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## **Texaco Petroleum, Ecuador and the Lawsuit against Chevron**

### **Executive Summary**

The environmental case pending against Chevron in Ecuador has devolved into a runaway judicial farce, orchestrated by a community of interest made up of U.S.-based contingency-fee lawyers seeking a financial bonanza and the government of Ecuadorian President Rafael Correa, which seeks both a financial and political windfall. Four facts about the case cannot be disputed:

1. At the conclusion of the oil production concession between Texaco Petroleum (“Texpet,” a subsidiary of Texaco, which merged with a Chevron subsidiary in 2001) and the government of Ecuador in 1992, the parties conducted a full environmental audit, and Texpet performed a multi-year, \$40 million remediation program proportionate to its minority ownership share of the Consortium. That program was approved by the government of Ecuador, which then granted Texpet and all related entities a full and complete release from any remaining environmental liability associated with the consortium’s operations.
2. When the same U.S. contingency-fee lawyers initially filed the *Aguinda* case—the precursor to today’s Lago Agrio lawsuit—in U.S. federal court in 1993, the then government of Ecuador formally intervened in the case and advised the court that the government, not private plaintiffs, had the exclusive right to assert claims for environmental impacts to the government-owned lands upon which the oil operations had been conducted, and that the government had resolved those claims through the negotiated remediation program and the related Settlement and Release.
3. By its own admission, the government of Ecuador for years neglected to perform its share of the environmental remediation. Indeed, in sharp contrast, it has systematically starved its wholly-owned oil operations of the funds necessary for reasonable maintenance and responsible oil field operations, preferring instead to divert its billions of dollars in oil proceeds to other purposes.
4. Since the government of Ecuador assumed full ownership of the operation nearly 20 years ago, Petroecuador has compiled a deplorable record of environmental irresponsibility, tallying more than 1,400 oil spills since 2000 alone.

These facts by themselves demonstrate that the government of Ecuador, not Chevron, bears both the legal and moral responsibility for the environmental conditions presently on display in Petroecuador’s production area.

For the U.S.-based contingency-fee lawyers, this case has never been about facts, evidence or law. Instead, it has been a constant campaign of misinformation designed to pressure Chevron into a large financial settlement. Their campaign features the compelling visual images of the environmental neglect at Petroecuador’s production sites and the impoverished conditions of the people residing in the area, but conveniently sidesteps the fact that Texpet cleaned up its portion of the operation and that Petroecuador has been the sole owner and operator of the area for nearly 20 years. There can be no serious question about the motives of the U.S. contingency-fee lawyers conducting this case. Philadelphia lawyer Joe Kohn, the financier behind the litigation, appeared in the recent movie *Crude*, saying unashamedly that this matter “was not taken as a pro bono case, you know a lot of my motivation is, at the end of the day, is that it will be a lucrative case for the firm.” This blind pursuit of money above all else is demonstrated by the fact that the plaintiffs’ lawyers, in apparent disregard for the supposed interests of their clients,

actually asked the government to cease environmental cleanup of Petroecuador sites so as not to interfere with their case.

For the current government of Ecuador, the case offers twin benefits. By publicly demanding a verdict against Chevron and pressuring the judicial system under his control to that end, President Correa burnishes his image as a revolutionary man of the people crusading against foreign economic interests. At the same time, the government of Ecuador diverts blame for the state-owned oil company's undeniable and well-documented environmental mismanagement and for the government's failure to provide basic sanitation and healthcare infrastructure in the Oriente region.

Emboldened by the open and public support they have received from the Correa government, the plaintiffs' lawyers have brazenly transformed the case from a claim for environmental remediation into a demand that Chevron spend billions of dollars to reconstruct the government's wholly-owned oil production infrastructure and to install water systems and healthcare facilities throughout the former concession area. The plaintiffs also demand that Chevron pay more than \$8 billion in compensation for alleged "unjust enrichment," despite the fact that the government of Ecuador took more than 95 percent of the Consortium's proceeds when Texpet was participating and has been the 100 percent owner of the oil operation since 1992.

