Court File No. CV-12-980800CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL COURT)

BETWEEN:

(Court Seal)

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE, and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Plaintiffs

and

CHEVRON CORPORATION, CHEVRON CANADA LIMITED, and CHEVRON CANADA FINANCE LIMITED

Defendants

REPLY AND JOINDER OF ISSUE TO THE STATEMENT OF DEFENCE OF CHEVRON CORPORATION

1. The plaintiffs repeat the allegations contained in the Amended Amended Statement of Claim and deny all the allegations of Chevron Corporation ("Chevron Corp.").

2. All of Chevron Corp.'s alleged defences fail for one or more of the following reasons:

(a) it does not challenge the Judgment of the Intermediate Court of Appeals in Ecuador of January 3, 2012. That Court, as admitted by Chevron Corp., has full *de novo* jurisdiction, the right to find facts anew and to alter legal conclusions. The Judgment of that court, as maintained by the Judgment of the National Court of Cassation of November 12, 2013, is being enforced by the plaintiffs;

(b) the alleged defences do not comply with or conform to the restricted list and scope of defences that the Supreme Court of Canada has held to be available to contest the recognition and enforcement of a foreign judgment; and

(c) almost all of the issues that Chevron Corp. seeks to re-litigate have been determined against it by the courts of Ecuador. No aspect of the merits of the case, whether factual or legal, can be tried or raised in Canada.

3. The Supreme Court of Canada in *Beals v. Saldanha* and the Ontario Court of Appeal have restricted the defences that can be put forward in the enforcing court in a recognition and enforcement action: The Defence of Extrinsic Fraud; the Defence of Natural Justice; and the Defence of Public Policy.

4. With regard to allegations of fraud, the Supreme Court of Canada has determined that only evidence of extrinsic fraud, not intrinsic fraud, can be advanced and only then if it was not put before the foreign trial court or could not have been discovered and brought to the attention of the foreign trial court through the exercise of reasonable diligence.

5. All of the allegations in Chevron Corp.'s Statement of Defence were brought before the Ecuadorian trial court, several times, by motions filed by Chevron and addressed and decided by a judge, well before the trial Judgment was rendered in February 2011. The same allegations were raised before the Intermediate Court of Appeals and decided by it. The allegations were raised again before the National Court of Cassation. None of the evidence regarding these allegations is admissible in the Canadian enforcing court.

6. Extrinsic fraud is fraud going to the jurisdiction of the issuing court. Evidence of Fraud that goes to the merits of the case (intrinsic fraud) is inadmissible. Only evidence of fraud which misleads a court into taking jurisdiction (extrinsic) is admissible. All of Chevron Corp.'s allegations of fraud constitute allegations of inadmissible intrinsic fraud. Furthermore, all of the allegations of fraud and the evidence in support were put before the Ecuadorian courts, addressed and adjudicated.

7. In any event, Judge Zambrano made no findings in his Judgment, in addressing Chevron Corp.'s submissions on the Calmbacher and Cabrera reports, that they were improperly influenced.

8. Judge Zambrano expressly stated in his Judgment that he was not relying on the Calmbacher or Cabrera reports as he had 50 other expert reports and a wealth of scientific data. There is no merit in re-raising irrelevant matters.

9. Judge Zambrano awarded punitive damages against Chevron Corp. because of its improper and egregious conduct throughout the eight year trial process. Chevron Corp. filed more than 900 motions, often a dozen or more in one afternoon, each one seeking similar relief, although worded slightly differently, requiring, because of Ecuadorian procedural rules, that each one be disposed of separately within a prescribed time. When a judge failed to adhere to the time allotted for judgment, Chevron Corp. generally sought to have him recused, which resulted in an automatic suspension of the proceeding while another judge ruled on the recusal motion.

10. Chevron Corp. also asserts that the Zambrano Decision was "ghost" written by the plaintiffs. The plaintiffs deny this allegation and, as Chevron Corp. knows from an expert report it received analyzing the hard-drive from Judge Zambrano's computer, the allegation is proven to be false.

11. But, more importantly, this allegation was first made two days after Judge Zambrano released his Judgment of February 14, 2011. Thereafter, in the months of February and March, 2011, Chevron Corp. attended before Judge Zambrano and asked for numerous clarifications and reconsiderations. Intentionally, Chevron Corp. avoided raising this issue and putting its alleged evidence before Judge Zambrano although it had a full opportunity to do so.

12. Chevron Corp. did however raise the allegation that the plaintiffs "ghost" wrote the Decision of Judge Zambrano, before the Intermediate Court of Appeals and the National Court of Cassation. The submission was rejected. It cannot now be raised again or tried in Canada.

13. Chevron Corp. asserts that Judge Zambrano was offered a bribe of $500,000 to give judgment in favour of the plaintiffs. The evidence was overwhelming that Chevron Corp., as operator of the extractive oil activities conducted in the Ecuadorian Amazon, polluted and

contaminated 1,500 square miles of lands, rivers, streams and ponds, causing disease, illness and death to the indigenous people who rely on the water for drinking, bathing, irrigating crops, and on the land for their food. This evidence is uncontroverted.

14. Judge Zambrano found, relying on a published manual of proper extractive management practices authored by the American Petroleum Institute and, in part, by a Texaco official, that Chevron Corp., in the Amazon, had not adhered to the standards it and the industry set for themselves in the U.S.A. Judge Zambrano also relied on data gathered from well sites that the toxicity in the lands and waters exceeded by far the safe and allowable levels. In particular, Chevron Corp. failed, as it was required to do, to either pump 15.8 billion gallons of toxic production water underground or to treat it before disseminating it onto the adjoining lands and waterways. Additionally, Chevron failed to line the approximately 950 ponds in which it pumped the very toxic drilling muds from its well sites and failed to insure that the drilling muds did not overflow their banks, but rather intentionally installed gooseneck outlet pipes to allow the toxic brew to escape into the environment. By reason of these failures, at some 950 sites, scattered over the 1,500 square miles, pollutants seeped and continue to seep into the ground and ground waters and overflowed the banks of the ponds. The harm caused is ongoing and will continue for decades absent the remediation remedies ordered.

