

DAVID v. GOLIATH

AN UPDATE



David v. Goliath

An Update on the \$19 Billion Judgment in Ecuador Against Chevron

First in a series
Spring 2013

This Newsletter provides background and information on Aguinda v. Chevron, the Ecuadorian case that held Chevron responsible for massive environmental damage in the Ecuadorian rainforest. Our intention in developing this Newsletter is to promote awareness and accurate reporting of (i) the extensive findings and binding nature of the court judgment in Ecuador, (ii) the plaintiffs' progress in enforcing their judgment in countries around the world where Chevron has assets, and (iii) Chevron's unsuccessful efforts to complicate enforcement. It will be updated from time to time as conditions warrant.

1. THE ENFORCEABLE ECUADORIAN JUDGMENT

Key early dates:

- The case was first filed on Nov. 3, 1993, on behalf of the Ecuadorian victims or "Afectados" near the headquarters of Texaco (now part of Chevron) in federal court for the Southern District of New York, for damages done from 1964 through 1992, *ongoing to this day*, during drilling for oil in the region where the plaintiffs live and work.
- For nine years Chevron contested being tried in the United States on the grounds that Ecuador was a more convenient forum and that its courts were fair. In 2002, Chevron succeeded in dismissing the original suit only after agreeing to a

condition of the federal courts that Chevron promise to honor any judgment that might eventually result from a new trial in Ecuador.

- The trial resumed in May 2003 in a provincial court in the province of Sucumbiós, in Northern Ecuador. (Chevron acquired Texaco, the original defendant, in 2002.)

The Ecuadorian Trial Judgment

On Feb. 14, 2011, the court in Ecuador found overwhelming evidence that the company deliberately dumped billions of gallons of toxic waste into the Amazon rainforest, rivers and soil from 1964 to 1992, uprooting indigenous groups and other residents and causing a public health crisis, including a cancer outbreak that has killed or threatens to kill thousands of people.¹ The trial court in Sucumbiós reviewed more than 216,000 pages of recorded evidence, 103 expert reports, and testimony from dozens of witnesses before Judge Nicolas Zambrano found Chevron liable and imposed a damages award that was affirmed by a separate Ecuadorian appellate court. The amount of damages that Chevron must pay is \$19 billion. Chevron has been in default of this obligation for many months.

In his decision, Judge Zambrano apportioned the damages and allocated them to address specific environmental and human harms caused by Chevron's pollution. His opinion expressly provided:

- \$5.4 billion for remediation of contaminated soil
- \$600 million for treatment of groundwater contamination
- \$200 million for restoration of the ecology
- \$150 million to implement an emergency potable water system for affected residents

The court also ordered Chevron to fund a series of projects designed to mitigate the effect of the environmental damage where remediation would be impossible, providing \$1.4 billion to address the public health crisis, \$800 million for cancer-related cases, and \$100 million to compensate five affected indigenous communities.

The evidence against Chevron and its practices was overwhelming. First, Chevron left over 900 unlined pits in the area, contrary to U.S. and prevailing standards, allowing them to overflow into the surrounding environment. Second, Chevron admitted to intentionally dumping billions of gallons of untreated production water into the Amazon from the pits. Third, the judge relied on a chapter written by Texaco's own environmental manager as to the proper standard of practice and found that the company did not follow that practice in Ecuador, although it did in the United States.

Finally, the trial court addressed and ruled on the multitude of motions made by Chevron accusing the plaintiffs and even the Ecuadorian courts of a series of alleged irregularities in the proceedings. In disposing of these motions, the trial judge *granted*

Chevron's motion requesting that the court not consider certain experts' opinions and ultimately based his findings on his own evaluation of the evidence of contamination and a damages valuation report that was submitted by a Chevron-designated court expert.

The thoroughness of the court's opinion and findings was without question. As the United States Court of Appeals for the 2nd Circuit stated:

The Ecuadorian court returned a judgment against Chevron, rejecting Chevron's claim of potential intimidation and concluding, in a 188-page opinion containing extensive findings of fact and detailed conclusions of law, that Chevron was liable for widespread environmental degradation in the Lago Agrio region.[at pg 10]

The Appellate Affirmance and Admonitions Against Chevron's Trial Tactics

In January 2012, the provincial appellate court in Sucumbiós upheld the entire amount of the trial judgment,² which was rendered enforceable when Chevron refused to post a bond during its appeal to the National Court. The Sucumbios appellate court not only confirmed the trial court's findings, but also rejected Chevron's abusive attacks on the proceedings as "baseless" and having "no merit."

