SUMMARY OF JUDGMENT ENTERED IN *AGUINDA ET AL. V. CHEVRON CORPORATION*

On February 14, 2011, after approximately eight years of litigation in Ecuador, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Provincial Court of Justice of Sucumbíos, rendered judgment in the form of a 188-page opinion. Judge Zambrano ultimately found Chevron liable for approximately $8.6 billion in damages (primarily for remediation of contaminated soils), awarded ten percent of that amount to the entity representing the Plaintiffs (by operation of law), and would grant an additional, punitive award amounting to 100% of the base judgment, which Chevron could avoid by publicly recognizing its misconduct in a measure of moral redress.

The majority of the opinion is devoted to identifying and analyzing the vast quantities of scientific and other evidence of damages in a court record exceeding 200,000 pages. Below, we summarize the most pertinent aspects of Judge Zambrano's opinion, including: (1) the Court's assessment of Chevron's liability for environmental contamination of the former Napo Concession area and the effects flowing therefrom; (2) the Court's observations concerning Chevron's procedural misconduct throughout the trial; (3) the Court's analysis of Chevron's legal defenses to liability; and (4) the Court's handling of the parties' mutual allegations of fraud and manipulation.[1]

I. CHEVRON'S LIABILITY

- **Texaco's Substandard and Unlawful Practices.** The Court observed that the essence of Texaco's conduct itself was not really in dispute—Chevron representative Rodrigo Pérez Pallares had admitted in a letter to a popular Ecuadorian magazine that Texaco dumped approximately 16 billion gallons of "production water"—water containing PTEX, TPH, and polycyclic hydrocarbons—directly into the surface waters between 1972 and 1990. (113) It also was undisputed that Texaco had dumped oil waste into unlined pits that were merely shallow excavations in the ground—Chevron's experts simply argued that this was "common practice" for the times. (159) Testimony from former Texaco workers indicated that "all of the mud would come out and the pit would spill oil towards the estuary. There was no water wall, there wasn't anything; they did not put a membrane, anything." (167)

  The Court assessed Chevron's fault from both an objective and a subjective perspective; the former asking whether the generic "reasonable oil company" would have acted in the same manner, the latter asking whether Texaco—with its particular knowledge set as evidenced in the record—was acting reasonably in light of that subjective knowledge. (81) The Court took note of a book entered into the record entitled "Primer on Oil and Gas Production," published by the American Oil Institute in 1962. (81-82) The Court—expressly skeptical of both parties' experts in light of their diametrically opposing interpretations of the same set of facts with respect to virtually every topic in the case—emphasized the reliability of the publication due to the source, and the fact that it was published long before the litigation ever came about. (81) As an objective matter, the Court noted that as early as 1962, the industry was aware that "[e]xtreme care should be

[1] All numerical citations refer to the page number of the Plaintiffs' certified English translation of the opinion.

employed to handle and disposition of the produced water not only because of the possible damage to agriculture, but also because of the possibility of contaminating lakes and rivers that hold drinking water as well as water for irrigation" (81) As a subjective matter, the Court noted that the aforementioned book contains an acknowledgment of the contribution of a Texaco engineer to the very chapter that contains the relevant text concerning the hazards of production water. (82) Moreover, the record evidence demonstrated that Texaco itself held patents for a production water "reinjection" technology as early as 1974—the Court concluded that Texaco had the means, but not the will, to employ safer but perhaps more expensive methods. (162-164) With respect to the use of unlined pits, the Court found that the historical texts also undermined Chevron's assertion that this method was "common practice." (161) The Court also cited to correspondence between Texaco officials demonstrating that they were aware of the problems with unlined pits, but decided to continue using them because they were "efficient and profitable," and the alternative would be too expensive. (161-162)

In assessing the reasonableness of Texaco's practices, the Court also engaged in a detailed analysis of the laws in force during the time of Texaco's operations in Ecuador. (61-71) The Court found that Texaco violated multiple provisions of Ecuadorian law, including *inter alia*: the Health Code of 1971, the Water Law of 1972, and the Regulation of Hydrocarbon Operations Law of 1987. (62-64, 70) The Court took note of the fact that the laws applicable at the time broadly prohibited the infliction of *any* environmental harm; but at the time, there was an absence of regulations that specifically established tolerable "parameters." (66, 70) Nonetheless, the Court rejected Chevron's argument that a lack of regulations to animate the many blanket prohibitions on pollution found in the law somehow excused Texaco from the obligation to comply with the law. (71) The Court found that Chevron was well aware that its operations fell short of legal mandates—the record evidence demonstrated that Texaco had incurred several penalties over the course of its operations. (71)

