Condemning Chevron's oil crime in the Ecuadorean Amazon Rainforest: the role of shareholders

Abstract

In a world where the environment seems constantly put under threat by the insatiable greed of corporations, a growing demand that ethical parameters start orienting the business' strategies emerges. The very nodal question of this analysis will be exactly how this goal can be promoted in particular through a proactive and aware role of investors, those represented by Public Fund and those private. It will be argued that they have the right to know which conduct towards the environment the company in which they are investing adopts and, above all, the right to exercise the power their shares give to them in order to put this conduct under control and to put pressure on corporate strategies. The analysis will also examine some cases of study, like the role of the Norwegian Pension Fund Global in disinvesting from coal companies and that of Chevron's own stakeholders in urging the firm to remediate the environmental, social and cultural damages caused in in the Ecuadorean Amazon Rainforest according to the sentence of the Ecuadorian Supreme court.

The history of the case in Ecuador

Chevron is responsible of major environmental crimes in the world. However, this analysis will be focused of its answerability for one of the world biggest oil contamination, i.e. that which have affected and still today affects the Ecuadorean Amazon Rainforest where the firm operated from 1964 to 1992. The impacted area covers the territories surrounding the wells, the stations where the extracted crude was processed and the open air pools into which the oil produced were directly discharged, without any sort of safety membranes. The consequences of this irresponsible conduct have affected water resources, soil, air and the entire ecosystem. It is estimated that Texaco, over the time that it operated the sites, spilled directly in water bodies a total of 18 billion gallons of formation water, at a rate close to 10 million liters of toxic water per day, and 16,800 million gallons of crude, that is about 30 times the oil spilled in the Exxon Valdez disaster in Alaska. Due to the use of outdated techniques for oil associated gas' combustion, around 6,667 million cubic meters of gas were burned outdoors over the 28 years of Texaco's operations. The overall area affected reached 450,000 hectares and the impacted population amounts to 30,000 victims. This contamination not only caused damages to the ecosystem, it also destroyed the subsistence farming and fishing of the affected people and deeply impacted indigenous cultures.

In 1993, a group of Ecuadorian indigenous and farmers living around the contaminated sites filed a class-action lawsuit against Texaco in New York denouncing the company's *intentional* use of substandard environmental practices which have caused massive soil and water pollution. Some years later, the company obtained to have the case transferred to Ecuador. The case, *Aguinda v. Chevron Texaco*, was re-filed against Chevron in Ecuador in 2003. In the meanwhile, Chevron acquired Texaco (2001), *de facto* purchasing Texaco's legal, financial, and reputational liabilities stemming from the second firm's operations in Ecuador. After nearly two decades of litigation, one of the largest court judgments for environmental damage in history was proclaimed against the multinational. Indeed, on

February 14, 2011, the Ecuadorian Provincial Court of Sucumbíos. issued its final judgment condemning Chevron liable for $18 billion in compensatory and punitive damages. On January 3, 2012, the Ecuadorian appeals court confirmed the judgment in its entirety, and, on November 12, 2013, the Supreme Court of Ecuador upheld the lower court's ruling, though removing the punitive damages, and assessed the compensation for the victims as amounting to $9.51 billion. Subsequently, Chevron appealed the ruling to the Ecuadorean Constitutional Court, through an extraordinary recourse, that is still pending before this court. Notwithstanding, the Supreme Court's judgment, being the country's last instance, is considered definitive and already internationally enforceable. Meanwhile Chevron removed all its assets from Ecuador in order not to pay, so that the lawyers of the affected people had to undertake legal actions in different countries such as Argentina, Brasil and Canada to recover the payment of the sentence. Lately seven judges of the Supreme Court of Canada unanimously decided that the victims could sue Chevron in Canada which was a worldwide precedent applauded by major NGO's in the world. However, the dilatory actions and misuse of laws of the company to avoid the payment force the affected people to continue to live in this contaminated environment, causing more deaths and sickness.

Ethical concerns about investment decisions

The question which should precede any investment decision is: do I know *in which kind of firm* I am investing in? And, above all, do I know *how* this firm will use your money? The answer actually is to be evaluated through the lens of an environmental ethics that today more than in the past must be recognized and must orient our investment choices. Unfortunately, the logic of the economic convenience often wins over any other reasoning.

