

Synopsis: Opinion and Order Granting Chevron’s Motion for a Preliminary Injunction, Southern District of New York, *Chevron Corp. v. Donziger et al.*, 11 Civ. 0691, Dkt. 181, March 7, 2011, Lewis A. Kaplan, U.S.D.J.

On March 7, 2011, a federal judge in the United States District Court for the Southern District of New York (the “U.S. court”) enjoined the plaintiffs in an environmental lawsuit against Chevron Corporation pending in Lago Agrio, Ecuador from enforcing any judgment obtained in that court. The U.S. court entered the injunction after Chevron filed a declaratory judgment action in New York—prior to the issuance of any (let alone a *final*) judgment in Ecuador—seeking a declaration of non-recognition, notwithstanding the fact that the Ecuadorian plaintiffs had not even expressed an intention to ever attempt to enforce the judgment in New York. The injunction purports to bar the Ecuadorian plaintiffs and their counsel from enforcing any judgment not only in New York and throughout the United States, but indeed, in every jurisdiction in *the world*. If allowed to stand as precedent, the U.S. court’s order will have a profound impact on the framework for recognition and enforcement of judgments around the world. Every nation—not just Ecuador—has reason to be concerned with the opinion on multiple levels. Not only does it invite forum-shopping, procedural gamesmanship, and wasted litigation, but it effectively declares that no country other than the United States should be trusted to determine whether a judgment rendered outside its borders should be enforced or not. The opinion stands for the proposition that if a single American judge does not find a foreign judgment to be enforceable, no other court should even be given the opportunity to decide this issue for itself. The opinion flies in the face of longstanding and important principles of international comity, will undoubtedly discourage courts of other nations—particularly those concerned with the principle of reciprocal respect—from enforcing U.S. judgments, and has the potential to encroach upon various judgment recognition and enforcement treaties.

Below is a summary of the relevant events leading up to this unprecedented and overreaching order, and a synopsis of the U.S. court’s order granting the injunction.

Historical Background

The many twists and turns of the litigation between the Ecuadorian Amazon communities and Chevron Corporation are impossible to capture here, and to attempt do so would defeat the purpose of this limited summary. Thus, below is only the most essential procedural history leading up to the U.S. court’s grant to Chevron of a worldwide preliminary injunction against enforcement of a foreign judgment.

The Underlying Environmental Crimes, 1964-1990: Between 1964 and 1990, Chevron’s predecessor, Texaco, owned an interest in and was the sole operator of an oil concession covering a large swath of the Ecuadorian Amazon rainforest, in the Oriente (eastern) region of Ecuador. During that time period, Texaco dumped approximately 16 billion gallons of toxic “production water” into the surface waters of the Amazon, relied upon by the indigenous Amazon communities for drinking, bathing, and virtually every other facet of their way of life. Texaco also carved hundreds of unlined pits into the jungle floor and filled them with toxic sludge from the drilling and extraction process. Internal Texaco memoranda reveal that Texaco adopted a policy of not documenting oil spills unless they had to (because the public independently found about them), and of destroying records of previous spills. Internal Texaco memoranda also reveal that the company

expressly eschewed modern environmental practices—such as lining its waste pits—because such practices would be harmful to its bottom line. The basic underlying facts relating to Texaco’s polluting practices are largely undisputed.

The New York Lawsuit, 1993-2002: In 1993, one year after Texaco relinquished its share of the concession, the Amazon communities sued Texaco in its home jurisdiction—the United States District Court for the Southern District of New York—seeking redress for the damages inflicted by Texaco’s substandard operations. For nine years, from 1993 to 2002, Texaco—later coming to refer to itself as ChevronTexaco—fought to have the case dismissed in favor of moving it to Ecuador, claiming that the country was a more proper forum for the dispute. However, discovery obtained in related litigation reveals Chevron’s true reason for its desire to litigate in Ecuador rather than its own backyard: at the time, Chevron had a stranglehold on the Ecuadorian government, and was working behind the scenes to assure that once the case was re-filed in Ecuador, it would be promptly quashed. The U.S. courts ultimately granted Chevron its dismissal in 2002, but required Chevron to promise (1) that it would not challenge the jurisdiction of the Ecuadorian court; and (2) that it would satisfy any judgment rendered by that court subject only to its right to challenge any future effort to enforce an Ecuadorian court’s judgment on the grounds enumerated in New York’s judgment recognition statute. While the New York action was pending, Chevron pulled its assets from Ecuador, ensuring that the Ecuadorian Plaintiffs would be unable to enforce and collect any judgment in that country.

