The following is an English translation of the original spanish documents filed with the President of the Superior Court of Justice of Nueva Loja on Monday, October 8th, 2007.

HONORABLE PRESIDENT OF THE SUPERIOR COURT OF JUSTICE OF NUEVA LOJA

I, Adolfo Callejas Ribadeneira, attorney of record for Chevron Corporation in case No. 002-2003 brought by Maria Aguinda and others against my client, appear before you to formulate specific objections with respect to the manner in which this proceeding has been conducted to date. The Court's failure to follow the law of Ecuador, and to address dispositive legal defenses properly submitted by Chevron to the Court, violates my client's legitimate constitutional, legal and procedural rights in such a way that, if not addressed by the Court, it would destroy any legal legitimacy for the results of this proceeding, as it would be impossible for my client to obtain from the Administration of Justice in Ecuador the effective, impartial and timely protection of its rights and interests. I therefore respectfully request that the Court immediately or at the appropriate procedural time dismiss this lawsuit in its entirety in order to avoid an injustice or a denial of due process.

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PRELIMINARY STATEMENT

Chevron Corporation ("Chevron") calls upon the President of the Court to stop an ongoing injustice. Since the moment they filed this action in 2003, Plaintiffs and their supporters have waged an intense, extra-judicial campaign of false propaganda, intimidation tactics and exploitation of nationalistic fervor to subvert the judicial process. Now, after three long years of evidence collection, the only scientific evidence properly before the Court proves Chevron's defense and demonstrates that Plaintiffs' claims are without merit. That evidence, however, is being ignored.

Unfortunately, bellicose pronouncements by officials of the government of the Republic of Ecuador ("the Government"), together with rulings by the most recently-appointed judge, are causing this case to rapidly descend into a judicial farce. Among other things, the Court has abruptly terminated the court-ordered processes for collecting and assessing scientific evidence and substituted in its place a wholly subjective, non-evidentiary assessment to be conducted by a sole, patently unqualified appointee of the Court. That appointee, who lacks any academic training or credentials in most of the scientific disciplines within his charter, will purport to tabulate the cost of remediating environmental damage despite the complete lack of any credible evidence before the Court of its existence, cause, or effect.

Chevron calls upon this Court to stop this manifest denial of justice on each of the following grounds.

- First, acting in direct contravention of Ecuadorian law, the Court has failed to rule upon well grounded legal objections to this proceeding, including the lack of jurisdiction over Chevron, the inability under Ecuadorian law of Plaintiffs to sue under a statute enacted years after Texaco Petroleum Company ("TexPet") (Chevron's indirect subsidiary) had ceased operations in Ecuador, and the fact that the Government of Ecuador granted TexPet a full and complete release from any and all environmental liability arising from its former petroleum operations in the country. Each of these issues presents a complete defense to this action and was formally interposed by Chevron at the very outset of this proceeding, but has

never been addressed by the Court, even though Ecuadorian law requires it to do so.

- Second, Plaintiffs have completely failed to meet their burden of proof in their attempt to establish environmental harm attributable to Texaco Petroleum Company. Plaintiffs requested a two phase evidence gathering process. In the first phase, the parties proffer scientific evidence, which is reviewed by the Court's own "settling" experts. That evidence becomes the factual basis for subsequent proceedings to assess cause and effect. Here, Plaintiffs began the evidentiary process, but became frustrated when their outlandish claims were subjected to scientific scrutiny. While their initial plan was to conduct evidence gathering at more than 100 sites, they abruptly began to obstruct the evidentiary process when the Court's settling experts fully supported Chevron's suggested experts' scientific assessment of the first site. Thereafter, Plaintiffs prevented judicially ordered inspections of the questionable laboratory that was producing their suggested experts' evidentiary submissions and refused to honor the Court's orders to pay their share of the expenses for the Court's settling experts. As a result, the court-ordered evidentiary process ground to a halt, with no further findings by the Court's settling experts. Having obstructed the initial phase of evidence collection and assessment, Plaintiffs have presented no qualifying evidence with which to proceed into the second phase of the case. Their case therefore fails and must be dismissed.

- Third, when it became apparent that Plaintiffs could not prove their claims, the Court allowed them effectively to waive their own burden of proof and to seek an award of damages—from a lone, unqualified expert—for harms they cannot and will not be required to prove. Such a process plainly violates the right to due process guaranteed to Chevron and to all litigants by the Ecuadorian Political Constitution and by the universal principles of justice on which it is based. No litigation can be allowed to proceed in these circumstances.

The Court's failure to follow the law of Ecuador or even its own procedural orders casts serious doubt over its adherence to the rule of law. The failure to address dispositive legal defenses, while simultaneously absolving Plaintiffs of any obligation to substantiate their claims with legally qualified evidence, amounts to a clear denial of justice that, if not addressed immediately by this Court, will destroy any legal legitimacy for the results of this proceeding and sentence the litigants on both sides to a lifetime of appellate and collateral litigation.

The Credible Scientific Evidence Exonerates Chevron.

However disappointing to Plaintiffs, and brazenly disregarded by their advocates and publicists, the record is clear: TexPet operated oil fields and facilities in Ecuador: (1) in compliance with all Ecuadorian laws and regulations, and (2) without ever causing significant environmental health risk to Plaintiffs or anyone else. And *all* of the credible evidence collected painstakingly over the last three years through the judicial inspection process demonstrates that upon exiting the Ecuadorian oil consortium, TexPet properly remediated its fair share of the oil well sites to the full and complete satisfaction of the Government, such that the TexPet-remediated sites currently pose no significant health risks.

Specifically, court-appointed experts suggested by Chevron have conducted judicial inspections at 45 sites, during which they properly collected and analyzed 1344 water and soil samples. These experts concluded, based on the reliable scientific data collected, that Chevron has no liability for Plaintiffs' claimed environmental damages. Not surprisingly, the court-appointed experts suggested by Plaintiffs disagreed, albeit without any basis in fact or science. As a result, the Court's procedure required the appointment of "settling experts" to resolve the disagreement and to render a final assessment of the scientific findings for each inspection site. The first set of five settling experts (for the Sacha 53 site) agreed with the conclusions of Chevron's suggested experts and issued a report—now properly before this Court—finalizing the Sacha 53 judicial inspection with a finding in favor of Chevron's defense. Unable to contradict this finding with credible scientific evidence or to rebut it by any other legitimate judicial means, Plaintiffs organized a public demonstration when the settling experts' report was submitted, and thereafter refused to proceed with the settling expert process for obvious reasons: An unfinished record allows Plaintiffs to claim that evidence exists to support their case, whereas a completed judicial inspection and settling expert process would entirely refute their claims.

Even in the absence of settling expert reports, Plaintiffs' suggested experts' reports must be rejected as inherently lacking in credibility. At times, these reports present conclusions with no supporting data, and at other times, the data actually contradict their conclusions. Plaintiffs' suggested experts have failed (in violation of the Court's orders and basic scientific protocols) to analyze all samples taken, and have used a suspect, unaccredited laboratory to conduct the analysis they did perform. On eight separate occasions, attorneys for the plaintiffs and for the laboratory blocked the Civil Court's attempts to inspect its facilities. Whether deliberate or the result of simple ineptitude, the technical reports submitted by Plaintiffs' suggested experts show a pattern of gross scientific error that would lead any reasonable scientist or Court to reject them.

Outside the scientific record of this case, the overwhelming evidence exonerating Chevron is bolstered by the fact that TexPet was expressly released by the Government from all liability for environmental remediation a decade ago in a comprehensive settlement of all public remediation claims that existed at that time. Prior to executing the release, the Government closely supervised and certified TexPet's three-year remediation of its share of the oil fields. Since then, Ecuador's Prosecutor General has conducted multiple independent investigations—some as the result of the encouragement or insistence of the Plaintiffs' representatives—and *repeatedly* concluded that TexPet's remediation was proper, that the publicly negotiated settlement and release agreements were legitimate and fair, and that there was no impropriety associated with either the remediation or the agreements. In other words, the Government has, on multiple occasions and in multiple ways, acknowledged TexPet's proper environmental remediation of the Ecuadorian oil fields for which it was responsible. These extra-judicial government findings, combined with the one settling experts' report and all of the other scientifically credible evidence presented by Chevron's suggested experts, plainly prove

Chevron's defense.

Petroecuador's Responsibility Is Ignored By Plaintiffs And The Government.

Petroecuador, the state-owned Ecuadorian oil company, has grievously failed to fulfill its remediation obligations and has operated the oil fields in question in a manner that has caused numerous environmental problems. Petroecuador (formerly CEPE) has been the sole operator of the oil concession in Lago Agrio for the last seventeen years, the sole owner for the last fifteen years, and was the majority partner in the concession for 15 years before that. It joined in the Government's release of TexPet a decade ago following TexPet's extensive three-year remediation project, but has never, until very recently, faced its own share of environmental responsibility. "For over 30 years, Petroecuador has done absolutely nothing to remediate those pits under its responsibility." (MEM Miguel Muñoz 5/10/06 Congressional Testimony.) Indeed, Petroecuador has an established history of environmental negligence. According to its own data, Petroecuador has recorded a total of 801 spills between 1990 and 2004 and a total spill volume of 1.9 million gallons. Published reports in the press reveal that the number of spills is even higher: 325 spills between 2003 and 2004, and a total spill volume greater than 3.2 million gallons between 1990 and 2005. Thus, Petroecuador officials recently admitted publicly that Petroecuador—not TexPet—is responsible for cleaning up the remaining well sites in the former Consortium area that were not remediated by TexPet.[1]

Yet Plaintiffs have, for reasons of their own, chosen not to sue the (admittedly) proper defendant, Petroecuador, despite its 30 years of control and its 17 year record of complete environmental neglect. Plaintiffs' attorneys blatantly are pursuing Chevron, not because it is the proper defendant, but because it is the most *convenient* one with the deepest pockets. Indeed, in

[1] El Comercio, October 2, 2006; El Comercio, October 5, 2006.

flagrant disregard of their clients' proclaimed desire to have Petroecuador's environmental damage remediated, Plaintiffs' attorneys have consistently opposed the Government's efforts to begin remediation because such actions might compromise this lawsuit.

To remain aligned with the Government, Plaintiffs' attorneys have lobbied the Government to invalidate its release of TexPet from all public environmental liability and to conduct fraud investigations of Chevron/TexPet and various company officials and representatives, despite the Ecuadorian Prosecutor General's repeated findings to the contrary. As part of this concerted effort to nullify the settlement and release, Government officials—seemingly with the support, if not the prompting of, Plaintiffs' representatives—have publicly referred to the Ecuadorian officials who certified TexPet's fulfillment of its environmental remediation obligations as traitors to the country.

