

Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America

by Steven R. Donziger

AGUINDA V. CHEVRONTExACO, CURRENTLY BEING HEARD in the Superior Court of Sucumbios in the Ecuadorian Amazon, has the potential to set a precedent that could benefit millions of persons victimized by human rights abuses committed by multinational corporations pursuing economic gain. Initiated by solo practitioner Cristobal Bonifaz in 1993, co-counseled by a Philadelphia-based law firm known for innovative human rights cases, and driven by eighty affected communities in the Amazon region, this litigation represents the first time in Latin America and possibly in the developing world where a historically marginalized class of persons has established legal jurisdiction over a multinational oil company in a case involving billions of dollars of environmental damages. This case is also a leading example of how courts have the potential to re-allocate some of the costs of globalization—in this case, environmental destruction—from the most vulnerable rainforest dwellers to the most powerful energy companies on the planet.

The goal of the case is to remedy the worst oil-related ecological catastrophe in the world, and according to some experts, the worst ecological catastrophe of any kind next to Chernobyl. Until recently, this disaster was largely hidden from public view, even though it has festered for three decades and has been connected to hundreds of cancer-related deaths and the devastation of five indigenous cultures.

A distinguishing feature of the litigation is that any judgment imposed in Ecuador is enforceable against ChevronTexaco's assets in the U.S. via the District Court of New York, where the case was originally filed. This multi-jurisdictional arrangement means that *Aguinda v. ChevronTexaco* could provide signposts for a new model of class-action environmental litigation using Southern court systems against Northern multinationals. To what extent a new litigation model emerges from this case, and whether that model is worth emulating given the extraordinary level of suffering that has accrued over the many years of legal battles and delays, remains to be seen.

BACKGROUND

AGUINDA V. CHEVRONTExACO AROSE OUT OF THE HAZARDOUS methods of oil extraction Texaco used when it became the first oil company to enter Ecuador's Amazon region in the late 1960s (Chevron and Texaco merged in 2001, and the combined entity is called ChevronTexaco). Ecuador's Ministry of Energy and Mines entered into a partnership with Texaco to develop fields in the northern part of the Amazon region just south of Colombia. Its contract required it to take all reasonable measures to protect the environment, and government officials at the time testified that they expected the methods to be consistent with the best practices then used in the United States and most other countries. These requirements, largely ignored by Texaco in Ecuador, were intended to protect what was considered one of the most fragile ecosystems in the world, home to five percent of the plant species on the planet and five of the nine indigenous groups in Ecuador's Amazon region—the Cofan, Secoya, Siona, Huaorani, and Quichua.

The fundamental claim of the lawsuit is that Texaco, to save an estimated \$3 per barrel or \$4.5 billion over the two decades of the operations, systematically dumped billions of gallons of toxic waste into unlined pits dug out of the earth and into swamps, streams, and rivers. When oil is extracted from a well, it produces two fundamental parts. One is the commercially marketable crude and the other is "water of formation" that includes carcinogenic toxins such as benzene, toluene, and arsenic. To minimize impact on the environment and surrounding populations, it has been the custom of the oil industry for at least one-half century to separate the water of formation from the marketable crude and dispose of it by "re-injecting" it back into wells, sometimes as deep as thousands of feet underground. Properly re-injected, these powerful toxins have little or no environmental impact. Not to re-inject has been considered extremely hazardous. For example, the state of Texas outlawed the practice of dumping water of formation in 1919.

Significantly, most of the pollution alleged in the complaint was not caused by pipeline spills or a calamitous one-time spill, as was the

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case with the Exxon Valdez. Rather, the damage was the result of a conscious decision by Texaco executives to increase its return by externalizing to the environment the cost of disposing the water of formation on a daily basis at all of its 330 well sites. At the height of its operation, Texaco dumped 4.3 million gallons of water of formation *per day* into the rainforest.

Once a pristine rainforest, the area where Texaco operated is now filled with 627 open-air, toxic waste pits and hundreds of swamps and streams filled with fudge-like oil muck. Some of the waste pits are the size of football fields, and many contain the carcasses of cows and horses that have fallen in the pits and asphyxiated. Over the years, the contents of each pit have leached into the groundwater and surrounding streams and rivers, which the population depends on for drinking water. Because there is virtually no running water in the region and



Lou Demattis

A child with feet covered in oil after running through polluted areas.

bottled water is not affordable nor available, the vast majority of people who live in the countryside are forced to slowly poison themselves day after day when they consume the contaminated water.

