displacement due primarily to the impact suffered by the lands and rivers and to the diminution of the species that were used for traditional hunting and fishing, which has obliged them to modify their customs...” (p. 154).

In terms of the relationship of causality with respect to the environmental damages, the judgment opined that the system implemented by Texpet for the treatment of its waste “did not eliminate or manage the risks in an adequate or sufficient manner” and that “the system was designed to discharge the wastes into the environment in an economical manner and did not adequately manage the risk of damages, but externalised them” (pp. 165-166).

In regard to damages to health, the judgment stated that “there is reasonable and sufficient proof for both the existence of impacts on the public health, as well as the fact that this impact had a medically reasonable probability of being caused by the exposure of the persons who inhabited the concession area to the substances discharged by Texpet into the ecosystem” (p. 170).

In terms of the impact on the indigenous peoples, while not attributing all of the cultural changes they had undergone to the company’s activities, the judge concluded that the company had contributed to these, with the environmental impacts being a “direct causal agent of certain changes forced upon the indigenous cultures that based their social system, their cultures, and their existence on a close relationship with nature” (p. 172).

Finally, the judgment concluded with the following statements:

“Therefore, after analysing the various types of evidence presented during the disclosure phase for the issues in this litigation, it appears clear to this court that, 1. Contamination attributable to the scheme of petroleum operations in the concession exists, since it was designed to take advantage of the dumping of effluents into the environment, in spite of the existence of other available alternative technologies; 2.

The contamination reported can be considered as hazardous, because of the admitted possibility that the dumping of fluids such as those that Texaco has admitted to have dumped, under the name of Texpet, causes damage to agriculture and to the health of persons. This possibility of suffering damage, which in this case threatens indeterminate persons, should not cause those threatened by contingent damages to remain without defence, because the legislature has wisely anticipated (art. 2236 of the Civil Code) the exercise of the type of popular action that is being exercised [...]; 3. The dumping of contaminants as described could have been avoided by the defendant with the use of other technology that was available at that time, but which was omitted from the operational scheme for the concession, which was under the full responsibility of the company Texpet, which operated as a fourth-level subsidiary of Texaco Inc., which in turn publically merged with Chevron, thereby creating Chevron Texaco, the defendant company in this trial, which would later change its name to Chevron Corp. “(p. 174)

When the time came to establish the amount of the reparations, the judge considered it appropriate to divide the various applicable measures of reparation among the damages in evidence, and considered that these measures could be of three types:

“(1) primary measures, focused upon restoration of the natural resources to their original state to the extent possible and as soon as possible; (2) compensatory measures, created in recognition that the principal measures could be delayed or may not be performed in their entirety, and the objective of which is to compensate for the fact that the primary reparation does not achieve full restitution of the natural resources and to compensate for the time that passes without reparation; and (3) measures for mitigation, designated to reduce and attenuate the effect of damages impossible to repair. “(pp. 177-178)

Based upon all of these considerations, in the judgment a total amount of reparation is established at 8.646 billion dollars²⁹. For purposes of implementing the terms of the judgment, a trust would have to be created on behalf of those affected and administered by the Amazon Defence Coalition, which would be the organisation responsible for the

²⁹ Distributed in the following manner: 600 million for cleaning up subterranean waters; 5.396 billion for cleaning up contaminated soils, estimated to represent 7,392,000 cubic metres; 200 million (10 million per year for 20 years) for recuperation of the flora and fauna and the aquatic life native to the area; 150 million to create a system to bring potable water to the region; 1.4 billion to create a health system to address the health-related needs created by the public health problems; 100 million for the creation of a community reconstruction and ethnic reaffirmation program for the indigenous peoples; 800 million to provide funds for a health plan, which will have to include treatment for people suffering from cancer attributable to Texpet’s operations in the concession area.

reparations. In agreement with the Environmental Management Law, an additional 10% was assigned to the total reparations established under the concept of reparation of damages, for the Amazon Defence Coalition.

The judgment also imposes a punitive sanction equivalent to an additional 100% of the sum of the amounts for the reparation measures:

“... which is adequate for punitive and deterrent purposes for this type of compensation, at the same time having an example-making and dissuasive objective, providing recognition for the victims and ensuring the non-repetition of similar misconduct. However, considering that the defendant has already been ordered to repair the damages, and that this serves the same example-making and dissuasive ends, this civil punishment may be replaced, at the election of the defendant, by a public apology issued in the name of Chevron Corp., offered to those affected by Texpet’s operations in Ecuador. This public recognition of the damages caused must be published within 15 days, in Ecuador’s main written media as well as in the defendant’s home country, on three different days, and in the event of compliance, will be considered as a symbolic means of moral reparation and recognition of the effects of its misconduct, while also ensuring non-repetition.” (pp. 185-186)

On 9 March 2011, Chevron presented a petition of appeal, requesting the annulment of all of the proceedings for lack of the court’s jurisdiction, for lack of authority, for violations of the standards of due process, and for fraud in the proceedings. The company claimed, again, that Chevron never operated in Ecuador, that it never accepted the jurisdiction of the Ecuadorian courts, and that it is not the legal successor of Texaco, and that Texaco did not control the operations of Texpet.

For their part, the plaintiffs also presented a petition of appeal on 17 February 2011. Although in agreement with the majority of the judgment, they considered the reparations awarded to be insufficient because of the omission of reparations for the economic impact on the persons affected by the contamination, as well as for the damages caused by the loss of territory suffered by the ethnic groups in the area.

On 3 January 2012, the Provincial Court of Sucumbíos (Ecuador) resolved both petitions of appeal, confirming the previous decision of the Court of Lago Agrio in all

its aspects and thus condemning Chevron to pay more than 18,000 million dollars, as long as the company does not make a public apology³⁰.

Chevron filed a new appeal to the Supreme Court of Ecuador (*Corte Nacional de Justicia*). The extensive judgment of the high court was issued on 12 November 2013³¹. The judgment partially cancels the previous sentence issued by the Chamber of the Provincial Court of Sucumbíos on 3 January 2012 in relation to punitive damages, the imposition of which has no basis in Ecuadorian legislation nor has the requirement for public apology, and the subsequent order to pay for this. For the rest, the judgment confirms the second instance decision which orders the payment of US\$ 8,646,160 for environmental damage, plus 10% under the concept of reparation of damages, to the Amazon Defence Coalition.