15. The evidence was overwhelming that Chevron Corp. polluted and contaminated 1,500 square miles of the Amazon. Chevron Corp. does not, and cannot, challenge the findings of Judge Zambrano. There was no bribe offered and no reason to offer a bribe.

16. Chevron Corp. has no evidence that a bribe was ever paid. Its only evidence of a bribe being offered comes from a former judge Guerra, who admits to accepting bribes when he was a

judge. Chevron Corp. has, at its own expense, relocated Guerra and his family to the U.S.A. and continues to pay him a monthly stipend of US $10,000, leases a car for him and pays for health coverage for him and his family. Chevron Corp. has to-date paid approximately $2 million to Guerra for his "testimony". Chevron Corp. prepared Guerra for 53 days for his "testimony". His evidence is unreliable and has been proven to be wrong.

The Defence of Natural Justice

17. In Canada, natural justice has frequently been viewed to include notice of the claim and the opportunity to defend. The defence of natural justice is restricted to the form of the foreign procedure and does not relate to the merits of the case.

The Trial Process

18. The trial lasted over eight years. It was robust. Extensive evidence, including examinations-in-chief and cross-examinations were conducted by both sides. Contrary to Chevron Corp.'s assertions in its Statement of Defence, it received a very fair hearing. The Supreme Court of Canada in *Beals* instructs that the natural justice requirement of a foreign court is met when the defendant has notice of the proceedings and is afforded an opportunity to put its position forward. Chevron Corp. was well represented by excellent counsel who vigorously advanced Chevron Corp.'s positions and defences. The record of the trial before Judge Zambrano consisted of approximately 216,000 pages of evidence. Chevron Corp. filed a closing argument of 258 pages with 1153 footnotes referencing evidence and law.

19. The plaintiffs commenced the action in the Town of Lago Agrio in May 2003. The action was vigorously defended by Chevron Corp. As Judge Zambrano stated:

> ...the parties, which have shown themselves to be capable of exercising a passionate and extensive defense of their positions ...

20. There were 56 judicial inspections with approximately 100 technical expert reports, six thematic expert reports, testimony, documents and depositions.

21. Judge Zambrano stated in his Judgment:

> It should be clear from the record that the defendant, Chevron has been allowed to carry out all the procedures it requested in order to mount its defense and thus it is not accurate to speak of a lack of proper defense, irreparable harm, or favorable treatment to any party.

22. Judge Zambrano also noted:

> For the complex task of [evaluating] the presence of environmental harm, the first consideration is that there are more than 100 expert reports in the case file, which constitute an important documented source of evidence, provided by experts nominated by both parties and also provided by experts of the Court not nominated by either party, such that as a whole their information is reliable and allows the Judge to come to the conclusion that there are different levels of contaminant elements that are from the hydrocarbons industry in the area of the Concession.

23. The Court also noted:

> Thus, analysis of the different expert reports has proceeded considering that the environmental harm that are the object of this lawsuit are not only those that are caused by a direct impact to the ecosystem, but that due to their nature, this type of harm also includes all harm that are direct consequence of environmental impact. In that regard, it is seen that this is a technical matter; therefore the different expert reports presented throughout this lawsuit are considered. Starting with the presence of contamination in the soil, this Court considers the findings of the different experts who have participated in the judicial inspections that were undertaken within this lawsuit and that have presented the results of their experts. The reports presented by the experts nominated by the plaintiff and by the defendant show the presence of different concentrations of hydrocarbons and/or products used during drilling or preparation of oil wells.

24. Further, Judge Zambrano stated:

> An exhaustive and complicated analysis of the results of the laboratory analyses presented as valid evidence during this lawsuit had to be performed, and the magnitude of this work is underlined in regards to which the experts nominated by Chevron have provided 50,939 results

> from 2,371 samples, the experts nominated by the plaintiffs have provided the case file with a total of 6,239 results from 466 valid samples; while the experts named by the Court, without nomination by either party, have provided 178 samples and 2,166 results (without considering the sampling done by the expert Cabrera); resulting in a total of 2,311 samples. To this we must add the 608 results presented by expert Jorge Bermeo, and 939 results presented on 109 samples collected by Gerardo Barros, which have also been taken into consideration but with considerations annotated for each case.

25. A Texaco representative admitted that 15.834 billion gallons of production water (containing oil and chemicals) were dumped into the environment during the period of operations. Judge Zambrano held:

> Moreover, if we consider the amounts of formation waters dumped in relation to the hazardousness of the substance dumped, that is, the hazards that may arise from dumping formation water into surface waters used for human consumption, it is evident that people using these water sources were exposed to the contaminants that were discharged into it, considering that formation waters have hydrocarbon solvents, such as BTex (benzene, toluene, ethyl benzene and zylene); PAHs (polycyclic hydrocarbons) and TPHs (total petroleum hydrocarbons) which we have already mentioned above because of the hazard they post to human health, the harm and risk become apparent.

26. In the result, Judge Nicolas Zambrano Lozada of the Sucumbios Provincial Court of Justice issued Judgment on February 14, 2011 in the amount of USD $18,238,480.00. This amount was ordered for the cleanup of soils, remediation of ground waters including rivers, estuaries, and wetlands, restoration of the native flora, fauna and aquatic life and for mitigation to the health of affected persons and for punitive damages.

27. By further Decision for Amplification dated March 4, 2011, Judge Zambrano addressed 27 requests made by Chevron Corp. for clarification or amplification. He did not disturb his prior Judgment.

