

**OPEN LETTER TO THE HUMAN RIGHTS COMMUNITY
ON THE ECUADORIAN JUDGMENT AGAINST CHEVRON**

Doug Cassel¹

Notre Dame Law School
2142 Eck Hall of Law
Notre Dame, Indiana USA 46556

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Ecuadorian courts – the same appendages of President Rafael Correa who recently concocted an outrageous \$42 million verdict against the newspaper *El Universo* and its executives and an editor – have now also blessed an \$18.2 billion “judgment” against Chevron in the Lago Agrio environmental case. The judgment supposedly awards damages for oil pollution that ended 20 years ago when Texaco Petroleum Company (later bought by Chevron) ceased drilling in Ecuador. No one committed to the rule of law, due process, or trial before independent, impartial and honest judges, should tarnish the good name of human rights by endorsing this charade.

An Indefensible Judgment

The Lago Agrio judgment was orchestrated by lawyers who purport to represent a group of Ecuadorian plaintiffs, yet tried to stop environmental clean-up because it might “destroy evidence” for their case, and who gave the Correa government a free pass for environmental damage -- even though the only company pumping oil near Lago Agrio for the last two decades has been the state oil company. (The lawyers did not assert individual claims of harm, but only collective claims to redress environmental harm.)

In zealous pursuit of victory, the lawyers threw professional ethics out the window.² Their misdeeds are now proved by their own words, as recorded in the deposition testimony of plaintiffs’ lawyer Steven Donziger, as filmed in the outtakes of a documentary Donziger commissioned and then belatedly attempted to censor, and as documented in emails between Donziger and plaintiffs’ Ecuadorian lawyers.³ Once their improprieties began to leak out, U.S.

¹ Views expressed herein are solely those of the author, and not necessarily those of Notre Dame Law School or any other entity.

² References herein to plaintiffs’ lawyers, and to the misconduct specified herein, do not include the law firm of Patton Boggs or any of its lawyers who represent plaintiffs in various proceedings before U.S. courts, Forum Nobis PLLC or any of its lawyers, or other law firms and lawyers who began to represent plaintiffs only recently.

³ Further information and citations for the facts discussed in this letter are available on the internet: for example, see the opposing arguments in Plaintiffs’ Request for Precautionary Measures, filed with the Inter-American Commission on February 9, and Chevron’s *amicus* brief in opposition, filed on February 22. Both documents are posted on my faculty web page at <http://law.nd.edu>.

courts ordered disclosure of these sources. They reveal, among other misconduct, that plaintiffs' lawyers met covertly with the judge presiding over the case at the time no fewer than seven times, in venues such as an abandoned warehouse. The purpose of their clandestine huddles was to rig the selection of the sole "independent" expert who would later be appointed by the judge to assess the amount of damages.

But first they had to convince the judge to appoint an expert. An outtake from the documentary captures Donziger explaining their strategy: "[T]he only language that I believe, this judge is gonna understand," declares Donziger, "is one of pressure, intimidation and humiliation. And that's what we're doin' today. We're gonna let him know what time it is ... We're going to scare the judge, I think today."

The judge was convinced. Not only did he appoint an expert, he appointed the one secretly named by plaintiffs' lawyers.

In another outtake, a statement is made that tests failed to show contamination near pits remediated by Texaco Petroleum Company between 1995 and 1998. As the camera rolls, Donziger responds, "Hold on a second, you know, this is Ecuador, okay? ... You can say whatever you want but at the end of the day, there's a thousand people around the courthouse, you're going to get what you want . . . And we can get money for it . . . Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win."

Not content with handpicking the court's expert, the lawyers then wrote his "report." As Donziger later admitted (once he was caught), the expert's report came out "pretty much verbatim" the same as the draft they slipped to him under the table. All the while, in court documents, the plaintiffs' lawyers repeatedly insisted that the expert was "independent."

To cover up their collusion, plaintiffs' lawyers even developed code language, as in the following internal email exchange (later decoded by Donziger at his deposition):

"Today the cook [the Judge] met with the waiter [the supposedly independent expert] to coordinate the menu [the plan for the allegedly neutral expert's report] at the restaurant [the Court]."

The lawyers had no illusions that what they were doing was permissible. As their scheme began to unravel, one of them emailed Donziger: "Today Pablo [Fajardo] and Luis [Yanza] [told us] ... that certainly ALL will be made public, including correspondence ... the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail)..."

Months later, Donziger asked in an email, “I wonder whether we do better by explaining that we authored the [expert’s] report – rather than letting Chevron tell the story like Nancy Drew.”

