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Corporate Accountability, Human Rights and Pursuing  
Justice in the Ecuadorian Amazon: Attorney Pablo  
Fajardo's Perspective on *Aguinda v. Chevron*

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INTRODUCTION

*Texaco operations in Ecuador began in 1964 and continued until 1992. Until 1990, Texaco served as sole operator of a concession covering approximately 1,500 square miles of Ecuador's Amazon rainforest. Texaco alone was responsible for planning, constructing and operating more than 350 well sites in a region that was, and still is, the ancestral home to numerous indigenous and farming communities. In violation of Ecuadorian laws and regulations, as well as standard operating practices being used in the United States at the time, Texaco engineered and oversaw a system responsible for what experts believe is the worst oil-related environmental disaster in the world.<sup>1</sup>*

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<sup>1</sup> The dumping of toxic waste in inhabited regions that relied on water for drinking was prohibited in the United States decades before Chevron began operations in Ecuador. A process called "re-injection" was the standard practice, promoted by the American Petroleum Institute in an oil field primer in 1962. Texaco itself owned a patent on the re-injection technology at the time of operations in Ecuador. For violation of U.S. operating standards *see, e.g.* Louisiana anti-dumping statute: Order No. 29-A, Statewide Order Governing the Drilling for and Producing of Oil and Gas in the State of Louisiana, State of Louisiana Department of Conservation, Minerals Division, May 20, 1942 ("When a well starts producing salt water, the operator or company shall report that condition to the Department. No salt water shall be allowed to run into the natural drainage channels of the area. Permits must be secured before disposing of salt water underground.") *amended by* Statewide Order No. 29-B, Revision of Statewide Order No. 29 & 29-A Governing the Drilling for and Producing of Oil and Gas in the State of Louisiana, LA. ADMIN. CODE tit. 43 § 129 (1943) ("When a well starts producing salt water, the operator or company shall report that condition to the Department. Permits must be secured before disposing of salt water underground.") (subsequently amended and reorganized); "Texas Oil and Gas Statewide Rulebook, Railroad Commission of Texas," 16

*Seventeen years ago, 30,000 indigenous people and farmers, now led by Ecuadorian attorney, Pablo Fajardo, filed a class action lawsuit against Texaco for a long list of grievances.*

*Pablo Fajardo was born in the village of El Carmen, Manabí, on July 8, 1972. In 1987 he migrated to the Ecuadorian Amazon town of Shushufindi where he still resides. At the age of 17, Mr Fajardo became founder of the Human Rights Committee of Shushufindi, an organization that still exists today, and, from 1996 to 2003, worked for the Apostolic Vicariate of Aguarico as head of the Human Rights Office in Shushufindi. Mr Fajardo attended the Universidad Técnica Particular de Loja where, in 2003, he graduated as a lawyer in the courts of the Republic of Ecuador. He has attended courses on Human Rights and Environmental Management at the Universidad Politécnica Salesiana de Quito and completed his Masters Degree in International Environmental Law at the Universidad Central del Ecuador.*

*In 2003, the Amazon Defense Coalition retained Mr Fajardo as an assistant lawyer and, in that position, he helped coordinate and develop the legal case brought by indigenous and farming communities from the provinces of Orellana and Sucumbios against multinational oil company Chevron<sup>2</sup> for serious violations against the environment and people of the region.*

*In June 2005, Mr Fajardo assumed the role of lead counsel for the plaintiffs and has served in this role until the present. For his tireless work defending the environment and advocating greater respect for human rights and social justice, Pablo Fajardo was awarded the 2007 CNN World Heroes Award in the 'Fighting for Justice' category. In April 2008, Mr Fajardo received further recognition when he was awarded the Goldman Environmental Prize, regarded by many as the "Green Nobel Prize".<sup>3</sup>*

*In the following reflection piece, Pablo Fajardo details his experiences throughout the Aguinda v. Chevron lawsuit, how and why he became involved in the case, and the challenges he has faced.*

#### ARTICLE

Although taking on this case was a great personal challenge for me, I was always aware of two aspects of it that would work in my favor. First of all, I live in the area affected by Chevron's operations, and therefore I know personally the effects of the

