LITIGATION 2006
A SUPPLEMENT TO THE AMERICAN LAWYER & CORPORATE COUNSEL
ALM

Jungle Warfare

When residents of the Ecuadorean Amazon sued Texaco (now Chevron) in the U.S. for environmental damage, the company argued that the case belonged in Ecuador. Memo to Chevron: Be careful what you wish for.

By Carlyn Kolker

It is hard to imagine a more unlikely place for a high-stakes trial of a multibillion-dollar claim against a multinational oil company than Lago Agrio, Ecuador, population 35,000. Lago Agrio is a gritty, diesel-fumed city, a through-station for workers heading to the nearby petroleum wells, and a gateway for tourists heading to the nearby Amazon jungle. It is 20 miles from the paramilitary-controlled Colombian border. It has just one paved road in and out of town. Its streets are lined with open-air markets, fuel trucks bump along the road, and stray goats occasionally wander by.

And yet Lago Agrio is the central theater in a nearly 15-year war between 30,000 residents of Ecuador's Amazon basin and Chevron Corporation, the second-largest oil company in the United States. The war began in federal court in New York, where the personal injury class action went through a nine-year jurisdictional battle. For the past three years, the two sides have been engaged in a contentious trial in Lago Agrio over Chevron's alleged contamination of the Amazon region. According to the plaintiffs' allegations, Chevron is guilty of the most dire of environmental and human disasters: dumping 18.5 billion gallons of oily water into rivers and streams in Ecuador's Amazon region, where a subsidiary of Texaco Inc. (which merged with Chevron in 2001) operated from 1964 to 1992. They say the dumping caused a high incidence of cancer, spontaneous abortions, and birth defects. Chevron says it complied with Ecuadorean law at the time. It says the plaintiffs are just trying to score a hefty settlement.

The trial is a test of Ecuador's fragile judiciary. (Two years ago Ecuador's then-president fired 27 of 31 members of the Supreme Court and replaced them with his allies before fleeing the country; the court was reconstituted last year with new judges.) But so far the results of dragging a U.S.–style claim into a courtroom in a developing nation have been organized chaos—in this case, a trial that is governed less by a judge than by the wills of two opposing parties and their lawyers.

DAVID DEAL

Chevron counsel Thomas Cullen, Jr., of Jones Day: The Ecuador case "has got history and resonances beyond a normal litigation."

The plaintiffs in the Lago Agrio case are trying for something beyond the norm: representing a class of individual plaintiffs in an environmental tort case in a country with little history of toxic tort law. In that sense, the case is a pioneering new paradigm of exporting American-style environmental class actions.

ECUADOREAN PLAINTIFFS RALLY OUTSIDE THE LAGO AGRIO COURTHOUSE ON THE FIRST DAY OF TRIAL IN OCTOBER 2003 (ABOVE). THEIR SUIT ACCUSES TEXACO (NOW CHEVRON) OF DUMPING CONTAMINATED WATER FROM OIL WELLS INTO OPEN PITS.

Chevron itself once believed Ecuador was the best place to try this case, pushing early on to move the case south. But now it is doing its best to move the center of the litigation back into the U.S. court system. In June 2004 Chevron fired the opening salvo with an arbitration-turned-federal-court suit. In the arbitration filing, Chevron argued that the plaintiffs had no right to sue it after the Ecuadorean government indemnified Chevron against future losses. The case has now evolved into a dispute over the legitimacy of the contract Texaco had to operate in Ecuador back in the 1970s. The result of that case could wipe out any potential judgment against Chevron in Ecuador.

No one knows how much money is at stake in the Lago Agrio trial. At one point plaintiffs estimated damages at $6 billion. Now they're saying they could be higher. Chevron says any award against it would be "nonmaterial"—so small it's not even worth mentioning in Securities and Exchange Commission filings. But before any pennies have been won or lost in this case, its importance is indisputable. The case, says Thomas Cullen, Jr., a Jones Day partner who represents Chevron, "has got history and resonances beyond a normal litigation." The Chevron dispute is at the intersection of some of the strongest political, economic, and legal currents in the world today: the rights of indigenous populations, the disputed science of environmental disasters, and the collision of sovereign and international law.