Since the Correa government assumed power and consolidated executive control over the other branches of Ecuadorian government, the lawsuit has lost any semblance of impartiality or basic fairness. Most significantly, the court has abandoned the due process guarantees mandated by Ecuadorian law, eliminated the plaintiffs' burden of proof, and substituted in its place the work of a patently unqualified mining engineer, Mr. Richard Cabrera. Mr. Cabrera has suggested a wholly illegitimate and unsubstantiated damage and penalty recommendation against Chevron in excess of \$27 billion. Mr. Cabrera was not only paid solely by the plaintiffs, but he openly relied on them to staff his effort while seeking to obstruct Chevron's representatives from even observing his work. In fact, major portions of his submissions to the court are cribbed from the plaintiffs' own submissions, if not written by them directly. His work product is devoid of scientific content, lacks even the most basic evidentiary support, and assesses monetary relief for alleged environmental damage and health claims he has never even bothered to investigate, inspect or verify.

Early in his administration, President Correa openly campaigned for a verdict against Chevron, at the same time that the government proclaimed that any judge who issued opinions inconsistent with the government's interests would be subject to dismissal and even possible criminal prosecution. In these sad circumstances, it would be nothing short of professional suicide for the court in Lago Agrio to do anything other than rule against Chevron.

### **Background: The Oil Concession, Texpet's Cleanup, and Petroecuador's Mismanagement**

Texpet operated in Ecuador in the 1970s and 1980s through an oil concession originally granted to a consortium of Texaco and Gulf subsidiaries by the government of Ecuador. Around the time that significant commercial oil production was about to begin, the government of Ecuador muscled its way into the Consortium by government proclamation, granting its newly formed state oil company, CEPE—the precursor of today's Petroecuador—a 25 percent ownership interest. In 1976 the government bought out Gulf's remaining interest and became the majority owner with 62.5 percent. Although it was the minority shareholder, with only a 37.5 percent interest as of 1976, Texpet served as operator of the Consortium on the parties' behalf for most of the concession period, until Petroecuador exercised its right to become the operator in July 1990, just two years before the concession ended. Throughout the entire term of the concession, the government regulated, approved, and in many instances *mandated* the Consortium's activities. No facilities were constructed, nor wells drilled, nor oil extracted without the government's oversight and approval.

Consistent with hydrocarbons operations around the world now and then, the Consortium members functioned as a single entity in dealing with the government and producing oil. The Consortium as a distinct legal entity made all of the decisions about exploration, financing and operations, provided royalties and other fees to the government, and was subject to government regulation and oversight. Even though Texpet, as operator, conducted the physical work of the Consortium, the Consortium as an entity stood to enjoy any profits, and also bore any operational risk and liability associated with its operations.

As the concession was drawing to a close, Texpet, Petroecuador and the government agreed to conduct an environmental audit and to apportion responsibility for environmental remediation. The government led a thorough and transparent set of negotiations with Texpet, and at various stages, regulatory bodies, the Ecuador legislature, environmental NGOs, and community organizations participated and provided input. Early in the negotiations, the government of Ecuador specifically rejected Texpet's suggestion that the remediation program address all environmental issues in the concession area with Texpet and Petroecuador each paying its proportionate share, claiming, among other things, that Petroecuador lacked the funds for such a project. The government instead dictated that Texpet remediate its proportionate share and leave the remainder for Petroecuador to carry out in due course as part of its ongoing operations. The government and Texpet identified the specific sites that Texpet would be required to remediate commensurate with its 37.5 percent interest and agreed to the specific types of remediation and restoration that would be conducted.

Independent contractors approved by the government conducted Texpet's remediation program, at a cost to Texpet of \$40 million. Under this program Texpet:

- Closed and remediated 161 well pits and seven spill areas;
- Closed 18 wells;
- Remediated soil at 36 sites;
- Installed three produced water reinjection systems and provided Petroecuador with equipment for 10 more;
- Designed three secondary spill containment dikes at storage facilities;
- Performed extensive replanting and reforestation;
- Contributed approximately \$3.8 million to local potable water and sewage projects; and
- Provided equipment and \$2 million in funds for local socioeconomic projects to benefit the indigenous and settler communities living in the former concession area.

The clean-up work was monitored, inspected and certified site-by-site by representatives of Petroecuador and the Ministries of Energy and Environment, and the results were scientifically validated by independent laboratories, including Ecuador's own Universidad Central. When the work was completed in 1998, the government and Petroecuador certified that Texpet had complied fully with its obligations under the remediation contract and granted Texpet a complete release from all legal and contractual obligations and from any further liability for environmental impact arising out of the Consortium's operations. From that point forward, all remaining liability for remediation was the responsibility of the government and Petroecuador—the majority owner since 1977, operator since 1990, and sole owner since 1992.

