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' MEMORIAL ON THE MERITS

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I. INTRODUCTION

1. This singular investment dispute arises from an unprecedented, fraudulent, and corrupt campaign of legally and factually baseless civil litigation and bad-faith criminal prosecution—all designed by the Lago Agrio Plaintiffs' attorneys in collusion with representatives of the Republic of Ecuador ("Ecuador," "Government" or "GOE") to eviscerate the value of prior settlement agreements, unlawfully influence an Ecuadorian court to enter an enormous judgment, and pressure Chevron into a large and unfair settlement.

2. The most shocking evidence of fraud and corruption is found in videotapes commissioned by the U.S. lawyers now directing and funding the civil litigation against Chevron in Ecuador (the "Lago Agrio Litigation").[1] One such tape shows a January 2007 strategy meeting between two of the U.S. lawyers for the Plaintiffs, in which one notes that Chevron has argued that there is a "conspiracy" between the Plaintiffs and the Republic of Ecuador. "*If only they knew*," the other responds.[2] Thanks to this and other outtakes from the documentary film *Crude*, now we do know.

3. The Lago Agrio Plaintiffs' lawyers brought the *Crude* film crew to meetings they held with the presiding judge in the Lago Agrio Litigation, and with the court-appointed "global expert" on damages, just days before that "expert" was appointed to his official capacity, in which he recommended a staggering US$ 27 billion judgment against Chevron. They filmed meetings in which they conspired to intimidate and humiliate judges, and then, with cameras still rolling, stormed into the courthouses to carry out their illegal plans. They filmed meetings with

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[1] Beginning in late July, Chevron obtained the *Crude* outtakes in U.S. discovery from Joseph Berlinger, the director who released the film. Mr. Berlinger shot hundreds of hours of film footage, which was edited down to just over one-and-a-half hours upon its commercial release in 2009. The publicly-released version of *Crude* features events such as judicial site inspections, hearings before the Lago Agrio Court, and other meetings among the Plaintiffs' representatives. Another version of the film available only on the Internet, however, contains extra scenes showing Dr. Carlos Martín Beristain—a member of the court-appointed "independent" expert's team whose "cancer study" formed the basis for the "independent expert's" US$ 9.5 billion assessment in damages for "excess" cancer deaths—working directly and privately with the Plaintiffs' lawyers. Mr. Berlinger filed a sworn declaration in a U.S. court that he had removed evidence of Dr. Beristain's coordination with the Plaintiffs at the request of the Plaintiffs' lawyers. Based on this and other evidence, a U.S. federal court ordered Mr. Berlinger to produce all of the unused film footage to Chevron, and this order was affirmed by the United States Court of Appeals for the Second Circuit, with some modifications. **Exhibit C-359**, *Chevron Corp. v. Berlinger*, Nos. 10-cv-1918, 10-cv-1966 (2d Cir. July 15, 2010).

[2] **Exhibit C-360**, *Crude* Outtakes, Jan. 31, 2007, at CRS169-05-CLIP 09 (emphasis added).

the President of Ecuador, with the President's Legal Secretary, with lawyers from the Solicitor General's office and outside counsel for Ecuador, and with various other Ministers and other high officials. Chevron has just begun to review and analyze the videotapes, and anticipates receipt of substantial additional evidence through document production and testimony ordered by U.S. federal courts,[3] but it is already beyond serious dispute that the Lago Agrio Litigation is an elaborate fraud, and that officials of Respondent, the Republic of Ecuador, have politically interfered with the courts and the criminal process in order to assist Plaintiffs in obtaining a large judgment against Chevron—regardless of the facts, Chevron's due process rights, and the Government's earlier releases of Texaco Petroleum Company ("TexPet") and its affiliates from all public environmental claims like those asserted in the Lago Agrio Litigation.

4. The *Crude* video footage and other evidence submitted with this Memorial provide unmistakable proof of fraud and corruption in the Lago Agrio Litigation and the Criminal Proceedings:

- Plaintiffs submitted an expert report in the Lago Agrio Litigation purportedly by Dr. Charles Calmbacher. But in a recent deposition, Dr. Calmbacher testified under oath that the report submitted in his name by the Plaintiffs' lawyers was falsified, and that at the sites he inspected he did not find evidence indicating a threat to human health or a need for further remediation.[4]

- In a January 2007 conversation between Joseph Kohn, the Lago Agrio Litigation's principal financier, and Steven Donziger, who purports to be Plaintiffs' lead U.S. lawyer, Mr. Donziger stated that the Lago Agrio Court would soon appoint a global assessment expert, that "our people will do the work and give it to this guy," and that the expert would then submit it as his own work.[5]

- On March 3, 2007, the Plaintiffs' lawyers and environmental consultants met secretly with Richard Stalin Cabrera Vega, the Court-nominated, supposedly "independent" expert, to plan his global assessment report.[6] The Plaintiffs' lawyer Pablo Fajardo told the group that "the work isn't going to be the expert's,"

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[3] Claimants reserve their right to supplement the record in this proceeding with additional evidence from those outtakes and other relevant sources.

[4] **Exhibit C-186**, *In re Chevron Corp*., No. 1:10-MI-0076-TWT-GGB, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 112:1-12, 117:2-5, 16-20.

[5] **Exhibit C-360**, *Crude* Outtakes, Jan. 31, 2007, at CRS169-05-CLIP 01.

[6] **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS187-01-02-CLIP 01, 187-01-02-CLIP 02, 187-01-02-CLIP 03, 189-00-CLIP 01, 189-00-CLIP 02, 189-00-CLIP 03, 191-00-CLIP 01, 191-00-CLIP 02, 192-00-CLIP 01.

and that the expert will "sign the report and review it. But all of us have to contribute to that report." One of the environmental consultants responds, "But not Chevron," to which everyone laughed.[7]

- A few days later, the Plaintiffs' lawyers met secretly with the Lago Agrio Court to discuss the appointment of the expert, and two weeks later the Court appointed Mr. Cabrera.[8]

- Court filings in U.S. litigation by the Plaintiffs' environmental consultants, Stratus Consulting, 3TM, Uhl, Baron Rana & Associates, and E-Tech International, and Stratus Consulting's document production demonstrate conclusively that these consultants secretly ghostwrote much or all of the reports for the supposedly "independent" expert, Mr. Cabrera, which he then submitted in his name.[9]

5. After examining *Crude* evidence from the March 3 meeting in particular, a U.S. federal court judge recently stated, "While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."[10]

6. But despite such clear evidence of fraud, the Lago Agrio Court has rejected every motion filed by Chevron to strike the fraudulent evidence and reports from the case record. Moreover, a week after the *Crude* outtakes were produced to Chevron, the Court abruptly announced that it would not consider Chevron's evidence from the outtakes demonstrating the Plaintiffs' and Cabrera's fraudulent acts. Far from rectifying the effects of the Government's and the Plaintiffs' misconduct through application of the rule of law, the Lago Agrio Court has capitulated to their pressure and denied Chevron an effective means to defend itself. The Court's astounding refusal to investigate or even acknowledge Plaintiffs' fraudulent activity appears to be the result of (i) pressure and intimidation from the Plaintiffs, (ii) political pressure from the President and other high Ecuadorian Government officials, and (iii) corruption. It is a further

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7 **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS191-00-CLIP 03.

8 **Exhibit C-360**, *Crude* Outtakes, Mar. 6, 2007, at CRS210-02-01; **Exhibit C-197**, Lago Agrio Court Order Appointing Richard Stalin Cabrera Vega, Mar. 19, 2007, at 8:30 a.m., p. 2 (Eng.).

9 *See infra* § II.G.3.d.

10 **Exhibit C-388**, *Chevron Corp. v. Charles Camp*, *Rodrigo Pérez Pallares and Ricardo Reis Veiga v. Charles Camp*, Case 1:10-mc-00027-GCM-DLH, Order at 12 (W.D.N.C. Aug. 28, 2010).

example of the inability of the Ecuadorian courts to act independently in cases in which, as here, the Government has a direct legal, financial, and political interest.

7. Despite Respondent's efforts to cast itself as an indifferent and innocent bystander in a dispute between private parties, it is anything but. The Republic has manifested a clear interest not only in avoiding its contractual obligations, but also in foisting those obligations back upon the investor to whom it promised finality and repose—and the Lago Agrio Litigation allows it to do indirectly what it cannot do directly. In addition to the promise of a multi-billion-dollar judgment, the lawsuit allows the Government to lay blame upon a long-departed foreign company while deflecting attention from Petroecuador's ongoing and admittedly harmful operations. With money and politics putting Ecuador squarely on the Plaintiffs' side, key Government officials—acting expediently and in bad faith—have attacked the validity of the settlements, condemned Chevron in the most strident terms, and given the Plaintiffs their full support. All of this has occurred in the context of an institutionally weak judiciary that is not capable of acting independently in politically-charged cases.

8. The Government officials, including the President of Ecuador, have succeeded in putting enormous political pressure on the Lago Agrio judges. In the *Crude* outtakes, Mr. Donziger admitted that this "is not a legal case," but a "political battle that's being played out through a legal case."[11] He affirmed that "the only way we're going to succeed, in my opinion, is if the country gets excited about getting this kind of money out of Texaco."[12] When President Correa was elected, Mr. Donziger called it a "new dawn" for the Plaintiffs because their "friends" were now in office, "Correa … really likes us," and the Plaintiffs should "take advantage" of this relationship.[13] According to Mr. Donziger, President Correa's Cabinet received a "whole … talk about the case" in February 2007, after which Correa appointed a Presidential Commission to monitor the case.[14] Since then, President Correa has toured the Oriente with the Plaintiffs' lawyers, made public statements about the case many times, publicly

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

[12] *Id.*

[13] *Id.* at CRS145-02-CLIP 01; *id.* [undated], at CRS139-03-CLIP 01.

[14] *Id.,* Feb. 15, 2007, at CRS180-00-CLIP 01.

called the Plaintiffs his "*compañeros*,"[15] called TexPet's operations a "barbarity,"[16] said that Chevron must be "held liable,"[17] declared Chevron an "open enemy" of the country,[18] and proclaimed that he wanted his "indigenous friends to win."[19] Other high officials have also publicly declared Chevron's guilt, Petroecuador's innocence, and that a quick decision is necessary.[20] The political signals to the Court are unmistakable. In an institutionally weak judiciary in which the Executive Branch has repeatedly removed or prosecuted judges that have made rulings that the Government did not like,[21] these public statements are tremendously influential, and have made it impossible for Chevron to obtain a fair trial. The timing of these public statements has not been fortuitous; the statements have preceded key judicial and prosecutorial decisions. As the timeline of events beginning on page 148 of this Memorial demonstrates, the public statements of President Correa and the increasing political pressure have clearly influenced the Court's decisions, in violation of Chevron's due process rights.

9. The *Crude* outtakes starkly reveal a joint strategy of intimidating the judges in the Lago Agrio Litigation. On many occasions, the Plaintiffs have held demonstrations in front of the courthouse, and at most hearings they brought crowds of people to the Court. In one film clip, Mr. Donziger says that there is an "institutional weakness in the judiciary" in Ecuador, and that "they [judges] make decisions based on who they fear the most, not based on what the laws

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15 **Exhibit C-173**, Excerpt from Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008, at 11:00 a.m.

16 **Exhibit C-170**, Press Release, Office of President Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007.

17 *Id.*

18 **Exhibit C-391**, *Correa Will Turn to UNASUR for Joint Struggle against the Transnationals*, EL MERCURIO, Apr. 3, 2010.

19 **Exhibit C-228**, Hugh Bronstein, *Ecuador Says had no role in Alleged Bribery case*, REUTERS, Sept. 12, 2009.

20 **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 said that "[t]he pollution is the result of Chevron's actions and not of Petroecuador"); **Exhibit C-268**, *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009 (in which the Ombudsman declared that "arguments concerning the State's responsibility for the Lago Agrio Plaintiffs' claims "cannot be accepted under any circumstances"); **Exhibit C-392**, '*Chevron has delayed proceedings in Lago Agrio*,' LA HORA, Apr. 3, 2010 (in which the Ombudsman "urge[d] the courts to hand down their decision.")

21 **Exhibit C-360**, *Crude* Outtakes, June 6, 2007, at CRS350-04-CLIP 01 (in which Mr. Donziger said, "You know, it's a problem of institutional weakness in the judiciary, generally, and of this court, in particular. We have concluded that we need to do more, politically, to control the court, to pressure the court."); *see also infra* § IV.I for a discussion of the Government's influence on the judiciary.

should dictate."[22] He observed that, "no one fears us right now. And, until they fear us, we're not gonna win this case. I'm convinced."[23] With that in mind, Mr. Donziger told the Plaintiffs' consultants that if "there's [*sic*] are a thousand people around the courthouse, you're going to get what you want."[24] Three months later, he proposed to "take over the court with a massive protest" and "shut the court down for a day."[25] He observed that the Ecuadorian judiciary is "corrupt," and that you have to play "dirty" in Ecuador.[26] In another strategy meeting discussing pressuring the Court to swear-in Mr. Cabrera as the global expert, Mr. Fajardo reported that "the judge is scared shitless."[27] In a final videotape, one of the Plaintiffs' counsel says that the judge will be killed if he rules against them. Mr. Donziger responds, "He might not be, but … he thinks he will be. Which is just as good."[28] The institutional weakness of the Ecuadorian judiciary and the political pressure imposed by the Government have permitted and assisted the Plaintiffs in these tactics.

10. As lead U.S. counsel for the Plaintiffs, Steven Donziger, bluntly stated in one of the *Crude* outtakes:

> Hold on a second, you know, this is Ecuador, okay? … You can say whatever you want but at the end of the day, there's a thousand people around the courthouse, you're going to get what you want . . . And we can get money for it . . . *Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win.*[29]

Mr. Donziger's statement came in response to a remark by one of the Plaintiffs' environmental consultants, who pointed out that, contrary to the Plaintiffs' assertions, there is *no* evidence that

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

23 *Id.*

24 *Id.*, Mar. 4, 2007, at CRS-195-05-CLIP 01.

25 *Id.*, June 6, 2007, at CRS350-04-CLIP 01.

26 *Id.*, Mar. 30, 2006, at 053-02-CLIP 01; *id.* at 052-00-CLIP 06; **Exhibit C-344**, *In re Application of Chevron Corp., In re Application of Rodrigo Pérez Pallares and Richard Reis Veiga*, Memorandum Opinion (S.D.N.Y. May 6, 2010) (Kaplan, J.), at 10.

27 **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, at CRS376-03-CLIP 10.

28 *Id.*, Apr. 5, 2006, at CRS129-00-CLIP 02.

29 *Id.*, Mar. 4, 2007, at CRS195-05-CLIP 01 (emphasis added).

"groundwater contamination has spread anywhere at all" and that it does not exist other than "right under the pits" at issue in the Lago Agrio Litigation.

11. Ecuador's support for the Plaintiffs has also included an egregious and indefensible abuse of the prosecutorial power. The public statements and private advice of President Correa, coordinating with the Plaintiffs, have decisively influenced the course of the Criminal Proceedings against Claimants' lawyers, Ricardo Reis Veiga and Rodrigo Pérez Pallares. In early March 2007, Mr. Donziger rehearsed with his team a scheduled March 6, 2007 press conference designed, among other things, to pressure the Prosecutor General to file criminal charges.[30] The very next day, Mr. Donziger discussed his upcoming private meeting with a Supreme Court justice that afternoon and how the filing of criminal charges against Chevron's attorneys could affect the dynamics of a settlement.[31] Within two weeks, President Correa issued a press release announcing the Government's support for the Lago Agrio Plaintiffs and its intention to help them collect evidence.[32]

12. Having toured the Lago Agrio oilfields with the Plaintiffs' lawyer Pablo Fajardo, President Correa issued a press release on April 26, 2007, calling for the criminal prosecution of those who signed the 1998 Final Release.[33] In a national radio address two days later, he echoed the Plaintiffs' rhetoric, calling Chevron's Ecuadorian lawyers traitors and demanding that they, along with the Petroecuador officials who signed the 1998 Final Release, be criminally prosecuted.[34] The *Crude* cameras caught Mr. Donziger responding to this development by exclaiming, "Correa just said that anyone in the Ecuadorian Government who approved the so-

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30 **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS-198-00-CLIP 04.

31 *Id.*, Mar. 5, 2007, at CRS208-04-CLIP 04, CRS208-06-CLIP 02. This meeting took place right after the Prosecutor General's request to the Supreme Court President to archive the criminal case file. The Supreme Court President ignored this request and failed to archive the case.

32 **Exhibit C-168**, Press Release, Government of Ecuador Secretary General of Communications, *The Government Backs Actions of the Assembly of Persons Affected by Texaco Oil Company*, Mar. 20, 2007.

33 **Exhibit C-242**, Press Release, Office of President Correa, *President Calls Upon District Attorney to Allow Criminal Case to be Heard Against Petroecuador Officers Who Accepted the Remediation Performed by Texaco*, Apr. 26, 2007; **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007.

34 **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

called remediation is now going to be subject to litigation in Ecuador," and adding that those people "are shittin' in their pants right now."[35]

13. President Correa later offered private advice on how to press the criminal charges to Plaintiffs' lawyer Mr. Fajardo, who recounted the conversation: "So, the President thinks that if we put in a little effort, before getting the public involved, the Prosecutor will yield, and will re-open that investigation into the fraud of—of the contract between Texaco, Inc., and the Ecuadorian Government."[36] This is precisely what the Plaintiffs ultimately achieved: in August 2008, with the statute of limitations nearing expiration, at the urging of Plaintiffs' lawyers President Correa again called for the prosecution of Claimants' lawyers.[37] Despite the fact that the former Prosecutor General and the Pichincha Prosecutor had found no basis for any criminal charges, new Prosecutor General Washington Pesántez (a friend of President Correa and a purported puppet of Alexis Mera, President Correa's legal advisor) re-opened the charges against Claimants' lawyers and, in recent months, his office escalated the proceedings by filing a formal Prosecutorial Opinion.[38]

14. In September 2009, videotape evidence revealed corruption on the part of the Lago Agrio Court. The videotapes showed purported Ecuadorian Government representatives meeting with would-be remediation contractors and discussing a bribe of US$ 3 million related to the judgment in the Lago Agrio case. Judge Juan Núñez attended two of those meetings, discussed the case with the contractors, and affirmed the guilt of Chevron to them. He described any appeal of his judgment by Chevron as destined to fail—a mere "formality."[39] The purported Government representatives told the contractors that the Government was behind this, that its officials would help the judge write his final judgment against Chevron, that it would direct the resulting remediation contracts, and that the bribe would be split in the following manner: US$ 1

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[35] **Exhibit C-344**, *In re Chevron Corp*., Case No. M-19-111, U.S. District Court for the Southern District of New York, Memorandum Opinion, May 6, 2010 ("S.D.N.Y. Memorandum Opinion"), at 11.

[36] **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, at CRS-376-03-CLIP-01.

[37] **Exhibit C-173**, Excerpt from Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008, at 10:00 a.m.; **Exhibit C-252**, Order from Prosecutor General Washington Pesántez Ordering Investigation to Begin, Aug. 26, 2008, at 11:00 a.m.

[38] **Exhibit C-346**, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010.

[39] **Exhibit C-267**, Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 32.

million to the judge, US$ 1 million to the Presidency, and US$ 1 million to the Plaintiffs. Despite Chevron's complaint, Judge Núñez has never been prosecuted or even disciplined by Ecuadorian authorities. After Judge Núñez was allowed to "excuse" himself from the case (in order, according to public statements by Ecuador's Prosecutor General, to avoid delaying a judgment), the new judge in the Lago Agrio case denied Chevron's motion to nullify his biased rulings, including his refusal to allow Chevron any meaningful discovery of Mr. Cabrera's fraudulent report.

15. The purpose behind this strategy of intimidation, political pressure, and corruption is clear—to extort billions of dollars from a foreign investor through an unjust settlement or a fraudulent judgment. This is all being done in violation of the State's contractual and Treaty obligations. In the Lago Agrio Litigation, the nominal Plaintiffs seek to hold Chevron liable for the same claims that Ecuador, its State-owned oil company Petroecuador, and four municipalities and two provinces in the former Concession Area settled and released in a series of agreements signed in 1995, 1996 and 1998. The Lago Agrio Plaintiffs do not seek any individual damages for alleged injuries to themselves or their property. Rather, they purport to act in a representative capacity, bringing public claims to remediate the former Concession Area as well as the oil-production facilities owned and controlled by Petroecuador for the past 20 years. But Ecuador has already settled and released exactly those claims on behalf of the Ecuadorian community, and the Lago Agrio Plaintiffs' attempts to prosecute the same claims on behalf of that same community are barred by *res judicata*.

16. Ecuador has not only refused to inform the Lago Agrio Court that Claimants have been released from all public environmental claims, but instead, in breach of its good-faith duty to protect and defend Claimants' releases, it has actively supported the Lago Agrio Plaintiffs in their litigation against Chevron. To this end, Ecuador has sought to undermine the Settlement and Release Agreements and has signaled to the Court that the only acceptable outcome in Lago Agrio is a massive judgment against Chevron. As part of these efforts, Ecuador has pursued the substantively baseless and procedurally invalid Criminal Proceedings against Claimants' lawyers who signed the Settlement and Release Agreements. This conduct is anathema to the BIT, which requires fair and equitable treatment of foreign investors, and observance of fundamental legal principles such as *res judicata*, which provides predictability, finality, and repose.

17. Although the Lago Agrio Plaintiffs purport to seek environmental remediation, they have refused to do so from Petroecuador, which is primarily responsible for any environmental impacts in the former Concession Area based on its majority ownership and oversight of the Consortium with TexPet, its sole ownership of oil operations for the past 18 years (which indisputably has caused environmental harm), and its release of Claimants from any further public environmental-remediation obligations. Instead, the Lago Agrio Plaintiffs have promised Ecuador that they will not seek to hold Ecuador or Petroecuador liable for such remediation or accept any recovery that might be awarded against them—an evident *quid pro quo* for Ecuador's assistance in the litigation against Chevron. This, along with their effort to halt the Governments' belated remediation program, indicate that the Plaintiffs' attorneys are not truly interested in the environment, but rather a large payday.

18. The acts and omissions of Ecuador's Government and its courts with respect to the Lago Agrio Litigation and the Criminal Proceedings constitute independent breaches of Ecuador's Settlement and Release Agreements with Claimants and violations of the U.S.-Ecuador bilateral investment treaty.

19. Article II of the U.S-Ecuador BIT contains the substantive protections that Ecuador must provide to a foreign investor. Fundamentally, Ecuador is required to "observe any [contractual] obligation" that it enters into "with regard to investments."[40] Because such an obligation undertaken by a host state gives rise to concomitant rights on behalf of the foreign investor, Ecuador is also required to provide those investors with an "effective means" of asserting, defending or vindicating those same rights.[41] The Treaty imposes other positive obligations on Ecuador: It must treat a foreign investor "fair[ly] and equitab[ly],"[42] it must give it "full protection and security,"[43] and it cannot impose "arbitrary or discriminatory measures."[44]

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[40] **Exhibit C-279,** U.S.-Ecuador BIT, Art. II(3)(c), signed Aug. 27, 1993 ("Each Party shall observe any obligation it may have entered into with regard to investments.").

[41] *Id*. Art. II(7) ("Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.").

[42] *Id*. Art. II(3)(a) ("Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.").

[43] *Id*.

[44] *Id*. Art. II(3)(b).

20. By their actions and inactions, all branches of the Ecuadorian State have violated all of these provisions with respect to Chevron's and TexPet's investments.

- *First*, Ecuador has violated Claimants' rights under the Settlement and Release Agreements. Claimants have the right to be fully and forever released and discharged from any and all claims for public environmental impact arising out of the Consortium's former oilfield activities and from any further obligation to pay for any such environmental impact. The Lago Agrio Litigation solely concerns such claims, and Claimants therefore have the related *res judicata* right to be free from any legal process relating to those claims. By (1) failing to dismiss the Lago Agrio Litigation, as requested by Chevron in its 2003 Answer to the Plaintiffs' Complaint; and (2) refusing to accept responsibility for any remaining remediation that may be necessary, Ecuador has violated Claimants' rights and breached its agreements with Claimants. These breaches constitute violations of investment agreements and of the BIT's umbrella clause.

- *Second*, Ecuador has provided no means—let alone an "effective means"—for Claimants to effectively resolve their *res judicata* and jurisdictional defenses, or receive any measure of due process of their right to a fair and open hearing. With the Government stridently and openly aligned against Chevron, the political interference in the judicial process in Ecuador has rendered any means that is available to Chevron completely ineffective. All of this is in breach of Ecuador's obligation under Article II(7) of the BIT.

- *Third*, Ecuador's failure to provide Claimants due process in its courts, its acts taken in bad faith, its deliberate frustration of Claimants' legitimate expectations, its brazen attempts to coerce the judicial process and harass Claimants and their representatives, and its refusal to protect Claimants' investment, all amount to a failure of "fair and equitable treatment" under the BIT.

- *Fourth*, the Ecuadorian Government has breached its other positive obligations to require full protection and security to Claimants' investment, and to refrain from treating Claimants arbitrarily and discriminatorily.

These treaty derogations arise from Ecuador's refusal to acknowledge and adhere to its contractual commitments to Claimants and its refusal to apply the rule of law to the released claims that are being brought against Chevron. Independently and in sum, these acts and omissions have caused significant harm to Claimants' investments in Ecuador, entitling Claimants to relief under the Treaty.

II. FACTUAL BACKGROUND

A. TexPet's Operations in Ecuador

1. The TexPet-Petroecuador Consortium

21. On February 5, 1964, Ecuador granted oil exploration and production rights in Ecuador's Oriente region[45] to TexPet and the Ecuadorian Gulf Oil Company ("Gulf") through a 45-year concession contract with the companies' local subsidiaries (the "Napo Concession").[46] Under the Napo Concession, TexPet and Gulf each owned 50% ownership rights as concessionaires.[47]

22. In early 1965, TexPet and Gulf entered into a Joint Operating Agreement (the "Napo JOA") and formed a Consortium.[48] The Napo JOA set forth the parties' rights and obligations as joint owners in the Napo Concession.[49] The parties agreed to share all rights and obligations of the Napo Concession in accordance with their percentage interest in the venture,[50] and TexPet served as Operator of the Consortium.[51]

23. TexPet and Gulf's investment in the Oriente was the first large oil operation in the area,[52] and entailed significant fiscal and logistical risks and challenges. In 1967, TexPet and Gulf made their first oil discovery and drilled their first well.[53] By 1969, they had discovered considerable oil reserves. That same year the Government awarded TexPet the construction of an oil pipeline, the Trans-Ecuadorian Oil Pipeline System (the "SOTE"), to connect the Lago Agrio oilfield with the Esmeraldas oil export maritime facility and refinery on the northwestern

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45 The Oriente Region of Ecuador refers to the Amazon Basin of Ecuador, which is located in the eastern section of the country, bordering Colombia and Peru.

46 **Exhibit C-6**, Supreme Decree No. 205-A, Feb. 5, 1964, published in Official Registry No. 186, Feb. 21, 1964.

47 *Id.*

48 **Exhibit C-409**, Texaco-Gulf NAPO Joint Operating Agreement, Jan. 1, 1965 ("Napo JOA").

49 *Id.*

50 *Id.* Art. 4.1.

51 *Id.* Art. 6.1.

52 In 1937, the Anglo-Saxon Petroleum Co., Ltd ("Shell") received a concession from Ecuador for the entire Oriente, but abandoned its effort in 1950 after drilling six wells with unsatisfactory results. **Exhibit C-410**, Donald G. Sawyer Report: Response to Evidentiary Request No. 29, July 1, 2010, at 1-2.

53 **Exhibit C-410**, Donald G. Sawyer Report: Response to Evidentiary Request No. 29, July 1, 2010, at 3-4.

coast of Ecuador. Construction of the 506 km pipeline across the Andes Mountains took over three years to complete. At the same time, TexPet also built export facilities, including storage tanks, submarine lines, and buoys. Shortly thereafter, the Consortium began producing and exporting oil.

24. In September 1971, Ecuador formed the Corporación Estatal Petrolera Ecuatoriana ("CEPE")[54] to represent its interests in the hydrocarbons industry. It then enacted a new Hydrocarbons Law, requiring the incorporation of more onerous terms into future concession contracts and Government participation in oil contracts through CEPE.[55]

25. In February 1972, a military *junta* assumed power in Ecuador and sought firm control over the nation's petroleum resources. The new regime required that the 1971 Hydrocarbons Law apply retroactively to all preexisting concession contracts and called for concessionaires to sign new contracts by June 6, 1973.[56] To remain in the Ecuadorian hydrocarbons business, TexPet and Gulf were required to revise the terms of the Napo Concession and surrender a significant portion of their concession rights and interests, including transfering a share of their interest to CEPE.[57]

26. In March 1973, as part of the Government's renegotiation policy, Ecuador issued a model hydrocarbons contract that formed the basis of negotiations between CEPE, and TexPet and Gulf.[58] In August of that year, the Government issued Supreme Decree No. 925, which contained the terms of the new TexPet-Gulf concession. Two days later, the parties signed the agreement (the "1973 Agreement").[59]

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[54] In September 1989, the Government replaced CEPE with the new national oil company Empresa Estatal Petroleos del Ecuador ("Petroecuador"), which succeeded CEPE in all rights and obligations.

[55] **Exhibit C-411**, Hydrocarbons Law, Decree No. 1459, Sept. 27, 1971, Official Registry No. 322, Oct. 1, 1971. Specifically, the new Hydrocarbons Law included limitations on the maximum concession and exploitation areas, increased annual surface taxes, and increased Government royalties.

[56] **Exhibit C-412**, Supreme Decree No. 430, published in Official Registry No. 80, June 14, 1972; **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 23.

[57] **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 23.

[58] *Id.* **Exhibit C-414,** Supreme Decree No. 317, published in Official Registry No. 283, Apr. 10, 1973; **Exhibit C-415,** Supreme Decree No. 905, published in Official Registry No. 362, Aug. 3, 1973.

[59] **Exhibit C-416**, Supreme Decree No. 925, Aug. 4, 1973, published in Official Registry No. 370, Aug. 16, 1973; **Exhibit C-7**, Agreement between the Government of Ecuador, Ecuadorian Gulf Oil Company, and Texaco

27. The 1973 Agreement made several changes to the original Napo Concession. First, it significantly reduced the area of the concession from more than 1.4 million hectares to less than 500,000 hectares. Second, the 1973 Agreement increased the royalty and surface-right rates and set June 6, 1992, as the Concession's termination date.[60] Third, it granted CEPE an option to acquire a 25% ownership interest in the Consortium by June 1977.[61] Ecuador later mandated that CEPE's option would go into effect in 1974.[62] In June 1974, CEPE exercised the option and acquired a 12.5% interest in the Consortium from TexPet and a 12.5% interest from Gulf. The result was a 25% ownership interest by CEPE in the Consortium, and a 37.5% ownership each for TexPet and Gulf.[63] This agreement was set forth in an "*Acta*" stating that the parties' activities would be regulated by an operating agreement and that CEPE would participate in Consortium subcommittees.[64]

28. On December 31, 1976, CEPE acquired Gulf's remaining interest, giving CEPE a 62.5% interest in the Consortium, with TexPet retaining a 37.5% interest, until the 1973 Agreement expired and the Consortium ended in 1992.[65] Even though TexPet was a minority owner, it continued to serve as Operator until 1990, always under the control of CEPE/Petroecuador and the regulation of the Government.

29. In September 1988, CEPE advised TexPet that it intended to take over as Operator in July 1990. In 1990, TexPet and Petroecuador entered into an agreement by which Petroecuador's affiliate, Petroamazonas, replaced TexPet as Operator.[66] On June 30, 1990, Petroamazonas assumed responsibility for the Consortium's operations.

Petroleum Company, Aug. 6, 1973 (the "1973 Agreement"); **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 25.

60 **Exhibit C-7**, 1973 Agreement, at §§ 4, 28, 29; **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 24.

61 **Exhibit C-7**, 1973 Agreement, at §§ 52.1 and 52.2.

62 **Exhibit C-417**, Memorandum of Agreement between the Government of Ecuador and TexPet, June 14, 1974; **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 28.

63 **Exhibit C-417**, Memorandum of Agreement between the Government of Ecuador and TexPet, June 14, 1974.

64 *Id.*

65 **Exhibit C-8**, Agreement among the Government of Ecuador, CEPE and Ecuadorian Gulf Oil Company, May 27, 1977 ("1977 Agreement").

66 **Exhibit C-418**, Agreement for the Change of Operator of the Consortium Petroecuador-Texaco, June 30, 1990.

30. Approximately two years later, on June 6, 1992, the Consortium expired. TexPet has not operated any oilfields in Ecuador since 1990, and has had no ownership interest in oilfield operations in Ecuador since 1992. A Petroecuador subsidiary has conducted—and has significantly expanded—operations in the Consortium's former oilfields in the Oriente region from 1992 until today.

2. Ecuador's Control over the Consortium

31. Although TexPet was the Operator from 1965 to 1990, the Consortium, as a whole, made overall operational decisions, stood to enjoy any profits, and bore any operational risk and liability associated with operations. When CEPE became the majority owner, it assumed and exercised majority control in regulating, funding and dictating the Consortium's operations. It audited Consortium contracts and expenses, funded 62.5% of the Consortium's operating and capital costs, and maintained on-site inspectors and engineers.[67] It approved the Consortium's work plans, drilling locations and practices, well completions, road construction, and other operations.[68] It also authorized the Consortium to employ specialized subcontractors, subject to oversight by Ecuador, which approved all of the subcontractors' technical backgrounds and their compliance with legal and regulatory requirements. As majority owner, CEPE approved all operations and significant contracts.

32. Ecuador regulated, approved, and in many instances mandated the Consortium's activities.[69] For instance, the Consortium submitted all work plans and budgets, including for the

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[67] **Exhibit C-419**, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527, Deposition of Robert M. Bischoff, at 57, 190 (S.D.N.Y. Aug. 17 and 18, 1995); **Exhibit C-420**, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527, Deposition of Robert C. Shields, at 294-95 (S.D.N.Y. Aug. 24, 1995); **Exhibit C-7,** Agreement between the Government of Ecuador and Ecuadorian Gulf Oil Company, Aug. 6, 1973 (the "1973 Agreement"), §§ 22-25 (requiring Government approvals of the Consortium activities and budget).

[68] *See* **Exhibit C-421,** Letter from TexPet to CEPE, Jan. 6, 1978 (stating that projects and contracts will be submitted for CEPE approval); **Exhibit C-422,** Letter from Director General of Hydrocarbons to TexPet, Jan. 8, 1979 (the Director General of Hydrocarbons requesting that TexPet send the Work Program approved by CEPE, not just Texaco, Inc.); **Exhibit C-423,** Letter from CEPE to TexPet, Apr. 3, 1985 (approving and authorizing TexPet to renew contracts).

[69] *See* **Exhibit C-9**, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527, Ecuador's Brief *Amicus Curiae* at 2-4 (S.D.N.Y. 1994) ("Ecuador strictly regulates the exploration and development of its resources by foreign investors" and the *Aguinda* case "involves conduct . . . extensively regulated by the Government of Ecuador."), at 2-4. **Exhibit C-424**, Deposition of Diego Tamariz, Nov. 14, 2006, at 126:20-132:13; **Exhibit C-290**, Deposition of Giovanni Rosania Schiavone, Oct. 19, 2006, at 20:19-26:12; **Exhibit C-425**, Deposition of Edmund Brown, Dec. 19, 2006, at 66:5-68:13. *See also* **Exhibit C-426,** Minutes of Meeting between Consortium and Department of Hydrocarbons regarding 1976 Work Program, Jan. 22, 1976 (discussing exploration, development of drilling

drilling of new wells, to the Government. Ecuador not only approved or modified the plans, but also supervised and monitored the planned activities.[70] In fact, a U.S. federal court found that Ecuador had the primary role in "authorizing, directing, funding, and profiting from" the Consortium's activities.[71]

33. Ecuador also reviewed and approved the design specifications for the SOTE's construction. Supreme Decree No. 925 confirmed that "the [SOTE] pipeline . . . has been built in accordance with specifications approved by the Government pursuant to the National Security Law, and under the Government's cost and technical control."[72] The Government also required the Consortium to construct public roads to encourage the Oriente's development and colonization.[73]

34. Throughout TexPet's time as Operator, Ecuador continuously monitored the environmental impact of the Consortium's activities by physically inspecting its operations, checking for compliance with environmental laws, investigating environmental problems such as oil spills, and investigating complaints by members of the local community.[74] The Ecuadorian Director of the Hydrocarbons requested that environmental activities, studies, and funds be included in the Consortium's annual work programs each year that the work program came up for approval.[75] Ecuador also issued fines against TexPet on the few occasions when crude oil was detected in rivers or oil spills occurred.[76]

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and production)**; Exhibit-427,** Interoffice Memorandum from J.D. Mahoney of TexPet to E.D. McKnight of TexPet, June 17, 1974 (describing details of June 10 meeting with the Director General of Hydrocarbon's technical personnel).

70 **Exhibit C-413**, Affidavit of René Bucaram, Feb. 25, 2005, ¶ 35; **Exhibit C-424,** Deposition of Diego Tamariz, Nov. 14, 2006, at 126:20-132:13; **Exhibit C-290**, Deposition of Giovanni Rosania Schiavone, Oct. 19, 2006, at 20:19-26:12; **Exhibit C-425**, Deposition of Edmund Brown, Dec. 19, 2006, at 66:5-68:13. *See also* **Exhibit C-428,** Letter from Director General of Hydrocarbons to TexPet, Dec. 12, 1979 (stating that the Work Program is rejected because of concern that he/it has not taken CEPE's requests into consideration).

71 **Exhibit C-10**, *Aguinda v. Texaco, Inc.,* 142 F. Supp. 2d 534, 551 (S.D.N.Y. 2001).

72 **Exhibit C-416**, Supreme Decree No. 925, Aug. 4, 1973, published in Official Registry No. 370, Aug. 16, 1973, at Cl. 18.2.

73 *See infra* § II.A.5.

74 **Exhibit C-425**, Deposition of Edmund Brown, Dec. 19, 2006, at 66:5-68:13; **Exhibit C-424**, Deposition of Diego Tamariz, Nov. 14, 2006, at 126:20-132:13.

75 *See* **Exhibit C-429**, Letter from TexPet to Director General of Hydrocarbons, Dec. 30, 1987 (noting that TexPet submits official petroleum or derivative spill reports with solutions and repairs of the spills to the Director

35. Before its termination, the Consortium's activities generated over US$ 23.3 billion in revenue.[77] The vast majority of these benefits—US$ 22.67 billion—went directly to the Ecuadorian Government in the form of income taxes, royalties, contribution for domestic consumption, and gross profit on CEPE/Petroecuador's share.[78] In other words, Ecuador reaped 97.3% of the economic benefits of the Consortium.

36. TexPet's total profits over the life of the Consortium were a small fraction of those realized by Ecuador—less than US$ 500 million.[79] TexPet was entitled to a 37.5% share of the Consortium's oil production, on which it paid an 18.5% royalty.[80] TexPet also paid a 37.5% share of the Consortium's expenses and income tax at the rate of 87.31%. [81]

37. After TexPet left the Consortium, from 1992 to 2008 alone Petroecuador's operations generated over 1.2 billion barrels of crude oil, which represent a market value of more than US$ 94 billion.[82]

3. The Consortium's Operations

38. The Consortium's physical operations centered on wells and production stations. During its life, the Consortium drilled 321 wells within the Concession Area, and developed and

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General of Hydrocarbons; **Exhibit C-430**, Letter from TexPet to Director General of Hydrocarbons, Feb. 8, 1988 (describing TexPet's objectives to reduce environmental contamination and details improvements made to its operations).

76 **Exhibit C-431**, Letter from the Ministry of Natural Resources and Energy, Aug. 27, 1973 (fining TexPet for detection of crude oil in rivers and ravines in Oriente); **Exhibit C-432**, Letter from the Director General of Hydrocarbons to TexPet, July 4, 1986 (providing details of oil spill and clarifying oil spill amounts); **Exhibit C-433**, Letter from Director General of Hydrocarbons to TexPet, Sept. 5, 1975 (TexPet fined for overflow of TexPet tank).

77 Report of Brent Kaczmarek, Navigant Consulting, Inc., Sept. 6, 2010 (hereinafter "Navigant Report"), Table 1.

78 Navigant Report ¶ 81.

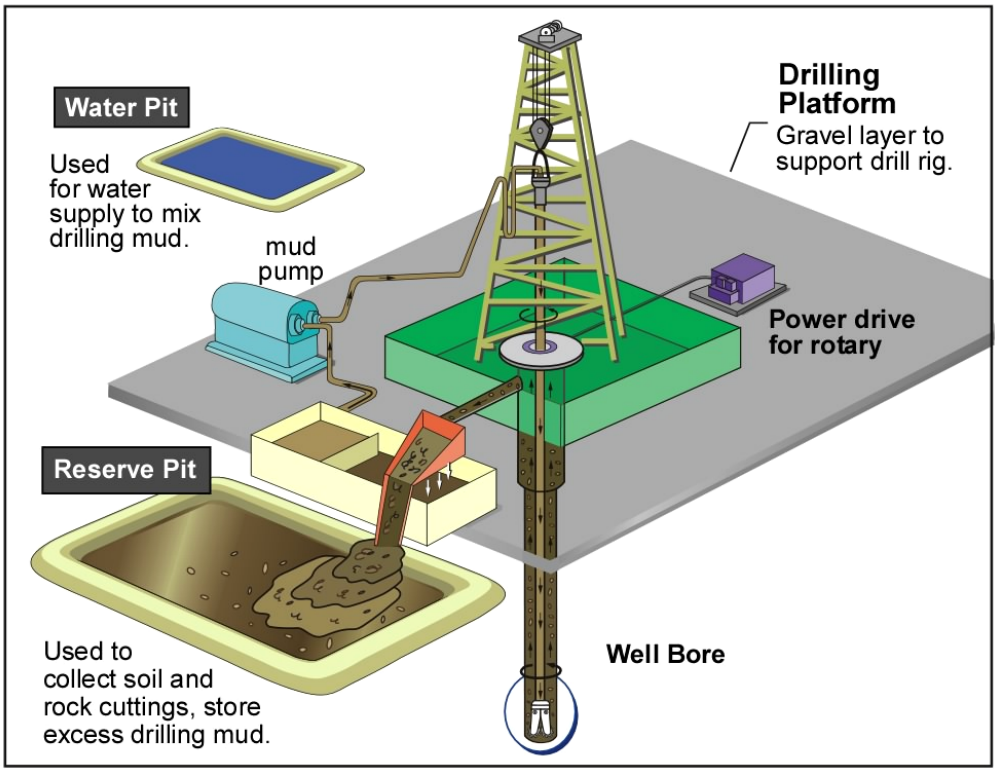
79 *Id.* ¶ 84, Figure 5; *see also* **Exhibit C-213**, Chevron's Rebuttal to Cabrera's Supplemental Report, Feb. 10, 2009, at 5:35 p.m., p. 9 (Eng.).

80 TexPet also was required to sell a portion of its share of production, at reduced rates, to Ecuador for domestic consumption.

81 TexPet's 87.31% tax rate applied since 1977. Before 1977, TexPet was subject to a 71.42% income tax rate and a 17% royalty. **Exhibit C-434,** Supreme Decree No. 982, Nov. 21, 1975 (stating that income tax rate is "71.42% and royalties 17.%); **Exhibit C-435,** Supreme Decree No. 2059, Dec. 16, 1977 (increasing the income tax rate from 71.42 to 87.31% and royalties from 17% to 18.5%).

82 **Exhibit C-436**, Response to the Proposal of Mr. Cabrera regarding Improvement of the Infrastructure in the Former Petroecuador-TexPet Concession, Oriente Region, Ecuador by John Connor and William Hutton, Aug. 29, 2008, at 1, 7.

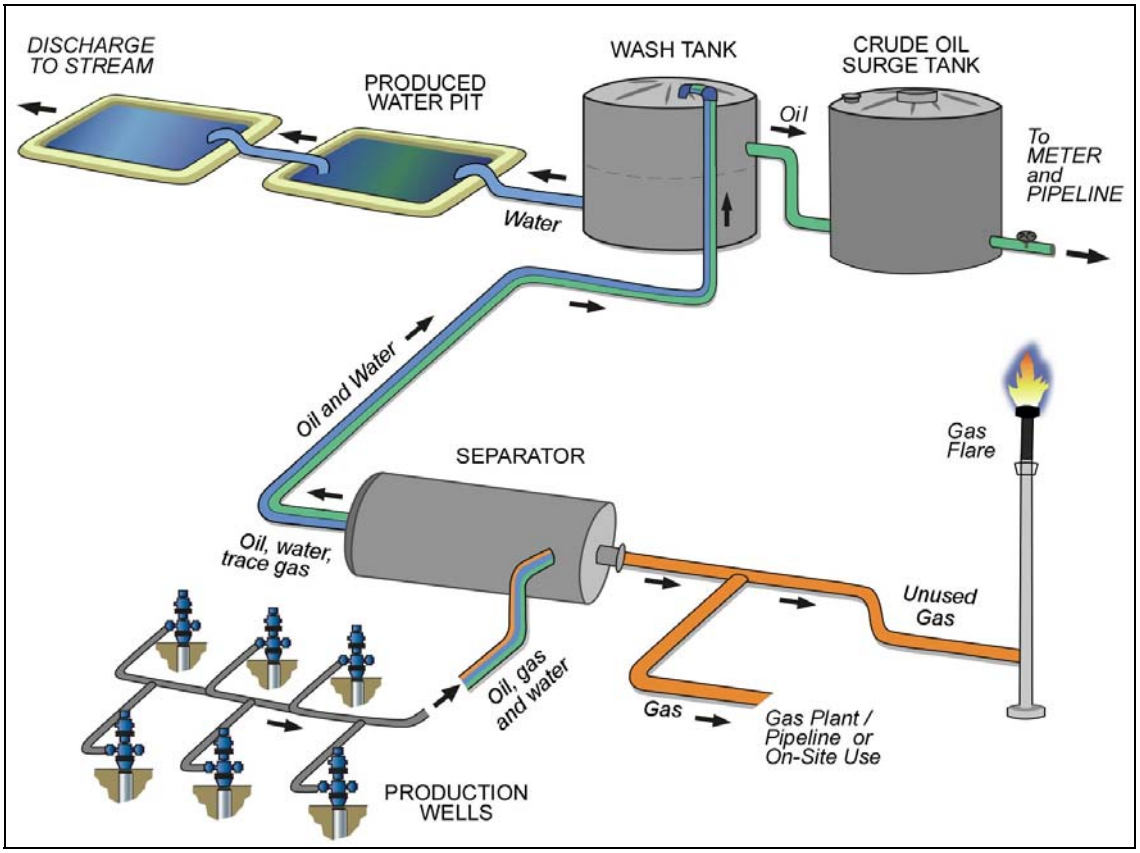
operated 18 production stations, 6 base camps, and associated pipelines.[83] The graphic below depicts the process of drilling an oil well. The derrick, a tower-like structure, connects the drill bit (which drills the well hole) to a series of pipes, and forces drilling muds and water through the pipes down the well. The drilling muds and water serve as a lubricant for the drill bit as it crushes the rocks on its way to the crude oil deposit, and provides pressure equal to that of the formation. As the drill bit advances into the ground, soil and rock (called drill cuttings) are forced up through the well. The drill cuttings that reach the surface are placed in an earthen pit or tank, where the heavier solids settle out and the liquids are re-circulated back into the well:



39. Oil coexists naturally underground with natural gas and formation (or produced) water, which also rise up the well as oil is pumped. At the production stations built by TexPet, the crude oil, natural gas, and produced water were separated. The vast majority of the crude oil was sent through the SOTE to a refinery or shipping terminal on the coast for sale and export. The produced water was treated to remove, to the extent possible, remaining oil components and

[83] 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") at 31.

sediments before discharge.[84] The natural gas, if not used at production facilities or processed for marketing as directed by the Government, was flared.[85] The graphic below depicts a production station:



40. In the normal course of operations, the Consortium handled all residual material produced in the oil recovery process. TexPet used excavated earthen pits (trenches in the ground) to hold drilling muds, to contain and treat produced water, and to contain wastes associated with maintenance or repair activities or other operations. Earthen pits are an integral

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[84] J. Connor Expert Report at 7, 29; **Exhibit C-437,** D. Southgate, J. Connor and D. MacNair, Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008 at 6, 9, and 10 (stating that "the production stations in the former Concession used separation pits to remove solids and oil from produced water before its discharge.")

[85] **Exhibit C-436,** J. Connor and W. Hutton, Response to the Proposal of Mr. Cabrera Regarding Improvement of the Infrastructure in the Former Petroecuador-TexPet Concession, Aug. 29, 2008, at 8; **Exhibit C-437,** D. Southgate, J. Connor and D. MacNair, Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008 at 7, 12.

part of petroleum exploration and production operations and are used worldwide.[86] In Ecuador, the low permeability of the clay soil found in the Oriente, and the low mobility of the crude oil through the area, among other factors, limited the spread of the pits' contents beyond their boundaries.[87] In fact, clay soil is recommended as a protective liner in permanent disposal sites in the United States and elsewhere.[88] The Consortium also separated oil components and sediments from the produced water before discharging it.[89]

4. TexPet's Operations Complied with Then-Prevailing Industry Standards

41. During the period of TexPet's operation of the Consortium, Ecuador had few environmental laws and regulations. Ecuadorian laws contained only general, narrative provisions and did not set numerical waste discharge limits or other detailed, measurable, and enforceable quantitative standards.[90] There were no Ecuadorian regulations that specifically addressed oilfield pits or produced water.[91]

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[86] **Exhibit C-437,** D. Southgate, J. Connor and D. MacNair, Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008, at 6, 10-12.

[87] **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 8-25.

[88] J. Connor Expert Report at 16.

[89] **Exhibit C-437,** D. Southgate, J. Connor and D. MacNair, Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008, at 6, 9-10; J. Connor Expert Report at 7.

[90] *See, e.g.*, **Exhibit C-438,** Law on Prevention and Control of Environmental Pollution: Supreme Decree No. 374 (May 31, 1976) Ch. V, Art. 11 (referring to future regulations to be adopted). *See also* **Exhibit C-11,** HBT AGRA Ltd., Draft Audit: Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Oct. 1993 (Draft) at Part 4. In 1989, less than a year before TexPet surrendered operations of the Consortium, Ecuador for the first time issued quantitative environmental standards that applied to the Consortium's activities. Ecuador enacted the Regulation for Prevention and Control of Environmental Pollution Related to Water Resources (Decree No. 2144) that established specific requirements for septic and industrial waste water discharges. *See* **Exhibit C-439**, Fugro-McClelland (West), Inc., Final International Oilfield Practices (1964-1990) In Tropical Rain Forest Areas And Summary Of Ecuadorian Laws And Regulations, July 22, 1992, at 3-3, 5-10, 5-15. Another, later regulation set maximum allowable concentrations for several constituents that could be found in discharges of produced water. Specifically, Decree No. 2982 required that concentrations of hydrocarbons in the produced water discharges were to be below 15 mg/l (15 ppm). *See* **Exhibit C-43**, Woodward-Clyde International, Remedial Action Project, Oriente Region, Ecuador, Final Report, Vol. I (May 2000) ("Woodward-Clyde Final Report, Vol. I") at 3-7, Table 3-2; **Exhibit C-12**, Fugro-McClelland, Final Environmental Field Audit for Practices 1964-1990, Oct. 1992; *see also* **Exhibit C-439**, Fugro-McClelland (West), Inc., Final International Oilfield Practices (1964-1990) In Tropical Rain Forest Areas And Summary Of Ecuadorian Laws And Regulations, July 22, 1992, at 5-15; s*ee also* **Exhibit C-411**, Hydrocarbons Law, Supreme Decree No. 1459, Sept. 27, 1971, at Arts. 24 and 29; **Exhibit C-379**, Water Law, Supreme Decree No. 369, May 30, 1972, at Art. 22**; Exhibit C-438**, Law for Prevention and Control of Environmental

42. Most other countries also had few, if any, environmental laws and regulations when TexPet began exploring for oil in 1965. In the United States, the modern era of environmental regulation did not begin until the 1970s.[92] Other countries in Central and South America, such as Argentina, Brazil, Colombia, Mexico, and Venezuela, had few environmental laws and regulations applicable to oil exploration and production activities even as late as 1995.[93] For example Venezuela only adopted pit closure standards in 1998.[94]

43. The use of earthen pits to contain drilling muds, waters, and other solid waste was a common worldwide industry practice at the time, and remains so today.[95] As the graphic below demonstrates, the use of pits is a common practice in oil exploration and production:[96]

Contamination, Supreme Decree No. 374, May 31, 1976, published in Official Registry No. 97, at Ch. V, Art. 11, Ch. VI, Art. 16, Ch. VII, Art. 20.

91 J. Connor Expert Report at 20, 25.

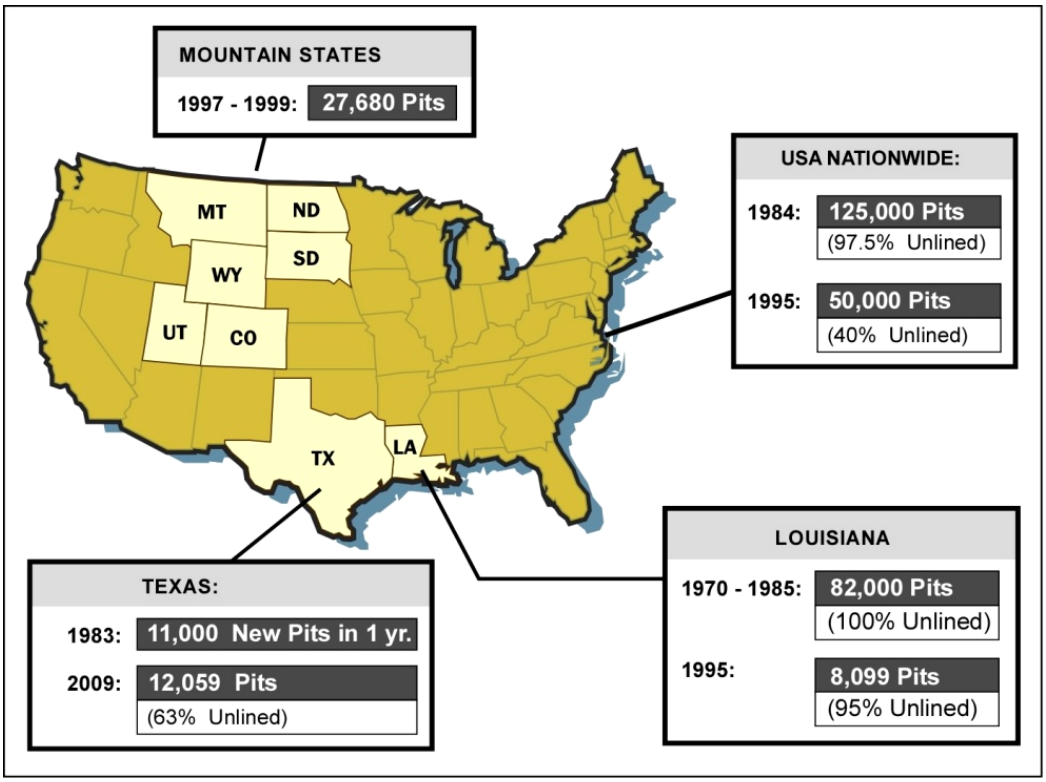
92 The U.S. enacted the National Environmental Policy Act in 1969 and created the Environmental Protection Agency ("USEPA") in 1970. Over the following decade, the U.S. enacted or amended many of that country's most significant environmental laws, including: (i) the Clean Air Act (1970) (42 U.S.C. § 7401 *et seq*.), (ii) the Water Pollution Control Act, as amended by the Clean Water Act (1972) (33 U.S.C. § 1257 *et seq*.); (iii) the Resource Conservation and Recovery Act ("RCRA," the hazardous waste management and disposal law) (1976) (42 U.S.C. § 6901 *et seq*.) and (iv) the Comprehensive Environmental Response, Compensation, and Liability Act (1980) (42 U.S.C. § 9601 *et seq*.). While these laws created the legal framework for pollution-control activities in the United States, it still took the USEPA many years to issue the regulations to implement those laws. For example, USEPA did not adopt final hazardous waste management regulations until four years after Congress had passed RCRA, and they did not become effective until the end of 1980. *See, e.g.*, **Exhibit C-440,** 40 C.F.R. Part 260 *et seq*. (1980).

93 J. Connor Expert Report at 19-20, 23-5.

94 *Id*. at 19-20; *See generally* **Exhibit C-437,** D. Southgate, J. Connor and D. MacNair, Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008, at 11-12, n.54 (citing Venezuelan Decree 1635 of Aug. 3, 1998).

95 J. Connor Expert Report at 18. For instance, according to a study by the U.S. Environmental Protection Agency, during the mid-1980's, over 125,000 earthen pits (97.5% of which were constructed without synthetic liners) were in use in oilfields in the U.S. *Id.*

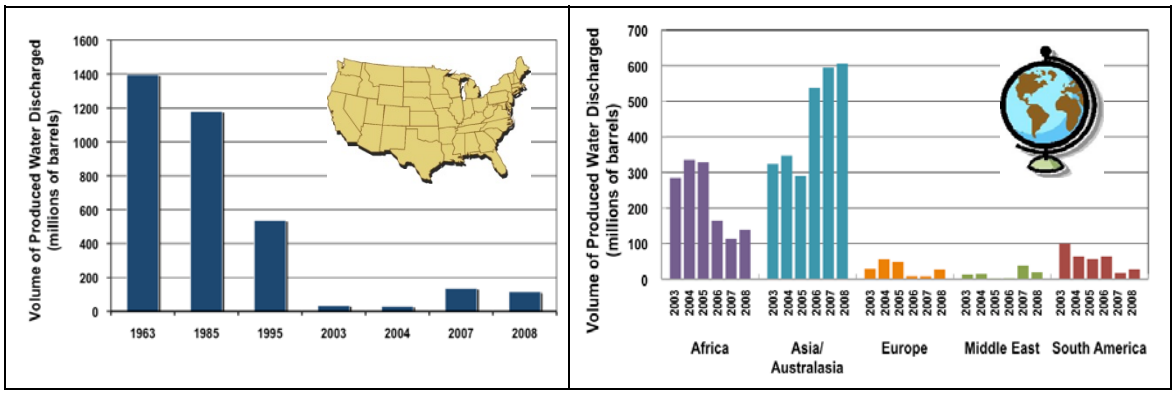
96 J. Connor Expert Report at 18.



44. Treatment of produced water to remove free oil and sediments, followed by discharge to nearby rivers or streams, was an oilfield practice used not only in Ecuador, but in the U.S. and worldwide,[97] as shown in the graphic below:[98]

Figure 9A: Volume of Produced Water Discharged Onshore in *North America*: 1963 - 2008

Figure 9B: Volume of Produced Water Discharged Onshore *Worldwide*: 2003 - 2008



97 J. Connor Expert Report at 22-5.

98 *Id.* at 22-3.

45. In short, TexPet's practices complied with applicable standards of environmental management at the time.[99]

46. The Consortium's total operations that resulted from drilling wells and constructing roads and supporting facilities occupied only 4,415 hectares—approximately 1% of the Concession Area and 0.4 % of all deforested areas in the Ecuadorian northeastern forests.[100]

5. The Government Required TexPet to Build Public Infrastructure

47. Since the 19th century, Ecuador has followed a policy of occupying "vacant lands," and converting them into productive agricultural regions to achieve "national integration."[101] Starting in the 1960s, Ecuador focused on two regions: the plains extending from the Andes to the north coast, and the Amazon.[102] In 1964, the Government passed the Agrarian Reform and Colonization Law and the Vacant Land and Colonization Law, which established new conditions for settlement in the Oriente. Those laws gave free title to 50 hectares of "unoccupied" land to settlers who cultivated at least 25% (later 50%) of that land as proof of "productive use."[103]

48. Providing putative settlers with access to the Amazon region was the fundamental component of the Government's plan to colonize the area; previous settlement efforts had failed as a result of the region's extreme isolation.[104] According to Government policy, successful land

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99 J. Connor Expert Report at 53.

100 Expert Report of Dr. Robert Wasserstrom, Agricultural Settlement, Deforestation and Indigenous People in Ecuador, 1964-1994, Aug. 28, 2010 (hereinafter "R. Wasserstrom Expert Report"), ¶ 36; s*ee also* **Exhibit C-441,** Bjorn Bjorkman, Douglas Southgate and Robert Wasserstrom, Response to Mr. Cabrera's Declarations about Alleged Harm to Indigenous Communities in the Petroecuador-Texaco Concession Area, Sept. 8, 2008, at 5-6.

101 R. Wasserstrom Expert Report ¶ 9; **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Declarations about Alleged Harm to Indigenous Communities in the Petroecuador-Texaco Concession Area, Sept. 8, 2008, at 6.

102 **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Declarations about Alleged Harm to Indigenous Communities in the Petroecuador-Texaco Concession Area, Sept. 8, 2008, at 6.

103 R. Wasserstrom Expert Report ¶ 17, Conclusion 4, Annex 2 (p. 42); **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Declarations about Alleged Harm to Indigenous Communities in the Petroecuador-Texaco Concession Area, at 6.

104 **Exhibit C-441**, Bjorn Bjorkman, Dr. Douglas Southgate, and Dr. Robert Wasserstrom, Response to Mr. Cabrera's Claims about Deforestation and Alleged Violations of Indigenous Territorial Rights in the Ecuadorian Amazon, Sept. 8, 2008, at 7; R. Wasserstrom Expert Report ¶¶ 9-10. Indeed, the 1899 *Special Law of the*

settlement depended on road construction into unoccupied areas.[105] Starting in 1969, the Government required TexPet to conduct a series of projects aimed at improving access and connecting the Oriente region to the western side of Ecuador.[106] These included an airport at Lago Agrio, two main highways to Lago Agrio, and "USD 20,000,000 million worth of access roads to the East, to be completed in a ten-year period."[107] In the 1973 Agreement between TexPet and Petroecuador and the Republic of Ecuador, the Government specified that "the projects . . . charged against the USD 20,000,000, have been selected by the Government, and the companies must only deliver the funds against invoices approved by the Ministry of Natural and Energy Resources."[108]

49. Much of the infrastructure required by the Government was unrelated to oil production—its purpose was to assist Ecuador in advancing its goal of national integration.[109] The roads were for public use.[110] In fact, the Government and the Ecuadorian military instructed the Consortium "how to maintain the road" and "what [to] put over it," and instructed the Consortium to deposit oil on dirt roads to keep down dust.[111]

50. The Government's colonization policies were successful. Non-indigenous settlers known as "*colonos*" migrated to the Oriente in large numbers.[112] In total, between 1964 and

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Oriente granted free land to agricultural settlers. But this law resulted in very little migration due to the region's extreme isolation. In 1905 the Ecuadorian Government granted 500,000 hectares in the Oriente to a European company that promised to attract German and Dutch settlers. But the settlement failed for similar reasons. *Id.*

[105] **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Claims about Deforestation and Alleged Violations of Indigenous Territorial Rights in the Ecuadorian Amazon, Sept. 8, 2008, at 3.

[106] **Exhibit C-419**, Deposition of Robert M. Bischoff, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y. Aug. 17, 1995), at 192-93.

[107] **Exhibit C-7**, 1973 Agreement, Arts. 27, 30.

[108] *Id.*

[109] R. Wasserstrom Expert Report ¶ 26, Conclusion 6. **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Claims about Deforestation and Alleged Violations of Indigenous Territorial Rights in the Ecuadorian Amazon, Sept. 8, 2008, at 10.

[110] R. Wasserstrom Expert Report, Conclusion 6; **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Claims about Deforestation and Alleged Violations of Indigenous Territorial Rights in the Ecuadorian Amazon, Sept. 8, 2008, at 10.

[111] **R-15**, Deposition of Denis LeCorgne, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y. Feb. 11, 1994), at 89.

[112] R. Wasserstrom Expert Report ¶¶ 32-3.

1992, the Government's land grants in the northern Oriente rose from 55,142,876 hectares (165,184 acres) to 1,040,853 hectares (2.57 million acres);[113] meanwhile, population there grew sixfold.[114]

51. Because the Government required settlers to make productive use of the land in order to gain title, most of the cleared land became agricultural land.[115] Between 1972 and 1989, crop lands and pasture lands in the Oriente more than doubled.[116] Ecuador also granted large land areas in the northern Oriente to commercial plantations for oil palm and livestock production.[117]

52. Settling, and therefore deforestation, occurred in areas where public roads existed.[118] Because the Government required oil companies to open the roads constructed for operational purposes for public use, some settling occurred around oil production areas. But nearly all of the deforestation and all of the settling were unrelated to oil production. As anthropologist Dr. Robert Wasserstrom concludes, "[d]eforestation in the *Oriente* occurred overwhelmingly in areas where roads were built – whether or not these roads were used to produce oil."[119] Indeed, in areas of oil production where oil-production roads were not public, deforestation has been controlled.[120]

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[113] *Id.* ¶ 32; **Exhibit C-441**, Bjorn Bjorkman, Douglas Southgate, and Robert Wasserstrom, Response to Mr. Cabrera's Claims about Deforestation and Alleged Violations of Indigenous Territorial Rights in the Ecuadorian Amazon, Sept. 8, 2008, at 17-18.

[114] R. Wasserstrom Expert Report ¶ 32.

[115] *Id.* ¶ 17, Annex 2 (p. 42).

[116] *Id.* ¶ 35. According to Dr. Wasserstrom, between 1972 and 1989, as crop lands in the *Oriente* grew from 30,000 hectares (74,100 acres) to 135,000 hectares (333,450 acres), pasture lands increased from 384,000 hectares (921,600 acres) to 880,000 hectares (2,173,600 acres). *Id.* *See also* **Exhibit C-442**, Robert Wasserstrom, Roads, Oil, and Native People: A Controlled Comparison on the Ecuadorian Frontier, at 14.

[117] R. Wasserstrom Expert Report ¶ 35.

[118] *Id.* ¶¶ 36, 63, Conclusion 9.

[119] *Id.* ¶ 36 (emphasis in the original).

[120] *Id.* ¶¶ 62-63, Conclusion 9.

53. Furthermore, indigenous populations in the former Concession Area have grown since 1955 at a rate similar to that of the rest of the nation.[121]

B. Post-Consortium Negotiations and Environmental Audits

54. In the late 1980s and early 1990s, it became apparent that TexPet and Ecuador would not agree on an extension of the 1973 Agreement, and the parties began negotiations to end the Consortium. These included discussions of any environmental impacts arising out of the Consortium operations.

55. TexPet, Ecuador, and Petroecuador agreed to hire an independent environmental consulting firm to identify, assess, and estimate the cost of any necessary remediation, and to help allocate responsibility for the Consortium's environmental liabilities. In 1992, Petroecuador and TexPet jointly hired HBT AGRA Limited ("HBT AGRA"), a Canadian environmental consulting firm, as an independent expert to perform an audit and environmental assessment of the Consortium's activities and their impact on the Concession Area.[122]

56. TexPet, Ecuador, and Petroecuador also formed an Environmental Audit Technical Committee composed of representatives from Petroecuador and its subsidiary Petroamazonas, TexPet, and Ecuador's Ministry of Energy. The Environmental Audit Technical Committee established the scope of HBT AGRA's work and the environmental audit, oversaw the technical aspects of HBT AGRA's environmental field work, and had final approval authority to accept or reject HBT AGRA's reports.[123]

57. TexPet independently hired a second environmental audit company, Fugro-McClelland (West), Inc. ("Fugro-McClelland"), to obtain an independent assessment of the environmental conditions in the former Concession Area.

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[121] *Id.* Conclusion 10; *See generally,* **Exhibit C-441**, Robert Wasserstrom, Response To Mr. Cabrera's Errors Concerning Indigenous Populations In The Petroecuador-Texaco Concession Area, Sept. 8, 2008, *passim*.

[122] **Exhibit C-443,** HBT Agra Contract of Environmental Investigation Services for the Oilfields of the CEPE_Texaco Consortium, Apr. 15, 1992. HBT-AGRA merged with AMEC, Inc. in 2000.

[123] **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 1-3.

1. HBT AGRA's Audit

58. HBT AGRA performed its environmental audit in two phases over the course of several months. In the first phase, it (i) reviewed documents about the Consortium's operations; (ii) examined applicable Ecuadorian laws and regulations; (iii) inspected 163 well sites (about 50% of the total) and all production stations; (iv) conducted facility audits; (v) reviewed available information about the Consortium's environmental practices; and (vi) collected and arranged for analysis of soil, surface water, and groundwater samples.[124] HBT AGRA selected well sites for physical inspection on a random basis and confirmed that the selected well sites were representative of the Consortium's oilfields.[125] In the second phase, HBT AGRA went to some of the sites a second time to investigate subsurface water reservoirs and aquifers.[126]

59. In October 1993, after completing its field work, HBT AGRA prepared a two-volume draft Environmental Assessment Report. It concluded that there was no evidence of widespread or unconfined contamination either in the surface or subsurface soil.[127] It also found little evidence of subsurface contamination migration beyond the boundaries of the production stations and well sites, because the impervious clay soil largely prevented contamination from moving away from the pits and ponds.[128] Similarly, HBT AGRA found little evidence of contamination of groundwater (*i.e.*, subsurface water) that might serve as a drinking supply.[129] Regarding surface water, HBT Agra found that effluent (*i.e.*, produced water) discharges from operations had changed the quality of some streams and affected their water quality for drinking

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[124] **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 3-1, 4-1, 5-1, and 6-1.

[125] *Id.* at 6-1 and 6-3.

[126] *Id.* at 6-1 Part 7 and Part 8.

[127] *Id.* at 8-25.