The Ecuadorian Litigation, 2003-Present: The case was re-filed in Ecuador in 2003. During the evidentiary phase of the trial, hundreds of former Texaco well sites were inspected by the parties and by experts appointed by the court, and hundreds of expert reports were submitted. The inspections revealed significant contamination by various toxic chemicals at every site. Often, Chevron’s own experts would report contamination exceeding Ecuadorian standards. Such exceedances were found at sites only operated by Texaco (and not subsequently by Ecuador’s state-owned oil company), and even at sites that Texaco purportedly “remediated” in the early 1990s as part of its gambit to derail the New York litigation by performing a sham, woefully inadequate cleanup at a limited number of sites. The record in the case consists of approximately 200,000 pages, containing reams of evidence not only generated during the site inspections, but also related to Texaco’s practices and Chevron’s legal defenses—including its defense that it structured its merger with Texaco in such a way as to avoid the continuation of liability. The case was hotly contested for approximately eight years in Ecuador, during which time Chevron engaged in various nefarious tactics (beyond the scope of this writing) and tried mightily to derail the litigation. Chevron has alleged that the Ecuadorian plaintiffs’ representatives also engaged in a series of fraudulent conduct vis à vis the case in Ecuador. Most notably, Chevron has asserted that the plaintiffs’ involvement with a court-appointed expert charged with submitting a report on the valuation of damages was improper, and has sought dismissal of the case on that basis. Chevron has also used a series of frustrated, flippant comments made by one of the Ecuadorian plaintiffs’ U.S.-based lawyers, captured on subpoenaed outtakes from the 2009 documentary film entitled *Crude: The Real Price of Oil*, to cast doubt on the Ecuadorian court and on the validity of the plaintiffs’ case.

The Ecuadorian Judgment

On February 14, 2011, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Provincial Court of Justice of Sucumbíos, rendered judgment in the form of a comprehensive, 188-page opinion. Judge Zambrano found Chevron liable for approximately \$8.6 billion in damages, most of it

(roughly \$5.4 billion) based on the projected cost of soil remediation, and also accounting for groundwater remediation, the delivery of potable water to the affected region, the need for enhanced healthcare in the region, and the damage to the Amazon communities' way of life and cultural traditions engendered by the decimation of the land and water on which they depend. The Ecuadorian court also assessed punitive damages against Chevron in an amount equivalent to the remedial damages, although the company was presented with—and predictably, squandered—an opportunity to avoid this penalty. Here, the most salient aspects of the Ecuadorian court's detailed opinion are summarized.

Culpability of Texaco's Conduct: The court observed that the essence of Texaco's conduct itself was not really in dispute. For example, the court noted that Chevron lawyer Rodrigo Pérez Pallares had admitted in a letter to a popular Ecuadorian magazine that Texaco dumped approximately 16 billion gallons of "production water"—a liquid contaminated with PTEX, TPH, and polycyclic hydrocarbons—directly into the surface waters between 1972 and 1990. It also was undisputed that Texaco had dumped oil waste into unlined pits that were merely shallow excavations in the ground—Chevron's experts simply argued that this was "common practice" for the times. The court, however, took note of a book entered into the record entitled "Primer on Oil and Gas Production," published by the American Oil Institute in 1962, which demonstrated that the industry as a whole was aware that "[e]xtreme care should be employed to handle and disposition of the produced water not only because of the possible damage to agriculture, but also because of the possibility of contaminating lakes and rivers that hold drinking water as well as water for irrigation." Indeed, the court noted that a Texaco official had contributed to the relevant portion of that very same industry publication. Further, the record evidence demonstrated that Texaco itself held patents for a production water "re injection" technology as early as 1974. The court concluded that Texaco had the means, but not the will, to employ safer but perhaps more expensive methods. The court also cited to correspondence between Texaco officials demonstrating that they were aware of the problems with unlined pits, but decided to continue using them because they were "efficient and profitable," and the alternative would be too expensive. The court found that Texaco's practices violated multiple provisions of Ecuadorian law, including laws and regulations dealing with human health, protection of the waterways, and the management of hydrocarbons. In sum, the court concluded that Texaco's "system was designed to discharge waste to the environment in a cost-effective way, but did not correctly address the risks of damages." The court further opined that the damage was "not only foreseeable, but also avoidable."

