

Fossil Fuels & Climate Justice/ Energy

Keywords – title

- > Texaco-Chevron
- > Ecuador Amazon
- > Oil spill
- > Oil extraction
- > Texaco suit



© 2004 Lou Dematteis – Gas burning outside the town of Shushufindi

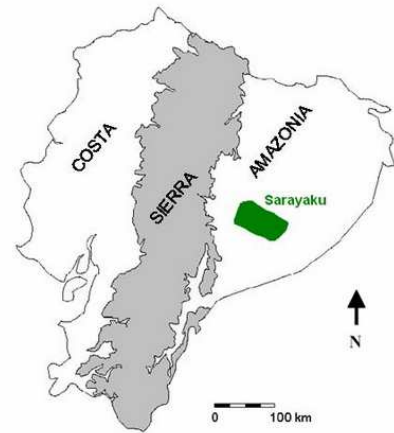
1. Factual background

Texaco-Gulf operated in Ecuador for almost thirty years, between 1964 and 1992, in the Ecuadorian Amazon region.¹ The Ecuadorian state's original concession to the Texaco-Gulf consortium included 1,500,000 hectares for petroleum exploration and exploitation.² However, on 4 August 1973, the state signed a new contract with the petroleum companies limiting the area of the concession to 491,355 ha.

During this period, Texaco drilled 339 wells in 15 petroleum fields and 627 toxic wastewater pits were abandoned, along with other elements of petroleum infrastructure. Moreover, obsolete and highly polluting technologies were used during these years of exploitation. The deforestation of 2,000,000 hectares of land is attributed to petroleum operations in the northern Ecuadorian Amazon, as well as massive water contamination with toxic substances and heavy metals. The wastes derived from petroleum operations and accidental crude oil spills have had a major effect on forests, rivers, and estuaries:

"It has also been estimated that the company deliberately dumped tons of toxic drilling and maintenance wastes and 19 billion gallons of produced wastes into the environment without treatment or monitoring, despite oil industry standards that suggest reinjecting the wastes back into the ground. In addition to routine deliberate discharges, accidental spills were common. During the time that Texaco operated the main trans-Ecuadorean pipeline, spills from that line alone sent an estimated 16.8 million gallons of crude into the environment. By comparison, the Exxon Valdez spilled 10.8 million gallons into the Prince William Sound in the largest oil spill in the history of the United States."³

Several environmental impact studies have yielded specific data⁴ which have



Map of Ecuador

http://www.sarayaku.com/mapa_sarayaku.jpg

been presented during the legal process in Ecuador. Some highlights of these include:

- Higher levels of child malnutrition (43%) compared to the population living in areas removed from the petroleum activities (21.5%), with an infant mortality rate of 143/1,000 births.
- The primary cause of death in the area is cancer, at 32% of total deaths, three times higher than Ecuador's national average of deaths by cancer (12%) and four to five times higher than in Orellana (7.9%) and Sucumbios (5.6%).
- A rate of spontaneous miscarriages 2.5 times higher in Ecuadorian Amazon communities exposed to petroleum contamination than in similar communities lacking such exposure.
- Widespread death of animals from drinking water contaminated with crude, falling in pits, or by asphyxiation caused by natural gas. The indigenous populations have also lost hunting opportunities, since forest animals are especially sensitive to contamination, noise, and deforestation.
- 75% of the population studied were found to use contaminated water, which causes numerous types of illness. The contaminated water was used for drinking, cooking, and bathing, not out of a lack of awareness of the hazards of the water, but due to a lack of other options.

¹ Fajardo, Pablo and de Heredia, María Guadalupe, "El Caso Texaco: un trabajo por la restitución de derechos colectivos y de la naturaleza", in ¿Estado constitucional de derechos? Informe sobre derechos humanos. Ecuador 2009; Universidad Andina Simón Bolívar, Sede Ecuador. Quito, Ediciones Abya-Yala, pp. 181-182.

² Concessionary contract published in the Official Registry (RO in Spanish) 186, 21 February 1964.

³ Hurtig, A.K. - San Sebastián, M., "Epidemiology vs. epidemiology: the case of oil exploitation in the Amazon basin of Ecuador", *International Journal of Epidemiology*, Vol. 34, Issue 5, October 2005, p. 1171.

⁴ Fajardo, Pablo and de Heredia, María Guadalupe, "El Caso Texaco: un trabajo por la restitución de derechos colectivos y de la naturaleza", in ¿Estado constitucional de derechos? Informe sobre derechos humanos. Ecuador 2009; Universidad Andina Simón Bolívar, Sede Ecuador. Ediciones Abya-Yala, pp. 188-191. All of this data is rejected by the company on its website:

<http://www.texaco.com/sitelets/ecuador/es/PlaintiffsMyths.aspx>. See also the critical commentary authored by a group made up of numerous scientists and published in a letter in the *Journal of Environmental and Occupational Health* Vol. 11/No 2, Apr/Jun 2005, entitled "Texaco and its Consultants"; <http://chevrontoxic.com/assets/docs/ijoeh-breilh.pdf>.



*Planeta Vital Web - Yasuni
National Park*

In addition to environmental impacts, numerous effects on human rights have also been identified in the form of sexual violence, discrimination, loss of lands, forced displacement as well as considerable effects on the culture itself⁵.

2. International legal framework

The only aspect of this case that has resorted to international norms is in relation to the protection of Texaco-Chevron's investments in Ecuador, regulated by the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment⁶ of 27 August 1993. In keeping with common practice, this treaty's Article III establishes that these investments will not be directly expropriated or nationalised, except when this is done in the public interest, in an equitable manner, and after prompt, adequate, and effective payment. Furthermore, Article II paragraph 7 establishes that: "Each party shall establish effective means by which to evaluate claims and respect the rights related to the investments, investment agreements, and investment authorisations." This treaty and this specific stipulation have been cited by both sides in the context of the judicial process for the case that is the subject of this report.