[128] *Id.*

[129] Indeed, HBT AGRA found "groundwater samples from domestic water wells and springs . . . to be near or below the assessment criteria standards." **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 8-25.

and aquatic life.[130] This impact was mainly due to the "increased salinity" of the water.[131] HBT AGRA, however, rated these impacts from "none to moderate."[132]

60. Furthermore, HBT AGRA found that, as the Consortium's Operator, TexPet had adhered to standard industry practices of the time related to environmental management.[133]

61. HBT AGRA made preliminary recommendations for remediation work within the former Concession Area. Depending on the site, these included taking no action, landfarming contaminated soil in place, landspreading and treating contaminated soil, recovering and reclaiming liquids, incorporating weathered oil in the sumps with other materials, and mixing-burying-covering certain contaminated materials.[134] HBT AGRA noted that various factors, such as the size and depth of an affected area, the nature of the soil in an affected area, and the type of contaminated substances being addressed, would determine which cleanup option or options to employ at a particular contaminated area.[135] It estimated the cost to remediate spills and pits at the production stations and the 163 well sites that it had assessed at US$ 13,274,000.[136]

2. Fugro-McClelland's Parallel Audit

62. In 1992 TexPet separately hired Fugro-McClelland[137] to verify that HBT AGRA had conducted the jointly-funded audit properly, and to obtain an independent assessment of the environmental issues and liabilities attributable to the period in which TexPet operated the Consortium. Specifically, TexPet asked Fugro-McClelland to perform a quality

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[130] **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 7-20, 7-21. Specifically, Surface water samples showed that different constituents (chlorides, total suspended solids, total dissolved solids, sulphides, and TPH) were sometimes at concentrations above their respective screening criteria.

[131] **Exhibit C-11**, HBT AGRA Limited, Environmental Assessment of the Petroecuador-Texaco Consortium Oilfields, Volume I: Environmental Audit Report (Draft Only), Oct. 1993, at 7-20, 7-21.

[132] *Id.* Oct. 1993, at 7-21.

[133] *Id.* at 5-21, 5-22 (Table 5-4).

[134] *Id.* at 4-1 to 4-18 (Tables 4-1, 4-2, 4-3 and 4-4).

[135] *Id.* at 4-1 to 4-5 (Tables 4-1 to 4-2).

[136] *Id.* at 4-39 (Table 4-9).

[137] Fugro-McClelland (West), Inc. is part of Fugro N.V., an international company based in The Netherlands that provides geotechnical, engineering and other services to various industries, including the oil and gas industry.

assurance/quality control ("QA/QC") assessment of HBT AGRA's work,[138] and a parallel audit of environmental conditions and liabilities within the Consortium's oilfields.[139]

63. Fugro-McClelland performed a QA/QC audit of approximately 10% of HBT AGRA's work and concluded that HBT AGRA's environmental assessment practices were generally acceptable.[140]

64. In performing its independent audit, Fugro-McClelland followed environmental investigation guidelines similar to those followed by HBT AGRA. It (i) visited 18 production facilities, 6 of the 15 camps (40%), 159 of the 325 drill/production pads (about 50%), and approximately 30 miles of the 140 miles of secondary pipeline (about 20%);[141] (ii) observed waste-management practices; reviewed relevant historical documents; observed pits, spills, tanks, and other equipment; and (iii) collected samples of water pit discharges, surface streams, and groundwater for laboratory analysis.[142]

65. Fugro-McClelland also analyzed the degradation state of the surface crude oil to estimate the age of any contamination that it observed. Petroleum hydrocarbons naturally degrade over time, particularly when exposed to air, sunlight, or microbes, thereby changing the crude oil's composition—a process known as "weathering." Because crude oil naturally weathers quickly in the Oriente rainforest, it is possible to differentiate through a degradation assessment between fresh crude (*i.e.*, crude that was just released onto the surface) or weathered crude (*i.e.*, crude whose composition has changed due to exposure to environmental conditions). Fugro-McClelland concluded that TexPet was responsible for only a portion of the identified hydrocarbon contamination because it observed new contamination that had to have occurred

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138 **Exhibit C-444**, Fugro-McClelland (West), Inc., Final Joint Environmental Field Audit Petroecuador-Texaco Consortium Quality Assurance/Quality Control (QA/QC) HBT-AGRA Ltd. Field Work Oriente Ecuador, Sept. 1993, at 4.

139 *Id.* at 1-1 through 1-5.

140 **Exhibit C-444**, Fugro-McClelland (West), Inc., Final Joint Environmental Field Audit Petroecuador-Texaco Consortium Quality Assurance/Quality Control (QA/QC) HBT-AGRA Ltd. Field Work Oriente Ecuador, Sept. 1993, at ES2, 48, and 49.

141 **Exhibit C-12**, Fugro-McClelland (West), Inc., Final Environmental Field Audit for Practices 1964-1990 Petroecuador-Texaco Consortium, Oriente, Ecuador, Oct. 1992, at 1-6.

142 *Id.* at E-1.

after Petroecuador took over operations in 1990.[143] The auditors also found no evidence of any groundwater contamination.[144]

66. After completing its environmental audit, Fugro-McClelland recommended certain remediation and restoration measures, including cleanup of spills associated with residential base camp activities, well site activities, production facilities, and pipeline leaks; proper closure of pits; and modification of produced water management practices.[145] Specifically, Fugro-McClelland recommended the use of a bioremediation method, supplemented by natural weathering processes, for cleaning up the soils at the various petroleum-contaminated sites in the former Concession Area.[146] The estimated cost of the remediation recommended by Fugro-McClelland was US$ 8,482,000.[147]

67. Taken together, the HBT AGRA and Fugro-McClelland audits provide the most accurate assessment of the environmental impacts that may have resulted from TexPet's operations. Each company inspected approximately 50% of the well sites operated by the former Consortium; combined they inspected approximately 75% of the well sites.

C. Ecuador Released TexPet from Public Environmental Claims in Exchange for Environmental Remediation and Other Payments

1. TexPet and Ecuador Negotiated the Scope of Remedial Work

68. In 1993, TexPet, Ecuador, and Petroecuador negotiated allocation of the Consortium's environmental liabilities between TexPet and Petroecuador. Initially, the parties discussed performing environmental remediation across the entire area in which the Consortium had operated, with the total environmental remediation costs being shared among TexPet and Petroecuador, commensurate with the parties' respective equity participation in the Consortium,

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[143] **Exhibit C-12**, Fugro-McClelland (West), Inc., Final Environmental Field Audit for Practices 1964-1990 Petroecuador-Texaco Consortium, Oriente, Ecuador, Oct. 1992, at 6-9, 6-10 and 7-2.

[144] *Id.* at 6-22.

[145] *Id.* at 7-1 and 7-2.

[146] *Id.* at 7-5, 7-6, 7-7, 7-8, and 7-9.

[147] *Id.* at 7-13.

as they had historically shared Consortium expenses.[148] But it quickly became apparent that Ecuador was not willing to pay for its share of the cleanup. Ecuador's negotiators informed TexPet that Petroecuador lacked the funds to pay for its 62.5% share of the cleanup, [149] despite the fact that it had received approximately US$ 23 billion from the Consortium's activities.[150] In public, Ecuador rejected HBT AGRA's audit findings and threatened to sue TexPet for "harm to Ecuador's environment,"[151] even though Ecuador had actively participated in all decisions relating to operations and environmental practices in the Concession Area. Moreover, Ecuador then refused to negotiate further and took the position that it alone could determine Petroecuador's responsibilities.[152]

69. Once it became clear that only TexPet was willing to pay for any immediate environmental clean-up, Ecuador proposed that the parties negotiate a definitive work plan that would specify TexPet's remediation obligations in exchange for a full release.[153] Because Petroamazonas had operated the former Concession Area sites since 1990, the parties decided that TexPet should not be responsible for remediating any sites that Petroecuador had continued to use, or had developed, after TexPet transferred the Consortium's Operatorship.[154] TexPet agreed to perform remediation tasks within a defined scope of work because it wanted to ensure that any monies that it paid actually would be used for remediation.[155]

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148 Witness Statement of Ricardo Reis Veiga, Aug. 27, 2010 (hereinafter "R. Veiga Witness Statement"), ¶ 14; *see also* **Exhibit C-445,** Letter of TexPet Manager Warren Gillies to Minister Diego Tamariz, June 1, 1990, at 2.

149 R. Veiga Witness Statement, ¶ 15.

150 Navigant Report, Table 1.

151 R. Veiga Witness Statement, ¶ 15; s*ee also* **Exhibit C-446,** Letter from TexPet Chairman of the Board Patrick Lynch to the Vice President of Ecuador, July 8, 1994, at 1.

152 R. Veiga Witness Statement, ¶ 15.

153 *Id.* ¶ 16.

154 **Exhibit C-447,** Final Draft, Petroecuador-Texaco Consortium, Oriente Region, Ecuador, Remedial Action Request for Proposal at 1.

155 **Exhibit C-446**, Letter from TexPet Chairman of the Board Patrick Lynch to the Vice President of Ecuador, July 8, 1994, at 1.

2. The Ecuadorian State Was the Only Entity with Authority to Negotiate and Settle Public Environmental Claims

70. At the time of these negotiations, only the Ecuadorian State legally could bring, and therefore, settle claims against non-State actors as a result of alleged damage to the environment. In fact, Ecuador insisted that TexPet not conduct any direct negotiations with individuals or organizations (such as the *Aguinda* Plaintiffs) who claimed an interest in seeking environmental remediation within the former Concession Area.[156] Ecuador's negotiators took the position that only the Government could properly represent the collective interests of all Ecuadorian citizens, and only Ecuador could "legally negotiate the settlement of TexPet's environmental remediation obligations."[157] Ecuador took the same position in public. For instance, the Ambassador from Ecuador to the United States, Edgar Terán, explained that "the soil, the subsoil, the vegetation, their air . . . all of these are property properly belonging to the Nation of Ecuador, not to the individuals living there."[158]

71. Individual Ecuadorians were free to bring individual claims against TexPet or anyone else for injury to their person, private land or personal property.[159] But until 1999, *only* the Ecuadorian State had the authority or standing to pursue or settle public, diffuse-rights claims for harm to the environment. That authority was grounded in Ecuador's constitutional obligation to guarantee an environment free of contamination. Article 19 of the Constitution provided that the State guarantees "[t]he right to live in an environment free of contamination. It is the duty of the State to ensure that this right is not violated and to safeguard the preservation of the environment[.]"[160]

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156 R. Veiga Witness Statement, ¶ 17

157 *Id.* ¶ 17; *see also* **Exhibit C-292,** *Aguinda et al. v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y.), Supplemental Brief *Amicus Curiae* of the Republic of Ecuador, Jan. 11, 1996, at 1 ("The claims asserted in this action would inevitably involve this Court in issues concerning the validity of Ecuadorian laws, regulations and social policies affecting property and persons located in Ecuador. These are matters over which Ecuador has exclusive jurisdiction."); **Exhibit C-20,** *Aguinda et al. v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y.), Letter from Ambassador Edgar Terán to Judge Rakoff, June 10, 1996.

158 **Exhibit C-20**, *Aguinda v. Texaco, Inc.*, No. 93-CV-7527 (S.D.N.Y.), Letter from Ambassador Edgar Terán to Judge Rakoff, June 10, 1996.

159 First C. Coronel Expert Report, ¶¶ 91–93.

160 **Exhibit C-448**, Article 19 (2) of the Constitution of the Republic of Ecuador, Codification of 1993, Law No. 25, Official Registry No. 183, May 5, 1993.

72. Unlike the Ecuadorian State, individuals did not have any authority or standing to pursue or settle public, diffuse-rights claims against non-State actors for harm to the environment. An individual could sue non-State actors only for individual damage to their persons or property as a result of alleged environmental activities under the general damages provisions of the Civil Code.[161]

73. The Ecuadorian Civil Code lacks a class action-type device that would allow individual plaintiffs to combine their individual actions for damages in a single proceeding. According to Alberto Wray—the *Aguinda* Plaintiffs' Ecuadorian-law expert and the Lago Agrio Plaintiffs' original lead counsel—"no one can bring an action in the name of another . . . [t]herefore, in Ecuador nothing exists that can be compared to United States' 'class action.'"[162] It was precisely for this reason that the *Aguinda* Plaintiffs filed a class action before a U.S. federal court.

3. The Parties' Agreements

74. Ecuador, Petroecuador, and TexPet memorialized their final agreements—relating both to the scope of TexPet's remediation obligations and to the ensuing release that Ecuador and Petroecuador would grant TexPet—in a series of negotiated documents: the Draft Proposal, the 1994 Memorandum of Understanding, the 1995 Scope of Work, the 1995 Settlement Agreement, and various release agreements with the Municipalities and Provinces within the former Concession Area.

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[161] An individual also could file a popular action to prevent potential *future* harm under Articles 2236 and 2237 of the Civil Code. While Article 2236 allows individuals to act in a non-individual capacity, that authority is narrow and subject to several conditions. First, the provision concerns potential future harm, known as contingent harm, and is preventative in nature—not compensatory. Thus, the action necessarily concerns a situation in which harm has not yet occurred. Second, the relief can only be injunctive—aimed at removing the situation constituting a threat of potential future harm. Because the action concerns a situation in which damages have not occurred, it could not result in an award of money damages. Third, an action under Article 2236 may only be pursued against the party currently in possession or control of the situation constituting a potential future harm—the party with the ability to remove the threat. For example, if the action concerns a bridge at risk of collapsing, the action must be pursued against the bridge owner—not the bridge builder. The only other legal action available to private individuals was an action against the Ecuadorian State under the Constitution demanding that the State comply with its constitutional obligation to protect the environment. Article 19(2) of the 1978 Constitution, as amended in 1980, allowed individuals to sue the State in an effort to force the state to comply with its express obligation to address environmental harms. It could not be used against anyone else. First Coronel Expert Report, ¶¶ 88–106.

[162] **Exhibit C-293,** Affidavit of Alberto Wray, Mar. 8, 1994, ¶ 8; *see infra* ¶ 269.

a. The Final Draft Proposal

75. The first document that the parties negotiated and signed was the Final Draft Proposal for Environmental Remediation, which the parties' technical representatives initialed on August 24, 1994 (the "Final Draft Proposal"). The Final Draft Proposal set out the environmental remediation project's objectives and outlined the parties' agreement regarding applicable remediation standards and TexPet's required clean-up actions.[163] The parties acknowledged that TexPet's remediation contractor would prepare a Remedial Action Plan that would provide details about the planned remedial actions, methodology, and techniques.[164]

76. In the Final Draft Proposal, the parties agreed that TexPet would be responsible for:

- remediating the listed sites that were in existence before June 30, 1990 (when TexPet stopped being the Operator), but only if Petroecuador had not used or closed the pits after that date;[165]
- performing surface restoration work at former Concession Area facilities that had been abandoned before June 30, 1990, but only if those facilities had not been used after that date, were not another contractor's responsibility, and had not been occupied by the local population;[166]
- cleaning hydrocarbon-contaminated soil if the contamination resulted at identified sites from operations that took place before June 30, 1990;[167]
- performing some facility improvements, such as installing spill containment dikes around tanks, related to environmental management practices, so long as the sites had been in use before June 30, 1990;[168] and
- completing certain community relations projects, provided Ecuador, Petroecuador, and TexPet could reach agreement on the projects.[169]

b. The 1994 Memorandum of Understanding

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163 **Exhibit C-447**, Final Draft Proposal, *passim*.

164 *Id.* at 3.

165 *Id.* at 1.

166 *Id.* at 1 and 2.

167 *Id.* at 2 and 3.

168 *Id.* at 2.

169 *Id.* at 4 and 5.

77. On December 14, 1994, Ecuador, Petroecuador, and TexPet executed a Memorandum of Understanding (the "1994 MOU"), memorializing the terms of the Final Draft Proposal. The parties also acknowledged that they would develop, define, and approve a detailed scope of environmental remedial work, and that TexPet would perform such work.[170] They also agreed that, in exchange for TexPet's completion of the agreed tasks, the parties would "negotiate the full and complete release of TexPet's obligations for environmental impacts arising from the operations of the Consortium."[171]

78. The 1994 MOU was part of an open and transparent negotiation process. Groups purporting to act "in democratic representation of the peoples of the Ecuadorian Oriente and especially of the areas affected by petroleum operations and the indigenous organizations" were an integral part of the negotiations.[172] Ecuadorian Government officials saw their role in the negotiations as "facilitat[ing]" the dialogue between the indigenous communities and TexPet, and making sure that "the interests of the individuals in the affected communities" were "represent[ed] and protect[ed]."[173] As such, socioeconomic "items were included in the definitive remediation agreement to compensate the [affected] inhabitants."[174]

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[170] **Exhibit C-17**, Ecuador, Petro-Ecuador, TexPet, Memorandum of Understanding, Dec. 14, 1994 ("1994 MOU"), at Art. II.

[171] *Id.* at Art. IV.

[172] *See* **Exhibit C-449**, Work Session Record, Feb. 22, 1995.

[173] **Exhibit C-290,** *Republic of Ecuador v. ChevronTexaco Corp. et al*., No. 04-CV-837 (S.D.N.Y.), Deposition of Giovanni Rosania Schiavone, Oct. 19, 2006, at 78:4-79:7; *id*. at 112:5-113:10. Mr. Rosania was the Ecuadorian Undersecretary of Environmental Protection from 1995-1996, and the person who led the Republic's negotiation with TexPet. When deposed in a related matter in 2006, he also confirmed that those negotiations were "very transparent and open," (Rosania Dep. at 73:3-14; 92:14-97:10) and that the "[s]ocioeconomic compensation was negotiated directly [between] FCUNAE and Texaco," with the government providing only "oversight" to make sure the agreement was "well done." *Id*., at 166:1-167:4. In addition, the Minister of Energy and Mines, deposed in the same matter, stated that Republic officials negotiating with TexPet "had a relationship with indigenous peoples from Amazonia . . . at the request of the National Congress," **Exhibit C-450**, Dep. of Galo Abril Ojeda, at 69:14-74:6; that they "consider[ed] the official communication of the National Congress to take into account the problems that the Amazonian groups were having. And that is why we invited before the [settlement] contract with Texaco was signed the representatives of indigenous peoples and the representatives of the local governments, [a]nd congressmen representing the Provinces of Amazonia." *Id*. at 76:2-76:19. Mr. Abril candidly admitted that "[t]he environmentalists were just behind everything that was being done. But that was not considered bad because the Government wanted everything to be very clear and illuminating for everyone. There were no secrets." *Id*. at 94:13-95:3

[174] **Exhibit C-290,** Rosania Dep. at 112:5-10.

79. The parties defined "the Scope of the Work of Environmental Reparation" to include items in the "socio-economic" context, and secured from TexPet a commitment to "carry out socio-economic compensation projects in order to address problems… stemming from the oil operations[.]"[175] Such compensatory effort would accrue to the benefit not of the Government, but of the population as a whole. In fact, the 1994 MOU expressly underscores that these projects had to unfold "taking into consideration the inhabitants of the Oriente Region."[176] This aligns with the recommendation made by an Environmental Committee of the Ecuadorian Congress, which insisted that any agreement "indemnify or alleviate the negative environmental affects caused . . . to the Ecuadorian population living in [the] Amazonian region," and stressed to that end that TexPet must provide compensation in "biotic, abiotic and socio-economic areas," and, with an "atmosphere of consensus, . . . take into consideration the inhabitants and authorities in the region."[177]

80. In exchange for TexPet's completion of the agreed tasks, the parties agreed to "negotiate the full and complete release of TexPet's obligations for environmental impacts arising from the operations of the Consortium."[178] TexPet and its affiliates would therefore receive a two-fold release. First, TexPet would immediately be released from all environmental impacts or effects not expressly included in a "Scope of Work." Second, TexPet would be released and discharged from any responsibility for the remediation of those tasks allocated to it in the Scope of Work once TexPet completed that work.[179]

c. The 1995 Scope of Work

81. On March 23, 1995, Ecuador, Petroecuador, and TexPet executed a Scope of the Environmental Remedial Mitigation Work and Socio-economic Compensation (the "Scope of Work") that listed the specific sites that TexPet would be obligated to remediate or otherwise

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[175] **Exhibit C-17**, 1994 MOU, Art. V at 3.

[176] *Id.*

[177] **Exhibit C-451**, Report of the Special Permanent Environmental Comm'n of the National Congress, Nov. 9, 1994, at 3-5.

[178] **Exhibit C-17**, 1994 MOU, Art. IV.

[179] *Id*., Art. IV.

address in accordance with the document's terms.[180] TexPet also agreed to modify produced water management facilities at nine production stations, to revegetate the sites listed for remediation work, and to provide specified socio-economic compensation.[181]

82. The Scope of Work focused on seven issues:

(i) well site pit closures;
(ii) production stations;
(iii) abandoned installations;
(iv) hydrocarbon contaminated soil remediation;
(v) revegetation;
(vi) containment dikes; and
(vii) socio-economic compensation for community infrastructure and other projects.[182]

83. The parties selected the sites to be remediated by relying on HBT Agra's preliminary environmental audit results and recommendations, as well as documents provided by Petroproducción (a Petroecuador affiliate) and the National Directorate of Hydrocarbons (a directorate within the Ministry of Energy), including lists of well sites and other facilities, workover and wireline logs, and pit closure records.

84. The Scope of Work required TexPet to contribute to the "communal infrastructure" by funding (1) the construction and administration of "four Basic Educational Centers and four adjacent Medical Clinics, with… two river ambulances and a small aircraft," as well as (2) "training and teaching materials for environmental education programs."[183] The Ministry of Energy and Mines was entrusted to administer the fund "for the benefit of the native community of the Amazonian region."[184] The fulfillment of these obligations met what the

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[180] R. Veiga Witness Statement, ¶ 26.

[181] **Exhibit C-22**, Scope of Work, Arts. II, V, and VII.

[182] *Id.* Arts. I-VII

[183] **Exhibit C-22**, Ecuador, Petro-Ecuador, TexPet, *Scope of the Work of Environmental Reparation* (1995) at 5 (VII)(B).

[184] **Exhibit C-452**, Approval *Acta,* Nov. 15, 1995; *see also* **Exhibit C-53**, Final Certification Between the Republic of Ecuador, Petroecuador, PetroProducción and TexPet, Sept. 30, 1998 ("1998 Final Release"), arts. II.2, III., VII.B.

Ecuadorian Congress saw as a "historic necessity . . . to compensate, actually and rapidly, the inhabitants of the affected areas."[185]

d. The 1995 Settlement Agreement

85. On May 4, 1995, Ecuador, Petroecuador, and TexPet executed a settlement agreement (the "1995 Settlement Agreement") that provided that "the scope of the Environmental Remedial Work to be undertaken by TexPet to discharge all of its legal and contractual obligations and liability [for] Environmental Impact arising out of the Consortium's operations has been determined and agreed to by TexPet, the Government and Petroecuador as described in this Contract," and that "TexPet agrees to undertake such Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual obligations and liability for Environmental Impact arising out of the Consortium's operations."[186] In addition to accepting responsibility for performing the Environmental Remedial Work, TexPet agreed to fund certain projects for the benefit of the local communities.[187]

86. The 1995 Settlement Agreement incorporated the previously executed Scope of Work as Annex A,[188] and required TexPet to prepare a Remedial Action Plan setting out the detailed environmental cleanup requirements needed to supplement the Scope of Work.[189]

87. In consideration for TexPet's agreement to perform the Environmental Remedial Work in accordance with the Scope of Work and the Remedial Action Plan, in Article V of the 1995 Settlement Agreement, Ecuador and Petroecuador released TexPet and its affiliates from "all the Government's and Petroecuador's claims against the Releasees for Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted hereunder for the performance by TexPet of the Scope of Work (Annex A), which

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185 **Exhibit C-451**, Report of the Special Permanent Environmental Comm'n of the National Congress, Nov. 9, 1994, at 4.

186 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 ("1995 Settlement Agreement"), at 3.

187 *Id.*, Annex A at Art. VII.

188 *Id.* Annex A.

189 *Id.* Art. I, 1.6. and Art. II.

shall be released as the Environmental Remedial Work is performed to the satisfaction of the Government and Petroecuador."[190] The release is broad and express:

> The Government and Petroecuador intend *claims* to mean any and all claims, rights to claims, debts, liens, common or civil law or equitable causes of actions and penalties, whether sounding in contract or tort, *constitutional, statutory, or regulatory causes of action* and penalties . . . costs, lawsuits, settlements and attorneys' fees (past, present, future, known or unknown), that the Government or Petroecuador have, or ever may have against each Releasee for or in any way related to contamination, that have or ever may arise in the future, directly or indirectly arising out of Operations of the Consortium, *including but not limited to consequences of all types of injury that the Government or Petroecuador may allege concerning persons, properties, business, reputations, and all other types of injuries that may be measured in money, including but not limited to, trespass, nuisance, negligence, strict liability, breach of warranty, or any other theory or potential theory of recovery*.[191]

88. The parties drafted the release to protect TexPet from all types of future public environmental liability that might arise from the Consortium's activities. The document's sweeping definition of "Environmental Impact" further reinforces the broad reach of the release language. "Environmental Impact" includes "[a]ny solid, liquid, or gaseous substance present or released into the environment in such concentration or condition, the presence or release of which causes, or has the potential to cause harm to human health or the environment."[192]

89. The scope of the environmental release that Ecuador granted to TexPet was consistent with Ecuador's authority under Ecuadorian law. Under Article 19 of the extant Constitution, the authority to sue for diffuse environmental damages was at the time held exclusively by the Government.[193] Only Ecuador had the legal authority to file and settle claims arising from any public interest in the environment or any environmental conditions alleged to

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[190] *Id.* Art. V, ¶ 5.1.

[191] *Id.* Art. V, ¶ 5.2 (emphasis added).

[192] *Id.* Art. I.

[193] *See* **Exhibit C-453**, 1978 Constitution of Ecuador, Art. 19(2) (imposing "duty [on] the State" to "take responsibility for the protection of nature" and "assure [all Ecuadorians] the right to live in an environment free of contamination").

affect the public at large,[194] and any claims that the Government had under Article 19 of the Constitution were expressly released.[195]

90. The parties predicated the release solely on TexPet's agreement to perform and complete successfully those environmental remediation measures and other related projects specifically listed in the Scope of Work. By operation of law, as 100% owner Petroecuador was responsible for the remainder of the former Consortium facilities.

e. The Municipal and Provincial Settlement Agreements

91. In 1994, four municipalities in the Oriente—Shushufindi, Francisco de Orellana (Coca), Lago Agrio and La Joya de los Sachas—filed suit against TexPet in Ecuadorian courts (the "Municipal Lawsuits").[196] Together, the Municipal Lawsuits sought millions of dollars in compensation for environmental harm and injuries to the community allegedly resulting from the former Consortium's operations, and requested orders requiring TexPet to remediate alleged contamination in the former Concession Area.[197] As part of Ecuador's consideration for the release, Annex A of the 1995 Settlement Agreement required TexPet to attempt to negotiate settlements of these claims by the municipalities and provinces within the former Concession Area.[198]

92. Ecuador acknowledged before U.S. courts that the Municipal Lawsuits were "brought on behalf of all the members of the plaintiff community and organizations, alleging

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[194] **Exhibit C-289**, Affidavit of Edgar Terán, Jan. 3, 1996 ("It is the Republic's obligation to become involved in matters that direct impact the welfare of Ecuadorian citizens, territory and natural resources, and the very sovereignty of the Republic of Ecuador.")

[195] **Exhibit C-23,** 1995 Settlement Agreement, Art. V, ¶ 5.2 (May 4, 1995).

[196] *See* **Exhibit C-320**, Complaint filed by the Municipality of Shushufindi to the Judge of the Civil Court of Shushufindi, July 20, 1994; **Exhibit C-325**, Complaint filed by the Municipality of Orellana to the Civil Judge of the Orellana Canton, Aug. 23, 1994; **Exhibit C-323**, Complaint filed by the Municipality of Lago Agrio to the Provincial Civil Judge of Sucumbíos, July 25, 1994; **Exhibit C-322**, Complaint filed by the Municipality of La Joya de los Sachas to the Civil Judge of La Joya de los Sachas, May 9, 1994.

[197] *See* **Exhibit C-320**, Complaint filed by the Municipality of Shushufindi to the Judge of the Civil Court of Shushufindi, July 20, 1994; **Exhibit C-325**, Complaint filed by the Municipality of Orellana to the Civil Judge of the Orellana Canton, Aug. 23, 1994; **Exhibit C-323**, Complaint filed by the Municipality of Lago Agrio to the Provincial Civil Judge of Sucumbíos, July 25, 1994; **Exhibit C-322**, Complaint filed by the Municipality of La Joya de los Sachas to the Civil Judge of La Joya de los Sachas, May 9, 1994.

[198] **Exhibit C-23**, 1995 Settlement Agreement, Annex A.

environmental contamination in the Oriente."[199] It characterized the lawsuits as "popular" actions seeking environmental remediation of the same sort already released by Ecuador and Petroecuador:

> The Municipalities litigation, filed as "*popular actions*" under Article 47 of the Environmental Regulations for Hydrocarbon Operations in Ecuador, alleged, among other things that TexPet … "left behind a true ecological catastrophe which degraded the environment and its forest biodiversity, and contaminated its water sources, in streams and rivers which the population used not only for their household consumption, and even to bathe in, but also as drinking sources for their cattle." … *They sought not only "damages" but also that the courts order "the cleaning up of our environment* . . . by cleaning up the crude oil pools and pumping stations."[200]

93. Acting in their capacities as "small states . . . in each of their respective jurisdictions,"[201] the municipalities purported to fulfill their quasi-sovereign duties to assist the Republic in meeting its environmental obligations to all Ecuadorians, and to exercise their own capacity to "carry out legal actions" necessary to protect the "collective needs of [their] community" of inhabitants, specifically those needs concerning health and environmental concerns.[202]

94. In 1996, TexPet negotiated a full and complete settlement of the claims asserted in the Municipal Lawsuits and the potential claims of the two provincial governments. In exchange for cash payments of over US $ 3.6 million, as of May 1996 the municipalities and provinces agreed to release TexPet from any and all public environmental claims. The releases

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[199] *See, e.g.,* **Exhibit C-25**, *Rep. of Ecuador and Petroecuador v. ChevronTexaco Corp. and Texaco Petroleum Co.*, No. 04-Civ-8378 (LBS) Plaintiffs' Local Civil Rule 56.1 Statement of Undisputed Material Facts on Motion for Summary Judgment, ¶¶ 100-101 (S.D.N.Y Jan. 16, 2007). *See also* **Exhibit C-26**, Court Approval of Settlement with Municipality of Lago Agrio, Sept. 19, 1996 (characterizing the relief sought by the Municipality as "the clean-up of the contaminated areas, … [and] the restoration of health of the affected population, animals and species").

[200] **Exhibit C-2**, *Republic of Ecuador v. Chevron Corp.*, Case No. 09-CIV-9958, Petitioner's [Ecuador's] Response in Opposition to Respondents' Local Rule 56.1 Counter-Statement of Facts, Mar. 5, 2010, at 10 (internal citations omitted, emphasis added).

[201] **Exhibit C-321**, Shushufindi Municipality Amended Compl. at ¶ 2(b),

[202] *See* **Exhibit C-347**, Ecuadorian Municipal Regime Law, Arts. 2, 12, 19, 20, 164 (entrusting the municipalities with "[c]aring for the . . . health of the canton," and "ensuring faithful compliance with the legal rules on [the] environment[] . . . and especially those rules related to . . . toxic . . . emissions and other factors that may affect the health and well-being of the population").

expressly provide that the municipalities represented the community, noting that the settlements were entered into "*after consulting with the entities and organizations representing the community of [their] inhabitants*."[203] The releases broadly state that the representatives of each municipality or province

> proceed to exempt, release, exonerate and relieve forever Texaco Petroleum Company, Texas Petroleum Company, Compañía Texaco de Petróleos del Ecuador S.A., Texaco Inc., and any other affiliate, subsidiary or other related companies … from any responsibility, claim, request, demand, or complaint, be it past current, or future, for any and all reasons related to the actions, works, or omissions arising from the activity of the aforementioned companies in the territorial jurisdiction of [the municipality or province].[204]

95. Government officials of each of the four municipalities and the province of Sucumbíos avowed in sworn statements that the settlements "meet[] the interests of the Municipality *and of its citizens* as to any claim they may have against TexPet."[205] Furthermore, the parties expressly agreed that "pursuant to Article 2386 [current Article 2362] of the Civil Code, this settlement shall have for the parties the effect of *res judicata* before the highest court."[206]

96. Courts in each of the respective municipalities or cantons where lawsuits had been brought "approved the[se] settlement[s] in full, stating that they "do[] not violate any legal provision and cover[] all issues described in the [respective] complaint[s].'"[207] The Lago Agrio Court specifically held that the settlement "agreement is legally valid inasmuch as it was entered

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[203] **Exhibit C-27-32,** Settlements of Municipalities of Lago Agrio, Shushufindi, La Joya de los Sachas, Orellana, and the Province of Sucumbíos, § 2.4 (emphasis added).

[204] **Exhibit C-27-32,** Settlements of Municipalities of Lago Agrio, Shushufindi, La Joya de los Sachas, Orellana, Napo Consortium, and the Province of Sucumbíos, at 5-6 (emphasis added).

[205] **Exhibits C-33, 336, 337, 338, 339,** Sworn Statements by Prefect of Sucumbíos, Mayor of Lago Agrio, and Presidents of Councils of Shushufindi, Orellana, and Joya de los Sachas (emphasis added).

[206] *See, e.g.*, **Exhibit C-30,** Release with Municipality of Lago Agrio, at Point FIFTH. *See also* **Exhibit C-34,** Ecuadorian Civil Code, at Art. 2362 (formerly Art. 2386) ("A settlement has the *res judicata* effect of a final [non-appealable] instance decision, but a declaration of nullity or rescission may be requested pursuant to the preceding articles.").

[207] **Exhibit C-35,** Court Approval of Settlement with Municipality of La Joya de los Sachas, June 12, 1996; **Exhibit C-36,** Court Approval of Settlement with Municipality of Francisco de Orellana, June 25, 1996; **Exhibit C-37,** Court Approval of Settlement with Municipality of Shushufindi, May 8, 1996; **Exhibit C-26,** Court Approval of Settlement with Municipality of Lago Agrio, Sept. 19, 1996.

into before a competent authority, and it constitutes a law binding upon the parties."[208] When a subsequent mayor in the municipality of Lago Agrio challenged the terms of the Lago Agrio municipal settlement, the court dismissed the challenge on grounds that the settlement was *res judicata*.[209] The Court denied a motion to rescind the settlement because "the defendant has indicated its desire to perform under th[e settlement] agreement." Considering the settlement, the Court held that "no issue in dispute . . . remains unresolved" between the parties; that "the claimant institution has received the amount paid by the defendant in compliance with the transnational contract signed by the parties"; and that the parties have "mutually agreed" and jointly asked the judge to approve that transaction, which was done.[210] The Supreme Court of Justice denied cassation.

D. TexPet Fulfilled Its Remediation Obligations and Received a Full Environmental Release from Ecuador

1. TexPet Hired Woodward-Clyde to Prepare the Remedial Action Plan

97. The 1995 Settlement Agreement required TexPet to prepare a Remedial Action Plan (the "RAP") to implement the Scope of Work.[211] TexPet hired a contractor to prepare the RAP from a list of independent environmental engineering companies approved by the Ministry of Energy and Mines on behalf of Ecuador and Petroecuador.[212] That company was Woodward-Clyde International, Inc. ("Woodward-Clyde"), now called URS Corporation—one of the most reputable environmental engineering firms in the world.[213] As mandated by the 1995 Settlement

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208 **Exhibit C-26,** Court Approval of Settlement with Municipality of Lago Agrio, Sept. 19, 1996.

209 **Exhibit C-38,** Decision of the Nueva Loja Court, Oct. 1, 1996; **Exhibit C-39,** Decision of the Nueva Loja Court, Oct. 10, 1996; **Exhibit C-40,** Decision of the Nueva Loja Court, Oct. 23, 1996; **Exhibit C-41,** Decision of the Nueva Loja Court, Feb. 27, 1997; *see also* R. Veiga Witness Statement ¶ 32.

210 *Id*.

211 **Exhibit C-23,** 1995 Settlement Agreement, Art. II.

212 *Id.* Art. III, 3.1 (citing Memorandum 005-SMA-95 of February 7, 1995, signed by the Subsecretary of the Environment).

213 TexPet originally signed an agreement with both Woodward-Clyde and Canonie Environmental Services, which was subsequently acquired by Smith Environmental. A subsidiary of Woodward-Clyde, Sert Ingenieurs-Conseils S.A., signed a remediation contract with TexPet to perform the work jointly with Smith Environmental. Ultimately, Sert Ingenieurs-Conseils, S.A. took over all responsibilities from Smith Environmental. For purposes of this document, all of these parties are referred to individually or collectively as "Woodward-Clyde."

Agreement, TexPet executed a "Service Agreement" with Woodward-Clyde setting out the terms and conditions under which the contractor would prepare the required RAP.[214]

98. In July 1995, Woodward-Clyde conducted an environmental investigation of the specific sites and facilities listed in the Scope of Work in order to develop the RAP. Based on data gathered during this investigation, and following the standards delineated in the 1994 MOU, the 1995 Scope of Work, and the 1995 Settlement Agreement, Woodward-Clyde classified pits, well sites, production stations, and other areas potentially requiring some remediation as either within or outside of TexPet's remediation obligations.

99. In August 1995, Woodward-Clyde submitted a draft RAP to Ecuador, Petroecuador, and TexPet. Following review and amendment, on September 8, 1995, Petroecuador, the Minister of Energy and Mines (acting on behalf of Ecuador), and TexPet signed and accepted the RAP.[215] The Minister of Energy and Mines also issued a letter to TexPet's legal representative confirming that Ecuador accepted the RAP and agreed that the RAP met Ecuador's requirements.[216]

2. The Remedial Action Plan

100. The RAP set forth the governing environmental remediation criteria and guidelines, and listed the various remedial actions that Woodward-Clyde would perform on behalf of TexPet to address every site and facility identified in the Scope of Work.[217] The RAP specifically noted that the "[c]riteria and guidelines were developed *in accordance with the Ecuadorian Regulations applicable at the signature date* of the contract for the execution of the remedial action work (May 4, 1995), especially 'Acuerdo Ministerial No. 621 y Decreto Ejecutivo 1802' and *current practice in tropical forest environment*."[218] The RAP also noted

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214 **Exhibit C-23,** 1995 Settlement Agreement, at Art. I, 1.9, Art. III, 3.2.

215 **Exhibit C-42,** RAP, at Signature Page.

216 **Exhibit C-456,** Letter from Dr. Galo Abril Ojeda to Rodrigo Pérez dated 8 September 1995.

217 **Exhibit C-42,** RAP, at 1.

218 *Id.* at 4 (emphasis added).

that "[t]he criteria for the treatment of soil and sludge was prepared considering current internationally accepted practice for soil and sludge remediation in tropical rainforest."[219]

101. The RAP expressly indicated whether particular pits and other areas at each site listed in the Scope of Work and the RAP required remediation and, if so, whether TexPet was responsible for the remediation.[220] It followed the categories designated for remediation in the Scope of Work.[221] For each of these categories, the RAP set forth the specific remediation criteria.

102. The RAP also set out specific and detailed requirements governing sampling measures, testing procedures, and numerical acceptance criteria that the parties agreed were to be used to determine what, if any, remediation would be required at a particular location, and whether completed remediation work had been successful.[222]

a. Pit Closure

103. The first step under the RAP was to determine whether the pits listed in the Scope of Work needed to be remediated. Two categories of listed pits required no remediation by TexPet: "no further action" or "NFA" pits, and pits that had gone through a "change of conditions" ("COC" pits).[223]

104. NFA pits were those with a TPH content below 0.5% (5,000 mg/kg). These typically were dry pits, pits that already had been remediated prior to June 30, 1990 (the day TexPet's duties as Consortium Operator ended) with no visible contamination, or clean water pits that were being used by the local community—either for fishing, laundry or other purposes.[224]

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219 *Id.* at 4.

220 *Id.* at 1, and Tables 3-3 through 3-6.

221 *See supra* § II.C.3.c

222 **Exhibit C-42**, RAP, at 8.

223 *Id.* at 3 and Table 2.1.

224 **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-1. Pits closed after Jun 30, 1990 were not subject to remedial action. **Exhibit C-42**, RAP at 12.

105. Pits were classified as COC pits "if during the implementation of remedial actions, site conditions were different from those encountered during the investigation and those different conditions were due to Petroecuador or any of its affiliates and/or its respective subcontractors' activities (*e.g.*, new spill areas, fresh oil being discarded in pits, modifications to installation, etc.)."[225]

106. The RAP set forth a physical process required to remediate a particular pit. Woodward-Clyde was to:

(i) prepare the site;

(ii) remove debris and crude oil from the site, including washing the debris to remove oil;

(iii) transport and deliver recovered oil to Petroecuador;

(iv) treat and discharge the pit's water in accordance with the water discharge criteria;

(v) treat visibly contaminated soil;

(vi) treat any sludge; and

(vii) backfill and regrade the pit with soil.[226]

The RAP also required Woodard Clyde to wash, burn or transport to a landfill any trash in the area.[227] The RAP's remediation process was consistent with industry-standard methods for pit remediation at the time, and remains so today.[228]

107. In sum, the RAP classified pits as follows:

Oil and Water Pits	**No Further Action Pits**	**Change of Conditions Pits**
• TPH content > 5,000mg/kg • Action – Prepare the site – Clear and remove	• Previously closed • Soil with TPH < 5,000 mg/kg • Clean water pits still in use by local community	• Modified after remedial investigation by Petroecuador or its affiliates • Access was not granted by

[225] **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-2.

[226] **Exhibit C-42**, RAP, at 13-7.

[227] *Id.* at 6.

[228] J. Connor Expert Report at 57.

debris and oil – Recover oil – Treat and discharge water – Treat soil – Treat sludge – Backfill and regrade	– used for bathing, washing clothes • Constructed after June 30, 1990 (after TexPet ceased the Operatorship)	owners[229] • Action: – Notify representative of Ministry of Energy and Mines so that remedial action may be deemed completed for the site

108. For any pit that required remediation, the type of soil (sludge, clay, gravel, or sand) and the percentage of TPH (*i.e.*, petroleum hydrocarbons) in the soil (0.5% to 2%, 2% to 5%, 5% to 95%, or 95% to 100%) would determine which of the remediation methodologies (adding stabilizing agents, bioremediating, or recovering crude oil and recycling) would be used.[230] The RAP also included revegetation requirements for remediated pits.[231]

109. After a pit had been remediated, the RAP mandated that the cleaned site go through a multi-point sample analysis process. The parties chose a modified version of the Toxicity Characteristic Leaching Procedure ("TCLP") test. The TCLP test is a standard U.S. Environmental Protection Agency ("USEPA") test used to determine the amount of a contaminant, if any, that will leach out and potentially migrate into other areas when rain or other water moves through contaminated soil.[232] Some modifications to the TCLP test method were necessary to make it practical for use in the field laboratory.[233] During the remediation period, in March 1997, the parties added a TPH test on the soil as an additional standard applied prospectively to assess cleanup on newly remediated pits.

b. Other Remediation Action Requirements

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[229] In some instances, the local owners did not grant access to the properties to clean the pit. These pits were declared COC.

[230] **Exhibit C-42**, RAP, at 5 and Table 2-1. When the RAP specified stabilization, Woodward-Clyde mixed the contaminated soil with a cement that would bind to the soil and make the contaminants more physically stable. The physical stabilization would prevent or significantly reduce the mobility of the contaminants and also would reduce the possibility of rainwater reaching and causing movement of the contaminants. **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at 3-10.

[231] **Exhibit C-42**, RAP, at 21, Table 3.7, and Table 3.8.

[232] J. Connor Expert Report at viii, 35, 38-9.

[233] **Exhibit C-42**, RAP at Table 2.4.

110. The RAP also described equipment modifications that TexPet had to address at 13 of Petroecuador's active production stations.[234] The modifications included work on produced-water filters, produced-water tanks, high-pressure injection pumps, transfer-booster pumps, and station piping.[235]

111. At abandoned facilities, the RAP required clean-up of contamination on the pad, pit closure, well plugging and abandonment, and revegetation of affected areas.[236] Generally, contaminated soil and pits at the abandoned facilities were subject to the pit remediation criteria described above.[237]

112. The RAP also required environmental remediation for identified areas of soil contamination, likely from spills, not contained within pits.[238] As to these particularly identified areas, TexPet was required to remediate the areas presumed to pre-date June 30, 1990, with soil contamination that tested above 5,000 mg/kg TPH.[239] In such cases, Woodward-Clyde excavated the soil for offsite treatment, and backfilled and regraded the treated area.[240]

113. Furthermore, the RAP required that secondary containment dikes around above-ground storage tanks be built at three designated sites.[241] It specified the size of the required dikes and the dike construction materials.[242]

114. Upon completion of the remedial action or cleanup at each site, TexPet had to file a completion notification with the Ministry of Energy and Mines, along with specified quality control documentation.[243] The Ministry could either approve the work or notify TexPet that the

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234 **Exhibit C-42**, RAP at 18.

235 *Id.* at 18.

236 *Id.* at 19.

237 *Id.* at 19.

238 *Id.* at 20, Appendix D, Table 3.5, and Table 3.6.

239 *Id.* at 20.

240 *Id.* at 20.

241 *Id.* at 33.

242 *Id.* at 33.

243 *Id.* at 2.

work failed to meet the applicable standards.[244] If the parties disagreed about the adequacy of any of the remedial work, an Independent Technical Arbitrator would decide the issue.[245]

115. Because the impacts of disposing of produced water in rivers in a very humid environment, such as the Oriente, are limited and temporary,[246] Ecuador did not require TexPet to remediate any of the previously-affected water or plants due to produced water discharges.[247] Instead, Ecuador made TexPet responsible for helping to change designated produced water-management systems from surface-treatment-and-discharge systems to underground-injection systems.[248]

3. TexPet Remediated the Concession Area According to the Remedial Action Plan

116. Between October 1995 and September 1998, Woodward-Clyde completed all of the remedial actions that TexPet was required to perform under the 1995 Settlement Agreement, the Scope of Work, and the RAP.[249] The Government of Ecuador provided a certification of completeness.[250]

117. Once the work began, and as anticipated by the Scope of Work, some adjustments to the RAP were necessary. During the remediation process, Woodward-Clyde discovered 25 additional pre-1990 pits and seven additional pre-1990 spill areas.[251] It investigated them, determined that some were contaminated, and added the contaminated ones to the work list.[252] Based on additional field work, Woodward-Clyde determined that ten pits initially classified in the RAP as NFA pits actually required remediation, so the parties added those pits to the work

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244 **Exhibit C-23**, 1995 Settlement Agreement, Art. IV.

245 *Id.* at Art. IV.

246 **Exhibit C-437**, D. Southgate, J. Connor, and D. MacNair Response to the Allegations of Mr. Cabrera Regarding the Supposed Unjust Enrichment of TexPet, Sept. 8, 2008, at 10.

247 Neither the Scope of Work nor the RAP required TexPet to perform produced water-related remediation on surface water or plants.

248 **Exhibit C-42**, RAP, at 18; **Exhibit C-22**, Scope of Work, at 1-2.

249 **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at ES-1 and ES-2.

250 *Id.* at 6-8.

251 *Id.* at 3-2.

252 *Id.* at 3-2.

list.[253] 12 pits and one spill were also removed from the RAP's task list because Woodward-Clyde's field investigation found that Petroecuador's activities (after the remedial investigation inspection) had changed conditions at those sites.[254] Ecuador reviewed and approved all of these additions to and deletions from the scope of TexPet's remediation obligations.[255]

118. The process for remediating pits closely followed, and was even more comprehensive than, the RAP's basic cleanup requirements. Woodward-Clyde's remediation consisted of an eight-step process:

(i) prepare the pit by clearing vegetation to gain access to the pit;

(ii) remove, clean, and burn or landfill the pit's debris;

(iii) remove and process pumpable crude oil prior to injection in Petroecuador's pipeline and remove non-pumpable (asphalt-like) crude oil and dispose of it in concrete vaults;

(iv) treat water using filtration, flocculation, or aeration to remove solids; introduce oxygen into the water; and discharge it to a water body when post-treatment testing showed compliance with the applicable Ecuadorian water discharge standards;

(v) treat soil and sludge by performing bioremediation, stabilization, encapsulation, or surfactant-enhanced recovery (washing to remove oil) on soil removed from pits and spill zones,

(vi) sample remediated soils to ensure compliance with applicable cleanup standards;

(vii) backfill and grade the remediated pits; and

(viii) revegetate and regrade pits with native plants appropriate for the region and the identified land use.[256]

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253 *Id.* at 3-2.

254 *Id.* at 3-2.

255 *See, e.g.*, **Exhibit C-457**, Global *Acta* No. 52, Sept. 24, 1998, at 3, 4, 5, 6 and 7 (Eng.); **Exhibit C-53**, 1998 Final Release at 2 and 3.

256 **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-4 through 3-10.

119. The following graphic demonstrates the RAP remediation process:[257]

120. As the Government strongly encouraged, Woodward-Clyde hired local Ecuadorian subcontractors to perform the various pit-remediation tasks whenever possible.[258] Ecuador approved the hiring of each subcontractor and the remediation technologies that each subcontractor would employ when performing its assignments.[259] Woodward-Clyde personnel supervised the subcontractors' field work to ensure their compliance with the Scope of Work and the RAP.[260]

121. In March 1997, when the remediation was well underway, the Government requested an additional cleanup criterion.[261] For a pit to be considered closed after that date, its

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257 J. Connor Expert Report at 34 (Figure 15).

258 **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-10.

259 *Id.* at 3-11.

260 *Id.* at 3-10.

261 **Exhibit C-50**, Approval *Acta* of Mar. 20, 1997.

soil had to meet the existing TCLP leachate standard also and not exceed a TPH standard of 5,000 mg/kg.

122. After remediating each site, consistent with the RAP's specifications, Woodward-Clyde collected multi-point composite soil samples to confirm that the cleanup was successful.[262] The samples were analyzed by an independent laboratory staffed with employees of the Universidad Central in Quito.[263]

123. For each remediated site, Woodward-Clyde provided Ecuador with the results of the confirmatory soil samples, photographs, and summaries of the completed work activity.[264] Ecuador reviewed this information and approved the work that Woodward-Clyde completed for all sites assigned to TexPet for action.[265] Occasionally, Ecuador required additional remediation work before it would issue its final approval of work completed at a particular site.

124. Woodward-Clyde performed remediation at 133 (or about 41%) of the 321 identified well sites.[266] It remediated and closed 162 pits and six spill areas at those sites.[267] The post-cleanup confirmatory soil sampling showed that Woodward-Clyde met the applicable cleanup standard for each site.[268]

125. Woodward-Clyde completed other tasks assigned to TexPet under the RAP, including (i) construction of secondary containment at several production stations; (ii) delivery and installation of produced-water reinjection equipment; (iii) completion of a pipeline design and installation project; and (iv) construction of a plant so that Petroecuador could reuse oil recovered from the pits.[269] The treatment-conveyance and reinjection facilities began operating

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[262] **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-14; **Exhibit C-42,** RAP at 8-9.

[263] *Id.* at 2-1.

[264] *Id.* at 3-14.

[265] *Id.* at 3-14.

[266] *Id.* at 3-1, 3-2 and Table 3-1, and 1-2, table 1-1.

[267] *Id.* at 3-1, 3-2, and Table 3-1.

[268] *Id.* at 3-15 through 3-21, 3-23, 3-25, 3-26, 3-28, and 3-30.

[269] *Id.* at 7-2 through 7-8.

in 1996, and Ecuador certified that TexPet provided the required produced water treatment and discharge infrastructure.[270]

126. TexPet also provided socio-economic compensation to Ecuador as required under the 1995 Settlement Agreement. In particular, it (i) paid Ecuador US $ 1 million to be used to build four schools and adjacent medical clinics; (ii) paid US$ 3.8 million to complete various social interest projects, including installing drinking water systems and sewage handling systems; (iii) paid US$ 1 million to fund natural resource projects to benefit indigenous peoples; and (iv) funded the purchase of an airplane to provide residents of the Oriente better access to healthcare.[271]

127. Numerous contemporaneous documents demonstrate that TexPet conducted proper and complete remediation. In addition to interim documentation, Woodward-Clyde prepared a detailed final project report that described the completed tasks, and through presentation of appropriate post-remediation sampling data, photographs, and physical inspections by the Government officials, established that every pit and other remediated area met the established acceptance criteria as determined by the results of samples analyzed by an independent laboratory.[272] Environmental expert John Connor confirms that TexPet completed the remediation in accordance with the RAP:

> My review of project documentation demonstrates that TexPet completed the full work program specified in the [Scope of Work] and RAP, subject to the modifications and additions approved by GOE and Petroecuador, and that the pit and soil remediation activities met the applicable remediation criteria. The remediation procedures and parameters employed in his project were appropriate and are still employed today.[273]

128. Ultimately, TexPet spent approximately US$ 40 million satisfying its environmental remediation and community development obligations mandated by the 1995

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[270] *Id.* at 7-8; *see also* 1998 Final Release.

[271] **Exhibit C-53**, 1998 Final Release; *see also* Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 43; *see also* R. Veiga Witness Statement, ¶¶ 31, 39, 40.

[272] *See* **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I; Woodward-Clyde International, Remedial Action Project, Oriente Region, Ecuador, Final Report, Vol. II (May 2000).

[273] J. Connor Expert Report at 57.

Settlement Agreement, the Scope of Work, and the RAP.[274] Its costs for the remediation work alone were about US$ 34 million, which exceeded both HBT AGRA's US$ 13,274,000 and Fugro-McClelland's US$ 8,482,000 cost estimates.

4. Ecuador and Petroecuador Formally Approved the Remediation Work

129. The responsible Government ministries and agencies oversaw, inspected and approved all of the environmental remediation work that Woodward-Clyde performed on TexPet's behalf, and they fully documented their activities in a series of official records called "*Actas*."[275]

130. During the course of the remediation work, Government personnel conducted field inspections and certified that the required remediation and reclamation work was properly completed.[276] Inspectors from the Ministry of Energy and Mines, Petroecuador, and Petroproducción (called "*fiscalizadores*") monitored and reported to senior Government officials on Woodward-Clyde's field work. The *fiscalizadores* also certified and approved whether a pit was declared an NFA or COC pit. The *fiscalizadores* prepared 52 inspection *Actas* ("Working *Actas*") detailing their observations and conclusions.[277] These Working *Actas* summarized the *fiscalizadores*' (i) personal inspections of the TexPet remediation sites; (ii) review of the site-specific sampling and laboratory analytical data; and (iii) assessment of Woodward-Clyde's cleanup work.[278] Additional *Actas* confirmed that TexPet had complied with its equipment

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274 R. Veiga Witness Statement, ¶ 41.

275 *See* **Exhibit C-53**, 1998 Final Release; *see also* **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at ES-2.

276 *See* **Exhibit C-53**, 1998 Final Release; *see also* **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at ES-2; J. Connor Expert Report at 9.

277 *See, e.g.*, **Exhibit C-458**, Working *Acta* No. 12-RAT-96 of June 25, 1996 (describing remediation of various pits); **Exhibit C-459**, Working *Acta* No. 15-RAT-96 of July 16, 1996 (describing remediation of various pits); **Exhibit C-460**, Working *Acta* No. 23-RAT-96 of Sept. 11, 1996 (describing remediation of various pits).

278 *See, e.g.*, **Exhibit C-458**, Working *Acta* No. 12-RAT-96 of June 25, 1996 (describing remediation of various pits); **Exhibit C-459**, Working *Acta* No. 15-RAT-96 of July 16, 1996 (describing remediation of various pits); **Exhibit C-460**, Working *Acta* No. 23-RAT-96 of Sept. 11, 1996 (describing remediation of various pits).

donation, cash contribution, and other socio-economic obligations under the parties' agreements.[279]

131. As might be expected in a project of this magnitude, the *fiscalizadores* and TexPet officials occasionally disagreed about the status of particular sites. In those instances, the parties acted in accordance with the 1995 Settlement Agreement's dispute resolution provision and referred the matter to a technical arbitrator for resolution.[280] In all cases, Ecuador either accepted the original post-remediation data as proof of acceptable work, or granted approval after Woodward-Clyde had conducted requested supplemental work.[281] Therefore, the parties ultimately resolved all disagreements to Ecuador's satisfaction, as contemporaneous official Government records confirm.[282] The final Working *Acta*, dated September 24, 1998 ("Global *Acta* No. 52"), concluded that there were no open deficiencies (except a single unaddressed spill

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[279] *See, e.g*., **Exhibit C-452**, Approval *Acta,* Nov. 15, 1995 (TexPet pays $1 million); **Exhibit C-461**, Approval *Acta* of Jan. 25, 1996 (TexPet provides equipment for water reinjection); **Exhibit C-454**, Approval *Acta* of Oct. 29, 1996 (TexPet provides equipment to Petroproducción); **Exhibit C-455**, Approval *Acta* of Nov. 13, 1997 (TexPet delivers $1 million for the construction of education centers and medical centers); J. Connor Expert Report at 34, Attachment D.

[280] *See* **Exhibit C-23,** 1995 Settlement Agreement, at Art. IV; *see e.g*., **Exhibit C-462,** Republic of Ecuador Ministry of Energy and Mines Official Letter No. 199 dated May 30, 1996 to Dr. Rodrigo Pérez P., Legal Representative of TexPet (requesting that listed pits be subjected to independent technical arbitration) ("Official Letter No. 199").

[281] *See e.g*. **Exhibit C-462,** Official Letter No. 199; **Exhibit C-463**, TexPet Letter MP-155/96 dated June 12, 2006 to Economist Jorge Pareja Cucalón, Ministry of Energy and Mines; Manager of Petroproducción; **Exhibit C-464,** Official Letter No. 3363 dated June 20, 1996 to Undersecretary for Environmental Protection, Ministry of Energy and Mines; **Exhibit C-276,** Republic of Ecuador Ministry of Energy and Mines, Official Letter No. 248 dated June 28, 1996 to Dr. Rodrigo Pérez P., Legal Representative of TexPet (describing status of disputed pits); **Exhibit C-47,** Approval *Acta* of July 24, 1996; **Exhibit C-49,** Approval *Acta* of Nov. 22, 1996; **Exhibit C-50,** Approval *Acta* of Mar. 20, 1997.

[282] *See, e.g*., **Exhibit C-465**, Working *Acta* No. 9-RAT-96 of June 5, 1996 at 4 (noting that the VISTA-1 pit should be sampled again using adequate instruments to determine if the remediation was successful), **Exhibit C-49,** Approval *Acta* of Nov. 22, 1996 at 3 (noting that the remediation of the VISTA-1 pit had been approved) and **Exhibit C-50,** Approval *Acta* of Mar. 20, 1997 (noting again that the remediation of the VISTA-1 pit had been approved); **Exhibit C-458**, Working *Acta* No. 12-RAT-96 of June 25, 1996 at 2, **Exhibit C-49,** Approval *Acta* of November 22, 1996 at 6 (noting that the remediation for the SSF-66.1 pit had been approved), and **Exhibit C-50,** Approval *Acta* of Mar. 20, 1997 (noting again that the remediation of the SSF-66.1 pit had been approved); **Exhibit C-459**, Working *Acta* No. 15-RAT-96 of July 16, 1996 at 4; **Exhibit C-49,** Approval *Acta* of November 22, 1996 at 5 (noting that the remediation of the SA-90.1 pit had been approved); **Exhibit C-459**, Working *Acta* No. 15-RAT-96 of July 16, 1996 at 7; **Exhibit C-49,** Approval *Acta* of Nov. 22, 1996 at 5 (noting that the remediation of the SSF-30.3 pit had been approved) and **Exhibit C-50**, Approval *Acta* of Mar. 20, 1997 (noting again that the remediation of the SSF-30.3 pit had been approved).

that could not be cleaned up because Petroproducción had not cleaned up and closed a pit at one of its sites).[283]

132. From October 1995 to September 1998, Ecuador issued more than 15 approval *Actas* documenting its acceptance of Woodward-Clyde's cleanup work and TexPet's other undertakings. Nine approval *Actas* addressed specific lists of pits and other areas, described the work that had been performed, and certified Ecuador's agreement that TexPet had remediated the identified areas in accordance with the parties' agreement.[284] Each of these approval *Actas* was supported by test data collected from the remediated sites, photographs, and other documentation.[285] Ecuador's and TexPet's representatives signed each approval *Acta*.[286]

5. The 1998 Final Release

133. On September 30, 1998, Ecuador, Petroecuador, and TexPet executed the final *Acta* (the "1998 Final Release"). It certified that TexPet had performed all of its obligations under the 1995 Settlement Agreement, and fully released TexPet from any and all public environmental liability arising from the Consortium's operations.[287] Ecuador and Petroecuador retained responsibility for any remaining environmental impact and remediation work. The 1998 Final Release sets forth an additional broad release of liability:

> In accordance with that agreed in the Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims, specified above, *the Government and PETROECUADOR proceed to release, absolve and discharge TEXPET, Texas Petroleum Company, Compañía Texaco de Petroleos del Ecuador, S.A., Texaco Inc. and all their respective*

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[283] **Exhibit C-457**, Global *Acta* No. 52, Sept. 24, 1998 at 5. Because Petroproducción had not cleaned up and closed a pit at its site, TexPet was no longer obligated to remediate that specific spill. Instead, the parties agreed that TexPet would pay a specified amount as a voluntary contribution. **Exhibit C-53**, Additional *Acta* signed by the Ministry of Energy and Mines, Petroecuador, Petroproducción and TexPet on Sept. 30, 1998.

[284] **Exhibit C-44,** Approval *Acta* of Feb. 26, 1996; **Exhibit C-45,** Approval *Acta* of Mar. 14, 1996; **Exhibit C-46**, Approval *Acta* of Apr. 11, 1996; **Exhibit C-47**, Approval *Acta* of July 24, 1996; **Exhibit C-49**, Approval *Acta* of Nov. 22, 1996; **Exhibit C-50**, Approval *Acta* of Mar. 20, 1997; **Exhibit C-51**, Approval *Acta* of May 14, 1997; **Exhibit C-52**, Approval *Acta* of Oct. 16, 1997.

[285] *See* **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I at 3-14; **Exhibit C-457**, Global *Acta* No. 52, Sept. 24, 1998.

[286] *See, e.g.*, **Exhibit C-44,** Approval *Acta*, Feb. 26, 1996.

[287] **Exhibit C-53,** 1998 Final Release.

> *agents, servants, employees, officers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principals and subsidiaries, forever, from any liability and claims by the Government of the Republic of Ecuador, PETROECUADOR and its Affiliates, for items related to the obligations assumed by TEXPET in the aforementioned Contract, which has been fully performed by TEXPET*, within the framework of that agreed with the Government and PETROECUADOR; for which reasons the parties declare the Contract dated May 4, 1995, and all its supplementary documents, scope, acts, etc., fully performed and concluded.[288]

TexPet and all of its affiliated companies were thus fully released from all environmental liability arising out of the former Consortium's operations, with the exception of individual claims for personal injury or private property damage.

6. There Is No Significant Risk to Human Health or the Environment Associated with TexPet-Remediated Sites

134. Consistent with generally-accepted principles, the remediation process did not require removal of all traces of petroleum from the environment. Even today, Ecuador and other countries do not require remediation of 100% of all petroleum releases.

135. Crude oil remediation projects around the world often employ a soil cleanup standard that is based on a maximum TPH concentration value.[289] Many jurisdictions, including Texas, Louisiana, and Venezuela, employ 10,000 mg/kg as their TPH-based cleanup standard.[290] This is also the TPH value for soil that the American Petroleum Institute has determined is unlikely to cause adverse effects on groundwater or vegetation.[291] Colombia uses a 20,000 to 30,000 mg/kg TPH value.[292] A standard based upon a TPH value establishes a bright line for accepting cleanup work. It is not indicative of the potential toxicity of the petroleum contained

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[288] **Exhibit C-53**, 1998 Final Release, § IV ("Release from Obligations, Liabilities and Claims") (emphasis added).

[289] J. Connor Expert Report at 37.

[290] *Id.*

[291] *Id.*

[292] *Id.* at 20, 37.

within the soil, and of the risk that such petroleum may pose to human health or the environment.[293]

136. Crude oil is composed of thousands of different chemicals, many of which pose little or no toxicity to humans.[294] And some common household products are made from petroleum, such as baby oil or petroleum jelly. For assessing hydrocarbon risk to human health, only the concentrations of a limited number of the individual crude oil constituents—not the total petroleum hydrocarbon value—are important. As shown in the following graphic, many harmless plants, materials and products contain TPH concentrations well above 5,000 mg/kg:[295]

TPH Concentrations

137. The potentially harmful substances of crude oil generally are the lighter hydrocarbon fractions: Volatile Aromatic Hydrocarbons (known as "BTEX" in reference to their

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293 J. Connor Expert Report at 48, 64.

294 *Id.* at 48. *See* **Exhibit C-466**, U.S. Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Total Petroleum Hydrocarbons (TPH)* at Section 6 (Sept. 1999).

295 J. Connor Expert Report at 49.

individual constituents),[296] Polycyclic Aromatic Hydrocarbons ("PAHs"),[297] and metals.[298] The heavier, asphalt-like hydrocarbon fractions are generally not harmful, and in fact are used worldwide to build roads, housing foundations, tennis courts, children's playgrounds, and other infrastructure. In addition, some concentrations of even the potentially harmful constituents exist in the environment without presenting concerns—either because the concentrations of those constituents are sufficiently low as to be harmless, or because the site conditions prevent humans from coming into contact with those constituents (*e.g.,* the site is fenced off, or material is encapsulated in a concrete vault well underneath a cap of clean soil).[299] To analyze crude oil's potential impact on human health, it is therefore necessary to determine the existence and amount of its potentially harmful components in a location accessible to people.[300]

138. The natural crude oil weathering process (*i.e.*, the degradation of the petroleum hydrocarbons' composition due to their exposure environmental conditions) generally removes the lighter hydrocarbon fractions (BTEX and some PAHs) and leaves a higher percentage of heavier (asphalt, tar-like) petroleum fractions.[301] A number of natural weathering processes—such as volatilization, microbial degradation, and the effects of sunlight—contribute to these changes.[302] In an environment as hot, humid, and lush as the Amazon rainforest, crude oil weathers quickly.[303] In the Oriente, the lighter hydrocarbon fractions of crude oil disappear in a

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296 BTEX stands for benzene, toluene, ethylbenzene and xylenes. J. Connor Expert Report at 47.

297 PAHs are acenaphthene, acenaphthylene, anthracene, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, fluoranthene, fluorene, indeno(1,2,3-cd)pyrene, naphthalene, phenanthrene, and pyrene. J. Connor Expert Report at 47.

298 Potentially toxic metals found in crude oil are Barium, Cadmium, Chromium (total), Chromium (VI), Copper, Lead, Mercury, Nickel, Vanadium, and Zinc. J. Connor Expert Report at 47.

299 *See* J. Connor Expert Report at 47-51.

300 J. Connor Expert Report at 64.

301 Gregory S. Douglas, Ph.D., The Invalidity of Plaintiffs' Experts and Mr. Cabrera's Environmental Chemistry Data, Sept. 3, 2010 ("G. Douglas Expert Report"), ¶ 71-72; **Exhibit C-467,** G. Douglas, P. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004, at 1 (included as Appendix O in the Sacha-53 Judicial Inspection Report from E. Baca); J. Connor Expert Report at 48.

302 For a detailed explanation, *see* **Exhibit C-467,** G. Douglas, P. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004, at 1 (included as Appendix O in the Sacha-53 Judicial Inspection Report from E. Baca).

303 **Exhibit C-467,** G. Douglas, P. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004, at 1, 4 (included as Appendix O in the Sacha-53 Judicial Inspection Report from E. Baca); G. Douglas Expert Report ¶ 71-2.

matter of days or weeks of being released into the environment.[304] In addition, like most crude oil types, Ecuadorian crude oil has relatively low concentrations of the heavy metals that can be of potential concern to human health and the environment.[305]

139. Because TexPet's remediation obligations extended only to remediating sites that originated during the pre-1990 period of TexPet's operational responsibilities,[306] the crude oil within the pits and other areas assigned to it for remediation was considerably weathered.[307] This weathered crude oil had lost its lighter, more mobile and more toxic petroleum fractions.[308] Already in 1992, Fugro-McClelland's field audit of the Consortium's sites noted that pits and other areas within the scope of TexPet's remediation contained "weathered" crude oil.[309]

140. The RAP-mandated TCLP test results showed that any residual petroleum hydrocarbons would not leach from the soil into the groundwater.[310] Remediated areas remained as firm, clayey soils with no free oil.[311] Moreover, all remediated areas were covered with a layer of clean soil and vegetation, which prevented humans and wildlife from coming into direct contact with any residual petroleum.[312]

141. Several years after TexPet completed the remediation, during the judicial inspections in the Lago Agrio Litigation between 2003 and 2008, various technical experts conducted an evaluation of potential risks posed to human health by remediated or non-remediated facilities. Chevron's experts conducted analyses of a broad range of chemical

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304 **Exhibit C-467**, Gregory S. Douglas and Pedro J. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004, at 5.

305 J. Connor Expert Report at 47, 70.

306 **Exhibit C-42**, RAP at 12; **Exhibit C-23**, May 4, 1995 Contract and Scope of Work Annex.

307 J. Connor Expert Report at 48; **Exhibit C-12,** Fugro-McClelland (Oct. 1992) at 6-9, 6-10, 7-2, Table 6-3, and Table 6-4

308 J. Connor Expert Report at 47-9, 70; **Exhibit C-467**, Gregory S. Douglas and Pedro J. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004, at 5; G. Douglas Expert Report ¶ 71-2.

309 **Exhibit C-12**, Fugro-McClelland (Oct. 1992) at 6-9, 6-10, 7-2, Table 6-3, and Table 6-4.

310 J. Connor Expert Report at 57.

311 *Id.* at 60.

312 *Id.* at 60.

components indicative of potential risk to human health.[313] Environmental expert John Connor analyzes their findings in his expert report.[314] The health-based screening levels were based on USEPA, American Society for Testing and Materials ("ASTM") and World Health Organization ("WHO") guidelines that addressed health risk issues associated with chemical exposures.[315] The experts evaluated whether environmental conditions at both remediated and unremediated sites presented potentially significant risks to human health by comparing the results from the laboratory analysis of 1082 soil samples from 46 sites and 458 water samples to these screening levels.[316] The results of this comprehensive risk evaluation showed that the soil, sediments and water affected by the Consortium's historical oilfield operations do not pose a measurable risk to the health of local residents or workers.[317] None of the soil samples collected from TexPet-remediated pits or spills exhibited concentrations of any potentially toxic hydrocarbon constituents above screening levels.[318]

142. Chevron's experts also found that there was no current impact on surface water quality from the historical discharges of produced water in the former Concession area.[319] Of the 458 water samples collected, 440 did not contain petroleum-related chemicals at concentrations in excess of health-based screening levels and therefore met the relevant risk-based screening levels.[320] 18 water samples exceeded a risk-based screening value.[321] But after site-specific examinations—following the USEPA and WHO methodology—at none of the sample locations was that water currently used as a drinking water supply.[322] Consequently, no person could

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313 *Id.* at 11.