Furthermore, the Court felt it was necessary to expose Chevron's contradictory position that:

“...after litigating in the United States of America for ten years, where it could be judged according to its jurisdiction then, waiving its authority and admitting to have confidence in the Ecuadorian justice as honest and independent, competence fell on the administration of justice in Ecuador. However, in contradiction, it disowns Ecuadorian jurisdiction and competence, not in legal terms to which it was and is obliged, but with abuses and offences towards the nature of this state power. It accused Ecuadorian justice at a domestic and international level, not only of lack of jurisdiction and competence but also, with absolute lack of evidence, of having a “dishonest and corrupt administration of justice”, which threatens the prestige of the judicial system through the bodies constitutionally instituted for litigation such as this one. An accusation that this Court turns down flat.” (p.220) (non-official translation).

Reiterating that:

“There is no legal cause nor foundation for declaring the process null that the appealing company has repeatedly requested. It is sufficient to note that fraud was

³⁰ The decision partially accepts the company's appeal, only in the part which refers to the presence of mercury in the concession area, considering that there was a mistake in the assessment of the evidence regarding this element in the first instance and consequently, its importance in this judgment is disregarded, although it considers that this does not affect the amount of the compensation fixed; Trial Num. 2011-0106. Judge: Dr. Milton Toral Zevallos. Provincial Court of Justice of Sucumbíos. Single Chamber of the Provincial Court of Justice of Sucumbíos. Nueva Loja, 3 January 2012.

³¹ National Justice Court. Trial Num. 174-2012. Dr. Wilson Andino Reinoso. National Court of Justice. Civil and Merchant Court Room. Quito, 12 November 2013.

never proved and that the company has continuously been alleging it without legal basis. It is reiterated that neither default nor procedural violation has been established for the alleged disqualification to operate. The repeated insistence of the appellant deviates from procedural good faith” (p.221) (non-official translation).

Afterwards the Constitutional Court of Ecuador has accepted an *acción extraordinaria de protección* (special proceeding for protection)³² presented by Chevron on December 32 2013. There the corporation allege, among other reasons, the violation of due process and also the violation of *res iudicata*.³³

VI. THE ARBITRATION TRIBUNAL

The second legal avenue Chevron used was raised in The Hague. Despite being committed in the U.S. courts to accept Ecuadorian jurisdiction and abide by its decisions, in 2004 Chevron filed a first claim against Ecuador’s government before the American Arbitration Association (AAA), seeking a declaration that it was not liable for further environmental clean-up based on the release, and ordering Ecuador’s executive branch to intervene in the case to immunize Chevron from any liability³⁴. The Federal Courts in New York rejected this possibility.

In September 2009, Chevron presented a demand for international arbitration before the Permanent Court of Arbitration in The Hague, under the regulations of the United Nations Commission on International Trade Law³⁵, alleging that the government of Ecuador violated the bilateral investment treaty between the United States and Ecuador,

³² According to the Article 94 of the Ecuadorian Constitution: “The special proceedings for protection shall be admissible against those rulings or definitive judgments where there has been a violation, by deed or omission, of the rights enshrined in the Constitution, and they shall be filed with the Constitutional Court. This appeal shall be admissible when regular and special appeals have been exhausted within the legal framework, unless the failure to file these resources was not attributable to the negligence of the person bearing the constitutional right that was infringed.” The English version is available online at <pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

³³ Constitutional Court of Ecuador. Case N° 0105-14-EP. Judge Rapporteur: Dr Manuel Viteri Olvera. Constitutional Court, Admissions Chamber. Quito D.M. 20 March 2014.

³⁴ Republic of Ecuador v ChevronTexaco, 376 F Supp 2d 334, 342 (SDNY), 27 June 2005. Republic of Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452 (S.D.N.Y. 2007); Republic of Ecuador v. ChevronTexaco Corp.. 296 F. App’x 124, 2008 WL 4507422 (2d Cir. Oct. 7, 2008), cert. denied, 129 S. Ct. 2862 (2009).

³⁵ For more details on this matter: LINARES RODRÍGUEZ, E., “Homologación en terceros estados de la sentencia dictada en Ecuador contra Chevron”, *Anuario Español de Derecho Internacional Privado* (Tomo XII). 2013, pp. 589-594.

for two reasons: the agreement between Texpet and Ecuador in terms of the reparation of damages, and Ecuador's interference in the independence of Ecuadorian judicial authority. It is paradoxical that the company seems to intend to say that Ecuador, and ultimately its own victims, are to take on responsibility for the reparation, and that the government of Ecuador effectively interferes in the domestic legal process where it does not take the part in favour of the company's interests. In addition, by considering that the arbitration forum is a place where victims have no relevance, as it has been noted: "Chevron was and is essentially attempting to circumvent domestic proceedings without the participation of its adversaries in the relevant litigation."³⁶

For its part, the government of Ecuador and the plaintiffs in the Ecuadorian lawsuit presented a demand in the U.S. federal courts, with the objective of paralysing the arbitration to the extent that it could affect the plaintiffs' rights within the context of the process opened in Ecuador, and especially the conditions under which the *forum non conveniens* was used in the original U.S. litigation. On 17 March 2010, U.S. District Court, Southern District of New York (Judge Leonard B. Sand) ruled that Chevron could continue requesting international arbitration in this case³⁷. The plaintiffs and the government of Ecuador appealed this decision, but the court once again ruled in favour of Chevron on 17 March 2011³⁸.

As has already been shown, Texaco left Ecuador in 1992 and Chevron has never had direct investment in Ecuador. However, on 9 February 2011, again just a few days before the judgement in Lago Agrio, the Arbitration Court adopted interim measures in favour of Chevron, ordering Ecuador to suspend the execution of any judgment against the company in relation to the Lago Agrio case, either within or outside Ecuador, and to

³⁶ JOSEPH, J. "Protracted lawfare: the tale of Chevron Texaco in the Amazon", cit., p.83. The opinion of the lawyers of the Amazon Defence Coalition can be seen in: DONZIGER, S.; GARR, L.; MARR PAGE, A. "Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon." American University, *Human Rights Brief* 17, no.2 (2010): 8-15; 78-82. Available at: <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1114&context=hrbrief>>. (Accessed on 23 January 2014)

³⁷ See Republic of Ecuador v. Chevron Corp., Nos. 09 Civ. 9958, 10 Civ. 316, 2010 WL 1028349 (S.D.N.Y. Mar. 16, 2010). On the attempt of blocking the arbitration through the Inter-American Commission on Human Rights, see GIORGETTI, C. "Mass Tort Claims in International Investment Proceedings: What Are the Lessons from the Ecuador-Chevron Dispute?", 34 U. Pa. J. Int'l L. 787 2012-2013, pp. 792-794.