Since 1992, Petroecuador has had a widely acknowledged record of operational and environmental mismanagement, characterized by lack of investment in or maintenance of its equipment and installations, numerous spills, and failure to timely perform its share of environmental remediation. Ecuadorian newspapers have reported that Petroecuador has been responsible for more than 1,400 oil spills from 2000 to 2008, and press reports suggest that the company has spilled in excess of four million gallons of oil since 1990. In May 2006, Ecuador's National Director of Environmental Protection Management, Manuel Muñoz, a representative of the Ministry of Energy, testified before Ecuador's Congress:

*“Texaco conducted the remediation of the pits under its responsibility, that is 33 percent of the total. On the other hand, for over 30 years Petroecuador has done absolutely nothing to remediate those pits under its responsibility.”*

Muñoz also stated that Petroecuador allowed equipment, infrastructure and operations to deteriorate:

*“There is a very serious problem regarding the pipelines, regarding all transmission systems—both of oil as well as of derivatives—which have mostly become obsolete because the budget is not adequate to replace them. Mr. President, this is one of the most important sources of contamination because their useful life has come to an end and they have not been replaced, so spills occur.”*

### **The Litigation in New York and Ecuador**

The history of the Chevron litigation in Ecuador unfortunately coincides with a shift by the Ecuador government from a relatively lawful entity that respected its legal obligations to an autocratic state that abuses power, repudiates its responsibilities, and seeks to transfer its liabilities onto others. The plaintiffs originally sued Texaco Inc. in U.S. federal court in New York in 1993, purporting to seek relief related to personal injuries, property damage and environmental remediation. The government of Ecuador intervened in that case to inform the federal court that: 1) only the government had authority over Ecuador’s public lands; 2) the plaintiffs had no independent right to litigate over public lands; and 3) the Settlement and Release negotiated with Texpet disposed of the remediation issues raised by the Ecuador plaintiffs, who asserted claims addressing Ecuador’s public land.

When it appeared that the New York court would dismiss their case, and seeing their aspirations of a large financial windfall blocked, plaintiffs’ lead lawyer and architect of their case, Cristóbal Bonifaz, lobbied the Ecuador legislature to enact a new law that for the first time would allow individuals a right to sue for environmental remediation of public land. In 1999—a year after Texpet completed its remediation and was granted a full release—the Ecuador Congress enacted the Environmental Management Act (“EMA”). Even though the Ecuador Constitution expressly prohibits retroactive application of the law, Mr. Bonifaz filed the current case in Ecuador in 2003, seeking relief under the 1999 EMA and this time suing Chevron, which by that time had become Texpet’s ultimate parent corporation.

Chevron immediately moved to dismiss the case on four legally incontrovertible and dispositive grounds:

- The Ecuador Constitution bars retroactive application of the 1999 EMA.
- Plaintiffs’ claims for remediation of public land are barred by the Settlement and Release.
- The court in Ecuador lacks jurisdiction over Chevron.
- Plaintiffs’ claims are barred by Ecuador’s statute of limitations.

Simultaneously, Chevron called upon the government of Ecuador to reaffirm in its own courts what it had just formally represented to the court in New York: that the Settlement and Release negotiated with Texpet covered the claims for remediation raised by the Lago Agrio plaintiffs.

By 2003, however, political currents were beginning to shift in Ecuador, and the case against Chevron had become a political inconvenience to the fragile administration then in power. That administration was still courting favorable trade status and trying to attract foreign investment, and thus recognized the importance of at least appearing to respect the rule of law. But at the same time, the administration could not risk inflaming leftist sentiment by acknowledging rights and obligations that had been negotiated with a U.S. oil company. Caught between these conflicting political cross-currents, the government did nothing.

Without an appearance by the government to challenge the propriety of the lawsuit against Chevron, the Lago Agrio court reserved decision on all pending motions until final resolution on the merits, thereby avoiding ruling on Chevron's dispositive defenses—each of which was sufficient in and of itself to end the case—and proceeded to open the evidentiary segment of the trial. Based on requests from both sides, the core of the evidentiary phase was focused on obtaining scientific evidence through “judicial inspections” at 122 former Consortium sites. The parties agreed that each side would provide an expert who would submit a report on each inspected site, and any inconsistent findings would be resolved by “settling” experts independently appointed by the court. Once the judicial inspections had been completed, the same group of experts were to carry out a “global assessment” to determine the existence and extent of oil-production impacts on the environment, causation and chronology, and any necessary remediation. The global assessment was to be based upon the undisputed scientific data produced by the parties' experts during the judicial inspections and any findings by the settling experts. Thus, at least initially, the evidentiary process in the Lago Agrio trial appeared to follow an established process and enjoy a modicum of transparency.