The Government (through many of its officials) also has publicly supported Plaintiffs' case before this Court. Most notably, Ecuador's executive branch has offered the National Government's full support to Plaintiffs, and in a news release the Government announced its intention to provide them with "assistance in gathering evidence" against Chevron. Indeed, high-level executive officials recently visited sites in the former Petroecuador-TexPet oil concession, (accompanied by Plaintiffs' representatives and attorneys) and announced to the media that Chevron had blatantly failed to carry out a proper remediation at those sites and that the Government of Ecuador officials who approved the remediation, along with Chevron representatives, should be prosecuted. The Government officials failed to acknowledge, and the Plaintiffs failed to point out, that the sites visited are the sole responsibility of Ecuador's state-owned oil company, Petroecuador. This manner of interference by the executive branch in a private civil dispute certainly suggests an ulterior motive (*i.e.,* the avoidance of Petroecuador's

liability), and it intolerably offends the most basic tenets of due process.

Illegitimate Forces Outside The Courtroom Are Influencing These Proceedings, Resulting In A Denial Of Due Process And Justice.

To counter the undisputable facts of Petroecuador's admitted responsibility for the alleged damages, the scientific data's exoneration of TexPet, and TexPet's prior release from all public environmental claims, Plaintiffs have repeatedly turned to their unscrupulous methods outside the courtroom to bolster their litigation position. With the Government as their supporter, Plaintiffs have brought political pressure to bear upon the Court. Since evidence can be pushed aside in favor of half-truths and outright lies in a press release, Plaintiffs have increased their media campaign to spread false and inflammatory information about Chevron, and even about the President of the Court, all to pressure the Court and to make a fair and scientific process impossible.

Beyond being merely defamatory, this illegitimate conduct has unfairly prejudiced Chevron, changed the course of the trial, and caused the Court to deny the due process to which Chevron, like all litigants, is entitled. In recent months, the Court abruptly abandoned its own prior procedural rulings in ways that are calculated to reduce the Plaintiffs' evidentiary burden and to smooth their way to an unsupported finding of liability against Chevron. According to the Plaintiffs, the requested judicial inspection phase, already ordered by the Court, was taking too long and was unnecessary. The fact is that these inspections were revealing unacceptable results for Plaintiffs, as all of the legitimate evidence exonerated TexPet. Nonetheless, the President of the Court, in violation of specific provisions of the Code of Civil Procedure (Articles 114 and 119), has effectively allowed Plaintiffs to "waive" their burden to prove environmental harm at more than half of the sites for which they continue to claim damages. Then, without completing the judicial inspections evidence-gathering phase, and in a complete inversion of due process, the

Court granted Plaintiffs' request to proceed prematurely to an expert determination phase. The end result is that Plaintiffs will be allowed to seek—from a single, unqualified expert—a recommendation of causation and damages for environmental harms that are now not even before the Court, and that they have never been able to prove.

This new procedural path avoids the embarrassment of the evidence for Plaintiffs, not only all of the current scientific evidence that proves Chevron's defense, but also all of the additional evidence that would have been gathered had the ordered process not been interrupted. With complete and legitimate evidence no longer the basis for decision, Plaintiffs have renewed hope that with the proper amount of extra-judicial and governmental pressure on the Court, they can win against Chevron a large financial judgment to which they are not entitled.

These Claims Were Legally Baseless From The Beginning.

Compounding this denial of due process and justice is that the Court failed properly to dismiss this case years ago on appropriate and purely legal grounds. Chevron itself is the wrong defendant here because it was never involved in any of the events relating to this environmental contamination lawsuit for damages allegedly caused by TexPet as operator of the former Petroecuador-TexPet Consortium. The Plaintiffs have not, and cannot, prove that Chevron is in any way the successor-in-interest of TexPet. And the environmental rights that Plaintiffs now claim were rights that only the Republic of Ecuador itself could have asserted at the time TexPet operated the oil consortium—rights that the Government expressly and fully released a decade ago. As such, these claims may be asserted against the Government or Petroecuador, but they cannot be asserted against Chevron.

These basic facts show that Plaintiffs' case against Chevron is, and always has been, baseless as a matter of law. Chevron's right to dismissal on these purely legal grounds is not new to the Court. Immediately after suit was brought in 2003, Chevron raised these issues with

the Court. Although the Ecuador Code of Civil Procedure requires the Court to rule on this type of dismissal petition within three days, in the nearly four years that have passed since Chevron raised these arguments, the Court has failed to rule. Further delay in ruling on this petition, given the overwhelming scientific evidence proving Chevron's defense and the gross procedural failures now occurring, will immeasurably prejudice Chevron.

Chevron therefore respectfully petitions the President of the Court to dismiss this action now or at the appropriate procedural time in this action to avoid a complete denial of justice against Chevron. The legal grounds urged in Chevron's long-pending petition require dismissal. Moreover, due process and justice demand it: the credible evidence in the record proves Chevron's defense and the existing procedure violates universal principles of due process.

I. THERE IS NO VALID LEGAL CLAIM AGAINST CHEVRON OR TEXPET

In 2003, Chevron notified the Court that dismissal was required on several purely legal grounds. First, Plaintiffs' claims are a public action for environmental remediation; they depend on an unlawful retroactive application of the 1999 Environmental Management Act ("EMA") (Law 99-37, O.G. 245, dated July 30, 1999), which cannot be applied to past conduct under Ecuadorian law. Additionally, Plaintiffs' claims are barred by the Government's 1995 settlement and the 1998 final release of TexPet from all environmental liability. Second, Chevron is not a proper party to this action. It is not responsible for TexPet's alleged conduct; it is not subject to jurisdiction in the Ecuadorian courts; and the applicable statute of limitations bars the claims against it. Third, Plaintiffs have not demonstrated standing to sue for the environmental damages they claim.

Pursuant to Ecuadorian law, the Court was required to rule on Chevron's 2003 petition for dismissal within three days.[2] Chevron explicitly requested that the Court do just that, but four years later the Court still has not ruled. It is the time to correct not only the procedural error of ignoring Chevron's motions but also the substantive error of allowing this proceeding to continue. Each of the legal grounds stated in the 2003 petition are equally valid today.[3]

A. The 1999 Environmental Management Act Does Not Apply Retroactively To TexPet's Conduct For Which It Was Fully Released

Under Ecuador's law, protection against retroactive application of law is firmly established as a basis of due process. Where, as here, the conduct at issue was fully performed and fully released before new legal causes of action and remedies were legislated, the new legislation cannot constitutionally either fashion new rights or revise old ones.

1. *All Events Underlying This Litigation Occurred Before The 1999 EMA Was Enacted*

To address the retroactivity issue, it is necessary to understand what the charged conduct was and to place it in its time. At various points in the past, TexPet has been a half-owner or minority member of a consortium operating an oil concession in Ecuador, an operator of the concession on behalf of the members of the consortium, and a former member of the consortium negotiating and performing an environmental remediation to obtain complete release of environmental remediation liability, both from its concession partner, Petroecuador, and from the concession grantor, the Republic of Ecuador, itself. The time span of these various roles is clear, as are the limits on TexPet's responsibility in each role. From 1964 to 1992, TexPet participated in a consortium of oil companies ("the Consortium") that was granted a concession contract by

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[2] *See* Article 835 of the Code of Civil Procedure (requiring a judge to rule, in the case of a purely legal controversy, within three days of being petitioned to do so).

[3] Because Chevron's lengthy original petition is part of the record of the case and therefore readily accessible to the Court, Chevron will only briefly summarize its legal objections here.

the Government to explore for and develop oil reserves in Ecuador's Oriente region ("the Petroecuador-TexPet Concession" or "the Concession"). Ecuador's state-owned oil company, now called Petroecuador, acquired a minority interest in the Petroecuador-TexPet Concession in 1974, and by 1977, it held a 62.5% majority stake. From 1977 until 1992, when the Concession expired, TexPet owned 37.5%. For the last fifteen years, Petroecuador has exclusively owned and operated the former Consortium's oil fields and facilities and has been solely responsible for any environmental impact that results.

Even when TexPet served as the operator of the Consortium from 1964 to 1990, the Consortium's operations were closely scrutinized by the Government, which approved all work plans and budgets, monitored its impact on the environment, and oversaw its response to any environmental issues that arose. Petroecuador (through a subsidiary) took over as operator in July 1990, two years before the Concession expired.

Shortly before Petroecuador became operator, the Government asked Petroecuador and TexPet to begin conducting an audit of the current environmental conditions at the Consortium's oil fields and facilities—a standard procedure at the end of any joint oil concession. TexPet agreed to this request, but insisted that Petroecuador, as majority owner of the Consortium, share responsibility for any necessary remediation that the environmental audit identified.

In the early 1990s, two separate audits were conducted by internationally recognized consulting firms to assess the Consortium's environmental impact, as well as its compliance with the applicable Ecuadorian laws and regulations and the generally accepted oil field operating practices of the time. Both audits confirmed that the Consortium's operations from 1964 to 1990 (the period during which TexPet was operator) had caused minimal environmental impact and identified certain areas for remediation. One of the audits also found that then-current

environmental conditions in the Concession were largely the result of operations conducted under Petroecuador's leadership from 1990 to 1992. Specifically, the audit estimated that even then roughly 70% of hydrocarbon contamination at production facilities and 50% of drill pad and pit contamination was attributable to Petroecuador's operations.

In 1994, the Government abruptly and publicly rejected the findings of the audit (which it had requested) and threatened to sue TexPet for injuries to Ecuador's environment. It informed TexPet that Petroecuador would *not* participate in implementing any of the audit's recommended environmental remediation measures. Instead, the Government insisted that the parties simply identify a fixed set of remediation obligations (corresponding to TexPet's share of responsibility for the Consortium's environmental impact) for which TexPet would be responsible. In May 1995, TexPet, the Government, and Petroecuador entered into a settlement agreement ("the Settlement") under which TexPet agreed to conduct specified remediation efforts at particular sites ("the Scope of Work"). In exchange, TexPet was immediately released from all liability for environmental remediation *outside* the Scope of Work, and would be released from all *remaining* liability upon completion of the Scope of Work to the Government's satisfaction.