According to data provided by Ecuador's State Office of the Attorney General⁷, in 1964 Ecuador granted the company Texaco Petroleum the rights for petroleum exploration and production in Ecuador's Amazonian region, by means of a concessionary contract established with the local Texaco subsidiary (Texpet).

Texaco assigned half of its holdings in the concession to the company Ecuadorian Oil Gulf Company, thereby forming a consortium in which Texaco provided its services as an operator. In September of 1971, Ecuador created a government entity, the Ecuadorian State

Petroleum Corporation (CEPE), which would be replaced in 1989 by a new petroleum company owned by the nation of Ecuador, PetroEcuador. On 6 August 1973, Texaco and Gulf signed a new concessionary contract with Ecuador, through CEPE. This new contract replaced the 1964 concessionary contract. It included a substantial reduction in the area included in the concession, and would remain in effect until 1992. The contract also envisaged the progressive incorporation of CEPE into the consortium, until it had acquired holdings of 25%. At the beginning of 1974, CEPE purchased 12.5% of the shares held by Texaco and 12.5% of those held by Gulf. Later, in December of 1976, it purchased the remaining shares held by Gulf, thereby reaching shareholdings in the consortium of 62.5%. Texaco held the remaining 37.5% of the shares, although it continued as the operator of the consortium, meaning that at no point in time did either Gulf or CEPE operate in the area.

The 1973 contract required Texaco to provide a percentage of its crude oil production to the government, at a price set by the government, in order to help satisfy Ecuador's domestic consumption needs. Texaco was allowed to export the remainder of the petroleum it produced for sale at the significantly higher international market price. If Ecuador used any of the petroleum for purposes other than its own internal consumption, Texaco would have the right to receive compensation at the international market price. On 16 December 1977, the nation of Ecuador (through CEPE) and Texaco signed a supplemental agreement with similar terms to the 1973 contract.

In 1990, PetroEcuador assumed the role of operator of the consortium. The parties did not agree to extend the validity period of the 1973 contract, which had an expiration date set for 6 June 1992. Texaco, PetroEcuador, and the nation of Ecuador therefore began negotiations to resolve all of the issues related to the 1973 contract and to effect its termination. At that time, Texaco also began shutting down its operations in Ecuador. Between December 1991 and December 1993, Texaco filed seven

⁵ Carlos Martín Beristain, Darío Páez Rovira, and Itziar Fernández, "Las palabras de la Selva. Estudio psicosocial del impacto de las explotaciones petroleras de Texaco en las comunidades amazónicas de Ecuador"; Hegoa, Bilbao, 2009; available online at http://pdf2.hegoa.efaber.net/entry/content/442/Las_palabras_de_la_selva.pdf

⁶ Available at http://www.sice.oas.org/bits/usecu_e.asp.

⁷ www.pge.gob.ec/es/reglamentos.../250-informacion-ampliada-1.html



www.chevrontoxico.com - Members of the Indigenous Kichwa community of Rumpamba with Chevron's pollution.

⁸ Rural workers and indigenous people of five nationalities (Siona, Secoya, Cofán, Wuaorani and Kichwa), as well as two others that had already disappeared (Tetetes and Sansahuaris).

⁹ The ATCA was adopted in 1789. Its brief text contains the following: "1350. Alien's action for tort. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Act of 24 September 1789*, ch. 20, § 9 (b), 1 Stat. 79; 25 June 1948, ch 646, § 1, 62 Stat. 934; 28 U.S.C. § 1350 (2004).

¹⁰ In which Dr. Joel Filártiga, an opponent of the Stroessner regime in Paraguay, presented a claim for the 1976 kidnapping, torture, and killing of his son at the hands of Norberto Peña Irala, the police inspector general of the city of Asunción. In 1980, the Court of Appeals ruled that the ATCA was applicable to the case and that a torturer could be tried in the United States for acts committed in a foreign country; *Filártiga v. Peña-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980).

¹¹ A second suit with similar terms, representing more than twenty-five thousand residents of Peru, was presented by Peruvian citizens in 1994 (*Jota v. Texaco*).

¹² "[f]orum non conveniens is a discretionary device permitting a court in rare instances to "dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim. In assessing whether forum non conveniens dismissal is appropriate, courts engage in a two-step process: The first step is to determine if an adequate alternative forum exists. [...] If so, courts must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake. [...] The defendant has the burden to establish that an adequate alternative forum exists and then to show that the pertinent factors "tilt[] strongly in favor of trial in the foreign forum." [...]. "The claimant's choice of forum should rarely be disturbed." [...]" [omitted references] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir. 2000).

¹³ "[d]isputes over class membership, determination of individualised or common damages, and the need for large amounts of testimony with interpreters, perhaps often in local dialects, would make effective adjudication in New York problematic at best." *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994).

claims in the Ecuadorian courts for alleged non-compliance with the 1973 and 1977 contracts, mainly related to Ecuador's acquisition of a larger quantity of petroleum at the domestic market price than was actually used for its own consumption. In these claims, Texaco requested over 553 million dollars in compensation for damages.

In December of 2006, the Chevron Corporation and Texaco Petroleum Company agreed to go to arbitration against Ecuador for denial-of-justice violations related to the cited Article II of the bilateral investment treaty, since their seven claims had not been taken up before the Ecuadorian courts. Meanwhile, the suit against Texaco for contamination derived from the petroleum operations in the Ecuadorian Amazon had been presented in the U.S. federal courts.