³⁸ United States Court of Appeals for The Second Circuit, August Term, 2010 (Argued: August 5, 2010 Decided: March 17, 2011) Docket Nos. 10-1020-cv (L) 10-1026 (Con), Republic Of Ecuador, Petitioner-Appellant and others, Plaintiffs-Appellants — v.— Chevron Corporation, Texaco Petroleum Company, Defendants-Appellees.

wait for a ruling regarding the merits of the claim³⁹. A similar decision was adopted in 2012, in which the Court also ruled

“to adopt a “twin-track” procedure, leading simultaneously to: (i) a first short hearing addressing preliminary legal issues arising from the Settlement Agreements; and (ii) a second longer hearing addressing all extant issues which may be required finally to decide the Parties’ dispute.”⁴⁰

And on 7 February 2013, in a new ruling, noted that:

“The Tribunal declares that the Respondent has violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina”⁴¹

³⁹ PCA Case No. 2009-23. In the matter of an Arbitration before a Tribunal constituted in accordance with the Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investments, signed 27 August 1993 (the “treaty”) and the UNICTRAL Arbitration Rules 1976 between - 1. Chevron Corporation (U.S.A.) 2. Texaco Petroleum Company (U.S.A.) The Claimants - and - the Republic of Ecuador The Respondent. Order for Interim Measures dated 9 February 2011. The Arbitration Tribunal: Dr. Horacio A. Grigera Naón; Professor Vaughan Lowe, QC; V.V. Veeder QC (President).

⁴⁰ PCA Case No. 2009-23. In the matter of an Arbitration before a Tribunal constituted in accordance with the Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investments, signed 27 August 1993 (the “treaty”) and the UNICTRAL Arbitration Rules 1976 between - 1. Chevron Corporation (U.S.A.) 2. Texaco Petroleum Company (U.S.A.) The Claimants - and - the Republic of Ecuador The Respondent. Procedural Order No. 10 dated 9 April 2012 . The Arbitration Tribunal: Dr. Horacio A. Grigera Naón; Professor Vaughan Lowe, QC; V.V. Veeder QC (President).

⁴¹ PCA Case N° 2009–23. In the matter of an Arbitration before a Tribunal constituted in accordance with the Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investments, signed 27 August 1993 (the “treaty”) and the UNICTRAL Arbitration Rules 1976 between - 1. Chevron Corporation (U.S.A.) 2. Texaco Petroleum Company (both of the United States of America) The First and Second Claimants - and - the Republic of Ecuador The Respondent. Fourth Interim Award on Interim Measures. Dated 7 February 2013. . The Arbitration Tribunal: Dr. Horacio A. Grigera Naón; Professor Vaughan Lowe, QC; V.V. Veeder QC (President).

In its first decision on the crux of the matter⁴², the arbitration panel issued an opinion which considered closed the possibility that Ecuador requested TexPet, Texaco and Chevron, as subsequent parent company, to take responsibility. The Court considers that the Agreement “was intended to preclude the Respondent from itself making any claim against a Releasee (now including Chevron) under Article 19-2 of the Constitution [that conferred a right to a pollution-free environment guaranteed by the State] (or its subsequent constitutional equivalent).” (par.99)

And instead, it understands that:

“...the release does not extend to any claims made by third persons in respect of their own individual rights separate from the Respondent under Ecuadorian or other laws..”(par. 81) and that “... as at 1995, such an individual claiming damages for personal harm remained free to do so, notwithstanding the Respondent’s release in Article 5, even where that person invoked Article 19-2 of the Constitution in support of an individual claim for damages in respect of personal harm (actual or threatened) separate from the Respondent.”

However, in relation to the action for diffuse or collective damage, the Court concludes, in accordance with Chevron’s position, that there were no routes open at that time for that, so:

“it must follow from the circumstances prevailing in 1995 that the Respondent, and only the Respondent, had the legal capacity to make and settle a diffuse claim under Article 19-2. If the Respondent could not make and then settle a diffuse claim under Article 19-2, no-one else could. [...] in 1995 the Respondent (acting by its Government) could settle a diffuse claim under Article 19-2 “forever” against the Releasees; and that accordingly no such diffuse claim could be made in the future against any Releasee.”

⁴² PCA Case No. 2009-23. In the matter of an Arbitration before a Tribunal constituted in accordance with the Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investments, signed 27 August 1993 (the “treaty”) and the UNICTRAL Arbitration Rules 1976 between - 1. CHEVRON CORPORATION (“Chevron”), 2. TEXACO PETROLEUM COMPANY (“TexPet”) (both of the United States of America) The First and Second Claimants - and - THE REPUBLIC OF ECUADOR, The Respondent. First Partial Award on Track I dated 17 September 2013. The Arbitration Tribunal: Dr Horacio A. Grigera Naón; Professor Vaughan Lowe; V.V. Veeder (President). Administrative Secretary: Martin Doe. Among other aspects, the Court left as a second phase, issues like “whether or not the claims pleaded by the Lago Agrio Plaintiffs rest upon individual rights, as distinct from “collective” or “diffuse” rights (in whole or in part) and whether or not those claims are materially similar to the claims made by the Aguinda Plaintiffs in New York; and [...] the specific effect of any changes in Ecuadorian law taking place after the execution of the 1995 Settlement Agreement and the 1998 Final Release, including the interpretation and application of the 1999 Environmental Management Act.” *Ibid.*, par. 93.

Thus, it understands that if the right did not exist at the time for the individuals⁴³, its creation later on by the Environmental Management Act of 1999, would be irrelevant to the lawsuit. And, in the last paragraph of the judgement, it is particularly striking that with respect to this argument, the Court states not having ruled on the nature and scope of popular actions under Articles 990 and 2236 of the Civil Code although it states that “it seems at present that these actions are unlikely to be decisive one way or the other in this case, the Tribunal again prefers to defer its decision for the time being. Similarly, the Tribunal will if necessary request further submissions from the Parties on these popular actions.” Indeed, the lawsuit presented in Ecuador is based, among other dispositions, not only on legislation introduced after 1995, but also on the old Article 2260 of the Civil Code of Ecuador of 1970, currently Article 2236, which seems of little relevance to the arbitration panel and which provides that:

”Generally, popular action is granted in all cases of contingent damage that by some recklessness or negligence threatens unspecified people. But if damage threatens only particular people, only some of them will be able to try the action.”

In any case, a new arbitration is expected centred, inter alia, on Chevron’s accusation about the alleged denial of justice against the company by the Ecuadorian State. However, Ecuador continues to sustain arbitration null due to lack of jurisdiction, since it is applying a Bilateral Investment Treaty which entered into force a long time after Texaco had voluntarily left the country. In November 2013, after the aforementioned judgment of the Supreme Court of Justice of Ecuador, in annulment, another argument was added to this last one, when it was shown that arbitration had been sought when the procedural steps within Ecuador’s jurisdiction had not concluded.