From 1995 to 1998, TexPet spent $40 million completing the environmental remediation program outlined in the Scope of Work. Among other things, it cleaned and closed pits, modified produced-water systems, revegetated cleared lands, and remediated contaminated soil at the sites for which it was responsible. In all, TexPet, which held a 37.5% share in the Consortium, performed environmental remediation at 133 of the 321 well sites (41%) that were operated by the Consortium during TexPet's tenure as the operator. The Government and Petroecuador supervised TexPet's remediation efforts, at times demanded additional work, and

ultimately certified that all work described in the Scope of Work had been properly completed.[4] Thus, in September 1998, TexPet, the Government, and Petroecuador executed the "Final Acta" ("the Release"), which certified that TexPet had performed all remediation obligations under the Settlement and was therefore fully released from all environmental liability arising from its participation in the Consortium.[5]

The result is that all of the events relevant to an environmental contamination claim against TexPet: (1) occurred no later than September 1998, well before the EMA was enacted in July 1999; and (2) were covered by the Settlement and Release of TexPet for all environmental liability, which was agreed to by the Government as sovereign authority over Ecuador's environment. Nonetheless, in May 2003, Plaintiffs brought a retroactive EMA claim against Chevron (as the purported successor to TexPet's parent corporation, Texaco Inc.) seeking damages, not for personal injuries, but for the exact type of public environmental harm covered by the Settlement and Release.

2. ***Plaintiffs Cannot, As A Matter Of Law, Bring Environmental Contamination Claims Against Chevron Under The 1999 EMA***

The 1999 EMA created substantive rights that did not exist before and cannot be used to challenge pre-1999 conduct. Article 24 of the 1998 Political Constitution of the Republic of Ecuador provides that certain "basic guarantees . . . must be observed to ensure due process." Among these is the rule that "[n]o one may be judged for an act or omission which at the time it

[4] In addition to environmental remediation, TexPet provided funding for natural resources projects for the benefit of indigenous peoples, and for the construction and operation of four schools and adjacent medical clinics in affected communities. It also entered into settlements with the four affected municipalities whereby it provided potable water and sewage systems.

[5] In contrast to the extensive remediation efforts conducted by TexPet at its share of the operations sites in the Concession area, Petroecuador made no efforts to remediate the remaining Consortium sites. "For over 30 years, Petroecuador has done absolutely nothing to remediate those pits under its responsibility." (MEM Miguel Muñoz 5/10/06 Congressional Testimony). Notably, Petroecuador officials have recently admitted that Petroecuador—and not TexPet—is responsible for cleaning up the remaining well sites in the former Consortium area. (*See* El Comercio, Oct. 2, 2006; El Comercio, Oct. 5, 2006).

was committed was not legally classified as a . . . violation, nor . . . . shall a person be judged except in accordance with preexisting laws . . . ." *Id.*, Art. 24.1. Similarly, Article 7 of the Civil Code states: "The law provides only for the future; it has no retroactive effect . . . ." While purely procedural rules are exempted from this prohibition against retroactivity, substantive laws are not. *See id.*, ¶ 20.

On its face, the Plaintiffs' complaint depends on substantive provisions of the EMA, which cannot be applied retroactively. (Pls.' Comp. §§ V.3.c, VI.2-3.) Specifically, Plaintiffs rely on Article 43 of the EMA, which basically permits qualified[6] individuals directly affected to act on behalf of their communities to compel remediation and recover damages for general environmental harm. (Pls.' Comp. §§ V.3.c.) The right to bring such communal claims for environmental damages and relief did not exist for private citizens under Ecuadorian law prior to the enactment of the EMA in 1999. To understand what a basic change in the law this was, it is necessary to address what the Plaintiffs' rights were without it.

Absent an express exception in the law, Ecuadorians have standing to seek redress only of individualized harm, not to bring a "public" action in a court of law on behalf of the people.[7] The only "public" environmental claims that private parties could assert prior to the 1999 EMA were actions to prevent or report violations of environmental laws. Under the 1976 Law for Prevention and Control of Environmental Pollution, citizens could bring a "public" action to

[6] The qualifications required for standing to bring such claims are briefly discussed below in section I.C.

[7] *See* Andrade Ubidia Santiago, Articulo "El Papel del Poder Judicial en la Aplicación del Derecho Ambiental y las Acciones des Interés Publico" en "RUPTURA, Revista Annual de la Asociación Escuela de Derecho," Pontificia Universidad Catolica del Ecuador, Quito- Ecuador, 1996, p. 132; *see also* Affidavit of Alberto Wray ¶ 2 ("Ecuador abides by the principle of direct interest as a condition of active legitimation. That means that no one can bring an action in the name of another, unless he has been granted the power of representation (art. 47 CPC) and the Constitution expressly forbids the exercise of this power on behalf of the people (art. 19, num. 10 Const.).") (attached as Exhibit 1).

report to the competent authorities any activity that pollutes the environment.[8] Citizens also could bring a "public administrative action" to intervene in an administrative proceeding and request the reversal of an administrative act that *threatened* environmental harm.[9] In neither of these "public" actions could a citizen compel a private company to conduct environmental remediation; that right was reserved exclusively to the Government.

Nor did the Ecuador Civil Code provide for a cause of action like the one Plaintiffs now bring against Chevron to redress general environmental harm. An individual could and may bring an action in tort under Article 2214 (formerly Article 2241) *et seq.* of the Civil Code to demand that compensation for the plaintiff's *specific* personal and/or property injuries be paid by the party whose negligence or intentional act caused the injuries. And an individual may bring a nuisance action under Article 2236 (formerly Article 2260) of the Civil Code to demand an injunction—not damages—against the *current* owner/operator of the property to prevent a specific polluting activity that is threatening environmental harm. In neither of these private actions, however, can the party seek to compel the type of general environmental remediation at issue here from a *former* owner/operator. Again, prior to the 1999 EMA, such claims could only be pursued by the Government in its sovereign capacity.

This fact has been confirmed—repeatedly—by the Government itself. In November 1993, a group of Ecuadorians, similar but not identical to the group of Plaintiffs here, filed a lawsuit against Texaco Inc. in a United States court ("the *Aguinda* litigation") for damages purportedly caused by TexPet's actions when it was the operator of the Consortium. While the *Aguinda* litigation was pending, the Government was engaged in settlement negotiations with

[8] *See* Law for Prevention and Control of Environmental Pollution (Registro Oficial No. 97 of May 31, 1976) Art. 29.

[9] *See* Statute on the Legal-Administrative Rules for the Executive Branch (Supplement to the Registro Oficial No. 411 of March 31, 1994), Art. 115(b).

TexPet. Because the Government was addressing the situation, it viewed the *Aguinda* litigation as an affront to its exclusive sovereign authority to manage the environment, and it voiced that position repeatedly to the U.S. court.[10] The Government made clear that citizens had no rights under Ecuadorian law to seek damages for environmental harm to public lands: "Nobody can seek compensation for damages in property belonging to the Ecuadorian Government. Only the Government can litigate. No third parties." (5/1994 Interview of Ambassador E. Terán with La Otra (attached as Exhibit 3). The Republic is, of course, the "legal owner of the rivers, streams and natural resources and all public lands where the [Consortium's] oil producing operations" took place. (6/10/96 Letter from Ambassador E. Terán to Hon. J. Rakoff ("Terán 6/10/96 Letter) (attached as Exhibit 4).) Accordingly, the Government denounced "the [*Aguinda*] plaintiffs' attorneys in this matter [for] attempting to usurp rights that belong[ed] to the government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law." (Terán 6/10/96 Letter.)

During the period relevant to this case (1973 to 1998), only the Government—which expressly released TexPet from all environmental liability—could have raised the type of claims Plaintiffs have lodged against Chevron. Therefore, to the extent the 1999 EMA now authorizes qualified individuals to bring claims for environmental remediation and for a money judgment that is not compensation for individualized injuries, it establishes new rights for an entirely new type of environmental claim, not just new procedural mechanisms; the provisions of the 1999 EMA on which Plaintiffs rely are plainly substantive. As a result, Article 24 of the Political Constitution and Article 7 of the Civil Code forbid their retroactive application to Chevron here.

[10] *See* 1/3/96 Affidavit of Ambassador E. Téran ¶ 11 (the *Aguinda* litigation was contrary to the Government's obligation "to become involved in matters that directly impact the welfare of Ecuadorian citizens, territory and natural resources, and the very sovereignty of the Republic of Ecuador," and the Settlement with TexPet "demonstrate[d] the Republic's determination to fulfill this obligation.") (attached as Exhibit 2).

The issue has been clear enough where the claim is against an Ecuadorian party. In the case of *Calva v. Petroproduccion*, Case No. 349-2000 (Superior Court of Nueva Loja filed Aug. 20, 2001), the Court held that the 1999 EMA could not retroactively be applied against Petroecuador's production subsidiary with regard to pollution that had occurred before the law's enactment, precisely because individuals had no prior ability to bring such claims.[11]

Perhaps recognizing the inapplicability of the EMA to this case, Alejandro Ponce Villacis—one of Plaintiffs' attorneys in this matter—recently contended in a sworn declaration submitted to a U.S. court that the EMA does not provide the substantive legal basis for Plaintiffs' claims against Chevron. Instead, he asserted that Plaintiffs' claims are merely environmental "tort[]" claims "seeking damages for harm caused to the environment." Declaration of Dr. Alejandro Ponce-Villacis (Dec. 18, 2006), *Republic of Ecuador, et el. v. ChevronTexaco Corp., et al.*, Case No. 04 Civ. 8378 (LBS) (S.D.N.Y.), ¶ 5; *see id.*, ¶ 4 ("the Lago Agrio Litigation is not an action substantively based on the 1999 Law at all").[12] If Dr. Ponce is correct, then Plaintiffs are attempting to prosecute a mass tort class action against Chevron that is not permitted under Ecuadorian law, and that is inconsistent with the procedures applied by this Court. In either case, whether Plaintiffs are attempting to bring a non-existent communal mass tort claim or retroactively to apply a substantive law, their claim is improper as a legal matter and should be dismissed immediately or at the appropriate procedural time.

The Government's release of TexPet provides both a useful perspective on retroactivity and an additional ground for dismissal. That release clearly discharged all then-existing

[11] Were the Court to hold that the 1999 EMA can retroactively be applied against Chevron—a foreigner—in the face of a previous ruling denying retroactive application of the same statute against a state-owned Ecuadorian company, it would certainly suggest nationalistic bias.

