AMICUS CURIAE

In the case of María Aguinda et al. v. ChevronTexaco Corporation, in accordance with Art. 42 of the Environmental Management Act, we appear before you in order to be heard by the Court, for the purpose of stating the following:

We, *amici curiae,* are Ecuadorian civil law professionals – academics and practitioners – each with considerable experience in litigation involving low-income litigants and other vulnerable groups, appear before the President of this Superior Court of Lago Agrio to express our most sincere concern, based on our professional experience in other cases, that the above-referenced case is not being conducted according to the procedural principles of economy, promptness and efficiency established by the Ecuadorian constitution particularly for protecting low-income litigants and other vulnerable groups.

To guarantee the protection of these people, the Constitution itself recognizes as a procedural principle, or procedural guarantee, the principle of procedural economy, under which courts are obligated to conduct litigation in a manner that most favors such, eliminating, for such purpose, conducting unnecessary proceedings, or proceedings whose probative value is already guaranteed by other previously-conducted proceedings. Likewise, procedural economy includes the court's duty to ensure that court costs are not increased without any purpose and without any need. Legal scholar Lino Palacio tells us that this principle "*includes all measures aimed at shortening and simplifying the lawsuit, preventing its unreasonable prolongation from nullifying the protection of the rights and interests being determined in it,*"[1] as can ultimately happen if it is allowed for a lawsuit to be prolonged so that a financially-powerful litigant can easily turn it into a contest of bankbooks that low-income people are always going to lose.

Beyond the direct expenses involved in a lawsuit, a fundamental aspect is the time that it involves. This time is a period in which the parties, and the State itself, must make multiple efforts – aside from the economy and all of the logistics necessary for "being pending" – , for which reason this principle of procedural economy alerts the Courts to avoid this waste of time, resources and efforts.[2]

Other principles guaranteed by the Ecuadorian constitution are the principles of promptness and efficiency, which are theoretically considered to be derivations of the principle of procedural economy. Article 23, Section 27 establishes a constitutional right to due process and justice without delay. This right to justice without delay is established in Chapter One - *General principles* – of Title VIII – *The Judicial Branch* – of the Constitution, Article 192 of which provides generally that the procedural system will be the means for achieving justice. This article expressly guarantees that the procedural system will enforce the right to due process and ensure compliance with the principles of promptness and efficiency in the administration of justice. In addition, Article 193 provides *verbatim* that "*Procedural laws shall be aimed at the simplification, uniformity, efficiency and flexibility of procedures,*" and, therefore, it is beyond

[1] Palacio, 63.
[2] Vescovi, 58.

any doubt that these principles are in full force and effect in the Ecuadorian legal system and must be applied throughout the judicial system, to the extent that the Constitution itself provides that the law will penalize delay in the administration of justice.

Based on these principles, the Ecuadorian legal system has determined that civil disputes must be resolved in the least time possible and consuming the least amount of possible resources (of both the State and the litigating parties), without neglecting compliance with other due process guarantees. However, although not "squandering" these resources is in the interest of all Ecuadorians, this principle is particularly important for financially-disadvantaged individuals and communities, who certainly do not have the resources necessary to deal with lawsuits if unnecessary and excessive expenses are demanded from them. Allowing the prolongation of a suit with proceedings that have no probative value is paving the way for the immunity of the economically powerful, who can try to prolong a suit so that it becomes a competition of financial possibilities, for which reason, in view of this threat, the procedural guarantees and principles established in the Constitution play a very important role.

In fact, for the low-income people and communities that we usually represent, the principles of procedural economy, promptness and efficiency are much more than empty phrases or simple statements of aspirations to be applied whenever convenient. These procedural principles are fundamental procedural tools that ensure due process and effective access to justice in Ecuadorian courts.

For almost three years, those of us who were have appeared before you as *amici curiae* have been following developments in the *Aguinda v. ChevronTexaco* case, and we have been able to determine, as the Court is aware, that it is a monumental case that continues to grow at an uncontrolled rate without any new elements being added to the case. So then, we have noted that:

- The case record now contains more than 100,000 pages;
- A large part of this procedural volume consists of "evidence" that is repeated several times and the various experts' reports: we see that several reports submitted by the experts exceed 1500 pages and contain exhibits that are repeated elsewhere in the record;
- The evidence presented during the inspections has also become repetitive: the defendant defends its environmental policies during the time in question, which are the same for all of these sites inspected, and did not vary throughout all of the years that it operated in the Amazon.

