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Ecuador's Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a $9.5 Billion Judgment for Amazon Devastation?

Investor-State Tribunal of Three Private Lawyers Ignores Years of U.S. and Ecuadorian Court Rulings, Tries to Extinguish Indigenous Communities' Rights to Sue Chevron for Contamination

In November 2013, after a legal battle spanning two decades and two countries,[1] Ecuador's highest court upheld a ruling against Chevron that found the U.S. oil giant responsible[2] for the contamination of a Rhode-Island-sized section of Ecuador's Amazon.[3] The court ordered Chevron to pay $9.5 billion,[4] which would provide afflicted indigenous communities with the clean-up and health care they desperately need.[5]

Chevron is seeking to evade this ruling by asking three private sector lawyers to second guess the decision of a sovereign nation's legal system.

Vaughan Lowe, Horacio Grigera Naón, and V.V. Veeder[6] – these are the three men who have assumed the authority to cast aside 20 years of litigation and court rulings against Chevron under two sovereign legal systems.[7] To consider jettisoning the $9.5 billion ruling against Chevron.[8] To order Ecuador's government to violate its own Constitution and block enforcement of a ruling upheld on appeal in its court system.[9] And, in a decision in September 2013, to declare that rights granted by Ecuadorian law do not actually exist.[10]

Under what country's legal system do these three men assume such astounding power?

None. The three have made all of the audacious decisions above as members of an extrajudicial tribunal that sits outside of any legal system and is unaccountable to any electorate. The men derive their sovereignty-trumping power from the "investor-state enforcement system" included in a Bilateral Investment Treaty (BIT) between Ecuador and the United States.[11]

They recently set new standards of audacity by proclaiming that some of Ecuadorians' legal rights to mount a case against Chevron were unwittingly and permanently extinguished by a contract signed years before between the government and Texaco Petroleum Co.,[12] which became a Chevron subsidiary in 2001.[13]

In ruling that *the government's* liability waiver also waived the rights of *private parties* to sue Chevron, the tribunal contradicted Ecuadorian court decisions on this very issue. In real courts, Chevron's attempts to raise this improbable argument failed.[14] Chevron hopes that the tribunal's revival of this dead argument will lead the tribunal to order[15] the taxpayers of Ecuador, an $84 billion economy[16] – not the shareholders of Chevron, a $231 billion business[17] – to pay billions to clean up the vast Amazonian pollution.[18]

Background: After Losing in Domestic Courts, Chevron Turns to Foreign Tribunal to Evade Payment

For 26 years, Texaco, Chevron's predecessor company, performed oil operations in Ecuador. Ecuadorian courts have found that during that period, the company dumped billions of gallons of toxic water and dug hundreds of open-air oil sludge pits in Ecuador's Amazon,[19] poisoning the communities of some 30,000 Amazon residents, including the entire populations of six indigenous groups (one of which is now extinct).[20]

For 20 years, those communities have sought a basic notion of justice – water that is safe to drink, the clean-up of the rivers and land on which their lives depend, and healthcare for the many stricken with pollution-related illness. They have demanded that the corporation that devastated their lives, livelihoods, and ecosystem pay for rehabilitation.[21] For 20 years, Chevron has tried to evade justice, seeking to have the case dismissed in both the U.S. and Ecuadorian court systems. The company lost issue after issue under both legal systems. In 2011, after Chevron insisted that the U.S. case be moved to Ecuadorian courts, deemed Ecuador's legal system "fair and adequate," and committed to comply with a final court ruling there,[22] an Ecuadorian court produced a $19 billion ruling against Chevron for the massive contamination.[23] In 2012 the ruling was upheld on appeal.[24] The November 2013 ruling from Ecuador's highest court upheld the judgment against Chevron, but halved the fine after overturning the lower court's order of punitive damages against Chevron for misconduct during the trial and a refusal to apologize for its actions.[25]

Instead of paying as agreed, after having lost in two countries, Chevron has turned to the country-less investor-state tribunal of Vaughan Lowe, Horacio Grigera Naón, and V.V. Veeder in its quest to evade justice. How was this even possible? Chevron claimed that the ruling issued in the Ecuadorian legal process, a process upon which Chevron had insisted, was a violation of extraordinary investor privileges enshrined in a U.S.-Ecuador Bilateral Investment Treaty (BIT).[26]