⁴³ “Article 5 of the 1995 Settlement Agreement and Article IV of the Final Release preclude any claim by the Respondent against any Releasee invoking the diffuse constitutional right under Article 19-2 of the Constitution, but that these releases also preclude any third person making a claim against a Releasee invoking the same diffuse constitutional right under Article 19-2, not being a separate and different claim for personal harm (whether actual or threatened).” *Ibid.* par. 108. Agreeing with this position, see DHOOGHE, L.J., “Aguinda v. Chevrontexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States”, 19 *J. Transnat’l L. & Pol’y* 1 2009-2010, pp. 51-54.

VII. THE EXECUTION OF THE JUDGMENT IN THIRD COUNTRIES

In the absence of Chevron's assets in Ecuador, the Ecuadorian authorities have taken the necessary steps for enforcing the judgment in third countries. First in Canada, then in Brazil and in Argentina⁴⁴.

In Brazil, the first judicial decision is expected sometime in 2014. Chevron operates several concessions for extracting oil and gas, including Campo Frade, in the Atlantic Ocean, Papa-Terra and that of Maromba. In Brazil, Chevron operates through Chevron Brasil Petróleo Ltda. (Chevron Brasil Upstream Frade Ltda.), which is a fully owned subsidiary of Chevron Corp. Additionally, Chevron owns a manufacturing plant of lubricants and another one of industrial greases (through Chevron Brasil Lubrificantes Ltda.), as well as a plant of performance additives (through Chevron Oronite Company LLC, another fully owned subsidiary)⁴⁵.

In Canada and in Argentina, distinct decisions have already been made.

1. Canada

Canada is the first country they tried to enforce the Ecuadorian sentence. Chevron has been operating in Canada for over 70 years, during which it has discovered and produced oil and natural gas. Chevron operates through Chevron Canada Ltd. and Chevron Canada Finance Limited (both fully owned by the company) and Chevron Canada Resources of which it is a shareholder.

⁴⁴ For a general view of the problems regarding the recognition and the enforcement of the decision, see REQUEJO ISIDRO, M., "The Last Struggle for Redress: Recognition and Enforcement of Foreign Resolutions on Civil Liability for Human Rights Violations", en *Companies in Conflict Situations. Building a Research Network on Business, Conflicts and Human Rights*, ICIP Research 01, ICIP, Barcelona, 2013, pp. 71-86.

⁴⁵ On the corresponding legal framework, GOMEZ, M.A., "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador", FIU Legal Studies Research Paper Series. Research Paper No.13-14, August 2013, pp. 455-461; available at: <<http://ssrn.com/abstract=2307639>>; [accessed on 11 February 2014].

On 1 May 2013, Judge D.M. Brown, of the Superior Court of Justice of Ontario issued the decision at first instance, in the lawsuit filed against Chevron Corporation and Chevron Canada Ltd.⁴⁶

The question at issue was: what should those seeking recognition and enforcement of a judgment favourable to their interests in a third country show in Ontario? The plaintiffs argued that they only needed to prove the existence of a real and substantial connection between the foreign court and the subject-matter and/or defendant in the foreign proceeding, whereas Chevron held that they needed to demonstrate a real and substantial connection between the defendant and Ontario's jurisdiction. Understanding that such connection did not exist, the defendants brought a motion to a.) set aside the service *ex juris* of the claim on Chevron Corporation and b.) stay the action under s.106 of the Courts of Justice Act.⁴⁷

Regarding the first motion, the court rejected the argument considering that the requirement of a real and substantial connection applies only to a court assuming jurisdiction over the initial adjudication of a claim on its merits, thereby declining to set aside service *ex juris*.⁴⁸

However, the Judge admitted the second motion by expressly accepting Chevron's argument, in the sense that:

“Chevron Corp. does not have assets here, and there is no reasonable prospect that it will do so in the future, there is no prospect for any recovery here. To allow the Plaintiffs' academic exercise to take place in the Ontario judicial system would, therefore, be an utter and unnecessary waste of valuable judicial resources...”⁴⁹

Regarding the Canadian subsidiary of Chevron, the Judge considers that, despite the links with the parent company, Chevron Canada operates independently⁵⁰ and it is a

⁴⁶ *Yaguaje v. Chevron Corporation*, 2013 ONSC 2527.

⁴⁷ Section 106 of the Canadian Courts of Justice Act, entitles a court, on its own initiative, to stay a proceeding.

⁴⁸ “I am not prepared to adopt, as the defendants argued, a blanket principle that an Ontario court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of a showing that the defendant has some real and substantial connection to Ontario or currently possesses assets in Ontario.” *Ibid.*, para. 85. “Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere “virtual” business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. In the words of Rule 16.02(1)(c), Chevron Canada was served at a “place of business” in this province. This court therefore possesses jurisdiction over Chevron Canada. I therefore dismiss its motion to set aside the earlier service *ex juris* because, in the result, service in *juris* was made.” *Ibid.* para. 87.

separate legal entity. Consequently, the court rejected the plaintiffs' arguments that the corporate veil should be pierced so as to make those assets available for execution: "the plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy a Judgment against its ultimate parent."⁵¹

The decision was appealed by both parties, each concerning the aspect that had been rejected in their respective claims.

The Court of Appeal for Ontario, in its ruling of 17 December 2013, rejected Chevron's motion and admitted that of the Ecuadorian plaintiffs.⁵²

In the opinion of the Court, confirming the decision at first instance in this regard: "in recognition and enforcement actions relating to foreign (e.g. Ecuadorian) judgments in Canadian jurisdictions (e.g. Ontario), the exclusive focus of the real and substantial connection test is on the foreign jurisdiction" para.30. Thus, this implies that "an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario." Para. 35. In contrast, on Chevron Canada which had no relationship with Ecuador, the Court had the following to say:

"I would additionally note Chevron Canada's significant relationship with Chevron. Chevron Canada is a wholly-owned subsidiary of Chevron, albeit one owned via intermediate wholly-owned subsidiaries. Chevron guarantees the debt of its indirect subsidiaries which in turn furnish capital to Chevron Canada, and has directly guaranteed certain performance obligations of Chevron Canada. Furthermore, Chevron's income is wholly derived from dividends from indirect subsidiaries that carry out its actual business functions, which include Chevron Canada. In light of the economically significant relationship between Chevron and Chevron Canada, and given that Chevron Canada maintains a non-transitory place of business in Ontario, an Ontario court has jurisdiction to adjudicate a recognition and enforcement action against Chevron Canada's indirect corporate parent that

⁴⁹ *Ibid.* para. 88.

⁵⁰ "[...] the management of Chevron Canada operates its business in a fashion which is separate and distinct from that of its parents up the corporate "family tree", subject to the direction of its own board of directors which does not contain any over-lapping members with the Chevron board or executive." *Ibid.* para. 99.

⁵¹ *Ibid.* para. 109.