TEXACO (NOW CHEVRON) PERPETRATED ONE OF THE WORST ENVIRONMENTAL DISASTERS OF THE CENTURY, PLAINTIFFS SAY.

Aguinda v. *Texaco* was filed in federal court in New York City in 1993, when Cristobal Bonifaz, a U.S. plaintiffs lawyer who is Ecuadorean by birth, sued Texaco in a class action alleging negligence and major environmental damage. Bonifaz seized on a theory in vogue with human rights lawyers at the time: using the centuries-old Alien Tort Claims Act to hold corporations responsible for alleged torts committed abroad. U.S. courts can be good for plaintiffs. Unlike those of most other countries, they promise jury trials. They are relatively efficient. They tend to hold companies to high legal standards. They offer the possibility of high damages. "Punitive damages are very unusual in other parts of the world," says Alejandro Garro, a Columbia University Law School professor. "Victims can get windfalls for damages in U.S. courts."

Bonifaz wasn't so lucky. In 2002 the Second Circuit upheld a lower court and dismissed the case on grounds of *forum non conveniens*—a common reason for dismissal of alien tort cases. The three-judge panel upheld the trial court's view that plaintiffs had an adequate forum for their grievances in Ecuador. For Texaco, it was a win. The company had argued all along to transfer the case to Ecuador. The plaintiffs said they could never get a fair trial there because the courts were corrupt and inefficient and had little experience with tort claims.

But by the time the case moved to Ecuador, a lot had changed for Texaco. The political climate was different: Thanks to a change in governments, Ecuador, which had originally written to the U.S. Department of State to say the American case violated Ecuadorean sovereignty, had ended up supporting the plaintiffs in their efforts to keep the case in the U.S. The Ecuadorean legislature had passed stricter environmental laws, including one permitting private citizens to bring class action–type law suits.

Even the cast of characters looked different. Texaco had been swallowed by Chevron. With the acquisition came a switch of lead counsel from King & Spalding to Jones Day. On the plaintiffs side, there was also a change in counsel. In Ecuador, Bonifaz's role dwindled. The plaintiffs executive committee became increasingly frustrated with his sporadic visits there and by his sparring with Chevron lawyers, who claimed that Bonifaz threatened them with violence.

ABOVE, ONE OF THE ALLEGEDLY POLLUTED SITES. PHOTOGRAPHS BY LOU DEMATTEIS

(A Chevron local lawyer later retracted the claim.) Into Bonifaz's shoes stepped Steven Donziger, a passionate and ambitious former Washington, D.C., public defender, who had worked on the case on-and-off from its inception. Donziger, a Harvard Law School classmate of Bonifaz's son, John, is a sole practitioner who works from his apartment on Manhattan's Upper East Side.

Like Bonifaz before him, Donziger is funded in large part by the deep pockets of the Philadelphia plaintiffs firm Kohn Swift & Graf, which specializes in consumer class actions. It has also funded other international human rights class actions, including suits against Holocaust-era banks and a human rights case against the estate of Ferdinand Marcos in which the plaintiffs won a $2 billion award in 1996. (They are still trying to collect.) Partner Joseph Kohn won't say how much money his firm has fronted so far in the Lago Agrio case. Kohn Swift, Donziger, and Bonifaz will all take portions of any award the plaintiffs ultimately receive; the rest will go to the Frente de Defensa de la Amazonia, the nonprofit group that is spearheading the Lago Agrio case, to oversee a cleanup. Donziger won't specify the formula, but says it will depend on the size of any award—the bigger the award, the smaller the percentage the lawyers will take.

In May 2003 the plaintiffs filed the new suit in Ecuador. The trial began five months later, in October, with more than 200 people filling the courtroom in the Superior Court in Lago Agrio. Many were class members, indigenous Ecuadoreans wearing their native dress, some of the women bare-breasted. Ten years into the litigation, in the midst of the crowd, the two sides finally had a chance to lay out their basic arguments of the merits.

