Chevron to Ecuadorians: Drop Dead

How Chevron Violates International Law to Evade Its $18 Billion Environmental Liability In Ecuador

Background:

**In 2002, to avoid a trial in U.S. federal court, Chevron selected Ecuador as the venue to resolve the legal claims of indigenous groups and farmer communities affected by the company's oil operations in the Amazon region of that country. Chevron operated in Ecuador from 1964 to 1992 under the Texaco brand; during this time it admitted to dumping more than 16 billion gallons of toxic "water of formation" into the streams and rivers used by local inhabitants for their drinking water, decimating indigenous groups and causing dramatically increased rates of cancer.

**In 2011, after conducting an eight-year trial that generated over 220,000 pages of evidence, the Ecuador court ordered Chevron to pay $18 billion for a clean-up. An Ecuadorian appellate court affirmed the decision on January 3, 2012. Anticipating an adverse judgment, Chevron had stripped its assets from Ecuador. Its executives vowed never to pay despite having promised U.S. courts that it would abide by the decision as a condition of moving the trial to Ecuador.

Arbitration as Escape Hatch:

**Having lost on the merits, Chevron is now seeking to escape its liability by commencing a private arbitration to shift the clean-up costs to Ecuador's government. Essentially, Chevron – one of the wealthiest corporations on the planet with revenues of $240 billion in 2011 – is seeking a taxpayer-funded bailout in Ecuador where the per capita income is $4,000 per annum. In other words, it wants the victims of its contamination to pay for the clean-up of their ancestral lands – sort of

like executing someone before a firing squad and sending their family an invoice for the bullets.

U.S.-Ecuador Bilateral Investment Treaty:

**The tool for Chevron's latest maneuver is to convene a secret investment arbitration panel under the U.S.-Ecuador Bilateral Investment Treaty, or BIT. The U.S.-Ecuador BIT allows U.S. investors to seek monetary damages from the government of Ecuador if they can show unfair treatment. In this case, Chevron has turned the treaty on its head to use it as a tool to try to immunize itself from liability in a private litigation. Further, the BIT should not even be available to Chevron given that it took effect in 1997, five years *after* the oil company abandoned its Ecuador operations. Interestingly, Chevron has retained as a consultant to its legal team the former Ecuador foreign minister (Benjamin Ortiz) who negotiated the BIT that the company now uses to evade its legal obligations.

**The investor arbitration is a grossly unfair process. The panel of three arbitrators – all private sector lawyers – meet in secret. They reap enormous sums of money so they are incentivized to assert "jurisdiction" over any claim, regardless of how trivial or abusive. Members of the panel claim the outrageous power to override decisions of any public court system of any sovereign nation. Rules prohibit third parties who are the most affected (such as the rainforest communities) from even appearing. Chevron essentially gets a private "court" where it has no effective opposition. In reality, the arbitration panel in this instance is functioning as a "kangaroo court" that violates any notion of due process and flouts the fundamental human rights of thousands of Ecuadorians to seek legal redress for the contamination.

Why Chevron's BIT panel violates international law:

**Chevron is now asking the panel of three lawyers to nullify the entire nine-year Ecuadorian court process that the company chose to litigate

the claims of the plaintiffs. Chevron wants the panel to "order" Ecuador's government to interfere in its independent judiciary to suspend the case until the panel itself can rule. Such an order would be unprecedented under any BIT and would go well beyond any authority granted by the treaty. It also would violate Ecuador's Constitution and international human rights treaties protecting the right of claimants to seek legal redress. Needless to say, Chevron's claims have sparked outrage in the international legal community.

**The panel of arbitrators themselves are violating the law in the following ways:

- ***International law***. International law respects the sovereignty of States. There is nothing in the U.S.-Ecuador BIT that even remotely suggests that either party agreed to subject themselves to the kind of "injunctive" order that Chevron seeks (as opposed to a traditional arbitral award of monetary damages). Rather, the BIT reflects the care with which the parties sought to protect their respective national court systems from interference.

- ***Ecuadorian constitutional law***. Ecuador's Constitution, like its U.S. counterpart, strictly regulates the independence of the judicial branch. The Constitution even makes clear that its terms cannot be circumvented through the BIT, providing that "[t]he Constitution is the supreme norm and prevails over any other norm in the legal system."

- ***International human right law***. Ecuador has ratified a number of treaties that require it to broadly guarantee all persons right to a fair trial, including, as stated in Article 8 of the binding American Convention on Human Rights (ratified by Ecuador on Dec. 8, 1997), "the determination of [one's] rights and obligations of a civil, labor, fiscal, or any other nature." *See also* Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) (ratified by Ecuador on Mar. 6, 1969)

(requiring Ecuador to "ensure . . . an effective remedy [and] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities"). Ecuador is also bound by the 1989 Indigenous and Tribal Peoples Convention (International Labor Organization, Convention No. 169) (ratified by Ecuador on May 15, 1998), which requires it to ensure that indigenous peoples are "safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through representative bodies, for the effective protection of these rights." *See also* Article 40 of the 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples (declaring that "indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . as well as to effective remedies for all infringements of their individual and collective rights").

Chevron tried this stunt before:

**Chevron actually tried a version of this strategy before, but it was thrown out in U.S. court. In 2004, Chevron sued Ecuador at the American Arbitration Association in New York to demand that it indemnify the company on the basis of an absurd interpretation of the 1964 operating agreement governing the oil concession. Ecuador managed to redirect the case to U.S. federal court, which examined Chevron's claims and rejected them out of hand.

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