The *de Novo* Appeal

28. The Judgment the plaintiffs are enforcing is that of the Intermediate Court of Appeals, authored by Judge Toral. The Intermediate Court of Appeals in Ecuador has full *de novo*

jurisdiction to review the facts and change the factual determinations as well as the legal conclusions. The Intermediate Court of Appeals exercised its jurisdiction and upheld the determination of liability and of damages in its Judgment rendered on January 3, 2012.

29. By Article 114 of the Code of Civil Procedure in Ecuador, the parties may introduce new evidence at the appellate level and Chevron Corp. took advantage of this provision to add approximately 20,000 pages of new evidence to the initial trial record.

30. The Intermediate Court of Appeals stated that it had reviewed the additional evidence. It indeed did alter some of the factual findings made by Judge Zambrano.

31. Once again Chevron Corp. had excellent legal representation and presented all its arguments extensively to that Court with evidentiary references and full submissions on facts and law.

32. Additionally, the U.S. 2nd Circuit Court of Appeals, in express reliance on Chevron Corp.'s own expert, determined that the Intermediate Court of Appeals in Ecuador has full *de novo* jurisdiction. Chevron Corp. is precluded from claiming otherwise.

33. Chevron Corp.'s allegations of fraud, contained in its Statement of Defence, are not with regard to the Intermediate Court of Appeal's Decision. They are without relevance to this proceeding.

34. Chevron Corp. appealed the Intermediate Court of Appeal's Judgment to the National Court of Cassation, which, but for allowing the appeal as to punitive damages, dismissed the appeal. It concluded that the Intermediate Court of Appeals properly exercised the appropriate standard of review and the appellate court's judgment constituted a new, substitute judgment and

that Chevron Corp. was challenging the wrong judgment: "The court decision sought to be annulled here is the one rendered by the court of appeals, and not the one issued by a trial court, something which the cassation appellant has confused in this allegation".

35. Chevron Corp. again raised all of its allegations of fraud, of procedural irregularities, of lack of jurisdiction, etc. Chevron Corp.'s written submissions were 163 pages in length with 318 footnotes. The National Court of Cassation rendered a well-reasoned Judgment of 222 pages with 237 footnotes. The first 48 pages outline the points of appeal raised by Chevron Corp. The balance of the Judgment addresses all those points, including the submission regarding the *Environmental Management Act* and its alleged retroactivity, the lack of jurisdiction, the fairness and independence of judges Calmbacher and Cabrera, the Settlement Agreement, the remediation, and the "ghost written" judgment of Judge Zambrano etc.

No Denial of Natural Justice

36. All the general allegations regarding political interference and the composition of Ecuador's judiciary are denied. These allegations are not permitted defences pursuant to *Beals v. Saldanha*. The defence of a lack of natural justice in the foreign trial courts must relate to the specific circumstances pertaining to those proceedings.

37. The Judges who heard the evidence and legal arguments have demonstrated that their judgments are sound and factually and legally based. They were impartial. They addressed Chevron Corp.'s many submissions of fact and of law.

38. Chevron Corp. asserts that the entire judiciary in Ecuador is unreliable. This allegation is irrelevant to any permissible defence in a recognition and enforcement action. Nevertheless, in 2001 and 2002, in seeking to strike the Aguinda action in the US SDNY, Chevron Corp. filed at

least 10 affidavits attesting to the independence and impartiality of the Ecuadorian courts and their ability to try tort and environmental claims. Judge Rakoff, and subsequently the U.S. 2nd Circuit Court of Appeals, in granting Chevron Corp.'s *forum non conveniens'* motion found:

> We find no merit in plaintiffs' further argument that Ecuadorian courts are unreceptive to tort claims. The record shows that several plaintiffs have recovered judgments against TexPet and PetroEcuador for claims arising out of the very facts here alleged. Other U.S. courts have found Ecuador to be an adequate forum for hosting tort suits. See, e.g., Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1359-60 (S.D.Tex. 1995) (Ecuador adequate to host mass tort suit for pesticide exposure); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1117 (Fla. Dist. Ct. App. 1997) (finding Ecuadorian forum adequate for hosting suit for fungicide exposure). In addition, Texaco has offered unrebutted evidence of other types of successful tort claims brought in Ecuadorian courts, including personal injury claims by Ecuadorian oilfield workers against TexPet.
>
> Plaintiffs contend that Ecuadorian courts are subject to corrupt influences and are incapable of acting impartially. After ordering supplemental briefing on this question, Judge Rakoff made detailed findings. He found: 1) no evidence of impropriety by Texaco or any past member of the Consortium in any prior judicial proceeding in Ecuador; 2) there are presently pending in Ecuador's courts numerous cases against multinational corporations without any evidence of corruption; 3) Ecuador has recently taken significant steps to further the independence of its judiciary; 4) the State Department's general description of Ecuador's judiciary as politicized applies primarily to cases of confrontations between the police and political protestors; 5) numerous U.S. courts have found Ecuador adequate for the resolution of civil disputes involving U.S. companies; and 6) because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic's involvement in the litigation, there is little chance of undue influence being applied. See Aguinda, 142 F. Supp. 2d at 544-46. We cannot say that these findings were an abuse of discretion. See Leon v. Millon Air, Inc., 251 F.3d 1305, 1313 n.3 (11th Cir. 2001).

39. The Aguinda trial started in Lago Agrio in 2003 and, since that time, the Ecuadorian judiciary has been strengthened and its standing has been recognized, internationally, as much improved.

New York District Court

40. Chevron Corp. states that, as a result of the findings of the SDNY court, it would be unfair to Chevron Corp. and an abuse of the process of this court to permit the plaintiffs to oppose the findings made in that proceeding. This also is not a permissible defence.

41. 45 of the 47 plaintiffs were not parties to the proceeding before the SDNY court.