Notably, the appellate court affirmed court sanctions against Chevron on the grounds "that the procedural conduct of [Chevron], few times seen in the annals of the administrator of Justice in Ecuador, were abusive to the point that... it would be an example of disastrous precedent for other litigants." The Sucumbiós court also expressed "its concern that the abuse of the legal process extends even to a foreign jurisdiction, with the same demonstrated attempt to deprive the plaintiffs of the rights to which they are entitled in this legal action."

Cassation Appeal

Following the appellate decision upholding the trial award, Chevron filed an appeal (called a cassation appeal) with the National Court of Justice in Ecuador.³ The National Court's review is limited to whether the lower courts committed errors of law. It is not a de novo review and should not make any findings of fact. A ruling is expected by the end of 2013.

Chevron waived its right to stall enforcement of the affirmed judgment pending the cassation appeal when it failed to post a bond with the appellate court. Santiago Bermeo of Bermeo, Eguiguren, Ramírez, a highly regarded local law firm, is litigating the cassation appeal for the affected communities before Ecuador's National Court

2. ENFORCEMENT ACTIONS

The laws of countries around the world offer legal pathways for recognition and enforcement of foreign judgments. These rules operate to convert a foreign judgment into a domestic one, and then to enforce the “recognized” judgment as such, including through seizure of assets. Since Chevron has no significant assets in Ecuador and refuses to pay the Ecuadorian judgment, the Afectados have initiated foreign enforcement actions in Canada (May 2012), Brazil (June 2012), and Argentina (November 2012). More filings will occur in 2013.

Ecuador, like many countries around the world, has ratified treaties related to the enforcement of foreign judgments. The two principal enforcement-related treaties signed by Ecuador and other Latin American states are: the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* and the *Inter-American Convention on the Execution of Preventative Measures* (discussed further below). These treaties permit enforcement suits in countries such as Brazil, Argentina, Colombia, and Venezuela (see discussion below after Canada). One such action occurred on October 15, 2012 in which the Ecuador trial court requested the freezing of all of Chevron’s relevant assets in Argentina and Colombia (the “Ecuadorian Embargo Order”).

CNN Hero Award and 2008 Goldman Environmental Prize recipient Pablo Fajardo is the lead lawyer for the Afectados in Ecuador.

Argentina

On Nov, 7, 2012, the Commercial Court of Justice in Argentina, acting under the *Inter-American Convention on the Execution of Preventive Measures* and the Ecuadorian Order froze all of Chevron’s relevant assets Argentina.⁴ The Argentine order includes orders requiring Chevron to deposit 40 percent of Chevron’s oil revenues in Argentina into a court-ordered escrow account. Last year, Chevron’s oil revenues were approximately \$600 million.⁵ The case for the Ecuadorians is being led by Enrique Bruchou, founding partner of Bruchou, Fernández Madero & Lombardi, one of the most prestigious law firms in Argentina.

On Jan. 30, 2013, a 3-judge appellate court unanimously upheld the embargo in a holding that emphasized (i) the need to strictly observe international treaties designed to credit foreign court orders, (ii) that any disagreement with the grounds for the embargo should be directed at the Ecuadorian court with original jurisdiction, (iii) that the enforcement-related embargo – including the portion attributable to punitive damages -- in no way violated the public policy of Argentina, and (iv) that the embargo was properly directed at wholly-owned Chevron subsidiaries.⁶

Upon a successful completion of the Afectados’ recognition suit in Argentina, the judgment creditors will initiate seizure actions to collect the frozen assets and monies held in the escrow account.

Brazil

On June 27, 2012, the Afectados filed an enforcement action against Chevron in Brazil.⁷ Chevron has significant assets in Brazil and has recently been involved in an oil spill off the coast of Rio de Janeiro that resulted in a suspension of its operation (now lifted) and a pending lawsuit brought by the authorities. The Afectados hired Sergio Bermudes, founder and senior partner of the leading litigation firm of Sergio Bermudes Advogados, to represent them.

Brazil and Ecuador are both signatories to the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*. Applicable Brazilian legislation also provides streamlined processes for recognizing, and then enforcing, foreign judgments.⁸

Brazil, unlike many other countries, hears cases to recognize foreign judgments at the highest non-constitutional court level: the Superior Tribunal de Justiça, or STJ, located in Brasilia. This fact will likely reduce the time to reach a recognition decision by eliminating appeals from lower court levels. A judge was named to hear the case and a recognition ruling is estimated sometime in 2014.

Canada

On May 1, 2013, Justice David Brown of the Ontario Superior Court of Justice issued a stay in the action filed by the Ecuadorians nearly a year before to recognize and enforce their judgment against Chevron and Chevron Canada's assets in Canada. While Judge Brown found that his Canadian court does have jurisdiction against both Chevron defendants, the key issue on the motion in front of him, he nonetheless stayed the action, without prejudice to future appeals, citing the slim likelihood that the Ecuadorians can legally attach properties owned by Chevron subsidiaries. However, he did not question the legitimacy of the Ecuador decision or its right to enforcement in jurisdictions where Chevron does have assets.

