

**IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

**CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
CLAIMANTS,**

v.

**THE REPUBLIC OF ECUADOR,
RESPONDENT.**

CLAIMANTS' SUPPLEMENTAL MEMORIAL ON THE MERITS

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I. INTRODUCTION

1. On February 14, 2011, the Lago Agrio Court issued a US\$ 18.2 billion judgment against Chevron, based on the alleged environmental effects of a State-controlled Consortium in which a Chevron subsidiary held a minority interest over 20 years ago. That Judgment—the largest environmental-damage award in world history—is fraudulent and based on serious violations of due process and Ecuadorian law. It is the work of a handful of U.S. lawyers and consultants, in concert with Ecuadorian judicial and government officials, who manipulated a court system susceptible to corruption and political pressure. Ecuador’s courts and officials are thus willing accomplices of the Plaintiffs, their lawyers, and their shell organization (the Amazon Defense Front or “Frente”) in a multi-billion-dollar fraud against Claimants.

2. This Supplemental Memorial updates the facts of this dispute with events that have transpired since Claimants filed their Memorial on the Merits on September 6, 2010, and adds a claim for denial of justice under customary international law to the claims asserted in the Memorial on the Merits. Ecuador’s violations of the Treaty and international law are evidenced most clearly by the Republic’s conduct in the Lago Agrio Litigation and resulting Judgment, the appellate process leading to the first-level decision on appeal, and the overall deterioration of the judiciary, which has deprived Chevron of the ability to obtain a fair trial in Ecuador. New evidence confirms that:

- The Plaintiffs’ representatives ghostwrote portions of the Judgment issued by the Lago Agrio Court;¹
- Despite its statements to the contrary, the Judgment relies on the Plaintiffs’ fraudulent evidence, including the discredited Cabrera Reports;²
- The Government and the Frente, not the named Plaintiffs, will exercise control over Judgment proceeds through a trust scheme jointly orchestrated by the Court and the Plaintiffs;³
- Years before the Plaintiffs filed the Lago Agrio Litigation, their counsel signed a *quid pro quo* agreement with the Government, agreeing not to bring any claims

¹ See *infra* § II.A.1.

² See *infra* § II.A.2, 4.

³ See *infra* § II.B.

against Ecuador and Petroecuador in exchange for the Government’s assistance, and offering the Government assurances that it would receive or administer the Judgment’s proceeds;⁴

- Ecuador’s courts violated their own constitution, laws, and due-process obligations throughout the first-instance appellate process;⁵
- After the US\$ 18.2 billion Judgment was confirmed on appeal, two judges who presided over the Lago Agrio Litigation (including Judge Zambrano, who allowed the Plaintiffs to ghostwrite the Judgment in his name) were removed from their posts for misconduct that took place during Judge Zambrano’s tenure as a Lago Agrio judge;⁶
- President Correa directly pressured the Lago Agrio Court. The President “asked the attorney general to do everything necessary to win the trial” and had “asked his team to urgently work on the matter.”⁷ According to an email among the Plaintiffs’ representatives, President Correa “even said that he would call the [Lago Agrio] judge”;⁸ and
- The Government increased its control over the entire judiciary, issuing a Referendum allowing President Correa to control the judicial administrative council,⁹ transmitting an Executive memorandum holding judges personally liable for rulings against State interests,¹⁰ and engaging in abusive litigation against judges and the media in order to intimidate the judiciary into submitting to the Government’s will.¹¹

3. The evidence in this case proves that Ecuador has committed a denial of justice and various violations of Claimants’ rights under the BIT. Yet Claimants need not prove a denial of justice in order to prevail on their claims under the Treaty. The Treaty standards that form the partial basis of Claimants’ Memorial on the Merits (including the fair and equitable treatment clause and the effective means clause, among others) are distinct from—and less stringent than—the standards applicable to a denial of justice under customary international

⁴ See *infra* § II(C)(1)(a).

⁵ See *infra* § II(D)(1).

⁶ See *infra* ¶¶ 115-118.

⁷ **Exhibit C-1005**, Email from M. Yépez to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103690].

⁸ **Exhibit C-1005**, Email from M. Yépez to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103690].

⁹ See *infra* § II(E)(2).

¹⁰ See *infra* § II(E)(1).

¹¹ See *infra* §§ II(E)(3)-(4).

law.¹² Claimants' Treaty claims therefore stand on their own. Beyond Ecuador's obligations under the Treaty, however, the State through its various organs also has violated customary international law by denying justice to Chevron, and in so doing has breached its obligations to Claimants under the BIT as well.¹³

II. FACTUAL BACKGROUND

A. The Lago Agrio Judgment is Fraudulent

4. The Lago Agrio Judgment is the latest manifestation of the fraudulent scheme perpetrated by the Plaintiffs, the Government, and the Court acting in concert. As set forth in more detail below, the Lago Agrio Judgment:

- (1) Is the ghostwritten work of the Plaintiffs' lawyers and consultants, echoing their conduct in ghostwriting the supposedly independent Cabrera Reports;
- (2) Relies on the Plaintiffs' false and fraudulent data, including that of the tainted Cabrera Reports;
- (3) Adopts the Plaintiffs' biased and bad-faith factual and legal analysis;
- (4) Awards unfounded damages (without the support of scientific data) in amounts that vastly exceed any rational measure of costs; and
- (5) Imposes an additional US\$ 8.6 billion in punitive damages (that were never requested and that do not exist under Ecuadorian law) if Chevron failed to issue a public apology within 15 days of the Judgment.¹⁴

¹² As the *Commercial Cases Dispute* Tribunal held, “[a] failure of domestic courts to enforce rights ‘effectively’ will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law.” **CLA-47**, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, Ad hoc-UNCITRAL, Partial Award on Merits, Mar. 30, 2010, ¶ 244 (hereinafter “*Chevron Partial Award on Merits*”) (Karl-Heinz Böckstiegel (President); Charles N. Brower; and Albert Jan Van den Berg). “Investors that are guaranteed ‘effective means’ are promised a mechanism in which their rights can be meaningfully enforced, vindicated, or defended during the proceedings at issue, and not merely a remedy to compensate for the final deprivation of the rights they once held. When a State fails to provide such a mechanism, it is in breach of the Treaty immediately. This interpretation is supported by the plain language of the Treaty, the intent of its drafters, the clause’s usage in previous international arbitrations (including the *Commercial Cases Dispute* between these same parties), and analyses by international law experts.” *See* Claimants’ Memorial on the Merits, ¶ 460.

¹³ **Exhibit C-279**, U.S. Ecuador BIT. Article II(3)(a) provides, “[i]nvestment . . . shall in no case be accorded treatment less than that required by international law.”

¹⁴ The first-instance appellate decision restated and affirmed this penalty, setting another deadline for Chevron to issue an apology, which has since passed. **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012 at 4:43 p.m. (hereinafter “*Lago Agrio First-Instance Appellate Decision*”), at 11.

The factual and legal illegitimacy of the Lago Agrio Judgment is clear from the arbitrary decisions and bias shown in the Judgment itself, as well as by hard evidence of the fraud and government collusion that produced this unprecedented decision.

1. *The Plaintiffs Colluded With the Court to Draft the Judgment*

5. Forensic evidence and the Plaintiffs' own communications prove that the Plaintiffs' representatives ghostwrote at least parts of the Lago Agrio Judgment. The Judgment copies—verbatim or nearly verbatim—numerous paragraphs and pages from Plaintiffs' internal documents that were never submitted into the Court record (or even publicly revealed), including various errors and idiosyncrasies in the Plaintiffs' unfiled work product. Forensic evidence of the Judgment's content, the Judgment's timing in relation to the close of the evidentiary period, and the Plaintiffs' stated intent to write the Judgment all prove that someone other than Judge Zambrano (with access to the Plaintiffs' internal files) drafted the Judgment, thereby consummating the Lago Agrio fraud.

6. *First*, scientific evidence proves that the authors of the Judgment relied on (and copied verbatim) the Plaintiffs' internal legal and technical documents, which were never submitted into the court record or made public.¹⁵ Portions of several of the Plaintiffs' internal documents, memoranda and draft briefs appear word-for-word in the Judgment, including among others: (1) the "Fusión Memo"—a memorandum prepared by the Plaintiffs' lawyers regarding their incorrect theory about the relationship between Chevron and Texaco; (2) a draft *alegato* (a written closing argument) that the Plaintiffs never filed; and (3) an "index summary," which is a collection of spreadsheets created by the Plaintiffs' legal team listing documents in the record.

7. Dr. Robert Leonard, Professor of Linguistics and a qualified expert in the field, has concluded that the Lago Agrio Judgment contains passages from the Plaintiffs' internal work product that were never filed in the record.¹⁶ In his expert report, Dr. Leonard explains the

¹⁵ Although Ecuador has submitted a report from Dr. Ronald Butters, speculating that sources in the Lago Agrio trial court record might be able to explain the significant overlap between the Judgment and the Plaintiffs' unfiled work product, that speculation is wrong. Respondent's Letter to the Tribunal, Jan. 9, 2012, at 11. Dr. Patrick Juola, an expert in computational and forensic linguistics, has concluded—after performing a computational analysis of the entire record—that "the overall similarity between Sentencia [the Judgment] and the LAP's [Lago Agrio Plaintiffs'] Work Product Documents cited, including the Memo Fusion, could not have derived from legitimate copies from secondary sources in the Lago Agrio court record." **Exhibit C-1007**, Declaration of Patrick Juola, Ph.D., Dec. 20, 2011, at 5.

¹⁶ Expert Report of Robert A. Leonard, Ph.D., January 5, 2012 (hereinafter "Leonard Expert Report") at 12.

process by which he compared the language in the Judgment with other documents created by the Plaintiffs, looking for matching or similar word strings that are not otherwise explainable as common phrases or coincidences.¹⁷ In both English and Spanish, word bundles of more than six words are exceedingly rare, meaning that when long strings of words are found to be exactly (or nearly) the same in two texts, the likelihood of plagiarism greatly increases.¹⁸ As Dr. Leonard notes, “current research ... suggests that matches of strings of even 7 words must be treated as highly suspect for plagiarism, and strings of words longer than 7 are of course even more highly suspect.”¹⁹

8. Dr. Leonard identifies several instances of verbatim copying from the Plaintiffs’ unfiled documents in the Judgment, including: (i) identical or nearly identical strings of more than 90 words in the final Judgment and the “Fusión Memo;” (ii) the idiosyncratic use of citations and reference shorthand in the “Fusión Memo;” (iii) the verbatim copying of out-of-place numerical ordering from the “Fusión Memo;” (iv) several identical, lengthy word bundles from the Plaintiffs’ unfiled draft *alegato* that do not appear in the Plaintiffs’ filed *alegato*; and (v) repeated errors and identical word bundles from the Plaintiffs’ unfiled index summary, which they used to track filings made during the Lago Agrio Litigation.²⁰

9. The following chart (one of numerous examples in Dr. Leonard’s report) illustrates how a portion of the Judgment copies verbatim from the Plaintiffs’ unfiled *Fusión Memo*:²¹

Fusion Memo: page 8	Judgment: page 24
<p>Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están</p>	<p>Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están</p>

¹⁷ Leonard Expert Report, at 11-12.

¹⁸ Leonard Expert Report, at 5-7.

¹⁹ Leonard Expert Report, at 7.

²⁰ Leonard Expert Report, at 12-13.

²¹ In this example, bolding indicates identical or nearly identical matches between the documents. Leonard Expert Report, Ex. 1, at 14.

<p>directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Las decisiones importante pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc.,</p>	<p>directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante, o incluso llega desaparecer. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Tanto las decisiones importantes como las triviales pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc.,</p>
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As Dr. Leonard notes, the numerous instances of word strings “in the range of 20, 30, 40 words and more, arranged in the exact same order” indicate “direct copying.”²² Dr. Leonard concludes “to a reasonable degree of scientific certainty” that “the co-occurrence of language between parts of the [Judgment] and the Lago Agrio Plaintiffs’ unfiled work product is due to common authorship.”²³

10. Professor Gerald R. McMenamín, Professor Emeritus of Linguistics, independently confirmed that Judge Zambrano did not write the Judgment. Professor McMenamín analyzed the language of the Judgment and compared it with 36 other writings by Judge Zambrano on the basis of “seven patterned and re-occurring markers of writing style,” including the use of headings, dollar amounts, date format, spacing, punctuation, ellipsis format, and capitalization.²⁴ Noting that the use of all seven style markers in the aggregate is sufficient to identify a given author, Professor McMenamín concludes that it is “highly probable that the [Judgment] has multiple authors”; and that “it is highly probable that Judge Zambrano did not author a significant amount of the [Judgment].”²⁵

11. In comparing the Judgment to 36 other orders and judgments known to have been written by Judge Zambrano, Professor McMenamín discovered a striking contrast between the writing styles. For example, in Judge Zambrano’s known writings, every single time (100%) an ellipsis appeared, it appeared without brackets (“ ... ”). But in the Judgment, only 30% of the

²² Leonard Expert Report, at 8.

²³ Leonard Expert Report, at 12.

²⁴ Expert Report of Gerald R. McMenamín, Mar. 14, 2012 (hereinafter “McMenamín Expert Report”) at 4.

²⁵ McMenamín Expert Report at 1.

ellipses appear without brackets.²⁶ In another example, Judge Zambrano’s known writings use a year form with a period (“2.009”) 79.2% of the time, while only 0.4% of the year forms in the Judgment contain such a period.²⁷ Judge Zambrano used a period outside closed-quotes (such as “word”.) 95.5% of the time in his known writings. But in the Judgment, the author followed this style only 55.9% of the time.²⁸

12. *Second*, the Judgment relies on a data compilation developed by the Plaintiffs but not shared with Chevron or placed into the Court record. Forensic evidence performed by Michael Younger, Senior Director of Digital Forensics at Stroz Friedberg, established that the “data points cited in the Sentencia [Lago Agrio Court Decision] were copied, cut-and-pasted, or otherwise taken directly from the Selva Viva Data Compilation”²⁹—a database controlled by the Plaintiffs that is not part of the case record. As Claimants have informed the Tribunal, this database is controlled both by a company called Selva Viva (a pass-through organization created by the Plaintiffs’ lawyers to fund the litigation) and by the Frente (the named beneficiary of all damages awarded in the Lago Agrio Judgment).³⁰ It now appears that the Selva Viva Data Compilation is the source for portions of the Judgment, even though that database is not in the court record, and the Judgment purported to rely only on evidence in the record.³¹

13. Mr. Younger’s conclusion that the Sentencia [Lago Agrio Court Decision] “was not authored independent of the unfiled Selva Viva Data Compilation” is based on otherwise

²⁶ McMenamin Expert Report at 4.

²⁷ McMenamin Expert Report at 4.

²⁸ McMenamin Expert Report at 4.

²⁹ Expert Report of Michael L. Younger, Dec. 21, 2011 (hereinafter “Younger Expert Report”), at 19.

³⁰ Claimants first described the Selva Viva Database in their letter to the Tribunal dated September 2, 2010. Additional evidence shows that the Ecuadorian Ministry of Environment may have funded the Selva Viva Database through a grant of US\$ 185,000 to the Frente for a project entitled “Management of Information Regarding the Socio-Environmental Problems of the Areas Affected by Petroleum Activity in Sucumbíos and Orellana.” **Exhibit C-1135**, Cooperation Agreement Between the Management Team Unit of the Environmental and Social Remediation Project (“UEG-PRAS”) of the Ministry of the Environment and The Amazon Defense Front “FDA” for Carrying Out the Project “Management of Information on the Socio-Environmental Problems of the Areas Affected by Petroleum Industry Activity in Sucumbíos and Orellana,” Aug. 15, 2008. The contract between the Government and the Frente provides that the scope of the project “will be within the current area of operations of Petroecuador former areas of operation of CEPE and Texaco.” *Id.* While the public purpose of this project remains unclear, it seems likely that the “information” gathered by the Frente regarding the Consortium area eventually formed a basis for the Lago Agrio Judgment.

³¹ **Exhibit C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, Feb. 14, 2011, at 8:37 a.m. (hereinafter “Lago Agrio Judgment”), at 99, 100, 105, 112, 122, 160-62, 179.

inexplicable similarities between the Judgment and the Selva Viva Data Compilation.³² For example, the Judgment found “alarming” levels of mercury present at certain sites. But the data in the official record shows those sites as having *no* mercury above detectable limits. The error came from the Plaintiffs’ internal database, which had separated the “less than” symbol from the sampling results (*e.g.*, “< .07”), so that what was a negative result looked as if it were positive. Another error is that the Judgment claims that results for certain samples are in milligrams per kilogram (mg/kg) when they are really in *micrograms* per kilograms (µg/kg), to arrive at contaminant levels a thousand times higher than the samples actually showed. Again, the source of this error is mistakes in the Selva Viva Data Compilation in which the results were mislabeled.³³ In another example, most of the sampling results on pages 104-112 of the Judgment end with the suffix “_sv” or “_tx,” which appear nowhere in any of the lab results or judicial inspection reports in the record.³⁴ But a majority of the sampling results in the Selva Viva Data Compilation do contain such “_sv” or “_tx” suffixes.³⁵

14. Not only is there no legitimate reason for Judge Zambrano to have had access to this non-public information, but the Judgment’s actual reliance on the Selva Viva Data Compilation contradicts its assertion that it relied on data properly filed in the record.³⁶ Moreover, the Plaintiffs have offered no substantive rebuttal to the expert testimony that they had a hand in drafting the Judgment.³⁷ In a superficial attempt to validate the Judgment, the appellate court later wrongly affirmed that the Judgment relied on data filed in the record.³⁸

15. *Third*, the timing of the Judgment reveals that it could not have been written by Judge Zambrano. After issuing *autos para sentencia* on December 17, 2010, which closed the evidentiary record and signaled the clerk to submit the record to the judge for consideration,

³² Younger Expert Report, at 11.

³³ Younger Expert Report, at 13-14.

³⁴ Younger Expert Report, at 11.

³⁵ *Id.*

³⁶ **Exhibit C-931**, Lago Agrio Judgment, at 99, 100, 105, 112, 122, 160-62, 179.

³⁷ Having no valid response, the Plaintiffs have instead lodged personal attacks against Chevron’s witnesses, calling them “mercenaries” whose “work has been to plant doubt in every case around the world whose purpose is to put the wellbeing of the masses above special economic interests.” **Exhibit C-1136**, Plaintiffs’ Motion to the Lago Agrio Court, Dec. 6, 2011, at 4:42 p.m., at 1-2.

³⁸ The appellate court gravely erred in its analysis of the Judgment’s purported use of data in the record, as discussed in detail *infra* § II(D)(2). **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 11 (Eng.).

Judge Zambrano admitted that he had yet to read much of the record.³⁹ Just two months later, the Lago Agrio Court issued a single-spaced judgment of 188 pages, meaning that Judge Zambrano would have had to review and analyze a record of over 237,000 pages, in addition to drafting the entire Judgment.⁴⁰ According to expert testimony, “given the limitations on human readers’ processing capabilities,” such a review in an eight-week period is “impossible.”⁴¹ Moreover, 15 days before issuing the Judgment, Judge Zambrano publicly stated that he had reviewed about 75% of the record, meaning that he had more than 50,000 pages left to read.⁴² Ecuadorian law requires the judge to consider the evidence of a case “in its entirety,” and to express in the judgment an evaluation of all evidence produced.⁴³ The Lago Agrio Judgment reflects no such consideration, and is instead the product of bias, fraud, and the political pre-determination of Chevron’s liability.

16. *Fourth*, internal communications beginning in August 2008 show the Plaintiffs secretly planning to draft the Judgment for the Court, stating that they felt the need to “prepare the court to issue a quick Judgment and in such a way that it can be enforced in the U.S. before appeals in Ecuador” and confirming that they soon would “start the work with the new judges.”⁴⁴ Newly-revealed documents from the year 2009 further demonstrate the Plaintiffs’ ongoing plan to draft the Judgment:

- Steven Donziger’s “Strategic Plan for 2009/Ecuador” stated: “speed to finish, deal with release, number, *reasoned opinion*, relationship to alegato, final order for U.S. enforcement, ask for bond and interest to run.”⁴⁵

³⁹ **Exhibit C-896**, *Judgment in Chevron Case will come in 2011*, EXPRESO, Dec. 18, 2010; *see also* Claimants’ Letter to the Tribunal, Jan. 14, 2011.

⁴⁰ **Exhibit C-919**, *Ecuador Judge Works Marathon Hours on Chevron Case*, REUTERS, Jan 31, 2011.

⁴¹ **Exhibit C-1036**, Expert Report of Dr. Keith Rayner, June 30, 2011 (concluding that, based on reading-comprehension rates, such a review would be impossible in the time allotted).

⁴² **Exhibit C-919**, *Ecuador Judge Works Marathon Hours on Chevron Case*, Reuters, Jan 31, 2011.

⁴³ **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 115 (“Evidence must be evaluated as a whole, in accordance with the rules of good judgment [*sana crítica*], without prejudice to the solemnities for certain acts to exist or be valid, as established by the substantive law. In his ruling the judge must state his evaluation of all the evidence produced.”).

⁴⁴ **Exhibit C-993**, Email exchange between P. Fajardo and S. Donziger, Aug. 9, 2008 [DONZ00047253].

⁴⁵ **Exhibit C-1137**, Email from S. Donziger to himself, Jan. 5, 2009 [DONZ00049360] (emphasis added).

- Consistent with this “Strategic Plan,” in June 2009, Fajardo stated that he was giving one of the Plaintiffs’ legal interns “a research assignment for our legal alegato *and the judgment*, but without him knowing what he is doing.”⁴⁶
- Less than two weeks later, on June 18, 2009, Fajardo circulated an internal email attaching the Ecuadorian case *Delfina Torres Vda. de Concha v. Petroecuador* and stating: “Friends, this is the judgment in the Viuda-Petroecuador case. The arguments by the magistrates are very interesting, I think they serve us well for our *alegato and . . .* Worth reading.”⁴⁷ Fajardo’s use of an ellipsis appears to be a veiled reference to the judgment, given his reference only two weeks earlier to the “alegato and the judgment.”⁴⁸ (The Judgment went on to discuss the *Torres de Concha* case at length).⁴⁹
- That same day, Fajardo sent an internal email saying: “Colleagues, take a look at this decision. I think it works very well for us.”⁵⁰ He then copied into the body of the email a short memo from a not-yet identified third party and a “transcri[ption]” of part of the published Ecuadorian court decision in *Andrade v. CONELEC*.⁵¹ That transcription contains numerous mistakes not found in any published version of the court opinion itself.⁵² The Judgment repeats these transcription errors verbatim, as well as a citation error that Fajardo made.⁵³
- On June 19, 2009, the Plaintiffs’ lawyers held a “key” meeting to outline details of the Judgment, including the amount of damages to be awarded.⁵⁴ According to

⁴⁶ **Exhibit C-995**, Email from P. Fajardo to S. Donziger, June 5, 2009 [DONZ00051338] (emphasis added).

⁴⁷ **Exhibit C-1138**, Email from P. Fajardo to S. Donziger and others, June 18, 2009 [DONZ00051506] (emphasis added, ellipsis in original).

⁴⁸ **Exhibit C-995**, Email from P. Fajardo to S. Donziger, June 5, 2009 [DONZ00051338]. When asked at his deposition whether someone had instructed Fajardo between his June 5, 2009 “alegato and the judgment” email and his June 18, 2009 “alegato and . . .” email to stop referring to the judgment in correspondence, Donziger responded, “I don’t remember.” **Exhibit C-1003**, S. Donziger Deposition at 4773:21-4774:6, July 19, 2011.

⁴⁹ **Exhibit C-931**, Lago Agrio Judgment, at 74-76, 80-88.

⁵⁰ **Exhibit C-997**, Email from P. Fajardo to S. Donziger et al., dated June 18, 2009 at 2:27 p.m. [DONZ00051504].

⁵¹ **Exhibit C-997**, Email from P. Fajardo to S. Donziger et al., dated June 18, 2009 at 2:27 p.m. [DONZ00051504].

⁵² Compare **Exhibit C-999**, highlighted Email from Pablo Fajardo to Steven Donziger et al., dated June 18, 2009 at 2:27 p.m.; with **Exhibit C-998**, highlighted Copy of *Andrade v. CONELEC*.

⁵³ Compare **Exhibit C-997**, highlighted Email from Pablo Fajardo to Steven Donziger et al., dated June 18, 2009 at 2:27 p.m., and **Exhibit C-998**, highlighted Copy of *Andrade v. CONELEC*; with **Exhibit C-1000**, highlighted Excerpt from Page 186 of the Judgment, showing overlap with the Fajardo Email and variation from the published *CONELEC* case.

⁵⁴ **Exhibit C-996**, Email exchange between S. Donziger and P. Fajardo, June 16, 2009 [DONZ00066328].

Fajardo, they discussed “all of the outcome of the case and what to do, how much money to put in, how to distribute the items and everything.”⁵⁵

- Later that summer, Fajardo internally circulated more documents for use in the Judgment and again used an ellipsis after a reference to the alegato: “[P]lease find below a series of links and text citations related to our case. Some of them are very interesting and, as a matter of fact, will help us with the *alegato work and* . . .”⁵⁶
- In August 2009, Joseph Kohn of Kohn, Swift & Graf, the U.S. law firm that was then funding the Plaintiffs, wrote to Donziger about “developing a judgment that will be enforceable in the US and elsewhere.”⁵⁷
- The minutes of a September 2009 meeting between Donziger and Kohn, Swift & Graf attorneys refer to the “Creation of Final Order,” including subheadings for “Trust or 2 phases”—a reference to alternative ways to structure the award of damages—and “Kohn, Swift to determine precedence [sic] for this in other countries.”⁵⁸ A Kohn, Swift & Graf attorney incorporated those minutes into an “Ecuador Task List,” which stated that “KSG will continue to discuss and think about *how to structure the judgment*.”⁵⁹
- In October 2009, sought to hire a new attorney to assist in “organizing the office’s legal information for the alegato and *the other project*.”⁶⁰ As with their prior use of an ellipsis, “the other project” seems to refer to the judgment.
- In December 2009, Fajardo reassured Donziger that he was “99.99 percent sure” that the “plan for the judgment” would be fulfilled, but added that he could not share any details by email.⁶¹

The Plaintiffs never publicly submitted a proposed judgment to the Court.⁶² Fajardo’s initial linkage of the work for the “alegato and the judgment,” followed by his e-mails noting the

⁵⁵ **Exhibit C-996**, Email exchange between S. Donziger and P. Fajardo, June 16, 2009 [DONZ00066328].

⁵⁶ **Exhibit C-1140**, Email from P. Fajardo to S. Donziger and others, July 26, 2009 [DONZ00051937] (emphasis added, ellipsis in original).

⁵⁷ **Exhibit C-994**, Email from J. Kohn to S. Donziger et al., Aug. 7, 2009 [WOODS-HDD-0148433].

⁵⁸ **Exhibit C-1141**, Email from L. Garr to S. Donziger and A. Woods, Sept. 10, 2009 [WOODS-HDD-0161016-21].

⁵⁹ **Exhibit C-1071**, Email from J. Solomon to J. Kohn et al., Sept. 11, 2009 [DONZ00100266-67] (emphasis added).

⁶⁰ **Exhibit C-1142**, Email from P. Fajardo to S. Donziger and others, Oct. 25, 2009 [DONZ00052960] (emphasis added).

⁶¹ **Exhibit C-1001**, Email from P. Fajardo to S. Donziger, Dec. 29, 2009 [DONZ00053642].

⁶² **Exhibit C-1003**, S. Donziger Deposition, July 19, 2011, at 4758:16-4759:3 (Donziger conceded that the Plaintiffs “never publicly on the record submitted a proposed judgment in Lago Agrio.”).

“alegato and ...” demonstrate that Plaintiffs’ counsel knew that their drafting of the Judgment was improper and had to be kept secret.

17. Although the Government has attempted to defend the Lago Agrio Judgment as a valid, Court-issued decision,⁶³ the evidence reveals that it was written by Plaintiffs’ counsel and merely secretly adopted by the Court. This “judgment” is the foreordained conclusion of the fraud orchestrated by the Plaintiffs and carried out by the Republic of Ecuador through its courts.

2. *The Judgment’s Legal Analysis Evidences Bias and Bad Faith*

18. The Judgment exhibits a number of serious legal flaws that are attributable not only to the Plaintiffs’ ghostwriting, but also to the bias and bad faith of the Court. First, the Judgment fails to take into account Petroecuador’s role during and after the former Consortium, even though Petroecuador was the majority owner of the Consortium since 1976 (and sole owner and operator since 1992), has admitted its responsibility for cleaning up all remaining environmental liabilities in the former Concession, and has remediated or is remediating more than 200 of the 370 pits in the former Concession. Second, the Lago Agrio Court had no jurisdiction over Chevron, which never operated in Ecuador and cannot be held liable for the activities of its indirect subsidiary (which it acquired years after the Consortium had ended). Finally, the Plaintiffs’ environmental claims already have been settled.⁶⁴ The Government of Ecuador, along with all the relevant local governments, released TexPet and its affiliates from all public environmental liability in exchange for tens of millions of dollars of remediation and socioeconomic work—the identical relief sought for a second time by the Plaintiffs. These departures from established legal principles demonstrate that the Judgment is based on external political, social, and economic forces—not the law.

a. *Petroecuador’s Operations, Liability, and Remediation*

19. Ecuador had an “uncontested role ... in authorizing, directing, funding, and profiting from” the Consortium, and Petroecuador exerted “primary control of it throughout

⁶³ Ecuador affirmatively stated, in a recent § 1782 filing before a federal court in Florida, that it seeks discovery from TestAmerica (formerly Severn Trent Laboratories, which provided technical assistance to Chevron in the Lago Agrio Litigation) “to aid the Republic in defending the validity of the *Lago Agrio* judgment.” **Exhibit C-992**, *In re Application of Republic of Ecuador et al.*, Case No. 4:11-mc-00088-RH-WCS, Ecuador’s Application for an Order under 28 U.S.C. § 1782, Oct. 20, 2011 (N.D. Fla.).

⁶⁴ Claimants’ Memorial on the Merits, §§ II(C)(3)-(4), II(G)(1).

much of the relevant time period.”⁶⁵ Petroecuador joined the Consortium in 1974, became the majority owner in 1976, and took over as sole operator in 1990.⁶⁶ For the past two decades, Petroecuador—not TexPet—has operated the oil facilities that the Judgment orders Chevron to pay to remediate.

20. Chevron presented the Lago Agrio Court with the following, overwhelming evidence of Petroecuador’s liability for environmental conditions observed in the former Concession:

- Beginning in 1990, when Petroecuador took over Consortium operations, it expanded its oil drilling and production program. Between July 1990 and March 2011, Petroecuador drilled more than 520 new wells in the former Concession.⁶⁷
- An audit conducted in 1992 (just two years after Petroecuador had taken over Consortium operations) concluded that Petroecuador operations between 1990 and 1992 had resulted in hydrocarbon impacts to almost 60,000 cubic meters of soil in the former Concession, and that Petroecuador operations from 1990 to 1992 were responsible for more than 70% of all the hydrocarbon-impacted soil observed at the former Consortium well sites.⁶⁸
- Independent news media reports that between 1992 and 2009, Petroecuador had spilled roughly 4.6 million gallons of crude oil into the environment, including into rivers and waterways.⁶⁹
- Even though TexPet provided Petroecuador funding and equipment to re-inject produced water rather than discharge it to local streams and rivers, and completed “the construction of treatment and injection plants for produced water” at Petroecuador facilities,⁷⁰ Petroecuador still discharged 394 million barrels of

⁶⁵ **Exhibit C-10**, *Aguinda et al. v. Texaco*, No. 93-CIV-7527, 142 F. Supp. 2d 534, 551 (S.D.N.Y. 2001).

⁶⁶ **Exhibit C-1144**, Certificate of Delivery and Acceptance of the Petroecuador-Texaco Consortium Operations of Nov. 25, 1992, filed Apr. 27, 2004 at 2:38 p.m.

⁶⁷ **Exhibit C-1145**, I.H.S. Report, Mar. 2011; **Exhibit C-1146**, Attachment B of the Report *Environmental Impacts Related to Petroecuador’s Defective Operating Practices*, attached as Appendix A to Chevron’s Rebuttal to the first Barros Report filed Jan. 14, 2010 at 5:55 p.m. (hereinafter “Petroecuador Impacts Report”).

⁶⁸ **Exhibit C-12**, Fugro-McClelland, Final Environmental Field Audit for Practices 1964-1990, Oct. 1992, at 5-4 (Table 5-1).

⁶⁹ See **Exhibit C-1147**, Petroecuador Impacts Report, Attachment H, filed as part of Appendix A to Chevron’s Rebuttal to the first Barros Report, filed on Jan. 14, 2010, at 5:55 p.m. (register of spills in the former Concession from 1992 to 2009).

⁷⁰ **Exhibit C-53**, Final Certification between the Republic of Ecuador, Petroecuador, PetroProduccion and TexPet, Sept. 30, 1998, at II.1.

produced water to surface streams and rivers in the former Concession between 1990 and 2007.⁷¹

- Since 1992, Petroecuador has dug hundreds of unlined pits at well sites and “pit farms” around the former Concession, transported drilling wastes from new wells to the pit farms, and disposed of the drilling waste in those pits.⁷²
- Petroecuador repeatedly has confirmed its responsibility to remediate its share of pre-1990 Consortium operations and all post-1990 oil operations.⁷³ Most recently, on December 14, 2011 Petroecuador’s general manager, Marco Calvopina, admitted that “[t]he pollution is in areas assigned to us and we’ve got the obligation to clean them up.”⁷⁴

21. Despite the undeniable impact of Petroecuador’s operations and its admissions of responsibility, the Lago Agrio Court faced serious pressure from the Government and the Plaintiffs to find against Chevron, and Chevron alone. Several high-ranking officials, including

⁷¹ Expert Opinion of John A. Connor, P.E., P.G., B.C.E.E., regarding Remediation Activities and Environmental Conditions in the Former Petroecuador-Texaco Concession, Oriente Region, Ecuador, Sept. 3, 2010 (hereinafter “J. Connor Expert Report”), ¶ 40, fig. 10.

⁷² See, e.g., **Exhibit C-1148**, Judicial Inspection Acta, Auca 19, July 24, 2009; **Exhibit C-1149**, Excerpt from Alcance de la Reevaluation de Auca, Aug. 2011, at 319; **Exhibit C-1150**, Excerpt from Reevaluación del Diagnóstico Ambiental y Plan de Manejo Ambiental del Área Sacha, 2011, Envirotec Ingeniería, Ambiente y Desarrollo Cia. Ltda. (all demonstrating Petroecuador’s continuing use of unlined pits).

⁷³ **Exhibit C-61**, *Petroecuador Special Supplement: Petroecuador will eliminate 264 contaminated pits in the Amazonia*, EL COMERCIO, Oct. 5, 2006 (“Through a 1995 agreement between the Ecuadorian State and Texaco, the company started an Environmental Remediation Plan in order to correct the effects of its operations by remediating 165 pits. The State owned PETROECUADOR, through its subsidiary Petroproduccion, continues with the cleanup of the remaining 264 pits which were not treated by Texaco.”); see also **Exhibit C-1151**, Official Letter No. 674 – SPA – DINAPA – CSA – 705769, from the Office of the Assistant Secretary of Environmental Protection (DINAPA) of the Ministry of Energy and Mines, to the President of the Superior Court of Nueva Loja, Nov. 14, 2007 (“The objective of PEPDA is to eliminate all of the contaminated pits within their areas of operation . . . [T]he project has two basic components, which are: the elimination of the sources of contamination and the recovery of [weathered] crude. The first case deals with the pits with crude and other contaminants, which have been catalogued as Environmental Liabilities that form a part of the environmental policy of the National Government”); **Exhibit C-58**, Testimony of Manuel Muñoz, before the National Congress, Extraordinary Session of the Permanent Specialized Commission on Health, Environment and Ecological Protection, May 10, 2006, appearance of Congress, submitted as evidence during the Judicial Inspection of Auca 1, filed Nov. 15, 2006, at 9:30 a.m. (confirming that TexPet “completed the remediation of the pits that were their responsibility . . . but Petroecuador, during more than three decades, ha[s] done absolutely nothing with regard to those that were the [state-owned] company’s responsibility to remediate”); **Exhibit C-1152**, Victor Gómez, *Ecuador will clean up areas in \$18 bln Chevron case*, REUTERS, Dec. 14, 2011.

⁷⁴ **Exhibit C-1152**, Victor Gómez, *Ecuador will clean up areas in \$18 bln Chevron case*, REUTERS, Dec. 14, 2011.

the Attorney General, publicly signaled to the Court that “the Correa administration’s position in this case is clear: The pollution is [the] result of Chevron’s actions and not of Petroecuador.”⁷⁵

22. From the outset, Chevron argued that the Lago Agrio Litigation should not be permitted to continue without the inclusion of the Government or Petroecuador.⁷⁶ Yet Chevron was prevented from impleading Petroecuador because the 1999 Environmental Management Act (the “1999 EMA”) did not allow third-party impleading—just one of several reasons that the verbal-summary procedure employed by the Court was inadequate for a case involving complex environmental claims, multiple parties, and a lengthy evidentiary phase.⁷⁷

23. Chevron nonetheless informed the Court of the following facts regarding Petroecuador’s inventory of oil field pits in the former Concession and its ongoing remediation of those pits:

- As of 2007, Petroecuador had identified a total of 370 pits in the former Concession that required remediation;⁷⁸
- At least 26 of those pits have received certification from Ecuador’s Environmental Agency (“DINAPA”) approving Petroecuador’s completed pit

⁷⁵ **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008; **Exhibit C-331**, *Attorney General Diego Garcia: the Ecuadorian Government did not Contribute to Environmental Damage Caused by Chevron*, ECUADORINMEDIATO, May 6, 2010.

⁷⁶ **Exhibit C-72**, *Lawsuit for Alleged Damages filed before the President of the Superior Court of “Nueva Loja,” in Lago Agrio, Province of Sucumbíos; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbíos Province*, Superior Court of Nueva Loja, Oct. 21, 2003, (hereinafter “Chevron’s Answer to the Lago Agrio Complaint”) at 36 (“[I]t is illogical to imagine [Petroecuador] had no effect on the alleged damage and ill-effects that are the subject of the lawsuit by Maria Aguinda et al. ... Thirteen years have passed since the change of Operator in the hydrocarbon fields of the Consortium and virtually no techniques have been deemed to cause the effects noted in the lawsuit and therefore changed. This is a basic fact that must be considered by you, Mr. President, since it means that any decision you eventually make regarding said operating techniques should dearly separate the events occurring before June 30, 1990, from those over the last 13 years in which the operation of the areas that belonged to the Consortium have continued ...”); *id.* at 37 (emphasis added) (“[I]t is undoubted, Mr. President, that the Releases I referenced in this number, meant that the Government of Ecuador and PETROECUADOR assumed the installations and deposits that belonged to the Consortium in the state in which they were found after the remediation work executed by TEXPET and accepted completely by said Entities. Therefore, any claim regarding this matter should be directed against the Ecuadorian Government and PETROECUADOR.”).

⁷⁷ See Claimants’ Memorial on the Merits, ¶ 176; **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 828 (governing the verbal summary procedure).

⁷⁸ **Exhibit C-210**, Ernesto Baca, Response to Mr. Cabrera Regarding His Evaluation of PetroEcuador’s Pit Remediation Program (PEPDA), Sept. 5, 2008; **Exhibit C-472**, PEPDA 2007 Annual Report, attached as Annex A to Chevron’s Motion dated Sept. 15, 2008 at 2:14 p.m.; **Exhibit C-1153**, PEPDA 2008 Annual Report, Jan. 9, 2008 at 16.

remediation,⁷⁹ and at least another 104 pits have been remediated and are awaiting DINAPA certification;⁸⁰

- DINAPA approved Petroecuador's remediation of these pits to a standard of 2,500 mg/kg or 4,000 mg/kg of Total Petroleum Hydrocarbons (TPH) in soil, the petroleum cleanup standards set by Ecuadorian law (DE 1215) for agricultural and industrial land respectively;⁸¹
- Petroecuador is in the process of remediating 72 other pits, for a total of 202 out of 370 pits that either have been reported as fully remediated or undergoing remediation;⁸² and
- Petroecuador's own cost data indicates that it had budgeted approximately US\$ 85,000 per pit for the 370 pits that required remediation, and was actually

⁷⁹ *Id.*

⁸⁰ **Exhibit C-472**, PEPDA 2007 Annual Report, attached as Annex A to Chevron's Motion dated Sept. 15, 2008 at 2:14 p.m.; **Exhibit C-1153** PEPDA 2008 Annual Report, Jan. 9, 2008 at 18; **Exhibit C-1154**, 2003 Environmental Audit of Petroproduccion's Oil Field Operations, attached as Annex G.3 to Chevron's Motion filed Jan. 29, 2010, at 3:30 p.m.

⁸¹ **Exhibit C-1155**, Chevron Motion, filed Sept. 19, 2011, at 1:15 p.m., at 9-11; **Exhibit C-1156**, Bioremediation of Crude Oil in Amazon Rain Forest, MICROBAC, Dec. 4, 2009 at 2:36, *available at* http://www.youtube.com/watch?v=q_N1WtYrI&feature=player_embedded, and <http://www.youtube.com/watch?v=B8m5TgCao50>, (agricultural land use standard); **Exhibit C-1157**, Oleoducto de Crudos Pesados, Ecuador S.A. Remediation, July 21, 2009 at 1:21, *available at* http://www.ocpecuador.com/index.php?option=com_phocagallery&view=category&id=2%3Acat-videos&lang=es (agricultural land use standard); **Exhibit C-1158**, Verónica Paulina Orosco Verdezoto and Mercedes Margarita Soria Guano, *Bioremediation of Vegetation Contaminated with Oil From Spills in the Guarumo – Petroproduction Field*, Chimborazo Polytechnic College, 2008; **Exhibit C-1159**, Lissette Paola Rodríguez Muñoz, *Evaluation of Two Substances in the Landfarming Technique for the Treatment of Hydrocarbon Contaminated Soils*, Polytechnic Institute of Higher Education of Chimborazo, 2008 (agricultural land use standard); **Exhibit C-1160**, Yomar Daniela Alvarez Méndez, Degree Thesis: *Soils Affected by Hydrocarbon Spills: Remediation Alternatives at the Petrocomercial El Beaterio Clean Products Terminal*, Central University of Ecuador, School of Geological, Mining, Petroleum, and Environmental Engineering, March 2009 at 110, 140 (industrial land use standard); **Exhibit C-1161**, Pasivos Ambientales (Universidad de Guayaquil), *available at* <http://www.youtube.com/watch?v=W40J9kcc87Q&feature=related>, video uploaded Nov. 15, 2010.

⁸² Some of the pits on PEPDA's original list of pits to be remediated by 2010 (**Exhibit C-472**, PEPDA 2007 Annual Report, attached as Annex A to Chevron's Motion dated Sept. 15, 2008 at 2:14 p.m.) have been used by the Plaintiffs for public relations purposes. For example, dignitaries and international media have visited sites such as Aguatico 4 (AG-4), Shushufindi 38 (SSF-38), and Shushufindi 61 (SSF-61). Petroecuador started remediating these sites by the end of 2007, but remediation efforts have been suspended at SSF-61 and AG-4. **Exhibit C-528**, Letter to the Lago Agrio Court, July 12, 2007, at 10:15 a.m.; **Exhibit C-364**, Letter to the Lago Agrio Court, Oct. 3, 2007, at 11:00 a.m. Remediation at Shushufindi-38 was delayed until late 2009. **Exhibit C-1153**, PEPDA 2008 Annual Report, Jan. 9, 2008; **Exhibit C-1165**, Remediation Progress at Pits by PEPDA Project: 2010, Investigation Conducted by the Chevron Field Team, Oriente Region, Ecuador, Attachment E to Chevron's Motion filed on May 21, 2010.

remediating an average of 1,810 cubic meters of soil per pit at a cost of approximately US\$ 34 per cubic meter of soil.⁸³

24. In November 2007, the Government, at the Plaintiffs' behest, attempted to downplay the scope of Petroecuador's work in order to mitigate PEPDA's effects on the lawsuit. Responding to a request from the Frente, the Ecuadorian Ministry of Energy and Mines sent a letter to the Lago Agrio Court, attempting to downplay PEPDA's remediation as less than "comprehensive," but nevertheless admitting that its objective is "to eliminate all of the contaminated pits in its areas of operation" and that its work to date had received DINAPA certification.⁸⁴

25. The Judgment disregarded this information and assessed damages against Chevron that are astronomically higher than Petroecuador's actual expenditures in cleaning up the very same pits.⁸⁵ The Judgment inflates and exaggerates every factor in its calculation of soil-remediation costs, including: (i) the number of pits (880 pits claimed in the Judgment, while Petroecuador's data show 370 pits—202 of which are remediated or in the process of remediation); (ii) the amount of soil per pit requiring remediation (8,400 cubic meters of soil per pit claimed in the Judgment, while Petroecuador's data show 1,810 cubic meters of soil per pit); and (iii) the cost of cleanup (US\$ 765 per cubic meter claimed in the Judgment, while Petroecuador is spending just US\$ 34 per cubic meter to remediate soil).⁸⁶ This absurd and discriminatory inflation of damages results in the Judgment assessing US\$ 5.4 billion to remediate soil in the former Concession, while Petroecuador has publicly stated that remediation of all the remaining pits in the former Concession, plus all of Petroecuador's other environmental liabilities in the Ecuadorian Amazon, will cost less than US\$ 70 million.⁸⁷

⁸³ **Exhibit C-200**, Robert E. Hinchee, Rebuttal of the Method Used by Mr. Cabrera to Determine the Supposed Necessity and Cost of Remediation, Executive Summary, Aug. 9, 2008, at Table 4.

⁸⁴ **Exhibit C-1151**, Letter from Ecuadorian Ministry of Energy and Mines to Lago Agrio Court, filed Nov. 16, 2007 at 10:02 a.m.

⁸⁵ See Claimants' Memorial on the Merits, ¶¶ 149-151 (comparing PEPDA remediation data with TexPet's actual costs in the mid-1990s).