Alberto Wray, a former Ecuadorean justice minister, argued for the plaintiffs that day. (Wray no longer works on the case day-to-day but is still a member of the plaintiffs' team.) He said Texaco had perpetrated one of the worst environmental disasters of the past century, dumping 18.5 billion gallons of "formation water"—the water left over when crude oil is taken from underground wells—into open pits that fed into rivers and streams. (Coincidently, Lago Agrio means "sour lake.")

The practice of discharging oily water into pits, rather than reinjecting it into the oil wells, was already out of favor in the U.S. when Texaco began employing it in Ecuador in the 1960s. Donziger points to state regulations in California and Louisiana, where Texaco also operated at the time, that restricted the practice. "They decided to apply a different standard of life in the Amazon rain forest than in the U.S.," says Donziger.

When Adolfo Callejas, Chevron's local lawyer, spoke in court that day, he said the *plaintiffs* were applying different legal and environmental standards today than existed back then. Moreover, he said, the plaintiffs' whole case was moot because it relied on the 1999 Ecuadorean class action law, which is not retroactive. Chevron continues to defend Texaco's practice of dumping formation water, saying it was still common in the U.S. through the 1980s. The company says there are no known health risks to the practice. For Chevron, this case is a straightforward contract dispute.

The argument dates to the origin of Texaco's involvement in Ecuador: After coming to Ecuador in 1964, the company operated in a joint venture, first with Gulf Oil Corporation Limited and later with Empresa Estatal Petroleos Del Ecuador (Petroecuador), the Ecuadorean government's state-owned oil company. Once Petroecuador joined, Texaco's stake in the joint venture never exceeded 37.5 percent. Texaco managed oil exploration and built the pipelines. When Texaco started winding down its operations in 1992, it began negotiating a cleanup of its sites with the Ecuadorean government.

"After months, years of negotiation, we came up with a plan in 1995," says Ricardo Reis Veiga, Chevron's associate general counsel for Latin American litigation. Texaco agreed to a long list of sites that it would remediate. "We had a very detailed certification process. Every single work we did had to be inspected and approved by different agencies of the government," Reis Veiga says. (A remediation is a customary part of any departure from a country, Chevron says, and is not any admission of environmental harm.) In 1998, representatives of Texaco, Ecuador's environmental minister, and the head of Petroecaudor signed

a final agreement certifying the remediation process and releasing Texaco from any liability. So why, says Chevron, has another group—30,000 residents in the region, to be precise—turned around and sued it?

"We think we negotiated with the government, which represents the interest of the people," says Reis Veiga. "We owe it to our shareholders and the public to prove the truth: We did comply with the remediation."

Both sides soon learned that the legal system in Ecuador bore little resemblance to a U.S.–style trial process. Trying a case in Ecuador meant mastering a system based on an arcane, Napoleonic civil code rather than the U.S.'s common law system, which relies on extensive fact-finding and judicial precedent. In Ecuador there's no discovery phase, no summary judgment, no Daubert hearings. And witness testimony? In the three years of trial, that's taken just six days.

BOTH SIDES SOON LEARNED THAT THE LEGAL SYSTEM IN ECUADOR BORE LITTLE RESEMBLANCE TO A U.S.–STYLE TRIAL PROCESS.

Not that the court is preoccupied with the trial every day of the week. The court convenes a few days each month for "judicial inspections." Civil law contains the "inquisitorial principle," or notion of judge as investigator, says Oscar Garibaldi, a partner at Washington, D.C.'s Covington & Burling who has practiced in Argentina's civil law system. "The judge has an obligation to seek the truth on his own. That is very ingrained in cultural traditions." If a judge is deciding a dispute about a traffic accident, for example, he'll visit the intersection where it occurred.

Or, if he's deciding liability in an alleged environmental disaster, he'll go to the site of the alleged contamination. At the beginning of the trial, each side came up with a list of sites they wanted the judge to see: 95 sites for the plaintiffs, 27 for Chevron. He agreed to the whole list. (In August a different judge granted the plaintiffs' request to cancel 64 inspections.) The inspections take place at oil wells, former oil wells, drinking wells, or production stations in the rural jungle surrounding Lago Agrio. The plaintiffs allege that, as part of the remediation, Texaco covered pits of formation water with dirt instead of cleaning them up. They say that hydrocarbons lace the soil around the pits. In turn, Chevron says it complied with the standard of the remediation. The company also says that if any damage to the environment exists, it is the result of antiquated oil production technology used by Petroecuador, which still operates in the region.