There is reason to believe that the deception did not end there. Plaintiffs’ lawyers’ emails show that they worked on a draft of the judgment, one not intended for public presentation or for scrutiny in the record. In fact, there is troubling evidence that the “judgment,” purportedly written by the last judge assigned to the case, was covertly co-authored by plaintiffs’ lawyers. As published, it contains significant passages which never entered into the judicial record and can only have come from their internal documents. In addition to closely paraphrasing plaintiffs’ language, the final judgment cites figures, not in the judicial record, from plaintiffs’ internal database. In apparent haste, the judgment even copies plaintiffs’ errors and idiosyncratic reference citations.

Not surprisingly, as a yardstick of damages, the judgment that emerged from this fraudulent process would not pass the straight face test in a real court of law. It purports not to rely on the now discredited expert report, but nonetheless uses damages categories for which the report is the sole expert support. Other categories of damages awarded – some \$2.2 billion ordered to be paid for health programs – are left with not one word of budgetary justification in the judgment.

Most egregiously, more than half of the total \$18.2 billion award does not even pretend to turn on any measure of environmental damage. The largest single component -- \$8.6 billion – was a conditional punitive damages award, payable only because Chevron refused to issue a public apology, and to accept responsibility, within 15 days of the judgment. Even assuming that this so-called sanction – an exercise in *chutzpah* by a court with unclean hands – could be justified, it does not purport to correspond to the amount of any environmental damage. At best, it puts a price tag on the most expensive apology in history; at worst, it amounts to a judicial shakedown.

A further extravagant sum equally does not purport to measure environmental damage. The judgment awards a ten percent bonus – \$865 million -- to the Amazon Defense Front, an NGO working with plaintiffs’ lawyers, which the judgment names as beneficiary of the sums awarded. This is simply a windfall.

Unethical lawyers and dishonest judges were not the only players in this high stakes game posing as a judicial process. Few politically important cases pass through Ecuadorian courts untouched by the hand of President Correa. Lago Agrio was no exception.

For Correa the case was a sweetheart deal. Plaintiffs promised in writing not to seek damages from the government -- despite the State oil company’s extensive exposure, first as majority owner of the consortium with Texaco Petroleum Company before 1992, and later as sole owner and operator since 1992 (reportedly responsible for 1,400 oil spills between 2000 and

2008 alone). Their lawsuit gave Correa a way to stick Chevron with the tab for the State's share of liability.

In return Correa supported the case both publicly and privately. Publicly he promised his "full support." Privately Correa told plaintiffs' representatives in a closed-door meeting (memorialized in their emails) that he would "call the judge." When the judgment was later made public, Correa praised it as "the most important judgment in the history of the country." The head of Ecuador's judicial council (effectively controlled by Correa) held a press conference with the judge, lauding him as a "shining star."

If there ever turns out to be any resemblance between this judicial mugging and the extent of environmental damages at Lago Agrio, it will be pure coincidence. As an international arbitral tribunal stated, in finding that it has jurisdiction over an arbitral complaint brought by Chevron against Ecuador over this case (discussed below), "There is no doubt in the Tribunal's mind that the allegations pleaded by the Claimants [Chevron] against the Respondent [Ecuador] rank amongst the gravest accusations which can be advanced by a claimant against a modern State subject to the rule of law."

Because the arbitral tribunal has not yet reached the merits, it could go no further (at this stage) than to characterize Chevron's complaint. But the judicial and attorney misconduct in the Lago Agrio case, already admitted on the record, is confirmed for all the world to see.

How Should the Human Rights Community Respond?

First, full disclosure: Last week I co-signed an *amicus* brief before the Inter-American Commission on Human Rights on behalf of Chevron in the Lago Agrio case. I billed Chevron for my time on the brief (but not for my time on this letter).

The *amicus* brief opposes a request for precautionary measures filed by plaintiffs' lawyers. They ask the Inter-American Commission to call on Ecuador, in effect, to enforce the \$18.2 billion Lago Agrio Judgment. Chevron's *amicus* argues that the judgment is "illegitimate" and that suspending its enforcement, as recently ordered by the arbitral tribunal (discussed below), poses no imminent threat of grave and irreparable harm.

Why should a human rights lawyer sign a brief for a large oil company opposing a request filed to protect the human rights of indigenous and other Amazonians to a healthy environment?

The short answer is that the ends do not justify the means. Anyone victimized by pollution, in Ecuador or elsewhere, deserves redress. But no one deserves redress in the form of a sham judgment. The Lago Agrio Judgment is an affront to minimum standards of both procedural and substantive justice.