### **The Legitimate Evidence in the Case Exonerates Chevron.**

Over the course of the next 30 months, Chevron experts participated in the court's judicial-inspection process, properly sampling and analyzing data, respecting chains of custody, employing accredited laboratories, and presenting results in a transparent fashion, as initially agreed by the parties in jointly negotiated sampling and analysis protocols submitted to and adopted by the court. Chevron took 1,427 water and soil samples and had all of them analyzed at accredited U.S. laboratories. In comprehensive reports for 45 different sites, Chevron's experts concluded that 98 percent of the remediation performed by Texpet met the requisite standards and that there is no significant risk to human health at the remediated well sites. Likewise, 99 percent of drinking water samples met U.S. Environmental Protection Agency (USEPA) and World Health Organization (WHO) guidelines for hydrocarbons and metals.<sup>1</sup>

The science clearly demonstrated that none of the remediated areas contained levels of hydrocarbons or heavy metals that could pose a risk to health:

- Benzene has not been detected in any sampling.
- Polycyclic aromatic hydrocarbons (PAHs) have been detected only at levels below USEPA soil screening levels.
- Heavy metals, like chromium 6, either are not present or are present at levels consistent with background concentrations and do not exceed USEPA soil screening guidelines. Indeed, the highest concentration of chromium 6 found in any soil sample was 0.129 mg/kg, which is less than one-tenth of one percent of typical cleanup levels in the United States and is not considered harmful.

For their part, plaintiffs quickly abandoned the mutually agreed protocols that the court ordered would govern the judicial-inspection process. For example, the protocols required the parties to use “qualified” laboratories meeting industry competency standards,<sup>2</sup> yet the vast majority of plaintiffs' soil and water samples were analyzed at an unaccredited laboratory, aptly named HAVOC. The court ordered an inspection of HAVOC, but on eight separate occasions, lawyers for the plaintiffs and HAVOC blocked

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<sup>1</sup> USEPA, 1995. National Primary Drinking Water Regulations and National Secondary Drinking Water Regulations, List of Drinking Water Contaminants & MCLs and World Health Organization, 1993. Guidelines for Potable Water Quality, Volume 1, Recommendations. Second Edition.

<sup>2</sup> Environmental Assessment of Judicial Inspection Sites: Analysis Plan (AP), Oriente Region — Ecuador, August 13, 2004, §§ 1.4, 3.3.

the inspections from occurring. In addition, plaintiffs failed to offer data on more than a third of their soil and water samples.<sup>3</sup>

Moreover, plaintiffs were unable to substantiate any of their claims against Texpet. For example, a central theme repeatedly put forth by plaintiffs is related to the “produced water”<sup>4</sup> discharged during oil field operations. Plaintiffs claim that “produced water contains a variety of toxic and carcinogenic petroleum hydrocarbons including benzene, toluene, ethylbenzene, and xylene (BTEX) and polynuclear aromatics (PAHs),”<sup>5</sup> yet their experts never once analyzed any produced water for BTEX as part of the judicial-inspection process. Moreover, not one of plaintiffs’ three reported produced water samples contained PAHs exceeding USEPA or WHO drinking water standards.

Similarly, plaintiffs were unable to provide any scientific proof during the judicial inspections to substantiate their claims that oil production has caused widespread health problems in the former concession area. Plaintiffs’ health claims have been refuted repeatedly by a roster of acclaimed scientists in substantive papers submitted to the Lago Agrio court. Those conclusions are echoed by the independent findings of many physicians, epidemiologists and health organizations that health conditions in the Oriente region are likely the result of prevalent socioeconomic conditions, insufficient access to medical care, and a lack of water treatment and sanitation systems. Indeed, analysis of drinking water conducted during the trial found not hydrocarbons and metals, as plaintiffs have long alleged, but instead bacterial contamination from human or animal waste in 90 percent of samples, indicating widespread microbial contamination, which has well documented health consequences.<sup>6</sup>

### **Sacha 53 and the Abandonment of Science**

The turning point in the trial came in February of 2006 with the issuance of the first—and only—report by the court’s independent settling experts. One of the sites suggested by plaintiffs for judicial inspection was a former Consortium site known as Sacha 53. Following the widely publicized Sacha 53 inspection, plaintiffs proclaimed that this site proved what they had been saying all along: that Texpet’s remediation program had been a sham and the remediated sites posed a grave threat to public health. In their report on Sacha 53, however, the court’s settling experts concluded that the plaintiffs had failed to substantiate their claims of environmental contamination and specifically found that the remediated areas at Sacha 53 posed no significant risk to human health. The settling experts were immediately denounced as traitors.