The inspections are a mobile court proceeding. Each side will bring up to 15 local lawyers as well as technical assistants, security details, photographers, and expert witnesses. (The Lago Agrio case is being tried by local counsel in Ecuador; Jones Day lawyers handle overall strategy, as well as the litigation in New York.) Donziger and Reis Veiga come to Ecuador for the more important inspections. Plaintiffs—members of the nearby communities, often stop by to protest the conditions in the region. The judge brings his own experts—technical assistants who are paid for by both sides and who assist the judge in his ultimate decision. In the often-blazing, 100-plus degree heat, the lawyers expound on the legal issues and the disputed technical methods. Then the technicians bore for samples. The inspections sometimes last six hours. "You have like a mini-trial, every time we go to a site," says Reis Veiga.

Three years and 42 site visits in, it's hard to say who's winning the trial. Both sides have written reports, rebuttals, and answers to the rebuttals about the data collected from each site. Those will be taken into account by the court's own experts, who will then write their own, supposedly conclusive reports. To date, just one such report has been released. (Plaintiffs lawyer Donziger cautions that court reports are only expected to be necessary when the parties' experts disagree on the level of contamination at the sites.)

In and out of the courtroom, this case looks more like hand-to-hand combat than a professional exchange of arguments. In the face of a weak judiciary, the two sides have resorted to litigation tactics that have gone virtually unchecked by any judge. Each side accuses the other of egregious behavior—although few of these claims are independently verifiable. Meanwhile, evidence gathering has degenerated into a scientific free-for-all.

"Chevron is engaged in litigation strategies that I believe are not ethical," says Donziger. He says the company's ties to the Ecuadorean military have jeopardized the plaintiffs' ability to try their case. According to Donziger, the turning point came last October when both sides had assembled in Lago Agrio for a major inspection at an oil production site on land belonging to the indigenous Cofan tribe. Donziger's team had arranged for about 100 Cofan villagers, members of the plaintiffs class, to attend. The night before the inspection was to take place, the judge cancelled it, citing security reasons—the villagers were going to schedule a roadblock. Donziger says the security tip was a hoax concocted by Chevron's private security force, which is linked to the military. "It was so insulting. It was so disrespectful. Win or lose, this litigation should be about people who have never had access to justice getting access to justice. The view that [the villagers] would pose a threat is just outrageous," says Donziger. After complaining publicly about the incident, he says, the plaintiffs began receiving threats: One local lawyer's office was robbed, with only important case documents stolen; a lead plaintiff received a threatening call; another lawyer got a death threat, Donziger says.

After that, Donziger says, the plaintiffs employed round-the-clock security at their offices. They also launched a letter-writing campaign asking the Ecuadorean authorities to investigate; the plaintiffs office in Quito is packed

with postcards from around the world expressing support. Amnesty International and the International Commission of Jurists in Geneva have also pressured the Ecuadorean government for an investigation. Donziger doesn't directly accuse Chevron, but doesn't rule out a connection: "It's not out of the question that Chevron's private intelligence believes it's part of their job to wage a war of espionage on us."

Chevron denies the plaintiffs' accusations and fires back with some of its own. "Chevron has absolutely no connection," to the threats, says Reis Veiga. "They only talk, and never prove" their facts, adds Rodrigo Perez, a Chevron local lawyer. Besides, says Reis Veiga, "I have some concerns around the behaviors and actions of the plaintiffs attorneys in terms of going beyond the practice of law and exercise of justice." He says the plaintiffs have tampered with the sampling data, broken the proper chain of custody for the data, and regularly defied court orders on proper sampling techniques. He points to a sworn statement from a plaintiffs expert who said he could not authenticate the chain of custody of samples.

