

Ecuador Appeals Court Affirms Lago Agrio Judgment

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On January 3, 2012 an Ecuador Appeals Court affirmed the \$18 billion judgment against Chevron in the long-running battle over environmental damage. (Available in English and the original Spanish [here](#)). According to an unofficial English translation of the sixteen page opinion, the Court dismissed all of Chevron's arguments, including the allegations of fraud. Here is a taste:

As for the invalidity of the trial "for procedural fraud and violation of the guarantees of due process" it must be said that the record of the trial court reflects that the Defendants have exercised a vigorous and ample defense in the trial—the thousands of pages that bloat the trial have already been mentioned, in addition to this appeal and litigation; insinuating expert witnesses; questioning and reexamining these same judicial auxiliaries, and to witnesses, visiting each and each one of the formalities given in the first trial. As such, the trial has been public and, from what can be seen, also transparent, with a horrifyingly uncommon temporal duration, and without a doubt, affecting the interests of those that drive the case, as since the action, more than eight years have passed in Ecuador alone; definitely putting into process the proof and the performances—all of them—requested by the parties in the investigative procedures....

Fraud and corruption were also mentioned, of officials, attorneys, and representatives, the issue of which this Court should not make any reference, only to leave emphasized that the same accusations can be found pending before authorities of the United States in the denouncement that has been presented the same here by the Defendant Chevron, under the RICO act, and the Court does not have competence to resolve the conduct of attorneys, expert witnesses, or other government employees or administrators and judicial auxiliaries, if that is the case....

The logical anticipated consequence, in the case of carrying out the request, was that it was impossible to rely on any expert, and resulted in not being able to have expert proof which paralyzed the trial; thus Chevron has acted up until the outer limits of its defense and the Court considers the particularly precarious situation which could doom the administration of justice should it be allowed during the controlling procedural moments and stages of the suit, making it depend on its decision in the advancing of the cases. The deeds made public considered in the judge's decision at the first instance, and Chevron was condemned to pay trial costs for manifest bad faith, notorious and obvious; so much so that now suffice it to say that the procedural conduct of the defendant, few times seen

in the annals of the administrator of Justice in Ecuador, were abusive to the point that, in terms of attitude, that the Court will not even dedicate any more writings to this portion of the decision, it would be an example of disastrous precedent for other litigants.

Following the judgment, plaintiffs' attorney Pablo Fajardo indicated that Chevron is authorized to request clarifications of the appellate court decision within the next month or so. According to my conversation with plaintiffs' representative Karen Hinton yesterday, if Chevron wishes to appeal to the Ecuador National Court in Quito, Chevron must post an appeal bond of approximately 10%, or \$1.8 billion. Chevron itself contends that the appeal bond could be 100% of the judgment, forcing it "to deposit, with no likelihood of recoupment, billions into the very court system whose corruption and bias ... render the Lago Agrio judgment unenforceable."

Meanwhile Chevron has filed a motion with the Second Circuit this morning asking the Second Circuit to lift the temporary stay on the district court's antisuit injunction. The Second Circuit's principal concern that an antisuit injunction was not ripe has been obviated by the Ecuador Appeals Court judgment. "Without such relief, the [plaintiffs] will be able immediately to commence their extortionate plan to harass Chevron through multiplicative, vexatious enforcement proceedings expressly intended to disrupt the operations of Chevron's affiliates in foreign countries."

In its motion, Chevron argues that "The Ecuadorian appellate decision ... does not purport to explain or even mention the extensive evidence that the Lago Agrio Judgment was ghostwritten by parties other than Judge Zambrano, who had secret access to the LAP's internal, unfiled work product." Among other things, Chevron argues that the Ecuadorian appellate judgment ignores (1) the extensive verbatim overlap between the judgment and the LAP's unfiled "Fusion memo"; (2) the overlap between the judgment and the LAP's unfiled record summary; (3) the LAP's internal emails evidencing their plan to draft the judgment; and (4) expert linguistic testimony that the judgment was not written by Judge Zambrano.

Yesterday Chevron has also filed a motion with the UNCITRAL arbitration tribunal in The Hague requesting that panel to order Ecuador to inform the tribunal of the steps it intends to take to comply with the tribunal's February 2011 order requiring Ecuador to prevent the Lago Agrio judgment from being enforced.

After almost two decades of litigation, the Chevron Ecuador judgment has reached the critical enforcement stage. The \$18 billion question is whether the Second Circuit will stay enforcement of the Ecuador judgment, and if not, whether foreign courts will recognize and enforce the Ecuador judgment. Overshadowing it all is an investment arbitration that may require Ecuador to pay Chevron for any damages it has incurred from the enforcement of a judgment in violation of the Ecuador-United States bilateral investment treaty.