Assessment of Damages: The court observed the vast quantities of scientific evidence in the record resulting from the judicial site inspection process and the sampling performed by court-appointed experts. Experts appointed by Chevron had taken 2,371 samples yielding 50,939 separate results; experts appointed by the Plaintiffs had taken 466 samples yielding 6,239 results; and experts appointed by the court had taken 178 samples yielding 2,166 results. In light of the similarity of the results across the board at all 54 judicial inspection sites (and considering that Texaco's sites were all operated in ostensibly the same manner), the court concluded that it was reasonable to extrapolate—i.e., to assume that sites not sampled would also yield similar results—notwithstanding Chevron's assertion that the parties would "need to inspect every hectare in the Concession." The court was particularly troubled by the fact that even samples taken by Chevron's experts in some cases revealed "alarming" levels of carcinogenic or otherwise highly toxic substances like benzene, toluene, mercury, lead, cadmium, barium. Based on the record evidence and the economic criteria largely proposed by expert Gerardo Barros, a court-appointed expert sponsored by *Chevron*, the court concluded that an award of approximately \$5.4 billion and \$600 million would be appropriate

for the remediation of soil and groundwater contamination, respectively. With respect to the restoration of native flora and fauna, the court awarded \$200 million. The court also found that an award of \$150 million dollars would be sufficient to deliver potable water to the residents of the Concession area. Upon engaging in extensive summary of the record evidence in connection with the health effects of the contamination, the court found that there was a “reasonable medical probability” that the health problems experienced by persons in the Concession area had been caused by oil-related contamination. The court awarded \$2.2 billion reflective of the need to augment the healthcare system to respond to health issues—including increased incidence of cancer—engendered by exposure to oil-related contamination. Moreover, recognizing that conduct such as that engaged in by Texaco can have “particularly severe consequences in cases that affect the ecosystem where groups whose cultural integrity is strongly associated with the health of the territory live, as the environmental degradation can potentially threaten the very existence of the group,” the court awarded \$100 million to execute community rebuilding and ethnic reaffirmation programs within the affected communities. Finally, in consideration of the grave and willing nature of Chevron’s offenses and the shocking nature of its procedural misconduct (the considerable scope of which exceeds the limited purpose of this document), the court assessed punitive damages in the amount of 100% of the remedial damages. Nonetheless, Chevron was given the option to avoid punitive damages altogether by issuing a public apology to the Plaintiffs, “a symbolic measure of moral redress” recognized by the inter-American Court of Human Rights. As noted, Chevron did not accept this opportunity to avoid punitive damages within the time period allotted by the court.