⁸⁶ **Exhibit C-200**, Robert E. Hinchee, Rebuttal of the Method Used by Mr. Cabrera to Determine the Supposed Necessity and Cost of Remediation, Executive Summary, Aug. 9, 2008, at Table 4.

⁸⁷ **Exhibit C-1152**, Victor Gómez, *Ecuador will clean up areas in \$18 bln Chevron case*, REUTERS, Dec. 14, 2011.

26. Although the Judgment appears to acknowledge that there is harm “that [is] the responsibility of Petroecuador,”⁸⁸ it purports to exclude any assessment of this harm for two self-serving reasons. First, “in this trial there appear as parties only the plaintiffs and the defendant company, while the third parties that are presumably responsible for new damages (Petroecuador), have not been able to present any defense whatsoever in this proceeding.” Second, “no claim for reparation has been made for damages caused by third parties[.]” The Court’s March 4, 2011 clarification order, issued four weeks after the Judgment, falsely claims that the Court declined to consider damage caused by Petroecuador “using a time-based approach that divides liability and attributes it to the perpetrator of the harm committed depending on who was the industry’s operator.”⁸⁹ Nothing in the Judgment supports the use of such an approach, and even if the Court did in fact undergo such an analysis, it still failed to change or reduce its damage award against Chevron. That the Judgment orders Chevron to pay for the remediation of pits that are the clear responsibility of Petroecuador (many of which have been, or will be, remediated by the State) reinforces the Judgment’s true goal—not to enforce the law but to maximize damages against Chevron.

b. The Court’s Lack of Jurisdiction

27. The Judgment consummates the Lago Agrio Court’s improper exercise of jurisdiction over Chevron, and in so doing it parrots the Plaintiffs’ ghostwritten work product and violates basic tenets of Ecuadorian law and due process.⁹⁰ In fact, the “merger” section of the Judgment, in which the Court justifies its jurisdiction over Chevron, contains at least two identical, 90+ word strings from the Plaintiffs’ unfiled Fusión Memo, an overlap proving that the Plaintiffs’ lawyers are the true Judgment authors.⁹¹

⁸⁸ **Exhibit C-931**, Lago Agrio Judgment, at 123.

⁸⁹ **Exhibit C-971**, Lago Agrio Court Order addressing Chevron’s Motion to Clarify and Amplify, Mar. 4, 2011, at 3:10 p.m. (hereinafter “Lago Agrio Court Clarification Order”), at 8.

⁹⁰ Chevron filed a jurisdictional objection in response to the Lago Agrio Complaint, explaining that: (i) Chevron never operated in Ecuador; (ii) Chevron is not the legal successor to Texaco, Inc., which is the only entity that agreed to submit to Ecuadorian jurisdiction; (iii) Texaco, Inc. did not control TexPet’s operations; and (iv) Texaco, Inc. did not consent to the suit filed by the Plaintiffs. **Exhibit C-72**, Chevron’s Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:10 a.m., at 243-244, 265. Despite Chevron’s request for an immediate ruling on its preliminary objections (which included not only these jurisdictional matters, but also the effect of the Settlement and Release Agreements and the improper application of the 1999 EMA), the Court never timely ruled on these matters, exercised *de facto* jurisdiction over Chevron by requiring it to litigate the merits for over seven years, and ultimately upheld its jurisdiction over Chevron by issuing the judgment.

⁹¹ Younger Expert Report, at 11-12.

28. The Judgment admits that “Chevron Corporation is not the successor of TEXACO INC.” and that “the record shows duly certified documentary evidence proving that demonstrates that Texaco maintains legal status and consequently legal life.”⁹² It then contradicts its own conclusion by citing unofficial documents such as press releases and PowerPoint slides, describing the transaction in general terms, to determine that there nonetheless was a “merger” between the two companies. But these non-legal documents themselves demonstrate Texaco, Inc.’s continuing existence, maintenance of assets, and capacity to acquire rights and incur obligations.⁹³

29. The Plaintiffs’ lawyers knew that Texaco, Inc. survived as a viable entity: After the 2001 transaction but before the 2003 filing of the Lago Agrio Litigation, Texaco, Inc.’s lawyers formally notified the Plaintiffs’ lawyers that Texaco, Inc. had designated an “authorized agent for service of process for claims filed against Texaco in Ecuador.”⁹⁴ That, along with the publicly available, official documents concerning the acquisition, clearly informed the Plaintiffs that Texaco, Inc. continued to exist as a corporate entity, distinct from Chevron, that they could have named as a defendant. The Plaintiffs ignored the facts, however, and chose to sue Chevron under the false pretense that Chevron was the successor-in-interest to Texaco.⁹⁵ Donziger later privately admitted that the Plaintiffs had “su[ed] the wrong party in the complaint.”⁹⁶

30. At bottom, neither the Lago Agrio Plaintiffs nor the Court had any justification for exercising jurisdiction over Chevron. Texaco, Inc. stood ready to defend claims in Ecuador,

⁹² **Exhibit C-931**, Lago Agrio Judgment, at 6.

⁹³ **Exhibit C-1167**, United States Securities and Exchange Commission (“SEC”) filing, Oct. 9, 2001, attached as Annex A to Chevron’s Second Rebuttal to the Barros Report, filed Jan. 29, 2010 at 3:30 p.m. (the translation in Spanish is included at *Record* at 166759-67, 166764); **Exhibit C-1168**, SEC filing, attached as Annex A to Chevron’s Second Rebuttal to the Barros Report, Nov. 13, 2001, filed Jan. 29, 2010 at 3:30 p.m., *Record* at 166633-75, 166641 (the translation into Spanish is included at *Record* at 166790-834, 166800); *see also* **Exhibit C-1169**, Agreement and Plan of Merger, Oct. 15, 2000 attached as Annex B to Chevron’s Second Rebuttal to the Barros Report, filed Jan. 29, 2010 at 3:30 p.m.; **Exhibit C-1170**, Affidavit of Frank G. Soler, Mar. 26, 2010, submitted as Annex 18 to Chevron’s Motion, filed Oct. 29, 2010 at 5:20 p.m., ¶ 8.

⁹⁴ **Exhibit C-1171**, Letter from King and Spalding to Plaintiff’s lawyers, Oct. 11, 2002, filed Oct. 19, 2004 at 4:05 p.m., *Record* at 10327-28 (the translation in Spanish is included in the *Record* at 10329); **Exhibit C-1172**, Letter from King and Spalding to Plaintiff’s lawyers, Jan. 2, 2003, filed Oct. 19, 2004 at 4:05 p.m., *Record* at 10330-31.

⁹⁵ *See, e.g.*, **Exhibit C-1173**, Plaintiff’s Motion, Mar. 6, 2009 at 11:06 a.m., *Record* at 154650-651, 154650.

⁹⁶ **Exhibit C-716**, Diary of Steven Donziger, Jan. 24, 2006, attached as Annex 1 to Chevron’s Third Supplemental Motion for Terminating Sanctions, filed Dec. 20, 2010 at 4:30 p.m. [DONZ00027156].

and the Lago Agrio Plaintiffs presented no allegations against Chevron itself, but relied only on a false theory of derivative liability.

c. The *Res Judicata* Effect of the Settlement and Release Agreements

31. The Lago Agrio Judgment acknowledges that “the State has released Texaco, and consequently Chevron, from all their responsibilities in relation to the environmental harm that is the subject of this complaint.”⁹⁷ But instead of barring the Lago Agrio Plaintiffs’ claims by operation of *res judicata*, the Judgment ignores that the Ecuadorian Government, along with the relevant local Government entities, represented all of the people of Ecuador (including the Plaintiffs) in enforcing the same collective rights that the Plaintiffs later attempted to enforce in the Lago Agrio Litigation.⁹⁸

32. Three important facts emerge from the Judgment and other evidence obtained since Claimants filed their Memorial on the Merits. *First*, the Lago Agrio Judgment’s damage award does not purport to compensate for claims for any harm or damage to individuals, proving that the Plaintiffs sought only to recover for diffuse-rights claims that already had been released by the Settlement and Release Agreements. For example, the Judgment awards US\$ 1.4 billion in collective damages for healthcare, while noting that no individual cancer cases had been identified,⁹⁹ and that “in this case there is not a demand for reparation of harm to the health of specific individuals.”¹⁰⁰

33. *Second*, the Plaintiffs’ representatives themselves participated in negotiations related to the Settlement and Release Agreements—the same Agreements that the Plaintiffs later called “fraudulent” when they no longer suited their goals.¹⁰¹ In 1994, Luis Yanza, President of

⁹⁷ **Exhibit C-931**, Lago Agrio Judgment, at 29-30, 34, 91.

⁹⁸ For detailed discussions of Claimants’ arguments regarding the *res judicata* effect of the Settlement and Release agreements on the Lago Agrio Plaintiffs’ claims, see Claimants’ Request for Interim Measures, Apr. 1, 2010, at 8-16, 19-22; Claimants’ Reply in Support of Interim Measures, May 7, 2011, at 36-43; Claimants’ Memorial on the Merits, at 188-213.

⁹⁹ See *infra* ¶¶ II(A)(3)(e) (regarding healthcare damages).

¹⁰⁰ **Exhibit C-931**, Lago Agrio Judgment, at 170 (Eng.).

¹⁰¹ As Claimants have informed the Tribunal, U.S. courts in related litigation have ordered Steven Donziger and other Plaintiffs’ representatives to give deposition testimony and to produce a significant amount of documents regarding the Lago Agrio Litigation. The bulk of these document productions have taken place since Claimants filed their Memorial on the Merits. See **Exhibit C-683**, *In re Application of Chevron Corp.*, Case No. 10 MC 00002 (LAK), U.S. District Court for the Southern District of New York, Subpoena and Proof of Service of

the Frente, sought an “audience” with the President of Ecuador “to explain to you directly the situation” of the people of the Oriente whom he purported to represent, so that their situation “may be taken into consideration when signing [settlement] agreements with [TexPet].”¹⁰² Yanza submitted his group’s “proposal” for the scope of work for TexPet’s remediation, which he claimed represented an “excellent level of awareness” and “far-reaching and vigorous work to reach consensus” among the population.¹⁰³ Reflecting the Government’s cooperation with groups like the Frente, Ecuadorian officials repeated under oath that the negotiations were “open for all those who wanted to attend,” and that members of many organizations, including the Frente, did attend.¹⁰⁴ These Government officials saw themselves as the “facilitator[s]” of a dialogue between the communities and TexPet,¹⁰⁵ and in agreeing to the settlements, followed orders from the “National Congress to take into account the problems that Amazonian groups were having.”¹⁰⁶

34. As a result of this dialogue, the environmental groups were “behind everything that was being done,”¹⁰⁷ leading to a final settlement that accounted for the interests of individuals and communities in the former Concession.¹⁰⁸ When the Memorandum of Understanding (“MOU”) was opened to public scrutiny, and while the Scope of Work was still

Subpoena served on Steven Robert Donziger on Aug. 9, 2010; **Exhibit C-672**, *In re Application of Chevron Corp.*, Case No. 10-MC-0002-LAK, U.S. District Court for the Southern District of New York, Order, Nov. 5, 2010; **Exhibit C-908**, *In re Application of Chevron Corp.*, No. 10-MC-0002, U.S. District Court for the Southern District of New York, Memorandum and Order, Oct. 20, 2010.

¹⁰² **Exhibit C-1139**, Letter from L. Yanza to D. Ballen, Oct. 5, 1994. Early in the negotiations, other environmental groups like Fundacion Natura also submitted their comments on the MOU to the Government, and pledged to “follow the progress of the negotiations, in order to contribute to the search for an adequate solution serving the interests of the country.” **Exhibit R-50**, Letter from T. Bustamante to G. Rosania, Oct. 20, 1994, at 1.

¹⁰³ **Exhibit C-1143**, Letter from L. Yanza to G. Abril, Feb. 22, 1995.

¹⁰⁴ During the *Aguinda* Litigation, Ecuadorian Government officials gave testimony regarding the involvement of the State in the Consortium and describing the community’s involvement in negotiating the Settlement and Release Agreements. **Exhibit C-290**, *Republic of Ecuador et al. v. ChevronTexaco Corp. et al.*, No. 04-CV-837 (LBS), U.S. District Court for the Southern District of New York, Deposition of Giovanni Rosania Schiavone, Oct. 19, 2006 (hereinafter “Rosania Deposition”), at 73:3-14, 93:22-94:12, 95:9-15, 102:20-103:10, 2006.10.10; **Exhibit C-450**, *Republic of Ecuador v. ChevronTexaco Corp. et al.*, No. 04-CV-837 (LBS) (S.D.N.Y.) Deposition of Galo Abril Ojeda, Oct. 10, 2006 (hereinafter “Abril Deposition”), at 70:6-22.

¹⁰⁵ **Exhibit C-290**, Rosania Deposition at 78:4-79:3.

¹⁰⁶ **Exhibit C-450**, Abril Deposition at 76:2-77:7.

¹⁰⁷ **Exhibit C-450**, Abril Deposition at 94:13-95:3.

¹⁰⁸ **Exhibit C-290**, Rosania Deposition at 86:6-87:5, 88:21-89:21, 112:5-113:10.

being defined, the Frente wrote to the Ministry of Energy and Mines to express its “agree[ment] that the process of understanding [between Ecuador and TexPet] and the immediate performance of the environmental remediation work should continue.”¹⁰⁹ Hugo Camacho, then the municipal president of Pimampiro and now one of the named plaintiffs in the Lago Agrio Litigation, wrote to the CEO of TexPet expressing “a testimony of real gratefulness ... for the environmental remediation work performed” by TexPet, which was “fully and satisfactorily completed” and produced a “positive outcome for the local population.”¹¹⁰ The Lago Agrio Litigation raises no new substantive legal rights or individual claims (as Ecuador and the Lago Agrio Plaintiffs have conceded),¹¹¹ but instead seeks to recover from Chevron for the same diffuse-rights claims that TexPet and the Government already settled on behalf of its citizens, more than a decade earlier.

35. *Third*, recent Ecuadorian case law proves that the Lago Agrio Judgment violates Ecuadorian law (and universal comparative law) regarding *res judicata* as applied to diffuse-rights claims. This case law also illustrates the Lago Agrio Court’s discriminatory application of the law against Chevron. In the case of *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.* (the “OCP Case”), an appellate panel including Judge Zambrano—the purported author of the Lago Agrio Judgment—rejected an EMA claim brought by an environmental NGO and landowners asserting that the construction of a heavy crude pipeline (referred to by its Spanish acronym as the “OCP”) had caused environmental damage.¹¹²

36. On December 14, 2011, the OCP Court issued a 12-page decision drawing a clear distinction between individual civil claims and environmental claims that seek to enforce a collective right: “[T]he environmental action seeking compensation for damage is in no way analogous to a civil action for damages. ... The environmental action protects a common good that is indispensable to humanity’s very existence ... On the other hand, a purely civil action for

¹⁰⁹ **Exhibit C-449**, Work Session Record, TexPet Remediation Agreement, Feb. 22, 1995, at 1.

¹¹⁰ **Exhibit C-1174**, Letter from H. Camacho to P. Bijur, Sept. 18, 1997.

¹¹¹ Both the Lago Agrio Plaintiffs and the Ecuadorian Government have conceded that the Plaintiffs assert no individual claims, and that the 1999 EMA provides no new substantive, collective rights that had not previously existed under Ecuadorian law. *See* Claimants’ Memorial on the Merits, ¶¶ 415-18.

¹¹² **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m.

damages protects other legal goods, related to an individual's private property"¹¹³ Based on this distinction, the court rejected all of the plaintiffs' evidence (including expert evidence), holding that it concerned alleged damage to private property, and not environmental damage.¹¹⁴ The court then noted that a prior decision already had addressed the same issue and concluded that the OCP had *not* caused environmental damage. The *OCP* Court stated that it would follow the earlier court's holding, even though the nominal parties in that proceeding were different:

Since this is an environmental action, it does not matter who initiates the lawsuit. The same issue is always at stake, that is, whether a specific event caused environmental damages. The subject of analysis is a right held by all. For that reason, when the Court decided [the prior case], it evaluated the collective right, so a new action was not necessary to discuss the matter that had already been judged. That is different from a civil action, in which only the rights of the parties are analyzed. In that case, then, it makes sense that the parties must be identical in order to have *res judicata*. But on environmental matters, a decision about whether an event has caused environmental damage is valid. The right is always assessed with regard to all of society, so a new action simply means another assessment of the thing that has already been judged¹¹⁵

37. Thus, Judge Zambrano in the *OCP* Case held that regardless of party identity, a judicial finding of no environmental damage must bar the right of later plaintiffs to pursue claims for the same environmental damage.¹¹⁶ Yet the Lago Agrio Judgment—issued just eight months earlier—permitted the Plaintiffs to assert their environmental claims despite the 1995 Settlement and Release Agreement concerning the same claims, on the basis that nominal Lago Agrio Plaintiffs themselves did not execute it.¹¹⁷ The Judgment's insistence on identical parties

¹¹³ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m, at ¶ 12.

¹¹⁴ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m, at ¶¶ 13, 15.

¹¹⁵ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m, at ¶ 17.

¹¹⁶ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m, at ¶ 17.

¹¹⁷ **Exhibit C-931**, Lago Agrio Judgment, at 31. The Judgment's reasoning also begs the question of exactly which Plaintiffs' representatives would be required to sign the Settlement and Release Agreement in order to achieve *res judicata* effect on their claims—all Oriente residents, the named Plaintiffs only, or the Frente in a representative capacity (as the Government had done years earlier).

squarely contradicts the *OCP* Court’s reasoning on the *erga omnes* effect of a diffuse-rights adjudication in the environmental context, whether it be a settlement or a court decision. The Lago Agrio Judgment therefore cannot be reconciled either with Judge Zambrano’s own reasoning in another case or with the fundamental principle of *res judicata*, thereby illustrating the Court’s discrimination against Chevron.

3. *The Judgment’s Determination of Damages Is Arbitrary, Biased, and Based on the Fraudulent Cabrera Reports*

38. There is no competent evidence in the Lago Agrio record to support the Judgment’s enormous damage figures. The Plaintiffs acknowledged that their lawyer-driven “science” was “spotty,”¹¹⁸ “screwy,”¹¹⁹ and short of the “really tight science needed in order to win the case”¹²⁰—in Donziger’s own words, it was “smoke and mirrors and bullshit.”¹²¹ The only reliable evidence in the record, submitted by Chevron-nominated experts adhering to established scientific protocols, showed no contamination posing any unreasonable risk to human health or the environment.

39. Yet Judge Zambrano, lacking any technical training, purported to make sweeping findings of environmental harm, and damages for that harm, based on his own purported evaluation of raw data. The Lago Agrio Judgment assigns enormous dollar-amounts to a number of damage categories, several of which the Plaintiffs failed even to plead (making these damages inadmissible under Ecuadorian law). For each of these damage categories, the Judgment ignored sound scientific evidence, relied on faulty evidence, and drew scientifically unjustified conclusions.

40. The Judgment’s damage awards directly rely on the Cabrera Report by awarding eight categories of damages for which the Cabrera Reports are the sole expert opinion.¹²² The

¹¹⁸ **Exhibit C-1176**, Email from J. Berlinger to M. Bonfiglio and A. Spiegel, Jan. 28, 2008 [JB-nonWaiver00092079-83].

¹¹⁹ **Exhibit C-716**, Diary of S. Donziger, Mar. 7, 2007, at 8 of 111 [DONZ0027256].

¹²⁰ **Exhibit C-716**, Diary of S. Donziger, June 3, 2006, at 61 of 111 and 2 of 52 [DONZ00027156 and DONZ0023089].

¹²¹ **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS195-05-CLIP 01.

¹²² *Compare Exhibit C-201*, Expert Report of Richard Cabrera Vega, Apr. 1, 2008, at 6 (recommending damage awards for “remediation of soil,” a “healthcare system,” “indigenous population impacts,” a “potable water system,” “excessive deaths from cancer,” “ecosystem losses,” and “unfair profits”) and Supplemental Cabrera Report at 12-14, 53 (recommending a damage award for the remediation of groundwater), *with Exhibit C-931*,

fraud surrounding the Cabrera Report, which forms the basis of the Judgment’s US\$ 18.2-billion damage award, is undeniable.¹²³ Instead of addressing the Plaintiffs’ fraud surrounding those reports, the Judgment purported to moot the issue by disclaiming reliance upon either the Calmbacher or Cabrera reports. In truth, however, the Judgment is the culmination of the fraud perpetrated throughout the Lago Agrio Litigation, including the fraudulent Cabrera Reports as one of many examples.

a. *Extra Petita* Damages (Nearly US\$ 1 Billion)

41. Chevron complained to the Lago Agrio Court that much of the damages assessed by Cabrera and the September 16 “cleansing” experts¹²⁴ related to claims that the Plaintiffs had not even pleaded, and thus could not legally be awarded.¹²⁵ These damage categories included awards totaling nearly US \$1 billion for a potable water system, excess cancer deaths, and cultural damages.

Lago Agrio Judgment, Feb. 14, 2011 at 8:37 a.m., at 179-186 (awarding US\$ 5,396,160,000 to “recover the natural conditions of the soil;” US\$ 1.4 billion for a “health system;” US\$ 100 million for a “community reconstruction and ethnic reaffirmation program” and to redress “cultural harm;” US\$ 150 million for regional potable water systems; \$800 million for “treatment for the persons who suffer from cancer;” US\$ 200 million “to recover the native flora, fauna, and the aquatic life of the zone;” US\$ 8.646 billion in punitive damages based on the Cabrera Report’s finding of “unjust enrichment;” and US\$ 600 million for “the cleanup of groundwater.”). In another example provided to the Tribunal, the Judgment’s conclusion that 880 pits required remediation derives directly from the Cabrera Report and no other source in the record. Claimants’ Letter to the Tribunal, Jan. 4, 2012, at 5; Younger Expert Report, at 18-19.

¹²³ Claimants have set forth the facts surrounding the Cabrera fraud in numerous prior submissions, and incorporate all of those facts here. See Claimants’ Memorial on the Merits, § II.G (3)-(4); Claimants’ Letter to the Tribunal, Mar. 4, 2011, at 5-6.

¹²⁴ As Claimants have informed the Tribunal, on September 16, 2010 (and in response to the Court’s unlawful August 2 order), the Plaintiffs filed seven new “expert” reports with the Court, demanding US\$ 113 billion in damages. Although these reports are a mere repackaging of flawed and fraudulent data found in the Cabrera Report, Judge Zambrano purported to rely on them throughout the final Judgment in reaching his damage conclusions, thereby tainting the final judgment well beyond repair. See *infra* ¶¶ 100-102.

¹²⁵ Ecuadorian law recognizes a principle of “congruence” between the Complaint and the final judgment. Under this principle, a lack of congruence exists in the form of *ultra petita* when “what is granted is more than what was requested,” and *extra petita* when “something other than what was requested is granted.” **Exhibit C-1177**, *Alberto Vásconez Gavilanez vs. Manuel Tobar Mayrga*, Ecuadorian Supreme Court of Justice, First Civil and Merchant Court, Decision 246-2000, Matter 150-97, Official Gazette, Aug. 2, 2000 [Exhibit to Chevron’s Appeal to Lago Agrio Judgment]. Article 273 of the Code of Civil Procedure codifies this mandatory principle, stating that “[t]he judgment shall decide only the issues regarding which the case was filed . . .” **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 273. Thus, the principles of *extra petita* and *ultra petita* prohibit a Court from deciding issues or awarding damages not pleaded in the Complaint. Chevron submitted all of these arguments before the Ecuadorian system in its appeal to the Lago Agrio Judgment. See **Exhibit C-1178**, Chevron’s Appeal of the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m., 108-112.

42. First, the Judgment awards US\$ 150 million in *extra petita* damages for the construction of “a potable water system or systems” to “benefit the persons who inhabit the area that was operated by the defendant.”¹²⁶ The Judgment provides no rationale for requiring the installation of a permanent potable-water system, and ignores the vast evidence in the record that the area’s water is contaminated not by petroleum, but by fecal coliform (*E. coli*), which arises from inadequate sanitation.¹²⁷ The Ecuadorian Public Health Ministry has reported that 50% of area hospitalizations result from sanitation problems.¹²⁸

43. Even if the scientific evidence did support damages for petroleum impacts on the region’s potable water, the Judgment relied on the Cabrera Report’s grossly exaggerated estimate. The Judgment assesses US\$ 150 million for potable water costs by multiplying the percentage of residents that it claims are not connected to the regional water system (35%) by what is claimed to be the total cost of the system as a whole (US\$ 430 million, approximating Cabrera’s estimate of US\$ 428 million).¹²⁹ Although the Judgment purports to rely on Gerardo Barros’s expert report and the international standards quoted therein,¹³⁰ that statement is false. Dr. Barros in fact rejected the US\$ 428 million figure from the ghostwritten Cabrera Report, calling it “enormously exaggerated,” and that figure appears nowhere else in the court record.¹³¹ Thus, Annex R to the fraudulent Cabrera Report stands as the sole basis for the Judgment’s potable-water damages.¹³²

¹²⁶ **Exhibit C-931**, Lago Agrio Judgment, at 182 (Eng.).

¹²⁷ **Exhibit C-1179**, Gerardo Barros, *Ruling on the Defendant’s Request Regarding the Documents*, Feb. 11, 2010. Cited in Ch. IV of the Motion dated Jan. 29, 2010, Annex 5.

¹²⁸ **Exhibit C-1180**, Guillermo Yepes and Bernardo Gómez, *National Development Plan for the Potable Water and Basic Sanitation Sector*, Ministry of Urban Development and Housing, December 2002.

¹²⁹ **Exhibit C-931**, Lago Agrio Judgment, at 182-83 (Eng.).

¹³⁰ **Exhibit C-931**, Lago Agrio Judgment, at 182 (Eng.).

¹³¹ **Exhibit C-201**, Cabrera Report at 4-5, 43, Annex R. The judgment notes that Dr. Barros criticized the US\$ 428 million cost figure, but rejects Dr. Barros’s criticism without explaining that the US\$ 428 million cost estimate came from the Cabrera Report. Compare **Exhibit C-931**, Lago Agrio Judgment at 182-183 with **Exhibit C-1179**, Gerardo Barros, *Ruling on the Defendant’s Request Regarding the Documents*, Feb. 11, 2010. Cited in Ch. IV of the Motion dated Jan. 29, 2010, Annex 5.

¹³² Annex R, in turn, comes directly from a Uhl, Baron & Rana (“UBR”) Report funded by Plaintiffs’ counsel, and which Plaintiffs’ representatives altered after the fact by removing UBR’s recommendation that a groundwater study must be completed in order to validate its conclusions. Compare **Exhibit C-1182**, V. Uhl and C. Villao, Ecuador Water Project, Draft Report, *Assessment of Water Provision Costs, Sucumbíos and Orellana Provinces, Ecuador*, Uhl, Baron, Rana & Associates, Inc. (UBR), Dec. 21, 2007, at 3 of 28 [VU00000136, VU00000136.-0001-0002] (draft from UBR stating that a groundwater study is “essential”) with **Exhibit C-**

44. *Second*, the Judgment awards US\$ 800 million in *extra petita* damages (on top of its already arbitrary general healthcare award), purportedly to “include treatment for the persons who suffer from cancer that can be attributed to TexPet’s operation in the Concession.”¹³³ The Judgment states that there are “sufficient indications to demonstrate the existence of an excessive number of deaths from cancer in the area of the Concession.”¹³⁴ In the same breath, the Judgment contradicts itself by admitting that “*the reparation of particular cases of cancer has not been demanded, nor are such cases identified.*”¹³⁵ The Plaintiffs themselves admitted that they had no actual proof of individualized cancer cases: “we do NOT have medical certificates.”¹³⁶

45. The Judgment points to no epidemiological study confirming a causal link between petroleum and cancer, and even if it were appropriate to find causation without supporting expert evidence (which it is not), the only studies cited in connection with cancer risks are those of Dr. Miguel San Sebastian, which the Frente secretly commissioned and sponsored. Dr. San Sebastian himself admits that his report was not scientifically sufficient to be used to establish a link between proximity to oil production and cancer,¹³⁷ as the Judgment itself concedes¹³⁸ and other epidemiological experts confirm.¹³⁹ For example, Dr. Jack Siemiatycki took the unusual step of publishing a precautionary note immediately following Dr. San Sebastian’s article, describing Dr. San Sebastian’s work as a “geographical correlation study

371, Cabrera Report, Annex R (containing no recommendation for groundwater study); **Exhibit C-1183**, Email from D. Beltman to S. Donziger, Mar. 5, 2008 [DONZ-HDD-0159924] (sending the UBR report, saying: “Here is the Uhl report, cleaned and sanitized”).

¹³³ **Exhibit C-931**, Lago Agrio Judgment, at 184 (Eng.).

¹³⁴ **Exhibit C-931**, Lago Agrio Judgment, at 184 (Eng.).

¹³⁵ **Exhibit C-931**, Lago Agrio Judgment, at 184 (Eng.) (emphasis added).

¹³⁶ **Exhibit C-1184**, Email from J. Prieto to S. Donziger, Nov. 17, 2009 [DONZ00053202].

¹³⁷ **Exhibit C-1185**, A.K. Hurtig & M. San Sebastian, *Cancer in the Ecuadorian Amazon* (1985-1998), Manuel Amunarrt6 Institute of Epidemiology and Community Health (Quito 2004) at 35.

¹³⁸ **Exhibit C-931**, Lago Agrio Judgment, at 136 (Eng.).

¹³⁹ **Exhibit C-1186**, J. Christopher, *Evaluation of the Scientific Value of the Published Work of Plaintiffs’ Experts, Dr. Miguel San Sebastian and Colleagues*, Sept. 9, 2010 (“They fail to show a causal connection between their analytical data and potential exposures near San Carlos and other communities in the former concession.”); **Exhibit C-1187**, J. Siemiatycki, *Commentary: Epidemiology on the side of the angels*, INT. J. EPIDEMIOLOGY (2002) 31 (5):1027-1029; **Exhibit C-1188**, A. Arana & F. Arellano, *Cancer incidence near oilfields in the Amazon basin of Ecuador revisited*, OCCUP. ENVIRON. MED. 64: 490-491 (2007), attached as Appendix H.1B, Sept. 15, 2008.

with a real possibility of bias ... While the overall cancer incidence was ostensibly higher in the ‘exposed’ area, the cancer site distributions did not exhibit a pattern that would obviously throw suspicion on etiological agents coming from oil industry pollution.”¹⁴⁰ And in 2008, a published report stated that Dr. San Sebastian had underestimated the population of San Carlos by nearly 50%, skewing his data, and concluded that there was “no excess of cancer or cancer mortality in the village of San Carlos.”¹⁴¹

46. The Judgment also ignores all of Chevron’s evidence in the record—including opinions by highly-respected epidemiologists and toxicologists, international medical publications, and Ecuador’s own official statistics—which disprove any link between cancer in the Oriente and residence in the proximity of oil production.¹⁴² Epidemiologist Dr. Michael Kelsh designed a study “[t]o compare cancer mortality rates in Amazon cantons (counties) with and without long-term oil exploration and extraction activities.”¹⁴³ He used cancer mortality and census data from all cantons in the northern Amazon Region (Napo, Orellana, Pastaza, and Sucumbios) and Pichincha province, obtained from Ecuador’s Instituto Nacional de Estadística y Censos (INEC).¹⁴⁴ He found that “[c]omparing mortality in the Amazon and Pichincha province, mortality rates from all causes, cancer, circulatory disease, and respiratory disease were lower in the Amazon than in Pichincha province, while death rates from infectious diseases were higher.”¹⁴⁵ Dr. Kelsh’s study concluded that “analyses of national mortality data of the Amazon Region in Ecuador does not provide evidence for an excess cancer risk in regions of the Amazon

¹⁴⁰ **Exhibit C-1187**, J. Siemiatycki, *Commentary: Epidemiology on the side of the angels*, INT. J. EPIDEMIOLOG. (2002) 31 (5):1027-1029.

¹⁴¹ **Exhibit C-1188**, **Exhibit C-1188**, A. Arana & F. Arellano, *Cancer incidence near oilfields in the Amazon basin of Ecuador revisited*, OCCUP. ENVIRON MED. 64: 490-491 2007, attached as Appendix H.1B, Sept. 15, 2008.

¹⁴² See e.g., **Exhibit C-1189**, M. Kelsh, *Expert Report of Michael A. Kelsh: Cancer Risk and Oil Production in the Amazon Region of Ecuador - A Review of the Epidemiologic Evidence*, CHEVRON ENERGY TECHNOLOGY COMPANY, Sept. 2, 2010; **Exhibit C-1188**, A. Arana & F. Arellano, *Cancer incidence near oilfields in the Amazon basin of Ecuador revisited*, OCCUP. ENVIRON MED. 64: 490-491 (2007), attached as Appendix H.1B, Sept. 15, 2008; **Exhibit C-1186**, J. Christopher, *Evaluation of the Scientific Value of the Published Work of Plaintiffs’ Experts, Dr. Miguel San Sebastian and Colleagues*, Sept. 9, 2010.

¹⁴³ **Exhibit C-1190**, M. Kelsh, L. Moritmoto, and E. Lau, *Cancer mortality and oil production in the Amazon Region of Ecuador, 1990-2005*, Int. Arch Occup Environ Health, 2008 at 1.

¹⁴⁴ INEC is the Ecuadorian institution that collects, analyzes, and reports statistical information on health, economic, socio-demographic, population, and other topics (<http://www.inec.gov.ec>).

¹⁴⁵ **Exhibit C-1190**, M. Kelsh, L. Moritmoto, and E. Lau, *Cancer mortality and oil production in the Amazon Region of Ecuador, 1990-2005*, Int. Arch Occup Environ Health, 2008 at 11.

with long-term oil production.”¹⁴⁶ The International Agency for Cancer Research confirms this study, broadly concluding that “[t]here is inadequate evidence for the carcinogenicity in humans of crude oil.”¹⁴⁷

47. The Lago Agrio Court disregarded this expert evidence in favor of “testimonies of the residents,” some of whom claimed that oil caused cancer, because—according to the Court—their “authenticity overcomes the testimony of the foreign experts in question, whose foundation is their academic degrees and the study of the documents submitted by Chevron to refute—from afar—the suffering of the residents.”¹⁴⁸

48. Moreover, nothing in the record supports US\$ 800 million as an appropriate amount for cancer treatment. The Judgment fails to explain: (i) why the unjustified US\$ 1.4 billion healthcare program that it also awarded is insufficient for cancer treatment; (ii) how many people in the former Consortium area “suffer from cancer that can be attributed to TexPet’s operation;” and (iii) why that unknown (and unidentified) set of people would require almost US\$ 1 billion of health care to treat illnesses that are nowhere identified in the record.¹⁴⁹ The Judgment thus reveals the true state of the evidence—that the record fails to identify or prove even a single case of cancer attributable to the Consortium’s operations.

49. *Third*, the Judgment awards *extra petita* damages of US\$ 100 million for a “community reconstruction and ethnic reaffirmation program.”¹⁵⁰ Although the Plaintiffs submitted no expert report or evidence regarding the indigenous population or damages to it, the Judgment states (without distinguishing the evidence and expert reports to the contrary) that Chevron “partially caused” harm to indigenous peoples, including disruptions to their customary

¹⁴⁶ **Exhibit C-1190**, M. Kelsh, L. Morimoto, and E. Lau, *Cancer mortality and oil production in the Amazon Region of Ecuador, 1990-2005*, Int. Arch Occup Environ Health, 2008 at 1.

¹⁴⁷ **Exhibit C-1191**, World Health Organization, International Agency for Research on Cancer, *Occupational Exposures in Petroleum Refining; Crude Oil and Major Petroleum Fuels, Summary of Data Reported and Evaluation*, IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Vol. 45 (1989), at 20.

¹⁴⁸ **Exhibit C-1367**, Lago Agrio Clarification Order of the Judgment, May 4, 2011, at 13; see also **Exhibit C-931**, Lago Agrio Judgment, at 141 (Eng.) (“[W]omen had cancer in their reproductive organs, the body caught inhalations, and this from pure contamination; I am no expert on oil, but I think that it was surely caused by the fluid ...”).

¹⁴⁹ **Exhibit C-931**, Lago Agrio Judgment, at 184 (Eng.).

¹⁵⁰ **Exhibit C-931**, Lago Agrio Judgment, at 183 (Eng.).

diet and displacement.¹⁵¹ These assertions, which repeat the unsupported claims made in the fraudulent Cabrera Report, are directly contrary to the expert anthropological evidence submitted to the court. And although the phrase “partially caused” indicates an understanding that any harms to the indigenous population resulted from other causes (such as the direct effect of Government policies), it failed to reduce the alleged damages on this basis.¹⁵² Therefore, there is no foundation for the Judgment’s US\$ 100 million award.

b. Soil Remediation (US\$ 5.4 Billion)

50. The Judgment awards the Plaintiffs soil-remediation damages—US\$ 5.396 billion, the lion’s share of the compensatory relief—based on a number of premises that contradict on-the-ground facts regarding the remediation, including: (i) The number of pits requiring remediation, (ii) the size of those pits, and (iii) the cost of remediating each pit.

51. *First*, the Judgment holds Chevron responsible for remediating 880 pits, although it never discloses the basis for this pit count (or even how many pits it found to exist in total), stating only that the Court relied on “aerial photographs certified by the Geographic Military Institute which appear throughout the record.”¹⁵³ The Court repeated this same excuse in the Clarification Order, stating that the court reached the pit count by “analys[ing] the various aerial photographs that form a part of the record[.]”¹⁵⁴ This statement is demonstrably false. Even if a judge with no expertise could undertake such an analysis, there are nowhere near 880 pits revealed by aerial photographs in the record, much less that many pits requiring remediation. Remote sensing expert William Di Paolo “reviewed all the aerial photographs in the record” and

¹⁵¹ **Exhibit C-931**, Lago Agrio Judgment, at 172 (Eng.).

¹⁵² **Exhibit C-931**, Lago Agrio Judgment, at 172 (Eng.); *see* **Exhibit C-442**, R. Wasserstrom, Roads, Oil and Native Peoples: A Controlled Comparison on the Ecuadorian Frontier, attached as Annex 17 to Chevron’s filing of Sept. 16, 2010 at 4:35 p.m., at 1 (“The Ecuadorian Oriente is divided into four distinct zones: an area with oil development and access roads; another one with oil and no roads; a third area with access roads and no oil; and a fourth with neither oil nor roads. A comparison of such areas clearly shows that roads and agricultural settlement, not oil development, explain existing patterns of deforestation and land loss among native inhabitants.”).

¹⁵³ **Exhibit C-931**, Lago Agrio Judgment, at 125 (Eng.).

¹⁵⁴ **Exhibit C-1367**, Lago Agrio Clarification Order of the Judgment, May 4, 2011, at 15.

found no photos in existence for approximately 35% of the sites.¹⁵⁵ And a 2007 Petroecuador report stated that only 370 pits required remediation in the former Concession.¹⁵⁶

52. Forensic analysis by Michael Younger reveals the true source of the pit count used in the Judgment: Annex H-1 of the fraudulent Cabrera Report.¹⁵⁷ That annex contains a spreadsheet listing 916 supposedly existing pits, along with explanatory comments derived in part from TexPet’s earlier remediation. But when the spreadsheet is sorted to remove the pits for which the comments mention “no impact,” “Petroecuador,” and “Petroproduccion” (an affiliate of Petroecuador), the result is 880—the same number of pits identified in the Judgment. Mr. Younger concludes that “the count of 880 was probably arrived at simply by sorting . . . within the Stratus Compilation, which itself contains almost the exact same data in the exact same format as [Annex H-1].”¹⁵⁸ The Judgment thus assigned Chevron responsibility for the same number of pits as the fraudulent Cabrera Report, but obscured its reliance on that report by failing to cite the real source for the total number of pits that it found to exist.

53. *Second*, the Judgment claims, purportedly based on the same aerial photographs and reports, that 7,392,000 cubic meters of soil require remediation.¹⁵⁹ But extensive data from the Government Project for Elimination of Pits in the Amazon District (“PEPDA”)¹⁶⁰ indicates that the actual pit sizes are in fact much smaller.¹⁶¹ According to PEPDA, the average depth of

¹⁵⁵ **Exhibit C-1193**, Expert Report of William D. Di Paolo, *Lack of Aerial Photographic Evidence for the Pit Count in the Sentencia*, June 10, 2011, at 1.

¹⁵⁶ **Exhibit C-210**, Ernesto Baca, Response to Mr. Cabrera Regarding His Evaluation of PetroEcuador’s Pit Remediation Program (PEPDA), Sept. 5, 2008; **Exhibit C-472**, PEPDA 2007 Annual Report, attached as Annex A to Chevron’s Motion dated Sept. 15, 2008 at 2:14 p.m.; **Exhibit C-1153**, PEPDA 2008 Annual Report, Jan. 9, 2008 at 16.

¹⁵⁷ Younger Expert Report at 18.

¹⁵⁸ Younger Expert Report at 18.

¹⁵⁹ **Exhibit C-931**, Lago Agrio Judgment, at 125 (Eng.).

¹⁶⁰ At the Court’s request, PEPDA submitted details about surface area, depth, and volume of soils for 66 pits remediated in the former Concession. **Exhibit C-1194**, Letter from Engineer Jorge Vivanco A., PEPDA Project Coordinator, to the Director of Environmental Protection, Amazon District, Nov. 26, 2007.

¹⁶¹ **Exhibit C-13**, HBT Agra, Ltd., October 1993, *Environmental Assessment and Audit of the Petroecuador-Texaco Consortium Oilfields to June 30, 1990*, Woodward Clyde Corporation, 2000; **Exhibit C-43**, Remediation Action Program, Oriente Region, Ecuador, Final Report - Volume I and II, Environmental Audit Report, Final Report – document prepared for Texaco Petroleum Company, Woodward-Clyde International, Inc., May 2000; **Exhibit C-1195**, Culebra – Yulebra Area, *Environmental Liabilities, Ecuador Oil Opportunities, International Bid for the Areas: Auca, Culebra – Yulebra, Lago Agrio and Shushufindi*, 2004; **Exhibit C-1364**; Lago Agrio Area, *Environmental Liabilities, Ecuador Oil Opportunities, 2004, International Bid for the Areas, Auca, Culebra – Yulebra, Lago Agrio and Shushufindi*, Petroecuador Report, Ministry of

remediation was 1.32 meters (about half the depth assumed in the Judgment), and the average volume of soil to be remediated was 1,810 cubic meters (4.5 times less than the volume indicated in the Judgment).¹⁶²

54. *Third* and finally, the Judgment grossly inflates the cost of remediating each pit. Although the Judgment cites Dr. Barros’s expert report as the source for soil remediation costs ranging from US\$ 183 per cubic meter to US\$ 547 per cubic meter, with an average cost of US\$ 365 per cubic meter,¹⁶³ no such statements appear in his reports. In fact, these unit costs exist nowhere in the court record, and there is no technical basis for them.¹⁶⁴ Official Petroecuador documents indicate that PEPDA remediated some of the same pits in the former Concession for US\$ 15.71 per cubic meter, *23 times less* than the unit cost claimed in the Judgment.¹⁶⁵

55. The enormous difference between the actual costs of soil remediation and the inflated costs contained in the Judgment are predicated, in part, on the Judgment’s discriminatory application of a “100 ppm” standard, a standard that exists neither in law nor in practice in Ecuador.¹⁶⁶ By its own admission, the Judgment holds Chevron to a discriminatory (and far more stringent) remediation standard than that employed by Petroecuador and all other operators: “[I]f the levels of cleanup obtained by the referenced projects are considered, ... we see that they attain a level of cleanup of up to 1000 mg/Kg of TPHs, while the plaintiffs have requested the removal of all the elements that can affect their health and their lives, such that the level of cleanup should tend to leave the thing in the state they had before the consortium

Energy and Mines, Republic of Ecuador, 2004; **Exhibit C-1365**, *Shushufindi Area, Environmental Liabilities, Ecuador Oil Opportunities, 2004, International Bid for the Areas, Auca, Culebra – Yulebra, Lago Agrio and Shushufindi*, Petroecuador Report, Ministry of Energy and Mines, Republic of Ecuador, 2004.

¹⁶² **Exhibit C-1194**, Letter from Engineer Jorge Vivanco A., PEPDA Project Coordinator, to the Director of Environmental Protection, Amazon District, Nov. 26, 2007.

¹⁶³ See **Exhibit C-931**, Lago Agrio Judgment, at 180-81 (Eng.).

¹⁶⁴ One of the Plaintiffs’ own experts, Mr. Villacreces, who authored 11 judicial inspection reports and who has worked for PECS and Garner, conceded that Ecuadorian remediation unit costs are no more than US\$ 29 to US\$ 72 per cubic meter. See e.g., **Exhibit C-967**, Anexo S for the judicial inspection report written by Mr. Villacreces for Shushufindi-24, Jan. 23, 2006.

¹⁶⁵ **Exhibit C-1198**, Robert E. Hinchee, *Rebuttal of the Method Used by Mr. Cabrera to Determine the Supposed Necessity and Cost of Remediation*, Aug. 9, 2008, at 12.

¹⁶⁶ **Exhibit C-931**, Lago Agrio Judgment, at 181.

operations...”¹⁶⁷ In fact, the applicable regulatory standard for petroleum-impacted sites is either the 2,500 mg/Kg TPH standard for agricultural land, or the 4,000 mg/Kg TPH standard for industrial land.¹⁶⁸ The Judgment’s arbitrary use of a remediation standard that has no basis in Ecuadorian law, and that is not applied against other companies (including Petroecuador), constitutes blatant discrimination against Chevron in favor of the Plaintiffs and Petroecuador.

56. To make matters worse, the Judgment doubles its already-inflated cost estimate based on the work of Douglas Allen (one of the Plaintiffs’ “cleansing” experts brought in as a last-minute substitute for Cabrera). The Judgment described Allen’s report as stating that the cost to remediate to 100 ppm TPH was roughly double the cost to remediate to 1,000 ppm TPH.¹⁶⁹ This arbitrary doubling increases the Judgment’s cost estimate to US\$ 730 per cubic meter, more than 46 times higher than the amount PEPDA now pays to remediate in the same area, using the applicable legal parameters. Here again, the Judgment uses sleight of hand to justify an exorbitant award; in fact, Allen did not double the cost of remediating from 1,000 ppm to 100 ppm, but rather increased his high-end cost estimate as a result of increased volume. And even more troubling, the Judgment rejected Mr. Allen’s high-end cost estimate of US\$ 949 million, awarding (without evidentiary basis) more than five times that amount for soil remediation.