On 1 December 2008, the arbitration tribunal was declared as authorised to consider Texaco's claims, and on 30 March 2010 it issued a partial binding award in favour of the claimant companies, determining that a denial of justice had occurred, ruling in favour of the object of the demands and requiring Ecuador to compensate the companies. On 22 December 2010, the tribunal awarded Chevron and the Texaco Petroleum Company approximately 700 million U.S. dollars. On 31 August 2011, after an appeal by Ecuador, this amount was reduced to 96 million dollars for reasons related to taxation.

On 7 July 2010, the nation of Ecuador brought an action for nullification of the various rulings before the The Hague District Court.

However, violation of the bilateral investment treaty was again alleged in other judicial proceedings in Ecuador, as will be discussed below.

3. Development of the Texaco-Chevron case before national courts

3.1 United States

As Texaco was no longer operating in Ecuador, a class-action suit representing

30,000 Ecuadorian citizens from the Oriente region⁸ (*Aguinda v. Texaco*) was presented before the New York federal courts in November 1993, under the aegis of the Alien Tort Claims Act (ATCA)⁹. Successful use of the ATCA to claim reparations derived from human rights violations began with the well-known Filártiga case in 1980.¹⁰ This decision opened up the U.S. federal courts for defending the rights recognised under international law.

The pleading alleged that Texaco's operations in the region between 1964 and 1992, through its subsidiary Texaco Petroleum Company ("Texpet"), had polluted and destroyed rivers and forests in an area of 14,000 square kilometres, and that these operations were directed and controlled by the parent company in the U.S.A.¹¹ The remedy sought was the funds necessary for redressing the contamination of the waters and the environment, for recovery of access to potable water, for the reintroduction of fish and game, and for the creation of funds for medical care and the development of tracking and oversight operations, among other aspects. However, the responsibility was not exclusively Texpet's. As described above, in 1974 the Republic of Ecuador acquired Gulf Oil's rights through its national petroleum company, PetroEcuador, and became a majority partner in the consortium in 1976. In any event, Texpet was the only ground operator until 30 June 1990, when PetroEcuador took over operations until 6 June 1992.

The case led to numerous rulings in the U.S. courts between 1992 and 2002, most of which were related to procedural issues. The cases were assigned to Judge Vincent Broderick. In 1993, Texaco presented a motion for inadmissibility in the *Aguinda* case based upon, among other arguments, *forum non conveniens*¹². In his 1994 decision, Judge Broderick indicated a favourable view regarding the applicability of *forum non conveniens*,¹³



although he reserved his decision regarding this issue as he considered it premature, ordering new investigations regarding the control of the parent Texaco company over the activities in Ecuador. The judge also considered that dismissal of the claim on the basis of *forum non conveniens* should be conditioned upon Texaco's acceptance of the jurisdiction of Ecuador. In a November 1996 decision, Judge Jed Rakoff, who replaced Broderick, accepted dismissal on these grounds, among others,¹⁴ although no reference was made to the acceptance of Ecuadorian jurisdiction by Texaco.¹⁵

In 1998, the Second Circuit Court of Appeals overturned this decision due partially to the fact that Texaco did not act as such in Ecuador, but rather through a subsidiary, and therefore could not be directly sued under Ecuadorian jurisdiction. Consequently, the Court of Appeals decided that the district court must confirm whether or not Texaco was prepared to submit to the Ecuadorian courts, in the event that the *forum non conveniens* exception was ruled to be applicable.¹⁶ After various procedural occurrences, the District Court and the Court of Appeals confirmed the decision to apply the doctrine of *forum non conveniens* in 2001 and 2002,¹⁷ and Texaco committed to accepting Ecuador's jurisdiction. Furthermore, any judicial decision handed down in Ecuador in the matter could be executed against Texaco in the U.S.

While this litigation was pending in the U.S., Texpet reached an agreement with its partner Petroecuador on 4 May 1995, where it agreed to perform environmental recovery work in exchange for release from Ecuador's claims. This agreement covered Texpet, Texaco, and other associated companies, and was considered to represent a response to all claims made by the government and Petroecuador in relation to the environmental impact derived from the consortium's operations. Soon thereafter, on 30 September 1998, Ecuador signed an

agreement with Texpet indicating that the environmental reparations work, which cost 40 million dollars to implement, had been completed, releasing the company Texpet and its subsidiaries, including its successors, from any further responsibility or claims.¹⁸

At the same time, an agreement between the government of Ecuador and the claimants allowed them to receive Ecuador's support for their claims, in exchange for renouncing any claims against the State of Ecuador or Petroecuador and its subsidiaries, and for assuming the costs of any possible action against these parties by Texaco.

3.2 Ecuador

In 2003, through the Amazon Defence Coalition, the victims filed a class action suit against Texaco (which meanwhile had been acquired by Chevron in 2001) in Lago Agrio, Ecuador. The complaint alleged serious environmental contamination in the locations where Texaco performed petroleum exploitation activities in the Napo concession, in an area of more than 500,000 hectares, thereby causing increased cancer rates and other serious illnesses in the area's residents. The claim was filed under the framework for civil actions contained in the civil code¹⁹ and the Environmental Management Law passed in 1999²⁰.

The claimants demanded from Chevron Texaco Corporation:

- “ 1. The elimination or removal of the contaminating elements that still threaten the environment and the health of the residents. The judgment must therefore provide for: a) The removal and adequate treatment and disposal of the waste and contaminating materials that still exist in the pools or pits opened by TEXACO and which have been simply capped, covered, or inadequately treated; b) The clean up of the

¹⁴ He also considered the fact that Ecuador and the company Petroecuador, in the consortium with Texaco, were not named as defendants. He later denied the request to appear in the case in support of the claimants, but without renouncing his sovereign immunity; *Aguinda v. Texaco, Inc.*, 175 F.R.D 50 (S.D.N.Y. 1997).