314 *Id.* at 64-7.

315 *Id.* at 11, 47-51.

316 *Id.* at 65-7.

317 *Id.* at 11.

318 *Id.* at 65-7.

319 *Id.* at 26; **Exhibit C-179**, J. Connor, Response to Statements by Mr. Cabrera regarding Alleged Impacts to Water Resources in the Petroecuador-Concession Area, Aug. 29, 2008, at 6.

320 J. Connor Expert Report at 66.

321 *Id.*

322 J. Connor Expert Report § 3.6(a). As Mr. Connor explains, "of the 18 water samples exceeding health-based levels, only 10 are from locations (*i.e.*, surface water streams) that could be potentially considered as a potential future water resource, under any hypothetical scenario. All 10 of these sampling locations are within streams that, at the time of sample collection, were impacted along a limited distance due to on-going leaks or

reasonably be exposed to the water at these locations in a manner that would result in a measurable health risk.[323]

143. Furthermore, the results of a survey of vegetative conditions at 14 former discharge points found the vegetation to be dense and healthy, with no indication of vegetative stress as a result of past discharge of produced water.[324]

E. Petroecuador's Ongoing Impacts in the Former Concession Area

1. Petroecuador Has Caused Extensive Environmental Damage since 1992

144. Since the Consortium ended in 1992, TexPet has had no ownership interest or involvement in any production activities in Ecuador, and Petroecuador has been the sole owner of continuous and expanding oil producing operations in the former Concession Area. As the map below demonstrates, Petroecuador in the ensuing years has drilled more new wells (414) than the Consortium drilled during its life (321):[325]

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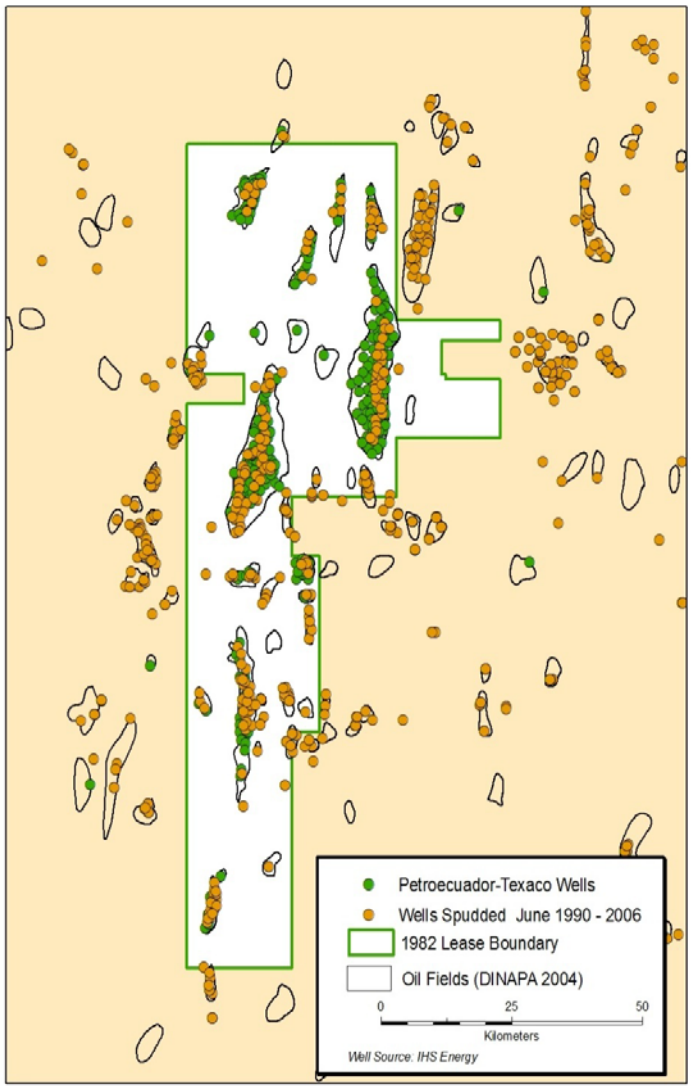
discharges of produced water by Petroecuador. Interviews with local residents indicate that the affected portions of these streams are not used as drinking water supplies. In addition, available information indicates that Petroecuador has undertaken actions to terminate these produced water leaks." *Id.*

323 J. Connor Expert Report at 67.

324 *Id.* at 26.

325 **Exhibit C-468**, *Petroecuador Diagnoses Environmental Damage Caused by Crude Oil*, EL UNIVERSO, Feb. 28, 2009; **Exhibit C-469**, Chevron's Motion to the Lago Agrio Court in Response to G. Barros's Report, Jan. 14, 2010, at 5:50 p.m., at 19 (Eng.).



145. Since assuming operational control in 1990 and full ownership of the former Concession Area in 1992, Petroecuador has developed a widely-acknowledged record of operational and environmental mismanagement, characterized by lack of investment in or maintenance of its equipment and installations, numerous spills, and failure to timely perform environmental remediation. Ecuadorian public media sources have reported that Petroecuador was responsible for more than 1,400 spills from 2000 to 2008.[326]

[326] **Exhibit C-468**, *Petroecuador Diagnoses Environmental Damage Caused by Crude Oil*, EL UNIVERSO, Feb. 28, 2009; **Exhibit C-470**, *Spending on Environmental Remediation Fell in 2008,* EL TELEGRAFO, Feb. 9, 2009.

146. Petroecuador is a large and profitable oil company. It ranks among the top 100 oil companies in the world and is the fourth leading producer of oil and gas in Latin America.[327] Since 1990, the company has invested more than US$ 1 billion in new oil wells,[328] but it has invested very little in its environmental management program.[329] From 2000 to 2004, Petroecuador set aside only 1.1% of its budget for environmental protection, and did not even spend all of the budgeted amount.[330]

147. Nor has Petroecuador made meaningful investments in the basic maintenance of its oilfield infrastructure. The result has been frequent spills of crude oil from outdated and corroded pipelines.[331] And as reported by the Ecuadorian Controller's Office, produced water is discharged in large volumes to rivers and streams.[332] Furthermore, Petroecuador has failed to close and remediate old, inactive oil pits while constructing hundreds of new pits across the former Concession Area.[333]

148. In testimony before Ecuador's Congress in May 2006, Ecuador's National Director of Environmental Protection Management ("DINAPA"), Manuel Muñoz, 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*

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327 **Exhibit C-471**, *OGJ 100 Group Posts Improved 2007 Results*, 106(35) OIL & GAS J. 15 (Sept. 2008).

328 **Exhibit C-469**, Chevron's Motion to the Lago Agrio Court in Response to G. Barros's Report, Jan. 14, 2010, at 5:50 p.m., at 19 (Eng.).

329 **Exhibit C-469**, Chevron's Motion to the Lago Agrio Court in Response to G. Barros's Report, Jan. 14, 2010, at 5:50 p.m., at 21 (Eng.).

330 *Id.*; **Exhibit C-474**, Contraloría General del Estado Ecuatoriano, 2005, at 14-18.

331 **Exhibit C-473**, *Un derrame cada 2 días en el 2006*, EL UNIVERSO, Sept. 17, 2006 ("[I]n 2003 and 2004, the principal cause [of spills] was corrosion…," and stating that of 169 total spills in 2005, 64 were caused by corrosion, and that as of August 23, 2006, 39 of 117 total spills had been caused by corrosion); **Exhibit C-58**, Testimony of Manuel Muñoz, Director of the Nacional Environmental Protection Management (DINAPA) -- Minister of Energy from his May 10, 2006 appearance before the Extraordinary Session of the Permanent Specialized Commission on Health, Environment and Ecological Protection of Congress ("the pipelines. . . have mostly become obsolete. . .[and] this is one of the most important sources of contamination because their useful life has come to an end and they have not been replaced, so spills occur…"); **Exhibit C-436**, John A. Connor William C. Hutton, Response to the Proposal of Mr. Cabrera Regarding Improvement of the Infrastructure in the Former Petroecuador-TexPet Concession, August 29, 2008, at 7 ("Petroecuador records demonstrate very frequent spills of crude oil and produced water in the former Concession area, reflecting the poor maintenance of the existing oilfield infrastructure…").

332 **Exhibit C-474**, Contraloría General del Estado Ecuatoriano, 2005.

333 *See* **Exhibit C-472**, PEPDA Annual Report, Dec. 2007; **Exhibit C-469**, Chevron's Motion to the Lago Agrio Court in Response to G. Barros's Report, Jan. 14, 2010, at 5:50 p.m., at 19 (Eng.).

pits that were the state-owned company's responsibility to remediate."[334] Director Muñoz also stated that Petroecuador had allowed equipment, infrastructure, and operations to deteriorate: "[T]here is a very serious problem regarding the pipelines, regarding all flow transmission systems both of oil as well as derivatives, which have to a large degree become obsolete [because] there is no adequate budget to have them replaced."[335]

2. The Belated PEPDA Remediation Program

149. Although it was painfully slow in doing so, Petroecuador commenced remediation efforts in 2005 by approving and implementing the Project for Elimination of Pits in the Amazon District ("PEPDA").[336] The main goals of the PEPDA remediation program are to treat and eliminate all sources of contamination in the Amazon region (including the former Concession Area) at the lowest possible cost and to recover degraded crude.[337]

150. PEPDA has employed recognized and appropriate remediation technologies.[338] In fact, the PEPDA program appears to involve generally the same steps that Woodward-Clyde employed when completing its remediation work for TexPet.[339] After all steps are completed at a particular site, the owner of the remediated land signs an *Acta Entrega—Recepción* (Remediated Pit Acknowledgement Certificate) together with the PEPDA coordinator and representatives

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[334] **Exhibit C-58**, Testimony of Manuel Muñoz, Director of the National Environmental Protection Management (DINAPA) — Minister of Energy from his May 10, 2006 appearance before the Extraordinary Session of the Permanent Specialized Commission on Health, Environment and Ecological Protection of Congress (emphasis added).

[335] *Id.*

[336] PEPDA is the Spanish acronym for "Proyecto de Eliminación de Piscinas en el Distrito Amazónico." In 2008, PEPDA was replaced by the Unit for Mitigation and Remediation ("UMR"), which continues remediation efforts to this day. For purposes of this submission, "PEPDA" will refer collectively to PEPDA and UMR.

[337] **Exhibit C-210**, E. Baca, Response to Mr. Cabrera Regarding His Evaluation of Petroecuador's Pit Remediation Program (PEPDA), Sept. 5, 2008, at 5. **Exhibit C-472**, PEPDA Annual Report, Dece. 2007, at 22.

[338] **Exhibit C-210**, E. Baca, Response to Mr. Cabrera Regarding His Evaluation of Petroecuador's Pit Remediation Program (PEPDA), Sept. 5, 2008, at 2. *See also* **Exhibit C-475**, Letter to the Superior Court of Nueva Loja, Dec. 5, 2007, No. 133.840.

[339] *See* **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at 3-4 through 3-10.

from DINAPA and Petroproducción.[340] This document certifies that pit remediation was completed to the satisfaction of all relevant parties.[341]

151. PEPDA's costs are among the "best and most credible" source of pit remediation costs in the Oriente.[342] In 2008 dollars, PEPDA's actual unit cost of remediation was US$ 17/m^3-$34/$m^3$ of soil; in 2007 dollars, this is about US $85,000 per pit.[343] These numbers are consistent with international industry standards for environmental remediation and track average petroleum pit remediation costs worldwide.[344] They are also lower than TexPet's remediation costs. As of 1998, TexPet paid US $102,200 per remediated pit.[345] Dr. Robert Hinchee, an environmental expert specializing in remediation, agrees that PEPDA's remediation costs and estimates are reasonable and generally consistent with the costs that TexPet incurred in remediating the pits under the RAP.[346] The following comparative table compares the per-unit remediation costs of the different parties that have performed remediation or estimated remediation costs in the former Concession Area (at net present value):[347]

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340 **Exhibit C-472**, PEPDA, Proyecto de Eliminación de Pasivos Ambientales a través del Proyecto -- PEPDA -- en el Distrito Amazónico, Dec. 2007, at 21.

341 *Id.* at 21. **Exhibit C-210**, E. Baca, Response to Mr. Cabrera Regarding His Evaluation of Petroecuador's Pit Remediation Program (PEPDA), Sept. 5, 2008, at 2, 13.

342 **Exhibit C-200**, R. Hinchee, Rebuttal of the Method Used by Mr. Cabrera to Determine the Supposed Necessity and Cost of Remediation, Aug. 9, 2008, at 21.

343 *Id. Table 4: Oilfield pit remediation costs in Ecuador*, at 12.

344 *Id.* at 3; *id., Table 5: Summary of unit costs for pit and crude-impacted soil remediation from various locations around the world*, at 13.

345 TexPet's expenditures are slightly higher because TexPet incurred higher labor and travel costs due to supervisory work being done by U.S. firms. **Exhibit C-200**, R. Hinchee, Rebuttal of the Method Used by Mr. Cabrera to Determine the Supposed Necessity and Cost of Remediation, Aug. 9, 2008, *Table 4: Oilfield pit remediation costs in Ecuador*, at 12 and n.29.

346 *Id.* at 1, 3.

347 Navigant Report, ¶ 129, Figure 12.

Study/Project:	Fugro-McClelland	HBT Agra	TexPet	Petroecuador (Sacha Field)	PEPDA	Hinchee
Year:	1992	1993	1998	2006	2007	1996
Unit Cost:	$13,500	$29,434	$101,485	$24,000	$85,000	$20,700
PPI Index in Year of Estimate:	103.7	104.0	113.6	187.6	194.3	108.2
July 2010 PPI Index:	178.1	178.1	178.1	178.1	178.1	178.1
Inflation Adjustment Factor:	1.7175	1.7125	1.5678	0.9494	0.9166	1.6460
Unit Cost in Today's Dollars:	$23,186	$50,405	$159,106	$22,785	$77,913	$34,073

F. The *Aguinda* Litigation Concerned Individual, Not Public Claims

152. On November 3, 1993, U.S. plaintiffs' lawyers[348] filed a class action lawsuit in the United States District Court for the Southern District of New York (the "*Aguinda* Litigation"). The Plaintiffs, 76 residents of the Oriente region of Ecuador, claimed to represent a class of 30,000 Oriente residents who allegedly had been harmed by the Consortium's operations.[349] The Plaintiffs named Texaco, Inc. as the sole defendant.[350] Although Texaco, Inc.'s only involvement in the Consortium consisted of its indirect investment in TexPet, its fourth-tier subsidiary, the Plaintiffs alleged that Texaco, Inc. made or controlled the decisions of TexPet.[351]

153. In December 1993, Texaco, Inc. moved to dismiss the *Aguinda* Complaint on the grounds of, *inter alia*, (1) failure to join the Republic of Ecuador as a party; (2) international comity; and (3) *forum non conveniens*. For its part, Ecuador also sought dismissal of the *Aguinda* lawsuit. After the 1995 Settlement Agreement was executed, Ecuador represented to the court in *Aguinda* that the "agreement reached in Ecuador on a detailed program of environmental remedial work" was an "appropriate remedy," and that these "steps [taken] to address the matters that are the subject of this lawsuit render the continued exercise of

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348 The plaintiffs were initially represented by Joseph C. Kohn, Myles H. Malman, Martin J. D'Urso, Diana Liberto, Cristobal Bonifaz, John Bonifaz, Steven R. Donziger and Amy Damen. **Exhibit C-14**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Complaint (S.D.N.Y. Nov. 3, 1993).

349 *Id.,* ¶¶ 30, 3, 1.

350 **Exhibit C-10**, *Aguinda v. Texaco, Inc.,* 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

351 **Exhibit C-14**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Complaint (S.D.N.Y. Nov. 3, 1993).

jurisdiction by this Court over these claims unwarranted and inappropriate."[352] Ecuador saw the *Aguinda* Plaintiffs' attorneys as "attempting to usurp rights that belong to the government of the Republic of Ecuador under the Constitution and laws of Ecuador and under international law."[353]

154. The Court ordered discovery as to whether Texaco, Inc. directed activities in Ecuador from the United States.[354] After discovery, Texaco, Inc. renewed its motion to dismiss and, on November 13, 1996, Judge Jed Rakoff granted Texaco, Inc.'s motion on grounds of *forum non conveniens* and international comity, and dismissed the *Aguinda* action.[355] The Court also based dismissal on the "independently-sufficient reason" that the Plaintiffs had failed to join Petroecuador and the Republic of Ecuador, which the Court determined were indispensable parties.

155. Within days of that dismissal, Plaintiffs' organization *Frente de Defensa de la Amazonía* (the "Amazon Defense Front," or "ADF") staged a sit-in protest at the Ecuadorian Attorney General's Office, threatening not to leave until Ecuador revised its position supporting dismissal of the Plaintiffs' claims.[356] Three days later, Ecuador agreed to reverse its position before the *Aguinda* Court, moved to intervene in the case, and sought reconsideration of the dismissal based on the Government's newly-changed position.[357] In a letter from the Ecuadorian Attorney General, the Republic stated that it was "look[ing] to protect the interest of the indigenous citizens of the Ecuadorian Amazon" and "act[ing] as a coadjutor to the claims of the

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352 **Exhibit C-292**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, *Amicus* Brief of the Republic of Ecuador, at 2, (S.D.N.Y. Jan. 11, 1996).

353 **Exhibit C-20**, Letter From Ecuadorian Ambassador E. Terán to Hon. Judge Rakoff, June 10, 1996.

354 **Exhibit C-476**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, 1994 WL 142006, at *3-4. (S.D.N.Y. Apr. 11, 1994) (Broderick, J.).

355 **Exhibit C-477**, *Aguinda v. Texaco, Inc.,* 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996).

356 **Exhibit C-74**, *Jane Doe I, et al. v. Texaco, Inc*., Case No. C 06-2820, Declaration of Cristobal Bónifaz in Support of Plaintiffs' Renewed Motion to Proceed with Action using Pseudonyms, (WHA), June 9, 2006, at 3; *see also* **Exhibit C-478** , Letter from Attorney General Leonidas Plaza Verduga to Judge Jed Rakoff, Aguinda v. Texaco, Inc., Dec. 18, 1996. Previously, Ecuador had sought dismissal of the *Aguinda* Litigation in New York.

357 **Exhibit C-479,** Motion to Intervene, *Aguinda v. Texaco, Inc.* (Dec. 20, 1996); **Exhibit C-480,** Motion for Reconsideration, *Aguinda v. Texaco, Inc.* (Nov. 26, 1996).

indigenous actors."[358] Still, it continued to view the *Aguinda* Plaintiffs' claims as brought to vindicate "*personal* rights" by seeking damages to "*their* property and *personal* health."[359]

156. Shortly after Ecuador filed its motions in the *Aguinda* Court, Plaintiffs' attorney Cristóbal Bonifaz and Ecuador's Attorney General Leonidas Plaza Verduga embarked on a media tour together to explain to the public the Government's changed position. In a January 1997 interview, with Bonifaz translating, Attorney General Plaza claimed that the *Aguinda* Court misunderstood the Government's position in seeking the dismissal of the *Aguinda* Litigation, as it is "100% behind the plight of the indigenous people of the Amazon."[360] In mid-April 1997, the *Aguinda* Plaintiffs' then-lead attorney, Mr. Bonifaz, publicly stated that the Plaintiffs had agreed—in legal documents—to neither sue for nor accept any damages attributed to the State should it be found to be jointly responsible with Texaco, Inc. for causing environmental damage.[361] Parroting the Plaintiffs' future legal claims in the Lago Agrio Litigation, the Attorney General went on to assert that the 1995 Settlement Agreement was null and void because the Attorney General's office had not approved it.[362]

157. After a political crisis in Ecuador in February 1997 resulted in the end of President Abdalá Bucaram's term, a "credible source" in Ecuador's executive office stated that Plaintiffs' lawyer Cristóbal Bonifaz "offered to ensure that the [new] government would administer the winnings of the [*Aguinda*] lawsuit."[363] In November 2000, the *Aguinda* Plaintiffs' attorney told the Ecuadorian Ambassador that although the Republic of Ecuador was not a party

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358 **Exhibit C-478**, Letter from Attorney General Leonidas Plaza Verduga to Judge Jed Rakoff, Aguinda v. Texaco, Inc., Dec. 18, 1996.

359 **Exhibit C-481**, Rep. of Ecuador, Ministry of Foreign Relations, Information Regarding the Texaco, Inc. Case (submitted as Exh. 21 to Pls.' Brief in Opposition to Texaco Inc.'s Motion to Dismiss (Feb. 20, 1996)).

360 **Exhibit C-482,** Interview of Cristobal Bonifaz and Attorney General Leonidas Plaza Verduga, Democracy Now, Jan. 23, 1997.

361 **Exhibit C-77**, *Texaco—The Time Has Come*, HOY, Apr. 14, 1997; **Exhibit C-76**, *Petroecuador Will Not be Hurt—Interview with Cristobal Bonifaz*, EL COMERCIO, Apr. 22, 1997.

362 Despite this public claim, Ecuador and Petroecuador never sought to set aside the Settlement and Release Agreements, and, in fact, signed the 1998 Final Release acknowledging that TexPet had complied with the terms of the 1995 Settlement Agreement.

363 **Exhibit C-483,** Judith Kimerling, *Indigenous Peoples And The Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, *Inc.* 38(3) N.Y.U. J. INT'L L. 413, 519, n.288 (Spring 2006).

to the *Aguinda* lawsuit, the Republic would receive any funds obtained from Texaco, Inc.[364] Thus, years before the Plaintiffs filed the Lago Agrio Litigation in an Ecuadorian court, the Plaintiffs' lawyers planted the seed that the Ecuadorian Government could collect a windfall from their claims.

158. The *Aguinda* Plaintiffs appealed and the U.S. Court of Appeals for the Second Circuit remanded the case back to the District Court for failure to include a condition requiring Texaco, Inc. to submit to jurisdiction in Ecuador's courts.[365] Following remand, Texaco, Inc. committed to submit to the jurisdiction of the Ecuadorian courts and renewed its motion to dismiss on the ground of *forum non conveniens*.[366] On May 30, 2001, the District Court dismissed the *Aguinda* case on *forum non conveniens* grounds.[367]

159. In dismissing the case, the Court made key findings regarding Ecuador's role in the Consortium. It found that "the Government of Ecuador [] either directly or through the state-owned corporation Petroecuador regulated the Consortium from the outset, acquired a minority stake in 1974, acquired full operational control in 1990, and acquired exclusive ownership in 1992."[368] The Court held that "on any fair view of the evidence so far adduced in this case, the alleged preference given by the Consortium to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador in order to stimulate its economy."[369] The Court also noted that Ecuador had an uncontested role in "authorizing, directing, funding, and profiting from" the Consortium's activities.[370] The Plaintiffs appealed Judge Rakoff's second dismissal, but this time the Second Circuit affirmed.

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364 **Exhibit C-484**, Letter from C. Bonifaz to Amb. I. Baki, Nov. 15, 2000 (stating that the *Aguinda* Plaintiffs would "use the funds obtained from Texaco" to "pay the government").

365 **Exhibit R-29**, *Jota v. Texaco, Inc*., 157 F.3d 153 (2d Cir. 1998). The Second Circuit also held that dismissal on comity grounds was erroneous without a condition requiring Texaco, Inc. to submit to jurisdiction in Ecuador.

366 **Exhibit C-10**, *Aguinda v. Texaco, Inc.,* 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001).

367 *Id.* at 534.

368 *Id.* at 537.

369 *Id.* at 551 (emphasis added).

370 *Id.* at 550-51.

160. Throughout the *Aguinda* litigation, the Plaintiffs, Texaco, Inc., the District Court, and the Second Circuit all treated the Plaintiffs' claims as individual claims for damage to individual persons and personal property.

1. The *Aguinda* Plaintiffs Treated the *Aguinda* Claims as Individual

161. The *Aguinda* Plaintiffs' Complaint makes plain that it concerns individual claims. For instance, the plaintiffs expressly filed suit "individually," and when applicable, "as guardians" for their children.[371] The Complaint alleges that the Plaintiffs "have or will suffer property damage, personal injuries, and increased risk of disease." The factual basis for each of the claims arises from allegations of "physical injury;" actual contact with allegedly unsafe air, soil, and drinking water; and Texaco, Inc.'s alleged failure to regard "the health, well being and safety of Plaintiffs and the class."[372] Each count asserted by the Plaintiffs is accompanied by (i) an assertion of private injury or harm, and (ii) a request for individual damages or equitable relief to redress that individual harm.[373]

162. The Complaint also alleged that "[c]ommon questions of law and fact predominate over any individual issues … In the absence of a class action, the courts will be unnecessarily burdened with multiple, duplicative individual actions. Moreover, if a class is not certified, many meritorious claims will go unredressed as the individual class members are not able to prosecute complex litigation against a large, multi-national corporation."[374]

163. During the course of the *Aguinda* litigation, the Plaintiffs expressly confirmed in their pleadings that they were only asserting individual claims: "[The Plaintiffs are] not seeking damages for real property which they do not own."[375] According to the Plaintiffs:

> The release which TexPet obtained in its settlement agreement includes a release of 'any claims that the Government and Petroecuador have, or may have against TexPet, arising out of the

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371 **Exhibit C-14,** *Aguinda v. Texaco, Inc.*, No. 93-CV-7527, Complaint, Nov. 3, 1993 (S.D.N.Y.) (caption).

372 *Id.*

373 *Id.*

374 **Exhibit C-14**, *Aguinda* Complaint, ¶ 34.

375 **Exhibit C-16**, *Aguinda v. Texaco, Inc.,* No. 93-CV-7527, Plaintiffs' Memorandum of Law in Opposition to Texaco, Inc.'s Motion to Dismiss, at 50 (S.D.N.Y. Feb. 20, 1996).

> Consortium Agreements' pursuant to which TexPet operated in Ecuador. This release explicitly protects Texaco Inc., as well as TexPet and the other Texaco subsidiaries that operated in Ecuador. Thus, the protection which Texaco claims to need from inconsistent judgments will be provided by principles of *res judicata*, not those regarding indispensable parties. Moreover, because any judgment rendered in this action will be binding on members of the class, there is no risk of inconsistent verdicts without regard to the status of the Ecuadorian Entities.[376]

164. The *Aguinda* Plaintiffs explicitly conceded that they had no right to bring public environmental remediation claims against Texaco, Inc. under Ecuadorian law because allegations of "environmental contamination [can] be filed only . . . against the Government of Ecuador and not the party responsible for the damages."[377] The Lago Agrio Plaintiffs' lead counsel—who had served as the *Aguinda* Plaintiffs' expert on Ecuadorian law—unambiguously informed the New York court that "*no one can bring an action in the name of another*" in Ecuador, and that the Ecuadorian "*Constitution expressly forbids*" a person from litigating "on behalf of the people."[378] The *Aguinda* Plaintiffs' other experts on Ecuadorian environmental law also attested to this fact:

> Section two of Article 19 of the Ecuadoran Constitution guarantees the right of the people to live in an environment free of pollution. However, the executive branch has never promulgated any rules or regulations to enforce this provision of the Ecuadoran Constitution … I am aware of no case where an Ecuadoran citizen has ever received compensation or any other relief for environmental damage under the Ecuadoran constitution.[379]

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[376] **Exhibit C-16**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Plaintiffs' Memorandum in Opposition to Texaco, Inc.'s Motions to Dismiss, at 52-53 (internal citations omitted) (S.D.N.Y. Feb. 20, 1996).

[377] **Exhibit C-294**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Plaintiffs' Memorandum of Law in Opposition to Texaco, Inc.'s Motion to Dismiss, at 8-9 (S.D.N.Y. Jan. 11, 1999).

[378] **Exhibit C-293**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Affidavit of Alberto Wray, ¶ 2 (emphasis added) (S.D.N.Y. Mar. 8, 1994).

[379] **Exhibit C-340,** *Aguinda et al. v. Texaco, Inc.*, No. 93-CV-7527, Affidavit of Dr. Ricardo Crespo Plaza, Mar. 4, 1994, ¶ 4. *See also* **Exhibit C-341,** Sworn Affidavit of Attorney Vladimir Serrano Perez, Mar. 4, 1994.

Thus, faced with a dismissal of the action to Ecuador, the *Aguinda* Plaintiffs' counsel candidly admitted that any environmental claims brought in Ecuador could only seek remediation of the individual Plaintiffs' land.[380]

2. Texaco, Inc. Treated the *Aguinda* Claims as Individual

165. Throughout its *Aguinda* pleadings, Texaco, Inc. repeatedly demonstrated its understanding that the *Aguinda* claims were individual. For instance, it argued that litigating numerous individual issues would unduly burden the court in New York: "Clearly, a case alleging injury to 30,000 Ecuadorian residents and property damage throughout the Oriente will necessarily require extensive Ecuadorian witnesses and proof . . . Class members and other witnesses would be obligated to travel to New York for trial to prove or disprove personal injury and property claims."[381] When arguing that Ecuadorian courts would be an adequate alternative forum, Texaco, Inc. clarified: "An adequate alternative forum is simply a forum that provides plaintiffs with a remedy for the alleged injuries . . . Individuals in Ecuador may bring a civil action to recover private remedies for personal injury or property damage caused by an intentional or negligent act of another person."[382] Texaco, Inc. also explicitly sought dismissal of the *Aguinda* Complaint "without prejudice to plaintiffs' right to refile their *individual monetary claims* against TexPet in Ecuador."[383]

3. The District Court Treated the *Aguinda* Claims as Individual

166. In its second decision dismissing the *Aguinda* litigation, the District Court in New York repeatedly described the *Aguinda* claims as individual claims. For example, in rejecting the Plaintiffs' argument that Ecuadorian jurisprudence does not recognize tort claims, the Court cited the article in the Civil Code regarding individual tort claims: "[S]ection 2241 of the

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380 **Exhibit C-335,** *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Tr. of Oral Argument (S.D.N.Y. Feb. 1, 1999) ("What purpose will it serve for us to take 73 plaintiffs, go to Ecuador, file suits, even if we were able to succeed, because what are we going to get fixed? Plots of land, which are eight acres apiece. *That's all we can seek in Ecuador.* The remediation of eight acres of [land].")

381 **Exhibit C-486**, *Aguinda v. Texaco, Inc.,* Case No. 93-CIV-7527, Memorandum of Law in Support of Texaco, Inc's Motion to Dismiss based upon *Forum Non Conveniens*, at 3 (S.D.N.Y. Dec. 1993).

382 *Id.* at 8-9.

383 **Exhibit C-342**, *Aguinda v. Texaco, Inc*., Case No. 93-CIV-7527, Defendant Texaco, Inc.'s Report on the Settlement between Texaco Petroleum Company, the Republic of Ecuador, and Petroecuador and Texaco, Inc.'s Response to the Court's Proposed Conditions for Dismissal of Litigation, at 4 (S.D.N.Y. Dec. 22, 1994).

Ecuadorian Civil Code expressly provides that persons injured in their person or property by another's negligence or intentional wrongdoing may sue in the Ecuadorian courts for monetary damages and equitable relief."[384]

167. After describing the *Aguinda* claims as individual, the District Court stated that even if it had not dismissed the case, it likely never would have certified the class because individual issues predominated over the common issues: "It is also obvious that the multiplicity of ways in which plaintiffs allege that the Consortium's activities have directly and indirectly impacted various plaintiffs' various interests, or will impact them in the future, renders problematic whether questions of law or fact common to the members of the class predominate over questions affecting individual members."[385] The Court also rejected the *Aguinda* Plaintiffs' arguments that its requests for equitable relief made the claims less individual: "While plaintiffs try to skirt some of these objections by claiming in conclusory fashion that they are 'principally' seeking equitable, injunctive relief . . . they have in no respect relinquished their claims for billions of dollars in damages and other relief . . . Indeed, much of the equitable relief here sought (such as 'medical monitoring' for a variety of potential future medical injuries) is inextricably intertwined with the individualized claims for damages and the individualized issues of multiple causation."[386]

4. The Second Circuit Treated the *Aguinda* Claims as Individual

168. Like the *Aguinda* plaintiffs, Texaco, Inc. and the District Court, the Second Circuit also considered the *Aguinda* claims to be individual claims. In rejecting the Plaintiffs' arguments that their tort claims would not be allowed to proceed in the Ecuadorian courts, the Court expressly recognized the individualized nature of the Plaintiffs' claims: "While the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum."[387] And because the Second Circuit appeals court—like Texaco, Inc.—understood that the alleged thousands of individualized claims

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[384] **Exhibit C-10**, *Aguinda v. Texaco, Inc.,* 142 F. Supp. 2d 534, 542 (S.D.N.Y. 2001)

[385] *Id.* 542.

[386] *Id.*

[387] **Exhibit C-65**, *Aguinda et al. v. Texaco Inc*., 303 F.3d 470, 479 (2d Cir. 2002).

were likely to result in thousands of separate lawsuits if the litigation was moved to Ecuador, it ordered the District Court to extend Texaco, Inc.'s consent to suit in Ecuador from 60 days to one year: "In Ecuador, because class action procedures are not recognized, signed authorizations would need to be obtained from each individual plaintiff."[388]

169. In sum, throughout the *Aguinda* Litigation, both the parties and the courts treated the Plaintiffs' claims as individual claims.

G. The Lago Agrio Litigation Concerns Public Claims that Have Been Settled, and the Litigation Is Permeated with Fraud

170. In May 2003, a group of 48 Ecuadorians filed the Lago Agrio Litigation in Ecuador against ChevronTexaco Corporation (later renamed "Chevron Corporation") for public environmental damages allegedly caused by TexPet in the Oriente.[389] The Lago Agrio Complaint does not assert any claims against Texaco, Inc. or TexPet. Nor does it assert any claims against Ecuador, Petroecuador, or any related Governmental entity. The complaint was filed before the President of the Superior Court of Justice of Nueva Loja (currently the Provincial Court of Sucumbíos—the "Lago Agrio Court"), and was signed by Mr. Alberto Wray, an Ecuadorian attorney who, in parallel to the Lago Agrio Litigation, acted as counsel for the Government of Ecuador in various international arbitrations.[390]

1. The Lago Agrio Complaint and Initial Court Proceedings

a. The Lago Agrio Plaintiffs Do Not Seek Individual Damages, but Seek Enforcement of Their Collective Environmental Rights under the 1999 Environmental Management Act

171. In contrast to *Aguinda*, the Lago Agrio Plaintiffs seek no individual damages from Chevron. In their alleged capacity as "members of the affected communities" and "in safeguard of their recognized collective rights," they seek an undetermined monetary award payable to an

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388 *Id.*

389 **Exhibit C-71**, Lawsuit for Alleged Damages Filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos, May 7, 2003, at 11:30 a.m. ("Lago Agrio Complaint"). The name of the court has since been changed to the Provincial Court of Justice of Sucumbíos. ChevronTexaco Corporation has since changed its name to Chevron Corporation.

390 **Exhibit C-487,** Alberto Wray's Profile, at http://www.foleyhoag.com/People/Attorneys/Wray-Alberto.aspx?ref=1; *see infra* § II.H.2.

organization called the Amazon Defense Front or "ADF." The ADF is funded by and intimately related with the U.S.-based lawyers who have directed and financed the *Aguinda* and Lago Agrio cases.[391] In addition to proposing that the ADF be the sole recipient of all funds from the Lago Agrio judgment, the Complaint also seeks payment to the ADF of a 10% bounty over the total amount awarded, plus legal costs.[392] There is no indication that any of the amounts sought will actually go to the individual Plaintiffs or to any identifiable class of individuals, because, as shown in detail below from public statements by the Plaintiffs' lawyers and representatives and the evidence gathered from the *Crude* outtakes and elsewhere, the Lago Agrio Litigation is not designed to compensate individual Ecuadorians in the former Concession Area for any harm to their persons or property. Ultimately, the Lago Agrio Litigation is a fraudulent scheme to extract money from Chevron on a grand scale by alleging general harm to the Ecuadorian environment and seeking money under the guise of funding further public environmental remediation.

172. The Plaintiffs seek remediation of alleged impacts by the former Consortium's operations under Articles 41 and 43 of the 1999 Environmental Management Act (the "1999 EMA").[393] The 1999 EMA extended to private individuals the right to bring public claims for environmental remediation of public lands—in this case, precisely the claims that Ecuador had settled with TexPet in the Settlement and Release Agreements. The Plaintiffs had conceded in *Aguinda* that they had no right to bring environmental remediation claims against Texaco, Inc. or TexPet under Ecuadorian law because allegations of "environmental contamination [can] be filed only . . . against the Government of Ecuador and not the party responsible for the damages."[394]

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391 **Exhibit C-71**, Lago Agrio Complaint at 19 (Eng.); *See also infra* § II.H.

392 **Exhibit C-71**, Lago Agrio Complaint at 19 (Eng.).

393 EMA Article 41 states: "In order to protect individual or collective environmental rights, a public action is hereby granted to individuals and legal entities or human groups to denounce the violation of environmental rules without prejudice to the action for constitutional protection provided for in the Political Constitution of the Republic." **Exhibit C-73**, 1999 Environmental Management Act, Official Registry No. 37, July 30, 1999 ("1999 EMA" or "EMA"), at Art. 41. The Complaint also invokes several provisions of Ecuadorian and international law relating to public environmental protection principles, such as Articles 23.6 and 86 of the 1998 Constitution of Ecuador, which gives Ecuadorians the right to live in a healthy environment, and orders the Government to protect that right.

394 **Exhibit C-294**, *Aguinda et al. v. Texaco, Inc.,* No. 93-CIV-7527 (S.D.N.Y.), Plaintiffs' Memorandum of Law in Opposition to Texaco, Inc.'s Motion to Dismiss, Jan. 11, 1999, at 8-9. Also at that time, Plaintiffs' lead counsel unambiguously informed the U.S. court that "*no one can bring an action in the name of another*" in Ecuador, and that the Ecuadorian "*Constitution expressly forbids*" a person from litigating "on behalf of the people." **Exhibit C-293**, *Aguinda et al. v. Texaco, Inc.,* No. 93-CIV-7527 Affidavit of Alberto Wray, Mar. 8, 1994, ¶ 2 (emphasis added).

But after Ecuador and Petroecuador had already released all claims against TexPet, non-governmental organizations with ties to the Plaintiffs, including Esperanza International and others, lobbied the Ecuadorian Government to enact legislation (which they helped draft) aimed retroactively and unconstitutionally at circumventing the 1998 Final Release.[395]

173. The 1999 EMA entered into force in July 1999, less than one year after Ecuador, Petroecuador, and TexPet executed the 1998 Final Release, and nine years after TexPet had ceased being the Operator of the Consortium. The 1999 EMA created an entirely new cause of action to enforce "collective environmental rights" for environmental harm.[396]

174. Before the 1999 EMA was enacted, individuals could only bring claims based on specific, individual harm caused to their own property or rights, as opposed to indivisible harm caused to the community. Historically, in Ecuador as in other countries, only the State had standing to claim for damages to the community considered as a whole, or specific communities within the country.[397] In 1998, the Ecuadorian Constitution was amended to include "Rights of Nature" provisions and were written by American lawyers who specifically informed the legislature that such language would allow individuals, for the first time, to sue for damage to the environment.[398]

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[395] **Exhibit C-488,** Etienne Ma, *Student Group Influences Ecuador's Constitution*, THE BROWN DAILY HERALD, Apr. 12, 2009 ("[Esperanza International member] Pallares has worked in Ecuador on introducing legislation over the past seven years, and it was mainly through his efforts that the recent environmental legislation in Ecuador was passed."). Manuel Pallares is a close friend and former brother-in-law of the former lead counsel for the Plaintiffs, Cristóbal Bonifaz, and Mr. Bonifaz credits Mr. Pallares with introducing him to the very idea of the lawsuit, at the very same time that Esperanza International was lobbying the Ecuadorian Government to create new legal rights for environmental damage. **Exhibit C-489**, Eyal Press, *Texaco on Trial*, THE NATION, May 13, 1999 (noting that shortly after Esperanza International created the Rights of Nature provision in the Constitution, that same group inspired Cristobal Bonifaz to file the Lago Agrio Litigation in Ecuador.

[396] **Exhibit C-73**, 1999 EMA, Art. 41.

[397] During the Consortium's operations, the Republic of Ecuador—and not private individuals—was the *sole* "legal protector of the quality of the air, water, atmosphere and environment within its frontiers," as well as "legal owner of the rivers, streams and natural resources within its frontiers" and "all public lands where the [Consortium's] oil producing operations" took place. **Exhibit C-20**, Letter from Amb. Edgar Terán to Judge Rakoff, June 10, 1996. *See also* **Exhibit C-21**, *Sovereignty of the Country at Stake, Interview of Ambassador Terán*, LA OTRA, May 25, 1994 ("the soil, the subsoil, the vegetation, the air . . . all of these are property belonging to the Nation of Ecuador, not to the individuals living there, and not to the lawyers drawing up the claims . . . Nobody can seek compensation for damages in property belonging to the Ecuadorian Government. Only the Government can litigate. No third parties.").

[398] **Exhibit C-79**, Political Constitution of Ecuador (1998), Art. 86, Official Registry No. 1, Aug. 11, 1998. It provides in part, "[t]he State shall protect the people's right to live in a healthy and ecologically balanced

b. The Lago Agrio Litigation Is Being Tried as a Verbal Summary Proceeding

175. On May 13, 2003, the Lago Agrio Court accepted the Complaint and agreed to conduct the trial as a verbal summary proceeding pursuant to Article 43 of the 1999 EMA.[399] Pursuant to Article 41 "[c]laims for damages originating from harm to the environment shall be heard in verbal summary proceedings." These "mini-trials" serve, in theory, as expedited proceedings designed to settle small claims and disputes that require limited or no evidence.[400]

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environment. It shall ensure that this right is not affected and shall guarantee the preservation of nature." It further states that preservation of the environment, prevention of environmental contamination, and recovery of natural spaces are matters "of public interest." *See* **Exhibit C-490**, The Community Environmental Legal Defense Fund, *Ecuador Approves New Constitution: Voters Approve Rights of Nature*, Sept. 28, 2008, *available at* http://www.celdf.org/Default.aspx?tabid=548 (announcing, "Ecuador Adopts New Constitution - with CELDF Rights of Nature Language"). According to the CELDF itself:

> We explained to Delegates [of the Constituent Assembly] how recognizing legally enforceable Rights of Nature in the Constitution would enable governments, organizations, and people to take action on behalf of ecosystems and communities to defend them against projects that would interfere with their integrity, existence, and functioning. ***While under existing law, people defending ecosystems can only recover damages based on an individual's loss of use of that ecosystem***, a legal system of ecosystem rights would guarantee that the ecosystem's right to exist and flourish could not be impaired. ***Damages would be measured not by people's loss of use of the ecosystem, but by the damage inflicted on the ecosystem itself***.

Exhibit C-491, The Community Environmental Legal Defense Fund, *Assisting the Ecuador Constitutional Assembly Draft Rights of Nature*, undated, *available at* http://www.celdf.org/Default.aspx?tabid=519 (emphasis added).

During the legislative debate, legislators forcefully pointed out the significant change to Ecuadorian law that the 1999 EMA entailed. One Ecuadorian representative explained that "[t]his law establishes extremely major changes to the Ecuadorian legal system" because "[i]t establishes the possibility that any civil person, either a natural person or a legal entity, can file an action for damages against anyone else, including the Ecuadorian State, to claim that right was in fact violated, not his own right, and this is indeed a modification that totally changes the basis of the Ecuadorian legal system." **Exhibit C-274**, First Debate, Minutes No. 8, Aug. 19, 1996, at 3, (emphasis added). Another representative viewed the 1999 EMA as "a historic step" in Ecuadorian law, and he argued that one should not "proceed through the rights of the individual, which is currently established, but there should also be a start to a new concept that is coming up in other countries, where collective rights exist . . . ." **Exhibit C-274**, First Debate, Minutes No. 8, Aug. 19, 1996, at 2-3. Yet another representative opposed enactment of the new law, saying it was "inconceivable that the twelve and a half million of us Ecuadorians could suddenly be heard in a personal motion of an environmental nature unleashed in a court without any prior appeal or background." **Exhibit C-275**, Second Debate, Minutes No. 105, June 10, 1999, at 35 (emphasis added

399 **Exhibit C-492**, Lago Agrio Court Order Accepting the Lago Agrio Complaint, May 13, 2003, 11:40 a.m. The Lago Agrio Court did not admit the complaint as a civil case or an individual claim for damages, which would have required the Court to follow the ordinary civil procedure. Neither did the Court admit the complaint as constitutional protection case, nor as a "popular action."

400 First Coronel Expert Report ¶¶ 109–120.

But the Ecuadorian Code of Civil Procedure provides that statutes and laws (like the 1999 EMA) shall determine which type of claims should be heard using verbal summary proceedings.[401] Specific provisions of the Ecuadorian Code of Civil Procedure govern verbal summary proceedings.

176. The rules on verbal summary proceedings provide that: (1) the Complaint cannot be amended or modified;[402] (2) no counterclaims are admissible;[403] (3) the proceedings cannot be suspended by virtue of appeals, petitions, or motions;[404] and (4) no motions other than the complaint, motions and requests regarding evidence, and final conclusions shall be accepted by the Court.[405] In a verbal summary proceeding, the judge is barred by law from ruling on a defendant's jurisdictional objection or a *res judicata* defense before conducting an evidence phase. The defendant cannot implead another party into the case.[406]

c. Chevron Objected to the Jurisdiction of the Lago Agrio Court

177. On August 26, 2003, Chevron appeared before the Lago Agrio Court.[407] Because of its expedited nature, the verbal summary proceeding does not contemplate a written answer by the defendant. Instead, the judge shall schedule a conciliation hearing in which the defendant must answer the complaint and raise all objections. The judge summoned the parties to attend the conciliation hearing scheduled for October 21, 2003.

178. At the conciliation hearing, before orally presenting an answer on the merits, Chevron presented a number of objections that justified the Court's immediate dismissal of the case, including that the Court lacked jurisdiction over Chevron because it is a legal entity distinct and separate from Texaco, Inc. Chevron made the Court aware that it is a different company

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401 **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 828. The Code also establishes that the parties may mutually agree to use verbal summary proceedings to settle a dispute.

402 *Id.*, Art. 834.

403 *Id.*

404 *Id.*, Art. 844.

405 *Id.*, Art. 845.

406 First Coronel Expert Report ¶ 114.

407 **Exhibit C-493**, Chevron's Motion for Extension of Time, Aug. 26, 2003, at 3:00 p.m.

than Texaco, Inc., and that the latter company is still in existence.[408] These documents included a letter from Chevron's Corporate Secretary indicating that Chevron did not accept the jurisdiction of the Ecuadorian courts to hear the case.[409]

179. Chevron presented additional objections, including that TexPet and its related companies had been duly released by the Ecuadorian Government, Petroecuador, and the municipalities and provinces from the public environmental claims brought by the Lago Agrio Plaintiffs; and that retroactive application of the 1999 EMA was unlawful. Chevron requested an immediate ruling on its preliminary objections, but the Court refused. Chevron subsequently responded to the merits of the Plaintiffs' arguments while preserving its threshold legal objections.[410] The Court continued the proceedings and opened a six-day period for the parties to present the categories of evidence and evidentiary activities to be subsequently conducted.[411]

d. The Plaintiffs Brought Suit against the Wrong Party

180. Failing to name Texaco, Inc. as the defendant in the Complaint was no mistake. At the time that the Lago Agrio Complaint was filed, the Plaintiffs were aware that Texaco, Inc. still existed and constituted an independent legal entity.[412] Despite their admission that Chevron did not cause the alleged harms described in the Complaint, the Lago Agrio Plaintiffs have incorrectly suggested that Texaco, Inc. and Chevron merged in 2001, "giving rise to a new legal entity known as ChevronTexaco Corporation" (now Chevron Corporation). According to the Plaintiffs' incorrect theory, Chevron acquired Texaco, Inc.'s rights and obligations, and thus became liable for the damages allegedly caused by Texaco, Inc.

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408 **Exhibit C-401**, Adolfo Callejas's Filing of Chevron's Power of Attorney, illegible date, at 5-6 (Eng.).

409 *Id.*

410 **Exhibit C-72,** Chevron's Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:10 a.m., pp. 1-47 (Eng.).

411 *Id.* at 49 (Eng.).

412 As explained below, Chevron effectively proved that Texaco, Inc. actually merged with a wholly-owned subsidiary of Chevron called Keepep Inc., and that as a result of that transaction, Texaco, Inc. absorbed Keepep. Texaco, Inc. thus survived the merger and became a wholly-owned subsidiary of Chevron, retaining its independent legal identity. In 2002, after the merger but before the Lago Agrio complaint was filed, Texaco, Inc. notified the *Aguinda* plaintiffs and their attorneys that it had named an agent in Ecuador to accept service of process for the *Aguinda* claims.

181. The Lago Agrio Plaintiffs also chose not to name Petroecuador as a defendant in their Complaint. Despite a stated goal in its bylaws to "protect and defend" the people and environment of the Ecuadorian Amazon,[413] the ADF has ignored its more obvious legal recourse against Petroecuador, the sole owner and Operator of the former Concession Area for nearly 20 years. The Plaintiffs have publicly acknowledged that Petroecuador operations have caused, and continue to cause, environmental harm.[414] Yet, years earlier, the Plaintiffs' attorney Cristóbal Bonifaz had publicly announced that "the plaintiffs and their attorneys have agreed—in legal documents—to not sue the State should it be found that the State was jointly responsible with Texaco, Inc. for causing environmental damage."[415] Mr. Bonifaz further explained in a published interview that he had "presented the Attorney General with notarized documents in which the indigenous people refused to pursue any legal action against the State . . . [I]f the U.S. court finds both Petroecuador and Texaco, Inc. liable, we will not accept the percentage of the claim assigned to [Petroecuador]."[416] Years later, after he had parted ways with the ADF, Mr. Bonifaz told a U.S. federal judge that the ADF is a "powerful political force" and that plaintiffs in his separate case could not publicly disclose their names because they would face "harassment and retaliation, including physical retaliation."[417]

182. At the beginning of the Lago Agrio Litigation, Petroecuador also actively funded an environmental report filed by the Plaintiffs. In 2003, the Plaintiffs submitted a report authored by Roberto and Montserrat Bejarano detailing the alleged "*pasivos ambientales*" (environmental liabilities) for which they sought to hold Claimants liable. This report bears

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413 **Exhibit C-75**, Bylaws of the Amazon Defense Coalition.

414 **Exhibit C-184**, Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002), FLACSO Project, Report by Guillaume Fontaine, Nov. 2003, at 77 (Eng.) (emphasis added) (In which Plaintiffs' lawyer Pablo Fajardo is reported saying: "They are not trustworthy because Petro [Petroecuador] does not practice what it preaches. Ever since Texaco, Inc. left, *Petro has caused more damages and far more disasters than Texaco itself. But that is not what they say at all*. Therefore, there are frequent spills and pipe breaks, and swamps, rivers and marshlands become contaminated to a large extent. But as this is a state-owned company and these people are linked with the legal system and everything, no one says a thing.").

415 **Exhibit C-77**, *Texaco—The Time Has Come*, EL HOY, Apr. 14, 1997; **Exhibit C-76**, *Petroecuador Will Not Be Hurt—Interview with Cristobal Bonifaz*, EL COMERCIO, Apr. 22, 1997, (noting that plaintiffs had provided "notarized documents" to the Ecuadorian Attorney General waiving any claims against the Republic).

416 **Exhibit C-76,** *Petroecuador will not be hurt*, EL COMERCIO, Apr. 22, 1997.

417 **Exhibit C-74**, *Jane Doe I, et al. v. Texaco, Inc.*, Case No. C 06-2820, Declaration of Cristóbal Bonifaz in Support of Plaintiffs' Renewed Motion to Proceed with Action Using Pseudonyms, Case No. C 06-2820 (WHA), June 9, 2006.

Petroecuador's logo,[418] and it soon emerged that Petroecuador paid the ADF nearly US$ 100,000 in 2002 to prepare the report.[419] In addition, Mr. Bejarano later admitted his understanding that Petroecuador and the ADF had worked together to generate the report.[420] Petroecuador also supported the Lago Agrio Plaintiffs by granting them exclusive access to its library of documents, while refusing to provide those same documents to Chevron,[421] and not-yet fully analyzed video outtakes from *Crude* indicate significant further dealings between the ADF and Petroecuador. In sum, from the very outset of the Lago Agrio Litigation, Petroecuador provided direct financial and other support to the Plaintiffs with the goal of manufacturing evidence against Chevron. Petroecuador did this while delaying for years the start of any remediation with respect to its own 62.5% interest in the Consortium's activities.

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418 **Exhibit C-606**, Excerpts of Report by Roberto Bejarano to the Lago Agrio Court, 2003.

419 **Exhibit C-184**, Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002), FLACSO Project, Report by Guillaume Fontaine, Nov. 2003, at 28 n.29 (noting that Petroecuador paid US$ 98,500 to have the report made).

420 **Exhibit C-185**, Questions and Answers by Roberto Bejarano to Questions Submitted by Chevron, at No. 10.

421 Claimants' Request for Interim Measures, ¶ 59.

2. The Evidence-Gathering Process

a. The Parties Agreed to an Evidence-Gathering Judicial Inspection Process

183. After the conciliation hearing, both parties asked the Court to conduct a first phase of on-site judicial inspections of well sites and production stations in the former Concession Area—97 requested by the Plaintiffs and 25 requested by Chevron—for the purpose of assessing the existence and extent of any contamination in the former Concession Area and determining whether the remediation conducted by TexPet between 1995 and 1998 met the requisite standards.[422] Given the technical nature of the inspections, both parties agreed that the Court could rely on experts to assist in the collection and analysis of soil, water, and other physical samples.[423]

184. The Plaintiffs further requested that the Court order a global expert examination "to determine the environmental effects of hydrocarbon production activities in all the fields used by Texaco for production in its role as Operator of the consortium."[424] To ensure that this second assessment "b[ore] a relationship to and complemented" the judicial inspection process, the Plaintiffs requested that "the same expert(s) . . . participate in both procedures."[425]

185. The Court approved the Plaintiffs' requests and ordered an evidence-gathering process with two main phases: (1) each party was to designate experts to conduct 122 judicial inspections; and (2) the same group of experts would carry out an assessment to determine the existence and extent of oil-production impacts on the environment, causation and chronology, and any necessary remediation.[426]

186. For purposes of ensuring that all evidence would be gathered and assessed in accordance with generally accepted standards, the parties spent several months negotiating a

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[422] **Exhibit C-494A**, Chevron's Motion for Evidence, Oct. 29, 2003, at 5:10 p.m. Most of the inspections were requested by the plaintiffs and, in a few cases, the sites indicated by both parties coincided. The parties also requested additional evidence-gathering beyond judicial inspection of the former well sites.

[423] *See* **Exhibit C-494B**, Plaintiffs' Motion for Evidence, Oct. 29, 2003, at 5:45 p.m.; **Exhibit C-494A,** Chevron's Motion for Evidence, Oct. 29, 2003, at 5:10 p.m.

[424] **Exhibit C-494B**, Plaintiffs' Motion for Evidence, Oct. 29, 2003, at 5:45 p.m.

[425] *Id.*

[426] **Exhibit C-176**, Lago Agrio Court Order, Oct. 29, 2003, at 5:55 p.m.

"procedural agreement" that, once approved by the Court, would become the governing protocol for the judicial inspection process. The "procedural agreement" included three documents: (1) the Terms of Reference for the Participation of the Experts during the judicial inspections and the global assessment;[427] (2) a Sample Collection Plan for the environmental evaluation of the sites subject to judicial inspection;[428] and (3) an Analysis Plan for the environmental evaluation of the sites subject to judicial inspection.[429] The Court entered an order accepting and adopting the procedural agreement of the parties on August 26, 2004 (the "August 2004 Order").[430]

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[427] The Terms of Reference set forth the protocols for how the experts would be selected for service in the judicial inspections and how the judicial inspections would be conducted. The parties agreed – and the court ordered – that:

- two experts would participate in each of the site inspections, one nominated by each party;
- the Judicial Inspection experts would also participate in a final "global" assessment of all of the fields that had been operated by TexPet;
- each expert was to provide a written report for each site, which was to be "based on credible, proven analytical data," with "well-founded and supported" conclusions;
- the experts were required to "strictly follow the instructions for their tasks" specified in the procedural agreement and to collect and analyze the samples taken in accordance with the Sampling Plan and the Analysis Plan agreed to by the parties;
- if the party-appointed experts issued "discordant" reports, their disagreements would be "settled" by an independent third expert appointed by the court.

Exhibit C-177, Terms of Reference (filed in Lago Agrio)

[428] The Sampling Plan was developed to ensure compliance with generally-accepted environmental investigation standards and established "appropriate methods for collection, handling, preservation and shipping that will allow precise and reliable measurement of the chemical parameters." **Exhibit C-177**, Sampling Plan, Aug. 7, 2004, at 1-1. It provided standard operating procedures for collecting samples, field measurements, calibration and decontamination of equipment, reduction of field data, shipping of samples and control through chain of custody." *Id.* The Sampling Plan also identified "Data Quality Objectives" intended to "ensure that the data from [the judicial inspections] [were] of acceptable and known quality." *Id.* at 2-1.

[429] The Analysis Plan provided procedures for analysis of the samples collected during the judicial inspections, so that the parties would follow uniform analytical protocols, resulting in valid and reliable data. It discussed agreed data quality objectives, laboratory procedures and standards, analytical chemistry methods, and independent data validation. Laboratory personnel were required to be qualified and competent to perform the required analyses. **Exhibit C-177**, Analysis Plan, Aug. 7, 2004, at 1.1. (Analysis Plan at i.) Chevron also agreed with plaintiffs' requests that the samples be analyzed for various individual petroleum components, including BTEX, PAHs, and metals despite the fact that such analysis was not required by any Court order.

[430] **Exhibit C-496**, Lago Agrio Court Order, Aug. 26, 2004, at 9:00 a.m., p. 1 (Eng.).

b. The Judicial Inspections Demonstrated that TexPet Complied with Its Remediation Obligations and that There Was No Significant Risk to Human Health or the Environment Associated with TexPet-Remediated Sites

187. An abbreviated version of the Court-ordered judicial inspections took place over the course of 30 months. The Court designated 122 former Consortium sites for inspection, most of which were not TexPet's responsibility under the terms of the 1995 Settlement Agreement, the Scope of Work, or the RAP.[431] Woodward-Clyde had conducted remediation at 45 of the sites on the Court's list of 122 sites.

188. During each judicial inspection, the Judge, the appointed experts, representatives of the parties, and the parties' counsel, met at a particular site for the experts to inspect the site and collect soil and water samples. The Court opened the inspection and, after hearing the parties, instructed the experts to answer the parties' questions about environmental conditions at the designated sites. Some of those questions sought information concerning the adequacy of TexPet's remediation and the potential for remaining environmental conditions to present unreasonable risks to human health and the environment.

189. Chevron nominated experts to appear as judicial inspection experts, and the Court appointed them as experts in the case. Those experts followed the agreed sampling protocols, focused their inspection on specifically listed petroleum-related constituents of potential concern, and ensured that their laboratories used published analytical methods, testing procedures, and other standards that the parties had agreed to follow and the Court had approved and incorporated in its August 2004 Order.[432]

190. As part of the judicial inspection process, Chevron's experts collected 1,499 samples, including 964 soil samples, 360 water samples, 105 sediment samples, and other

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[431] *See, e.g.*, **Exhibit C-497**, Expert Report of John A. Connor, P.E., P.G., D.E.E., Judicial Inspection of Well Sacha-06, Jan. 7, 2005, at 25-96.

[432] *See* **Exhibit C-498,** Pedro J. Alvarez, et al., Evaluation of Chevron's Sampling and Analysis Methods, Aug. 28, 2006; *see generally* **Exhibit C-183,** G. Douglas, Evaluations of the Validity of the Plaintiffs' suggested Experts' Analytical Data from the Judicial Inspections 9/8/089 at 2, 6, 7; **Exhibit C-499,** Sampling Plan: Environmental Assessment of Judicial Inspection Sites - Oriente Region, Ecuador, 13 Aug. 2004; **Exhibit C-500,** Analysis Plan: Environmental Assessment of Judicial Inspection Sites - Oriente Region, Ecuador, 13 Aug. 2004; G. Douglas Expert Report, at 15, 28, 29; **Exhibit C-496**, Lago Agrio Court Order, Aug. 26, 2004, at 9:00 a.m., p. 1 (Eng.).

asphalt and crude oil samples, at sites scattered throughout the former Concession Area.[433] With respect to sites included in the RAP, Chevron's experts collected 259 soil samples from RAP work areas at RAP sites.[434]

191. Properly-accredited laboratories in the United States analyzed these samples, using appropriate and generally-accepted analytical methods that met the standards and protocols of the Analysis Plan.[435] Chevron's experts concluded that all but one of the pits previously remediated by TexPet met the RAP's cleanup requirements.[436] The one exception was a pit whose TPH level exceeded the RAP 5000 mg/kg TPH screening standard. The test results for this pit at the time of the remediation (years earlier), as well as sampling by the Plaintiffs-nominated experts in the Lago Agrio Litigation showed TPH levels below 5,000 mg/kg.[437]

192. At no remediated area did Chevron's experts detect any evidence of contamination that could pose a potentially significant threat to human health or the environment.[438] Chevron's experts compared the sampling results collected at the TexPet-remediated sites to well-recognized risk standards—including the appropriate relevant screening values from Ecuadorian regulations, USEPA drinking water standards, WHO guidelines, American Petroleum Institute recommendations, and USEPA guidance related to proper performance of risk-based screening[439]—and concluded that they did not present unreasonable risks to public health or the environment.[440] Three experts evaluated this approach and agreed that "this is a reasonable approach to set the evaluation criteria."[441] A Court-nominated expert in the Lago Agrio Litigation, Gerardo Barros, reached the same conclusion and noted that

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433 J. Connor Expert Report, Table 3.

434 *Id.* at 42.

435 *See* **Exhibit C-498,** Pedro J. Alvarez, et al., Evaluation of Chevron's Sampling and Analysis Methods, Aug. 28, 2006.

436 J. Connor Expert Report at 64.

437 *Id.* at 9-10, 64, 67-8.

438 *Id.* at 11.

439 *Id.*at 11; **Exhibit C-498,** Pedro J. Alvarez, et al., Evaluation of Chevron's Sampling and Analysis Methods, Aug. 28, 2006, at 10.

440 J. Connor Expert Report at 11, 64-70.

441 **Exhibit C-498,** Pedro J. Alvarez, *et al*., Evaluation of Chevron's Sampling and Analysis Methods, Aug. 28, 2006, at 12.

"weathered crude no longer leaches any harmful substances into the water."[442] Chevron's expert, Dr. Gregory Douglas, explained the natural processes in soil that cause these changes to occur.[443]

193. Moreover, none of the drinking water samples showed adverse effects from TexPet's operations.[444] Similarly, sampling indicated that groundwater and surface water resources were not impacted by past TexPet operations.[445]

194. In contrast, the Plaintiffs' side prepared few expert reports, failed to adhere to the procedures to which they had agreed, and falsified testimony. Dr. Charles Calmbacher testified under oath in a U.S. proceeding that he never authorized or signed the reports filed by the Plaintiffs in his name, and that he never even saw the reports before they were filed.[446] Rather, the Plaintiffs' counsel asked him to provide blank signature pages and blank pages with his initials, on which he understood that his report would be printed. Dr. Calmbacher testified that at the sites he inspected there was no evidence indicating a threat to human health or a need for further remediation.[447] The filed, falsified versions of his report, however, included opposite findings.[448] Dr. Calmbacher further testified that Plaintiffs' counsel *knew* his actual findings and

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442 **Exhibit C-381,** Expert Report of Gerardo Barros, Dec. 21, 2009, at 16 (Eng.).

443 **Exhibit C-467,** Gregory S. Douglas and Pedro J. Alvarez, Procesos de Degradación Que Afectan el Petróleo Crudo en el Medio Ambiente, Dec. 8, 2004 (included as Appendix O in the Sacha-53 Judicial Inspection Report from E. Baca).

444 J. Connor Expert Report at 66; *See also* **Exhibit C-179,** J. Connor and R. Landazuri, Response to Statements by Mr. Cabrera regarding Alleged Impacts to Water Resources in the Petroecuador-TexPet Concession Area, Aug. 29, 2008, at 3-4.

445 J. Connor Expert Report at 66.

Chevron's experts did find, however, that "92% of domestic water supplies (household wells, streams, etc.) and 22% of public water supplies sampled in the area of the former Concession area were found to contain concentrations of fecal coliform (*E. coli*) at levels far in excess of safe drinking water standards. . . . The elevated bacteria levels measures in these water supplies, which are unrelated ro oilfield operations and reflect poor sanitary conditions, represent a serious public health concern. J. Connor Expert Report at 70. *See also* **Exhibit C-179,** J. Connor and R. Landazuri, Response to Statements by Mr. Cabrera Regarding Alleged Impacts to Water Resources in the Petroecuador-Texaco Concession Area, Aug. 29, 2008, at 8.

446 **Exhibit C-186**, *In re Chevron Corp*., No. 1:10-MI-0076-TWT-GGB, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 112:1-12, 117:2-5, 16-20.

447 **Exhibit C-186**, *In re Chevron Corp*., No. 1:10-MI-0076-TWT-GGB, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 113:19-25.

448 **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.

that he would not have authorized those reports to be submitted in his name.[449] And that the Plaintiffs' counsel even attempted to dissuade him from testifying at his deposition.[450] Despite Chevron's repeated motions to strike Dr. Calmbacher's falsified expert report from the record, the Lago Agrio Court has refused to do so.[451]

195. The Plaintiffs' fraudulent actions demonstrate that they never took the judicial inspection process seriously. While Claimants believe that many of the Plaintiffs' expert reports and associated data were falsified, the reports in any event presented little, if any, scientifically acceptable environmental sampling or analytical data.[452] The vast majority of the environmental sampling and analytical data collected by the Plaintiffs' experts are invalid and scientifically unacceptable because (i) they employed inappropriate sample collection, preservation, documentation, and storage methods; (ii) their primary laboratory, HAVOC, deviated from the agreed analytical program, used inappropriate analytical methods, failed to meet established quality-control standards, incorrectly reported analytical test methods' detection limits as actual concentrations in the samples, did not obtain the well-recognized reproducible chemical trends needed to show the reasonableness of their analytical results, and failed a double-blind analytical performance evaluation test; (iii) none of their laboratories provided the quality assurance/quality control information needed to evaluate their reported results; and (iv) HAVOC, and most of their other retained laboratories, lacked proper Government accreditations establishing their ability to perform properly the reported laboratory analyses.[453]

196. Because of the serious flaws in their analytical data, HAVOC's results did not meet valid and generally-accepted data quality standards, and they violated the August 2004 Order and the Sampling and Analysis Plans agreed to by the parties.[454] Because of the

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449 **Exhibit C-186**, *In re Chevron Corp*., No. 1:10-MI-0076-TWT-GGB, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 118:22-119:1.

450 *Id.*, at 144:17 to 146:20.

451 **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m (discussing prior objections to Mr. Calmbacher's submissions).

452 G. Douglas Expert Report, *passim*.

453 **Exhibit C-183**, Gregory S. Douglas, Evaluation of the Validity of the Plaintiffs' Suggested Experts Analytical Data from the Judicial Inspections, Sept. 8, 2008, at 2 and 3; G. Douglas Expert Report, *passim*.

454 **Exhibit C-183**, Gregory S. Douglas, Evaluation of the Validity of the Plaintiffs' Suggested Experts Analytical Data from the Judicial Inspections, Sept. 8, 2008, at 11-44; G. Douglas Expert Report at 12-14, 16, 20, 21.

significant concerns about the lack of quality of HAVOC's analytical methods, Chevron received court permission to inspect the HAVOC facility, but Plaintiffs' lawyers and HAVOC laboratory personnel repeatedly blocked Chevron's inspection efforts.[455]

197. The Plaintiffs' sampling results were not just riddled with analytical problems. The Plaintiffs' experts failed even to report data for more than one-third of their samples.[456] And they improperly used field screening kits and forwarded for analysis only those "screened" samples that they knew were contaminated, discarding any "clean" samples.[457] In addition, they sampled contaminated pits and areas that fell outside TexPet's scope of responsibility as allocated under the RAP and the related agreements, although they claimed they were RAP areas.[458]

198. Even with all their sampling and laboratory errors, the Plaintiffs' data failed to confirm that there is potential risk to human health associated with TexPet-remediated sites. The samples they collected showed "no exceedance of health-based concentration limits for the potentially toxic chemicals associated with crude oil."[459] The Plaintiffs' data also showed no presence of petroleum hydrocarbons in groundwater, surface water or drinking water—only metals.[460] But the Plaintiffs' invalid water sampling methods (by allowing sediments from the river to mix with the water while taking the sample), likely were the cause of the elevated metals.[461] These inappropriate sampling methods provide an invalid measure of the true water quality, and thus invalidate the Plaintiffs' results.[462] Indeed, for these same water resources, test results of Chevron's experts—which used appropriate sampling and testing protocols—show no

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455 **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2006, at CRS053-02-CLIP 01 (in which Mr. Donziger plans to block the HAVOC lab's inspection by bringing 1,000 protestors "from Quito and surround that lab").

456 **Exhibit C-180**, Expert Report of Dr. Luis Alberto Villacreces Carvajal, Feb. 6, 2006; **Exhibit C-181**, *Motion from Edison Camino Castro to the Superior Court of Nueva Loja*, Feb. 21, 2006, **Exhibit C-182,** Expert Report of Oscar M. Dávila, Conclusions, July 12, 2005.

457 *See, e.g.*, **Exhibit C-498**, Pedro J. Alvarez, *et al*., Evaluation of Chevron's Sampling and Analysis Methods, Aug. 28, 2006, at 8.