[12] The declaration, attached as Exhibit 5, was submitted in the United States District Court for the Southern District of New York, where the Government and Petroecuador sued Chevron and TexPet on a related matter.

environmental remediation claims against TexPet and settled rights between the Government and TexPet. It was fully negotiated, agreed, and performed. This suit purports to change this publicly negotiated division of responsibility between the Government and TexPet and thereby retroactively to change both the prerogatives of the Government and the rights of TexPet. The Release was issued only after TexPet had completed an extensive three-year remediation program to the satisfaction of the Government of its proportional share of the Consortium's operations sites. The Release given by the Government— which is the *only* party with authority to bring these types of claims at the time they accrued—is valid and binding as a matter of law, and it should serve as a complete bar to Plaintiffs' claims in this case.[13]

B. Chevron Is Not A Proper Party To This Lawsuit

Chevron itself is a complete legal stranger to the prior events of this long-running dispute, both to the operations in Ecuador and to the litigation in New York. Chevron and TexPet cannot be conveniently confused by the Plaintiffs because there is no basis for derivative liability here and the Plaintiffs have not even advanced one. The alleged wrong-doing complained of by Plaintiffs was purportedly committed by TexPet, which was a wholly-owned subsidiary of Texaco Inc. during its operations in Ecuador. When ChevronTexaco Corporation (now Chevron) was formed in the fall of 2001, Chevron did not acquire Texaco Inc., as Plaintiffs apparently believe. Rather, Texaco Inc. retained its independent legal identity, and Chevron—which itself had no connection to TexPet or the underlying facts of this case—did not become Texaco Inc.'s

[13] Chevron notified the Government that the Lago Agrio Plaintiffs' claims "clearly fall . . . within the scope of the releases" and, thus, that "the Government and Petroecuador hold full financial liability for any obligation related to the Consortium and for any court ruling that may be handed down against [Chevron]." (E. Scott 10/6/03 Letter to C. Arboleda at 3.) Chevron also asked the Government to notify this Court that, pursuant to the Settlement, Chevron, Texaco Inc. and TexPet "are not liable for environmental damage or for the remediation work arising from the operation of the former Petroecuador-Texaco Consortium." (*Id.*) To date, neither the Government nor Petroecuador has notified the Court of the scope of the Settlement and Release.

successor-in-interest as a matter of law.[14] Plaintiffs are therefore incorrect that Chevron replaced Texaco Inc. "in all its obligations and rights," as they stated without any corroboration in section I.12 of their complaint. To the contrary, there is no law in Ecuador that would make Chevron legally responsible for Texaco Inc.'s or TexPet's conduct.[15] Plaintiffs have sued the wrong party, and they have not as yet made any attempt to address these legal arguments or to reconcile their case with the clear legal structure Chevron has demonstrated.

Plaintiffs' claim for the exercise of this Court's jurisdiction over Chevron in Ecuador fails for similar reasons of corporate identity. Plaintiffs' claim for jurisdiction arises out of the U.S. *Aguinda* litigation discussed above, but *Chevron* was, properly, not a party there. During the almost ten years that litigation was pending in the U.S., Texaco Inc. sought to have the case dismissed on a number of grounds, including that the case was improperly brought in the United States and should have been filed in Ecuador. The U.S. court ultimately agreed and dismissed the *Aguinda* litigation in 2002 on the condition that *Texaco Inc.*—the defendant there—agree to submit to the jurisdiction of Ecuador's courts for a specified period with respect to the *Aguinda* plaintiffs' claims. The U.S. court also conditioned the dismissal on Texaco Inc.'s agreement to toll any applicable Ecuador statutes of limitation as of the 1993 date the *Aguinda* case was filed. Although the Chevron-Texaco merger had already occurred, Chevron was not a party to that

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[14] Under the terms of the Merger Agreement between Chevron and Texaco Inc., Texaco Inc. was merged with a wholly-owned subsidiary of Chevron called Keepep, Inc. As a result of that legal transaction, Texaco Inc. survived the merger as an independent legal entity because it fully absorbed Keepep. Chevron maintained its separate identity but, in recognition of the fact that Texaco Inc. had become its subsidiary, changed its corporate name (for a time) to ChevronTexaco Corporation. Official records from the U.S. State of Delaware, certified by the Secretary of State of the United States and the Consul General of Ecuador in Washington, D.C., which verified these corporate transactions, were provided to the Court in October 2003 with Chevron's original petition for dismissal.

[15] Moreover, it has not been proven that Texaco Inc. had any responsibility for or control over TexPet's operation of the Consortium such that Texaco Inc.—a separate legal entity—could be held legally liable for TexPet's conduct in that regard. Plaintiffs' inability to prove this point was specifically noted by the U.S. court in the *Aguinda* litigation. *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001) ("[P]laintiffs . . . were unable to adduce material competent evidence of meaningful Texaco involvement in the misconduct complained of—to the point that plaintiffs essentially stipulated as much.")

case, and it was never mentioned in the court's opinion, including with respect to *Texaco Inc.'s* submission to jurisdiction in Ecuador.[16]

Accordingly, Texaco Inc.'s consent to jurisdiction in Ecuador as part of the resolution of the *Aguinda* litigation has no legal effect on Chevron, since Chevron is neither Texaco Inc.'s successor-in-interest, nor was it a party to the U.S. *Aguinda* proceedings. Moreover, Chevron has no legal domicile in Ecuador and has never operated here. The exercise of jurisdiction over Chevron in Ecuador is therefore improper.

Texaco Inc.'s agreement to toll any applicable Ecuador statutes of limitations as part of the resolution of the U.S. *Aguinda* litigation is equally inapplicable to Chevron for the same reasons. And under Article 2235 (formerly Article 2259) of the Civil Code, a four-year statute of limitations is applicable to, and therefore bars, Plaintiffs' 2003 claims challenging conduct that ended more than a decade before. For all these reasons, Plaintiffs' claims must be dismissed as a matter of law immediately or at the appropriate procedural time.

C. Plaintiffs Have No Standing To Bring These Claims

These Plaintiffs may not bring claims under the EMA because they lack the necessary qualifications. Article 43 of the EMA provides that before an individual may bring a public action for remediation of environmental harm to a community, he must first establish that he *himself* was directly affected by the environmental harm claimed.[17] Here, Plaintiffs attempt to ignore the requirement for their own harm and to proceed directly to vindication of common rights. Their complaint never identifies any personal injury or property damage suffered by

[16] Texaco Inc., having agreed to jurisdiction in Ecuador with regard to the *Aguinda* plaintiffs' claims, named an agent in Ecuador with capacity to answer complaints, and it notified the *Aguinda* plaintiffs, through their attorneys, of this fact. Nonetheless, Plaintiffs chose to bring this action against Chevron, not Texaco Inc.

[17] *See* 1999 EMA Art. 43 ("The natural or juridical persons or human groups, linked by common interest and affected directly by the harmful act or omission, may file . . . actions for damages and losses and for deterioration caused to health or to the environment . . . .").

them, but rather seeks compensation for only the broadest of communal environmental harms. (Pls.' Comp. §§ VI.1-3.) As a legal matter, Plaintiffs lack standing to bring these claims, which should be dismissed immediately or at the appropriate procedural time.

II. THIS CASE SHOULD BE DISMISSED BECAUSE THE EVIDENCE PROVES CHEVRON'S DEFENSE AND THE NEW PROCEDURE VIOLATES DUE PROCESS

The process of these claims has been as deficient as their legal architecture. It threatens to allow the evidence to be ignored in the same way as the law has been. For nearly four years Chevron has, in good faith, actively participated in the legal proceedings before this Court, hoping that at some point, both the law and the facts would be fairly addressed. To that end, Chevron has expended significant resources and time, first to negotiate with Plaintiffs a series of procedures for building and addressing the record (procedures that were approved by the Court and became binding law of the case), and then to execute those procedures in order to gather evidence that would demonstrate the truth: careful operations, an appropriate agreed remediation, and no link between TexPet's operations and the Plaintiffs' alleged damages.

The credible, scientific evidence collected to date speaks overwhelmingly to the accuracy of Chevron's position. It is undisputed that TexPet completed an environmental remediation program, to the satisfaction of the Ecuadorian Government, in the Oriente region from 1995 to 1998 as part of its Settlement with the Government. It is also undisputed that the Government closely supervised TexPet's remediation efforts and certified that the remediation was properly accomplished. These facts are confirmed by *all* of the credible evidence gathered in this case, which proves Chevron's defense. Unfortunately, the evidence is drowned out in Ecuador's current political climate, as the Government has banded together with Plaintiffs' attorneys to generate a media wave of anti-Chevron (in a sort of xenophobia) bias meant to inflame the public and intimidate the Court. After recently becoming the direct target of Plaintiffs' tactics, the

Court, in direct violation of the Code of Civil Procedure, has repudiated its previous rulings on the matter in a way that seems calculated to ignore the evidence and proceeded directly to a wholly unsupported verdict against Chevron. A proceeding so constructed and pursued cannot be reconciled with due process and should not continue.

A. The Current Record Proves Chevron's Defense And Requires Dismissal

All of the credible evidence collected in this case to date proves that TexPet conducted a proper remediation of all of the Concession sites for which it was responsible, and that there is no significant risk to human health at any of the TexPet-remediated sites. To the extent any evidence in the record suggests otherwise, that was submitted in violation of the Code of Civil Procedure and the Court's orders. Such evidence cannot be credited by this Court or any other. As such, the *only* evidence that may be considered overwhelmingly proves that Chevron is not responsible for Plaintiffs' claimed environmental contamination damages. Dismissal of these baseless claims against Chevron is therefore necessary.

1. *All Reliable Evidence Shows That TexPet Properly Remediated The Sites For Which It Was Responsible*

All of the reliable evidence in the record proves Chevron's defense. In order to distinguish between the reliable evidence collected, and the unreliable evidence that must be disregarded, it is first necessary to recount a bit of the procedural history and law of this case.

a) The Court-Ordered Evidentiary Process

At the beginning of the litigation, Plaintiffs requested a two-phase evidence-gathering process. For phase one, they proposed judicial inspections of particular well sites that contained former Consortium oil production facilities in order to gather scientific evidence to determine if environmental contamination was present. In phase two, Plaintiffs requested an expert determination of the extent of, the causation for, and the amount of damage resulting from any

environmental contamination found. The phase-two expert determination necessarily would rely on the credible scientific data gathered and analyzed during the phase-one judicial site inspections.