We have also been able to determine the existence of several efforts made by the plaintiff to prevent the process from being unnecessarily delayed, including even submitting a document expressly waiving conducting several evidentiary proceedings, which, according to the plaintiff, are not necessary, since its case is already proven. To be specific, in a document filed on January 27, 2006, at 5:10 p.m., which appears at pages 92,442 to 92,444 of the record, the plaintiff stated that she was waiving the conduct of several inspections in the Sacha and Shushufindi fields, which proceedings were solely for her benefit, since they were requested exclusively by her, even being objected to by the defendant.

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This waiver by the plaintiff represents a gesture demonstrating her confidence in the evidence that has already been submitted, and the consequent application of the procedural principles that would lead to dispensing with additional and redundant evidence of facts that have already been proven in the case. In the plaintiff's opinion, her case has already been proven, and conducting new proceedings is not going to "prove it more," so such proceedings are unnecessary. In fact, the plaintiff feels that conducting such proceedings (exclusively for her evidentiary benefit) would unnecessarily prolong the case, for which reason she has voluntarily waived her right. We should point out, Mr. President, that under the provisions of Art. 11 of the Civil Code, anyone may waive his rights, provided that such waiver is not prohibited and that it affects only the personal interest of the parties making such waiver. The Supreme Court itself has ruled, in connection with the means of defense, such as the conduct of judicial inspections in this case, that "it is a waiver that can be legally made because it involves a strictly personal right" (Judicial Gazette, Year LX, Series VIII, No. 14, P. 1323)

We have been able to uncover another disturbing fact that is directly related to the waiver to which we have referred: in response to the waiver by the plaintiff, the defendant nevertheless decided that the proceedings that were waived should be conducted, i.e., it requested that proceedings be conducted which had been proposed only by the plaintiffs and which the defendant had opposed and criticized as being contrary to law, as appears on page 4697. We feel that this maneuver by the defendant is unlawful and unfair, and the only thing that it has to gain would be prolonging the suit. At the average rate that has been maintained over these last few years, it could be assumed that conducting these waived inspections could end up taking about four more years and costing several more hundreds of thousands of dollars, thereby eliminating any possibility of talking about economy and promptness in access to justice.

We feel that if the defendants had any interest in this evidence, they should have requested it at the right time – during the evidentiary phase, or at least not opposed or challenged it in its entirety, as they ended up doing. The right to request the production of evidence is born from an interest expressed on a timely basis, and the defendant not only did not express any interest in such proceedings, rather it opposed them vehemently, for which reason its request lacks any basis, since there is no right without an interest.

It is of extreme concern to us that this procedural practice by the defendant has become a recurrent strategy in Ecuadorian courts: the Ecuadorian judicial system could end up being thwarted by the financial superiority of one the parties. It has come to our knowledge that in a suit recently brought against the OCP – in which, as you may know – the same attorneys who are representing the defendant are advising the new defendants and have recommended that they request 92 judicial inspections, which constitutes irrefutable evidence of their unfair intent to try to use procedural institutions to evade justice.

However, in the case before us at this time, the defendant's attorneys apparently discovered this "strategy" late, for which reason it was not possible for them to make their own exaggerated request for evidence, instead, taking note of the benefit that they might gain compared financial advantage over the plaintiffs (by the undue prolongation of the lawsuit), are now seeking to exercise a procedural right of the

plaintiffs by requesting evidence that they previously (when they should have requested it) challenged as "unlawful" and "irrelevant."

You, Mr. President, are actually a witness to the truth of what we are saying: the plaintiff, trusting completely in the evidence already on file, convinced of the irrelevance of new inspections, and conscious of the principles of procedural economy, promptness and efficiency, has voluntarily decided to expressly waive her personal procedural right to conduct judicial proceedings that are exclusively in her procedural interest, and the defendant has requested that the same proceedings be conducted, which it opposed and challenged when it had the chance to request them, making it more than clear that it did not have any interest in them.

To better explain our argument, we should point out that in civil matters, procedural principles can receive a more specialized application, due primarily to the fact that Ecuadorian civil procedure is an adversary system, and in the adversary system, in contrast to the inquisitorial system, the parties have control over the evidentiary aspects of the lawsuit[3], that is, one of the aspects in which the adversary principle is manifested is in the production of evidence: the parties choose the evidence in which they are interested in order to prove their allegations. The Court can order the production of evidence *sua sponte* only in exceptional cases (118 Code of Civ. Proc.).[4]

In civil cases, it is up to the party who alleges a fact to prove it, as provided in Art. 113 of the Code of Civil Procedure, i.e., it is the responsibility of each party in the case to prove his allegations. The form and the evidence that will prove the allegations of a party are freely selected by each of them, who will present them in an independent written document that must be filed within the appropriate period of time. Subsequently, in the adversary system, the parties are responsible for moving the process forward, and, therefore, anyone who requests that the court take evidence or conduct a proceeding must also ask the court to do so, i.e., the party who timely requested that evidence be taken can then decide whether he or she will continue with producing such evidence. Therefore, it is clear that the party that timely requests evidence is not obligated to produce it, nor is the court obligated to order it, except based on a request by the person who asked for it at the appropriate stage in the proceeding.