458 *Id.*

459 J. Connor Expert Report at 67-8.

460 *Id.*

461 *Id.*

462 *Id.* For a detailed discussion of the invalidity of the Platintiffs' data, *see* G. Douglas Expert Report, ¶¶ 30-51.

such elevated levels of metals.[463] In sum, even the Plaintiffs' data did not show that TexPet-remediated sites pose a risk to human health.

c. The Panel of Settling Experts for Sacha 53

199. Article 259 of the Code of Civil Procedure and the parties' Terms of Reference contemplated that the Court would appoint a panel of "settling experts" to resolve any differences between the reports of the Plaintiffs' and Chevron's judicial inspection experts.[464] The court requested the settling experts to submit a report for only one site: the Sacha 53 well site.[465] This was because Sacha 53 was the only site for which the parties had filed all required reports, rebuttals and responses before the Plaintiffs stopped nominating their party-appointed experts for the judicial inspections and paying for their share of the settling experts' work.[466]

200. On February 1, 2006, the settling experts submitted their report on the Sacha 53 well site.[467] The Sacha 53 settling experts found that the available data showed that TexPet's remediated pits posed low risk to nearby residents and water supplies, based on: the low contaminant concentrations found at the remediated pits, the absence of hydrocarbons and heavy metals in water samples, the absence of hydrocarbons in the pit surfaces, the clayey nature of the soil, which restricts movements of contaminants, and the distance from the remediated pits to the nearest residences.[468] Specifically, these experts found that: (i) TexPet had presented documentation of its pit remediation work and sampling activities, which enabled the experts to observe that the laboratory analyses of samples from the remediated pits showed the listed

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[463] J. Connor Expert Report, ¶ 66-7.

[464] **Exhibit C-177**, Terms of Reference.

[465] **Exhibit C-187**, Report of Settling Experts of the Judicial Inspection of Well Sacha-53, Feb. 1, 2006.

[466] From that moment on, the Court began to appoint one expert per judicial inspection. While one settling expert participated with the party-nominated exerts in the judicial inspections that actually took place, the Court never ordered the expert to submit a report, even though the party-nominated experts continued to submit divergent reports. Almost 18 months after the settling experts had been appointed, the Plaintiffs attacked the settling-expert process as a whole, claiming that, among other things, the settling experts had been illegally impaneled and that the Court had violated the rules of civil procedure in designating them at the beginning of the judicial-inspection process. **Exhibit C-504**, Plaintiffs' Motion Objecting the Settling-Expert Process, Mar. 2, 2006, at 5:45 p.m.

[467] **Exhibit C-504**, Plaintiffs' Motion Objecting the Settling-Expert Process, Mar. 2, 2006, at 5:45 p.m.

[468] **Exhibit C-187**, Report of Settling Experts of the Judicial Inspection of Well Sacha-53, Feb. 1, 2006, Questions 4.6.1, 4.6.2, and L.22, L.32, L.15.

constituents' concentration levels to be "below the permissible limits" set out in the May 4, 1995 contract;[469] (ii) the data showed that two pits were not remediated (NFA pits) because they had TPH concentrations below the 5,000 mg/kg concentration specified in the RAP;[470] and (iii) the source of an unidentified, unremediated oil spill area outside the pits was unknown, no evidence of interaction between the spill's "theoretically contaminant substances and the live beings and the environment" was presented, and the available evidence did not allow for an assessment of any impacts to the surrounding area.[471]

3. The Court Abandoned the Evidence-Gathering Process and Appointed a Single Global Assessment Expert

a. The Plaintiffs Sought to Set Aside the Judicial Inspection Process and Designate a Single Global Expert

201. On January 27, 2006, with 35 of the 123 judicial inspections completed, the Plaintiffs moved to withdraw from 26 of their pending site inspections.[472] On July 21, 2006, the Plaintiffs again moved to relinquish the judicial inspection process—this time withdrawing from 64 of the pending sites (some two-thirds of the inspections they originally requested).[473]

202. On December 4, 2006, the Plaintiffs took their request a step further and requested that the Court abandon the entire judicial inspection system agreed by the parties and ordered by the Court, and instead, move on to the appointment of a single expert to conduct the global assessment of the entire Concession Area. The Plaintiffs' request required the Court to violate its October 3, 2003 Order—the procedural law of the case.[474] Chevron objected to the

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469 *Id.,* Questions 4.1.2.3, L.8.

470 *Id.* Questions 3.3.1, 4.1.2.2, L.7, L.11.

471 *Id.* Questions 3.4.1, 4.4.1, L.25-33.

472 **Exhibit C-188**, Plaintiffs' Motion to Withdraw from Specific Judicial Inspections, Jan. 27, 2006, at 5:10 p.m. This request was limited to sites in the Sacha and Shushufindi fields, but nonetheless covered almost one-third of the original 97 inspections originally requested by the Plaintiffs.

473 **Exhibit C-505**, Plaintiffs' Motion to Relinquish Judicial Inspections, July 21, 2006, at 9:10 a.m.

474 **Exhibit C-189**, Plaintiffs' Motion to the Lago Agrio Court, Dec. 4, 2006, at 5:20 p.m.

Plaintiffs' request.[475] The Plaintiffs renewed the request on March 9, 2007, and asked the court to sanction Chevron's counsel for allegedly attempt to delay the proceedings.[476]

203. During this time, the Plaintiffs and their supporters mounted a major publicity and political campaign to pressure the Court to terminate the judicial inspection process.[477] A group of prominent Ecuadorian "civil law processionals," including Gustavo Larrea, then campaign manager for candidate (now President) Rafael Correa, filed an *amicus* brief urging the Court to terminate the Judicial Inspection process, as requested by the Plaintiffs.[478] On March 19, 2007, after substantial political pressure and at least one secret meeting with the Plaintiffs themselves,[479] the Court granted the Plaintiffs' motion to appoint a single global expert, and appointed Richard Stalin Cabrera Vega.[480]

b. The Plaintiffs Hand-Picked Richard Cabrera as the Global Expert and Secretly Met with Him before His Appointment

204. When the Court appointed Richard Cabrera as the global assessment expert, it ordered him to perform his duties impartially and transparently as a "neutral" auxiliary of the Court. Articles 251 and 256 of the Code of Civil Procedure require that an expert appointed by a court be of "recognized honesty and probity," and that an expert perform his duties "faithfully and lawfully."[481] When the Lago Agrio Court administered the oath to Mr. Cabrera, in June 2007, he promised to perform his duties "with complete impartiality and independence vis-à-vis the parties."[482] The Lago Agrio Court required Mr. Cabrera to "observe and ensure … the

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475 **Exhibit C-506**, Chevron's Motion to Reject Plaintiffs' Petition, Jan. 17, 2007, at 2:50 p.m.

476 **Exhibit C-507**, Plaintiffs' Motion to the Lago Agrio Court, Mar. 9, 2007, at 5:30 p.m.

477 **Exhibit C-360**, *Crude* Outtakes, June 13, 2007, at 361-11-CLIP-01; **Exhibit C-192**, *Persons Injured by Texaco Are Filing Claim for Slowness of Court Proceedings*, ECUADOR INMEDIATO, June 14, 2006; **Exhibit C-193**, *Protests in Lago Agrio for Slowness in Texaco's Case*, FDA Press Release, June 14, 2006.

478 **Exhibit C-194**, *Amicus Curiae* Brief Submitted by Gustavo Larrea *et al*. filed with the Lago Agrio Court, Jul. 21, 2006, at 9:15 p.m.

479 **Exhibit C-360**, *Crude* Outtakes, Mar. 6, 2007, at 210-02-01 (in which Plaintiffs' representative Luis Macas admitted to meeting with the judge regarding the appointment of the global assessment expert).

480 **Exhibit C-197,** Lago Agrio Court Order Declaring the Relinquishment Valid and Appointing Engineer Richard Stalin Cabrera Vega, Mar. 19, 2007, at 8:30 a.m., p. 2 (Eng.).

481 **Exhibit C-362**, Ecuadorian Code of Civil Procedure, Arts. 251, 256.

482 **Exhibit C-385**, Certificate of Swearing in of Richard Cabrera before the Lago Agrio Court, June 13, 2007, at 9:45 a.m.

impartiality of his work and the transparency of his activities as a professional appointed by the Court" and further stated that "the role of the expert is one of *complete impartiality and transparency* with respect to the parties and their attorneys."[483] In November 2007, the Court ordered that "all the documents that serve as support or a source of information for the work performed by the Expert must be presented together with the report … [I]n his report the Expert is required to cite all of the scientific sources, and analytical and legal documents that he uses to perform his work."[484] These provisions mandate, among other things, that a Court-appointed expert be impartial, neutral and forthright. Mr. Cabrera complied with none of these obligations.

205. As the *Crude* outtakes have now revealed, at the same time that the Court was considering the Plaintiffs' request (and Chevron's objection), the Plaintiffs were already moving ahead with a plan to improperly influence the purportedly "neutral" global expert. In a meeting between Joseph Kohn (a financial backer of the Lago Agrio Litigation) and Steven Donziger on January 31, 2007, where Donziger describes de global expert process, Mr. Kohn inquires, "[B]ut, our people would do the basic work and give it to this guy…[because] he's not gonna go out and do…the study," to which Donziger responds, "Exactly… It would be our team...that we would pay… [and] would do whatever… field work we would want." According to Donziger, the "[s]cience has to serve the law practice," not the other way around.[485]

206. The *Crude* outtakes depict key members of the Plaintiffs' legal and technical teams meeting secretly with Mr. Cabrera on March 3, 2007, to discuss the Global Expert Report that Mr. Cabrera would submit. This meeting occurred *two weeks before* the Lago Agrio Court appointed Mr. Cabrera as its "neutral" and "independent" court auxiliary. Yet it is clear from the footage that the participants at the meeting *already knew* that the Court would appoint Mr. Cabrera as the global expert.[486] The members of the Plaintiffs' litigation team present at the meeting included: Steven Donziger, lead U.S. counsel for Plaintiffs; Pablo Fajardo, lead Ecuadorian counsel for Plaintiffs; Luis Yanza, representative of the ADF or Selva Viva Cia. Ltda

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[483] **Exhibit C-364,** Lago Agrio Court Order, Oct. 3, 2007, at 11:00 a.m., p. 13 (Eng.).

[484] **Exhibit C-508**, Lago Agrio Court Order, Nov. 29, 2007, at 5:00 p.m.

[485] **Exhibit C-360**, *Crude* Outtakes, undated, at CRS169-05-CLIP 01.

[486] *Id.*, Mar. 3, 2007, at CRS187-01-02-CLIP 01, 187-01-02-CLIP 02, 187-01-02-CLIP 03, 189-00-CLIP 01, 189-00-CLIP 02, 189-00-CLIP 03, 191-00-CLIP 01, 191-00-CLIP 02, 192-00-CLIP 01.

("Selva Viva"); Dick Kamp, director of E-Tech International ("E-Tech"); Anne Maest, of Stratus Consulting, Inc. ("Stratus") and E-Tech; Rocío Santillán, Mr. Cabrera's field director; Luis Villacreces, one of Plaintiffs' nominated experts during the judicial inspections, who was also a member of ADF's sampling team; and Charlie Champ of Champ Science and Engineering.[487] Mr. Cabrera is also clearly shown attending this meeting.[488]

207. In the morning session of the meeting, Plaintiffs' counsel Pablo Fajardo presented a PowerPoint presentation to the group, outlining the Plan for Cabrera's Global Expert Assessment.[489] As part of this plan, Mr. Fajardo bluntly stated: "Our legal theory is that Texaco is liable for all of the existing damage, even that caused by Petroecuador."[490] Fajardo also talked in great detail about the content of the expert report, including what legal standards and technical parameters should be discussed.[491]

208. Mr. Fajardo then outlined a plan for dealing with Chevron: "Chevron's main problem right now is that it doesn't know what the hell is going to happen in the global expert examination. In other words, they don't know that. I hope none of you tell them, please. [laughter] … [I]t's Chevron's problem."[492] Mr. Fajardo subsequently identified six steps that the Plaintiffs and their counsel must take, specifically: (1) the team must "[k]eep up the pressure and constant oversight in the court"; (2) the team must "[m]ake certain that the expert constantly coordinates with the plaintiffs' technical and legal team"; (3) "[t]he plaintiff's technical coordinator must be [involved] in the process fulltime" and "[a]ccompany the expert in the field"; (4) "an attorney . . . will always be in the field to also protect the activity being performed"; (5) the team must "provide the facilities and necessary support to the field team"; and (6) the team must "support the expert in writing the report."[493]

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487 *Id.*

488 *Id.*, Mar. 3, 2007, at CRS187-01-02-CLIP 02.

489 *Id.*, Mar. 3, 2007, at CRS187-CLIPS 01-02-03.

490 *Id.*, Mar. 3, 2007, at 187-01-02-CLIP 11.

491 **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS187-01-02-CLIP 12.

492 *Id.*, Mar. 3, 2007, at CRS191-00-CLIP 03.

493 *Id.*.

209. Mr. Fajardo emphasized that the entire Plaintiffs' team must contribute to the Cabrera report, explaining: "And here is where we do want the support of our entire technical team . . . of experts, scientists, attorneys, political scientists, so that all will contribute to that report—in other words—you see . . . *the work isn't going to be the expert's*. All of us bear the burden."[494] One of the meeting's participants asked whether the final report is going to be prepared only by the expert. Mr. Fajardo said that the expert will "sign the report and review it. But all of us . . . have to contribute to that report."[495] Anne Maest asked, "Together[?]," and Mr. Fajardo confirmed. Ms. Maest then asked, "But not Chevron," to which everyone laughed.[496] After discussing how the Plaintiffs would carry out Mr. Cabrera's work, Plaintiffs' lead lawyer Mr. Donziger turned to Mr. Cabrera and said: "And Richard, of course you really have to be comfortable with all that. And we'll also def- define the support the expert needs."[497] The recording ends with Donziger talking about the ways to make Chevron pay more, and his comment that they could "jack this thing up to thirty billion . . . in one day... Well, whatever. I mean, I'm exaggerating, but I mean . . . but with ninety days you could do that analysis. Easily."[498]

210. The *Crude* footage also confirms that these immense damage figures were fabricated by the Plaintiffs, led by Mr. Donziger, so that a huge, baseless judgment against Chevron could be portrayed as a reduced amount. For years before Mr. Cabrera's appointment, the Plaintiffs' representatives touted a US$ 6 billion figure supposedly endorsed by one of their experts, David Russell. In December 2006, however, Mr. Donziger explained that the "price tag" for remediation "would only be a guess" and that Mr. Russell's US$ 6 billion "very rough estimate" overstated the true costs of remediation: "[The] six billion dollar thing is out there. The reality is, based on what this guy is telling me, [it] would cost less than that. Significantly less than that, you know? Because of a whole host of reasons . . . ."[499] Mr. Donziger also admitted that Mr. Russell had since "back[ed] off of that number," but declared, "I don't care

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494 *Id.*

495 *Id.*

496 *Id.*

497 **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS189-00-CLIP 02.

498 *Id.*, Mar. 3, 2007, at CRS193-00-CLIP 01.

499 *Id.*, Dec. 6, 2006, at CRS138-02-CLIP 02.

what the fuck that guy says." Shortly thereafter, Mr. Donziger discussed requesting an even higher amount, US$ 8 billion, so that a judgment of US$ 3 billion could be perversely portrayed as favorable to Chevron. Mr. Donziger asked the Plaintiffs' Ecuadorian counsel: "But as a concept, I ask, do we ask for much more than we really want as a strategy? Do we ask for eight and expect three, so that [the judge] says, 'Look, Texaco, I cut down the largest part.'"[500] The day after the Plaintiffs' secret meeting with Mr. Cabrera discussed above, on March 4, 2007, Mr. Donziger stated: "If we have a legitimate fifty billion dollar damage claim, and they end up -- judge says, well, I can't give them less than five billion. You know what I mean?" He explained that the judge can then say that "[Texaco] had a huge victory; they knocked out ninety percent of the damages claim."[501]

211. The footage from March 4, 2007 captured a lunch meeting involving Mr. Donziger and the Plaintiffs' U.S. environmental consultants, Ms. Maest of Stratus, Mr. Kamp of E-Tech, and Mr. Champ of Champ Science and Engineering, during which they discussed what happened at the meeting with Mr. Cabrera.[502]

212. At several points, the experts raised problems with the plan, each of which Mr. Donziger brushed off. First, Mr. Champ said, "I know we have to be totally transparent with Chevron in showing them what we're doing." Mr. Donziger answered, "No, no," explaining that "[o]ur goal is that they don't know shit . . . and that's why they're so panicked."[503] Mr. Kamp then commented to Mr. Donziger, "Having *perito* [Cabrera] there yesterday in retrospect . . . That was bizarre."[504] Donziger looked at Mr. Kamp and then instructed him: "Don't talk about it," telling the camera crew, "[a]nd that is off the record."[505] In response to Mr. Kamp's concern, Mr. Donziger simply said, "That's the way it works."[506] Mr. Donziger has elsewhere underscored the Plaintiffs' willingness to bend the rules in Ecuador, saying that although such

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[500] *Id.*, Jan. 16, 2007, at CRS159-00-CLIP 6.

[501] *Id.*, Mar. 4, 2007, at CRS196-01-CLIP 01.

[502] **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS196-00-CLIP 01.

[503] *Id.*, Mar. 4, 2007, at CRS196-00-CLIP 01.

[504] *Id.*

[505] *Id.*

[506] *Id.*

pressure tactics and maneuvering would never work in the United States, "[in] Ecuador, you know… this is how the game is played, it's dirty."[507]

213. During the same lunch, the experts told Mr. Donziger that no evidence of groundwater contamination (other than "right under the pits") existed: "[A]ll the reports are saying it's [*i.e.*, groundwater contamination] just at the pits and the stations and *nothing has spread anywhere at all.*"[508] Donziger tried to convince them otherwise, but when they were not easily swayed, he finally said, "Hold on a second, you know, this is Ecuador, okay,… You can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want" and "[t]herefore, if we take our existing evidence on groundwater contamination *which admittedly is right below the source* . . . [a]nd wanted to extrapolate based on nothing other than our [. . .] theory," then "[w]e can do it. And we can get money for it."[509] He went on: "*Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win*."[510]

214. In addition to meeting with Mr. Cabrera, the Plaintiffs also directly pressured the judge to name their selected candidate. Plaintiffs' lawyer Pablo Fajardo reported that he had met with the "President of the court of justice" a couple of times regarding who to appoint as the "neutral" global assessment expert, that they had tentatively set when the examination would begin, and that "we have more or less an idea of who it could be, but it has yet to be specified."[511] On March 5, 2007, Mr. Donziger told the *Crude* cameras about a secret meeting that the Plaintiffs had planned with a Supreme Court judge that day to pressure the Lago Agrio judge on the appointment of the global expert. According to Donziger, "the judge, right now, is falling into the trap of Chevron. He's just not moving on a key issue and we're meeting with a

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[507] *Id.*, Mar. 30, 2006, at CRS053-02-CLIP 01; *Id.*, at CRS052-00-CLIP 06.

[508] *Id.*, Mar. 4, 2007, at CRS195-05-CLIP 01 (emphasis added). The experts' private admission captured in this clip about the lack of evidence of groundwater contamination—when viewed in light of the Plaintiffs' contradictory public assertions—displays the Plaintiffs' contempt for any need for evidence.

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

[510] *Id.* (emphasis added).

[511] *Id.*, Jan. 16, 2007, at CRS158-02-CLIP 06.

Supreme Court judge today to talk about it."[512] When the filmmaker asked if that was something the cameras could film, Mr. Donziger replied, "No."[513] Other Plaintiffs' representatives, including Juan Pablo Saenz and Julio Prieto, spoke separately of attending a meeting with the Supreme Court judge that day, along with Donziger.[514]

215. The very next day, Plaintiffs' representative Luis Macas admitted publicly that the Plaintiffs had met with Judge German Yánez the day before regarding the Global Expert Report.[515] Mr. Macas reported that yesterday "we were in the -- in the court, speaking with the President of the Superior Court of … Sucumbíos, in Nueva Loja" regarding the Global Expert. Mr. Donziger later chided Mr. Macas for making these remarks, calling them "dangerous" because they disclosed publicly the Plaintiffs' political connections and influence with the Court.[516]

216. On March 9, 2007, the *Crude* cameras captured Plaintiffs' consultant Ann Maest and Amazon Watch director Atossa Soltani discussing another *ex parte* meeting they had with the Lago Agrio judge after judicial inspections. At that meeting, Ms. Soltani said that the Chevron lawyers were removed by the military "as soon as possible" after the judicial inspections, and that the judge then told her that it was "very important" that she was watching the trial, and gave her his private contact information.[517]

217. On March 19, 2007, the Court granted the Plaintiffs' motion to appoint a single global expert, and appointed Richard Cabrera, the hand-picked candidate of the Plaintiffs' lawyers.[518]

218. These events undeniably prove that Richard Cabrera's supposedly "independent" report assessing over US$ 27 billion is a fraud. They show that the Plaintiffs conspired with Mr.

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[512] *Id.*, Mar. 5, 2007, at CRS208-02-CLIP 01.

[513] *Id.*

[514] *Id.*

[515] *Id.*, Mar. 6, 2007, at CRS210-02-01.

[516] **Exhibit C-360**, *Crude* Outtakes, Mar. 6, 2007, at CRS211-01-01.

[517] *Id.,* Mar. 9, 2007, at CRS034-03-CLIP 03.

[518] **Exhibit C-197**, Lago Agrio Court Order Appointing Richard Stalin Cabrera Vega, Mar. 19, 2007, at 8:30 a.m., p. 2 (Eng.).

Cabrera in violation of his obligation to serve as a neutral expert, to be impartial and independent from the parties,[519] and that, even before he was appointed, Mr. Cabrera had no intention of complying with his obligation to perform his expert duties impartially and transparently, as required by Ecuadorian law and the Court.[520] In direct contradiction to the evidence revealed by the *Crude* footage, Mr. Cabrera stated under oath that he had no relationship with plaintiffs and that he received no technical assistance from them:

- "All the work was planned, directed, and approved by me, as the person responsible for the expert examination."[521]
- "All my work has been public. I have concealed absolutely nothing[.]"[522]
- "I should clarify that I do not have any relation or agreements with the plaintiff, and it seems to me to be an insult against me that I should be linked with the attorneys of the plaintiffs."[523]
- "The defendant's attorneys allege that the plaintiff is in 'close contact' with me, and that the plaintiff has provided me with technical information and support staff to assist with the expert examination. This is untrue. If I need any technical information in connection with this case, all I have to do is request it from this Court; the idea that the plaintiffs would be helping me with that is unthinkable."[524]

219. In direct contradiction to the evidence revealed by the *Crude* footage, the Lago Agrio Plaintiffs have repeatedly claimed that they had no special or improper relationship with Mr. Cabrera:

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[519] **Exhibit C-363**, Certificate of Swearing in of Richard Cabrera before the Lago Agrio Court, June 13, 2007, at 9:45 a.m.

[520] **Exhibit C-364**, Lago Agrio Court Order, Oct. 3, 2007, at 11:00 a.m.

[521] **Exhibit C-365**, Filing by Richard Cabrera before the Lago Agrio Court, Mar. 4, 2009, at 9:50 a.m.

[522] *Id.*

[523] **Exhibit C-366**, Filing by Richard Cabrera before the Lago Agrio Court, July 23, 2007, at 8:30 a.m. "I do not take orders from either of the parties to the lawsuit. . . . This means, Mr. President, that I am not, nor will I be, subject to the views or whims of either of the parties; I act in accordance with rulings by the judge, with the law and my principles." **Exhibit C-509**, Filing by Richard Cabrera before the Lago Agrio Court, Oct. 8, 2008, at 8:30 a.m., p. 2 (Eng.).

[524] **Exhibit C-367**, Filing by Richard Cabrera before the Lago Agrio Court, Oct. 11, 2007, at 2:20 a.m., p. 4 (Eng.).

- Mr. Fajardo stated that the idea that Mr. Cabrera is working with the Plaintiffs was "*simply ridiculous*."[525]

- Plaintiffs characterized Chevron's claim of a close relationship between the Plaintiffs and Mr. Cabrera as "[a]nother infamy, childish and absurd."[526]

- The Amazon Defense Coalition issued a press release stating that "Chevron's claim that Mr. Cabrera is cooperating with the plaintiffs is completely false."[527]

220. Before the Court designated Mr. Cabrera as the global assessment expert, it had appointed him the "Court expert," or settling expert, for judicial inspections at three sites. Although Mr. Cabrera attended the judicial inspections at those three sites, he was not asked to, and therefore did not, submit an expert report. Contrary to the established procedure by which each party provided funds to the Court for payment of settling experts, Mr. Cabrera filed a letter with the Court on February 7, 2007, asking that Chevron be ordered to pay an "honorarium" for his work as a "settling expert" and indicating that he had already received direct payments from the ADF on the Plaintiffs' behalf.[528] Mr. Cabrera also hand-delivered a copy of the letter to counsel for Chevron indicating a direct payment arrangement with the ADF.[529] Counsel for Chevron immediately told Mr. Cabrera that the arrangement described in the letter was illegal and contrary to the Court procedures.[530] Soon thereafter, Mr. Cabrera returned to the courthouse and enlisted the help of Judge Yánez—by then rotated off the case— to withdraw the letter and erase from the court records evidence of the payment arrangement between him and the ADF. A clerk later confirmed in writing that Mr. Cabrera and Judge Yánez removed the document from the case file—without notifying Chevron.[531]

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525 **Exhibit C-510**, Plaintiffs' Motion to the Lago Agrio Court, Apr. 4, 2008, at 5:45 p.m., p. 3 (Eng.); *see also* **Exhibit C-511**, Plaintiffs' Motion to the Lago Agrio Court, June 4, 2008, at 5:38 p.m. (in which Mr. Fajardo said that Chevron's accusation that there was "some type of collusion between plaintiffs and Cabrera" was a "ridiculous affirmation.").

526 **Exhibit C-512**, Plaintiffs' Motion to the Lago Agrio Court, Apr. 25, 2008, at 4:38 p.m.

527 **Exhibit C-513**, Press Release, Amazon Defense Coalition, *Chevron Accused of Lying to Shareholders Over $16 Billion Damages Claim to Ecuador Rainforest Case by Amazon Defense Coalition*, Apr. 3, 2008.

528 **Exhibit C-514,** Letter from Cabrera to the Lago Agrio Court, Feb. 7, 2007, at 9:30 a.m.

529 **Exhibit C-515**, Chevron's Motion to Vacate Cabrera's Appointment, July 2, 2007, at 9:00 a.m.

530 *Id.*

531 **Exhibit C-516,** Clerk's Letter to President of Lago Agrio Court, June 4, 2008, at 8:00 a.m.

c. Mr. Cabrera's Appointment Was Non-Transparent, Illegal, and Procedurally Inappropriate

221. After Mr. Cabrera's appointment, the Plaintiffs' representatives met privately with presiding Judge Yánez to pressure him to swear in Mr. Cabrera quickly. Judge Yánez explained that he had denied Chevron's attempts to "delay" the global assessment process, and promised that he would "resolve[] the final situation so the expert inspection can be carried out … soon."[532] He also told them that the draft providencia was ready and would be coming out the following Wednesday.[533] When the Lago Agrio Court officially swore in Mr. Cabrera as the global assessment expert on June 13, 2007, Steven Donziger was elated, stating that the development was good for the Plaintiffs' case: "We have to keep pushing on all fronts at all times, … [A]ll this bullshit about the law and facts … but in the end of the day it is about brute force, … [T]his [Cabrera's appointment] took five months … five months of delay … and [the Court] never would have done [it] had we not really pushed him."[534]

222. The change to the global assessment procedure destroyed the procedural safeguards incorporated in the order governing the judicial inspection process. Under the prior procedure, the Court had allowed Chevron to test the sites at each judicial inspection and present evidence that confirmed TexPet's effective remediation and refuted the Plaintiffs' sweeping allegations. Completion of all site inspections was needed to ensure that any judgment was based upon science and facts—not generalization, conjecture, or extrapolation. Chevron immediately objected to the appointment of a single expert, and specifically to Mr. Cabrera's appointment, but the Court overruled each of Chevron's challenges.[535]

223. Setting aside the improper collusion between the Plaintiffs and the Court in appointing Mr. Cabrera to submit a falsified and fraudulent expert report that the Plaintiffs' lawyers and their experts would draft, the Court's appointment of Mr. Cabrera also violated the laws of Ecuador in several respects. First, it contravened the law of the case. The Court's

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[532] **Exhibit C-360**, *Crude* Outtakes, June 4, 2007, at CRS347-00-CLIP 01 (showing Judge Yánez giving the Plaintiffs, including actress Darryl Hannah, a private tour of the Court's case file and accepting the Plaintiffs' invitation to join them at a private dinner in Quito the same week).

[533] *Id.,* June 4, 2007, at CRS345-02-CLIP 05.

[534] **Exhibit C-360**, *Crude* Outtakes, June 13, 2007, at CRS361-11-CLIP 01.

[535] *See*, *e.g.*, **Exhibit C-517**, Chevron's Motion to Revoke Cabrera's Appointment, Mar. 22, 2007, at. 5:37 p.m.

October 2003 Order, which required the appointment of the experts selected by the parties to perform judicial inspections, had been executed and the parties had acted in reliance upon it. The Plaintiffs had not appealed that Order, and it became final and binding as the law of the case. By March 2007, 45 judicial inspections had already taken place based on the October 2003 and August 2004 Orders and the Terms of Reference, and the Court had named settling experts for Sacha 53. Under Article 292 of the Code of Civil Procedure, the Court must reject any motion to alter prior orders that would result in prejudice to the other side. By appointing Mr. Cabrera in violation of those two orders, the Court caused undue prejudice to Chevron by curtailing its ability to defend itself, thus violating the express terms of Article 292.

224. Second, under Article 252 of the Code of Civil Procedure, the Court may appoint an expert of its choice from a list of experts registered with the local Superior Court, or the parties may agree to the appointment of one or more experts, in which case the parties' agreement is binding on the Court. The Court's March 19, 2007 Order appointing Mr. Cabrera did not follow either procedure. The Court already had entered the October 2003 Order based on the second alternative—the parties had agreed to a protocol for appointment of experts to conduct the judicial inspections. That agreement was binding on the Court—and had in fact been approved by it—and the process that it mandated was ongoing when the Plaintiffs and the Court radically changed the course of the litigation. Mr. Cabrera's appointment was also invalid under the first alternative provision of Article 252 because, at the time of his appointment, he was not a registered expert with the Superior Court.[536]

225. Given the Court's decision to waive judicial inspections of the sites at Plaintiffs' behest, Chevron requested that Plaintiffs be prohibited from seeking damages for those sites that were never inspected.[537] The Court, however, ignored this request, and the Plaintiffs—who bear the burden of proof— continue to seek public damages for sites that were never inspected.[538]

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[536] Mr. Cabrera attempted to cure this obvious error by completing a registration after the fact. Mr. Cabrera registered with the Prosecutor General's Office on April 25, 2007, more than a month after his appointment. Not only was this national registration untimely, but is irrelevant and invalid under Article 252 for purposes of the case in Nueva Loja. Finally, even Plaintiffs acknowledged that registration with the Prosecutor General's Office applies only to criminal issues, which are unrelated to the Lago Agrio Litigation. *See* **Exhibit C-518**, Organic Law of the Public Ministry of Ecuador, Art. 1.

[537] **Exhibit C-519**, Chevron's Motion to the Lago Agrio Court, Apr. 5, 2007, at 4:50 p.m.

[538] **Exhibit C-520**, Plaintiffs' Motion to the Lago Agrio Court, Apr. 26, 2007, at [illegible].

d. Mr. Cabrera Did Not Write the Reports that Were Submitted in His Name

226. Mr. Cabrera is not the true author of the reports that he signed. Just as they all planned during their meeting on March 3, 2007, that distinction goes to the Lago Agrio Plaintiffs' lawyers and Plaintiffs' consultants and allies, including:

- Stratus—a Colorado-based environmental consulting company. Counsel for Stratus admitted before a U.S. Court that there were communications between Mr. Cabrera and two Stratus representatives. Ann Maest, a consultant from Stratus, attended the March 3, 2007 meeting with Cabrera and drafted the "workplan" submitted by Cabrera. In ongoing litigation in the United States, Stratus has produced an extensive log of documents and emails that they claim are privileged, but the descriptions of the documents and emails confirm that Stratus personnel were the primary draftspeople for the report and the report annexes that Cabrera submitted as his own

- 3TM—a Texas-based environmental consulting company that co-authored a report with Stratus regarding remediation costs in the former Concession Area.

- E-Tech—a New Mexico-based environmental organization that that helped draft certain of the annexes to the report submitted by Cabrera. E-Tech's database (also known as the "Selva Viva database") is the source of certain documents filed by Mr. Cabrera.[539]

- Uhl, Baron Rana & Associates ("UBR")—a New Jersey based consulting firm whose personnel also served on Mr. Cabrera's team, leading a U.S. District Court to conclude that such "covert[]" maneuvering "can only be viewed as a fraud upon that tribunal."

- The ADF—an Ecuadorian organization named by the Plaintiffs in their Complaint as the beneficiary of any damages awarded by the Lago Agrio Court.

- Acción Ecológica—an Ecuadorian organization allied with the ADF.

- Selva Viva—the logistics and funding arm of the ADF. Selva Viva is an Ecuador-based organization funded by Joseph Kohn, his law firm, and other persons and entities in the United States, which provides money and technical assistance to the participants in the Lago Agrio Litigation. Its president is Plaintiffs' lawyer Steven Donziger, and its general manager is Luis Yanza, the legal coordinator of the ADF.

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[539] **Exhibit C-372,** Declaration of Michael Younger in Lago Agrio Litigation, Apr. 26, 2010.

227. The *Crude* outtakes show Mr. Donziger meeting with Ann Maest (a former E-Tech consultant who also works for Stratus) and other Stratus consultants in April 2007,[540] discussing the various damage categories that Mr. Cabrera will present to the Court, which are laid out in a memorandum on which the camera focuses from Mr. Donzinger to the Stratus CEO.[541] This footage makes clear that Stratus was retained for the very purpose of secretly preparing Mr. Cabrera's allegedly "neutral" report, which adopted the damages predetermined by Plaintiffs' counsel.

228. A "privilege log" provided by the Lago Agrio Plaintiffs in a proceeding for discovery regarding Stratus' collusion with Mr. Cabrera revealed that Stratus did, in fact, ghostwrite the report signed by Cabrera.[542] Examples of entries from the privilege log demonstrating Stratus' involvement in writing the April 1, 2008 report signed by Cabrera include:

- A January 25, 2008 email involving Lago Agrio Plaintiffs' Lawyer Donziger, and Stratus consultants Douglas Beltman and Ann Maest, attaching document entitled "draft outline of proposed annexes";
- February 8, 2008 emails from Beltman to Donziger "attaching document entitled draft outline of proposed annexes";
- February 11, 2008 notes from Maest "regarding sampling plan for global damages assessment";
- A February 15, 2008 memorandum "regarding proposed topic and annex language for anticipated global damages assessment";

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[540] **Exhibit C-360**, *Crude* Outtakes, Apr. 2007, at CRS269-00-CLIP 01.

[541] *Id.,* Apr. 2007, at CRS269-01-04-CLIP 05, CRS269-01-08-CLIP 01, CRS269-00-CLIP 01.

[542] Additional evidence shows that Stratus and 3TM ghostwrote the Cabrera reports. During a November 12, 2007 mediation, the Plaintiffs provided Chevron with a report issued for them by Stratus (the "Stratus Report"). Although Mr. Cabrera never listed the Stratus Report as a source, some portions of the Cabrera report's section on environmental contamination (Section 3) is copied almost verbatim from that document. A mere textual comparison is sufficient to reach this conclusion. During the mediation, the Plaintiffs also provided a Stratus PowerPoint Presentation dated November 28, 2007, and entitled "Estimated Remediation Costs for the Napo Concession, Ecuador," which addressed the cost of pit remediation in Ecuador (the "Stratus Presentation"). **Exhibit C-368**, Stratus Consulting presentation "Estimated Remediation Costs for the Napo Concession, Ecuador," Nov. 28, 2007. This presentation appears to summarize a report that 3TM authored with Stratus with a similar title. **Exhibit C-370,** Objection to Subpoena issued to 3TM, 2, 4-5.

- A February 20, 2008 email from Beltman to Stratus consultant Sowell "regarding attached proposed annex language on the extrapolation of sampling data"
- A February 20, 2008 email from Beltman to Stratus consultant Peers "regarding plan of work, drafting language of proposed annexes, and Ecuador[i]an environmental standards";
- A February 20, 2008 email "regarding attached proposed annex language on the extrapolation of sampling data";
- A February 21, 2008 email from Beltman to Donziger "attaching draft outline for proposed annexes";
- February 22, 2008 emails from Beltman to Stratus consultants Hodgson and Sowell "regarding status of proposed annex language";
- A February 28, 2008 email "regarding attached proposed language for expert report and attached proposed language for toxicity annex";
- A March 19, 2008 email "regarding potential TPH tabulations for attached proposed global damages assessment".[543]

229. The same log shows that Stratus had communications with members of Cabrera's expert team before Cabrera publicly issued his report.[544]

230. The authors of the Cabrera reports also had access to the Plaintiffs' litigation database controlled by Selva Viva and the ADF (the "Selva Viva Database"). Chevron obtained the Selva Viva Database pursuant to a discovery subpoena issued by a United States federal court. The Selva Viva Database is the source of at least two Annexes that Mr. Cabrera submitted as his own in his reports.[545] The first is Annex 4 of Cabrera's supplemental report, which

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[543] **Exhibit C-521**, "Partial Privilege Log" from *Chevron Corp. v. Stratus Consulting, Inc.* ("*Stratus 1782*"), No. 1:10-cv-00047-MSK-MEH (D. Colo.). (Aug. 13, 2010 Log, at log entries PD6438-PD6442, PD6396-PD6405, PD6688-PD6692, PD6717-PD6721, PD6722-PD6727, PD6311-PD6318, PD6286-PD6290, PD6193- PD6218, PD5209-PD5242; PD9630-PD9632, PD10076-PD10077, PD9630-PD9632, PD6976).

[544] **Exhibit C-521**, "Partial Privilege Log" from *Chevron Corp. v. Stratus Consulting, Inc.* ("*Stratus 1782*"), No. 1:10-cv-00047-MSK-MEH (D. Colo.) (Aug. 13, 2010 Log, at log entries PD5103-PD5106 (Mar. 20, 2008 email from Stratus consultant to Cabrera team member Jose David Torres "regarding attached spreadsheet entitled 'Number of wells installed each year in the Concession'"), PD6389, PD6697 (Feb. 14, 2008 emails to Cabrera team member Andrea Ximena Echeverria "regarding formatting of maps" and "TPH concentrations in soil"), PD6443-PD6486 (emails to Cabrera team member Luis Miguel García Aragón attaching article), PD6555 (collaborating on trip to Ecuador)).

[545] For purposes of analyzing the database, Chevron retained Mr. Michael Younger, an expert in electronic forensics, who submitted an expert report in the underlying Lago Agrio Litigation. **Exhibit C-372,** Declaration of Michael Younger in Lago Agrio Litigation, Apr. 26, 2010.

purports to contain survey data, but in reality is merely a printout of a table from the Selva Viva Database, to which it is virtually identical—including misspellings and other typos.[546] Similarly, Annex H to the Cabrera report contains data that are an exact match to data from another spreadsheet in the Selva Viva Database.[547]

231. Moreover, some of the pits identified in Annex H-1 of the Cabrera report are taken directly from a June 6, 2006 report by the ADF identifying so-called "hidden" pits (the "ADF Report"), and likely generated using the Selva Viva Database. Both reports contain the same (numerous) errors, including misidentifying pits with large trees or low-lying vegetation.[548]

232. The Cabrera report's US$ 9.5 billion claim for "excess" cancer deaths is based solely on alleged "statistical data" from the field study of Carlos Martín Beristain (the "Beristain Survey"), a Spanish social psychologist. Instead of being independent from the Plaintiffs, however, Beristain's work was secretly performed largely by personnel from the ADF and Acción Ecológica, with the active involvement of the Plaintiffs' legal team,[549] and his field work

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[546] Annex 4 to the Supplemental Cabrera report contains matching headings and cell contents, the exact same number of rows (1,017) and 36 of the 42 columns of one of the tables (the "Familia Table") in the Selva Viva Database. Furthermore, Annex 4 and the Familia Table contain the same misspellings, unique abbreviations, punctuation and use or lack of use of spacing. **Exhibit C-372,** Declaration of Michael Younger in Lago Agrio Litigation, Apr. 26, 2010, ¶¶13-14.

[547] Three tables within Annex H to the Cabrera report contain data matching content in the Selva Viva Database table called "PozoPiscinaDatos_RAP" (the "RAP table"). In particular, the data within the "Description" column is identical to that in Annex H, and contain, *in English*, the entries "Oil Pit" and "Water Pit" rather than their Spanish equivalent "*Piscina de Crudo*" and "*Piscina de Agua*."

[548] **Exhibit C-373,** Rebuttal Report of Di Paolo and Hall in Lago Agrio Litigation, p. 17-18. Indeed, the writers of the Cabrera report had such an absolute adherence to the FDA Report that they wrote in the Cabrera reports that previously-remediated pits at wellsite Sacha 53 would require millions of dollars to remediate, despite the fact that the independent Settling Experts had already determined that these areas did not require further remediation.

[549] Mr. Berlinger filed a sworn declaration in a U.S. court that he had removed from the film evidence of Dr. Beristain's coordination with the Plaintiffs *at the request of the Plaintiffs' lawyers*.[549] **Exhibit C-344**, *In re Application of Chevron Corp., In re Application of Rodrigo Pérez Pallares and Richard Reis Veiga*, Memorandum Opinion, at 24 (S.D.N.Y. May 6, 2010).

Mr. Beristain has ties to Acción Ecológica—one of the main supporters of the ADF—dating back to at least 2006. In October 2006, he attended an Oilwatch-sponsored convention in the city of Coca, Ecuador, as a member of a panel with Acción Ecologica regarding human rights and environmental issues in the oil industry. **Exhibit C-374,** Transcript of Beristain Declarations at Oilwatch Conference Petroleum Forum, October 22, 2006.

Adolfo Maldonado—one of the principals of Acción Ecológica—and Carlos Beristain have jointly published at least three reports or studies between 2003 and 2005. **Exhibit C-375,** Hegoa Website, at http://biblioteca.hegoa.efaber.net./registros/author/13947.

began three months before Mr. Cabrera was authorized to begin his work. The *Crude* footage shows that Steven Donziger, Pablo Fajardo, Adolfo Maldonado of Acción Ecológica, and Luis Yanza of the ADF attended and actively participated a meeting in May 2007 with Beristain in the Cofán Dureno community,[550] and that Mr. Donziger attended other such meetings in the Secoya community.[551] The footage further shows Mr. Maldonado explaining that Acción Ecológica would do a survey of 1,200 people that were in an area of contamination.[552] Moreover, Stratus produced extensive communications with Mr. Beristain, including exchanging drafts of his cancer survey. In one such exchange, Pablo Fajardo sent an e-mail to Stratus and Carlos Beristain regarding "questions to be posed to the technical expert regarding his work on the global damages assessment."[553] This study, which was carried out secretly, is apparently the basis for the Cabrera report's US$ 9.5 billion damages estimate for "excessive cancer deaths," but its details still have never been disclosed to Chevron or the Lago Agrio Court.

233. In the face of unimpeachable evidence revealing their malfeasance, the Plaintiffs have been forced to admit in a U.S. court that Mr. Cabrera had undisclosed dealings with some

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Furthermore, Hegoa, a Spanish human rights organization affiliated with the Universidad del País Vasco, where Beristain formerly taught, non-transparently provided much of the funding for a human impact study resulting in the Beristain Survey. On December 8, 2008, Hegoa posted an article on its website acknowledging that Acción Ecológica and the ADF worked with Beristain in conducting the study **Exhibit C-376** "*Proyecto de Investigación sobre la dimension psico-social, comunitaria y de género de los conflictos bélicos y socio-ambientales: derechos humanos, ayuda internacional y construcción de la paz*" accessed Mar. 10, 2009). This study included discussions of the impact on the indigenous and mestizo communities of the former Consortium's activities. The article was subsequently removed from the website and replaced with a new version of the article that excluded the reference to the ADF's and Acción Ecológica's participation, but was identical in all the rest. **Exhibit C-377,** Revised version of "*Proyecto de Investigación sobre la dimension psico-social, comunitaria y de género de los conflictos bélicos y socio-ambientales: derechos humanos, ayuda internacional y construcción de la paz*", accessed Apr. 22, 2010. Similarly, the copy of the Beristain Survey that Beristain provided Mr. Cabrera did not disclose the assistance of Acción Ecológica or the ADF in the work underlying that report.

[550] Pablo Fajardo is shown ringing a tire rim like a bell, apparently to call villagers to the meeting; he is later shown addressing the participants at the meeting, appearing to manage the proceedings, and he appears in one scene at the meeting with Mr. Beristain. Donziger describes the Cofán meeting as one called for the people "to talk to their lawyers . . . to talk about what they want as compensation for all the damage, as part of the lawsuit." Throughout these scenes, Beristain appears on film with Donziger, Fajardo, and Criollo. **Exhibit C-360**, *Crude* Outtakes, May 21, 2007, at CRS300-00-CLIP 03.

[551] *Id.,* at CRS-006-10-CLIP 01.

[552] *Id.,* May 21, 2007, at CRS301-00-CLIP 04. *See also id.*, May 23, 2007, at CRS305-01-CLIP 03 (Donziger stating that Acción Ecológica was funding the survey).

[553] **Exhibit C-522**, *Chevron v. Stratus Consulting, Inc.,* Case No. 10-CV-00047, Production from Stratus Consulting, at PD4728 (D. Colo. Aug. 6, 2010).

of the Plaintiffs' consultants and access to their work product, although they falsely asserted that this work was given to Mr. Cabrera through an official Lago Agrio Court procedure that denied Chevron access to the documents.[554] In examining the *Crude* evidence from the March 3, 2007 meeting between key members of the Plaintiffs' legal and technical teams and Mr. Cabrera, a U.S. federal District Court recently stated:

> While respondent has argued that it would be inappropriate for this court to apply its American view of the role of an "independent court appointed expert" to that of an auxiliary court appointed in an Ecuadorian court, it is very clear from the words used by plaintiffs' lawyer in the meeting -- some few weeks before the expert sitting in the room was in fact appointed by the court -- that Chevron did not know that the expert report was being ghostwritten by experts for the party opponent, that it would be important for no one at the meeting to tell Chevron that such had occurred, and, to the amusement of those in attendance at the meeting, Chevron would not realize what had happened to them with the independent report. *While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.*[555]

234. In addition to the clear evidence that the Plaintiffs hand-picked him and ghost-wrote his reports, Mr. Cabrera's own practices and conduct during the global assessment process further prove his prejudice against Chevron:

- Cabrera received payments directly from the ADF in violation of the laws of Ecuador.[556]
- Cabrera had *ex parte* communications with local residents, the Plaintiffs themselves, and the Plaintiffs' representatives, and he received instructions from them as to where to collect samples.[557]

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[554] **Exhibit C-378**, *Chevron v. Stratus Consulting, Inc.,* case No. 10-CV-00047, Stratus Status Report (D. Colo. May 18, 2010).

[555] **Exhibit C-388**, *Chevron Corp. v. Charles Camp*, *Rodrigo Pérez Pallares and Ricardo Reis Veiga v. Charles Camp*, Case No. 1:10-mc-00027-GCM-DLH, Order at 12 (W.D.N.C. Aug. 28, 2010) (emphasis added).

[556] **Exhibit C-516,** Clerk's Letter to President of Lago Agrio Court, June 4, 2008, at 8:00 a.m.; **Exhibit C-523**, Jeff Schreiber, *Data Problems, Conflict of Interest At Heart of $27B Lawsuit Against Chevron* (April 23, 2010, 5:08 PM), http://americasright.com.

- Cabrera allowed local residents, Plaintiffs' representatives and their counsel, and environmental activist groups to accompany his team in the field, and allowed them to participate in and provide technical support for his sampling activities.[558]

- When Cabrera and his team took samples, more than a quarter were discarded in the field with no explanation.[559] In addition, he often discarded samples that he believed were "clean."[560]

- Cabrera visited only 49 of the 335 sites that he was directed to evaluate,[561] and took soil samples at only 45 of those sites.[562] Yet based on those tests and extrapolations from other sources of information, such as aerial photographs (which he failed to attach to his report), the authors of the Cabrera reports purported to assess environmental conditions throughout the entirety of the former Concession Area in just nine months—despite the fact that it took the parties' experts 30 months to perform testing at only 45 sites.[563]

- Cabrera sometimes barred Chevron's representatives from observing or participating in any of his sampling activities and performed many of his sampling activities—if they actually occurred at all—unannounced and in secret.[564]

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[557] *See*, *e.g.*, **Exhibit C-524**, Chevron's Motion to Strike the Cabrera Reports, May 21, 2010, at 4:35 p.m.; **Exhibit C-525,** Chevron's Supplemental Motion to Strike the Cabrera Reports, June 4, 2010, at 8:35 a.m.

[558] *See*, *e.g.*, **Exhibit C-524**, Chevron's Motion to Strike the Cabrera Reports, May 21, 2010, at 4:35 p.m.

[559] *See*, *e.g.*, **Exhibit C-202**, Chevron's Rebuttal to First Cabrera Report, Sept. 15, 2008, at 2:14 p.m., pp. 16-7 (Eng.); **Exhibit C-524**, Chevron's Motion to Strike Cabrera Reports, May 21, 2010, at 4:35 p.m.

[560] *See*, *e.g.*, **Exhibit C-202**, Chevron's Rebuttal to First Cabrera Report, Sept. 15, 2008, at 2:14 p.m., pp. 16-7 (Eng.); **Exhibit C-524**, Chevron's Motion to Strike Cabrera Reports, May 21, 2010, at 4:35 p.m.; s*ee also* **Exhibit C-639,** Gregory S. Douglas, *Rebuttal of Mr. Cabrera's Analytical Data and Evaluation of the Validity of His Sampling and Analytical Program,* at 4-5 (Sept. 8, 2008).

[561] **Exhibit C-202,** Chevron's Rebuttal to First Cabrera Report, Sept. 15. 2008, at 2:14 p.m., p. 7 (Eng.); **Exhibit C-197,** Lago Agrio Court Order Declaring the Relinquishment Valid and Appointing Engineer Richard Stalin Cabrera Vega, Mar. 19, 2007, at 8:30 a.m., at p. 2 (Eng.); **Exhibit C-494**, Plaintiffs' Motion for Evidence, Oct. 29, 2003, at 4:45 p.m., at pp. 2-3 (Eng.).

[562] Mr. Cabrera visited four sites that he did not sample: Yuca Sur, Sacha 05, Eno 01, and Yuca 01. *See* Annex U-04 to the first Cabrera report, "*Resultados Sitio por Sitio*" (showing that only 45 reports were generated regarding site visits).

[563] *See*, *e.g.*, **Exhibit C-202**, Chevron's Rebuttal to First Cabrera Report, Sept. 15, 2008, at 2:14 p.m., at p. 91 (Eng.).

[564] *See*, *e.g.*, *id.,* at p. 6 (Eng.).

- Despite numerous Court orders, Cabrera has refused repeatedly to identify all of his team members, provide a list of their qualifications, or identify the work that they actually performed.[565]

- Cabrera failed to prepare, maintain, and produce properly completed chain-of-custody documentation for his samples.[566] Because of this, nothing but Cabrera's unverified word suggests that his data are valid or reliable.[567]

- Cabrera has a serious conflict of interest because he is the co-founder, majority shareholder, general manager, and legal representative of an oil remediation company called CAMPET, which is registered to do business with Petroecuador. Cabrera's undisclosed conflict means that he stands to gain advantages in business dealings with Petroecuador, especially if he were to issue a report absolving Petroecuador of liability for damages in the Oriente region.[568]

- Cabrera failed to assess causation, attributing to Chevron not only 100% of the damages allegedly caused by the Consortium's activities (despite the fact that TexPet was only the minority owner and was expressly released from liability), but also damages caused by Petroecuador's subsequent conduct after TexPet ceased operating in the area.[569] The failure to assess any responsibility to Petroecuador was no accident; at the March 3, 2007 meeting, Fajardo had told Cabrera that the Plaintiffs' theory was that Chevron was liable for all environmental impacts, even impacts caused by Petroecuador.[570]

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[565] **Exhibit C-529,** Lago Agrio Court Order Requiring Mr. Cabrera to Provide Information About His Team, Oct. 3, 2007, at 11:00 a.m.; **Exhibit C-526,** Motion from Pablo Fajardo Mendoza to the Lago Agrio Court, Oct. 11, 2007; **Exhibit C-367,** Richard Cabrera Vega Response to the Lago Agrio Court, Oct. 11, 2007, at 2:20 p.m.

[566] *See*, *e.g.*, **Exhibit C-202**, Chevron's Rebuttal to First Cabrera Report, Sept. 15, 2008, at 2:14 p.m., pp. 40, 94, 95 (Eng.).

[567] **Exhibit C-183,** G. Douglas Expert Report, at 22-29.

[568] **Exhibit C-221**, Chevron's Motion to the Lago Agrio Court, Feb. 9, 2010, at 9:07 a.m.

[569] *See* **Exhibit C-55**, Bret Stephens, *Amazonian Swindle*, WALL STREET JOURNAL, Oct. 30, 2007 (noting that the Ecuadorian Minister of Energy admitted that Petroecuador did "nothing" to remediate pits under its responsibility for over 30 years). *See also* **Exhibit C-56**, *Ecuadorian Farce*, LATIN BUSINESS CHRONICLE, Apr. 7, 2008 (saying that Petroecuador is "clearly a major and serial contaminator"); **Exhibit C-57**, *Ecuador's Pathetic Tactics*, LATIN BUSINESS CHRONICLE , Sept. 15, 2008 (noting that Petroecuador caused 1,000 oil spills between 2002 and 2007, accounting for 90% of all oil spills in Ecuador).

[570] **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS187-01-02-CLIP 11. This is also the Government's position as publicly stated by the Attorney General and the Ombudsman. **Exhibit C-175,** Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008 (quoting Attorney General García Carrión as saying, "the Correa administration's position in this case is clear: 'The pollution is the result of Chevron's actions and not of Petroecuador.'"); **Exhibit C-268,** *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009 (quoting Ombudsman Gutiérrez stating that arguments concerning the State's responsibility for the Lago Agrio Plaintiffs' claims "cannot be accepted under any circumstances.")

- Cabrera assessed compensation for alleged personal injuries, destruction of indigenous peoples' homelands, funding for improvements to Petroecuador's infrastructure, unjust enrichment, and other items never sought in the Plaintiffs' Complaint or ordered by the Court. Accordingly, there is no legal basis for the Cabrera reports' damage estimates for these items.[571]

235. The process that Mr. Cabrera and his team undertook to determine alleged environmental impacts in the former Concession Area has no scientific basis and constitutes further evidence of Mr. Cabrera's bias against Chevron.

e. The Cabrera Reports Lack Any Scientific Basis or Support

236. The Plaintiffs and their representatives ultimately issued two reports in Mr. Cabrera's name, both of which are fraught with serious errors in methodology and calculations, reach absurd conclusions, and vastly overstate any possible damages. First, on April 1, 2008, a Cabrera report was filed with the Court, recommending that the Court impose more than US$ 16 billion in damages on Chevron for:

(i) remediation of contaminated soil (US$ 1,700,000,000);

(ii) alleged "excess" cancer deaths (US$ 2,910,400,000);

(iii) recovery of unlawful profits, *i.e.*, unjust enrichment (US$ 8,310,000,000)

(iv) compensation for lost ecosystem (US$ 1,697,000,000);

(v) funding of health-care systems (US$ 480,000,000);

(vi) funding for new potable water systems (US$ 428,000,000);

(vii) funding for improvements to Petroecuador's petroleum operations infrastructure (US$ 375,000,000); and

(viii) funding for projects to recover indigenous territory and culture (US$ 430,000,000).[572]

237. The parties submitted comments to the Cabrera report in the Lago Agrio Litigation, and the Plaintiffs requested that Mr. Cabrera increase the damage figures.[573] Ignoring

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[571] **Exhibit C-202**, Chevron's Rebuttal to First Cabrera Report, Sept. 15, 2008, at 2:14 p.m., pp. 6, 10, 17-19, 26, 33-35, 101, and 102; **Exhibit C-524**, Chevron's Motion to Strike Cabrera Reports, May 21, 2010, at 4:35 p.m.

[572] **Exhibit C- 201,** Technical Summary Report By: Engineer Richard Stalin Cabrera Vega Expert for the Court of Nueva Loja, Expert Opinion (including technical annexes), March 24, 2008 and filed April 1, 2008 ("Cabrera Initial Report") at 6.

[573] **Exhibit C-211,** Plaintiffs' Comments to the Cabrera Report, Sept. 16, 2008, at 11:30 a.m.; **Exhibit C-202,** Chevron's Objections to the Cabrera Report, Sept. 15, 2008, at 2:14 p.m.

Chevron's objections, on November 26, 2008, Mr. Cabrera issued a supplemental report that acceded to the vast majority of the Plaintiffs' demands (in fact, it copied the Plaintiffs' requests almost verbatim) and, despite having no new evidence, increased the total amount from US$ 16 billion to more than US$ 27 billion.[574] Mr. Cabrera's action in this respect is strikingly reminiscent of a statement by Plaintiffs' lawyer Steven Donziger in the recently-revealed *Crude* footage; during a meeting with Mr. Cabrera and others, Mr. Donziger states, "[W]e could jack this up to $30 billion in one day. Well, whatever. I mean, I'm exaggerating, but I mean . . . but with ninety days you could do that analysis. Easily."[575]

238. The Lago Agrio Plaintiffs claim that they seek remediation, but they have repeatedly sought to halt PEPDA's current remediation efforts. In October 2006, the Plaintiffs' counsel criticized the PEPDA program as destroying evidence and thus "tamper[ing]" with the lawsuit.[576] In June 2007, Mr. Donziger met with Petroecuador to "confront" them regarding the remediation, explaining that he was only able to get the meeting because "there's a new government and they're forcing the meeting on Petroecuador."[577] Mr. Donziger's stated goal at that meeting was "to get some sort over control over what they [PEPDA are] doing … maybe even stop them -- from doing their cleanup operation[.]"[578] Within weeks of this meeting, Mr. Cabrera asked the Court to suspend all PEPDA remediation at 120 specified sites,[579] and the Court complied on October 3, 2007, evidencing the Court's (and Mr. Cabrera's) collusion with the Plaintiffs' lawyers to deprive Chevron of its rights to be free of further public environmental claims.[580] The Plaintiffs expressed support for the Court's order, stating that "the plaintiffs believe, as does Expert Cabrera, that the sites that were going to be the subject of the judicial test

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574 **Exhibit C-212,** Answers By The Expert Richard Cabrera, With The Support Of His Technical Team, To The Questions And Comments Made By The Plaintiffs, Nov. 26, 2008 ("Cabrera's Supplemental Report"), at 51 and 52. On November 27, 2008, Chevron filed its Rebuttal to Cabrera's Supplemental Report and included in that submission six annexes that provided technical responses to and criticisms of Mr. Cabrera's revised conclusions and calculations. *See* **Exhibit C-213,** Chevron's Rebuttal to Cabrera's Supplemental Report, Feb. 10, 2009.

575 **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS193-00-CLIP 01.

576 **Exhibit C-527,** *Petroecuador Is Set to Clean 230 Pits*, DIARIO LA HORA, Oct. 20, 2006.

577 **Exhibit C-360,** *Crude* Outtakes, June 7, 2007, at CRS355-28-CLIP 01.

578 **Exhibit C-360,** *Crude* Outtakes, June 7, 2007, at CRS355-28-CLIP 02.

579 **Exhibit C-528,** Letter to the Lago Agrio Court, July 12, 2007, at 10:15 a.m.

580 **Exhibit C-529,** Lago Agrio Court Order, Oct. 3, 2007, at 11:00 a.m.

should not be altered."[581] The Plaintiffs thereafter renewed their request to halt the PEPDA remediation, evidencing their continuing efforts to terminate the very remediation they initially sought.[582]

239. The following chart[583] compares the damage assessments from the first Cabrera report to the second report:

Category	Recommended Damages From "Cabrera" Initial Report	Recommended Damages From "Cabrera" Supplemental Report
Remediation of contaminated soils	1,700,000,000	2,743,000,000
Excess" Cancer Deaths	2,910,400,000	9,527,000,000
Groundwater remediation	0	3,236,350,000
Recovery of "unlawful profits" (unjust enrichment)	8,310,000,000	8,420,000,000
Compensation for "lost ecosystem"	1,697,000,000	1,697,000,000
Funding of health-care systems	480,000,000	480,000,000
Funding for new potable water systems	428,000,000	428,000,000
Funding for improvements to Petroecuador's petroleum operations infrastructure	375,000,000	375,000,000
Funding for projects to recover indigenous territory and culture	430,000,000	430,000,000
TOTAL	**$16,330,400,000**	**$27,336,350,000**

240. Chevron retained experts who—unlike Mr. Cabrera—are highly qualified in the subject matter areas covered in the two Cabrera reports. Each of these experts prepared and filed detailed rebuttals, enumerating the many flaws in the facts, methodologies, and conclusions contained in the Cabrera reports.[584] The court denied Chevron's request for a hearing on its

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[581] **Exhibit C-530,** Letter to the Lago Agrio Court, Oct. 29, 2007, at 5:46 p.m.

[582] **Exhibit C-511,** Letter to the Lago Agrio Court, June 4, 2008, No. 140.460; **Exhibit C-360,** *Crude* Outtakes, Mar. 3, 2007, at CRS193-00-CLIP 01.

[583] **Exhibit C- 212,** Cabrera's Supplemental Report at 51 and 52.

[584] *See, e.g.*, **Exhibit C-200,** Robert E. Hinchee, Rebuttal Of The Method Used By Mr. Cabrera To Determine The Supposed Necessity And Cost Of Remediation, Aug. 9, 2008; **Exhibit C-436,** John A. Connor and William C.

claims of essential error. Judge Núñez stated only that the Cabrera report did not need clarification—a rationale that has nothing to do with Chevron's essential error claims.[585] When Chevron asked the court to reconsider its order, the Court issued sanctions against Chevron's counsel.[586]

Hutton, Response To The Proposal Of Mr. Cabrera Regarding Improvement Of The Infrastructure In The Former Petroecuador-TexPet Concession, Oriente Region, Ecuador, Aug. 29, 2008; **Exhibit C-179,** John A. Connor and Roberto Landazuri, Response To Statements By Mr. Cabrera Regarding Alleged Impacts To Water Resources In The Petroecuador-Texaco Concession, Oriente Region, Ecuador, Aug. 29, 2008; **Exhibit C-210,** Ernesto Baca, Response To Mr. Cabrera Regarding His Evaluation Of Petroecuador's Pit Remediation Program (PEPDA) Oriente Region, Ecuador, Sept. 5, 2008; **Exhibit C-441,** Bjorn Bjorkman, Douglas Southgate and Robert Wasserstrom, Response To Mr. Cabrera's Declarations About Alleged Harm To Indigenous Communities In The Petroecuador-Texaco Concession Area, Sept. 8, 2008 (that includes the following individual reports - - 1. Bjorn Bjorkman, Douglas Southgate, Robert Wasserstrom, Response To Mr. Cabrera's Declarations About Alleged Harm To Indigenous Communities In The Petroecuador-Texaco Concession Area; 2. Douglas Southgate, Robert Wasserstrom, Response To Mr. Cabrera's Claims About Deforestation And Alleged Violations Of Indigenous Territorial Rights In The Ecuadorian Amazon; 3. Robert Wasserstrom, Response To Mr. Cabrera's Errors Concerning Indigenous Populations In The Petroecuador-Texaco Concession Area; 4. Bjorn Bjorkman, Response To Claims By Mr. Cabrera Concerning Alleged Harm To Traditional Food Production Systems And To Claims About Their Restoration; 5. Robert Wasserstrom, Response To Mr. Cabrera's Claims About Alleged Harm To Indigenous Communities And Their Cultural Traditions; 6. Robert Wasserstrom, Annex: Mr. Cabrera Fails To Follow World Bank Procedures And Standards For Social Research); **Exhibit C-639,** Gregory S. Douglas, Rebuttal Of Mr. Cabrera's Analytical Data And Evaluation Of The Validity Of His Sampling Program And Analytical Program, Sept. 8, 2008; **Exhibit C-183,** Gregory S. Douglas, Evaluation Of The Validity Of The Plaintiffs' Suggested Experts' Analytical Data From The Judicial Inspections, Sept. 8, 2008; **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; **Exhibit C-380,** James Ellis, Land Use Changes Evaluated With Remote Sensing Methods, Sept. 8, 2008; **Exhibit C-373,** William (Bill) D. Di Paolo, Rebuttal Of The Methodology Used By Mr. Cabrera To Determine The Number And Size Of Pits In The Petroecuador-Texaco Concession, Sept. 8, 2008; **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; **Exhibit C-437,** Douglas Southgate, John A. Connor and Douglas MacNair, Response To The Allegations Of Mr. Cabrera Regarding The Supposed Unjust Enrichment Of TexPet, Sept. 8, 2008; **Exhibit C-533,** Bjorn Bjorkman and Claudia Sanchez de Lozada, Response To Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008; **Exhibit C-535,** Ms. Deborah Proctor, Rebuttal Of The Affirmation Of Mr. Cabrera With Regard To The Presence Of Total And Hexavalent Chromium At Petroleum Exploration And Production Sites In Ecuador - Affirmation Related To The Judicial Process Of Maria Aguinda And Others Against Chevron Corporation, Nov. 25, 2008 (all filed with the Superior Court of Nueva Loja as Technical Appendices to Chevron's Rebuttal to Cabrera's Initial Report); *see also*, **Exhibit C-536,** Robert E. Hinchee, Rebuttal To Mr. Cabrera's Answers Regarding The Recalculation Of Pit Remediation Costs, Jan. 23, 2009; **Exhibit C-537,** Robert E. Hinchee, Rebuttal To Mr. Cabrera's Answers Regarding The Supposed Need For Groundwater Remediation And Its Cost, Jan. 23, 2009; **Exhibit C-538,** Michael A. Kelsh, Rebuttal to Mr. Cabrera's Responses To Health-Related Questions, Jan. 23, 2009; **Exhibit C-539**, Douglas Southgate, John A. Connor and Douglas MacNair, Rebuttal Of The Revised Estimate of Alleged Unjust Enrichment Presented By Mr. Cabrera, Jan. 23, 2009 (all filed with the Superior Court of Nueva Loja as Annexes to Chevron's Rebuttal to Cabrera's Supplemental Report).

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

586 **Exhibit C-218**, Lago Agrio Court Sanctions, Aug. 28, 2009, at 9:30 a.m.; **Exhibit C-541**, Lago Agrio Court Sanctions, Aug. 13, 2009, at 2:30 p.m.; **Exhibit C-542**, Chevron's Motion on Fines, Sept. 8, 2009, at 5:20 p.m.

4. The Court Orders Regarding Cabrera

a. The Court Has Ignored All Evidence of Serious Flaws and Fraud in the Cabrera Reports

241. The Lago Agrio Court has ignored or rejected more than 100 separate complaints by Chevron regarding Cabrera's impartiality, his lack of qualifications, his conflicts of interest, his failure to follow scientific protocol, and even the most recent evidence of his fraud.[587] A summary of the Court's rejection of key evidence proving flaws in the Cabrera reports includes the following:

- Chevron filed several challenges to Cabrera's lack of qualifications. The Ecuadorian Code of Civil Procedure requires a court-appointed expert to have "sufficient knowledge of the matter on which they must report," and Mr. Cabrera lacked expertise in a number of subjects on which he submitted recommendations.[588]

- Chevron challenged Cabrera's failure to accept the appointment within five days as required by Ecuadorian law, but the Court ruled that Mr. Cabrera should be "notified again."[589]

- Chevron unsuccessfully objected to Cabrera's appointment on the basis that he was not a court-accredited expert. Ecuadorian law requires a court-appointed expert to be chosen "from among the persons registered with the appellate court," and the Court appointed Mr. Cabrera even though his name never appeared on this registry.[590]

- Chevron made some 74 objections to Cabrera's technical work, including: that Cabrera failed to provide chain of custody records for samples;[591] that Cabrera discarded apparently clean soil samples in the field in order to manipulate evidence of contamination;[592] that Cabrera sampled sites operated by

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[587] **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m.

[588] **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m; **Exhibit C-260,** Ecuadorian Code of Civil Procedure, Art. 252.

[589] **Exhibit C-204,** Order by the Lago Agrio Court, May 17, 2007, at 8:30 a.m.

[590] **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m.

[591] **Exhibit C-543**, Chevron's Motion to the Lago Agrio Court, July 17, 2007, at 2:10 p.m. Cabrera later submitted chain of custody, at the time he filed his reports.

[592] **Exhibit C-209**, Chevron's Motion to the Lago Agrio Court, July 6, 2007, at 9:50 a.m.; **Exhibit C-545,** Chevron's Motion to the Lago Agrio Court, July 31, 2007, at 2:20 p.m.

Petroecuador in assessing damages against TexPet;[593] and that Cabrera failed to follow his own work plan.[594]

- Chevron filed several challenges to Cabrera's ability to serve as an impartial expert, including: that Cabrera failed to disclose that he was a paid expert for a group of plaintiffs in another environmental case alleging harm in the Oriente;[595] that he failed to disclose his conflict of interest through his affiliation with the company CAMPET; that extensive parts of the Cabrera reports and appendices were drafted by the Plaintiffs' consultants;[596] and that Carlos Beristain, a member of Cabrera's purportedly neutral technical team, was working with the Plaintiffs to draft Cabrera's report on cancer damages, and began his work even before Cabrera started.[597]

In all, the Lago Agrio Court has either rejected or refused to rule on each of these arguments in some 30 separate rulings.[598]

b. Faced with Massive Evidence of the Plaintiffs' Fraud and Collusion with Mr. Cabrera Revealed in the *Crude* Outtakes, the Court Attempted to Restrict Chevron's Due Process Rights

242. When, on May 10, 2010, the U.S. District Court first ordered filmmaker Berlinger to produce the raw footage of *Crude* to Chevron,[599] it became clear that Mr. Cabrera would be fatally compromised, and that the fraudulent nature of the Lago Agrio Litigation would be exposed. Both Ecuador and the Plaintiffs immediately appealed the decision to the Second Circuit Court of Appeals.[600]

243. Aware that the Lago Agrio Court would no longer be able to rely on the Cabrera reports to award damages against Chevron, the Plaintiffs proceeded on a parallel track and

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593 **Exhibit C-546**, Chevron's Motion to the Lago Agrio Court, July 17, 2007, at 2:15 p.m.