Under the BIT, Chevron asked the three-person extrajudicial tribunal to order the Ecuadorian government to suspend enforcement of the multi-billion dollar domestic court ruling.[27] The tribunal granted that wish, ordering the government of Ecuador to violate its own Constitution, interfere with the independent judiciary, and somehow get it to stop the ruling.[28] Such a maneuver would breach Ecuador's constitutionally-enshrined "separation of powers," a legal concept that was probably not foreign to the panelists.[29] (Imagine a foreign extrajudicial tribunal ordering President Obama to suspend a U.S. Supreme Court ruling and you get the picture.) Reasonably, the government decided to heed its Constitution rather than the three lawyers.

Now Chevron is asking the same extrajudicial tribunal to order Ecuador's *taxpayers* to hand over to the corporation any of the billions in damages it might be required to pay to clean up the still-devastated Amazon, plus all the legal fees incurred by the corporation in its efforts to evade justice.[30]

To justify such a request, the corporation alleges that Ecuador's decision to not block enforcement of the ruling violates a BIT obligation to afford Chevron "fair and equitable treatment."[31] Never mind the fact that Chevron's investment in Ecuador ended in 1992,[32] the BIT did not take effect until 1997,[33] and the BIT is not supposed to apply retroactively to cover past investments.[34]

Never mind the fact that "fair and equitable treatment" is supposed to mean providing an investor due process in court – as Chevron was provided over years of litigation. Fair and equitable treatment does not mean the right to nullify any inconvenient rulings resulting from said due process.[35]

But nullification is precisely what the three-person tribunal is contemplating.[36] And under the investor-state system, there is no appeals process – only a "Hail Mary"-style procedural option to seek "annulment."[37]

There is no established system of precedent.[38] The investor-state regime makes these three lawyers, as an *ad hoc* tribunal, a law unto themselves.

Tribunal Revives Rejected Chevron Claim, Hatches Theory of Ecuadorians' Extinguished Rights

It would be bad enough if three panelists-for-hire deigned to second-guess a ruling rendered by a sovereign country's court system. (That, in fact, is what an investor-state tribunal has done to the United States in a past case filed by a Canadian corporation[39] and what another tribunal is currently considering with respect to Canadian courts' rulings on two drug patents[40] under the similarly extraordinary investor privileges of the North American Free Trade Agreement.)

But the extrajudicial tribunal siding with Chevron is going a step further: *it is acting as if the sovereign court ruling and two decades of trial never happened*. In its recent decision, the tribunal barely made mention of the domestic ruling in Ecuador, or of the preceding 18 years of litigation spanning two nations.[41] Many of the arguments that Chevron is bringing before the tribunal are the very same ones the corporation used before Ecuadorian courts[42] – arguments that were rejected.[43] Rather than even examine the domestic courts' logic, the tribunal has invited Chevron to make the same arguments again as if for the first time.

That includes Chevron's repeated claim that an agreement signed in 1995 between the Ecuador government and Texaco (later acquired by Chevron)[44] extinguishes Ecuadorians' collective rights to sue over damage caused by the firm.[45] The agreement committed the company to clean up some of its mass-contamination of the Amazon and in exchange, *the government* agreed not to bring future environmental claims over the past pollution.[46] (The contract waived all of Texaco's "legal and contractual obligations and liability, *towards the Government and Petroecuador*, for the Environmental Impact arising from" the oil operations carried out under Texaco's partnership with the government.)[47] But the $9.5 billion case against Chevron for the remaining swaths of Amazonian pollution was not brought by the government. It was brought by 48 plaintiffs, in conjunction with the Amazon Defense Front, on behalf of thousands of indigenous people affected by the pollution.[48]

Under Ecuadorian law[49] or U.S. law, when a government signs a contract agreeing it won't sue, it does not extinguish the rights of other parties to do so unless it explicitly assumes the liability for any private claims. Not only did the Ecuadorian government not do this, but in a Memorandum of Understanding (MOU) that led to the 1995 agreement, the government expressly stated that the release of liability would not apply to private claims.[50] The Ecuadorian government has always made clear in its arguments to the tribunal that its agreement with Texaco did not and legally could not have signed away in 1995 any rights of private parties to bring a case against the corporation that polluted their land.[51] How did the tribunal deem otherwise? By rewriting history.