This desperate appeal to put an environment-based moral first in orienting our conduct is old. The contemporary German philosopher, Hans Jonas, in the early '80s in its book "The Imperative of Responsibility. In Search of an Ethics for the Technological Age" (1984) already called for an ethic regulating the enormous power humans were acquiring on nature. He realized the enormous transforming power technoscience had and strongly claimed the necessity for human beings to act with caution in using this power. More than

of drastic environmental apocalypses, he was worried of a gradual one, resultant form the inadequate use the global technical progress. And this is exactly what we are experiencing nowadays.

Once nature fell under humans' power, the human acquired a relation of *responsibility* towards it. Consequently, the ethics from anthropocentric started also to include nature in its scope. The new ethic proposed by Jonas considers not only the human wellbeing but also the extra-human common good, i.e. the environment. But, actually, as the human being is part of the environment himself, the preservation of the nature must be perceived as ultimately part of the human self-conservation attitude which has always driven human acts but that seems lost nowadays. An ethic of conservation, of prevention, of prudence shall prevail over progress at any cost because the preservation of the environment, in the end, coincides with the preservation of our life.

The philosopher's ethic is oriented towards the future, a future that, unfortunately, today is not so far from us. When Jonas talks of responsibility, he reminds us Umberto Eco's words: the progress, said the novelist, increased his moral sensitivity, raised his moral responsibility that he defined a *product* of technology. This call to be responsible for the impact of technology on nature is not an imperative but an exhortation to our own freedom and potentiality to *make a change*. The scientific progress is not neutral: now, more than in the past, it should be ethics-based and submitted to an extra-technologic control.

The challenge of introducing ethics into corporative strategies will be analyzed under two perspectives: the first regards the role of the Council on Ethics for Pension Funds investing in powerful firms; the second analyzes the potentiality of shareholders activism to this purpose.

The role of the Council on Ethics for Pension Funds

As for the Councils on Ethics for Pension Funds, their responsibility in orienting business' conduct derives from their role to evaluate whether or not the Fund's investment in a certain company is consistent with its Ethical Guidelines. This should be the parameters

according to which the decision to exclude companies from the fund is made. For example, the Council on Ethics for the Norwegian Government Pension Fund Global advises Norges Bank, the central bank of Norway which manages the Fund, in exclusion decisions. The Fund is one of the greatestpublicfunds in the world, witha valueof more than 800 billion euros,derived from the sale, by the NorwegianState, of the oilextracted inthe North Seaand from theinvestments madewith this incomein about 9,000 companiesin over 75countries.

Among the Guidelines of the Fund (http://etikkradet.no/en/guidelines/), at Section 3(*Criteria for conduct-based observation and exclusion of companies*) it is affirmed that *"*Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for: a) serious or systematic *human rights violations* (..) c) severe *environmental damage* (..)". An environmental ethics seems therefore crucial in admitting or maintaining a company in the fund. But is it really as it seems? Some lines after, at Section 4 (*The Council on Ethics*), it is added that "(2) The composition of members shall ensure that the Council possesses the *required expertise* to perform its functions as defined in these guidelines". Therefore, it is imaginable that, in case of Funds investing in firms with an high environmental impact, members of the Council will be trained enough in environmental issues and conflicts.

The potentiality of the Fund to make a change in the global environmental scenario is clear. The more the Fund is powerful, the greater is the responsibility carried by the Council on Ethics. Another weapon funds have is that of exercising their property rights on corporate shares in a responsible way. For example, in October 2013, the Council for Ethics of the Norwegian Fund started monitoring the environmental impact of the mining activities of the South Africa based Anglo Gold Ashanti through a five years active participation. The same active participation occurred for the Fund's investment in Royal Dutch Shell and Eni, related to their operations in the Niger Delta.

An impressive use of this power was made in June 2015 when the Fund decided to pull billions of dollars of investments out of companies that derive 30 percent or more of their business from mining or burning coal. This action was undoubtedly a meaningful signal

against climate change, in the framework of the summit conference on the issue (COP21) held in Paris just some months later. Along with the Norwegian Fund, other "giants" have taken the decision to cut coal investments, among them can be mentioned the World Council of Churches, Oxford University, Stanford University, the Rockefeller Brothers Fund, the French insurer Axa etc. An outstanding movement is spreading among major investors to take action for our planet (for an overview on fossil fuels' disinvestment decisions see http://gofossilfree.org/commitments/).

However, some perplexities arise if one reflects on the fact that Norway is Europe's greatest producer of other fossil fuels, i.e. oil and gas, thanks to which it earns the money that the country is pulling out of coal. Indeed, an deeper reasoning inevitably lead to reappraise this selective decision. The divestment decision option aimed to reduce carbon emissions cannot be flanked by an unvaried extraction of other fossil fuels. The huge wealth of the Fund should rather be used to invest in renewable energy and to support research on sustainable alternatives to *all* fossil fuels.