¹⁶⁷ **Exhibit C-931**, Lago Agrio Judgment, at 181; *see supra* note 81 (noting that Petroecuador’s remediation of the same area is certified to a standard of 2,500 mg/kg or 4,000 mg/kg).

¹⁶⁸ **Exhibit C-1155**, Chevron’s Motion filed Sept. 19, 2011, at 1:15 p.m., at 9-11; **Exhibit C-1156**, Bioremediation of Crude Oil in Amazon Rain Forest, MICROBAC, Dec. 4, 2009 at 2:36, *available at* http://www.youtube.com/watch?v=q_N1WtYrI&feature=player_embedded, and <http://www.youtube.com/watch?v=B8m5TgCao50>, (agricultural land use standard); **Exhibit C-1157**, Oleoducto de Crudos Pesados, Ecuador S.A. Remediation, July 21, 2009 at 1:21, http://www.ocpecuador.com/index.php?option=com_phocagallery&view=category&id=2%3Acat-videos&lang=es (agricultural land use standard); **Exhibit C-1158**, Verónica Paulina Orosco Verdezoto and Mercedes Margarita Soria Guano, *Bioremediation of Vegetation Contaminated with Oil From Spills in the Guarumo – Petroproduction Field*, Chimborazo Polytechnic College, 2008, at 73 (agricultural land use standard); **Exhibit C-1159**, Lissette Paola Rodríguez Muñoz, *Evaluation of Two Substrates in the Landfarming Technique for the Treatment of Hydrocarbon Contaminated Soils*, Polytechnic Institute of Higher Education of Chimborazo, 2008 at 116 (agricultural land use standard); **Exhibit C-1160**, Yomar Daniela Álvarez Méndez, Degree Thesis: “Soils Affected by Hydrocarbon Spills: Remediation Alternatives at the Petrocomercial El Beaterio Clean Products Terminal,” Central University Of Ecuador, School of Geological, Mining, Petroleum, and Environmental Engineering, March 2009 at 110, 140 (industrial land use standard); **Exhibit C-1161**, Pasivos Ambientales (Universidad de Guayaquil), Nov. 15, 2010, *available at* <http://www.youtube.com/watch?v=W40J9kcc87Q&feature=related>.

¹⁶⁹ **Exhibit C-931**, Lago Agrio Judgment, at 181 (Eng.).

57. Moreover, Mr. Allen’s US\$ 949 million estimate was calculated based on a 100 ppm TPH limit, which Mr. Allen himself admits is only a “conceptual-level valuation . . . not a detailed study,” and which he concedes does not represent the actual cost to remediate soil or groundwater in the former Concession.¹⁷⁰ It therefore does not support the proposition that unit costs would double. Moreover, there is no legal or regulatory basis in Ecuador for using a 100 ppm TPH level for cleanup.¹⁷¹

58. The Judgment’s inflation of every variable led to its outrageous award of roughly US\$ 5.4 billion for soil remediation—77 times higher than Petroecuador’s recent estimate of US\$ 70 million to remediate pits throughout the Ecuadorian Amazon,¹⁷² and 44 times higher than Petroecuador’s 2007 remediation budget in the former Concession (US\$ 121.15 million),¹⁷³ an official estimate approved by the State and Petroecuador as sufficient to remediate *all* of the pits in the area.¹⁷⁴

c. Groundwater Contamination (US\$ 600 Million)

59. The Judgment’s US\$ 600 million award for remediation of alleged groundwater contamination also has no basis in the record. The Judgment merely mentions “the *possibility* that there exist seepages” from pits and a risk that “groundwater *could* become contaminated.”¹⁷⁵ This is pure speculation.

¹⁷⁰ See **Exhibit C-898**, *In re Application of Chevron Corp.*, No. 2:10-mc-0091, U.S. District Court for the District of Vermont, Transcript of Videotaped Deposition of Douglas C. Allen, Dec. 16, 2010 (hereinafter “Allen Deposition”), at 336, 374.

¹⁷¹ In fact, as noted above, the standard applied to Petroecuador’s remediation of the same area is 2,500 mg/kg or 4,000 mg/kg.

¹⁷² **Exhibit C-1152**, Victor Gómez, *Ecuador will clean up areas in \$18 bln Chevron case*, REUTERS, Dec. 14, 2011.

¹⁷³ **Exhibit C-1200**, Letter from the Undersecretary of Environmental Protection (DINAPA) of the Ministry of Energy and Mines to Eng. Galo Balda S., Vice President of Petroproduction, Quito Ecuador, Oct. 28, 2002; **Exhibit C-1201**, Final Report, Elimination of Pit SA-14-1, PEPDA, 2006; **Exhibit C-1202**, Final Report, Elimination of Pit SA-15-1, PEPDA, 2006; **Exhibit C-1203**, Final Report, Elimination of Pit SA-32-1, PEPDA, 2006; **Exhibit C-1204**, Final Report, Elimination of Pit SA-32-2, PEPDA, 2006; **Exhibit C-1205**, Final Report, Elimination of Pit SA-78, PEPDA, 2006.

¹⁷⁴ **Exhibit C-60**, Annual Report on the Timeline for the Elimination of Environmental Liabilities, PEPDA, Dec. 2007.

¹⁷⁵ **Exhibit C-931**, Lago Agrio Judgment, at 117 (Eng.) (emphasis added).

60. The Judgment ignores substantial evidence that the Consortium's operations contaminated no groundwater at all.¹⁷⁶ The Judgment also ignores Chevron's evidence demonstrating that the data in the record "show no signs of impacts to groundwater," and that there is "no evidence that oil residuals attributable to TexPet operations can lead to groundwater contamination."¹⁷⁷ The only "expert" in the record to find a need for groundwater remediation was Cabrera, and even the ghostwritten Supplemental Cabrera Report stated that "further investigation is needed to develop a plan and assess the costs of cleaning up the groundwater."¹⁷⁸ Even the Plaintiffs' experts privately admitted that there is no evidence of groundwater contamination in the former Concession.¹⁷⁹ In 2006, the Plaintiffs' expert David Russell warned the Plaintiffs: "To date I have seen no data which would indicate that there is any significant surface or groundwater contamination caused by petroleum sources in Ecuador."¹⁸⁰ In 2007, the Plaintiffs' expert Ann Maest said on film that "all the reports are saying it's just at the pits and stations and nothing has spread anywhere at all."¹⁸¹ And just two months before the Judgment issued, Plaintiffs' "cleansing" expert Douglas Allen (on whose report the Judgment relies) testified that he did not have "any independent basis to opine that there is groundwater contamination requiring remediation within the former concession area," nor was he offering such an opinion.¹⁸² Yet the Judgment awards US\$ 600 million on the mere "possibility" of contamination, more than 20 years after TexPet stopped operating the sites.

61. The Judgment merely guesses at a compensation amount, stating that US\$ 600 million is "a figure that is lower than average according to the economic criterion estimated by Plaintiffs' "cleansing" expert Douglas Allen, "which is not in any way obligatory or binding for

¹⁷⁶ **Exhibit C-1206**, C. Newell, *Groundwater Conditions in the Former Petroecuador-Texaco Concession Area*, dated Sept. 9, 2010, attached as Annex 13 to Chevron's Technical Alegato filed Sept. 16, 2010 at 4:35 p.m.

¹⁷⁷ **Exhibit C-1207**, P. Alvarez, D. MacKay, & R. Hincee, *Expert Report on Remediation Costs: Rebuttal to Environmental Damages Valuation – TexPet-Ecuador Concession Area Authored by Douglas C. Allen*, Sept. 2010, attached as Annex 2 to Chevron's Motion filed Oct. 29, 2010 at 5:20 p.m.

¹⁷⁸ **Exhibit C-212**, Supplemental Report by Richard Stalin Cabrera Vega, Nov. 26, 2008, at 12.

¹⁷⁹ **Exhibit C-722**, Transcript of *Crude* outtakes, attached as Exhibit 2 to Chevron's Motion filed Aug. 6, 2010, at 2:50 p.m. (CRS 195-05-01); *see also* **Exhibit C-503**, Chevron's Motion filed Aug. 6, 2010, at 2:50 p.m., at 21; **Exhibit C-1208**, E-mail from A. Maest to D. Beltman, Dec. 4, 2007 [STRATUS-NATIVE050355-57].

¹⁸⁰ **Exhibit C-1051**, Letter from D. Russell to S. Donziger, "Cease and Desist," Feb. 14, 2006 [POWERS-NATIVE09594-95].

¹⁸¹ **Exhibit C-360**, *Crude* Outtakes, CRS-195-05-CLIP-01 (Tr. at 5).

¹⁸² **Exhibit C-898**, Allen Deposition, at 374:22-24.

this Court, but rather a simple reference that is not accepted.”¹⁸³ Allen himself later testified that he had relied on the Cabrera Report despite his opinion that it was unreliable, and that his report’s conclusions would have been different had he known that the Plaintiffs’ lawyers ghostwrote the Cabrera Report.¹⁸⁴ He further admitted that his report failed to consider causation or Petroecuador’s role in any alleged contamination.¹⁸⁵ The Judgment offers no explanation as to why the Allen report should be the benchmark to justify an award of US\$ 600 million. In sum, the Judgment’s damage award for groundwater remediation ignores the scientific evidence entirely.

d. Ecosystem (US\$ 200 Million)

62. The Judgment’s award of “at least” US\$ 200 million for the restoration of flora, fauna, and aquatic life over “at least 20 years” is based on nothing more than conclusory assertions that it “is obvious” that “the native flora and fauna will not be restored on their own.”¹⁸⁶ The Judgment cites no evidence of any impact from Consortium operations on flora and fauna in the first place, much less any evidence as to what supplementary measures would address any impact or the cost of such measures. Rather, the Judgment ignores the only report in the record that directly addresses the issue of biodiversity of flora and fauna: A rebuttal to the Cabrera Report submitted in 2008 by Bjorn Bjorkman and Claudia Sanchez de Lozada, which concluded: “Those differences [in biodiversity] that were observed can be attributed primarily to the natural variability inherent to biological evaluations. It can be concluded that a history of petroleum development alone does not affect abundance and diversity of biological resources in the area.”¹⁸⁷

63. The only document cited for these damages—a report of the Plaintiffs’ “cleansing” expert Dr. Barnthouse—provides no independent damage estimate. It merely

¹⁸³ **Exhibit C-931**, Lago Agrio Judgment, at 179 (Eng.).

¹⁸⁴ **Exhibit C-898**, Allen Deposition, at 163:14-17, 205-206.

¹⁸⁵ *Id.* at 139: 7-21.

¹⁸⁶ **Exhibit C-931**, Lago Agrio Judgment, at 182 (Eng.).

¹⁸⁷ The report continues: “These comparative diversity indices do not detect significant differences between areas with, and areas without, petroleum development. Those differences that were observed can be attributed primarily to the natural variability inherent to biological evaluations. It can be concluded that a history of petroleum development alone does not affect abundance and diversity of biological resources in the area.” **Exhibit C-533**, Bjorn Bjorkman and Claudia Sanchez de Lozada, Response To Mr. Cabrera’s Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008.

regurgitates the damage figures from the fraudulent Cabrera Report.¹⁸⁸ For example, Dr. Barnthouse adopts Cabrera’s proposed cost per hectare for rainforest restoration (US\$ 29,180 per hectare) without considering that this is many times higher than the cost estimates provided by the Ecuadorian Forestry Law.¹⁸⁹ The Judgment ignores this evidence and appears to use Dr. Barnthouse’s report to establish a range of damages, and arrives at a final amount without referring to any evidence or explaining its rationale.¹⁹⁰

e. Healthcare System (US\$ 1.4 Billion)

64. The Judgment distorts and ignores the scientific and factual evidence to conclude that Chevron should pay US\$ 1.4 billion to “cover the health needs created by the public health problem occasioned by the acts of the defendant.”¹⁹¹ Contrary to all of the scientific and factual evidence in the record, the Judgment finds that “a serious impact on public health has been demonstrated, provoked by the presence in the environment of contaminants coming from the hydrocarbon operational practices as they were implemented by TexPet.”¹⁹² Yet the Judgment admits that it is “undetermined” whether even one person has suffered this supposedly “serious” damage,¹⁹³ and that there is a “*lack of proof of the harm or injuries to the health of specific persons.*”¹⁹⁴ In fact, all of the scientific evidence (including the only risk assessment conducted in the case) demonstrates that there is no significant risk to public health posed by former Consortium operations.¹⁹⁵ That risk assessment, conducted in 2008 and updated in 2011 by a

¹⁸⁸ See generally, **Exhibit C-1209**, L. Barnthouse, *Evaluation of Natural Resource Service Losses Related to Oil Field Development in the Concession*, Sept. 14, 2010, attached as Annex E to Plaintiffs’ Motion filed Sept. 16, 2010 at 5:15 p.m.

¹⁸⁹ **Exhibit C-532**, Theodore D. Tomasi, *Rebuttal To The Calculation Of Supposed Economic Damages Due To Ecosystem Losses By Mr. Richard Cabrera Vega*, Sept. 8, 2008 at p. 13. After adjusting for these overestimates in the “restoration cost” and other errors, the purported damages amount to US\$ 145,000—less than .01% of the total awarded.

¹⁹⁰ **Exhibit C-931**, Lago Agrio Judgment, at 182 (Eng.).

¹⁹¹ **Exhibit C-931**, Lago Agrio Judgment, at 183 (Eng.).

¹⁹² **Exhibit C-931**, Lago Agrio Judgment, at 183 (Eng.); compare **Exhibit C-531**, Michael A. Kelsh, Thomas E. McHugh and Theodore D. Tomasi, *Rebuttal To Mr. Cabrera’s Excess Cancer Death And Other Health Effects Claims, And His Proposal For A New Health Infrastructure*, Sept. 8, 2008, at 5 (concluding that the residents of the former Concession do not show any higher incidence of cancer than elsewhere in the region).

¹⁹³ **Exhibit C-931**, Lago Agrio Judgment, at 183 (Eng.).

¹⁹⁴ *Ibid.* at 138.

¹⁹⁵ **Exhibit C-1210**, T. McHugh, *Water and Soil Criteria for Assessments of the Judicial Inspection Environmental Data*, Appendix A.4 submitted to the Court with Chevron’s Motion refuting the Expert Report of Richard Cabrera. Sept. 15, 2008; J. Connor Expert Report at 11, 64-70.

toxicologist and environmental scientist, showed no unsafe levels of hydrocarbons or metals in sources of water used for drinking (e.g., municipal water systems, hand-dug wells, and surface water): “Specifically, in a number of cases where local residents stated that they believed that their drinking water was contaminated, testing of the identified source of drinking water showed an absence of petroleum hydrocarbons.”¹⁹⁶

65. As it did with the US\$ 800 million in *extra petita* damages for “excess cancer,” the Judgment discarded scientific evidence in favor of testimony from local residents. For instance, the Judgment quotes residents who testified to contracting “typhoid fever,” fungal infections, and skin conditions as a result of using river water to bathe, concluding that this testimony “proves that human beings used these waters and that the Texpet dumping caused unlawful exposure to the people who used that water.”¹⁹⁷ The Judgment, of course, does not cite any evidence that crude oil causes these diseases, but nonetheless treats these testimonies as trumping the scientific conclusions of epidemiologists and toxicologists.

66. Although the Judgment does not disclose its basis for assessing US\$ 1.4 billion for construction of a healthcare system, this number matches exactly the report of Plaintiffs’ cleansing expert Carlos Picone, who identified it as the amount needed to address *all* of the healthcare needs in the area (not just those alleged to be the result of oil operations). Dr. Picone himself later testified that he did not “reach the conclusion that the healthcare needs of the population in the Oriente can be tied to any particular environmental damage.”¹⁹⁸ In fact, Dr. Picone admitted that there was no reason to believe that the healthcare needs of the population near the former Concession were any different than the rest of the Oriente.¹⁹⁹

¹⁹⁶ **Exhibit C-1210**, T. McHugh, *Water and Soil Criteria for Assessments of the Judicial Inspection Environmental Data*, Appendix A.4 submitted to the Court with Chevron’s Motion refuting the Expert Report of Richard Cabrera. Sept. 15, 2008, at 7; **Exhibit C-1211**, T. McHugh, *Lack of Evidence of Health Risks Associated with Hydrocarbons and Metals in the Former Concession Area*, June 10, 2011, at 2 (finding that the Judgment’s conclusions regarding health impacts “are not supported by scientific evidence in the record”).

¹⁹⁷ **Exhibit C-931**, Lago Agrio Judgment, at 142 (Eng.).

¹⁹⁸ **Exhibit C-900**, *Chevron Corp. v. Picone*, No. 8:10-cv-02990-AW, U.S. District Court for the District of Maryland, Videotaped Deposition of Carlos Emilio Picone, Dec. 16, 2010, at 159:7-17.

¹⁹⁹ **Exhibit C-900**, *Chevron Corp. v. Picone*, No. 8:10-cv-02990-AW, U.S. District Court for the District of Maryland, Videotaped Deposition of Carlos Emilio Picone, Dec. 16, 2010, at 220:20-221:3.

4. *The Judgment Constitutes and Contains an Unenforceable Penalty*

67. The Lago Agrio Court doubled the amount of its already penal and arbitrary Judgment by imposing an additional US\$ 8.65 billion in punitive damages, even though Ecuadorian law does not allow such damages and the Lago Agrio Plaintiffs failed to seek them in their Complaint.²⁰⁰ The Court stated that it would relieve Chevron of this “penalty” only if Chevron issued a “public apology” in both the Ecuadorian and United States press, effectively admitting liability, within 15 days.²⁰¹ This penalty’s effect is to make the cost of an appeal equal to US\$ 8.65 billion. Aside from the sheer absurdity of the dollar amount,²⁰² the penalty is unenforceable and a violation of Ecuador’s Treaty and international-law obligations for at least four reasons.

68. *First*, punitive damages of this type do not exist under Ecuadorian law. Under the Ecuadorian Civil Code, actions giving rise to extra-contractual responsibility only allow a plaintiff to recover compensatory damages. Article 1572 of the Civil Code limits compensation in these cases to consequential damages and lost profits.²⁰³ In 2006, Ecuador’s Supreme Court (now the National Court of Justice) confirmed that Ecuadorian law recognizes only compensatory or indemnification damages—“not punitive damages.”²⁰⁴ Several years into the litigation, Donziger admitted that “[p]unitive [damages have] no basis in Ecuadorian law, but we

²⁰⁰ See **Exhibit C-1178**, Chevron’s Appeal to the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m., at 180-86; **Exhibit C-1212**, *Chevron Corp. v. Donziger*, No. 1:11-cv-00691 (LAK) (S.D.N.Y.), Dkt. 95), Declaration of Dr. César Coronel Jones, Dkt. 95, Feb. 15, 2011, ¶¶ 12-15.

²⁰¹ **Exhibit C-931**, Lago Agrio Judgment at 185-86. Judge Zambrano held a post-judgment press conference with the Ecuadorian press, in which he stated: “[f]urthermore, as the company has proceeded in bad procedural faith during this judicial process, a fine amounting to 100% additional to all the amounts established for the reparation has been set both as a punitive and dissuasive measure. These compensations seek to set an example and to dissuade others from incurring the same conduct, as well as to compensate the victims.” Judge Zambrano went on to say “this sanction could be removed if Chevron publicly apologizes to the affected. This public acknowledgment of damage caused should be published -- in three consecutive days -- in no more than 15 days in the main newspapers in Ecuador, as well as in the United States.” **Exhibit C-969**, Press Conference of Judge Nicolás Zambrano in Quito, Feb. 14, 2011.

²⁰² Even if the Court were to accept Plaintiffs’ unjust-enrichment claim as the basis for its punitive damages award, TexPet only received approximately US\$ 500 million during its entire participation in the Consortium. See **Exhibit C-1213**, Chevron Initial Alegato, Jan. 6, 2011 at 5:55 p.m., § 7.4.6, at 236-37.

²⁰³ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1572 (“[Compensation for damages].– Damages include consequential damages and lost profit, regardless of whether they result from failure to comply with the obligation, or improper performance of the obligation or delay in the performance.”).

²⁰⁴ **Exhibit C-1214**, *Asociación de Negros del Ecuador (ASONE) y otros vs. Petroecuador y sus filiales [Association of Blacks in Ecuador (ASONE), et. al., vs. Petroecuador and its affiliates]*, Judgment of the Supreme Court of Justice No. 120-06, Mar. 30, 2006, Official Registry No. 381, Oct. 20, 2006 (emphasis added).

could push it and seek it anyway.”²⁰⁵ These damages amount to a penalty in violation of Ecuadorian law and public policy.

69. *Second*, the Plaintiffs never requested punitive damages in their Complaint, making this portion of the Judgment *extra petita* and thus improper under Ecuadorian law.²⁰⁶

70. *Third*, the Judgment’s conditional punitive-damage award links the US\$ 8.6 billion punitive-damages award directly to a public acknowledgment of liability within a 15-day period. The Judgment effectively provides that if Chevron exercises its due-process and appellate rights, the already outrageous damage award will nearly double. Standing alone, this amounts to a denial of justice under international law because it seeks to deny Chevron the right to exercise its appellate rights by imposing a prohibitive cost through the Judgment.

71. *Finally*, the punitive-damage award against Chevron is discriminatory, since neither Petroecuador nor anyone else in Ecuador has ever been subjected to such damages.

B. A Trust For the Benefit of the Amazon Defense Front and Supervised by the Lago Agrio Court Will Administer the Judgment Funds

72. In a portion of the Judgment ghostwritten by the Plaintiffs,²⁰⁷ it orders that an Ecuadorian trust, controlled entirely by the Lago Agrio Court and the Frente, will receive the Judgment proceeds slated for remediation (the “Trust”). Specifically, the Judgment directs the Plaintiffs to create, within 60 days of the Judgment, “a commercial trust, to be administered by one of the fund and trust administrator companies located in Ecuador in keeping with the terms of the Securities Market Law and other applicable laws.”²⁰⁸ It directs the entire award of actual damages (except for the 10% bounty, which goes directly to the Frente) to be placed in that Trust.²⁰⁹ Some of this language establishing the Trust first appeared in the Plaintiffs’ internal

²⁰⁵ **Exhibit C-1215**, Email from S. Donziger to J. Lipton, Apr. 22, 2007 [DONZ00038322-25].

²⁰⁶ **Exhibit C-1178**, Chevron’s Appeal to the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m., at 109-11.

²⁰⁷ *See supra* p. 11 *et seq.* (explaining Fajardo’s involvement in ghostwriting legal portions of the Judgment regarding the establishment of a trust).

²⁰⁸ **Exhibit C-931**, Lago Agrio Judgment, at 186 (Eng.).

²⁰⁹ **Exhibit C-931**, Lago Agrio Judgment, at 186 (Eng.) (“b) The autonomous endowment should be comprised by the total value of the compensation that the defendant has been ordered to pay per part Thirteenth of the Findings.”). The 10% bounty awarded to the Frente and the US\$ 8.6 billion penalty imposed on Chevron are not included in part Thirteenth of the judgment and thus fall outside the Trust. So to the extent that the Trust provides any transparency for the US\$ 8.6 billion in “actual” damages, it provides none at all for the amount that falls outside the Trust.

documents that were never made part of the Court record, and then reappeared largely verbatim in the Judgment.²¹⁰ According to Plaintiffs' representative Juan Pablo Saenz, the Plaintiffs formed and signed the Trust on March 2, 2012.²¹¹

73. The Frente is the Trust's beneficiary²¹² and controls its Board.²¹³ The 2009 bribery scandal involving Judge Núñez—in which Chevron obtained video proof of the presiding judge promising remediation contracts in exchange for illicit bribes²¹⁴—vividly illustrates the potential for graft with respect to this Trust.

74. The Trust's status as the repository of the Judgment funds has another critical effect: The individual Lago Agrio Plaintiffs will not benefit from enforcement of the Judgment. A lawyer for two of the nominal Lago Agrio Plaintiffs, James Tyrrell, has confirmed as much. During an oral hearing before the U.S. Second Circuit Court of Appeals, Mr. Tyrrell claimed that the named plaintiffs were no longer the "real party in interest," and that the Ecuadorian courts instead controlled the Trust to be established by the Frente.²¹⁵ According to Mr. Tyrrell, "[t]he court in Ecuador has decided that a commercial trust to be established under the control of the court in Ecuador will own the Judgment, not my clients. *My clients are no longer the real party in interest.*"²¹⁶ Steven Donziger, one of the main architects of this intricate fraud, testified in a deposition that he and the Frente had no plans to transfer any of the Judgment money to the named plaintiffs.²¹⁷ As contemplated in the *quid pro quo* agreement, it is ultimately the

²¹⁰ **Exhibit C-1216**, Email from P. Fajardo to J. Prieto, J. Saenz, and S. Donziger, June 18, 2009 [DONZ00051504].

²¹¹ **Exhibit C-1133**, *18 billion, if one contextualizes it with the damage they have caused, it not an outlandish figure'* according to Chevron case Attorney," ECUADOR INMEDIATO RADIO, Mar. 3, 2012.

²¹² **Exhibit C-931**, Lago Agrio Judgment, at 186-187 (Eng.) ("c) The beneficiary of the trust shall be the Amazon Defense Front or the person or persons that it designates, considering that 'those affected' by the environmental harm, are undetermined, but determinable, persons united by a collective right, with measures of reparation being the way to benefit them.").

²¹³ *Id.* at 187.

²¹⁴ See Claimants' Memorial on the Merits, at 285-286.

²¹⁵ **Exhibit C-1002**, *Chevron Corp. v. Naranjo et al.*, Hearing Transcript 34:1-8, Sept. 16, 2011 (2d Cir.).

²¹⁶ **Exhibit C-1002**, *Chevron Corp. v. Naranjo et al.*, Hearing Transcript 34:1-8, Sept. 16, 2011 (2d Cir.) (emphasis added).

²¹⁷ **Exhibit C-910**, *In re Application of Chevron Corp.*, No. 10-MC-00002, U.S. District Court for the Southern District of New York, Deposition of Steven Donziger, Jan. 8, 2011, Vol. 9, at 2695:10-2701:25. These acknowledgments are consistent with evidence confirming that the named Lago Agrio Plaintiffs will not see a penny from the Judgment, and instead those funds will go entirely to the lawyers or to the Frente, pursuant to the Trust established in the Judgment. On October 31, 2010, the Frente, and Treca Financial Solutions

Government of Ecuador, which already settled these same claims with TexPet, that will supervise the disbursement of the funds through the same Court that issued the fraudulent Judgment.

C. The Lago Agrio Judgment Is Based on Gross Due-Process Violations and Fraudulent Proceedings

75. Not only does the Lago Agrio Judgment constitute a fraud standing alone, but it also consummates seven years' worth of fraud and collusion by the Plaintiffs, the Court, and the Government. The Judgment fails to admit or correct the fraudulent and biased nature of the overall proceedings, which falls into three broad categories:

- (1) Fraud in the initiation of the lawsuit, including a wrongful deal struck between the Plaintiffs and the Government to exempt Petroecuador from liability, and the forgery of many of the nominal plaintiffs' signatures;²¹⁸
- (2) The Plaintiffs' fraud and bribery in procuring sham evidence, including the Cabrera Reports and the September 16, 2010 expert reports, which were designed to "cleanse" the record of the ghostwritten Cabrera Reports;²¹⁹ and
- (3) Years of improper coordination between the Lago Agrio judges and the Plaintiffs' lawyers, including reliance on the biased rulings of Judges Núñez and Yánez.²²⁰

("Trecá"), a Cayman Islands shell company set up by Burford Advisors (a New York-based litigation funding group), and 37 of the 47 living Lago Agrio Plaintiffs executed a funding agreement (the "Burford Funding Agreement"). **Exhibit C-1217**, Burford Funding Agreement, Oct. 31, 2010. Pursuant to this agreement, the Lago Agrio Plaintiffs and the Frente obtained US\$ 4 million in immediate cash, with further potential funding tranches totaling a combined \$15 million. *Id.*, Art. 2.1. In exchange for this investment, the parties agreed to establish "a trust under Ecuadoran law" to hold "all of the litigious rights as well as any and all interest in the Claim, the Award, any proceedings of the enforcement enforce [sic] the Award, and any proceeds . . . of any of the foregoing . . ." (the "Burford Trust") and agreed that the trustee "is the sole and only Person entitled to, among other things, pursue the Claim and enforce and collect the Award." *Id.*, Art. 8.1(a). The parties further agreed that "all proceeds of the Award that are paid to the Trust shall be distributed in accordance with the Intercreditor Agreement." *Id.*, Art. 8.1(c). In turn, the Intercreditor Agreement—executed on the same day as the Burford Funding Agreement by Trecá, Torvia Limited, Patton Boggs LLP, Donziger & Associates, PLLC, Emery, Celli Brinckerhoof & Abady LLP, Fajardo, Erik T. Moe, H5, and the Frente—provides that if any of these parties "receives all or any part of the proceeds of the Award, that Party will hold these proceeds in trust (or the local law equivalent in Ecuador or elsewhere in the world where those proceeds are received) to be paid or delivered to" the trustee, Patton Boggs, "in trust for deposit into the Escrow Account and distribution in accordance with this Agreement." **Exhibit C-1218**, Intercreditor Agreement, Oct. 31, 2010, § 2.2. "Escrow Account" is defined as being "in the sole control" of Patton Boggs or a trustee "in a common law jurisdiction (excluding the United States) selected by the Claimants with the approval of" Burford and Torvia. *Id.*, § 1.20. Patton Boggs has "a full power of attorney . . . to cause and allow any and all Award proceeds to be paid or delivered forthwith as set out above." *Id.*, § 2.4.

²¹⁸ **Exhibit C-1166**, Report of Gus R. Lesnevich, June 27, 2011.

²¹⁹ Claimants' Letter to the Tribunal, Mar. 4, 2011, at 5-6.

²²⁰ Claimants' Memorial on the Merits, at 120-132; Claimants' Letter to the Tribunal, Dec. 12, 2010, at 6-9.

Claimants have detailed this wrongdoing in their previous pleadings, and this Section focuses on new evidence obtained since the filing of Claimants' Memorial on the Merits.

1. The Court Ignored Fraud in the Initiation of the Lawsuit

76. The foundation of the Lago Agrio Judgment is marred by fraud and corruption not only on the part of the Plaintiffs, but also of the Lago Agrio Court and Government officials. The Court turned a blind eye to the Plaintiffs' expressed desire to shield Ecuador and Petroecuador from liability, despite the fact that the State-owned company was responsible for the vast majority of the "damage" alleged in the Complaint. It also ignored evidence that the 48 named Plaintiffs were proxies for the true Judgment beneficiaries (the Frente and the Ecuadorian State)—including that Plaintiffs' counsel had forged at least 20 of the named plaintiffs' signatures on the Complaint. Under Ecuadorian law, such a forgery should have resulted in the lawsuit's dismissal.

a. Plaintiffs' Counsel Agreed Not to Sue Ecuador or Petroecuador In Exchange for the Government's Assistance

77. The Lago Agrio Plaintiffs' failure to sue Petroecuador and the Court's refusal to account for Petroecuador's responsibility in the Judgment were no accidents. They resulted from the Plaintiffs' explicit agreement to forego their claims against the Government in exchange for political and judicial support in seeking to shift all liability for the remediation onto Chevron.

78. The Plaintiffs had no desire to sue Petroecuador or Ecuador because, as Donziger explained, "the government here will never pay for any judgment. In contrast, Texaco can pay."²²¹ The Plaintiffs' former lead attorney Cristóbal Bonifaz also acknowledged that "it would have been futile to file a case against the Government of Ecuador or Petroecuador in Ecuador" because "there was no way a court was going to find against the Government."²²²

79. Understanding the futility of a suit against the Government or its State-owned oil company, the Plaintiffs entered into a written agreement in 1996, through which Plaintiffs

²²¹ **Exhibit C-360**, *Crude* Outtakes, Nov. 16-17, 2007, at CRS-116-01-CLIP-01 (video clip of meeting between S. Donziger and L. Yanza).

²²² **Exhibit C-1220**, Deposition of Cristobal Bonifaz, *In re application of Chevron Corp. for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings*, and *In re Application of Rodrigo Perez Pallares and Richard Reis Veiga*, No. 10-MC-30022 and 10-mc-30023 (D. Mass. Mar. 1, 2011) 94:6-95:18 (hereinafter "Bonifaz Deposition, Mar. 2011").

“expressly waive[d] the right to file any claim against the Ecuadorian State.”²²³ In exchange, the Government agreed to change its prior position and “intervene” on behalf of the Plaintiffs in the proceedings against Texaco filed in the United States.²²⁴ In January 1997, when the Ecuadorian Government changed with the inauguration of President Fabian Alarcon, a “credible source” in that administration stated that “Bonifaz offered to ensure that *the government would administer the winnings of the lawsuit*” in order to “convince the new government to support the position of its predecessor in the litigation.”²²⁵

80. In his March 2011 deposition, Bonifaz testified that the “idea of an agreement not to sue” was raised by then-Attorney General Leonidas Plaza Verduga “following statements by Judge Rakoff . . . that if the Government of Ecuador intervened in the *Aguinda* litigation, that Texaco might bring counterclaims against it.”²²⁶ According to Bonifaz, the Government “freaked out”²²⁷ about the possibility of being sued, and the Attorney General asked the Plaintiffs to “sign the piece of paper” that “says you’re not going to sue [the Government]”²²⁸ if the Government “was going to intervene in the case.”²²⁹ As Bonifaz put it, “[t]here’s no question there was a *quid pro quo*.”²³⁰ The Government’s lawyers drafted the agreement, which the Plaintiffs’ representatives signed with “no negotiations.”²³¹ In Bonifaz’s view, the agreement not

²²³ Counsel for Respondent represented to the Tribunal that they were unable to find this document, and challenged its existence. Transcript of Hearing on Interim Measures, May 10-11, 2010, Day 2, at 71-72; **Exhibit C-911**, Waiver of Rights Granted Before Notaries Public of Massachusetts and Pennsylvania, Respectively, Nov. 20, 1996; *see also* Claimants’ Letter to the Tribunal Requesting Interim Measures, Jan. 14, 2011, at 11 (describing the agreement). As Bonifaz announced to the media around that time, “if the U.S. court [in the *Aguinda* or *Jota* actions] finds both Petroecuador and Texaco liable, we will not accept the percentage of the claim assigned to [Petroecuador].” **Exhibit C-76**, *Petroecuador will not be hurt*, EL COMERCIO, Apr. 22, 1997; *see also* **Exhibit C-911**, Waiver of Rights, Nov. 20, 1996, *Aguinda v. Texaco*, No. 93-CV-7527 (S.D.N.Y.) (CH-0000233).

²²⁴ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 33:2-20.

²²⁵ **Exhibit C-1222**, Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT’L L. & POL. 413, 519, n.288 (Spring 2006); **Exhibit C-484**, Letter from C. Bonifaz to Amb. I. Baki, Nov. 15, 2000 [ROEP00176460-61].

²²⁶ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 14:16-15:9.

²²⁷ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 16:8-21.

²²⁸ **Exhibit C-1221**, Deposition of Cristobal Bonifaz, *In re application of Chevron Corp. for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings*, Nos. 10-MC-30022-MAP, 10-MC-30023-MAP (D. Mass. Dec. 30, 2010) 209:15-23.

²²⁹ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 14:23-15:9.

²³⁰ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 33:2-5.

²³¹ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 16:2-18:2.

only applied to the *Aguinda* litigation and the Lago Agrio Litigation, but it also applied to “everything,” and is still “in force and effect today.”²³²

81. In November 2000, a few years after the signing of the *quid pro quo* agreement, Bonifaz wrote to Ecuadorian Ambassador Ivonne Baki reiterating the Plaintiffs’ offer “to pay the government, by mutual agreement, for the cost of improvements that would benefit the Amazonian people.”²³³ Bonifaz explained, “[t]he people would use the funds obtained from Texaco resulting from a settlement in the pending case to pay the government.”²³⁴

82. Even after U.S. courts dismissed the *Aguinda* Litigation and the Plaintiffs filed a new suit in Ecuador (this time against Chevron), they still considered themselves “bound” by the *quid pro quo* agreement.²³⁵ The Government continued to support the Plaintiffs, providing them with confidential Petroecuador documents about the remediation, funding the Lago Agrio Litigation in various ways,²³⁶ and holding meetings to coordinate their responses regarding Petroecuador’s environmental practices since 1990.²³⁷

²³² **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 18:3-19:11, 31:24-33:23.

²³³ **Exhibit C-484**, Letter from C. Bonifaz to Amb. I. Baki, Nov. 15, 2000 [ROEP00176460-61] (emphasis added).

²³⁴ **Exhibit C-484**, Letter from C. Bonifaz to Amb. I. Baki, Nov. 15, 2000 [ROEP00176460-61] (emphasis added).

²³⁵ **Exhibit C-1220**, Bonifaz Deposition, Mar. 2011, 31:24-33:23.

²³⁶ Claimants’ Letter to the Tribunal, Dec. 12, 2010 (detailing several instances of Government and Petroecuador funding for Plaintiffs’ studies). The Ecuadorian Ministry of the Environment signed yet another contract with the Frente in August 2008, by which the Government paid the Frente US\$ 185,000 for a project entitled “Management of Information Regarding the Socio-Environmental Problems of the Areas Affected by Petroleum Activity in Sucumbíos and Orellana.” This project closely resembles the Selva Viva Database that was used by the Plaintiffs in the Lago Agrio Litigation, on which Cabrera secretly relied in his ghostwritten reports, and on which the Judgment secretly relied. In fact, the contract between the Government and Frente provides that the scope of the project “will be within the current area of operations of Petroecuador former areas of operation of CEPE and Texaco.” While the public purpose of this project remains unclear, it seems entirely likely that the “information” gathered by the Frente regarding the Consortium area eventually formed a basis for the Lago Agrio Judgment. **Exhibit C-1135**, Cooperation Agreement Between the Management Team Unit of the Environmental and Social Remediation Project (“UEG-PRAS”) of the Ministry of the Environment and The Amazon Defense Front “FDA” for Carrying Out the Project “Management of Information on the Socio-Environmental Problems of the Areas Affected by Petroleum Industry Activity in Sucumbíos and Orellana,” Aug. 15, 2008.

²³⁷ **Exhibit C-659**, Email from M. Pallares to S. Donziger and others, Nov. 29, 2004 (stating that Pallares held a meeting with Petroecuador representatives, and that Petroecuador was interested in funding a study to show that contamination occurred prior to 1990); **Exhibit C-670**, Email from C. Bonifaz to S. Donziger and others, Dec. 8, 2004 (noting that Bonifaz had received internal documents from Petroecuador on the condition that the Plaintiffs not publicly share the documents).

83. Despite their purported interest in protecting the environment, the Plaintiffs actually urged Petroecuador to *stop* remediation efforts in the former Consortium area.²³⁸ As Pablo Fajardo explained to his colleagues, “[Petroecuador is] altering the evidence and it is possible that when our technicians go to the PG [*peritaje global*] to take samples that they will find most of the waste has been removed. This could complicate things for us a bit.”²³⁹ Fajardo explained that it was “urgent” that the Plaintiffs “coordinate” with Petroecuador “so they will desist [remediating] until we’ve had a chance to extract the evidence we need.”²⁴⁰ In response, Donziger cautioned Fajardo to “[b]e careful with written letters—informal and oral meetings are better[.] [W]e don’t want Texaco to use some letter to say we are obstructing remediation.”²⁴¹ Later, in June 2009, Pablo Fajardo warned Donziger and others (in an email with the subject line “WORRISOME”) of a newspaper report that the Government was assuming responsibility for environmental remediation, and worse, that it believed that remediation would cost an “extremely low” US\$ 96 million. Fearful that Chevron would “say that the State finally assumed its duty and is going to clean up what it ought to,” Fajardo called on his co-conspirators to act. Donziger responded in an email to Juan Saenz, “You have to go to get [President] Correa to put an end to this shit once and for all.”²⁴²

84. As discussed above, the Lago Agrio Court refused to consider evidence of Petroecuador’s liability in the Judgment,²⁴³ despite the fact that both the Plaintiffs and the Government acknowledged Petroecuador’s responsibility for any environmental impact in the Consortium area.²⁴⁴ In April 2007, during his private tour of the Oriente with the Plaintiffs’

²³⁸ Claimants’ Memorial on the Merits, ¶¶ 238.

²³⁹ **Exhibit C-1162**, Emails between P. Fajardo, S. Donziger, L. Yanza, and others, Subject: Re: “URGENT PROPOSAL,” Dec. 21, 2006 [DONZ00020233].

²⁴⁰ **Exhibit C-1162**, Emails between P. Fajardo, S. Donziger, L. Yanza, and others, Subject: Re: “URGENT PROPOSAL,” Dec. 21, 2006 [DONZ00020233].

²⁴¹ **Exhibit C-1162**, Emails between P. Fajardo, S. Donziger, L. Yanza, and others, Subject: Re: “URGENT PROPOSAL,” Dec. 21, 2006 [DONZ00020233].

²⁴² **Exhibit C-1163**, Emails between S. Donziger, J. Saenz, P. Fajardo, L. Yanza, and others re: “PREOCUPANTE” [“WORRISOME”], June 22, 2009, at 1 [DONZ00066371].

²⁴³ *See supra* § II(A)(2).

²⁴⁴ Claimants’ Memorial on the Merits, ¶¶ 148 (noting that Ecuador’s National Director of Environmental Protection Management confirmed that TexPet “*completed the remediation of the pits that were their responsibility . . . but Petroecuador, during more than three decades, had done absolutely nothing with regard to the pits that were the state-owned company’s responsibility to remediate.*”).

representatives, President Correa admitted that Petroecuador “has dreadful environmental management practices.”²⁴⁵ Pablo Fajardo has also criticized Petroecuador’s practices:

Since Texaco left here, Petro[ecuador] has inflicted more damage and many more disasters than Texaco itself. But they’d never, ever say that. So there’s one spill after another; there’s broken pipes, there’s contamination of wetlands, of rivers, of streams in great magnitude. But since it’s a state-owned company, since it’s the same people involved in the laws and all, no one says a thing.²⁴⁶

These admissions, along with other similar evidence of collaboration, uncover the common enterprise between the Plaintiffs and the Government—to shift Petroecuador’s remediation obligations onto Chevron and extract a political and financial windfall.

b. Plaintiffs’ Counsel Forged the Signatures of at Least 20 Nominal Plaintiffs on the Complaint

85. The ostensible Plaintiffs in the Lago Agrio Litigation are 48 named individuals, but it remains unknown whether these individuals consented to have the litigation brought in their names. At least 20 of the named Plaintiffs’ signatures were forged in the very document that purported to provide authority to their Ecuadorian counsel to file the Complaint.²⁴⁷

86. At the time they filed the Lago Agrio Complaint, Plaintiffs’ counsel also filed a document known as the Plaintiff Ratification of Complaint, purportedly containing the signatures of all named plaintiffs.²⁴⁸ Forensic expert analysis by Gus Lesnevich, a former Senior Document Examiner for the U.S. Secret Service, demonstrates that nearly half of the named Plaintiffs did not in fact sign their names to the Ratification.²⁴⁹ Mr. Lesnevich compared the handwriting on that document to several other documents containing known signatures of the named Plaintiffs, such as identification cards and the Power of Attorney signed by a number of the Plaintiffs. Using forensic handwriting analysis which focuses on the design, shape, and scale of the letters, Mr. Lesnevich created a comparison chart displaying significant dissimilarities between 20

²⁴⁵ **Exhibit C-1164**, Press Conference held by Pres. R. Correa during visit to the Oriente, Apr. 27, 2007, at 2.

²⁴⁶ **Exhibit C-184**, Final Report FLACSO-Petroecuador Project Phase Two: Study on the Socio-Environmental Conflicts in the Sacha and Shushufindi Fields (1994-2002) by Dr. Guillaume Fontaine, Nov. 2003, at 77.

²⁴⁷ **Exhibit C-1166**, Report of Gus R. Lesnevich, June 27, 2011.

²⁴⁸ **Exhibit C-71**, Plaintiff Ratification of Complaint, May 7, 2003.

²⁴⁹ **Exhibit C-1166**, Report of Gus R. Lesnevich, June 27, 2011.

signatures on the Ratification document and the other control documents.²⁵⁰ These dissimilarities led Mr. Lesnevich to conclude that 20 of the signatures had been forged.

87. Based on evidence uncovered in U.S. discovery proceedings, in 2010 Chevron asked Mr. Lesnevich to undertake an analysis of the Plaintiffs' signatures. Chevron notified the Lago Agrio Court of the falsified signatures on December 20, 2010, well before the issuance of the Judgment.²⁵¹ As Chevron noted in its motion to the Court, the forgery of the Plaintiffs' signatures not only is a crime under Ecuadorian law, but it also creates several grounds for nullification of the lawsuit, including fraud in relation to the Complaint, lack of legitimacy of the Plaintiffs' representatives, and other due-process violations.²⁵² The Ecuadorian Civil Code states that "in order for a person to be bound by an act or statement of intent, ... [h]e must consent to the act or statement."²⁵³ Falsification of a signature is not a legal means to express the consent of a party, and in the case of contracts, such a defect leads to "absolute nullity."²⁵⁴ Far from expressing concern regarding the forensic evidence of forgery, however, the Lago Agrio Court dismissed Chevron's objection as "extremely reckless and evidence of bad faith toward the Court and the opposing party."²⁵⁵ The Court sidestepped Chevron's forgery evidence by finding that the named plaintiffs had otherwise ratified their participation in the proceedings, so even a forged signature would not have nullified their claims.²⁵⁶

2. *The Court Accepted Key Evidence from the Plaintiffs That Was Falsified*

88. Throughout the litigation and particularly in its final pleadings before the Lago Agrio Court, Chevron informed the Court of the serious fraud and irregularities in the Plaintiffs' evidence.²⁵⁷ But the Court ignored Chevron's claims, both in its unprecedented and illegal

²⁵⁰ **Exhibit C-1166**, Report of Gus R. Lesnevich, June 27, 2011, at 6.

²⁵¹ **Exhibit C-1181**, Chevron's Motion of Dec. 20, 2010 at 8:50 a.m.