42. Further, Judge Kaplan expressly stated that his judgment "granted only narrow relief intended to preclude Donziger [not a plaintiff] and the two LAP Representatives from profiting from their misdeeds for which they were responsible". "It merely prevents these three individuals – from profiting from that misconduct."

43. There is no unfairness nor abuse of process when the defendant is required to call evidence in the enforcing court in support of its permissible defences. The defendant is a judgment debtor. It has failed to pay the judgment. The Supreme Court of Canada has determined that the plaintiffs can proceed to enforce the judgment debt in Canada. The U.S. 2nd Circuit Court of Appeals and the SDNY court have determined similarly: "Significantly, the NY Judgment did not restrict the other LAPs who remain free … to seek to enforce it (the Lago Agrio Judgment) anywhere in the world".

Texaco Liable

44. Chevron Corp. asserts that its operating entity in Ecuador was TexPet and not its parent Texaco. Judge Zambrano found, on the evidence before him, that the parent Texaco directed all the activities and decisions of TexPet in Ecuador. The Intermediate Court of Appeals upheld that determination. The National Court of Cassation also addressed the submission and rejected it.

Chevron Corp. is now attempting to re-litigate an issue it put before the Ecuadorian Courts and which was determined against it. *Beals* disallows this assertion.

45. Chevron Corp. asserts that, when it merged with Texaco, it retained Texaco as a subsidiary and therefore it, Chevron Corp., is not liable to the plaintiffs. This assertion was raised before the courts of Ecuador and dismissed. It forms a part of the merits of the Ecuadorian judgments. It cannot be raised again in this enforcing court. Chevron Corp. made, without success, the same submissions before the Intermediate Court of Appeals and the Court of Cassation.

46. Further, the assertion is incorrect. As the U.S. 2nd Circuit Court determined:

> Chevron Corporation merged with Texpet's parent company, Texaco in 2001 to form Chevron Texaco, Inc. In 2005, Chevron Texaco changed its name back to Chevron Corporation.
>
> Chevron Corporation claims, without citation to relevant case law, that it is not bound by the promises made by its predecessors in interest Texaco and ChevronTexaco, Inc. However, in seeking affirmance of the district court's forum non conveniens dismissal, lawyers from ChevronTexaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint. In so doing, ChevronTexaco bound itself to those concessions. In 2005, ChevronTexaco dropped the name "Texaco" and reverted to its original name, Chevron Corporation. There is no indication in the record before us that shortening its name had any effect on ChevronTexaco's legal obligations. Chevron Corporation therefore remains accountable for the promises upon which we and the district court relied in dismissing Plaintiffs' action.

Same Action, Same Plaintiffs

47. Chevron Corp. also asserts that the action, first started in the U.S.A. in 1993, is not the same as the action commenced in Ecuador in 2003. This is also incorrect. The U.S. 2nd Circuit Court of Appeals dismissed the same submission that Chevron Corp. put before it:

> Chevron's contention that the Lago Agrio litigation is not the refiled Aguinda action is without merit. The Lago Agrio plaintiffs are substantially the same as those who brought suit in the Southern District of

> New York, and the claims now being asserted in Lago Agrio are the Ecuadorian equivalent of those dismissed on forum non conveniens grounds.

Chevron Corp.'s submissions in this regard were rejected by three courts in Ecuador.

48. Chevron Corp. asserts that the *Environmental Management Act* was applied retroactively to its activities to and including 1990. Chevron Corp. made extensive submissions to the Ecuadorian courts that it would be contrary to Ecuador's laws to find it liable for a breach of statutory duties. Its submissions on this point were rejected by all three Ecuadorian courts. The application of domestic Ecuadorian law was a matter for Ecuador's courts and forms part of the merits underlying the Judgments. It cannot be raised in this proceeding.

49. Chevron Corp. asserts that it is not bound by its promises to the U.S. Courts to attorn to the jurisdiction of the Ecuadorian courts and to pay any judgment given against it, subject only to the defences available under the New York *Recognition of Foreign Country Money Judgments Act*, as a condition of succeeding in its *forum non conveniens* motion to move the plaintiffs' action from New York to Ecuador. Nothing could be further from the truth:

> On appeal, we held that the district court erred by dismissing Plaintiffs' complaint without first securing "a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts" and remanded for further proceedings. Id. at 159-61, 163.
>
> On remand, Texaco provided that commitment by "unambiguously agree[ing] in writing to be[] sued . . . in Ecuador, to accept service of process in Ecuador, and to waive any statute of limitations-based defenses that may have matured since the filing of the [complaint]." Aguinda,142 F. Supp. 2d at 539. Texaco also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act.3 See N.Y. C.P.L.R. 5301 et seq.
>
> While the district court did not include Texaco's promise to satisfy any Ecuadorian judgment in its stipulation and order, an express adoption of the prior inconsistent position is not required. The court need only adopt the position "in some manner, such as by rendering a favorable judgment."

> *Mitchell v. Washingtonville Cent. Sch. Dist.*,190 F.3d 1, 6 (2d Cir. 1999) (internal citation omitted); see also *Maharaj v. Bankamerica Corp.*,128 F.3d 2 94, 98 (2d Cir. 1997). Here, Texaco had been trying to convince the district court that Ecuador would serve as an adequate alternative forum for resolution of its dispute with Plaintiffs. As part of those efforts, Texaco assured the district court that it would recognize the binding nature of any judgment issued in Ecuador. Doing so displayed Texaco's well-founded belief that such a promise would make the district court more likely to grant its motion to dismiss. Had Texaco taken a different approach and agreed to participate in the Ecuadorian litigation, but announced an intention to disregard any judgment the Ecuadorian courts might issue, dismissal would have been (to say the least) less likely. We therefore conclude that the district court adopted Texaco's promise to satisfy any judgment issued by the Ecuadorian courts, subject to its rights under New York's Recognition of Foreign Country Money Judgments Act, in awarding Texaco the relief it sought in its motion to dismiss.

