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## Rainforest Chernobyl Revisited†

# The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon

by Steven Donziger,\* Laura Garr & Aaron Marr Page\*\*

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### A MARATHON ENVIRONMENTAL LITIGATION: SEVENTEEN YEARS AND COUNTING

The last time the environmental lawsuit *Aguinda v. ChevronTexaco* was discussed in these pages, the defendant Chevron Corporation<sup>1</sup> had just won a *forum non conveniens* dismissal of the case from a U.S. federal court to Ecuador after nine years of litigation. Filed in 1993, the lawsuit alleged that Chevron's predecessor company, Texaco, while it exclusively operated several oil fields in Ecuador's Amazon from 1964 to 1990, deliberately dumped billions of gallons of toxic waste into the rainforest to cut costs and abandoned more than 900 large unlined waste pits that leach toxins into soils and groundwater. The suit contended that the contamination poisoned an area the size of Rhode Island, created a cancer epidemic, and decimated indigenous groups.

During the U.S. stage of the litigation, Chevron submitted fourteen sworn affidavits attesting to the fairness and adequacy of Ecuador's courts. The company also drafted a letter that was signed by Ecuador's then ambassador to the United States, a former Chevron lawyer, asking the U.S. court to send the case to Ecuador.<sup>2</sup> Representative of Chevron's position was the sworn statement from Dr. Ponce Martinez, its lead lawyer in Ecuador for more than three decades: "In my opinion, based upon my knowledge and expertise, the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims."<sup>3</sup> As a condition of the dismissal, Chevron promised to subject itself to jurisdiction in Ecuador for purposes of the claims, agreed to abide by any judgment from Ecuador's courts subject only to narrow enforcement defenses in the United States, and waived statute of limitations defenses.<sup>4</sup> Armed with these legally-enforceable commitments, indigenous and farmer communities from Ecuador's Amazon region, along with their U.S. and Ecuadorian lawyers, made the bold decision to re-file the same tort action in Ecuador's courts. The communities were committed to seeking redress for human rights abuses that have decimated indigenous groups and to addressing the broader, related questions of accountability and impunity. Therefore, they plowed ahead despite deep concern that Chevron, with its



By Lou Dematteis/Redux.

Steven Donziger, attorney for the affected communities, speaks with Huaorani women outside the Superior Court at the start of the Chevron trial on October 21, 2003 in Lago Agrio in the Ecuadoran Amazon.

vast resources and cadres of loyal and influential operatives in Ecuador built up over decades of operations there, would either make the case disappear or draw it out endlessly. In 2004, it looked as though the case could be an example of how "courts have the potential to re-allocate some of the costs of globalization — in this case, environmental destruction — from the most vulnerable rainforest dwellers to the most powerful energy companies on the planet." Those words were written in this publication by one of the authors when assessing the case in 2004, at the very beginning of the trial in Ecuador that has yet to conclude.<sup>5</sup>

The ensuing seven years of environmental litigation in Ecuador have been far from easy, raising a number of critical legal and policy challenges relating to accountability for human rights violations. Most of these challenges stem from Chevron's use of what one observer called a "textbook example of abusive litigation" to forestall resolution of pressing legal claims on which the survival of thousands of people could depend.<sup>6</sup> As discussed below, Chevron representatives have repeatedly tried to improperly influence the court and apply political pressure to coax Ecuador's government to quash the private lawsuit in violation of Ecuador's constitution.<sup>7</sup> Evidence suggests the company is now violating its commitments to a U.S. federal court about its intentions to abide by a judgment in Ecuador.<sup>8</sup> Chevron recently resorted to using a Nixon-style "dirty tricks" sting operation

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†Steven Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and The Environment in Latin America*, 11 No. 2 HUM. RTS. BRIEF 1 (2004).

designed to undermine the trial and fabricate evidence of judicial misconduct.<sup>9</sup>

In Ecuador, providing scientific proof has required the communities to assemble and manage teams of environmental experts to produce reports and counter-reports that collectively run into the thousands of pages. The legal side has required just as much effort, not only to determine questions of liability but also to respond to hundreds of motions filed by Chevron to delay the trial over the years. Chevron, having correctly concluded it is far cheaper to litigate than to pay the cost of cleaning up an area the size of Rhode Island, adopted a simple defense strategy: deny, distract, and delay. The company can afford this strategy: it made U.S. \$25 billion in profit in 2008 alone. The communities operate under a more terrifying calculus: more than 1,400 cancer deaths due to oil contamination and near-constant exposure to cancer-causing oil hydrocarbons, resulting in damages up to U.S. \$27.3 billion,<sup>10</sup> according to a court-appointed Special Master.<sup>11</sup>