Two epidemiological studies found that rates of cancer and other diseases are skyrocketing in the areas that are most affected. It is common to meet young women who complain of spontaneous abortions and/or uterine cancer, or who have young children who have died of cancer. Studies indicate that most natural water sources are contaminated at hundreds or even thousands of times levels considered safe by the U.S. Environmental Protection Agency or the European Union. For the clean up, an oil remediation expert hired by the plaintiffs estimated it will take a minimum of \$6.14 billion and at least five to ten years of around-the-clock dredging, incineration, and disposal. While this might seem like a large sum, it is a relatively modest portion of the estimated \$20 to \$30 billion in profits that Texaco extracted from its operations in Ecuador.

Before Texaco arrived, the five indigenous groups in this area had prospered for centuries by living off the forest and river ecosystems. Each of these groups has been severely impacted, and one group, the Cofan, has seen its population drop from 15,000 in 1970 to approximately 800 today. Residents of the region are exposed to contaminants and suffer dreadful medical consequences and the added indignity of having their survival as a cultural entity threatened.

CREATING A LEGAL CASE

FILING AN ORIGINAL ACTION IN ECUADOR UNDER ECUADORIAN law seemed far-fetched. Courts in Ecuador had virtually no history of

hearing environmental cases against multinational oil companies, and the largest judgment against an oil company after more than twenty years of oil activity and millions of gallons of spills and dumping was less than \$1,000. The Ecuadorian judiciary was hostage to an antiquated civil code (e.g., no pre-trial discovery, no right of the parties to call their own experts, and no cross-examination of witnesses) and had a reputation for corruption such that the plaintiffs had no confidence in their national court system even if the civil code was not so burdened. Further, because there was no mechanism for a class action, each of the tens of thousands of victims would have to sue individually in the local court where the damage occurred. This was a practical impossibility, as there are only four judges and a handful of lawyers in the region and the vast majority of those affected had no money to finance a lawsuit. For these reasons, the U.S.-based legal team concluded that Ecuador's civil justice system simply could not provide an adequate remedy against Texaco.

The most logical place to file, then, was the federal court in New York City. At the time, this option made the most sense because it seemed like a far more convenient forum than Ecuador. Texaco's global headquarters was only thirty kilometers away from the Manhattan courthouse, in the New York City suburb of White Plains. Most witnesses, including those from Texaco and any experts, would speak English and be in the United States. A U.S. court, even though historically loath to take cases against American companies from foreign plaintiffs, was the most likely place to get a fair hearing if jurisdiction could be established. Civil procedure law in the U.S. also provided a mechanism for class-actions, meaning thousands of victims could join together in one lawsuit represented by one legal team. The case could be decided by a jury of American citizens, as opposed to a judge. Finally, a U.S. court would have the power to enforce a judgment against Texaco in the U.S., where its assets lay.

FILING A CLAIM IN U.S. COURTS

The case was brought under traditional common-law tort theories of negligence, public nuisance, private nuisance, strict liability, trespass, and civil conspiracy. Additionally, the litigation team alleged a violation of the Alien Tort Claims Act (ATCA). This law, passed by the first U.S. Congress in 1789, allows federal courts original jurisdiction over any civil action brought by a foreigner for torts committed in violation of the law of nations. In sum, there seemed to be ample basis for jurisdiction in the U.S. apart from the ATCA, while at the same time the ATCA provided its own base of jurisdiction independent of the other common-law theories.

Egregious environmental damage of this sort did not at first glance present a convincing case for a violation of the law of nations, given the nascent state of international law on the environment at the time the case was filed. Texaco's actions seemed more like the byproduct of an attempt to maximize profits, rather than an overtly political crime more likely to be litigated under international law. Thus, an action in the U.S. based only on the ATCA seemed risky. Even though the ATCA has been used successfully against foreign government officials accused of political crimes such as torture, it had never been used successfully to prosecute a private company for the destructive environmental impact of its economic activity.

In regard to the ATCA, the limited question before the court was whether Texaco's adoption of sub-standard exploration methods in Ecuador violated the law of nations. This question was explored in three separate, yet interrelated, ways: first, was the environmental harm such that it violated customary international law; second, did the impact on the indigenous groups amount to cultural genocide;

and third, did the methods used by Texaco amount to a form of racial or ethnic discrimination, given that they only dumped water of formation in communities inhabited by indigenous persons and persons of color. Legal papers cited various declarations, treaties, and commentaries of international jurists in support of these arguments (including the Stockholm Declaration on the Human Environment, the Convention On Biological Diversity, the Rio Declaration on Environment and Development [Rio Declaration], the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, the U.N. Draft Declaration on the Rights of Indigenous Peoples, as well as support among commentators for a basic international norm prohibiting serious assaults on the environment). In short, the plaintiffs argued that the survival of the indigenous groups in Ecuador—as well as the human race—depended to some extent on the survival of the rainforest that Texaco was destroying with its methods of oil extraction, and that Texaco's behavior violated the law of nations just like piracy on the high seas or state-mandated torture.