50. Chevron Corp. has also raised the Bilateral Investment Treaty ("BIT") arbitration that it initiated against the Republic of Ecuador. That arbitration is totally irrelevant to this enforcement action and should be ignored. As the U.S. 2nd Circuit Court of Appeals noted:

> Initially, we note that there is no inherent conflict between BIT arbitration and the Lago Agrio litigation. Those two proceedings involve different parties and distinct claims. BIT arbitration is designed to settle investment disputes between foreign investors and the host government. See Bilateral Investment Treaty, art. VI. It is limited to the resolution of disputes "between a Party [to the BIT] and a national or company of the other Party arising out of or relating to . . . an investment agreement between that Party and such national or company . . . [or] an alleged [breach] of any right conferred or created by [the BIT] with respect to an investment." Id. Chevron's claims are now pending in BIT arbitration precisely because they deal with allegations of Ecuador's improper behavior with respect to Texaco's investment in the region. However, Plaintiffs are not parties to the BIT, and that treaty has no application to their claims; their dispute with Chevron therefore cannot be settled through BIT arbitration. Instead Plaintiffs have exercised their right under the forum non conveniens dismissal to litigate their claims against Chevron in Lago Agrio. That litigation continues to this day. The existence of those parallel proceedings — one in which Chevron asserts wrongdoing on the part of Ecuador and another in which Plaintiffs assert wrongdoing on the part of Chevron — makes clear that the Lago Agrio litigation can coexist with BIT arbitration.

51. For the same reasons, Chevron Corp.'s assertion of its 1995 Settlement Agreement with the Republic of Ecuador is irrelevant in this enforcement proceeding. It is not a settlement of the claims of the plaintiffs. The plaintiffs were not parties to that agreement.

52. Further, Chevron Corp. raised the Settlement Agreement as a defence in the Ecuadorian Courts. Those courts held that it did not apply to the plaintiffs or their claims. As a result, the Settlement Agreement cannot, by reason of the Decision in *Beals*, be raised in this proceeding.

Chevron Corp. Owns the Shares and Assets of Chevron Canada

53. Chevron Corp. operates in over 30 countries as a single enterprise. Its operations are integrated, investment decisions for its operating subsidiaries are made by Chevron Corp. officers and its Board of Directors and its committees. It wholly owns its operating subsidiaries, often through layers of other subsidiaries, which in the Canadian context, carry on no business. The approximately $5 billion it dividends to its shareholders comes up to it from its operating subsidiaries, including Chevron Canada.

54. Chevron Canada is a 7th level subsidiary. All intermediate subsidiaries are wholly owned. None conduct business. Chevron Canada is an asset of Chevron Corp. Corporate separateness is a fiction for the purposes of debt collection. A wholly-owned subsidiary is an exigible asset like any other property. In an enforcement action, the debt is at the core of the action.

Chevron Corp.: A Global Energy Company. An Integrated Energy Company.

55. Chevron Corp. has been for decades and continues to be a public company that has raised substantial funds from persons situate in many countries. These owners receive Annual Reports from Chevron Corp. and have access to the required 10Qs and 10Ks.

56. The requirement of the Annual Reports, 10Qs and 10Ks are that they accurately describe the business, operations, financial condition, etc. of Chevron Corp. and that no statement contained therein is untrue or misleading. Chevron Corp.'s owners are entitled to rely fully on Chevron Corp.'s published documents to follow the progress of their company.

57. In its Annual Reports, Chevron Corp. makes the claims:

> Chevron is a global energy company with substantial business activities in the following countries: Angola, Argentina, Australia ... Brazil ... Canada ... the United Kingdom.
>
> ...
>
> Earnings of the company depend mostly on the profitability of its upstream and downstream business segments.
>
> ...
>
> To sustain its long-term competitive position in the upstream business, the company must develop and replenish an inventory of projects that offer attractive financial returns for the investment required.

58. Under the heading "Sustained Results":

> Chevron Texaco is committed to creating long-term stockholder value while delivering new energy supplies to meet growing worldwide demand. In 2004, we achieved milestones in our two main business – upstream and downstream – that are delivering strong results now and for the future.
>
> 2006 was an exceptional year for our company. We continue to deliver value to our stockholders and to make strategic investments that will drive sustained, superior performance over the long-term.
>
> As one of the world's leading integrated energy companies, Chevron holds crude oil and natural gas assets in the key energy basins of the world.
>
> Chevron is one of the world's leading integrated energy companies. We have approximately 56,000 employees, and our subsidiaries conduct business in more than 180 countries.
>
> 2007 was a year of significant achievement for our company. We reported record earnings, led our peer group in total stockholder return, and advanced our robust queue of major capital projects, which are creating a strong foundation for long-term growth.

> To build upon our organizational capability, in 2007 we restructured the upstream business into four operating companies – North America; Asia-Pacific; Africa and Latin America; and Eurasia; Europe and Middle East. This new structure will strengthen our focus on long-term growth, enhance business partnerships, and drive more efficiency, standardization and collaboration across the organization.
>
> For Chevron 2014 was a year of moving forward our strong queue of projects. Even as we experienced a 50 percent drop in the price of oil in the second half of the year, we maintained our focus on providing affordable and reliable energy, safely and responsibly, to the benefit of our stakeholders.
>
> Financially we had a solid year as reflected in our net income of $19.2 billion on sales and other operating revenues of $100.5 billion. We achieved a 10.9 percent return on capital employed. 2014 represented the 27th consecutive year of annual dividend payout increases, underlining that our commitment to the dividend is our highest financial priority.
>
> As always, The Chevron Way provides a roadmap for how we conduct our business, setting our vision to be the global energy company most admired for its people, partnership and performance. It establishes the values by which we deliver our results, including acting with integrity, promoting diversity, and protecting people and the environment.