Shareholders' power to put pressure on corporate strategies

In regards to individual shareholders' power to urge big firms to respect an environmental ethics, it should be considered the alternative between selling the shares in environmentally bad corporations or rather retaining a holdings for the purpose of shareholder activism. This second choice seems preferable if one considers that, in the end, selling your own fossil fuel shares to another investor that neglects environmental issues simply does not causes any change in business' strategy. Maybe the very solution is to both divest and exercise shareholder activism, as suggested by Simon Billenness, President of the CSR Strategy Group. This results in being the most effective tactic: not just to disinvest from the fossil fuel companies, but to retain a limited and decreasing number of shares aimed to put pressure on the firm's conduct.

However, in order to effectively lobby on corporate conduct, shareholders need to be informed about corporate strategy and main concerns. But this often does not properly

occur. For example, in the case of Chevron's responsibility for the decades of un-remediated oil pollution in the Ecuadoran Amazon, the firm's shareholders have continually questioned the management about the real extent of the oil pollution, the real damage the contamination has produced on the health and livelihoods of the people, and, above all, to what extent Chevron could be hold responsible and liable for that pollution. However, the company keeps hiding the truth on its legal troubles in Ecuador to investors. During Chevron's 2014 annual shareholder meeting, the management even tried to depict the company as *victim* of "the legal fraud of the century" perpetrated by the injured party's plaintiffs. Notwithstanding, a significant number of shareholders continued to vote for resolutions disapproving the company's conduct in Ecuador.

Shareholders' activism is driven by environmental ethics' consideration, but not only. Indeed, fossil fuels corporations like Chevron which fight on an extremely competitive market for the right to explore for new reserves, must present themselves as socially responsible firm. The oil giant's shareholders have repeatedly claimed that demonstrating reliability for remediating the Ecuadorean contaminated sites would make Chevron more likely to obtain concessions for new operations in other countries, which strongly depend on public opinion perception and its influence on governments. In response, Chevron's management has mostly disregarded these shareholder claims. What is therefore the *real* power of shareholders who want to actively and responsibly exercise their property right, before corporate uncooperative and ambiguous attitude?

The answer is controversial. It is true that neither public divestment nor shareholder advocacy can drastically transform the corporate approach toward the environment but they can contribute to *make a change*. Indeed, it shall be considered that in the case of huge multinational companies, even a tiny variation could result in having a global impact. As said by the renown pundit David Sirota: "If you force the company that has produced 5 percent of all the human-created carbon emissions in history to even vaguely acknowledge that global warming is occurring, you have potentially started changing the planet*"*. This is what occurred, for example, in the case of shareholder resolutions aimed to pressure ExxonMobil into stopping the financial support to climate denial groups and achieving a

carbon tax. What is remarkable, above all, is that these shareholders achieved their goals mainly through direct dialogue with the company, by the pressure of their resolutions, and intervening actively in annual shareholder meetings.

Conclusively, even if unable to transform business' strategy as they would, shareholders caring about ethical criteria should consider to exercise their power to positively orient corporate decision-making. A combination of both divestment and shareholder advocacy results in being strategic to this purpose, and preferable to completely disinvest, thus leaving environmentally insensitive shareholders to leverage the company. This, instead, would really mean the fossil fuel companies' victory to freely harm our planet and continue to enjoy impunity (see, with regard to Chevron, https://www.tni.org/en/impunityinfographic).

The risks shareholders must take into account

If the ethics about investing in Chevron is not by itself persuasive enough to motivate a active use of company's shares, maybe the following concerns will be decisive. Are Chevron's shareholders aware of the significant financial and operational risks the firm is facing due to the threat of enforcement of an $ 9.5 billion adverse judgment in Ecuador? If they are not, the responsibility bears on Chevron for its un-transparent conduct towards its own shareholders. This mismanagement of the Ecuadorean case is to be ascribed to the poor corporate governance by Chevron's executive. In the text which follows each of these concerns will be analyzed step by step.