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TEX. ADMIN. CODE § 3.8 (1976) (subsequently amended and reorganized). For information about Ecuadorian laws that were violated *see, e.g. La Ley sobre Yacimientos o Depósitos Hidrocarburos* (Mineral Deposits Law), 332 Registro Oficial (Separata), October 21, 1921; *Ley de Agua* (Water Law), 69 Registro Oficial (Separata), May 30, 1972; *Ley de Hidrocarburos* (Law of Hydrocarbons) Nov. 15, 1978 (amended by R.O. No. 306. Aug. 13, 1982); *Ley de Prevención y Control de Contaminación Ambiental* (Law of Prevention and Control of Environmental Contamination), 418 Registro Oficial (Separata), Sept. 10, 1976.

<sup>2</sup> In 2001, following a corporate merger, Texaco was acquired by Chevron. Hereinafter "Texaco" will be used only when specifically referring to the company's actions prior to the merger with Chevron.

<sup>3</sup> Richard Goldman, *Saluting the Unsung Local Heroes*, BBC NEWS, Apr. 20, 2009, available at <http://news.bbc.co.uk/2/hi/science/nature/8004152.stm>.

environmental and human rights abuses committed by the company in the Ecuadorian Amazon. Fully understanding the reality of the situation, I can speak with conviction: I know that I am speaking the truth. Furthermore, I am a human being who believes in God, life, justice and solidarity. Along with the indigenous peoples and farmers in the Amazon, my co-workers and I fight for justice and for life.

My involvement in the lawsuit against Chevron is the result of many years of personal experience and hard work. It began with my parents' migration from the coast of Ecuador to the Amazon in search of a better life. When I arrived in the Amazon, the area affected by the company's operations, I began to see the environmental problems first hand. I soon became involved in social work with the Catholic Church and I learned more about the effects of Chevron's operations on health, indigenous culture and all aspects of life in the region.

We began to realize the need for a group to fight in defence of human rights because, in my city, there was nowhere for affected people to reach out for help. Subsequently, as part of the Human Rights Committee of Shushufindi, we joined the Amazon Defense Coalition to unite with indigenous groups and affected farmers throughout the region.

As soon as I completed my legal studies, I became part of the team working to defend the affected people and the environment. In 2005, I had to assume direct responsibility and legal representation of all those affected by the operations of Texaco in the Ecuadorian Amazon. So, my involvement in the case against Chevron was progressive. It was out of conviction and with the sole desire of achieving justice.

Throughout this case we have learned positive, negative, and at times, confusing lessons. The case involves five indigenous nationalities as well as other settlers in the region. It includes many cultures, customs and worldviews. Yet all of these people have put aside any differences they may have to work together in the pursuit of justice and respect for their human rights. Uniting these diverse cultures has been a great achievement.

This unity has been further reinforced through the building of a strong international support network. We have learned how to form a team with very different players, with people of the Ecuadorian rainforest, and those from big cities such as Quito. We work with people from a variety of countries, including the United States, allowing us to build a global team that is small, but very strong.

The lessons we have learned have been accompanied by great challenges, not least in the area of international human rights. Despite the fact that many national and international legal instruments have been established to protect human rights, they are all too often neglected. Furthermore, multinational corporations are not bound by these conventions; the legislation only applies to governments, effectively rendering big business immune to international accountability. Among these rights, the least respected is the right to a healthy and ecologically balanced environment, which, to me, is the most important human right we have. The right to a healthy environment is the very foundation of health, culture and the economy. By respecting this right, we protect life itself.

The conflict surrounding this right is of great concern and involves three major societal groups. Businesses and corporations primarily intend to reap profit and grow

economically while States are required to help develop society as a whole, although frequently give absolute priority to economic growth. Finally, the general population demands that corporations and states respect their rights, including their right to a healthy environment and a life with dignity.

This socio-economic conflict shows little sign of subsiding. Rather, it seems more likely to increase. For businesses and many governments, more stringent environmental regulations appear to threaten economic growth, a threat that is taken very seriously. However, this lawsuit is not against business. We are not against economic development, and indeed we believe that business must grow, but not at the expense of human life. The problem is not business; the problem is the manner in which businesses operate.