In addition to the applicable laws and standards of the day, the Court also assessed Texaco's conduct in view of the requirements of its concession contract, which allowed Texaco to exploit the waters of the Napo Concession "without depriving the towns of the water volume that is indispensable for them for their domestic and irrigable necessities, neither making difficult the navigation, nor taking the drinkable and purity qualities of the waters, nor preventing fishing." (62) On a related note, the Court also rejected Chevron's argument that it could not be held liable for negligent conduct where that conduct occurred under the presumed auspices of State authority—the Court found that there was "no legal authority nor jurisprudence" to support the notion that an "administrative authorization" of some sort would defeat the rights of third-party claimants. (78) Indeed, the Court noted that where Texaco incurred administrative penalties, those penalties were doled out with the express reservation that they would not adversely affect the rights of potential third-party claimants. (79)

In sum, the Court concluded that Texaco's "system was designed to discharge waste to the environment in a cost-effective way, but did not correctly address the risks of damages." (166) The Court further opined that the damage was damage was "not only foreseeable, but also avoidable. Thus being the case, and since the duty is legally demandable from Texpet to prevent such damage under the historic legislation in effect

in the era in which it operated the Consortium, in the opinion of this Presidency the acts of the defendant are clearly a conduct amounting to gross negligence." (175)

- **Imposition of Strict Liability.** Much of the Court's discussion of negligence is rendered academic by the fact that the Court found it appropriate to impose strict liability on Chevron. (83) The Court first engaged in a theoretical discussion of "risk theory"—based on the Roman maxim *ubi emolumentum ibi llus* ("where there is a benefit comes responsibility—a doctrine that has long been a part of American jurisprudence but is still relatively new to the law of other nations, including Ecuador. (83) The Court observed that the imposition of strict liability is appropriate where a defendant has engaged in high risk/high reward behavior, and particularly in industrial cases where the burden of proving traditional fault is nearly impossible for the victim. (83) The Court ultimately concluded that the "production, industry, transport and operation of hydrocarbon substances constitute without a doubt, activities of high risk" warranting the application of strict liability—that is, liability for causing damage vis à vis high risk practices without regard to the culpability of the defendant's *particular* conduct. (83-86)

- **The Causation Element.** The Court placed a particular emphasis on the issue of causation. Noting the practical difficulties that can arise in determining whether one event should rightly be deemed to have caused another, especially where multiple contingencies may have brought about the result, the Court conducted a survey of multiple theories of causation. (87-88) The Court's analysis touched upon theories of causation grounded in civil law as well as those which trace their roots to the common law—including the "substantial factor test" and "probable cause." (87-88) The Court opined that *different* theories of causation might be appropriately applied in a single case depending upon the nature of the damages at issue: "due to a complexity of the case, to the nature of the damages and the diversity of theories, it is imperative that in considering the causality of the damages we do it studying separately each kind of damages. . . ." (90)

- **Evidence of Toxic Contamination.** Once again, the Court "ma[de] clear that [it did] not consider[] the conclusions presented by the experts in the[ir] report[s] because they are contradictory [of one another]. . .[This is the] reason why we have omitted the . . . personal opinions of each expert and we have taken [only] the technical content of the reports . . . ." (94) Moreover, at the outset of its discussion regarding contamination, the Court noted that it relies on current Ecuadorian standards for the presence of potentially harmful compounds in soil and water as a reference point as to what is currently understood as safe—not to suggest that Texaco was in "violation" of these regulations *per se*, given that they did not exist during the time of Texaco's operations in Ecuador. (96) The Court took note of the parties' mutual attacks on the sampling methodology of the other's experts (Chevron criticizing Plaintiffs for sampling directly at the pits and Plaintiffs criticizing Chevron for sampling at high elevations and upstream from the pits, and using sample homogenization to "dampen" especially contaminated samples), concluding that individual samples would be considered representative only of the location where they were taken and not representative of the larger area within that site. (102-104).

The Court observed the vast quantities of scientific evidence in the record resulting from the judicial site inspection process and the sampling performed by court-appointed experts (excluding Richard Cabrera). (99) Experts appointed by Chevron had taken 2,371 samples yielding 50,939 separate results; experts appointed by the Plaintiffs had taken 466 samples yielding 6,239 results, and experts appointed by the court had taken 178 samples yielding 2,166 results. (99) In the Court's view, the sheer magnitude of the evidence-gathering process provided reasonable assurance that isolated irregularities in reports, if any, could not possibly affect the total picture. (99) The Court noted that while its focus would be on total petroleum hydrocarbon (TPH) results—an *imperfect* indicator of health risk but nonetheless a scientifically valid and useful one—the Court was also concerned with BTEX (benzene, toluene, and xilene), polycyclic aromatic hydrocarbons (PAH). (100-101) As a general matter, the Court observed that pits at sites allegedly remediated by Texaco in the mid-1990s and subsequently *abandoned* were just as contaminated by pits at sites subsequently operated by Petroecuador, and indeed just as contaminated as sites never purportedly remediated at all. (105-106) In light of the similarity of the results across the board at all 54 judicial inspection sites (and considering that Texaco's sites were all operated in ostensibly the same manner), the Court concluded that it was reasonable to extrapolate—i.e., to assume that sites not sampled would also yield similar results—notwithstanding Chevron's assertion that the parties would "need to inspect every hectare in the Concession." (106, 125) The Court was particularly troubled by the fact that even samples taken by Chevron's experts in some cases revealed "alarming" levels of carcinogenic or otherwise highly toxic substances like benzene, toluene, mercury, lead, cadmium, barium. (106-111). The Court also noted that Chevron—presumably to minimize the impact of contamination—did not test for certain harmful chemicals such as Chromium VI, and did not really even test for TPH, opting instead to test only for certain compounds within the TPH spectrum ("DRO" and GRO"). (112)