Alan Lenczner, founding partner of the leading Canadian litigation firm, *Lenczner Slaght*, represents the Afectados and brought the action in the Ontario. In response to the ruling, he said, "the plaintiffs will definitely be appealing. It cannot be right that a multinational company that operates entirely through subsidiaries is immune from the enforcement of a judgment in Canada, particularly where the subsidiary is 100% owned and provides some of the billions of dollars that Chevron pays out in dividends each year and even more billions in share buy backs. Chevron Corp itself earns no money. All its earnings and profits come from subsidiaries including, importantly, Chevron Canada." He predicted the court of appeals will hear the case in September or October

2013 and that, depending on how it rules, one party or the other likely will take the case to Canada's Supreme Court.

Lenczner also notes that Canadian law only permits stays of the enforcement of foreign judgments in very rare circumstances that do not cause an injustice to the party enforcing the judgment (here, the Afectados). As to the common law framework for recognizing foreign money judgments, these rules permit only limited grounds to defend against recognition.

Colombia

The Ecuadorian Embargo Order also extends to Chevron's most relevant assets in Colombia under the same treaty -- the *Inter-American Convention on the Execution of Preventive Measures* -- that permitted the freezing of Chevron's assets in Argentina. The Ecuadorian Embargo Order can, therefore, be introduced in Colombia at any time.

3. CHEVRON'S EFFORTS TO BLOCK ENFORCEMENT

Notwithstanding express promises made to U.S. federal courts that it would submit to jurisdiction in Ecuador and pay any resulting judgment, Chevron began implementing a strategy as early as 2009 to create ancillary litigation designed to block or at least delay enforcement of an adverse judgment in Ecuador.¹ Chevron then intensified its strategy following the Ecuadorian court's 2011 decision, a strategy that continues despite the Afectados' progress toward enforcement.

International Arbitration Against Ecuador

In September 2009 as the Ecuador trial was winding down with clear evidence of Chevron's culpability, Chevron sued the government of Ecuador under Ecuador's Bilateral Investment Treaty (BIT) with the United States. The suit claimed Ecuador violated a release of liability it gave to Texaco in the 1990s and that a lack of due process afforded to Chevron in the trial violated its rights as an investor (even though the company left Ecuador in 1992, five years before the treaty was signed by the U.S. and Ecuador.) Chevron's arbitration seeks indemnification for any sums that Chevron must pay as a result of the contamination lawsuit.

As the Lago Agrio trial reached an end and its enforcement loomed, Chevron began to ask the arbitration panel for "interim orders" to the effect that the government of Ecuador should prevent enforcement of the judgment. The arbitral tribunal issued a series of

¹ The United States Court of Appeals for the 2nd Circuit has ruled that the promises made by Chevron's predecessor company, Texaco, in support of a motion to dismiss the original lawsuit filed by the villagers in the United States are attributable to, and enforceable against, Chevron. See *Republic of Ecuador v. Chervon Corp.* 2d Circuit opinion, March 17, 2011

orders and awards against the government, the most recent being a Feb. 7, 2013, holding that Ecuador had violated the tribunal's previous interim awards and should have stopped the Afectados from pursuing enforcement actions in other countries pending the outcome of the BIT proceedings.

The government has refused to follow the BIT' arbitration orders, stating that interference in the Afectados' lawsuit would be illegal and unconstitutional. Ecuador's Foreign Minister recently called on two Latin American regional organizations (ALBA and UNASUR) to discuss the "legal aberration" committed by the BIT tribunal in its rulings against Ecuador.⁹ Additionally, member states of these regional bodies issued a joint statement denouncing Chevron's aggression at the international tribunal.¹⁰

Ecuador's courts have affirmed on multiple occasions that private citizens like the Afectados are not parties to the bilateral treaty proceedings and cannot be bound by the rulings. It also would be a violation of Ecuador's obligations under international human rights treaties to interfere in disputes between private parties that involves human rights issues. It is difficult to foresee how any ruling from the arbitration panel could affect the Afectados' enforcement actions outside Ecuador since, among other defects, the Afectados are not, and cannot be, a party to the arbitration.

Sideshow "Racketeering" Lawsuit in NYC

Chevron also attempted to block enforcement by filing a "fraud" and "racketeering" case (RICO) in the U.S. Southern District Court of New York before Judge Lewis A. Kaplan. It targets the Afectados, their legal counsel and technical consultants, and names a wide range of other environmental and legal organizations as "co-conspirators." Chevron is seeking treble damages (nearly \$60 billion) for the cost of the underlying judgment in Ecuador as well as compensation for the company's legal fees, which alone could be hundreds of millions of dollars.