Plaintiffs' lawyers allege litigation misconduct by Chevron and its lawyers.⁴ Chevron disputes the allegations. Even if one were to assume *arguendo* that these allegations were well-founded, however, they could not excuse plaintiffs' lawyers' collusion with the court to construct a fraudulent judgment in the name of human rights.

By no means do I denigrate the right of the people who live near Lago Agrio to a safe and healthy environment. I also recognize that plaintiffs' attorneys (albeit by unethical means) have invested long years of hard work, against high odds. And I respect their many honest and well-intentioned supporters in the international human rights community. But the plaintiffs' lawyers' effort to enlist a human rights watchdog to enforce a sham judgment is, to say the least, a contradiction in terms.

Literally the plaintiffs' lawyers ask only that the Inter-American Commission request Ecuador to refrain from undermining the human rights of indigenous and other residents of the Amazon region and take "all appropriate measures to affirmatively protect" their rights. However, the text of their request makes clear the real objective: they want the Commission in effect to call on Ecuador to enforce the Lago Agrio Judgment, and to disregard the recent arbitral award ordering Ecuador to suspend enforcement of the judgment.

In my view their request is unfounded on its face. The Inter-American Commission grants precautionary measures only on a showing of an imminent threat of grave and irreparable harm. Almost by definition, suspending judgments for money damages – even valid judgments -- does not produce irreparable harm within the meaning of the Commission rules. Appropriate money damages, plus interest, can be paid later.

But the plaintiffs' lawyers' effort to capitalize on the Lago Agrio Judgment deserves repudiation on more fundamental grounds. Human rights lawyers should not defend indefensible judgments, period. Nor should they hold their noses, seeking to enforce fraudulent judgments, on the instrumental ground that deserving and sympathetic communities would thereby benefit. Both integrity and credibility demand that human rights lawyers be principled and consistent in advocacy of internationally recognized human rights. In seeking to vindicate the human rights of people who have suffered, we cannot simply discard other human rights principles –including the rule of law, due process, and adjudication by independent and impartial judges.

As the Inter-American Court has aptly stated:

"In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component ... complements and depends on the others for its meaning."⁵

⁴ *E.g.*, Declaration of Juan Pablo Sáenz M., Feb. 25, 2011, filed in *Chevron v. Donziger*, Civil Action No: 1:11-cv-00691-LAK, U.S. Dist. Ct. (S.D.N.Y.).

⁵ Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (1987), Par. 26.

Human rights depend on the rule of law. We cannot stand up for human rights by conniving with judges and presidents to subvert the rule of law.

This point of principle, always important, takes on added strategic importance at this moment in the history of the human rights movement. There is now growing recognition that corporations have human rights responsibilities. It behooves us to show the corporate community that our commitment to human rights – like the one we ask of them -- is neither selective nor result oriented. If we jettison our principles when it seems opportune, how can we expect skeptical corporate leaders to take them seriously?

What Next?

In a recent *New Yorker* article Steven Donziger protests, “The story of this case is not about the lawyers. It is about the people of Ecuador and how they have suffered at the hands of an American oil company ...”

Unfortunately, by their unethical and possibly criminal conduct, plaintiffs’ attorneys have made this case, if not about them, then about the illegitimate court judgment they procured. In so doing, they have ill served the people of Ecuador and the clients whose rights they have labored so long to vindicate. The Lago Agrio Judgment is so pervasive a sham that it cannot serve as a credible basis for justice. The international human rights community does neither the people of Ecuador nor the movement any favors by attempting to defend this indefensible judgment.

Legitimate claims deserve redress. But this irredeemably tainted vehicle is not the way. Another way must be found.

What next, then? In my view the best way forward, one that is in the objective interests of all parties, is to pursue a negotiated resolution. Those who care for the human rights of residents of the Amazon, for sustainable development in Ecuador, and for the enlightened business interests of Chevron, would do well to call on all parties to rein in the litigators and to sit down in a spirit of constructive compromise. It will not be easy, but this case should settle.

The Arbitral Proceeding

In 2009 Chevron brought an international arbitration proceeding against Ecuador, under the Bilateral Investment Treaty between Ecuador and the United States, based on the Lago Agrio litigation. In February 2011 the arbitral tribunal, in order to preserve the status quo pending the outcome of the arbitration, ordered Ecuador to suspend enforcement of the Lago Agrio Judgment. In February 2012 the arbitral tribunal issued an interim award to the same effect. That same month the tribunal ruled that it has jurisdiction to proceed to the merits.