The communities have been buoyed by the fundamental strength of the underlying scientific and technical evidence. Any visitor to the region can see the *prima facie* case in striking terms: old Texaco barrels mired in hundreds of giant, unlined, open-air pits of oily sludge that leach their contents via pipes built by the oil company into nearby streams and rivers. Carcasses of cows and birds can often be seen floating in the oil muck at well sites built, operated, and closed — but never cleaned — by Texaco. Evidence demonstrates the company never conducted a single environmental impact study or health evaluation in the decades it operated in the Amazon, even though thousands of people lived in and around its oil production facilities and relied on rivers and streams that the company used to discharge toxic waste. Hundreds of waste pits left by Texaco have been tested extensively by Chevron, the plaintiffs, and various third parties, revealing levels of total petroleum hydrocarbons and heavy metals hundreds and sometimes thousands of times higher than allowable norms in Ecuador and the U.S.<sup>12</sup> In fact, Chevron's own documents prove that, as the communities have long alleged, Texaco never re-injected or safely disposed of "produced water,"<sup>13</sup> and instead directed it via an elaborate system of pipes into surrounding streams and rivers which local residents still use for drinking and bathing.<sup>14</sup>

The communities have successfully rebutted Chevron's defenses as factually false and legally inadequate. For example, after *Aguinda* was filed in 1993, Chevron decided, without consulting with the communities, to remediate a small portion of the contaminated sites in exchange for a release from Ecuador's government. The release expressly excludes the private claims in *Aguinda*; yet, as the case was pending in U.S. court, Chevron argued that the release covered those claims and that the case should be dismissed based on the purported clean-up.<sup>15</sup> Though the U.S. district court never accepted this argument, Chevron still reaps huge public relations benefits and buys years of time by litigating the "release" issue repeatedly in various fora and using it to claim that the very existence of the lawsuit in Ecuador is a violation of its contractual rights. Aside from the fact the "release" is not applicable to the claims in *Aguinda*, the clean-up on which it was conditioned appears to have been a fraud: samples from both parties in the current trial reveal that the "remediated" sites are just as contaminated as ones that



Courtesy of Steven Donziger.

The Shushufindi 38 well site.

were never treated.<sup>16</sup> Worse, two former Texaco lawyers, both now employed by Chevron, are facing criminal fraud charges in Ecuador for using a laboratory test that made it impossible to detect anything more than trace amounts of toxins in the soils at highly contaminated sites at the time the company secured the release.<sup>17</sup> The results of this test were reported to Ecuador's government to prove the remediation met the required clean-up standards.

At trial, Chevron used soil samples lifted far from the contaminated areas as proof that its operation had no environmental impact, but this tactic was documented by the Special Master. Chevron's technical team reported that it could not detect contamination at waste pits that resembled lakes of oil sludge, such as one at a well site called Shushufindi 38. At this site, Chevron reported a "no detect" based on a laboratory analysis of a random soil sample of dirt lifted from surrounding forest far away from the waste pit. This sampling result and others like it were used as the basis for a technical report submitted by Chevron as evidence to the court that concluded the site posed no risk to human health.<sup>18</sup> Chevron also claims that the contamination is really the fault of the current operator of the oil fields, state-owned Petroecuador. However, this has proven to be both factually false, according to company records and field samplings that reveal contamination at sites never touched by Petroecuador, and legally insufficient, because the concept of joint and several liability applies to remediation cases precisely in order to prevent the general public from having to foot the bill to clean up contamination that once benefited a polluter.

There have been myriad other obstacles related to Chevron's effort to use its political muscle to terminate the *Aguinda* case. In the United States, the company employs six public relations firms and roughly one dozen lobbyists to handle the Ecuador issue, leading one Congressperson to accuse the company of engaging "in a lobbying effort that looks like little more than extortion."<sup>19</sup> The lobbyists, who include former high-level Clinton and Bush administration officials, try to influence the U.S. government to cancel bilateral trade preferences for Ecuador as "punishment" for letting its citizens sue Chevron in U.S. courts.<sup>20</sup> If Chevron were to succeed, Ecuador's economy would lose approximately 300,000 jobs.<sup>21</sup> Public relations firms,

including Hill & Knowlton (of tobacco industry fame) and Edelman Worldwide, try to quash unfavorable stories, sow doubt about scientific evidence, and control the political environment to influence judicial decisions and public opinion. Their work includes buying advertisements in U.S. and Ecuadorian newspapers and on websites attacking the Ecuador trial judge, court expert, and the plaintiffs' representatives. The two Ecuadorian men who are leading the lawsuit were labeled "environmental con men" in a full-page Chevron advertisement in the *San Francisco Chronicle* in 2008, the day before they received the prestigious Goldman Environmental Award.<sup>22</sup> Chevron also makes significant donations to various U.S. non-profit organizations to provide a platform to press its views on Ecuador. This includes providing financial support to the Fund for Peace to set up roundtable discussions for Chevron lawyers to opine on how the company is being victimized by Ecuador's court system.<sup>23</sup>

In Ecuador, Chevron has repeatedly tried to enlist the U.S. embassy in Quito to advance its litigation interests and to help it dispense with the lawsuit through a separate settlement with Ecuador's government. Chevron signed a contract with Ecuador's army — historically viewed by indigenous groups as a hostile force — to provide it private security and housing during the trial. At one point, the commander of the base on which Chevron's legal team maintained its office signed a false military report, alleging a security threat to the Chevron lawyers that delayed a critical court-supervised field inspection for six months.<sup>24</sup> Chevron has met on a regular basis with Ecuador's presidents during the pendency of the litigation to press its position that the case should be dismissed.<sup>25</sup> Finally, Amnesty International and the International Commission of Jurists have noted that attorneys for the Ecuadorian communities have been victims of mysterious death threats and robberies.<sup>26</sup> Notably, Chevron has refused to join these organizations in condemning these threats.