On October 29, 2003, the Court accepted the Plaintiffs' plan with minor modifications and issued an order establishing the framework for evidence-gathering in this case. The parties requested 122 judicial inspections—most by Plaintiffs, some by Chevron, and a few on which the parties coincided—and the Court ordered that these inspections be conducted in accordance with the Code of Civil Procedure.[18] These 122 judicial inspections would make up phase one of the evidence-collection process. The October 29, 2003 Court order further provided that a second phase would take place in the form of an expert determination that would, essentially, result in a recommendation to the Court regarding causation and damages. The Plaintiffs requested and the Court ordered that the expert determination be conducted by the same group of experts that would conduct the judicial inspections, in order to maintain the relation between the two phases and to allow them to supplement each other. Neither Chevron nor the Plaintiffs timely objected to the Court's October 29, 2003 order, which became binding law of the case for both the parties and the Court. *See* Articles 281 and 289 of the Code of Civil Procedure.

The parties then spent months negotiating a series of detailed documents that would serve

[18] Among other things, the Code of Civil Procedure provides that in the course of judicial inspections:

- Each party may ask the other party's suggested expert specific questions about his analytical methods and conclusions. An expert report may not be considered part of the record unless the expert responds fully to all questions by the other party.
- The Court must appoint "settling experts" for each judicial inspection site if the reports of the party-suggested experts reach different conclusions. Each party is entitled to ask questions of and to rebut any reports submitted by settling experts.
- Either party may petition the Court to expunge an expert report from the evidentiary record because it contains essential, or gross, factual error. The Court must conduct a hearing on each petition of essential error and must expunge the report if the expert fails to satisfactorily demonstrate the lack of essential error.

as a protocol to govern the phase-one judicial inspections. Those documents included: (1) a Terms of Reference for the Participation of the Experts (the "TRPE"); (2) a Sampling Plan for conducting inspections and collecting samples; and (3) an Analysis Plan for testing soil and water samples from each inspected site. These three documents were intended to ensure that soil and water samples were taken, transported, and tested properly by all appointed experts in a consistent and reliable manner. Indeed, the protocol reflected the consensus of the international environmental science community with regard to sampling and laboratory analysis of environmental media.[19] All three documents were jointly submitted to the Court and, on August 18, 2004, were approved by written order. Neither Chevron nor the Plaintiffs timely objected to the Court's order ("the phase-one protocol"), which likewise became binding law of the case. *See* Articles 281 and 289 of the Code of Civil Procedure.

The Court began scheduling judicial inspections in the fall of 2004, shortly after issuing the phase-one protocol. For the first 45 scheduled inspections, Chevron and Plaintiffs each suggested experts, who were then appointed by the Court.[20] The Court also appointed "settling experts," *see supra* note 19, for 42 of the scheduled inspections, in case they were needed to resolve conflicting reports on particular sites. To date, the experts have conducted 47 of the 122 judicial inspections initially ordered by the Court. The reports submitted by Plaintiffs' suggested experts ("the Plaintiff experts") and Chevron's suggested experts ("the Defense experts") contradict each other as to significant facts, but thus far the Court has requested and received

[19] For example, the requirements for analytical testing and laboratory documentation were in compliance with both the National Environmental Laboratory Accreditation Conference ("NELAC") (the U.S. standard) and ISO 17025 ("general requirements for the competence of testing and calibration laboratories"), which has been adopted under Ecuadorian law. These requirements were meant to ensure that analysis of samples would occur in proper laboratory facilities.

[20] For the last two scheduled judicial inspections, the parties were unable to reach agreement on the suggestion of experts, and the Court therefore appointed a single expert for each of these sites under Article 252 of the Code of Civil Procedure.

only one settling expert report for a single inspection site.

b) The Credible Evidence Overwhelmingly Proves Chevron's Defense

When conducting judicial inspections, the Defense experts have dutifully followed the TRPE, the Sampling Plan, the Analysis Plan, and all other specific instructions ordered by the President of the Court or found in the Code of Civil Procedure. A total of 1344 water and soil samples collected by the Defense experts were analyzed in accredited U.S. laboratories, and all analytical methods used by them have fully complied with the court-ordered Analysis Plan. The Defense experts also submitted all of the required quality assurance and control data for all analytical results, or "Data Packages," necessary to verify the accuracy of their laboratory data, as well as complete chain-of-custody forms. Accordingly, all of the data in the 45 reports properly submitted by the Defense experts in accordance with the phase-one protocol must be deemed scientifically credible evidence.

Each of these expert reports containing scientifically reliable data concludes that there is no significant health risk to humans from oil at any TexPet-remediated sites or from past TexPet operations. More specifically, the Defense experts found that the samples from the inspected sites proved that: (1) TexPet's remediation met all applicable standards, (2) there is no risk to human health at TexPet-remediated areas, and (3) drinking water sources meet U.S. Environmental Protection Agency ("USEPA") and World Health Organization drinking water guidelines for hydrocarbons and metals.[21]

Likewise, the lone settling experts' report—submitted by five independent, Court-appointed experts for the Sacha 53 site—concludes that TexPet's remediation was conducted in accordance with the required parameters and that there is low health risk to humans from oil at

[21] Because the Defense experts' judicial inspection reports have all been filed with the Court, they will not be addressed in detail here.

that site. The settling experts that attended this judicial inspection conducted an objective and technically-sound review of both Plaintiff and Defense experts' reports and data. In reviewing the settling experts' report, Dr. Raymond Loehr, former Chair of the Environmental Engineering Department at the University of Texas and the USEPA Advisory Committee, said: "*The Settling Experts did perform a logical, reasonable, balanced and technically supportable evaluation of the available data. The report of the Settling Experts does not appear to have a bias toward positions and statements of either defendant or the plaintiff. There is considerable weight-of-evidence information in the peer reviewed literature to support statements in the Settling Experts Report that the remaining petroleum organics at the Sacha-53 site have low mobility and risk.*"

The settling experts' report is credible based on all scientific evidence. And it, too, supports the fact that TexPet conducted a proper remediation of all of the Petroecuador-TexPet Concession sites for which it was responsible and therefore cannot be liable to Plaintiffs or anyone else for environmental contamination in Ecuador.[22]

These findings by the Defense experts and the settling experts are bolstered by multiple independent investigations conducted by Ecuador's Prosecutor General, who found no evidence of criminal liability on the part of TexPet in entering into the 1995 Settlement and 1998 Final Release and completing the environmental remediation required in the Scope of Work.[23] In particular, the Office of the District Prosecutor of Pichincha determined that there was "no

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[22] If there is environmental liability for the former Consortium's operations, it belongs to Petroecuador, which admittedly failed to remediate its share of the oil fields and facilities. *See supra* note 6.

[23] Indeed, the Prosecutor General's Office sought dismissal of the criminal complaint filed by the Comptroller General against TexPet's representatives, having determined that its allegations of fraud and misconduct were without merit. (Motion of Dr. Cecilia Armas Erazo de Tobar, Acting National Prosecutor General, to Criminal Division of the Supreme Court, dated August 9, 2006.) Specifically, the Prosecutor General's Office concluded that the Comptroller General's own report "d[id] not find civil or administrative liability in any of his conclusions, nor d[id] he find evidence of any criminal liability whatsoever." (*Id*. ¶ 2.2.) In fact, the Prosecutor General found "an obvious contradiction" between the Comptroller General's report, "none of the findings of which indicate[d] any evidence of criminal liability, and the criminal complaint, which the Comptroller alleges to be based on 'evidence found in [its] Examination.'" (*Id*. ¶ 3.)

environmental crime committed by TEXPET." (Motion of Dr. Mariana Vega Carrera, Assistant District Prosecutor of Pichincha, to Third Criminal Court of Francisco de Orellana, dated September 4, 2006.) Based on expert reports submitted during its investigation, the District Prosecutor concluded that "[n]one of the pits evaluated [were] having negative impacts on the environment." *Id.*[24] Recently, the District Prosecutor's Office again noted a lack of "evidence of the environmental damage allegedly caused by Texaco in connection with oil production operations that [have] been conducted in the Ecuadorian Oriente" and found that the technical reports "established that TEXACO did satisfy the requirements provided for and established" in the Settlement and Scope of Work. (Motion of Dr. Washington Pesántez Muñoz, District Prosecutor of Pichincha, to Third Criminal Court of Napo, dated March 13, 2007, at 8.)

2. ***The Plaintiff Experts' Reports Are Biased And Unreliable And Should Have Been Expunged***

In contrast to the Defense experts and the Sacha 53 settling experts, the Plaintiff experts have failed to comply with both the Court's phase-one protocol and basic principles of scientific analysis. In particular, the Plaintiff experts have not submitted two of the required reports (Sacha 6 and Sacha 21), and have submitted two reports without any supporting data (Shushufindi Norte Production Station and Sacha 57). Despite an order from the Court requiring the experts to report data for all samples collected at each site, the Plaintiff experts have failed to report data for more than *half* of the samples collected during the first 19 inspections (and more than one-third of all inspections that were conducted). The Plaintiff experts also failed to provide the quality assurance and control back-up materials required for independent validation and verification of their data. Only *five* of the mere 465 soil and water samples sent to analysis

[24] The District Prosecutor's Office also concluded that the definition of environmental crimes in Ecuador's Penal Code (Reform Law 99-49, published in Official Gazette No. 2 on January 25, 2000) could not be applied retroactively to TexPet's alleged acts. *Id.* (Conclusions).

by the Plaintiff experts were actually analyzed in an accredited laboratory meeting the required standards. It is therefore not a surprise that the analytical results from those five samples corroborate the Defense experts' and settling experts' conclusions that *there is no significant health risk* from TexPet-remediated areas.

A majority of the soil and water sample analysis conducted for the Plaintiff experts took place at the then-unaccredited HAVOC laboratory in Quito.[25] Because Chevron's own suggested experts had indicated that no Ecuadorian laboratory met the standards required by the Analysis Plan, Chevron petitioned the Civil Court in Quito to inspect the HAVOC laboratory. On seven separate occasions, however, HAVOC has obstructed the Court from inspecting its facilities. After the initial three inspections failed to take place as scheduled, Chevron petitioned this Court to order the Ecuador Accreditation Organization (the "EAO") to answer a series of questions about HAVOC and its accreditation status. The Court issued the necessary order, and in a July 11, 2006 letter, the EAO stated that the HAVOC laboratory was not accredited for the specific analysis required by the phase-one protocol: "[the evidence] demonstrates that the analysis [performed by HAVOC in this case] does not form part of accreditation competency of the mentioned laboratory."