As for groundwater, the Court noted that results from samples taken under reservoirs presented a real risk of groundwater contamination and thus, contact with the human population as well as flora and fauna. (117) The Court also took note of documentary evidence of groundwater contamination found in Texaco's historical records, and observed that the *identical* language concerning groundwater found in the reports of various experts nominated by Chevron called into question the independence of these experts. (119)

Based on the record evidence and the economic criteria largely proposed by expert Gerardo Barros, a court-appointed expert sponsored by Chevron, the Court concluded that an award of approximately $5.4 billion and $600 million would be appropriate for the remediation of soil and groundwater contamination, respectively. (177-181) While the Court rejected the majority of Plaintiffs' claim for ecological damages, with respect to the restoration of native flora and fauna, the Court awarded $200 million. The Court also found that an award of $150 million dollars would be sufficient to effect the delivery of potable water to the residents of the Concession area. (183)

- **Health Impacts.** The Court noted that damages can be assessed not only for past and present damage, but also for damage that is reasonably foreseeable "according to the

circumstances of the case and the experiences of life." (76) On the issue of the impact of Texaco's operations on human health, the Court conducted an extensive survey of the many health studies in the record evidencing a range of health problems engendered by petroleum operations. (126-234) The Court observed that Chevron's experts tended to attack these studies based on their inability to firmly establish cause-effect relationships, notwithstanding the fact that these studies explicitly disclaimed that they did not purport to conclude such a relationship existed. (135) It would be up to the Court to determine whether the "association" evidenced in the studies would amount to sufficient legal causation. (136) To reach its ultimate conclusion, the Court also relied on numerous surveys and interviews of Concession area residents conducted in the context of the judicial site inspections. (139-143) The Court recognized that such evidence certainly does not constitute "incontrovertible proof," but it was nonetheless persuasive in light of the "impressive coincidence between the facts described by all of these declarations," and the lack of any countervailing testimony. (144) The Court also assessed human health impacts by way of a risk assessment method, as suggested by Chevron's counsel. (145-146). Ultimately, the Court found that there was a "reasonable medical probability" that the health problem experienced by persons in the Concession area had been caused by oil-related contamination. (170-171) The Court awarded $1.4 billion reflective of the need to augment the healthcare system to respond to health issues—with the exception of cancer, addressed separately—engendered by exposure to oil-related contamination. (183)

- **Cultural Impacts.** The Court recognized that conduct such as that engaged in by Texaco can have "particularly severe consequences in cases that affect the ecosystem where groups whose cultural integrity is strongly associated with the health of the territory live, as the environmental degradation can potentially threaten the very existence of the group." (147) In order to assess impacts on the affected communities' way of life, the Court reviewed, among other things, interviews taken in the context of the judicial inspections. (147-151). Ultimately, the Court rejected most of Plaintiffs' bases for cultural damages—the Court did not find that there was a valid "loss of land" claim and did not agree that Plaintiffs could recover for loss of culture engendered through contact with Texaco workers. (152, 154). The Court agreed, however, that forced displacement due to the damage to rivers and soils caused by Texaco's oil extraction operations caused real and recoverable damage to the indigenous communities' way of life. (153) The Court awarded $100 million to execute community rebuilding and ethnic reaffirmation programs within the affected communities. (183)

- **Cancer.** The Court rejected the Plaintiffs' request for damages up to approximately $70 billion to address past and future excess cancer deaths in the affected area resulting from oil-related contamination, noting a lack of specificity in the demand as to particular cases. (184) Nonetheless, the Court found ample evidence in the record from which to conclude that cancer is a serious oil-related health problem in the Napo Concession area, warranting supplementation of the Court's general healthcare award in the amount of $800 million. (184)