The procedural system guarantees to the parties the right to evidence taken if they have requested it in a timely manner, but this right is based on the procedural interest shown by each party in each item of evidence during the evidentiary phase. Therefore, a party's right to request that an evidentiary proceeding be conducted results from the interest that the party has shown at the appropriate stage in the proceeding. If this interest is not expressed at the appropriate time, there is no right to request that an evidentiary proceeding be conducted. Only a party who expressed his procedural interest in evidence at the appropriate time has the right to request that the evidentiary proceeding be conducted, or can, if he has not made such request, waive his right, since a waiver affects only his interest.

With respect to evidence in court proceedings, we should note that only after it is legally obtained and admitted can it be part of the lawsuit, so that no party can allege his right to, or the benefits of, any evidence that has not been produced, since judicial evidence does not

[3] The contribution of evidence is one of the manifestations of the adversary system; others are: initiative, availability of material right, procedural impulse, delineation of the *thema decidndum* and contribution of the facts.

[4] 66 Lino Palacio.

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exist, as such, in the case until it is admitted, and before this there is only a request for evidence, which is not the same as judicial evidence. The right to request the procurement of requested evidence is granted only to the party, or parties, who expressed their interest in such evidence on a timely basis, and, therefore, no right can be asserted in this request for evidence, because this right is based on the procedural interest expressed on a timely basis.

As professionals knowledgeable in the law, we are alarmed that even despite the fact that these procedural principles are generally guaranteed for all lawsuits in Ecuador, and, also despite the provisions of the law and the holdings of the Supreme Court with regard to the waiver of means of defense, the plaintiff's waiver of a procedural right related solely to her interest has not been accepted. This is even more alarming if one considers that there is no procedural rule prohibiting such waiver, so often seen in other court cases, and, therefore, we should also remind you that such waiver is, indeed, a lawful and common process for those of us who practice law, since, as you know, there are many cases, both civil and criminal, in which not all evidentiary proceedings are ultimately conducted, if there is enough evidence to prove the cause of action, something that has never been doubted or questioned by Ecuadorian and international judges and justices.

To conduct a lawsuit according to the principles of economy, promptness and efficiency can be difficult in certain cases – particularly if there are constant attempts to abuse procedural institutions, but in the case before us, such difficulties do not exist. In response to any question as to the interpretation of the articles of the Code of Civil Procedure, we should turn to the procedural principles that are established in the Constitution and developed in scholarly writing, and that, in the words of legal scholar Dr. Lino E. Palacio, constitute interpretive instruments of inestimable value (Lino Palacio, 63).

We, the undersigned, are concerned that powerful business groups have discovered a path to *de facto* impunity in the Ecuadorian judicial system due to the failure to apply certain procedural principles that would enable them to do make any dispute into a multimillion dollar lawsuit lasting for several decades.

Based on the foregoing, we feel that the appropriate thing to do would be for you to accept the express waiver made by the plaintiff.

If necessary, we will receive any service in the Court Clerk's Office.

[signature]
Gustavo Larrea
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[signature]
Juana Sotomayor
Bar No. 2088 [Azuay?] Bar Assn. CAA

[signature]
Ramiro Avila
170594621.9

[signature]
Mario Melo
Bar No. 3448. [Pichincha?] Bar Assn. CAP

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[signature]
Patricio Hernández
170594621.9

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César Duque
Bar No. 882. [Chimborazo?] Bar. Assn. CHO

[signature]
Pablo de la Vega

[signature]
Bolivar Beltrán

Dr. Bolívar Beltrán G.
BAR NO. 5351 CAP

[signature]
[illegible name]
1040 CAP

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2951

[signature]
BAR NO. 9940

[signature]
BAR NO. Q. Bar Assn. CAQ

Seal: SUPERIOR COURT
OF NUEVA LOJA
OFFICE OF THE PRESIDENT
RECEIVED in Nueva Loja on the 21st
day
of July of 2006
at 9:15 a.m. in 5 copies
attached.
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CLERK

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