All of this illustrates that the Plaintiff experts' reports do not contain scientifically credible data. Moreover, in addition to their inherent unreliability, the Plaintiff experts' reports show clear indicia of bias in favor of Plaintiffs' litigation position. For example, the Plaintiff experts reported that all water sources at 43 sites were contaminated, yet the data they produced indicates that they analyzed drinking water at only 12 of those 43 sites. Their utterly unsupported "inference" that drinking water contamination was present at the other 27 sites is a

[25] HAVOC became partially accredited in January 2007, but that accreditation is not retroactive.

clear example of gross scientific error—or plain bias—and strong evidence of a desire to further Plaintiffs' cause, with or without a scientific basis. Similarly, the Plaintiff experts have, among other things: (1) reported the presence of carcinogenic hexavalent chromium, when their analytical method used did not measure for hexavalent chromium; (2) claimed that *any* metals in soil samples are the result of TexPet's failure to remediate, when in fact metals occur naturally in all soil; (3) purported to sample TexPet-remediated sites, when in fact their contaminated samples were taken from areas that are Petroecuador's responsibility to remediate; (4) claimed that contaminants like benzene were present, when in fact these compounds were not detected; and (5) relied on current standards—which are inapplicable since they are not retroactive and since they are not the standards being used by the petroleum industry in Ecuador—to claim that TexPet failed to properly remediate over a decade ago. Such tactics, again, demonstrate that the Plaintiff experts' reports lack integrity and veracity.[26]

Because the scientifically unreliable and biased inspection reports submitted by the Plaintiff experts violated the Code of Civil Procedure and the phase-one protocol and suffered from essential errors—gross mistakes that no reasonable person could conclude were accurate or even made in good faith—under the procedures established by the Court and Ecuadorian law[27] they should have been expunged from the record of this case. Chevron filed eleven petitions asking the Court to do just that. Chevron's petitions argued, among other things, that the Plaintiff experts had used improper analytical methods in violation of the Analysis Plan, were biased and had committed forgery, and had made clear and obvious reporting errors.[28] Article

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[26] In this regard, the Plaintiff experts have violated their oaths to the Court to "carry out [their] duties faithfully and lawfully." Article 256 of the Code of Civil Procedure.

[27] *See* Article 258 of the Code of Civil Procedure (If an expert's report suffers from essential errors that are proven in a summary proceeding, the judge must order the report to be corrected by another expert).

[28] The full litany of errors contained in the Plaintiff experts' flawed reports, as well as Chevron's detailed

258 of the Civil Procedure Code provides that, in this circumstance, the Court must conduct a hearing on the petition and then issue a ruling. Unfortunately, this Court has not conducted a single hearing on any of Chevron's essential error petitions. Rather, the Court has denied one petition without the required examination, indefinitely postponed ruling on three others, and simply ignored the rest.

By violating the required procedures for responding to essential error petitions, the Court has not only failed to fulfill its requirements, but it also has unfairly prejudiced Chevron. Indeed, had the Court followed Article 258, Plaintiffs would be unable to claim that *any* evidence—even biased, scientifically unreliable evidence—exists in the record to support their case. Ignoring and denying Chevron's requests to expunge the flawed Plaintiff expert reports is fundamental error.

3. *It Is Now Clear That Chevron Has Proven Its Defense And That These Claims Should Be Dismissed*

Regardless of the Court's failure to expunge the Plaintiff experts' unreliable judicial inspection reports, the fact remains that all of the *credible* evidence in the record proves Chevron's defense: TexPet properly remediated its required sites upon leaving the Consortium and it is not responsible for any further environmental contamination. Having had nearly four years to collect evidence to prove their claims, and having produced not a *shred* of credible evidence to do so, Plaintiffs should not be allowed to press their baseless claims against Chevron any further. Four years of time and expense defending a frivolous lawsuit that has never had any merit is enough. These claims should be dismissed immediately or at the appropriate procedural time because Chevron has, without question, proven that it is not responsible for any of

(continued…)

grounds for seeking their expungement, can be found in the essential error petitions that form part of the record of this case. Chevron will not repeat those arguments in full here.

Plaintiffs' claimed environmental contamination damages.

B. Allowing Plaintiffs To Waive Their Burden Of Proof And Begin The Expert Determination Is A Denial Of Due Process And Justice

Even Plaintiffs seem to recognize their absolute inability to meet their burden of proof against Chevron. They recently requested—and shockingly were granted—the practical ability to relinquish that burden. They then sought—and again were granted—the right to proceed prematurely to the second phase of the proceedings. Contrary to the law of the case, Plaintiffs asked that this second phase, the expert determination, be conducted by a single expert who is Ecuadorian and has no ties to Chevron. Again, the Court acquiesced, allowing Plaintiffs to seek from this lone expert a recommendation for causation and damages without first having to prove that environmental contamination exists, and while ignoring all of the scientific evidence to the contrary. Perhaps most troubling of all is that the Court issued these improper rulings in the wake of an intense, nationalistic campaign of defamation and intimidation aimed both at Chevron and—until he began ruling as Plaintiffs' requested—the President of the Court.

Since the filing of their lawsuit in 2003, Plaintiffs have relied heavily on extrajudicial means to disseminate false information about Chevron and about TexPet's former operations in Ecuador. They have engaged in a broad media campaign in which they and their supporters, including the Government and various environmental groups, have: (1) repeatedly accused TexPet of engaging in fraud in order to secure the 1998 Release from environmental liability, despite that the Prosecutor General's office has repeatedly investigated the situation and found no evidence of fraud at all, *see supra* pages 26-27; (2) asked the U.S. Attorney General to work with Plaintiffs to investigate Chevron/TexPet for fraud, notwithstanding Ecuador's own Prosecutor General's findings to the contrary; and (3) announced that the Government offered its "full support" to Plaintiffs, and intended to provide them with "assistance in gathering evidence"

against Chevron.

Indeed, officials from the Government's executive branch recently visited some of the former Consortium's operations sites, along with Plaintiffs' representatives and attorneys, and announced to the media that Chevron had blatantly failed to carry out a proper remediation at those sites, and that the Government of Ecuador officials who approved the remediation, along with Chevron representatives, should be prosecuted. Government officials similarly have referred (in the press) to the Ecuadorian officials who had certified TexPet's remediation efforts from 1995 to 1998 as traitors against Ecuador. In short, an essential part of the Plaintiffs' strategy in this litigation has been to generate a firestorm of nationalistic bias against Chevron outside the courtroom, and even to similarly attack the President of the Court, in a despicable attempt to affect the proceedings inside.

1. *The Court May Not Allow A Plaintiff To Unilaterally Relinquish His Burden Of Proof*

It should go without saying that a litigant assigned the burden of proof may not be allowed simply to "relinquish" it to the detriment of his opponent without violating basic, universally accepted principles of justice. Yet in this case, that is what the Court has allowed Plaintiffs to do. Worse, the President of the Court made this decision only after three times denying Plaintiffs' request and then being subjected to personal attacks in the public eye. Having pleaded to be allowed to evade their burden of proof over the majority of the allegedly affected areas, Plaintiffs should not be allowed to continue to seek relief related to those areas.

Plaintiffs sought to evade their burden of proof in January 2006 by requesting, pursuant to the Code of Civil Procedure, to "withdraw" from 26 of the 122 phase-one judicial inspections originally ordered by the Court. Having seen that credible scientific analysis is harmful to their case, Plaintiffs obviously prefer to have the matter decided with as little scientific evidence in the

record as possible and to promote their causes of action on mere propaganda. The Court properly declined to grant this request on three different occasions over the next several months. The President of the Court noted that, when a party requests the collection of evidence, it has the burden to submit that evidence for review.

Soon thereafter, in June 2006, the President of the Court became the direct target of Plaintiffs' intimidation tactics. Plaintiffs' representatives subjected him to public demonstrations and a press campaign that questioned his handling of the case and accused him of bias in favor of Chevron (the foreigner) and against Plaintiffs (the nationals). For example, it was reported on June 14, 2006 that "[t]hose affected by Texaco's pollution took to the streets of Lago Agrio to demand that the trial being held against the multinational in the country be sped up. . . . [They held] a march in the vicinity of the Superior Court . . . with the purpose of protesting the slowness of the proceedings. The plaintiffs' commission managed to hold an interview with the Judge and expressed the need to expedite the case."[29] The following month, Plaintiffs stepped up their efforts. Their ally, Frente de Defensa de la Amazonia ("FDA), publicly proclaimed on its website:

> The recent news that two of the four judges of the Superior Court of Nueva Loja are being investigated for corruption may explain the unusual judicial delay in the Texaco case due to the influence of the transnational company and its several suspicious acts, according to the plaintiffs. "There have been signs of corruption on the part of Texaco during many months and now two judges are being investigated," says Luis Yanza, legal coordinator for the Frente. "We fear that is not a coincidence . . . ."

[29] "Those affected by Texaco protest the slowness of the judicial proceedings. There were street demonstrations on the topic." June 14, 2006, *found at* www.ecuadorinmediato.com.

> . . . . Yanez is the current judge and his presidency has been marked by a series of strange decisions without legal basis which aim to delay the case.[30]

Plaintiffs' representatives have admitted that these tactics are intended to pressure the Court. Their American attorney, Steven Donziger, publicly (and falsely) claimed in 2006 "that the judge . . . overseeing the case is apparently under pressure from the oil company's lawyers to delay the proceedings. . . . Donziger advised that in the next few days, the country's social organizations would be creating a coalition to *put pressure on* and keep an eye on the conduct of the judges overseeing the case."[31]

After initiating their public campaign against the Court, Plaintiffs again sought to waive judicial inspections. This time, though, their petition took a different form in two respects. First, it addressed 64 judicial inspections—more than double the number they originally sought to waive. Second, rather than seeking withdrawal under the Code of Civil Procedure, Plaintiffs sought to "relinquish" their "rights" to the judicial inspections under the Ecuador Civil Code, specifically Articles 8 and 11. Although Civil Code Articles 8 and 11 permit a party to relinquish *rights*, they do not permit a plaintiff to relinquish its burden of proof.[32] The Civil Code deals with substantive rights, not procedural mechanisms, and simply has no applicability to the collection of evidence, a process specifically and fundamentally regulated by the Code of Civil Procedure. The rules established by the Code of Civil Procedure are considered norms of Public Law different from the private rights referred under Articles 8 and 11 of the Civil Code.

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[30] "Official Investigation of Two judges in Lago Agrio," *found at* www.texacotoxico.com (FDA website), July 2006 Archives (emphasis added).

[31] "Texaco rejects claim for environmental damage in the Amazon," *found at* www.texacotoxico.com (FDA website), July 2006 Archives (emphasis added).