Facing the prospect of similar reports at other sites and with less than half of the judicial inspections completed, plaintiffs embarked upon a plan to shut down the judicial-inspection process in its entirety. First, the plaintiffs brought the work of the settling experts to an immediate halt by defying a court order to fund their share of those experts’ work. Next, they sought to “withdraw” from 64 of the site inspections and move directly to a modified version of the global assessment, thereby evading their

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<sup>3</sup> <http://www.texaco.com/sitelets/ecuador/en/releases/2006-08-08.aspx> and [http://www.texaco.com/sitelets/ecuador/docs/2006-08-08\\_appendix\\_en.pdf](http://www.texaco.com/sitelets/ecuador/docs/2006-08-08_appendix_en.pdf)

<sup>4</sup> Produced water is the brackish water that is trapped within the geologic formations that contain crude oil and brought to the surface during oil production. Consistent with Ecuador regulations of the time and with industry practices still in use in many places in the world today, Texpet separated the crude oil from the produced water in several stages before safely discharging it into the environment. The average annual volume of produced water discharged by Texpet in Ecuador is equivalent to 1.7 percent of the total volume of water discharged onshore in the United States in 1985.

<sup>5</sup> <http://www.texacotoxico.org/eng/node/144>

<sup>6</sup> While dangerously high levels of bacteria-related contamination may not be the source of all of illnesses reported in the area, the World Health Organization states that, “The potential health consequences of microbial contamination are such that its control must always be of paramount importance and must never be compromised.” (World Health Organization, 1993. Guidelines for Potable Water Quality, Volume 1, Recommendations. Second Edition.)

burden of proof. Plaintiffs' clear strategy in the case was to avoid legitimate evidence and science in favor of pursuing their goals through other means.

On two occasions, the court denied plaintiffs' requests to waive several of the site inspections that they had requested as part of their evidence. Thereafter, plaintiffs launched a campaign to pressure the judge, accusing him of favoring a foreign corporation over the people of Ecuador. On June 14, 2006, plaintiffs and their supporters organized a protest in the streets outside the Lago Agrio courthouse to demand that the trial be sped up. The protesters assailed the judge directly in his chambers, demanding an expedited verdict. The following month, plaintiffs' advocates stepped up their efforts, proclaiming on their "Amazon Defense Coalition" website that two of the Superior Court judges were being investigated for corruption and accusing them of being improperly influenced by Chevron. Plaintiffs' representatives admitted that these tactics were intended to pressure the court, and their U.S.-based lawyer, Steven Donziger, announced that "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." Mr. Donziger later admitted in the film *Crude* that employing pressure tactics on the judge "is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty."

In July 2006, an amicus brief was filed in support of the plaintiffs' position by a group of Ecuadorian officials, including Gustavo Larrea, then the campaign manager for presidential candidate Rafael Correa. The amicus brief demanded that the court cease the judicial inspections and grant plaintiffs' request to move to a modified global assessment. Mr. Larrea is a well-known and powerful figure in Ecuador, having been named Minister of Internal and External Security by President Correa when he took office, although he has since been removed from that post as part of an ongoing investigation into alleged connections between members of Mr. Correa's government and the Colombian terrorist group FARC.

Almost immediately after receiving the amicus brief presented by Mr. Larrea and his colleagues, the embattled Lago Agrio court reversed itself and granted plaintiffs' request to waive their inspections. Amazingly, the court held that the plaintiffs could "waive" their remaining inspections without affecting their claims for damages at uninspected sites. More importantly, the court acceded to the plaintiffs' demand that, instead of any further work by the settling experts, the entire evidentiary assessment process would be put into the hands of Richard Cabrera, a mining engineer with no prior experience in the remediation of oil fields.