¹⁵ *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), 627-628.

¹⁶ *Jota v. Texaco Inc.*, 157 F. 3d 153 (2d Cir. 1998).

¹⁷ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Aguinda v. Texaco Inc.*, 303 F. 3d 470 (2d Cir. 2002).

¹⁸ Later, however, this agreement was disputed, in the context of criminal proceedings, and two of Texpet's attorneys were prosecuted in Ecuador for alleged involvement in the falsification of documents.

¹⁹ Articles 2241 and 2256 of the earlier text of the Civil Code, currently articles 2214 and 2229, respectively, according to the new Codification published in the Official Registry of 24 June 2005.

²⁰ Articles 41 and 43 of the Environmental Management Law; Law No. 37, published in Official Registry No. 245 of 30 July 1999. In particular, Article 43, related to civil actions states:

“Art. 43) Natural or legal persons or human groups, linked by a common interest and directly affected by the damaging acts or omissions may present actions for damages and losses and for damages caused to health or the environment, including to biodiversity and its constitutive elements, before the appropriate judge. Without prejudice to the other legal actions that may exist, the judge will order those responsible for the damages to pay compensation in favour of the collective group directly affected and for reparation of the damages and losses caused. Those responsible for the damages will also be ordered to pay ten percent (10%) of the value of the compensation in favour of the claimant. Without prejudice to said payments, and in the event that the community directly affected is unidentifiable or if the group consists of the entire community, the judge will order that the appropriate payment for civil reparations be made to the institution that must undertake the work of reparation in conformity with this Law. In any event, the judge will determine in the judgment, in conformity with the expert reports solicited, the amount required to rectify of the damages produced and the amount to be delivered to those who make up the community directly affected. The judge will also establish the natural or legal person who should receive the payment and perform the rectification work.

Claims for damages and losses originating in environmental impacts will be handled via the verbal process.”



© 2004 Lou Dematteis – A boy stands on an oil pipeline in the Amazonian jungle near the town of Lago Agrio

rivers, estuaries, lakes, wetlands, and natural and artificial watercourses, and the appropriate disposal of all of waste materials; c) The removal of all of the structural elements and machinery that remain on the ground surface at the closed, shut-down, or abandoned well stations and substations, as well as the ducts, pipes, inlets and other similar elements related to these wells; and, d) The general clean up of the land, plantations, crop areas, street, roads, and buildings where contaminating wastes produced or generated as a consequence of the operations directed by TEXACO are located, including the tanks for contaminating wastes built as part of the poorly executed environmental clean up work; 2. The repair of the environmental damages caused, in accordance with the stipulations of article 43 of the Environmental Management Law.”²¹

Chevron, meanwhile, presented a series of rebuttals. First and foremost, it denied the jurisdiction and authority of the Ecuadorian court. Chevron also alleged that the company was not the successor to Texaco and that the Environmental Management Law could not be applied retroactively. Finally, it cast doubt upon the legitimacy of the claimants for their lack of any connection with the Chevron Texaco Corporation and because the supposed ecological damages in the Amazon region, in the area that where the Petroecuador-Texaco consortium operated, which they claimed were unjustifiably attributed to the Texaco Petroleum Corporation, were legally subject to settlement agreements that had been signed and granted. Finally, the company stated that it had not caused any damage to the claimants, that it was not required to answer for third parties, and that it had no obligation to pay any reparations. The company also used the arguments that the claims made against it were not supported by any credible, scientifically based proof, and that in any event the period of prescription for the acts had expired.

For more than eight years now the proceedings have been plagued by procedural incidents as well as accusations and denials of illegal activities on both sides, in both the U.S.²² and in Ecuador.

For example, based upon accusations of corruption, supported by recordings made in secret by a Chevron manager, the original judge in Ecuador, Dr. Juan Nuñez, was removed from the case and a new judge assigned.

In 2008 an expert designated by the judge, the engineer Richard Cabrera, led a team that detected hydrocarbons at levels considered to be unsafe according to national standards in 44 percent of the water samples they analysed. They also found cadmium, barium, lead, and other heavy metals in the sludge in wastewater pits, and said that 80 percent of these would have to be cleaned up. The team also provided scientific studies that found cancer rates almost double Ecuador’s average, with the most common types being cancer of the uterus and leukaemia. Cabrera’s report recommended to the court that Chevron should pay an amount of 27 billion dollars in reparations. However, based upon the constant filing of motions to revoke Cabrera’s nomination and Chevron’s accusations of his collusion with the claimants, the judge decided to omit consideration of Richard Cabrera’s report in his judgment.

Furthermore, the documentary film *Crude* was released in 2009.²³ In response, Chevron presented a petition before the court in August 2010, requesting dismissal of the case based upon allegations of fraud committed by the claimants, after having obtained access through the U.S. courts to materials related to the documentary that were not used in the final version.

In September 2010, the claimants presented a new evaluation of damages and losses, of between 90 and 113 billion dollars. In this same month, the judge closed the period allowed for the submission of evidence for the trial.

Finally, on 14 February 2011, the President of the Provincial Court of

²¹ Ruling, Trial No. 2003-0002. Ruling judge: Nicolas Zambrano Lozada, Provincial Court of Justice of Sucumbios - Courtroom One - of the Provincial Court of Justice of Sucumbios, p. 2.