The financial risk

The financial risks Chevron's shareholders must consider mainly derive from a "chain-mechanism" which could be explained as follows. The first element to be taken into account is that the oil pollution is still present and tangible in the formerly operated sites, and this fact is quite undisputed, as demonstrated by various research reports (http://chevrontoxico.com/assets/ docs/2013-12-17-lbg-rejoinder-report-executive-summary.pdf). In March 2014, the U.S. District Court Judge Lewis Kaplan, who stands on

the side of Chevron in the RICO case against the Ecuadoran plaintiffs and their lawyers, did not deny the oil pollution, affirming that Texaco and probably also Chevron would be held responsible for it. A more recent (June 2014) press release by Hinton Communications, again stressed that the "widespread" toxic contamination endures nowadays (http://www.csrwire.com/ preview/press_release/ oSQJZKDH3XzSqIP2EAZMP05SejnOSfpMbTN0FOTg). Still in June 2014 a report by EcoWatch denounced the hiding of evidence perpetrated by Chevron which secretly conducted preliminary inspections not authorized by the Lago Agrio Court in order to be able to avoid the badly contaminated areas during the official judicial inspections (http://ecowatch.com/2014/06/13/chevron-evidence-guilt-ecuador-rainforest/; see also https://www.youtube.com/watch?v=8VKX2yD2slM&feature=youtu.be). This unfair conduct was illustrated during the arbitration [Arbitration between *Chevron Corp. and Texaco petroleum Co.* and *the Republic of Ecuador*, (PCA Case No.2009-23, April 21-May 8, 2015)] against the Republic of Ecuador – Chevron III (http://chevrontoxico.com/assets/docs/2013-12-17-respondents-track-2-rejoinder.pdf, p. 63). Also the site inspections conducted in the framework of the mentioned arbitration proceeding have been affected by the company's misconduct, from which derives the ROE's claim of an "abuse of pre-inspections" by Chevron (http://www.pge.gob.ec/images/documentos/Direcciones2015/asuntosinternacionales/adjuntos/ProcesosIntAct/CHEVRON3.pdf; http://eeuu.embajada.gob.ec/estan-las-manos-de-chevron-realmente-limpias-una-respuesta-a-doug-cassel/). However, the site inspection which took place in Shushufindi, in the Ecuadorean Oriente (Track 2 Hearing, Shushufindi – 34, Sunday, June 7, 2015) fully support the positions advanced by the Lago Agrio plaintiffs about the environmental and legal standards and the actual risk for health.

The awareness of the magnitude of the company's accountabilityfor the Ecuadorean oil crime matched with the firm's vulnerability to enforcement actions around the world, makes Chevron extremely at risk of devaluation of its shares. Indeed, recent developments of the case, as explained further on, have demonstrated the weakness of Chevron's defenses to enforcement actions. It is reasonable to presume that, as plaintiffs' global enforcement strategy progresses, the litigation costs and risks will increase as well as the damages to the

corporations image. This bad public opinion has been amplified last years due to declarations in the United Nations, to condemnations of Chevron's conduct by civil society at People's tribunals and at the Rights of Nature's tribunals in different countries, due to worldwide campaigns such as the Anti-Chevron Day on the 21st of May and others (see for example the lifetime shame award Chevron received last year in Davos: http://publiceye.ch/). This will eventually lead to a chain of shares' sale which will inevitably cause a depreciation of them. The increasing concern toward this risk has urged stock analysts to incorporate Chevron's legal liability for the Ecuadorean oil crime into their investment analysis, like for example the recent analyst report "3 Oil And Gas Stocks To Consider Now" by Ry Frank (15 March 2012) and the Financial Times article "Chevron's Ecuador case takes new Twist" by Ed Crooks and Naomi Mapstone (4 January 2012). After the developments of the case in Canada a number of articles have spread dealing with the risks the Canadian recognition of jurisdiction meant for the corporation both from independent analysts (see for example http://www.canadianappeals.com/2015/09/09/chevron-corp-v-yaiguaje-scc-decision-highlights-increased-litigation-risk-for-canadian-companies-for-misdeeds-of-their-foreign-affiliates/; http://business.financialpost.com/legal-post/supreme-court-of-canada-rules-ecuador-villagers-can-go-ahead-with-us9-5-billion-legal-case-against-chevron; http://www.lawyersweekly.ca/articles/2517) and from Chevron's analysts (http://www.chevron.com/news/).

The operational risk

Maybe more worrying that the financial risk, is for shareholders the operational risk to which the company is exposed, due to the liability for the Ecuadorean oil pollution. This concern was perceived and expressed by shareholders when the Ecuadorean courts first ruled against Chevron in 2011 and awarded the plaintiffs a multi-billion dollar judgment and the right to collect it by seizing Chevron's assets worldwide. The seriousness of this ruling has been confirmed by Chevron, even if not directly addressing shareholders, in its 2011 sworn legal statement affirming that "the seizure of Chevron assets, such as oil

tankers, wells, or pipelines [around the world] would disrupt Chevron's supply chain and operations; and seizures in multiple jurisdictions would be more disruptive".