Judge Kaplan embraced Chevron's suit and has made numerous comments from the bench maligning the Ecuadorians and their counsel in open court. His initial key decision on the case – a "global injunction" preventing the Afectados from enforcing their judgment anywhere – was swiftly struck down by the 2nd Circuit Court of Appeals in 2011. In a decision highly critical of Kaplan, the three circuit judges scolded the lower court judge, saying:

"[W]hen a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy ..."

The 2nd Circuit ruling reinforces the Afectados' rights to pursue international enforcement – as it has in Canada, Argentina, and Brazil – irrespective of Chevron's efforts to obtain blocking orders from a New York court. As the circuit court said:

“The LAPs hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets.”

Chevron took the extraordinary step of appealing for a review by the U.S. Supreme Court. The Supreme Court denied the request in October 2012.¹¹

Notwithstanding, Judge Kaplan and Chevron lawyers have stubbornly devised ways to stack the U.S. litigation to produce “findings” that malign the Ecuadorian judgment as if such findings would even matter internationally. To avoid having to spend further resources litigating in Judge Kaplan’s arena, the Afectados have filed a petition with the 2nd Circuit asking that a new judge be appointed.¹² A hearing is expected this May.

The remainder of the RICO case is moving ahead, with a trial scheduled for October 2013.¹³ Through recent filings recasting its case as one focused on lawyer conduct, Chevron and Judge Kaplan have gone to great lengths to take discovery of evidence of contamination in Ecuador “off the table” to prevent a U.S. jury from being able to see the real story behind the case.

At the same time, Chevron is seeking to re-litigate issues that were considered in Ecuador and found to be without merit. For example, as a condition of dropping the engineering firm Stratus Consulting from the RICO case, Chevron required affidavits in which the consultants disavowed their prior work on the case. Chevron trumpeted the affidavits in the media but it failed to disclose that – at Chevron’s request -- the Ecuadorian trial court never considered Stratus’s work but rather relied on over 100 reports and thousands of soil samples from other sources, including Chevron’s own submissions. Chevron engaged in heavy-handed pressure tactics designed to gain Stratus’s cooperation, including efforts to disrupt Stratus’s client relationships.

Chevron also recently revealed an affidavit from a former judge, Alberto Guerra, containing allegations of fraud in the original Ecuador trial decision. Media coverage on the story was quickly tempered, however, when it was discovered that (i) Guerra is a disgraced former judge who was only involved at the outset of the Afectados case in Ecuador, and (iii) Chevron is paying Guerra hundreds of thousands of dollars.¹⁴ The deciding judge from Ecuador, Nicolas Zambrano, volunteered a declaration to Kaplan’s court denying Guerra’s claims and testifying that Chevron tried to bribe him through Guerra.

The Stratus and Guerra examples demonstrate Chevron’s willingness to use hundreds of millions of dollars and 2000 legal professionals to divert attention from the underlying contamination it caused in Ecuador, rather than to remediate that harm.

¹ See an English translation of the trial ruling here: <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf>

² An English translation of the appellate decision is available at: <http://chevrontoxico/assets/docs/2012-01-03-appeal-decision-english.pdf>

³ <http://www.marketwatch.com/story/chevron-appeals-ruling-in-ecuadorian-court-2012-01-20>

⁴ <http://www.reuters.com/article/2012/11/08/argentina-chevron-idUSL1E8M7IVV20121108>

⁵ <http://www.telegrafo.com.ec/actualidad/item/justicia-ecuatoriana-y-argentina-coinciden-en-condenar-el-dano.html>

⁶ http://articles.chicagotribune.com/2013-01-30/business/sns-rt-us-chevron-argentinare90t1ai-20130130_1_enrique-bruchou-ecuadorean-amazon-chevron-argentina-and-ing

⁷ <http://www.reuters.com/article/2012/06/28/us-ecuador-chevron-idUSBRE85R01I20120628>

⁸ <http://chevrontoxico.com/assets/docs/2012-brazilian-enforcement-q-and-a.pdf>

⁹ <http://en.mercopress.com/2013/02/26/ecuador-chevron-dispute-enters-a-new-chapter-correa-calls-for-latam-support>

¹⁰ <http://www.eluniverso.com/2013/03/01/1/1355/paises-alba-apoyan-ecuador-conflicto-petrolera-chevron.html>

¹¹ <http://www.bbc.co.uk/news/world-us-canada-19892561>

¹² <http://chevrontoxico.com/assets/docs/2013-03-05-petition-for-writ-of-mandamus.pdf>

¹³ <http://www.law360.com/articles/387751/chevron-trial-over-19b-ecuador-verdict-set-for-october-2013>

¹⁴ <http://www.telegrafo.com.ec/actualidad/item/chevron-tiene-mucha-plata-invertida-en-un-ex-juez.html>