²² Chevron tried to challenge the open process in Ecuador in the U.S. courts, alleging that the nation of Ecuador had released the company from all liability. However, Ecuador had made it very clear in this release that the rights of third parties were preserved, and all of the U.S. courts were aware of this when Chevron tried to extend the release of liability to third-party claims.

²³ The documentary *Crude, The Real Price of Oil*, by Joe Berlinguer, has been shown at numerous independent film festivals and has received almost thirty awards; <http://www.crudethemovie.com/>



Justice of Sucumbíos announced a judgment in favour of the claimants. The ruling ordered Chevron to pay more than 8.6 billion dollars in reparations, which would be increased to 19 billion if Chevron did not promptly issue a public apology. In the ruling, the judge considered that the act of the merger between the Chevron subsidiary Keepep Inc and Texaco brought with it a transfer of Texaco's rights, but also its obligations, to Chevron. In regard to the alleged separation between Texaco and Texpet, its Ecuadorian affiliate, the judge concluded that:

"Texpet lacked not only administrative independence but financial independence as well, since it was Texaco Inc. that not only controlled the decisions, but that also authorised the funds that Texpet needed for the normal management of its activities. The admitted fact that Texpet is a fourth-level subsidiary company owned one-hundred per cent by a single owner, and that Texpet operated using funds from Texaco Inc.'s accounts, has demonstrated that a real separation of assets did not exist." (p.22)

The ruling considered as justified the need

"to entirely lift the corporate veil that separates Texaco Inc. and its fourth-level subsidiary, Texaco Petroleum Company (Texpet), since it has been proven that it was a company with capital much lower than its volume of its operations, which required constant authorisations and investments from the parent company to carry out its normal flow of commercial activity, that the executives were the same in both companies, and principally the manifest fact that failing to lift the corporate veil would imply a manifest injustice." (p.26)

In relation to the existence of settlements, the judgment stated the following:

"... the Presidency observes that said settlements were effective as stated in the inquiry, by which the government of Ecuador released

Texpet and its parent company, Texaco Inc., from all liability for environmental damages that may have originated in the concession. There is not a single piece of legal evidence in the files indicating that the government of Ecuador had planned this claim or any other against Texaco Inc. in relation to environmental damages in the Napo concession, nor that it had acted as a procedural party in this trial. Neither is there a legal basis to sustain that the existence of this settlement serves to deprive the claimants of their fundamental right to bring actions and petitions and for these to be resolved." (p.30)

Therefore, it is considered that the cited agreements cannot limit the individual rights protected within the Ecuadorian system, and in particular, by Article 42 of the Environmental Management Law, which states: "All natural or legal persons or human groups shall be able to be heard in criminal, civil or administrative processes which they may initiate for infractions of an environmental nature, even if their own rights have not been violated." For the judge:

"In this way, the legal basis upon which the collective right of the claimants to present this action has been established to the court's satisfaction; it is summarised in the fundamental substantive right, irrevocable and indispensable, of action and petition, and secondly, in the regulations of the civil code to support the right to request reparation for damages, and thirdly, in the active legitimation of the claimants to be heard in this process in defence of collective rights." (p.33)

In relation to applicable law, the judgment cites the validity of the Regulations for Hydrocarbons Exploration and Exploitation (Supreme Decree 1185, Official Registry No. 530 of 9 April 1974), which establishes that it is the operator's obligation to "take all measures and precautions required as the case may require in order to perform



its activities in a manner that prevents damages or hazards to persons, property, natural resources, and sites of archaeological, religious, or tourist interest” (art. 41). Moreover, the 1964 concessionary agreement itself expressly safeguards the rights of third parties and the company’s commitment to perform its operations without causing difficulties for navigation, or depriving the waters of their qualities of drinkability and purity, or obstructing fishing.

The judgment also considered the 1971 health code to be applicable to the case (Official Registry No. 158, 8 February 1971). It is applicable to public and private activities and includes, among others, regulations related to the prohibition of discharging substances that are hazardous to human health into the environment, including industrial wastes.

The judgment also noted:

“Similarly, the Law of Hydrocarbons published in the Official Registry No. 322 of 1 October 1971 is also applicable, which contains an express stipulation imposing the obligation to “adopt the measures necessary to protect flora and fauna and other natural resources”, and “to avoid contamination of waters, the atmosphere, and the soils” (see article 29, letters s and t), stipulations which are similar to those found in the later codification of the Law of Hydrocarbons, published in Official Registry No. 616 of 14 August 1974 (article 30, letters s and t), and in Official Record No. 711 of 15 November 1978, (article 31, letters s and t), being a constant in the hydrocarbon-related legislation in force in Ecuador.” (pp.63-64)

Finally, the Water Law is equally applicable (Official Registry of 30 May 1972), which in its article 22 prohibits “all contamination of waters that affects human health or the development of flora or fauna,” which is applicable to all use rights granted by means of administrative concessions.

The ruling applied these norms because the first barrel of petroleum from the

Ecuadorian Amazon was not exploited until 1972, and the region “until then was known to be an area free from all industry and human contamination, except for the ancestral activities of the peoples who lived there, in a manner such that we can [...] reasonably affirm that there is no doubt regarding the quality of purity of the waters up until that year” (p. 64).

In the judge’s view, the absence of regulations establishing environmental standards does not imply that there were no laws applicable to the case, such as those cited, although he did cede to Chevron that current standards could not be applied to operations carried out in previous years. In fact, the same judgment cites specific sanctions imposed on Texpet by the authorities as a consequence of their operations failing to comply with legal mandates.

In regard to civil liability, the judgment points out that, in agreement with Ecuadorian law, three requirements must be concurrently present: a damage or loss, either material or moral; demonstrable or pre-existing culpability; and a causal link between the two (p. 75). The damage must be clear and demonstrable, but may also relate to future damages, when there are elements of probability in relation to a prior damage. The judge stated that due to the volume of damages alleged, these must be subjected to analysis.

