

UNDERSTANDING RECENT DEVELOPMENTS IN THE LANDMARK CHEVRON-ECUADOR CASE

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INTRODUCTION & SUMMARY

After more than 17 years of litigation, the monumental class action against oil giant Chevron (formerly Texaco) for widespread environmental devastation in the Ecuadorian Amazon is nearing an end. In December 2010, the judge presiding over the trial in Ecuador announced the formal close to the evidentiary phase,¹ and a verdict is widely expected to be delivered by the Fall of 2011.² In January, both Chevron and the plaintiffs filed their final arguments in the case.

In an award-winning *60 Minutes* report on the case, a Chevron spokesperson admitted that the company expects an adverse judgment in Ecuador.³ Mountains of evidence—including thousands of contamination samples taken by Chevron—prove the company is responsible for oil contamination in the rainforest region of northeastern Ecuador called the *Oriente*. In April 2008, a court-appointed expert released a report recommending that Chevron pay \$27.3 billion in damages. It's useful to compare this figure with estimates of BP's liability for the Gulf Spill, which some analysts suggest could exceed \$50 billion,⁴ for the estimated 185 million gallons of crude spilled. Over the course of its operations, it is estimated that Texaco spilled or deliberately dumped the equivalent of 345 million gallons⁵ of crude in Ecuador's rainforest.

Expecting to be hit with a massive verdict against the company in Ecuador, Chevron has poured immense resources into a scorched-earth legal and public relations strategy designed to exhaust the plaintiffs' resources, portray the case and the courts as corrupt, and

lay a basis for evading enforcement of the judgment. Instead of dealing with the indisputable evidence of its responsibility, the company has instead launched a strategy of intimidation, distraction, and delay. There are major implications to Chevron's latest offensive, not only for Ecuador's indigenous people and campesino communities, but also for international human rights and environmental law, and movements for corporate accountability.

Below is a brief background on this historic legal battle, followed by an outline of some of Chevron's strategies to evade accountability for one of the world's worst ecological disasters.

A BRIEF HISTORY

1964: Texaco Discovers Oil in Ecuador

Texaco operations in Ecuador began in 1964 and continued until 1990. During that time, Texaco served as sole operator of a concession covering approximately 1,500 square miles of Ecuador's Amazon rainforest. Texaco alone was responsible for planning, constructing and operating more than 350 well sites in a region that was, and still is, the ancestral home to numerous indigenous and farming communities. In violation of Ecuadorian laws and regulations, as well as standard operating practices being used in the United States at the time, Texaco engineered and oversaw a system responsible for what experts believe is the worst oil-related environmental disaster in the world.⁶

Texaco Departs Ecuador in 1992; Ecuadorians Sue for Cleanup in 1993

In 1992, Texaco departed Ecuador, turning over its shares in the oil concession to Ecuador's national oil company, Petroecuador. The following year, plaintiffs representing some 30,000 Ecuadorians, filed a lawsuit against Texaco in the United States, demanding cleanup of the contamination, and compensation for damages. Early on, the plaintiffs obtained smoking gun documents that confirm that Texaco made deliberate design decisions to use cheaper, substandard oil field technology which led to the massive contamination and ensuing health problems that form the basis of the ongoing litigation.⁷

For years, Texaco vigorously fought to move the case to Ecuador. The company submitted fourteen affidavits attesting to the competency, independence, and transparency of the Ecuadorian courts and judicial system.⁸ As a precondition of the case's removal to Ecuadorian courts, Texaco agreed to submit to jurisdiction in Ecuador and waived its rights to utilize various defenses, including statute of limi-

CHEVRON'S TOXIC LEGACY IN ECUADOR—THE FACTS:

- Chevron dumped at least 18.5 billion gallons of toxic wastewater and sludge into rainforest waterways depended upon by local residents
- Independent, peer-reviewed health studies show elevated cancer rates in the impacted region; 1400+ deaths attributed to Chevron's contamination
- Hundreds of waste pits abandoned by Chevron continue to leach dangerous toxins into local communities' water and soil
- Five indigenous cultures have been decimated by oil operations in their previously-pristine ancestral lands

tations, and agreed to satisfy any adverse final judgment, subject only to limited enforcement defenses under U.S. law.⁹

Chevron Absorbs Texaco; Case Moves to Ecuador

By the time the plaintiffs re-filed the case in Ecuador in 2003, Texaco had merged with California-based oil giant Chevron, creating a mammoth new adversary.