There is also pervasive chaos in the courtroom and the judge's chambers. In the trial's three-year lifespan, three judges have presided thus far. Ecuadorean law calls for large cases like the Chevron matter to be overseen by the head of the local court where it is tried; that position rotates every two years. One judge establishes certain procedures, and another enforces them as he pleases. It doesn't help that Ecuador has little experience with toxic tort or environmental cases. The Lago trial is a dispute about science. But the fundamental ground rules that govern the trial are themselves in dispute: Did a judge approve them? Are they a binding agreement between two parties? Or just a set of suggestions?

In the early phase of the Lago trial, scientists and lawyers from both sides spent nearly six months negotiating guidelines for the impending judicial inspections: what to test, how to test for it, and how to analyze those tests. The result was more than 70 pages of highly technical language laying forth sampling and analysis methods, presented to and acknowledged by the court in August 2004.

EACH SIDE ACCUSES THE OTHER OF EGREGIOUS BEHAVIOR, AND EVIDENCE GATHERING IS NOW A SCIENTIFIC FREE-FOR-ALL.

Donziger views the documents as a suggestion: "At the end of the day, they put forth a document that was a general guide, but it was not binding," he says. "It provided a structure for us to communicate about how to do the science in a country where the judge wasn't going to step up and impose his own rules." He says, for example, that the guidelines called for tests that do not truly measure oil contamination.

"No one would spend six months discussing this and say, 'I never agreed to it,' " responds Reis Veiga. "The way I see it is they are failing to obey an order of the court." But Donziger says Chevron isn't following the agreement either—sometimes, for example, testing in places far from oil wells. Chevron denied the charges. "I guarantee to you that Chevron has consistently complied with this agreement," says Reis Veiga.

The disagreement about whether in fact there is any binding agreement could ultimately call into question the legitimacy of the proceeding in Lago Agrio. Because they are not following the same procedures—whether court-ordered or not—each side is basically coming up with scientific results that support its own case. Chevron, for example, uses a test for contamination that was used in its remediation in the 1990s. Plaintiffs' experts call the test "completely inappropriate" for oil contamination, and don't use it. The two sides take different amounts of samples: Chevron often logs hundreds, and the plaintiffs a quarter of that number per inspection. Neither side believes in the accreditation of the lab the other uses. Currently, no judge has quelled this bickering.

There's little to signify that Lago Agrio's courthouse is anything but another semidilapidated building on a strip of semidilapidated buildings. There's no august architecture, no reliefs of the scales of justice—just a sign at the top of a four-story building that you must tilt your head back to read, "Corte Superior de Justicia." At street level there's an open-air stationery store.

The current presiding judge, Superior Court Judge German Yanez, keeps his chambers on the third floor. He is used to overseeing divorces or petty crimes, even the occasional drug-trafficking case, not politically charged environmental class actions. He appears shell-shocked by the trial he's overseeing, shrugging his shoulders and looking up toward the sky before answering questions in a slow, deliberate manner; he frequently responds with a Spanish version of the sentence, "As the judge, I have to fulfill what the law sets forth," which he repeats like a mantra. It is a nice way of saying that he's just acting as a traffic cop, waving people through or stopping the rush. When it comes to the accusations of evidence tampering and death threats, for example, Yanez says, "Logically, the parties, as much the plaintiffs as the defense, accuse each other of many things. They are defending their positions." He adds, "I am a simple observer of the actions of the parties. . . . It's not my job to investigate the causes or reasons of actions outside of this trial." When asked about the differing scientific methods, he simply shrugs his shoulders and points to the inspection protocol. And then he says that judicial decisions about the methods can be made only at the end of the trial.

Yanez probably won't decide the outcome of this trial; his term expires in January 2008. The judge who does ultimately rule will rely on the record that's piled up from all the judges before him, mostly the scientific reports from the previous judges' experts. Notes plaintiffs' lawyer Alberto Wray: "Even a very good [report] will never be the same thing as a judge who is present in the

field." The deciding judge will have hundreds of thousands of pages to sift through; about 110,000 pages have accumulated in the case so far, and the court has a separate room—a converted supply closet—to house them.