Chevron’s Legal Defenses: As noted, because the facts and incidents surrounding Texaco’s contamination of the Ecuadorian Amazon were largely undisputed in the case, Chevron relied on a series of legal defenses to defeat liability. Those defenses were each given substantial consideration by the court, but ultimately were rejected. By way of example, the court rejected Chevron’s argument that it cannot be held liable for the actions of Texaco. The court identified the vast amount of evidence in the record demonstrating that Chevron acquired the liabilities of Texaco. This evidence included Chevron’s numerous public statements touting the “strengthened capacity of the new company” and the value-added for shareholders by way of the merger. The court was troubled by Chevron’s attempt to reap all possible benefits from its combination with Texaco, while simultaneously avoiding any of its target’s obligations. The court looked to United States corporate veil-piercing jurisprudence, which has become a model for Ecuadorian law on that issue, and observed that “allowing the right of the victims...to disappear because of mere formalities within the merger would be considered by the U.S. courts as ‘manifest injustice.’” The court also rejected Chevron’s argument that the plaintiffs’ claims were extinguished by a release of liability granted to Texaco by the Ecuadorian government after a limited (and fraudulent) remediation was performed in the mid-1990s. The court observed that the release agreements held out by Chevron as precluding the claims in this case unambiguously contemplate Texaco’s release from claims brought by the Republic of Ecuador or the state-owned oil company, Petroecuador. Furthermore, even if the release were not so clearly limited on its face to potential claims by the *government*, the court noted that the release still could not correctly be construed as precluding claims by Ecuadorian citizens. The court found that the peoples’ right to bring a claim is fundamental and inviolate, citing the Ecuadorian Constitution as well as multiple human rights conventions. The court observed that if the agreements between the government and Texaco actually did purport to release claims held by non-parties to the agreements (i.e., the residents of the region), the contracts would be illegal (and presumably unenforceable). The court was also unmoved by Chevron’s propensity to point the finger of blame at Petroecuador. In response to Chevron’s repeated assertions that Petroecuador caused contamination, the court noted that “the obligation to make reparation imposed on...[a

tortfeasor]...does not extinguish because of new damages [attributable] to third parties.” While the court suggested that Petroecuador may be “presumably liable for new damages,” the court would not factor in Petroecuador’s liability into *this* proceeding, in light of the company’s non-party status, without prejudice to the right of any party to seek redress from Petroecuador in another proceeding. Further marginalizing the import of Chevron’s attempt to blame Petroecuador is the court’s observation that contamination appears to be fairly consistent no matter whether a particular site was abandoned after Texaco ceased operation, or whether Petroecuador subsequently operated at the site.

The Parties’ Mutual Allegations of Fraud and Manipulation: Although Chevron’s willful contamination of the Ecuadorian Amazon lies at the heart of this case, Chevron has—particularly of late—shifted the public discourse to ancillary claims of litigation misconduct on the part of the parties’ representatives. The task has been an easy one—the public is obviously inclined to be more interested in sordid allegations of manipulation involving U.S. players than it is with environmental crimes that occurred on foreign soil many years ago. Judge Zambrano, however, was keenly aware that these allegations are tangential at best, and dealt with them pragmatically and appropriately. For instance, the court acknowledged that Chevron had filed a “huge number” of motions attacking the aforementioned damages expert report on every conceivable basis. The court stated that it had viewed and scrutinized the documents, emails, and video clips submitted by Chevron in relation to the report and the expert’s alleged contacts with the Plaintiffs’ team. The court noted that Chevron’s evidence regarding the report could not be deemed valid “proof” under Ecuadorian law (submitted, as it was, outside the proof period), and further observed the impropriety of Chevron’s demands that the trial be suspended unless and until Chevron deemed its foreign evidence-gathering process complete—a transparent attempt to further delay an already protracted case. Nonetheless, the court recognized the seriousness of Chevron’s allegations concerning the report, and—accepting as true Chevron’s allegations that it needed more time to gather evidence—that it might be unfair to render a judgment based on the report. Accordingly, the court granted Chevron’s petition to set aside the report. As for the array of misconduct alleged by both parties on the part of the other’s representatives, the court—while finding some of it troubling—ultimately found that none of it impacted the merits of the case.

A more detailed summary of the Ecuadorian court’s opinion is available on request. Chevron has filed an appeal in Ecuador, which is currently under consideration by a panel of three judges who will review the decision *de novo*.