[32] Article 8 provides that no individual may be impeded from taking a particular action unless that action is forbidden by law. Article 11 specifies that the rights granted by law may be relinquished as long as the relinquishment concerns only the rights of the relinquishing individual and is not prohibited.

Moreover, according to Article 1478 of the Civil Code, any action or decision against Public Law rules is considered illegal. Indeed, the Court had previously noted, correctly, that Articles 114 and 119 of the Code of Civil Procedure prohibit Plaintiffs' request.

Improperly, the President of the Court reversed his earlier position and ruled in August 2006 that Plaintiffs were, indeed, entitled to "relinquish" the 64 judicial inspections. Chevron countered that Public Law rules governed by the Code of Civil Procedure could not be waived on the grounds of Civil Code rules, much less based only on the signature of Plaintiffs' counsel. The Court therefore imposed the condition that all 47 Plaintiffs ratify the relinquishment within a certain time.

Throughout the fall of 2006, the President of the Court repeatedly extended Plaintiffs' deadline for obtaining the relinquishment ratifications. During that time, Chevron sought to clarify that, having relinquished the 64 judicial inspections, Plaintiffs would no longer be able to claim any damages relating to those sites. Specifically, Chevron argued that Plaintiffs should not be able to waive their burden to prove more than half the damages sought by their claims. The Court has ignored Chevron's petitions, and Plaintiffs continue to request damages for the sites that were relinquished. Moreover, the Court apparently has finalized the relinquishment of the 64 judicial inspections, notwithstanding that the ratification requirement has not been satisfied. On January 22, 2007, with only 39 of 47 ratifications collected, the Court declared the relinquishment of the 64 judicial inspections valid. On March 19, 2007, the President of the Court, in a clearly illegal and biased decision to benefit the interests of the Plaintiffs, "clarified" that, because a "majority" of the Plaintiffs had ratified the relinquishment of the 64 judicial inspections, the relinquishment was valid and presumably final.

By this ruling, the Court has abandoned the binding law of the case in favor of Plaintiffs'

changing positions, thereby violating Ecuadorian law. *See* Articles 281 and 292 of the Code of Civil Procedure.[33] The Court also has violated Articles 114 and 119 of the Code of Civil Procedure, and basic principles of justice, by permitting Plaintiffs to waive their burden to prove environmental harm at the 64 relinquished sites, while still allowing them to claim damages for those sites. Chevron, like any defendant, should have the right to defend itself through the collection of scientific evidence against Plaintiffs' continued claims for environmental damages related to the 64 relinquished sites. This is particularly so given that all of the credible evidence currently in the record proves Chevron's defense. It therefore was grossly improper as a matter of Ecuadorian law—and any other civilized system of justice—for the Court to allow Plaintiffs to relinquish their burden of proof as to those 64 sites. Naturally, the Plaintiffs should no longer be entitled to seek any relief whatsoever related to those sites, which should be eliminated from the case, with prejudice.

Equally improper was the Court's prevention of Chevron's attempt to file a "recurso de hecho"—an intermediate appeal—with regard to the relinquishment of seven particular judicial inspections that had been ordered and scheduled prior to Plaintiffs' request. Upon the filing of Chevron's "recurso de hecho," the President of the Court was required automatically to send it to his immediate superior and had no discretion to interfere with the intermediate appeal in any way.[34] The Court refused to fulfill these requirements, however, effectively denying Chevron's appellate rights and once again committing a gross violation of Ecuadorian law.

2. *Using One Unqualified Expert Violates Agreed Procedure, Sensible Procedure, And Due Process*

After relinquishing their burden of proof with regard to liability (which the credible

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[33] Article 292 provides that requests "whose objective is to alter the meaning of . . . orders . . . or to maliciously prejudice the other party, shall be dismissed and sanctioned . . . ."

[34] *See* Articles 365-72 of the Code of Civil Procedure.

evidence proves they cannot satisfy), Plaintiffs petitioned the Court to proceed directly to the expert determination phase of the case, during which recommendations on causation and damages will be made. Acknowledging that this second phase was to have relied on the scientific evidence collected during phase one, Plaintiffs outrageously suggested that environmental contamination could be inferred at *all* sites based on the flawed findings in any one of the Plaintiff experts' error-ridden judicial inspection reports. Plaintiffs also asked the Court to appoint only *one* expert to conduct the second phase. They requested that this lone expert be Ecuadorian, and that he *not* be an expert suggested at any point by Chevron.

In his March 19, 2007 order confirming Plaintiffs' relinquishment of the 64 judicial inspections (and their burden of proof), the President of the Court appointed Richard Cabrera—an Ecuadorian who had never been suggested as an expert at any point by Chevron—to be the *sole* expert tasked with the expert determination. Specifically, Mr. Cabrera—a mining engineer with no known experience analyzing hydrocarbons—will be responsible for: (1) evaluation of environmental damage, if any, to soil, water, and other primary resources; (2) specification of the origin of such damages based on causation and chronology; (3) verification of the current existence of substances that affect the environment and constitute a danger to living beings or a threat to their subsistence and lifestyle; (4) specification of the technical work necessary to remediate the sites; and (5) determination of the methodological parameters for the remediation. In other words, Mr. Cabrera will make a recommendation to the Court regarding causation and damages.

This order directly contradicts the law of the case established by the Court's October 2003 order, which provided that the expert determination would be conducted by the same *group* of experts who conducted the judicial inspections (*i.e.*, an *unbiased* group made up of experts

from various fields suggested by *both* sides).[35] As such, the order violates Articles 281 and 292 of the Code of Civil Procedure. Moreover, because the Court's 2003 order is binding on the parties and the Court itself, the Court's recent disregard for that order also violates Article 252 of the Code of Civil Procedure. That article states that "the parties may by mutual agreement select the expert or request the appointment of *more than one expert* to carry out the [expert examination], which agreement shall be *binding* on the judge." (Emphasis added).

More than merely violating the Ecuador Code of Civil Procedure, though, this last order (as a culmination of the series of improper orders recently issued) also offends basic principles of due process and justice. Not only does Mr. Cabrera lack expertise in many of the areas relevant to his appointed task—hydrocarbon chemistry, epidemiology, hydrogeology, remediation technologies, oil and gas operations practices, etc.—he also lacks a proper record. As noted above, the so-called scientific evidence submitted by the Plaintiff experts is, at best, completely unreliable, and likely the result of bias and collusion. Yet the Court has thus far improperly refused to strike it from the record, despite Chevron's repeated requests that it do so. Moreover, the Defense experts have issued 45 scientifically credible reports that prove Chevron's defense, yet to date only one of those reports (for Sacha 53) has been confirmed through the settling expert process. Chevron submits that the expert determination process should consider only the credible evidence, which would result in a recommendation by Mr. Cabrera that Chevron be exonerated. Given the current state of the record, however, it is unlikely that Mr. Cabrera will feel at liberty to do so, making it impossible for him—or anyone—to render a credible expert

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[35] In May 2007, the Court agreed to reconsider, to some extent, its March 19, 2007 order, but not with respect to the points addressed here—particularly the appointment of Mr. Cabrera as the sole expert tasked with conducting the phase-two expert determination process. Indeed, in violation of the Code of Civil Procedure, the Court recently (in June 2007) confirmed Mr. Cabrera's appointment and swore him into his position, ignoring the fact that Chevron had both a petition for reconsideration and a recurso de hecho (intermediate appeal) pending with regard to this matter.

determination based on science and proven facts.

And that is exactly what Plaintiffs were hoping when they made their request, since science and proven facts contradict their claims. Instead, Plaintiffs want a foregone conclusion of Chevron's liability *despite* the overwhelming scientific evidence to the contrary. With its March 19, 2007 order, the Court has essentially granted Plaintiffs the right to seek—from a lone, unqualified expert—a final recommendation of causation and damages against Chevron without first being required to prove any liability on Chevron's part. This prejudicial rush to judgment is serious judicial error that requires dismissal.

3. *The Expert's Proposed Course Of Work Ignores And Exceeds His Mandate And Lacks Any Scientific Basis*

His credentials and mandate to one side, Mr. Cabrera has now embarked on his mission by furthering the denial of due process already detailed herein. First, Mr. Cabrera submitted a proposed scope of work that largely ignores, and far exceeds, his mandate. Second, Mr. Cabrera began the actual site inspections by denying Chevron the basic right to participate and observe his work that the Court specifically ordered.

Mr. Cabrera's proposed scope of work exceeds his mandate and flouts scientific and economic theory. Mr. Cabrera was ordered by the Court to evaluate environmental conditions in the allegedly affected areas, determine the origin of any environmental damage, and determine and describe actions necessary to remediate those areas.[36] Mr. Cabrera began this process by

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[36] Certificate of Investiture of Expert (June 13, 2007). According to this certificate, the expert shall proceed to:

> carry out the Expert Determination aimed at ascertaining the environmental effects of the activities related to the production of hydrocarbons in all of the fields developed by Texaco in its role as operator of the consortium, in which Gulf initially as well as CEPE and then Petroecuador had an interest. The expert shall: **a)** Evaluate the environmental damage, if any, to primary resources, the ground, water resources, the plant covering, fauna, and the other surrounding elements and detail their characteristics; **b)** Specify, if possible, the origin of

indicating that he will conduct sampling at only a "representative sample"[37] of the sites at issue and extrapolate his results over the rest of the allegedly affected area. This exacerbates the Court's denial of due process in failing to compel the Plaintiffs to meet their burden of proof. Indeed, the vast majority of sites for which the Plaintiffs seek relief will never be inspected or evaluated. The result would be that, for the most part, there will never be any legitimate assessment in this case of liability or causation.

Mr. Cabrera's proposed scope of work also contains any number of undertakings that have nothing to do with the relatively narrow assignment he was given. As just a few examples of items beyond his mandate, Mr. Cabrera reports that he also intends to evaluate, among other things, social and economic conditions in the allegedly affected areas:

> By the use of surveys, covering an appropriate sample, we will attempt to determine whether the alleged impact of Texaco's operations on non-indigenous settlers and indigenous peoples, colonies and groups actually exists. The inhabitants' knowledge and remembrance of Texaco's operations will be investigated. The following will also be determined: possible effects on community cohesiveness, knowledge of accidents, environmental risks and impacts, displacement and loss of territory, impacts on health, cultural changes in everyday life, management of community

(continued…)

> those damages, both in causal and chronological terms; **c)** Ascertain the possible current existence of substances that affect the environment and constitute or could constitute a danger for living beings or a threat to their subsistence and way of life; **d)** Specify the work, activities, and measures of a technical nature that must be carried out to clean up the environment first and to restore it, to the extent technically possible, to the state in which it existed prior to the damage; **e)** Determine the methodological parameters of the restoration and the environmental standards or goals to be attained, depending on the characteristics of each environment . . . .