In terms of culpability, the judgment expresses that this covers both intentional liability, when the subject desires the action to occur, as well as culpability “when the agent causes damage unintentionally, but while operating with imprudence, negligence, or ignorance, as well as in violation of legal norms or regulations” (pp. 76-77). The judge also stated, applying earlier judicial decisions, that as activities entailing risk are involved, strict liability should be considered, “as the benefits that derive from such activity have as a counterbalance the rectification of damages caused to individuals or their property” (p. 83).

In terms of causality, and after analysing various perspectives, the judgment arrives at the consideration that “when a situation that involves a hazard has been



created, any damage that occurs should be understood as a causal result of this risk. For example, in this case, with the creation of a hazardous situation, as is an industrial area related to the petroleum industry with the impacts that it generates on its surroundings, the mere existence of damage should be sufficient to attribute a causal nexus between the damage and the hazard created" (p. 89), also stating that the company was fully aware of the risks that its activities incurred.

In consideration of the acts examined, the judge made use of a broad concept of environmental damage, characterised as "any and all loss, diminishment, detriment, harm, damage, caused or inflicted upon the environment or any of its natural or cultural components" (p. 94). Next, he extracts his own conclusions from the more than one hundred expert reports brought to the process:

"1. The operations at all of the petroleum fields operated by Texpet visited during the judicial inspections have used identical systems of operation, which allows us to assume that the operational practices did not vary from one site to another and that the results have been the same; 2. The contamination in the area of the concession affected 7,392,000 cubic metres (m³), a figure arrived at in consideration of the fact that we have 880 pools (verified through aerial photographs certified by the Military Geographical Institute) that have been documented throughout the inquiry and analysed in conjunction with Petroecuador's official documents as presented by the parties, and especially by the expert Gerardo Barros, and aggravated by the fact that the defendant has not presented historical records that record the number of pools, their criteria for construction, use, or abandonment, and that the pools are 60 x 40 metres in area, and that because of the possibility of filtration and spillage at least 5 metres around the pools must be remediated, and that the pools

are 2.40 metres deep [...]; 3. The surface waters used for human consumption have suffered a considerable impact from the dumping of at least 16 billion gallons of produced water during Texpet's operations; and 4. There are risks of filtration from the pools that could affect subterranean waters." (p.125)

The judge also recognised the non-existence of personalised medical reports that provided evidence for illnesses suffered by specific persons, but after analysing various epidemiological reports as well as a large quantity of testimony from the victims²⁴, he estimates that "the natural water sources in the concession area have been contaminated by the hydrocarbon activities of the defendant company, and because of the hazardous nature of the substances dumped and all of the means of possible exposure, this contamination puts the health and life of the people in general and the ecosystem at risk" (p. 147). Furthermore, the impact on the indigenous people is referred to specifically in these terms:

"It is considered that the only impact suffered by the indigenous people that can be considered as environmental damage is the cultural damage provoked by the forced displacement due primarily to the impact suffered by the lands and rivers and to the diminution of the species that were used for traditional hunting and fishing, which has obliged them to modify their customs..." (p. 154).

In terms of the relationship of causality with respect to the environmental damages, the judgment opines that the system implemented by Texpet for the treatment of its wastes "did not eliminate or manage the risks in an adequate or sufficient manner" and that "the system was designed to discharge the wastes into the environment in an economical manner and did not adequately manage the risk of damages, but externalised them" (pp. 165-166).

²⁴ See the study by Carlos Martín Beristain, Darío Páez Rovira, and Itziar Fernández, *Las palabras de la Selva. Estudio psicosocial del impacto de las explotaciones petroleras de Texaco en las comunidades amazónicas de Ecuador*; Hegoa, Bilbao, 2009; available online at: http://pdf2.hegoa.efaber.net/entry/content/442/Las_palabras_de_la_selva.pdf



In regard to damages to health, the judgment states that “there is reasonable and sufficient proof for both the existence of impacts on the public health, as well as the fact that this impact had a medically reasonable probability of being caused by the exposure of the persons who inhabited the concession area to the substances discharged by Texpet into the ecosystem” (p. 170).

In terms of the impact on the indigenous peoples, while not attributing all of the cultural changes they had undergone to the company's activities, the judge concluded that the company had contributed to these, with the environmental impacts being a “direct causal agent of certain changes forced upon the indigenous cultures that based their social system, their cultures, and their existence on a close relationship with nature” (p. 172).

Finally, the judgment concludes with the following statements:

“Therefore, after analysing the various types of evidence presented during the disclosure phase for the issues in this litigation, it appears clear to this court that, 1. Contamination attributable to the scheme of petroleum operations in the concession exists, since it was designed to take advantage of the dumping of effluents into the environment, in spite of the existence of other available alternative technologies; 2. The contamination reported can be considered as hazardous, because of the admitted possibility that the dumping of fluids such as those that Texaco has admitted to have dumped, under the name of Texpet, causes damage to agriculture and to the health of persons. This possibility of suffering damage, which in this case threatens indeterminate persons, should not cause those threatened by contingent damages to remain without defence, because the legislature has wisely anticipated (art. 2236 of the Civil Code) the exercise of the type of popular action that is being exercised [...]; 3. The

dumping of contaminants as described could have been avoided by the defendant with the use of other technology that was available at that time, but which was omitted from the operational scheme for the concession, which was under the full responsibility of the company Texpet, which operated as a fourth-level subsidiary of Texaco Inc., which in turn publically merged with Chevron, thereby creating Chevron Texaco, the defendant company in this trial, which would later change its name to Chevron Corp.” (p. 174)

