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JUNGLE LITIGATION: WILL THE VICTIMS OF THE OIL CONTAMINATION IN ECUADOR EVER RECOVER?

by JESSICA LIENAU

A \$16 billion civil lawsuit against Chevron is currently pending in Ecuadorian courts. The suit was brought by a group of indigenous Ecuadorians alleging massive oil contamination of the Ecuadorian rainforest by Chevron and its affiliates. Commencing in 1993 in a U.S. District Court in New York, the case has since been moved to an Ecuadorian court and appears to have no end in sight.¹ The case, involving one of the world's most profitable corporations and some of the world's poorest indigenous people, has been rife with accusations of impropriety on both sides throughout the course of the litiga-

tion. Lawyers on both sides, court-appointed experts, and the Ecuadorian government have all been implicated, and in some instances even criminally charged, for their behavior surrounding this case. The outcome of this case has high stakes because it could represent the first time a large and powerful American oil company is held liable for billions of dollars of damages by a foreign court.

SCARE TACTICS

Chevron's involvement in the dispute can be traced back to 1964 when Texaco became the exclusive operator of an oil enterprise in Ecuador.² In 1990, when its operating contract expired, Texaco turned over its production and operational infrastructure to Petroecuador, the Ecuadorian national oil company.³ In 1998 Petroecuador and the Republic of Ecuador signed a final release agreement with Texaco that absolved Texaco and its affiliates of future liabilities and claims in return for Texaco's promise to cleanup its portion of the oil operation in Ecuador.⁴ Meanwhile, Chevron purchased Texaco in 2001, thereby assuming all of Texaco's liabilities.⁵

After the plaintiff's filed suit, Chevron successfully removed the case to Ecuador in an attempt to avoid liability.⁶ Chevron hoped that transferring the litigation from the sophisticated U.S. courts, capable of handling complex litigation, to the smaller courts of Ecuador might be advantageous.⁷ However, the Ecuadorian court refused to be bullied by Chevron and not only has proceeded with the discovery phase of the litigation, but may even be poised to rule against Chevron.⁸ With a judgment against Chevron looking more like a reality, Chevron seems to be regretting its decision to litigate in Ecuador.⁹

In an effort to bring the litigation back to America in 2004, Chevron attempted to bind the Ecuadorian government to arbitration. Chevron maintained the 1998 release required arbitration for issues of liability concerning oil contamination.¹⁰ The Ecuadorian government claimed the arbitration clause was invalid, asserting it was obtained by fraudulent means.¹¹ In response, Chevron argued that the clause was valid because it was reviewed by the highest level of Ecuadorian government. Chevron also argued that since the new Ecuadorian president Rafael Correa assumed office in 2007, it has been the government's and the plaintiff's goal to shift the responsibility of Petroecuador to Chevron.¹² However, on October 7, 2008, the United States Court of Ap-

peals for the Second Circuit held that the release signed by Texaco and Ecuador did not require Ecuador to submit to binding arbitration to determine liability.¹³ Therefore the litigation will remain solely in Ecuadorian court.¹⁴

HUMAN IMPACT

The actual environmental and human impact of the alleged oil contamination in the Ecuadorian rainforest is also a heated issue. The plaintiffs claim cancer rates are 1.7 to four times greater for people living where Texaco operated than for those living elsewhere.¹⁵ Chevron has funded other studies that show there has been no increase in cancer levels in the oil regions.¹⁶ As part of the litigation, the Ecuadorian court employed an expert to conduct a two-phase study of the oil contamination.¹⁷ The court expert's report stated that all of the Chevron sites were contaminated, that Chevron was the responsible party, and that the cleanup could be more than \$16 billion.¹⁸

THE BLAME GAME

Chevron does not deny environmental damage; they claim, "impacts in the region are primarily due to Petroecuador's poor operations and well-documented history of spills and environmental mismanagement, or to factors wholly independent of oil-extraction activities, such as bacteria in the water due to poor sanitation."¹⁹ Furthermore, in its rebuttal of the court appointed expert's report, Chevron asserted the report was biased and not scientifically sound.²⁰ Chevron alleged the expert had created "a report that would provide billions of dollars to his fellow Ecuadorian citizens and absolve state-owned Petroecuador of responsibility for its continued and admittedly harmful oil operations."²¹

Chevron has been villainized to some degree in this case, and as the plaintiffs would argue, rightfully so.²² One of the lawyers for the plaintiffs, Andrew Woods, stated, "It never occurred to Chevron that these people had human rights."²³ Chevron is also facing other legal challenges resulting from their industry practices in Nigeria and Burma. Woods further stated, "Chevron is increasingly out of step with the rest of the industry" and is now facing multi-billion dollar litigation in multiple legal forums.²⁴