The lawyers never regarded this action exclusively or even predominately as an ATCA case. It was always primarily a tort action with underlying human rights claims framed through traditional common-law theories. Cultural genocide and environmental harm could be litigated not only through the ATCA but just as effectively through theories of negligence, strict liability, trespass, and nuisance. This approach not only had a solid basis in law, but given the novelty of the ATCA in the environmental context, the litigation team decided it would be more palatable to a court historically suspect of granting jurisdiction to low-income foreign plaintiffs suing a wealthy American corporation.

The initial decision in 1994 on Texaco's motion to dismiss the case was extremely encouraging. Judge Vincent Broderick, in granting discovery rights to the plaintiffs, found that the Rio Declaration was supportive of allegations that the widespread dumping of hazardous wastes violated the law of nations. Judge Broderick passed away in 1995 and was replaced by Judge Jed Rakoff, who suggested that the ATCA was not violated and ruled the case should be heard in Ecuador under the doctrine of *forum non conveniens* (which allows a case to be “removed”—not dismissed—when the judge determines that another forum is more convenient and could provide an adequate remedy to the plaintiffs). However, the court forced Texaco to make several concessions. The company had to stipulate that it would accept jurisdiction in Ecuador. It also had to agree that thousands of pages of its internal documents received via discovery in the U.S. could be used as proof in the Ecuadorian litigation. Finally, Texaco had to waive defenses under Ecuadorian law based on the statute of limitations and agree to pay any judgment imposed against it. In short, if ChevronTexaco wanted to avoid judgment in the U.S., it had to agree to engage in a trial in Ecuador under conditions the likes of which had never been seen in Latin America and which could scarcely have been contemplated at the outset of the litigation.

REMOVAL TO ECUADORIAN COURTS

On August 16, 2002, the U.S. Court of Appeals for the Second Circuit affirmed the “removal” of the case to Ecuador after almost ten years of litigation. At that point, a pivotal decision had to be made: would it be worth it to go through the major expense and logistical challenge of re-filing the case in Ecuador? The answer, for reasons related to conditions imposed on ChevronTexaco by the U.S. Court of Appeals, but also to improvements in the Ecuadorian civil justice

system during the decade of the litigation, was a resounding yes. In effect, the only alternative was to let the case end, which would have guaranteed that there would be no legal remedy. But to continue a case in a foreign forum after removal from the U.S. on grounds of *forum non conveniens* would be rare. Because of the expense and difficulties in finding local counsel, the overwhelming majority of such cases never get re-filed. Moreover, because it still was not possible to bring a class-action case in Ecuador, the only viable way to frame the case was as a “popular action” brought by an organization that would seek



Oil contamination seeps into a pond.

clean-up. Given the shortcomings of the Ecuadorian civil code, it would not be practicable to seek personal damages. Thus, the thousands of victims would not recover personal compensation unless it could be negotiated with the company after a judgment was imposed by the court.

On October 21, 2003, when Judge Alberto Guerra Bastides called the court to order in the town of Lago Agrio, more than sixty of the victims—many indigenous in traditional dress—packed the gallery. About 1,000 more plaintiffs and townspeople stood on the street outside the courthouse. Some, like the Huaorani, traveled two days by foot, canoe, and bus to attend the trial. Dozens of photographers and television crews, from Ecuador and around the world, were on hand. The local radio station broadcast the proceedings live. Lawyers from ChevronTexaco, including a vice-president based in the U.S., were present. In Ecuador, the trial led national broadcasts and made the front pages of every leading newspaper in the country—one called it “The Environmental Trial of the Century.”

Over the course of the initial six-day “proof period” called for by Ecuadorian law, the plaintiffs submitted 6,000 pages of documentary evidence and presented several witnesses, including a Spanish doctor who conducted the epidemiological studies, a former Ecuadorian military leader who was the minister of energy in the 1970s, and several local residents affected by the contamination. In addition, an expert hired by the plaintiffs released a preliminary assessment in which he

concluded that a comprehensive clean-up would cost at least \$6.14 billion, a figure almost as large as the government's annual budget and about one-third the size of the national debt. In February 2004, the second phase of the trial is set to begin. This involves site inspections by the judge, field testimony of witnesses who live near the toxic waste pits, and reports by court-appointed scientific experts. The inspections are expected to take approximately six months, with a decision expected in late 2004. Any decision can be appealed to an intermediate court in the region, and then to the country's Supreme Court in Quito.