On the legal front, Chevron quickly abdicated on its commitments to the U.S. federal court once the evidence pointed to its culpability. In 2004, as the *Aguinda* trial was in full motion, Chevron filed a claim against Ecuador's government before the American Arbitration Association (AAA) in New York, 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 liability.<sup>27</sup> The same New York federal court that originally dismissed *Aguinda* to Ecuador soundly rebuked Chevron and permanently stayed the arbitration. The Second Circuit denied Chevron's appeal with a unanimous summary order, and the Supreme Court denied review even after the company hired former U.S. Solicitor Paul Clement to prepare its petition for *certiorari*.<sup>28</sup>

Separately, in 2004 Chevron filed an arbitration claim against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty (BIT),<sup>29</sup> relating to seven lawsuits covering commercial disputes with Petroecuador that were filed in Ecuador by Texaco as it was winding down its operations in the early 1990s. Chevron alleged it was a victim of "denial of justice" in Ecuador because the cases had taken almost fifteen years and no rulings had issued. The costly and lengthy arbitration over these claims, which is now in its fourth year and involves several

major U.S. law firms, is largely an attempt by Chevron to create a "record" that Ecuador's judicial system is defective to help it defeat enforcement of any judgment in the *Aguinda* case using the same argument. In this "Seven Cases" arbitration, Ecuador presented evidence that Chevron deliberately delayed each of the cases — sometimes working no more than one person-hour per year on each case. In 2001, to induce the U.S. federal court to move the *Aguinda* case to Ecuador, Chevron cited the same seven cases as evidence of the "fairness and competency" of Ecuador's judiciary. An Ecuadorian trial court recently granted Chevron a \$1.5 million judgment against Petroecuador in one of these cases.<sup>30</sup> A decision in the "Seven Cases" arbitration is still pending.

Despite these roadblocks, the communities have kept the *Aguinda* trial on track. In 2008, the aforementioned Special Master, appointed by the court and accepted by Chevron without objection as an expert in a previous part of the case, calculated an overall damages figure of U.S. \$27.3 billion, roughly equivalent to twenty percent of the company's market value. The price tag, while considerable, is consistent with the clean-up costs for other large environmental disasters around the world.<sup>31</sup> Ultimately a judge will decide questions of liability and damages. Even if the court finds Chevron liable and lowers the damages award, something significant is happening in Ecuador: some of the world's most vulnerable indigenous groups and rainforest communities are moving ever closer to having their human rights claims resolved after years of struggle against one of the world's largest and most influential corporations. Despite Chevron's continued attempts at delay, the trial is nearing the submission of closing arguments.

When it became clear that the evidence in the trial against Chevron was building and that the company's multi-pronged strategy to extinguish the case was not working, a Chevron spokesman announced bluntly to the *Wall Street Journal*: "We're not paying and we're going to fight this for years if not decades into the future."<sup>32</sup> The company put out a press release promising the plaintiffs a "lifetime of litigation" if they persisted.<sup>33</sup> Chevron's General Counsel said he expected to lose the case, but vowed that Chevron would "fight until hell freezes over and then skate it out on the ice." These statements clearly contradicted Chevron's earlier promises to abide by a judgment in Ecuador's courts. It became increasingly clear to the plaintiffs that Chevron intended to play by a different set of rules. It appeared Chevron not only sought to quash the case, but also to kill off the very idea that indigenous communities could empower themselves to vindicate their legal rights. In a startling moment of candor, a Chevron lobbyist interviewed about the lawsuit admitted to *Newsweek's* Michael Isikoff: "We can't let little countries screw around with big companies like this — companies that have made big investments around the world."<sup>34</sup>

#### **INTERNATIONAL ARBITRATION AS A "STAR WARS"-STYLE DEFENSE AGAINST HUMAN RIGHTS CLAIMS**

With the mindset expressed by these Chevron officials, it becomes understandable how a corporate defense strategy can be pushed beyond standard legal and ethical boundaries. From the communities' perspective, this is exactly what happened. Recently, Chevron launched a maneuver that it believes

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can render the seventeen-year *Aguinda* trial a pointless exercise. Relying on the 1997 BIT between the United States and Ecuador, Chevron in September 2009 initiated a closed-door arbitration against the Ecuadorian government claiming it has not been treated fairly in the Ecuador trial.<sup>35</sup> Chevron argues that the release received from Ecuador for its “clean-up” in the 1990s should absolve it of all liability — even though the release expressly excludes private claims of the type being asserted in *Aguinda* and the remedial work on which it is based appears to have been fraudulent. Chevron argues that the Ecuador trial court, to whose jurisdiction it had agreed to submit when the case was in U.S. federal court, erred in not summarily dismissing the claims of the plaintiffs based on the release. Chevron already had raised the same argument about the release in multiple public courts and failed to prevail: the U.S. court in the early years of the case, the Ecuadorian court in the *Aguinda* trial where a decision is pending, and the aforementioned litigation in U.S. federal court over Chevron’s right to the AAA arbitration against Ecuador that was permanently stayed. In this latter proceeding, Chevron had hastily withdrawn the same claim regarding the release after the U.S. federal judge said it was “highly unlikely” it would prevail on the issue.<sup>36</sup>