Both Chevron and the Ecuadorian plaintiffs have hired lobbyists to plead their cause in Washington.²⁵ Chevron has hired a high-powered legal and lobbying team to pressure the White House into cutting off special trade preferences for Ecuador if the Ecuadorian government does not quash the case.²⁶ So far Washington has not sanctioned Ecuador in this way, even though certain U.S. Trade Representatives have stated that they are considering the idea.²⁷ President-elect Barack Obama, a Harvard Law School classmate and friend of plaintiffs' lawyer Steven Donziger, has stated that the Ecuadorian people deserve to have "their day in court."²⁸

An unidentified Chevron lobbyist is quoted as saying, "We can't let little countries screw around with big companies like this—companies that have made big investments around the world."²⁹ Although Chevron publicly rebuked its own lobbyist for this statement, the indigenous people of Ecuador were nonetheless offended by the arrogance reflected in this comment.³⁰

Chevron claims the legal proceedings in Ecuador are turning into a sham to allow the government to avoid its legal and monetary duty to remediate the damage.³¹ Plaintiffs' counsel Andrew Woods asserts, "Chevron did whatever it could get away with" in Ecuador, operating its oil facilities far below industry safety standards, and is deserving of serious sanctions.³² The oil contamination in Ecuador is not the first such environmental disaster of its kind, but if the Ecuadorian court levels the unprecedented sanction of \$16 billion against Chevron, it may be the last.

NOTES

1 *Aguinta v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Apr. 11, 1994).

2 Press Release, Amazon Defense Coalition, Fact Sheet on History & Status of Legal Case (July 30, 2008) (*available at* <http://www.texacotoxico.org/eng/node/143>).

3 *Id.*

4 Press Release, Chevron, Chevron Condemns Government of Ecuador's Attack on Chevron Attorneys (Sep. 12, 2008) (*available at* <http://chevron.com/news/press/release/?id=2008-09-12a>).

5 *Id.*

6 Fact Sheet, *supra* note 2.

7 *Id.*

8 *Id.*

9 Telephone Interview with Andrew M. Woods, Counsel for Plaintiffs (Oct. 7, 2008).

- 10 Press Release, Karen Hinton, Amazon Defense Coalition, Chevron Loses Another Round in Legal Battle over Ecuador Rainforest Contamination; Amazon Defense Coalition Says Chevron Should Accept Responsibility for Contamination: U.S. Federal Appeals Court Rejects Attempt to Shift Liability, (Oct. 7, 2008) (*available at* http://www.amazonwatch.org/newsroom/view_news.php?id=1660).
- 11 Chevron Condemns, *supra* note 4.
- 12 *Id.*
- 13 *Id.*
- 14 Republic of Ecuador v. ChevronTexaco Corp., No. 07-2868-cv (2d Cir. Oct. 7, 2008).
- 15 Fact Sheet, *supra* note 2.
- 16 Press Release, Chevron, Analysis of Ecuador Data Reveals No Increased Cancer Levels in Oil Region (Sept. 6, 2008) (*available at* <http://www.texaco.com/sitelets/ecuador/en/releases/2008-09-06.aspx>).
- 17 Press Release, Chevron, Media Conference Call Transcript (Sept. 15, 2008)(*available at* <http://www.chevron.com/documents/pdf/charlesjamestranscript.pdf>).
- 18 Fact Sheet, *supra* note 2.
- 19 Press Release, Chevron, Executive Summary of Chevron's Response to the Cabrera Report (Sept. 15, 2008) (*available at* <http://www.chevron.com/documents/pdf/texacoexecutivesummaryecuador.pdf>).
- 20 *Id.*
- 21 *Id.*
- 22 Fact Sheet, *supra* note 2.
- 23 Woods, *supra* note 9.
- 24 *Id.*
- 25 *Battle Over Chevron's "Amazon Chernobyl" Comes to Washington, D.C.*, REUTERS.COM, Sept. 18, 2008, <http://www.reuters.com/article/pressRelease/idUS107126+18-Sep-2008+BW20080918>.
- 26 *Id.*
- 27 Michael Isikoff, *A \$16 Billion Problem: Chevron Hires Lobbyist to Squeeze Ecuador in toxic-dumping Case. What an Obama Win Could Mean*, NEWSWEEK.COM, Jul. 26, 2008, <http://www.newsweek.com/id/149090>.
- 28 *Id.*
- 29 Brian Baxter, *Ecuadorian Plaintiff's Wildcard Against Chevron: Obama*, LAW.COM, July 31, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423417704>.
- 30 *Id.*
- 31 Press Release, Chevron, Most Significant Flaws in the Cabrera Report (Sept. 15, 2008) (*available at* <http://chevron.com/ecuador/cabrerareportflaws/?view=2>).
- 32 Woods, *supra* note 9.