- **Punitive Damages.** The Plaintiffs sought up to $40 billion in the form of an unjust enrichment award, in order to disgorge Chevron of its ill-gotten gains and to assure that

polluting and remediating only if "caught" becomes a less attractive option than simply acting as a responsible corporate citizen in the first instance. Although the Court rejected Plaintiffs' unjust enrichment claim, the Court nonetheless recognized the need to assure that Chevron and others would be dissuaded from engaging in similar misconduct—both in terms of the underlying pollution and the unethical behavior displayed by Chevron throughout the trial (*See* Section III, below)—in the future. (185) The Court also recognized Chevron's failure to treat the Plaintiffs with a modicum of human dignity (e.g., portraying them as scoundrels, denying their *existence*, and vowing to litigate against them until the end of time), further warranting the imposition of punitive damages. (185) Thus, in consideration of the grave and willing nature of Chevron's offenses and the shocking nature of its procedural misconduct (among other factors), the Court assessed punitive damages in the amount of 100% of the remedial damages. (185) Nonetheless, Chevron was given the option to avoid punitive damages altogether by issuing a public apology to the Plaintiffs, "a symbolic measure of moral redress" recognized by the inter-American Court of Human Rights. (186)

II. CHEVRON'S PROCEDURAL MISCONDUCT THROUGHOUT THE TRIAL

- **"Unresolved Issues" Raised by Chevron at the Eleventh Hour in an Effort to Delay Resolution of the Case.** The Court recognized Chevron's overarching complaint that the Court incorrectly applied the principle of expeditiousness thus preventing Chevron from fully exercising its right to a defense. (35) The Court noted, however, that Chevron's attempts to portray the litigation as a railroading are not supported by the realities of a case "which has lasted almost 8 years and accumulated more than two hundred thousand folios of files." (35) Far from swift justice, the extreme protraction of the case was "not the fault of the judge but [of] the…parties who have debated and complicated even the most common aspects of the procedural process." (35) By way of example, the Court noted Chevron's bad faith efforts to delay resolution of the case by "reopening" issues that had been previously resolved by the Court or already abandoned by Chevron. (36)

- **Chevron's Obstruction of the Evidence-Gathering Process.** Addressing Chevron's conduct vis à vis the judicial site inspection process and the reports prepared by the many scientific experts who participated in that process, the Court observed: "the challenges to the different reports have been taken to extremes by the defendant, who has alleged the existence of crucial errors in practically all the expert reports not presented by themselves, showing a lack of objectivity in their arguments which when examined by the judge have failed to…[show]…errors that might affect the integrity of the reports." (39-43) The Court engaged in an exhaustive analysis of Chevron's many claims of "crucial error," concluding that Chevron's objections to virtually every site inspection report not commissioned by Chevron were *legal* in nature (e.g., the expert did not account for the supposed release of liability secured by Texaco in the mid-1990s), and did not actually speak to the integrity of the inspection data. (40-43) The Court noted that challenges were raised against each and every expert, including the manner by which they were nominated and named. (36) The Court was even asked to appoint a third expert to resolve contradictions between the party experts; and Chevron accused the Court of violating a "procedural contract" to the extent the judge exercised his

discretion to modify the site inspection plan to suit the practical realities of the case. (36-38) The Court observed that a third expert for each site was not necessary and would inject undue complication into an already complex process; the 56 judicial inspections with their respective expert reports constituted more than enough evidence to allow the court to render a reasoned decision. (38) The Court concluded that Chevron's many objections to the evidence-gathering process appeared to be designed to "impede the normal advance of the evidence gathering process, or even prolong it indefinitely." (36)

- **Chevron's Frontal Attacks on the Integrity of the Court.** Judge Zambrano lamented the fact that, over the course of the trial, an inordinate amount of the Court's time has been occupied with addressing Chevron's constant attacks on the integrity of the Court. (58) The Court noted that Chevron has repeatedly accused the Court of engaging in a "judicial lynching," despite a lack of any valid basis to challenge the Court's decisions. (58-59) By way of example, the Court referred to the "unfounded and gratuitous" complaint filed by Chevron against then-presiding Judge Germán Yánez Ruiz. (58-59) Chevron accused Judge Yánez of a "lack of integrity" based on his decision to appoint an expert where the parties could not agree to one, notwithstanding that the Judge was statutorily authorized to do just that. (59) Regarding the pervasive nature of Chevron's shocking disrespect for the judicial process, Judge Zambrano observed: "This is not about isolated events . . .[It has] been constant throughout the process and ha[s] been publicly repeated by the spokespersons of the defendant company, reaching the ears of the Judge . . . [These] offences against his judicial competence . . . shall be also considered when passing ruling." (60)

- **A Pattern of Vexatious Conduct.** In summation of Chevron's behavior throughout the course of the litigation, the Court observed that "the following constitutes a display of procedural bad faith on the defendant's part: failure to…[produce]…documents ordered coupled with a failure to submit an excuse on the date indicated; attempting to abuse the merger between Chevron Corp. and Texaco Inc. as a mechanism to evade liability; abuse of the rights granted under procedural law, such as the right to submit the motions that the law allows for […]; repeated motions on issues already ruled upon, and motions that by operation of law are inadmissible within summary verbal proceedings, and that have all warranted admonishments and fines against defense counsel defendant from the various Judges who have presided over this Court; [and] delays provoked through conduct that in principle is legitimate, but…[which have]…unfair consequences for the proceedings…such as refusing and creating obstacles for payment of the experts who took office, thus preventing them from being able to commence their work. . . ." (184-185) As noted above at Section I, Chevron's course of conduct ultimately factored into the Court's award of punitive damages. (185.)