This risk will *directly* threaten the firm's operations, but there is another even more alarming threat. Indeed, it shall be considered the "irreparable injury to [the company's] business reputation and business relationships" deriving from potential enforcement of the Ecuadorian judgment, which "would not be remediable by money damages" (Declaration of Chevron Deputy Comptroller Rex Mitchell in support of Chevron Corporation Motion for a Preliminary Injunction, Filed 2/5/11, p. 4). This second risk, i.e. that of a globally spread bad reputation, might affect the company's operations even more than the actual seizure.

This poor reputation will not only stem from the worldwide enforcement of the judgment favorable to the plaintiffs, but also to the renown aggressive global litigation and public relations strategy the firm has chosen to pursue to defend itself in the case. For example, it can be mentioned Chevron's attempt to have the judgment annulled on the basis of alleged fraud and extortion claims against the Ecuadorian plaintiffs and their legal team before U.S. courts (the RICO case). In addition, the firm has notoriously spent a huge sum of money up to this time to harm the images of the plaintiffs, to frighten adverse witnesses while paying favorable ones, to discourage the plaintiffs' supporters, and even to hide evidence of its contamination (see the report on this subject submitted to the United Nations Special Rapporteur in 2015: http://www.cetim.ch/report-submitted-to-the-united-nations-special-rapporteur-on-the-situation-of-human-rights-defenders-individual-names-have-been-deleted/). Moreover, the company has resorted to international arbitration in order to transfer its own responsibility for the oil pollution on the Ecuadorean government's shoulders. The overall conduct of the firm has caused legal observers to question the company's fair exercise of its right to defense.

Turning back to the enforcement's risk for a while, it is opportune to reflect on the plaintiffs' "keystone nation" strategy. Following this strategy, nations which promise the best potential for recognizing the judgment and enjoy reciprocity, or which presents a judgment recognition treaty with countries where Chevron has assets, are identified. For

example, the lawyers for the Ecuadorean victims have pinpointed as "keystone nations" the following countries: Argentina, Brazil, Colombia, and Venezuela, which all have ratified the Organization of American States' Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards and where Chevron has significant operations. In addition to South American countries, enforcement possibilities are under analysis for both Singapore (which hosts the Chevron's Asia-Pacific headquarters for downstream operations, key refineries and chemical plants), and the Philippines (where the firm's retains a huge oil production and has interest in geothermal power facilities). Moreover, as illustrated further on, recent developments in Canada have demonstrated the country's suitability to be a key-stone nation for plaintiffs' enforcement strategy. It is worth to mention the emblematic words of Marco Simons, Legal Director of EarthRights International, according to which the magnitude of Chevron's risk for the plaintiffs' enforcement strategies stems from the consideration that "[t]he plaintiffs only need to win once or a few times, while Chevron needs to win *everywhere*. Even if Chevron wins twenty cases, just one loss could cost the company hundreds of millions or billions of dollars" (Simons M., "Chevron fights justice in Ecuador on two fronts, but needs to win everywhere", EarthRights International blog, 4 May 2011).

As regards the company's bad notoriety, it is necessary to reflect on the consequences that this will have on Chevron's future operations. This bad image will be increased by the plaintiffs' efforts to publicize Chevron's connection to the environmental damage in the Amazon and its long-lasting denial of reparation. The poor management of the *Aguinda* case risks to generate resistance among governments and local communities worldwide, undermining the firm's chance to obtain concessions and public approval. It is plain the importance that these two factors have for a firm like Chevron whose value derive for over its half from oil and gas production operations. In order to sustain and expand its business, the company must constantly gain access to new projects, for which it plays around the world in competition with other oil and gas companies. The company's chance to win this competition strongly depends on both legal permission from governments and "social license to operate" from local communities. Why a firm acknowledged as irresponsible

towards the environment and unfair in dealing with governments and local communities should be chosen?