Of course, there are many elements that obstruct justice within the state and internationally. The economic power of corporations often determines state economic policy and international environmental law. Corporations look to invest in states where there are better trade conditions and security for investments. Factors in creating 'business friendly' conditions include limiting regulation of employment and environmental legislation. By way of example, note how China, has become the great factory of the United States and the world, arguably at the expense of human rights.

One of my biggest disappointments has been the discovery of systematic corruption implemented by Chevron during the supposed remediation of the affected areas in the early 1990s. Corporate executives, Chevron lawyers and former officials of various Ecuadorian governments have been implicated in acts of corruption and deception linked to the fraudulent clean-up. They have sought to benefit economically, but in turn have caused or prolonged the worst oil related environmental disaster in history.

Another obstacle, much greater than I could have imagined, is the manipulation of scientific evidence by expert scientists to serve their own interests. In the same context, it is deplorable to see how Chevron has abused (and continues to abuse) the law in Ecuador and the United States of America to ensure that this grave and inhumane crime go unpunished.

Chevron has manipulated the international legal system from the moment the case was first filed in New York. For nine years Texaco vigorously argued under the doctrines of *forum non conveniens* and international comity that the case should be dismissed and, instead, be tried in Ecuador. To transfer the case to Ecuador, Texaco submitted fourteen separate expert affidavits from Ecuadorian lawyers and scholars (including their own Ecuadorian lawyers in the current trial), attesting to the fairness, independence and competency of the Ecuadorian judiciary.<sup>4</sup> Chevron also promised, as a condition of the dismissal, to submit to jurisdiction in Ecuador and abide by any final judgment in the trial.<sup>5</sup> Chevron was eventually successful in its plea and in 2002

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<sup>4</sup> For copies of 14 affidavits, see CHEVRON'TOXICO, EXAMPLES OF CHEVRON'S HIGH PRAISE OF ECUADOR'S COURTS (2009), <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf>.

<sup>5</sup> See Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *Aguinda v. Texaco Inc. and Jota*

the Southern District Federal Court of New York finally dismissed the case to be re-filed in their requested forum, Ecuador. Chevron praised the ruling, stating that it was “pleased with the ruling...[which] vindicate[d] Chevron[]’s long-standing position that the arguments we have made to the court: The appropriate forum for this litigation is Ecuador...”<sup>6</sup> The communities, who had already waited a decade for redress, now had a limited time to re-file their claims in their home country.

Now, almost eight years later, Chevron is continuing this ‘forum shopping’ strategy in an attempt to delay the case even further.

On September 23, 2009, shortly before what the company expected to be an adverse judgment in the Ecuadorian case, Chevron filed a Notice of Arbitration against The Republic of Ecuador for alleged violations of the terms of the Bilateral Investment Treaty between the United States and Ecuador. Chevron claims that the Ecuadorian Courts have failed to provide the company with due process of law, despite seven years of extensive litigation with over 60,000 chemical samplings and hundreds of thousands of pages of trial testimony. As part of the relief, Chevron requests that the arbitration panel declare that the company has no liability for environmental remediation in Ecuador as a result of the former consortium between Texaco and Ecuador. They also request that Ecuador be ordered to inform the court in Lago Agrio that the company has been released any remaining and future remediation of environmental damage.

In short, Chevron seeks to remove the case from the Ecuadorian Courts after fighting for almost ten years to prove that Ecuador was the appropriate forum for the trial. This is being done despite the companies earlier promises to accept jurisdiction and abide by *any* judgment, and after consuming almost seven years of resources of the impacted communities who have sought nothing more than a public resolution of their claims in a public and neutral forum. The international arbitration claim has the potential to set a precedent that will have a profound effect on human rights law, public international law and the field of international arbitration. If allowed to proceed, Chevron’s request will essentially strip 30,000 plaintiffs of their legal right to seek justice for decades of human and environmental rights abuses.