The tribunal argued that at the time the government signed the 1995 contract, the government was the only entity with legal standing to bring a specific legal "cause of action" that Chevron says was later used by the indigenous communities in the $9.5 billion suit.[52] According to the tribunal, since the government had a monopoly on this sort of legal claim when signing the 1995 agreement, and since that agreement waived the government's right to bring future environmental claims against the company…the government had inadvertently signed away *anyone's* ability to bring that claim against Chevron.[53] Ever. That includes the indigenous groups who won the $9.5 billion case against Chevron. Even worse, the legal provision the tribunal claims was extinguished was not some arcane statutory sub-clause, but a right established in the Bill of Rights of Ecuador's Constitution that, by its very nature, applied to and protected every Ecuadorian.[54]

To reach this astounding conclusion, the three panelists had to be willing to undertake several audacious steps:

Step #1: Disregard the actual legal basis for the $9.5 billion case. The legal claim that the tribunal painstakingly argued had been extinguished by the government contract was not actually the core legal basis upon which the 48 plaintiffs relied in their successful case against Chevron on behalf of the affected indigenous communities. The legal claim the tribunal analyzed – and that Chevron argued was the basis for the $9.5 billion case – was based on the "collective" or "diffuse" right "to live in a healthy environment" provided in the Ecuadorian 1998 Constitution and later "implemented" in a 1999 Environmental Management Act.[55] However, as the original complaint in the case makes clear, the plaintiffs' claim as to Chevron's liability and their right to proceed "collectively" are both founded in provisions of Ecuador's civil code that were in effect more than a century earlier. Indeed, the plaintiffs' claimed Chevron's liability was rooted in "the obligation to repair the resulting damage from willful misconduct or negligence," a basic right that "has existed in the Ecuadorian Law since the beginning of the Republic."[56] The plaintiffs made reference to the constitutional right to live in a healthy environment, as well as other sources such as the International Labor Organization's Convention No. 169 on the rights of indigenous peoples, as contextual and supplementary support for their case and the rightness of their cause, not as essential legal grounds without which the case would fail.[57]

The Ecuadorian courts agreed that the civil code provided sufficient legal grounds for the plaintiffs' case. In a 2012 ruling on Chevron's appeal that upheld the 2011 judgment, the appeals court stated: "the right granted by the Civil Code which provides that 'in general, popular action is granted in contingent damages which threaten unspecified parties due to the carelessness or negligence of a party', is recognized. This right was in effect when Texaco operated in Ecuador. This is sufficient legal basis according to Ecuadorian law to provide legal justification for issuing judgments based on the remedies contained in the [2011] ruling..."[58] While the investor-state tribunal explicitly refused to opine on the veracity of Chevron's history-defying claim that the case had relied on an entirely different law,[59] the tribunal readily proceeded as if the false assertion were true.[60]

Step #2: Contradict domestic rulings. Even if the indigenous Ecuadorians had relied on the rights enacted in the 1999 environmental law, as Chevron erroneously argued, Ecuador's courts already definitively dismissed the notion that *any* rights belonging to Ecuadorians could have been extinguished by the 1995 contract between Texaco and the government. In the 2011 ruling, the Ecuadorian court plainly stated, "Certainly, the plaintiffs who do not appear as having signed the alleged settlements in the defendants' defense, have the right to take legal action and make petitions, as guaranteed by the Constitution because this right is inviolate…and this kind of legal transaction cannot be extended to third parties and is not applicable to inviolate rights."[61] The appeals court upheld the argument.[62] And then the investor-state tribunal pretended as if these rulings had never occurred, embracing the very argument that those courts had weighed and rejected after years of litigation – that a government contract with a private company could somehow destroy inviolable rights of Ecuadorians not party to the contract.