The recent developments of the case

Chevron's shareholders should be even more worried about the risks the company is facing given the recent developments of the case. It is opportune to explain each of them, as part of an overall trend of favorable judgments for the Ecuadorean plaintiffs. Firstly, the focus will interest the failure of Chevron's attempt to invalidate the Ecuadorean judgment favorable to the Amazon victims on the basis of allegations of fraud, bribery and coercion. The company appealed to the RICO (Racketeering Influence and Corrupt Organizations) law to prevent the judgment's enforcement in the United States. In particular, it has sued in the Second District Court of New York the Ecuadorian plaintiffs, their lawyers, and certain consultants, under the RICO Act. Chevron's main allegation was that plaintiffs' lawyers colluded with Ecuadorian officials to obtain a judgment against the corporation and that they even ghostwrote the text of the final ruling. On March 7, 2011, Judge Kaplan issued a preliminary injunction banning the execution of *any* Ecuadorean court judgment in *any* country outside Ecuador. The decision was not long to be struck down: indeed, the U.S. Second Circuit on September 19, 2011, annulled Kaplan's decision noting that the RICO law was not meant to make its courts act "as transnational arbiters to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs" (Court opinion of January 26, 2012).

Moreover, the fraud allegations were mainly based on the deposition of Chevron's so called "star-witness", Mr. Alberto Guerra. He is a former Ecuadorean judge of the Provincial Court of Justice of Sucumbíos who first heard the *Aguinda* case between May 2003 and January 2004, when the lawsuit was transferred to Ecuador from the United States. After having left this institutional position, he was literally contracted by Chevron to testify on its behalf, describing inexistent collusive dealings with the Ecuadorean plaintiffs before U.S. courts. Indeed, he became sadly famous for having admitted under oath before a New York Court to having struck a deal between the Ecuadorean plaintiffs and the presiding judge,

Nicolas Zambrano, with the aim to ghostwrite the final verdict of 2011, in exchange of money. Due to his cooperation with Chevron in "disclosing the truth", he is receiving substantial amounts of money and other benefits from the multinational.

However, Guerra's testimony was contradicted by his own outstanding affirmations before the International Arbitration Panel in Washington DC during the Phase II of the Arbitration between *Chevron Corp. and Texaco petroleum Co.* and *the Republic of Ecuador* (PCA Case No.2009-23, April 21- May 8, 2015), initiated in 2009 by the company under the U.S.-Ecuador Bilateral Investment Treaty. His declaration, stated before the Arbitration tribunal in the cross-examination held over two days between April and May of 2015, shows dramatically that there is *no evidence* to support the claims of a bribery and of a ghostwritten judgment. Indeed, he admitted herein that the majority of the declarations released before the New Yorker Judge, Lewis Kaplan, were exaggerated or simply not true.

From this series of events, it appears evident the company's unfair strategy to move the attention from the environmental crime to the fraud issue, in order to hide the truth on its responsibilities for the Amazon still un-repaired contamination. This conduct is even worse if one considers it in light of the historical reality of the case, which is that Chevron itself requested the transferral of the trial from the U.S. to Ecuador. The firm made this demand with the belief to be able to manipulate and influence the Ecuadorean judiciary for obtaining a favourable ruling. Texaco (and thus Chevron) assured the U.S. district court that it would have recognized the binding nature of *any judgment* issued in Ecuador and submitted itself to Ecuadorean jurisdiction (March 17, 2011 Decision by the United States Court of Appeals, Second Circuit, *Republic of Ecuador v. Chevron Corporation*, Texaco Petroleum Company, p. 21). However, the company seems to have "forgiven" this commitment.

A second point which it is worth to make is the circumstance that Chevron, in September 2009, initiated an international arbitration proceedings against the government of Ecuador at the Permanent Court of Arbitration in The Hague, under the provisions of the Bilateral Investment Treaty (BIT) between the U.S. and Ecuador. The action can be inserted in a

long-lasting strategy to delay the achievement of justice and the reparation, but maybe the company would do better to take responsibility for the damage caused rather than continue to invest enormous sums in fighting the claim. In this instance, Chevron asked the arbitral panel to issue a "declaration that the State of Ecuador (or Petroecuador, the oil public firm which was part of the Ecuadorean consortium in which Texaco operated) is *exclusively liable for any judgment* that may be issued in the Lago Agrio Litigation" (Chevron's Notice of International Arbitration Against Government of Ecuador, http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf). What should be underlined is that, though Chevron could possibly obtain money damages from the Ecuadorean State, however the arbitral panel cannot affect in any way the *Aguinda* ruling, because it has no jurisdiction over the*Aguinda* plaintiffs. If the company can still defend before the Ecuadorean government the releases from liability previously given to Texpet (Texaco) by the Republic of Ecuador and Petroecuador, nonetheless it was released from *government* claims only, not from third-party claims like those of the *Aguinda* plaintiffs (Ruling of Presiding Judge Nicolas Zambrano Lozada, Provincial Court of Sucumbíos, 14 February 2011, p.34 and p.176, http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf).