594 **Exhibit C-524**, Chevron's Motion to Strike the Cabrera Reports, May 21, 2010, at 4:35 p.m.

595 **Exhibit C-221**, Chevron's Motion to Strike Cabrera Reports, Feb. 9, 2010, at 9:07 a.m.; **Exhibit C-524**, Chevron's Motion to Strike Cabrera Reports, May 21, 2010, at 4:35 p.m.; **Exhibit C-525**, Chevron's Motion to Strike Cabrera Reports, June 4, 2010, at 8:35 a.m.; **Exhibit C-547,** Chevron's Motion to Strike Cabrera Reports, July 12, 2010, at 2:39 p.m.

596 **Exhibit C-503**, Chevron's Motion for Terminating Sanctions, Aug. 6, 2010, at 2:50 p.m. (listing various objections to the Cabrera Reports).

597 *Id.*

598 *Id.* (listing the Court's various refusals to rule on challenges to to the Cabrera Reports).

599 **Exhibit C-548**, *In re Application of Chevron Corporation and Rodrigo Pérez Pallares and Ricardo Reis Veiga*, Memorandum Opinion, May 12, 2010.

600 **Exhibit C-359,** *Chevron Corp. v. Berlinger*, Nos. 10-cv-1918, 10-cv-1966 (2d Cir. July 15, 2010).

requested a new, custom-tailored damage assessment process from the Lago Agrio Court. Specifically, on June 21, 2010, the Plaintiffs requested that the Lago Agrio Court adopt an *ad hoc* procedure so as to address Chevron's "false concerns" regarding the credibility of the Cabrera reports and to "guarantee that the trial reach its conclusion without any further delay and distraction due to Chevron's attacks before foreign tribunals."[601] The Plaintiffs asked the Lago Agrio Court to request both parties to submit additional final information to help the Court in its assessment of damages within 30 days, with an additional 15 days for the parties to submit reply observations.

244. Barely two weeks after the Second Circuit ordered the release of the raw *Crude* footage,[602] on August 2, 2010, the Lago Agrio Court acceded to the Plaintiffs' request and ordered a slightly-modified version of their proposed new damages assessment.[603] Although it did not grant the parties a right of reply as requested by the Plaintiffs, it ordered the parties simultaneously to submit, within 45 days, a new damages assessment.[604] Seemingly aware of what the video footage would show about Mr. Cabrera, the Court "reiterate[d] that, under Article 262 of the Civil Procedure Code, the judge is under no obligation to follow the experts' opinions."[605]

245. Immediately upon review, Chevron presented the *Crude* evidence of the Plaintiffs' lawyers' serious misconduct to the Lago Agrio Court and sought the dismissal of the case as a terminating sanction. But the court has not shown any interest in the concrete evidence of the Plaintiffs' malfeasance, which of course strikes at the very integrity and reliability of <u>*all*</u> of the evidence. Indeed, Judge Ordóñez ignored Chevron's motion for terminating sanctions, as well as other Chevron motions such as a motion to strike the Cabrera reports and a motion to strike certain expert reports related to the judicial inspections.[606] Based on Judge Ordóñez's

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601 **Exhibit C-382**, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010.

602 **Exhibit C-359,** *Chevron Corp. v. Berlinger*, Nos. 10-cv-1918, 10-cv-1966 (2d Cir. July 15, 2010) (order directing Berlinger to turn over footage).

603 **Exhibit C-361**, Lago Agrio Court Order , Aug. 2, 2010, at 9:00 a.m.

604 *Id.*

605 *Id.*

606 *See, e.g.*, **Exhibit C-383**, Lago Agrio Court Order, Aug. 3, 2010, at 3:00 p.m. (ordering that several motions filed by Chevron after the August 2, 2010 order be added to the record without any further consideration by the Court).

failure to act on these motions, Chevron filed a motion to recuse him on August 26, 2010. Pursuant to Article 164(1) of the Organic Code of the Judiciary, the motion to recuse resulted in the suspension of Judge Ordonez's jurisdiction over the case until that motion is decided. Notwithstanding this loss of jurisdiction, however, a few days later, on August 31, 2010, Judge Ordóñez improperly issued a further ruling, denying all recent petitions filed by the parties on the basis of his August 2, 2010 order.[607] The Court's disregard of this evidence showing the Plaintiffs' fraud is further evidence of the coordination and collusion between the Plaintiffs and the Court.

H. The Ecuadorian Government Is Colluding with the Plaintiffs to Improperly Influence the Court and Undermine Chevron's Defense

246. According to Ecuador, the Lago Agrio Plaintiffs have pursued their claims "with no assistance or coordination . . . from the Republic."[608] The evidence is overwhelmingly to the contrary. The Government's involvement in the Lago Agrio Litigation includes improper[609] and surreptitious contacts with the Plaintiffs, financial support to the Plaintiffs' ADF, public statements by the President and other high officials vilifying Claimants and calling for action by the Lago Agrio Court and the public prosecutors, the institution and pursuit of criminal charges against Claimants' lawyers, and apparent corruption. This pressure has led to blatantly biased and one-sided rulings by the Court in the Lago Agrio Litigation and Criminal Proceedings, and all but assures that the outcome of those proceedings is rigged.

247. The dramatic new evidence emerging from the *Crude* outtakes and from other litigation proceedings in the United States exposes the gravity of the fraud and collusion evident in the Lago Agrio Litigation. As a U.S. District Court recently noted:

> The release of many hours of the outtakes has sent shockwaves

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607 **Exhibit C-389**, Lago Agrio Court Order, Aug. 31, 2010, at 4:00 p.m.

608 Respondent's Response to Claimants' Interim Measures Request, ¶ 66.

609 The Ecuadorian Government and the Plaintiffs both knew that their clandestine contacts were improper. Deputy Attorney General Martha Escobar testified under oath that it would be "completely" improper for the Attorney General to intervene in any "private" litigation." **Exhibit C-167,** Dr. Martha Escobar Deposition Transcript, Excerpts, Nov. 21, 2006, at 14:21-15:5, 128:21-129:17, 144:12-145:8 (Eng.). Similarly, Pablo Fajardo was careful to tell the media that President Correa's involvement in the case, including his tour of the Oriente with the Plaintiffs on the presidential helicopter, was strictly connected to "helping" indigenous people, and that in no way did the President intend to interfere with the judiciary. **Exhibit C-360**, *Crude* Outtakes, Apr. 26, 2007, CRS 276-00-CLIP 01.

> through the nation's legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct. In the film itself, Attorney Donziger brags of his *ex parte* contacts with the Ecuadorian judge, confessing that he would never be allowed to do such things in the United States, but, in Ecuador, everyone plays dirty. The outtakes support, in large part, Applicants' contentions of corruption in the judicial process. They show how non-governmental organizations, labor organizations, community groups and others were organized by the Lago Agrio attorneys to place pressure on the new Ecuadorian government to push for a specific outcome in the litigation, and how the Ecuadorian government intervened in ongoing litigation.[610]

248. The financial and political stakes of the Lago Agrio Litigation have made conspiring with the Lago Agrio Plaintiffs an easy choice for the Government. The benefit to State-owned oil company Petroecuador includes evading its responsibilities to remediate its share of the Consortium sites and deflecting attention from present conditions in the region. The benefits to the national Government and its politicians include (1) attracting votes under the banner of President Correa's increasingly populist and anti-corporate regime; (2) achieving political and financial power by accessing and administering billions of dollars as a result of the Lago Agrio judgment—an unprecedented opportunity for both graft and patronage; and (3) deflecting attention away from Petroecuador's harmful practices by seeking to blame all social ills in the Oriente on a long-departed U.S. corporation. Ecuador thus has a direct, obvious, and substantial financial interest in the outcome of the case. Indeed, Ecuador's Prosecutor General, Washington Pesántez, has stated that 90% of the proceeds from any judgment against Chevron would be delivered to the State.[611] And Steven Donziger told the Plaintiffs that "we have to get the politics in order … [because] the only way we're going to succeed, in my opinion, is if the country gets excited about getting this kind of money out of Texaco[.]"[612]

249. The magnitude of what Ecuador stands to gain from the Lago Agrio Litigation is clearly a driving force in its collusion with the Plaintiffs and its breach of its contractual and BIT obligations. That is precisely why it has tried to undermine a transparent, technical, and

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610 **Exhibit C-390**, *Chevron Corp.*, *In Re Application of Rodrigo Pérez Pallares and Ricardo Reis Veiga*, Civil No. 10-MC-21JH/LFG, Memorandum Opinion and Order Authorizing Discovery, at 3-4 (D.N.M. Sept. 1, 2010).

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

612 **Exhibit C-360**, *Crude* Outtakes, Apr. 3, 2006, at CRS-060-CLIP 04 (emphasis added).

comprehensive settlement agreement it signed and substitute for it a collusive, politicized, and fraudulent judgment from a debilitated court system.

1. Government Officials Have Had Repeated Improper Contacts with the Lago Agrio Plaintiffs and Have Provided Them with Financial Support

250. Since the filing of the Lago Agrio Litigation in 2003, the Plaintiffs have enjoyed not only the Government's public support, but also the willingness of its officials to engage in behind-the-scenes dealings and secretive meetings. Although the Government's joint interests aligned it with the Lago Agrio Plaintiffs years earlier,[613] its support strengthened after the Plaintiffs filed their new lawsuit in Ecuador.

251. In the spring of 2005, Amazon Watch—a non-governmental organization working with the Lago Agrio Plaintiffs—organized a meeting in Ecuador among certain Chevron shareholders, a number of the Plaintiffs' representatives, and Ecuadorian Attorney General Jose Maria Borja.[614] At that meeting, Attorney General Borja told a few of Chevron's shareholders that the 1995 Settlement Agreement had been executed "in violation of the Constitution."[615] Referring to the Attorney General's statements at the meeting, Steven Donziger announced the enormous implications of invalidating the release for the Lago Agrio Plaintiffs: "One cannot ignore the fact that ChevronTexaco is trying to use the existence of this agreement as a total defense at trial … In other words, they believe that this agreement completely exonerates them from any liability regardless of what happens at trial."[616]

252. Within months of Attorney General Borja's announcement, the relationship between the Plaintiffs and the Government strengthened and expanded. On August 10, 2005, Deputy Attorney General Martha Escobar exchanged e-mails with Lago Agrio Plaintiffs' attorneys Alberto Wray and Cristóbal Bonifaz and leaders of the ADF including Luis Yanza,

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613 **Exhibit C-482,** Interview of Cristobal Bonifaz and Attorney General Leonidas Plaza Verduga, Democracy Now, Jan. 23, 1997.

614 **Exhibit C-549**, William Baue, *Ecuadorian Attorney General Tells ChevronTexaco Shareholders Remediation Agreement May Be Invalid,* ChevronToxico.com, Apr. 12, 2005.

615 *Id.*

616 *Id.*

regarding a meeting that she had attended with the legal representative of the President.[617] In one e-mail, an attorney for the Plaintiffs wrote, "[i]f at some point we want the Government and the Attorney General to play our side, we must give them some ability to maneuver."[618] Dr. Escobar replied, copying the Attorney General and Esperanza Martínez, who would later serve on the staff of Alberto Acosta when he was president of the Constituent Assembly:

> With respect to the [1998 Final Release], I explained to the [President's legal representative] that the Attorney General's Office and all of us working on the State's defense were searching for a way to nullify or *undermine the value of the remediation contract and the final acta and that our greatest difficulty lay in the time that has passed.*
>
> I have not managed to speak to the Attorney General since Monday, but I am sure that he will not accept the proposal. *The Attorney General remains resolved to have the Comptroller[] [General's] Office conduct another audit* (that also seems unlikely to me given the time); *he wants to criminally try those who executed the contract (that also seems unlikely to me, since the evidence of criminal liability established by the Comptroller's office was rejected by the prosecutor)*.[619]

253. This communication is merely one example of how Ecuador and the Lago Agrio Plaintiffs' lawyers have colluded to undermine Claimants' rights under the Settlement and Release Agreements. In an attempt to conceal this coordination, Dr. Escobar testified falsely under oath that she had not had *any* contact with Plaintiffs' lawyers.[620] She went on to admit that such conduct would be "completely" improper and that the Attorney General "must stay to the side" and not involve itself in "private" litigation.[621] Only when Dr. Escobar was confronted with the documents did she admit that she had sent the email to the Plaintiffs' lawyers, and

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617 **Exhibit C-166,** Email exchange between Dr. Martha Escobar and Alberto Wray *et al*, Aug. 10, 2005.

618 *Id.*

619 **Exhibit C-166,** Email exchange between Dr. Martha Escobar and Alberto Wray *et al*, Aug. 10, 2005 (emphasis added).

620 **Exhibit C-167,** Dr. Martha Escobar Deposition Transcript, Excerpts, Nov. 21, 2006, at 14:21-15:5, 128:21-129:17, 144:12-145:8.

621 *Id.*

further *admit that she had since destroyed other emails*, possibly including communications with Mr. Bonifaz.[622]

254. Since Dr. Escobar's e-mail exchange with the Plaintiffs' lawyers and other Government officials, the Plaintiffs have continued to trumpet their connections with high-level officials in the Ecuadorian Government. Plaintiffs' lead lawyer Steven Donziger has expressed the political strategy underlying the Lago Agrio Litigation on numerous occasions:

- Mr. Donziger announced to a group of indigenous people that working with politicians is "necessary," and that "your interests and the government's are exactly aligned."[623]
- Mr. Donziger admitted that the Lago Agrio Litigation "is not a legal case," but a "political battle that's being played out through a legal case." He insisted, that "[w]hat we need to do is get the politics in order . . . [because] the only way we're going to succeed, in my opinion, is if the country gets excited about getting this kind of money out of Texaco . . . . [Y]ou have to play to those . . . themes . . . those feelings people have."[624]
- Mr. Donziger said that "Correa really likes us," and that the Plaintiffs needed to focus on how to "take advantage" of this relationship.[625]
- Mr. Donziger insisted that President Correa's inauguration was a "new dawn" for the Plaintiffs, because their "friends" are now in office. After he recommended coordinating with President Correa, Alberto Acosta, Fander Falconi (of the Ecuadorian Foreign Ministry), and Monica Chuji (of the Constituent Assembly), among others, Mr. Donziger stated that it was important for the Plaintiffs to show the Ecuadorian Government that the Texaco, Inc. case is a "national sovereignty issue."[626]
- According to Mr. Donziger, part of being an advocate is "doing political work at the highest level to make things happen, like get the government, for example, to take a position in a case that affects your clients."[627]
- Mr. Donziger admitted that "in Ecuador … we have contacts at a very high level."[628]

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622 **Exhibit C-167,** Dr. Martha Escobar Deposition Transcript, Excerpts, Nov. 21, 2006, at 134-135, 142-163.

623 **Exhibit C-360**, *Crude* Outtakes, at CRS003-07-CLIP 05; *see also id*., at CRS003-07-CLIP 05 (in which Mr. Donziger recognized that "the trial can also be lost due to a lack of gains in the political arena").

624 *Id.,* Apr. 3, 2006, at CRS060-00-CLIP 04.

625 *Id.,* Dec. 6, 2006, at CRS145-02-CLIP 01; *id.,* at CRS139-03-CLIP 01.

626 *Id.,* Jan. 16, 2007, at CRS145-02-CLIP 01.

627 *Id.,* July 24, 2006, at CRS104-01-CLIP 01.

255. These statements underscore the Plaintiffs' focus on coordinating with the national Government to influence the outcome of the Lago Agrio Litigation. And in the months surrounding President Correa's election, the national Government demonstrated its receptiveness to the Plaintiffs' strategy as it became increasingly involved in the case:

- December 2006: President-elect Correa met with Mr. Donziger acting on behalf of the Lago Agrio Plaintiffs,[629] leading Mr. Donziger to conclude that, with respect to President Correa, René Vargas Pazos (of Petroecuador), and Alberto Acosta (President of the Constituent Assembly): "We already have connections with [these people] … They're actually asking us to come [to meet with them] … asking what they can do [to help with the case]."[630]

- January 2007: Mr. Donziger insisted that President Correa's inauguration is a "new dawn" for the Plaintiffs because their "friends" are now in office.[631] Separately, Mr. Donziger told the lawsuit's financier that Alberto Acosta was a "huge ally," and that the new political power in Ecuador favors the Plaintiffs: "[N]ow, the door is always open."[632]

- January 2007: During a dinner with the Plaintiffs, 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.[633]

- February 2007: During the first week of February, President Correa's Cabinet was presented with a "whole … talk about the case," after which a Presidential Commission was appointed to monitor the case for the Government.[634]

- June 2007: Plaintiffs' lawyer Pablo Fajardo reported that President Correa personally gave him advice on how to advance the Criminal Proceedings against Claimants' lawyers: "We spoke a few minutes with Correa, and he was telling us about the current position of the Prosecutor General … [T]he commercial-national political forces have changed, that is, [the Prosecutor General] is afraid of being removed . . . So, the President thinks that if we put in a little effort, before getting the public involved, the Prosecutor will yield,

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628 *Id.,* Feb. 15, 2007, at CRS183-00-CLIP 01.

629 **Exhibit C-360**, *Crude* Outtakes, Dec. 8, 2006, at CRS130-00-CLIP 01.

630 *Id.,* Dec. 6, 2006, at CRS138-01-CLIP 01.

631 *Id.,* Dec. 6, 2006, at CRS145-02-CLIP 01.

632 *Id.,* Jan. 31, 2007, at CRS169-05-CLIP 08.

633 *Id.,* Jan. 17, 2007, at CRS161-01-02-CLIP 01; *id*. at CRS161-01-02-CLIP 02.

634 *Id.,* Feb. 15, 2007, at CRS-180-00-CLIP 01.

and will re-open that investigation into the fraud of—of the contract between Texaco and the Ecuadorian Government."[635]

- July 2007: Anita Alban—then Ecuador's Minister of the Environment and now an Ecuadorian Ambassador—gave a private presentation to Plaintiffs' representatives, including Donziger and celebrity activist Trudie Styler. Minister Alban explained that the Government was "helping" the Plaintiffs by, among other things, setting up a corporation with them to manage all the remediation work flowing from a future (and apparently pre-determined) Lago Agrio judgment.[636]

256. According to Mr. Donziger, the Plaintiffs had held a "quiet meeting" with Rafael Correa and one of his aides during the presidential campaign in April 2006, which led Mr. Donziger to conclude that President Correa "loves us."[637] He continued, "And that's why, you know, we want to bring in Maria Eugenia [Yepez] who worked for the old president [Alfredo Palacio], to lead the campaign for us to meet with him [Correa], and really raise the profile of leadership, because what good is it if a friend gets elected, if he doesn't do anything for you?"[638]

257. With this goal in mind, Steven Donziger and Luis Yanza asked Ms. Yepez to join the Plaintiffs and perform "political work" for the case.[639] According to Mr. Donziger, Ms. Yepez's role would be to increase "political pressure" on her contacts in the Correa administration. First, Mr. Donziger asked Ms. Yepez to set up meetings and media opportunities with a variety of Government officials, including President of the Constituent Assembly Alberto Acosta, President Correa's campaign manager Gustavo Larrea, Ecuadorian ministers, and President Correa himself. Although Ecuador's politicians had previously shown general support for the Oriente without specifically targeting Claimants, Mr. Donziger decided that this needed to change; he challenged Ms. Yepez to "focus the Texaco case as a national sovereignty issue," touching on the country's control over its natural resources.[640] Second, Mr. Donziger asked Ms.

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635 *Id.,* June 7, 2007, at CRS-376-03-CLIP-01.

636 **Exhibit C-360**, *Crude* Outtakes, July 24, 2007, at CRS421-00-CLIP 03.

637 *Id.,* Jan. 18, 2008, at CRS162-03-CLIP 01.

638 *Id.,* Jan. 18, 2008, at CRS162-03-CLIP 01 (emphasis added).

639 *Id.,* Jan. 16, 2007, at CRS-145-02-CLIP 01.

640 *Id.*

Yepez to distribute the Plaintiffs' 15-page report on "Texaco's fraud" to "each cabinet minister."[641] In Mr. Donziger's words:

> I think that Correa has to talk about the issue this year. And -- he has to visit the wells. We have to turn the Texaco subject into the issue [that is the] most -- the highest -- profile issue out of all the country's environmental issues … But we strengthen the foundation and -- first looking to get into the government through our friends -- Alberto Acosta, [Fander] Falconi, Monica [Chuji] herself.

Mr. Donziger assured Ms. Yepez that the job would entail "meetings with important people," "political consultation," and working to "strengthen" allies.[642]

258. The Plaintiffs' collusion with the Government increased after the inauguration of Rafael Correa in January 2007. The Lago Agrio Plaintiffs themselves recognized that Correa's election would be a "turning point" for their case, since President Correa had already met with them and expressed support for their case.[643] Just weeks after the inauguration, Mr. Donziger bragged to celebrity activist Trudie Styler that if she agreed to visit Ecuador, he would "set up a meeting with Rafael, the President. I think he'd probably love to meet you and a couple of the key cabinet ministers."[644]

259. President Correa met with lawyers for the Lago Agrio Plaintiffs in April 2007, when the group took a highly-publicized tour of the Oriente region together. During this trip, President Correa invited Plaintiffs' lawyers Pablo Fajardo and Luis Yanza onto the presidential helicopter, which they used to conduct a bird's-eye tour of the Oriente. Around the time of this trip, President Correa embraced the Plaintiffs' lawyers and encouraged them to "[k]eep it up."[645]

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641 *Id.*

642 *Id.*

643 *Id.,* Dec. 8, 2006, at CRS130-00-CLIP 01 (Mr. Donziger says he has met President Correa, that the Plaintiffs are "tight with him," and that his win puts the Plaintiffs "in a significantly improved position"); *id*., Dec. 6, 2006, at CRS138-01-CLIP 01 (Mr. Donziger says that Correa's new government "love[s] us and they want to help us"); *id*., Dec. 6, 2006, CRS138-01-CLIP 02 (Mr. Donziger says "with Correa's victory, like we've never been tighter with the government, you know"); *id*., Jan. 18, 2008, at CRS162-03-CLIP 01 (Donziger again confirmed that "the new president helps us tremendously.").

644 *Id.,* Mar. 15, 2007, at CRS214-01-CLIP 06.

645 **Exhibit C-344**, *In re Application of Chevron Corp., In re Application of Rodrigo Pérez Pallares and Ricardo Reis Veiga*, Memorandum Opinion (S.D.N.Y. May 6, 2010) (J. Kaplan), at 11.

Plaintiffs' lead lawyer Steven Donziger announced the obvious: "We've achieved something very important in this case … Now we are friends with the President."[646]

260. During the media tour, President Correa gave a speech calling for the criminal prosecution of Claimants' lawyers, labeling them "*vende patrias* … who for a fistful of dollars are capable of selling their souls, their country, their families, etc."[647] As President Correa's statements make clear, the Plaintiffs' campaign to befriend the President had its intended effects. Indeed, Steven Donziger expressed his delight at President Correa's call for criminal prosecution, telling the camera in the documentary film *Crude*: "Correa just said that anyone in the Ecuador government who approved the so-called remediation is now going to be subject to litigation in Ecuador. Those guys are shittin' in their pants right now."[648]

261. On January 19, 2008, President Correa announced during his weekly national radio address that he had again met with the ADF, and that the Lago Agrio Plaintiffs had "all the support of the National Government."[649]

262. In August 2008, with the Plaintiffs publicly calling for the prosecution of Claimants' lawyers before expiration of the statute of limitations, President Correa met yet again with the ADF and the Plaintiffs' lawyers—whom he called his "*compañeros*"—and declared that there had been no remediation, that the Prosecutor General should indict those who signed the release,[650] and that his "patriotic and sovereign" government would "never again bow to the

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[646] **Exhibit C-344**, *In re Application of Chevron Corp., In re Application of Rodrigo Pérez Pallares and Richard Reis Veiga,* Memorandum Opinion (S.D.N.Y. May 6, 2010) (J. Kaplan), at 11.

[647] **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007 (emphasis added). This rhetoric appears to have come directly from Mr. Donziger, who only weeks earlier had stirred up public animus against Claimants' lawyers in similar language:

> Well, when a foreign company comes there are local people that help, and Texaco has its accomplices: Ecuadorians who are more interested in making money than showing solidarity toward their fellow countrymen whose lives are in peril.

Exhibit C-550, Radio Cristal Program, *Interview with Steven Donziger*, Feb. 8, 2007.

[648] **Exhibit C-344**, *In re Application of Chevron Corp., In re Application of Rodrigo Pérez Pallares and Richard Reis Veiga*, Memorandum Opinion (S.D.N.Y. May 6, 2010) (J. Kaplan), at 11.

[649] **Exhibit C-172**, Presidential Weekly Radio Address, Jan. 19, 2008.

[650] **Exhibit C-173**, Excerpt from Transcript of Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008.

interests of the big transnational [companies]."[651] President Correa also said during this interview that he continued to meet with the Plaintiffs "periodically," to assure them that his administration would not "sell out" to Chevron.[652]

263. In September 2009—more than two years after President Correa first toured the Oriente with the Plaintiffs' lawyers, and just days after the release of the bribery videotapes implicating Judge Juan Núñez—President Correa again met with Mr. Donziger, Mr. Fajardo, and Mr. Yanza, all representing the Lago Agrio Plaintiffs, in the presidential palace.[653] Although the purpose of this meeting has not been publicized, the fact that it occurred in the immediate wake of explosive proof of corruption in the Lago Agrio trial seems hardly coincidental.

264. As demonstrated in the *Crude* outtakes, the Plaintiffs also forged ties with the Office of the Vice President. In March 2007, shortly after Mr. Cabrera's appointment as the global assessment expert, Plaintiffs' representatives Mariana Yepez, Luis Yanza, Julio Prieto, and Pablo Fajardo prepared for a meeting at the Ecuadorian Vice President's office.[654] Ms. Yepez told her colleagues that she had first scheduled a meeting with an engineer who was part of the Vice President's Office, in order to make an "agreement" regarding the allocation of remediation and development projects in the Consortium region. The Plaintiffs expected that the engineer would relay this agreement to the Vice President, so that the Plaintiffs' lawyers could later meet with him and discuss how these arrangements could help their case.

265. Given that the Lago Agrio Plaintiffs have enjoyed extended and repeated meetings with the Head of the Ecuadorian State (in addition to receiving strategy assistance in correspondence from the Attorney General's Office), Ecuador cannot credibly argue that the Government has no stake in the Lago Agrio Litigation, or that the Government has provided "no assistance or coordination" to the Plaintiffs.[655] Its prior representations to this Tribunal in this regard are false.

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651 **Exhibit C-174**, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS, Aug. 16, 2008.

652 **Exhibit C-174**, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS, Aug. 16, 2008.

653 **Exhibit C-551**, *Amazon Watch Claims Ecuador's Not a Party to the Chevron Lawsuit? Think Again*!, SAN FRANCISCO GATE, Sept. 17, 2009.

654 **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2007, at CRS223-02-01.

655 Respondent's Response to Claimants' Interim Measures Request, May 3, 2010, ¶ 66.

266. Ecuador has also provided financial and logistical support to the Plaintiffs' representative organization, the ADF. This group subsidizes the Lago Agrio Plaintiffs, and the Plaintiffs' lawyers suggested in their Complaint that the ADF be named the sole beneficiary of the final judgment.[656] Shortly before Mr. Cabrera began his work as the global assessment expert—an appointment that the Plaintiffs orchestrated behind the scenes with the Lago Agrio Court—the Ecuadorian Ministry of the Environment gave the ADF US$ 160,000 purportedly in exchange for, among other things, information and laboratory samples provided by the ADF.[657] It seems likely that money was intended to be used to finance the Lago Agrio Litigation.

267. After President Correa visited the former Consortium area in April 2007, he publicly announced a relocation plan for the inhabitants.[658] In August 2008, the Ministry of Environment awarded a five-year, US$ 30 million contract to the ADF, pursuant to President Correa's relocation plan, to move selected families to new housing and evaluate environmental impacts.[659] These facts reinforce Mr. Bonifaz's statements that the ADF is a "powerful political force" in Ecuador.[660]

2. The Lago Agrio Plaintiffs and the Ecuadorian Government Have Shared Legal Counsel

268. The relationship between the Lago Agrio Plaintiffs and the State extends beyond improper contacts related to the Lago Agrio Litigation. Over the years the Plaintiffs and the Government also have shared virtually the same legal team. A number of the Plaintiffs' lawyers, including Cristobal Bonifaz, Terry Collingsworth, Jonathan Abady, and Alberto Wray, have represented both the Lago Agrio Plaintiffs and the Government of Ecuador in proceedings related to the Lago Agrio Litigation:

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656 The ability to administer a large fund would provide enormous political and financial power to the ADF.

657 **Exhibit C-552**, Ministry Agreement No. 164, Official Gazette No. 26, Feb. 22, 2007.

658 **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

659 **Exhibit C-553**, María Augusta Sandoval, *Environmental Remediation Plan in Motion*, EL TELEGRAFO, Aug. 12, 2008; **Exhibit C-554**, *The Remediation Took a First Step*, EL COMERCIO, Dec. 24, 2008. That is a substantial amount of money, and there are no assurances that the ADF has not used it to pursue this case.

660 **Exhibit C-74**, *Jane Doe I, et al. v. Texaco, Inc.*, No. C 06-2820, Declaration of Cristóbal Bonifaz in Support of Plaintiffs' Renewed Motion to Proceed with Action Using Pseudonyms, Case No. C-06-2820 (WHA), June 9, 2006.

- Plaintiffs' former lead counsel and architect of the Lago Agrio Litigation, U.S. lawyer Cristóbal Bonifaz, also represented Petroecuador and Ecuador in a 2004 lawsuit in New York to enjoin the AAA Arbitration filed by Texaco, Inc. and Chevron (seeking indemnification from Petroecuador and Ecuador for costs incurred in the Lago Agrio Litigation). Mr. Bonifaz continued to represent the Plaintiffs in Lago Agrio until around February 2006.

- Another U.S. lawyer, Terry Collingsworth, worked alongside Mr. Bonifaz in representing Ecuador in seeking to stay the AAA Arbitration and later represented a number of indigenous people in district court in California, but was eventually sanctioned for bringing bogus claims that the TexPet operations caused cancer deaths.[661]

- Jonathan Abady, a U.S. lawyer currently representing the Lago Agrio Plaintiffs,[662] also represented the Republic of Ecuador in the *Aguinda* Litigation.[663]

- Alberto Wray, the Plaintiffs' former lead lawyer and the signatory of the Lago Agrio Complaint, now represents Ecuador in a number of international investment arbitrations, and currently advises it on matters related to this arbitration.[664]

269. This exchange of legal counsel has benefited directly the Lago Agrio Plaintiffs, who have received a number of litigation-related documents that could only have come from the Government. For example, discovery that Chevron produced to the Government of Ecuador in related U.S. litigation apparently was given by the Government to the Lago Agrio Plaintiffs, including a TexPet internal memorandum (complete with Bates number from the U.S. litigation), which the Plaintiffs attached to a press release.[665]

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[661] **Exhibit C-169,** *Republic of Ecuador v. ChevronTexaco Corp.*, No. 04-CV-8378 (LBS) (S.D.N.Y.) (Sand, J.); *see also* **Exhibit C-215**, *Gonzales v. Texaco, Inc*., No. C 06-02820 WHA, 2007 WL 3036093 (N.D. Cal. Oct. 16, 2007) ("This order finds and holds that the cancer claims made on behalf of the three plaintiffs at issue by Attorney Bonifaz, Collingsworth and Hoffman were baseless and made without reasonable and competent inquiry.") The sanction against these attorneys has since been vacated.

[662] **Exhibit C-556**, *U.S. judge rules for Chevron in Ecuador case*, REUTERS, Mar. 11, 2010.

[663] **Exhibit C-557**, Affirmation of Jonathan S. Abady, *Aguinda et al. v. Texaco, Inc*., Case No. 93- Civ.-7527, (S.D.N.Y. Aug. 22, 1997).

[664] **Exhibit C-387**, *In re Application of Chevron Corp*., Case No. 10:371 (CK), Response of the Republic of Ecuador to Chevron's Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (S.D.N.Y. June 23, 2010), at 9 (explaining that Mr. Wray also represents Ecuador in *Murphy Exploration & Proc. Co. Intl. v. Ecuador,* ICSID Case No. ARB/08/4, and *Repsol YPF Ecuador, S.A. et al. v. Ecuador and Petroecuador*, ICSID Case No. ARB/08/10).

[665] **Exhibit C-558**, Amazon Watch Press Release, *Texaco Ordered Destruction of Oil Spill Documents*, Oct. 15, 2008.

270. Furthermore, the Lago Agrio Plaintiffs have admitted that the Government and the Plaintiffs share the same "opponent" in Chevron. In a recent filing before the U.S. District Court for the Southern District of New York, the Lago Agrio Plaintiffs argued that Alberto Wray's documents related to the Lago Agrio Litigation were protected under the work product doctrine, *even if he had shared those documents with the Ecuadorian Government*.[666] Ecuador has echoed these arguments in U.S. proceedings, asserting privilege over Mr. Wray's documents "throughout the time period relevant to Chevron's discovery application," on the basis that Mr. Wray "has acted and currently acts as counsel to the Republic in a number of matters, including the BIT arbitration underlying Chevron's request."[667] Thus, at the same time that it seeks to protect joint defense work undertaken by the Government and the Plaintiffs in other fora, Ecuador is arguing before this Tribunal that it has offered "no assistance or coordination" to the Plaintiffs.[668]

271. Further, Ecuador has submitted expert evidence paid for and directed by the Plaintiffs in related U.S. litigation. In 2007, Ecuador submitted a declaration by environmental consultant Mark Quarles regarding the "independence" of the Cabrera report, using that declaration to support the Government's contention that the Lago Agrio Litigation "has proceeded in accordance with rules of procedure under Ecuador law."[669] Recently, Mr. Quarles admitted in sworn testimony that Steven Donziger paid him for this affidavit, and that he would not have signed the affidavit if he had known about the Plaintiffs' involvement with Mr. Cabrera.[670]

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666 **Exhibit C-386**, *In re Veiga and Pallares*, Case No. 1:10-mc-00370-CKK-DAR, Response of the Ecuadorian Plaintiffs in Opposition to an Application for an Order Under 28 U.S.C. § 1782 to Issue a Subpoena to Alberto Wray for the Taking of a Deposition and the Production of Documents for Use in a Foreign Proceeding (S.D.N.Y. June 28, 2010), at 13-14 (internal citations omitted).

667 **Exhibit C-387**, *In re Application of Chevron Corp*., Case No. 10:371 (CK), Response of the Republic of Ecuador to Chevron's Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings (S.D.N.Y. June 23, 2010), at 15.

668 Respondent's Response to Claimants' Interim Measures Request, ¶ 66.

669 **Exhibit C-559**, *Republic of Ecuador and Petroecuador v. ChevronTexaco et al*., Case No. 1:04-cv-08378 (LBS), Plaintiffs' Supplemental Memorandum of Law at 26 n.20 (S.D.N.Y. Sept. 18, 2007).

670 **Exhibit C-560**, *In re Chevron Corp.*, No. 3:10-cv-00686 (M.D. Tenn.), Deposition of Mark Quarles, Sept. 1, 2010, at 79, 116-17.

272. Recently released outtakes from *Crude* further prove that the legal teams for the Plaintiffs and Ecuador have worked together on the Lago Agrio Litigation. In December 2006, Steven Donziger described the significance of the Government's involvement in the case, claiming that the Ecuadorian Government is "working hand-in-hand with us [the Plaintiffs] … on a joint defense."[671] This collaboration was sealed a few weeks later, when a telephone conversation between Mr. Donziger and Eric Bloom (counsel for Ecuador in this Arbitration) was filmed and recorded.[672] And Mr. Donziger explained the key role of President Correa's new administration in the Plaintiffs' overall legal strategy: "[W]e've been really helping each other … [T]hey've already known about this case before they came into office, so we have a huge, you know, leg up over where we usually are with governments … [B]ut we're continuing to -- to work those contacts."[673]

273. In another example, the filmmaker's cameras captured a January 2007 meeting between Mr. Donziger and Joseph Kohn, a partner of the U.S. firm funding the Lago Agrio Litigation, during which Donziger mentioned that he had been "helping" Winston & Strawn, counsel for Ecuador, prepare the response to Chevron's statement of undisputed facts in the AAA Arbitration proceedings before Judge Sand in the federal court in New York.[674] Donziger told Kohn that Chevron was alleging a "conspiracy" between Plaintiffs and the Ecuadorian Government, to which Kohn responded, "*If only they knew*."[675] During the same meeting, Donziger showed Kohn a report that the Ecuadorian Attorney General forwarded to the U.S. Department of Justice on why TexPet's remediation supposedly was a fraud, and explained that "we did the work for him."[676]

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671 **Exhibit C-360**, *Crude* Outtakes, Dec. 6, 2006, at CRS167-01-CLIP 01.

672 *Id.,* Jan. 18, 2007, at CRS163-02-CLIP 02.

673 *Id.*

674 *Id.,* Jan. 31, 2007, at CRS169-05-10; *see also id.*, at CRS170-00-CLIP 01.

675 *Id.,* Jan. 31, 2007, at CRS169-05-CLIP 09 (emphasis added).

676 **Exhibit C-360**, *Crude* Outtakes, Jan. 31, 2007, at CRS170-00-CLIP 03.

3. The Lago Agrio Court Has Succumbed to Corruption and Political Pressure by the Plaintiffs and the Government

274. Both the Lago Agrio Court and the Ecuadorian criminal justice system have proved susceptible to the improper pressures and intimidation tactics by both the Plaintiffs and the Government. Throughout the course of the proceedings, a pattern has emerged establishing that the Plaintiffs' and the Government's conduct has directly affected judicial and prosecutorial decisions in both the Lago Agrio Litigation, in which the Court has exhibited prejudice against Chevron throughout the course of the litigation, and the Criminal Proceedings, which are characterized by a series of unjust and unlawful decisions. As the newly discovered evidence from *Crude* makes clear, these wrongful court decisions can be tied directly to political pressure from the national Government and collusion with the Plaintiffs themselves.

a. The Lago Agrio Plaintiffs Are Engaged in Pressure Tactics Designed to Influence the Lago Agrio Court

275. Although Ecuador has attempted to characterize the Lago Agrio Litigation as a purely "private" lawsuit, the conduct of the Lago Agrio Plaintiffs' lawyers suggests otherwise. Having recognized that their case aligns with the Government's interests, and further understanding that Ecuadorian courts are weak and susceptible to political pressure, the Plaintiffs repeatedly have engaged in corrupt tactics and political maneuvering in order to achieve their desired results. They have pressured the Court through demonstrations designed to intimidate the Court, public statements and political pressure from both Government officials and Plaintiffs, *ex parte* meetings with the judges themselves on substantive rulings, and the filing of criminal charges against Claimants' lawyers, among other tactics.

276. Mr. Donziger admitted that he repeatedly called Chevron lawyer Diego Larrea "corrupt" during a Court hearing in order to create publicity and pressure the Judge.[677] He crowed afterward that the "utter weakness" of the judges is so "incredible" that Plaintiffs could barge into the judge's office with the media and force the judge to fall into line by "yell[ing] and

[677] *Id.,* Mar. 30, 2006, at CRS053-02-CLIP 01.

scream[ing].”[678] In Mr. Donziger’s own words, what he achieved “would never happen in any judicial system that had integrity.”[679]

277. The Plaintiffs have engaged in repeated publicity campaigns to intimidate the Court by creating an atmosphere of public outrage and instilling fear in the judge. To achieve this goal, the Plaintiffs have schemed to influence the Court by staging political rallies and stirring up public animus toward Chevron. Well before Mr. Cabrera’s fraudulent appointment, the Plaintiffs designed a “strategy” to “choreograph” conflict at the judicial inspections, and to “create conflict, invite the press” to “entrap [Chevron] in the conflict.”[680] From Mr. Donziger’s perspective, the judicial inspection process was “all about politics and arguing and bullshit and show.”[681]

278. In March 2006, the *Crude* video cameras captured Steven Donziger talking about blocking the Court-ordered judicial inspection of the HAVOC laboratory by bringing 1,000 protesters to surround the premises.[682] Mr. Donziger reinforced his belief in this strategy a year later, when he bluntly observed: “[T]his is Ecuador, okay? You can say whatever you want and at the end of the day, [if] there’s a thousand people around the courthouse, you are going to get what you want.”[683] During a June 6, 2007 meeting among Plaintiffs’ representatives, Mr. Donziger returned to the same tactics, proposing to “take over the [Lago Agrio] court with a massive protest,” with one of the purposes being to “shut the court down for a day.” He reasoned that there is an “institutional weakness in the judiciary,” and that “they [the judges] make decisions based on who they fear most.”[684] The next day, Pablo Fajardo echoed the need to pressure the Court to swear in Mr. Cabrera as the global expert, stating that “the judge is

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678 **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2006, at CRS053-02-CLIP 01; *id*., Mar. 30, 2006, at CRS053-02-CLIP 04.

679 *Id.,* Mar. 30, 2006, at CRS053-02-CLIP 01.

680 *Id.,* undated, at CRS069-02-CLIP 03; *id.*, Mar. 30, 2006, at CRS053-01.

681 *Id.,* undated, at CRS069-02-CLIP 03.

682 *Id.,* Mar. 30, 2006, at CRS053-02-CLIP 01.

683 *Id.,* Mar. 4, 2007, at CRS-195-05-CLIP-01.

684 *Id.,* June 6, 2007, at CRS350-04-CLIP 01.

scared shitless," and that the Plaintiffs will continue to use even stronger political measures to influence the Court.[685]

279. Indeed, the Plaintiffs repeatedly resorted to veiled threats and scare tactics in order to pressure the Lago Agrio Court. During a dinner among the Plaintiffs' team, one of Plaintiffs' female associates told Mr. Donziger and Mr. Ponce that the judge would "be killed" if he ruled in favor of Chevron. Mr. Donziger replied "[h]e might not be, but … he thinks he will be. Which is just as good."[686] He further stated: "[The judges] don't have to be intelligent enough to understand the law, just as long as they understand the politics."[687] In another clip, Mr. Donziger bragged: "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 gonna let him know what time it is … We're going to scare the judge, I think today."[688] Mr. Donziger is also captured on tape saying that "no judge can rule against [the Plaintiffs] and feel that he can get away with it in terms of his career."[689]

280. These pressure tactics are not new to the Plaintiffs' lawyers, who have employed them in other cases. At a hearing of a lawsuit in Ecuador brought against Mr. Donziger by Edison Camino Castro, a former environmental consultant in the Lago Agrio case, Mr. Donziger and another Lago Agrio Plaintiffs' lawyer tried to intimidate the judge into an adverse ruling by calling her "corrupt," threatening a complaint against her to the Inter-American Court of Human Rights, and threatening to have her arrested. Outside the hearing, Mr. Donziger suggested to the other lawyer that they falsely accuse the judge of calling him an "imbecile" or a "gringo," which the judge did not do. "We'll just make it up," said Mr. Donziger.[690] Months later, Mr. Donziger suggested that the judge dismissed the lawsuit not based on the law but because she was afraid of his Ecuadorian co-counsel and negative publicity.

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685 **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, at 376-03-CLIP 10.

686 *Id.,* Apr. 5, 2006, at CRS129-00-CLIP 02.

687 *Id.*

688 *Id.,* Mar. 30, 2006, at CRS052-00-CLIP 06.

689 *Id.,* Mar. 9, 2006, at CRS032-00-CLIP 01.

690 *Id.,* Mar. 8, 2006, at CRS046-02-CLIP 01.

b. The Ecuadorian Government Has Signaled the Required Outcome to the Lago Agrio Court

281. Truly cognizant of the enormous political and financial opportunities presented by a Lago Agrio judgment,[691] President Correa and his administration unleashed a public campaign to assist the Plaintiffs and pressure the judiciary to rule against Chevron. Not only have President Correa and other key officials issued repeated, public statements against Claimants, but they are also directly pressuring the judicial and criminal branches to further the Plaintiffs' case. This conduct extends to the highest levels of the Ecuadorian Government, at the same time that President Correa has worked to consolidate his power over the judiciary, ensuring that any judge who issues opinions contrary to the Executive's interest is subject to dismissal and even criminal prosecution.[692] These facts, among others, prompted a U.S. federal judge in related litigation to

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691 Under Article 43 of the 1999 EMA, "the court shall establish … the amount required for reparation of damages … [and] shall also establish the individual or juridical person that will receive that amount in order to perform the reparation of damages." *See* **Exhibit C-73**, 1999 EMA, Art. 43. The Ecuadorian State administers the funds used for remediation of the environment. Therefore, the Government is the "juridical person" that should receive the amount required for remediation. High-ranking Government officials have admitted that the Government expects to receive 90% of the judgment. Ecuador's Prosecutor General, Washington Pesántez, confirmed that "Ninety percent [of any judgment against Chevron] would be delivered to the State for remediation and bio-remediation activities." **Exhibit C-5,** Press Conference by Prosecutor General Washington Pesántez, Sept. 4, 2009, at 2. The ability to administer a large fund of money would provide enormous political and economic power to government officials.

692 The Constituent Assembly enacted the following as its first official mandate in November 2007:

> [T]he decisions of the Constituent Assembly are superior to any other rule in the judicial system, and compliance with them is mandatory for all persons, entities and other public authorities without any exception whatsoever. No decision of the Constituent Assembly shall be subject to the oversight of, or be challenged by, any agency of the current government.
>
> Judges and tribunals that process any action contrary to the decisions of the Constituent Assembly shall be dismissed from their post and subject to corresponding prosecution.

Exhibit C-104, Constituent Assembly, Mandate 1, Official Registry No. 223, Nov. 30, 2007. The Government, and President Correa in particular, has enforced this mandate on a number of occasions, removing and disciplining judges from their posts for ruling against the Government's interests. In July 2009, three judges in Quito were removed from office after they dismissed an appeal filed by the Office of the Comptroller. **Exhibit C-134**, *Office of the Comptroller Gets Judges Out*, EL HOY, July 23, 2009. In January 2010, President Correa personally called for the Judicial Council to investigate the bank accounts of judges who ruled against the Government's interests in the highly politicized Filanbanco case, and those judges were in fact investigated and sanctioned. **Exhibit C-160**, *Alternate Judges in the Isaías Case Sanctioned Following Correa's and Prosecutor General Pesántez's Complaints*, EL UNIVERSO A1, at A3, Jan. 20, 2010.

conclude that as of April 2007, it was "an established fact" that Ecuador was supporting the Lago Agrio Plaintiffs.[693]

282. In addition to holding private meetings with the Plaintiffs and other Government officials on issues related to the Lago Agrio Litigation,[694] President Correa has launched a public campaign to vilify Claimants through weekly radio addresses, television broadcasts on multiple Ecuadorian television stations, press releases, and numerous public statements. He has personally levied accusations against Claimants,[695] condemned and threatened criminal prosecutions against their Ecuadorian attorneys,[696] and attempted to exploit Ecuadorian public opinion by making the case against Claimants a national cause, just as Donziger sought.[697] Some of President Correa's statements designed to influence the Lago Agrio Court include the following:

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693 **Exhibit C-169,** *Republic of Ecuador v. ChevronTexaco*, 04-cv-8378 (S.D.N.Y.), Transcript of Hearing at 6-7, Apr. 19, 2007.

694 *See infra* § IV.H.1 (listing the President's direct contacts with Plaintiffs).

695 *See*, *e.g.*, **Exhibit C-168**, Press Release, *The Government Backs Actions of Assembly of Persons Affected by Texaco Oil Company,* Government of Ecuador Secretary General of Communications, The government backs actions of the assembly of persons affected by Texaco Oil Company, Mar. 20, 2007 ("The President of the Republic, Rafael Correa, offered all the support of the National Government to the Assembly of the Parties Affected by Texaco Oil Company"); **Exhibit C-561**, Press Release, Office of President Rafael Correa, The President will visit the Province of Orellana and Sucumbíos, Apr. 25, 2007; **Exhibit C-170**, Press Release, Office of President Rafael Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007; **Exhibit C-171**, Radio Caravana, Presidential Weekly Radio Address, Apr. 28, 2007; **Exhibit C-173**, Excerpt from Transcript of Weekly Presidential Radio Address, Canal del Estado, Aug. 9, 2008; **Exhibit C-174**, Ecuador says to meet Chevron over $16 billion lawsuit, REUTERS, Aug. 16, 2008; **Exhibit C-243,** Transcript of Statements by Rafael CorreaBroadcast on Teleamazonas, Apr. 26, 2007; **Exhibit C**-561, Press Release, Office of President Rafael Correa, The President will visit the Province of Orellana and Sucumbios, Apr. 25, 2007; **Exhibit C-251**, Presidential Weekly Radio Address, Aug. 16, 2008; **Exhibit C-242,** Press Release, Office of President Rafael Correa, *President calls upon District Attorney to Allow a Criminal Case to be Heard Against Petroecuador Officers Who Accepted the Remediation Performed by Texaco*, Apr. 26, 2007.

696 **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007; **Exhibit C-173,** Excerpt from Transcript of Weekly Presidential Radio Address, Canal del Estado, Aug. 9, 2008, at 10:00 a.m.; **Exhibit C-242,** Press Release, Office of President Rafael Correa, *President calls upon District Attorney to Allow a Criminal Case to be Heard Against Petroecuador Officers Who Accepted the Remediation Performed by Texaco*, Apr. 26, 2007.

697 *See*, *e.g.*, **Exhibit C-168,** Press Release, Government of Ecuador Secretary General of Communications, *The Government Backs Actions of Assembly of Persons Affected by Texaco Oil Company*, Government of Ecuador Secretary General of Communications, Mar. 20, 2007 ("The President of the Republic, Rafael Correa, offered all the support of the National Government to the Assembly of Parties Affected by Texaco Oil Company"); **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007; **Exhibit C-174**, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS, Aug. 16, 2008.

- March 2007: Weeks after his election on a populist and anti-corporate platform, President Correa called the Plaintiffs' lawyers "true heroes … who for years stood up for their people, their Amazon," offering them "the National Government's full support" including "assistance in gathering evidence" against Chevron.[698]

- April 2007: President Correa made a highly-publicized trip to the former Concession Area with the Plaintiffs' lawyers and the ADF, where he (i) publicly denounced the "barbarity committed by that multinational corporation [Texaco]";[699] (ii) accused Texaco, Inc. of causing "irreversible" damage in the Amazon;[700] (iii) demanded that the Office of the Public Prosecutor bring "criminal actions" against Chevron's Ecuadorian attorneys for corruption and for being "*vende patrias*"; (iv) sent a "message of solidarity" to the Lago Agrio Plaintiffs;[701] and (v) declared that "Texaco's 'savage exploitation' of oil 'killed and poisoned people.'"[702]

- September 2009: Referring to the plaintiffs in the Lago Agrio Litigation, President Correa stated, "[o]f course I want our indigenous friends to win,"[703] and further asserted that the videotapes unearthing Judge Núñez's involvement in corruption prove that Chevron is "desperate" and merely "attempt[ing] to delay the process."[704]

- March 2010: President Correa stated that the alleged contamination in Ecuador is a "crime against humanity" that is "thirty times larger" than Exxon Valdez.[705]

- April 2010: President Correa called Chevron an "open enemy of the country."[706]

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698 **Exhibit C-168**, Press Release, *The Government Backs Actions of Assembly of Persons Affected by Texac*o *Oil Company*, Government of Ecuador Secretary General of Communications, Mar. 20, 2007.

699 **Exhibit C-561**, Press Release, Office of President Rafael Correa, The President will visit the Province of Orellana and Sucumbíos, Apr. 25, 2007.

700 **Exhibit C-170**, Press Release, Office of President Rafael Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007.

701 **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

702 **Exhibit C-224**, Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASHINGTON POST, Apr. 28, 2009 (further quoting President Correa that "Texaco's cleanup [was] a charade"; and that "Chevron's Ecuadorian attorneys [are] 'sellouts'").

703 **Exhibit C-562**, Transcript of Public Address, Sept. 12, 2009; *see also* **Exhibit C-228**, *Ecuador Says Had No Role in Alleged Bribery Case*, REUTERS, Sept. 12, 2009.

704 **Exhibit C-562**, Transcript of Public Address, Sept. 12, 2009; **Exhibit C-563**, *Chevron's Case: "We Are not Going to Fall down on the Trap; the Government Has Nothing to do with This,"* EXPRESO, Sept. 12, 2009.

705 **Exhibit C-564**, *People in the Ecuadorian Amazon Sue Chevron*, Santiago Piedra, APF, March 14, 2010.

706 **Exhibit C-391**, *Correa Will Turn to UNASUR for Joint Struggle against the Transnationals*, EL MERCURIO, Apr. 3, 2010.

283. Other officials, including the Attorney General, the Prosecutor General, the Ombudsman, and the President of the Constituent Assembly, also have publicly maligned Claimants and signaled the Government's expectations to the Lago Agrio Court:

Attorney General Diego García Carrión:

- August 2008: Attorney General García told a reporter that "the Correa administration's position in this case is clear: 'The pollution is the result of Chevron's actions and not of Petroecuador.'"[707]
- September 2009: In reference to the bribery recordings implicating Judge Núñez and other purported Government officials, Attorney General García stated: "It's a scheme organized by these malicious people of Chevron. They want to damage the peasants."[708]
- May 2010: Attorney General García "rule[d] out the responsibility of the Ecuadorian government for the environmental damage caused to the Amazonia region by the U.S. oil company Chevron-Texaco."[709]

Prosecutor General Washington Pesántez:

- September 2009: Prosecutor General Pesántez held a press conference in response to the bribery recordings, in which he (i) announced that "bad practices in oil exploitation . . . caused severe damage in the Amazon region" and "[m]uch of this damage, listen well, is irreversible"; (ii) asked Judge Núñez to recuse himself from the case, not because of the apparent bribery scheme, but rather to ensure that the judge's ruling "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, by this multinational company, to unilaterally exempt itself from paying the compensation we consider just, because it did cause damage on our territory;"[710] and (iii) stated that 90% of the proceeds from any judgment against Chevron would be paid to the Republic of Ecuador.[711]

Ombudsman Fernando Gutiérrez:

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707 **Exhibit C-175,** Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008.

708 **Exhibit C-565**, *Filing of Suits Announced – Partied Involved in Videos Accuse Chevron*, HOY, Sept. 17, 2009.

709 **Exhibit C-331**, *Attorney General Diego García: The Ecuadorian Government Is Not Responsible for the Environmental Damage Caused by Chevron*, ECUADOR INMEDIATO, May 6, 2010.

710 The Government has never filed any criminal charges against Judge Núñez, nor has the Judicial Council taken any disciplinary action against him.

711 **Exhibit C-5**, Press Conference with Dr. Washington Pesántez Muñoz, Prosecutor General of Ecuador, Sept. 4 2009.

- September 2009: Ombudsman Gutiérrez publicly stated (i) that the Lago Agrio Litigation "has absolute priority and that judgment must be prosecuted as soon as possible";[712] and (ii) that the case concerns "an aggression against the entire country[.]"[713] He also announced, in a direct signal to the Lago Agrio Court regarding Chevron's legal defenses, that arguments concerning the State's responsibility for the Lago Agrio Plaintiffs' claims "cannot be accepted under any circumstances."[714]

- April 2010: Ombudsman Gutiérrez accused Chevron of "creating hindrances to the processing of the case so that it will not reach a conclusion" and again "urge[s] the courts to hand down their decision."[715]

Other Officials:

- November 2007: Alberto Acosta, President of the Constituent Assembly, publicly declared solidarity with the Lago Agrio Plaintiffs and pronounced that Chevron "is responsible for environmental and social destruction in the Amazon."[716]

- February 2008: Constituent Assembly Member Manuel Mendoza stated that "we provide frontal support to the unceasing struggle of" the Lago Agrio Plaintiffs.[717]

- September 2009: In response to the release of the bribery tapes implicating the Lago Agrio judge and other purported Government officials, Secretary of Transparency Esteban Rubio claimed "[t]here has been an absolute irresponsibility in the way Chevron is acting" and that the "clandestine recording . . . constitutes a crime of espionage, a planned piece of theater staged to prolong the case."[718]

This sampling of statements leaves no doubt that the Ecuadorian Government has signaled unmistakably its instructions to the Lago Agrio Court.

c. Timeline of Political Conduct and Court Action

284. The collective support of Ecuador's highest Government officials for the Plaintiffs has decidedly affected Chevron's treatment before Ecuadorian courts. For example,

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712 **Exhibit C-268**, *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009.

713 **Exhibit C-566**, *Ecuadorian Ombudsman Affirms Chevron's Case Demands a Ruling*, EFE, Sept. 10, 2009.

714 **Exhibit C-268,** *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009.

715 **Exhibit C-392**, '*Chevron has delayed proceedings in Lago Agrio*,' LA HORA, Apr. 3, 2010.

716 **Exhibit C-567**, Greg Palast, *Amazon Natives Sue Oil Giant*, BBC NEWS, November 27, 2007.

717 **Exhibit C-568**, Noticias TV, Cable Noticias Estelar, Feb. 12, 2008.

718 **Exhibit C-569**, *Ecuador Judge, Chevron Disputes Secret Recordings*, ASSOCIATED PRESS, Sept. 2, 2009.

Judge Núñez, who presided over the litigation for more than two years, issued a number of biased rulings and repeatedly announced his determination to rule against Chevron. He made a series of statements demonstrating not only his personal bias against Chevron, but also Ecuador's vested interest in the outcome of the Lago Agrio Litigation. In the spring of 2009, Judge Núñez publicly characterized the case as "a fight between a Goliath and people who cannot even pay their bills."[719] Weeks later, he told *The Financial Times* that the Lago Agrio Litigation is "the case of the century" and "what happens here is important . . . for all humanity," betraying a desire to make a political statement by issuing an enormous judgment against Chevron.[720]

285. Judge Núñez was eventually caught in a videotaped bribery scheme involving purported Government officials.[721] In June 2009, Chevron was presented with evidence indicating that Judge Núñez, the Office of the President, and Plaintiffs participated in a US$ 3 million bribery scheme arising out of a predetermined judgment against Chevron. Specifically, audiovisual recordings indicate that while the trial was still ongoing, the Ecuadorian Government was involved in crafting a judgment against Chevron;[722] that Judge Núñez would issue a ruling against Chevron by the end of 2009;[723] and that in order to obtain remediation contracts arising out of this judgment, the prospective contractors would have to pay a US$ 3 million bribe that would be shared among the Presidency, the presiding judge, and the Plaintiffs.[724]

286. The recordings captured a series of four meetings involving a combination of the following people: Judge Núñez, persons purporting to represent the Ecuadorian Government and President Correa's *Alianza PAÍS* party, and prospective environmental remediation contractors Diego Borja and Wayne Hansen. Chevron had no involvement in the meetings or the recordings, which were independently made by the prospective contractors. The meetings took place in May and June of 2009 at three locations in Ecuador: once in the chambers of Judge Núñez, twice in the offices of the *Alianza PAÍS* party, and once in a Quito hotel.

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719 **Exhibit C-222**, Simon Romero and Clifford Kraus, *In Ecuador, Resentment of an Oil Company Oozes*, THE NEW YORK TIMES, May 15, 2009.

720 **Exhibit C-223**, Naomi Mapstone, *Chevron fights Ecuador pollution lawsuit*, FINANCIAL TIMES, June 12, 2009.

721 **Exhibit C-267**, Bribery Transcript Pertaining to Recordings.

722 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, at 6, 19, 24.

723 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 2, at 2.

724 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 2.

287. In addition to Judge Núñez, at least two other people with political connections participated in discussions of a bribe relating to the Lago Agrio Judgment: Carlos Patricio García Ortego and Juan Pablo Novoa. Patricio García has described himself as being "in charge of" La Adelantada, or the headquarters of Rafael Correa's *Alianza PAÍS* party.[725] García has explained that La Adelantada is "a headquarters to support the President, the security of the President to work in some areas[.]"[726] Ecuadorian court filings in matters unrelated to the Lago Agrio Litigation also identify Patricio García as a "public employee" belonging to the political party of *Alianza PAÍS*.[727]

288. Juan Pablo Novoa has likewise identified himself as a "delegate" of "people in the government," and shortly after the release of the bribery tapes, his political connections were corroborated.[728] Just weeks after the tapes were released, Novoa was appointed to perform public functions as a bank liquidator at the Dirección Nacional de Entidades en Liquidación ("DNEL"), a position of public trust that is recognized as a patronage appointment.[729] Such an appointment can only be made by the DNEL Director or by the Superintendent of Banks, both of whom serve in official Government positions.[730] The participation of both Mr. García and Mr. Novoa in the bribery scandal therefore implicates not only Judge Núñez but also the Government of Ecuador. And although she does not participate in the meetings directly, President Correa's sister Pierina Correa is discussed at length as having influence over the distribution of the bribe and the eventual remediation contracts.

289. The first recorded meeting took place on May 11, 2009, at the *Alianza PAÍS* party offices in Quito. At this meeting, Patricio García—who identified himself as a "political coordinator" of the *Alianza PAÍS* party, explaining that "we are part of the presidency, political

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725 **Exhibit C-570**, *Interview with Patricio García*, La Luna Radio, Sept. 4, 2009.

726 *Id.*

727 **Exhibit C-571**, Filings in Unrelated Criminal Lawsuit related to Patricio García.

728 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4.

729 **Exhibit C-635**, *Despite Autonomy, Gloria Sabando is Scolded*, EL UNIVERSO, Aug. 27, 2009.

730 **Exhibit C-573,** Letter confirming Appointment of J.P. Novoa as Liquidator, signed by Superintendent of Banks G. Sabando, Nov. 30, 2009.

coordination, support for political coordination"[731]—told the prospective contractors that the Government was involved in crafting the judgment: "[W]e send a team of lawyers that's going to help [Judge Núñez] finish this thing, to conclude it."[732]

290. This meeting was followed by two meetings with Judge Núñez to discuss further the case against Chevron. At a meeting on June 5, 2009, Judge Núñez explicitly confirmed that he would rule against Chevron at a determined time, even though the trial was ongoing and evidence continued to be received.[733]

291. In addition, during the third recorded meeting, another participant, Juan Pablo Novoa, represented himself as "the legal representative of the outside part of the government" and suggested "manipulating the situation" in Lago Agrio.[734] Mr. Novoa added that, in endorsing the bribery scheme, he was representing "people in the government" and was "accompanying the judge here so that you can be serious about the case."[735]

292. On June 22, at the fourth recorded meeting, one of the prospective contractors again met with Mr. García at the offices of the *Alianza PAÍS* party. Previously, Mr. García had stated that President Correa's legal advisor, Alexis Mera,[736] had provided instructions to the Lago Agrio Court on how to route the judgment money.[737] At this meeting, Mr. García again affirmed the Government's involvement in ensuring a judgment against Chevron. He then

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731 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 8. In a radio interview after the recordings had been made public, Mr. García described himself as "one of the members of Movimiento País, I am one more who believes in the revolution, I support the thinking of our leader." **Exhibit C-570**, *Interview with Patricio García*, La Luna Radio, Sept. 4, 2009.

732 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, at 34.

733 **Exhibit C-267,** Bribery Transcript Pertaining to Recording 3, at 34.

734 *Id.* at 35.

735 *Id.* at 15.

736 Mr. Mera is an extremely influential Government official who has repeatedly been accused of 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 borther, 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.

737 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, at 6.

acknowledged the impropriety of all of this, wondering aloud what would happen if "even before the judgment is issued, those in the U.S. know they lost already … there would be a huge scandal."[738]

293. Mr. García added that "[t]hree million is nothing; they're going to give them [the prospective contractors] a billion" in remediation deals.[739] Mr. García also confirmed that the bribery scheme had been approved by both the Government and the presiding judge:

> Mr. Borja: And is there any chance that—does judge Núñez know already that this is the way it will be?
>
> Mr. García: This has already been worked out. It's in gear. This is in gear.
>
> Mr. Borja: He knows already?
>
> Mr. García: That's when the judge is ready with us. The judge takes a tough stance. He says, it's not just two nobodies that were behind this. *The government is the one that is behind this*.[740]

294. On September 9, 2009, Chevron filed a petition for the permanent recusal of Judge Núñez, as well as a motion to annul all of Judge Núñez's rulings in the Lago Agrio Litigation.[741] Although Judge Núñez was forced to recuse himself, the latter petition was denied by his replacement, Judge Nicolas Zambrano, who instead adopted all of Judge Núñez's biased rulings.[742]

295. Other examples of the national Government's and the Plaintiffs' concrete influence exerted on the judicial branch are illustrated in the following timeline:

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738 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 15.

739 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 8.

740 **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 12 (emphasis added). He added that Pierina Correa would speak with her brother President Correa to ensure the award of a remediation contract to the contractors. In exchange, Ms. Correa was purportedly to receive US$ 500,000 of the bribe money, and "the Presidency" was to receive another US $1 million. *Id.* at 7.

741 **Exhibit C-230**, Lago Agrio Court Order Denying Chevron Motion to Recuse, Oct. 21, 2009, at 4:05 p.m.; **Exhibit C-229**, Chevron's Motion to Annul, Sept. 11, 2009, at 5:50 p.m.

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

Action by the Plaintiffs or National Government	→	Action in the Lago Agrio Litigation or Criminal Proceedings
Oct. 6, 2003: Chevron notifies Ecuador that the Lago Agrio claims fall within the scope of the Settlement and Release Agreements.[743] On October 21, Chevron files its Answer in the Lago Agrio Litigation asserting this same defense.[744]		**Oct. 29, 2003:** The Comptroller General's Office files a Criminal Complaint against Claimants' lawyers and former Petroecuador and Ecuador officials, claiming that the releases were obtained by fraud.[745]
July 21, 2006: President Correa's campaign manager Gustavo Larrea and others sign an *amicus* brief urging the Lago Agrio Court to expedite the litigation and accept the Plaintiffs' request to "relinquish" the remaining judicial inspections.[746]		**Aug. 22, 2006:** After twice denying the motion, the Court now accepts the Plaintiffs' motion to "relinquish" the remaining judicial inspections, in violation of the prior Court orders and the procedure agreed by the parties.[747]
Mar. 3, 2007: The Plaintiffs secretly meet with Richard Cabrera and discuss how they will collectively write the global assessment expert report, treating his appointment by the Court as a foregone conclusion.[748] Two days later, the Plaintiffs meet with the Lago Agrio judge to discuss the expert's appointment.[749]		**Mar. 19, 2007:** The Court appoints Mr. Cabrera as the purportedly "neutral" global assessment expert.[750]
Apr. 26-28, 2007: President Correa tours the Oriente region with the Plaintiffs' lawyers and calls on the Prosecutor General to prosecute the Criminal Proceedings and bring criminal actions against "*vende patrias*" Chevron		**May 18, 2007:** The Comptroller General of Ecuador insists on reopening the criminal investigation, despite several opinions from Prosecutors General that it should be closed and despite the lack of any new evidence.[752]

[743] **Exhibit C-78**, Letter from Edward B. Scott to Minister of Energy Carlos Arboleda, Oct. 6, 2003.

[744] **Exhibit C-72,** Chevron's Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:10 a.m.

[745] **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m.

[746] **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.

[747] **Exhibit C-195,** Lago Agrio Court Order, Aug. 22, 2006, at 11:00 a.m.

[748] **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS187-01-02-CLIP 01, CRS187-01-02-CLIP 02, CRS187-01-02-CLIP 03, CRS189-00-CLIP 01, CRS189-00-CLIP 02, CRS189-00-CLIP 03, CRS191-00-CLIP 01, CRS191-00-CLIP 02, CRS192-00-CLIP 01.

[749] **Exhibit C-360**, *Crude* Outtakes, Mar. 5, 2007, at CRS208-02-CLIP 01; *id*., Mar. 6, 2007, at CRS210-02-CLIP 01; *id*., Mar. 6, 2007, at CRS211-01-CLIP 01.

[750] **Exhibit C-197**, Court Order Declaring Relinquishment Valid, Mar. 19, 2007.

[751] **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

Action by the Plaintiffs or National Government	→	Action in the Lago Agrio Litigation or Criminal Proceedings
lawyers.[751]		
June 4, 2007: Plaintiffs' representatives, including actress Darryl Hannah, meet privately with presiding Judge Yánez and pressure him to explain delays in the appointment of Mr. Cabrera. Judge Yánez promises that he will "resolve the final situation so the expert inspection can be carried out" "soon."[753]		**June 13, 2007:** The Court swears in Richard Cabrera as the purported "global assessment" expert.[754]
Feb. 8, 2008: Constituent Assembly Member Manuel Mendoza sends a letter to the Lago Agrio Court, complaining about the delay in the Criminal Proceedings and saying "the Office of the Prosecutor … has not been able to prosecute this case aggressively and, therefore, the violations of the law remain unpunished."[755]		**Mar. 31, 2008:** Prosecutor General Pesántez reopens the Criminal Proceedings, despite having no new evidence.[756]
Aug. 9, 2008: President Correa praises Prosecutor General Pesántez for reopening the investigation to "punish" the Chevron lawyers who signed the releases, and holds a "working meeting on the Texaco case" with the ADF.[757]		**Aug. 26, 2008:** Prosecutor General Pesántez, who has known President Correa since they were college students together in Belgium,[758] officially files criminal charges against Mr. Pérez and Mr. Veiga, as well as former Petroecuador and Ecuador officials who signed the Settlement and Release Agreements.[759]
Mar. 4, 2009: President Correa meets privately with judges from the National Court of Justice and certain other judges and personally		**Apr. 28, 2009:** Judge Núñez publicly announces that the case "has taken too long" and pledges that the trial should finish within

[752] **Exhibit C-244**, Comptroller General Petition Insisting on the Reopening of the Prosecutorial Investigation, May 18, 2007.

[753] **Exhibit C-360**, *Crude* Outtakes, June 4, 2007, at CRS347-00-CLIP 01.

[754] **Exhibit C-363,** Certificate of Swearing In of Richard Cabrera before the Lago Agrio Court, June 13, 2007, at 9:45 a.m.

[755] **Exhibit C-576,** Letter from Manuel Mendoza to Judge German Yánez of the Lago Agrio Court, Feb. 8, 2008.

[756] **Exhibit C-247,** Order by Prosecutor General Reopening the Investigation, Mar. 31, 2008.

[757] **Exhibit C-173,** Presidential Weekly Radio Address, *Canal del Estado*, Aug. 9, 2008, at 10:00 a.m.

[758] **Exhibit C-577**, *Correa: I Don't Have To Give Any Explanations About Who I Choose To Invite*, EL HOY, Dec. 2, 2009.