Step #3: Concoct theory of inadvertently extinguished rights. Ecuadorian law has long recognized Ecuadorians' ability to proceed collectively to challenge violations of rights that affect groups of people – that is, violations causing generalized harm to groups of unnamed individuals. As mentioned, one of the key century-old civil code provisions on which the $9.5 billion case relied allowed for a "*popular* action" in cases of "damages which threaten *unspecified parties…*"[63] International law has also recognized class, mass, popular, representative, and other forms of "aggregate" and "collective" rights for decades. For example, the

International Covenant on Economic, Social and Cultural Rights – which was ratified by Ecuador in 1969, which entered into force in 1976, and to which nearly all countries of the world are signatories[64] – states, "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all *peoples* to enjoy and utilise fully and freely their natural wealth and resources."[65]

But the tribunal paid no heed to the legal history enshrining Ecuadorians' ability to articulate and protect collective rights and instead focused on the *government's* responsibilities with respect to those rights. Deeming themselves qualified to interpret Ecuador's Constitution, Mr. Lowe, Mr. Grigera Naón, and Mr. Veeder decided that the Constitution had implicitly enshrined the government's duty to protect "collective" rights back in 1995, though it was "not framed in terms that explicitly confer any right of action."[66]

On this basis, the tribunal concocted a theory that because the government had a responsibility with respect to "collective" rights, it necessarily had a monopoly over those rights in 1995 when it signed the agreement with Texaco. Based on its disregard for Ecuador's longstanding civil code and ratification of international laws (such as the International Covenant on Economic, Social and Cultural Rights), the tribunal posited that Ecuadorians themselves could not claim these rights in 1995, nor act to protect them. Why not? Because, having ignored evidence to the contrary, the tribunal believed that Ecuadorians did not gain the ability to act on these rights until the 1999 Environmental Management Act.[67] And voilà, the tribunal invented a government monopoly over Ecuadorians' "collective" rights at the critical moment of the 1995 agreement between the government and Texaco.

Since the government released in that agreement all possible environmental claims it could make against Texaco, and since the government (according to the tribunal) at that point had a monopoly on the ability to exercise such "collective" rights, the tribunal reasoned that the government had (inadvertently) released Chevron from "collective" rights claims arising not just from the government, but from *any Ecuadorian*. That is, the loss of this right was all-inclusive, affecting any and every actor that might one day gain standing to pursue claims of violated "collective" rights. So, though Ecuadorians' standing to bring such claims was confirmed a few years later (and though they had such standing all along under the civil code and international law), their "right to make an environmental claim [against Chevron] based upon the diffuse [or collective] right" under Ecuador's Constitution "had already been extinguished by the 1995 Settlement Agreement," according to the tribunal.[68] The tribunal dispassionately concluded, "It is not juridically possible for a person to exercise a right which no longer exists…"[69]

The tribunal's theory that the government had a monopoly on its citizens' collective rights by virtue of having not formally recognized them via national law is as dangerous as it is baseless. According to the tribunal's logic, any government that has not yet enshrined a given right of its citizens into law could preemptively and permanently destroy that right for future generations, with agreements from one era suffocating the development of human rights in the next.[70]

Conclusion: Three Lawyers Pose Threat to Ecuadorians, Confirm Audacity of Investor-State System

For the Ecuadorians' case against Chevron, the tribunal's decision may seem innocuous, given that it used legal gymnastics to undercut Ecuadorians' ability to use a legal claim on which they did not actually rely (i.e. the 1999 Environmental Management Act, rather than the much older civil code that provided the core legal basis for the $9.5 billion case). But such distinctions appear to be lost on many of the media outlets reporting on the tribunal's decision,[71] and more worryingly, may even be lost on courts in other countries that may one day be called upon to enforce the $9.5 billion judgment (given that Chevron has removed its assets from

Ecuador). Moreover, the tribunal's willingness to employ such inventive logic to reach its aims hardly bodes well for what might still come in the investor-state case, which is far from over. The tribunal noted that it intends to still evaluate any individual rights that the plaintiffs may have relied upon, meaning that the Ecuadorians seeking justice for the devastation of their health and homeland could have their rights further questioned by the tribunal in future decisions.[72]

The tribunal's ruling offers a stark warning to anyone who thinks that their legal rights should not be subject to nullification by three private lawyers sitting outside of any domestic court system. Will the three now attempt further erasure of rights belonging to the indigenous people of Ecuador? Will they grant Chevron's wish and order Ecuadorians themselves to pay for the poisoning of their ecosystem?[73]

Whatever the answers, the tribunal's latest decision left one thing abundantly clear: the investor-state regime is not constrained by domestic court rulings, Constitutions, international law, or a basic sense of decency.

ENDNOTES

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