Chevron’s Declaratory Judgment Suit

The Complaint: On the eve of judgment in the Ecuadorian litigation, Chevron launched its latest stratagem to derail the litigation and filed a lawsuit in the Southern District of New York making scurrilous and malicious allegations against the Ecuadorian plaintiffs, their counsel, their environmental consultants, their press liaison, and the entire Ecuadorian judiciary. Chevron claimed that the Ecuadorian suit against it is simply a racketeering operation, and that the Ecuadorian plaintiffs and those assisting them are extortionists. Chevron seeks a declaratory judgment from the U.S. court that *any* judgment issued by the Ecuadorian court (the complaint was filed, of course, before there was an actual judgment to evaluate) is unenforceable *anywhere in the world*. Chevron asked the U.S. court to second-guess the thorough and well-reasoned decision of the Ecuadorian court—that Chevron agreed to litigate in—and declare that the judgment was obtained fraudulently. Chevron also sought a declaration that the entire Ecuadorian judicial system fails to provide due

process or impartial tribunals. In conjunction with its complaint, Chevron sought an order barring the Amazon communities, their counsel, and others assisting them from taking any steps to enforce a judgment anywhere while Chevron's action is pending before the U.S. court. As detailed below, the U.S. court obliged Chevron's outrageous requests.

The Preliminary Injunction: On February 3, 2011, the U.S. court issued an Order to Show Cause why the Amazon communities and their representatives should not be restrained and enjoined from enforcing any Ecuadorian judgment. The court opined that it would be proper for the Ecuadorian plaintiffs—many of whom are indigenous people of the Amazon rainforest—to be served via email to their counsel in Ecuador. (Op. at 89). After affording the Amazon communities and their representatives two days to digest and respond to Chevron's nearly 7,000-page application for injunctive relief, the court issued a temporary restraining order on February 8, 2011. The court then afforded the Ecuadorian plaintiffs approximately three business days to oppose the extension of the temporary restraining order for the duration of the action. The court granted Chevron this preliminary injunction on March 7, 2011. Research suggests that no court has ever allowed a prospective foreign judgment debtor to file a preemptive declaratory judgment claim in the United States seeking to block enforcement of the foreign judgment across the entire world. Yet this is precisely what the U.S. court has done for Chevron.

If not overturned on appeal, the U.S. court's opinion essentially would establish the United States as the world's judgment enforcement police, empowering American judgment debtors to run to the U.S.—even before the foreign judgment is rendered and even where there is no indication that the judgment creditor would enforce in the U.S.—and preempt enforcement worldwide, usurping every nation's ability to apply their own recognition and enforcement frameworks, including those affected by international treaties. The clear implication of the court's opinion is that it must protect Chevron from not-yet-instituted enforcement efforts because any foreign court in which the Ecuadorian Plaintiffs seek to enforce will not provide Chevron with due process.

The perversity of this outcome is exaggerated in this instance, where Chevron once obtained a dismissal of the case from the Southern District of New York by submitting numerous affidavits praising the fairness and efficacy of the Ecuadorian judiciary. Now, Chevron asks that same court to declare that an Ecuadorian judgment may not be enforced in the courts of *any* nation in the world.

Below, are some of the most notable and troubling aspects of the court's issuance of a preliminary injunction under these circumstances—aside from the overarching concern that it enjoins indigenous Ecuadorians from exercising legal rights obtained after eight long, hard-fought years of litigation in Ecuador, to say nothing of the preceding nine-year struggle in New York:

- To enable it to issue a sweeping injunction, the court first needed to find that it had jurisdiction over Ecuadorian citizens, most of who obviously had never been to New York and certainly conduct no business there. To reach that end, the court found that the indigenous persons maintained the “functional equivalent” of a New York office and was therefore subject to jurisdiction because one of their lawyers was based in New York. (Op. at 92). The court also reasoned that by virtue of previously bringing legal action in New York, a foreign national could subject him/herself to jurisdiction in the United States in separate proceedings. (Op. at 5). On these facts, the court found that it possessed “general” personal jurisdiction over the indigenous Ecuadorians; that is, based on this opinion, these indigenous persons could be sued in New York by *anyone* for *anything*.