Ecuador immediately proved a hostile environment for the plaintiffs' legal efforts. On the day before the trial was set to begin, the presiding judge reported that he received a phone call threatening him if he did not dismiss the case. Throughout the trial, members of the plaintiffs' team and their families have been repeatedly threatened, and are currently protected, according to pre-cautionary measures decreed by the Inter-American Human Rights Commission.¹⁰

Chevron's opening arguments turned out to be a precursor to the kinds of dishonest legal tactics the company has employed in recent years. In blatant defiance of the U.S. court order, Chevron opened by arguing that the company was not bound by Ecuadorian jurisdiction, that it had been too long since the 'alleged' crimes occurred, and that the plaintiffs were suing the *wrong company*.¹¹ This set the stage for what would be a series of evolving Chevron legal and extra-legal tactics designed to evade justice and remain above the law.

Chevron Seizes on Tactics of Distraction, Deception, and Delay

After its initial disingenuous legal arguments got the company nowhere, the company turned to manipulating the trial proceedings—in particular, the judicial field inspections of polluted oil well sites—in hopes of winning a judgment in the company's favor. The first judicial inspection in indigenous territory was canceled outright when Chevron colluded with the Ecuadorian military to produce a false "security report" citing a threat against company employees. An investigation¹² revealed that the threat was invented, and the military personnel involved in the fraud were sanctioned.¹³

During the field inspections that followed, Chevron employed classic junk science in an attempt to conceal contamination. Company technicians took samples selectively in areas—uphill or upstream from pollution sites—in order to purposefully minimize the presence of contaminants. Chevron scientists then used inappropriate testing techniques designed to minimize the detection of toxins in their samples.¹⁴ More recently, a former friend of a Chevron employee in Ecuador turned whistleblower released recordings of the self-proclaimed 'dirty tricks' operative explaining how the company 'cooked evidence' in the trial. (see '*Extra-Legal Maneuvers*,' below)

CHEVRON'S RECENT TACTICS IN ECUADOR

As the plaintiffs wrote in a recent legal brief, "The record contains more than 200,000 pages of evidence, roughly 63,000 chemical sampling results produced by laboratories contracted by both parties and the court experts, testimony from dozens of witnesses, and dozens of judicial field inspections of former Chevron wells and production sites conducted over a five-year period under the over-

sight of the Lago Agrio Court."¹⁵ With an absolutely overwhelming amount of evidence pointing clearly to Chevron's liability, the company has increasingly focused on tactics to delay, disrupt, and derail the trial.

- **Abuse of the Judicial System**

Chevron has overwhelmed the courts with redundant motions and paperwork, in a two-pronged attempt at delaying the judicial proceedings, while advancing the disingenuous argument that the judge is biased against the company, for not ruling in favor of Chevron's repeated empty motions. Ecuadorian lead attorney and Goldman Prize winner Pablo Fajardo noted that in one half-hour period on August 5, 2010, "Chevron bombarded the court with 19 separate and largely repetitive petitions."¹⁶

- **Extra-Legal Maneuvers**

Chevron has engaged in extra-legal maneuvers to derail the judicial proceedings in Ecuador. While legal analysts had expected the trial in Ecuador to come to a close in early 2010, Chevron pulled off a last-minute stunt in September 2009 to derail the trial's conclusion when the company unveiled what it called a 'bribery scandal' implicating the presiding judge. The judge vehemently denied the allegations and, under scrutiny, they evaporated. However, the judge recused himself to avoid any appearance of impropriety, causing another delay.

Investigation by a private investigator for the plaintiffs, as well as Amazon Watch, uncovered the contrived scandal as a sting operation by a former Chevron employee named Diego Borja whom Chevron paid to relocate from Ecuador to a home only minutes from Chevron's headquarters. Disgusted by Borja's actions as a self-proclaimed 'dirty tricks' operative for Chevron, a friend-turned-whistleblower made recordings of Borja detailing a variety of activities he spearheaded in an attempt to undermine the plaintiffs' case. The whistleblower testified to Borja's admissions before Ecuador's Prosecutor General's office, including his involvement in manipulating evidence and taking fraudulent court-ordered contamination samples (apparently, up to 30Km from the polluted sites meant to be tested).¹⁷ A U.S. federal judge recently ordered Borja to be deposed and answer questions about his activities, which the plaintiffs cite as an opportunity to expose Chevron's tactics in Ecuador before the courts.¹⁸