In this latest arbitration notification, Chevron seeks to have a panel of international jurists — all private citizens not part of any public judicial body — issue an order instructing the government of Ecuador to mandate that its constitutionally-independent courts determine that Chevron is “not liable” despite the mountains of scientific and legal evidence in the *Aguinda* case and despite the fact the *Aguinda* court has yet to rule. Chevron is also trying to burrow its way into this forum even though it agreed to the dismissal of the *Aguinda* action in the United States with only one reservation to contest a judgment — an enforcement action in the United States, where it could present the same underlying facts of unfair treatment to try to nullify any adverse judgment that it plans to present in the BIT arbitration. If Chevron gets its way, the BIT arbitral panel would allow it to re-litigate the core claims at issue in the public trial in Ecuador. The communities, by arbitration rules, would not have access to the proceedings, much less the opportunity to be a party.<sup>37</sup> Chevron’s desired result would effectively strip tens of thou-

sands of people of their legal rights to seek a remedy against the perpetrator of what they consider to be an environmental crime on their ancestral lands. The arbitral panel would be governed by the UNCITRAL rules, which were created under the auspices of the United Nations to promote dispute resolution in the context of international trade law.<sup>38</sup>

Although clothed in the elegant language of international jurisprudence, Chevron’s underlying construct is ominous: a corporation with almost limitless resources is using an investment treaty as a weapon to engineer a favorable verdict in a human rights trial in which it promised to participate and satisfy any adverse judgment. It is now trying to use international arbitration to accomplish what it could not through political pressure or proceedings in open court. That this process will wreak havoc on the rule of law in Ecuador, with negative consequences for other foreign investors in the country, appears to make no difference to Chevron as long as it benefits the company in this instance.<sup>39</sup>

A leading specialist in this area recently noted in a somewhat tinged compliment that Chevron’s claim is “what the state of the art looks like” as far as corporations taking on states in international arbitration.<sup>40</sup> While extreme, Chevron’s maneuver is the latest example of a profoundly disturbing trend that could have devastating consequences for human rights victims seeking recourse against private actors in the courts of their home countries. There are numerous recent examples of multinational corporations using the international arbitration system along the lines of the Reagan-era “Star Wars Missile Defense” fantasy — a shield to deflect the claims of human rights victims being heard in national courts around the globe. Under Chevron’s proposed construct, the rulings of these private arbitration panels could be tailored to trump the rulings of any public court, including the highest courts of the countries where the abuses occurred.

In the last two decades, multinational corporations have lined up to sue states in ways that raise profound public policy, human rights, and environmental concerns. Recently, when El Salvador denied Canadian gold mining company Pacific Rim a mining permit — after conducting an extensive environmental impact assessment — the case wound up at international arbitration

with El Salvador potentially on the hook for hundreds of millions of dollars.<sup>41</sup> Investors have sued Argentina, Bolivia, and Tanzania on claims that raise profound issues with respect to the fundamental human right to water;<sup>42</sup> insurance companies have attacked developing-country plans to institute universal health care;<sup>43</sup> and a white-owned mining company sued South Africa alleging that the country's internationally-celebrated affirmative action program discriminates against the company.<sup>44</sup> For smaller or economically disadvantaged countries, these are not minor matters: for example, the U.S. \$353 million award won by American investor Ronald Lauder against the Czech Republic for alleged "interference" with his Czech TV business equaled the entire national health insurance budget of the country.<sup>45</sup>

While Chevron's BIT case is only designed to evade liability in Ecuador, the move risks pushing international arbitration in a radically expansive direction that could provide an unprecedented level of immunity to multinationals. A successful human rights or commercial claim against a foreign entity could be snatched away by a private court of arbitrators in which the party initially bringing suit cannot be heard and has little or no recourse. Chevron's core claim that Ecuador's entire judicial system is broken and therefore denies it due process is a traditional human rights claim, yet Chevron is using it to derail a human rights litigation involving the deliberate dumping of billions of gallons of toxic waste into a local water supply. Chevron is asserting that, because of the BIT, its rights as an investor trump those of domestic constituencies, here indigenous groups fighting to remedy the despoliation of the ecosystem on which they are dependent for their survival.

Whether Chevron's plan turns out to be "state of the art" is dependent on how the landscape of arbitration under investment treaties unfolds and whether, as a general matter, domestic courts will treat private arbitral awards as barriers to enforcement of foreign judgments. Unless this gathering danger is addressed, the prospects for future human rights litigation against corporations like Chevron will face steep new obstacles. Corporate defendants facing liability in a domestic human rights proceeding could seek safe haven in a BIT by offering conspiracy theories that describe a "denial of justice" or a similarly generalized claim, allowing an arbitration tribunal to take control and issue injunctive orders against the domestic sovereign and its courts.

