



Course
Global Environmental Litigation
2020

The Chevron v. Ecuador case

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I- Factsheet

A- Where it started

In 1964, Texaco Petroleum (TexPet), Texaco's Ecuadorian daughter company (100% owned), entered along with another company (Gulf) a consortium, which signed with Ecuador a concession agreement for the exploitation of oils in Amazonia. The concession was renewed several times with the introduction, in 1974, of a new partner to the consortium, CEPE (Corporacion Estatal Petrolera Ecuatoriana), a state-owned Ecuadorian company. CEPE became afterwards Petroecuador. Gulf and TexPet progressively sold their shares to Petroecuador. By 1992, Gulf and TexPet were no longer involved in the project.

It is not disputed that the consortium activities have resulted in a major environmental and health disaster¹: for years, toxic residues have been spilled in the forest, creating “pools” of toxic waste everywhere. Biodiversity has been severely damaged, and local populations have suffered extremely grave diseases such as cancer.

In 1995, a settlement agreement was concluded between TexPet and Ecuador. Although the document is not available to the public, its content may be partly reconstructed, based on references made to it in further proceedings.

The agreement states that “*the scope of the Environmental Remedial Work to be undertaken by TexPet to discharge all of its legal and contractual obligations and liability [for] Environmental Impact arising out of the Consortium's operations has been determined and agreed to by TexPet, the Government and Petroecuador as described in this Contract*”. It also states that “*TexPet agrees to undertake such Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual obligations and liability for Environmental Impact arising out of the Consortium's operations.*”²

In addition to accepting responsibility for performing the Environmental Remedial Work, TexPet agreed to fund certain projects for the benefit of the local communities. The overall costs for TexPet under the agreement seem to amount to 40 million dollars.

In 2001, Texaco and TexPet have been absorbed by Chevron of which they became daughter companies. The consequences of the merger, as to the transfer of Texaco's liabilities to Chevron, are legally disputed.

It is undisputed that until today, the part of Amazonia where the consortium operated is still suffering severe pollution.

¹ Judith Kimberling, *Amazon Crude*, Natural Resource Defense, 1991.

² See for instance, Chevron's memorandum, 2010 :

<https://www.investorstatelawguide.com/documents/documents/UN-0045-22%20-%20Chevron%20II%20-%20Claimants%20Memorial%20on%20the%20Merits.pdf>

B- How it evolved in courts

(N.B.: the number of proceedings in this case makes it impossible to propose a complete and exhaustive description. Only the main procedural steps are analyzed).

The inhabitants and indigenous peoples of the Amazonian forest, and more specifically those of the Lago Agrio Region, started one of the longest environmental judicial saga, involving multiple national fora and finally leading to investment arbitration. **The case shows how competition between national fora, as well as between national fora and arbitration, can be optimized in order to build an efficient litigation strategy.**

The peoples of Lago Agrio, victims of the environmental disaster, have been acting worldwide in order to seek for effective relief, whereas Chevron has been acting worldwide, and ultimately in an arbitration based on the USA-Ecuador BIT, to escape liability.

1) Lago Agrio peoples v. Texaco and Chevron

While the peoples of Lago Agrio started litigation in the USA, which could be seen as the natural forum to hear a claim against US companies, it is finally before the courts of Ecuador that they obtained relief.

Suing Texaco in the USA

U.S. District Court for the Southern District of New York - 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), May 30, 2001. Decision available at: <https://law.justia.com/cases/federal/district-courts/FSupp2/142/534/2346987/>

Appeal Court of NY, 2e Circuit, 16 Oct. 2002: *Aguinda v. Texaco. Inc.*, 303 F.3d 470 (2d Cir. 2002) ; *Jota v. Texaco. Inc.*, 157 F.3d 153, 2d Cir. 1998 (<https://casetext.com/case/aguinda-v-texaco-inc-4>)

The US Court denied its jurisdiction, based on the doctrine of *forum non conveniens*, with the blessing of the Ecuadorian Government, based on Texaco's commitment to submit to Ecuador's courts.