59. In its annual 10K, Chevron Corp. tells its owners under the heading: Chevron Corp.'s Strategic Direction:

> Chevron's primary objective is to create shareholder value and achieve sustained financial results from its operations that will enable it to outperform its competitors. In the upstream, the company's strategies are to grow profitably in core areas, build new legacy positions and commercialize the company's equity natural gas resource base while growing a high impact natural gas business. In the downstream, the strategies are to improve returns and grow earnings across the value chain. [emphasis added]

ECONOMICALLY SIGNIFICANT RELATIONSHIP

Consolidated Financial Statements

60. Chevron Corp. earns no revenue directly and has no direct earnings. All of its money comes from indirect subsidiaries that carry out the extractive business functions. It does not own

its own head office building or the buildings that house the offices of many of its subsidiaries in Chevron Park.

61. Chevron Corp. has and continues to use the earnings of its indirect subsidiaries to reward its shareholders. In 2008, it paid out as dividends to its shareholders $5.162 billion; in 2009, $5.302 billion; in 2010, $5.674 billion; in 2011, $6.139 billion. In four years, a total of $22.275 billion has been paid to Chevron shareholders from revenue earned by Chevron subsidiaries.

62. Additionally, Chevron Corp. utilized these monies to repurchase its shares on the market. Between September 2007 and July 2010, it bought back 118,996,749 shares at a cost of $10.16 billion; and from July 1, 2010 to December 31, 2011, a further $5 billion worth; totalling over $15 billion.

63. In the 2006 Annual Report, it is stated:

> In 2006, we invested almost $13 billion in our exploration and production operations.
>
> Of that $13 billion, $2 billion was approved for investments in Canada's Athabasca Oil Sands. [emphasis added]

The $2 billion was a net additional $2 billion to expand the original project. Although the initial investment in the Athabasca Oil Sands was made in 1999-2000, the defendants refuse to disclose how much was invested in this project between 1999-2006.

64. In 2011, the 10K indicates that Capital and Exploratory Expenditures were $29 billion, with $26.5 billion for investment in new projects and expansion of existing projects. In 2009 and 2010, Capital Expenditures were $19.843 billion and $19.612 billion respectively.

65. The capital that is invested, year upon year, either comes from the Consolidated Statement of Operations and Cashflows, i.e. from the indirect subsidiaries, or from the capital markets, i.e. shares issued by Chevron Corp., or from various debt instruments. Chevron Corp., which controls the balance sheet and cash flows, guarantees the debt instruments.

Borrowings, Financial and Performance Guarantees

66. For more than a decade, Chevron Corp. has issued debt securities in the public markets. If for a direct or indirect subsidiary, the debt is unconditionally guaranteed by Chevron Corp. In 2010, Chevron Corp. had short and long term debt of $11 billion and $9.684 billion as of December 31, 2011. These debts are represented by 13 interest bearing notes and debentures with varying maturity dates. The monies raised pursuant to consecutive shelf registration statements are used for general corporate purposes including for new and expanding capex projects.

67. Chevron Corp. currently has an automatic shelf registration statement filed with the SEC for an unspecified amount of nonconvertible debt securities issued or guaranteed by the company.

68. "The major debt rating agencies routinely evaluate the company's debt ...." The rating is entirely dependent on the earnings and operations of the subsidiaries.

69. In June 2002, a number of indirect subsidiaries filed a Registration Statement with the SEC and raised $4 billion of debt in the public markets. Chevron Corp. unconditionally guaranteed the borrowing. Of that amount, $3 billion was provided to Chevron Canada.

70. In July 2002, by virtue of a bond issue of Chevron Texaco Capital Company, an indirect subsidiary of Chevron Corp. and unconditionally guaranteed by it, Chevron Canada received a further $1 billion.

71. In addition, Chevron Canada received a further $2.7 billion from another financing guaranteed by Chevron Corp.

72. In December 1999, the Board of Directors of Chevron Corp. approved Chevron Canada acquiring a [redacted] percent interest [redacted]. Chevron Corp. guaranteed all the obligations of Chevron Canada:

> **Section 3.1 Guaranty.** Subject to the limitations set forth in this Section 3.1, Chevron hereby unconditionally guarantees to [redacted] the full and prompt payment by Chevron Canada of all of its payment obligations under
>
> (a) the [redacted], including, but not limited to:
>
> (i) payment obligations with respect to its share of all costs incurred for any Joint Account in accordance with Section 7.2 of the [redacted] (including without limitation, costs charged to the Joint Account pursuant to Section 7.2 (Costs, Expenses and Liabilities) of the [redacted], Section 7.2 (Costs, Expenses and Liabilities) of the [redacted] Agreement and Sections 6.2(a) and (b) (Costs and Revenues) of the [redacted] Agreement) and
>
> (ii) any other payment obligations of Chevron Canada under Sections 2.10(g), 7.3(b), 10.1, 10.2, 10.3, 15.3, 16.2, 18.2, 23.1, 23.2 and 23.3 and Exhibit C of the [redacted].

73. This Guarantee has been re-affirmed, and amended to expand its scope six times since 1999.

74. In addition, Chevron Corp. guaranteed Chevron Canada's obligations to [redacted] in December 1999:

> **Section 3.1. Guaranty.** Chevron hereby unconditionally guarantees to [redacted] the full and prompt payment by Chevron Canada of all of its payment obligations under the [redacted] Agreement, including, but not limited to its: (a) payment obligations with respect to its proportional share of the full [redacted] and other amounts payable under Section 3.1 and Article 7of the [redacted] Agreement and (b) indemnification obligations under Article 21 of the [redacted]

> Agreement (collectively, the "Guaranteed Obligations") when and as the same shall become due and payable. All payments by Chevron hereunder shall be made in the lawful money of Canada. All demands for payment of any of the Guaranteed Obligations may be made by [redacted], as representative of the parties constituting [redacted] as provided in Section 4.5 hereof. All payments by Chevron of any Guaranteed Obligations shall be made to [redacted] account as may be specified in such demand.
>
> [redacted] hereby agrees to give Chevron prompt written notice of any failure by Chevron Canada to pay any of the Guaranteed Obligations.