III. CHEVRON'S LEGAL DEFENSES

- **"Chevron Cannot be Held Liable for the Actions of Texaco."** The Court identified the vast amount of evidence in the record demonstrating that Chevron acquired the liabilities of Texaco. This evidence included Chevron's numerous public statements touting the "strengthened capacity of the new company" and the value-added for shareholders by way of the merger. (9-11) In this regard, the Court took particular note

of the new company's statements describing its strengthened position in South America. (10) The Court also noted that Chevron had failed to produce multiple documents requested by the Court in relation to the Chevron/Texaco merger, including documents related to Chevron's decision to change its name, for a period of time, to "ChevronTexaco." (7) The Court was troubled by Chevron's attempt to reap all possible benefits from its combination with Texaco, while simultaneously avoiding any of its target's obligations. (11-13) Indeed, the Court found bad faith in the fact that Chevron intentionally created the impression of a merger in its presentations to the public, but in the context of litigation, denied that any merger had occurred. (12) The Court looked to United States corporate veil-piercing jurisprudence, which has become a model for Ecuadorian law on that issue, and observed that "allowing the right of the victims…to disappear because of mere formalities within the merger would be considered by the U.S. courts as 'manifest injustice.'" (13, 16) The Court concluded that where, as here, a transaction has been structured for the purpose of allowing a newly-formed company to reap all of the benefits of a combination, while purportedly extinguishing liability to third parties, the corporate form should be set aside to prevent a fraud. (13, 15)

In a related argument, Chevron had also maintained that, even if it could be held accountable for the liabilities of Texaco, the company which operated in Ecuador was not Texaco itself but its subsidiary *Texaco Petroleum* (TexPet). (16) In order to determine whether Texaco would be liable for the actions of TexPet, the Court engaged in a multi-pronged, U.S.-style veil-piercing analysis. The Court opined that the record evidence demonstrated TexPet's total lack of administrative autonomy; it was clear that TexPet needed Texaco's approval for even the most mundane, day-to-day activities, including the retention of cleaning and catering services. (20-22) The evidence also demonstrated "no real separation of assets" between the companies; TexPet not only lacked administrative autonomy, but financial autonomy as well. (22) In sum, TexPet "was an undercapitalized company that depended both economically and administratively on the parent." (22) The Court found that veil-piercing was appropriate where, as here, it appears that a foreign company attempts to hide behind a local subsidiary that has been rendered quite purposefully incapable of satisfying legal obligations. (24-25)

- **"Plaintiffs' Claims Were Extinguished by the Release of Liability Granted to Texaco by the Ecuadorian Government in the Mid-1990s."** The Court observed that the 1995 and 1998 agreements held out by Chevron as precluding the claims in this case unambiguously contemplate Texaco's release from claims brought by the Republic of Ecuador or by Petroecuador. (32, 34) Furthermore, even if the Release were not so clearly limited on its face to potential claims by the *governmen*t, the Court noted that the release still could not correctly be construed as precluding claims by Ecuadorian citizens. (30-32) The Court found that the peoples' right to bring a claim is fundamental and inviolate, citing the Ecuadorian Constitution as well as multiple human rights conventions. (30-32, 176) The Court observed that Chevron's argument rests on a perversion of the general principle that the government acts in the name of "the people"—entering into a contract with a private company such as Texaco is not the type of fundamental, representative act that could somehow be construed as binding all citizens. (30-31) The Court observed that if the agreements between the government and Texaco actually did purport to release claims held by non-parties to the agreements

(i.e., the people of Ecuador), the contracts would be illegal (and presumably unenforceable). (32-33)

- **"The Case is Invalid Because it is Premised on Ecuador's Environmental Management Act, Which Did Not Exist Until 1999."** The Court recognized that under Ecuadorian law, retroactive application of the law—i.e., holding a party liable for conduct that would have been lawful when it occurred—is impermissible as a general rule. (27) However, *procedural* provisions of the law are the exception to the general rule of non-retroactivity—to the extent that a code provision governs process and procedure, it takes effect and supplants the former rule immediately. (27) In this case, the Plaintiffs did not rely on the LGA for a substantive cause of action—the Court observed that strict liability and negligence claims are premised upon the Ecuadorian Civil Code, and Chevron violated a host of environmental laws in existence throughout the period of its operations in Ecuador. (28, 60-70) The subsections of the Environmental Management Act implicated in this case govern: (1) the identity of the Court that will hear claims for damages that are "environmental" in nature (the law dictates that such a case will be tried before the President of the local state court in the jurisdiction where the underlying events occurred); and (2) the nature of the case as a "verbal summary proceeding." (27) The Court found both provisions to be "clearly procedural," and thus applicable notwithstanding the retro-active application of the law. (28)