### THE GATHERING DANGER OF EXPANSIVE JURISDICTION OF INTERNATIONAL ARBITRAL TRIBUNALS

The modern system of investor-state arbitration evolved largely out of a much older system of *commercial* arbitration between private companies. Such arbitration, based on contracts between specific parties, was heard by panels consisting of lawyers in private practice and non-lawyer professionals in the relevant field. It was a "gentlemanly" system of dispute resolution: tribunals, as a practical matter, looked to more or less any law they wished;<sup>46</sup> established facts "by all appropriate means;"<sup>47</sup> and otherwise acted freely to deliver "arbitral justice" as between the parties.<sup>48</sup> The modern investor-state system, however, lacks the specific consent and clear limitations that made the earlier system palatable: BITs are not specific agreements to arbitrate, but generalized offers to arbitrate certain classes of disputes against certain investors in a wide range

of circumstances. Creative lawyering has dragged many states into arbitration they never would have considered submitting to at the time they signed the BIT. In this "new world of arbitration," often called "arbitration without privity,"<sup>49</sup> what was once "gentlemanly" becomes autocratic, with a tiny elite privately working out deals that can deeply affect the well-being of millions of people and the autonomy of entire nations.

While investor-state tribunals have on rare occasions awarded injunctive relief, they are usually limited to orders necessary to prevent the secreting away or spoiling of assets. Chevron observes no such limitation in its desire that Ecuador's executive branch declare it absolved of all claims in the *Aguinda* court case. Historically, unbounded orders of this sort only flowed from the "equity" powers of courts of chancery, which were known to provide remedies as necessary to "do justice" in the eyes of the sitting magistrate. Though formal chancery is extinct, domestic courts that assert such jurisdiction do so only under specific constitutional and statutory grounds, which carefully circumscribe the degree to which those powers can be exercised.

Another worrying feature of the arbitral panels is that they have become a major revenue generator, creating perverse incentives. The estimated two dozen private citizen-arbitrators and the numerous lawyers who repeatedly take part in these proceedings consider themselves members of an informal elite circle, or to use their words, "The Club."<sup>50</sup> A typical arbitrator may never have visited the country over which he or she will serve as *de facto* judge and jury and likely will have little appreciation for the policy complexities at stake when the people who are often most impacted are not represented before the panel.<sup>51</sup> The arbitrators also have a pronounced personal incentive to extend their jurisdiction as widely as reasonably possible given that they are paid by the hour and can reap millions of dollars in fees from a single matter.<sup>52</sup> Structurally, the panels seem to favor well-resourced private investors who can afford the best legal talent and disfavor the government lawyers running litigation for developing nations. Under the inchoate standards that govern these proceedings, some arbitrators have ruled in favor of investors repeatedly across numerous cases. Since there is no database of decisions and little or no public scrutiny, there is no system-wide check on any perceived or actual bias. Once a panelist develops a pro-investor reputation grounded in a solid grasp of international law, he or she becomes part of a highly coveted pool of candidates who are repeatedly appointed. It is virtually impossible, given the arbitral rules that govern appointments, to have a panel where the majority of arbitrators are outside of "The Club."<sup>53</sup> Chevron's appointed arbitrator in its hoped-for BIT case is an example of this phenomenon.<sup>54</sup>

While the scope of Chevron's requested relief is likely unprecedented, its actual claims appear tenuous at best. Indeed, a different tribunal recently rejected a much less sweeping request for injunctive relief against Ecuador made by Occidental Petroleum. Notably, the tribunal found that injunctive relief could be justified only where it was "necessary and urgent" to avoid harm that was both "imminent and irreparable."<sup>55</sup> Chevron will have several layers of appeal in Ecuador — which it has vowed to exhaust<sup>56</sup> — where it will still be able to fight enforcement and raise the same claims that it is asserting before the BIT tribunal.<sup>57</sup> So while having to face judgment in such a high-profile

case and answer to an evidentiary record of over 200,000 pages may be disconcerting to Chevron, relief is hardly “necessary and urgent” as a matter of international law. Nor is there any threat of *irreparable* harm here; a harm is only irreparable if it *cannot* be fully compensated by damages, and damages are all that is at issue. Finally, it is unclear whether Chevron was an “investor” in Ecuador before the BIT came into force in 1997, since Texaco left Ecuador in 1992, a fact which could nullify Chevron’s ability to be covered by the treaty and thus block the arbitration.<sup>58</sup>

The tenuousness of Chevron’s claims, however, should not be confused with the viability of its overall strategy. Its purpose is to use — or abuse, as the case may be — the opportunity afforded by the BIT arbitration to continue to exhaust the resources of its adversaries and cast a cloud of confusion over the proceeding in Ecuador. Even if Chevron loses the BIT case, it is still acting on its threat to pursue a “lifetime of litigation” that gains the company years of time and additional profits from the monies it could collect on capital that otherwise would be used to satisfy a judgment. The arbitration could easily take five or more years and consume tens of millions of dollars of attorney time for each side, potentially deterring human rights litigants from bringing similar cases in countries where Chevron has operations implicated in human rights abuses.<sup>59</sup> Effectively playing international human rights law and international investment law against one another, the implications of this strategy raise profound challenges for both areas of law.<sup>60</sup>

### FROM SOUR GRAPES TO “DENIAL OF JUSTICE”

Chevron claims that the Ecuador trial has been conducted “in total disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due process and natural rights.”<sup>61</sup> The evidence suggests that Chevron is attempting to contrive a narrative to undermine the due process rights of the claimants in Ecuador to create “evidence” that it can use in a BIT arbitration or in a later enforcement action. To this end, the company has used its lobbyists to convince the U.S. State Department and the office of the U.S. Trade Representative to adopt reporting language which seems hand-casted by Chevron’s legal team that raises doubts about the fairness of Ecuador’s judicial system.<sup>62</sup>