Because the arbitral process makes no provision for the plaintiffs to appear, intervene, or even be notified of the private proceedings, those whose rights are most

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v. Texaco Inc. (S.D.N.Y. Jan. 11, 1999) (promising “If this Court dismisses these cases on forum non conveniens or comity grounds, [Chevron] will agree as follows: (i) first, it will accept service of process in Ecuador and not object to civil jurisdiction of a court of competent jurisdiction in Ecuador as to *Aguinda*...plaintiffs; ... (ii) second, [Chevron] will waive statute of limitations-based defenses that may have matured between the dates when the *Aguinda* ...plaintiffs filed their Complaints in this Court...and 60 days after dismissal[] by this Court to give plaintiffs an opportunity to re-filed in Ecuador; (iii) third, plaintiffs and [Chevron] may utilize the extensive discovery obtained to date in lawsuits to be filed in Ecuador...; and (iv) fourth, [Chevron] will *satisfy* judgments that might be entered in plaintiffs’ favor, subject to [Chevron’s] rights under New York’s Recognition of Foreign Money Judgments Act, NYCPLR 5301 *et seq.* (McKinney 1998)) (emphasis added).

<sup>6</sup> Press release, Texaco Inc., ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation (Aug. 19, 2002).

at risk are left without a voice, without access to information and without redress in the event of an adverse decision.

In many respects we must move forward. We need to understand that the environmental disaster caused by Texaco in Ecuador is not an Ecuadorian problem; it is a global issue. The double standard that companies employ in their operations demonstrates an immoral attitude of racism and discrimination. In their home countries, where regulations are more rigid (or more effectively enforced) corporations operate and act responsibly, but these same companies go to an institutionally deficient country and apply different standards that are designed to cut costs without any regard for the environment or human health.

The first step we must take is to research and monitor the actions of multinational corporations, particularly when they operate in developing regions. Secondly, we must accept the fact that environmental issues know no borders, and therefore the struggle to protect environmental rights should include all people from all countries. We must come together in the pursuit of justice, respect for life, and protection of the environment in which we live.

Finally, we must take a global perspective, but from a local reality, consciously regulating our consumption. The luxuries that we desire may often be complicit in the killing of other humans. For example, many people adorn themselves with expensive jewellery; never thinking of the many hundreds of barrels of water contaminated with mercury to extract those few grams of gold. People are dying, poisoned by mercury, for this extravagance. This is but one of many examples; we must reflect on what we consume and make conscious, moral decisions. Powerful companies, such as Chevron, must also address their business decisions from a moral perspective, and when they do not, legal frameworks must be in place to allow those affected to seek justice.

Though all evidence at trial, including Chevron's own samplings, prove extensive contamination, and despite the fact that a verdict is near, Chevron has publicly stated: "We're not paying and we're going to fight this for years if not decades into the future."<sup>7</sup> In violation of sworn promises it made to the US federal court in order to move the case to Ecuador, Chevron's general counsel and the company's spokesman has said that notwithstanding an adverse judgment, the company would "fight until hell freezes over, and then we'll fight it out on the ice."<sup>8</sup> Chevron has made clear that it believes itself above the law and immune to accountability in *any* nation in which the communities seek redress. With its unlimited resources and complete disregard for the communities, Chevron has shown that it does not respect the liberty of indigenous and farmer communities to assert their legal rights. This arrogance and sense of impunity was illustrated by one Chevron lobbyist who stated "We can't let

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<sup>7</sup> Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.*, WALL ST. J., July 20, 2009, at B3, available at <http://online.wsj.com/article/SB124804873580263085.html>.

<sup>8</sup> Chevron in Ecuador, *Chevron to Get an Award?*, <http://www.chevroninecuador.com/2009/10/chevron-to-get-award.html> (Oct. 27, 2009).

little countries screw around with big companies like this – companies that have made big investments around the world.”<sup>9</sup>

In light of this mindset, and the legal difficulties faced when holding multinational corporations accountable for even egregious wrongdoings, accountability in the face of non-compliance remains a large challenge.

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<sup>9</sup> Michael Isikoff, *A \$16 Billion Problem*, NEWSWEEK, Jul. 26, 2008, *available at* <http://www.newsweek.com/id/149090>.