ChevronTexaco presented no witnesses or documentary evidence during the initial period, and instead relied on two technical defenses. First, it claimed the plaintiffs sued the wrong party. It claimed that the proper defendant was not ChevronTexaco but rather its fourth-tier, wholly-owned subsidiary, Texpet, or Texaco itself rather than ChevronTexaco. Given this claim that the proper party was not sued, ChevronTexaco challenged the jurisdiction of the court to hear the case despite its stipulation with the federal U.S. court that it would accept jurisdiction in Ecuador. Judge Guerra immediately rejected this jurisdictional challenge. Second, ChevronTexaco claimed that the Ecuadorian government released it from all responsibility for clean-up following a \$40 million settlement with Ecuador's Ministry of Energy and Mines in 1995. The plaintiffs have challenged this agreement as fraudulent and argue that regardless it is irrelevant to the private claims of Ecuador's citizens who live in the region. As part of this agreement, Texaco claimed it remediated 207 of the 627 waste pits it left behind, but a study by the plaintiffs submitted as evidence found that each of these pits still contained significant concentrations of oil and toxins underneath dirt that was piled on top of the sludge. Significantly, as part of this agreement, ChevronTexaco never claimed to have remediated the contaminated groundwater, or the swamps and rivers into which the water of formation leached or was dumped directly. According to the plaintiffs' expert, these components of the clean-up comprise the bulk of the multi-billion dollar cost estimate for a comprehensive remediation.

CONCLUSION

ONE OF THE IRONIES OF THE CASE IS THAT AFTER ARGUING for ten years before a U.S. court that the case should be heard in Ecuador, ChevronTexaco promptly challenged the Ecuadorian court's jurisdiction. And after arguing for ten years that Ecuador could not possibly provide a fair forum for the case, the plaintiffs embraced the opportunity to use that country's forum despite its procedural limitations and its history of failing to act on environmental claims. ChevronTexaco's defense might be an example of assertive lawyering, but much of the Ecuadorian press interpreted its challenge to the court's jurisdiction as an affront to Ecuador's sovereignty. As for the plaintiffs, the federal

U.S. court's exercise of residual jurisdiction over ChevronTexaco in Ecuador provided powerful leverage that would not have existed had the case been filed in Ecuador initially. Further, the lead Ecuadorian lawyer for the plaintiffs, Alberto Wray, is a former member of the Ecuadorian Supreme Court and a leader in efforts to reform the nation's judiciary to make it less corrupt and more procedurally agile. Wray is highly respected in Ecuador and throughout Latin America and, working closely with his colleague Monica Pareja, he is confident that the case can get a fair hearing in Ecuador despite the doubts of some of the plaintiffs.

If one can make out a new model of litigation for environmental problems in the developing world based on this case, such model might have certain elements. Initiating the case in the U.S. provided the means to subject ChevronTexaco to jurisdiction in Ecuador, the tools (via the internal documents obtained through discovery) to prove the case, and the enforcement power to ensure payment of any judgment that might be imposed. Also important is transnational cooperation among lawyers and clients. The solo practitioner who initiated the case, Cristobal Bonifaz, is an Ecuadorian native who bridges cultural gaps between the U.S. lawyers and Ecuadorian lawyers and clients. The U.S. law firm of Kohn, Swift & Graf, which specializes in class-action litigation with human rights implications, has provided legal expertise and financial resources to sustain what for years was an inordi-

nately high-risk litigation (the lawyers are working on a contingency-fee basis, meaning no fees will be collected if the plaintiffs do not prevail). Manuel Pallares, a highly skilled biologist from Quito who has lived in the Amazon region, has been instrumental in locating and identifying each of Texaco's toxic pits (amazingly, there is no evidence the company kept records of each pit it left behind). Perhaps most importantly, the class of plaintiffs in the 80 affected communities has been united in a grass roots organization called the Front for the Defense of the Amazon. This organization and its leader, Luis Yanza, have played an indispensable role in driving the litigation, capturing the public imagination in Ecuador, and providing consistent direction to lawyers in the U.S.

Ultimately, the case is about whether the life of people in the rainforest is worth as much to a multinational company as the life of a person in the developed world, where oil companies use re-injection technology. If ChevronTexaco can be held accountable for its actions in Ecuador, there will exist a new economic incentive for all oil companies to raise the standards of their practices throughout the developing world. In Ecuador, as a result of this litigation and the potential multi-billion dollar liability facing the company, those standards are already rising. *HRB*