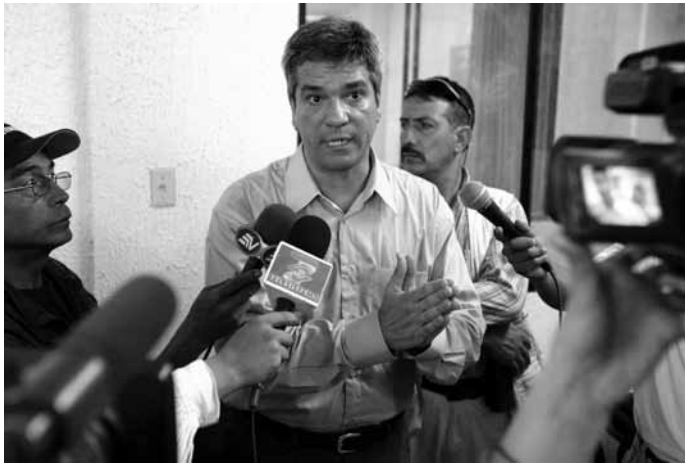
Chevron’s claim is built largely on a disconnected series of innocuous events along with various incidents fashioned by the company’s legal team to try to paint a picture of systemic bias. The Chevron methodology that allows the company to argue that Ecuador’s judicial system is “broken” could make the judiciaries of the world’s most robust democracies appear politicized and corrupt. Using Chevron’s strategy, one would be able to condemn the entire U.S. judiciary by pointing to the fact that U.S. judges receive campaign contributions in Texas, a federal judge was recently impeached, two judges in Pennsylvania received kickbacks by sentencing juveniles to incarceration, seventeen judges in Illinois were indicted, and the U.S. Supreme Court arbitrarily decided who would be president in *Bush v. Gore*.<sup>63</sup> In Ecuador, Chevron has deliberately inundated the trial court with repetitive motions that it expects to lose in order to support its central theme. The court decisions cited by Chevron to “prove” bias in Ecuador all fit well within Ecuadorian and U.S. jurisprudence. For example, Chevron as of the time of this writing had filed 29 motions to disqualify the Special Master; each one was

denied by the court. Chevron uses these denials as “evidence” of the court’s bias.<sup>64</sup> In another example, Chevron cites a 2007 decision granting the motion of the plaintiffs to withdraw a request for judicial inspections of some contaminated well sites. The parties inspected 47 sites, including all of the 36 sites Chevron requested; each site revealed significant toxic contamination in soils and water in and around the waste pits. Additional inspections would have been redundant and consumed years of time. Given that the plaintiffs had concluded that their burden of proof was met, the court granted the motion. Chevron has used this issue as a central feature of its BIT arbitration claim.

Chevron also claims “political interference” in the trial by the Ecuadorian executive branch on behalf of the plaintiffs, a claim for which Chevron has not presented a scintilla of actual evidence.<sup>65</sup> The company cites comments made by Ecuador’s President Rafael Correa criticizing environmental damage caused when Texaco was the operator of the oil fields. However, Chevron fails to mention that, in the same comments, which followed a visit to the region, President Correa blasted his own state-owned oil company for causing environmental damage, which arguably helps Chevron’s defense that it is not responsible. Heads of state have a right, indeed an obligation, to comment on a humanitarian disaster afflicting their own citizens even if there is open litigation related to it, and many do. Indeed, U.S. Presidents Barack Obama, George W. Bush, and Bill Clinton all have commented on ongoing litigation as a matter of course, without charges that they are interfering with the independence of the judicial branch.<sup>66</sup>

### CONCLUSION

Cross-border capital flows can bring important economic benefits and jobs to both developed and developing countries; in this context, BITs can play a constructive role if designed to protect the interests of the public and third parties who may be adversely impacted. The question is how to prevent the BIT regime from being used to further abusive litigation tactics that are predicated on a strategy of forum shopping and indefinite delay. Currently BITs do little to guarantee procedural or substantive fairness to non-investor litigants. What has emerged from thousands of separate BITs is a patchwork system with seemingly inscrutable arbitration provisions. Arbitral tribunals operate unchecked with no formal public scrutiny, inviting gamesmanship and abuse. Chevron’s willingness to play musical jurisdictions, all the while consuming the resources of its impoverished adversaries while amassing record-breaking profits (fractions of which could pay for a clean-up in Ecuador), threatens to turn the *Aguinda* trial into an epic illustration of corporate impunity. Recent history shows that citizen-arbitrators have generally been only too willing to play along, pushing the system far past where states — not to mention third parties whose legal claims are being hijacked into forums where they cannot appear — ever thought they would or could venture. Moreover, as the linkages between investment, development, and human rights increasingly emerge, deeper structural problems that cannot be papered over are revealed in the BIT arbitral process.



Chevron Vice President Ricardo Reis Veiga talks to the press in the Superior Court of Justice in Lago Agrio, Ecuador on the first day of the trial against Chevron on October 21, 2003.