- **Boycotting Proceedings & Inventing Bias**

As mentioned in the introduction, a court-appointed expert released a report in April 2008 recommending that Chevron pay \$27.3 billion in damages. Despite having the opportunity to furnish materials to the expert, Chevron boycotted the damages assessment process, and then accused the plaintiffs of fraud for following court orders to assist the expert in making his determinations. After repeated complaints by Chevron about the process by which the original damages report was produced, the court ordered both parties to submit new valuations assessments for the judge to consider in determining damages. The plaintiffs submitted their new damages estimate, with studies by prominent American technical and medical experts estimating damages to be from \$40 billion to upwards of \$100 billion dollars. A large proportion of the suggested damages are attributed to Chevron's "unjust enrichment" – money the company saved by employing sub-standard drilling practices – as well as

compensation for excess cancer deaths that an expert projects could be caused by exposure to cancer-causing contamination over time if un-remediated. Most of the damages in the 2008 report were from these same two categories. Instead of hailing the opportunity to present its own valuations, Chevron immediately filed a motion to block the order, and subsequently filed another motion to have the judge removed, claiming he was biased. On October 1st, the court announced the removal of the presiding judge¹⁹ for failing to reply to the company's barrage of lengthy and redundant motions in the allotted time. Manipulating the Ecuadorian law requiring the judge to respond in a timely manner to each of Chevron's repetitive motions, Chevron once again succeeded in delaying a verdict in the trial.

CHEVRON'S RECENT TACTICS IN THE UNITED STATES & BEYOND

Chevron, in the face of a looming adverse judgment based on scientific evidence, turned its efforts back to international courts in hopes of derailing a case that has been taking a toll on its stock price.²⁰ Chevron brought on Gibson Dunn, a corporate law behemoth run by ideologically hard-right attorneys which brags on its website, "clients in deep trouble turn to Gibson Dunn for fresh, aggressive thinking and innovative rescues."²¹ Chevron's latest legal strategies include:

- **Forum Shopping**

Shortly after its contrived 'bribery scandal,' Chevron filed an international arbitration claim against Ecuador,²² in effect seeking to permanently remove the case—sixteen years in litigation at that point—from Ecuadorian jurisdiction. The plaintiffs have noted that they wouldn't even be allowed to appear before an international arbitration panel to argue their claims, and one international law expert characterized Chevron's arbitration bid as "forum shopping" and a "textbook case of abusive litigation."²³

- **Using Political Influence to Undermine Rule of Law**

In an attempt to pressure the government of Ecuador to intervene in the case being heard in its courts, Chevron has aggressively lobbied Congress and the U.S. Trade Representative to eliminate trade benefits the country receives under the Andean Trade Preferences Act (ATPA). In testimony before the House Ways & Means Trade Subcommittee, Representative Linda Sanchez, called Chevron's lobbying efforts "little more than extortion" Sanchez told the subcommittee, "Apparently, if it can't get the outcome it wants from the Ecuadorian court system, Chevron will use the U.S. government to deny trade benefits until Ecuador cries uncle."²⁴

- **Undermining the First Amendment**

Chevron and its Gibson Dunn lawyers outraged 1st Amendment supporters²⁵ by going after documentary filmmaker Joe Berlinger, whose acclaimed documentary film *Crude* explores Chevron's legacy in Ecuador. Chevron demanded the raw footage from the making of the film, which free speech experts and media organizations asserted must be protected in the same way as a reporter's notes.²⁶ Outgunned, Berlinger fought the demand for months but eventually turned over hundreds of hours of footage, which Chevron and its lawyers have spliced

and diced and presented out of context in an attempt to manipulate U.S. courts and public opinion against the plaintiffs' case.