Suing Chevron in Ecuador

[All links to decisions refers to this website: <https://chevroninecuador.org/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team>]

- Ecuadorian Superior Court of Nueva Loja (Provincial court of Justice of Secumbios), 14 Feb. 2011: Decision rendered against ChevronTexaco, damages to be paid up to 17 billion dollars, of which more than 8 billion as punitive damages (see decision in English: <https://chevroninecuador.org/assets/docs/2012-01-03-appeal-decision-english.pdf>)

-Appeal Court Ecuador, 3 Jan. 2012: Judgment of the tribunal upheld

-National Court of Justice, 12 Nov. 2013 : Judgment upheld, although the final amount to be paid is reduced to 9,5 billion dollars

-Constitutional Court, 27 June 2018: Chevron' request for protection is rejected.

Going global: Suing Chevron before the International Criminal Court

In 2014, a complaint (<https://chevroninecuador.org/assets/docs/2014-icc-complaint.pdf>) was filed in by more than 30.000 Ecuadorian plaintiffs (mostly members of rainforest communities) against John Watson (Chevron's CEO) and Hewitt Pate (Chevron's Vice-president) based on alleged crimes against humanity constituting a violation of the Rome Statute.

But on the 16th of March 2016, the Prosecutor of the International Criminal Court informed the plaintiffs that there was not a basis, at this time, to prosecute. The alleged crimes were either falling outside of the Court's temporal jurisdiction, or outside of the Court's subject-matter jurisdiction.

2) Chevron strikes back

Chevron's defense consisted firstly of opposing by all means to the execution of the Ecuadorian judgment worldwide, before starting arbitration proceedings, based on the USA-Ecuador BIT, for the purpose of neutralizing the State judgment.

State courts proceedings to oppose the Ecuadorian judgment enforcement

Chevron has been multiplying proceedings over the world to oppose the enforcement of the Ecuadorian judgment in States where it has assets. It was the case, notably, in the USA, Canada Argentina and Brazil, where its claims opposing the execution have been granted.

▪ *In the USA*

Chevron Corporation v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 7 March 2011) : Chevron's motion is granted : Interim injunction prohibiting the Ecuadorian judgment execution (see https://casetext.com/case/chevron-corporation-v-donziger-2/?PHONE_NUMBER_GROUP=P for the full decision).

“All defendants other than Stratus Beltman and Maest (their names being listed for convenience on the attached Schedule) be and they hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in Maria Aguinday Otros v. Chevron Corporation, No. 002–2003, in the Provincial Court of Justice of Sucumbios, Ecuador (hereinafter the “Lago Agrio Case”), or any other judgment that hereafter may be rendered in the Lago Agrio Case by that court or by any other court in Ecuador in or by reason of the Lago Agrio Case (collectively, a “Judgment”), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment” (*Chevron Corporation v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011)).

But the injunction was overturned by US Court of Appeal for the 2nd Circuit, 26 Jan. 2012 [Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012)], (<https://chevrontinecuador.org/assets/docs/2012-01-26-2nd-circuit-final-ruling.pdf>): "[t]he [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets" (pp. 245-56).

The case for Chevron was then to establish before the USA Courts that the Ecuadorian judgment had resulted from fraud committed by Mr. Donziger and others on the Ecuadorian courts, in order to avoid execution of the judgement.

Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014)³: On the 4th of March 2014, Judge Kaplan of the District Court holds that the Ecuadorian judgment had resulted from fraud and orders Ecuador and the Ecuadorian parties not to enforce the 2013 Ecuadorian judgment on the US territory. (<https://casetext.com/case/chevron-corp-v-donziger-8>)

- *In Canada*

The execution of the Ecuadorian decision was although sought in Canada, where Chevron USA has a daughter company, Chevron Canada. Assets in Canada are the property of Chevron Canada, not Chevron USA.

In 2015, the Supreme Court of Canada (4 Sept. 2015) admitted the jurisdiction of Ontario Courts over Chevron Canada, although not ruling on the merits of a claim for execution of the Ecuadorian judgment against Chevron Canada (https://jsumundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-supreme-court-of-canada-judgment-friday-4th-september-2015#decision_1200)

In 2018, the Appeal Court of Ontario (Yaiguaje et al. v. Chevron, 23 May 2018, https://jsumundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-judgment-of-the-court-of-appeal-for-ontario-yaiguaje-et-al-v-chevron-wednesday-23rd-may-2018#decision_5181) ruled that Chevron Canada was a distinct entity from its parent company, Chevron USA, with the result that its assets could not be seized to pay the debts of the mother company. The decision was confirmed by the Supreme Court of Canada on the 4th of April 2019 (Yaiguaje et al. v. Chevron : application for leave to appeal dismissed). As an entity, distinct from its mother company, Chevron Canada should have been a party in the proceedings in Ecuador for the seizure of its assets to be authorized.