A decentralized system that includes more than 2,500 bilateral treaties may seem dauntingly hard to reform, but current widespread discontent has already stimulated a fair amount of thought. Ecuador and Bolivia have withdrawn from the International Center for the Settlement of Investment Disputes, the World Bank's international arbitration arm, and have begun formulating an alternative dispute resolution mechanism that would address the broader public interest and function more predictably and transparently.<sup>67</sup> The U.S. State Department has begun reviewing and amending the U.S. Model BIT, which often serves as the first draft for BITs between non-U.S. parties. Changes being considered could add transparency and mechanisms to prevent meritless claims, enhance requirements relating to exhaustion of domestic remedies, increase protections for affected third parties, and perhaps move entirely from an investor-state to a state-to-state model.<sup>68</sup> Likewise, the International Institute for Sustainable Development has formulated an entire proposed BIT that would address many of these shortcomings.<sup>69</sup> Indeed, even an "international investment court" of the sort proposed by leading academics would go a long way toward clarifying the proper jurisdiction of investment disputes, the latitude of states to act in the public interest, and the rights available to affected third parties.<sup>70</sup>

What is clear is that none of these proposed reforms goes far enough to guarantee fairness to persons in the position of the *Aguinda* plaintiffs. The unusual circumstances and long history of the *Aguinda* matter require the intervention of a U.S. federal court to enjoin Chevron from violating its previous representations that served as the basis for the court to send the case to Ecuador's courts. Accordingly, both the *Aguinda* plaintiffs and Ecuador are seeking such relief now in the very court where the case started seventeen years ago.<sup>71</sup> In terms of the BIT process, the fact Chevron is pushing the envelope so aggressively reveals flaws in the arbitration regime that should be corrected. As a start, those reforming the BITs might consider a bright-line rule that prohibits an investor who has sought, over the objections

of the plaintiffs, jurisdiction in another court from using the BIT to re-litigate the same or similar issues and claims in the arbitral process. Second, BIT arbitral panels might benefit from bifurcation of jurisdictional and merits-based questions. On this point, arbitrators hearing jurisdictional questions must not also hear merits questions, and vice-versa, so there is no incentive to expand jurisdiction in ways that benefit all. Further, all questions of jurisdiction should be decided as a threshold matter to avoid extended proceedings on the merits that turn out to be unnecessary. Finally, just as any public judiciary is held accountable, it might be useful to consider how BIT arbitrators can be monitored to ensure they have the necessary qualifications to ensure competent decision making, transparency, and sensitivity to affected third party concerns. The pool of candidates should be expanded beyond the members of "The Club," so the same arbitrators are not recycled from case to case. In the meantime, arbitration rules need to be modified to make the hearings public upon the request of any interested party; to permit third parties to appear with full rights as parties, including the right to appoint an arbitrator, if they can prove a sufficiently strong non-protected interest; and to properly incentivize payments to arbitrators so they are not motivated for the wrong reasons to expand their jurisdiction to the edge of what is permissible.

Whatever the reforms that are needed, this important area deserves more scrutiny so that the rule of law can better protect human rights litigants and better control investors who seek to use abusive litigation tactics. In *Aguinda*, the Amazon communities will continue fighting for their rights, in whatever forum they must. The plaintiffs have filed a motion in the same U.S. federal court where they initially filed *Aguinda* to enjoin Chevron from participating in its BIT arbitration on the grounds it violates the binding promises the company made to the U.S. court to induce dismissal to Ecuador. Even if the BIT arbitration is not enjoined and Chevron is granted its ambitious request for injunctive relief, the communities will argue that the Ecuadorian court can and should disregard the tribunal's order and reject the government's interference. There is no basis to conclude that an arbitral order in favor of Chevron would have a preclusive effect on the enforcement of any adverse judgment in another country. The plaintiffs plan to move to satisfy any judgment against Chevron in any of dozens of countries where the company maintains substantial assets. The stakes are enormously high. For Chevron, the "drown the beast in the bathtub" strategy of constant litigation and forum-shopping risks destroying its international reputation and ultimately devastating the company's financial picture. For the indigenous groups and rainforest communities, it means more years of litigation but also a growing sense of empowerment to achieve what has always been a relatively simple objective — clean-up of their ancestral lands and rainforest ecosystem — that seems to be evolving into a legal battle with historic ramifications on the global stage. The international legal community needs to fully appreciate these stakes to move toward a sustainable future in which the rights of investors and those of human rights victims are more justly balanced.

**HRB**

## ENDNOTES: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon

<sup>1</sup> Texaco merged with Chevron Corp. on Oct. 9, 2001, eight years after the plaintiffs filed claims in U.S. federal court. ChevronTexaco Corporation (whose name has since changed to "Chevron") announced that it acquired Texaco in a merger transaction while the case was ongoing. Press Release, Chevron, ChevronTexaco to Begin First Full Day of Global Operations (Oct. 10, 2001) (on file with author). Chevron has since defended the *Aguinda* action.

<sup>2</sup> Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment on their Counterclaims, *Republic of Ecuador v. ChevronTexaco Corporation*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005) (No. 04 Civ. 8378 LBS) (revealing a fax from Mike Kostiw, an official in Texaco's Federal Government Affairs Office, to Texaco officials York LeCorgne and Ricardo Reis Vega transmitting an English language "Diplomatic Note, Second Draft" stating that "I worked with Amb Teran (Ecuador) on this last Friday. He will deliver to the State Department today."). The substantive text of the draft was virtually identical to the letter filed in *Aguinda*. Edgar Teran served as Ecuador's ambassador to the United States from 1992 to 1996.