²⁵² **Exhibit C-1181**, Chevron's Motion of Dec. 20, 2010 at 8:50 a.m.; *see also* **Exhibit C-1178**, Chevron's Appeal of the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m., at 35.

²⁵³ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1461.

²⁵⁴ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1698.

²⁵⁵ **Exhibit C-931**, Lago Agrio Judgment, at 56.

²⁵⁶ **Exhibit C-931**, Lago Agrio Judgment, at 56.

²⁵⁷ *See* Claimants' Memorial on the Merits, ¶ 241-44 (summarizing these challenges by category); **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m.

procedural orders leading up to the Judgment and in the Judgment itself.²⁵⁸ Since the filing of Claimants’ Memorial on the Merits, additional evidence has come to light of fraud surrounding the conduct and eventual termination of the judicial inspections, the Cabrera Reports, and the September 16 “cleansing” reports.

89. *First*, with regard to the judicial inspections, new documents reveal the Plaintiffs’ own acknowledgment that TexPet adequately remediated the pits for which it was responsible under the Settlement and Release Agreements.²⁵⁹ Around the time that Chevron’s experts were concluding that the remediated areas posed no significant threat to human health or the environment, Plaintiffs’ representative Alberto Wray told Steven Donziger that the first two judicial inspection reports showed that “hydrocarbons are below detection limits” and did “not help” the Plaintiffs’ case.²⁶⁰ And Plaintiffs’ expert Charles Calmbacher concluded that none of the sites he inspected posed a risk to human health.²⁶¹ As Claimants have explained, within a matter of months, the Plaintiffs had fabricated their own evidence in a report ostensibly authored by Dr. Calmbacher, but which contained new and unapproved conclusions drafted after the fact

²⁵⁸ For example, on August 2, 2010, just two weeks after a U.S. Court of Appeals ordered the production of the *Crude* outtakes, the Lago Agrio Court granted Plaintiffs’ request and ordered the parties to submit all-new damages assessments within 45 days—an order without basis in Ecuadorian law. **Exhibit C-361**, Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.; Claimants’ Memorial on the Merits, ¶ 244. In response to the Court’s August 2 order, the Plaintiffs submitted seven new expert reports on September 16, 2010, which they have said were intended to “cleanse” the record of the tainted Cabrera Reports. But these reports relied entirely on Cabrera’s flawed data and contained no independent assessment of the remediation—indeed, these experts later admitted that they never even visited the sites, and many recanted or qualified their findings as entirely based on the Cabrera Reports. *See* Claimants’ Request for Interim Measures, Jan. 14, 2011, at 3 (describing the testimony of the September 16 “cleansing” experts). The morning after the Plaintiffs filed these reports, Judge Ordóñez issued *autos para sentencia*, which closed the evidence and paved the way for the Court to enter a judgment at any time and without any further notice. **Exhibit C-642**, Order by the Provincial Court of Sucumbíos, Sept. 17, 2010, at 8:05 a.m. Judge Ordóñez was recused and replaced by Judge Zambrano, who issued two orders in October 2010, in which he: (i) Revoked the *autos para sentencia*, (ii) rejected most of Chevron’s pending motions (including a request to nullify the unlawful August 2 order), and (iii) threatened to sanction Chevron’s lawyers if they filed further motions seeking to revoke prior orders. **Exhibit C-643**, Order by the Provincial Court of Sucumbíos, Oct. 11, 2010, at 5:17 p.m.; **Exhibit C-644**, Order by the Provincial Court of Sucumbíos, Oct. 19, 2010, at 5:02 p.m.

²⁵⁹ *See* Claimants’ Memorial on the Merits, ¶¶ 190-193.

²⁶⁰ **Exhibit C-1192**, Email from S. Donziger to A. Wray, Nov. 27, 2004 [DONZ00016731].

²⁶¹ **Exhibit C-186**, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010 (hereinafter “Calmbacher Deposition”), at 113; **Exhibit C-1196**, Email from C. Calmbacher to S. Donziger, Sept. 28, 2004 [DONZ-HDD-00566637-38].

by the Plaintiffs’ lawyers, and which forged Dr. Calmbacher’s signature by attaching his signature page to their conclusions without authorization.²⁶²

90. The Lago Agrio Court eventually terminated the judicial inspections at the Plaintiffs’ request, even though new evidence shows that the Court knew that there was “no legal basis” to do so.²⁶³ Shortly after the Court rejected the Plaintiffs’ request to cancel the inspections in January 2006, new judge German Yáñez was appointed to preside over the litigation, and the Plaintiffs immediately began to probe his receptiveness to their fraud. On February 14, 2006, Steven Donziger wrote, “[Plaintiffs’ counsel Alejandro Ponce Villacis] said we need to get rid of the judge, and that MP [Manuel Pallares] is going to work on it.”²⁶⁴ But in the months leading up to Cabrera’s appointment, the Plaintiffs’ team met privately with Judge Yáñez numerous times and even blackmailed him with a bogus complaint that they prepared, but did not file.²⁶⁵ Eventually, Judge Yáñez submitted to the Plaintiffs’ pressure and appointed Cabrera on March 19, 2007.²⁶⁶

91. *Second*, new evidence confirms that the Plaintiffs’ representatives controlled Cabrera’s appointment and later the content of his reports. Documents reveal that in the weeks leading up to Cabrera’s appointment, in order to cover up the fact that Judge Yáñez already had agreed to the Plaintiffs’ plan, the judge called Cabrera directly and pretended to ask him for an expert recommendation.²⁶⁷ In internal correspondence, Donziger expressed his fear that the judge’s call to Cabrera meant the appointment of their handpicked “expert” was in jeopardy, but Fajardo reassured that the call was just “part of the judge’s complicated plan to protect

²⁶² See Claimants’ Memorial on the Merits, ¶ 194; **Exhibit C-501**, Calmbacher Report on Sacha 94 Well Site, Feb. 14, 2005, at 9:00 a.m.; **Exhibit C-502**, Calmbacher Report on Shushufindi 48 Well Site, Mar. 8, 2005, at 12:00 p.m.; **Exhibit C-186**, Calmbacher Deposition, at 112-119.

²⁶³ **Exhibit C-1081**, Email from S. Donziger to A. Wray, Mar. 4, 2006 [WOODS-HDD-0083326-27].

²⁶⁴ **Exhibit C-716**, Diary of Steven Donziger, Feb. 14, 2006 [DONZ00023089].

²⁶⁵ **Exhibit C-716**, Diary of Steven Donziger, Nov. 16, 2006 [DONZ00027256], at 56 of 109; **Exhibit C-760**, Email exchange between J. Mutti and S. Donziger, July 26, 2006 (“The judge who is on his heels from the charges of trading jobs for sex in the court, said he is going to accept our request to withdraw the rest of the inspections The judge also I believe wants to forestall the filing of a complaint against him by us, which we have prepared but not yet filed.”)

²⁶⁶ See *infra* ¶¶ 108-112 (discussing Judge Yáñez’s contacts with the Plaintiffs during this time); see also Claimants’ Memorial on the Merits, ¶¶ 214-217, 221-225.

²⁶⁷ **Exhibit C-716**, Diary of Steven Donziger, Mar. 1, 2007, at 10 of 109 [DONZ00027256].

himself.”²⁶⁸ On March 19, 2007, the Lago Agrio Court appointed Cabrera as its global assessment expert,²⁶⁹ ordering him to be “responsible for the entire report, the methodology used, for the work done by his assistants, etc.”²⁷⁰ The Plaintiffs later took credit for Cabrera’s appointment, stating that their meeting with the judge the week before Cabrera’s swearing-in was a “huge help,”²⁷¹ and that Cabrera’s appointment was a “huge victory.”²⁷² Around this very time, the Plaintiffs arranged a meeting with President Correa, in which Correa said “he would call the Judge.”²⁷³ Donziger boasted that the judge “never would have done [Cabrera’s appointment] had we not really pushed him.”²⁷⁴

92. By the time the Court appointed Cabrera as the global expert, Plaintiffs had convinced him “to totally play ball with us and let us take the lead while projecting the image that he is working for the court.”²⁷⁵ To ensure Cabrera’s cooperation, Plaintiffs made tens of thousands of dollars in secret payments to him through what they described as a “secret account.”²⁷⁶

93. The Plaintiffs hired U.S. environmental firms to ghostwrite the Cabrera Report and inflate the damages.²⁷⁷ While Stratus Consulting was the primary coordinator of the work that went into the Cabrera Report, other members of the U.S.-based team of experts, including E-Tech, Uhl, Baron, Rana & Associates, Inc., and 3TM Consulting, also contributed without

²⁶⁸ **Exhibit C-716**, Diary of Steven Donziger, Mar. 1, 2007, at 10 of 109 [DONZ00027256].

²⁶⁹ **Exhibit C-197**, Court Order Declaring the Relinquishment Valid and Appointing Engineer Richard Stalin Cabrera Vega, Mar. 19, 2007, at 2.

²⁷⁰ **Exhibit C-529**, Lago Agrio Court Order, Oct. 3, 2007, at 10.

²⁷¹ **Exhibit C-1197**, Email from S. Donziger to Amazon Watch, June 13, 2007 [DONZ-HDD-0113389].

²⁷² **Exhibit C-1199**, Email from S. Donziger to J. Berlinger and M. Bonfiglio, Subject: Re: “emergency,” June 13, 2007 [JB-NONWAIVER00062204].

²⁷³ **Exhibit C-1005**, Email from M. Yépez to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103690].

²⁷⁴ **Exhibit C-360**, *Crude* Outtakes, CRS-361-11-01, at 5.

²⁷⁵ **Exhibit C-716**, Diary of Steven Donziger, Mar. 1, 2007, at 10 of 109 [DONZ00027256].

²⁷⁶ **Exhibit C-1053**, Email from L. Yanza to S. Donziger, Sept. 12, 2007; **Exhibit C-1041**, Donziger Deposition, Mar. 23, 2011, at 4414:16-4415:3 (testifying that over US\$ 100,000 was transferred to this “secret account,” and Donziger was aware of no other purpose for the account except to pay Cabrera).

²⁷⁷ Donziger continually pressed Stratus for higher damages, explaining at one point that an estimate for unjust enrichment “sound[ed] awfully low” and implored that the Stratus consultants not “say or even suggest anything that backs away from the [Plaintiffs’] figures.” **Exhibit C-835**, Email from S. Donziger to D. Beltman, Subject: Unjust Enrichment, Nov. 16, 2007 [DONZ00025512], at 3; **Exhibit C-835**, Email from S. Donziger to D. Beltman, Subject: Unjust Enrichment, Nov. 17, 2007 [DONZ00025512].

attribution or disclosure.²⁷⁸ William Powers, who worked for E-Tech and sub-contracted for Stratus, drafted Annex S of the Cabrera Report, and his calculations appeared in Annex T of the Cabrera Report.²⁷⁹ And Stratus retained a contractor to prepare a large database of sampling data, the Selva Viva Data Compilation, which covertly made its way into the Judgment itself.²⁸⁰

94. The Plaintiffs also plotted to use their connections with the Ecuadorian Government to maximize the Cabrera Reports' dollar figures. In September 2007, Donziger suggested to Stratus that they "define the norms of clean-up" and then "propose these norms to the Ministry of Energy which governs these norms[,] and whose Minister is a good friend of ours, so that the Ministry issues them as an official decree before the trial ends."²⁸¹

95. It was the Plaintiffs' lawyers and consultants who wrote the Cabrera Reports, down to the last comma. The bulk of the first Cabrera Report was written in English—a language that Cabrera does not speak—and was not completed until just days before the filing.²⁸² As Plaintiffs' environmental consultant Douglas Beltman later put it, Stratus agreed to treat "our original English version as if it's a translated version" of Cabrera's work.²⁸³ Beltman corresponded with several translation firms to translate the Cabrera Report into Spanish, working mainly with Translating Spanish, Inc.²⁸⁴ On March 12, 2008, Beltman sent the report—with an introduction falsely stating that "This report was prepared by the Expert Richard Stalin Cabrera

²⁷⁸ *E.g.*, **Exhibit C-927**, *In re Application of Chevron Corp.*, 10-cv-01146 (IEG-WMC) (S.D. Cal.), Deposition of William Powers, Sept. 10, 2010 (hereinafter "Powers Deposition"), at 240:16-243:13; **Exhibit C-1219**, *Chevron Corp. v. 3TM Consulting, LLC*, No. 04:10-mc-134 (S.D. Tex.), Deposition of Randy Horsak, Oct. 27, 2010, at 16:24-18:8, 45:21-47:7, 49:14-25; **Exhibit C-1223**, Email from D. Beltman to S. Donziger, Subject: Re: "we have spanish translation of Uhl report already," Mar. 6, 2008 [STRATUS-NATIVE069116].

²⁷⁹ **Exhibit C-927**, Powers Deposition at 251:4-252:23.

²⁸⁰ **Exhibit C-1224**, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047-MSK-MEH (D. Colo.), Deposition of Laura Belanger, Nov. 30, 2010, at 47:5-50:17, 54:22-56:12. New evidence also suggests that Ecuador's Ministry of the Environment provided the Frente a US\$ 185,000 grant in order to create this database. *See supra* note 236.

²⁸¹ **Exhibit C-796**, Email from S. Donziger to D. Beltman, A. Maest, J. Lipton, and P. Sowell, copying J. Kohn, Subject: Re: "Important idea," Sept. 19, 2007 [DONZ00025160].

²⁸² **Exhibit C-855**, Email from D. Beltman, Subject: Big Report with attachment titled Peritaje Global Summary Report, Mar. 12, 2008.

²⁸³ **Exhibit C-1079**, Email from D. Beltman to B. Lazar and D. Mills, Subject: Re: "english translations," July 28, 2008 [STRATUS-NATIVE044716].

²⁸⁴ *E.g.*, **Exhibit C-855**, Email from D. Beltman, Subject: Big Report with attachment titled Peritaje Global Summary Report, Mar. 12, 2008; **Exhibit C-1225**, Email from Enlaso Enterprise Language Solutions to D. Beltman, Subject: Re: "Confidentiality agreements," Mar. 13, 2008 [STRATUS-NATIVE065206-07].

Vega for purposes of providing professional technical assistance to the Nueva Loja Superior Court²⁸⁵—to be translated into Spanish for filing with the Court.²⁸⁶ To facilitate the final preparations, the Plaintiffs discussed renting office space in Ecuador, but Donziger stressed that it had to be “isolated” and could not be space shared with those known to be affiliated with the Plaintiffs.²⁸⁷

96. The key annexes to the Cabrera Report covering alleged remediation costs, excess cancer deaths, and key damage categories were translated into Spanish just days before they were submitted to the Court as Cabrera’s work.²⁸⁸ The Plaintiffs continued to maintain control of the document during this time, revising the Spanish text directly, until the morning of March 31, the day before it was filed.²⁸⁹ Expert evaluation confirms that Donziger and other Plaintiffs’ representatives continued to draft the Cabrera report up to that point, and that Cabrera himself made *no* changes to that report prior to its filing. Donziger produced in U.S. discovery proceedings a Word file named “Informe Sumario Version Final (Steve).doc.” The file’s metadata shows that it was created on March 30, 2008 at 9:17 a.m. EDT, was last printed on March 31, 2008 at 10:26 a.m. EDT, and was last saved on March 31, 2008 at 11:09 a.m. EDT. According to forensic computer analysis, “[t]he text of the ‘INFORME SUMARIO VERSION FINAL(Steve).doc’ document . . . is identical to text of the report filed by Richard Cabrera on April 1, 2008.”²⁹⁰ Thus, the Plaintiffs’ lawyers exclusively prepared, revised, and printed the report and its voluminous supporting material, which were submitted to the Lago Agrio Court by Cabrera—its author in name only.

²⁸⁵ **Exhibit C-201**, Expert Report of Richard Cabrera Vega, Apr. 1, 2008, at 1.

²⁸⁶ **Exhibit C-855**, Email from D. Beltman, Subject: Big Report with attachment titled Peritaje Global Summary Report, Mar. 12, 2008, at 1.

²⁸⁷ **Exhibit C-1226**, Email chain between S. Donziger and L. Francisco, Subject: Re: “JK,” May 7, 2007, at 1 [DONZ00108534].

²⁸⁸ **Exhibit C-855**, Email from D. Beltman, Subject: Big Report with attachment titled Peritaje Global Summary Report, Mar. 12, 2008; **Exhibit C-1227**, Email from D. Beltman to info@translatingspanish.com, Subject: Re: “Two more annexes for translation,” Mar. 7, 2008 [STRATUS-NATIVE070414]; **Exhibit C-1228**, Email from Beltman to info@translatingspanish.com, Subject: Re: “Last Annex: Unjust enrichment,” Mar. 13, 2008 [STRATUS-NATIVE062935-43].

²⁸⁹ **Exhibit C-1080**, Email from J. Peers to P. Fajardo, Subject: Re: “Figuras corregidas – Anexo IMPACTOS ECOLOGICOS,” Mar. 27, 2008 [STRATUS-NATIVE052259].

²⁹⁰ **Exhibit C-1048**, Declaration of Michael F. McGowan, July 21, 2011, at 7; *see also* **Exhibit C-1047**, “INFORME SUMARIO VERSION FINAL(Steve).doc,” attached to email from S. Donziger to D. Beltman and A. Maest, Apr. 1, 2008, at 8:18 a.m. [DONZ00064048-9]. Plaintiffs’ consultants, of course, proceeded to rely on that fraudulent report to draft the reports submitted September 16, 2010.

97. Forensic analysis by Professor McMEnamin independently concluded that it is highly probable that Pablo Fajardo ghostwrote numerous other Court filings purportedly authored by Cabrera. To reach this conclusion, Professor McMEnamin employed a scientific study of patterns of variation in written language known as “stylistics.” Professor McMEnamin applied this analysis to compare a set of 17 purported Cabrera filings to 16 writings known to have been authored by Pablo Fajardo. Professor McMEnamin identified 18 “style-markers” of Fajardo’s writing, including date format, page formatting, structure of sections and subsections, capitalization, dropped accents and misspellings, punctuation, and syntax, among others.²⁹¹ He concluded that Fajardo had personally ghostwritten 15 of the 17 purported Cabrera filings, including official letters to the Court purporting to be from Cabrera, many of which protested Cabrera’s independence from the Plaintiffs.²⁹² For example, a July 2007 letter ghostwritten by Fajardo purported to contain Cabrera’s denial that he had “any relation or agreements with the plaintiff,” and stated that “it seems to me to be an insult against me that I should be linked with the attorneys of the plaintiffs.”²⁹³ In another letter ghostwritten by Fajardo, “Cabrera” falsely claimed that “my life, as well as the lives of my family and collaborators, are in serious danger” because of Chevron.²⁹⁴ The Plaintiffs have since cited this letter to the Ecuadorian appellate court and to 14 different U.S. federal courts as so-called evidence of malfeasance by *Chevron*, without ever disclosing that their own attorney wrote it.²⁹⁵

²⁹¹ See McMEnamin Expert Report, at 13-14.

²⁹² See McMEnamin Expert Report, at 1.

²⁹³ **Exhibit C-366**, Letter from R. Cabrera to Lago Agrio Court, July 23, 2007.

²⁹⁴ **Exhibit C-1230**, Letter from R. Cabrera to Lago Agrio Court, Nov. 6, 2007, at 2:45 p.m.

²⁹⁵ See **Exhibit C-1231**, Motion to the Lago Agrio Court, Apr. 5, 2011, at 8:40 a.m., at 18, 37; **Exhibit C-1232**, Declaration of Pablo Fajardo Mendoza, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047-MSK-MEH (D. Colo. May 5, 2010), ECF No. 99; **Exhibit C-1233**, Memorandum Of Points And Authorities In Support Of Ecuadorian Plaintiffs’ Motion For A Protective Order In Connection With Subpoenas Issued To The Ecuadorian Plaintiffs’ Non-Testifying Litigation Consultants Pursuant to 28 U.S.C. § 1782, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047-MSK-MEH (D. Colo. May 5, 2010), ECF No. 102; **Exhibit C-1234**, Response Of The Ecuadorian Plaintiffs, UHL, Baron, Rana & Associates, Inc., And Juan Cristóbal Villao Yopez To Order To Show Cause And Opposition To Chevron Corporation’s Application For An Order Pursuant to 28 U.S.C. § 1782 To Conduct Discovery, *In re Application of Chevron Corp.*, No. 2:10-cv-02675-ES-CLW (D.N.J. June 7, 2010), ECF No. 6; **Exhibit C-1235**, Declaration of Maria C. Severson In Support Of Plaintiffs’ And Respondents’ Motion To Quash Subpoenas, *In re Application of Chevron Corp.*, No. 3:10-cv-01146-IEG-WMC (S.D. Cal. June 26, 2010), ECF No. 16; **Exhibit C-1236**, Ecuadorian Plaintiffs’ Brief In Support Of Motion To Quash Subpoenas Duces Tecum And Ad Testificandum Issued To 3TM International, Inc. And 3TM Consulting, LLC By Chevron Corporation Pursuant To 28 U.S.C. § 1782, *In re Application of Chevron Corp.*, No. 4:10-mc-00134 (S.D. Tex. May 7, 2010), ECF No. 38; **Exhibit C-1237**, Appellants’ Brief, *Chevron Corp., v. 3TM Int’l., Inc.*, No. 10-20389 (5th Cir. July 16, 2010), ECF No. 00511176044, July 16,

98. Judge Zambrano’s own decision in another environmental case demonstrates his discriminatory departures from Ecuadorian law in the Lago Agrio Judgment. In the *OCP* Case, Judge Zambrano dismissed the court-appointed experts’ findings of “environmental damage arising from construction of the Heavy Crude Pipeline,” which was the plaintiffs’ “principal argument refuting the evidence of compliance with the environmental rules.”²⁹⁶ The *OCP* court dismissed the expert’s findings because “the expert accepted statements from the interested parties themselves, action that was not part of the task assigned him and that cannot be, since, under Arts. 123 and 219 of the Code of Civil Procedure, only the judge, not the expert, can receive the statements of parties to the case, whether given as testimony or admission.”²⁹⁷ The court did “not [] defer to the expert report,” and consequently ruled there to be “no evidence that would indicate that the defendant could have caused any environmental damage arising from construction of the Heavy Crude Pipeline.”²⁹⁸

2010; **Exhibit C-1238**, Response Of The Ecuadorian Plaintiffs In Opposition To Chevron Corporation’s Application For An Order, Pursuant To 28 U.S.C. § 1782, To Conduct Discovery For Use In Foreign Proceedings, *In re Application of Chevron Corp.*, No. 1:10-mc-00371-CKK, ECF No. 22; **Exhibit C-1239**, Declaration of W. David B. Gridgers In Support Of Respondent Mark Quarles And Interested Parties The Lago Agrio Plaintiffs’ Opposition To Application Of Chevron Corporation For An Order Pursuant To 28 U.S.C. § 1782 To Conduct Discovery, *In re Application of Chevron Corp.*, No. 3:10-cv-00686 (M.D. Tenn. Aug. 11, 2010), ECF No. 44; **Exhibit C-1240**, Declaration of Wyatt S. Stevens In Support Of Respondent Charles Champ And Interested Parties The Lago Agrio Plaintiffs’ Opposition To The Chevron Petitioners’ Applications For An Order Pursuant To 28 U.S.C. § 1782 To Conduct Discovery, *Chevron Corp. v. Champ*, No. 1:10-mc-00027-GCM-DLH (W.D.N.C. Aug. 24, 2010), ECF No. 20; **Exhibit C-1241**, [Corrected] Respondents’ and Ecuadorian Plaintiffs’ Objections Pursuant to Fed.R.Civ.P. 72(b) Addressed to the Magistrate’s September 1, 2010 Memorandum Opinion and Order Authorizing Discovery, *In re Application of Chevron Corp.*, No. 1:10-mc-00021-JCH-LFG (D.N.M. Sept. 10, 2010), ECF No. 84; **Exhibit C-1242**, Respondent’s and Ecuadorian Plaintiffs’ Joint Brief in Opposition to Chevron Corporation’s *Ex Parte* Application For Discovery Under 28 U.S.C. § 1782, *Chevron Corp. v. Allen*, No. 2:10-mc-00091-WKS (D. Vt. Nov. 16, 2010), ECF No. 21; **Exhibit C-1243**, Respondent’s and Ecuadorian Plaintiffs’ Joint Brief in Opposition to Chevron Corporation’s *Ex Parte* Application For Discovery Under 28 U.S.C. § 1782, *Chevron Corp. v. Barnthouse*, No. 1:10-mc-053 (D. Ohio Nov. 16, 2010), ECF No. 20; **Exhibit C-1244**, Respondent’s and Ecuadorian Plaintiffs’ Joint Brief in Opposition to Chevron Corporation’s *Ex Parte* Application For Discovery Under 28 U.S.C. § 1782, *Chevron Corp. v. Rourke*, No. 8:10-cv-02990-AW (D. Md. Nov. 16, 2010), ECF No. 18; **Exhibit C-1245**, Respondent’s and Ecuadorian Plaintiffs’ Joint Brief in Opposition to Chevron Corporation’s *Ex Parte* Application For Discovery Under 28 U.S.C. § 1782, *Chevron Corp. v. Rourke*, No. 8:10-cv-02989-AW (D. Md. Nov. 16, 2010), ECF No. 24; **Exhibit C-1246**, Respondent’s and Ecuadorian Plaintiffs’ Joint Brief in Opposition to Chevron Corporation’s *Ex Parte* Application For Discovery Under 28 U.S.C. § 1782, *Chevron Corp. v. Shefftz*, No. 1:10-mc-10352-JLT (D. Mass. Nov. 16, 2010), ECF No. 23.

²⁹⁶ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m.

²⁹⁷ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m.

²⁹⁸ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m.

99. The Lago Agrio Judgment ignores the same law that Judge Zambrano found to be controlling in the *OCP* Case and reaches conclusions contrary to Ecuadorian law in order to rule against Chevron.²⁹⁹ While the expert in the *OCP* Case may have “accepted statements from the interested parties,” the Cabrera Reports are nothing but the statements of an “interested party” disguised as the work of a court expert. In *OCP* and in the Lago Agrio Litigation, the Plaintiffs’ “principal” evidence of environmental damage was the favorable court expert report. In *OCP*, Judge Zambrano ruled that the exclusion of that expert report left the plaintiffs without evidence of “environmental damage” and thus dismissed their claim. But in the Lago Agrio case, the same Judge purported to exclude the Cabrera Reports (according to the Plaintiffs, the “most important technical document” in the case), designated himself the expert, and presented the opinions of the excluded expert as his own. All of this, as the *OCP* Case confirms, violates Ecuadorian law.

100. *Third*, with regard to the so-called “cleansing” experts, new evidence reveals the Plaintiffs’ plan to whitewash the fraud surrounding the Cabrera Reports by filing the same reports again—only with new names attached.³⁰⁰ Since filing these reports, a number of the “cleansing” experts have recanted or qualified their conclusions. For example, Plaintiffs’ expert Lawrence Barnthouse acknowledged that his report “couldn’t be completely independent” because most of the information he used was “only available from the Cabrera Report.”³⁰¹ Another expert, Jonathan Shefftz, admitted that his report depended upon “data and cost figures from the Cabrera Report” and that he had “simply taken [Cabrera’s] volume figures and . . . cost figures and used those as inputs to [his] calculations.”³⁰² Yet another expert, Douglas Allen, admitted to relying on the Cabrera Report despite his opinion that it was unreliable and lacked appropriate citations and references.³⁰³ Allen admitted that had he known that the Plaintiffs’

²⁹⁹ This differential treatment of Chevron violates various BIT provisions, including arbitrary and discriminatory conduct, national treatment, and most-favored-nation status. **Exhibit C-279**, U.S.-Ecuador BIT.

³⁰⁰ **Exhibit C-1247**, Email chain among S. Donziger, E. Westenberger, J. Abady, and others re “Draft Outline of Possible Ecuadorian Court Filing,” May 20, 2010, at 1 [DONZ00067932].

³⁰¹ **Exhibit C-899**, *Chevron Corp. v. Barnthouse*, No. 1:10-mc-53, U.S. District Court for the Western District of Ohio, Deposition of Lawrence W. Barnthouse, Dec. 10, 2010 (hereinafter “Barnthouse Deposition”), at 52:5-52:10.

³⁰² **Exhibit C-901**, *Chevron Corp. v. Shefftz*, No. 1:10-mc-10352, U.S. District Court for the District of Massachusetts, Deposition of Jonathan Shefftz, Dec. 16, 2010 (hereinafter “Shefftz Deposition”), at 59:24-60:2, 62:13-17, 82:17-83:6, 165:10-13.

³⁰³ **Exhibit C-898**, Allen Deposition, at 163:14-17.

lawyers actually wrote the Cabrera Report, that would have “bother[ed]” him and affected his expert opinion.³⁰⁴

101. The Weinberg Group, the Plaintiffs’ consulting firm charged with retaining the September 16 “cleansing” experts, hired them only to “review” selected sections of the Cabrera Report, not to produce any new, independent reports themselves.³⁰⁵ The Weinberg Group gave the experts copies of the Cabrera Report for use in their own reports.³⁰⁶ According to Donziger and his co-conspirators, all the “new expert[s]” needed was the “Cabrera report in and of itself” along with the data upon which Cabrera relied.³⁰⁷ As Donziger conceded, none of these experts “[went] to Ecuador,” “did any kind of new site inspection,” “did any kind of new sampling,” or performed “environmental testing of any kind.”³⁰⁸ Some of these “new” experts did not even write their own reports: Carlos Picone (whose report included a US\$ 1.4 billion damage assessment for healthcare costs) and Paolo Scardina (whose report assessed US\$ 541.5 million in damages for a new potable water system in Ecuador) have testified that the Weinberg Group ghostwrote large portions of their reports.³⁰⁹

102. The Plaintiffs acknowledged that these reports were a last-ditch effort to conceal the Judgment’s eventual reliance on the Cabrera Reports. As Donziger reported, “[t]he Ecuador team is getting nervous that there is an increasing risk that our ‘cleansing’ process is going to be outrun by the judge and we will end up with a decision based entirely on Cabrera. Absent our

³⁰⁴ **Exhibit C-898**, Allen Deposition, at 205-206.

³⁰⁵ **Exhibit C-1248**, Letter from H. Dunkelberger to J. Abady, Subject: Re: “independent analysis of Cabrera Rpt.,” Aug. 18, 2010, at 1 [DONZ00031477] (containing the retention agreement between the Weinberg Group and the September 16 experts); **Exhibit C-902**, *In re Application of Chevron Corp.*, No. 10-MC-00002, U.S. District Court for the Southern District of New York, Deposition of Steven Donziger, Dec. 29, 2010, at 2331:15-19, 2337:20-21.

³⁰⁶ **Exhibit C-898**, Allen Deposition at 122:2-5; **Exhibit C-899**, Barnthouse Deposition, at 62:2-5.

³⁰⁷ **Exhibit C-1249**, Email chain between S. Donziger and E. Westenberg, July 13, 2010 [DONZ00057942], at 1.

³⁰⁸ **Exhibit C-1087**, *In re Application of Chevron Corp.*, No. 10-MC-00002, U.S. District Court for the Southern District of New York, Dec. 22, 2010 (hereinafter “Donziger Deposition, Dec. 22, 2010”), at 1652:17-1653:17.

³⁰⁹ **Exhibit C-900**, Picone Deposition, at 51:5-18, 54:13-20, 75:11-21, 88:16-89:3, 115:1-11, 118:12-22, 152:19-153:4 (Picone and the Weinberg Group “were working on the draft and the various iterations of the same draft”), 224:4-225:2, 234:19-235:15 (the report was a “collaborative product . . . it was a team effort”); **Exhibit C-1043**, Scardina Deposition at 87:9-88:2; *see* **Exhibit C-898**, Allen Deposition at 140:21-141:11, 152:10-21, 162:25-164:13, 166:8-13, 171:18-172:3, 225:6-25, 270:18-271:24; **Exhibit C-901**, Shefftz Deposition at 59:12-60:2, 62:18:63:9, 68:21-69:4; **Exhibit C-1043**, Scardina Deposition at 114:14-19, 224:20-225:20, 262:21-264:2, 269:8-270:16, 276:8-20; **Exhibit C-899**, Barnthouse Deposition at 52:2-10, 79:24-80:19, 115:10-21, 130:3-15, 188:7-20.

intervention ASAP, they believe the judge could issue autos para sentencia in about 3-4 weeks, which would in effect bar our remedy to the Cabrera problem.”³¹⁰ As one of the Plaintiffs’ U.S. lawyers wrote to Donziger in August 2010, “[w]e probably wouldn’t want to draw that much attention to Cabrera, but we should think about whether our expert might address Cabrera’s findings in such a subtle way that someone reading the new expert report (the Court in Lago or an enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages.”³¹¹ Because the Cabrera Reports were the sole source in the record for the various damage categories sought by the Plaintiffs, it was essential to their fraud for the conclusions of those reports to remain in the record by any means possible.

103. Under any credible standard, this conduct amounts to fraud. U.S. courts, reviewing some of the Plaintiffs’ conduct in the context of discovery proceedings, have independently concluded that the Plaintiffs’ evidence is fraudulent and their lawsuit is a sham.³¹² In the words of one U.S. federal court, “what has blatantly occurred in this matter would in fact be considered fraud by any court.”³¹³ Compounding the Plaintiffs’ misconduct is the fact that this fraud implicates the Government of Ecuador as an active participant through its various organs. As illustrated below, the Lago Agrio Court chose not only to accept the Plaintiffs’ false evidence, but also actively engaged in the fraud itself.

3. *The Government and the Court Itself Participated in the Plaintiffs’ Fraud*

104. From the outset, the Lago Agrio Court’s institutional weakness and corruption served a key role in the Plaintiffs’ multi-billion-dollar fraud. The Plaintiffs’ pressure on, and coordination with, Government officials and the Court fall into three basic categories: (1) direct and improper contacts between the Lago Agrio Court and the Plaintiffs’ representatives; (2) behind-the-scenes political pressure on the Court, in the context of a judiciary susceptible to such

³¹⁰ **Exhibit C-1044**, Email from S. Donziger to N. Economou, Subject: Re: “FYI”, June 14, 2010 [DONZ00068050].

³¹¹ **Exhibit C-1250**, E-mail from A. Small to S. Donziger, Aug. 18, 2010, at 1 [DONZ00031475].

³¹² **Exhibit C-648**, *In re Application of Chevron Corp.*, No. 1:10-mc-00021, Amended Order, at 3 (D.N.M. Sept. 2, 2010); **Exhibit C-1251**, Application for Stay of Court Order Transcript, *In re Application of Chevron*, No. 10-2675 (SRC) (D. N.J. June 17, 2010) 23:19-20; **Exhibit C-1252**, *Chevron Corp. v. Salazar*, No. 11-cv-3781 (LAK) (JCF), 2011 WL 3424486, at *3 (S.D. N.Y. Aug. 3, 2011).

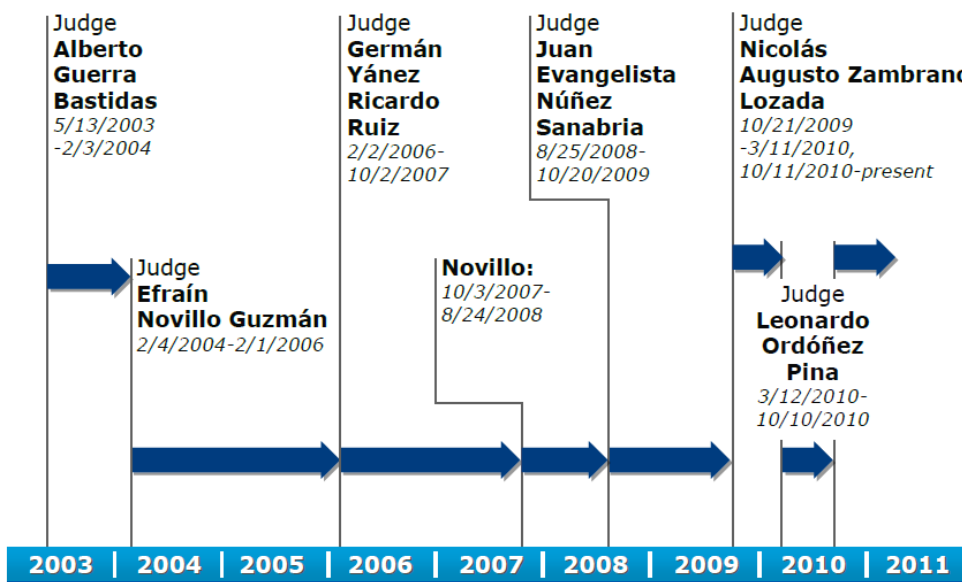
³¹³ **Exhibit C-1253**, *In re Application of Chevron Corp.*, Nos. 1:10 mc 27, 1:10 mc 28 (GCM) (DLH) (W.D.N.C.), Order, Aug. 30, 2010, at 12.

pressure; and (3) pressure tactics, including demonstrations and media statements, in order to threaten the Court publicly into ruling against Chevron.

a. Improper Collusion Between the Judges and the Plaintiffs

105. Throughout the seven-year course of this case, the Plaintiffs maintained improper and direct contact with the Lago Agrio Court. As the following timeline illustrates, six different judges have presided over the Lago Agrio Litigation. Evidence shows a spectrum of complicity with the Plaintiffs’ fraud, ranging from willful ignorance to full-blown participation. The following timeline illustrates the tenure of each judge:

Timeline of Judges



Although Claimants have informed the Tribunal of the Lago Agrio judges’ improper contacts with the Plaintiffs,³¹⁴ the following evidence, much of which is new to these proceedings, merits particular consideration.

106. Judge Novillo: The second presiding judge in the Lago Agrio Litigation, Judge Efraín Novillo, currently serves as a paid expert for the Plaintiffs in related litigation in New York involving the enforceability of the Lago Agrio Judgment.³¹⁵ In contrast to Judge Novillo’s paid testimony in the Southern District of New York (filed by the Plaintiffs), the evidence shows

³¹⁴ See Claimants’ Memorial on the Merits, at 132-139; Claimants’ Letter to the Tribunal, Dec. 12, 2010, at 3-5.

³¹⁵ See **Exhibit C-1254**, *Chevron Corp. v. Aguinda et al.*, Case No. 11-CV-03718 (LAK) (S.D.N.Y), Expert Witness Report of Dr. Efraín Novillo Guzman, July 28, 2011.

that he participated in several improper communications with the Plaintiffs as presiding judge.³¹⁶ The Plaintiffs' representatives met secretly with Judge Novillo on a number of occasions to discuss the merits of the case, including at least a meeting in August 2004 in which the judge took home one of the Plaintiffs' "press kits;"³¹⁷ a meeting in October 2005 in which Pablo Fajardo warned the judge that Chevron would resist inspection of a pit, telling him to "get ready;"³¹⁸ and a meeting around January 2006 which led Luis Yanza to state, in relation to the Plaintiffs' agenda for the judicial inspections, that "the judge gets it."³¹⁹

107. After Judge Novillo was replaced by Judge Yáñez (and shortly before again becoming presiding judge in this case in October 2007), Judge Novillo improperly refused to rule on Chevron's recusal petition against Judge Yáñez (in contravention of Ecuadorian law), instead waiting for Judge Yáñez's term as President of the Court to expire so he could deem the matter "moot."³²⁰ Once Judge Novillo resumed his role as presiding judge, he met with the Plaintiffs several more times in the spring and summer 2008, giving them advance notice of the orders he would issue.³²¹

108. Judge Yáñez: Within weeks of his appointment, Judge Yáñez had met with Steven Donziger multiple times, leading Donziger to proclaim that he "like[s] the judge" and that "the court is now in play, up for grabs, and accessible."³²² In June 2006, after calling Judge Yáñez personally on his cell phone, Donziger changed his tune, writing that the judge was "weak" and that he was "not this guy" to help the Plaintiffs finish the case within their two-year plan.³²³ A few weeks later, Donziger decided that if Judge Yáñez would not cancel the

³¹⁶ **Exhibit C-1254**, *Chevron Corp. v. Aguinda et al.*, Case No. 11-CV-03718 (LAK) (S.D.N.Y.), Expert Witness Report of Dr. Efraín Novillo Guzman, July 28, 2011.

³¹⁷ **Exhibit C-716**, Diary of Steven Donziger, Oct. 5, 2005, at 106 of 111 [DONZ00027156].

³¹⁸ **Exhibit C-716**, Diary of Steven Donziger, Oct. 5, 2005 [DONZ00027156], at 106 of 111.

³¹⁹ **Exhibit C-716**, Diary of Steven Donziger, Jan. 27, 2006 [DONZ00036243].

³²⁰ **Exhibit C-1255**, Lago Agrio Court Order, Nov. 16, 2007, at 9:00 a.m.

³²¹ **Exhibit C-1256**, Email from P. Fajardo to S. Donziger, Apr. 2, 2008 [DONZ00045561]; **Exhibit C-1257**, Email from P. Fajardo to A. Ponce and others, Apr. 4, 2008 [DONZ00045727]; **Exhibit C-1258**, Email from S. Donziger to P. Fajardo and others, July 18, 2008 [DONZ00064724]; **Exhibit C-1259**, Email from P. Fajardo to S. Donziger, June 23, 2008 [DONZ00046718].

³²² **Exhibit C-716**, Diary of Steven Donziger, Mar. 11, 2006 [DONZ00027156], at 73 of 111.

³²³ **Exhibit C-716**, Diary of Steven Donziger, June 2, 2006 [DONZ00036275].

remaining site inspections, then he would enter “an all-out war with the judge to get him removed.”³²⁴

109. Around the time that they petitioned to terminate the judicial inspections, the Plaintiffs drafted a complaint against Judge Yánez in order to blackmail him into submission. Just before filing it, Fajardo, in consultation with Donziger, met *ex parte* with the judge concerning their pending request to terminate the inspections in favor of the “global assessment” process.³²⁵ Fajardo left the meeting with the belief that the judge wanted “to forestall the filing of a complaint against him by the” Plaintiffs and the view that their prospects with respect to the global assessment were “looking better.”³²⁶ In August 2006, a member of the Plaintiffs’ team told Donziger that “Luis [Yanza] reported that the judge appears to be backing down from his position regarding the cancellation of the inspections and that pressure must be brought to bear on him. Thus, it was resolved that two members of the coalition will be traveling to Lago next week to meet with the judge. Esperanza already met with him twice this week—once with an accompanying declaration—so he’s already feeling the pressure.”³²⁷

110. In October and November 2006, Judge Yánez met with the Plaintiffs several times.³²⁸ In one private meeting on October 10, 2006, Judge Yánez told the Plaintiffs that he would not permit Chevron to assert any further challenges to the Plaintiffs’ waiver of judicial inspections.³²⁹ A few weeks later, Fajardo reported the judge’s promise to reject the Plaintiffs’ request to waive appointment of settling experts for three upcoming inspections, *in the judge’s own words*, “just for appearances ... and not to contradict himself with what has been done up to now.”³³⁰ In another meeting that same month, Judge Yánez warned the Plaintiffs that their “intelligence is bad” because Chevron was able to anticipate their decisions, and he advised

³²⁴ **Exhibit C-716**, Diary of Steven Donziger, Nov. 16, 2006 [DONZ00027256], at 56 of 109.

³²⁵ **Exhibit C-760**, Email exchange between Joseph Mutti and Steven Donziger, Subject: Potentially Huge, July 26, 2006, [DONZ00023182-83].

³²⁶ **Exhibit C-760**, Email exchange between Joseph Mutti and Steven Donziger, Subject: Potentially Huge, July 26, 2006, [DONZ00023182-83] at 1 of 2.

³²⁷ **Exhibit C-1260**, Email chain among J. Mutti, S. Donziger, and others, Aug. 18, 2006 [DONZ00041397].

³²⁸ **Exhibit C-1261**, Email from P. Fajardo to S. Donziger, Oct. 11, 2006 [DONZ00041714]; **Exhibit C-1262**, Email from P. Fajardo to S. Donziger and others, Nov. 7, 2006 [DONZ00041865]; **Exhibit C-1263**, Email exchange between P. Fajardo and S. Donziger, Dec. 21, 2006 [DONZ00042194].

³²⁹ **Exhibit C-1261**, Email from P. Fajardo to S. Donziger, Oct. 11, 2006 [DONZ00041714].

³³⁰ **Exhibit C-1262**, Email from P. Fajardo to S. Donziger and others, Nov. 7, 2006 [DONZ00041865].

Pablo Fajardo that he should have “create[d] an incident” during a judicial inspection earlier that week.³³¹

111. By January 2007, Donziger bragged that the Plaintiffs were “reaping the benefits” of “saving” the judge’s job. Stating that he had met with Judge Yánez in his home the night before, Donziger reported that he “really liked him” and could not believe he tried to “get him off case” a few months earlier.³³² That same month, Judge Yánez granted the Plaintiffs’ request to terminate the judicial inspections, despite the fact that just weeks earlier, he had rejected this request on the basis that it “entirely lacks legal logic.”³³³

112. Judge Yánez participated in at least six secret in-person meetings regarding the global assessment phase and Richard Cabrera’s appointment as expert.³³⁴ Judge Yánez even suggested to the Plaintiffs that they swear in Cabrera at one of the oil wells, as a “symbolic thing ... from a publicity point of view.”³³⁵ Finally and tellingly, Judge Yánez served the role of “cook” in the Plaintiffs’ coded email exchanges about the Lago Agrio Court serving as a “restaurant” and the Plaintiffs’ selected expert serving as the “waiter.”³³⁶

³³¹ **Exhibit C-716**, Diary of S. Donziger, Nov. 16, 2006 [DONZ00027256], at 38 of 109.

³³² **Exhibit C-716**, Diary of S. Donziger, Jan. 19, 2007 [DONZ00027256], at 26 of 109.

³³³ **Exhibit C-196**, Court Order Declaring the Relinquishment Valid, Jan. 22, 2007; **Exhibit C-716**, Diary of Steven Donziger, Nov. 28, 2006 [DONZ00042039]. Shortly before Judge Yánez appointed Cabrera as global expert, Plaintiffs’ representative Aaron Page consoled Donziger that “Pablo [Fajardo]’s a clever character and pretty in with the judge, right, so I’m sure some solution will come up.” **Exhibit C-1264**, Email exchange between S. Donziger and A. Page, Feb. 7, 2007 [DONZ-HDD-0100386-88].