⁵² Court of Appeal for Ontario. *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758 (CanLII), <<http://canlii.ca/t/g2dbp>> retrieved on 2014-04-26.

also names Chevron Canada as a defendant and seeks the seizure of the shares and assets of Chevron Canada to satisfy a judgment against the corporate parent.”⁵³

And this, without prejudicing the debate regarding the piercing of the corporate veil that, in the opinion of the Court should be discussed once jurisdiction is determined.

Once was Chevron’s appeal rejected, the Court refers to the appeal regarding the decision to stay the action. The Court allowed the appeal on the basis of different arguments.⁵⁴ (paras. 45 et seq.)

In the first place, the issue was never really discussed by the parties at first instance, as it is a construction of the Judge himself.⁵⁵ In the second place, the Court rejects the argument in which in an extraordinary way Chevron has been prevented from presenting new arguments, different to that of the lack of jurisdiction, to maintain the stay of judgement, since Chevron and Chevron Canada were the ones who freely opted to waive the defence of their cause before the Court, and only chose to challenge jurisdiction at first instance. Thirdly, it considers that the reasoning of the trial Judge as to the relationship between Chevron and Chevron Canada and the lifting of the veil should be open to debate⁵⁶. Fourthly, it considers that the Judge ends up assuming the *forum non conveniens* concept even though none of the parties had suggested it, and that:

“[T]he existence of assets of the judgment debtors in Ontario is irrelevant to the question of whether the court should grant recognition to the [foreign] judgment. The plaintiff has the right to satisfy itself whether the defendants have or will have assets in Ontario and, if so, to seize them. If it is unsuccessful in this regard, it simply will be in the same position as other judgment creditors.”

⁵³ *Ibid.*, para.38.

⁵⁴ *Ibid.*, paras. 45-72.

⁵⁵ “the motion judge’s stay in a major case involving poor and vulnerable foreign residents, one of the world’s largest corporations, a long and difficult process in a foreign court, and a huge damages award, was entirely his own construct; no party sought it. Consequently, this issue was not argued before the trial judge, and no cases were put before him regarding the appropriateness of granting a discretionary stay. To justify a stay, the defendant must satisfy the court that a continuance of the action would work as injustice because it would be oppressive or vexatious or an abuse of the process of the court and that the stay would not cause an injustice to the plaintiff.”

⁵⁶ “In my view, these issues deserve to be addressed and determined, if not at a trial, at least in the context of a record and legal arguments made under the umbrella of either Rule 20 or Rule 21 (or both). To grant this stay without giving the plaintiffs the option to make legal arguments and compile a record would constitute an injustice to the plaintiffs.” P *Ibid.*, para. 57.

Fifthly, it considers that there is no congruence between the reasoning of the Judge, regarding the defence of Ontario's jurisdiction, and the finally adopted decision to stay the action, argued in favour of the decision to be taken in another jurisdiction.

Finally, the Court does not share the view expressed by the first instance Judge that

“...Ontario courts should be reluctant to dedicate their resources to disputes where, in dollar and cents terms, there is nothing to fight over. In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorian Judgment will have a practical effect.”

The Court recalls that “the long history of this litigation, and especially Chevron's role in it, suggests the opposite”. And emphatically after reviewing the various chapters of the litigation in the United States, Ecuador and Canada:

“[69] The picture from the above history is an obvious one. For 20 years, Chevron has contested the legal proceedings of every court involved in this litigation – in the United States, Ecuador and Canada. Chevron even sought, and briefly obtained, a global injunction against enforcement of the Ecuadorian judgment.

[70] In these circumstances, I cannot agree with the motion judge that the Ecuadorian plaintiffs' recognition and enforcement action in Ontario is an “academic exercise” and would be “an utter and unnecessary waste of valuable judicial resources.” In these circumstances, the Ecuadorian plaintiffs do not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond. In these circumstances, the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian judgment in a court where Chevron will have to respond on the merits. That the plaintiffs in this case may ultimately not succeed on the merits of their recognition and enforcement action, or that they may not succeed in successfully collecting from the judgment debtors against whom they bring this action, are not relevant factors for a court to consider in determining whether to grant a discretionary stay before the defendants have even attorned to the jurisdiction of the Ontario court. A party may bring an action for all kinds of strategic reasons, recognizing that their chances of collection on the judgment are minimal. It is not the role of the court to weed out cases on this basis and it is a risky practice for a judge to second-guess counsel on strategy in the name of judicial economy.”

Even before the judgment on the appeal of the Ecuadorian plaintiffs, the court allows a Chevron spokesman to comment:

”Even before the Ecuadorian judgment was released, Chevron, speaking through a spokesman, stated that Chevron intended to contest the judgment if Chevron lost. He said: “We’re going to fight this until hell freezes over. And then we’ll fight it out on the ice. [...] Chevron’s wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction.”⁵⁷

Chevron and Chevron Canada filed an appeal before the Supreme Court of Canada. On 3 April 2014, the Supreme Court of Canada has agreed to hear the company’s appeal.

2. Argentina

There are several Chevron subsidiaries in Argentina. Furthermore, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards are in force between Ecuador and Argentina, and of special interest in this case, the Inter-American Convention on Execution of Preventive Measures, both from 8 May 1979.

As the judgment on the merits on the recognition and enforcement of the sentence is still pending, this has probably been influenced by the procedure relating to the possibility of adopting a precautionary seizing measure on the Chevron subsidiaries operating in Argentina.

At first, in November 2012, the Judge of the Civil Court No. 61, at the request of the Ecuadorian judge, ordered a precautionary measure, understanding the effects of the ruling to be extended to the Chevron subsidiaries in Argentina, ordering a seizure for the sum of USD 19,021,552,000, over goods belonging to Chevron Argentina S.R.L., Ing. Norberto Priú S.R.L., CDC ApS, and CDHC ApS. The judge sustained that the appellants’ right of defence was not violated as they had the opportunity to take part in these proceedings and in the main process.

The same decision was confirmed in substance in the National Court of Civil Appeals which understood that the Inter-American Convention on Execution of Preventive

⁵⁷ *Ibid.*, paras. 74-75.

Measures limits the authority of the Argentinian legal bodies to review a measure decreed by a foreign judge, having guaranteed the right to defense in both Argentina and Ecuador⁵⁸.

However, the Chevron subsidiaries filed an appeal before the Supreme Court of Justice which deemed the sentence appealed ineffective, annulling the judgment appealed⁵⁹.