The third interesting development of the case regards the enforcement of the Ecuadorean judgment outside the country. The plaintiffs, who have been struggling for 22 years to obtain a proper remediation of the environmental disaster and appropriate compensation, on September 4, 2015, have obtained a crucial judgment by the Supreme Court of Canada (last instance) in the *Chevron Corp. v. Yaiguaje* case. The Court unanimously recognized the Canadian jurisdiction over the judgment enforcement claim made by plaintiffs, confirming a second instance's decision. The Ecuadorean victims, after Chevron moved all its assets out of Ecuador, sought to enforce the judgment against the firm in other countries, including Canada. The Court of Appeal in Ontario (second instance) recognized the due assistance that courts worldwide shall grant to the victims: "Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets. Faced with this situation, the plaintiffs have turned to

the Canadian courts for assistance in enforcing the Ecuadorian judgment, and obtaining *their financial due*".

The Canadian decision is important not only for the Ecuadorian plaintiffs but also for other affected people fighting Chevron around the world (see the insertion of the decision among the top ten Canadian Appellate Courts' rulings for the years 2014-2015 http://www.canadianappeals.com/2014/12/31/appeals-to-watch-in-2015-the-appeals-monitors-top-ten/). The corporation's shareholders should be concerned with this potential chain of other actions against Chevron this ruling could generate. Indeed, this verdict assesses a strong precedent for environmental global enforceability: when a domestic court's decision cannot be enforced in the jurisdiction of the violation because the guilty firm no longer has assets there, the only solution is to seek recourse in States where the multinationals have their headquarters or otherwise hold assets subject to seizure. The "forum of necessity" rule is exactly intended to address these sorts of cases and the Canada enforcement litigation could turn into the first clear global precedent establishing this doctrine.

The lack of transparency

It has been explained above how the awareness about potential risks is hindered by the company's un-transparent conduct towards investors. It is also for this reason that an increasing number of shareholders is demanding a full disclosure of the risks Chevron is facing due to the Ecuadorean case. In the early 2003, shareholders led by Trillium Asset Management presented Chevron a series of resolutions demanding for the company to remediate the oil pollution in Ecuador. Their words are emblematic: "In our view, Texaco's cleanup efforts were inadequate and our company has a continuing ethical obligation to redress the outstanding environment and health consequences of its activities in Ecuador" (see Trillium website:http://www.trilliuminvest.com/shareholder-proposal/environmental-health-2/).

In April 2010, Trillium Asset Management along with Amnesty International USA and the Commonwealth of Pennsylvania Treasury Department urged Chevron shareholders to

support their resolution demanding a board renovation based on candidates selected on the basis of their "expertise and experience in environmental matters relevant to hydrocarbon exploration and production". About 25% of Chevron shareholders endorsed this resolution in 2010 and 2011. In May 2011, again Trillium Asset Management asked the Securities and Exchange Commission (SEC) to investigate to which extent Chevron, in its 2011 annual report concerning the Ecuadorian judgment, disclosed the real risks. The same year, a percentage of shareholders equivalent to $ 156 million of the firms' assets, asked Chevron "to fully disclose the risks to its operations and business from the potential enforcement of the *Aguinda* verdict" and to "revaluate whether endless litigation in the *Aguinda* case is the best strategy for the Company and its shareholders" ("Investor Statement on Chevron and *Aguinda v. Texaco*", May 2011, http://trilliuminvest.com/wp-content/uploads/2011/05/CVX-investor-statement-with-Signatories-May-25-2011.pdf). Chevron has not properly addressed any of these concerns yet.

Indeed, if one analyzes the company's 2011 10-K report (http://www.sec.gov/Archives/edgar/data/93410/000095012312002976/f60351e10vk.htm) there is no reference to the mentioned sworn testimony that the Deputy Comptroller Rex Mitchell released the same year to the U.S. District Court on the severity of the risks related to the Ecuadorean case. He claimed the threat of "irreparable damages" related to the Ecuadorian plaintiffs' enforcement strategy (Declaration of Chevron Deputy Comptroller Rex Mitchell in support of Chevron Corporation Motion for a Preliminary Injunction, Filed 2/5/11, p.4). And not only Chevron's omitted to mention this information, it also misled its investors affirming that it was plain that the Ecuadorian court lacked jurisdiction over Chevron, in contradiction with the company's own filings from *Aguinda v. ChevronTexaco*. As explained above, the company itself consented to be subject to any Ecuadorean courts' judgments as a condition of the case's removal to Ecuador, therefore admitting this latter jurisdiction. Moreover, this 10-K report seems aimed to keep shareholders in the uncertainty, when it affirms: "the highly uncertain legal environment surrounding the case provides no basis for management to estimate a reasonably possible loss" (Chevron Corporation, 2011 10-K Report, 2/23/12, p. FS-42).