[759] **Exhibit C-252,** Order from Prosecutor General Washington Pesántez Ordering Investigation to Begin, Aug. 26, 2008.

Action by the Plaintiffs or National Government	→	Action in the Lago Agrio Litigation or Criminal Proceedings
requests "expediency in cases of interest to Ecuador."[760]		the year.[761]
May 11, 2009: Purported Government official Patricio García meets with prospective remediation contractors, telling them that Judge Núñez will "assign the funds" from the Lago Agrio judgment (promised to be US$ 27 billion), and that the President's legal advisor has already instructed the judge how to route the money.[762]		**May 28, 2009:** In violation of Ecuadorian law, Judge Núñez issues an order rejecting Chevron's essential error petitions related to the Cabrera report as well as the report of judicial inspection expert Oscar Dávila, who testified that Plaintiffs' financing company, Selva Viva Cía, Ltda., had illegally paid him for his work as a judicial inspection expert.[763]
July 28, 2009: Plaintiffs' representative organization ELaw boasts on its website about private communications that it had with Judge Núñez about objective liability under the Constitution, among other issues before the Court.[764]		**Aug. 13, 2009:** The Court retroactively shifts the burden of proof to Chevron under provisions of the new 2008 Constitution,[765] and sanctions one of Chevron's attorneys for filing an appeal to one of the Court's rulings.[766]
Sept. 2009: Videotapes emerge implicating Judge Núñez in a bribe related to the Lago Agrio Litigation;[767] Prosecutor General Pesántez says that 90% of the Lago Agrio judgment will go to the Government and asks		**Oct. 21, 2009:** The Court rejects Chevron's motion to annul Judge Núñez's rulings even after the release of the bribery videotapes proves his bias and corruption in the case.[771]

[760] **Exhibit C-125**, Joffre Campaña Mora, *Interference in the Administration of Justice*, EL UNIVERSO, Mar. 5, 2009.

[761] **Exhibit C-224**, Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12.

[762] **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, at 3-6.

[763] **Exhibit C-540**, Lago Agrio Court Order, May 28, 2009, at 11:00 a.m., at Nos. 9 and 32.

[764] **Exhibit C-578**, ELaw, *ELaw Spotlight: Crude Reflections*, July 28, 2009. While Claimants only became aware of this communication due to ELaw's online blog, other similar communications were almost certainly exchanged. And Judge Núñez was not the only presiding judge who had improper contacts with the Plaintiffs; recently released videotapes prove that his predecessor, Judge Yánez, invited the actress Darryl Hannah (a public supporter of the Lago Agrio Plaintiffs) and several of Plaintiffs' interns to the Court, answering their questions and giving them a tour of the case files. **Exhibit C-360**, *Crude* Outtakes, June 4, 2007, at CRS347-00-CLIP 01. In that video, Judge Yánez told the Plaintiffs' representatives that Chevron has made filings to delay the process, but that he has denied each of those filings, and expresses hope that the case will move forward quickly.

[765] **Exhibit C-541**, Lago Agrio Court Order, Aug. 13, 2009, at 2:30 p.m., at No. 3, citing Section 1 of Article 397 of the current Constitution: "The burden of proof about inexistence of potential or real damages shall be upon the promoter of the activity or the defendant."

[766] **Exhibit C-541**, Lago Agrio Court Order, Aug. 13, 2009, at 2:30 p.m., at No. 11.

[767] **Exhibit C-226**, Letter from Thomas F. Cullen, Jr. to Dr. Washington Pesántez, Aug. 31, 2009.

Action by the Plaintiffs or National Government	→	Action in the Lago Agrio Litigation or Criminal Proceedings
Judge Núñez to recuse himself, only to "avoid any trick that might possibly be used by the American oil company";[768] and President Correa admits, "of course I want our indigenous friends to win."[769] The Government, including the Judicial Council and the Prosecutor General, takes no action to discipline Judge Núñez.[770]		
Apr. 3, 2010: President Correa calls Chevron "an open enemy of this country."[772]		**Apr. 29, 2010:** Prosecutor General Alvear issues a Prosecutorial Opinion against Mr. Pérez and Mr. Veiga, formally initiating criminal proceedings.[773]
July 15, 2010: The U.S. Second Circuit Court of Appeals orders filmmaker Joseph Berlinger to turn over 600 hours of videotapes concerning the Plaintiffs' activities in the Lago Agrio Litigation.[774]		**Aug. 2, 2010:** In response to the Plaintiffs' request that the Court quickly close the evidentiary phase of the trial and allow 45 days for damage submissions, the Court issues an obscure order restricting Chevron's right to submit new pleadings and directing the parties to file their damages submissions within 45 days.[775]

296. This sordid history of political influence and Government collusion is part of a larger problem in Ecuador regarding State corruption and judicial independence. In the context of judicial purges, politicized threats of prosecution or removal of judges, and open hostility toward foreign companies and international law, the Government—and President

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

769 **Exhibit C-228**, Hugh Bronstein, *Ecuador Says had no role in Alleged Bribery case*, REUTERS, Sept. 12, 2009.

770 **Exhibit C-579**, *Administrative Problems in Chevron's Case*, LA HORA, Mar. 24, 2010 (noting that six months alter the bribery tapes were released, the Judicial Council has failed to sanction Judge Núñez).

771 **Exhibit C-230**, Order Denying Chevron Motion to Recuse, Oct. 21, 2009, ¶ 13 ("The record shows that the acts of former Judge Juan Núñez did not violate any of the legal rules mentioned, and therefore, the motion to invalidate each and every one of his acts is hereby denied.").

772 **Exhibit C-580,** Presidential Weekly Radio Address, Apr. 3, 2010.

773 **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010.

774 **Exhibit C-359**, *Chevron Corp. v. Berlinger*, Order by the Second Circuit Affirming the U.S. District Court's Order, July 15, 2010.

775 **Exhibit C-361,** Order by the Lago Agrio Court, Aug. 2, 2010.

Correa in particular—has made it very clear to the Lago Agrio Court how the litigation should be resolved: decisively, and in the Plaintiffs' favor.

I. The Ecuadorian Judiciary Lacks Independence

297. With their Interim Measures Request, Claimants provided a detailed timeline of events from November 2004 to early 2010, which graphically demonstrated that President Correa has consolidated all Government power in himself and that there is no legitimate rule of law in Ecuador today.[776] Claimants will not reiterate all of those events here except to note a consistent pattern of sanctioning judges who cross the will of the other branches:

Sanction	Context
December 2004: Congress unconstitutionally replaces 27 of the 31 justices of the Supreme Court. *See* Alvarez Report ¶ 30; Coronel Report ¶ 124.	Political purge
April 2005: President Gutiérrez unconstitutionally removes all justices of the Supreme Court. *See* Alvarez Report ¶ 31; Coronel Report ¶ 125.	Political purge
April 2007: Congress unconstitutionally removes all members of the Constitutional Tribunal. *See* Alvarez Report ¶ 40; Coronel Report ¶ 136.	Constitutional Tribunal previously ruled that the dismissal of 57 opposition legislators, an action that had been backed by President Correa, was unconstitutional.
January 2009: Prosecutor General begins criminal investigation of judges of the Criminal Division of the Court of Tungurahua. *See* Alvarez Report ¶ 59; Coronel Report ¶ 161(i).	Judges dismissed criminal indictment against officials of the Brazilian engineering company Odebrecht in a high-profile case.
July 2009: Judicial Council removes judges from the Second Division of the Administrative Law Court from office. *See* Alvarez Report ¶ 58; Coronel Report ¶ 161(vii).	Judges ruled against the State in a $100 million tax dispute.
January 2010: Judicial Council removes judge from the Fourth Criminal Court in Guayas. *See* Alvarez Report ¶ 58.	Judge ruled in favor of six Catholic University students accused for offending President Correa.

[776] Claimants' Interim Measures Request, Apr. 1, 2010, § II.F.

Sanction	Context
February 2010: Judicial Council fines judges of the First Criminal Division of the Provincial Court of Pichincha 10% of their salaries. *See* Alvarez Report ¶ 77.	Judges ruled that a fine imposed on Teleamazonas, a television station critical of President Correa, was unconstitutional.
March 2010: Judicial Council removes judges of the First Criminal Chamber of the National Court of Justice from office. *See* Alvarez Report ¶ 57; Coronel Report ¶ 160.	Judges reduced criminal charges against the owners of Filanbanco S.A. in a high-profile case.
July 2010: Judicial Council suspends judges from the Provincial Court of Justice of Esmeraldas for 90 days. *See* Coronel Report ¶ 165.	Judges accepted the habeas corpus appeal of demonstrators who had been arrested and accused of terrorism for protesting against President Correa in the canton of La Concordia.
August 2010: Comptroller General announces audit of judges of the Second Criminal Division of the National Court of Justice, *see* Coronel Report ¶ 161(xiv), and the Council on Citizen Participation and Social Control orders the judges to reverse their decision, *see* Alvarez Report ¶ 66.	Judges lifted the precautionary measures (pretrial detention and seizure of assets) to which former President Jamil Mahuad had been subject in a criminal case.

298. Claimants incorporate herein by reference the timeline from the Interim Measures Request and the information provided in the expert reports of Dr. Vladimiro Alvarez and Dr. Cesar Coronel.[777] But as the Government's control of the Ecuadorian judiciary has only increased, some new developments are worth noting:

- March 2010: In its annual Human Rights Report on Ecuador, the U.S. State Department stated that "there continued to be serious problems" with respect to "corruption and denial of due process within the judicial system" and that "the judiciary was at times susceptible to outside pressure and corruption." Additionally, the Report notes that "[t]he media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature."[778]
- March 15, 2010: The vice-president of the Pichincha Bar Association stated that: "the insults and accusations, oftentimes unfounded, [against judges] lead to two

[777] A. Grau Expert Report, ¶¶ 22–87; First Coronel Expert Report, ¶¶ 121–72.

[778] **Exhibit C-165**, U.S. State Department, *2009 Report on Human Rights Practices: Ecuador*.

objective and real situations: first that the judge be weaker, more submissive, and true to the political interests of the current administration, and also, to contribute to an ambiance of suspicion in the country surrounding the administration of justice."[779]

- June 19, 2010: A survey of Ecuadorians finds that 75% do not trust the Ecuadorian judicial system.[780]

- June 22, 2010**:** Ecuador's National Judicial Council issued a resolution stating that currently, "the Judicial Branch is not independent."[781] The Council identified "actions that affect the ability to dispense justice and the institutionality of the State and that are an attack on social peace based on the rule of law" as including the threat of impeachment and the judiciary's lack of financial autonomy.[782]

- July 9, 2010: An editorial in Hoy stated: "[j]ustice, in Ecuador is going through one of the worst moments in its history in Ecuador, in contrast with the announcements of revolution and positive changes which this Government promotes so strongly."[783]

- July 16, 2010: The UN Special Rapporteur on extrajudicial executions stated that Ecuador has "a prosecution service which seems more concerned with public relations than with convicting major criminals, and a judicial system which is almost universally condemned for its inefficiency and mismanagement." [784]

J. The Criminal Proceedings against Messrs. Veiga and Pérez Are Baseless and Are Designed to Undermine the Settlement and Release Agreements

299. Ecuador's collusion with the Lago Agrio Plaintiffs extends to the Criminal Proceedings. Ecuador is "searching for a way to nullify or undermine the value of the remediation contract and the final acta" through the Criminal Proceedings, so that it can shift to Claimants the responsibility to remediate environmental impact for which Ecuador is solely responsible.[785] With a criminal conviction in hand, Ecuador then could seek to nullify the 1998

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779 First Coronel Expert Report, ¶ 169.

780 **Exhibit C-581,** *Three out of Four Ecuadorian Citizens Distrust the Judicial System, According to Opinion Profiles*, ECUADOR INMEDIATO, June 19, 2010.

781 **Exhibit C-641,** From the Judiciary Council to the Nation, Resolution No. 043-2010, June 22, 2010.

782 *Id.*

783 **Exhibit C-582,** *Collapse of the Legal System*, HOY, July 9, 2010.

784 **Exhibit C-583**, *UN independent expert finds "astonishingly high rates of impunity for killings in Ecuador,"* UN NEWS SERVICE, July 16, 2010.

785 **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray *et al.*, Aug. 10, 2005. Dr. Escobar initially testified falsely under oath in a U.S. federal court that she had not had any contact with Plaintiffs' representatives. Only when confronted with the emails did she admit such contacts. **Exhibit C-167**, Deposition of Martha Escobar, Nov. 21, 2006.

Final Release in a civil action by invoking improperly Articles 1697-1699 of the Ecuadorian Civil Code.[786] These provisions allow a public prosecutor or any interested party (such as the Lago Agrio Plaintiffs) to seek, within 15 years, the nullification *ab initio* of any act or contract if it results from an illicit object or illicit consideration.[787] In the present case, 15 years have not lapsed since the execution of the 1998 Final Release, and thus this type of civil action is not yet barred by the limitations period.[788] Thus, Ecuador (or the Lago Agrio Plaintiffs) could use a criminal conviction, in such a civil action, as evidence that the 1998 Final Release was procured illicitly—by way of "ideological falsification"—and request that it be declared null and void *ab initio*. Although this would constitute an abuse of those Ecuadorian Civil Code provisions, it would be consistent with the Attorney General's Office's "search[] for a way to nullify" the 1998 Final Release.

300. These Proceedings also assist the Lago Agrio Plaintiffs by creating uncertainty as to the validity and effect of the 1998 Final Release, which clearly bars the Lago Agrio Plaintiffs' claims. The Proceedings are a blatant attempt to remove a legal obstacle to the massive judgment that Ecuador and the ADF expect to secure through the Lago Agrio Litigation, and are a clear signal to the Lago Agrio Court that the 1995 Settlement Agreement and 1998 Final Release can and should be disregarded.

301. The Plaintiffs' lawyers are fully aware that Ecuador's efforts to undermine the release agreements through the Criminal Proceedings have a direct impact on their ability to secure large amounts of money through the Lago Agrio Litigation. The interplay between these

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[786] **Exhibit C-34**, Ecuadorian Civil Code, Arts. 1697-1699.

[787] **Exhibit C-34**, Ecuadorian Civil Code, Arts. 1697-1699. A judge may also nullify an act or contract *ex officio* if the nullity is manifest. **Exhibit C-34**, Ecuadorian Civil Code, Art. 1699.

[788] On the second day of the hearing on interim measures, President Veeder had an exchange with the parties' counsel about the limitations period for an action to nullify the settlement agreement under Ecuadorian law, specifically under Article 2362 of the Ecuadorian Civil Code. *See* 5/11/10 Tr. 46:1-10 (asking Claimants' counsel, who answered that the limitations period would be four years or certainly not more than 10 years); 5/11/10 Tr. 100:25-101:5 (asking Respondent's counsel, who answered that the limitations period would be 10 years); *see also* **Exhibit C-34**, Ecuadorian Civil Code, Art. 2362. When Claimants' counsel affirmed that the period for such a claim had already expired, President Veeder then asked Claimants' counsel, "What is the point of this, as you say it, rather dark attempt to tarnish the settlement agreements if it doesn't actually lead to their nullification under Ecuadorian law?" 5/11/10 Tr. 46:11-15. However, the 10-year limitations period referenced by the parties was pursuant to Article 2362 of the Ecuadorian Civil Code, which relates to settlement agreements. Articles 1697-1699 of the Civil Code would allow Ecuador to circumvent the 10-year statute of limitations and avail itself of a 15-year statute of limitations. This means that the risk that the Criminal Proceedings *could* lead ultimately to the nullification of the 1998 Final Release is very real.

proceedings is crucial for the Plaintiffs, who have admitted that a failure to pursue the criminal prosecution would affect "that case that is being heard in Nueva Loja."[789] The Plaintiffs further benefit from the Criminal Proceedings as a means to exert "personal psychological pressure [on Texaco's] top executives"[790] and pressure on Chevron to extort a settlement of the Lago Agrio Litigation on unfair terms.[791] The Plaintiffs' lawyers and representatives have pursued a vocal and aggressive campaign for the criminal prosecution of Messrs. Veiga and Pérez on repeated occasions,[792] garnering not only the attention but also the assistance of various Ecuadorian officials. Thanks to their "contacts at a very high level"[793] and the fact that President Correa "is totally with us [the Plaintiffs],"[794] the Plaintiffs' pressure tactics were able to achieve, *inter alia*, the reopening of the criminal investigation[795] after two different Prosecutors General had dismissed the case on three different occasions, and the initiation of the prosecutorial investigation despite the lack of any new evidence.[796]

302. Ecuador's and the Lago Agrio Plaintiffs lawyers' interests in pursuing the Criminal Proceedings are clearly aligned: to secure an improper windfall, whether in terms of money or of remediation of environmental impact for which solely Ecuador is responsible. The Criminal Proceedings are key to this strategy, which explains Ecuador's dogged determination to pursue them in complete disregard of its own laws and procedures.

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789 **Exhibit C-633**, Plaintiffs' Press Conference, Transcript, July 31, 2008.

790 **Exhibit C-360**, *Crude* Outtakes, July 24, 2006, at CRS-104-01-CLIP 01.

791 **Exhibit C-360**, *Crude* Outtakes, Mar. 5, 2007, at CRS-208-04-CLIP 04, CRS-208-06-CLIP 02 (Donziger discussing how the filing of criminal charges against Claimants' attorneys could affect the dynamics of a settlement).

792 *See, e.g.*, **Exhibit C-584,** Transcript of Lago Agrio Plaintiffs' Press Conference, July 24, 2006; **Exhibit C-550**, Radio Cristal Program, *Interview with Steven Donziger*, Transcript, Feb. 8, 2007; **Exhibit C-249**, *Preliminary Criminal Investigation of Falsehood in a Public Instrument: A Serious Crime that is About to Be Time-Barred*, July 31, 2008.

793 **Exhibit C-360**, *Crude* Outtakes, Feb. 15, 2007, at CRS-183-00-CLIP 01.

794 **Exhibit C-360**, *Crude* Outtakes, Apr. 27, 2007, at CRS-268-00-01.

795 **Exhibit C-360**, *Crude* Outtakes, June 2, 2007, at CRS-376-03-CLIP-01 (Fajardo: "So, the President thinks that if we put in a little effort, before getting the public involved, the Prosecutor will yield, and will re-open that investigation into the fraud of - of the contract between Texaco and the Ecuadorian Government.").

796 **Exhibit C-249**, *Preliminary Criminal Investigation of Falsehood in a Public Instrument: A Serious Crime that Is about to Be Time-Barred*, July 31, 2008.

1. The April 2003 Comptroller General Report Is Replete with Fundamental Errors

303. The Criminal Proceedings have their roots in Report No. DA3-25-2002 issued on April 9, 2003, by Ecuador's Comptroller General, Dr. Genaro Peña Ugalde,[797] and entitled "Special Evaluation of the Contract for Implementing of Environmental Remedial Works and Release from Obligations, Liabilities and Claims, Executed on May 4, 1995, by and between the Minister of Energy and Mines on Behalf of the Ecuadorian Government, the Executive President of Petroecuador, and the Vice-President of the Texaco Petroleum Company TexPet" (the "CG Report").[798] The CG Report was based on a series of four inspections conducted by the Comptroller General's team from 1997 to 2003.[799] Its stated objectives were twofold: (1) "[t]o determine compliance with the clauses of the Contract for Implementing of Environmental Remedial Works and the Scope of the Environmental Remedial Work"; and (2) "[t]o verify that the contracting company has complied with the socioeconomic compensations contained in the scope of work agreed to for the projects in the Amazon region."[800] The relevant period of analysis stated was from May 4, 1995, to August 31, 2001.

304. In reality, the CG Report was intended to create a basis for fabricating criminal charges against those who signed Global *Acta* No. 52 and the 1998 Final Release, thereby assisting the Lago Agrio Plaintiffs in their efforts to circumvent the 1995 Settlement Agreement, the RAP, and the 1998 Final Release. The CG Report is replete with errors, so much so that its

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797 The Office of the Comptroller General is an autonomous technical and advisory body that oversees the use of public resources by both governmental and private entities. In that capacity, the Office of the Comptroller General is authorized to conduct internal and external audits, and to establish administrative, civil, and criminal responsibilities in connection with the use of public resources. **Exhibit C-288**, 2008 Political Constitution of Ecuador, Arts. 211 and 212. The Office of the Comptroller General is not a part of the three branches of the Ecuadorian government (executive, legislative, or judicial). On the other hand, the Office of the Prosecutor General is an autonomous body within the Judiciary, and the Prosecutor General is its highest authority. *Id*., Art. 194. By request of a party or on its own initiative, the Office of the Prosecutor General conducts investigations of possible crimes, and prosecutes defendants before the competent criminal courts. *Id*., Art. 195.

798 **Exhibit R-78**, Comptroller General's Report No. DA3-25-2002, "Special Evaluation of the Contract for Implementing Environmental Remedial Works and Release from Obligations, Liabilities and Claims, Executed on May 4, 1995, by and between the Minister of Energy and Mines on Behalf of the Ecuadorian Government, the Executive President of Petroecuador, and the Vice-President of the Texaco Petroleum Company TexPet," Apr. 9, 2003 (the "CG Report" or the "Report").

799 Two additional inspections were conducted in 2000 and 2004, and were reported after the CG Report was issued. J. Connor Expert Report at 73. Any discussions in this Memorial of the Comptroller General's inspections include the results of these additional inspections.

800 **Exhibit R-78**, CG Report at 2 (Eng.).

ultimate conclusion—that the environmental remediation work conducted by TexPet from 1995 to 1998 was incomplete and improper—is manifestly untenable. The CG Report is flawed primarily in two ways: (1) it exhibited a misunderstanding of the Scope of Work and the standards established in the RAP; and (2) it applied standards different from those agreed upon by all parties and employed by Ecuador when it certified and accepted TexPet's remediation.

305. *First*, the CG Report fundamentally misstated the Scope of Work and the RAP in the 1995 Settlement Agreement. Although the CG Report refers to the Scope of Work and the RAP, it reports extensively on well sites and pits that were not within the Scope of Work (and sometimes not even within the Concession Area) and pits that TexPet was not required to remediate under the RAP. In fact, 14 of the 144 well sites inspected during the course of the four inspections conducted between 1997 and 2004 were located in oilfields outside the physical boundaries of the former Concession Area and were never operated by TexPet.[801] Of the 130 well sites inspected that were within the former Concession Area, 78 (60%) were not included within TexPet's remediation obligations under the RAP for pit cleanup.[802]

306. As to the 52 well sites inspected that were within the RAP for soil or pit remediation, no open pits were observed other than pits that had been designated as "No Further Action" or "Change of Condition," meaning they were not part of TexPet's remedial obligations under the RAP.[803] Apart from these pits, the Comptroller General conducted sampling at only 37 pits that had been included within TexPet's RAP remediation obligations.[804] Of those 37 pits, there were only 2 pits where the laboratory test showed that the soil cleanup criteria applicable at the time of remediation had been exceeded.[805] The CG Report, however, does not provide precise location information for these samples and the test results may correspond to other conditions on these sites. Indeed, subsequent re-sampling of these sites by the Comptroller

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801 J. Connor Expert Report at 76.

802 *Id.* at 73.

803 *Id.*

804 *Id.*

805 *Id.* at 73-74.

General (and later tests done by Chevron and others) found that the samples did not exceed the soil cleanup criteria.[806]

307. Thus, based on the information in the CG Report, 100% of the pits that were identified as needing additional remediation were outside of the Scope of Work and the RAP, were otherwise determined by the Ministry of Energy, Petroecuador, and Petroproducción to require no action by TexPet, or were remediated properly in accordance with the remediation standards agreed by the parties.[807]

308. Furthermore, the Comptroller General did not provide any documentation to demonstrate that the sampling and testing procedures and results conducted by its inspectors were proper. None of the following was reported: specific sample locations, field records, sample chain-of-custody records, information on laboratory test procedures or QA/QC procedures, or signed laboratory test reports from a certified analytical laboratory. Without this supporting information, the data presented by the Comptroller General would not have been accepted by credible regulatory agencies or scientific bodies.[808]

309. In July 2002, Comptroller General Peña Ugalde provided several of the original inspectors involved in the remediation project with the opportunity to review and comment on the draft report regarding the alleged deficiencies of the remediation program.[809] Those individuals informed the Comptroller General that the remediation program had been performed fully and in complete compliance with the Scope of Work and the RAP, and they identified

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806 *Id.* at 74.

807 *Id.*

808 *Id.* at 75.

809 The inspectors who were provided with a copy of the draft report were: Hugo Humberto Jara Román, who served as Undersecretary of Environmental Protection for the Ministry of Energy and Mines and signed approval *Actas*; Jorge Rene Dután Erráez and Alix Paquito Suárez Luna, who conducted site inspections and signed the approval *Actas*, on behalf of the National Bureau of Hydrocarbons; Marcos Fernando Trejo Ordóñez, who conducted site inspections and signed the approval *Actas* on behalf of Petroproducción; and Martha Susana Romero de la Cadena, who conducted site inspections and signed the approval *Actas* on behalf of Petroecuador. **Exhibit R-78**, CG Report at 60 (Eng.).

several errors contained in the draft report.[810] The Comptroller General ignored these comments.[811]

310. *Second*, Comptroller General Peña Ugalde applied standards that are different from those agreed upon by all parties. For instance, Comptroller General Peña Ugalde incorrectly identified the soil cleanup criterion applied by TexPet as a total soil TPH of 1,000 mg/kg, when the true Remedial Action Plan cleanup criteria were: (i) TPH for TCLP soil leachate of 1,000 mg/L and (ii) total soil TPH of 5,000 mg/kg (although this standard was applicable only for pits remediated after March 1997). In addition, the CG Report compared the TPH concentrations measured in affected soils to an "international norm" of 300 mg/kg, which the CG Report alleged to be based upon standards published by the U.S. EPA and the International E&P Forum. In fact, neither of these entities has ever established this alleged cleanup standard, and no such "international norm" exists. Rather, the prevailing TPH limit applied in major oil-producing states in the U.S. and elsewhere for remediation of affected soils at oilfield sites is 10,000 mg/kg. By using incorrect soil cleanup criteria, Comptroller General Peña Ugalde misrepresented the number of soil samples found to exceed the TexPet remediation criteria and the alleged "international norm."[812]

2. The Comptroller General Nonetheless Filed a Criminal Complaint with Ecuador's Prosecutor General on the Basis of the CG Report

311. On May 7, 2003, less than one month after the CG Report was issued, the Plaintiffs filed the Lago Agrio Complaint. A few months later, on October 29, 2003, Ecuador's Comptroller General submitted a criminal complaint (*denuncia*) to the Prosecutor General of Ecuador against Claimants' lawyers Ricardo Veiga and Rodrigo Pérez, as well as the former Ecuadorian officials who signed the 1998 Final Release (the "Criminal Complaint").[813] The

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[810] These errors included: (i) TexPet completed the full RAP, and more; (ii) the Comptroller General should have addressed only TexPet's compliance with the Scope of Work; (iii) the Comptroller General addressed many well sites outside the RAP; (iv) the Comptroller General used the wrong remediation criteria; and (v) the field and laboratory data presented by the Comptroller General were deficient and not representative of true conditions. J. Connor Expert Report at 75.

[811] J. Connor Expert Report at 75.

[812] *Id.* at 74.

[813] **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m. The Criminal Complaint denounced 14 individuals: Patricio Ribadeneira,

Comptroller General filed the Criminal Complaint (i) three weeks after Claimants notified Ecuador that the Lago Agrio claims fell within the scope of the 1995 Settlement Agreement and the 1998 Final Release, and requested Ecuador to intervene and assume responsibility for any remaining environmental remediation;[814] and (ii) one week after Chevron filed its answer to the Lago Agrio Complaint, stating, *inter alia*, that the Plaintiffs' claims were barred by the Settlement and Release Agreements, which made Ecuador and Petroecuador responsible for any remaining remediation.[815] The proximity of these dates cannot but highlight the coordination between the Plaintiffs and the Government, coordination later confirmed by Deputy Attorney General Martha Escobar.[816]

312. From its very first paragraphs, the Criminal Complaint relied extensively on the CG Report, alleging that the "number of assessments and inspections of the work performed" led to findings "indicating criminal liability."[817] Among these findings was the conclusion that remediation was required and estimated to cost US$ 8,669,312.[818] The Criminal Complaint alleged that Global *Acta* No. 52 and the nine partial approval *Actas* issued by Ecuador and Petroecuador approving the remediation "indicate[d] as complete work that was not carried out or that remains to be completed; that is, these certificates report as true facts which were not, leading to a presumption of evidence of criminal liability."[819] The Criminal Complaint claimed that TexPet's remediation work had not been performed and accused Messrs. Veiga and Pérez of

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Minister of Energy and Mines; Giovanni Rosanía Shavone, Hugo Jara Román, and Jorge Albán Gómez (all former Undersecretaries of Environmental Protection of the Ministry of Energy and Mines); Patricio Izurieta, National Director for Environmental Protection; Ramiro Gordillo (CEO) and Patricio Maldonado (Head of the Environmental Unit) of Petroecuador; Ricardo Veiga and Rodrigo Pérez, TexPet; Martha Romero de la Cadena, (Environmental Specialist I) in the Petroecuador Environmental Protection Unit; Jorge Dután and Alix Suárez, officials from the National Bureau of Hydrocarbons; and Luis Albán Granizo (Vice President) and Marcos Trejo Ordóñez of Petroproducción.

814 **Exhibit C-78**, Letter from Edward B. Scott to Minister of Energy Carlos Arboleda, Oct. 6, 2009.

815 **Exhibit C-72,** Chevron's Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:30 a.m.

816 **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray et al., Aug. 10, 2005.

817 **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m., at 1-2 (Eng.).

818 *Id.* at 6 (Eng.).

819 *Id.* at 9 (Eng.).

misstating the facts regarding the remediation in public documents in breach of Articles 338 and 339 of the Ecuadorian Criminal Code.[820]

313. Notwithstanding the errors at the core of the CG Report and the resulting Criminal Complaint, in May 2004, then-Prosecutor General of Ecuador Mariana Yépez Andrade opened a preliminary investigation into the alleged falsification of public documents (the "Falsification Proceedings"),[821] while the Public Prosecutor of Pichincha opened a separate investigation into potential environmental crimes (the "Environmental Proceedings").[822]

314. While these two investigations were ongoing, Ecuadorian officials made it clear that the Government's goal was to undermine the Settlement and Release Agreements. On August 10, 2005, Deputy Attorney General Escobar wrote to Alberto Wray, then a lead lawyer for the Lago Agrio Plaintiffs, that the Attorney General's Office was "searching for a way to nullify or undermine the value of the remediation contract and the final acta," "that our greatest difficulty lay in the time that has passed," and that the Attorney General "want[ed] to criminally try those who executed the contract."[823] But Attorney General José María Borja—who was copied on Ms. Escobar's email—later admitted under oath that he had no knowledge of evidence supporting an allegation of fraud,[824] further revealing the baselessness of the criminal charges. Ecuador and Petroecuador also raised this fraud allegation in related civil litigation in the Southern District of New York,[825] but after discovery, they expressly disclaimed it and stipulated that the Settlement and Release Agreements were valid and fully performed by TexPet.[826]

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820 **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m.

821 **Exhibit C-232,** Motion by Dr. Mariana Yépez Andrade to Investigate Alleged Falsification of Public Documents, May 10, 2004; R. Veiga Witness Statement, ¶ 47.

822 **Exhibit C-233,** Motion by Dr. Luis Enriquez Villacrés to Investigate Injury to the Environment, May 27, 2004, at 8:00 a.m.

823 **Exhibit C-166,** Email from Dr. Martha Escobar to Alberto Wray *et al*., Aug. 10, 2005.

824 **Exhibit C-587**, José María Borja Deposition Transcript, Sept. 14, 2006, at 65:12-66:14; 67:19-67:24; 73:1-10; 84:17-85:4.

825 **Exhibit C-588**, *The Rep. of Ecuador et al. v. ChevronTexaco Corp. et al.*, No. 04-CV-8378LBS, Pls.' Notice of Mot. to Amend Reply (S.D.N.Y. June 20, 2006).

826 **Exhibit C-589**, Letter from C. Mitchell to M. Kolis, Oct. 24, 2006.

315. While the investigations were proceeding, the Plaintiffs became increasingly vocal participants in the campaign against Messrs. Veiga and Pérez. On July 24, 2006, Mr. Donziger and others staged a press conference at which they sat before oversized photographs of Messrs. Veiga and Pérez manipulated to look like mug-shots. Mr. Donziger pointed to the photos and said, "These people are the ones who signed the Remediation Agreement now considered fraudulent by the Ecuadorian State."[827] One of his co-counsel, Alexis Ponce, then stated, "We have Mr. Ricardo Reis . . . one of Texaco Petroleum Company's most important officials. It is against them that the State begins this claim for fraud, and it is against them that the [Lago Agrio Plaintiffs] will address its batteries, its artillery, so that . . . this company is condemned once and for all."[828] Mr. Ponce then vilified Messrs. Veiga and Pérez, denouncing them as "'*ecuagringos*' who are the type of lawyers that . . . seem to be evidently defending foreign interests over the health of the people and the population and of national interests."[829] The same rhetoric was later adopted by President Correa, who condemned Claimants' lawyers as "*vende patrias*"—traitors.[830]

3. Ecuador's Prosecutor General Investigated and Dismissed the Falsification Proceedings

316. After more than two years of investigation, on August 9, 2006, Ecuador's Prosecutor General Cecilia Armas requested dismissal of the Falsification Proceedings on the basis that there was no evidence of any criminal wrongdoing.[831] Dr. Armas reviewed the CG Report and found no "civil or administrative liability in any of [the Comptroller General's] conclusions, nor . . . evidence of any criminal liability for any crime whatsoever."[832] To the contrary, Dr. Armas noted the "obvious contradiction" between the CG Report, in which "none of the findings [] indicate[s] any evidence of criminal liability," and the Criminal Complaint,

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827 **Exhibit C-584**, Transcript of Lago Agrio Plaintiffs' Press Conference, July 24, 2006.

828 *Id.*

829 *Id.*

830 **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

831 **Exhibit C-234,** Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006.

832 *Id.* at 2 (Eng.); R. Veiga Witness Statement, ¶ 49.

"which the Comptroller alleges to be based on 'evidence found in the [CG Report]'."[833] Dr. Armas concluded that the Comptroller General's Criminal Complaint failed to show that any crime of "falsity" had occurred, whether it be outright forgery or "ideological falsity" (*i.e.*, when "facts are set forth as being true when in fact they are not").[834] Dr. Armas noted that the 1998 Final Release "was prepared on the basis of nine prior documents that were not objected to or challenged by Petroecuador or the Ministry of Energy and Mines at the appropriate time, with the understanding that they reflected reality."[835] According to Dr. Armas, if the Government believed that TexPet had not complied with its contractual obligations, the proper recourse was to pursue an action in the civil courts:

> [G]iven the fact that the matter that might give rise to this preliminary criminal investigation is a civil matter, and specifically a matter involving a breach of contract, and the fact that Ecuadorian law establishes causes of action for this type of legal relationship, and the fact that the report by the Office of the Comptroller General does not find any evidence of criminal liability, on the basis of Art. 38 of the Code of Criminal Procedure I therefore dismiss the criminal complaint filed by the Comptroller General.[836]

317. Dr. Armas requested that the President of the Supreme Court archive the case file in accordance with Article 39 of the Code of Criminal Procedure.[837]

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[833] **Exhibit C-234,** Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006, at 3 (Eng.).

[834] **Exhibit C-234,** Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006, at 3 (Eng.). Dr. Armas further stated that "[w]hen a settlement agreement is at issue, as in the case at hand, it is improper to speak of 'falsity in documents,' and therefore, if one of the parties who enter into such a contract believes he is affected by the breach of the other, he has causes of action to remedy this breach, as well as to obtain damages for it." *Id.*; *see also* R. Veiga Witness Statement, ¶ 49.

[835] *Id.*

[836] **Exhibit C-234,** Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006. *See also* **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, at Art. 38 ("The Prosecutor must request to the Judge, through a duly grounded request, the archiving of the complaint, when it is manifest that the alleged act is not a crime, or when there is any legal obstacle for the continuation of the proceeding."). Claimants refer herein to the Code of Criminal Procedure in force at the time of each phase of the Criminal Proceedings.

[837] **Exhibit C-234,** Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006.

4. Ecuador's Pichincha Prosecutors Investigated and Dismissed the Environmental Proceedings

318. In parallel to the Falsification Proceedings, the preliminary investigation in the Environmental Proceedings, which included field inspections of sites in the former Consortium area, were also dismissed after two years of investigation. On September 4, 2006, the Prosecutor of Pichincha, Dr. Marianita Vega Carrera, issued a report finding that no improper conduct had occurred and thus dismissing the Environmental Proceedings.[838] Like Dr. Armas, Dr. Vega studied the CG Report and found that "it is unable to determine, in any of its conclusions, that there was any liability of a civil or administrative nature, nor was there any evidence of criminal liability, or the existence of any crime, and limits [itself] to only giving recommendations of an administrative nature to the Ministry of Energy and Mines and the Vice-President of Petroproducción."[839]

319. Dr. Vega also based her conclusions on three experts' reports commissioned during the preliminary investigation, all of which confirmed that TexPet's remediation had been successful. First, Mr. Jaime Gutiérrez Granja prepared an expert report based on visual inspections of 78 pits between August 14, 2004, and November 25, 2004,[840] of which 74 were RAP well sites.[841] The expert found that 75 of the 78 pits were covered with weeds, grass, shrubs, or wild vegetation.[842] With respect to the remaining 3 pits, Mr. Gutiérrez noted "the presence of black material . . . on their surface,"[843] which Dr. Vega concluded "had recently

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838 **Exhibit C-236,** Motion of Dr. Marianita Vega Carrera, Assistant District Prosecutor of Pichincha, to Third Criminal Judge of Francisco de Orellana, Sept. 4, 2006. The District Prosecutor's Office also concluded that the definition of environmental crimes in Ecuador's Criminal Code (Reform Law 99-49, Official Registry No. 2, Jan. 25, 2000) could not be applied retroactively to TexPet's alleged acts. *Id.* at Conclusions. *See also* R. Veiga Witness Statement, ¶ 48.

839 **Exhibit C-236,** Motion of Dr. Marianita Vega Carrera, Assistant District Prosecutor of Pichincha, to Third Criminal Judge of Francisco de Orellana, Sept. 4, 2006, at Point 6.

840 **Exhibit C-590**, Expert Report by Jaime Gutiérrez Granja, Inspection Agent of the Environmental, Cultural Heritage and Intellectual Property Crime Units, Dec. 27, 2004.

841 J. Connor Expert Report at 13, 76.

842 **Exhibit C-590**, Expert Report by Jaime Gutiérrez Granja, Inspection Agent of the Environmental, Cultural Heritage and Intellectual Property Crime Units, Dec. 27, 2004.

843 **Exhibit C-590**, Expert Report by Jaime Gutiérrez Granja, Inspection Agent of the Environmental, Cultural Heritage and Intellectual Property Crime Units, Dec. 27, 2004, at 11. The reported locations of these three well sites were not associated with RAP items in the TexPet remediation project. J. Connor Expert Report at 13.

appeared and was fresh, which fact cannot be imputed to TEXPET, since TEXPET ceased oil operations in the Ecuadorian Oriente more than a decade ago."[844]

320. Second, Drs. Ivan Narváez Troncoso and Bolívar García Pinos also prepared an expert report based on field inspections conducted between August 2004 and January 2005, with the stated purpose of analyzing the TPH content in the soil to determine "whether the subsoil of the former pits reach the levels of concentration of hydrocarbons established by the [RAP] after the remediation work."[845] After sampling 82 remediated pits, Drs. Narváez and García concluded that 73 pits were within the parameters of remediation established in the RAP, while 9 pits purportedly exceeded the TPH values set forth in the RAP.[846] With respect to these latter pits, however, Drs. Narváez and García concluded that, "due to the impermeability of the clays, such impacts have been confined and do not affect the quality of the groundwater or wildlife in the vicinity."[847] They further concluded that the "presence of the remediated pits has no effect on the quality of wildlife, nor were any leaks or escapes into the surrounding subsoil or through the bottom of such detected in exploratory drilling around the pits."[848] The Lago Agrio

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[844] **Exhibit C-236,** Motion of Dr. Marianita Vega Carrera, Assistant District Prosecutor of Pichincha, to Third Criminal Judge of Francisco de Orellana, Sept. 4, 2006, at Point 8.

[845] **Exhibit C-591**, Drs. Ian Narváez Troncoso and Bolívar García Pinos, Technical Experts' Report on the Evaluation of the Environmental Impact on the Sites Stipulated in the RAP, Feb. 3, 2005, at 2 (Eng.).

[846] **Exhibit C-591**, Drs. Ian Narváez Troncoso and Bolívar García Pinos, Technical Experts' Report on the Evaluation of the Environmental Impact on the Sites Stipulated in the RAP, Feb. 3, 2005, at 9 (Eng.). Although their report indicated that soil sampling was conducted at 82 well sites, Drs. Narváez and García provided data for 85 well sites. According to Mr. Connor, Drs. Narváez and García sampled only 51 pits, while the rest of the soil samples were collected from areas unrelated to the Texpet remediation program. Of these 51 pits, 44 were RAP pits remediated prior to March 20, 1997, and 1 was a RAP pit remediated after March 20, 1997, while the other 6 were either NFA pits (3) or COC pits (3), for which no remediation was required by Texpet. J. Connor Expert Report at 13, 76. Of the 45 remediated pits investigated, the test results indicated only one soil sample from one pit to possibly exceed the numerical remediation criteria applicable at the time of the remedial action. *Id.* at 76-77. However, the moderately elevated TPH level reported by Drs. Narváez and García "was for an individual soil sample, not a composite soil sample, and therefore was not directly comparable to the remediation criteria. Analysis of a composite soil sample at the time of remediation (1997) showed the soil TPH to be less than 5000 mg/kg, as required." *Id.* at 77.

[847] **Exhibit C-591**, Drs. Ian Narváez Troncoso and Bolívar García Pinos, Technical Experts' Report on the Evaluation of the Environmental Impact on the Sites Stipulated in the RAP, Feb. 3, 2005, at 10 (Eng.). *See also id.* at 3 (Eng.) ("The soil found on the bottom of some pits contained traces of hydrocarbons, but, due to the impermeability of the clays, it is confined, like in a sack, at a depth of approximately 2 to 3 meters below the surface. Above these 'sacks' of contaminated dirt, there is fill material consisting of virgin clayey dirt, with which the relief of the land has been restored and, at this time, where the pits were, the surface has been revegetated or, in some cases, reforested.").

[848] **Exhibit C-591**, Drs. Ian Narváez Troncoso and Bolívar García Pinos, Technical Experts' Report on the Evaluation of the Environmental Impact on the Sites Stipulated in the RAP, Feb. 3, 2005, at 3 (Eng.).

Plaintiffs' own environmental consultants reached the same conclusion that there was no evidence that contamination from the pits had spread into the surrounding groundwater.[849]

321. Finally, Ms. Adriana Maribel Enríquez Sánchez, an environmental engineer, conducted a visual evaluation of some of the remediated sites to determine "whether the surface of the pits remediated according to the [RAP] have seeps of oil or any sort of hydrocarbons that might endanger human health, flora or fauna."[850] In her report, Ms. Enríquez stated that there was neither evidence of hydrocarbons on the surface of the soil in the remediated pits, nor any "remains or leaks of hydrocarbons into the soil around the pits."[851] She concluded that all the pits that she inspected "showed no surface environmental impacts that endanger human life, flora or fauna."[852] She further noted that at certain locations near the pits visited, "it is easy to notice the current presence of oil on the ground, evidently caused by recent spills occurring due to the deterioration or rupture of oil pipelines operated by the State-owned Oil Company, Petroecuador, which have not yet been remediated."[853]

322. Dr. Vega dismissed the Environmental Proceedings, concluding on the basis of these expert reports that:

- None of the pits evaluated is having negative impacts on the environment.
- At certain locations near the wells visited, the presence of oil on the ground was noted, which was due to recent spills caused by State-owned Petroecuador.[854]

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849 **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS-195-05-CLIP-01. Plaintiffs' lawyer Donziger was unfazed by this lack of evidence, making it clear that pressure on the Ecuadorian courts was all that was needed to win: "You can say whatever you want but at the end of the day, there's a thousand people around the courthouse, you're going to get what you want" and "[t]herefore, if we take our existing evidence on groundwater contamination, which admittedly is right below the source . . . [a]nd wanted to extrapolate based on nothing other than our, um, theory," then "[w]e can do it. And we can get money for it." *Id*. He went on to say, "[T]his is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win." *Id*.

850 **Exhibit C-592**, Adriana Maribel Enríquez Sánchez, Examination of the Site of the Events for the Technical-Visual Evaluation of the Environmental Impact on Sites Remediated by Texaco Petroleum Company, July 7, 2006.

851 *Id.* at Summary.

852 *Id.* at Conclusions.

853 *Id.*

854 *Id.* (emphasis added).

323. Dr. Vega's superior, then District Prosecutor of Pichincha, Dr. Washington Pesántez, reviewed her report and confirmed all of her findings and ratified her request for dismissal.[855] Dr. Pesántez concluded that the Comptroller General had "not provide[d] evidence of the environmental damage allegedly caused by TEXACO" and that this was "*corroborated*" by the CG Report, "which showed that there was no evidence of civil, administrative, or criminal nature liability" by Ecuadorian officials, Petroecuador, or TexPet's representatives.[856] Having reviewed the record—including the aforementioned reports prepared by the State-appointed experts all concluding that TexPet's remediation had been successful[857]—Dr. Pesántez found no evidence of environmental damage caused by TexPet in connection with oil production operations. He further found that the technical expert reports established that TexPet satisfied the requirements in the 1995 Settlement Agreement and the Scope of Work.[858] Since there was "no relevant evidence of a crime," Dr. Pesántez opined that there were "no sufficient grounds to commence the prosecutorial investigation (*Instrucción Fiscal*) against any person whatsoever for the facts reported" by the Comptroller General and ratified Dr. Vega's request for dismissal.[859]

324. In sum, all three prosecutors—Prosecutor General Armas, Public Prosecutor Vega, and District Prosecutor Pesántez—reviewed the CG Report and concluded that it did not present any evidence of civil, administrative or criminal liability, and thus could not serve as the basis for a criminal proceeding. Moreover, the reports of State-appointed experts who conducted field inspections and technical analyses at pits remediated by TexPet confirmed that TexPet's

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855 **Exhibit C-237,** Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9-10 (Eng.); **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbios, Sept. 13, 2007.

856 **Exhibit C-237,** Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9 (Eng.) (emphasis added); **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbios, Sept. 13, 2007, at 12 (Eng.); R. Veiga Witness Statement, ¶ 48.

857 **Exhibit C-237**, Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9 (Eng.); **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbios, Sept. 13, 2007, at 5-6. Dr. Pesántez also took into account the fact that Prosecutor General Armas had reached the conclusion that "no 'criminal falsification' of public documents within the meaning of Arts. 338 and 339 of the Penal Code had been committed." **Exhibit C-237**, Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9 (Eng.).

858 *Id.* at 9-10 (Eng.); **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbios, Sept. 13, 2007, at 12 (Eng.); R. Veiga Witness Statement, ¶ 48.

859 **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbios, Sept. 13, 2007, at 12; *see also* R. Veiga Witness Statement, ¶ 48.

remediation had been successful, and that any issues that currently existed were the result of more recent activities—thus absolving TexPet of responsibility. Accordingly, both the Falsification Proceedings and the Environmental Proceedings were dismissed after more than two years of investigation.

325. The *Crude* footage reveals that during this period, Plaintiffs' lawyer Donziger expressed his surprise that criminal charges had not been filed, given that he had been working with Ecuador's prosecutors on the case.[860] As Mr. Donziger noted to his financier, the "beauty" of Ecuador's legal system is that "there's never a finality."[861] In other words, Mr. Donziger clearly planned to seek the re-opening of the Criminal Proceedings to help advance the fraud that he was (and is) spearheading through the Lago Agrio Litigation. In furtherance of that objective, Plaintiffs' lawyer Fajardo would later meet with Ecuadorian officials to discuss the Lago Agrio Litigation and to encourage Ecuador to investigate and pursue an action for fraud against TexPet.[862]

5. Despite the Prosecutor General's Requests to Dismiss the Falsification Proceedings, the President of the Supreme Court Breached Ecuadorian Criminal Procedure by Refusing to Archive the Case

326. On October 27, 2006, Dr. Velasco transferred Prosecutor General Armas's findings to the Comptroller General for his comments.[863] Pursuant to Article 39,[864] after hearing the criminal complainant (here, the Comptroller General),[865] the President of the Supreme Court had the power to dismiss the case with no further action. And because the request to archive the file came from Prosecutor General Armas as the highest Prosecutor in Ecuador, Article 39 of the Code of Criminal Procedure required the Court to issue an order archiving the case.[866]

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860 **Exhibit C-360**, *Crude* Outtakes, Jan. 31, 2007, at CRS-170-00-CLIP 03.

861 *Id.*

862 **Exhibit C-360**, *Crude* Outtakes, Mar. 28, 2007, at CRS-220-00-CLIP 01.

863 **Exhibit C-238**, Court Order Transferring Prosecutor General's Opinion to Comptroller General, Oct. 27, 2006, at 3:10 p.m.

864 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, at Art. 39.

865 **Exhibit C-239**, Motion by Dr. Genaro Peña Ugalde, Comptroller General, to the President of the Supreme Court, Nov. 1, 2006, at 5:25 p.m., at 8 (Eng.).

866 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, at Art. 39.

327. Notwithstanding Prosecutor General Armas's request to archive the file in the Falsification Proceedings, the President of the Supreme Court, Dr. Jaime Velasco, failed to archive the case as required by Ecuadorian criminal procedure. Instead, on January 12, 2007, Dr. Velasco improperly transferred the Comptroller General's comments back to the Prosecutor General in violation of Ecuadorian criminal procedure.[867]

328. On March 1, 2007, the new Prosecutor General of Ecuador, Jorge German, again requested that the case file be archived, emphasizing that this was the only permissible course of action: "Article 39 of the Criminal Procedure Code clearly sets forth the procedure to be followed . . . and *that article does not provide for transferring the file [to the Prosecutor] with the complainant's response to the Prosecutor General's dismissal.* Therefore, I hereby request that you [Judge Velasco] issue the proper order, in compliance with Article 39 . . . , that is, the case be dismissed."[868] The President of the Supreme Court, however, ignored the Prosecutor General's emphatic request to follow the law and archive the case.

6. President Correa and the Government Demanded the Prosecution of Claimants' Lawyers and Dismissed the Prosecutor General Who Refused to Pursue the Case

329. This refusal by the President of the Supreme Court to archive the case coincided with President Correa's increasing interest in the Lago Agrio Litigation and his calls for criminal prosecution of those who executed the Settlement and Release Agreements.[869]

330. At the same time, Plaintiffs' lawyer Donziger began focusing his efforts on obtaining Ecuador's support for the prosecution of Messrs. Veiga and Pérez. In early February 2007, Mr. Donziger and his colleagues appeared on radio and television programs, campaigning for President Correa's attention while publicly accusing Messrs. Veiga and Pérez of fraud.[870] In

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867 **Exhibit C-240**, Court Order Transferring Prosecutor General's Opinion to Comptroller General, Jan. 12, 2007, at 10:05 a.m.

868 **Exhibit C-241**, Motion by Dr. Jorge Germán, Prosecutor General, to the President of the Supreme Court, Mar. 1, 2007, at 9:20 a.m. (emphasis added).

869 **Exhibit C-242**, Press Release, Office of President Rafael Correa, *President Calls upon District Attorney to Allow Criminal Case to be Heard against Petroecuador Officers who Accepted the Remediation Performed by Texaco*, Apr. 26, 2007; **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007.

870 **Exhibit C-550**, Radio Cristal Program, *Interview with Steven Donziger*, Transcript, Feb. 8, 2007.

early March 2007, Mr. Donziger rehearsed with his team a scheduled March 6, 2007 press conference designed, *inter alia*, to pressure the Prosecutor General to prosecute Messrs. Veiga and Pérez.[871] The very next day, Mr. Donziger discussed his upcoming meeting with a Supreme Court justice that afternoon and how the filing of criminal charges against Chevron's attorneys could affect the dynamics of a settlement.[872] Within two weeks, President Correa issued a press release announcing the Government's support for the Lago Agrio Plaintiffs and its intention to help them collect evidence.[873]

331. On April 26, 2007, President Correa toured the Lago Agrio oilfields with the Plaintiffs' lawyers. That same day, he issued a press release calling for the criminal prosecution of those who had signed the 1998 Final Release.[874] In a national radio address two days later, President Correa echoed the Plaintiffs' rhetoric, calling Chevron's Ecuadorian lawyers traitors and demanding that they, along with the Petroecuador officials who signed the 1998 Final Release, be criminally prosecuted:

> Chevron-Texaco has lawyers *"vende patrias"* (who sell their country) defending it, people who for a fistful of dollars are capable of selling their souls, their country, their families, etc. There are also people in Petroecuador; in 1998 a document was signed declaring everything had been remedied, while many of the pits had not been even covered. I cordially call on the Public Prosecutor of the Nation. There is a report from the Office of the Comptroller General establishing criminal liability incurred by Petroecuador's officials who shamelessly signed that document. It was said that everything had been remedied when nothing had been remedied. I request that this case be prosecuted and criminal actions be brought against those corrupt *"vende patrias"* . . .[875]

332. Mr. Donziger was gleeful. In the movie *Crude*, Mr. Donziger is shown stating that "Correa just said that anyone in the Ecuadorian Government who approved the so-called

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871 **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS-198-00-CLIP 04.

872 **Exhibit C-360**, *Crude* Outtakes, Mar. 5, 2007, at CRS-208-04-CLIP 04, CRS-208-06-CLIP 02.

873 **Exhibit C-168**, Press Release, Government of Ecuador Secretary General of Communications, *The government backs actions of the assembly of persons affected by Texaco Oil Company*, Mar. 20, 2007.

874 **Exhibit C-242**, Press Release, Office of President Rafael Correa, *President Calls upon District Attorney to Allow Criminal Case to be Heard against Petroecuador Officers who Accepted the Remediation Performed by Texaco*, Apr. 26, 2007; **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007.

875 **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

remediation is now going to be subject to litigation in Ecuador," and adding that those persons who signed the 1998 Final Release "are shittin' in their pants right now."[876] In the *Crude* Outtakes, Mr. Donziger is heard wondering whether the time might be right to "ask for the head of [Claimants' lawyer Rodrigo] Pérez Pallares—given what the President said."[877] Donziger explained: "[H]e's totally with us."[878] Plaintiffs' lawyer Fajardo later reported that he and others had spoken with President Correa, who had told them that "if we put in a little effort, before getting the public involved, the Prosecutor will yield, and will re-open that investigation into the fraud of – of the contract between Texaco and the Ecuadorian Government."[879] This is precisely what the Plaintiffs ultimately achieved.

333. Soon after President Correa's public statements, the Comptroller General objected once again to the Prosecutor General's request to dismiss the case, invoking the political importance of the case for Ecuador.[880]

334. On June 14, 2007, Prosecutor General German nonetheless directed the President of the Supreme Court—for the second time—to archive the case file. He noted that the law expressly required the case's archival and that the court had no discretion to do otherwise: "As you also know, rules of procedure are mandatory; that is, a judge ruling on a case must strictly adhere to those rules and has no power of authority to change them."[881] Prosecutor General German reiterated that the President of the Supreme Court had not acted pursuant to Article 39 of the Code of Criminal Procedure, which "clearly describes the procedure for dismissal of a criminal complaint."[882]

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876 **Exhibit C-344**, *In re Chevron Corp.*, Case No. M-19-111, U.S. District Court for the Southern District of New York, Memorandum Opinion, May 6, 2010 ("S.D.N.Y. Memorandum Opinion"), at 11.

877 **Exhibit C-360**, *Crude* Outtakes, Apr. 27, 2007 CRS-268-000-CLIP 01.

878 *Id.*

879 **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, at CRS-376-03-CLIP-01.

880 **Exhibit C-244**, Comptroller General Petition Insisting on the Reopening of the Investigation, May 18, 2007, at 3:30 p.m.

881 **Exhibit C-245**, Motion by Dr. Jorge German, Prosecutor General, to the President of the Supreme Court, June 14, 2007, at 4:10 p.m.

882 *Id.*

335. Five months later, on November 30, 2007, as one of its first acts, President Correa's new Constituent Assembly removed Prosecutor General German from office and appointed as his replacement a more cooperative Prosecutor General, Dr. Washington Pesántez,[883] a long-time friend of President Correa.[884] Dr. Pesántez previously had issued two separate motions approving and ratifying the report drafted by the Public Prosecutor of Pichincha, Dr. Vega, that dismissed the Environmental Proceedings.[885] In upholding Dr. Vega's conclusion, Dr. Pesántez stated that the CG Report showed that there was no evidence of civil, administrative or criminal nature liability on the part of . . . the representatives of the TEXACO company, with respect to environmental damage that had allegedly been caused in the Amazon region."[886] He also stated that TexPet had complied with its remediation obligations: "[T]he technical reports prepared by the College of Geology and Mines of the Central University of Ecuador established that TEXACO did satisfy the requirements provided for and established in the contract signed by the Government of Ecuador and TexPet."[887] But under mounting public pressure from President Correa to blame Chevron, Prosecutor General Pesántez soon issued a one-paragraph opinion stating that undisclosed new circumstances and evidence warranted reopening the criminal investigation against Claimants' lawyers.[888] This order reopening the preliminary investigation in the Falsification Proceedings was issued on March 31, 2008, the day before Mr. Cabrera filed his first "expert" report in the Lago Agrio Litigation.

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883 **Exhibit C-104**, Constituent Assembly, Mandate 1, Official Registry No. 223, Nov. 30, 2007.

884 **Exhibit C-577**, *Correa: I Don't Have To Give Any Explanations About Who I Choose To Invite*, EL HOY, Dec. 2, 2009 (explaining that President Correa and Washington Pesántez became close friends while studying together at the Louvain University in Belgium).

885 **Exhibit C-237**, Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007; **Exhibit C-246,** Motion of Dr. Washington Pesántez to Criminal Court of Sucumbíos, Sept. 13, 2007.

886 **Exhibit C-237,** Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9 (Eng.); **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbíos, Sept. 13, 2007, at 12.

887 **Exhibit C-237**, Motion of Dr. Washington Pesántez, District Prosecutor of Pichincha, to Third Criminal Court of Napo, Mar. 13, 2007, at 9. *See also* **Exhibit C-246**, Motion of Dr. Washington Pesántez to Criminal Court of Sucumbíos, Sept. 13, 2007, at 12.

888 **Exhibit C-247**, Order by Prosecutor General Reopening the Investigation, Mar. 31, 2008; *see also* R. Veiga Witness Statement, ¶ 51. Under Ecuadorian law, a prosecutor can reopen an investigation only on the basis of new evidence or new documents, and not because the prosecutor disagrees with the prior decision to close the investigation.

336. Despite an express request for such information by Messrs. Veiga and Pérez, Dr. Pesántez never revealed the alleged new evidence that justified his change of heart.[889] To date, the only identifiable changed circumstance was a political one: President Correa's increasingly open support for the Lago Agrio Plaintiffs.

7. Concerted Last-Minute Efforts by President Correa and the Lago Agrio Plaintiffs' Lawyers Pressured the Prosecutor General into Commencing a Baseless Prosecutorial Investigation

337. On July 31, 2008, the U.S. lawyers representing the Lago Agrio Plaintiffs issued a press release entitled "Preliminary Criminal Investigation of Falsehood in a Public Instrument: A Serious Crime that is About to Be Time-Barred."[890] In this release, the Plaintiffs' lawyers brazenly called for a prosecutorial investigation (*instrucción fiscal*) of Claimants' employees, noting that the statute of limitations would soon expire.[891] Plaintiffs' representative Luis Yanza openly admitted that a failure to bring the criminal prosecution would affect "that case that is being heard in Nueva Loja" (the Lago Agrio Litigation).[892] The Plaintiffs' lawyers reiterated their call for a prosecutorial investigation in *El Comercio* three days later, telling the newspaper that the statute of limitations would soon bar the prosecution of Messrs. Veiga and Pérez.[893] In making these statements, the Plaintiffs' lawyers ignored the fact that Ecuador repeatedly had determined, over several years, that there was no evidence upon which to proceed with criminal charges. As the Prosecutor General had concluded after a more than two-year investigation, "none of the findings [of the investigation] indicate[s] any evidence of criminal liability."[894]

338. In early August 2008, President Correa met with the ADF in what he called a "working meeting on the Texaco case."[895] During a weekly radio address to the country, he confirmed that the meeting was about the criminal investigations and personally commended

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889 **Exhibit C-248**, Motion of Dr. Jaime Donoso Jaramillo to Dr. Washington Pesántez, Apr. 11, 2008.

890 **Exhibit C-249**, *Preliminary Criminal Investigation of Falsehood in a Public Instrument: A Serious Crime that is About to Be Time-Barred*, July 31, 2008.

891 *Id*.

892 **Exhibit C-633,** Plaintiffs' Press Conference, Transcript, July 31, 2008.

893 **Exhibit C-250**, *Texaco, Accused of Risking Negotiations with the USA.*, EL COMERCIO, Aug. 1, 2008.

894 **Exhibit C-234**, Prosecutor General Opinion Dismissing the Criminal Complaint Filed by the Comptroller General, Aug. 9, 2006.

895 **Exhibit C-173**, Presidential Weekly Radio Address, Canal de Estado, Aug. 9, 2008, at 10:00 a.m.

Prosecutor General Pesántez for reopening the preliminary investigation against Claimants' lawyers.[896]

339. Ten days later, on August 26, 2008, Prosecutor General Pesántez instituted a prosecutorial investigation against nine individuals, including Messrs. Veiga and Pérez,[897] in accordance with the public urging of President Correa and the Lago Agrio Plaintiffs' lawyers.[898] Dr. Pesántez conducted no additional investigation between the reopening of the preliminary investigation in March 2008 and the commencement of the prosecutorial investigation in August 2008; accordingly no new facts were presented or alleged. With the exception of a few deleted sentences, the decision initiating the prosecutorial investigation tracks the language in the original 2003 Criminal Complaint almost word for word.[899] Although he had rejected the CG Report in 2007 in his capacity as District Prosecutor of Pichincha on the basis that it did not present any evidence of criminal liability, Dr. Pesántez, without any explanation, relied on this same CG Report as the basis for initiating the prosecutorial investigation. Dr. Pesántez later recused himself on the basis of his prior involvement in the case, but he failed to explain why he had not recused himself from the outset, or at least prior to commencing the prosecutorial investigation.[900]

340. Dr. Pesántez's prosecutorial investigation relied on the CG Report, which claimed that 89 pits allegedly were not remediated properly. Yet the investigation singled out only 16

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[896] *Id.*; *see also* **Exhibit C-251**, Presidential Weekly Radio Address, Aug. 16, 2008. *See also* **Exhibit C-171**, Radio Caravana, Presidential Weekly Radio Address, Apr. 28, 2007.

[897] The other 7 named individuals were: Martha Romero de la Cadena, Jorge Dután, Alix Suárez, Luis Albán Granizo, Marcos Trejo Ordóñez, Patricio Ribadeneira, and Ramiro Gordillo.

[898] **Exhibit C-252,** Order from Prosecutor General Washington Pesántez Ordering Prosecutorial Investigation to Begin, Aug. 26, 2008, at 11:00 a.m.; **Exhibit C-253**, Notification of Prosecutorial Investigation from Dr. Carlos Fernandez Idrovo, Comptroller General, to the President of the Supreme Court, Sept. 3, 2008, at 4:13 p.m.; *see also* R. Veiga Witness Statement, ¶ 52.

[899] *See* **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m.; *cf.* **Exhibit C-252**, Order from Prosecutor General Washington Pesántez Ordering Prosecutorial Investigation to Begin, Aug. 26, 2008, at 11:00 a.m.; *see also* R. Veiga Witness Statement, ¶ 52.

[900] **Exhibit C-254**, Notification from Prosecutor General Washington Pesántez to the Parties, Dec. 8, 2008; **Exhibit C-255**, Mercedes Álvaro, *Ecuador: Prosecutor Recuses Himself in Chevron Case*, DOW JONES, Dec. 16, 2008; **Exhibit C-256**, *Prosecutor General Recuses Himself from the Texaco Case*, EL COMERCIO, Dec. 16, 2008; **Exhibit C-257**, *Prosecutor General Recuses Himself in Chevron Case*, EL TIEMPO, Dec. 16, 2008; **Exhibit C-258**, *Prosecutor Pesántez Excuses Himself from Chevron-Texaco Lawsuit*, EXPRESO, Dec. 16, 2008; *see also* R. Veiga Witness Statement, ¶ 52.

pits, alleging that TexPet failed to comply with its requirement to remediate those sites, and thus, that Claimants' lawyers committed fraud by signing the 1998 Final Release. Of the 16 pits TexPet purportedly failed to remediate:

- eleven were designated as NFA (no further action) pits (*i.e.*, the field investigation performed in mid-1995 by Woodward-Clyde determined that no remediation was required pursuant to the terms of the 1995 Settlement Agreement, and in each instance Ecuador agreed and approved this designation of the pits);[901]
- three were designated as COC (change of conditions) pits (*i.e.*, conditions were found by Woodward-Clyde to be different during the remedial action from the conditions encountered during the remedial investigation, generally as a result of the actions of Petroecuador as Operator since 1990, such that Petroecuador was responsible for the pits and TexPet was not required by the parties' agreement to remediate them, as again agreed and approved by Ecuador and Petroecuador);[902] and
- two had been approved by Ecuador as having been properly remediated.[903]

341. Both the Criminal Complaint and the prosecutorial investigation order acknowledged that the 14 pits designated as "No Further Action" and "Change of Conditions" were so designated by Ecuador at the time of the remediation, but they asserted that unidentified officials at Petroecuador now disagreed with the original designations.[904] Neither document identified those officials or provided any factual basis for their alleged disagreement.

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[901] These pits are Sacha 52.1, Aguarico 9.1, Sacha 88.1, Guanta 5.1, Shushufindi B31.2, Sacha 110.1, Sacha 98.1, Sacha 52.2, Shushufindi 13A.3, Sacha 109.2, and Sacha 104. **Exhibit C-43**, Woodward-Clyde Final Report Vol. I at 3.5. *See also* **Exhibit C-276**, Letter from the Ministry of Energy and Mines to Rodrigo Pérez of TexPet, June 28, 1996.

[902] These pits are Aguarico 1.1, Guanta 3.1, and Sacha 111.1. Under the terms of the Remedial Action Plan, "[i]f during the implementation of the remedial actions, conditions are found to be different than the one encountered during the Remedial Investigation as documented in Appendices A through F and are due to Petroecuador or any of its affiliates and/or its respective subcontractors activities (that is, new spills, fresh oil being discarded in pits, modification to installation, etc.), the representative of the Ministry of Energy and Mines will be notified. No action will be undertaken and the remedial action will be deemed to have been completed for the site(s) where the changes of conditions occurred." **Exhibit C-42**, Remedial Action Plan, Sept. 8, 1995 ("RAP") ¶ 1.5; *see also* **Exhibit C-23**, 1995 Settlement Agreement, at Art. IV (referring to the Remedial Action Plan).

[903] These pits are Shushufindi 30.1 (30A.1) and Shushufindi B31.1. **Exhibit C-49**, Approval *Acta* of November 22, 1996 at 5 (Eng.)(approving, among others, these two pits); *see also* **Exhibit C-43**, Woodward-Clyde Final Report Vol. I Table 3-25 (showing "remediation completed" for both pits).

[904] **Exhibit C-231**, Criminal Complaint from Dr. Genaro Peña Ugalde, Comptroller General, to the Prosecutor General, Oct. 29, 2003, at 3:30 p.m., at 4; **Exhibit C-252**, Order from Prosecutor General Washington Pesántez Ordering Investigation to Begin, Aug. 26, 2008, at 11:00 a.m., at 5 (Eng.).

8. The Ecuadorian Courts Improperly Asserted Jurisdiction over the Criminal Proceedings after the Statute of Limitations Expired

342. Under Ecuadorian law, the limitations period begins to run when the alleged crime is committed,[905] which at the very latest occurred when the 1998 Final Release was executed on September 30, 1998. Article 101 of the Criminal Code provides for three different limitations periods based on the applicable penalty for so-called "public action crimes" (*delitos de acción pública*).[906] If the harsher type of imprisonment (*reclusión mayor especial*) applies to a particular public-action crime, the limitations period is 15 years; if the intermediate type of imprisonment (*reclusión*) applies, the limitations period is 10 years; and if the less severe type of imprisonment (*prisión*) applies, the limitations period is 5 years.[907] The articles at issue in the Falsification Proceedings (Articles 338 and 339) provide for the intermediate type of imprisonment—hence the ten-year statute of limitations applies.[908]

343. Ecuadorian law provides that the statute of limitations is tolled when proper notice of the prosecutorial investigation—the first phase of the criminal proceeding[909]—is served upon all defendants.[910] For notice to be proper, the court must notify all of the defendants of both the resolution by the criminal court ordering notice to be served upon the defendants and the prosecutorial investigation order itself. The date that all defendants are properly notified not only tolls the statute of limitations but also marks the beginning of the prosecutorial investigation period.

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[905] **Exhibit C-593**, Ecuadorian Criminal Code, Art. 101, ¶ 4 *in fine* ("The limitation period shall begin on the day that the offense was committed.").

[906] Public action crimes are crimes for which only the prosecutor can make a formal accusation, as opposed to private action crimes that require the victim to make a formal accusation. **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 33. The crime of falsification of public documents is a public action crime.

[907] **Exhibit C-593**, Ecuadorian Criminal Code, Art. 101.

[908] **Exhibit C-593**, Ecuadorian Criminal Code, Arts. 338-339. Ecuador acknowledged this 10-year limitations period at the hearing on Claimants' Request for Interim Measures. Hearing on Interim Measures, London, May 11, 2010, Tr. at 98:20-99:8; 101:3-5.

[909] Pursuant to Article 206 of the Code of Criminal Procedure, the prosecutorial investigation is the first stage of a criminal proceeding, and the prior phase is only pre-procedural. **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 206.

[910] **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Arts. 304, 305; **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, General Provisions. The Ecuadorian Code of Criminal Procedure provides that the Code of Civil Procedure governs when there is no express provision in the Code of Criminal Procedure.