I am not counsel in the arbitration and have not been involved in the proceeding in any way. But because the current request before the Inter-American Commission seeks in effect to

block enforcement of the arbitral award, the proceeding is relevant to Chevron's *amicus* brief before the Commission.

Several important concerns have been raised about the arbitral proceeding.⁶ One is the exclusion of interested parties from the proceeding. It is regrettable, in my view, that during the jurisdictional phase of the proceeding last year, an *amicus* brief submitted by Earth Rights International on behalf of two NGO's was not admitted, after both Chevron and Ecuador objected to its admission.

I am pleased that Chevron, in the cover letter for its *amicus* before the Inter-American Commission, now states that it has no objection to admission in the arbitral proceeding at an appropriate time of an *amicus* brief by plaintiffs, or potentially by others. Chevron has so advised the arbitral tribunal. Now that the tribunal has ruled that it has jurisdiction, *amicus* briefs should be received on the merits.

Two years ago plaintiffs' counsel stated on the record that they have "absolutely no interest" in participating in the arbitral proceeding. I do not know whether that continues to be their view. In any event, I recommend that the rights of the plaintiffs be advocated before the arbitral tribunal by capable *amici* who are committed to ensuring that the rights and interests of residents of the Lago Agrio area are heard. I also recommend that all proceedings before the tribunal, including written submissions, transcripts of oral argument, and arbitral orders and awards, be made public in timely fashion. I hope that additional means to ensure vigorous representation of the rights of the residents of the Lago Agrio area could be explored.

A second objection is that in ordering suspension of a domestic court judgment, the arbitral tribunal exceeded its jurisdiction and interfered in the sovereign judicial power of a State. Yet the tribunal did no more than the Inter-American Commission and Inter-American Court have done in other cases. Recently the Commission requested Ecuador to suspend enforcement of the \$42 million judgment in the *El Universo* case (shortly thereafter President Correa "pardoned" those accused in the case). A decade ago the Commission requested, and the Inter-American Court ordered, that Costa Rica suspend enforcement, pending review of the merits, of aspects of a domestic judicial ruling against a journalist and *La Nación* newspaper. Just as interim measures awarded by the Commission and Court endeavor to shield parties from apparently unjust domestic court orders pending full review, so, too, the arbitral tribunal here ordered suspension of an apparently unjust judgment, pending full review.

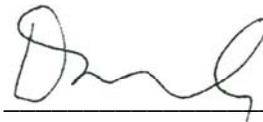
One might reply that the cases in which Inter-American bodies (as well as other arbitral tribunals) have ordered suspension or termination of domestic judicial proceedings involved

⁶ Recently one of plaintiffs' attorneys has alleged that one of the arbitrators has a "business relationship" with a Chevron attorney (based on appointments to other arbitral tribunals). I believe that claim reflects factual inaccuracies. In any event, the arbitral award was entered by a unanimous panel, including the arbitrator appointed by Ecuador, Professor Vaughan Lowe of Oxford. I happen to know Professor Lowe, for whom I have high regard, both as a public international lawyer and as a person with a track record of defense of human rights.

public litigation, not private litigation. The international bodies ordered States to suspend or terminate proceedings brought by public bodies or by public officials. These orders were fair and appropriate, because the State was duly represented and heard before the international body, and because the litigation interests adversely affected were those of the State or of public officials.

In contrast, the argument continues, the arbitral tribunal here ordered Ecuador to suspend a judgment entered in a litigation brought by private parties – the plaintiffs – in a case in which the Ecuadorian State is not a party. Yet the plaintiffs have not been heard by the arbitral tribunal.

The distinction between public and private litigation is important. I agree that arbitral tribunals generally ought not to order suspensions of private litigation, especially litigation to vindicate human rights. But to view the Lago Agrio litigation as merely private litigation is to exalt form over substance. As noted above, the case was litigated pursuant to a deal between the plaintiffs' lawyers and the Ecuadorian State. Plaintiffs' lawyers agreed not to seek damages from the State – despite the State oil company's extensive exposure in the alleged environmental damage. In return, the State assisted the plaintiffs, both publicly and through covert collusion, carried out in part by the State's judiciary, to gain an outsized and illegitimate award against Chevron. This is not the ordinary case where a losing private litigant might ask an arbitral tribunal in effect to review a domestic court judgment. To pretend that the State here was not in a real sense a party to the litigation – and a culpable one at that – is to close one's eyes to reality.



Douglass Cassel
Professor of Law
Notre Dame Law School