Under the Ecuadorean law that governs this trial, matters of law aren't determined until the end. The case could theoretically be thrown out on a jurisdictional issue or statute of limitations after many years of trial. If it gets to an award stage, there's even more guessing. Ecuador isn't known for its multibillion-dollar awards. Columbia Law professor Garro notes that it all comes down to the question: "How do you value human life in Ecuador, which has hundreds of dollars of [per capita] GDP?"

Federal judges in the U.S. aren't bound to enforce foreign judgments. Chevron won't say for sure that it will pay any judgment imposed in the Lago Agrio case: "I don't think we can say any award would be an internationally enforceable award based on full faith and credit," says Jones Day's Cullen. "We are at the beginning of the process. It would be very difficult to piece out what would happen [if there were an award]. It would be irresponsible." Aside from a brief settlement discussion when the case was in New York, there have been no publicly acknowledged settlement talks.

Chevron believes its solution to the entire Lago Agrio fiasco lies in the courtroom of New York federal district court judge Leonard Sand. The story of the nascent dispute in New York is a parallel tale to the Ecuador litigation, one that began soon after the opening moments of the Lago Agrio trial. In 2004 Chevron filed an arbitration with the American Arbitration Association against Petroecuador. The arbitration was an attempt to protect the U.S. company against an unfavorable outcome from the trial in Ecuador—an insurance policy against losses abroad. Chevron claims the Lago Agrio case is illegitimate, citing the 1998 promise by Ecuador (in the form of Petroecuador) to release Texaco from all environmental liability and claims. In its arbitration filing, Chevron claims Petroecuador—and, by extension, the Ecuadorean government—has breached this agreement. Chevron cites the joint venture agreement between Texaco and Gulf in the 1970s, arguing that Petroecuador stepped into Gulf's shoes by signing on to the joint venture. Under the contract, Chevron says, arbitration is the appropriate channel for any future dispute between the two parties.

The Ecuadorean government responded by questioning the very legitimacy of the contract Chevron cited, saying the two parties never had a contract that was subject to arbitration. (At the time, Ecuador was represented pro bono by Terry Collingsworth of the International Labor Rights Fund, a friend of Bonifaz and cocounsel with him in other cases.) Ecuador sued Chevron in state court in New York to stay the arbitration. The case was later removed to Judge Sand's federal courtroom, where it has blossomed into a full-fledged contract dispute. Ecuador says it's a ploy for Chevron to avoid the Lago Agrio trial: "When [Texaco was] first sued by Ecuadorean plaintiffs, this never [came] up. It's not until they are down there that they turn around and come up with this creative argument," says Raul Herrera, a partner at Winston & Strawn who now represents Ecuador. (Collingsworth declines to comment on the switch.)

If Judge Sand decides in Chevron's favor, there could be enormous consequences for Ecuador. According to Chevron's argument, Petroecuador would have to indemnify Chevron for any awards against the U.S. oil company. This means that Ecuador—because it owns Petroecuador—would have to pay up if there's an award in the Lago Agrio trial, according to Chevron's reasoning. "What happens in Lago doesn't necessarily decide the issue of who pays," says Cullen.

The prospect of a big payout has forced Ecuador to play another card. In July it fired back with a fraud defense in the New York case, saying that the remediation contract was executed with fraudulent tactics and that Chevron had "misrepresented the environmental status of the producing and shut-down oil fields" to the Ecuadorean government. Ecuador alleges that Chevron knowingly covered up pits with soil during the remediation in an attempt to hide the contamination from the Ecuadorean government. It's the same argument the class plaintiffs have employed in Lago Agrio. "They need to establish there is some material fact that we lied to them about," Cullen retorts of Ecuador's allegations.

The case is set for a bench trial next March. And therein lies the greatest irony of the case: that a federal judge in New York City could decide who pays in an environmental case that another U.S. judge had once sent to Ecuador.

E-mail: ckolker@alm.com

This article is reprinted with permission from the 2006 edition of LITIGATION. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM, Reprint Department at 800-888-8300 x6111 or visit www.almreprints.com. #001-11-06-0009

One Firm Worldwide℠
www.jonesday.com