- **Creating a Legal Hydra & Attacking Plaintiffs' Allies**

In addition to its attacks against Berlinger, Chevron has pursued separate legal actions in ten different jurisdictions against 22 other people who have served the plaintiffs' team, including the team of expert scientists from Boulder-based Stratus Consulting, the eminent environmental consulting firm that has played a key role in advising the plaintiffs. Chevron has attacked Stratus for "ghostwriting" the \$27 billion damages assessment report, when in reality, the court-appointed expert Richard Cabrera was free to adopt materials submitted by both parties to the litigation during the court-ordered damages assessment process, which Chevron boycotted. Having had precisely the same kinds of contacts not only with court experts but also with the court itself, Chevron disingenuously claims that the plaintiffs' assistance to court expert Richard Cabrera constitute "fraud" and have used this as a basis for its sprawling legal effort against the plaintiffs' allies. Recently, a federal magistrate judge hearing one of Chevron's motions, accused the company of attempting "to try a dispute that is pending in a foreign proceeding" and said that Chevron's litigation tactics are "spiraling out of control."²⁷

- **Inventing Fraud to Cripple Plaintiffs' Counsel & Evade Accountability**

Chevron's latest legal action has been using out-of-context clips from discarded footage shot during the making of Joe Berlinger's film *Crude* to make serious accusations of fraud and misconduct against Steven Donziger, lead U.S. attorney for the plaintiffs in Ecuador. While Donziger has admitted that some of his remarks have been "ill-advised," he characterizes Chevron's efforts as a "campaign of personal destruction to undermine the claims of its victims."²⁸ Berlinger told *Fortune Magazine*²⁹ that he was "dismayed at the level of mischaracterizations in Chevron's Memorandum brief... The footage citations are being taken out of context and not being presented to the court in its entirety, creating numerous false impressions, precisely what we feared when we were first issued the original subpoena." Now, in addition to relentless media attacks on Donziger, Chevron has asked a U.S. court to order the lawyer for the plaintiffs to turn over vast amounts of materials that are protected under attorney-client privilege, and be deposed by Chevron's lawyers.³⁰

This strategy has the effect—if not design—of simultaneously disrupting the work of plaintiffs' with legal attacks and subpoenas, while also building an official record of deceptive claims of "fraud" by the plaintiffs to aid Chevron in fighting enforcement of a judgment down the road. Referring to the *ex parte* contacts between the plaintiffs' team and the court expert that Chevron claims constitute fraud, Jonathan Abady, an American lawyer for the plaintiffs, writes in *The Wall Street Journal*,³¹ "Chevron knows that such contacts were allowed by the court and were common practice by both parties. Chevron devised this narrative as part of a strategy to defeat enforcement of a potentially adverse judgment."

CONCLUSION

Much of the recent media coverage of the monumental Chevron-Ecuador case has focused on the oil giant's legal fireworks.

Increasingly, Chevron and its legal team have achieved an impressive synchronicity between their legal and public relations strategy, weaving a narrative that is as elegant in its simplicity (the case is a fraudulent concoction to win money for greedy plaintiffs lawyers) as it is shameless in its dishonesty. There is no doubt that Chevron's strategies have scored PR points recently, but the facts have not changed. As we await a verdict in the case, Amazon Watch and its allies are working to put the spotlight back on the real issue—ongoing human suffering in Ecuador and Chevron's indisputable responsibility for terrible environmental devastation.

Of course, in addition to twisting public perception of the case, Chevron's recent offensive has larger implications as well. As the *Financial Times* noted,³² Chevron and other international oil companies are fearful of allowing a precedent to be set that will encour-

age people harmed by corporate abuse to demand redress. So, while disrupting the plaintiffs' efforts and gaining access to materials it can twist to its advantage, Chevron's recent actions also have the unmistakable effect, if not goal, of sending a message to those who would consider working to hold companies accountable for their abuses; cross us and you'll be punished.

Chevron's scorched earth strategy is motivated not only by a desire to avoid a multi-billion dollar liability in Ecuador, but by the wider implications of this case for the future of the global extractives industry. Likewise, for all those committed to building a more just and sustainable future, this final phase of the David and Goliath struggle for justice in Ecuador's rainforest represents an opportunity to set a historic precedent for human rights, environmental justice, and corporate accountability.