³³⁴ **Exhibit C-716**, Diary of Steven Donziger, Jan. 27, 2007 [DONZ00027256] (demonstrating the Plaintiffs’ knowledge that Judge Yánez will appoint an expert, but the Plaintiffs will “take the lead while projecting the image that he is working for the court”); **Exhibit C-360**, *Crude* Outtakes, Dec. 6, 2006, at CRS138-02-CLIP-01 *id.*, Feb. 6, 2007, at CRS-158-02-CLIP06; **Exhibit C-716**, Diary of Steven Donziger [DONZ00027256], at 20-21 of 109 (stating that the Plaintiffs have been “working with [the judge] in preparation” for the global expert appointment); *Id.*, Mar. 2007 [DONZ-HDD-033836] (recording multiple meetings between the Plaintiffs’ lawyers and Judge Yánez); *id.*, Mar. 1, 2007 [DONZ00027256], at 10 of 109 (recording a meeting between Pablo Fajardo and Judge Yánez, in which the judge “asked for us to help protect him,” and subsequently called Richard Cabrera directly for a recommendation of a global expert to be appointed); *id.*, Mar. 7, 2007 [DONZ00027256], at 7 of 109 (noting that Donziger sent indigenous leader Luis Macas to meet with Judge Yánez, in the hopes of “get[ting] us the order to begin the [peritaje global]”); *id.*, May 25, 2007 [DONZ00027256], at 1 of 109 (describing two meetings with Judge Yánez in May 2007 regarding the appointment of Cabrera); **Exhibit C-360**, *Crude* Outtakes, June 4, 2007, at CRS345-02-05; *id.*, June 4, 2007, at CRS347-00-02 (describing a meeting between Judge Yánez, Donziger, Fajardo, and Atossa Soltani of Amazon Watch, in which the judge is pressured to appoint Cabrera quickly; nine days later, he complies).

³³⁵ **Exhibit C-360**, *Crude* Outtakes, Jan. 16, 2007, at CRS-158-02-06.

³³⁶ **Exhibit C-917**, Email exchange between P. Fajardo and S. Donziger, Mar. 26, 2007 [DONZ00042758].

113. Judge Núñez: After Judge Núñez took over the case in August 2008, the Plaintiffs and the Court continued to coordinate in private.³³⁷ As Claimants have described,³³⁸ in May and June 2009 Judge Núñez participated in at least three meetings with purported Government officials and prospective remediation contractors, in which he confirmed that the Lago Agrio Judgment would be paid in part to the Government, that he would find against Chevron in the order of billions of dollars, and that he would issue the ruling in October or November 2009.³³⁹ A purported Government representative indicated that the Government would send a “team of lawyers” to help Judge Núñez write the Judgment, and that the judge had been instructed on how to route the money.³⁴⁰ After the tapes became public, Prosecutor General Washington Pesántez held a press conference and urged Judge Núñez to recuse himself from the case, not because of any wrongdoing, but to ensure that the future Judgment “is not the subject of any additional delays or delegitimization by the company” and to “avoid any trick that might possibly be used by the American oil company[.]”³⁴¹ Judge Núñez later recused himself, and the Ecuadorian Judicial Council suspended him as a judge.³⁴² But just a few weeks later, he was reinstated in full as Judge of the Provincial Court of Sucumbíos.³⁴³

114. Meanwhile, Judge Nicolas Zambrano denied Chevron’s motion to annul Judge Núñez’s biased rulings, and instead allowed them to taint the record permanently.³⁴⁴ Many of these rulings were significant, including Judge Núñez’s refusal to set a date for the deposition of

³³⁷ **Exhibit C-1265**, Email from D. Beltman to S. Donziger and K. Hinton, Aug. 22, 2008 [DONZ-HDD-0036534] (stating that the Plaintiffs had arranged meetings with the judge and journalists); **Exhibit C-578**, Elaw, *Elaw Spotlight: Crude Reflections*, July 28, 2008 (in which an environmental advocacy group working with the Plaintiffs boasted of private communications with Judge Núñez).

³³⁸ Claimants’ Memorial on the Merits, ¶¶ 285-294.

³³⁹ **Exhibit C-267**, Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 6-8, 15-16, 26-27, 34 (“Hansen: [Y]ou say, Chevron is the guilty party. Núñez: Yes Sir.”); *id.*, Bribery Transcript Pertaining to Recording 2, May 15, 2009, at 4, 7-8, 10, 14-15; *id.*, Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 12-13; Bribery Transcript Pertaining to Recording 2, May 15, 2009, at 7-8; *id.*, Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 31.

³⁴⁰ **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, May 11, 2009, at 34; *id.*, Bribery Transcript Pertaining to Recording 4, June 22, 2009, at 2.

³⁴¹ **Exhibit C-5**, Press Conference by Prosecutor General Washington, Sept. 4, 2009.

³⁴² **Exhibit C-1266**, Ecuadorian Judicial Council, Opinion by Dr. Germán Vázquez Galarza, Nov. 17, 2010, at 11:20 a.m.

³⁴³ **Exhibit C-1267**, Ecuadorian Transitional Judiciary Council, List of Applicants for National Court of Justice, Nov. 2, 2011 (listing Judge Núñez as a candidate with a higher-than-average ranking on merits).

³⁴⁴ **Exhibit C-230**, Lago Agrio Court Order Denying Chevron Motion to Recuse, Oct. 21, 2009, at 4:05 p.m.

Richard Cabrera,³⁴⁵ his denial of Chevron’s petitions to investigate the essential errors in the Cabrera Report,³⁴⁶ and his decision that Chevron should bear the burden of proof regarding damages.³⁴⁷

115. Judge Zambrano: Judge Zambrano presided over the case twice. In early 2010, the Plaintiffs described their ongoing strategy to pressure the judge directly to rule in their favor. Pablo Fajardo encouraged the team to increase pressure where the judge lives, and Juan Pablo Saenz advised his colleagues to “think seriously about measures to pressure the judge ... This guy is underestimating us.”³⁴⁸ In the months preceding the issuance of *autos para sentencia*, Judge Zambrano inexplicably refused to consider serious evidence of the Plaintiffs’ fraud, including the fraud surrounding the Cabrera Reports,³⁴⁹ the fact that at least one of the nominal plaintiffs was deceased,³⁵⁰ and the forgery of at least 20 nominal Plaintiffs’ signatures on the Complaint.³⁵¹

116. Judge Zambrano purports to have reviewed carefully more than 237,000 pages of case record, and drafted the 188-page, single-spaced judgment, in two months (supposedly reviewing the last 50,000 pages of the record in the two weeks before the Judgment’s issuance).³⁵² The day after issuing the Judgment, Judge Zambrano held a press conference with the Ecuadorian press, in which he explained the Court’s ruling and received praise from the then-President of the Judiciary Council, Benjamin Cevallos.³⁵³ Further, as described in detail above, portions of the Judgment tracked the Plaintiffs’ internal work product word-for-word and relied

³⁴⁵ **Exhibit C-1268**, Lago Agrio Court Order, Oct. 23, 2008, at 5:00 p.m.

³⁴⁶ **Exhibit C-540**, Lago Agrio Court Order of May 28, 2009, at 11:00 a.m.

³⁴⁷ **Exhibit C-541**, Lago Agrio Court Order of Aug. 13, 2009, at 2:30 p.m.

³⁴⁸ **Exhibit C-1270**, Email from P. Fajardo to M. Regalado and others, Jan. 7, 2010 [DONZ00049615]; **Exhibit C-1269**, Email from J. Saenz to Plaintiffs’ team, Feb. 5, 2010 [DONZ00053848], at 2 of 3.

³⁴⁹ **Exhibit C-878**, Order by the Provincial Court of Sucumbíos, Oct. 27, 2010, at 10:10 a.m.

³⁵⁰ **Exhibit C-894**, Order by the Provincial Court of Sucumbíos, Dec. 17, 2010, at 9:57 a.m.

³⁵¹ **Exhibit C-895**, Order by the Provincial Court of Sucumbíos, Dec. 29, 2010, at 2:20 p.m.

³⁵² **Exhibit C-919**, Hugh Bronstein, *Ecuador Judge Works Marathon Hours on Chevron Case*, REUTERS, Jan. 31, 2011.

³⁵³ **Exhibit C-969**, Press Conference of Judge Nicolás Zambrano in Quito, Feb. 14, 2011.

on information in the Selva Viva Data Compilation, a database controlled by the Plaintiffs that did not form part of the record.³⁵⁴

117. In the years before Judge Zambrano presided over the Lago Agrio Litigation, he developed a record of corruption and bribery as a public prosecutor and judge. During his tenure as a prosecutor (“*fiscal*”) in the provinces of Napo and Sucumbíos, Zambrano faced numerous complaints of improper conduct:

- In March 1997, the secretary general of the local truckers’ union in Sucumbíos accused Zambrano of bribery, saying that he extorted union members in exchange for dismissing their traffic citations.³⁵⁵
- In April 1997, a woman testified that while Judge Zambrano was in charge of criminal prosecutions in Lago Agrio, she was forced to pay him a bribe of over US\$ 1,000 in order for him to reverse a guilty verdict against her husband, who had been convicted of drug trafficking.³⁵⁶
- In February 1998, the Ecuadorian Health Commission filed a complaint against Judge Zambrano, then Prosecutor of Sucumbíos, for obstructing an inspection of a cabaret suspected of harboring sex workers.³⁵⁷
- In October 2004, a member of the Napo Bar Association filed a bar complaint against Zambrano, asking the Prosecutor General to investigate Zambrano for “lack of suitability.”³⁵⁸
- Also in October 2004, a criminal defendant accused then-Prosecutor Zambrano of bias, due-process violations, and even personal threats.³⁵⁹
- In July 2006, an attorney alleged that Prosecutor Zambrano offered to perform favorable actions for his clients in several cases in exchange for bribes.³⁶⁰

In light of this record, on June 28, 2006 roughly 40 individuals signed a petition challenging Zambrano’s fitness for the office of District Prosecutor for the Napo region.³⁶¹ Their petition stated: “Our collective indignation is based not only on events that occurred recently while in his

³⁵⁴ See *supra* § II.A.1.

³⁵⁵ **Exhibit C-1271**, Complaint by C. Montero, Secretary General of the Provincial Union of Drivers of Sucumbíos, Mar. 12, 1997.

³⁵⁶ **Exhibit C-1272**, Affidavit of D. E. Encarnación, Apr. 7, 1997, at 4:30 p.m.

³⁵⁷ **Exhibit C-1273**, Complaint by D. del Rosario Vargas Romero, Superintendent of Health of Sucumbíos, Sept. 4, 1998.

³⁵⁸ **Exhibit C-1274**, Complaint Dr. P. Rojas Trelles, Napo Bar Association President, et al., Oct. 1, 2004.

³⁵⁹ **Exhibit C-1275**, Complaint by Dr. E. Mancheno Guerrero, Oct. 28, 2004.

³⁶⁰ **Exhibit C-1276**, Complaint by Dr. R. G. Vera Cardenas, July 12, 2006.

³⁶¹ **Exhibit C-1277**, Petition to Challenge Judge Zambrano as Napo District Prosecutor, June 28, 2006.

current position as Napo Prosecuting Officer, but also because we have become aware of a number of irregular and reprehensible acts of ... Attorney Zambrano, who has been unable to maintain an honorable track record as a public official, but has made his professional career a path of extortion, blackmail and shame[.]”³⁶² Around the same time, the Napo Bar Association also opposed Zambrano’s nomination to District Prosecutor, asking the Province’s Prosecutor General “to suspend Zambrano as a prosecutor for allegedly asking for bribes and handing out political favors to keep his job.”³⁶³

118. Despite these complaints, and despite an earlier criminal history that includes several arrests for theft,³⁶⁴ Zambrano was sworn in as Judge of the Provincial Court of Sucumbíos in August 2008, where he became well known for his powerful political connections. Yet he continued to receive complaints from litigants and others about due-process violations, lack of diligence, and poor suitability for judicial office.³⁶⁵ One of Judge Zambrano’s high-profile cases, *Operación Aniversario*, involved a series of raids carried out in early October 2009 by an elite unit of the Ecuadorian National Police that resulted in more than a dozen arrests and the seizure of 8.3 tons of cocaine. Judge Zambrano’s and Judge Ordoñez’s inexplicable decision to release one of the defendants, reportedly along with other actions favoring individuals tied to drug trafficking, generated complaints from prosecutors and eventually led the National Judicial Council to dismiss Zambrano from the court in March 2012.³⁶⁶

119. The Plaintiffs’ lawyers have admitted their covert tactics to work with the Lago Agrio judges throughout the litigation. For example, one of Donziger’s colleagues suggested that in order to influence the court to rule in their favor on an important legal point, “[m]aybe Pablo [Fajardo] can have one of his backroom conversations.”³⁶⁷ Aaron Page, a young lawyer

³⁶² **Exhibit C-1277**, Petition to Challenge Judge Zambrano as Napo District Prosecutor, June 28, 2006.

³⁶³ **Exhibit C-1278**, *Accusations hover over judges hearing Texaco case*, EL UNIVERSO, Oct. 18, 2009.

³⁶⁴ **Exhibit C-1229**, Report of Ecuadorian National Office of Investigations regarding Nicolas Augusto Zambrano Lozada’s Criminal Record, Mar. 30, 1998.

³⁶⁵ **Exhibit C-1366**, Letter from Red Amazonica to Judge J. Nunez, Sept. 1, 2009; **Exhibit C-1278**, *Accusations hover over Judges Hearing Texaco Case*, EL COMERCIO, Oct. 18, 2009; **Exhibit C-1279**, Complaint filed by F. Cox SanMiguel, Apr. 18, 2011; **Exhibit C-1280**, Letter from N. Alcivar, Aug. 20, 2011.

³⁶⁶ **Exhibit C-1121**, *Two Sucumbios judges appeal CJT decision dismissing them from their posts*, EL UNIVERSO, Mar. 6, 2012; **Exhibit C-1122**, *Ecuadorian Judge in Chevron Case Dismissed*, Associated Press, Mar. 7, 2012; **Exhibit C-1281**, *Judges of Sucumbíos release drug escort*, HOY, Oct. 21, 2009.

³⁶⁷ **Exhibit C-1282**, Email from A. Page to S. Donziger, Sept. 5, 2006 [DONZ00106774].

who worked for Donziger at various times, has testified that he participated in “[b]etween two and ten” private meetings with judges presiding over the Lago Agrio litigation.³⁶⁸ The entire evidentiary phase of the Lago Agrio Litigation, ranging from 2003 to 2011, thus has been colored by a close coordination between the Court and the Plaintiffs, with no hope for Chevron to have its evidence considered by an impartial decision-maker.

b. Public Pressure and Anti-Chevron Sentiment

120. For years, the Plaintiffs engaged in a campaign to bully and intimidate Ecuadorian judges, whom they recognized as weak, and to foment public anger against Chevron:

- Donziger declared that “there’s almost no rules here [in Ecuador]”³⁶⁹ and that “the only language that I believe this judge is gonna understand is one of pressure, intimidation and humiliation. And that’s what we’re doin’ today. . . . We’re going to scare the judge, I think today.”³⁷⁰
- According to Donziger, Ecuadorian judges “make decisions based on who they fear the most, not based on what the laws should dictate.”³⁷¹
- When one of the Plaintiffs’ representatives suggested to Donziger that no judge would rule against them because “[h]e’ll be killed,” Donziger replied that, although the judge might not actually be killed if he ruled against them, “he thinks he will be Which is just as good.”³⁷²
- As a colleague told Donziger, “The only way we will win this case is if the judge thinks he will be doused with gasoline and burned if he rules against us.”³⁷³
- When the Court failed to accede immediately to their goal of ending the judicial inspections, the Plaintiffs planned to “take over the court with a massive protest,” with the goal of “shut[ting] the court down for a day.”³⁷⁴

³⁶⁸ **Exhibit C-1283**, *Chevron Corp. v. Donziger, et al.*, Case No. 11-CV-3718, Official Transcript of the Deposition of Aaron Marr Page, Sept. 15, 2011, at 111:25-112:5.

³⁶⁹ **Exhibit C-360**, *Crude* Outtakes, at CRS 052-00-Clip-01.

³⁷⁰ **Exhibit C-360**, *Crude* Outtakes, at CRS 052-00-Clip-01.

³⁷¹ **Exhibit C-360**, *Crude* Outtakes, June 6, 2007, at CRS350-04-CLIP 01.

³⁷² **Exhibit C-360**, *Crude* Outtakes, undated, CRS-129-00-CLIP-02 (*Crude* outtake video clip of meeting among S. Donziger, A. Ponce and others).

³⁷³ **Exhibit C-716**, Diary of Steven Donziger, Mar. 11, 2006, at 73 of 111. [DONZ00027156]. Donziger admitted that this comment did not shock him. *Id.*

³⁷⁴ **Exhibit C-360**, *Crude* Outtakes, June 6, 2007, at CRS350-04-CLIP 01.

121. The *Crude* outtakes shed light on Donziger’s statements. During one event in which the Plaintiffs attempted to stage a public protest during a judicial inspection at the Sacha Sur Station, the Plaintiffs amassed an “army” of protesters whom the judge would not permit to enter the Station due to the risk that such a large mob would pose to the Station’s operation.³⁷⁵ When Donziger saw that what he described as his “army” would not be able to enter, he demanded that the judge come to the gate to deal with the mob himself and warned that “they’re provoking a violent incident.”³⁷⁶ Although the Plaintiffs’ “army” was rebuffed at this inspection, Donziger achieved his purpose of letting the Court know that it was being watched by a potentially violent group.³⁷⁷ In another example already submitted before the Tribunal, Donziger had the *Crude* filmmakers tape an impromptu “hearing” before the Lago Agrio judge, in which Donziger brought in media cameras and accused Chevron’s lawyers of fraud.³⁷⁸

122. Although the Plaintiffs succeeded time and again in pressuring the Court to rule in their favor, they recognized the need to minimize the documentary evidence of their own interference with the Court and that of the Government. A recently-discovered internal communication illustrates the Plaintiffs’ knowledge that their pressure tactics could threaten the legitimacy of the Lago Agrio Judgment, and their late-stage efforts to keep these tactics secret. As Plaintiffs’ representative Julio Prieto wrote to Donziger in early 2009:

It seems to me that our goal isn’t to increase the pressure just because; rather, what we want is to increase it to get a judgment ... Let’s keep in mind that Texaco is alleging in the United States that the Ecuadorian courts can be politically influenced, and that the Lago Agrio Court is under enormous pressure. *The pressure should be felt by the judge, but should be subtle enough that it can’t be alleged that he acted due to that pressure ...* To understand it, let’s think about when Correa visited the region and publicly condemned Texaco. It was definitely a media victory, but Correa’s words that day are the basis for Texaco’s main argument for saying that the Lago Agrio judge isn’t independent and that he obeys Correa’s orders. To summarize, this strategy should be as

³⁷⁵ **Exhibit C-360**, *Crude* Outtakes, Mar. 8, 2006, at CRS-028-01, at 2-9.

³⁷⁶ **Exhibit C-360**, *Crude* Outtakes, Mar. 8, 2006, at CRS-028-01, at 3-4.

³⁷⁷ **Exhibit C-360**, *Crude* Outtakes, undated, at CRS-350-04-CLIP-02.

³⁷⁸ Claimants’ Memorial on the Merits, ¶¶ 276-78 (describing scenes in which Donziger called Chevron’s lawyers “corrupt” in front of the judge in order to intimidate him, and brought media into the courtroom while “yell[ing] and scream[ing]” at the judge to pressure him to rule in the Plaintiffs’ favor).

follows: “increase the pressure on the Court, but without negatively impacting its image of independence.” *The political pressure can be in the form of direct calls to the judge. Preferably avoid public threats!!*³⁷⁹

In sum, the Plaintiffs understood Ecuador’s judiciary and acted accordingly, pressuring the Court to get what they wanted. “We can have the best proof in the world,” Donziger wrote, “and if we don’t have a political plan we will surely lose. On the other hand, we can [have] mediocre proof and a good political plan and stand a good chance of winning.”³⁸⁰

c. Political Pressure on the Court by the Plaintiffs and Government Officials

123. From the outset of the Lago Agrio Litigation, the Ecuadorian Government cooperated with the Plaintiffs and pressured the Court to rule against Chevron, all the while knowing that its pressure tactics would be effective against a weak judiciary. New documents show Donziger boasting about the Plaintiffs’ “close ties” to “high-ranking Ecuadorian government officials” in addition to the Frente’s “wide influence in Ecuador” and “ab[ility] to command meetings with government ministers and even the President.”³⁸¹ These insider connections, in combination with the politicization of the Ecuadorian judiciary, allowed the Plaintiffs and the Government to obtain rulings based on the judges’ fear of repercussions rather than on the facts and law. For example:

- According to Donziger, “no judge can rule against us and feel like he can get away with it in terms of his career.”³⁸²
- Donziger said that what “we need to do is to get the politics in order . . . [because] the only way we’re going to succeed, in my opinion, is [i]f the country gets excited about getting this kind of money out of Texaco So you have to play to those . . . themes, those feelings these people have.”³⁸³
- As Donziger correctly noted, the litigation “is not a legal case,” but a “political battle that’s being played out through a legal case.”³⁸⁴ Consistent with the Plaintiffs’ strategy to “play dirty,” Donziger instructed one of his colleagues to

³⁷⁹ **Exhibit C-1284**, Email from J. Prieto to Plaintiffs’ team, Jan. 14, 2009 (emphasis added) [DONZ00039063].

³⁸⁰ **Exhibit C-716**, Diary of Steven Donziger at 64 of 111 [DONZ00027156].

³⁸¹ **Exhibit C-775**, S. Donziger book proposal for Amazon Awakening, Nov. 3, 2006 [DONZ00006707], at 4, 22.

³⁸² **Exhibit C-360**, *Crude* Outtakes, Mar. 9, 2006, at CRS032-00-CLIP 01.

³⁸³ **Exhibit C-360**, *Crude* Outtakes, Apr. 3, 2006, at CRS060-00-CLIP 04.

³⁸⁴ **Exhibit C-360**, *Crude* Outtakes, Apr. 3, 2006, at CRS060-00-CLIP 04.

“prepare a detailed plan with the necessary steps to attack the judge through legal, institutional channels and through any other channel you can think of.”³⁸⁵

This strategy would not have been possible if the Lago Agrio Court were independent, corruption-free, or unwilling to participate in the Plaintiffs’ fraud.

124. In addition to the evidence already submitted to this Tribunal regarding the Government’s influence in the Lago Agrio Litigation and coordination with the Plaintiffs,³⁸⁶ new documents underscore the Government’s direct involvement in pressuring the Lago Agrio Court:

- Shortly before Correa’s election, Alberto Wray drafted a three-part “plan” to work directly with the Correa administration, including: (1) engaging with President Correa “personally” and advising him to intervene in the litigation; (2) meeting with Ministers and high officials in Petroecuador; and (3) influencing “the designation of key positions that help us attain what we want.”³⁸⁷
- In a meeting on March 20, 2007, President Correa and several top officials (legal advisor Alexis Mera, General Counsel of Petroecuador Raúl Moscoso, Environmental Minister Anita Albán, and Prosecutor General Xavier Garaicoa) met in the Presidential Palace with Plaintiffs’ representatives to discuss their coordination in the case.³⁸⁸ One of those attending reported to Donziger that President Correa “gave us fabulous support” and “*even said that he would call the Judge.*”³⁸⁹
- Regarding the same meeting, Plaintiffs’ representative Manuel Pallares reported, “it couldn’t have been better. He [President Correa] offered full support for the case. I just want to be sure everything comes out well. We can put together a strategy to get Texaco by the balls very quickly. *The president ordered that the acta the finiquito [the 1998 Final Release] has to be nullified by whatever means full support to the arbitration resources all*” (ellipsis in original). Pallares suggested that Correa could denounce Chevron in the international community to add pressure.³⁹⁰

³⁸⁵ **Exhibit C-1285**, Email from S. Donziger to A. Villacis, Jun. 14, 2006, [DONZ00086533].

³⁸⁶ Claimants’ Memorial on the Merits, at 120-132; Claimants’ Letter to the Tribunal, Dec. 12, 2010, at 6-9.

³⁸⁷ **Exhibit C-1286**, Email from L. Yanza to S. Donziger, A. Ponce, and E. Mendoza, Nov. 28, 2006 [DONZ-HDD-0092119-20].

³⁸⁸ **Exhibit C-1046**, Photo of meeting with President Correa, et al, and Plaintiffs representatives, March 20, 2007 available at <http://www.flickr.com/photos/7413684@N02/428416812/> (last visited Mar. 19, 2012).

³⁸⁹ **Exhibit C-1005**, Email from M. Yépez to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103690] (emphasis added).

³⁹⁰ **Exhibit C-1287**, Email from M. Pallares to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103653] (emphasis added).

125. New documents reveal additional direct contacts between Alexis Mera, President Correa’s influential advisor, and the Plaintiffs, beyond the covert March 29, 2007 meeting in which they discussed ways to “help each other” by attempting to nullify the Settlement and Release Agreements.³⁹¹ In April 2009, Donziger emailed Mera directly, telling him that “Chevron is under a lot of political pressure here [in the United States] regarding the Ecuador issue.”³⁹² He asked Mera to set up a meeting the following week between the two of them, other Plaintiffs’ representatives, and President Correa.

126. The Plaintiffs created and developed these closed-door connections with the Ecuadorian Government to pressure the Lago Agrio Court and make a showing of political strength as a source of intimidation. This pressure, especially when considered alongside the public statements by President Correa and other Government officials in favor of the Plaintiffs and against Chevron,³⁹³ sent a clear message to the Ecuadorian judiciary that it must find Chevron liable.

127. In the months leading up to the Judgment, it became apparent that the Plaintiffs’ strategy (in tandem with the Government’s efforts to influence the Court) had worked. The Lago Agrio Court’s rulings in the late stages of the litigation, which allowed the Plaintiffs to submit new damage assessments quadrupling their claims, sanctioned Chevron’s lawyers for attempting to introduce new evidence of the Plaintiffs’ fraud, and terminated the evidence phase without ruling on dozens of Chevron’s motions, indicate that the Court had prejudged Chevron without regard for the law or the facts.³⁹⁴

³⁹¹ See Claimants’ Letter to the Tribunal, Oct. 27, 2010, at 8-9 (describing in detail a meeting between Alexis Mera and Plaintiffs’ representatives); **Exhibit C-721**, *Crude* Outtakes, Mar. 29, 2007, CRS221-02-CLIP 01.

³⁹² **Exhibit C-1288**, Email from S. Donziger to A. Mera, Apr. 29, 2009 [DONZ00040725].

³⁹³ See *infra* §§ II(C)(3)(a)-(b) (detailing direct contacts between Government officials and the Plaintiffs, and public statements by Ecuadorian officials with respect to the Lago Agrio Litigation).

³⁹⁴ Although this submission focuses on new developments, Claimants have detailed the Lago Agrio Court’s due-process violations throughout the course of the Litigation in their original Memorial. See Claimants’ Memorial on the Merits, Sept. 6, 2010, § II.

D. The Lago Agrio Appellate Process Violates Ecuadorian Law, General Standards of Due Process, and Ecuador’s Obligations Under International Law

128. On March 9, 2011, Chevron appealed the Lago Agrio Judgment, issued by the Acting President of the Provincial Court of Justice of Sucumbíos in Lago Agrio (formerly the Superior Court of Justice of Nueva Loja),³⁹⁵ to a three-member appellate panel of the same court.³⁹⁶ As with its submissions before the trial judge, Chevron informed the appellate panel of the legal, technical, and procedural flaws in the Judgment, along with evidence of the Plaintiffs’ fraud. Yet political manipulation, illegality, and non-transparency permeated the Lago Agrio appellate process, culminating in a decision that rubber-stamped the illegitimate Judgment without even considering the evidence that it was obtained by fraud.

1. Ecuador Manipulated the Appointment of the Appellate Panel in a Highly Irregular and Non-Transparent Process

129. As Claimants have explained, the Lago Agrio Plaintiffs’ claims arose under the 1999 EMA, meaning that the trial’s procedure was that of a verbal summary proceeding.³⁹⁷ Those rules order the trial to be conducted by the president of the Provincial Court of Justice of Sucumbíos,³⁹⁸ with any appeal to be filed before a panel of three judges of the same provincial court.³⁹⁹ If three permanent judges are not available to serve on the appeal, additional judges are selected, by public lottery, from a pool of substitute judges.⁴⁰⁰ In this case, none of the three permanent trial judges for the Provincial Court of Sucumbíos (Leonardo Ordóñez, Juan Núñez,

³⁹⁵ **Exhibit C-73**, 1999 Environmental Management Act, Official Registry No. 37, July 30, 1999 (hereinafter “1999 EMA” or “EMA”). Pursuant to Article 42 of the 1999 EMA, “[t]he President of the Superior Court of the place where the harm to the environment occurred shall have jurisdiction to hear the actions that may be brought as a result of such harm ...” Because the EMA is the basis of the Lago Agrio Litigation, the Plaintiffs filed the Lago Agrio Complaint with the President of the Superior Court of Justice of Nueva Loja. (The city of Nueva Loja is also known as Lago Agrio). After the enactment of the new Constitution in 2008 and the Organic Code of the Judiciary in 2009, the name of the Court took on its current name, *i.e.* Provincial Court of Justice of Sucumbíos. The Lago Agrio Judgment was issued by the Acting President of the Lago Agrio Court (Judge Nicolás Zambrano) who replaced the President of the Lago Agrio Court (Judge Leonardo Ordóñez) as a result of the recusal motion filed by Chevron, which was granted on September 30, 2010. **Exhibit C-1289**, Chevron’s Motion to Recuse Judge Ordóñez, Aug. 26, 2010, at 2:45 p.m.; *see also* **Exhibit R-207**, Order by the Lago Agrio Court Granting Recusal of Judge Ordóñez, Sept. 30, 2010, at 11:55 a.m.

³⁹⁶ **Exhibit C-1178**, Chevron’s Appeal of the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m.

³⁹⁷ Claimants’ Memorial on the Merits, ¶¶ 172-176; **Exhibit C-73**, 1999 EMA, Art. 43.

³⁹⁸ **Exhibit C-73**, 1999 EMA, Art. 42.

³⁹⁹ *See* **Exhibit C-400**, Organic Code of the Judicial Function, Art. 206, 208.

⁴⁰⁰ **Exhibit C-400**, Organic Code of the Judicial Function, Arts. 201, 214.

and Nicolás Zambrano) was competent to hear the Lago Agrio appeal, as two had previously been recused from the proceeding,⁴⁰¹ and the third had issued the lower court judgment.⁴⁰²

130. With the three permanent judges ineligible to hear Chevron's appeal, the panel should have consisted of the three substitute judges serving at that time (Marco Yaguache, Milton Toral, and Luis Legña). But the Provincial Court of Sucumbíos, along with the Judiciary Council, abandoned the usual process for selecting the appellate panel, instead maneuvering to hand-pick the judges in violation of Ecuadorian law. For example:

- The Court added two additional substitute judges to the pool, Juan Encarnación and Alejandro Orellana, who had been appointed by Judge Zambrano just five weeks before he issued the Judgment (apparently without conducting the traditional merits competition);⁴⁰³
- A little over two weeks after the Lago Agrio Judgment, President of the Judiciary Council Benjamín Cevallos⁴⁰⁴ removed Judge Yaguache from the substitute appellate panel, with no expressed justification except that it was “for the benefit of institutional interests.”⁴⁰⁵

⁴⁰¹ See **Exhibit C-400**, Organic Code of the Judicial Function, Art. 165(2); see also **Exhibit C-1290**, Decision Regarding Judge Núñez's Recusal, Sept. 28, 2009, at 10:00 a.m.; **Exhibit R-207**, Decision Regarding Judge Ordóñez's Recusal, Sept. 30, 2010, at 11:55 a.m.

⁴⁰² See **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 856(6).

⁴⁰³ **Exhibit C-1291**, Appointment of Judge Orellana as Associate Judge of the Provincial Court of Justice of Sucumbíos, Jan. 6, 2011; **Exhibit C-1292**, Lottery Certificate to Form the Sole Division of the Provincial Court of Sucumbíos, May 3, 2011, at 9:15 a.m., attached to notice letter from the Provincial Office of the Judiciary Council dated May 4, 2011. Additionally, Chevron has expressly noted that Judge Zambrano was legally prohibited from acting as both permanent judge of the Lago Agrio court and Provincial Director of the Judiciary Council, pursuant to Art. 16 of the Organic Code of the Judiciary. See **Exhibit C-1293**, Chevron's Nullity Motion Addressing the Appellate Panel, July 15, 2011, at 2:24 p.m.

⁴⁰⁴ The day after the Lago Agrio Judgment, Cevallos appeared at a press conference with Judge Zambrano to announce the issuance of the judgment, and praised Zambrano as a “shining star.” **Exhibit C-1012**, Press-Conference, Teleamazonas broadcast, Feb. 15, 2011.

⁴⁰⁵ **Exhibit C-1294**, Appointment of Judge Yaguache as Acting Substitute Judge Replacing Judge Ordóñez, Mar. 1, 2010; **Exhibit C-1295**, Appointment of Judge Legña as Substitute Judge Replacing Judge Yaguache, Memorandum No. 509-P-CJ-BCS-2011, Mar. 3, 2011. Strikingly, Cevallos did not even mention the fact that Judge Zambrano had already replaced Judge Yaguache two days earlier. **Exhibit C-1296**, Appointment of Judge Toral as Permanent Substitute Judge Replacing Judge Yaguache, Mar. 1, 2011. It appears that Judge Yaguache later challenged his irregular removal from the appellate panel before the Judiciary Council. See **Exhibit C-1008**, *Dispute Over Appointment of Judges in Chevron Case*, EL UNIVERSO, Mar. 14, 2011.

- A secret “lottery” selected the initial appellate panel of Judges Legña, Toral, and Orellana without notice to the parties,⁴⁰⁶ in violation of recently enacted Ecuadorian law requiring all judicial actions or proceedings to be public.⁴⁰⁷
- The Court permitted Judge Orellana to join the appellate panel even though, barely a month earlier, he had filed a complaint against Chevron on behalf of an individual plaintiff claiming personal injuries purportedly caused by TexPet’s activities in Ecuador.⁴⁰⁸ That complaint raised similar allegations concerning TexPet’s activities during the Consortium—so much so that Judge Orellana’s complaint contained several verbatim passages from the Lago Agrio Complaint.⁴⁰⁹ Chevron moved to recuse Judge Orellana,⁴¹⁰ but a two-judge panel (including Judge Toral, a current member of the main appellate panel) concluded that this obvious conflict of interest did not constitute grounds for recusal under Ecuadorian law.⁴¹¹ (The issue was ultimately moot as Judge Orellana resigned from the pool of substitute judges to accept a prosecutorial position).⁴¹²
- Judge Zambrano, again without notice, secretly designated Judge Juan Encarnación to replace Judge Orellana during the pendency of the recusal motion,⁴¹³ prompting Chevron to challenge this improper appointment.⁴¹⁴

⁴⁰⁶ **Exhibit C-1292**, Lottery Certificate to Form the Sole Division of the Provincial Court of Sucumbíos, May 3, 2011, at 9:15 a.m., attached to notice letter from the Provincial Office of the Judiciary Council dated May 4, 2011. Notably, the “lottery” took place even before the file record was duly received by the law clerk of the appellate court at 10:43 a.m. of that same day, which violates Ecuadorian law and renders the appellate proceeding null and void. *See* **Exhibit C-1298**, Minutes of Receipt of File Records by the Sole Panel of the Provincial Court of Sucumbíos, Mar. 23, 2011, at 10:43 a.m. Chevron exposed these irregularities, among others, in its March 30, 2011 motion to the appellate panel, requesting the nullity of the appellate proceedings. *See* **Exhibit C-1299**, Chevron’s Nullity Motion Addressing the Appellate Panel, Mar. 30, 2011, at 5:31 p.m. That same day, the Lago Agrio Plaintiffs themselves noted some of the procedural irregularities in the constitution of the appellate panel, and asked the panel to clarify that appropriate procedures were followed “to avoid defects nullifying the proceedings.” **Exhibit C-1300**, Lago Agrio Plaintiffs’ Motion to the Appellate Panel, Mar. 30, 2011, at 5:50 p.m.

⁴⁰⁷ *See* **Exhibit C-400**, Organic Code of the Judicial Function, Art. 13.

⁴⁰⁸ **Exhibit C-1301**, Complaint of Celso Parra, Feb. 21, 2011, at 11:30 a.m.

⁴⁰⁹ *See* **Exhibit C-1302**, Chevron Motion for Recusal against Judge Orellana, Sept. 27, 2011, at 4:40 p.m.

⁴¹⁰ **Exhibit C-1303**, Chevron Motion for Recusal against Judge Orellana, Apr. 13, 2011, at 5:12 p.m.

⁴¹¹ **Exhibit C-1304**, Decision Regarding the Recusal of Substitute Judge Orellana, Nov. 9, 2011, at 4:00 p.m.

⁴¹² **Exhibit C-1305**, Resignation of Judge Orellana as Substitute Judge, May 31, 2011.

⁴¹³ **Exhibit C-1292**, Lottery Certificate to Form the Sole Division of the Provincial Court of Sucumbíos, May 3, 2011, at 9:15 a.m., attached to notice letter from the Provincial Office of the Judiciary Council dated May 4, 2011. Additionally, Chevron has expressly noted that Judge Zambrano was legally prohibited from acting as both permanent judge of the Lago Agrio Court and Provincial Director of the Judiciary Council, pursuant to Art. 16 of the Organic Code of the Judiciary. *See* **Exhibit C-1293**, Chevron’s Nullity Motion Addressing the Appellate Panel, July 15, 2011, at 2:24 p.m.

⁴¹⁴ **Exhibit C-1293**, Chevron’s Nullity Motion Addressing the Appellate Panel, July 15, 2011, at 2:24 p.m.

- The Judiciary Council removed Judge Legña and replaced him provisionally with Judge Wilfrido Erazo, again without stating the reasons and in flagrant violation of Ecuadorian law.⁴¹⁵ On August 3, 2011, however, the so-called “Transitional Judiciary Council” vacated all provisional appointments of judges and substitute judges, including Judge Erazo.⁴¹⁶
- The acting Provincial Director of the Judiciary Council of Sucumbíos conducted yet another secret “lottery” in violation of Ecuadorian law to replace Judge Erazo with Judge Yaguache.⁴¹⁷
- On November 29, 2011, Judge Toral asked the local director of the Judiciary Council of Sucumbíos to appoint the other two members of the appellate panel,⁴¹⁸ which it did by means of a new lottery secretly conducted just two hours later.⁴¹⁹ Notably, Judge Ordóñez, who previously had been recused after Chevron’s petition,⁴²⁰ also signed off on the secret lottery. Needless to say, Chevron was only notified of these events after they had occurred, following the same pattern of *fait accompli* that has characterized the constitution of the appellate panel and the Lago Agrio proceedings from its inception.

131. Thus, from the time that the court accepted Chevron’s appeal, no less than five substitute judges were shuttled on and off the panel.⁴²¹ For example, over the course of nine

⁴¹⁵ **Exhibit C-1306**, Appointment of Judge Erazo as Substitute Judge Replacing Judge Zambrano, June 17, 2011, attached to letter from the Provincial Director of the Judiciary Council to Judge Zambrano dated June 29, 2011. Pursuant to Article 264(3) of the Organic Code of the Judiciary, the Judiciary Council *en banc*—not the President—shall appoint the judges of the provincial courts. **Exhibit C-400**, Ecuadorian Organic Code of the Judiciary, Art. 264(3).

⁴¹⁶ **Exhibit C-1307**, Letter from the National Personnel Director of the Judicial Council, Official Circular No. 48-DNP-2011, Aug. 3, 2011. A referendum passed on May 7, 2011 replaced the Judicial Council with a Transitory Judicial Council comprised of three members, one appointed by the President, one appointed by the Council on Citizen Participation and Social Control, and one appointed by the National Congress. *See infra* ¶¶ 163-6.

⁴¹⁷ **Exhibit C-1308**, Appointment of Judge Yaguache as Provincial Judge Replacing Judge Erazo, Aug. 4, 2011, Memorandum No. 027-D-DP-CJS, attached to notice letters from the Provincial Director of the Judiciary Council dated Aug. 4, 2011.

⁴¹⁸ **Exhibit C-1099**, Order Signed by Judge Toral, Nov. 29, 2011, at 2:48 p.m.

⁴¹⁹ **Exhibit C-1065**, Minutes of Lottery to Integrate Sole Panel of the Provincial Court of Sucumbíos, Nov. 29, 2011, at 4:50 p.m.

⁴²⁰ **Exhibit R-207**, Order by the Lago Agrio Court Granting Recusal of Judge Ordóñez, Sept. 30, 2010, at 11:55 a.m.

⁴²¹ *See, e.g., Exhibit C-1008, Dispute Over Appointment of Judges in Chevron Case*, EL UNIVERSO, Mar. 14, 2011 (stating that Permanent Substitute Judge Yaguache was replaced by Permanent Substitute Judge Legña).

months, a single substitute-judge position passed from Yaguache to Legña,⁴²² from Legña to Erazo,⁴²³ from Erazo back to Yaguache,⁴²⁴ and from Yaguache to Toral.⁴²⁵

132. After all of these maneuvers, the final appellate panel included Judge Toral (originally nominated by Judge Zambrano, who issued the first-instance Judgment),⁴²⁶ Judge Encarnación (appointed to the pool of substitute judges by Judge Zambrano just five weeks before the Judgment, apparently outside the traditional merit-based selection process),⁴²⁷ and Judge Legña (appointed by former President of the Judiciary Council Benjamín Cevallos, who in a press conference the day after the Lago Agrio Judgment praised Judge Zambrano as a “shining star” and called the Judgment an “outstanding ruling that meets the needs of all citizens of Ecuador.”).⁴²⁸ Judge Toral was selected as the “Juez Ponente” or presiding judge, responsible for authoring the appellate decision.

133. Even aside from the manipulations that led to the composition of the appellate panel, additional facts suggest that Ecuador failed to provide Chevron an adequate forum to redress the fraud in the Lago Agrio Judgment. Substitute judges in Ecuador are paid a meager amount—a maximum of US\$ 500 per case—for their entire work in reviewing the record and issuing their final decision.⁴²⁹ This creates an incentive for the appellate panel to issue rulings as quickly as possible and without taking the time and consideration required to review the massive

⁴²² **Exhibit C-1295**, Appointment of Judge Legña as Substitute Judge Replacing Judge Yaguache, Memorandum No. 509-P-CJ-BCS-2011, Mar. 3, 2011.

⁴²³ **Exhibit C-1308**, Appointment of Judge Yaguache as Provincial Judge Replacing Judge Erazo, Aug. 4, 2011, Memorandum No. 027-D-DP-CJS, attached to notice letters from the Provincial Director of the Judiciary Council dated Aug. 4, 2011.

⁴²⁴ **Exhibit C-1308**, Appointment of Judge Yaguache as Provincial Judge Replacing Judge Erazo, Aug. 4, 2011, Memorandum No. 027-D-DP-CJS, attached to notice letters from the Provincial Director of the Judiciary Council dated Aug. 4, 2011.

⁴²⁵ **Exhibit C-1010**, Personnel Action from the Provincial Director of the Judicial Council (Luis Naranjo), No. 081-DPCJS-2011, Nov. 28, 2011 (replacing Permanent Substitute Judge Yaguache with Substitute Judge Toral).

⁴²⁶ **Exhibit C-1009**, Personnel Action from the Provincial Director of the Judicial Council (Luis Naranjo), No. 082-DP-CJS-2011, Nov. 28, 2011; **Exhibit C-1010**, Personnel Action from the Provincial Director of the Judicial Council (Luis Naranjo), No. 081-DPCJS-2011, Nov. 28, 2011.

⁴²⁷ **Exhibit C-1011**, Personnel Action from the Provincial Director of the Judicial Council (Nicolas Zambrano), Jan. 5, 2011.

⁴²⁸ **Exhibit C-1012**, Press conference, Teleamazonas broadcast, Feb. 15, 2011; **Exhibit C-993**, TCTV, Ruling at Lago Agrio, Feb. 15, 2011.

⁴²⁹ **Exhibit C-1310**, Resolution of the National Judicial Council, Official Registry No. 11, Jan. 30, 2007.

record at issue in this case. Moreover, two of the judges on the final appellate panel owed their appointments to Judge Zambrano, whose opinion they were reviewing.

134. The foregoing shows that the appellate proceedings have been anything but transparent. Appointments to the appellate panel were irregular, improper, and clandestine, without notification to the interested parties who had the right to be present at the so-called “lotteries.” The Lago Agrio appellate process proceeded in a constant state of flux and without any semblance of a stable or transparent legal framework.

2. The Appellate Panel Upheld the Fraudulent Judgment Without Considering the Evidence

135. The appellate court in Ecuador affirmed the Lago Agrio Judgment on January 3, 2012—just one month after the constitution of the final appellate panel.⁴³⁰ President Correa immediately praised the judgment as an “achievement” in the press, saying that the Amazon communities had obtained a “huge judicial victory” and declaring that “justice has been done.”⁴³¹

136. Echoing the impossibility of Judge Zambrano’s supposed review of 237,000 pages of record in two months, the appellate panel purported to complete the same review—along with a careful review of the 188-page Judgment—in a little over 30 days. It is simply not credible to claim, as Ecuador did its January 9, 2012 letter, that the “Court of Appeals, having combed the whole trial court record,” satisfied its obligation under Ecuadorian law to assess the evidence “as a whole.”⁴³²

137. Chevron submitted evidence of the fraud in the Judgment before the Lago Agrio appellate court. Yet the Ecuadorian appellate court affirmed the entirety of the \$18.2 billion judgment, including the “penalty” imposed on Chevron for not publicly “apologizing.” In so holding, the appellate court ignored or summarily dismissed the extensive evidence of fraud, including evidence establishing that the Plaintiffs had ghostwritten the judgment and the Cabrera

⁴³⁰ The appellate court denied Chevron’s appeal in full, with one exception regarding the Judgment’s erroneous finding of mercury contamination, which the panel found to have no impact on damages. **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision.