[37] Work Plan for the Expert Determination submitted by Engineer Richard Cabrera (June 25, 2007) ¶ 5 ("Study Area and Sites") ("A very representative sample of the sites (wells and stations) was chosen from the area operated by Texaco" and "from that list (sample), each professional in charge of the different components will choose a representative sample for his/her respective study . . . .").

> affairs by Texaco, remediation, handling of complaints and demands, and the desire for repair.[38]

Besides that this supposed "social" investigation is in no way part of his mandate, Mr. Cabrera has no qualifications to undertake such an investigation. And the scientific errors implicated in this proposal, which completely lacks any hint of methodology to be followed, are so legion that they are difficult to list and describe. Additionally, investigation into testimony of witnesses presumably would have been part of the Plaintiffs' proof of their case in chief. Having abandoned their obligation to make their proof, Mr. Cabrera cannot now be permitted to do the Plaintiffs' work and collect "testimony" on their behalf.

Another task that Mr. Cabrera proposes to undertake, even though it was not part of his mandate, is an "economic valuation." Mr. Cabrera's supposed "economic valuation" boundlessly exceeds his authority and is particularly vexing for its lack of support under the Ecuadorian legal system and lack of methodological rigor:

> The economic valuation of the alleged damage and the application of management and repair measures can be based on the concept that natural resources have a use value and a non-use value, and that the total economic value (VET) of an environmental asset is equal to the current use value (direct or indirect) + option value (value of use by future generations) + existence value (value of use by other individuals and species).
>
> The use value can be direct or indirect. Direct values of a forest are its wood, recreational use and the use of plants with biological activity, while indirect values are its ability to recycle nutrients, filter water and enrich the soil. In turn, natural resources have a future use value (option value), in that the immediate use thereof is sacrificed for use by future generations.[39]

Putting to one side that this "economic valuation" proposal lacks any basis in science or legal support, it has nothing to do with what Mr. Cabrera was assigned to do: to evaluate

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[38] *Id.*, ¶ 6.1.1.e.

[39] *Id.*, ¶ 6.1.1.g.

environmental conditions, determine the origin of environmental impact, and to indicate actions necessary to remedy those conditions. Mr. Cabrera's economic theory is completely farcical and unrelated to this mandate; any possible recommendation or "damages" theory determined by this exercise would be completely scientifically invalid and hopelessly unrelated to anything at issue in this case.

4. *The Expert Has Begun His Work By Violating Basic Scientific Protocols And Denying Due Process*

Mr. Cabrera has now begun his site inspections by completely disregarding the Court's orders, scientific protocol, and all sense of due process. It is a basic tenet of scientific analysis, as well as of due process, that scientific sampling and testing be methodologically sound and transparent. Mr. Cabrera's conduct has precluded any possibility of due process in this phase of the case.

First, although Mr. Cabrera was instructed to establish and submit a complete calendar of his activities so that the parties could observe his work, he has failed to do so. The parties learn where Mr. Cabrera will undertake his work upon very short notice (usually one day before he conducts his inspections); notwithstanding, Mr. Cabrera has never advised or notified Chevron about the work which is supposedly being conducted by the other experts supporting him. This conduct not only increases costs for Chevron's representatives, who must be "on call" at all times for possible site inspections; it also violates due process, as Mr. Cabrera endeavors to conduct his work in secrecy.

Second, despite a clear directive from the Court that the parties should be allowed to observe the sampling process and share the samples taken for their own analyses, Mr. Cabrera has refused to comply. In recent weeks, Mr. Cabrera has limited access to Chevron's representatives to observe his sampling closely or to share the materials he was sampling so that

they could run their own studies. This is a plain violation of the Court's order that the parties be allowed to observe and share in Mr. Cabrera's testing.[40] Moreover, he has stated that he has expert support teams doing other types of sampling, yet Mr. Cabrera has refused to name these experts, their qualification, or their work plans.

Third, Mr. Cabrera's sampling "methodology" shows his irredeemable bias and complete disregard for scientific protocol. Mr. Cabrera has refused to provide or sign chain-of-custody documentation for the samples that he collects. As a result, there will be no means to authenticate any of the analyses that Mr. Cabrera ultimately provides. Mr. Cabrera has even refused to comply with a direct order from Judge Novillo to begin providing chain-of-custody documentation. Mr. Cabrera's refusal to establish a chain of custody for his sampling destroys any remaining shred of legitimacy—however small—associated with the inspection process, and his disregard for the simplest scientific protocol further evidences Mr. Cabrera's lack of credentials to serve in the capacity for which he has been appointed. Indeed, Mr. Cabrera has sampled rainwater or surface water that has collected in a soil borehole, and has erroneously claimed it is groundwater. Mr. Cabrera obviously lacks even the most basic skills of groundwater hydrology and site assessment.

Finally, Mr. Cabrera's flawed sampling "methods" also evidence his clear bias against Chevron. To the extent that Chevron has been able to observe portions of Mr. Cabrera's sampling, Mr. Cabrera has been seen discarding any visibly clean soil samples. That is, when Mr. Cabrera collects a soil sample that, to the naked eye, appears to be clean, he has been seen dumping that soil back on the ground and not submitting it for analysis. Obviously, this practice disregards even the most basic principals of sampling analysis, which is intended to determine

[40] *Rulings of the President of the Superior Court* (May 23, 2007 & June 7, 2007).

the composition of soils over a given area—whether offending materials are present or not. Rejecting apparently clean samples is plainly designed to steer the analysis to the worst possible result. Mr. Cabrera's conduct not only ludicrously disregards scientific practice, it is perhaps the most obvious indicator of his plain bias against Chevron.

In short, Mr. Cabrera's conduct so far in the inspection process is marked by rank amateurism, disregard for scientific protocol, and irredeemable bias. He has destroyed evidence while his clandestine and unverifiable sampling and testing can never form the basis of any legitimate expert determination of the environmental impact or its source. Mr. Cabrera's work effects a complete denial of due process.

5. ***The Procedure Now Established For Resolution Of This Matter Denies Chevron Due Process And Justice In Violation Of Law***

It is clear that the revised procedures for this case, ordered by the Court at Plaintiffs' request, are highly irregular and in violation of the Ecuador Code of Civil Procedure. The Court's orders also violate core substantive provisions of Ecuadorian law and the universal principles of justice on which it is based.

The 1998 Political Constitution directly addresses these issues. As an initial matter, it provides in Article 18 that "[t]he rights and guarantees determined by this Constitution and by the international instruments in force are *directly and immediately applicable before any judge*, tribunal or authority." (Emphasis added). One such right, set forth in Article 24, is the right to "due process" for "[e]very person,"[41] and in particular "the right to access to the judicial organs and to obtain the effective, impartial and expedited protection of their rights and interests, without in any case remaining defenseless." *Id.*, Art. 24.17. The manifestly unjust procedures now in effect for resolving this case—which likely came about due to the unlawful political and

[41] The Constitution makes clear that "Foreigners have the same rights as Ecuadorians." Art. 13.

public pressure that Plaintiffs placed upon the Court in an effort to instill nationalistic bias against Chevron—can hardly be called "effective" and "impartial." These proceedings trample Chevron's due process rights in violation of Ecuador constitutional law.

The proceedings, as conducted, therefore constitute a denial of justice under Ecuadorian law. Article 192 of the Constitution prescribes that "the procedural systems shall be a means for the materialization of justice. It is to give effect to the guarantees of due process . . . ." And Article 22 provides that "[t]he State shall have civil liability in cases of judicial error, for the inadequate administration of justice . . . and for the violations of the provisions laid down in Article 24." Those provisions, of course, include guarantees of due process and the right to impartial protection of a litigant's rights and interests.

Nevertheless, this Court has ignored Chevron's due process rights, and its rulings have increasingly become anything but impartial. As described in detail above, Chevron has spent the last four years litigating in good faith, and has in that time produced significant, scientifically credible evidence proving its defense and demonstrating that Plaintiffs' claims are baseless. Nonetheless, the Court has now abandoned the law of the case and the Ecuadorian Code of Civil Procedure and has denied Chevron due process by acquiescing (likely as a result of political pressure and nationalistic bias) to Plaintiffs' requests: (1) to be relieved of their burden of proof, and (2) to proceed directly to a biased expert determination of causation and damages in the absence of any showing of liability. Moreover, when Chevron attempted to appeal one such erroneous ruling through the "recurso de hecho" process, the Court improperly prevented the appeal from taking place. These rulings, in combination, suggest a foregone conclusion of liability against Chevron, despite contrary and conclusive evidence and law. Such conduct clearly constitutes an "inadequate administration of justice" that fails to "give effect to the

guarantees of due process." In the absence of a complete dismissal, therefore, this matter will result in a violation of Ecuador's Political Constitution.

Moreover, a failure by this Court to dismiss this case—followed by any judgment against Chevron on the Plaintiffs' unproven claims—would likely constitute a violation of Ecuador's obligations to Chevron under international law. The Ecuadorian Constitution explicitly provides that "[t]he norms contained in international treaties and agreements, once promulgated in the Official Register, form part of the juridical order of the Republic and prevail over laws and other norms of a lower hierarchy." Art. 163. Similarly, the Civil Code provides that, in the absence of an applicable Ecuadorian law, "general principles of universal law"—*i.e.,* customary international law—shall be applied. *See* Art. 18.7. International law imposes on Ecuador, at a very minimum, an obligation to maintain and make available to aliens such as Chevron a fair and effective system of justice. A failure of this universal obligation to provide a capable and impartial judiciary results in a denial of justice, an international violation by a State's judiciary for which the State is held responsible. If this Court continues on its present, unjust path and ultimately issues a final judgment in the Plaintiffs' favor, Chevron will take the necessary steps to seek redress against Ecuador under international law.

For these extraordinary reasons, Chevron requests that the Court dismiss the claims against it in their entirety in order to avoid a complete denial of due process and justice.

CONCLUSION

For all of the foregoing reasons, Chevron respectfully requests that the Court, immediately or at the appropriate procedural time in this action, dismiss this lawsuit in its entirety in order to avoid an injustice and a denial of due process. This lawsuit, as it has transpired, constitutes a flagrant and grotesque violation of Ecuadorian law, a farce of the

judicial system, as well as a violation of the most basic and fundamental principles of universal justice to which Chevron is entitled.

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