- *In Argentina*

In 2012 (7 Nov.), a judge froze the assets of Chevron's daughter company in Argentina, upon request from Ecuador. The purpose was to secure a possible execution of the Ecuadorian judgement in Argentina. The lower court decision was upheld by the Appeal Court in January 2013. But the Supreme Court of Argentina quashed and annulled the frozen order in an decision rendered on the 4th of June 2013 (https://jsumundi.com/en/document/decision/es-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-supreme-court-of-argentina-decision-on-the-enforcement-of-the-ecuadorian-judgment-tuesday-4th-june-2013#decision_1196). Like in Canada, the autonomy of the parent companies, combined to the

³ See also the decision and comment in French: H. Muir Watt, Horatia, "Conflits de juridictions", *Revue critique de droit international privé*, vol. 2, no. 2, 2014, pp. 397-403.

fact that Chevron Argentina had not been a party in the proceedings in Ecuador, founded the decision.

- *In Brazil*

On the 28th of November 2017, the Brazil Supreme Court of Justice ruled that “*the Ecuadorian Judgment may not be enforced against Chevron’s indirect subsidiary in Brazil because the subsidiary is a separate and distinct legal entity, is not the judgment debtor, and was not a party to the Ecuadorian proceedings*”. Moreover, the Court stated that the Ecuadorian judgment “*was issued in an irregular manner, especially under deplorable acts of corruption*” and constitutes “*an offense against the international public order and even to good customs.*”

Arbitration proceedings to “neutralize” the Ecuadorian judgment

- *Part I: TexPet and Chevron v. Ecuador*

The documents related to these arbitration proceedings are almost all fully accessible on <https://jsumundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-i-final-award-wednesday-31st-august-2011>

This first part of arbitration proceedings, which took place before the disputed Ecuadorian judgment on the merits was issued, will not be detailed. It is related to TexPet and Chevron claims that they had valid contractual claims against Ecuador pending before the Ecuadorian Courts, and that they were suffering undue delays both in the performance of the State contractual obligations and in the judicial proceedings. A final award (31 Aug. 2011) ordered Ecuador to pay up to 77 million dollars to the investors.

It should be noted that Ecuador brought claims before the Hague national courts, acting as judges of the seat of the arbitration, to challenge the arbitration, but it was unsuccessful (see Judgment of the Hague Court of Appeal, 18 June 2013, upheld by the Dutch Supreme Court, 26 Sept. 2014, decisions available at: https://jsumundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-i-judgment-of-the-hague-court-of-appeal-tuesday-18th-june-2013#decision_3796).

- *Part II : Chevron v. Ecuador*

In 2009, Chevron started arbitration proceedings, based on the USA-Ecuador BIT, before the Permanent Court of Arbitration in The Hague. Despite several attempts from Ecuador to stay arbitration proceedings, the case ended in 2018 with an award ordering Ecuador to annul the disputed judgment and to pay damages to Chevron.

The documents related to the arbitration proceedings are almost fully accessible on <https://www.italaw.com/cases/257>

Interim measures and Jurisdiction

Between 2011 and 2013, several interim awards were rendered. Regarding interim measures, the arbitral tribunal ordered Ecuador to take every step to stay the execution of any Ecuadorian judgement rendered against Chevron (2nd Interim award, 16 Fév. 2012, <https://jsumundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum->

[company-v-the-republic-of-ecuador-ii-second-interim-award-on-interim-measures-thursday-16th-february-2012#decision_1192](https://www.jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-second-interim-award-on-interim-measures-thursday-16th-february-2012#decision_1192)). Regarding jurisdiction and admissibility, the arbitral tribunal concluded it had jurisdiction over the matter regardless of previous proceedings (3rd Interim award, 27 Feb. 2012, https://www.jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-third-interim-award-on-jurisdiction-and-admissibility-monday-27th-february-2012#decision_294).