### **Community of Interest between Plaintiffs and the Government of Ecuador**

Since taking office in January 2007, President Correa has made no secret of the unity of interest between his government and the plaintiffs. He has continually used the Chevron litigation as a political rallying point, making a highly publicized trip—accompanied by the plaintiffs' lawyers and the Amazon Defense Coalition—to the former oil concession area in April 2007. The proclaimed purpose of the trip was "to *verify* the environmental, social, and cultural impacts caused by hydrocarbon exploitation, in particular that of the U.S. company Texaco," and once there he denounced the "barbarity committed by that multinational corporation." Correa also began calling on Ecuador's Prosecutor General to indict those involved with Texpet's remediation, exclaiming on his weekly radio program, "Hear me, you miserable Mafiosi, the party's over with this government. We will not permit you to take even one more peso from the country, our Amazonian region, and our oil."

Throughout the litigation, President Correa has repeatedly met with plaintiffs' counsel and advocates—whom he publicly refers to as his "*compañeros*"—to assure them of the solidarity of the "patriotic, sovereign, and honorable government" against the "big transnational compan[y]." As the Attorney General told a reporter in 2008, "the Correa administration's position in this case is clear: 'The pollution is result of Chevron's actions and not of Petroecuador.'" President Correa has gone so far as to call the plaintiffs' attorneys "real heroes . . . who have fought for years for their people, for their Amazon" and

has offered them “the National Government’s full support,” including “assistance in gathering evidence” against Chevron.

Direct interference in this case has not been limited to the Office of the President. Recognizing the political and financial advantages of shifting the blame to Chevron, the Ecuador’s Attorney General also has used his office to undermine Chevron’s legal position. The Attorney General has conspired with plaintiffs’ attorneys in an ongoing scheme to try to nullify the 1998 release granted by the government to Texpet. In an email exchange among representatives of the plaintiffs and the Attorney General’s office, one of the plaintiffs’ lead lawyers, Alberto Wray, wrote “*if at some point we want the Government and the Attorney General to play for our side, we must give them some ability to maneuver.*” Martha Escobar, a deputy of the Attorney General, responded: “*I explained that the Attorney General’s Office and all of us working on the State’s defense were searching for a way to nullify or undermine the value of the remediation contract and the final acta and that our greatest difficulty lay in the time that has passed.*” Ms. Escobar continued, “*The Attorney General remains resolved to have the Comptroller’s Office conduct another audit (that also seems unlikely to me given the time); he wants to criminally try those who executed the contract (that also seems unlikely to me, since the evidence of criminal liability established by the Comptroller’s Office was rejected by the prosecutor . . . .*”<sup>7</sup>

On August 26, 2008, after two previous Prosecutors General had determined that no evidence of fraud exists and requested that the case be closed, the government announced fraud indictments against two Chevron attorneys. Indeed, the charges were formally made by Dr. Washington Pesántez, who admittedly once upheld the no-fraud determination made by one of his subordinates. The indictments followed publicized meetings between the Amazon Defense Coalition and President Correa and public demands from plaintiffs’ U.S.-based counsel, Steven Donziger, for the indictments. While no new evidence has been presented to support the charges, the action effectively sidelines two of Chevron’s primary lawyers and compromises the company’s constitutional right to defend itself.

President Correa’s campaign against Chevron is part of a broader self-reinforcing scheme to consolidate his political power, as he has effectively taken control of Congress and the judiciary. In 2007 the Constituent Assembly, which Correa controlled, dissolved Congress and announced that “the decisions of the Constituent Assembly are superior to any other rule in the judicial system” and that “[j]udges and tribunals that process any actions contrary to the decisions of the Constituent Assembly shall be dismissed from their post and subject to corresponding prosecution.” President Correa blithely acknowledges that Ecuador is “not living under the rule of law,” and that “the Executive Branch could exert pressure on the Judicial Branch to get the courts to ‘respond to the needs of the country.’”

Correa’s control of the judiciary and his open disdain for the rule of law has led to a string of legal outcomes characterized by lawlessness and a lack of impartiality:

- On a personal level, Mr. Correa secured a \$5 million pain and suffering judgment from a local bank that had placed him on the “delinquent payers registry” for his failure to pay a \$136 credit card debt.
- In 2007 Ecuador’s Prosecutor General indicted three City Oriente executives after City Oriente, a company controlled by U.S. investors, challenged a decision by the government of Ecuador to demand the return of 50 percent of excess profits from the surge in oil prices.
- In 2008 in a dispute over work on a power plant, President Correa used the military to expel Brazilian engineering company Norberto Odebrecht, seized all of Odebrecht’s assets—valued at \$800 million—and prevented four Odebrecht officials from leaving the country.