- **"Petroecuador is to Blame."** Although the Amazon Communities originally sued Texaco in New York in 1992, only two short years after Chevron ceased its role as operator in the Napo Concession, Chevron's ability to delay the trial has allowed it to point the finger of blame at Petroecuador, the State-owned oil company that took over as operator subsequent to Chevron. However, pointing to an absent joint tortfeasor would not be an effective defense in the United States under a joint and several liability regime—and the same goes for Ecuador. In response to Chevron's repeated assertions that Petroecuador caused contamination, the Court noted that "the obligation to make reparation imposed on…[a tortfeasor]…does not extinguish because of new damages to third parties." (123) While the Court suggested that Petroecuador may be "presumably liable for new damages," the Court would not factor in Petroecuador's liability into *this* proceeding, in light of the company's non-party status, without prejudice to the right of any party to seek redress from Petroecuador in another proceeding. (123) As to Chevron's related argument that Texaco was part of a *consortium* and thus cannot fairly be made to bear the full extent of liability caused by drilling and extraction operations, the Court observed that the contract of 1964 states that "[i]t will be left to Texaco only the ways, the means to carry out procedures…in a way that it will be able to explore and exploit oil…." (123) Further marginalizing the import of Chevron's attempt to blame Petroecuador is the Court's observation that contamination appears to be fairly consistent no matter whether a particular site was abandoned after Texaco ceased operation, or whether Petroecuador subsequently operated at the site. (105)

IV. THE PARTIES' MUTUAL ALLEGATIONS OF FRAUD AND MANIPULATION

- **The Alleged Falsification of the Report of Plaintiffs' Site Inspection Expert, Charles Calmbacher.** The Court reviewed and recognized the deposition testimony of

Plaintiffs' expert Charles Calmbacher—acquired by Chevron in the U.S. via 28 U.S.C. § 1782—in which Calmbacher testified that the judicial site inspection reports submitted to the Court by Plaintiffs' counsel on his behalf were not authorized. (48) However, the Court also noted that Calmbacher had "personal issues with the plaintiffs' team due to labor and money issues," and, apparently prior to the rift, Calmbacher had given statements to the press condemning Chevron. (48-49) Although the Plaintiffs had not been given the opportunity to question Calmbacher regarding his apparent personal animus and contradictory public statements, on balance, in light of the seriousness of the allegations and the limited scope of the reports (they related only to two well sites, Sacha 94 and Shushufindi 48), the Court concluded that it would *not* consider the Calmbacher reports in its ruling. (49)

- **Plaintiffs' Involvement in the Preparation of the Global Damages Assessment Report (the "Cabrera Report").** At the outset of its discussion concerning the Cabrera report, the Court acknowledged that Chevron had filed a "huge number" of motions attacking Mr. Cabrera and the report on every conceivable basis. (49-50) The bulk of the Court's analysis in this regard focused on Chevron's complaint regarding Plaintiffs' level of involvement with the Cabrera Report. (50-51) The Court stated that it had viewed and scrutinized the documents, emails, and video clips submitted by Chevron in relation to the Cabrera Report and Mr. Cabrera's alleged contacts with the Plaintiffs' team. (50) The Court also acknowledged Plaintiffs' challenge to Chevron's video evidence on the grounds that it is deceptively edited and constitutes a fraction of the total video evidence in Chevron's possession. (50) The Court noted that Chevron's evidence regarding the Cabrera Report could not be deemed valid "proof" under Ecuadorian law (submitted, as it was, outside the proof period), and further observed the impropriety of Chevron's demands that the trial be suspended unless and until Chevron deemed its foreign evidence-gathering process complete. (50-51) Nonetheless, the Court recognized the seriousness of Chevron's allegations concerning the Cabrera Report, and— accepting as true Chevron's allegations that it needed more time to gather evidence—that it might be unfair to render a judgment based on the Cabrera Report. (51) Accordingly, the Court *granted* Chevron's petition to disregard the Cabrera Report. (51)

- **Alleged Misconduct as Evidenced by Outtakes from the Documentary Film, *Crude*.** The Court noted the tangential nature of any allegations relating to Attorney Steven Donziger—although Mr. Donziger's affiliation with the Plaintiffs' legal team seems clear based upon his public statements, there is nothing in the court record indicative of his participation in the case. (51) The Court took note of Mr. Donziger's "disrespectful statements" captured in the Crude outtakes, but found his utterances to be inconsequential. (51) Moreover, even if the Court were inclined to exercise its authority to judge the conduct of Mr. Donziger, it would not do so without giving him an opportunity to explain his statements—particularly when those statements were presented in the form of "small and limited portions of selected and edited hours of filming." (51-52) Most critically, the Court found that it would be inappropriate to punish the Plaintiffs themselves for any alleged misconduct on the part of Mr. Donziger. (51)