344. When the Prosecutor General ordered commencement of the prosecutorial investigation, the case was randomly assigned to the First Criminal Chamber of the Supreme Court pursuant to the lottery system. But in complete violation of Ecuador's criminal procedure, this court declined jurisdiction and ordered the case file "to be returned immediately" to the President of the Supreme Court, Dr. Roberto Gómez Mera.[911] Although he had no authority to do so, Judge Gómez immediately "accepted" the Criminal Proceedings, and on September 19, 2008, ordered the defendants to be notified.[912] As this rush seems to indicate, the President of the Supreme Court was presumably aware that the statute of limitations was about to expire on September 30, 2008,[913] and that the statute of limitations could be tolled only when *all* defendants were duly notified of the commencement of the prosecutorial investigation.

345. On February 3, 2009, the President of the First Chamber of the newly-constituted National Court of Justice (the former Supreme Court) issued an order nullifying all rulings by Judge Gómez on the grounds that he did not have jurisdiction over the case.[914] This nullification also affected the resolution dated September 19, 2008, by which the President of the Supreme Court had ordered that notice be served upon all defendants before the expiration of the ten-year limitations period. When a resolution is declared null and void by an Ecuadorian court, the resolution must be treated as if it had never been issued. Thus, the proceedings must return to

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911 **Exhibit C-261**, Resolution, Supreme Court of Justice, First Criminal Chamber, Sept. 16, 2008 ("Based on the foregoing and because the most recent filings by the Office of the State Prosecutor were improperly assigned, since this Division lacks jurisdiction to hear the present case, accordingly, it is ordered that the record be sent to the President of the Supreme Court of Justice.").

912 **Exhibit C-262,** Court Order Accepting the Criminal Case from the First Chamber of the Supreme Court, Sept. 19, 2008, at 11:00 a.m. *See also* **Exhibit C-263**, Motion by Dr. Jaime Donoso Jaramillo and Dr. Emiliano Donoso Vinueza to the Supreme Court, Sept. 25, 2008, at 4:15 p.m. A few weeks after Judge Gómez improperly asserted jurisdiction over the criminal case, Prosecutor General Pesántez requested that Judge Gómez abstain from hearing the case so as to "avoid future possible causes of nullity in these proceedings," on the basis that Ecuadorian procedural law requires that criminal proceedings be assigned to courts by lottery. **Exhibit C-264**, Motion by Dr. Prosecutor General Washington Pesántez to the Supreme Court, Oct. 13, 2008, at 11:45 a.m.

913 As noted above, the applicable statute of limitations with respect to Mr. Pérez was five years and expired no later than September 30, 2003, before the Criminal Complaint was even filed and certainly long before the prosecutorial investigation was instituted much less notified to all of the defendants.

914 **Exhibit C-265**, Court Order Nullifying the Rulings of the President of the Supreme Court, Feb. 3, 2009, at 9:00 a.m.

the *status quo ante* and any acts taken after the voided resolution are deemed invalid.[915] The Prosecutor General's office did not appeal this decision, and so it became final. Because Judge Gómez's actions were nullified, the defendants were never timely and properly notified of the proceedings pending against them, and the statute of limitations expired on September 30, 2008.

346. Although the statute of limitations had expired, the President of the First Chamber of the National Court of Justice failed to dismiss the case and instead ordered that the defendants be notified again.[916]

9. The Prosecutorial Investigation Had No Merit

347. Article 223 of the Ecuadorian Code of Criminal Procedure requires that the prosecutorial investigation conclude within 90 days from the date when notice is served on all nine named individuals.[917] The 90-day period may be extended only in 30-day increments (from the date when each notice is served) when new individuals are added to the investigation.[918] On March 5, 2009, the clerk of the court certified that he was unable to serve the notice on one of the individuals named in the Prosecutor General's order of August 26, 2008, engineer Patricio Ribadeneira García.[919] Although clearly not all defendants had been notified as of March 5, 2009, the President of the First Chamber of the National Court of Justice, Hernán Ulloa Parada, nonetheless ordered that the date of the prosecutorial investigation was March 5, 2009.[920]

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915 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 304-A ("…If the court, when issuing the verdict, finds that there are grounds to declare a nullity, it shall declare it …ordering that the proceeding be reinstated to the stage before the act was declared invalid.").

916 **Exhibit C-265**, Court Order Nullifying the Rulings of the President of the Supreme Court, Feb. 3, 2009, at 9:00 a.m. Messrs. Veiga and Pérez filed a motion before the President of the First Chamber of the National Court of Justice on February 16, 2009, to dismiss the case based on the expiration of the statute of limitations. This motion was denied by the court. **Exhibit C-594**, Motion to Dismiss the Criminal Proceedings Based on the Expiration of the Statute of Limitations, Feb. 16, 2009.

917 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 223. The Acting Prosecutor General expressly acknowledged that all defendants had to be duly notified for the prosecutorial investigation to begin. **Exhibit C-595**, Motion for Revocation by Acting Prosecutor General, May 7, 2009 (arguing that the prosecutorial investigation did not begin until March 5, 2009, because all defendants had not been notified until that date.).

918 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 221.

919 **Exhibit C-596**, Clerk of the First Criminal Division of the National Court of Justice, Certification of Notice, Mar. 5, 2009. Engineer Ribadeneira was not served with the notice until June 17, 2009. **Exhibit C-597**, Clerk of the First Criminal Chamber of the National Court of Justice, Service of Process on Patricio Ribadeneira García, June 17, 2009.

920 **Exhibit C-598**, Decision by Hernán Ulloa Parada, President of the First Criminal Chamber, National Court of Justice, May 14, 2009.

Messrs. Veiga and Pérez requested the revocation of Judge Ulloa's decision on the basis that Engineer Ribadeneira had not been notified, as certified by the court clerk.[921] Judge Luis Moyano Alarcón of the First Criminal Chamber of the National Court of Justice rejected, without any explanation, the request for revocation and confirmed March 5, 2009 as the starting date of the prosecutorial investigation, despite simultaneously and contradictorily ordering that Engineer Ribadeneira be notified of the prosecutorial investigation—thus acknowledging that not all of the named individuals had been served.[922] Based on this erroneous court-mandated date, the 90-day period was to expire on June 5, 2009.

348. On May 13, 2009, the Acting Prosecutor General (after Dr. Pesántez's self-recusal), Dr. Alfredo Alvear Enríquez, added nine new sites to the allegations and ordered inspections to be conducted at the 20 pits associated with them, to analyze the environmental remediation work performed in the former Concession Area.[923] Engineer William Mauricio Bedón Sánchez was appointed as the expert to conduct site inspections.[924] Engineer Bedón's findings confirm that the Government's claims are without merit. In his report, Engineer Bedón concluded that contamination levels were below acceptable levels and that TexPet complied with the terms contained in the Remedial Action Plan:

> On the TCLP-TPH testing of the samples collected in the field, all pits covered by this expert work meet the RAP standard, *i.e.* the values stand well below 1000 ppm.
>
> 100% of the samples collected from the pits meet the established limit in the TCLP test.
>
> . . .

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[921] **Exhibit C-599**, Motion by J. Donoso Jaramillo and E. Donoso Vinueza addressed to the President of the First Criminal Chamber of the National Court of Justice, May 15, 2009.

[922] **Exhibit C-600**, Decision by National Judge of the First Criminal Division of the National Court of Justice Rejecting Revocation Request, June 15, 2009.

[923] **Exhibit C-277**, Notification from Prosecutor General Washington Pesántez Regarding the Inspection of Nine Sites, May 13, 2009.

[924] **Exhibit C-278**, Environmental Expert Report on the Analysis of the Environmental Remediation Works Performed at the Pits in the Aguarico 08, Atacapi 05, Lago Agrio 05, Parahuacu 03, Ron 01, Sacha 56, Sacha 57, Sacha 94, and Shushufindi 18 Well Sites, Aug. 25, 2009, at 2:43 p.m., § 2. Engineer Bedón investigated a total of 11 RAP well sites during the periods of May to July 2009 and September 2009, and provided sampling and testing results for soils at 13 pits, which included 2 "No Further Action" pits and 11 RAP pits. J. Connor Expert Report at 13, 77.

> Based on this agreement of March 20, 1997, and using the 5000 ppm TPH limit, for pits received after such date and reflected in the record of May 14, 1997, the only pit in this group -- pit no. 2 at Sacha 57 -- has a TPH value of 2647 ppm.[925]

349. Notwithstanding his conclusion that TexPet's remediation was successful and in compliance with the RAP, Engineer Bedón then evaluated TexPet's remediation under an entirely different standard, namely a TPH level of 5,000 ppm, which allowed him to find that 13 of the 20 pits exceeded a 5,000 ppm TPH limit.[926] In reality, as set forth in the Scope of Work and the RAP, the standard applicable to TexPet's remediation of these pre-March 1997 pits was 1,000 mg TCLP-TPH per liter, and Engineer Bedón had confirmed TexPet's compliance with that standard.[927]

350. Before the prosecutorial investigation was to expire on June 5, 2009, Acting Prosecutor General Alvear ordered that three former officials from the Ministry of Energy and Mines—who had all been named in the 2003 Criminal Complaint and the 2004 opening of the preliminary investigations, and thus were indisputably known to the Prosecutor at the outset of the prosecutorial investigation—be joined to the prosecutorial investigation, in sequential order. That action allowed the Prosecutor to extend the prosecutorial investigation by 30 days each time a new individual was served with notice of the investigation.[928] On June 2, 2009, Dr. Alvear extended the prosecutorial investigation only to Jorge Efraín Albán Gómez,[929] who was notified on June 17, 2009.[930] Before that 30-day period expired, Dr. Alvear again extended the

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925 **Exhibit C-278**, Environmental Expert Report on the Analysis of the Environmental Remediation Works Performed at the Pits in the Aguarico 08, Atacapi 05, Lago Agrio 05, Parahuacu 03, Ron 01, Sacha 56, Sacha 57, Sacha 94, and Shushufindi 18 Well Sites, Aug. 25, 2009, § 9. Engineer Bedón incorrectly identified one of the pits that he investigated as having been remediated after March 20, 1997, but, in fact, all pits investigated by him had been remediated prior to that date; J. Connor Expert Report at 13-14, 77.

926 **Exhibit C-278**, Environmental Expert Report on the Analysis of the Environmental Remediation Works Performed at the Pits in the Aguarico 08, Atacapi 05, Lago Agrio 05, Parahuacu 03, Ron 01, Sacha 56, Sacha 57, Sacha 94, and Shushufindi 18 Well Sites, Aug. 25, 2009, § 9.

927 *See also generally* **Exhibit C-601**, Motion by J. Donoso and E. Donoso to Acting Prosecutor General Alvear, Sept. 28, 2009.

928 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 221.

929 **Exhibit C-602**, Acting Prosecutor General Alfredo Alvear Enríquez, Joinder of Jorge Efraín Albán Gómez to the Prosecutorial Investigation, June 2, 2009.

930 **Exhibit C-603**, Clerk of the First Criminal Chamber of the National Court of Justice, Service of Process on Jorge Efraín Albán Gómez, June 17, 2009.

prosecutorial investigation on July 1, 2009,[931] to Hugo Jara Román, who was served on July 15, 2009.[932] Dr. Alvear extended it yet again by order dated August 4, 2009 to Giovanni Rosanía Schiavone, who was served on August 31, 2009. That 30-day extension expired on September 30, 2009, at which time the protracted prosecutorial investigation expired as well.

351. At that point, Dr. Alvear was required by law to declare the prosecutorial investigation concluded and to issue an opinion within six days, failing which the judge could declare the prosecutorial investigation concluded.[933] Neither Dr. Alvear nor the judge, however, declared the prosecutorial investigation concluded. Further, Dr. Alvear did not issue his opinion within six days, as was required by law. Rather, the prosecutorial investigation lay dormant for almost *seven months*, hovering over the named individuals—including Claimants' lawyers.

10. The Prosecutorial Opinion Is Baseless and without Merit

352. On April 29, 2010, Dr. Alvear belatedly issued a prosecutorial opinion (*dictamen fiscal*) that formally accused and brought charges against Messrs. Veiga and Pérez, as well as seven former Ecuador and Petroecuador officials, for so-called ideological falsification of public documents (the "Prosecutorial Opinion").[934]

353. Based on the sweeping generalization that "there is contamination in the Oriente area" of Ecuador, the Prosecutor General concluded that by signing Global *Acta* No. 52 and the 1998 Final Release, Messrs. Veiga and Pérez "state[d] as true a fact that is in fact false, in that all environmental remediation work had been complied with by TEXPET" and therefore, committed the crime of "ideological falsification" (*falsedad ideológica*) because they "distorted the essence [of the documents by] establishing as true facts that were not . . . with the intent to favor TexPet

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931 **Exhibit C-604**, Acting Prosecutor General Alfredo Alvear Enríquez, Joinder of Jorge Hugo Ramón Jará Román to the Prosecutorial Investigation, July 1, 2009.

932 **Exhibit C-605**, Clerk of the First Criminal Chamber of the National Court of Justice, Service of Process on Hugo Jara Román, July 15, 2009.

933 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 224.

934 **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010. **Exhibit C-495,** *Prosecutor's Office pushes for trial in Texaco-related case*, LA HORA, May 4, 2010. The other seven named individuals are Martha Romero, Jorge Dután, Alix Suárez, Marcos Trejo, Patricio Ribadeneira, Ramiro Gordillo, and Luis Albán. Dr. Alvear did not accuse Jorge Albán, Hugo Jara, and Giovanni Rosanía on the basis that the charges were barred by the 10-year statute of limitations, since those individuals had only signed documents related to the remediation before September 1998. They had not signed Global *Acta* No. 52 and the 1998 Final Release.

to the detriment of the Ecuadorian State."[935] The basis for this charge is the allegation that TexPet did not complete the remediation required by the 1995 Settlement Agreement and that Messrs. Veiga and Pérez knew that the environmental remediation had not been completed. But the evidence in the investigative file demonstrates that these allegations are clearly false.[936]

354. *First*, in all of the reports cited in the Prosecutorial Opinion, there is no evidence that a single pit was accepted as remediated in violation of the standards that were agreed to by all parties.

355. Like the CG Report on which it is largely based, the Prosecutorial Opinion is based on a misunderstanding—or misrepresentation—of both the Scope of Work required by the 1995 Settlement Agreement and the standards established in the RAP by which completion of that work was to be determined. The reports on which it relied extensively referred to well sites that were not within the Scope of Work (as well as some sites that were not even within the Concession Area) and to pits that TexPet was not required to remediate under the RAP.

356. The reports underlying the Prosecutorial Opinion applied standards different from those that were agreed to by all parties, including Ecuador, and that were the bases upon which Ecuador certified and accepted the remediation work. The Prosecutorial Opinion repeated the CG Report's erroneous statement that Messrs. Veiga and Pérez signed the 1998 Final Release "even though [the environmental remediation] work did not meet the contractual terms of the Remedial Action Plan."[937] That claim is based on the Comptroller General's assertion that, according to Engineer Byron Rafael Miño Barrera's alleged testing of soil samples in 1997,

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935 **Exhibit C-346**, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, pp. 122-23 (Eng.).

936 Although Claimants focus on the grave errors and contradictions contained in the Prosecutorial Opinion's various factual underpinnings for purposes of this Memorial, the legal bases of the Prosecutorial Opinion are equally deficient and contradictory, and also highlight that these criminal charges are baseless and fabricated.

937 **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 2. *See also id.* at 122 (Eng.). The Prosecutor General also asserts that some of the work "did not comply with National Environmental Regulations for hydrocarbon activities." *Id.* ¶ 2. As the Prosecutor General notes later in his Opinion, however: "As of the date of execution of the agreement, the National Environmental Legal Framework did not contain any values setting the allowable standard limits for the remediation of soil with hydrocarbon traces." *Id.* ¶ 3.82.

"70% of the samples exceeded permissible limits imposed by the Remedial Action Plan."[938] But this assertion was based on an incorrect standard of 1,000 mg TPH per kilogram of soil, which was not the standard agreed to by the parties in the RAP. As noted above, the RAP standard was 1,000 mg TPH per liter of liquid analyzed according to the TCLP test, and the additional standard that only applied after March 20, 1997, was 5,000 mg TPH per kilogram of soil. Engineer Miño did not test any liquid using the TCLP test, and he did not test the soil from any pit that was accepted after March 20, 1997. Engineer Miño's findings do not show that any sample exceeded any standard that was applicable at the time TexPet performed the remediation.[939]

357. When applying the correct standard agreed to by the parties, the Prosecutorial Opinion recognized that "the laboratory results of the analyses obtained by technicians from the Central University of Ecuador"—which were the basis for the certification of completion of all work—"indicate that the parameters were within the limits stipulated in the RAP."[940] The independent technicians who were selected by Ecuador to conduct these analyses confirmed that the remediation was completed according to the terms of the RAP and the 1995 Settlement Agreement. It was on this basis that Jorge Albán Gómez, Undersecretary of Environmental Protection, confirmed in January 1998 that "[i]n general, the work provided for in the Contract has been performed, which can be demonstrated with the supporting documentation" and that "the contract can be considered legally and faithfully performed."[941] Thus the Albán report confirmed that the challenged statement in the 1998 Final Release—that the remediation was "fully performed"—was true. The Albán report added that, in his opinion, the 1995 Settlement

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[938] **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, p. 130 (Eng.).

The Prosecutorial Opinion also cites to and relies on the technical reports prepared by Mr. Jaime Gutiérrez Granja, Drs. Ivan Narváez Troncoso and Bolívar García Pinos, and Engineer Bedón. **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶¶ 3.61, 3.62, 3.82. As addressed in detail above (*supra* ¶¶ 349-50), these reports concluded that the remediation was performed in compliance with the Remedial Action Plan.

[939] Engineer Miño reported soil TPH above 5,000 ppm from seven pits, all of which were accepted before March 20, 1997. **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.5.

[940] **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.67.

[941] **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.78.

Agreement "is unsatisfactory for the country because it has not considered all of the environmental damages," and that "[a]n enormous environmental remediation task . . . remains to be done."[942] But the 1998 Final Release expressly found that the remediation agreed to in the 1995 Settlement Agreement was "fully performed"—a fact that the Albán report confirmed.

358. The most recent expert investigation ordered by the Prosecutor General also confirmed this fact. Engineer Bedón concluded that "100% of the present samples collected from the pits meet the established TCLP test limit."[943] The only pit that Engineer Bedón tested that was accepted after March 20, 1997, also met the 5,000 ppm TPH standard applicable after that date.[944] In short, there is no evidence that any pit exceeded the limit applicable to that pit at the time that it was accepted as remediated, as confirmed by the very evidence on which the Prosecutorial Opinion relied.

359. In addition to the technical reports confirming TexPet's compliance with its remediation obligations under the RAP, the witness testimony submitted in the Criminal Proceedings by the other seven individuals named in the Prosecutorial Opinion (as well as by one individual named only in the prosecutorial investigation, Hugo Jara) further confirms the lack of evidence that even a single pit was accepted as remediated in violation of the standards agreed to by all parties:

- Jorge Rene Dután Erráez, Hydrocarbons Specialist at the National Bureau of Hydrocarbons, declared that TexPet complied with the technical assessment parameters set forth in the Remedial Action Plan for each of the remediation

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942 **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.78. The Albán report acknowledged that "the Ecuadorian State has also been responsible for those operations and has the obligation to define its own responsibilities and actions to bring about change to remediate the affected areas and environmentally improve its own petroleum operations." *Id.*

943 **Exhibit C-346**, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.82. *See also* **Exhibit C-278**, Environmental Expert Report on the Analysis of the Environmental Remediation Works Performed at the Pits in the Aguarico 08, Atacapi 05, Lago Agrio 05, Parahuacu 03, Ron 01, Sacha 56, Sacha 57, Sacha 94, and Shushufindi 18 Well Sites, Aug. 25, 2009, at 2:43 p.m., § 9.

944 **Exhibit C-346**, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 3.82. *See also* **Exhibit C-278**, Environmental Expert Report on the Analysis of the Environmental Remediation Works Performed at the Pits in the Aguarico 08, Atacapi 05, Lago Agrio 05, Parahuacu 03, Ron 01, Sacha 56, Sacha 57, Sacha 94, and Shushufindi 18 Well Sites, Aug. 25, 2009, at 2:43 p.m., § 9.

actions, as confirmed by the Central University's analytical results reports with respect to the water and the soil and sediments.[945]

- Alix Paquito Suárez Luna, Hydrocarbons Specialist at the National Bureau of Hydrocarbons, stated that the reports that he signed approving TexPet's pit remediation were duly supported by the results from the Central University of Ecuador's laboratory analyses, which in turn were duly signed by those analysts.[946]

- Marcos Fernando Trejo Ordóñez, Environmental Specialist I at Petroproducción at the relevant time, declared that all of the environmental remediation activities were performed in conformity with the technical parameters and procedures set forth in the Remedial Action Plan and this conclusion was supported by the laboratory analyses from the Central University of Ecuador, which determined that both the water and the soil and sediment satisfied the values of the parameters stipulated in the Remedial Action Plan.[947]

- Martha Susana Romero de la Cadena, Environmental Specialist I in the Petroecuador Environmental Protection Unit, declared that TexPet complied with the technical assessment parameters set forth in the Remedial Action Plan for each of the remediation actions, as confirmed by the Central University's analytical results reports with respect to the water and the soil and sediments.[948]

- Ramiro Gordillo García, CEO of Petroecuador, declared that he signed the 1998 Final Release on the basis of all of the technical and legal reports and documents indicating that the work had been performed and after having been informed by Ecuadorian officials and technical advisors that TexPet's work had been performed in strict compliance with the parties' agreement.[949]

- Luis Albán Granizo, Vice President of Petroproducción, stated that he signed the 1998 Final Release after Petroproducción technicians, officials from the National Bureau of Hydrocarbons, and analysts from the Central University reported to him that TexPet's remediation activities had been fully completed.[950]

- Santiago Patricio Ribadeneira García, Minister of Energy and Mines who executed the 1998 Final Release, stated that in signing this Agreement, he relied on all of the documentation appended in support, the nine partial approval *Actas*

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[945] **Exhibit C-607**, Jorge Rene Dután Erráez, Unsworn Voluntary Statement, July 19, 2004; **Exhibit C-608**, Jorge Rene Dután Erráez, Free and Voluntary Statement, Sept. 9, 2009.

[946] **Exhibit C-609**, Alix Paquito Suárez Luna, Unsworn Voluntary Statement, July 20, 2004; **Exhibit C-610**, Alix Paquito Suárez Luna, Free and Voluntary Statement, Sept. 9, 2009.

[947] **Exhibit C-611**, Marcos Fernando Trejo Ordóñez, Unsworn Voluntary Statement, July 19, 2004; **Exhibit C-612**, Marcos Fernando Trejo Ordóñez, Free and Voluntary Statement, Sept. 9, 2009.

[948] **Exhibit C-613**, Martha Susana Romero de la Cadena, Unsworn Statement, July 20, 2004.

[949] **Exhibit C-614**, Ramiro Gordillo García, Free and Unsworn Statement, Aug. 6, 2004.

[950] **Exhibit C-615**, Luis Fernando Albán Granizo, Free and Voluntary Statement, Sept. 14, 2009.

that had already been signed by Ecuadorian officials, and the technical reports and laboratory reports confirming that TexPet had performed all of the work and all of its remediation obligations as agreed by the parties.[951]

- Hugo Humberto Jara Román, Undersecretary of Environmental Protection for the Ministry of Energy and Mines who signed partial approval *Acta* of November 22, 1996, declared that representatives of the National Hydrocarbons Bureau, the Undersecretariat of Environmental Protection, Petroproducción, and Petroecuador examined the laboratory results of the analyses conducted by the Central University of Ecuador and that not a single laboratory result was accepted if it was outside the parameters established for TexPet's remediation work.[952]

360. *Second*, not only is there no evidence that the remediation was not "fully performed," and thus no evidence of an act of falsehood, but even if one were to assume that the remediation was not "fully performed", it does not follow necessarily that Messrs. Veiga and Pérez are guilty of a crime. There is no evidence that Mr. Veiga or Mr. Pérez knew that to be the case. Nor is there any evidence that they knowingly or willfully committed an alleged act of falsehood, which, as the Prosecutorial Opinion acknowledged, is one of the necessary elements of the crime that has been charged.[953]

361. The Prosecutor General alleged that Messrs. Veiga and Pérez knew that the 1995 Settlement Agreement was not performed based on three categories of evidence: (1) the 1998 Albán report; (2) the 1997 Miño report; and (3) the observations made by the auditing group in 51 Working *Actas*, in particular Nos. 8, 10, 12, 13, 14, 15, 16, and 20.[954] For the reasons set forth above, none of these reports, however, contained any evidence that the 1995 Settlement Agreement was not performed.[955] Moreover, the interim Working *Actas* upon which the

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951 **Exhibit C-616**, Santiago Patricio Ribadeneira García, Free and Voluntary Statement, Aug. 24, 2009.

952 **Exhibit C-617**, Hugo Humberto Jara Román, Free and Voluntary Statement, Sept. 9, 2009.

953 **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, pp. 126-27 (Eng.) (the crime that has been charged contains "a subjective element" that "centers on the will and conscience that direct the action" of the accused—there must be "a culpable act . . . carried out willfully [and] consciously.").

954 The Prosecutor General also relied on the Plaintiffs' allegations in the Lago Agrio Complaint and on the findings in Cabrera's report as evidence of TexPet's supposedly incomplete remediation. **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, at 121-22 (Sp). However, a party's allegations in a complaint are not tantamount to evidence, and Cabrera's reports are fraught with essential errors.

955 Notably, the Albán report does *not* say, as the Prosecutor General paraphrased, that "no environmental remediation exists." **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez,

Prosecutor General relied[956] were superseded by a series of later approval *Actas*, as well as final Global *Acta* No. 52, which confirmed that, in the view of the Government inspectors, all remediation required by the 1995 Settlement Agreement had been completed. The Working *Actas* reported primarily on the status of work tasks that were pending completion at the time of issuance. The last of the ten Working *Actas* cited by the Prosecutor General was dated August 21, 1996. There were 31 Working *Actas* issued by the state inspectors after the last one cited by the Prosecutor General, and those *Actas* updated previous inspections and documented the progress of the remediation work. In these subsequent Working *Actas*, which are attached to the partial approval *Actas,* the same state inspectors recommended approval of specific pits based on their conclusion that the remediation of those pits had been completed. Thus, the partial approval *Actas* contain statements such as the following:

> Attached are the inspection *Actas* signed by the inspectors for the National Director of Hydrocarbons and Petroproducción recommending the approval of these remediated pits, as well as the individual reports for these pits, which were received by these inspectors and contain the laboratory results and the corresponding photographs.[957]

362. In the final Working *Acta*, Global *Acta* No. 52, issued on September 24, 1998, the state site-inspectors responsible for the prior 51 Working *Actas* confirmed that all work had been satisfactorily completed.[958] Neither Mr. Veiga nor Mr. Pérez signed Global *Acta* No. 52. Instead, they relied on final Global *Acta* No. 52 as well as the nine partial approval *Actas*, in signing the 1998 Final Release. Messrs. Veiga and Pérez, who are lawyers and not technical experts, were entitled to rely on those approval *Actas* when they signed the 1998 Final Release the following week—not a group of interim Working *Actas* issued two years earlier that had long since been superseded.

DRR/PVC/ASC, Apr. 29, 2010, p. 130 (Eng.). To the contrary, it said that the 1995 Settlement Agreement was "**faithfully performed**." *Id.* ¶ 3.78 (bold in original).

[956] **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, at 71-77 (Eng.).

[957] **Exhibit C-50**, Approval *Acta* of Mar. 20, 1997; **Exhibit C-52**, Approval *Acta* of Oct. 16, 1997.

[958] **Exhibit C-457**, Global *Acta* No. 52, Sept. 24, 1998.

363. In sum, none of these items—the Albán report, the Miño report, or the 51 Working *Actas*—contained any evidence that any pit was accepted in contravention of any remediation standard that was applicable at the time. None contained any evidence that the 1995 Settlement Agreement was not performed, and none provided any evidence that Mr. Veiga or Mr. Pérez was aware that the Release they were signing was false.

364. *Third*, the vague observation in the Prosecutorial Opinion that current officials of Petroproducción disagree with the designation in the RAP of some pits as "No Further Action" or "Change of Condition"[959] is an insufficient basis for a criminal charge of falsity. That the "opinion" of officials "currently responsible" for operations differs from determinations made at the time of the agreement does not establish as a matter of *fact* that the 1995 Settlement Agreement was not performed. The 1995 Settlement Agreement required the development of a RAP, and the RAP—which was approved and executed by Ecuador and Petroecuador—identified the pits that required "no further action." Thus, the 1995 Settlement Agreement did not require remediation of those pits, whatever "opinion" officials today might offer about those pits. Likewise, the RAP provided that no remediation was required when observations made during the remediation process indicated that conditions had changed since the initial remedial investigation due to the activities of Petroecuador or its affiliates. When such a pit was encountered, officials of Petroproducción *at the time* confirmed the pit's status, with the result that it was exempted from remediation.

365. Nor is there evidence that Mr. Veiga or Mr. Pérez knew that any pits designated as "No Further Action" or "Change of Condition" pits did not qualify for those designations. The Criminal Proceedings do not even allege that Messrs. Veiga and Pérez were involved in the decisions to classify certain pits as "No Further Action" or "Change of Condition" pits. Similarly, Messrs. Veiga and Pérez, who lacked any specific technical knowledge of the remediation performed by TexPet, were entitled to rely on independent expert reports and technical studies conducted by TexPet, Petroecuador, and the Ministry of Energy and Mines, and approved by Ecuador, before signing the 1998 Final Release. They had no reason to doubt the accuracy and the quality of those studies.

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[959] **Exhibit C-346,** Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, Apr. 29, 2010, ¶ 2.

11. The Current Status of the Criminal Proceedings

366. The Prosecutorial Opinion completes the investigation phase. The Opinion was transferred to the First Criminal Chamber of the National Court of Justice, which ordered on June 17, 2010, that the accused individuals be notified of the Prosecutorial Opinion.[960] Within ten days of notification of the Prosecutor's Opinion, the National Court of Justice must summon the parties to a preliminary hearing, to be held between 10 and 20 days from the date of the summons.[961] This hearing should have been held no later than July 18, 2010. To date, however, the National Court of Justice has not summoned the parties to a preliminary hearing.[962]

367. Messrs. Veiga and Pérez have filed several letters with the Comptroller General and the First Criminal Chamber of the National Court of Justice, requesting copies of more than 50 documents that are cited and relied upon in the CG Report and the Prosecutorial Opinion but are not included in the investigative file.[963] To date, the Comptroller General has answered only one letter,[964] and the Court has answered none.

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960 **Exhibit C-384**, Order by Judge Luis Moyano Alarcón, First Criminal Chamber of the National Court of Justice, June 17, 2010.

961 **Exhibit C-235**, Ecuadorian Code of Criminal Procedure, Art. 228.

962 Immediately after hearing the parties at the preliminary hearing (or at most within 72 hours), the judge can issue an order to stand trial (**Exhibit C-235**, Art. 232 of the Ecuadorian Code of Criminal Procedure), which can be appealed within three days (**Exhibit C-235**, Arts. 343, 344 of the Ecuadorian Code of Criminal Procedure). If affirmed on appeal, the trial will proceed in the appropriate criminal court, which must set a date and time for the trial hearing. At the close of the trial, the court must rule after proper deliberation, but no later than the following day. **Exhibit C-235**, Art. 306 of the Ecuadorian Code of Criminal Procedure.

963 *E.g.*, **Exhibit C-618**, Letter from Donoso and Donoso to the President of the First Criminal Chamber of the National Court of Justice, June 14, 2010 (requesting a copy of the Miño report); **Exhibit C-634**, Letter from Donoso and Donoso to the Comptroller General, June 14, 2010 (same); **Exhibit C-620**, Letter from Donoso and Donoso to the President of the First Criminal Chamber of the National Court of Justice, June 18, 2010 (requesting 47 documents); **Exhibit C-619**, Letter from Donoso and Donoso to the Comptroller General, June 17, 2010 (same); **Exhibit C-621**, Letter from Donoso and Donoso to the Comptroller General, June 29, 2010 (requesting 6 documents); **Exhibit C-622**, Letter from Donoso and Donoso to the First Criminal Chamber of the National Court of Justice, June 29, 2010 (same); **Exhibit C-623**, Letter from Donoso and Donoso to the Prosecutor General, Aug. 2, 2010 (requesting 1 document).

964 **Exhibit C-624**, Letter from the Office of the Comptroller General to Donoso and Donoso, Aug. 3, 2010 (responding to Donoso and Donoso letter dated June 29, 2010 requesting 6 documents).

12. The Criminal Proceedings Have Caused Significant Harm to Chevron and its Lawyers

368. Ecuador's pursuit of the Criminal Proceedings has not only adversely impacted Chevron's ability to defend the Lago Agrio Litigation, but has also affected Messrs. Veiga's and Pérez's personal and professional well-being.

369. *First*, the Criminal Proceedings have impeded Claimants' defense of the Lago Agrio Litigation. Messrs. Pérez and Veiga have been key actors on behalf of Claimants. They negotiated and signed the 1998 Final Release at issue, and Mr. Veiga was in charge of Chevron's defense of that Litigation before the Criminal Proceedings were instituted. Fear of being jailed on the bogus charges has forced Mr. Pérez and his wife to leave Ecuador and has prevented Mr. Veiga from traveling there.

370. Mr. Veiga's inability to travel to Ecuador has limited his ability to perform his professional responsibilities to defend Chevron fully against the litigation pending in Lago Agrio.[965] That is precisely why Plaintiffs' lawyer Donziger has been so intent on the prosecution of the Criminal Proceedings: to exclude from Claimants' defense team Mr. Veiga, because "[n]o one else knows what's goin' on down there."[966]

371. *Second*, the explosive situation facing Claimants' lawyers in Ecuador has caused and is continuing to cause extraordinary stress, mental anguish, and emotional harm to Messrs. Veiga and Pérez.[967] Following the re-opening of the preliminary investigation in 2008, Mr. Pérez, an Ecuadorian national, was forced to leave his home in Ecuador in 2008 and relocate with his wife to the United States for fear of his personal safety.[968] He is a 72-year-old man with a spotless reputation and record for the past 40 years as a practicing lawyer in Ecuador and

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965 R. Veiga Witness Statement, ¶ 57.

966 **Exhibit C-360**, *Crude* Outtakes, at CRS072-00-CLIP 03 (undated).

967 Plaintiffs' lawyer Donziger revealed his intent to exert "personal psychological pressure on [Texaco, Inc.'s] top executives," stating that one has to identify and strike the opponent's vulnerability. **Exhibit C-360**, *Crude* Outtakes, July 24, 2006, at CRS104-01-CLIP 01.

968 R. Pérez Pallares Witness Statement, ¶¶ 4-5.

deeply suffers from his reputation being slandered in the press by the ROE and by the Lago Agrio Plaintiffs' lawyers.[969]

372. Similarly, the Criminal Proceedings have caused significant distress for Mr. Veiga and his family, and have been deeply painful and harmful to them.[970] The Criminal Proceedings' attack on Mr. Veiga's character and professionalism have impeded his ability to perform his professional responsibilities to defend Chevron and instead have required Messrs. Veiga and Pérez to expend enormous amounts of time and energy defending themselves and their reputations in the context of the Criminal Proceedings.

III. ECUADOR BREACHED ITS SETTLEMENT AGREEMENTS WITH CLAIMANTS

373. Under Article VI(1)(a) of the BIT, Claimants are entitled to adjudicate before this Tribunal any dispute "arising under or relating to" an investment agreement between Ecuador and TexPet and Chevron. For the reasons set out in Claimants' Counter-Memorial on Jurisdiction (filed simultaneously with this Memorial), the 1995, 1996, and 1998 Settlement and Release Agreements constitute investment agreements.[971] They also "relat[e] to" the 1973 Agreement, which indisputably qualifies as an investment agreement, as determined by the *Commercial Cases Dispute* tribunal.[972] Under Article II(3)(c) of the BIT, Ecuador is required to "observe *any* obligation it may have entered into with regard to investments."[973] Each of these Treaty provisions constitutes an independent basis for this Tribunal to hold Ecuador liable for its breaches of the Settlement and Release Agreements in this case.

A. Ecuador Breached Its Investment Agreements with Claimants

374. At least on its face, Ecuador law is based on the same fundamental principles as the legal systems of other civilized nations. Quite simply, contracts must be complied with in

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969 R. Pérez Pallares Witness Statement, ¶ 7.

970 R. Veiga Witness Statement, ¶ 56.

971 Claimants' Counter-Memorial on Jurisdiction, Sept. 6, 2010, § III.C.

972 *Id.,* § III.C.2(i).

973 **Exhibit C-279**, U.S.-Ecuador BIT, Art. II(3)(c) (emphasis added), CLA-1.

good faith.[974] The U.S.-Ecuador BIT reiterates these duties as applied to the Ecuadorian State. It expressly obligates Ecuador to "observe any obligation it may have entered into with regard to investments." The affirmative obligation to treat U.S. investors "fair[ly] and equitabl[y]"[975] also presupposes obligations of good faith and natural justice.[976] International law also requires Ecuador to perform these treaty obligations in good faith.[977] And the BIT gives U.S. investors the right to adjudicate before this Tribunal any dispute alleging a breach of contract that "aris[es] under or relat[es] to" an investment agreement.

375. Ecuador has breached the Settlement and Release Agreements and violated its substantive BIT obligations. From virtually the inception of Claimants' investment in Ecuador, the Government was the principal owner and beneficiary of the Consortium. At the end of the investment, the Government again negotiated an advantageous bargain; it mandated a multi-year, technical process to determine the scope of environmental remediation of the former Concession area that resulted in TexPet providing millions of dollars of remediation work and funds for socio-economic projects for the neighboring communities. To obtain this bargain, it held itself out as the sole authority to settle environmental disputes.[978] As consideration, it forever released Claimants from "any and all" future claims for public environmental impact arising out of the

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[974] **Exhibit C-34**, Ecuadorian Civil Code, Art. 1562 ("Contracts must be performed in good faith and, consequently, they not only obligate [the parties] to the matters expressed therein but also to all matters precisely deriving from the nature of the obligation or belonging to it according to the law or custom."). *See also* **CLA-29**, UNIDROIT Principles of International Commercial Contracts, Art. 1.7 (2004) ("Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty."). Comment 2 to the UNIDROIT Principles states, "[t]he Principles do not provide any express definition, but the assumption is that the concept of 'commercial' contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, *such as investment and/or concession agreements*, contracts for professional services, etc." **CLA-30**, UNIDROIT Principles of International Commercial Contracts, Preamble cmt. 2 (2004) (emphasis added).

[975] **Exhibit C-279**, U.S.-Ecuador BIT.

[976] *See, e.g.*, **CLA-31**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ("*Tecmed* Award"), ¶ 153 n.189 (Horacio A Grigera Naón (President); José Carlos Fernández Rozas; and Carlos Bernal Verea), quoting *S.D. Myers, Inc. v. Government of Canada*, Ad hoc—UNCITRAL, Partial Award, Nov. 13, 2000 ("*S.D. Myers* Partial Award"), ¶ 134 (Bryan P Schwartz; Edward C Chiasson; and J. Martin Hunter).

[977] *See* **CLA-10**, Vienna Convention on the Law of Treaties, Art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1969). The BIT also requires Ecuador to act in good faith under the fair and equitable treatment standard. *See* **CLA-31**, *Tecmed* Award, ¶ 153 (concluding that fair and equitable treatment is "an expression and part of the *bona fides* principle recognized in international law.").

[978] R. Veiga Witness Statement, ¶¶ 17, 31, 39, 40.

Consortium's former oilfield activities and from any further obligation to pay for any such environmental impact. The Lago Agrio Litigation solely concerns such claims, and therefore, Claimants have the related *res judicata* right to be free from any legal process relating to them.

376. But soon after signing the Final Release Agreement, Ecuador began a process to effectively undermine the releases that it had conferred on Claimants for valuable consideration. Knowing that the Lago Agrio Plaintiffs had "agreed in legal documents not to sue the State . . . for causing environmental damage;"[979] that any funds obtained from Claimants would be managed, or even retained, by the State;[980] and that Petroecuador purportedly lacked the funds to perform its share of environmental remediation in the Oriente,[981] Ecuador began to repudiate its contractual agreements. In alliance with the Lago Agrio Plaintiffs' attorneys, it enacted and retroactively applied a new law that conferred standing on private parties to bring an action for the same matters addressed by the State's settled claims, and through truncated procedures that prevent Claimants from mounting an effective defense. Despite its clear, contractual and treaty obligations, the State refused to notify the court of the validity and applicability of its release, or indemnify Chevron for any ordered remediation or remuneration relating to those claims. Instead, it entered into a working relationship with Plaintiffs with the express purpose of "nullify[ing] or undermin[ing] the value" of those Agreements. As the Lago Agrio Litigation proceeded, the State has publicly and pointedly pressured the judicial branch to rule against Chevron. The Lago Agrio Court, in turn, has effectively ignored Plaintiffs' rampant fraud in those proceedings—which, under Ecuador's investment agreements with Claimants, should never have been allowed to be brought in the first place. This is anything but the "good faith" to which Claimants are entitled.

1. *Res Judicata* Rights Are Essential to Finality and Legal Security

a. *Res Judicata* Creates a Right to Be Free from Any Further Legal Process

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[979] **Exhibit C-77**, *Texaco-The Time has come*, EL HOY, Apr. 14, 1997.

[980] **Exhibit C-484**, Letter from C. Bonifaz to I. Baki, Nov. 15, 2000.

[981] *See supra* ¶¶ 146-148.

377. *Res judicata* is a universally-accepted principle that bars lawsuits involving questions already resolved, whether through settlement or judicial decision, from being litigated more than once.[982] The primary rationale for this doctrine is the need for finality, which is expressed in the maxim *interest res publicae ut sit finis litium* ("it is in the public interest that there should be an end to litigation").[983] Ecuadorian law emphasizes the importance of *res judicata* as a necessary component of a legal system if it is to provide finality and legal security. As underscored by the Ecuadorian Supreme Court:

> We unanimously recognize the binding nature and firmness of a judgment with the effect of *res judicata*, qualities that uphold universal compliance with the ruling to guarantee the end of the proceeding and its subsequent indisputability, to prevent new adjudications and decisions between the same parties on the same matter—*non bis in idem*—thereby avoiding instability in legal situations that have been explicitly defined by the legal judgment.[984]

378. The Supreme Court thus declared *res judicata* a foundational element of the principle of legal certainty.[985]

b. A *Res Judicata* Defense Must Be Decided before Litigation on the Merits

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[982] **CLA-75,** Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, AFR. J. INT'L. AND COMP. L. 38 (1996)*;* D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence,* 33 BRIT. Y.B. INT'L L. 176, 179 (1957)*;* **CLA-180,** *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. REP. 47, 53 (July 13) (*res judicata* is a "well-established and generally recognized principle of law"); **CLA-8,** *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Resubmission), May 10, 1988 ("*AMCO* Decision on Jurisdiction (Resubmission)"), 89 I.L.R. 552, 560 (1992) (Rosalyn Higgins (President); Marc Lalonde; and Per Magid); *Southern Pacific Railway Co. v. U.S.,* 18 S.Ct. 18 (1897).

[983] **CLA-179,** D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176, 179 (1957).

[984] **CLA-182,** Supreme Court Reporter, Year: XLVII. Series X. No. 4. p. 2266. *See also* **CLA-183,** Sentencia No. 008-09-SEP-CC; Caso No. 0103-09-EP (Juez Sustanciador: Roberto Bhrunis Lemarie, J.) (2009), II (Consideraciones y Competencia) (Acción Extraordinaria de Protección) ("Decisions affirmed upon their final and definite appeal turn into *res judicata*; they thus become definite and immutable and come to embody a singular, concrete, and imperative mandate, not because they issue from the judge's will, but because of the law's command.") and Gaceta Judicial, sentencia de 10 de octubre de 1977, Año LXXVIII, Serie XIII, No. 1, p. 128.

[985] **CLA-185,** Sentencia No. 005-09-SEP-CC; Caso No. 0112-09-EP (Juez Sustanciador: Edgar Zárate Zárate, J.) (2009), 3ra Consideración. *See also* **CLA-186,** Sentencia No. 835-2003-RA; Caso No. 00118-98-TC (2003) (Voto Salvado: Milton Burbano Bohórquez and Simón Zavala Guzmán, JJ.).

379. In order for the *res judicata* doctrine to serve its underlying purpose of providing for finality and legal security, a litigant's *res judicata* defense should be decided at the beginning of a case, rather than after litigation on the merits, which after all can take—and in Lago Agrio has taken—many years to resolve. This is because a *res judicata* right is the right to be free from any further legal process, not merely the right to prevail on a defense at the end of a case.

380. A legal system or court thus undermines the underlying aim of a fair and efficient administration of justice when it refuses to recognize at the outset of the case a legitimate *res judicata* claim, or when it delays such recognition in any significant way.[986] If a court waits to dismiss a case on *res judicata* grounds until the end of a merits proceeding, it certainly fails both to protect the defendant from the "burden of re-litigating" and to prevent "needless litigation."[987] After all, if a defendant is forced to try the same case on the merits over and over again, then ultimately winning each case because it is barred by law does not vindicate his *res judicata* right to be free of repeated litigation of the case in the first place, with all of the time, effort, expense, and uncertainty involved.[988]

2. *Res judicata* Applies to Settlements

381. The Ecuadorian Civil Code expressly defines a settlement agreement as a "contract in which the parties extrajudicially terminate a pending litigation or prevent a potential litigation."[989] It goes further to expressly provide: "A settlement agreement has the effect of *res judicata*."[990] Many other civil law countries also expressly provide in their Civil Codes that settlements have *res judicata* effect.[991] Examples include France (in its 1804 Civil Code), Mexico, Argentina, Colombia, Peru, Costa Rica, Uruguay, Nicaragua, Honduras, Venezuela, Bolivia, and Paraguay.[992]

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986 A. Oquendo Expert Report, ¶ 44.

987 *Id*.

988 *Id*.

989 **Exhibit C-34**, Ecuadorian Civil Code, Art. 2348.

990 **Exhibit C-34**, Ecuadorian Civil Code, Art. 2362.

991 A. Oquendo Expert ¶ 49; First Barros Expert Report ¶¶ 69–77.

992 **CLA-187**, Civ. Cd. (Fr.) (1804), Art. 2052 ("*Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort*."); **CLA-188**, Civ. Cd. (Chile) (1857), Art. 2460 ("*La transacción produce el efecto de cosa*

382. According *res judicata* effect to settlements serves several key policy objectives. As explained by the comparitivist and Chilean Civil Code expert Professor Enrique Barros (Ecuador's Civil Code is based on Chile's), it protects both corrective and commutative justice and incentivizes settlements.[993] It protects corrective justice because if the parties compromise and the victim is compensated, it is unjust to require the offender to pay again or to pay more for the same thing.[994] It protects commutative justice (*i.e.*, the situation resulting from a free and fair exchange) because if parties are willing to sacrifice some of what they seek in exchange for a guarantee that the dispute will not be raised again, their agreement to do so should be honored.[995] And it incentivizes settlements because the parties can have confidence that a settled dispute will remain so, which promotes the resolution of disputes, with legal stability and finality.[996]

3. The Elements of *Res Judicata*

383. Under Ecuadorian law, *res judicata* bars a dispute that already has been resolved concerning the same objective identity and the same subjective identity.[997] Objective identity has two components: (i) the *causa petendi*, and (ii) the *petitium*, or object of the lawsuit. Subjective identity has one component: the parties to the lawsuit.

a. The *Causa Petendi*

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juzgada en última instancia."); *See* **CLA-189**, Bernardino Bravo Lira, *Civil Codification in Iberian America and on the Iberian Peninsula (1827-1917): National v. Europeanized Law*, FUENTES IDEOLÓGICAS Y NORMATIVAS DE LA CODIFICACIÓN LATINOAMERICANA (1992); translated and reproduced in OQUENDO (2006), at 402. *See also* **CLA-190**, Civ. Cd. (Arg.) (1871), Art. 850 ("*La transacción extingue los derechos y obligaciones que las partes hubiesen renunciado, y tiene para con ellas la autoridad de la cosa juzgada*."); **CLA-191**, Civ. Cd. (Colom.) (1887), Art. 2483 ("*La transacción produce el efecto de cosa juzgada en última instancia*."); **CLA-192**, Fed. Civ. Cd. (Mex.) (1928), Art. 2953 ("*La transacción tiene, respecto de las partes, la misma eficacia y autoridad que la cosa juzgada…*"); **CLA-193**, Civ. Cd. (Peru) (1984), Art. 1302 ("*La transacción tiene valor de cosa juzgada*."); **CLA-193**, Civ. Cd. (Peru) (1984), Art. 1302 ("*La transacción tiene entre las partes la misma fuerza que la cosa juzgada*.").

993 First Barros Expert Report ¶ 76.

994 *Id*.

995 *Id*.

996 *Id* ¶ 77.

997 **Exhibit C-34**, Article 297 of the Ecuadorian Code of Civil Procedure defines *res judicata*: "A non-appealable judgment shall be irrevocable with respect to the parties to the suit or the legal successor. Therefore, a new lawsuit cannot be filed when the two suits have the same subjective identity, established by virtue of the same parties, and the same objective identity, which consists of claiming the same thing, quantity or fact based on the same cause, reason, or right."

384. The "same *causa petendi*" element concerns the plaintiff's justification for the relief it is demanding.[998] That justification concerns both a claim's factual elements and its legal basis.[999] Professor Barros explains that it is "why the complaint is being made….*Causa petendi* has also been understood to mean 'the legal or material fact that gives rise to the right being asserted[.]'"[1000] Colombian scholar Hernando Devis Echandía explains *causa petendi* as follows:

> The *causa petendi* is the foundation or reason alleged by the plaintiff, in order to obtain the object of the claim contained in the complaint.
>
> …
>
> Consequently, the *causa petendi* is the reason of fact which is set out in the complaint as the foundation of the claim, which is the same legal foundation of the requested right; which foundation is formed precisely by the facts that are affirmed as support or immediate source of the claim and of which facts the effects which are wished to be obtained with the decision are deduced.
>
> In other words, it is the factual situation that allegedly affects a subjective right that forms the basis for the claim. [1001]

b. The Object

385. The "object" concerns both what is actually sought and what could have been sought under the *causa petendi*. As Professor Barros explains, "The object sought…is an element concerning what the parties seek to obtain in the proceedings or the subject of the

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998 **CLA-195**, Eduardo Couture, FUNDAMENTOS DE DERECHO PROCESAL CIVIL [Foundations of Civil Procedure Law], at 399 (3d ed., Ediciones Depalma, Buenos Aires, 1990). *See also* **CLA-196**, Cristián Maturana, *Relación entre litispendencia, la acumulación de autos y la cosa juzgada* [The Relationship among *Lis Pendens*, the Consolidation of Cases, and *Res Judicata*], Thesis to apply for a graduate degree in Legal and Social Sciences, Universidad de Chile, Santiago, at 374 (1982) (the *causa petendi* is the "physical or legal act that serves as the basis for the claim that is asserted"); **CLA-197**, Marcel Planiol, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL [Elementary treatise on civil law], Vol. II, at 23 (3d ed., Pichon et Durand-Auzias, Paris, 1905) ("the legal or physical fact that serves as the basis for a right that is asserted or a defense that is set up").

999 **CLA-198**, Andrés de la Oliva, OBJETO DEL PROCESO Y COSA JUZGADA EN EL PROCESO CIVIL [The object of the lawsuit and res judicata in the civil lawsuit], at 182 (Thompson Civitas, Madrid, 2005).

1000 First Barros Expert Report, ¶ 89 (citing Marcel Planiol, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL [Elementary treatise on civil law], Vol. II, at 23 (3d ed., Pichon et Durand-Auzias, Paris, 1905)).

1001 **CLA-199**, Hernando Devis Echandía, NOCIONES GENERALES DE DERECHO PROCESAL CIVIL [General Bases of Civil Procedural Law], at 258 (Temis, Bogota 2009).

settlement."[1002] In other words, it is the vindication of the legal right at issue—"[t]he item sought is the *legal benefit* that the suit aims to obtain."[1003]

386. The vindication of the legal right at issue is broader than the tangible relief that the plaintiff seeks. "[S]ameness does not depend on the specific item itself being requested nor on the particular terms used by the parties to refer to it…The object sought is the same [even when] the item sought is actually different [if] the legal and economic benefit pursued is the same."[1004] As the Ecuadorian Supreme Court explained, it "shall not be understood as the material thing upon which the *in rem* right is attached or the basic content to which the obligation is referred to, but rather *the final aim the parties had when they set forth their claims*, through action or defense; in other terms, what was the subject of the discussion and the decision."[1005] For this reason, the "same object" inquiry covers not only what was claimed by the plaintiff in the earlier lawsuit (or potential lawsuit that was settled), but also what could have been requested at that time.[1006]

c. The Parties

387. The "same parties" element does not require a physical identity between the parties to two disputes, but rather a legal identity.[1007] A determination of the legal identity of the parties involved in a dispute requires identification of the real parties in interest and an analysis of the legal capacity in which those parties act.[1008]

388. The real party in interest to a dispute may act on his own behalf or through a proper representative. As Hernando Devis explains:

[1002] First Barros Expert Report, ¶ 126.

[1003] *Id*. ¶ 127 (emphasis in original).

[1004] *Id*. ¶ 128; Romero Expert Report ¶ 104.

[1005] **CLA-200**, Official Registry No. 506, Jan. 18, 2005, File 98 (emphasis added).

[1006] *See, e.g.,* **CLA-201**, Alejandro Romero, *op. cit*. p. 69, and Andrea Proto, *Appunti sul giudicato civile e soui limiti oggettivi*, *in* Rivista de Diritto Processuale, Vol. XLV, at 389 *et seq*. (Padova, Cedam 1990).

[1007] **CLA-195**, Eduardo J. Couture, FUNDAMENTOS DE DERECHO PROCESAL CIVIL [Foundations of Civil Procedure Law] 424-425 (§276) (1942) ("*El problema de la identidad de partes no se refiere, como se ve, a la identidad física, sino a su identidad jurídica*.").

[1008] First Barros Expert Report, ¶ 164.

> A judgment does not cause *res judicata* except when the same parties are involved. This does not mean the identity of the persons must be the same, because we know that not all the people who appear at a trial as parties are acting on their own behalf, as they often act via their agents or representatives ....[1009]

Professor Barros provides an example:

> [I]f a minor appears in proceedings represented by his mother, it is the minor who is the party in the proceedings, not the mother who is representing him. If the minor appears in another set of proceedings represented by his father, the parties will be the same because in this case, the minor is also the interested party; only his representative has changed. But in both cases, the effects of the proceedings will be in regard to the minor whose interests have been represented in the proceedings.[1010]

Thus, for purposes of a *res judicata* analysis, the "same parties" element refers to a required identity between the persons or entities who hold the substantive rights at issue in both disputes and who will ultimately benefit from the resolution of the disputes.

389. These elements of *res judicata* trace their origins to Roman law and the French author Pothier, and are generally accepted throughout the civil law tradition.[1011]

4. Diffuse and Individual Rights Are Fundamentally Distinct

390. The application of *res judicata* in this dispute centers on the distinction between diffuse and individual rights. The 1999 EMA, which forms the legal basis of the Lago Agrio Complaint, is part of a larger trend in Latin America regarding legal regimes to protect the environment.[1012] It is one example of increasingly common legal regimes for the enforcement of diffuse rights, which are fundamentally distinct from individual rights. Diffuse rights are public, collective, non-individual rights that belong to everyone, such as the right to live in a clean

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[1009] **CLA-199**, Hernando Devis Echandía, *Compendio de Derecho Procesal* [Compendium of Procedural Law]. Vol. I, General Theory of Procedure, at 464 (5th ed., Editorial ABC, Bogotá 1976).

[1010] First Barros Expert Report, ¶ 167.

[1011] *Id*. ¶¶ 60–65.

[1012] Ecuador's Interim Measures Response, May 3, 2010, Appx. B, ¶¶ 3-4.

environment and the right to have buildings of cultural and historical significance preserved.[1013] By contrast, individual rights are the traditional rights belonging to an individual, such as the right to compensation if someone negligently injures another person's property or body. For example, scholars on group litigation recently developed the Model Code of Collective Suits for Iberian-America, approved by the General Assembly of the Iberian-American Institute of Procedural Law in October 2004. The Model Code provides that group litigation can be filed to protect one of two different categories of rights—diffuse or individual:

> Art. 1: The collective action will be a lawsuit for the defense of:
>
> I – diffuse interests or rights, understood as transindividual, and indivisible by nature, that belong to a group, category or class of persons connected by circumstances of fact, or linked between them or with the other party by a juridical basis
>
> II – individual homogeneous interests or rights, understood as the whole of individual rights, running from a common origin, that belong to the members of a group, category or class.[1014]

391. As explained by comparative-law expert Professor Angel Oquendo, throughout Spanish America, Brazil, and the United States, diffuse rights (in the United States, analogous legal concepts) belong to everyone and are distinct from individual rights: "[I]ndividual rights, which allow division, stand in contrast with 'diffuse rights,' which are indivisible and belong to society as a whole or to a large community. The category of diffuse rights includes generalized rights that have been recognized nationally or internationally, such as the right to a healthy

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[1013] Ecuador argued that the distinction between diffuse and individual rights is artificial and was raised for the first time in this case. Hearing on Interim Measures, London, Day 2, at 122. To the contrary, every system of law draws this distinction. Moreover, Claimants drew this distinction from the very beginning. First, it is how they understood the Release Agreements when negotiating and executing them. R. Veiga Witness Statement, ¶¶ 21, 28. Second, Claimants raised this distinction in the letter of October 6, 2003, which they sent the government upon receiving the Lago Agrio complaint and before Chevron appeared and filed an answer. Third, Chevron raised this issue in its answer in the Lago Agrio Litigation. Fourth, Claimants and Ecuador litigated this distinction in the AAA litigation in the Southern District of New York. In fact, Martha Escobar, an attorney for Ecuador, expressly used the word "*difuso*" in her deposition in that litigation. **Exhibit C-167,** Dr. Martha Escobar Deposition Transcript, Excerpts, Nov. 21, 2006.

[1014] **CLA-58**, Model Code of Collective Suits for Iberian-America, Art. 1, approved by the General Assembly of the Iberian-American Institute of Procedural Law in October 2004. The Model Code provides for group litigation of both kinds of rights. Thus, for instance, individual homogenous rights as defined in Art. 1(II) concern individual rights or claims belonging to different people but arising out of the same facts.

environment[.]"[1015] Because claimed violations of diffuse and individual rights are distinct, they may arise in the same factual context. For instance, a general claim of contamination to the environment, which has allegedly violated the public's indivisible right to a clean environment, concerns a diffuse right.[1016] At the same time, claims by individuals that the same contamination caused them specific personal injury or damage to their private property concern individual rights.[1017]

392. Several aspects of diffuse rights are universal. They are by definition indivisible and thus they are always enforced through representatives. In addition, the acts of a representative are binding on everyone—not just the formal parties to litigation or a settlement. Scholars refer to this principle as *res judicata erga omnes*. As Professor Barros explains: "For several years, the literature and case law have recognized that a ruling resolving conflicts concerning diffuse rights has *erga omnes* effects, that is, it produces effects 'on everyone' or 'towards everyone' and does not merely affect those who participated actively in the proceedings."[1018] Historically, the *res judicata* effects of a diffuse-rights action presented less of an issue because only governments could assert such actions: "Traditionally, only the government was entitled to vindicate diffuse rights…many jurisdictions in the Western Hemisphere have started allowing individuals and organizations to take on this representative role…The legal systems in question have invariably established that a final decision on the merits, upon the initiative of one representative, precludes other potential representatives from filing a new action."[1019]

393. The *res judicata* effects of a diffuse-rights judgment or settlement are *erga omnes* because any other approach violates finality and repose. Under any other approach, it would be

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[1015] A. Oquendo Expert Report ¶ 31. Ecuador argued at the provisional measures hearing that there is no *parens patrie* doctrine under well-settled principles of Ecuadorian law. Hearing on Interim Measures, London, Day 2, at ~ 80-90. But there is an express provision in the Constitution that creates a diffuse right to a clean environment and obligates the State to enforce that right. That is an analogous legal concept to the *parens patrie* doctrine; it serves the same social purpose and is subject to the same universal principles of due process.

[1016] **CLA-63,** *See* Angel R. Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 Colum. J. Transnat'l L. 248, 251, 254 (2009).

[1017] *Id*.

[1018] First Barros Expert Report, ¶ 211.

[1019] A. Oquendo Expert Report ¶ 36.

impossible to achieve a complete and comprehensive resolution of public-law claims, because a different actor could ignore the settlement and sue again for more. In that situation, the settlement would be binding on the defendant, but not on the real plaintiff-in-interest—the community. That situation would undermine the entire point of diffuse-rights litigation, which is not only the enforcement, but also the final *resolution*, of public interest disputes. That in turn would undermine the enforcement of diffuse rights by discouraging settlement of disputes since a defendant could never finally resolve the issue. And that in turn would undermine the ability of any representative ever to adequately represent the community. As Professor Oquendo states:

> The fact that all of these jurisdictions bar potential posterior plaintiffs from enforcing the same diffuse rights is not surprising. The very notion of representative litigation requires such an approach. If representatives were not able to bind the entire community—including any of its members with similar standing to vindicate its diffuse rights, they would not really be representing it in a full sense….Allowing reiterated vindication of the same diffuse rights would, furthermore, encroach precisely upon the fundamental aims of efficiency and fairness that the doctrine of *res judicata* seeks to advance….For these reasons, the law throughout the Americas is uniform that the resolution of a diffuse-rights action has *erga omnes* effects.[1020]

Professor Barros agrees: "The *erga omnes* effect prevents anyone from claiming that the ruling is not binding on him because he did not actively participate in the defense of the collective right. Otherwise, legal proceedings would multiply until they found the most advantageous forum, thereby resulting in severe legal uncertainty for the defendant."[1021]

5. *Res Judicata* Bars the Lago Agrio Litigation

a. The Ecuadorian Government, Provinces, and Municipalities Released Claimants from Liability for All Diffuse-Rights Claims

394. During the negotiation and execution of the Settlement and Release Agreements, the Ecuadorian governmental entities that released TexPet purported to act—and indeed did

[1020] A. Oquendo Expert Report, ¶ 56.

[1021] First Barros Expert Report, ¶ 214.

act—on behalf of their citizens and communities. In so doing, Ecuador released TexPet from all diffuse-rights claims related to the environment.

(i) Ecuador Released All Diffuse-Rights Claims in the 1995 Settlement Agreement

(a) The Plain Language of the 1995 Settlement Agreement

395. The 1995 Settlement Agreement provides that in exchange for completing the Scope of Work, TexPet will be discharged from "*all of its legal and contractual obligations and liability for Environmental Impact* arising out of the Consortium's operations."[1022] "Environmental Impact" is defined as "[a]ny solid, liquid or gaseous substance present or released into the environment in such concentration or condition, the presence or release of which *causes, or has the potential to cause harm to human health or the environment*."[1023] This release is much broader than the narrow interpretation that Ecuador asserts. The reference to "harm to human health or the environment" goes well beyond any narrow interest of the Government's proprietary interest and was clearly designed to protect the public.

396. Article 5.2 of the 1995 Settlement Agreement clarifies the comprehensive nature of the release:

> The Government and Petroecuador intend "*claims*" to mean any and all claims, rights to claims, … *common or civil law or equitable causes of action* and penalties whether sounding in contract or *tort, constitutional, statutory, or regulatory causes of action* … (including, but not limited to, causes of action under *Article 19-2 of the Political Constitution* of the Republic of Ecuador …) for or in any way related to contamination, including but not limited to consequences of *all types of injury that the Government or Petroecuador might allege concerning persons, properties, business, reputations*, and all other types of injuries that may be measured in money, including but not limited to, *trespass, nuisance,* negligence, strict liability, breach of warranty, or any other theory or potential theory of recovery.[1024]

[1022] **Exhibit C-23**, 1995 Settlement Agreement, Preamble (emphasis added).

[1023] *Id.*

[1024] **Exhibit C-23**, 1995 Settlement Agreement, Preamble (emphasis added).

Article 5.2 expressly cites Article 19.2 of the Ecuadorian Constitution and releases all claims based on it. That Article provided that all citizens had "the right to live in an environment free of contamination" and placed the "duty [on] the State to ensure that this right will not be affected and to watch over the protection of nature."[1025] Thus, the 1995 Settlement Agreement expressly releases all claims based on the community's right to live in a clean environment arising out of the environmental impacts of the former consortium's operations.

(b) TexPet's Consideration for the Release

397. Pursuant to the terms of the 1995 Settlement Agreement, TexPet performed extensive remediation and community work—work that was verified by the international engineering firm Woodward-Clyde, and completed to the satisfaction of the Government.[1026]

398. In all, TexPet spent approximately US$ 40 million for remediation and community projects—an amount that makes little sense if the 1995 Settlement Agreement would not protect TexPet and its affiliates from later claims seeking the same remediation. In addition, TexPet provided socio-economic consideration directly to the communities. The Scope of Work attached as an Annex to the 1995 Settlement Agreement provided that TexPet would complete not only environmental remediation work such as well site pit closure, soil remediation, revegetation, and upgrades of produced water treatment systems, but also expressly required TexPet to perform "Projects for Socio-Economic Compensation," including "Community Infrastructure" work.[1027] The benefit of these projects inured directly to the affected communities and their citizens.

(c) Relevant Principles of Contract Interpretation Confirm the Release Agreements' Plain Language

399. Every relevant principle of contract interpretation confirms the preceding textual analysis. The Ecuadorian Civil Code provides that (a) party intent prevails over the literal words of a contract; (b) contracts' provisions should be interpreted in a manner that gives them effect;

[1025] **Exhibit C-24**, 1979 Political Constitution of the Republic of Ecuador, Art. 19.2.

[1026] In the 1998 Final Release, Ecuador recognized that the 1995 Settlement Agreement was "fully performed by TexPet, within the framework of that agreed with the Government and Petroecuador." **Exhibit C-53**, 1998 Final Release, § IV.

[1027] **Exhibit C-22**, Scope of the Environmental Remedial Work, Annex A to 1995 Settlement Agreement § VII.

(c) the laws in force when a contract is executed are incorporated into it, which requires interpreting contracts in accordance with the then-governing laws, and (d) contracts must be interpreted in good faith.[1028] This implicitly entails interpreting contracts (i) in accordance with universal principles of due process; and (ii) in a commercially reasonable manner.

i) Intent of the Parties is Reflected in the Unambiguous Text of the Agreements

400. The text of the Settlement and Release Agreements demonstrates that the Government settled all causes of action under Article 19.2 of the Constitution—the article that expressly provides a diffuse right to live in a clean environment and obligates the State to enforce that right—and "any other theory or potential theory of recovery." The 1995 Settlement Agreement's extremely broad release language communicates the common intent and mutual understanding of the parties that the Government was acting in every conceivable capacity.

ii) Interpret an Agreement to Be Effective

401. The entire purpose and essence of the agreement between TexPet and the Government was that TexPet would fully remediate a proportion of the Concession Area approximately commensurate with its minority-percentage equity interest, and provide additional funds for particular socio-economic compensation in return for not being obligated to perform any additional remedial work. But the Government's interpretation would fail to give effect to the parties' intent and would render the release effectively worthless. That interpretation would also render the specific reference to Article 19.2 of the Constitution and the reference to any claim that the Government could assert under "any theory or potential theory of recovery" in Article 5.2 of the 1995 Settlement Agreement ineffective.

iii) Interpret an Agreement within the Framework of the Governing Law

402. Under Ecuadorian law in 1995 and 1998, the Ecuadorian Government could enforce diffuse rights, and not surprisingly, the same is true today.[1029] The State always

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[1028] **Exhibit C-34**, Ecuadorian Civil Code, Arts. 1576, 1562, 7 (rule 18), and 1578; First C. Coronel Expert Report ¶ 88.

[1029] **Exhibit C-24,** 1979 Political Constitution of the Republic of Ecuador, Art. 19(2) (which remained in effect until it was replaced by the 1998 Constitution); **Exhibit C-288**, 2008 Political Constitution of the Republic of Ecuador; 1st Coronel Expert Report, ¶¶ 56–60.

represents the community. The converse—that the Ecuadorian State could not represent these types of interests—would be contrary to the very notion of the modern State.[1030]

403. Because the Ecuadorian State had (and still has today) the authority to represent the diffuse rights of the public, the only legitimate inquiry in this case is whether the Government acted in that capacity when it executed the Settlement and Release Agreements.[1031] The 1995 Settlement Agreement expressly references and releases all claims under Article 19.2 of the Ecuadorian Constitution, and also provides that the Government was releasing TexPet and its affiliates from all claims that it could assert under any theory or potential theory of law. Thus, the Government was necessarily representing the diffuse rights of its citizens in settling with Claimants. Moreover, that the Government negotiated socio-economic compensation and obtained a commitment from TexPet to continue negotiations with the Municipalities and Provinces further confirms that the Government was representing the interests of its citizens when it executed the 1995 Settlement Agreement.

404. In addition, the law at that time did not allow any other entity, including Ecuadorian citizens, to enforce public environmental claims.[1032] As explained by Dr. Coronel, none of the legal provisions cited in the Lago Agrio Complaint that existed in 1994 allow those Plaintiffs to demand the relief they seek. In particular, Articles 2214, 2215, and 2229 allowed individuals to sue another private party for injury to the plaintiff's person or property; not public harm.[1033] Article 2236 allowed individuals to bring popular actions for contingent, future harm against a person then in possession and control of a situation that might cause harm in the future—not for already existing damage against a party no longer in possession or control of the potentially harmful situation.[1034] And Articles 23(6) and 86 of the 1998 Constitution allowed individuals to bring actions against the State to demand that the State comply with the State's

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[1030] *Id*.

[1031] Ecuador has asserted that it could not at that time represent the individual rights of its citizens. That is a separate issue. Ecuador has not denied that it had at that time (and still has today) the authority to represent the public's difuse rights.

[1032] First C. Coronel Expert Report ¶ 105; Romero Expert Report ¶ 72.

[1033] *Id*. ¶¶ 88–101.