When the time came to establish the amount of the reparations, the judge considered it appropriate to divide the various applicable measures of reparation among the damages in evidence, and considered that these measures could be of three types:

“(1) primary measures, focused upon restoration of the natural resources to their original state to the extent possible and as soon as possible; (2) compensatory measures, created in recognition that the principal measures could be delayed or may not be performed in their entirety, and the objective of which is to compensate for the fact that the primary reparation does not achieve full restitution of the natural resources and to compensate for the time that passes without reparation; and (3) measures for mitigation, designated to reduce and attenuate the effect of damages impossible to repair.” (pp. 177-178)

Based upon all of these considerations, in the judgment a total amount of reparation is established at 8.646 billion dollars, distributed in the following manner: 600 million for cleaning up subterranean waters; 5.396 billion for cleaning up contaminated soils, estimated to represent 7,392,000 cubic metres; 200 million (10 million per year for 20 years) for recuperation of the flora and fauna and the aquatic life native to the area; 150 million to create a system to bring potable water to the region; 1.4



billion to create a health system to address the health-related needs created by the public health problems; 100 million for the creation of a community reconstruction and ethnic reaffirmation program for the indigenous peoples; 800 million to provide funds for a health plan, which will have to include treatment for people suffering from cancer attributable to Texpet's operations in the concession area.

The judgment also imposes a punitive sanction equivalent to an additional 100% of the sum of the amounts for the reparation measures:

“... which is adequate for punitive and deterrent purposes for this type of compensation, at the same time having an example-making and dissuasive objective, providing recognition for the victims and ensuring the non-repetition of similar misconduct. However, considering that the defendant has already been ordered to repair the damages, and that this serves the same example-making and dissuasive ends, this civil punishment may be replaced, at the election of the defendant, by a public apology issued in the name of Chevron Corp., offered to those affected by Texpet's operations in Ecuador. This public recognition of the damages caused must be published within 15 days, in Ecuador's main written communications media as well as in the defendant's home country, on three different days, and in the event of compliance, will be considered as a symbolic means of moral reparation and recognition of the effects of its misconduct, while also ensuring non-repetition.” (pp. 185-186)

For purposes of implementing the terms of the judgment, a trust would have to be created on behalf of those affected and administered by the Amazon Defence Coalition, which would be the organisation responsible for the reparations. In agreement with the Environmental Management Law, an additional 10% was assigned to the total reparations established under the

concept of reparation of damages, for the Amazon Defence Coalition.

On 9 March 2011, Chevron presented a petition of appeal, requesting the annulment of all of the proceedings for lack of the court's jurisdiction, for lack of authority, for violations of the standards of due process, and for fraud in the proceedings. The company claimed, again, that Chevron never operated in Ecuador, that it never accepted the jurisdiction of the Ecuadorian courts, and that it is not the legal successor of Texaco, and that Texaco did not control the operations of Texpet.

For their part, the claimants also presented a petition of appeal on 17 February 2011. Although in agreement with the majority of the judgment, they considered the reparations awarded to be insufficient because of the omission of reparations for the economic impact on the persons affected by the contamination, as well as for the damages caused by the loss of territory suffered by the ethnic groups in the area.

On 3 January 2012, the Provincial Court of Sucumbíos (Ecuador) resolved both petitions of appeal, confirming the previous decision of the Court of Lago Agrio in all its aspects and thus condemning Chevron to pay more than 18,000 million dollar, as long as the company does not submit a public request for apologies. Chevron may file a petition for clarification of the judgment before the Court.

3.3 Further developments

In addition to submitting a petition to appeal in Ecuador and requesting that the authorities there open criminal proceedings against the lawyers for the victims and against the judge who issued the decision, Chevron opened up two other parallel legal avenues with the aim of blocking execution of the judgment.

The first of these would be dismissed in the United States. On 1 February 2010, Chevron filed a civil complaint before the U.S. District Court, Southern District of New York, under the framework of the

²⁵ 18 U.S.C. § 1962.



© 2005 Kayana Szymczak – Old Texaco oil barrels left on the side of the Aguarico River, near Lago Agrio

²⁶ Previously, the same Judge Kaplan had ordered, based on a petition from Chevron, delivery of the unedited shots in the final montage of the documentary *Crude* mentioned above. This was to look for an alleged fraud in the information provided in the documentary, allegedly orchestrated by one of the Ecuadorian claimants' attorneys in the U.S., Steven Donziger. The memorandum in question was among the documents provided by Mr. Donziger.

²⁷ "All defendants [...] 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 Aguinda y 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. [...] The Court is mindful of the parties' interest in having the enforceability and recognizability of the judgment outside of Ecuador determined without unnecessary delay." US District Court SDNY *Chevron Corp. v. Donziger*, F. Supp. 2d, 11 Civ. 0691(LAK), 2011 WL 778052 (S.D.N.Y. Mar. 7, 2011).

²⁸ Order denying RICO defendants Motion for Relief; US District Court SDNY, *Chevron Corporation, Claimant, -against- 11 Civ. 0691 (LAK) Steven Donziger, et al., Defendants; Memorandum and Order*, April 18, 2011.

²⁹ *Chevron v. Salazar*, 11 Civ. 3718 (Lak), NYLJ 1202513188076, at *1 (SDNY, decided August 31, 2011).