- **Plaintiffs' Alleged Attempt to "Whitewash" the Cabrera Report through the Submission of Additional Reports in September 2010.** On August 2, 2010, then-presiding Judge Ordoñez invited both Chevron and Plaintiffs to file submissions in which the parties could suggest appropriate economic criteria for the assessment of damages. (57-58) Approximately 45 days later, both parties submitted briefing bolstered by reports prepared by American experts; Chevron, however, has accused Plaintiffs and their experts of attempting to deceive the Court through "ideological forgery," covertly disguising the maligned Cabrera Report as the work of another expert who has not been impugned. (57) The Court opined that Chevron's charge of ideological forgery was "reckless [and] without merit." (58) In reaching that conclusion, the Court observed: (1) no one had attempted to pass these reports off as anything more than the work of experts *hired by the Plaintiffs*; these experts were not assistants to the Court, and their reports would not even be treated as true "expert reports" under Ecuadorian law; (2) to the extent that these experts reviewed and relied on work found in the Cabrera Report, that reliance was fully disclosed to the Court; and (3) the Plaintiffs delivered to the Court precisely what it had asked for; Plaintiffs did not purport to deliver anything more than a series of economic reference points to aid the Court in its valuation of the damages evidenced elsewhere in the record—Plaintiffs never claimed that these reports were intended to prove the *existence* of environmental damage. (58)

  Notwithstanding the Court's rejection of Chevron's attacks on the reports of Plaintiffs' experts submitted in September 2010, the Court appears to have had little use for these reports in the grand scheme. Of the six reports, the opinion makes *no mention at all* of the reports submitted by experts Dr. Robert Scardina (delivery of potable water), Dr. Daniel Rourke (excess cancer deaths), and Jonathan Shefftz (unjust enrichment); and the report of Carlos Picone (healthcare) is mentioned only where the Court dealt with Chevron's motion to dismiss based on "ideological forgery." In fact, the court did not award *any* damages at all with respect to excess cancer deaths and unjust enrichment. (184-185) Only the reports of Dr. Lawrence Barnthouse (natural resources damages) and Douglas Allen (soil and groundwater remediation) receive substantive mention—but the Court's use of these reports appears to be *de minimis* at best. (180-182) Soil remediation costs account for the majority of the overall damages award—approximately $5.4 billion of it—but the Court *did not rely on Douglas Allen's report to reach that figure*; instead, the court relied on the valuations proposed in the report of Gerrardo Barros, a court-appointed expert who performed work in the case at the request of Chevron. (180-181) Allen's report is mentioned only as a reference point, as the Court noted that its Barros-based valuation is consistent with Allen's general hypothesis that costs will ostensibly double when a more rigorous cleanup standard is adopted. (181) As for groundwater damages, one could argue that the court's utilization of the Allen report might be more significant, but that category of damages only accounts for roughly 7% of the total award. (179) With respect to the Court's award of $200 million for ecological damage (2% of the total award), the court explicitly *rejected* the Barnthouse report—which contemplates a value between $874 million and $1.7 billion for this category of damages—insofar as the report accounts for the historic loss of rainforest services and the loss of habitat due to infrastructure. (180, 182)

- **Alleged Forgery of Plaintiffs' Signatures.** The court took notice of the dilatory nature of Chevron's allegation that certain of the plaintiffs' signatures on the 2003 complaint were "forged"—the allegation was not made until December 2010, approximately *seven years* after the alleged "forgery" and (conveniently) almost *immediately* following the Court's issuance of the "autos para sentencia" signaling the end of the case. (57-58) The Court observed that Chevron's allegations were based on the report of an American handwriting analyst. (56) However, the Court further observed that these plaintiffs had ratified their participation in the case on multiple occasions after 2003. (56) The Court opined that—handwriting analysis or not—a claim of forgery cannot be sustained where the very person whose signature was allegedly forged denies that the forgery occurred; here, not a single plaintiff corroborated Chevron's claims of forgery. (56) With regard to Chevron's related assertion that an apparent lack of "fingerprints" is an incurable defect that requires nullification of the proceeding, the Court noted that such a formality "cannot obstruct in any way the administration of justice." (56)

- **Chevron's Claim That the Ecuadorian Government Will Appropriate All or Most of Any Award.** Chevron has long maintained that the Plaintiffs will not benefit from any award; rather, the Ecuadorian government will swoop in and appropriate the funds. Indeed, this assertion has served as one of Chevron's primary justifications for questioning the validity of the proceedings and preemptively refusing to pay any judgment. In its opinion, however, the Court notes that the "Government of Ecuador which has no part in this suit cannot benefit from it." (31) Moreover, the execution process laid out by the Court makes clear that the Government of Ecuador will not be receiving any portion of the award. (186-187) Rather, the Court has ordered the Plaintiffs to set up a trust, into which the *total* amount of damages awarded shall be placed. (186) The beneficiary of the trust shall be the Amazon Defense Front, the NGO representing Plaintiffs' interests in this case, and/or any affected persons designated by the Amazon Defense Front. (186) Further, the Court has ordered that the "*entire endowment* shall be earmarked to cover the costs needed for contracting the persons in charge of carrying out the remediation measures contemplated in [the opinion], and the legal and administrative expenses of the trust." (187)