The appellants alleged a breach of Argentinian public policy since the foreign judgment would have been obtained in a trial tainted by fraud, extortion and bribery, in which the Argentine and Danish appellant companies were neither parties nor convicted, therefore they could not exercise their right to legal defence. The Attorney General said in her report:

“The public interest in the activity developed by the appellants (article 1, law 26.741) and the economical significance of the seizure led me to believe that the appealed decision may cause irreparable damage to some essential interests of the Nation related to energy policy and economical development of the country.” (non-official translation)⁶⁰

The subjects, whose assets were seized, are companies set up in the Republic of Argentina and the Kingdom of Denmark. They are separate legal entities from Chevron Corporation, and in that capacity, they had the right to be heard, absolutely equally, by an independent and impartial court to determine their rights and obligations. In his opinion the Ecuadorian judge “decreed a measure extending the effects of the sentence pronounced upon a subject to others who were not part of that process and without that decision being preceded by a due process where those affected subjects had been able to exercise their right to defence” (non-official translation).⁶¹ Since the right to defence covers Argentinian public policy as one of the essential principals on which the law is based and the exercise of that right “requires that the parties in the foreign process have had the possibility to appear and present their arguments, provide and produce evidence

⁵⁸ LINARES RODRÍGUEZ, E., “Homologación en terceros estados de la sentencia dictada en Ecuador contra Chevron”, ref.. p.599.

⁵⁹ 117.100 — CS, 2013/06/04. - *Aguinda Salazar, María c. Chevron Corporation s/precautionary measures.*

⁶⁰ Ruling of the Attorney General’s Office, 22 May 2013; reprinted in *La Ley*, N° 108, 12 June 2013, Volume La Ley 2013-C, ISSN 0024-1636, Buenos Aires (Argentina)., pp. 7-9.

⁶¹ *Ibid.*

and be notified the decision and have the opportunity to appeal”⁶² (non-official translation).. Therefore to the extent that Article 12 of the Inter-American Convention on Execution of Preventive Measures provides that the “State of destination may decline to execute a letter rogatory concerning preventive measures that are manifestly contrary to its public policy”, the Attorney General concluded on 22 May 2013, in favour of the appeal filed by the Chevron subsidiaries. The judgment of the Supreme Court of Argentina confirms all the arguments presented by the Attorney General. It upheld, in particular, that a decision to lift the veil and leave without effect the legal personality of a company, as taken by the Ecuadorian judge is exceptional in Argentinian law where it is subject to a series of requirements, which include the right of the defendant to be heard in a fair trial. Thus the Court, with only one dissenting opinion⁶³, in its judgment of 4 June 2013 admits and deems the extraordinary appeal and annuls the appealed sentence.

Analysts have noted the coincidence of timing in the process in Argentina with the negotiations with Chevron to undertake a multimillion investment in shale oil and shale gas exploitation in the Neuquén area known as Vaca Muerta, which was at the origin of the nationalization, in 2012, of the Argentine subsidiary Repsol YPF⁶⁴ and has led, at the same time, to negotiation culminating in an agreement through which Argentina will pay Repsol a compensation of USD 5.000 million.

Indeed the argument of the Attorney General at the same time, denies identity between the companies, and affirms, when he refers to damages to vital interests of the nation related to energy policy.⁶⁵

⁶² *Ibid.*

⁶³ Based on the allegation that precautionary measures by extraordinary means are unappealable and on the denial of the presence of exceptions to the enforcement of the precautionary measure present in the Inter American.

⁶⁴ “Con la atención puesta en aspectos que el dictamen no explicita, podría pensarse que Yacimientos Petrolíferos Fiscales y Chevron avanzan en un acuerdo para explotar Vaca Muerta, un yacimiento petrolífero, lo que se haría bajo la modalidad de “fracking” o “shale oil”; y la inversión de millones de dólares que ello implicará se haría a través de Chevron Argentina S.R.L.” (Focusing on issues not explained in the report, one might think that Yacimientos Petrolíferos Fiscales and Chevron progress on an agreement to exploit Vaca Muerta, an oil field, which would be done by “fracking” or “shale oil” and the investment involved of millions of dollars, would be done through Chevron Argentina S.R.L.). GUSTAVO GÓMEZ, A., “El caso “Chevron”, *La Ley*, N° 108, 12 June 2013, Volume La Ley 2013-C, ISSN 0024-1636, Buenos Aires (Argentina)., pp. 8-10.

⁶⁵ *Ibid.*

Few days later, Chevron and YPF signed an agreement and, then, the Argentinian Government passed the Decree N° 929/13, on hydrocarbons (July 11). This has resulted in a judicial enquiry on the Argentinian President.⁶⁶

VIII. THE PRESSURE AGAINST AND DISCREDITATION OF THE PLAINTIFFS AND THEIR COUNSEL

In addition to submitting a petition to appeal in Ecuador and requesting that the authorities there to open criminal proceedings against the lawyers for the victims and against the judge who issued the decision, Chevron opened up other parallel legal avenues with the aim of blocking execution of the judgment.

On 1 February 2011, Chevron filed a civil complaint before the U.S. District Court, Southern District of New York, under the framework of the RICO (Racketeer Influenced and Corrupt Organisations) Law⁶⁷, the special U.S. federal law created to combat organised crime. Chevron's new thesis was that the claimants and their legal representatives were part of a criminal organisation with the business of extorting from the company the amount of 113 billion dollars, by means of Ecuador's legal procedures. Chevron obtained an unusual temporary restraining order from the federal judge, Lewis A. Kaplan, on 8 February 2011, a few days before the judgment in Lago Agrio was issued, which blocked the Ecuadorian claimants and their attorneys from requesting execution outside Ecuador of the judgment issued in Ecuador for 28 days. Judge Kaplan based his decision on the contents of a memorandum from the law firm that anticipated the presentation of motions of execution for the judgment, in various jurisdictions, directed towards seizing the company's assets, in order to force the company to negotiate compliance with the judgment.⁶⁸ The judge considered that such a strategy of multiple demands was meant to exert pressure beyond the limits of the law, and that it would cause irreparable damage to the oil company. Another factor he considered was that "the Ecuadorian courts do not generally offer an impartial trial, and they have not

⁶⁶ PICOLOTTI, J.M., "Análisis del decreto 929/2013 desde una óptica jurídica y ambiental", available at <<http://wp.cedha.net/?p=13702>> [accessed on 15 February 2014].

⁶⁷ 18 U.S.C. § 1962.