75. This Guarantee was re-affirmed and amended on three occasions.

76. The Canadian assets include, but are not limited to:

(a) a lubricant business in Ontario;

(b) a large crude oil refinery in British Columbia;

(c) a network of retail gasoline and diesel fuel stations in British Columbia operating under the Chevron brand;

(d) a 20 percent interest in the Athabasca Oil Sands Project in Alberta;

(e) a 26.9 percent interest in the Hibernia Field and 23.6 percent interest in Hibernia South Expansion – offshore Newfoundland and Labrador;

(f) a 26.6 percent interest in the Hebron Field – Newfoundland;

(g) a 40 percent interest in exploration rights for two blocks in the Flemish Pass Basin offshore Newfoundland;

(h) a 70 percent interest in the Duvernay Shale in Alberta;

(i) a 50 percent interest in the proposed Kitimat and Trail Pipeline Project in British Columbia;

(j) a 50 percent interest in the Horn River and Liard Shale Basins in British Columbia; and

(k) leases in the Northwest Territories.

77. Chevron Canada markets and distributes Chevron-branded anti-freezes, automotive oils, greases and gear oils, industrial oils, passenger motor car oils and specialty products. These Chevron-branded products are also sold in the U.S.A. and in other countries, as well as British Columbia, Alberta, Saskatchewan and Ontario.

78. The trademarks for the lubricant products distributed by Chevron Canada are owned by Chevron Intellectual Property LLC, a wholly-owned indirect subsidiary of Chevron Corp. Chevron Intellectual Property LLC licenses Chevron Canada to use these products in Canada.

79. The 1995 10K reveals that Chevron's capitalized investment in Hibernia was $806 million. By 1996, it had risen to $941 million and by 1997, the investment had mounted to $1.3 billion.

80. With respect to the Athabasca Oil Sands Project, Chevron Corp. refuses to disclose the investment made between 1999 and 2006. The 2006 Annual Report discloses an additional net investment of $2 billion for the Project Expansion. Chevron Canada has indicated that it has expended a further $[redacted] billion in the project between 2006-2011.

81. The segment managers for the upstream and downstream Canadian operating segments are executive officers of Chevron Corp. In the case of the Canadian upstream operations, the manager is George Kirkland.

82. These facts make clear that monies are fully fungible between Chevron Corp., its subsidiaries and Chevron Canada. When monies are required, monies flow from the group to Chevron Canada. Annually, Chevron Canada returns monies to Chevron Corp. by way of dividends for the benefit of Chevron Corp.'s shareholders and for stock buy-backs.

Employees, LTIP and Pension

83. Of the employees working for Chevron Canada, 62 (or nine percent) are on the payroll of another Chevron entity – a point which illustrates the mobility between subsidiaries and operating segments right across the "Chevron Group", a term used and common parlance within the Chevron companies.

84. Seven percent of the employees working for Chevron Canada are members of the Chevron Corp. Pension Plan.

85. Thirty of the senior employees working for Chevron Canada are members of Chevron Corp.'s Long Term Incentive Plan and receive share options or share appreciation rights to Chevron Corp. stock.

86. The 2011 10K states that 93 million of an available 160 million units have been granted by Chevron Corp. to employees in the Chevron Group. A large number of the LTIP units are compensation rewards given to more than the 740 persons who are directly employed by Chevron

Corp. As with employees who work for Chevron Canada, so too LTIP units are awarded to employees of direct and indirect subsidiaries throughout the world.

Chevron Management and Control – The Corporate Governance Policies

87. Chevron Corp.'s management advises its shareholders that it manages the investments that it has made on their behalf through the 74 subsidiaries located in many countries of the world, including Canada. It states that it provides management to these subsidiaries as well as financial, administrative and technological support. It notes that "although each subsidiary is responsible for its own affairs, Chevron Corp. manages its investments in these subsidiaries and their affiliates. The investments are grouped into two business segments, Upstream and Downstream representing the company's 'reportable segments' and 'operating segments'". Upstream and downstream operations account for more than 90 percent of Chevron's Revenue and Earnings. Upstream operations consist primarily of exploring for, developing and producing crude oil and natural gas. Downstream operations consist primarily of refining crude oil into petroleum products and marketing crude oil and petroleum products.

88. The segment managers report to the

> ... 'chief operating decision maker' (CODM). The CODM is the company's Executive Committee (EXCOM), a committee of senior officers that includes the Chief Executive Officer, and EXCOM reports to the Board of Directors of Chevron Corporation.
>
> The operating segments represent components of the company, as described in accounting standards for segment reporting (ASC 280), that engage in activities (a) from which revenues are earned and expenses are incurred; (b) whose operating results are regularly reviewed by the CODM, which makes decisions about resources to be allocated to the segments and assesses their performance; and (c) for which discrete financial information is available.
>
> Segment managers for reportable segments are directly accountable to and maintain regular contact with the company's CODM to discuss the segment's operating activities and financial performance. The CODM

> approves annual capital and exploratory budgets at the reportable segment level as well as reviews capital and exploratory funding for major projects and approves major changes to the annual capital and exploratory budgets. [emphasis added]

89. The granularity of the controls exercised by the Board of Directors of Chevron Corp. and the Executive Committee, a Committee of Senior Officers of Chevron Corp., is spelled out in the Policies issued by Chevron Corp. and in particular the corporate governance policies. These policies are posted, internally, online within the Chevron Group of Companies and are accessible to its 61,000 employees.