- **Statements Made by Chevron Operative Diego Borja Indicative of Evidence-Tampering and Other Fraudulent Activity on the Part of Chevron.** The Court acknowledged its review of the secretly recorded conversations between Chevron operative Diego Borja and Santiago Escobar, in which Borja admits that Chevron's experts falsified soil and/or water sampling results (among other damning admissions concerning Chevron's manipulation of the trial). (52) The Court noted, however, that surreptitious recordings—whether commissioned by the Plaintiffs or Chevron—do not constitute valid proof before the Ecuadorian court. (52) The Court concluded the admitted activities of Mr. Borja would indeed be considered misconduct, but in light of Borja's apparent non-party status, no sanctions would be levied against Chevron in this proceeding in relation to Mr. Borja's claims of evidence falsification. (52-53)

- **Chevron's Collusion with Ecuadorian Military Personnel to Concoct a Phony Security Bulletin Resulting in the Cancellation of a Site Inspection.** The Court assessed the evidence in the record—including multiple affidavits from Ecuadorian

military personnel—regarding Chevron's role in generating a false security threat in order to block a judicial site inspection that may have been particularly damaging to the company. (53-55) The Court noted that Chevron used its military connections (specifically, one of Chevron's security officers was a former military Captain) to cause the generation of a baseless security bulletin, and to cause that false security bulletin to be delivered to the Court near the close of business on the day before the feared inspection. (53-55) The Court opined that Chevron's counsel had indeed intentionally misled the Court when it requested cancellation of the inspection based on a false security report. (55) Nonetheless, although Chevron's misconduct "hindered the prosecution of the case" by causing the critical inspection to be cancelled, the Court declined to issue the harshest penalty and merely factored the episode into its consideration of Chevron's broader procedural misconduct. (55)

- **The Parties' Mutual Attacks on the Laboratories Used by the Adversary.** The Court recognized the parties' mutual assertions that the other party's lab was not qualified, and thus, that any sampling results emanating from those labs (for Chevron, Severn Trent Labs, and for the Plaintiffs, Havoc Labs) should be disqualified. (44) Ultimately, the Court concluded that the laboratories' lack of Ecuadorian accreditation did not militate against considering their work, particularly where the allegations of incompetence were mutual. (45)

Plaintiffs' Conclusion

In sum, the Court's analysis of the issues in the case was thorough and comprehensive; skeptical of the claims made by *both* parties and their experts; and grounded in overwhelming quantities of scientific, documentary, and testimonial evidence. Moreover, the Court put aside the ancillary mud-slinging and focused more heavily on the *merits* of the parties' claims and legal defenses. Chevron, of course, took the position that the Lago Agrio Court's judgment is "illegitimate and unenforceable" long before it knew how the court would actually rule. Predictably, Chevron has denounced the judgment and vowed never to pay a penny.

Presented with an opinion that does not conform to Chevron's central thesis that the Ecuadorian tribunal is a "kangaroo court" which has railroaded the company, in recent weeks, the company has struggled to develop a new narrative to justify its disrespect for the judgment. Although Chevron's story had always been that the Plaintiffs concocted numerous baseless expert reports in order to secure a massive judgment, a Chevron spokesperson recently asserted that the Plaintiffs had "coordinate[d] with corrupt judges for a *smaller judgment*."[2] Further, Chevron's U.S. lawyers have now begun to float the new narrative—that somebody (presumably, the Plaintiffs' lawyers) wrote Judge Zambrano's opinion for him—without citing one iota of evidence to support their defamatory "suspicion."[3] In light of the scholarly and comprehensive nature of the opinion (including a

[2] Simon Romero and Clifford Krauss, "Ecuador Judge Orders Chevron to Pay $9 Billion," NY TIMES, Feb. 14, 2011, *available at* http://www.nytimes.com/2011/02/15/ world/americas/15ecuador.html?partner=rss&emc=rss.

[3] *Chevron Corporation v. Donziger et al.*, 1:11-cv-00691-LAK, Dkt. 91 (Feb. 15, 2011) ("Chevron suspects that Judge Zambrano received secret "assistance" drafting the judgment and anticipates requesting discovery on this issue shortly.")

thoughtful analysis of legal theory in both civil law and common law nations throughout the world), Plaintiffs accept Chevron's latest accusation as something of a left-handed compliment—albeit a reckless one. Plaintiffs fully expect that Chevron will continue to modify and refine its narrative in the coming weeks and months in an effort to avoid taking responsibility for its reckless destruction of the Amazon rainforest.