⁶⁸ Previously, the same Judge Kaplan had ordered, based on a petition from Chevron, delivery of the unedited shots in the final montage of the documentary *Crude* mentioned above. This was to look for an alleged fraud in the information provided in the documentary, allegedly orchestrated by one of the Ecuadorian claimants' attorneys in the U.S., Steven Donziger. The memorandum in question was among the documents provided by Mr. Donziger.

done so in this case.” Finally, the judge alluded to the public interest. He stated that Chevron is “a company with great importance for our economy,” which employs thousands of people. The order was later extended for eight additional days in another decision issued on 7 March 2011.⁶⁹ On 18 April 2011, the order was confirmed, despite a motion for a stay.⁷⁰

One of the aspects Chevron requested by the judge was the declaration that the Judgment in Ecuador was unenforceable and unrecognizable. On 31 August 2011, the judge again confirmed his perspective based upon the argument that the commitment made by Texaco at the time to accept the jurisdiction and the judgment issued in Ecuador is not linked to Chevron, which for such effects is a completely different company.⁷¹

However, this decision was revoked on appeal on 19 September 2011⁷². During the hearings, the Second Circuit Court of Appeals judges pointed out the paradox that while the company claimed in the first phase of the proceedings that the U.S. courts lacked authority, in order to bring the trial to Ecuador, it now invoked the alleged lack of guarantees of the Ecuadorian judicial system, to ask for the protection of the U.S. courts. For the moment, this decision removed the impossibility of executing the judgment in the United States, although the representatives of the Ecuadorian victims had committed themselves not to attempt to do so until the appeals phase had concluded in Ecuador.

⁶⁹ “All defendants [...] be and they hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in *Maria Aguinda y Otros v. Chevron Corporation*, No. 002-2003, in the Provincial Court of Justice of Sucumbios, Ecuador (hereinafter the “Lago Agrio Case”), or any other judgment that hereafter may be rendered in the Lago Agrio Case by that court or by any other court in Ecuador in or by reason of the Lago Agrio Case (collectively, a “Judgment”), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment. [...] The Court is mindful of the parties’ interest in having the enforceability and recognizability of the judgment outside of Ecuador determined without unnecessary delay.” *Chevron Corp v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011).

⁷⁰ Order denying RICO defendants Motion for Relief; US District Court SDNY, *Chevron Corporation, Claimant, -against- 11 Civ. 0691 (LAK) Steven Donziger, et al., Defendants*; Memorandum and Order, April 18, 2011.

⁷¹ *Chevron v. Salazar*, 11 Civ. 3718 (Lak), NYLJ 1202513188076, at *1 (SDNY, decided August 31, 2011).

⁷² United States Court of Appeals for the Second Circuit. *Chevron Corp. v. Naranjo*, No. 11-1150-cv(L), 2011 WL 4375022 (2d Cir. Sept. 19, 2011).

On 5 January 2012, Chevron requested the Second Circuit Court of Appeals to restore the court order which prohibits the plaintiffs from trying to enforce the Ecuadorian judgment. On 19 January 2012 the court rejected Chevron's request⁷³ and on 26 January, explaining its earlier decision, the court stated that district attorney Kaplan had no authority to prohibit the execution of the sentence pronounced in Ecuador⁷⁴.

In October 2012 the US Supreme Court refused to hear Chevron's appeal of the lower court's decision ruling that Judge Kaplan lacked authority to issue the injunction blocking enforcement of the Ecuadorian judgment.

However, the proceeding regarding the other issues raised in Chevron's legal action under the RICO Act, has run its course with a series of court decisions that has been dealing with all sorts of requests on the company's side, such as the delivery by the United States lawyers of the Ecuadorian communities, of all the information they had gathered. That included the access to all the unused materials in the *Crude* documentary or access to the email Communications of the Lawyers of the Amazon Defence Coalition. The trial finally began on 15 October 2013, where the substantive debate was over Chevron's request to recognise that the judgment had been fraudulently reached, once the financial claims were formally rejected, to avoid the presence of a jury.

Throughout the process which lasted more than the two months, Chevron submitted its arguments through dozens of lawyers to support the bribery accusations about Judge Zambrano, the manipulation of documents and reports on environmental and health damages. All of this was denied by the small group of lawyers for the Ecuadorian communities.

As expected in the light of the events which occurred during the procedure, judge Kaplan's decision was favorable to Chevron, including all its arguments. The judge gave a judgment of almost 500 pages, in which he concluded that the judgment for USD 9.5 billion against Chevron Corporation in Ecuador was the result of fraud and extortion: "Chevron has suffered injury – and is threatened with additional and irreparable injury – in consequence of defendants' fraud and their efforts to enforce the Judgment that they fraudulently obtained. It has no adequate remedy at law." The judge

⁷³ United States Court of Appeals for the Second Circuit. S.D.N.Y.–N.Y.C. 11-cv-691, 11-cv-3718, Kaplan, J. Case: 11-1150 Document: 641.

⁷⁴ United States Court of Appeals for the Second Circuit. *Chevron v. Naranjo*. 667 F.3d 232 (2d Cir. 2012).

states, among other arguments, that “theoretical possibility of review – limited to “fundamental constitutional rights violations” – by the Constitutional Court” is not feasible, since “Ecuador does not provide impartial tribunals or procedures compatible with due process in cases of this nature.”⁷⁵

According to Judge Kaplan:

“The equitable relief the Court now grants would not provide a complete remedy for Chevron’s injuries, existing and threatened. It does not set aside the Judgment. It does not enjoin foreign enforcement proceedings. But that does not preclude the Court from granting equitable relief that would solve the problem in part.”⁷⁶

Moreover the judge justifies adopting a series of measures to prevent lawyers of the Amazon Defence Coalition from collecting their fees at the expense of the goods applied to the payment of the sentence in Ecuador.

“In the circumstances, an order will be entered requiring Donziger and the other defendants to pay over and assign to Chevron all fees and other payments, property, and other benefits that they have received or hereafter receive, directly or indirectly, in consequence of the Judgment.”⁷⁷

Judge Kaplan’s ruling declares the sentence pronounced in Ecuador as unenforceable in the United States and decides that Chevron shall recover the costs of the action from the Lago Agrio Plaintiffs Representatives. Among other measures, he specifically decides that the lawyers have to transfer all the goods and rights they may receive as a result of the enforcement pronounced in Ecuador to Chevron, anywhere in the world, and prohibits lawyers of the Amazon Defence Coalition from “filing or prosecuting any action for recognition or enforcement of the Judgment or any new Judgment or seeking the seizure or attachment of assets based on the Judgment or any new Judgment, in each case in any court in the United States” or “seeking prejudgment seizure or attachment of assets based upon the Judgment or any new Judgment in each case in any court in the United States”, as well as obtaining any benefit from those considered illegal acts.⁷⁸

⁷⁵ USDC, SDNY, *Chevron Corporation v. Steven Donziger, et al.*, Case 1:11-cv-00691-LAK-JCF Document 1874. Filed 03/04/14; p. 469.

⁷⁶ *Ibid.*, p. 474.

⁷⁷ *Ibid.*, p. 478.