Final arbitration award, 30 Aug. 2018

Link to the award: <https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf>

The arbitral tribunal decided that the Ecuadorian judgment against Chevron was procured through egregious fraud and corruption by the plaintiffs' legal team, including bribery of the presiding judge and ghostwriting of the judgment.

Ecuador is said responsible for violating of the BIT, for denial of justice, and ordered to pay damages which will be calculated in a further award.

The tribunal finds the Ecuadorian judgment to be unenforceable under international law. It orders Ecuador “*to take immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgement*”. And it finds that “*no part of the said Lago Agrio Judgment should be recognized or enforced by any State with knowledge of the Respondant's said denial of justice*”.

3) Ecuador's unsuccessful attempts to stay arbitration proceedings

Requests to stay arbitration

Ecuador tried to stay these arbitration proceedings, first in the USA, then in the Netherlands.

▪ *USA*

Ecuador filled in a request to stay arbitration, based on the main argument that Chevron had waived its right to arbitrate and was estopped from arbitrating the claims brought before the arbitral tribunal. Several Ecuadorian citizens joined the cause, their claims being based on various estoppel theories.

US Court of appeal, 2nd Circuit, 17 March 2011: Motion denied <https://www.italaw.com/sites/default/files/case-documents/ita0168.pdf>

▪ *The Netherlands*

Various claims have been brought before the Dutch courts, as courts of the seat of the arbitration, seeking for the setting aside of the five interim awards both on interim measures and on jurisdiction.

The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company, District Court of The Hague, 20 Jan. 2016: Request dismissed (see the decision: <https://www.jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum->

[company-v-the-republic-of-ecuador-ii-judgment-of-the-district-court-of-the-hague-wednesday-20th-january-2016#decision_297](https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-judgment-of-the-district-court-of-the-hague-wednesday-20th-january-2016#decision_297)).

Confirmed by the Appeal Court of the Hague, 18 July 2017 (https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-judgment-of-the-appeal-court-of-the-hague-tuesday-18th-july-2017#decision_298) and the Dutch Supreme Court, 12 April 2019 (https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-judgment-of-the-dutch-supreme-court-friday-12th-april-2019#decision_5173)

Request to set aside the final award

District Court of The Hague, 16 sept. 2020: Rejects the request and upholds the 2018 arbitral award (in Dutch: https://jusmundi.com/en/document/decision/nl-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-ii-arrest-van-de-rechtbank-in-den-haag-wednesday-16th-september-2020#decision_12415)

II- Issued to be discussed

SUBSTANCE

- The confrontation between Chevron's investor rights and human rights (right to a healthy environment) : Was it taken into consideration at any stage? Could have it been considered in the arbitration phase?
- Has Chevron any international obligation to respect human rights?
- Compare with: *Alvarez y Marin v. Panama*, *Urbaser v. Argentina*

RELIEF

- Anti-arbitration injunctions: jurisdiction of courts, international validity
- Anti-enforcement injunctions: Orders by courts and/or by arbitral tribunals? Local or global?
- Enforcement of national courts decisions: Where to enforce? Substantial links needed? Incidence of the existence of national daughter companies.

JURISDICTION OF NATIONAL COURTS

- Jurisdiction: Multiple fora, *Forum non conveniens*
- Jurisdiction : Incidence of parties' settlements
- Jurisdiction of courts in relation to arbitration proceedings: seat of arbitration, other options...

INTERNATIONAL CRIMINAL COURT

- Can environmental crime fall within the jurisdiction of the Court?
- How has the situation evolved since 2016?

INVESTMENT ARBITRATION

- Status of the Permanent Court of Arbitration: arbitration institution v. arbitral tribunal
- Jurisdiction: How is the jurisdiction of the arbitral tribunal founded?
- Proceedings: What is the room left to third parties – Have Amicus curiae briefs been accepted? (here, the peoples of Lago Agrio and the civil society at large)?
- Award: The tribunal does not set aside the judgement. Why? What is the international status of an arbitration award? What is the scope of the award?