RICO (Racketeer Influenced and Corrupt Organisations) Law²⁵, the special U.S. federal law created to combat organised crime. Chevron's new thesis was that the claimants and their legal representatives were part of a criminal organisation with the business of extorting the company in the amount of 113 billion dollars, by means of Ecuador's legal procedures. Chevron obtained an unusual temporary restraining order from the federal judge, Lewis A. Kaplan, on 8 February 2011, a few days before the judgment in Lago Agrio was issued, which blocked the Ecuadorian claimants and their attorneys from requesting execution outside of Ecuador of the judgment issued in Ecuador for 28 days. Judge Kaplan based his decision on the contents of a memorandum from the law firm that predicted the presentation of motions of execution for the judgment in various jurisdictions, directed towards seizing the company's assets, in order to force the company to negotiate compliance with the judgment.²⁶ The judge considered that such a strategy of multiple demands was meant to exert pressure beyond the limits of the law, and that it would cause irreparable damage to the oil company. Another factor he considered was that "the Ecuadorian courts do not generally offer an impartial trial, and they have not done so in this case." Finally, the judge alluded to the public interest. He stated that Chevron is "a company with great importance for our economy," which employs thousands of people. The order was later extended for eight additional days in another decision issued on 7 March 2011.²⁷ On 18 April 2011, the order was confirmed, despite a motion for a stay.²⁸

On 31 August 2011, the judge again confirmed his perspective based upon the argument that the commitment made by Texaco at the time to accept the jurisdiction and the judgment issued in Ecuador is not linked to Chevron, which for such effects is a completely different

company.²⁹

However, this decision was revoked on appeal on 19 September 2011. During the hearings, the Second Circuit Court of Appeals judges pointed out the paradox that while the company claimed in the first phase of the proceedings that the U.S. courts lacked authority, in order to bring the trial to Ecuador, it now invoked the alleged lack of guarantees of the Ecuadorian judicial system to ask for the protection of the U.S. courts. For the moment, this decision removed the impossibility of executing the judgment in the United States, although the representatives of the Ecuadorian victims had committed themselves not to attempt to do so until the appeals phase had concluded in Ecuador.

On 8 January 2012 Judge Lewis Kaplan of the Southern District Court of New York, refused to block the enforcement of the judgment of a court in Ecuador, which condemned the U.S. oil company Chevron to pay compensation for environmental damage in the Amazon.

The second legal avenue Chevron used was raised in The Hague. In September of 2009, Chevron presented a demand for international arbitration before the Permanent Court of Arbitration in The Hague, under the regulations of the United Nations Commission on International Trade Law,³⁰ alleging that the government of Ecuador violated the bilateral investment treaty between the United States and Ecuador for two reasons: the period of validity of the agreement between Texpet and Ecuador in terms of the reparation of damages, and Ecuador's interference in the independence of Ecuadorian judicial authority. For its part, the government of Ecuador and the claimants in the Ecuadorian lawsuit presented a demand in the U.S. federal courts, with the objective of paralysing the arbitration to the extent that it could affect their rights within the context of the process open in Ecuador, and especially the conditions under which the *forum non conveniens*

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³⁰ “Rules of Arbitration of the United Nations Commission on International Trade Law”, Resolution 31/98, approved by the General Assembly on 15 December 1976. These were revised in 2010, and the revision entered into force on 15 August 2010; “2010 Revision of the Rules of Arbitration of the UNCITL”, Resolution 65/22, approved by the General Assembly on 6 December 2010; available at <http://www.uncitral.org/pdf/spanish/texts/arbitration/arb-rules-revised/arb-rules-revised-s.pdf>.

³¹ See *Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958, 10 Civ. 316, 2010 WL 1028349 (S.D.N.Y. 16 March 2010).

³² *Republic of Ecuador v. Chevron Corp.*, 638 F. 3d 384 (2d Cir. 2011).

³³ PCA Case No. 2009-23. In the matter of Arbitration before a Tribunal constituted in accordance with the Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investments, signed 27 August 1993 (the “treaty”) and the UNICTRAL Arbitration Rules 1976 between - 1. Chevron Corporation (U.S.A.) 2. Texaco Petroleum Company (U.S.A.) The Claimants - and - the Republic of Ecuador The Respondent. Order for Interim Measures dated 9 February 2011. The Arbitration Tribunal: Dr. Horacio A. Grigera Naón; Professor Vaughan Lowe, QC; V.V. Veeder QC (President).

³⁴ <http://noticias.terra.es/2011/economia/0526/actualidad/accionistas-piden-a-chevron-que-cierre-el-litigio-ecuatoriano.aspx>

was used in the original U.S. litigation. On 17 March 2010, U.S. District Court, Southern District of New York (Judge Leonard B. Sand) ruled that Chevron could continue requesting international arbitration in this case.³¹ The claimants and the government of Ecuador appealed this decision, but the court once again ruled in favour of Chevron on 17 March 2011.³²

On 9 February 2011, again just a few days before the judgement in Lago Agrio, the Arbitration Court adopted interim measures in favour of Chevron, ordering Ecuador to suspend the execution of any judgment against the company in relation to the Lago Agrio case, either within or outside of Ecuador,³³ and to wait for a ruling regarding the merits of the claim.

4. The voice of the shareholders

Meanwhile, and in accordance with what is fortunately becoming an increasingly common practice, Chevron’s top executives witnessed how the case came up as a matter of public debate during the company’s shareholder meeting held in California on 25 May 2011. A group of shareholders, representing twenty investment funds, requested that Chevron’s management enter into an agreement with the indigenous communities and finally put an end to the litigation. According to the jointly signed letter, “Chevron has shown poor judgement and has caused investors to wonder whether our company’s leaders can adequately manage the variety of environmental challenges and risks that they face.” In the words of Thomas P. DiNapoli, representative of the State of New York pension fund, “It is time for Chevron to face reality. The effects of this horrible, uncontrolled contamination of the Amazon forest are still being felt today.”³⁴

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