⁴³¹ **Exhibit C-1006**, *Ecuador court upholds \$18 bln ruling against Chevron*, REUTERS NEWS, Jan. 3, 2012.; **Exhibit C-1311**, *Court in Ecuador upholds multi-million dollar judgment against Chevron for environmental damage*, EL UNIVERSAL, Jan. 4, 2012.

⁴³² Respondent’s Letter to the Tribunal, Jan. 9, 2012, at 13.

Reports and falsified the Calmbacher report.⁴³³ Instead, the appellate court sidestepped the issue by claiming that it “*should not refer at all*” to the fraud allegations because they “are pending solution before authorities in the United States of America due to a complaint filed by Chevron, sued herein, under the RICO Act, and this Division has no competence to adjudicate the conduct of counsel, experts or other officials or administrators and auxiliaries of the judiciary, if that were the case.”⁴³⁴ The appellate court abdicated its fundamental responsibility to determine the legitimacy of the Judgment in light of overwhelming evidence of fraud.⁴³⁵

138. While the appellate court purported to address a few pieces of evidence showing the Plaintiffs’ role in authoring the Judgment, it avoided the real issues raised by that evidence. *First*, in response to proof that the Judgment shared common errors and idiosyncratic features with the Plaintiffs’ internal Selva Viva Data Compilation, the appellate court claimed that it was “not aware of the existence of the database to which the defendant refers,” which could not be the case if the appellate court actually had considered the evidence that the Selva Viva Data Compilation was used to draft the Judgment.⁴³⁶

139. *Second*, while the appellate court acknowledged the presence of common data errors between the Judgment and the Plaintiffs’ secret files, identified by Mr. Younger, it simply asserted that the errors themselves did not affect the Judgment.⁴³⁷ For example, the appellate court verified a naming error that Mr. Younger identified as originating in the Selva Viva Data

⁴³³ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 13-14 (Eng.). The appellate decision also ignored the fact that no scientific evidence in the record supported the massive damages awarded, including over US\$ 5 billion (the lion’s share of the supposedly compensatory damages in the Judgment) to remediate pits based on aerial photographs, many of which turn out not to have shown pits at all. *See supra* ¶¶ 51-2.

⁴³⁴ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 13 (Eng.).

⁴³⁵ This is consistent with the Ecuadorian courts’ actions in the *El Universo* case, described below, in which forensic evidence showed that the judgment was loaded onto the computer of the temporary judge newly assigned to the case just hours before it was issued. *See infra* ¶¶ 167-170; *see also* **Exhibit C-1312**, Iván Sandoval Carrión, *Dynamic Reading*, EL UNIVERSO, July 26, 2011. Similar to the Lago Agrio Litigation, five different judges presided over the *El Universo* case. The final judge who presided over the case, Dr. Juan Paredes, served for only 33 hours and during this time supposedly read and analyzed more than 5,000 pages of the record, reached a decision, and drafted a 156-page judgment. *Id.* El Universo obtained a court order to review Judge Paredes’ hard drive, and found that the judgment was not written on his computer at all, but instead had been copied from a flash drive the night before. Yet the court of appeals ignored the evidence of ghostwriting.

⁴³⁶ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 11 (Eng.).

⁴³⁷ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 11 (Eng.).

Compilation.⁴³⁸ In each case, the court did not address the larger implication—that these commonalities showed that Plaintiffs had a hand in writing the Judgment.

140. *Third*, the appellate panel’s incorrect finding that the Judgment relies on data in the record is based on blatant errors. Although the appellate court stated that it “been able to confirm first hand that the record includes the information to which the judgment refers,”⁴³⁹ most of its references to data in the record are wrong, referencing incorrect page numbers, incorrect data, or both.⁴⁴⁰ The record does not support the data as recited by the appellate panel.⁴⁴¹ These errors cannot be attributed to the record and demonstrate that, contrary to the appellate panel’s claims, it did not “confirm first hand that the record includes” the sampling data referenced in the Judgment.

141. Aside from sidestepping the evidence of fraud, the 16-page appellate decision upholds in full the first-instance award against Chevron—including the punitive damages, which the Plaintiffs never sought in their complaint, because Chevron refused publicly to “apologize” and thereby forfeit its appellate rights. The appellate decision even awarded a new 0.1% “professional fee,” amounting to US\$ 18 million, to the Plaintiffs’ lawyers.⁴⁴²

142. Moreover, as with the first-instance Judgment, there are reasons to suspect the authorship of the appellate decision. Ecuador submitted a media-obtained copy of the appellate

⁴³⁸ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 11 (Eng.) (“Regarding samples JL-LAC-PITI-SD2-SUI-R (1.30-1.90) M attributed to expert John Conner, a correction was made regarding the fact that the first of these samples was taken by expert Fernando Morales, also certified by the defendant. The results of expert Morales can be seen on page 118,776 of the case file.”).

⁴³⁹ **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 11.

⁴⁴⁰ For example, the appellate panel claims that sampling data for the Shushufindi field can be found at pages “100,978 and 119,378.” *Id.* at 11 (Eng.). In fact, these pages contain no sampling data for the Shushufindi fields, and instead refer to Lago Agrio 06 and Lago Agrio Central. **Exhibit C-1313**, Lago Agrio Record at 100,978; **Exhibit C-1314**, Lago Agrio Record at 119,378. Similarly, the appellate panel falsely claims that it reviewed “references to the presence of PAHs” on pages 93,744 and 85,814 of the record, where it purportedly found results of “154, 152, 736, 325, 704, 021 and 34.13 mg/Kg. of PAHs” for “samples SSF18-A1-SU2-R (0.0m), SSF18-PIT2-SD1-SU1-R (1.5-2.0m), SSF18-A1-SU1-R (0.0m) and SSF07-A2-SD1-SU1-R (1.3-1.9), respectively.” But page 93,744 does not contain any sampling results. **Exhibit C-1313**, Lago Agrio Record at 100,978; **Exhibit C-1314**, Lago Agrio Record at 119,378.

⁴⁴¹ For example, the appellate court misstated the data purportedly contained on page 93,744 of the record (*see id.*); rather, the record reports 154.1517 mg/Kg for sample SSF18-A1-SU2-R (0.0m); 73.6325 for SSF18-PIT2-SD1-SU1-R (1.5-2.0m) and 70.4021 mg/Kg for SSF18-A1-SU1-R (0.0m). **Exhibit C-1315**, Lago Agrio Record at 93,755.

⁴⁴² **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 16.

decision to this Tribunal on January 4, 2012.⁴⁴³ But the submitted document was not a copy of the authentic decision; rather, it was a near-final draft that contained multiple differences from the final, filed decision (including omitting the authoring judge’s name and any of the judges’ signatures, misstating the judge’s titles, and using italicizations where the official decision does not). The metadata in the file reveals the author to be “dpublica,” an apparent reference to the public defender’s office in the Ecuadorian Ministry of Justice.⁴⁴⁴ At a minimum, this calls into question whether the decision was a court-created document.

143. In response to the appellate court’s statement that it had “no competence” to address Chevron’s fraud claims, Plaintiffs’ asked the court to “clarify” that it had, in fact, had jurisdiction and had reviewed that evidence.⁴⁴⁵ Just hours after Chevron submitted its objections to this request,⁴⁴⁶ the appellate court issued its “clarification” order, stating:

[W]ith respect to irregularities in the preparation of the trial court judgment ... it is clarified that yes such allegations have been considered, but no reliable evidence of any crime have [*sic*] been found. The Division concluded that the evidence provided by Chevron Corporation, does not lead anywhere without a good dose of imaginative representation, therefore it has not been given any merit, nor has more space been dedicated to it.⁴⁴⁷

But Ecuadorian law does not permit this type of substantive change on a petition for clarification,⁴⁴⁸ and even the conclusory, *post hoc* “finding” was expressly limited to some of the Judgment fraud evidence; with respect to the other allegations of misconduct by the Plaintiffs, the court stated that it did “not find evidence of ‘fraud’ by the plaintiffs or their representatives, such that, as has been said, it stays out of these accusations[.]”⁴⁴⁹ It went on to confirm, as the Judgment had, that it was “preserving the parties’ rights to present formal complaint to the

⁴⁴³ Respondent’s Letter to the Tribunal, Jan. 4, 2012.

⁴⁴⁴ See Claimants’ Opening Presentation on Interim Measures, Feb. 11, 2012, PowerPoint, at 43-44.

⁴⁴⁵ **Exhibit C-1066**, Plaintiff’s Request for Clarification, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), Jan. 6, 2012.

⁴⁴⁶ **Exhibit C-1067**, Chevron’s Response to Plaintiff’s Request for Clarification and Amplification, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), Jan. 12, 2012.

⁴⁴⁷ **Exhibit R-299**, Decision of Sole Chamber, Provincial Court of Justice of Sucumbíos, Jan. 13, 2012, at 4.

⁴⁴⁸ **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 281 (“The judge who handed down the judgment may not revoke it nor change his opinion under any circumstances; but he may clarify it or amplify it if one of the parties so requests within three days.”).

⁴⁴⁹ **Exhibit R-299**, Decision of Sole Chamber, Provincial Court of Justice of Sucumbios, Jan. 13, 2012, at 5.

Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America. . . . [I]t is obvious that it was not its responsibility to hear and resolve proceedings that correspond to another jurisdiction.”⁴⁵⁰

3. *The Appellate Court Has Continued to Deny Chevron Due Process*

144. Since the appellate court issued and clarified its January 3, 2012 decision, it has continued to breach its obligations under the Treaty and international law to provide Chevron a fair hearing. These breaches are manifest in the appellate court’s February 17, 2012 order permitting Chevron’s cassation appeal to proceed, but declaring the Lago Agrio Judgment immediately enforceable (the “February 17 Order”), and its March 1, 2012 order refusing to revoke the appellate decision and declaring it to be enforceable despite the Tribunal’s Second Interim Award (the “March 1 Order”).

145. On Friday, January 20, 2012, Chevron filed its cassation appeal with the Lago Agrio appellate court.⁴⁵¹ Seeking compliance with this Tribunal’s February 2011 Interim Measures Order, Chevron’s cassation brief asked the appellate panel to suspend the Judgment’s enforceability by, *inter alia*, (i) suspending the requirement that Chevron post a bond in order to suspend enforceability of the Judgment;⁴⁵² (ii) ordering the court secretary to refrain from certifying that the judgment is enforceable; and (iii) ordering the suspension of any further proceedings that would render that judgment enforceable.

146. Three days before Chevron filed its cassation brief, the Plaintiffs preemptively filed an unsolicited and improper submission to the appellate panel, asking it to require Chevron to post an extraordinarily high bond.⁴⁵³ On January 25, 2012, the Plaintiffs filed yet another motion opposing Chevron’s request for suspension of the bond requirement, incorrectly arguing

⁴⁵⁰ **Exhibit R-299**, Decision of Sole Chamber, Provincial Court of Justice of Sucumbios, Jan. 13, 2012, at 5.

⁴⁵¹ **Exhibit C-1068**, Chevron’s Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), Jan. 20, 2012.

⁴⁵² Article 11 of the Law on Cassation, enacted in 1992, ordered the National Court of Justice to publish guidelines to determine the bond amount. **Exhibit C-316**, Ecuadorian Law on Cassation and Appeal, Official Gazette (Supplement) No. 299, Mar. 24 2004, Art. 11 (hereinafter “Ecuadorian Law of Cassation”). The National Court has not published any guidelines to date. Appellate courts thus retain complete discretion to set the bond requirement.

⁴⁵³ **Exhibit C-1037**, Pablo Fajardo’s Submission to the Appellate Court, Jan. 17, 2012, at 9:00 a.m.

that it had no “legal basis” and was forbidden by the Ecuadorian constitution, and reiterating their request for an abnormally high bond.⁴⁵⁴

147. In violation of this Tribunal’s First Interim Award, on February 17, 2012, the appellate court permitted Chevron’s cassation appeal to proceed, but held that Ecuadorian law required its courts to declare the Lago Agrio Judgment immediately enforceable.⁴⁵⁵ The appellate court held that it could not “just obey” the demands of the Arbitration Tribunal⁴⁵⁶ for two reasons. First, it held that the only mechanism to suspend enforcement under Ecuadorian law is for Chevron to apply for leave to post a bond.⁴⁵⁷ This is pure pretext: the appellate court could have suspended or vacated the bond requirement in order to suspend the Judgment’s enforceability, as Claimants pled in their most recent interim measures submissions.⁴⁵⁸ Likewise, nothing prevents the first-instance, appellate or cassation courts from ordering the suspension of any certificate of enforceability, as the Tribunal ordered in its Second Interim Award. Second, the appellate court acknowledged Ecuador’s obligation to honor the Tribunal’s Awards under the U.S.-Ecuador BIT and Ecuador’s own arbitration law.⁴⁵⁹ It then held, incorrectly, that those obligations were trumped by Article 29 of the American Convention on Human Rights (the “American Convention”), which the appellate court stated “prohibits the Arbitration Tribunal [from] suppress[ing] the enjoyment or exercise of the rights and freedoms recognized under the Convention, or [] preclud[ing] other rights or guarantees that are inherent to the human personality or derived from a representative democracy form of government.”⁴⁶⁰

⁴⁵⁴ **Exhibit C-1038**, Pablo Fajardo’s Submission to the Appellate Court, Jan. 25, 2012, at 4:22 p.m.

⁴⁵⁵ **Exhibit R-398**, Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012.

⁴⁵⁶ *Id.* at 3.

⁴⁵⁷ *Id.* at 1-2.

⁴⁵⁸ Claimants’ Letter to the Tribunal, Feb. 2, 2012, at 8 (“[A]s Ecuadorian law itself recognizes, the codes and legal provisions that govern internal acts like issuing certificates and setting bond amounts are *inferior* to this Tribunal’s orders and awards, which are second in the hierarchy and ‘final and binding’ within Ecuador’s territory. Article 425 of the Ecuadorian Constitution establishes the following hierarchy of legal rules: ‘the Constitution; *international treaties and conventions*; organic laws; regular laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.’”); *see also* Claimants’ Letter to the Tribunal, Jan. 12, 2012, at 15-16.

⁴⁵⁹ **Exhibit R-398**, Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012, at 2 (“we have a pertinent presentation made by Chevron Corp. regarding Ecuador’s binding international obligations according to Public International Law, in particular to the Vienna Convention”).

⁴⁶⁰ *Id.* at 3-4.

148. In relying exclusively on Article 29(c) of the American Convention, the appellate court ignores Articles 29 (b) and (d), which provide that the Convention shall not be interpreted to restrict rights granted by Ecuador’s national laws, by other conventions to which Ecuador is a party, or by other international acts of the same nature as the American Declaration of the Rights and Duties of Man.⁴⁶¹ The appellate court’s selective reliance on Article 29(c) violates each of these other strictures. First, under the Ecuadorian Constitution, Chevron is entitled to due process and a fair trial.⁴⁶² Second, the American Convention cannot be interpreted to require Ecuador to violate its obligations under the U.S.-Ecuador BIT, including compliance with the First Interim Award. Third, Ecuador must not violate other international acts of the same nature as the American Declaration, including the UN Basic Principles on the Independence of the Judiciary.⁴⁶³ As explained below, the conduct of the Lago Agrio Litigation violates the UN Basic Principles, which (consistent with the American Convention) guarantee all litigants—including corporations—the rights to an independent and impartial judiciary and a fair trial.⁴⁶⁴ Finally, it is for this Tribunal, and not the appellate court, to determine the propriety of interim measures issued under the auspices of the BIT and international law.⁴⁶⁵

149. The timing and content of the February 17 Order also evidence continued coordination between Ecuador and Plaintiffs’ lawyers. While the Plaintiffs’ lawyers *never* raised these arguments in any filing with the Provincial Court of Justice of Sucumbíos or the appellate panel,⁴⁶⁶ they did advance them before a different forum one week prior to the February 17 Order, when they sought precautionary measures before the Inter-American Commission on

⁴⁶¹ **RLA-160**, American Convention on Human Rights, Pact of San Jose (1984).

⁴⁶² **Exhibit C-79**, 1998 Political Constitution of Ecuador, at Art. 199, Official Registry No. 1, Aug. 11, 1998; **Exhibit C-288**, 2008 Political Constitution of Ecuador, Art. 76 (further guaranteeing that causes will be tried by “impartial” judges); Claimants’ Request for Interim Measures, Apr. 1, 2010, § II.F; Claimants’ Memorial on the Merits, § II.J.

⁴⁶³ **CLA-293**, UN Basic Principles on the Independence of the Judiciary, *available at* <http://www2.ohchr.org/english/law/indjudiciary.htm> (last visited Jan. 11, 2012).

⁴⁶⁴ The UN Basic Principles on the Independence of the Judiciary further provide that the “judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” *Id.*

⁴⁶⁵ *See generally* **CLA-295**, 1976 UNCITRAL Rules, Art. 26.

⁴⁶⁶ **Exhibit C-1316**, *Chevron Corp. v. Donziger et al.*, Case No. 11-CIV-0691, (S.D.N.Y.) Chevron Corporation’s Statement of Material Facts in Support of Motion for Summary Judgment or Partial Summary Judgment on Defendants’ Affirmative Defenses of Res Judicata and Collateral Estoppel, Mar. 1, 2012, ¶ 86.

Human Rights (claiming that enforcement of the Tribunal’s Awards somehow threatened “irreparable harm” to the Plaintiffs’ human rights).⁴⁶⁷ Notwithstanding the absence of any human-rights arguments before the Lago Agrio courts, the appellate court’s February 17 Order closely followed and adopted the Plaintiffs’ unsubstantiated arguments as a pretext to evade Ecuador’s international obligation to comply with the Tribunal’s Awards.

150. On February 23, 2012, the day after Chevron filed its *amicus curiae* submission contesting the Plaintiffs’ irreparable-harm allegations among others,⁴⁶⁸ the Commission asked the Plaintiffs to submit within 10 days detailed information regarding the so-called “irreparable harm” underlying their petition (including recent medical records demonstrating damage to individual health).⁴⁶⁹ If they failed to do so, the Commission wrote, the case would be closed in six months. As is evident from the Lago Agrio record and Judgment,⁴⁷⁰ the Plaintiffs cannot identify or prove even a single case of cancer attributable to the Consortium’s operations. The Plaintiffs withdrew their request for precautionary measures on March 2, 2012.⁴⁷¹

151. Chevron filed a motion to revoke the February 17 order and the appellate decision.⁴⁷² But on March 1, 2012, the Lago Agrio appellate court denied that motion and purported to render the appellate decision enforceable despite the pendency of Chevron’s cassation appeal.

152. First, the court denied the effect of the Tribunal’s First and Second Interim Awards on the Judgment’s enforceability, on the grounds that “members of the [Ecuadorian appellate] Division have no obligation to assume this responsibility under orders from a commercial Arbitration Panel who do [*sic*] not consider the conflict of international obligations

⁴⁶⁷ **Exhibit C-1111**, Request for Precautionary Measures Indicated to the Republic of Ecuador, filed by Plaintiffs’ Legal Representatives in *Aguinda et al. v. Chevron Corp.*, Feb. 9, 2012. Claimants’ counsel submitted an *amicus curiae* response to the Commission on February 22, 2012 and March 6, 2012.

⁴⁶⁸ **Exhibit C-1113**, Chevron’s Memorial *Amicus Curiae* in Opposition to Request for Precautionary Measures Indicated to the Republic of Ecuador, and filed by Plaintiffs’ Legal Representatives in *Aguinda et al. v. Chevron Corp.*, Feb. 22, 2012. See also **Exhibit C-1119**, Chevron’s Supplemental Memorial *Amicus Curiae* In Opposition to Request for Precautionary Measures Indicated to the Republic of Ecuador, and filed by Plaintiffs’ Legal Representatives in *Aginda et al. v. Chevron Corp.*, Mar. 6, 2012.

⁴⁶⁹ **Exhibit C-1118**, Letter from the Inter-American Commission on Human Rights to the Parties, Feb. 23, 2012.

⁴⁷⁰ See *supra* §§ II(A)(3)(a), (e).

⁴⁷¹ **Exhibit C-1120**, Letter from P. Fajardo and A. Page, *et al.* to the Inter-American Commission on Human Rights, Mar. 2, 2012.

⁴⁷² **Exhibit C-1317**, Chevron’s Motion to Revoke before the Appellate Court, Feb. 24, 2012, at 8:42 a.m.

they generate by ordering measures that restrict human rights.”⁴⁷³ According to the appellate court, the Plaintiffs’ rights under the Inter-American Convention on Human Rights—particularly the rights to equality before the law, access to justice, and non-discriminatory treatment—are at stake, and as such, a “proceeding as ... the Arbitration Panel orders would constitute a direct attack by us, the administrators of justice, on Ecuadorian citizens’ guarantee of access to an effective system of justice.”⁴⁷⁴ Second, the appellate court granted the Plaintiffs’ request that the appellate decision be declared enforceable for purposes of the Montevideo Convention.⁴⁷⁵ Specifically, it stated that “for all purposes and procedural requirements, the declaration that the decision issued at this level of jurisdiction is enforceable.”⁴⁷⁶ This particular finding contravenes the Tribunal’s order that the Republic of Ecuador—through all of its branches—must “preclude any certification by the Respondent that would cause the said judgments to be enforceable against the First Claimant.”⁴⁷⁷ Finally, the appellate court directed a police escort to deliver the entire court file to the National Court of Justice in Quito, noting the “social and legal importance” of the case.⁴⁷⁸

153. Two days after the appellate court issued its March 1 Order, President Correa publicly announced, during a three-hour-long television address, that the Second Interim Award

⁴⁷³ **Exhibit C-1114**, Providencia of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4:58 p.m., at 4. On a related note, Claimants previously notified the Tribunal that certain of the Lago Agrio Plaintiffs’ lawyers filed a request for precautionary measures before the Inter-American Commission on Human Rights, claiming that enforcement of the Tribunal’s Awards threatened “irreparable harm” to the Plaintiffs. Claimants’ Letter to the Tribunal, Feb. 23, 2012. On February 23, 2012, the day after Chevron filed its *amicus curiae* letter contesting the Plaintiffs’ irreparable-harm allegations among others, the Commission asked the Plaintiffs to submit within 10 days detailed information regarding the so-called irreparable harm underlying their petition (including recent medical records demonstrating damage to individual health). **Exhibit C-1118**, Letter from the Inter-American Commission on Human Rights to the Parties, Feb. 23, 2012. If they failed to do so, the Commission wrote, the case would be closed in six months. Chevron filed a supplemental *amicus curiae* submission on March 6, 2012. **Exhibit C-1119**, Chevron’s Supplemental Memorial *Amicus Curiae* in Opposition to Request for Precautionary Measures Indicated to the Republic of Ecuador, and filed by Plaintiff’s Legal Representatives in *Aguinda et al. v. Chevron Corp.*, Mar. 6, 2012. Chevron has learned that on March 2, 2012 the Plaintiffs’ lawyers withdrew their request for precautionary measures before the Commission. **Exhibit C-1120**, Letter from P. Fajardo and A. Page, *et al.* to the Inter-American Commission on Human Rights, Mar. 2, 2012.

⁴⁷⁴ **Exhibit C-1114**, Providencia of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4:58 p.m., at 4.

⁴⁷⁵ *Id.* at 6.

⁴⁷⁶ *Id.* at 6.

⁴⁷⁷ Second Interim Award, Feb. 16, 2012, at point 3(ii).

⁴⁷⁸ **Exhibit C-1114**, Providencia of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4:58 p.m., at 4.

would have no effect on the Lago Agrio Judgment’s enforceability.⁴⁷⁹ According to Correa, this Tribunal “asks that the enforcement of the judgment be suspended while they examine the case at the tribunal,” announcing that it was “terrible” for the Tribunal to “appl[y] a treaty which was not in force when the events the company is accused of occurred.”⁴⁸⁰ Ecuador’s Attorney General likewise announced that he “is in disagreement with the Court’s decision, which wrongly accepted Chevron -Texaco’s arguments in order to assume competence over a dispute in which Ecuador is not a party, and even more seriously, to act as a court that can review judgments issued by the Ecuadorian legal system.”⁴⁸¹

E. Ecuador Is Unable To Provide Chevron an Impartial Tribunal

154. The public and private support of President Correa and his administration—an executive branch renowned for exacting retribution against judges—has been essential to the “success” of the Lago Agrio scheme. The Government’s iron-fisted control over the judiciary, especially when combined with its political and financial interests in the Lago Agrio Litigation, has made it impossible for Claimants to seek effective relief through the Ecuadorian judicial system. Recent events, such as increased Executive pressure on judges, the May 2011 Referendum extending Executive control over judicial appointments and removals, and President Correa’s practice of filing abusive litigation in order to intimidate judges, are described in detail below.

1. *The Executive Branch’s Recent Threats Against Judges*

155. Since Claimants filed their Memorial on the Merits, the Ecuadorian Executive has increased its stranglehold over the judiciary and made clear that the courts are expected to serve the Executive’s political interests. This trend has manifested itself not only in individual incidents, but also in nationwide policies and purges affecting the entire judiciary. During a roughly one-year span from 2009 to 2010, the politicized Judiciary Council removed more than

⁴⁷⁹ **Exhibit C-1115**, Televised Address by President Correa, Mar. 3, 2012.

⁴⁸⁰ **Exhibit C-1318**, *Ecuadorian President criticizes retroactive use of treaty in favor of Chevron*, EL HOY, Mar. 3, 2012.

⁴⁸¹ **Exhibit C-1319**, *International Court will process Chevron’s complaint against Ecuador*, EL UNIVERSO, Feb. 29, 2012.

540 judicial officers from office, many on the basis of complaints filed on President Correa's behalf.⁴⁸²

156. By the fall of 2010, the security situation in Ecuador had deteriorated to such a point that Government ministers began to blame judges for rising crime rates, announcing publicly that the judges themselves should be put in jail.⁴⁸³ During his weekly radio address, President Correa blamed the judiciary's problems on the "corruption and inefficiency of the judges."⁴⁸⁴

157. In November 2010, the President of the Superior Court of Guayas, Dr. María Leonor Jiménez, spoke out against the increasing political pressure on judges, stating that during her 26-year career, "I have never seen the independence of the Judiciary reduced to such truly alarming levels as now."⁴⁸⁵ Dr. Jiménez explained that in politically-charged cases, the Judiciary Council regularly would appoint temporary judges who would serve only for two or three days in order to resolve a trial in the State's favor. According to Dr. Jiménez, there "is no judge who is not afraid."⁴⁸⁶

158. President Correa's influential advisor Alexis Mera has continued to play an important role in expanding the administration's control over judges.⁴⁸⁷ On November 18, 2010, Mera sent a memorandum to all Ecuadorian Ministers and Secretaries of State, with a copy to Benjamin Cevallos, former President of the Judicial Counsel, relaying President Correa's order that in any litigation between the State and private interests (such as expropriations and public works contracts), if a judge rules against the State and orders an injunction or other preventive

⁴⁸² **Exhibit C-1320**, *540 Judicial officers removed [from office]*, EL DIARIO, Sept. 5, 2010.

⁴⁸³ This echoes an earlier call from Alexis Mera, who proposed to "clean up" the Ecuadorian judiciary by stating that "[f]irst, jails should be filled up with judges." **Exhibit C-139**, *Alexis Mera: The Criminal Court Judges are the Criminals*, EL HOY, Oct. 27, 2009.

⁴⁸⁴ **Exhibit C-1321**, *President denounces judges' actions*, EL TELÉGRAFO, Dec. 12, 2010.

⁴⁸⁵ **Exhibit C-1322**, *According to Jiménez, the Judiciary Council should disappear*, EXPRESO, Oct. 10, 2010.

⁴⁸⁶ **Exhibit C-1322**, *According to Jiménez, the Judiciary Council should disappear*, EXPRESO, Oct. 10, 2010.

⁴⁸⁷ As Claimants have informed the Tribunal, Mr. Mera is an extremely influential official who is no stranger to influencing and intimidating judges in cases involving the Government's interest. Former Supreme Court Justice Edgar Terán has accused Alexis Mera of "roaming the halls" of the Supreme Court to influence judges and of "pulling strings" at the Constituent Assembly and other Government organs to retaliate against the judiciary. **Exhibit C-133**, *Terán: "Mera is Pressing the Court,"* EL HOY, July 10, 2009. President Correa's brother, Fabricio Correa, has described Prosecutor General Pesántez as a "puppet of Alexis Mera." **Exhibit C-574**, *Fabricio Correa Delivered Evidence of his Accusations*, EL UNIVERSO, Oct. 13, 2009. See also **Exhibit C-575**, *Pierina Did Intercede for Invermun*, EL HOY, Oct. 22, 2009.

measure that is later reversed by a higher court, the State entity subject to the injunction or preventive measure should sue the judge *immediately and personally* for damages caused by his first-instance ruling.⁴⁸⁸ This policy squarely punishes judges who rule against the State in the first instance, by assuring personal liability for any resulting damages.⁴⁸⁹ Mera himself has threatened judges with removal if they fail to rule in the State’s favor. In one recent example, casino workers claimed that their lawsuit against a State party was thrown out after Mera sent the judge an intimidating letter, threatening to fire him and sue him personally if he failed to dismiss the case.⁴⁹⁰

159. Other Government officials have gone on the offensive against judges, publicly warning them not to rule against the State in cases involving Executive interests, and even retaliating against them for rulings perceived to be against the State:

- The Judiciary Council suspended a judge for 90 days after he issued a ruling affecting a State-owned telecommunications company (notably, the same judge was in the process of hearing a claim filed against President Correa).⁴⁹¹
- After a September 2010 police uprising that President Correa branded as an attempted assassination and coup, Correa’s office sought criminal charges against a number of police officers. Ecuador’s Interior Minister announced that if the judge ruled in favor of any of the defendants, the Government would “file a criminal action” against the judge.⁴⁹²
- In relation to the same police uprising, the Minister of Justice announced that he would initiate legal action against judges who acquitted these defendants, saying that “there is a link, a conspiracy, a fix” by the judges to “let the events of September 30 go unpunished.”⁴⁹³

⁴⁸⁸ **Exhibit C-1323**, Letter from Legal Counsel to the Office of the President of the Republic, Official Circular No. T1.C1-SNJ-10-1689, Nov. 18, 2010.

⁴⁸⁹ Supplemental Expert Report of Vladimiro Álvarez Grau, Mar. 10, 2012 (hereinafter “Supplemental Alvarez Expert Report”), ¶ 54.

⁴⁹⁰ **Exhibit C-1324**, *Casino workers accuse Alexis Mera of pressuring the judge to reject action for protection in their favor*, ECUADOR INMEDIATO, Mar. 25, 2011. For earlier examples of Mera’s threats against judges, see Claimants’ Memorial on the Merits, at ¶ 292 n.736; Claimants’ Letter to the Tribunal, Oct. 27, 2010, at 8-9.

⁴⁹¹ **Exhibit C-1325**, *Judiciary suspends judge Sierra*, EL UNIVERSO, May 20, 2011.

⁴⁹² **Exhibit C-1326**, *Threats against judge prior to sentence*, EL HOY, May 14, 2011; see also **Exhibit C-1327**, *Minister Serrano warns of criminal charges against judge hearing the case*, ECUADOR INMEDIATO, May 13, 2011.

⁴⁹³ **Exhibit C-1328**, *Araujo Case: Complaint Against Judges*, EL HOY, Apr. 7, 2011.

- The Inter-American Commission of Human Rights recently filed a case against the Government of Ecuador, concerning the dismissal of 27 Ecuadorian Supreme Court justices, claiming that the judges were removed in “disregard of the constitutional regulations under which they were appointed.”⁴⁹⁴

160. International organizations have also continued to note a dramatic decline in the capability of the Ecuadorian judiciary to administer impartial justice. For example, the Millennium Challenge Corporation, an independent agency of the U.S. Government that publishes rankings of countries based on information collected from independent third-party sources, ranked Ecuador in the sixth percentile (with zero being the worst) for the rule of law in 2011—a four-fold deterioration from Ecuador’s 29th percentile ranking in the 2006 report.⁴⁹⁵ The World Bank’s Worldwide Governance Indicators for 2010, compiled from 16 independent sources, have Ecuador in the 11th percentile of all countries surveyed with respect to the “rule of law”—down from the 25th percentile in 2003.⁴⁹⁶ Ecuador’s negative score is -1.17, placing it in league with East Timor (-1.21) and North Korea (-1.30).⁴⁹⁷ And in the 2010–2011 Global Competitiveness Report by the World Economic Forum, an international economic organization, Ecuador was ranked at 135th out of 139 countries for judicial independence; 123rd for protection of property rights; and 112th for favoritism in decisions of government officials.⁴⁹⁸

161. In addition to evidence of overt political pressure, other current events demonstrate an ongoing culture of judicial corruption. In May 2011, two judges and six judicial officials were exposed in a bribery scheme to buy eight seats in the judiciary for nearly half a million dollars.⁴⁹⁹ In July 2011, an academic poll revealed that nearly 80% of the Ecuadorian

⁴⁹⁴ **Exhibit C-1329**, *IACHR Takes Case Involving Ecuador to Inter-American Court*, Inter-American Commission on Human Rights (IACHR), Press Release, Aug. 17, 2011; Supplemental Alvarez Expert Report, ¶¶ 52-66.

⁴⁹⁵ See **Exhibit C-1330**, *2011 Country Scorebook*, Millennium Challenge Corporation, available at <http://www.mcc.gov/documents/reports/reference-2010001042001-fy11-scorebook.pdf> (last visited Mar. 8, 2012); **Exhibit C-1331**, *2006 Country Scorebook*, Millennium Challenge Corporation, available at <http://www.mcc.gov/documents/reports/mcc-2006-scorebook.pdf> (last visited Mar. 8, 2012).

⁴⁹⁶ **Exhibit C-1332**, *Worldwide Governance Indicators*, The World Bank Group, 2010, available at http://info.worldbank.org/governance/wgi/sc_chart.asp (last visited Mar. 8, 2012).

⁴⁹⁷ **Exhibit C-1332**, *Worldwide Governance Indicators*, The World Bank Group, 2010, available at http://info.worldbank.org/governance/wgi/sc_chart.asp (last visited Mar. 8, 2012).

⁴⁹⁸ **Exhibit C-1333**, *Global Competitiveness Report, 2010-2011*, World Economic Forum, 2010, available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf (last visited Mar. 8, 2012).

⁴⁹⁹ **Exhibit C-1334**, *Two judges and six judicial employees caught in bribery*, ECUADOR EN VIVO, May 20, 2011; **Exhibit C-1335**, *Prosecutor General’s Office inspects the location of the presumed bribery*, EXPRESO, May 20, 2011; **Exhibit C-1336**, *Rumbea’s attorney denies charges*, EXPRESO, May 20, 2011; **Exhibit C-1337**, *The*

public did not trust the judicial system.⁵⁰⁰ And in recent months, Ecuadorian Government officials themselves have admitted the problem. President Correa has said that “[t]he justice system is a mess,” and that the “dysfunctional, corrupt judicial system” has undermined public safety.⁵⁰¹ Ecuador’s Minister of Foreign Affairs, Ricardo Patiño, told CNN that Ecuador’s judiciary is “inefficient and corrupt” and that judges “submit to earlier political appointments and ... don’t apply the law in our country.”⁵⁰²

162. Instead of instituting true reform, however, President Correa’s administration has used the corrupt judicial culture as an excuse to tighten its own control. In early 2011, President Correa publicly revealed, perhaps unintentionally, his plan to “get [his] hands on the justice system” (in his own words)—a goal that he achieved within a matter of months via an Executive referendum that greatly expanded his control over the judiciary and the media.⁵⁰³

2. *President Correa’s May 2011 Referendum*

163. On May 7, 2011, Ecuadorian citizens voted on a referendum introduced by President Correa that politicized the *Consejo de la Judicatura* (“the *Consejo*”), which controls the oversight and appointment process for the nation’s courts, and created a new media law to curb perceived “excesses” by the press. As Ecuador’s former President Osvaldo Hurtado observed with respect to the referendum, “[President Correa], [t]he most powerful president since the earliest 20th century, by a vote in which only one in 10 questions surpassed 50 percent [of the vote], has extended his influence to two institutions that hadn’t been entirely controlled: the judiciary and the media.”⁵⁰⁴

Prosecutor General’s Office catches two judges in the act, EXPRESO, May 12, 2011; **Exhibit C-1338**, *Judges arrested for bribery had already been under investigation for weeks*, EL UNIVERSO, May 14, 2011; **Exhibit C-1339**, *The Prosecutor General accused two judges of bribery*, EXPRESO, May 14, 2011.

⁵⁰⁰ **Exhibit C-1340**, *Unbalanced Justice*, VISTAZO MAGAZINE, July 4, 2011.

⁵⁰¹ **Exhibit C-1341**, *Society Should Intervene In the Judicial System—It’s a Mess*, EL CIUDADANO, May 4, 2011; **Exhibit C-1342**, *The President of the Republic says the Justice System requires an immediate overhaul*, ANDES, Mar. 2, 2011; **Exhibit C-1343**, *Ecuador: The President states that referendum will help depoliticize the judicial system*, EL CIUDADANO, Apr. 21, 2011.

⁵⁰² **Exhibit C-1344**, *Ecuador criticizes court ruling concerning the attempted coup d’etat*, CNN MÉXICO, May 17, 2011; Supplemental Alvarez Expert Report, ¶¶ 15-18.

⁵⁰³ **Exhibit C-1345**, *Judicial Restructuring Goes from Bad to Worse*, HOY, Jan. 10, 2011.

⁵⁰⁴ **Exhibit C-1346**, *Is Ecuador on the Brink of a ‘Perfect Dictatorship?’* INTER-AMERICAN DIALOGUES, LATIN AMERICAN ADVISOR, May 25, 2011, at 1-3.

164. The *Consejo* is one of the most powerful judicial bodies in Ecuador, with a broad mandate to ensure the proper administration of the nation’s judiciary, including the selection, evaluation, promotion, and discipline of judges and other employees of the judicial branch. President Correa’s referendum includes two constitutional amendments that radically alter the *Consejo*. Constitutional Amendment No. 4 replaces the *Consejo*’s governing body with a new “Transitional Judiciary Council” composed of three representatives (one appointed by the Executive, one by the Transparency and Social Control Branch (which is, in turn, controlled by the Executive), and one by the Legislature).⁵⁰⁵ This three-person council “assume[s] all and each of the functions of the *Consejo de la Judicatura* and with the power to restructure the judicial system.” Constitutional Amendment No. 5 modifies the composition of the *Consejo* (ostensibly to ensure “transparency and efficiency” in the judicial branch)⁵⁰⁶ by making key changes to the Constitution and the Organic Code of the Judicial Function, including reducing the number of members from nine to five.

165. President Correa claimed that dissolving the *Consejo* was necessary to “depoliticize” the judiciary in the country.⁵⁰⁷ But commentators and critics have pointed to ulterior motives in President Correa’s bid to take over the *Consejo*, including:

- Establishing direct control over the judiciary through the three-person Transitional Judiciary Council, which assumes full power of the *Consejo* for 18-month terms.⁵⁰⁸ The Transitional Judiciary Council could purge the judiciary, replacing judges viewed as overly independent or ideologically suspect with members viewed as more responsive to the Executive Branch;⁵⁰⁹
- Blaming the *Consejo* for the ills of the Ecuadorian judiciary, which had a popular approval rating of less than 20%;⁵¹⁰

⁵⁰⁵ The Executive effectively controls the Transparency and Control Branch, giving the Government in power majority control over the Consejo. See **Exhibit C-1347**, *Go-ahead for AP delegate in the Judiciary with divided opposition*, EL UNIVERSO, June 3, 2011.

⁵⁰⁶ See **Exhibit C-1348**, Republic of Ecuador, National Electoral Council, 2011 Referendum Notice, at Annex 5, Mar. 8, 2011.

⁵⁰⁷ **Exhibit C-1343**, *Ecuador: The President states that referendum will help depoliticize the judicial system*, EL CIUDADANO, Apr. 21, 2011.

⁵⁰⁸ See **Exhibit C-1348**, Republic of Ecuador, National Electoral Council, 2011 Referendum Notice, at Question 4, Mar. 8, 2011.

⁵⁰⁹ **Exhibit C-1349**, “All good judges are going to stay,” according to Alexis Mera, ECUADOR EN VIVO, May 2, 2011; **Exhibit C-1322**, *According to Jiménez, the Judiciary Council should disappear*, EXPRESO, Oct. 10, 2010.

⁵¹⁰ **Exhibit C-1340**, *Unbalanced Justice*, VISTAZO MAGAZINE, July 4, 2011.

- Revitalizing the *Alianza PAIS* political movement, which has been slowed by internal divisions;⁵¹¹ and
- Maintaining the *Consejo* as a more manageable body that is directly subordinate to political control.⁵¹²

166. After the referendum's passage, President Correa made clear that he intended to use the new law to retaliate against members of the judiciary who do not serve the State's interests, saying that such judges are "living on borrowed time." President Correa vowed: "[W]hen we have a new Judicial Council, we will carry out an audit and they'll [have to] live with the consequences of their actions. They're destroying the justice system ... What's taking place is terrible."⁵¹³

3. *Corruption and Government Influence in the El Universo Case*

167. Since the referendum's passage, President Correa has escalated his threats against the media, successfully suing *El Universo* (the country's largest newspaper) and several of its journalists for US\$ 40 million as a result of a column by Emilio Palacio calling Correa a "dictator."⁵¹⁴ In doing so, President Correa rejected *El Universo*'s offer to publish a rebuttal and instead sought the exorbitant sum, which threatens to bankrupt the newspaper. The judge presiding over the *El Universo* case was supposedly unavailable for the final hearing, so a temporary judge, Juan Paredes was appointed the day before the hearing. Much like the suspicious timing of the Lago Agrio Judgment, Judge Paredes issued a 156-page judgment in President Correa's favor within 33 hours of being appointed, a physical impossibility considering that the record contained 5,000 pages.⁵¹⁵ The judgment not only ordered the journalists to pay US\$ 40 million to President Correa, but it also sentenced them to three years in prison.⁵¹⁶

⁵¹¹ **Exhibit C-1350**, *Ruptura de los 25 [political group Rupture of the 25] decided early this morning to break with the Government*, EL UNIVERSO, Jan. 28, 2011.

⁵¹² **Exhibit C-1309**, *President wants his Court*, HOY, Jan. 19, 2011.

⁵¹³ **Exhibit C-1351**, Presidential Weekly Radio Address, June 25, 2011; Supplemental Alvarez Report, ¶¶ 19-39.

⁵¹⁴ **Exhibit C-1096**, *Lese-presidente: Rafael Correa seeks to bankrupt his media foes*, ECONOMIST, July 30, 2011.

⁵¹⁵ **Exhibit C-1062**, *El Universo Attorney: It was physically impossible for Judge Juan Paredes to hand down a ruling so quickly*, ECUADOR INMEDIATO, Sept. 1, 2011; **Exhibit C-1060**, *Paredes' "Flash" Judgment Could Not Have Been Written and Read in 1 Day*, EL UNIVERSO, Aug. 21, 2011.

⁵¹⁶ **Exhibit C-1098**, *Ecuadorian president calls privately-owned media "dangerous,"* COLUMBIA DAILY SPECTATOR, Sept. 26, 2011.

Palacio has since applied for and obtained asylum in Panama as a result of death threats he received due to his involvement in these proceedings.

168. Like the ghostwriting scandal in the Lago Agrio Litigation, evidence has surfaced to prove that Judge Paredes allowed someone else to draft the preordained *El Universo* judgment. *El Universo* filed criminal charges against the judge, alleging that the ruling was ghostwritten in advance by someone outside the Court.⁵¹⁷ Forensic evidence emerging from that investigation proved that the judgment was in fact prepared by someone other than the presiding judge, and then transmitted to the Court from an external memory device such as a thumb drive or CD.⁵¹⁸ Metadata embedded in the file proves that the author was someone other than the judge; for example, the judgment's electronic file was created in a Microsoft 2003 Word program, but the Court operates the 2007 program.⁵¹⁹

169. Recent evidence has further revealed the corruption permeating the *El Universo* judgment. On the eve of *El Universo*'s final appeal, Judge Monica Encalada, the presiding judge replaced by Judge Paredes shortly before the final hearing, came forward and announced that she had been offered nearly US\$ 1 million to issue a judgment pre-written by Correa's attorneys—the exact judgment that Judge Paredes would issue just days later.⁵²⁰ Judge Encalada stated that Correa's attorneys promised her monthly stipends and steady work if she would rule against the newspaper, and claimed that Judge Paredes later admitted that Correa's attorneys had written the judgment.⁵²¹ Immediately after issuing her declaration, Judge Encalada fled the country.⁵²² Despite this evidence, the Ecuadorian appellate court affirmed the ghostwritten US\$ 40 million judgment in its entirety. And just days later, in order to alleviate the intense international

⁵¹⁷ **Exhibit C-1097**, *This daily sues Judge Paredes for "misrepresentation,"* EL UNIVERSO, Aug. 30, 2011.

⁵¹⁸ **Exhibit C-1064**, *Judgment "copied" from external device to Court's system, according to report,* EL UNIVERSO, Sept. 7, 2011.

⁵¹⁹ *Id.*; **Exhibit C-1063**, *Defense of El Universo newspaper presents results of special analysis of judge's computer,* ECUADOR INMEDIATO, Sept. 6, 2011.

⁵²⁰ **Exhibit C-1352**, *Testimony given by former judge Monica Encalada to Antonio Gagliardo, provincial prosecuting attorney of Guayas,* EL UNIVERSO, Feb. 14, 2012.

⁵²¹ **Exhibit C-1353**, *Judge in Ecuador libel case flees country,* MIAMI HERALD, Feb. 23, 2012.