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<sup>7</sup> Interestingly, when Ms. Escobar was deposed in relation to the dispute between Chevron, Petroecuador and the Republic on the issue of arbitration and indemnification, she denied knowledge of any contact with plaintiffs’ attorneys until confronted with these e-mails.

- President Correa also has treated foreign investors as expendable, defaulting on more than \$3 billion in foreign debt despite having the means to make the payments. A former Finance Minister opined that “only political reasons” explained the default since President Correa was facing upcoming elections and the default had the support of more than 60 percent of the population.

President Correa’s attacks on foreign economic interests are highly popular with his constituents, but are pushing the country farther and farther from the global economic community, gradually making Ecuador an investment pariah. Indeed, the U.S. government has recognized that “[s]ystematic weakness and susceptibility to political or economic pressure in the rule of law” and “corruption and denial of due process” are common, and that “[b]usiness disputes with U.S. companies can become politicized.”

### **The Lago Agrio Trial Has Become a Clear Denial of Justice.**

Ecuador’s fragile judicial system has not been able to withstand President Correa’s all-out assault on Chevron, and the case now suffers from a complete lack of fairness and impartiality. The court has forced the parties into a drawn-out and expensive trial despite Chevron’s dispositive legal defenses, disregarded its own procedural orders, ignored Ecuador law, and allowed the case to move into areas for which there is no legal foundation, basis or precedent. To date there have been only outlandish damages figures offered without any attempt to establish causation for any alleged environmental impact. Moreover, even though the case was initiated as a lawsuit seeking funds for environmental remediation, the court has allowed the case to become a platform that would require Chevron to fund a massive investment program to completely redevelop the Oriente region and to pay for everything ranging from compensation (although it is unclear to whom) for an unproven allegation of excess cancer rates in the region, to developing both petroleum-related and basic socioeconomic infrastructure and establishing game preserves for the indigenous people. There is no basis under Ecuador law for such a suit, and the court so far has not required the plaintiffs to provide even the slightest bit of evidence to support their claims.

The work of Richard Cabrera, the court-appointed mining engineer tasked with the global assessment, has been central to this effort. Despite being ordered by the court to determine chronology and causation, Mr. Cabrera dismissed Petroecuador’s role out of hand, announced that Chevron was responsible for all alleged harm—even that clearly linked to Petroecuador—and concocted an unprecedented damages recommendation. Consistent with the government’s strategy to shift its liabilities to Chevron, Mr. Cabrera announced that his role in this case is “to achieve change in the overall economic, political and social paradigm to a new view of equality of entitlements, with economic solidarity that has as its ultimate goal of benefiting the population as a whole instead of elitist profiteering, in which the well-being of the environment and its rational sustainable use is valued, and which includes sovereign energy and food-supply independence.”

Mr. Cabrera’s “damages” recommendations have no basis and no foundation whatsoever in law or science. Mr. Cabrera was not neutral and he followed neither an expert process nor the process ordered by the court. Mr. Cabrera’s work was exclusively funded by plaintiffs’ representatives, who also provided him with *ex parte* assistance in performing his fieldwork. Nevertheless, Mr. Cabrera ignored the results of his own fieldwork in inventing environmental remediation needs. He also ignored the hundreds of pages of environmental audits, remediation plans, and remediation costs submitted to the court by Petroecuador and approved by the Ecuadorian Ministry of Environment. Instead, Mr. Cabrera used fabricated “evidence” and clean-up standards that are not applicable under any law to come up with outrageous costs unrelated to oilfield remediation. He violated court orders by conducting fieldwork at only 49 of the 335 well and production-station sites in the former concession area, and he manipulated and altered findings to produce false conclusions. These activities culminated in an April 1, 2008, recommendation that the court assess damages against Chevron in excess of \$16 billion. In response to Mr. Cabrera’s report, Chevron addressed Mr. Cabrera’s numerous fundamental errors, while the plaintiffs predictably insisted that his damages assessments should be higher and should include additional

categories of damages. In his second report, delivered in November 2008, Mr. Cabrera did not even address Chevron's response. Instead, Mr. Cabrera nearly doubled his earlier damages amount without identifying *any* new "evidence," increasing his recommendation to more than \$27 billion solely at plaintiffs' instigation.