- Although a judgment has been entered in the trial court in Ecuador, the judgment is not final and enforceable even in Ecuador until it clears the first level of appeal. The judgment is currently on appeal to a panel of three new judges, and the record is under *de novo* review—meaning that the panel will essentially consider the case anew. As recently reported in the Wall Street Journal, the judgment issued by this panel could look completely different than the initial judgment. Notwithstanding that under such circumstances, without a final judgment, the Amazon communities could not yet have brought an enforcement action in New York, the court found Chevron’s defense under New York’s enforcement statute to be ripe for a declaratory judgment.
- The court concluded that absent an injunction, Chevron would be irreparably harmed by having to defend against multiple judgment enforcement proceedings and asset seizures in foreign courts—the ordinary processes of international judgment enforcement (Op. at 104.) The court’s finding of potential “irreparable harm”—itself a pre-requisite to an injunction—appears to be premised solely on a single affidavit from a Chevron employee in which the employee makes conclusory statements about potential business disruption. (Op. at 65-66.)
- Underlying the entire decision is the notion that only U.S. courts can be trusted to perform an exacting analysis of a foreign judgment, and therefore, there is nothing wrong with forcing a foreign litigant into the United States notwithstanding that he may otherwise have had no intention to enforce the judgment in the United States. (*See, e.g.*, Op. at 104 (“A careful factual and legal determination here that the Ecuadorian judgment is not entitled to enforcement on either ground ought to dispose also of any foreign enforcement actions that might be filed.”); Op. at 86 (“Indeed, since equity acts *in personam*, the court may issue an injunction barring all of the defendants from filing enforcement proceedings in other jurisdictions. Hence, this Court’s judgment should finally determine the controversy worldwide.”).)
- The court opined, incredibly, that the entire Ecuadorian judiciary fails to provide due process and impartial tribunals to litigants. The court improperly imposed its notions of due process upon Ecuador—a democratic ally and trading partner of the United States. This belief appears premised upon nothing more than a series of flippant, exaggerated, and frustrated comments made by one of the attorneys for the Amazon communities and an affidavit submitted by an ousted political opponent of Ecuador’s current President. The President’s opponent claims that the President—who has publicly expressed support for the Amazon communities, not unlike President Obama’s condemnation of BP in the wake of the Deepwater Horizon incident—exercises too much influence over the courts. (Op. at 77-82). On rare occasions, U.S. courts have refused to enforce foreign judgments because of an apparent systemic absence of due process (according to international principles of fairness, not U.S. due process) in the court system of the foreign country where the judgment was rendered. For example, New York courts have invoked this reasoning in refusing to recognize to a Liberian judgment when the country was in the midst of a civil war and the courts were virtually non-existent. Such extraordinary circumstances are certainly not present in Ecuador.
- Having adopted the paradigm that the Ecuadorian courts cannot be trusted, the U.S. court disregarded the thorough analysis and conclusions of the Ecuadorian court. (Op. at 83-84). The Ecuadorian court’s decision was more than reasonable and should give great pause to any tribunal asked to nullify it.

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In sum, the U.S. court's injunction purports to nullify eight years worth of hard-fought litigation against Chevron in Ecuador (to say nothing of the preceding nine years in New York), and to eviscerate a thorough and reasoned judgment issued by a competent court of a sovereign which happens to be an important democratic ally and trading partner in an increasingly complex Latin American region. The Ecuadorian plaintiffs never attempted to enforce the judgment in New York—and indeed, until the appeal in Ecuador is decided, they could not even if they wanted to. Nonetheless, a judge sitting in New York has not only barred recognition and enforcement of the judgment in the United States, but also has usurped the ability of jurisdictions around the world to decide for themselves whether judgments issued by the courts of Ecuador are deserving of respect. Moreover, the opinion gives rise to a paradigm whereby Chevron may enjoy all of the upside attendant to doing business in countries across the world while avoiding any potential downside risk in subjecting itself to the rule of law in those countries. Under the auspices of what the U.S. court referred to as the American judiciary's interest in protecting domestic companies, Chevron has been permitted to: (1) demand that a case be litigated in a foreign country in which it holds a perceived litigation advantage; (2) attempt to exploit that country's judiciary in a manner it would never dream of if forced to litigate in the United States; and (3) preemptively run to the U.S. demanding *worldwide* relief from the judgment because the foreign litigation does not go as planned.