⁵²² **Exhibit C-1353**, *Judge in Ecuador libel case flees country,* MIAMI HERALD, Feb. 23, 2012.

pressure and an order of precautionary measures against Ecuador by the Inter-American Commission on Human Rights, President Correa pardoned *El Universo* and its journalists.⁵²³

170. Commentators have decried the *El Universo* saga as a pure intimidation tactic by President Correa against the judiciary and media.⁵²⁴ The Inter-American Press Association declared: “Rafael Correa’s administration continues its systematic and deliberate campaign to do away with the independent press and establish, by law or court action, the wellspring of truth to be consumed by all Ecuadorians.”⁵²⁵ The Economist has opined that “[f]or a man who calls his country’s legal system dysfunctional and corrupt, Rafael Correa, Ecuador’s president, has fared remarkably well before the courts.”⁵²⁶

4. *Declaration of a Judicial State of Emergency*

171. On September 5, 2011, just days after *El Universo* obtained a court order to review Judge Paredes’s computer hard drive, President Correa issued Executive Decree No. 872 declaring a 60-day “state of exception” for the country’s judicial system. Citing Correa’s May 2011 Referendum, the Decree states that the judiciary has “deteriorated” and “needs a new institutional structure that allows it to implement and efficiently control its strategic and operational management.”⁵²⁷ The Decree notes that the President of the Transitional Judiciary Council requested this declaration, citing a number of ongoing problems in the judiciary. But commentators reacted that the decree was a ploy by President Correa to cover up his interference in the *El Universo* case, among others: “The purpose of this hoax is to seize all of the Judiciary’s

⁵²³ **Exhibit C-1354**, *Diego García: “Inter-American Commission on Human Rights should lift precautionary measures” in El Universo case*, ECUADOR INMEDIATO, Feb. 28, 2012.

⁵²⁴ Former Chief Justice of the Ecuadorian Supreme Court Carlos Solórzano (whose tenure ended in 1997) called the case “the most terrible thing I’ve seen in a ruling. A complaint that has no feet or head, poorly prepared by attorneys who do not know the law, and with a ruling and a sentence that everyone knows that it was physically impossible for the judge to have written. It is impossible to accept terrible things, only arbitrariness, the joyful desire of a President of the Republic to humiliate the free press, and at the same time to fill his pockets through this system is what has allowed things of this type to occur.” **Exhibit C-1061**, ‘*It’s a trash political ruse,*’ Interview with Carlos Solórzano, EXPLORED, ECUADOR NEWS FILE, Aug. 26, 2011; see also **Exhibit C-1058**, *Ecuador’s leading newspaper in mute protest*, FINANCIAL TIMES, July 22, 2011.

⁵²⁵ **Exhibit C-1355**, *Condemnation and astonishment for judgment in favor of the president*, EL UNIVERSO, July 24, 2011.

⁵²⁶ **Exhibit C-1355**, *Condemnation and astonishment for judgment in favor of the president*, EL UNIVERSO, July 24, 2011; Supplemental Alvarez Expert Report, ¶¶ 67-88.

⁵²⁷ **Exhibit C-1356**, Executive Decree No. 872, Sept. 5, 2011, at 2-3.

computers that, one way or another, have been manipulated from [President Correa's attorney].”⁵²⁸

172. Executive Decree No. 872 declares a 60-day “state of exception,” extending at least three essential powers to the Executive: (i) to “declare as priority action the development, execution and implementation of the projects to change the justice system in Ecuador, through the Justice Transformation Plan;”⁵²⁹ (ii) to “mobiliz[e]” judicial personnel,⁵³⁰ meaning that the Transitional Judiciary Council’s power to appoint and fire judges extends to other court personnel such as clerks and functionaries; and (iii) to “allocate” funds for the emergency under the Ministry of Finance, which grants the Executive unlimited power to allocate public funds for the Transitional Judiciary Council.

173. Although the Decree purports to extend power to the Transitional Judiciary Council over the 60-day emergency period, at least two factors prove that this power is instead vested in President Correa himself. First, the Executive controls the Transitional Judiciary Council, since the majority of its members are appointed by the Executive. Second, Article 165 of the 2008 Constitution grants the “President” himself enhanced powers during a state of emergency,⁵³¹ leading to the conclusion that regardless of the language in Decree No. 872, President Correa has extended his direct control over the judicial branch.

174. The Ecuadorian public and media have recognized the Decree for what it is—a transparent ploy to control the judiciary—and have widely criticized it as unconstitutional.⁵³² Under Ecuadorian law, a state of emergency is only to be declared in times of war, serious internal conflict, public calamity, or natural disasters.⁵³³

⁵²⁸ **Exhibit C-1084**, *The Judiciary, in state of emergency*, EXPRESO, Sept. 6, 2011.

⁵²⁹ **Exhibit C-1356**, Executive Decree No. 872, Sept. 5, 2011, at 4.

⁵³⁰ **Exhibit C-1356**, Executive Decree No. 872, Sept. 5, 2011, at 4.

⁵³¹ **Exhibit C-288**, Political Constitution of Ecuador (2008), Art. 165.

⁵³² **Exhibit C-1357**, “*Decree of Exception violates the Rule of Law*,” HOY, Sept. 7, 2011; **Exhibit C-1358**, *Criticisms of Declaration of State of Emergency for the Judiciary*, LA HORA, Sept. 6, 2011; **Exhibit C-1359**, *Lawsuit filed in Inter-American Court over state of emergency at the Judicial Branch*, ECUADOR EN VIVO, Sept. 20, 2011; **Exhibit C-1360**, *There Is No Law in Ecuador: We Are at the Mercy of the Ruler*, EXPRESO, Sept. 9, 2011.

⁵³³ **Exhibit C-1357**, “*Decree of Exception violates the Rule of Law*,” HOY, Sept. 7, 2011 (citing Article 164 of the 2008 Constitution); Supplemental Alvarez Expert Report, ¶¶ 40-51.

175. Around this same time, the Inter-American Commission for Human Rights filed an application with its court against the Government of Ecuador, concerning the arbitrary dismissal of 27 Ecuadorian Supreme Court justices in 2004, on the grounds that the judges were removed in “disregard of the constitutional regulations under which they were appointed.”⁵³⁴ Ecuador’s response to the Commission Report, which cited without any specifications the new Transitional Judicial Council and the Organic Code of the Judiciary, “did not reveal any substantial progress on implementation of the recommendations,” leading the Commission to refer the matter to the Inter-American Court.⁵³⁵

5. *Ecuadorian Public Opinion*

176. In addition to the factual recitation of recent events in Ecuador, empirical evidence demonstrates that the Ecuadorian people do not trust the country’s judiciary, and believe it to be politicized and susceptible to corruption.

177. Professor Mitchell Seligson, a Political Science and Sociology Professor who founded the Latin American Public Opinion Project, has opined that Ecuadorians have “very low levels of confidence in Ecuador’s ability to guarantee a fair trial, when compared to residents of other countries in the Latin American and Caribbean region who were surveyed in the period 2004-2010.”⁵³⁶ In forming that opinion, Professor Seligson relied on the AmericasBarometer surveys conducted every two years by a Gallup affiliate, and containing a sample of roughly 3,000 respondents.⁵³⁷

178. Professor Seligson compared Ecuador’s survey results from 2004, 2006, 2008, and 2010 with those of its neighboring countries, on the following two questions: (1) “To what extent do you think the courts in [Ecuador] guarantee a fair trial:?” and (2) “Did you have to pay a bribe to the courts in the last twelve months?.”⁵³⁸ On question (1), Ecuador consistently ranked

⁵³⁴ **Exhibit C-1361**, Inter-American Commission of Human Rights Application to the Inter-American Court of Human Rights, Case No. 12,600, *Hugo Quintana Coello et al. (Supreme Court of Justice), Ecuador* (hereinafter “IACHR Application”), attaching Commission Report No. 65/11 (“Commission Report”) Aug. 2, 2011; **Exhibit C-1329**, *IACHR Takes Case Involving Ecuador to Inter-American Court*, Inter-American Commission on Human Rights (IACHR), Press Release, Aug. 17, 2011.

⁵³⁵ **Exhibit C-1361**, IACHR Application at 2.

⁵³⁶ Expert Report of Mitchell Seligson, Mar. 12, 2012 (hereinafter “Seligson Expert Report”), ¶ 14.

⁵³⁷ Seligson Expert Report, ¶ 16. To ensure a fair representative sample, the survey was administered both in Spanish and in the most widely spoken indigenous language in Ecuador, Quichua.

⁵³⁸ Seligson Expert Report, ¶ 19.

between last and third-to-last among the Latin American countries included in the survey—below Mexico, Nicaragua, and Haiti, among others.⁵³⁹ On question (2), the first three polls reported that more than one-fifth of survey respondents had paid a bribe to a judge in the previous year, and the 2010 poll shows that 30% of respondents had paid such a bribe.⁵⁴⁰ As Professor Seligson concludes, “[t]he high level of bribery and the low level of confidence that the courts in Ecuador guarantee fair trials support the conclusion that the courts of Ecuador do not offer impartial tribunals.”⁵⁴¹

179. All of this evidence reveals that Chevron’s treatment at the hands of Ecuador’s judiciary and Executive branch is part of an extensive pattern within Ecuador of judicial politicization and corruption. The Lago Agrio Litigation is an extreme example of this larger problem, and Ecuador must be held accountable for its violations of the Treaty and international law in denying Chevron justice.

III. THE CONDUCT OF ECUADOR AND THE LAGO AGRIO JUDGMENT CONSTITUTE A DENIAL OF JUSTICE UNDER CUSTOMARY INTERNATIONAL LAW

180. The Republic of Ecuador has committed numerous violations of its obligations under customary international law and the U.S.-Ecuador BIT. These violations arise from the Lago Agrio Court’s continued due-process violations prior to the Judgment, the Court’s participation in the Plaintiffs’ fraud, the issuance of a baseless Judgment and the first-instance appeal affirming it, and the Government’s continued interference with the Lago Agrio Court and the judiciary in general. This Supplemental Memorial identifies the main standards relevant to the Tribunal’s determination of these issues in Section A, and applies the facts at hand to those standards in Sections B and C.⁵⁴² Finally, in Section D, Claimants explain why international law requires the Tribunal to hear its supplemental claim at this time.

A. Denial of Justice Defined

181. Customary international law, through the concept of denial of justice, provides a standard for the assessment of national court conduct. In the words of Alwyn Freeman, the

⁵³⁹ Seligson Expert Report, Charts 1-4.

⁵⁴⁰ Seligson Expert Report, Charts 5-8.

⁵⁴¹ Seligson Expert Report, ¶ 33.

⁵⁴² All of the evidence previously provided by Claimants to the Tribunal is relevant to, and incorporated in, the present submission.

author of the first comprehensive study on denial of justice, customary international law guarantees aliens “fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political controls.”⁵⁴³ As Professor Jan Paulsson puts it, “[t]he basic premise of the rule of denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner.”⁵⁴⁴

182. A.O. Adede, of the United Nations Secretariat’s Office of Legal Affairs, defined denial of justice as “improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.”⁵⁴⁵ In his authoritative study, Jan Paulsson notes that “[s]ome denials of justice may be readily recognised: refusal of access to court to defend legal rights, refusal to decide, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure.”⁵⁴⁶ As the tribunal in *Azinian v. Mexico* held, even “the clear and malicious misapplication of the law” can constitute a denial of justice, insofar as that error constitutes a “pretence of form” to mask a process that falls below the minimum standard set by international law.⁵⁴⁷

183. The *Loewen v. The United States* tribunal stated that a denial of justice exists when there is “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”⁵⁴⁸ Likewise, the *Mondev v. United States* tribunal stated that “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety” to constitute a denial of justice.⁵⁴⁹ Notably, these definitions (which

⁵⁴³ **CLA-307**, Edwin Borchard, *The "Minimum Standard" Of The Treatment Of Aliens*, 33 Proceedings of ASIL at Its Annual Meeting 51, 63 (1939).

⁵⁴⁴ Expert Report of Jan Paulsson, Mar. 12, 2012 (hereinafter “Paulsson Report”), ¶ 12.

⁵⁴⁵ **CLA-298**, A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, 14 Can. Y.B. Int’l. L. 73, 91 (1976).

⁵⁴⁶ **RLA-61**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 204-05 (Cambridge Univ. Press 2005) (hereinafter “Paulsson, DENIAL OF JUSTICE”)

⁵⁴⁷ **CLA-299**, *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, Nov. 1, 1999 (hereinafter “*Azinian case*”), 39 I.L.M. 537 (1999), ¶¶ 102-103.

⁵⁴⁸ **CLA-44**, *Loewen v United States* (ICSID Case No ARB(AF)/98/3), Award, June 26, 2003, ¶ 132 (hereinafter “*Loewen Award*”).

⁵⁴⁹ See also **CLA-7**, *Mondev International Ltd v. United States of America*, Award, Oct. 11, 2002 (hereinafter “*Mondev Award*”), ¶ 127. See further **CLA-300**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 312-313.

are not meant to be exhaustive) link denial of justice under customary international law to international concepts of due process and transparency.

184. Two clear points stand out with respect to the concept of denial of justice. *First*, an internationally wrongful administration of justice may result from the conduct of a State's executive, legislature, or judiciary.⁵⁵⁰ As stated by Sir Gerald Fitzmaurice, denial of justice can concern "such actions in or concerning the administration of justice, whether on the part of the courts or of some other organs of the state."⁵⁵¹ Jan Paulsson also explains that "[i]f it is established that justice has been so maladministered, it is impossible to see why the state should escape sanction because the wrong was perpetrated by one category of its agents rather than another."⁵⁵²

185. *Second*, while the concept of denial of justice has long existed, the evolution of customary international law dictates that the conduct of States must be assessed with rigor.⁵⁵³ Historically, the substantive conduct of domestic courts has received deference from international tribunals, which do not sit as courts of appeals over domestic decisions concerning domestic law.⁵⁵⁴ The substantive standard is that of conduct that "offends a sense of judicial propriety."⁵⁵⁵ Nevertheless, the *evidentiary* standard applicable to Claimants' denial-of-justice claim is the ordinary balance-of-the-probabilities test.

⁵⁵⁰ Paulsson Report, ¶ 15. It is well-established that under international law, a State is responsible for the conduct of its organs, whether executive, legislative or judicial. On the international plane, the State is a single entity. Accordingly, the conduct of national courts can trigger international responsibility, as much as the conduct of any other organs of the State. See **CLA-288**, Article 4 of the ILC's Articles on State Responsibility (Conduct of organs of a State): "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." See also **RLA-61**, J. Paulsson, DENIAL OF JUSTICE, at 40.

⁵⁵¹ **CLA-301**, G. G. Fitzmaurice, *The Meaning of the Term "Denial of Justice,"* 13 Brit. Y.B. Int'l. L. 93, 94 (1932) (hereinafter "Fitzmaurice").

⁵⁵² **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 44.

⁵⁵³ **CLA-7**, *Mondev Award*, ¶ 125.

⁵⁵⁴ **CLA-7**, *Mondev Award*, ¶ 127; **CLA-302**, *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Award, July 3, 2008, ¶ 106.

⁵⁵⁵ **CLA-44**, *Loewen Award*, ¶ 132.

B. The Conduct of Ecuador Throughout the Lago Agrio Litigation Constitutes a Denial of Justice

186. Various forms of conduct by national courts have been recognized as denials of justice under customary international law. Ecuador has engaged in at least six types of conduct constituting a denial of justice in this case, including: (1) fraud and corruption, (2) fundamental breaches of due process, (3) governmental interference, (4) arbitrary conduct, (5) discrimination or prejudice, and (6) illegitimate assertion of jurisdiction. Each is examined in turn below.

1. *Fraud and Corruption*

187. In the chapter of his study on denial of justice entitled “Irregularities in the conduct of the proceedings,” Professor Freeman identified fraud and corruption as examples of denial of justice. In his view, denial of justice occurs “whenever proceedings are permeated with judicial fraud, venality, and corruption.”⁵⁵⁶

188. Fraud and corruption have permeated virtually every aspect of the Lago Agrio Litigation, from the filing of the Complaint to the issuance of the Judgment and appellate decision affirming it. The Plaintiffs’ counsel had a hand in key procedural and substantive judicial decisions and carried out self-interested schemes with the complicity of various presiding judges.⁵⁵⁷ Claimants have detailed the fraud and corruption in the Lago Agrio Litigation (insofar as known to them) in their Memorial on the Merits, in their various filings related to interim measures, and in the present submission.

189. In broadest terms, the Lago Agrio Litigation had a fraudulent beginning because it was part of a larger scheme between the Plaintiffs’ counsel and the Government of Ecuador to extract huge sums of money from Chevron, under the guise of acting for the public good. Once it became clear that their case in the United States would fail (and that no Ecuadorian court would hold Petroecuador accountable), Plaintiffs’ representatives worked with the Ecuadorian Government to create a new cause of action under which Chevron could be sued for already-settled claims, years after the alleged harm had occurred and despite the fact that Chevron had no

⁵⁵⁶ **CLA-297**, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 268 (Kraus Reprint Co. 1970) (1938) (hereinafter “Freeman”).

⁵⁵⁷ See Claimants’ Memorial on the Merits, ¶¶ 275-280.

involvement in Ecuador. Key to that scheme was the agreement between Plaintiffs' counsel and the Government that Petroecuador would be free from any liability or responsibility for remediation.⁵⁵⁸ These improper motives tainted the Lago Agrio Litigation from the outset.

190. After initiating the Lago Agrio Litigation under false pretenses (including forging at least 20 of the named Plaintiffs' signatures),⁵⁵⁹ the Plaintiffs' counsel ensured their own influence over the political, judicial, and scientific aspects of the proceedings. They secured meetings with high-level Government officials and orchestrated Chevron's "conviction" in the court of public opinion. The Plaintiffs also alternated between courting and threatening judges *ex parte* in order to procure: (i) various procedural and evidentiary orders in their favor that had no support in Ecuadorian law;⁵⁶⁰ (ii) the improper termination of judicial site inspections and environmental sampling that would have exonerated Chevron;⁵⁶¹ (iii) the Court's refusal to investigate or sanction their various acts of fraud, including the fabrication and manipulation of expert reports purporting to prove contamination;⁵⁶² (iv) the appointment of their hand-picked secret collaborator, Richard Cabrera, as the Court's "independent" global expert and the ghostwriting of his "independent" reports;⁵⁶³ (v) the repeated blocking of inspections of their unaccredited "laboratory;"⁵⁶⁴ (vi) the use of their fraudulent database (the Selva Viva Data Compilation) as a secret source of information for the Court without disclosure to Chevron;⁵⁶⁵ (vii) the ghostwriting of the final Judgment itself;⁵⁶⁶ and (viii) the manipulation and non-transparent selection of the judges to hear Chevron's appeal.⁵⁶⁷

⁵⁵⁸ **Exhibit C-911**, Waiver of Rights Granted Before Notaries Public of Massachusetts and Pennsylvania, Respectively, Nov. 20, 1996, at 2; *See* Claimants' Memorial on the Merits, ¶¶ 145, 148.

⁵⁵⁹ *See supra* § II(C)(1)(b).

⁵⁶⁰ *See* Claimants' Memorial on the Merits, § II.G.3; II.G.4, II.H.3.

⁵⁶¹ *See* Claimants' Memorial on the Merits, ¶¶ 201-203.

⁵⁶² *See supra* §§ II(C)(2)-(3).

⁵⁶³ *See* Claimants' Memorial on the Merits, ¶¶ 204-220; *supra* § II(C)(2).

⁵⁶⁴ Claimants' Memorial on the Merits, ¶¶ 195-198, 278 (describing the flaws in Plaintiffs' sampling and use of the HAVOC lab, and Donziger's attempts to block inspections of the lab by using protesters and public pressure to create "fear" in the judge).

⁵⁶⁵ *See* Claimants' Memorial on the Merits, ¶ 230; *supra* §§ II(A)(1), (3).

⁵⁶⁶ *See supra* § II(A)(1).

⁵⁶⁷ *See supra* § II(D)(1).

191. The Lago Agrio Court participated in the Plaintiffs’ fraud at every step, thereby incurring liability for the same conduct. Judge Yáñez appointed Cabrera with the knowledge that he was controlled by the Plaintiffs and that his “global assessment report” would be far from impartial.⁵⁶⁸ Judge Núñez was complicit in a bribery scheme in which he indicated that he would grant a large judgment against Chevron, and despite Chevron’s requests, his biased rulings were never overturned and continued to taint the trial through the very end.⁵⁶⁹ And Judge Zambrano closed the evidence phase immediately after the Plaintiffs submitted their “cleansing” expert reports in an attempt to conceal the Cabrera fraud and enable the Judgment to rely on the same data in a different form.⁵⁷⁰

192. While it would have been impossible to render a fair judgment after years of corrupt practices, improper communications, and unreliable evidentiary submissions, Judge Zambrano did not even attempt to do so. Instead, he allowed the Plaintiffs to ghostwrite the Judgment.⁵⁷¹ For years, the Plaintiffs’ representatives sought direct involvement in its preparation, and Government officials also reportedly arranged for outside lawyers to aid in its drafting.⁵⁷² Exact text from an unfiled memorandum of the Plaintiffs’ counsel regarding their theory of Chevron’s “merger” with Texaco appears verbatim in the Judgment, as well as exact text and symbols from the Plaintiffs’ internal Selva Viva Data Compilation.⁵⁷³ Without substantial help from the Government and Plaintiffs’ representatives, Judge Zambrano could not have produced the Judgment, since he would have had to review and analyze more than 237,000 pages of documentation and draft a 188-page decision—all within 60 days after issuing *autos para sentencia*.⁵⁷⁴

193. The conduct of Ecuador’s officials and its judiciary can only be described as fraudulent and corrupt. Plaintiffs’ representatives attempted to justify this conduct by explaining

⁵⁶⁸ See *supra* §§ II(C)(2)-(3); Claimants’ Memorial on the Merits, § II(G).

⁵⁶⁹ See *supra* § II(C)(3)(a).

⁵⁷⁰ See *id.* Judge Zambrano has since been dismissed from the court as a result of judicial improprieties.

⁵⁷¹ See *supra* § II(A)(1).

⁵⁷² See *supra* § II(A)(1).

⁵⁷³ See *id.*.

⁵⁷⁴ **Exhibit C-919**, *Judgment: Ecuador Judge Works Marathon Hours on Chevron Case*, REUTERS, Jan. 31, 2011.

that an “independent judiciary” is a “luxury” that Ecuador does not enjoy.⁵⁷⁵ But lack of an independent judiciary is no excuse for Ecuador’s failure to fulfil its obligations to U.S. investors under the Treaty and international law. The standard is an objective one.⁵⁷⁶ Whatever the reason, a denial of justice has occurred here. Moreover, the poor state of Ecuador’s judicial system is not the result of misfortune, but rather of the Government’s own actions politicizing its judiciary, beginning with the 2004 purge of all judges on the Supreme Court (which forms the basis of an Inter-American Court of Human Rights case),⁵⁷⁷ and culminating with President Correa’s 2011 Referendum.⁵⁷⁸ Ecuador has denied justice to Claimants in many ways, but the fraud and corruption described above and in previous submissions constitute its most egregious conduct. Ecuador cannot be permitted to escape international liability for those misdeeds.

2. *Fundamental Breaches of Due Process*

194. Customary international law sets a threshold of judicial propriety in adjudicating disputes under the law, enshrined in the international concept of due process.⁵⁷⁹ The 1929 Harvard Draft sets out in Article 9: “A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”⁵⁸⁰

195. In *Loewen v. The United States*, the tribunal stated that a denial of justice exists when there is “[m]anifest injustice in the sense of a lack of due process leading to an outcome

⁵⁷⁵ **Exhibit C-1362**, Email exchange between S. Donziger and E. Moe, Oct. 19, 2006 [DONZ-HDD-0228817-18].

⁵⁷⁶ **CLA-297**, Freeman at 262 (stating that denial of justice requires no bad faith and that the test is “purely objective”).

⁵⁷⁷ See *infra* ¶ 175.

⁵⁷⁸ See *infra* § II(E)(2).

⁵⁷⁹ Paulsson Report, ¶ 33.

⁵⁸⁰ **CLA-303**, Responsibility of States for Damage Done In Their Territory to the Person or Property of Foreigners (“Harvard Draft”), 23 Am. J. Int’l. L. Spec. Sup. 133 (1929) (hereinafter “Harvard Draft”).

which offends a sense of judicial propriety.”⁵⁸¹ The *Loewen* tribunal found that the judge in that case:

failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice on the part of O’Keefe’s counsel and witnesses. [The host State] is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted in this respect.⁵⁸²

The arbitrators concluded that “[t]here was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O’Keefe and its counsel.”⁵⁸³ The *Loewen* tribunal thus made clear that a denial of justice may occur not only when the court itself adopts the unfair conduct, but also when a third party’s conduct (the plaintiff’s counsel in that case) goes uncorrected by the court. National courts therefore have a positive duty to ensure that the alien enjoys court proceedings that are in accordance with international standards. This positive duty is not only part of the customary law of denial of justice, but it is also required of Ecuador under Article II(7) of the BIT.

196. In the *Idler* case, the commission’s finding of a denial of justice was grounded on, *inter alia*, improper communications regarding the case between the government and the Venezuelan Supreme Court.⁵⁸⁴

197. The Lago Agrio Litigation and its resulting Judgment are rife with due-process violations. As the preceding authorities demonstrate, a claimant may prove a denial of justice based on lack of due process by proving any of the following conduct: (i) a court’s failure to follow its own laws, rules, and procedures during the litigation;⁵⁸⁵ (ii) an outcome resulting from the litigation which “offends” or “shocks” a sense of judicial propriety;⁵⁸⁶ (iii) a court’s failure to

⁵⁸¹ **CLA-44**, *Loewen Award*, ¶ 132. See also **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 186-190.

⁵⁸² **CLA-44**, *Loewen Award*, ¶ 53.

⁵⁸³ **CLA-44**, *Loewen Award*, ¶ 87.

⁵⁸⁴ See *infra* ¶ 206 (discussing *Idler*); **CLA-304**, *Jacob Idler v. Venezuela (U.S. v. Venezuela)*, in IV John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3491 (1898) (hereinafter “*Idler case*”).

⁵⁸⁵ **CLA-301**, Fitzmaurice at 103.

⁵⁸⁶ **CLA-44**, *Loewen Award*, ¶ 132; **CLA-237**, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, ¶ 128. See also **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 186-190.

protect a litigant from improper tactics by the other side;⁵⁸⁷ or (iv) improper governmental interference in the proceedings, which is itself a stand-alone basis for denial of justice.⁵⁸⁸ The conduct of Ecuador and its courts in the Lago Agrio Litigation fails each of these tests.

198. *First*, the Lago Agrio Court failed to follow Ecuadorian law and its own trial procedures throughout the litigation, in a manner that consistently prejudiced Chevron and benefited the Plaintiffs. The Court prematurely ended the judicial inspections in response to improper pressure from the Plaintiffs and the Government,⁵⁸⁹ despite a prior acknowledgement from the judge that there was no legal basis to do so.⁵⁹⁰ Then the Court appointed Plaintiffs' hand-picked expert Richard Cabrera as an ostensibly "neutral" expert, even though the Court's own orders required the expert to remain independent from the parties. Indeed, the judge even met with the Plaintiffs to discuss the appointment before making it an official Court action.⁵⁹¹ Other procedural orders were similarly unlawful. The August 2, 2010 order for the parties to produce new expert reports within 45 days—which allowed the Plaintiffs to re-submit the fraudulent Cabrera data for use in the Judgment—had no basis in Ecuadorian law.⁵⁹² The Judgment itself blatantly violates Ecuadorian law by awarding punitive damages, a concept that does not even exist under that country's legal system.⁵⁹³ The appellate court, which was

⁵⁸⁷ **CLA-44**, *Loewen Award*, ¶ 87.

⁵⁸⁸ *See infra* ¶ 206 (discussing *Idler* and outlining the grounds for proving a denial of justice through governmental interference); **CLA-304**, *Idler* case.

⁵⁸⁹ As Claimants have demonstrated, the Plaintiffs' lawyers campaigned for months to terminate the judicial inspections. *See* Claimants' Memorial on the Merits, ¶¶ 201-203; *see supra* ¶ 90. Correa's campaign manager, Gustavo Larrea, also submitted an *amicus* brief asking the Court to terminate the judicial inspections, which it did just weeks later. **Exhibit C-194**, *Amicus Curiae* brief submitted by Gustavo Larrea *et al.*, Superior Court of Nueva Loja, July 21, 2006.

⁵⁹⁰ **Exhibit C-1081**, Email from S. Donziger to A. Wray, Mar. 4, 2006 [WOODS-HDD-0083326-27]; **Exhibit C-195**, Lago Agrio Court Order, Aug. 22, 2006 at 11:00 a.m.

⁵⁹¹ **Exhibit C-360**, *Crude* Outtakes, Mar. 6, 2007, at CRS210-02-01.

⁵⁹² The Lago Agrio Court cited, *inter alia*, the same legal provision as cited in the Plaintiffs' request (Article 330(1) of the Organic Code of the Judiciary) as purported legal support for its order. *See Exhibit C-361*, Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.; *see also* Claimants' Letter to the Tribunal, Sept. 2, 2010, at 17 (containing a detailed description of the August 2 order, which also barred Chevron from presenting any additional evidence, just weeks after the release of the *Crude* outtakes).

⁵⁹³ *See supra* ¶ 68; Paulsson Report, ¶¶ 51-53 (“[T]he imposition of a punitive order of more than \$8.6 billion in circumstances where there is no foundation for this type of award in Ecuadorean law is the kind of exceptional breach of domestic law that can form the basis of a finding of denial of justice, since, whatever the basis for such an award, it could in no even arguable way be said to have been the applicable law.”)

constituted in violation of Ecuadorian procedure,⁵⁹⁴ went on to abdicate its fundamental responsibility to review the serious procedural misconduct underlying the Judgment. It then attempted to cure that defect by improperly issuing a new finding, in its clarification order, that it had considered and rejected evidence of the Plaintiffs' fraud.⁵⁹⁵ Aside from the fact that such conduct shows the Court's bias, it also is an abuse of the Court's own rules of procedure, which Sir Fitzmaurice wrote amounts to a denial of justice.⁵⁹⁶

199. *Second*, the Lago Agrio Judgment (the "outcome" of the litigation) offends and shocks any sense of judicial propriety. The Judgment is a product of outright fraud, as Judge Zambrano did not write it, and it was based at least in part on the Plaintiffs' internal work product that never formed part of the Court record, to which the judge had no legitimate access, and to which Chevron had no opportunity to respond.⁵⁹⁷ Therefore, in blatant violation of international norms of due process, the Plaintiffs themselves became the judges of their own case.⁵⁹⁸ No impartial decisionmaker ever reached a determination of the facts and evidence at issue in the Lago Agrio Litigation. Instead, the ghostwritten Judgment contains numerous flaws in its analysis of legal, evidentiary, and damages issues—flaws so serious that they cannot be explained as errors made in good faith.⁵⁹⁹

200. As Professor Paulson explains, the Judgment devoted "much attention to describing alleged harm" but "virtually none to the question of whether it was caused by TexPet."⁶⁰⁰ Rather, the court holds Chevron liable for "whatever damages the court thought existed" without considering "whether TexPet caused the harm for which compensation was

⁵⁹⁴ Notably, Professor Paulsson has defined "manipulation in the composition of courts" as a stand-alone basis for a denial of justice claim. **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 163-64.

⁵⁹⁵ *Supra* § II(D)(3).

⁵⁹⁶ **CLA-301**, Fitzmaurice at 103.

⁵⁹⁷ *See supra* § II(A)(1) for a detailed discussion of fraud in the judgment.

⁵⁹⁸ International law recognizes the principle of *nemo iudex in causa sua* ("No one shall be the judge of his own cause."). **CLA-305**, *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, 1925 P.C.I.J. (ser. B) No. 12 (Nov. 21). The UN Basic Principles on the Independence of the Judiciary further provide that the "judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." **CLA-306**, U.N. Basic Principles on the Independence of the Judiciary, available at <http://www2.ohchr.org/english/law/indjudiciary.htm> (last visited Jan. 2, 2012).

⁵⁹⁹ **Exhibit C-931**, Lago Agrio Judgment at 185-86.

⁶⁰⁰ Paulsson Expert Report, ¶ 35

being awarded.” Because the Judgment fails to “suggest that any expert” addressed “who actually caused any harm,” and conducts no independent causation analysis, “the Court’s approach was arbitrary and thus a breach of the international concept of due process.”⁶⁰¹

201. The Judgment also crystallizes years of coordination between the Plaintiffs, the Ecuadorian Government, and the Court—conduct that shocks fundamental rules of judicial decorum and due process. The Judgment nowhere addresses the biased rulings of Judge Núñez, who not only predetermined Chevron’s guilt in conversations captured on video, but also publicly exposed his sympathy for the Plaintiffs’ case. The Lago Agrio Court’s bias against and prejudgment of Chevron continued even after Judge Núñez’s recusal, when Judge Zambrano refused to annul his biased rulings; those rulings made their way into the final Judgment untouched.⁶⁰² The facts summarized above, in addition to the due process violations explained in previous submissions, would (in the words of the *ELSI* and *Loewen* tribunals) offend, if not shock, any sense of judicial propriety.

202. *Third*, the Lago Agrio Court failed at every turn to protect Chevron from the fraudulent and bad-faith tactics of the Plaintiffs’ counsel. The Court’s participation in the Plaintiffs’ misconduct is undeniable. Among other examples, the Court:

- Refused to sanction, investigate, or remove from the record fraudulent evidence submitted by the Plaintiffs even after Chevron alerted it to the fraud, including two falsified reports by their environmental expert Charles Calmbacher, complete with false conclusions contrary to the evidence he reviewed,⁶⁰³ and unscientific data from an unaccredited laboratory;⁶⁰⁴
- Participated in the Plaintiffs’ fraudulent scheme to appoint Richard Cabrera as global assessment expert, and never divulged to Chevron its participation in these discussions;⁶⁰⁵
- Refused to rule or enforce rulings on Chevron’s challenges to the biased and error-riddled Cabrera Reports, including numerous motions to hold a hearing on essential-error petitions, motions regarding the excessive scope of the Cabrera

⁶⁰¹ Paulsson Expert Report, ¶ 37

⁶⁰² **Exhibit C-230**, Lago Agrio Court Order Denying Chevron’s Motion to Recuse, Oct. 21, 2009, at 4:05 p.m.

⁶⁰³ **Exhibit-C-186**, Calmbacher Deposition, at 114:1-21, 116:11-117:20.

⁶⁰⁴ *See* Claimants’ Memorial on the Merits, §§ II.G.2, 4.

⁶⁰⁵ Claimants’ Memorial on the Merits, § II.G.3.

Reports, a motion for Mr. Cabrera to disclose all information about his process and methodology, and a motion to depose Mr. Cabrera,⁶⁰⁶

- Issued the legally unsupported order of August 2, 2010, which acceded to the Plaintiffs’ request to “cleanse” the record of Cabrera by filing new damages reports;⁶⁰⁷
- Ignored evidence that the Plaintiffs’ counsel had forged at least 20 of the named plaintiffs’ signatures on the Complaint—a fact that, under Ecuadorian law, should have nullified the lawsuit;⁶⁰⁸ and
- Finally, the appellate court rubber-stamped the illegitimate Judgment without meaningfully considering the serious evidence of the Plaintiffs’ fraud and manipulation underlying it, stating that it lacked the competence to do so.⁶⁰⁹

The Court was aware of the Plaintiffs’ harmful and improper conduct and failed to correct it. The *Loewen* tribunal found less offensive conduct to amount to a violation of due process and therefore a denial of justice. As Professor Paulsson concludes with respect to the appellate decision, “if the appellate court had no competence to rule on the conduct of counsel, experts and public officials, and the extent to which that conduct may have compromised the integrity of the proceedings from which the appeal was brought, then the appellate court was simply not institutionally capable of ensuring compliance with the standards of due process required by international law.”⁶¹⁰

⁶⁰⁶ See, e.g., **Exhibit C-626**, Chevron’s Request to Schedule Deposition of Expert Cabrera and Allegations of Judicial Bias, Nov. 7, 2008, at 4:58 p.m.; **Exhibit C-627**, Chevron’s Request for Date to be Set for Expert Cabrera to Answer Interrogatories, filed Nov. 12, 2008, at 5:53 p.m.; **Exhibit-628**, Chevron’s Allegations of Judicial Bias, Aug. 18, 2009, at 5:40 p.m. For example, the Cabrera report recommended over US\$ 8 billion in damages for alleged “unfair profits” even though Julio Prieto, counsel for the Lago Agrio Plaintiffs, acknowledged that such damages were “not demanded” and are not permitted by Ecuadorian law. **Exhibit C-285**, Interview of Julio Prieto, *Informativo Cristalino 10h00*, RADIO CRISTAL, Sept. 11, 2009.

⁶⁰⁷ **Exhibit C-361**, Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.

⁶⁰⁸ **Exhibit C-1181**, Chevron’s Motion of Dec. 20, 2010 at 8:50 a.m.; see *supra* § II(C)(1)(b) (discussing the falsification of signatures).

⁶⁰⁹ See *supra* § II(D)(2).

⁶¹⁰ Paulsson Expert Report, ¶ 45. And although the appellate court’s clarification order purported to consider and reject Chevron’s fraud allegations, Professor Paulsson observes as follows: “[The appellate court] said that it had considered those allegations and determined that there was no evidence of a ‘crime’, but then said that delay or annulment of the proceedings to consider allegations of procedural misconduct was not ‘admissible’ and ‘could not affect the final result of the lawsuit’. Whatever one may make of this, there is no meaningful analysis in either the trial or appellate judgment of the very serious allegations of procedural impropriety made by Chevron. There appear to be only assertions that they could not be considered because of the nature of the proceeding, or assertions that they were unfounded, without any public explanation of why the court may have considered that to have been so.” *Id.*, ¶ 48.

203. *Fourth*, as described in the following section, the improper influence of the Ecuadorian Government—and the Executive branch in particular—offends fundamental standards of due process. The secret communications between Government officials and the Court, as well as the Government’s public calls for a verdict against Chevron (particularly in an environment in which the Executive controls the judiciary), violate Chevron’s due process rights and constitute a breach of this standard. Because Ecuador failed to ensure due process for Chevron in its courts, Ecuador is responsible for denying justice to a foreign investor in violation of the Treaty and international law.

3. *Governmental Interference*

204. Executive interference in a court proceeding is a quintessential form of denial of justice.⁶¹¹ Professor Borchard has stated that customary international law guarantees aliens “fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control.”⁶¹²

205. In the *Robert Brown* case, the South African executive and legislature interfered in a pending court proceeding by removing a judge and retroactively reversing a rule of law. The British-American Claims tribunal concluded that a denial of justice had occurred, stressing “the virtual subjection of the High Court [of South Africa] to the executive power.”⁶¹³ The tribunal stated:

The cumulative effect of the steps taken by the South African Government with the obvious intent to defeat Brown’s claims constituted a definite denial of justice ... The three branches of the Government conspired to ruin his enterprise. The executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to the fundamental principles of justice recognised in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined

⁶¹¹ Paulsson Expert Report, ¶ 29.

⁶¹² **CLA-307**, Edwin Borchard, *The "Minimum Standard" Of The Treatment Of Aliens*, 33 Proceedings of ASIL at Its Annual Meeting 51, 63 (1939).

⁶¹³ **CLA-308**, *Robert E. Brown (U.S. v. Gr. Brit.)*, Award, Nov. 23, 1923, 6 R.I.A.A. 120, 125 (2006) (hereinafter “*Brown Award*”).

policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions.⁶¹⁴

The collusion between the legislative, the executive, and the judiciary—acting in concert to defeat the defendant—thus gave rise to a denial of justice.

206. The *Idler* case offers another example of government interference with the judicial branch.⁶¹⁵ The commission noted that the Venezuelan government had communicated with the Supreme Court about the case and held that “it was the voice of Idler’s opponents which found expression in the judgments ... and not that either of justice or the supreme court of justice.”⁶¹⁶

207. More recently in *Petrobart v Kyrgyz Republic*,⁶¹⁷ the tribunal held that collusion between the executive and the court—which had suspended the enforcement of a judgment against the State gas company at the request of the vice prime minister—constituted a “clear breach of the prohibition of denial of justice under international law.”⁶¹⁸

208. In 2002, the United Nations published a revised version of the Bangalore Principles of Judicial Conduct (the “Bangalore Principles”), designed to establish international standards for the ethical conduct of judges.⁶¹⁹ The Bangalore Principles list judicial independence as the first and foremost standard, stating: “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.”⁶²⁰ Regarding political influence, the Bangalore Principles state that a judge “shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.”⁶²¹

⁶¹⁴ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 52-53 (quoting Brown).

⁶¹⁵ See **CLA-304**, *Idler* case.

⁶¹⁶ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 161-163.

⁶¹⁷ **CLA-219**, *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, Mar. 29, 2005, at 28

⁶¹⁸ **CLA-219**, *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, Mar. 29, 2005, at 28; See also Claimants’ Memorial on the Merits, ¶ 472.

⁶¹⁹ **CLA-309**, United Nations, Bangalore Principles of Judicial Conduct (2002).

⁶²⁰ **CLA-309**, United Nations, Bangalore Principles of Judicial Conduct (2002), Value 1.

⁶²¹ **CLA-309**, United Nations, Bangalore Principles of Judicial Conduct (2002), Value 1.3.

209. The undue influence of President Correa and his advisors on the outcome of the Lago Agrio Litigation is undeniable:

- President Correa and other Government officials made repeated, inflammatory public statements against Chevron, including in one example a reference to Chevron as an “open enemy” of Ecuador;⁶²²
- Government officials and Petroecuador provided direct financial support to the Plaintiffs and their representative organization the Frente, particularly regarding the development of their databases and expert reports;⁶²³
- High-ranking Government officials, including the Attorney General, publicly proclaimed that Petroecuador would not be held responsible for its conduct and that Chevron would bear 100% of the responsibility;⁶²⁴
- Government officials colluded with Plaintiffs’ representatives to halt remediation efforts by Petroecuador during the Lago Agrio Litigation;⁶²⁵
- President Correa, the President’s advisor Alexis Mera, Rene Vargas Pazos of Petroecuador, and members of the Constituent Assembly all attended private meetings with the Plaintiffs’ representatives to assist them with their efforts in the Lago Agrio Litigation;⁶²⁶
- Several Government officials pressured the Ecuadorian courts (both publicly and behind closed doors) to rule in the Plaintiffs’ favour,⁶²⁷ and Judge Novillo, a

⁶²² Claimants’ Memorial on the Merits, ¶¶ 282-283.

⁶²³ See Claimants’ Memorial on the Merits, ¶¶ 266-267; Claimants’ Letter to the Tribunal, Dec. 12, 2010; see *supra* note 236.

⁶²⁴ **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008 (in which the Attorney General stated, “[t]he pollution is the result of Chevron’s actions and not of Petroecuador”); **Exhibit C-331**, *Attorney General Diego García: The Ecuadorian Government did not Contribute to Environmental Damage Caused by Chevron*, ECUADOR INMEDIATO, May 6, 2010 (in which the Attorney General “dismissed any responsibility on the part of the Ecuadorian State for the environmental damage caused in the Amazon region by U.S.- based oil company Chevron-Texaco”).

⁶²⁵ See *supra* § II(A)(1)(b).

⁶²⁶ Claimants’ Memorial on the Merits, ¶¶ 255-267, 338, 496.

⁶²⁷ **Exhibit C-360**, *Crude Outtakes*, Jan. 17, 2007, at CRS161-01-02-CLIP 01; *id.* at CRS161-01-02-CLIP 02 (in which Petroecuador official and former Minister of Energy René Vargas Pazos recommended pressuring the Lago Agrio judge to speed up the case, and he said that he had friends on the Supreme Court); **Exhibit C-268**, *Ombudsman Is Requesting Priority for Texaco Case*, HOY, Sept. 15, 2009 (in which Ecuador’s Ombudsman Fernando Gutiérrez stated that the Lago Agrio Litigation “has absolute priority and the judgment must be delivered as soon as possible”); **Exhibit C-194**, *Amicus Curiae* brief submitted by Gustavo Larrea *et al.* filed with the Lago Agrio Court, July 21, 2006, at 9:15 p.m. (in which President Correa’s campaign manager urged the Court to expedite the litigation and grant the Plaintiffs’ request to end the judicial inspections); **Exhibit C-576**, Letter from Manuel Mendoza to Judge German Yáñez of the Lago Agrio Court, Feb. 8, 2008 (in which Constituent Assembly Member Manuel Mendoza complained about the delay in the Criminal Proceedings and

former presiding judge, admitted that the government and congress were pressuring him [to rule against Chevron];⁶²⁸ and

210. This list of Government interference in the Lago Agrio Litigation is not exhaustive, but it demonstrates a years-long campaign by the Government to ensure Chevron's liability for harm that may not even exist, and for which the State has only itself to blame. This pressure has taken place in the context of increasing Executive control over the judiciary, beginning with the purges of the Supreme Court in 2004 and 2005 and culminating in President Correa's increasingly vindictive actions against judges who rule against his wishes.⁶²⁹ In the words of one judge with nearly 30 years of experience on the Ecuadorian bench, there "is no judge who is not afraid."⁶³⁰ The Plaintiffs exploited this fear with relish, targeting their presiding judges with blackmail, backdoor pressure, and public pressure in order to make them fear for their careers, and even for their lives.⁶³¹ The extreme politicization of the Lago Agrio Court is yet another way in which Ecuador has denied justice to Claimants in this case.

4. *Arbitrariness*

211. The Lago Agrio Litigation has been replete with arbitrary due-process violations, as described in Section III(B)(2) above. The final Judgment itself is staggeringly arbitrary, basing its enormous damage award on: (i) the Cabrera Reports, which are both inaccurate (because they contain errors of measurement and sampling and make unsupported claims about causation and damages, contrary to the evidence) and fraudulent (because they are a product of the Plaintiffs' lawyers); (ii) reports from the Plaintiffs' September 16 "cleansing" experts, who conducted no independent analysis and instead relied on Cabrera's data; and (iii) the Plaintiffs' internal Selva Viva Data Compilation, a document that never formed part of the Court record.

212. Judge Zambrano—who has no first-hand knowledge of oil production operations, environmental contamination, public health statistics, toxicology, epidemiology, ecological

saying "the Office of the Prosecutor ... has not been able to prosecute this criminal case aggressively and, therefore, the violations of the law remain unpunished."

⁶²⁸ **Exhibit C-1363**, Email from L. Yanza to S. Donziger, June 16, 2004 [DONZ-HDD-0071116].

⁶²⁹ *See supra* § II(E).

⁶³⁰ **Exhibit C-1322**, *According to Jiménez, the Judiciary Council should disappear*, EXPRESO, Oct. 10, 2010 [Exhibit 165 to Alvarez RICO Report].