Mr. Cabrera's cancer claim is one of the most shocking examples of the absurdity of his work. First, this is an environmental remediation case, and none of the 48 named plaintiffs have claims for cancer-related damages. Second, despite recommending \$9.5 billion in damages for alleged "excess" cancer deaths, Mr. Cabrera did not identify a single victim or provide a single medical report. He relied solely upon the responses to a survey—which it appears was conducted by plaintiffs' supporters—that asked leading questions like "what [do] you think should be demanded of Texaco as relief of the damages suffered?" Third, Mr. Cabrera did not distinguish among different types of cancer and identified no evidence linking crude oil to stomach or uterine cancer—the two most common cancers reported in the surveys (and also the two most common cancers in Ecuador). Fourth, Mr. Cabrera's conclusions are contradicted by official Ecuador statistical data on cancer mortality, which show no increased cancer risk in the oil-producing areas of the Oriente. Finally, in increasing the damages figure from his initial report to the dollar amount requested by the plaintiffs, Mr. Cabrera simply cut-and-paste portions of plaintiffs' rebuttal into his own supplemental report. Thus, to support over \$9 billion of his damages assessment, Mr. Cabrera merely inserted plaintiffs' request for \$9.527 billion and relabeled it "my revised calculation."

In addition to his cancer assessment, every other aspect of Mr. Cabrera's damages recommendation is wildly exaggerated and unrelated either to the claims or evidence in the case or to Ecuador law:

- More than a billion dollars in soil remediation for sites that he never visited and the conditions and dimensions of which he cannot know. Even though official government data indicate that the average cost necessary to remediate a pit is roughly \$85,000, Mr. Cabrera arbitrarily assessed an average of more than 36 times that amount, or \$3.08 million per pit.
- \$428 million to improve Ecuador's potable water system even though Mr. Cabrera did not take a single drinking water sample.
- \$3.2 billion for groundwater remediation at plaintiffs' request, even though Mr. Cabrera acknowledged that he did not have enough data to develop a groundwater remediation plan. Instead, Mr. Cabrera hypothesized this figure based on four incomparable groundwater projects that he read about on the Internet.<sup>8</sup>
- Half a billion dollars for healthcare facilities even though Mr. Cabrera admits that this "goes beyond the treatment of the conditions and illnesses directly and strictly caused by Texpet's operations."
- More than \$8 billion for "unjust enrichment" and "punitive" damages, concepts that have no basis in fact and do not even exist under Ecuador law.
- Approximately 90 percent of Mr. Cabrera's \$27 billion figure was allocated to issues unrelated to remediation of the sites operated by the former Consortium, including improving public services, modernizing Petroecuador's infrastructure, and fostering indigenous cultures—even assessing nearly half a billion dollars to create a husbandry farm that would raise and release wild animals that the indigenous people could hunt.

Chevron has repeatedly petitioned the court to strike Mr. Cabrera's reports in their entirety. The court has yet to act.

## **Conclusion**

The government of Ecuador has used the Lago Agrio litigation to escape its liability for unfulfilled remediation and Petroecuador's poor operations, and to divert anger over environmental and social

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<sup>8</sup> <http://costperformance.org/search.cfm>

conditions, turning Chevron into the scapegoat for all of these perceived ills. Ecuador and Petroecuador, not to mention plaintiffs' lawyers and supporters, seek to enrich themselves unjustly through the potential transfer of billions of dollars from a U.S. oil company. President Correa and his allies also seek the clear political benefit resulting from the populist story of the native champion railing against the foreign corporation, even though Texpet was a minority partner in a consortium regulated, controlled and ultimately owned by the government of Ecuador. The Ecuador judiciary, so completely subordinated that it has no choice but to act in the government's interests, has treated Chevron in a way that fits neatly into President Correa's and Ecuador's naked practice of disregarding any rights and interests in conflict with their own. The government that repudiates its foreign debt, expels and seizes assets (and even indicts executives) of foreign companies that dare challenge its extortionist policies, is now merely using the judiciary that it holds under its thumb to assign that environmental liability to Chevron and to extort a staggering windfall along the way.

Meanwhile, it is the people of the Oriente who are truly suffering. The government has failed to provide for their basic needs, refusing to invest in necessary infrastructure and medical services essential for the region. It has not made funding available to allow Petroecuador to fulfill its obligation to remediate the environmental impacts that it has caused, much less to modernize its facilities to prevent further impact. While the government of Ecuador and the Lago Agrio plaintiffs' lawyers conspire to shift the government's responsibility onto Chevron's account, it is not only Chevron that has been denied justice, but also the people of the Oriente.