⁷⁸ SDNY. *Chevron Corporation v. Steven Donziger et al.* Case 1:11-cv-00691-LAK-JCF Document 1875. Filed 04/04/14.

The defence for the Ecuadorian communities submitted, on 19 March, a suspension request on the sentence and an appeal to the New York Court of Appeal. The appeal was based on different arguments: the wrong use of the RICO Act, which, in their view, does not allow the petition of precautionary measures by individuals, presented long before the legal proceedings in Ecuador were finished; the measures adopted are even more inappropriate after Chevron renounced to any financial compensation; and other considerations regarding the judicial procedures carried out in third countries and in this case, coinciding fundamentally in three separate courts decisions in Ecuador.

IX. PROVISIONAL CONCLUSIONS

This is an unfinished case but its development characterizes it as historic and we can draw some conclusions.

This is an unprecedented case due to its importance and the severity of injustice in its origin, the extreme inequality of means among the parties, the simultaneous use of national and international forums, and also to the significant sentence pronounced in Ecuador and the perseverance of the victims. The case has proven even more complex than those on Wiwa and Kiobel, arising from Shell's operations in Nigeria.⁷⁹

It is very significant that a company using its economic power can turn thousands of victims of serious environmental contamination into the culprits of extortion conspiracy against Chevron⁸⁰. Chevron had taken over Texaco, the company responsible for the damage which had direct impact on the health, livelihood and way of living for individuals and communities in Ecuador. Perhaps Chevron spent more than a billion dollars mobilizing lawyers, detectives and computer and publicity experts over many countries to achieve this.

⁷⁹ See PIGRAU, A., CARDESA-SALZMANN, A., "Acciones entrelazadas contra daños ambientales graves: el impacto de Shell en Nigeria" *Derecho PUCP* (Perú), n°70, 2013, pp. 217-240; "The Chevron-Ecuador Dispute: A Paradigm of Complexity" was the title of a panel at ASIL, 106 *Am. Soc'y Int'l L. Proc.* 415 2012.

⁸⁰ "But, sadly, this new chapter in the litigation seems to be shifting the focus of the legal and political contest from allegations about Texaco's misconduct to allegations of misconduct by lawyers in the Lago case, and from concern about the rights of the affected communities to the rights of Chevron. The alleged misconduct has not only prolonged the litigation, but also seems to have tainted the credibility of the victims' claims, and may have jeopardized their right to a remedy. And it has eclipsed the situation on the ground, where environmental conditions continue to deteriorate, people's rights are still being violated, and no one is accepting responsibility." Remarks By Judith KIMERLING, 106 *Am. Soc'y Int'l L. Proc.* 416 2012, 418.

It is no less significant that this huge operation can find a legal way to block the execution of the sentence pronounced and confirmed in Ecuador in its essential part by three levels of judicial system in the United States, where the Chevron headquarters are located. Chevron impunity in its Home State has been achieved, unless the Court of Appeal of the second level intervenes. In the words of judge Kaplan: “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. It is instead whether a court decision was procured by corrupt means, regardless of whether the cause was just. P.4

That implies a huge distortion in the interpretation we would give to the story.

The point is the profit made by a major oil company after 30 years taking advantage of natural resources in a less developed country. Using obsolete technology, the company made the most of the resources at an unfair price, leaving an environmental and social cost, which has extended much further and longer than the moment in which the company stopped operating in the country, besides the liability corresponding to Petroecuador.

Another important point is that despite all the attempts developed by Chevron to avoid trial, first in the United States and then, to extent indefinitely the process in Ecuador, and the significant differences in power between the Company and the Ecuadorian state⁸¹, the Ecuadorian courts and their various bodies have passed sentence acknowledging the victims as victims. This opens a door, many years later, for partial reparation of both economical and especially moral aspects, for the damages caused by Texaco.

Fundamentally the case shows how getting a sentence in the Host State can be cancelled in the implementation phase⁸² when the company has ceased its activity in that country.

⁸¹ “... some MNCs are extremely powerful. Some are more powerful than some of the host States in which they operate, and yet it is host States that are expected to regulate them and guard against, for example, dangerous pollution or catastrophic environmental damage, or against other harms such as worker exploitation or harm to consumers. MNCs may escape proper regulation by the world’s weaker States for a variety of reasons.”; Sarah Joseph, “Protracted lawfare: the tale of Chevron Texaco in the Amazon”, cit.,88

⁸² “MNCs are also able to take advantage of the corporate form to minimise liabilities by allocating assets across jurisdictions to minimise risk. In doing so, an undercapitalized subsidiary may be the entity which officially bears responsibility for risky yet lucrative ventures. In the Lago Agrio case, Judge Zambrano found that Texpet was in fact the alter ego of Texaco, as it was administratively and economically dependent on its US parent company. US courts have found otherwise on this question of fact. Even though the Ecuadorian court was willing to pierce the corporate veil, it is not capable of enforcing the judgment on its own as Chevron does not have sufficient assets within its jurisdiction. That

Similarly when the courts of third states refuse to lift the veil between parent and subsidiary companies or when international courts prevail to maintain the status quo over any other consideration on human rights or environmental protection. Investors very often obtain this policy in unequal negotiation contexts with the Host States, or when the company is so powerful in its Home State that it is able to make a “virtual” recreation of the facts, to fit all the pieces to justify the illegitimacy of the sentence and consequently its unenforceability.

It’s interesting to point out that, despite the impressive range of measures the company has adopted for damages caused in the Ecuadorian Amazon to frustrate the compensation law suit in the United States, Ecuador, the Netherlands, Argentina, Canada, Brazil, and other countries, and the enforcement of the sentence, years gone by, the resistance of the victims, indigenous peoples and peasant communities has not been destroyed. In spite of their poverty they have maintained their fight with dignity and they are still the ones who lead the actions of their lawyers.

Finally, this case points out again to another important issue, i.e. the relation between national judicial procedures and international arbitration, regarding aspects such as the protection of those who take part in national processes, but not in the international ones, or the use of the latter as a extraconstitutional remedy to the decisions taken at national level.⁸³

As Sara Joseph has pointed out, “the saga has demonstrated just how very difficult it is to hold an MNC to account for its alleged actions in a developing State if that MNC chooses to fight the issue in the courts rather than to settle the case.”⁸⁴

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is, Ecuador is unable to enforce its own belated attempt at regulating ChevronTexaco without the assistance of other States, partly due to the way Chevron has chosen to allocate its considerable assets internationally. *Ibid.*, p. 89.

⁸³ Remarks By Ralph G. STEINHARDT, 106 *Am. Soc’y Int’l L. Proc.* 416 2012, 422.

⁸⁴ JOSEPH, S., “Protracted lawfare: the tale of Chevron Texaco in the Amazon”, cit., p.90.

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