⁶³¹ *See supra* ¶ 121 (outlining Donziger's intent to make the judges afraid, and even believe that they would be "killed" or "doused with gasoline and burned" if they ruled in favor of Chevron).

resource assessment, indigenous history, or remediation costs—purported to conduct his own analysis of raw data and develop his own scientific conclusions in the final Judgment. In so doing, he made critical errors that cannot be explained away, including using data showing *no* contamination as evidence *of* contamination and erroneously inflating sampling results by *ten to one thousand times* their actual level. Judge Zambrano applied a 100 ppm remediation standard in awarding US\$ 5.4 billion in damages for soil remediation—a standard more than ten times stricter than permitted by regulation, and a damages figure astronomically higher than compensation standards applied by Petroecuador for the same area.⁶³² Not only does that standard lack any foundation under Ecuadorian law, but the Court had no power to depart from the standards established by the duly-authorized Ecuadorian agencies, as Plaintiffs’ counsel well understood when they sought a regulatory change of those standards through “an official decree before the trial ends.”⁶³³ Further, the Lago Agrio Court points to *no evidence* linking TexPet to the harm the Court claimed to have identified—a glaring omission given that Ecuador’s State-owned oil company has continued to operate in the Concession for the past 20 years, during which time it has acquired a notorious record for environmental mismanagement. The results of such a haphazard approach can be nothing but arbitrary.⁶³⁴

213. Perhaps most arbitrary are the damage figures themselves. In addition to the punitive-damage award that has no basis in Ecuadorian law, the Judgment awards “actual” damages for claims—such as potable water systems, excess cancer deaths, and cultural damages—that the Plaintiffs never pleaded, making them inadmissible under Ecuadorian law.⁶³⁵ Judge Zambrano awarded US\$ 150 million for damages related to lack of potable water in the area (despite no evidence that petroleum-related compounds had contaminated the water and contrary to evidence that that sum is enormously exaggerated);⁶³⁶ US\$ 800 million for cancer treatments (in addition to another arbitrary figure of US\$ 1.4 billion for a general health care system, and despite the facts that the Plaintiffs never requested reparation for cancer cases, and

⁶³² See *supra* § II(A)(2)(a).

⁶³³ **Exhibit C-796**, Email from S. Donziger to D. Beltman, A. Maest, J. Lipton, and P. Sowell, copying J. Kohn, Subject: Re: “Important idea,” Sept. 19, 2007 [DONZ00025160].

⁶³⁴ Paulsson Expert Report, ¶ 59.

⁶³⁵ See *supra* § II(A)(3)(a).

⁶³⁶ See *supra* § II(A)(3)(c).

that official Ecuadorian health statistics disprove any correlation between oil production and illness);⁶³⁷ and US\$ 100 million in so-called “cultural damages” (based solely on an unsupported finding that Chevron’s conduct had “impacts on the indigenous peoples”).⁶³⁸ Those figures are not supported by evidence, and as explained in Section II(A)(3), the methodologies used to arrive at those sums are either egregiously flawed or simply non-existent. As such, those figures are arbitrary.

214. Other, significantly larger, damage figures are grossly inflated and untethered to scientific or economic reality. The US\$ 5.4-billion figure for soil remediation is more than double the figure endorsed even by Plaintiffs’ discredited experts, and it is many times higher than Petroecuador’s own publicized cost estimates to remediate the same area.⁶³⁹ It is nothing more than the result of the judge’s creative mathematics with fake numbers and opportunistic placement of decimal points (for example, as described above, the judge used 22.5 meters as a depth measurement instead of 2.5 meters).⁶⁴⁰ The total sum is thus the result of the judge’s—and the Plaintiffs’—own arbitrary calculations.

215. Moreover, the damage figure for groundwater contamination, US\$ 600 million, is based only on the judge’s hypothesis that a “possibility” of seepage “could” result in groundwater contamination and his guess that US\$ 600 million is appropriate compensation. No evidence supporting that figure exists.⁶⁴¹ The “at least” US\$ 200 million award for damage to flora and fauna is similarly arbitrary, in that the judge purports to use the (flawed) Barnthouse report as a starting point, and then adds and subtracts numbers until he arrives at a round, base figure he feels “shall be sufficient.”⁶⁴² Again, no evidence exists to support that figure.

216. Finally, the judge awarded US\$ 1.4 billion for a general healthcare program, while simultaneously finding a “lack of proof of harm or injuries to the health of specific persons.”⁶⁴³ While the award amount matches the number put forth by Plaintiffs’ expert Carlos

⁶³⁷ See *supra* § II(A)(3)(e).

⁶³⁸ See *supra* § II(A)(3)(a).

⁶³⁹ See *supra* § II(A)(3)(b).

⁶⁴⁰ See *supra* § II(A)(3)(b).

⁶⁴¹ See *supra* § II(A)(3)(c).

⁶⁴² See *supra* § II(A)(3)(d).

⁶⁴³ See *supra* § II(A)(3)(e).

Picone, the Judgment conveniently ignores Dr. Picone’s testimony that this number corresponds to the health care needs of the Oriente population in general that are in no way tied to environmental damage, and are no different from the health care needs of the population residing outside the former Concession.⁶⁴⁴ In light of their myriad and significant flaws, including the utter lack of evidentiary support, it is difficult to overstate the arbitrariness of the damage figures. By allowing the Lago Agrio Litigation to proceed with arbitrary rulings and violations of due process that culminated in a Judgment replete with arbitrary damage figures, Ecuador has denied justice to Claimants.

217. The Judgment’s application of Ecuadorian law is likewise arbitrary. For instance, Judge Zambrano acted as a member of an appellate panel that rejected an EMA claim by landowners and an environmental NGO against the constructors of a heavy crude pipeline, asserting that the construction of the pipeline had caused environmental damage.⁶⁴⁵ There, Judge Zambrano drew a clear distinction between individual civil claims and environmental claims that seek to enforce a collective right.⁶⁴⁶ Along with the other panelists, he noted that a prior decision already addressed the environmental-damage claims, and that decision had *res judicata* effect for all future claims.⁶⁴⁷ In other words, the very same judge who held Chevron liable despite the “valid” Settlement and Release Agreements with the Government held in a later decision that environmental claims are *always* barred by *res judicata* when previously adjudicated on behalf of “all of society.”⁶⁴⁸

5. *Discrimination, Bias, or Prejudice*

218. International tribunals consistently have recognized that discrimination or prejudice against the alien constitutes a denial of justice. For example, in the *Salem* case, the tribunal observed that “obvious discrimination of foreigners against natives; palpable and

⁶⁴⁴ See *supra* § II(A)(3)(e).

⁶⁴⁵ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m.

⁶⁴⁶ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m., at ¶ 12.

⁶⁴⁷ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m., ¶ 17.

⁶⁴⁸ **Exhibit C-1175**, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, Dec. 14, 2011, at 3:01 p.m., at ¶ 17.

malicious inequity of a judgment – these are the cases which, one after another, have been included under the notion of ‘denial of justice.’”⁶⁴⁹ The *Cotesworth* tribunal similarly stated that: “[i]t is only in cases where justice is refused, or ... violated, or when odious distinctions have been made against its subjects, that the government and foreigner can interfere.”⁶⁵⁰

219. The most recent and clear condemnation of discrimination as giving rise to a denial of justice came in the *Loewen* case. The case arose out of proceedings before Mississippi courts, in which counsel for the U.S. claimant had made “extensive irrelevant and highly prejudicial references” to Loewen’s foreign nationality, as well as class- and race-based distinctions between Loewen and the U.S. plaintiff. The tribunal stated “A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.”⁶⁵¹ The tribunal concluded that there was “strong reason for thinking that the jury were affected by the persistent and extravagant O’Keefe appeals to prejudice,” and that the judge “failed to discharge his paramount duty to ensure that Loewen received a fair trial.”⁶⁵² It should be stressed that in *Loewen*, the tribunal found that there was “no direct evidence of bias on the part of Judge Graves or the jury ... Nor does the evidence warrant the drawing of an inference of bias.”⁶⁵³ Even so, the court’s passive attitude was sufficient to result in the finding that Loewen did not receive a fair trial.

220. While the *Loewen* court may have engaged in passive discrimination, the Lago Agrio Court engaged in active discrimination against foreign company Chevron and in favor of native Petroecuador and the named Plaintiffs. From the beginning, Ecuador and the Plaintiffs’ representatives agreed that Petroecuador would not be held responsible for any contamination, despite the fact that Petroecuador alone had been operating in the area since 1990, and despite Petroecuador’s well-known poor environmental record.⁶⁵⁴ In a written Waiver of Rights, the

⁶⁴⁹ **CLA-310**, *Salem Case (U.S. v. Egypt)*, June 8, 1932, 6 I.L.R. 188, 197 (1945).

⁶⁵⁰ **CLA-311**, *Case of Cotesworth and Powell*, Award, Nov. 5, 1875, in II John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2050, 2081 Section VII.(3) (1898), (hereinafter “*Cotesworth and Powell*”).

⁶⁵¹ **CLA-44**, *Loewen* Award, ¶ 138. See also **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 192-193.

⁶⁵² **CLA-44**, *Loewen* Award, ¶ 138.

⁶⁵³ *Id.*

⁶⁵⁴ **Exhibit C-911**, Waiver of Rights Granted Before Notaries Public of Massachusetts and Pennsylvania, Respectively, Nov. 20, 1996 at 2; See Claimants’ Memorial on the Merits, ¶¶ 145, 148.

Plaintiffs discharged: (1) any claim for damages against Ecuador/Petroecuador, and (2) any right to recover from Ecuador damages that the court might order. Furthermore, the Plaintiffs committed not to accept any ruling from the *Aguinda* Court ordering contribution from Ecuador, and to assist counsel for Ecuador at all times during the *Aguinda* Litigation. The Waiver of Rights specified that the Government would appear as a non-party to “express that it is in favor of allowing” performance of those measures, and that it would request that “any compensation sought . . . be paid exclusively by the company Texaco.”⁶⁵⁵

221. Since this agreement, Petroecuador has committed hundreds of oil spills, mishandled equipment and operations, employed outdated equipment, and delayed remediation of pits for which it was responsible.⁶⁵⁶ Yet Ecuadorian Government officials wilfully engaged in a campaign to paint Chevron as the bad actor. Not only has Petroecuador never been charged with its portion of responsibility, but at one point the Plaintiffs and Government officials pressured it to stop remediation efforts, so as to avoid taking responsibility.⁶⁵⁷ The Lago Agrio Court further discriminated against Chevron by applying remediation standards that had no basis in Ecuadorian law, and that were far stricter than those applied against Petroecuador and other operators.⁶⁵⁸ And it in fact ignored Petroecuador’s responsibility in fashioning an enormous damage award against Chevron. As Professor Paulsson observed: “At page 123 of the judgment three reasons are expressed ‘to exclude the damages that are the responsibility of Petroecuador from the scope of the present judgment.’ The third of them is that ‘the obligation of reparation imposed on the perpetrator of damage is not extinguished by the existence of new damages attributable to third parties.’ Although doubtless true, that cannot excuse a court from performing the task of determining whether a defendant did or did not cause the harm for which compensation is sought.”⁶⁵⁹

⁶⁵⁵ **Exhibit C-911**, Waiver of Rights Granted Before Notaries Public of Massachusetts and Pennsylvania, Respectively, Nov. 20, 1996 at 2; *See* Claimants’ Memorial on the Merits, ¶¶ 145, 148.

⁶⁵⁶ *See* Claimants’ Memorial on the Merits, ¶¶ 145-148.

⁶⁵⁷ Claimants’ Memorial on the Merits, ¶ 238.

⁶⁵⁸ *See supra* § II(A)(2)(a).

⁶⁵⁹ Paulsson Expert Report, ¶ 58.

222. In addition to obvious financial incentives, Ecuador had political reasons for painting Chevron as the State's "enemy."⁶⁶⁰ Judge Núñez, while a presiding judge in the Lago Agrio Litigation, compared the litigation to a case of David and Goliath.⁶⁶¹ President Correa repeated this analogy the day that the appellate decision affirming the Judgment was issued.⁶⁶² Government officials thereby cast the Lago Agrio Litigation as a case of "us against them," in an overt case of discrimination against a foreign company that amounts to a violation of international justice.

6. *Excessive Public Pressure*

223. As summarized by Professor Paulsson, "[a] theme recurrent in international awards relates to litigants' legitimate expectation that they be judged in an atmosphere of dispassionate serenity. In such circumstances, the issue is not so much a specific defect in the process as the failure to secure an environment within which neutral justice can be achieved."⁶⁶³

224. The local sentiment adverse to the alien was at the core of the *Solomon* case before the United States-Panama Claims Commission.⁶⁶⁴ The case concerned a U.S. citizen against whom Panamanian authorities had repeatedly brought criminal charges, accompanied by multiple arrests. The Commission found that Panama had sustained Solomon's imprisonment "not by the ordinary motive of punishing an offense, but by strong local sentiment." The Commission found that public sentiment led to repeated charges, unexplained shuffling of trial judges, and harsh statements by the government prosecutor.⁶⁶⁵

225. As mentioned above, the Ecuadorian court of public opinion found Chevron liable practically before the Lago Agrio Complaint was filed. Plaintiffs' representatives waged an exploitative campaign that misled members of the local communities by promising billions of dollars that the local population would never see, and for evoking fear by claiming either

⁶⁶⁰ **Exhibit C-391**, *Correa Will Turn to the UNASUR to Join Forces Against Multinationals*, EL MERCURIO, Apr. 3, 2010.

⁶⁶¹ **Exhibit C-222**, Simon Romero and Clifford Kraus, *In Ecuador, Resentment of an Oil Company Oozes*, THE NEW YORK TIMES, May 15, 2009.

⁶⁶² **Exhibit C-1006**, *Ecuador court upholds \$18 bln ruling against Chevron*, REUTERS NEWS, Jan. 3, 2012.

⁶⁶³ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 164.

⁶⁶⁴ **CLA-312**, *Solomon Case*, (*U.S. v. Panama*), Case No. 93, Award, June 29, 1933, 6 R.I.A.A. 370 (2006) (hereinafter "*Solomon case*"). See also **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 166.

⁶⁶⁵ **CLA-312**, *Solomon case* at 246.

imaginary or exaggerated harm that was in fact caused by the Government. The Frente, a politically powerful group in Ecuador, spearheaded the Republic's use of public pressure to condemn Chevron and ensure that no justice would be done.⁶⁶⁶ To further ensure that Claimants were cast in the most suspicious and unfavorable light, Ecuador concocted and carried out baseless criminal proceedings against two of Claimants' lawyers.⁶⁶⁷

226. Plaintiffs' counsel engaged in its own campaign to create public outrage and pressure judges, at times leading to physical threats and intimidation. For example, Plaintiffs' counsel amassed huge protests in order to force judges to make certain rulings, to stop site inspections of the former Concession and the Plaintiffs' testing facilities, and generally to disrupt the proceedings.⁶⁶⁸ That environment in Ecuador, which Government officials reinforced by publicly inciting hostility towards Claimants,⁶⁶⁹ was far from the atmosphere of "dispassionate serenity" that is crucial to the dispensation of justice. Because Ecuador allowed the Lago Agrio Litigation to proceed under such public pressure, it denied justice to Claimants.

7. *Illegitimate Assertion of Jurisdiction*

227. International law recognizes proper jurisdiction as a threshold requirement for the validity of any judgment. As stated in the *Idler* case, "A foreign judgment ... is always impeachable for want of jurisdiction[.]"⁶⁷⁰ According to that tribunal, any judgment is "open to attack" for lack of jurisdiction because "it is a *petitio principii* to say that it is unimpeachable because it is a judgment, and that it is a judgment because it is unimpeachable."⁶⁷¹

228. As summarized by Professor Paulsson:

This is a natural complement to tampering of the judiciary by the executive or legislative branches ... The government stacks the courts in its favour, or selects compliant judges to sit on special tribunals. If the

⁶⁶⁶ Claimants' Memorial on the Merits, at 132-135; *see also id.* ¶ 181 (in which Plaintiffs' former lead lawyer Cristóbal Bonifaz described the Frente as a "powerful political force" in Ecuador).

⁶⁶⁷ Claimants' Memorial on the Merits, § II(J).

⁶⁶⁸ *See supra* ¶ 120.

⁶⁶⁹ *See supra* § II(C)(3)(c).

⁶⁷⁰ **CLA-304**, *Idler* case at 3511 (quoting Wharton, Law of Ev. 3d ed. § 803).

⁶⁷¹ **CLA-304**, *Idler* case at 3514 (citing Wharton, Law of Ev. 3d ed. § 796).

tactic is to work, the manipulated court must go along with it. In such circumstances, its assertion of jurisdiction will be internationally illicit.⁶⁷²

Ecuador has committed these violations not only by wrongly asserting jurisdiction over Chevron in the first instance, but also by politically manipulating the composition of the appellate panel that eventually upheld the fraudulent Judgment.

229. The findings of at least one international tribunal suggest that a jurisdictional defect may rise to the level of a denial of justice. In the *Idler* case, the Venezuelan Claims Commission held that Venezuela's failures to serve process correctly were so egregious that they "vitiate[d] the whole proceedings."⁶⁷³ In the underlying case, the Venezuelan Supreme Court, which the Venezuelan Government had improperly stacked with judges sympathetic to its interests, summoned defendant Jacob Idler (who was living in Philadelphia at the time but who had connections with Venezuela) to appear before that court.⁶⁷⁴ The court then transferred Idler's matter to a lower-level court, but did not send Idler notice of the transfer. The lower-level court issued a decision against Idler that the Supreme Court subsequently affirmed. But the Venezuelan Claims Commission refused to recognize the judgment as valid, *inter alia*, for want of proper jurisdiction. As Professor Paulsson observed, "[t]he commission reasoned that if the facts necessary to give a court jurisdiction do not exist, 'the record will be a nullity in the eyes of a controlling authority....'"⁶⁷⁵ Regarding the basis of the improper service of process, the Commission remarked:

The notice directing him, away in a distant land, to appear in one court when the business affecting his interests was to be done in another, was worse than none at all, for it was misleading. Even if no notice had been required, and one had nevertheless been given, whose tendency was thus to mislead, we are inclined to think the act, from the standpoint of justice, would vitiate the whole proceedings. [...] The court has no jurisdiction and can not grant the prayer of the government, and it is now too late to bring the suit in the court which had jurisdiction.⁶⁷⁶

⁶⁷² **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 178-179.

⁶⁷³ **CLA-304**, *Idler* case at 3515.

⁶⁷⁴ **CLA-304**, *Idler* case at 3491.

⁶⁷⁵ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 179.

⁶⁷⁶ **CLA-304**, *Idler* case at 3515.

230. As Claimants previously have informed the Tribunal,⁶⁷⁷ Chevron is not a proper defendant in the Lago Agrio Litigation. At the time when the Plaintiffs filed their lawsuit in 2003, the parent corporation of TexPet (Texaco, Inc.) still existed as an independent legal entity.⁶⁷⁸ But the Plaintiffs chose to name Chevron as a defendant, even though Chevron has never operated in Ecuador, held a domicile there, or maintained business contacts there.⁶⁷⁹ While Chevron raised these jurisdictional objections in its initial pleadings in the Lago Agrio Litigation, the Court refused to rule, ostensibly because the litigation was subject to the manifestly inadequate rules of a verbal summary proceeding.⁶⁸⁰ The Court continued to ignore Chevron’s jurisdictional objections throughout the seven-year course of the litigation, and it merely glossed over these objections in its final Judgment, parroting the Plaintiffs’ incorrect theory regarding the relationship between Chevron and TexPet. In fact, the “merger” section of the Lago Agrio Judgment—upon which the judge based his jurisdiction over Chevron—has been proven to be the work product of the Plaintiffs’ lawyers, not the judge.⁶⁸¹ Therefore, Ecuador’s Lago Agrio Court committed a denial of justice by wrongfully subjecting Chevron to its jurisdiction for more than seven years, and by asserting jurisdiction over Chevron in the Judgment without any proper basis under Ecuadorian law to do so.

⁶⁷⁷ Claimants’ Memorial on the Merits, § II.G.1(c).

⁶⁷⁸ Even if the Plaintiffs had named Texaco, Inc. or TexPet, it is important to note that neither of these entities consented to be subject to the Lago Agrio Plaintiffs’ claims. As Claimants have explained, in 2001, Texaco, Inc. originally consented to a re-filing of the *Aguinda* Litigation in Ecuador. **Exhibit C-10**, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001); see Claimants’ Memorial on the Merits, ¶ 158. In so doing, the company understood that the Plaintiffs’ claims were for *individual* damages to persons and personal property, not claims for the community’s already-settled diffuse rights related to the environment. In fact, when dismissing the case from the U.S. courts, both the federal district court and the Second Circuit Court of Appeals were careful to describe the *Aguinda* Plaintiffs’ claims as individual; as the Second Circuit noted in extending the Plaintiffs’ time limit to re-file the claims from 60 days to an entire year, it would take a significant amount of time for the Plaintiffs’ counsel to obtain thousands of individual signatures in order to file thousands of individual suits for damages. Claimants’ Memorial on the Merits, ¶¶ 166-68. When the 48 named Plaintiffs filed the Lago Agrio Litigation in 2003, however, they sought entirely different damages for entirely different claims from those asserted in *Aguinda*—claims that TexPet had already paid for and settled with the Government.

⁶⁷⁹ **Exhibit C-401**, Adolfo Callejas’s Filing of Chevron’s Power of Attorney, Oct. 14, 2003, at 196-241, 199; **Exhibit C-72**, Chevron’s Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:10 a.m., at 243, 245 (Eng.).

⁶⁸⁰ As Claimants have explained, the verbal summary procedure is designed for expedited litigations with short evidentiary records. See Claimants’ Memorial on the Merits, ¶¶ 175-76.

⁶⁸¹ See *supra* § II(A)(1).

C. The Lago Agrio Judgment Itself Constitutes a Denial of Justice

231. It is well-established that a decision constitutes a denial of justice if the tribunal determines that it is “manifestly unjust,” or that no competent and honest court could reasonably have reached the decision. Mere judicial error does not result in a denial of justice under customary international law, but a “clear and malicious” misapplication of national law will.⁶⁸²

232. As addressed above, proof of bad faith is not necessary to a finding of denial of justice. The 1929 Harvard Draft sets out in Article 9 that “[d]enial of justice exists when there is ... a manifestly unjust judgment.”⁶⁸³ Sir Gerald Fitzmaurice adds:

An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that *the judgment is of a kind which no honest and competent court could possibly have given.*

[...]

In almost all such cases it is probable that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges.⁶⁸⁴

Professor Paulsson similarly states:

It is therefore clear that while international tribunals do not provide an appellate forum for parties aggrieved by the rulings of national courts, tribunals may conclude that a denial of justice has occurred when a court’s ruling is so egregious as to indicate gross incompetence, manifest disregard of national law, or malicious misapplication of the law—and thus bad faith on the part of the judicial decision-maker. The key factor appears to be what all of the circumstances surrounding the ruling in

⁶⁸² **CLA-299**, *Azinian* case ¶¶ 102-03.

⁶⁸³ **CLA-303**, Harvard Draft Art. 9.

⁶⁸⁴ **CLA-301**, Fitzmaurice at 112-114 (emphasis added). *See also* **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 82-83.

question indicates about the interest—or lack thereof—in providing impartial justice to a foreign litigant.⁶⁸⁵

Thus, if a decision indicates gross incompetence or is otherwise manifestly unjust, that by itself constitutes a denial of justice.

233. A number of international tribunals have found a denial of justice when courts issued grossly incompetent or manifestly unjust judgments under national law. For example, in *Idler v. Venezuela*, the Venezuelan court’s legal theory purporting to extend to the government the right of a minor to void contracts entered into on its behalf, was found to be so wanting as to constitute a denial of justice.⁶⁸⁶ And in *Cotesworth and Powell*, the Commission held that a denial of justice exists “when sentences are pronounced and executed in open violation of law or ... are manifestly iniquitous.”⁶⁸⁷

234. In the *Bronner* case, the umpire determined that the domestic court’s judgment was so wrong as to constitute a denial of justice. It held:

The umpire is always most reluctant to interfere with the sentences of judicial courts, but in this instance the decision appears to him so unfair as to amount to a denial of justice.⁶⁸⁸

The basis for that finding was not only that there was no evidence to support the domestic court’s finding, but also that all of the evidence pointed in the exact opposite direction.

235. The *Orient* case, decided by a Commission created under the U.S.-Mexico Treaty of 1839, involved Mexico’s confiscation of a schooner and its cargo from a U.S. national. The evidence against the U.S. national was the testimony of the revenue collector and a document that he claimed was a false manifest. Four witnesses, including the collector’s assistant, testified that the collector had in fact refused to take the manifest that had been presented to him, and that he had left it on the table of the master’s cabin. The Commission upheld the claim against

⁶⁸⁵ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 200-202. Professor Paulsson has echoed this definition as an arbitrator. **RLA-17**, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ¶ 94.

⁶⁸⁶ **CLA-304**, *Idler* case at 3510.

⁶⁸⁷ **CLA-311** *Cotesworth and Powell* at 2083, ¶ 9.

⁶⁸⁸ **CLA-313**, *Bronner Case (U.S. v. Mexico)*, Award, Nov. 4, 1874, in III John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3134 (1898).

Mexico, holding that “[a] decision ... given in direct opposition to so strong a preponderance of the testimony cannot be entitled to respect. It indicates strongly a predetermination of the part of the judge....”⁶⁸⁹

236. The Lago Agrio Judgment is a “manifestly unjust” decision that could not have been issued by a competent and honest judge.⁶⁹⁰ It also meets the other tests for denial of justice outlined by previous tribunals, such as a “clear and malicious application” of the law;⁶⁹¹ an administration of justice in a “seriously inadequate” manner;⁶⁹² or a sentence given in “open violation of the law.”⁶⁹³ Preceding sections of this memorial have detailed how: (i) Government officials, in concert with the Plaintiffs’ lawyers, colluded with several judges to pre-determine the outcome against Chevron; (ii) the final Judgment (ghostwritten by the Plaintiffs) contained gross evidentiary flaws and fabricated facts and data; and (iii) the Judgment ignored material legal issues that, if properly applied, would have prevented its issuance. Perhaps most compelling is the fact that the Judgment is not even the product of the judge, as it was ghostwritten by representatives of the Plaintiffs themselves, possibly with the aid of Government lawyers.

237. Because the Government pre-ordained the outcome (sufficient under the *Orient* standard to form a denial of justice), the Lago Agrio judges had no choice but to bend or fabricate evidence in fanciful ways to support a conclusion with no basis in fact. In some instances, Judge Zambrano merely lifted the “evidence”—errors and all—from the Plaintiffs’ own unfiled work product and database. The many instances of collusion and evidence fabrication have been discussed in previous sections, and they are each instances of judicial incompetence, if not outright dishonesty.

238. But the Judgment constitutes a denial of justice in a more profound way as well, since its purported legal substance is the result of a manifest disregard for, and gross misapplication of, basic elements of Ecuadorian law. Like many legal systems, Ecuadorian law

⁶⁸⁹ **CLA-314**, *Case of the Orient (U.S. v. Mexico)*, Award, in III John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, 3229-3231 (1898).

⁶⁹⁰ **CLA-301**, Fitzmaurice at 62, 64 (emphasis added). See also **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 82-83.

⁶⁹¹ **CLA-299**, *Azinian* case ¶¶ 102-103.

⁶⁹² **CLA-299**, *Azinian* case ¶¶ 102-103.

⁶⁹³ **CLA-311** *Cotesworth and Powell* at 2083.

requires that: (i) Plaintiffs have legal capacity in filing a proper complaint, (ii) jurisdiction is proper, (iii) legal issues cannot be repeatedly adjudicated, (iv) causation is a necessary precondition to finding liability, and (v) damages awarded must not be speculative, but rather supported by facts. As detailed above, the Lago Agrio Judgment violates each of those basic tenets.

239. In sum, what has happened in this case surpasses other modern examples of denial of justice. If the Mississippi trial at issue in *Loewen* was a “disgrace” and “so flawed that it constituted a miscarriage of justice,”⁶⁹⁴ then the process of this case and resulting Judgment surely falls far below the international minimum standard. If Albania did not provide “even a minimally adequate justice system” in the *Pantechniki* case, then Ecuador surely fell far below the same standard here.⁶⁹⁵ And if the Venezuelan judgment condemned in *Idler* was deemed to be “the voice of Idler’s opponents” and not the rule of law, then the Judgment at issue here is plainly the voice of the Plaintiffs and a politically-motivated Ecuadorian executive.⁶⁹⁶ Here, “the shock [and] surprise” generated by the Lago Agrio record “leads, on reflection, to justified concerns as to the judicial propriety of the outcome.”⁶⁹⁷ The Judgment under review here is indeed “so manifestly unjust that no court which was both competent and honest could have given it.”⁶⁹⁸

D. International Law Requires This Tribunal to Hear Claimants’ Denial-of-Justice Claim

240. Ecuador consummated its denial of justice on January 3, 2012, at the moment the appellate court denied Chevron’s appeal and Respondent allowed the Judgment to become enforceable under Ecuadorian law (with the remaining requirement of a certificate of enforceability to be issued by the secretary of the first-instance court). Although subject to the various defenses to enforcement available in individual jurisdictions, the appellate court has stated that the Judgment is an enforceable product of Ecuador’s justice system. At that point, the

⁶⁹⁴ **CLA-44**, *Loewen Award*, ¶¶ 119 and 137.

⁶⁹⁵ **RLA-17**, *Pantechniki*, ¶¶ 94-95.

⁶⁹⁶ See **CLA-304**, *Idler* case at 3516-17.

⁶⁹⁷ **CLA-7**, *Mondev Award*, ¶ 127

⁶⁹⁸ **CLA-315**, *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 114, 155-56 (Feb. 5) (Separate Opinion of Judge Tanaka).

risk to Chevron from potential extraterritorial enforcement became fully realized. Chevron has insufficient assets in Ecuador to satisfy the Judgment, and it has no ability to protect its rights or assets from international enforcement by continuing to seek local remedies there.

241. As Professor Paulsson observes:

Historically, denial of justice cases have typically involved domestic proceedings conducted from start to finish within one legal system. The present case is to my knowledge novel among denial of justice cases in the sense that it involves an avowed intention to seek to enforce an Ecuadorean judgment outside Ecuador once the judgment is enforceable under Ecuadorean law, but before all available domestic remedies have been exhausted within Ecuador.

...

The exhaustion of domestic remedies rule is designed to allow a state in which a breach of the standards of international law has occurred an opportunity to redress it by its own means; it is not designed to prevent a claim of denial of justice from being successful when a product of that state's legal system has become exportable and the wronged party is at peril of enforcement in other jurisdictions as a result.⁶⁹⁹

242. The exhaustion requirement for pleading a denial of justice does not apply in this case, because the Ecuadorian judicial system created a product enforceable within Ecuador with the Lago Agrio Judgment as upheld in the first instance. Even if the exhaustion requirement did apply, however, Claimants satisfy the futility exception to that requirement, given that the Government and Correa Administration support the fraudulent Judgment and have politicized the judiciary to the point that any attempted remedies obviously would be futile.

1. Claimants Are Not Required to Seek Any Further Remedies in Ecuador

243. International law requires a claimant to exhaust its local remedies before claiming a denial of justice,⁷⁰⁰ subject to limitations or qualifications in order for justice to be “dispensed efficiently and economically.”⁷⁰¹ In his treatise on *Local Remedies in International Arbitration*,

⁶⁹⁹ Paulsson Expert Report, ¶¶ 77-79.

⁷⁰⁰ **RLA-61**, Paulsson, DENIAL OF JUSTICE, at 100 *et seq.*, 108 (“For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”).

⁷⁰¹ **CLA-316**, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 200 (2nd ed., Cambridge Univ. Press 2004) (hereinafter “Amerasinghe”).

C.F. Amerasinghe recognizes several limitations or exceptions to the exhaustion requirement, including “the unavailability and inaccessibility of remedies,” “the ineffectiveness of remedies,” “undue delay,” “repetition of injury or likelihood of further damage,” “exceptional circumstances,” and “obstruction by the respondent State.”⁷⁰² Claimants need only exhaust ordinary remedies under Ecuadorian law to the extent that said remedies can rectify the complained-of harm.⁷⁰³

244. Claimants also need not pursue ineffective remedies. In the *Finnish Ships Arbitration*, the tribunal held: “It is no objection to an international claim that there exists some theoretical or technical possibility of resort to municipal jurisdictions. The local remedy must be really available and it must be effective and adequate.”⁷⁰⁴ The tribunal went on to find that when a finding of fact was final and the success of the claimant’s case depended on a different finding of fact, an appeal to a higher court or a reference to a different court or body was obviously futile.⁷⁰⁵

245. The International Law Commission’s Third Report on Diplomatic Protection endorsed the following formulation: local remedies do not have to be pursued when there is “no reasonable possibility of an effective remedy.”⁷⁰⁶ Sir Hersch Lauterpacht adopted this test in his separate opinion in the *Norwegian Loans case*.⁷⁰⁷ And Article 15 of the ILC’s Articles on

⁷⁰² *Id.*

⁷⁰³ Paulsson Expert Report ¶ 79. See also **CLA-317**, *Ambatielos Claim (Greece v. U.K.)*, Award, Mar. 6, 1956, 23 I.L.R. 306, 334-35 (“In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding international action. ... Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be obviously futile.”).

⁷⁰⁴ **CLA-318**, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Fin. v. Gr. Brit.)*, Award, May 9, 1934, 3 R.I.A.A. 1479, 1495 (1950).

⁷⁰⁵ *Id.* at 1545.

⁷⁰⁶ **CLA-319**, John Dugard, International Law Commission, Third Report on Diplomatic Protection, UN Doc. A/CN.4.523 (2002) (hereinafter “ILC Third Report”), ¶ 45. See also Paulsson Report, ¶ 80.

⁷⁰⁷ **CLA-320**, *Case of Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, July 6, 1957, 1957 I.C.J. Rep. 9, 39 (July 6) (Separate Opinion of Judge Sir Hersch Lauterpacht) (hereinafter “*Norwegian Loans*”) (“For the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in

Diplomatic Protection codified the test, saying that exhaustion need not be completed when “[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress....”⁷⁰⁸

246. The ILC Third Report and its Commentary on Diplomatic Protection discuss at least three examples of futility: (1) a notorious lack of independence of the local courts;⁷⁰⁹ (2) a consistent and well-established line of precedents adverse to the alien in question;⁷¹⁰ and (3) a lack of an adequate system of protection in the respondent State.⁷¹¹ According to Special Rapporteur Dugard, a prime example is when courts are “notoriously lacking independence,” and the leading authority in support of this principle is the *Robert E. Brown Case*.⁷¹²

247. In the *Robert E. Brown Case*, the British-American Claims Tribunal held that Mr. Brown had acquired substantial mining rights entitling him to an interest in real property or to damages for deprivation thereof, and that South Africa’s improper deprivation of his rights constituted a denial of justice.⁷¹³ The *Brown* tribunal rejected England’s argument (which had subsequently occupied South Africa) regarding non-exhaustion of local remedies. The tribunal held that local remedies were ineffective because the “judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result” (including by dismissing judges).⁷¹⁴ The tribunal concluded that “the futility of further proceedings has been fully demonstrated.”⁷¹⁵ It then quoted the famous phrase of American Secretary of State Hamilton Fish: “A claimant in a foreign State is not required to

which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.”).

⁷⁰⁸ **CLA-322**, Resolution Adopted by the General Assembly with Annex ILC Articles on Diplomatic Protection, Art. 15, UN General Assembly, 62d Sess., Jan. 8, 2008.

⁷⁰⁹ **CLA-321**, Draft Articles on Diplomatic Protection With Commentaries at 79 (United Nations 2006); **CLA-319**, ILC Third Report ¶ 41. *See also* **CLA-316**, Amerasinghe at 241.

⁷¹⁰ **CLA-321**, Draft Articles on Diplomatic Protection With Commentaries at 79 (United Nations 2006); **CLA-319**, ILC Third Report ¶ 42.

⁷¹¹ **CLA-321**, Draft Articles on Diplomatic Protection With Commentaries at 79 (United Nations 2006); **CLA-319**, ILC Third Report ¶ 44.

⁷¹² **CLA-319**, ILC Third Report, ¶ 41.

⁷¹³ **CLA-308**, *Brown Award* at 128-29.

⁷¹⁴ *Id.* at 129.

⁷¹⁵ *Id.*

exhaust justice in such a State when there is no justice to exhaust.”⁷¹⁶ The *Robert E. Brown Case* “illustrates the well-established principle that, where the executive branch dominates the courts, judicial remedies against executive action need not be pursued.”⁷¹⁷

248. Here, Claimants need not exhaust further local remedies because (i) the appellate court has stated that the Lago Agrio Judgment is enforceable, constituting a denial of justice *per se*; (ii) no local mechanisms are available to “remedy” the specific harm which Claimants claim; and (iii) the Ecuadorian judiciary is manifestly biased against Claimants and operate as tools of Ecuador’s Executive.

249. Moreover, filing an extraordinary appeal or “cassation” before the National Court of Justice (the Supreme Court of Ecuador),⁷¹⁸ is not a relevant remedy for Chevron’s purposes because it does not suspend the enforceability of the Judgment in Ecuador (absent the posting of an improper bond in this case). Cassation is limited to legal issues and cannot be brought on the basis of factual matters on which either the first-instance court or the appellate court may have erred.⁷¹⁹ The National Court of Justice cannot review the facts *de novo*. For all of these reasons, cassation is a remedy that need not be exhausted in advance of filing this denial-of-justice claim.

250. Claimants need not pursue remedies “beyond a point of reasonableness.”⁷²⁰ Claimants are not required to exhaust remedies that merely “exist[] on paper,” in particular when the “remedy which offers no possibility of redressing the situation.”⁷²¹ Here, in order to redress the wrongs of the Lago Agrio Judgment, Claimants would require a different, unbiased finding of fact. Since cassation does not allow a review of the facts, it is no remedy for Chevron to appeal to the National Court of Justice or Constitutional Court.⁷²² Therefore, as in the *Finnish*

⁷¹⁶ *Id.* (citing Moore’s International Law Digest, Vol. VI at 677).

⁷¹⁷ **RLA-62**, David R. Mummery, *The Content of the Duty to Exhaust Judicial Remedies*, AM. J. INT’L L. 389 (1964) at 403. *See also*, **CLA-316**, Amerasinghe at 208 (“The obvious futility of recourse to the state judicial organs in these circumstances is based on the absence of justice in the true sense.”).

⁷¹⁸ **Exhibit C-316**, Ecuadorian Law on Cassation Appeal, Official Gazette (Supplement) No. 299, Mar. 24, 2004.

⁷¹⁹ *Id.*, Art. 3.

⁷²⁰ **RLA-17**, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 ¶ 96.

⁷²¹ **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 44, Commentary (5).

⁷²² **CLA-318**, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Fin. v. Gr. Brit.)*, Award, May 9, 1934, 3 R.I.A.A. 1479, 1545 (1950).

Ships Arbitration, the present Tribunal should find that Claimants exhausted all “effective and adequate” local remedies.⁷²³

251. In addition, the declaration of enforceability issued already by the Court means that the Plaintiffs may soon begin enforcement actions in courts around the world. Because the cassation remedy is not reasonably capable of redressing the immediate harm of which Claimants complain, Claimants are not required to resort to cassation before filing their denial-of-justice claim.

2. *It Would be Futile for Chevron to Continue Seeking Relief in Ecuador*

252. Even if Claimants had not exhausted available local remedies, they would be excused from doing so based on the futility of seeking further relief in Ecuador. Claimants have described the undeniable evidence, over the course of several years, that the Ecuadorian judicial system has marred the Lago Agrio Litigation with fraud and corruption. Claimants refer the Tribunal to their previous pleadings and to the new developments presented in Section II above. The following main categories include:

- The Lago Agrio Court and the Plaintiffs’ representatives colluded to draft the Lago Agrio Judgment, which is factually and legally flawed;
- The Lago Agrio Court ordered Chevron to pay an arbitrary damages amount and a patently unenforceable penalty;
- The Lago Agrio Court ignored fraud in the initiation of the lawsuit;
- The Lago Agrio Court accepted key evidence from the Plaintiffs that was forged or falsified; and
- The Lago Agrio Court pre-determined the Judgment before reviewing all of the evidence.

253. The Ecuadorian judicial system as a whole lacks independence and impartiality and is biased toward the Executive’s prerogative. Claimants incorporate by reference the detailed timeline of events from their April 1, 2010 Interim Measures Request, the information provided in the expert reports of Dr. Vladimiro Alvarez and Dr. Cesar Coronel, and the new developments presented in Section II.I of their Memorial on the Merits and Section II.C above.

⁷²³ *Id.* at 1495.

254. International law recognizes that “where the executive branch dominates the courts, judicial remedies against executive action need not be pursued.”⁷²⁴ In the *Robert E. Brown Case*, the tribunal excused an alien from exhausting local remedies because the courts were at the time under Executive control, finding: “The obvious futility of recourse to the state judicial organs in these circumstances is based on the absence of justice in the true sense.”⁷²⁵ Claimants have shown that Ecuador’s courts since late 2004 have been “under the control of the Executive,” and that “recourse to the state judicial organs in these circumstances” is futile.

IV. THE LAGO AGRIO LITIGATION AND JUDGMENT CONSTITUTE VIOLATIONS OF THE TREATY

255. In addition to pleading a new claim for denial of justice, this Supplemental Memorial provides additional factual grounds that support Claimants’ existing claims under the U.S.-Ecuador BIT. These include violations of the Treaty’s substantive protections under Article II, including effective means, fair and equitable treatment, legitimate expectations, full protection and security, and the prohibition on arbitrary and discriminatory conduct.⁷²⁶ In their Memorial on the Merits, Claimants detailed the facts prior to the Judgment relevant to Ecuador’s Treaty violations.⁷²⁷ The facts presented in the instant pleading demonstrate that Ecuador’s conduct since that time—most notably with respect to the Judgment and first-instance appellate decision—constitutes further violations of these standards. These updated facts are thus incorporated into Claimants’ Memorial on the Merits with respect to all of its claims under the Treaty.

V. RELIEF REQUESTED

256. In addition to a new claim for denial of justice, Claimants restate their Request for Relief in their Memorial on the Merits (with the exception of Requests formerly numbered 9 and

⁷²⁴ Paulsson Expert Report, ¶¶ 80-82; **RLA-62**, David R. Mummery, *The Content of the Duty to Exhaust Judicial Remedies*, AM. J. INT’L L. 389 (1964) at 403.

⁷²⁵ **CLA-316**, Amerasinghe at 208.

⁷²⁶ Claimants’ Memorial on the Merits, § IV; see also Paulsson Report, ¶¶ 22-28 (noting that a denial of justice would also constitute a violation of the fair and equitable treatment standard and the effective-means provision).

⁷²⁷ Claimants’ Memorial on the Merits, § II.

10 regarding the Criminal Proceedings)⁷²⁸, and refer the Tribunal to that pleading for a detailed discussion of those claims and the Tribunal's authority to grant the requested relief.⁷²⁹

257. Accordingly, Claimants request an Order and Award granting the following relief:

1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador;
2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements;
3. Declaring that Ecuador has breached the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, and to observe obligations it entered into under the investment agreements;
4. Declaring that Ecuador has committed a denial of justice under customary international law;
5. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation;⁷³⁰
6. Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable;⁷³¹
7. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation;
8. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable;

⁷²⁸ Although Claimants do not re-state their request for relief related to the Criminal Proceedings, the significance of these proceedings is not moot—they still constitute a violation of the BIT and provide important context for Claimant's other claims.

⁷²⁹ Claimants' Memorial on the Merits, ¶¶ 538-546.

⁷³⁰ See Paulsson Expert Report, ¶ 85.

⁷³¹ See Paulsson Expert Report, ¶¶ 86-99.

9. Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices;
10. Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive;
11. Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in to the Lago Agrio Judgment;
12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio Judgment;⁷³²
13. Awarding all costs and attorneys' fees incurred by Claimants in (1) defending the Lago Agrio Litigation and the Criminal Proceedings, (2) pursuing this Arbitration, (3) uncovering the collusive fraud through investigation and discovery proceedings in the United States, (4) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this Arbitration through litigation in the United States, (5) as well as all costs associated with responding to the relentless public relations campaign by which the Lago Agrio Plaintiffs' lawyers (in collusion with Ecuador) attacked Chevron with false and fraudulent accusations concerning this case. These damages will be quantified at a later stage in these proceedings;
14. Awarding moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct;⁷³³
15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment,⁷³⁴ and

⁷³² See Paulsson Expert Report, ¶ 100.

⁷³³ Several arbitral decisions have awarded moral damages and confirm that this Tribunal is empowered to grant moral damages for Claimants' non-pecuniary damages. See, e.g., **CLA-241**, *Benvenuti et Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, Aug. 8, 1980 ("Benvenuti Award"), 21 I.L.M. 740 (1982); **LCA-280**, *Lusitania Case (U.S. v. Ger.)*, Award, Nov. 1, 1923, 7 R.I.A.A. 32 (1923), at 40, (awarding moral damages including for "mental suffering, injury to [the individual claimant's] feelings, humiliation, shame degradation, loss of social position or injury to his credit or to his reputation," that awarding moral damages to the claimant company was "equitable" given that the State's illegal measures."); **CLA-234**, *Desert Line Award*, ¶ 289 (awarding moral damages and stating that a "legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation").

⁷³⁴ Recent arbitral jurisprudence confirms that compound interest is the recognized standard of compensation for the time value of money in international law. See e.g., **CLA-242**, *Middle East Cement Shipping and Handling*

16. Any other and further relief that the Tribunal deems just and proper.

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Respectfully submitted,



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Co. SA v. Egypt, ICSID Case No ARB/99/6, Award, Apr. 12, 2002 (“*Middle East Cement Award*”), ¶ 174 (Karl-Heinz Böckstiegel (President); Piero Bernardini; and Don Wallace Jr.); **CLA-228**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 (“*Vivendi II Award*”), ¶ 9.2.6 (awarding compound interest and stating “a number of international tribunals have recently expressed the view that compound interest should be available as a matter of course if economic reality requires such an award to place the claimant in the position it would have been had it never been injured.”); **CLA-47**, *Chevron Partial Award on Merits* (awarding compound interest).