90. Policy 190 clearly indicates the over-arching power and authority of the Board of Directors:

> The Board of Directors possesses all powers necessary to manage the business and affairs of the corporation. The Executive Committee receives authority from the Board of Directors and is charged with responsibility to carry out Board policy in the management of the Corporation's business and affairs. This policy sets forth the expressed delegations of commitment, expenditure and human resources authorities from the Executive Committee to the Reporting Units. Under these delegations the Reporting Units implement their business plans in a manner consistent with the strategic direction and allocation of capital and human resources established by the Executive Committee.

91. Policy 190 then sets out the Reporting Units and its Officers. Global Upstream, which includes Africa, Latin America, Asia Pacific, Europe, Middle East and North America, all report to the Vice-Chairman of the Board and Executive Vice President, George L. Kirkland.

92. As Policy 110 indicates:

> The Capital and Exploratory Expenditure Budget is developed as part of the business plan and approved by the Board of Directors. It includes all projects, programs and evaluations (hereafter referred to as 'commitments') that are expected to be authorized (appropriated) during a given year of the business plan ...

> ***Responsibility***
>
> Annually, following strategic discussions, the Planning Committee establishes guidelines for use by the reporting units in developing their Financial Forecast submissions and Capital and Exploratory Expenditure Budget as part of the business planning process.
>
> Authority to appropriate and expend funds for commitments against the Excom–reviewed C&E Expenditure Budget rests within the reporting unit's respective authority limits, with the exception of commitments that require reporting to Excom or concurrence of the Reporting Officer as stated in Policy 190.
>
> The Capital and Exploratory Expenditure Budget sets the maximum dollar amount a reporting unit may expend during the first year of the multi-year business plan.

93. Policy 120 addresses financial appropriations:

> This policy applies to all operating and service companies and corporate departments and staffs (hereafter, referred to as 'Reporting Units'). The policy covers pre-Appropriation requirements, the preparation of Appropriation Requests and any supplemental Appropriation Requests that may be required ...
>
> An Appropriation Request is used to obtain authorization to proceed with a project, program or valuation ('commitment') consistent with the Board-endorsed business plan. Reporting Units must write Appropriation Requests for such commitments in excess of $1 million.

94. Every new project, every expansion of an existing project and every capital expenditure must pass through the levels described above. Every one is subject to review and revision, and must be approved by the Board of Directors of Chevron Corp. before any project, expansion of project or capital expenditure can be embarked upon. Well-documented Appropriation Requests with rationale and business, legal, regulatory, financial and human resource justification must be forwarded, in the case of all North American upstream operating companies to CNAEP through the Executive Committee and then on to the Board.

95. Once a project is approved, there nevertheless is a requirement for Reporting when expenditures exceed, in some cases [redacted] million and in some cases [redacted] million. Expenditures to be made in excess of the levels of authority must also be reported to CNAEP, to the Executive Committee of Chevron Corp. and they must be approved by Chevron Corp.

96. With respect to the major projects in Canada, which include but are not limited to, the Athabasca Oil Sands project, the Athabasca Oil Sands expansion, the Hebron project, the Hibernia project and the Hibernia South project, Final Investment Decisions were made by the Board of Directors, from time to time, Front End Engineering and Design Expenditures ("FEED") were approved by the Executive Committee and/or the Board of Directors. Appropriation Requests were forwarded by CNAEP and regular reporting requirements were submitted by CNAEP to the Executive Committee of Chevron Corp.

97. What these policies indicate is the integration of the upstream and of the downstream core businesses and the interrelationship between all the companies of Chevron Group that engage in those core businesses. The reporting and approval structure is not from the operating subsidiary through its line of indirect subsidiaries to the parent, but rather reporting to a group of people of other companies (CNAEP) within the Chevron Group of Companies and the whole presented as a comprehensive package for the Executive Committee of Chevron Corp. for approval, and to the Board of Directors, to be included within the Business Plan and Annual Budget for annual approval.

98. The shareholders can rely on the fact that their individual share ownership of Chevron Corp. and the investment it represents, aggregated with every other owner's investment is being

invested in, managed by and controlled by the Executive Committee, senior officers of Chevron Corp. and by the Board of Directors that they annually elect.

99. Chevron Canada is a 7th level wholly-owned subsidiary of Chevron Corp. Chevron Corp. owns 100 percent of the shares of each descending subsidiary, which in turn owns 100 percent of the next descending subsidiary. None of the intermediary subsidiary companies carries on business. The directors of five of these six subsidiaries are all employees of either Chevron Corp. or of Chevron Global Downstream LLC, itself a wholly-owned subsidiary of Chevron Corp. The four directors of Chevron Canada are all employees. It is obvious that Chevron Canada is wholly-owned and controlled by Chevron Corp. for the sole benefit of Chevron's shareholders.

100. Chevron Corp. owns the assets and shares of Chevron Canada. It is the sole entity that has the power to require Chevron Canada to buy an asset or sell an asset, change officers and directors, and alter its management practices.

The Defence of Public Policy

101. The third and final defence is that of public policy. As the Supreme Court of Canada held: "The public policy defence turns on whether the foreign law is contrary to our view of basic morality." The principle that a polluter must pay is not contrary to the Canadian view of morality, but rather is a bedrock principle of Canadian law.

102. Chevron Corp.'s Statement of Defence impermissibly seeks to raise issues which have been previously raised in foreign courts and determined against it. It does not comply with the restricted list and scope of defences allowed to be raised or tried in Canada.

103. The plaintiffs join issue with the defendant, Chevron Corp. on its Statement of Defence.

October 20, 2015

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Court File No. CV-12-980800CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL COURT

PROCEEDING COMMENCED AT TORONTO

REPLY AND JOINDER OF ISSUE TO CHEVRON CORPORATION STATEMENT OF DEFENCE

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