FOR MORE INFORMATION, AND TO LEARN HOW YOU CAN HELP, VISIT WWW.CHEVRONTOXICO.COM

Endnotes

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2 Reuters: 'Chevron-Ecuador verdict unlikely until 2011 -judge,' July 30, 2010, <http://www.reuters.com/article/idUSN3019553120100730>

3 60 Minutes: 'Amazon Crude,' May 3, 2009, <http://www.cbsnews.com/stories/2009/05/01/60minutes/main4983549.shtml>

4 Reuters: 'BP points fingers in oil spill blame game,' September 8, 2010, <http://www.reuters.com/article/idUSTRE6871GC20100909>

5 Amazon Defense Coalition press release: 'Chevron's \$27 Billion Liability In Ecuador "Glaringly Low" In Light of BP Disaster,' June 8, 2010 <http://chevrontoxico.com/news-and-multimedia/2010/0608-chevrons-27-billion-liability-in-ecuador-glaringly-low-in-light-of-bp-disaster.htm>

6 Pablo Fajardo & George Byrne, Corporate Accountability, Human Rights and Pursuing Justice in the Ecuadorian Amazon: Attorney Pablo Fajardo's Perspective on Aguinda v. Chevron, Harvard International Law Journal Online, Volume 51, August 31, 2010

7 A 1972 internal Texaco memo entitled "Reporting of Environmental Incidents: New Instructions," explains "a) Only major events as per Oil Spill Response Plan instructions are to be reported. Those events are to be reported immediately; b) A major event is further defined as one which attracts the attention of press and/or regulatory authorities or in your judgment merits reporting; and c). No reports are to be kept on a routine basis and all previous reports are to be removed from Field and Division offices and destroyed." Among other documents is a 1972 Texaco patent request for re-injection technology that would reinject toxic by-products from the drilling process underground. Texaco never used this standard industry practice in Ecuador, and instead dumped the toxic waste directly into surface streams. Also uncovered was a cost estimate to enclose open waste pits so people and animals would not come into contact with the pits. This was ultimately deemed too costly and never implemented.

8 Affidavit of Dr. Rodrigo Perez Pallares , attorney for Chevron: "the Ecuadorian courts provide an adequate forum for claims such as those asserted by the plaintiffs"; Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity: "Ecuador's judicial system provides a fair and adequate alternative forum"; Brief for Chevron, U.S. Court of Appeals for the Second Circuit "Ecuadorian legal norms are similar to those in many European nations."

9 If awarded a judgment by Ecuadorian courts, the plaintiffs will have to file for enforcement of the judgment in jurisdictions where Chevron currently has assets, which don't include Ecuador. In seeking removal of the case from the U.S. to Ecuador, Chevron agreed to satisfy a final judgment, subject only to review under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

10 Inter-American Commission on Human Rights Annual Report, 2005, <http://www.cidh.org/annualrep/2005eng/chap.3b.htm>

11 Chevron lawyers have claimed throughout the process that the U.S. judge's order only applied to Texaco, not Chevron, despite the merger of the two companies on Oct. 9, 2001—a litigation strategy rarely mentioned in the U.S. because of its blatantly disingenuous nature. In fact, Texaco and Chevron merged in 2001 while the case was still pending in U.S. courts, and the new company, then called ChevronTexaco lauded the removal of the case to Ecuador in August 2002.

12 Military Report on Cancellation of Guanta Inspection, October 20, 2005, <http://chevrontoxico.com/news-and-multimedia/2005/1020-military-report-on-cancellation-of-guanta-inspection.html>

13 During the time the false report was produced, Chevron employees resided on the Rayo 24 military base and were granted around-the-clock protection by the military. After repeated complaints of intimidation by the plaintiffs, the Ecuadorian government ended the arrangement.

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21 www.gibsondunn.com (accessed September 24, 2010)

22 Reuters: 'Chevron takes Ecuador fight to trade arbitrators,' September 23, 2009, <http://www.reuters.com/article/idUSTRE58M75O20090923>

23 International Law Business Advisor: 'Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions,' January 18, 2010, <http://www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions>

24 Members of Congress Urge USTR to Ignore Chevron Petition on Ecuador Legal Case, website of Rep. Linda Sanchez, http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=490&Itemid=32

25 The New York Times, ABC, CBS, NBC, HBO, Dow Jones, AP, Hearst, Gannett and The Washington Post joined together to submit a friend-of-the-court brief written by high-profile First Amendment attorney in support of Berlinger's fight against Chevron's subpoena. NY-Times.com Arts Beat blog: 'Media Companies File Brief on Behalf of Filmmaker in Chevron Case,' June 2, 2010, <http://artsbeat.blogs.nytimes.com/2010/06/02/media-companies-file-brief-on-behalf-of-filmmaker-in-chevron-case>

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