<sup>3</sup> In 2000, lead Ecuadorian attorney for Chevron, Adolfo Callejas, provided sworn testimony to the U.S. federal court stating that the U.S. judge "should not be concerned about the ability of the courts in Ecuador to dispense independent, impartial justice. . . . In none of the litigation involving TexPet in Ecuadorian courts have there been any allegations of unfairness or corruption." For copies of fourteen affidavits, see ChevronToxico, Examples of Chevron's High Praise of Ecuador's Courts, <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf> (last visited Feb. 15, 2010). See also *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006, at \*1 (S.D.N.Y. Apr. 11, 1994); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

<sup>4</sup> See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); Petition to Stay Arbitration at 5-6, *Republic of Ecuador v. Chevron Corp. & Texaco Petroleum Co.*, No. 09 Civ. 9958 (S.D.N.Y. filed Feb. 10, 2010) (noting how Texaco, in an effort to induce and ensure dismissal of the *Aguinda* action, unambiguously represented and promised, both in a verified interrogatory answer and in repeated submissions to the Court, that it would satisfy any 'final judgment' entered against it in Ecuador defined as a judgment after exhaustion of all appeal rights in Ecuador," subject only to those defenses to enforcement provided under the New York's Recognition of Foreign Country Money Judgments Act ("NY Foreign Judgments Act")) (citing Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 16-17, *Aguinda v. Texaco, Inc.*, 142 F. Supp 2d 534 (S.D.N.Y. 2001) *sub nom. Jota v. Texaco, Inc.* 157 F.3d 153, 159 (2d Cir. 1998) (Jan. 11, 1999) (No. 94 Civ. 9266 (JSR))); Texaco Inc.'s Reply Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *Aguinda v. Texaco, Inc.* 142 F. Supp 2d 534 *sub nom. Jota v. Texaco, Inc.* 157 F.3d 153, 159 (2d Cir. 1998) (Jan. 25, 1999) (93 Civ. 7527 (JSR)) at 21 (Texaco explained it "agreed to satisfy any judgments in plaintiffs' favor, reserving its right to contest their validity *only in the limited circumstances permitted by*

*New York's Recognition of Foreign Country Money Judgment's Act.*") (emphasis added). The NY Foreign Judgments Act allows Chevron to raise defenses to avoid enforcement of any adverse judgment that might result in the *Aguinda* lawsuit in Ecuador, including mandatory non-enforcement where it can show "the judgment was rendered under a system which does not provide impartial tribunals or procedures which are compatible with the requirements of due process of law." N.Y.C.P.L.R. § 5303 (McKinney 1997).

<sup>5</sup> Steven Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights in Latin America*, 11 No. 2 HUM. RTS. BRIEF 1 (2004).

<sup>6</sup> Santiago Cueto, *Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions*, INT'L BUS. L. ADVISOR, Jan. 18, 2010, <http://www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions/> (last visited Feb. 22, 2010); see also *Chevron Missteps: How Not to Handle Foreign Litigation*, INT'L BUS. L. ADVISOR, Sept. 16, 2009, <http://www.internationalbusinesslawadvisor.com/2009/09/articles/international-litigation/chevrons-missteps-how-not-to-handle-foreign-litigation/> (last visited Feb. 22, 2010).

<sup>7</sup> Chevron, one of the highest-spending lobbyists in D.C., has lobbied the U.S. Trade Representative for years to suspend Ecuador's trade preferences unless the government puts an end to the *Aguinda* trial. The trade preferences are estimated to provide over 300,000 jobs to the impoverished nation and so have been used as a bargaining chip by the corporation against the government of Ecuador. See Editorial, *Trading With Ecuador: Washington Must Resist Efforts by Chevron to Interfere with an Andean Trade Agreement*, L.A. TIMES, Dec. 3, 2009, available at <http://articles.latimes.com/2009/dec/03/opinion/la-ed-chevron3-2009dec03>; Kenneth Vogel, *Chevron's Lobbying Campaign Backfires*, POLITICO, Nov. 16, 2009, available at <http://www.politico.com/news/stories/1109/29560.html>. In response to recent efforts, 26 congressmen joined together urging their colleagues not to allow Chevron to use trade preferences as leverage in a private litigation. Press Release, Congresswoman Linda Sanchez, Members of Congress Urge USTR to Ignore Chevron Petition on Ecuador Legal Case (Dec. 15, 2009), available at <http://www.lindasanchez.house.gov/news.cfm/article/595>. Though the trade preferences were extended in 2009, it provides a strong example of how far Chevron is willing to go to undermine the rule of law, and improperly influence governmental officials. See *infra* note 14 and accompanying text. Additionally, Chevron's public relations firms have taken out numerous advertisements in Ecuadorian newspapers attacking the lawyers and judges in the trial as well as the independent court expert. See e.g. EL COMERCIO NEWSPAPER, Oct. 5, 2006, Feb. 18, 2009, and numerous others (on file with author).

<sup>8</sup> See *supra* note 4.