The importance of Chevron's omissions to its shareholders shall be assessed considering if the undisclosed information could have been "material" to determine the value of stock and prospects for the company and therefore crucial to orient investors' decision making. It is opportune to wonder if these omissions would have been considered by the reasonable investor as a factor altering the "total mix" of information made available. If this is the case, the company could be submitted to shareholders demands for compensatory damages according to a consolidated case law [TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed. 2d 757 (1976); Basic Incorporated v. Levinson, 485 U.S. 224. 108 S.Ct. 978, 99 L.Ed. 2d. 194 (1988)].

The mismanagement and the conflict of interests

Lastly,it shall be added thatan overall trend of Chevron shareholders' dissatisfaction with corporate governance in relation to the Ecuadorean case is registered. One first point regards Chevron's generous executive compensation packages to its General Counsel R. Hewitt Pate amounting $7.8 million salary due to a 75% raise in 2012 for his "outstanding management", even though the previous year the company lost a $18 billion judgment in Ecuador (Chevron A second Corporation, Notice of the 2012 Annual Meeting and 2012 Proxy Statement, 4/12/12, p.28).

A second point is the actual board's lack of *environmental expertise*, as demonstrates by the firm's mismanagement of its liability for the Ecuadorean case. A significant percentage of Chevron's shareholders are aware of this failure and, from the year 2010, called for the appointment of such experts as board members (http://www.sec.gov/Archives/edgar/data/93410/000121465911001793/f519111px14a6g.htm; https://www.ceres.org/investor-network/resolutions/chevron-board-member-env-expertise-2013/@@download/attachment). No provisions have been implemented by the company to answer this need.

A third critical point that the firm's CEO John Watson is also the Board Chairman, thus being *de facto* "his own boss", as warned by Simon Billenness, President of the CSR Strategy Group. A resolution asking for the separation of these two roles was presented

during the May 2012 annual meeting, and supported by 38% of Chevron's shareholders. An additional element shall be provided to understand Watson's mismanagement of the Amazon pollution case and his misleading conduct toward shareholders over the real risks the corporation was exposed to. Indeed, Watson was exactly the key player of the 2001 merger between Chevron and Texaco. For the operation Chevron paid 45 billion dollars. After this fusion, he became the corporation's chief financial officer. It is evident that admitting liability for the case in Ecuador would mean the proof that Chevron did a bad deal in merging with Texaco. Indeed, it will appear that the new company "purchased" the former company's legal troubles due to the fusion. Watson has always been opposing any sort of settlement of the case exactly because Chevron's taking on responsibility for the Amazon pollution would represent a professional defeat for him. Moreover, Watson is blamed for two crucial mistakes. The first is that he did not understand that the settlement of release from responsibilities granted by the Ecuadorean Government to Texaco freed the company just from State claims of damages, and not from private demands. Secondly, the CEO did a big mistake in pressing for the case's transfer from the United States to Ecuador, where indeed the corporation was found guilty and condemned to a huge reparation.

Conclusions

To sum up, the reflection on the potentiality of judicial instruments to achieve environmental justice has demonstrated the ineffectiveness of such means, above all when it is a matter of powerful multinationals. Their huge economic resources as well as the "fear" they can raise on courts and governments make them quite *evasise* to enforcement for the crimes they have committed. In consideration of the incapacity of the judicial system to promptly address environmental justice claims, the first compelling need is that courts around the world start cooperating against transnational businesses. However, this often requires years of expensive litigations before various jurisdictions which, nonetheless, may end up disturbing businesses and firm's reputation over the time. Therefore, in this lapse of time, a powerful instrument for urging companies to bear their responsibilities might be the influence public and private investors can exercise on corporate conduct. Ultimately, it must be born in mind that one option or the other cannot achieve

environmental justice by itself: a combination of the two, i.e. judicial integration and shareholder activism, is indispensible to face this challenge.

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