[1034] *Id*. ¶¶ 94–99.

obligation to protect the environment—not against another private party.[1035] In short, individuals did not have the right to sue other individuals for diffuse, public environmental harm until the 1999 EMA.[1036] Instead, throughout the period of the negotiation and execution of the releases, it was the *State's* exclusive responsibility under the Ecuadorian Constitution to enforce diffuse environmental rights.[1037] That the Ecuadorian State was the only entity that could legally enforce these diffuse rights further confirms that it was acting in this capacity, and that in fact it released all claims based on non-individual, diffuse rights.

iv) Good Faith Implies Interpreting an Agreement in a Manner that Does Not Violate Universal Principles of Law

405. As discussed in more detail in the expert reports of Professor Oquendo and Dr. Barros, in all legal systems final decisions and settlements regarding diffuse-rights claims have *erga omnes* effect, because every legal system that has directly addressed the issue recognizes that any other legal interpretation would violate generally-accepted principles of *res judicata*, and raise serious questions as to the fairness and legitimacy of the legal system. Similarly, the 1995 Settlement Agreement must be interpreted as barring subsequent diffuse rights claims regarding the same facts because any other interpretation would violate universal principles of *res judicata*, and would suggest a seriously deficient system of administering justice.[1038]

v) Good Faith Implies Interpreting an Agreement in a Commercially Reasonable Manner

406. Interpreting the 1995 Settlement Agreement as not covering diffuse rights would be commercially unreasonable and absurd. TexPet would not have agreed to remediate approximately 40% of the Consortium sites at a cost of many millions of dollars if it had understood that it could be sued again in a subsequent lawsuit for (i) remediation of the remaining 60% of the Consortium sites, (ii) the same sites that it had already remediated, and (iii) the new impacts caused by Petroecuador after TexPet left. Similarly, the Ecuadorian

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[1035] *Id*. ¶¶ 100–101.

[1036] *Id*. ¶ 105.

[1037] **Exhibit C-24,** 1979 Political Constitution of the Republic of Ecuador, Art. 19(2) (which remained in effect until it was replaced by the 1998 Constitution).

[1038] *See supra* § III(A)(4).

Government would not have required TexPet to remediate only a share of the Consortium sites proportionate to its equity interest, and given it a full release, had it believed that TexPet was legally responsible for 100% of the environmental conditions within the Concession Area. To the contrary, and as noted above, the Government has repeatedly acknowledged its obligation to complete the remaining remedial work, but has only recently begun that work.[1039]

407. In sum, under their plain language and every relevant principle of contract interpretation, the Settlement and Release Agreements concerned and resolved all non-individual environmental rights.

(ii) The Municipalities and Provinces Released All Diffuse-Rights Claims of Their Citizens in the Municipal and Provincial Releases

408. In signing their releases of TexPet and its affiliates, the municipalities acted expressly in furtherance of their sovereign duties to assist Ecuador in meeting its environmental guarantees to all Ecuadorians, and to exercise their own capacity to assert legal actions necessary to protect the "collective needs of [their] community" of inhabitants—specifically those needs concerning health and the environment.[1040]

409. Each of the Municipal and Provincial Releases expressly provides that the municipalities represented the community, by noting that the settlements were entered into "*after consulting with the entities and organizations representing the community of [their] inhabitants*."[1041] The releases then broadly state that the representatives of the municipality or province:

> proceed to exempt, release, exonerate and relieve forever Texaco Petroleum Company, Texas Petroleum Company, Compañía Texaco de Petróleos del Ecuador S.A., Texaco Inc., and any other affiliate, subsidiary or other related companies … from any

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[1039] **Exhibit C-58**, Testimony of Manuel Muñoz, Director of the National Environmental Protection Management (DINAPA) — Minister of Energy from his May 10, 2006 appearance before the Extraordinary Session of the Permanent Specialized Commission on Health, Environment and Ecological Protection of Congress.

[1040] **Exhibit C-347**, Ecuadorian Municipal Regime Law, Official Registry Supp. No. 131, Oct. 15, 1971, Arts. 2, 12, 19, 20, 164.

[1041] **Exhibits C-27-32**, Settlements of Municipalities of Lago Agrio, Shushufindi, La Joya de los Sachas, Orellana, and the Province of Sucumbíos § 2.4 (emphasis added).

> responsibility, claim, request, demand, or complaint, be it past current, or future, for any and all reasons related to the actions, works, or omissions arising from the activity of the aforementioned companies in the territorial jurisdiction of [the Municipality or Province].[1042]

410. Not only do these releases broadly exonerate Claimants from all past, present, or future claims arising from Consortium activities, but they also settled—with expressly-agreed *res judicata* effect—a set of lawsuits brought by the municipalities at issue, concerning the very same claims at issue in the Lago Agrio Litigation.[1043] While the Sucumbíos Province and the Napo Consortium of Municipalities both released TexPet of all claims in advance of litigation, the four individual municipalities that signed releases executed the releases to settle specific lawsuits related to environmental claims. Those lawsuits had been brought expressly on behalf of the respective municipal citizens and communities.[1044] Moreover, officials of each of these four municipalities and the Province of Sucumbíos explicitly avowed, in sworn statements, that the settlements "meet[] the interests of the Municipality *and of its citizens* as to any claim they may have against TexPet."[1045]

411. Ecuador has itself admitted that the lawsuits settled by the municipalities were "*brought on behalf of all the members of the plaintiff community and organizations*, alleging environmental contamination in the Oriente."[1046] Again in March 2010, Ecuador characterized the municipal lawsuits as "popular" actions seeking environmental remediation of the same sort already released by the Government:

[1042] *Id.* at 5-6 (emphasis added).

[1043] The settlements contain the following language: "RES JUDICATA—pursuant to the provisions of Article [2386] of the Civil Code, this settlement shall have for the parties the effect of *res judicata* before the highest court." *Id.* (emphasis added). Additionally, the Lago Agrio court that approved the Lago Agrio Municipal Release recited again that these agreements had *res judicata* effect. **Exhibit C-26**, Court Approval of Settlement with Municipality of Lago Agrio, at 5.

[1044] *See* **Exhibit C-320**, Complaint filed by the Municipality of Shushufindi to the Judge of the Civil Court of Shushufindi, July 20, 1994; **Exhibit C-325**, Complaint filed by the Municipality of Orellana to the Civil Judge of the Orellana Canton, Aug. 23, 1994; **Exhibit C-323**, Complaint filed by the Municipality of Lago Agrio to the Provincial Civil Judge of Sucumbíos, July 25, 1994; **Exhibit R-22**, Complaint filed by the Municipality of Joya de los Sachas to the Civil Judge of Joya de los Sachas, May 12, 1994.

[1045] **Exhibits C-33, 336, 337, 338, 339**, Sworn Statements by Prefect of Sucumbíos, Mayor of Lago Agrio, and Presidents of Councils of Shushufindi, Orellana, and Joya de los Sachas (emphasis added).

[1046] **Exhibit C-25**, *Republic of Ecuador and Petroecuador v. ChevronTexaco Corp.*, Case No. 04-CIV-8378, Plaintiffs' Local Civil Rule 56.1 Statement of Undisputed Material Facts, ¶ 100 (S.D.N.Y., Jan. 16, 2007).

> The Municipalities litigation, filed as "*popular actions*" under Article 47 of the Environmental Regulations for Hydrocarbon Operations in Ecuador, alleged, among other things that TexPet … "left behind a true ecological catastrophe which degraded the environment and its forest biodiversity, and contaminated its water sources, in streams and rivers which the population used not only for their household consumption, and even to bathe in, but also as drinking sources for their cattle." … *They sought not only "damages" but also that the courts order "the cleaning up of our environment* . . . by cleaning up the crude oil pools and pumping stations."[1047]

412. And again in its Interim Measures Response, Ecuador admitted that the municipalities sued TexPet for remediation and payment of damages for injury "to the environment and health of all citizens, animals, species, flora, fauna, rivers, water sources and soil contaminated by [TexPet]."[1048] What Ecuador omits to say, however, is that (1) TexPet settled all of those lawsuits and claims, providing socio-economic compensation and obtained broad releases for all past, present or future claims from all of the relevant municipalities and Provinces; and (2) the municipalities settled those lawsuits expressly on behalf of their communities and citizens.

413. All the Municipal Releases expressly provided for court approval: "The parties, by mutual consent, agree to request the judge sitting in the case, by joint writ, in view of this settlement, to approve it and order the closing of the case."[1049] Each of the courts approved the

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[1047] **Exhibit C-2**, *Republic of Ecuador v. Chevron Corp*., Case No. 09-CIV-9958, Petitioner's [Ecuador's] Response in Opposition to Respondents' Local Rule 56.1 Counter-Statement of Facts, Mar. 5, 2010, at 10 (internal citations omitted, emphasis added).

[1048] Ecuador's Interim Measures Response, May 3, 2010, ¶ 33.

[1049] **Exhibits C-27-30**, Settlements of Municipalities of Lago Agrio, Shushufindi, La Joya de los Sachas, and Orellana, and the Province of Sucumbíos at 5.

settlements.[1050] When a new Mayor of Lago Agrio later challenged that municipality's settlement, the Court expressly held that the settlement and release were *res judicata*.[1051]

414. The Sucumbíos Province and Napo Consortium both signed release agreements in order to avoid litigation. The Sucumbíos Province Release was made "[t]o preclude and avoid any lawsuit between the Province and TexPet as a consequence of possible environmental damages in the jurisdiction of the province, possibly caused as a result of TexPet's [operations]."[1052] Similarly, the Napo Consortium of Municipalities issued a sweeping release to TexPet, releasing it "for *any and all reasons related to the actions, works, or omissions* arising from the activity of the oil concession … *especially concerning the impact or damages possibly caused to the environment* in the jurisdiction of the Province of Napo."[1053] In sum, the environmental claims asserted by the Lago Agrio Plaintiffs have been raised and settled by the proper government representatives in at least seven separate settlement agreements.

b. The Lago Agrio Litigation Involves Only Diffuse Rights

415. The Plaintiffs have repeatedly admitted that they are not asserting individual claims in the Lago Agrio Litigation:

- Julio Prieto, one of Plaintiffs' lawyers: "What we are claiming in this lawsuit has never been indemnifications for damages to individuals due to health reasons, or for the death of a particular person . . . We are not suing for millions as indemnifications for sick persons, but rather we are demanding a compensation system for public health."[1054]

[1050] **Exhibit C-35**, Court Approval of Settlement with Municipality of La Joya de los Sachas, June 12, 1996, at 3:20 p.m.; **Exhibit C-36**, Court Approval of Settlement with Municipality of Francisco de Orellana, June 25, 1996, at 9:35 a.m.; **Exhibit C-37**, Court Approval of Settlement with Municipality of Shushufindi, May 8, 1996, at 4:55 p.m.; **Exhibit C-26**, Court Approval of Settlement with Municipality of Lago Agrio, Sept. 19, 1996, at 11:00 a.m.

[1051] **Exhibit C-38**, Decision of the Nueva Loja Court, Oct. 1, 1996, at 10:55 a.m.; **Exhibit C-39**, Decision of the Nueva Loja Court, Oct. 10, 1996, at 9:35 a.m.; **Exhibit C-40**, Decision of the Nueva Loja Court, Oct. 23, 1996, at 8:20 a.m.; **Exhibit C-41**, Decision of the Nueva Loja Court, Feb. 27, 1997, at 10:00 a.m.

[1052] **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect Office of Sucumbíos, May 2, 1996.

[1053] **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Co., Apr. 26, 1996 (emphasis added).

[1054] **Exhibit C-285**, Interview of Julio Prieto, *Informativo Cristalino 10h00*, Radio Cristal, Sept. 11, 2009.

- Pablo Fajardo, the lead Ecuadorian lawyer for the Plaintiffs: "We don't want money for any particular person in the lawsuit, but to fix the damage. That's what we've been pursuing here, and pursuing for . . . the harm to the people."[1055]

- Steven Donziger, a lead lawyer for the Lago Agrio Plaintiffs, when asked if the Plaintiffs are asking "for damages for the injured people": "Yes. But not individual damages. It's compensation for health and contamination of water."[1056]

416. Ecuador has also conceded in this arbitration that the Lago Agrio Plaintiffs are not asserting individual claims:

- Respondent's Summary Description of its Preliminary Jurisdictional and Admissibility Objections: "That the environmental plaintiffs have elected to narrow their requested relief in the Lago Agrio litigation and not pursue personal injury claims is of no consequence."[1057]

- Transcript of Day 1 of Hearing on Provisional Measures: "True, [the Lago Agrio plaintiffs] dropped their personal injury claims[.]"[1058]

417. Because the Lago Agrio plaintiffs are not asserting individual claims, by definition they are asserting diffuse claims.[1059] Ecuador effectively confirmed as much in Appendix B to its Response to Claimant's Request for Interim Measures.

- "[T]he [Lago Agrio] Complaint cites as its jurisdictional basis 'the existence of explicit, fully justifiable, and inherently *collective* environmental rights in the Ecuadorian Constitution."[1060]

- "The 1999 Law, far from affording new substantive environmental rights to Ecuadorian citizens, simply gathers together many of the respective *general* rights[.]"[1061]

[1055] **Exhibit C-287**, Pablo Fajardo, *Discussion with Xavier Lasso*, Ecuador TV, Apr. 22, 2008, at 9:25 p.m. *See also* **Exhibit C-287**, Luis Yanza, *Discussion with Xavier Lasso*, Ecuador TV, Apr. 22, 2008, at 9:25 p.m. (stating that, "[w]hen the complaint was drafted and the lawsuit was filed," this intent "was clearly stipulated.").

[1056] **Exhibit C-286**, Interview of Steven Donziger, Corporate Crime Reporter, Nov. 9, 2009, at 13.

[1057] Respondent's Summary Description of its Preliminary Jurisdictional and Admissibility Objections ¶ 35.

[1058] Hearing on Interim Measures, London, Day 1, Transcript at 140: 3-4.

[1059] *Supra* § III(4)(A).

[1060] Respondent's Summary Description of its Preliminary Jurisdictional and Admissibility Objections, May 3, 2010, Appendix B: The Substantive Provisions of the 1999 Environmental Management Law Are Not Implicated in the Lago Agrio Litigation and Are Thus Irrelevant to This Arbitration ¶ 6.

[1061] *Id*. ¶ 8 (emphasis in original).

- "The rights accorded under Article 43 [of the 1999 EMA] are not new but instead premised on the 1983 Ecuadorian Constitution, which explicitly recognized the fundamental right of each citizen 'to live in an environment free of contamination.'"[1062]

418. A cursory analysis of the Lago Agrio Complaint also confirms that the Lago Agrio Plaintiffs are asserting only diffuse claims. The factual allegation upon which the Lago Agrio Plaintiffs base their demand for remediation is that during its oil exploration activities, TexPet caused environmental impacts.[1063] As Ecuador effectively has conceded in this Arbitration, the legal basis of the Complaint is a general, non-individual, diffuse legal right to a clean environment. In its prayer for relief, the Complaint seeks remediation of the former Consortium area to vindicate the alleged injury that the former Consortium's activities caused to the diffuse right to a clean environment.[1064] In contrast, nowhere do the Lago Agrio Plaintiffs assert any injury to any particular person or property. Nor do they ask for compensation for alleged harm to any particular person or property. In sum, the Lago Agrio Litigation involves only diffuse rights, and not individual rights.

c. The Claims in the Lago Agrio Litigation Seek to Vindicate the Same Diffuse Rights that Were Released in the Settlement and Release Agreements

419. Because (i) the Ecuadorian Government released TexPet and its affiliates from all liability for any and all diffuse-rights claims; and (ii) the Lago Agrio Complaint only concerns diffuse-rights claims, then for purposes of a *res judicata* analysis, the only remaining inquiry is whether the Settlement and Release Agreements and the Lago Agrio Litigation concern the same diffuse rights. That analysis requires comparing the *res judicata* elements of the Settlement and Release Agreements with those of the Lago Agrio Litigation.

(i) The *Causa Petendi* Are the Same

420. The factual basis of the Settlement and Release Agreements is the environmental impact caused by the Consortium's activities. Article 1.3 of the 1995 Settlement Agreement defines "Environmental Impact" as "[a]ny solid, liquid, or gaseous substance present or released

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[1062] *Id*.

[1063] **Exhibit C-71**, Lago Agrio Complaint, at 7-10.

[1064] *Id.* at 17–20.

into the environment in such concentration or condition, the presence or release of which causes, or has the potential to cause harm to human health or the environment."[1065] And Article 5.1 releases TexPet and its affiliates from all liability for Environmental Impact arising out of the former Consortium's activities: "[T]he Government and Petroecuador shall hereby release, acquit, and forever discharge TexPet [and its affiliates] for Environmental Impact arising from the Operations of the Consortium, except those related to…the Scope of Work (Annex A)."[1066]

421. The factual basis for the Lago Agrio Litigation is also the environmental impact arising out of the Consortium's activities. The factual justification upon which the Lago Agrio Plaintiffs base their demand for remediation is that during its oil exploration activities as part of the Consortium with Petroecuador, TexPet allegedly used operational methods that were prohibited in other countries.[1067] In short, the Plaintiffs claim that TexPet's operations allegedly caused environmental impacts. The Lago Agrio Complaint makes this clear. Both the Settlement and Release Agreements and the Lago Agrio Complaint thus concern the same facts.

422. The Settlement and Release Agreements released TexPet and its affiliates from all liability arising out of diffuse rights—including in particular the community's right to live in a clean environment as set forth in Article 19.2 of the Constitution—concerning any environmental impacts from Consortium operations. "The Government and Petroecuador intend claims to mean any and all claims… common or civil law or equitable causes of action . . . contract or tort, constitutional, statutory, or regulatory causes of action . . . including, but not limited to, causes of action under Article 19-2 of the Political Constitution of the Republic of Ecuador . . . or any other theory or potential theory of recovery."[1068] It is difficult to imagine a broader release —it covers all possible legal claims.

[1065] **Exhibit C-23**, Contract for Implementing Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995.

[1066] *Id.*

[1067] **Exhibit C-71**, Lago Agrio Complaint at 7-10.

[1068] **Exhibit C-23**, Contract for Implementing Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995.

423. Similarly, the legal justification upon which the Lago Agrio Plaintiffs base their demand is the public's right to live in a healthy environment, free of contamination. The Complaint specifically cites:

- Article 23, No. 6 (formerly Article 19.2) of the Ecuadorian Constitution which states that all individuals have a right to live in a healthy and balanced environment, free of contamination;
- Article 86 of the Constitution, which provides that the preservation of the environment, ecosystems, and biodiversity are matters of public interest and that environmental rights are defined in the Constitution as collective rights, which means that any individual can file a claim and seek damages;
- Article 2260 of the Civil Code, which provides for a popular action regarding a potential contingent threat to undetermined individuals; and
- Article 41 of the 1999 EMA, which provides standing to individuals to bring an action for non-individual environmental damages.[1069]

Thus, the Lago Agrio Plaintiffs invoke the community's diffuse right to live in a clean environment in connection with the environmental impacts allegedly caused by the Consortium's activities. That legal right was explicitly included within the scope of legal rights released in the 1995 Settlement Agreement, which included all constitutional, statutory, and regulatory causes of action. Thus, the legal bases of both the Settlement and Release Agreements and the Lago Agrio Litigation are the same. Because both the factual and legal bases of the Settlement and Release Agreements and the Lago Agrio Litigation are the same, the *causa petendi* of both are the same.[1070]

(ii) The Objects Are the Same

424. Because the *causa petendi* of both the Settlement and Release Agreements and the Lago Agrio Litigation are the same, their objects are also the same—namely, remediation to

[1069] **Exhibit C-71**, Lago Agrio Complaint at 16. The Lago Agrio Complaint also cites as an alleged legal basis Articles 2241 and 2256 of the Ecuadorian Civil Code and Article 15 of the Convention No. 169 of the International Labor Organization. Those articles in the Civil Code would provide the legal basis for a claim for individual injury, but the Lago Agrio Complaint does not allege any personal injury to any particular person or property and does not request any compensation for any personal injury or property. The cited Convention is a treaty that imposes obligations on States; it does not provide individuals standing to assert any claims against anyone, much less private parties. Thus, neither of these cited laws can constitute the legal basis for the Lago Agrio Litigation.

[1070] Romero Expert Report ¶ 102.

vindicate the Ecuadorian community's diffuse right to a clean environment, to the extent that right was injured by any environmental impacts of the Consortium's activities. They are the same because both seek to vindicate the same legal right. The consideration that TexPet gave in return for the releases in the Settlement and Release Agreements—remediation and socio-economic compensation to address issues of public health and sanitation—are materially identical to the relief that the Lago Agrio Plaintiffs request.

425. Therefore, given that the Lago Agrio Litigation and the Settlement and Release Agreements have the same *causa petendi* and object, the objective identity of both is the same.

(iii) The Parties Are the Same

426. The Ecuadorian Government represented the community's diffuse rights when it negotiated and executed the Settlement and Release Agreements. Thus, the community, for purposes of its diffuse rights, was a party to those agreements.[1071] The Lago Agrio Plaintiffs are nominally (and allegedly) 48 residents of the former Consortium Area, but they do not assert that any of them have personally suffered harm to their persons or property, nor do they ask for any compensation for individual harm. Instead, they are acting in a representative capacity seeking to enforce the non-individual legal rights that they invoke as the legal component of their Complaint's *causa petendi*. Indeed, the Lago Agrio Complaint's Prayer for Relief explicitly states that the Plaintiffs are acting "in our capacity as members of the affected communities and

[1071] Ecuador argued at the provisional measures hearing 1) that the language in the 1994 MOU does not distinguish between types of third-party rights, 2) that the Settlements only released the "Government's claims," and 3) that there is no "hold harmless" or indemnification language in the Settlement Agreements. London Day 1, p. 148-94. The community is not a third party to the Settlement Agreements; it was the real party in interest to those agreements and its rights were represented, vindicated and released. Thus, when the 1994 MOU refers to "third-party rights," it is not referring to the community's diffuse rights; it is referring to the individual's individual rights. Second, because the Government could and did represent these diffuse rights when it executed the Settlement and Release Agreements, claims based on diffuse rights are within the scope of the "Government's claims" that were released. Third, the "hold harmless" and indemnification language concerns instances in which parties to the contract agree that one will indemnify the other if a third party sues one of them. But, again as explained by Professors Coronel, Romero, Barros, Oquendo, and the legal authorities they cite, the community is not a third-party to the Settlement and Release Agreements with respect to its diffuse rights. For instance, if a father settles a claim on behalf of his minor child, and the child's mother then sues based on the same claim, it is not a valid argument to assert that the settlement does not bar the claim because there is no indemnification provision. Both in the present arbitration and in this hypothetical, the same real party in interest settled the claim and is then suing based on that same claim in violation of the settlement.

in safeguard of their recognized collective rights[.]"[1072] Because these Plaintiffs are acting in a representative capacity on behalf the community—just as the Government, Municipalities, and Provinces did in 1995, 1996, and 1998—the real party in interest, for purposes of *res judicata*, is the community.

427. Ecuador argues that a ruling in favor of Claimants in this BIT arbitration would deprive the Lago Agrio Plaintiffs of their day in court. But the key question is "day in court" regarding (i) what and (ii) against whom? With respect to claims for individual damages for personal injury or private property damage, the Plaintiffs do not seek any such damage, as their lawyers and the Government have expressly admitted. With respect to diffuse-rights claims against TexPet and its related companies, the Lago Agrio Plaintiffs already have had their day in court because they are in privity with the Government that represented them. Under Ecuador's interpretation of its own law, *res judicata* would not even apply to a decision in the Lago Agrio Litigation because: "The right of all citizens of Ecuador to live in a safe environment free of contamination cannot be waived by any one citizen or group of citizens, much less by the State on their behalf."[1073]

428. Both the community—for purposes of its diffuse rights as they pertain to environmental impacts allegedly caused by the Consortium—and Chevron are parties to both the Settlement and Release Agreements and the Lago Agrio Litigation.[1074] As a result, the subjective identities of the Settlement and Release Agreements and the Lago Agrio Litigation are the same.

429. The Settlement and Release Agreements thus bar the Lago Agrio Litigation. The following table demonstrates how the agreements and the litigation have the same *causa petendi*, the same *petitum* or object, and the same parties, and therefore, that the former bar the latter.

[1072] **Exhibit C-71**, Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbios, on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbios Province, Superior Court of Nueva Loja, Complaint, May 7, 2003.

[1073] **Exhibit R-54**, Eguigeren/Albán Decl., Dec. 20, 2006.

[1074] For all of the reasons set forth in Claimants' Counter-Memorial on Jurisdiction, Chevron is entitled to invoke the releases set forth in the Settlement and Release Agreements. Thus, for purposes of *res judicata*, Chevron is a party to the Settlement Agreements.

	SETTLEMENTS	**LAGO AGRIO**	
CAUSA PETENDI			
Facts	TexPet conduct allegedly caused environmental impact that injured the environment	TexPet conduct allegedly caused environmental impact that injured the environment.	Same
Legal Right	Every legal right the Government could assert, including the Ecuadorian Community's diffuse right to a clean environment	The Ecuadorian Community's diffuse right to a clean environment	Same
PETITUM			
Object	Vindicate all rights that the Government could vindicate arising under these facts, including the Ecuadorian Community's diffuse right to a clean environment and public health, through remediation and socio-economic compensation	Vindicate the Ecuadorian Community's diffuse right to a clean environment and public health, through remediation or monies to be used for remediation	Same
PARTIES			
Plaintiff	The Government, including in its capacity as the primary representative of the Ecuadorian community	48 Plaintiffs, strictly in their capacity as purported representatives of the Ecuadorian community	Same
Defendants	TexPet and all affiliated entities, including Chevron	Chevron	Same

430. In sum, the Ecuadorian Government released TexPet and its affiliates from the community's diffuse right to remediation for alleged environmental impacts caused by the former Consortium's activities. The Lago Agrio Plaintiffs seek to enforce that same released right on behalf of that same community. Their lawsuit is therefore barred by *res judicata*.

6. The Government of Ecuador Has Breached the Settlement and Release Agreements and Sought to Undermine Claimants' Rights To Finality and Legal Security

431. The Ecuadorian Civil Code expressly provides that all contracts must be performed in good faith.[1075] As explained by Professor Coronel, the duty of good faith imposes both positive obligations to act with loyalty to provide the other party the benefit of the bargain, and it imposes negative obligations to refrain from engaging in conduct that undermines the benefit of the bargain for the other party.[1076] Doctrine also supports understanding of good faith in contract performance. For instance, according to Diez Picazo, "The legal system commands good-faith behavior, not only inasmuch as it operates as a limitation and rejection of dishonest conduct (such as to not deceive or defraud), but also insofar as it is an affirmative requirement, giving others everything congenial coexistence calls for (such as a duty of diligence, a duty to make effort, a duty of cooperation)."[1077] Similarly, Lopez Santa Maria explains, "Even after a contractual relationship has ended, during its liquidation phase, the rule of objective good faith applies and imposes specific obligations that depend on the circumstances. The general idea is for a party to refrain from any conduct that could diminish the legitimate economic benefits for the other party."[1078]

432. Ecuador has, through its various acts and omissions with respect to the Lago Agrio Litigation and Criminal Proceedings, breached both its express obligations to Claimants under the 1995, 1996,[1079] and 1998 Settlement and Release Agreements and its obligation to perform these agreements in good faith. Since these Agreements were executed, Ecuador has failed to perform its share of environmental remediation arising out of the former Consortium's activities; refused to defend Claimants' rights to finally and forever be free from environmental claims in exchange for completing its share of that work; and affirmatively sought to undermine

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[1075] **Exhibit C-34**, Ecuadorian Civil Code, Art. 1562.

[1076] Second Coronel Expert Report ¶ 15.

[1077] **Exhibit C-638,** L. Díez-Picazo Ponce de Léon, LA DOCTRINA DE LOS PROPRIOS ACTOS (Bosch undated).

[1078] **Exhibit C-637**, Jorge López Santa María, LOS CONTRATOS (Ed. Juridical de Chile 1988).

[1079] The provinces and municipalities that entered into the 1996 Settlement Agreements with TexPet are political subdivisions of Ecuador, and the BIT covers such political subdivisions. **CLA-625**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* Art. 4, at 94 (Cambridge Univ. Press 2002).

or nullify those agreements by actively supporting the Lago Agrio Plaintiffs and by filing criminal charges against Chevron's lawyers.

433. Through the negotiation of the Settlement and Release Agreements, the Government of Ecuador promised that TexPet would *not* have to answer for the precise environmental claims that the Lago Agrio Plaintiffs, with the Government's assistance, now seek in the Ecuadorian courts. The Government, not individual citizens, had the authority to represent and settle the collective environmental rights of all Ecuadorians. The parties entered into the Settlement and Release Agreements recognizing the Government's legal authority, its shared responsibility for the environmental remediation, and its *exclusive* responsibility for future operations and impacts. Thus, in exchange for TexPet's performance of environmental remediation corresponding to its share of responsibility, the Government contractually assured TexPet that it *would not be required to do more*—specifically, it would never need to perform additional remediation, nor would it be required to answer for claims that, prior to 1999, were only the Government's to bring.[1080]

434. Knowing that the Lago Agrio Plaintiffs had "agreed—in legal documents—not to sue the State . . . for causing environmental damage,"[1081] Ecuador began its outright repudiation of its contractual agreements. Soon after TexPet completed performance of its contractual obligations, and after the Government of Ecuador received the full value of TexPet's remediation and other performance, Ecuador reneged on the consideration that it promised in exchange for that bargained benefit. After insisting that individual citizens could not negotiate directly with TexPet or otherwise assert public remediation rights,[1082] the Government—with the admitted support of Lago Agrio Plaintiffs' counsel[1083]—passed a new environmental law that authorized individual citizens to do just that. That law is being used by Plaintiffs effectively to circumvent Ecuador's obligations under the Settlement and Release Agreements. It not only allowed the Lago Agrio Plaintiffs to bring the State's released claims, but its authorization of the verbal summary procedure also prevented any Judge who might otherwise give credence to the releases

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[1080] First Coronel Expert Report ¶ 105.

[1081] **Exhibit C-77**, *Texaco-The Time has come*, EL HOY, Apr. 14, 1997.

[1082] *Supra* ¶ 70.

[1083] *Supra* ¶ 172.

to put off ruling on Chevron's meritorious jurisdictional and *res judicata* defenses until *after* a full trial. This delay has allowed the State and the Plaintiffs to collectively and fraudulently bring the weight of the State's power and public opinion to bear upon Claimants for seven years.

435. The Government has also breached the Settlement and Release Agreements by refusing Claimants' demands for reimbursement of its defense costs and any costs incurred in satisfying a judgment in the Lago Agrio Litigation. Soon after the Lago Agrio Complaint was filed, Claimants delivered a letter to the Minister of Energy & Mines notifying the Republic of Ecuador of its legal obligations under the Agreements; explaining the mutual agreement that "extinguished any past, present and future claims related to any environmental damage caused by the Consortium operations"; asking Ecuador to notify the Lago Agrio Court that, pursuant to the Settlement and Release Agreements, Chevron, Texaco, Inc. and TexPet "are not liable for environmental damage or for [any] remediation work"; and demanding that "the Government and Petroecuador bear full financial liability for any . . . court ruling that may be handed down against [Chevron]" because the claims of the Lago Agrio Plaintiffs "clearly fall . . . within the scope of the releases."[1084] Rather than acting affirmatively to minimize the costs of the Lago Agrio claims, as Claimants demanded, the Government punctuated its breach with clear repudiations of its contractual obligations. It filed a complaint against Claimants in U.S. court (tellingly, through the *same counsel* representing the Lago Agrio Plaintiffs in Ecuador, and the same counsel who had made the promise not to sue the State). It sought, among other things, "a permanent and final injunction barring Texaco from asserting a right to indemnification against the Republic of Ecuador and Petroecuador in this matter."

436. Any ambiguity about the Government's complete repudiation is dispelled by its own admission in that action that "the Attorney General's Office and all of us working on the State's defense [are] searching for a way *to nullify or undermine the value of the remediation contract* and the final acta."[1085] The chosen means to do this—closely coordinated with the Lago Agrio Plaintiffs at every step—was a bogus criminal proceeding against the individuals who negotiated the Agreements and signed the releases (despite the fact that the Government itself had previously certified full performance).

[1084] **Exhibit C-78**, Letter from E. Scott to C. Arboleda, Oct. 6, 2003

[1085] **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray *et al.*, Aug. 10, 2005.

437. Through these acts, the State has plainly "undermine[d] the value" of the Settlement and Release Agreements in order to obtain a financial windfall and achieve political gains. Behind the scenes, Ecuador has worked "hand in hand" with lawyers for the Lago Agrio Plaintiffs, even describing their collaboration as a "joint defense."[1086] Top government officials, including President Correa, met privately with the Lago Agrio Plaintiffs on numerous occasions and offered them tactical advice, particularly with regard to the Criminal Prosecutions.[1087] Members of the Constituent Assembly exhibited open support for the Plaintiffs,[1088] at the same time that it expressly threatened any judges who countermand the Assembly with removal or even criminal prosecution.[1089] Various Ecuadorian Ministries along with Petroecuador have provided direct assistance to the Plaintiffs, granting them exclusive access to Petroecuador's library and awarding the ADF a number of lucrative money grants, with no assurance that this money is unrelated to the pursuit of Lago Agrio Litigation.[1090] Far from "observing" its contractual obligations or performing them in "good faith," these actions (and inactions) amount to a manifest breach of Claimants' agreements.

438. Through its enactment of the 1999 EMA, its express disavowment of the Settlement and Release Agreements, and its behind-the-scenes and public efforts to aid the Lago Agrio Plaintiffs to press its released claims, Ecuador is doing indirectly what it plainly promised

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[1086] **Exhibit C-360,** *Crude* Outtakes, Dec. 6, 2006, at CRS167-01-CLIP 01.

[1087] **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, CRS-376-03-CLIP-01.

[1088] For example, Assembly member Manuel Mendoza stated that we "*provide frontal support to the unceasing struggle of*" the plaintiffs. **Exhibit C-568**, Noticias TV, Cable Noticias Estelar, Feb. 12, 2008 (quoting Assembly member Manuel Mendoza); **Exhibit C-202**, Chevron's Objections to Expert Cabrera's Global Report, Sept. 15, 2008, at 2:14 p.m..

[1089] The Constituent Assembly enacted the following as its first official mandate in November 2007:

> [T]he decisions of the Constituent Assembly are superior to any other rule in the judicial system, and compliance with them is mandatory for all persons, entities and other public authorities without any exceptions whatsoever. No decision of the Constituent Assembly shall be subject to the oversight of, or be challenged by, any agency of the current government.
>
> Judges and tribunals that process any action contrary to the decisions of the Constituent Assembly shall be dismissed from their post and subject to corresponding prosecution.

Exhibit C-104, Constituent Assembly, Mandate 1, Official Gazette No. 223, Nov. 30, 2007.

[1090] **Exhibit C-552**, Ministry Agreement No. 164, Official Gazette No. 26, Feb. 22, 2007; **Exhibit C-553**, María Augusta Sandoval, *Environmental Remediation Plan in Motion*, EL TELEGRAFO, Aug. 12, 2008; **Exhibit C-554**, *The Remediation Took a First Step*, EL COMERCIO, Dec. 24, 2008.

not to do directly—attempting to hold Chevron liable for additional environmental remediation claims. By any measure, Ecuador's conduct is actionable under Article VI(1)(c) of the BIT.

B. Ecuador's Breaches of the Settlement and Release Agreements are Independently Actionable under the BIT's "Umbrella Clause"

439. The plain language of Article II(3)(c) is broad, requiring Ecuador to "observe *any* obligation" it may have entered into with regard to investments.[1091] By its express terms, the provision does not specify to whom the obligation is owed, and it does not limit the Government's obligations to parties with direct privity of contract.[1092] Its placement in Article II(3)—alongside other substantive guarantees like "fair and equitable treatment" and "full protection and security"—demonstrates that a breach of that clause is actionable before a BIT tribunal. Indeed, the history and modern application of that clause in other BITs illustrates that the very purpose of Article II(3)(c) is to ensure that a State's violation of a contract that relates to foreign investment constitutes an international wrong, and thus an actionable wrong under the Treaty.

1. The BIT's "Umbrella Clause" in Article II(3)(c) Enables This Tribunal to Adjudicate Ecuador's Breach of Contractual Obligations Regarding Claimants' Investment

a. Umbrella Clauses Were Developed to Provide An International Forum for Investment Contract Disputes

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[1091] **Exhibit C-279,** U.S.-Ecuador BIT, Art. II(3)(c) (emphasis added).

[1092] *See*, *e.g.*, **CLA-165**, *Azurix v. Argentina*, Decision on Application for Annulment, ICSID Case No ARB/01/12, Decision on Annulment, Sept. 1, 2009 ("*Azurix* Decision on Annulment") (Gavan Griffith (President); Bola A Ajibola; and Michael Hwang). In that case, Argentina argued that the U.S.-Argentina BIT and ICSID Convention "must be read in the light of general principles of customary international law under which the distinction in municipal law between the rights of a company and those of its shareholders is transposed onto the international plane," and that shareholders should not be permitted to lodge claims in respect of harm done to a company merely because the shareholder has been prejudiced through a diminution in the value of the shares. *Id*. ¶ 86. In rejecting these arguments, the *ad hoc* Committee explained that to deny an investor protection because of its shareholder status over harms done to the investor's "investment" would run contrary to the very purpose of bilateral investment treaties: "a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the State parties to the treaty. Indeed, often the very purpose of a treaty is to effect such a modification. The purpose of investment protection treaties is generally to augment or modify the customary international law procedures for protection of foreign investors. Hence the starting point in determining the effect of the treaty is the terms of the treaty itself . . . Here the BIT confers specific protections on 'investments.'" *Id*. ¶¶ 90-91 (emphasis added).

440. Umbrella clauses like that contained in Article II(3)(c) of the BIT were developed, in line with the overall purpose of BITs, to protect contractual arrangements made between foreign investors and host States. They do this by providing foreign investors with standing before international tribunals to press their contract claims. Prior to the advent of the umbrella clause, foreign investors were forced to resort to host States' domestic courts—which were often biased and susceptible to influence from sovereigns—to resolve their contractual disputes.

441. As a result of this situation, when the Anglo-Iranian Oil Company sought to settle claims between it and Iran concerning the latter's oil nationalization program, the settlement "was deliberately structured . . . in such a way that *a breach of the contract or settlement shall be* ipso facto *deemed to be a breach of [a] treaty*."[1093] Clauses that characterized ordinary contract breaches as a treaty violation then began to find their way into investment treaties. In 1959, the drafters of the Ab-Shawcross Draft Convention on Investments Abroad included an umbrella clause stipulating —in strikingly similar language as the BIT at issue here—that "[e]ach Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party."[1094] This provision's purpose was to ensure that a State's unilateral violation of a contract that relates to foreign investment would be deemed to constitute an international wrong.

> The purpose of the clause is to dispel whatever doubts may possibly exist as to whether a unilateral violation of a concession contract is an international wrong.
>
> . . . [It thus] served two purposes: it involved an undertaking that the state would not interfere with contractual arrangements made with foreign investors and crucially, when coupled with compulsory dispute settlement provisions, it would create a remedy for breach of that obligation in international law where one did not exist in municipal law.[1095]

[1093] **CLA-204**, J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 143, 145 (2006-2007).

[1094] **CLA-205**, Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L. 411, 420.

[1095] *Id*. at 422-23.

> The same year as the Ab-Shawcross Draft, the umbrella clause appeared in the first-known BIT, between Germany and Pakistan. It stated that "[e]ither Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party."[1096] Commentators described the role of the umbrella clause as that of "transform[ing] responsibility incurred towards a private investor under a contract into international responsibility."[1097]

442. In 1967, the Organization for Economic Cooperation and Development ("OECD") recommended to its member States a draft Convention on the Protection of Foreign Property ("OECD Draft Convention") as both a model for their bilateral investment treaties and as a general statement of international law rules applicable to foreign investment.[1098] Article 2, the "Observance and Undertakings" clause, stipulated (again in similar language to the U.S.-Ecuador BIT) that "[e]ach Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party."[1099] Elihu Lauterpacht explained that the umbrella clause's effect was to "put [investor-State contracts] on a special plane in that breach of them becomes immediately a breach of convention."[1100] Indeed, the preparatory work from both the OECD and Ab-Shawcross drafts lays bear, the fact that the umbrella clause was not intended to be limited to international obligations, but instead to apply to all contractual obligations and binding commitments of host States:

> There is no suggestion in the preparatory work for the OECD Draft (or the Abs–Shawcross Draft) or the commentaries thereon, that the undertakings referred to in the umbrella clause should be limited only to other international obligations. To limit the scope of the umbrella clause only to a host state's other obligations arising in international law would add nothing to the existing state of international law. The consistent understanding of commentators and drafters alike is that while the umbrella clause probably did cover international obligations, the focus of the umbrella clause was contractual obligations and unilateral

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[1096] *Id*. at 433.

[1097] *Id*. at 432.

[1098] *Id*. at 426.

[1099] *Id*.

[1100] **CLA-204**, Wong, 14 GEO. MASON L. REV. at 147 (quoting Elihu Lauterpacht, *Drafting of Conventions for the Protection of Investment*, *in* INT'L COMP. L.Q., *The Encouragement and Protection of Investment in Developing Countries* 218, 229 (3d ed. Supp. 1962)).

> commitments accepted by the host state with regard to foreign property.[1101]

443. The early Model BITs of both France and the United States were also "cast in nearly identical terms to the [Organization for Economic Cooperation and Development] Draft" and intended to "raise[] to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise . . . a breach of contract constitutes a breach of treaty."[1102] Kenneth Vandevelde, former lead attorney within the U.S. State Department on investment matters, who participated in the preparation of the U.S. Model BIT and in the negotiation of several U.S. BITs, explains that, pursuant to an umbrella clause:

> a party's breach of an investment agreement with an investor becomes a breach of the BIT, for which the investor or its state may seek a remedy under the investor-to-state or state-to-state disputes procedures. In effect this clause authorizes use of the BIT's disputes procedures to enforce investment agreements between the investor and the host state.[1103]

444. More recently, the United Nations Conference on Trade and Development concluded that the existence of an umbrella clause in a BIT means that "violations of commitments regarding investment by the host country would be redressible through the dispute-settlement procedures of a BIT."[1104] The United Nations Centre on Transnational Corporations likewise concluded that an umbrella clause "makes the respect of such contracts [between the host State and the investor] . . . an obligation under the treaty. Thus, the breach of such a contract by the host State would engage its responsibility under the agreement and—unless direct

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[1101] **CLA-205**, Sinclair, 20 ARB. INT'L., at 428.

[1102] *Id*. *See also* **CLA-204**, Wong, 14 GEO. MASON L. REV., at 148 ("The U.S. Model BIT of 1983, which was designed with the OECD Draft in mind, also contains an umbrella clause providing that '[e]ach Party shall observe any obligation it may have entered into with regard to investors or nationals or companies of the other Party.' Subsequent U.S. Model BITs published in 1984 and 1987 include similarly worded umbrella clauses. Again, commentators analyzing these umbrella clauses agree on their effects, namely that such a clause 'raises to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise . . . [such that] a breach of contract constitutes a breach of treaty.'") (internal citations omitted) (emphasis added).

[1103] **CLA-205**, Sinclair, 20 ARB. INT'L., at 433. *See also* **CLA-204**, Wong, 14 GEO. MASON L. REV., at 143 (noting that the purpose of the umbrella clause "is to create an inter-state obligation to observe investment agreements that investors may enforce when the BIT confers a direct right of recourse to arbitration. More specifically, the history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum.") (emphasis added), **RLA-44**.

[1104] **CLA-206**, UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* 56 (1998).

dispute settlement procedures come into play—entitle the home State to exercise diplomatic protection of the investor."[1105]

b. Arbitral Jurisprudence Confirms the Availability of Umbrella Clauses to Adjudicate Investment Contract Disputes

445. Numerous arbitral tribunals have ruled that umbrella clauses in BITs provide foreign investors with an international forum to resolve their contract disputes with host governments.

446. In *Noble Ventures v. Romania*, the tribunal held that Article II(2)(c) of the US-Romania BIT—which reads identically to Article II(3)(c) of the U.S.-Ecuador BIT—had the effect of "transform[ing] contractual undertakings into international law obligations and accordingly . . . a breach of the BIT."[1106] After analyzing the plain language and purpose of the umbrella clause, as well as arbitral precedent, the tribunal concluded that:

> An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law . . .
>
> [T]wo States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus "internationalized," *i.e*., assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted.[1107]

447. In *Enron v. Argentina*, the tribunal noted that the umbrella clause is meant to cover "both contractual obligations such as payment as well as obligations assumed through law or regulation."[1108] The *LG&E v. Argentina* tribunal similarly held that the umbrella clause

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[1105] *Id*. (quoting United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* 39 (1988)).

[1106] **CLA-159**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct. 12, 2005 ("*Noble Ventures* Award"), ¶ 46 (Karl-Heinz Böckstiegel (President); Jeremy Lever; and Pierre-Marie Dupuy).

[1107] *Id*. ¶¶ 53-55.

[1108] **CLA-207,** *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ("*Enron* Award"), ¶ 274 (Francisco Orrego Vicuña (President); Albert Jan Van den Berg; and

requires host States to comply with their contractual and legal obligations while providing foreign investors with an international remedy for the resolution of such disputes:

> an 'umbrella clause,' is a general provision included in a fairly large number of bilateral treaties that creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract. Hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty.[1109]

The tribunal concluded that "Argentina's abrogation of the guarantees under the statutory framework—calculation of the tariffs in dollars before conversion to pesos, semi-annual tariff adjustments by the PPI and no price controls without indemnification—violated its obligations to Claimants' investments" and therefore breached the BIT's umbrella clause.[1110]

448. Citing to the *LG&E* tribunal with approval, the *Continental Casualty* tribunal ruled that the umbrella clause of the US-Argentina BIT encompassed unilateral obligations contained in legislation as well as bilateral contractual obligations:

> The obligation that a State must observe under an umbrella clause "will often be a bilateral obligation," such as a contractual obligation, "or will be intrinsically linked to obligations of the investment company." This can include the unilateral commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein.[1111]

449. In *Eureko v. Poland*, the tribunal held that the umbrella clause contained in the Netherlands-Poland BIT brought Eureko's contractual claims within the Tribunal's jurisdiction,

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Pierre-Yves Tschanz). While, the *Enron* award was recently annulled in part, this reasoning of the tribunal was not annulled.

[1109] **CLA-208**, *LG&E Energy Corp. and ors v Argentina*, ICSID Case No ARB 02/1, Decision on Liability, Oct. 3, 2006 ("*LG&E* Decision on Liability"), ¶ 170 (Tatiana B. de Maekelt (President); Francisco Rezek; and Albert Jan Van den Berg).

[1110] *Id*. ¶ 175.

[1111] **CLA-209**, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, Sept. 5, 2008 ("*Continental Casualty* Award"), ¶ 301 (Giorgio Sacerdoti (President); V.V. Veeder; and Michell Nader). Importantly, the tribunal also held that the umbrella clause covered contractual obligations towards investments, regardless of whether the foreign investor was a signatory to the investment contract; "The covered obligations must have been entered 'with regard to' investments . . . They are not limited to obligations based on a contract. Finally, provided that these obligations have been entered 'with regard' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded." *Id*., ¶ 297.

and that Poland's breaches of the share purchase agreement could amount to breaches of the treaty's umbrella clause:

> The immediate, operative effects of [the umbrella clause] are two. The first is that Eureko's contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal . . . . The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 [fair and equitable treatment] and 5 [expropriation] of the Treaty nevertheless may be breaches of Article 35[the umbrella clause] of the Treaty, since they transgress Poland's Treaty commitment to "observe any obligations it may have entered into" with regard to Eureko's investments.[1112]

450. As the *Eureko* and *SGS v. Philippines* tribunals both concluded, the umbrella clause "means what it says,"[1113] and its plain language does not differentiate between undertakings of a commercial as opposed to a sovereign nature. "Any obligation" means just that—it does not mean "any sovereign obligation" or "any sovereign, non-commercial obligation,"[1114] which are limiting phrases that could have been included in the clause had the

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[1112] *See* **CLA-210**, *Eureko B.V. v. Republic of Poland*, Ad hoc—UNCITRAL, Partial Award, Aug. 19, 2005 ("*Eureko* Partial Award"), ¶ 250 (L Yves Fortier (President); Stephen M Schwebel; and Jerzy Rajski) (the tribunal also points out that the analysis in the *SGS v. Philippines* decision is cogent and convincing, while the *SGS v. Pakistan* Tribunal's interpretation of the umbrella clause is less convincing). Other arbitral tribunals have expressed their *obiter dicta* views on the meaning of such a clause. For example, in *Waste Management v. United Mexican States*, the tribunal expressed that umbrella clauses require host States to comply with contractual commitments: "unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not . . . contain an 'umbrella clause' committing the host State to comply with its contractual commitments." **CLA-42,** *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award, Apr. 30, 2004 ("*Waste Management* Award"), ¶ 73 (James R. Crawford (President); Eduardo Magallon Gomez; and Benjamin R. Civiletti). Similarly, the tribunal in *Consorzio Groupement L.E.S.I.-DIPENTA v. Republic of Algeria* found that "[s]ome treaties contain what is known as an 'umbrella clause,' that in effect transforms the State's breaches of contract into violations of that provision of the treaty, thereby granting jurisdiction to the Arbitral Tribunal established pursuant to the treaty to consider such violations." **CLA-211**, *Consortium Groupement L.E.S.I.-DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, Award, Dec. 27, 2004 ("*L.E.S.I.-DIPENTA* Award"), (Pierre Tercier (President); André Faurès; and Emmanuel Gaillard) (unofficial English Translation).

[1113] *See* **CLA-210,** *Eureko* Partial Award, ¶ 256; **RLA-47**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Jan. 29, 2004 ("*SGS v. Philippines* Decision on Jurisdiction"), ¶ 118 (Ahmed Sadek El-Kosheri (President); Antonio Crivellaro; and James R. Crawford).

[1114] *See, e.g.*, **RLA-49**, *Pan American Energy and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006 ("*Pan American* Decision on Preliminary Objections") (Lucius Caflisch (President); Brigitte Stern; and Albert Jan Van den Berg); **CLA-14**, *El Paso Energy Int'l. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, Apr. 27, 2006 ("*El Paso* Decision on Jurisdiction") (Lucius Caflisch (President); Brigitte Stern; and Piero Bernardini).

parties so intended. Given that the primary object and purpose of a BIT is "to promote greater economic cooperation . . . with respect to investment" and to treat such investment in a manner as to "stimulate the flow of private capital and the economic development," there is no reason to depart from a plain meaning interpretation of the umbrella clause.[1115]

c. Commentators Have Acknowledged That Umbrella Clauses In BITs Create Treaty Claims Based Upon Contract Breaches

451. The views of authoritative commentators and scholars confirm the conclusion that the umbrella clause elevates contractual breaches to the status of treaty claims. Professor Prosper Weil, when commenting on the umbrella clause in his Hague Academy lecture, concluded that:

> [A]n "umbrella treaty" between the contracting State and the State of the [investor] . . . turns the obligation to perform [a] contract into an international obligation of the contracting State *vis-à-vis* the State of the other contracting party. The intervention of the umbrella treaty transforms the contractual obligations thereby ensuring . . . "the inviolability of the contract under threat of violating the treaty"; any non-performance of the contract, even if it is legal under the national law of the contracting State, gives rise to the international liability of the latter *vis-à-vis* the State of the other contracting party.[1116]

452. Professor Christoph Schreuer explains that pursuant to umbrella clauses, contractual violations become treaty violations:

[1115] **Exhibit C-279**, U.S.-Ecuador BIT, at Preamble. In any event, any distinction between "purely commercial" and "sovereign" breaches (even if valid, which it is not) in this case is entirely irrelevant, given that Ecuador breached its obligations with regard to Claimants' investments through Ecuador's *sovereign* actions—the Lago Agrio Court's failure to dismiss in a timely fashion the Plaintiffs' claims as barred by *res judicata* or lack of jurisdiction, the Government's collusion with and assistance to the Lago Agrio Plaintiffs, and the Government's attempts to undermine the Settlement and Release Agreements through its manipulation of the criminal justice system. Ecuador therefore cannot credibly claim that its breaches of the Settlement and Release Agreements are "purely commercial."

[1116] **CLA-204**, Wong, 14 Geo. Mason L. Rev., at 147 (citing Alexandrov, 5(4) J. World Inv't and Trade 555, 566-67 (quoting in his own translation P. Weil, *Problemes relatifs aux contrats passes entre un Etat et un particulier*, *in* 128 RECUEIL DES COURS 95, 130 (1969). *See also* **CLA-212**, F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. 241, 246 (1982) (emphasis added); **CLA-213**, J.P. Gaffney and J.L. Loftis, *The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-based Tribunals to Hear Contract Claims*, 8(1) J. World Inv't and Trade 5, 17 (2007) (citing E. Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—The SGS Cases Considered, in* Todd Weiler (ed.), INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Cameron May 2005)).

> [Umbrella clauses] have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as umbrella clauses because they put contractual commitments under the BIT's protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT's substantive standards. In this way, a violation of such a contract becomes a violation of the BIT.[1117]

453. Dolzer and Stevens explain that umbrella clauses protect foreign investors against simple breaches of contract as well as administrative and legislative acts:

> [Umbrella clauses] seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts.[1118]

454. Other commentators have noted that the umbrella clause would be devoid of all meaning if "mere" breaches of contract were not actionable under it:

> Denying any effects of an umbrella clause on breaches of contractual obligations by the host state would mean the degradation of the clause to an empty phrase. If one took the view that in a BIT arbitration the tribunal is not allowed to take "mere" breaches of contract into consideration, even if the BIT contains an umbrella clause, one would deprive the umbrella clause of any meaning. . .
>
> If a state has promised in a treaty ─ without reservation ─ to observe all obligations it has assumed towards investors of the other state, it appears difficult to argue that the failure to comply with these contractual obligations would not automatically constitute a breach of the promise given in the BIT.[1119]

[1117] **CLA-170**, Schreuer, 5 J. World Inv't and Trade, at 250.

[1118] **CLA-214**, R. Dolzer and M. Stevens, *Bilateral Investment Treaties* 81-82 (Kluwer Law Int'l 1995) (internal citation omitted); *See also* **CLA-215**, Alexandrov, 5(4) J. World Inv't and Trade, at 556, 567; **CLA-213**, P. Gaffney and J.L. Loftis, *The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-based Tribunals to Hear Contract Claims*, 8(1) J. World Inv't and Trade 5, 17 (2007) (citing G. S. Tawil, *The Distinction Between Contract Claims And Treaty Claims: An Overview, paper presented at the 11th ICCA Congress, Montreal, Canada* 53 (2006)).

[1119] **CLA-216**, H. Schramke, *The Interpretation of Umbrella Clauses in Bilateral Investment Treaties*, 4 Transnat'l Disp. Mgmt. 1, 21-22 (Sept. 2007); *see also* **CLA-204,** Wong, 14 Geo. Mason L. Rev., at 137.

2. Ecuador Has Breached Its Obligations in the Settlement and Release Agreements, and Has Thereby Breached Article II(3)(c) of the BIT

455. As detailed in Section III(A) above, through its various acts and omissions with respect to the Lago Agrio Litigation and the Criminal Proceedings, Ecuador has breached its obligations to Claimants under the 1995, 1996,[1120] and 1998 Settlement and Release Agreements. Those acts and omissions include, *inter alia*, breaching the Settlement and Release Agreements, failing to defend Claimants' rights under them, colluding with and assisting the Lago Agrio Plaintiffs in their lawsuit against Chevron, affirmatively seeking to undermine or nullify the Settlement and Release Agreements, and filing criminal charges against Claimants' lawyers in an attempt to undermine the value of those agreements. Those breaches constitute independent violations of the BIT's Article II(3)(c).

IV. ECUADOR VIOLATED THE BIT STANDARDS OF PROTECTION

456. Article II of the U.S-Ecuador BIT contains the substantive protections that Ecuador must provide to a foreign investor. Ecuador is required to provide investors with an "effective means" of asserting, defending or vindicating its rights.[1121] The Treaty imposes other positive obligations on Ecuador: It must treat a foreign investor "fair[ly] and equitab[ly],"[1122] provide "full protection and security,"[1123] and it cannot impose "arbitrary or discriminatory measures."[1124]

457. By its actions and omissions, all three branches of the Ecuadorian State have violated these provisions with respect to Claimants' investments.

- *First*, Ecuador has not provided "effective means" for Claimants to receive resolution of their *res judicata* and jurisdictional defenses, or receive any measure of due process with respect to its right to a fair and open hearing.

[1120] The provinces and municipalities that entered into the 1996 Settlement Agreements with TexPet are political subdivisions of Ecuador, and the BIT covers such political subdivisions. *See* **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(b).

[1121] *Id*. Art. II(7) ("Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.").

[1122] *Id*. Art. II(3)(a) ("Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.").

[1123] *Id*.

[1124] *Id*. Art. II(3)(b).

With the Government stridently and openly aligned against it, the political interference in the judicial process in Ecuador has rendered any means that are available to Chevron completely ineffective. All of this is in breach of Ecuador's obligation under Article II(7) of the BIT.

- *Second*, Ecuador's failure to provide Claimants due process in its courts, its acts taken in bad faith, its deliberate frustration of Claimants' legitimate expectations, its brazen attempts to coerce the judicial process and harass Claimants' and its representatives, and its refusal to protect Claimants' investment, all amount to a failure of "fair and equitable treatment" under the BIT.

- *Third*, the Ecuadorian Government has breached its other positive obligations to provide full protection and security to Claimants' investment, and to refrain from treating it arbitrarily and discriminatorily.

458. These Treaty derogations are focused on Ecuador's refusal to acknowledge and adhere to its contractual commitments to Claimants and its refusal to apply the rule of law to the released claims that are being brought against them. Independently and in sum, these acts and omissions have caused significant harm to Claimants' investments in Ecuador, entitling them to relief under the Treaty.

A. Ecuador's Conduct Violated its Obligation to Provide Claimants With Effective Means of Asserting Claims and Enforcing Rights

459. Article II(7) of the BIT requires Ecuador to "provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."[1125] This standard of protection constitutes a *lex specialis* between the parties. Ecuador has breached Article II(7) by failing to afford Claimants viable and timely recourse to enforce their lawful rights in the Lago Agrio Litigation and the Criminal Proceedings, and by politically interfering in the Litigation and Criminal Proceeding.

1. Article II(7) of the BIT Imposes a Positive Obligation on Ecuador to Allow Claimants to Protect their Contractual, Legal and Treaty Rights

460. Unlike denial of justice under customary international law, which is designed to remedy a lack of effective means *ex post facto*, Article II(7) imposes a positive obligation on

[1125] **Exhibit C-279**, U.S.-Ecuador BIT, Art. II(7).

States to provide investors with effective means of enforcing their rights *ex ante*.[1126] A claim of ineffective means, therefore, is fundamentally distinct from a claim for denial of justice under customary international law.[1127] 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 compense 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.

a. The Plain Meaning and Context of Article II(7)

461. The Vienna Convention requires that a treaty be read according to "the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[1128] The key terms in Article II(7) are "investment," "effective means," and "enforcing rights." Proper treaty analysis demonstrates that this article requires Ecuador to provide a mechanism capable of permitting Claimants to assert and protect. *inter alia*, their *res judicata* rights, their jurisdictional rights, and their due process rights under Ecuadorian law.[1129]

462. *First*, Article II(7) expressly states that it applies to an "investment,"[1130] which is defined in the BIT to include claims to money, claims to performance having economic value, and rights conferred by law or contract.[1131] Therefore, Ecuador's obligation under Article II(7) applies to TexPet's contractual and legal rights—rights that Claimants have asserted and attempted to protect since 2003 in the Lago Agrio Litigation, but to no avail.

463. *Second*, "effective" qualifies "means." *The American Heritage Dictionary* defines "means" to be "a method, course of action, or an instrument by which an act can be

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[1126] *See* Expert Opinion of Professor David D.Caron as to Article II(7) of the Treaty, Sept. 3, 2010 ("D. Caron Expert Report"), ¶¶ 90, 160, 172.

[1127] *Id*.

[1128] **CLA-10**, Vienna Convention, Art. 31.

[1129] *See* D. Caron Expert Report at 69-76.

[1130] **Exhibit C-279**, U.S.-Ecuador BIT, Art. II(7).

[1131] *Id.* Art. I(a).

accomplished or an end achieved."[1132] Garner's *Dictionary of Modern Legal Usage* defines "effective" as having a "high degree of effect"; it defines "effect" as "to bring about/make happen."[1133] So Article II(7) obligates Ecuador to provide a method highly capable of compelling others—including the State itself—to observe U.S. investors' rights.[1134]

464. *Third*, Article II(7) requires Ecuador to allow Claimants to "enforce" their rights, a term defined by *The American Heritage Dictionary* as "to compel by observance or obedience to."[1135] Not only must Ecuador provide a mechanism to "compel" observance of Claimants' rights, but that mechanism must allow the investor to *"attain the State's acknowledgement and presentation, as well as execution, of the investor's powers and privileges guaranteed to the investor by the various domestic and international systems in which it operates.*"[1136] The key issue in analyzing Article II(7), therefore, is not whether the obligation to enforce Claimants' contract, treaty, and Ecuadorian law rights exists—or even whether the Ecuadorian legal system provides a mechanism for enforcing rights—but whether that mechanism allows meaningful enforcement of those rights; that is, whether it is "effective" in doing so.

465. The U.S.-Ecuador BIT's context and purpose confirm this plain-meaning interpretation. The BIT's preamble specifically cites as goals to "promote greater economic cooperation" and "stimulate the flow of private capital."[1137] Requiring signatory States to provide effective means of enforcing contractual and legal rights fits these goals by enabling investors to accept risks in reliance on a stable and predictable legal framework. In addition, both the preamble and the title of the BIT use the term "protection of investment."[1138] Rights that cannot be adequately enforced are not protected.

[1132] **CLA-217**, The American Heritage Dictionary of the English Language (4th ed. Houghton Mifflin Co. 2004), *available at* http://dictionary.reference.com/browse/means.

[1133] **CLA-218,** Bryan A. Garner, Garner's Modern American Usage 293 (3d ed. Oxford 2009).

[1134] *See* D. Caron Expert Report at 19.

[1135] **CLA-217**, The American Heritage Dictionary of the English Language (4th ed. Houghton Mifflin Co. 2004), *available at* http://dictionary.reference.com/browse/means.

[1136] *See* D. Caron Expert Report, ¶ 37.

[1137] **Exhibit C-279**, U.S.-Ecuador BIT, Preamble.

[1138] *Id.*

466. The primary method of enforcing rights—particularly legal and contractual rights—is through the court system. The effective means standard was designed to ensure that investors would be able to protect and defend their rights before local courts. Professor Kenneth Vandevelde (who served as an attorney in the U.S. State Department, worked to draft the 1984 U.S. Model BIT, and negotiated numerous U.S. BITs), has stated that the U.S. inserted the "effective means of enforcing rights" language in its Model BIT primarily in order to assure its investors judicial access.[1139] When considering whether to sign the BIT, Ecuador held Congressional debates in which members notified the State that Article II(7) "*go[es] beyond the judicial review and, in the judgment of what is effective, the standard to be applied would be determined internationally and might even be in comparison to Ecuador's BIT partner, the United States*."[1140]

467. Article II(7) is distinct from the customary international law obligations that also apply to the Ecuadorian judiciary's conduct in the Lago Agrio Litigation. *First*, the relevant interpretative processes are different. Interpretation of customary international law involves analysis of State practice and *opinio juris*.[1141] Interpretation of Article II(7) as *lex specialis* only requires an analysis of that particular article's terms in the context of the U.S.-Ecuador BIT.[1142] *Second*, the placement of Article II(7) shows that it is independent of customary international law standards. Article II(3)(a) of the BIT makes customary international law obligations a floor,[1143] meaning that many BIT standards—such as fair and equitable treatment and full protection and security—exceed those obligations. Like these other BIT standards that provide specific substantive obligations, the effective means obligation is found in its own sub-clause (Article II(7)). These obligations (for example, a prohibition on performance requirements) have no counterpart in customary international law.[1144] *Third*, conflating the effective means standard with customary international law would render Article II(7) duplicative because customary

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[1139] **CLA-145**, Kenneth Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 643 (1993).

[1140] D. Caron Expert Report, ¶ 81.

[1141] *See e.g.*, **CLA-11**, 1 *Oppenheim's International Law* 25–31 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996).

[1142] **CLA-10**, Vienna Convention, Art. 31.

[1143] **Exhibit C-279**, U.S.-Ecuador BIT, Art. II(3)(a).

[1144] *Id.* Art. II(6).

international law already applies to Ecuador's conduct through Article II(3)(a).[1145] If the BIT drafters intended Article II(7) to be merely the standard under customary international law, they could have stated that explicitly, but instead they adopted Articles II(7) and II(3)(a) as separate obligations. In short, the degree of effectiveness required by Article II(7) must be determined according to its plain language and as applied to Ecuador's conduct.

b. Prior Cases Interpreting Article II(7) and the Effective Means Standard

468. In a March 2010 Partial Award involving these same parties, the *Commercial Cases Dispute* Tribunal confirmed the plain-meaning interpretation of the "effective means" standard as articulated above.[1146] That tribunal made three key findings regarding this *lex specialis* between the parties.[1147] *First*, it held that Article II(7) is an independent—and less stringent—standard than denial of justice.[1148] In its Partial Award, the tribunal wrote that "[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."[1149] This reading is consistent with the plain language of the BIT and the intent of its drafters, which was to impose a *positive* obligation on States to provide their foreign investors "effective" local means for protection of rights, as opposed to the *negative* obligation not to interfere with those rights.[1150]

469. *Second*, the Partial Award held that the "effective means" standard does not require a review of global "system attributes," but applies to effects in *individual* cases.[1151] In the words of the Tribunal, the BIT requires that "some system must be provided for the investor

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[1145] *Id.* Art. II(3)(a).

[1146] **CLA-47**, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, Ad hoc-UNCITRAL, Partial Award on Merits, Mar. 30, 2010 ("*Chevron* Partial Award on Merits") (Karl-Heinz Böckstiegel (President); Charles N. Brower; and Albert Jan Van den Berg)

[1147] *Id*., ¶ 242.

[1148] *Id*., ¶ 244.

[1149] *Id*.

[1150] *Id*., ¶ 248; D. Caron Expert Report, ¶¶ 90, 160, 172.

[1151] **CLA-47**, *Chevron* Partial Award on Merits, ¶¶ 245-247.

for bringing claims, as well as 'enforcing rights,' so the BIT also focuses on the effective enforcement of the rights that are at issue in particular cases."[1152]

470. *Third*, the Partial Award established that a breach of Article II(7) does not require a host State's "extreme interference in the judicial proceedings," but rather may result from a range of State conduct affecting an investor's rights.[1153] Again, Article II(7) imposes on the State a *positive* obligation to provide effective means, not merely a negative obligation not to interfere in the functioning of those means.[1154] In the *Commercial Cases Dispute*, the Tribunal held that Claimants need not show political interference in the litigation, because the "effective means" standard extended to their claims of undue delay and manifestly unjust court decisions.[1155] Here, Claimants have proved not only the failure of Ecuador's courts to provide Chevron with a fair and impartial forum in which to defend itself (through, for example, the judicial bribery scandal involving Judge Nuñez, the Court's refusal to rule on Chevron's jurisdictional and *res judicata* defenses, the Court's acquiescence in numerous examples of significant fraud perpetrated by the Plaintiffs, and the Court's *ex parte* meetings with and appointment of the Plaintiffs' hand-picked "independent" expert, Mr. Cabrera, who is an "auxiliary of the Court"), but also the political interference envisioned by the Tribunal in the *Commercial Cases Dispute* as an additional basis for an Article II(7) violation.

471. The tribunal in *Duke Energy Electroquil Partners v. Ecuador* also confirmed that Article II(7) of the U.S.-Ecuador BIT requires Ecuador to provide and maintain a functional system for the enforcement of rights.[1156] That tribunal held that although "the existence and availability of the Ecuadorian judicial system … are not at issue here," it was still required to decide "how these mechanisms [*i.e.*, the judiciary] performed" in order to rule on the Article II(7) claim.[1157]

[1152] *Id*., ¶ 247.

[1153] *Id*., ¶ 248.

[1154] *Id*.

[1155] *Id*.

[1156] **RLA-40**, *Duke Energy Electroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 12, 2008 ("*Duke v. Ecuador* Award"), ¶ 390 *et seq* (Gabrielle Kaufmann-Kohler (President); Enrique Gómez Pinzón; and Albert Jan Van den Berg).

[1157] **RLA-40**, *Duke v. Ecuador* Award, ¶ 392.

472. In addition to cases involving the U.S.-Ecuador BIT in particular, investment tribunals have interpreted the "effective means" provision in other treaties as affording protection against the very conduct perpetrated by Ecuador in this case. For example, in *Petrobart v. Kyrgz Republic*,[1158] Petrobart asserted that the Kyrgz government had violated the "effective means" clause of the Energy Charter Treaty when its Vice Prime Minister wrote a letter to a local court requesting a stay of execution of a judgment in favor of Petrobart and against the State gas company KGM.[1159] During the resulting stay, the government issued a Presidential Decree transferring KGM's assets to other state enterprises, rendering the company bankrupt and therefore judgment-proof. Petrobart claimed that these acts by the Kyrgyz government constituted "conscious attempts to deliberately prevent Petrobart from asserting and enforcing its legitimate rights."[1160] The tribunal agreed. It held that the Vice Prime Minister's letter "must be regarded as an attempt by the Government to influence a judicial decision to the detriment of Petrobart."[1161] In the tribunal's view, any interference with judicial proceedings "is not in conformity with the rule of law in a democratic society" and shows a "lack of respect for Petrobart's rights as an investor having an investment under the Treaty."[1162]

2. Ecuador Has Failed to Provide Effective Means for Claimants to Protect their Contractual, Legal and Treaty Rights in the Lago Agrio Litigation and the Criminal Proceedings

473. The Ecuadorian legal system has not provided Claimants with "effective means" to enforce their contractual rights and the basic guarantees of the Rule of Law. *First*, Claimants have been unable to assert effectively their right to be free of claims covered by the Settlement and Release Agreements—the very same right that devolved from the "obligation" that Ecuador assumed "with respect to [Claimants'] investment." *Second*, any means that were arguably available to Claimants to assert their *res judicata* and jurisdictional defenses have been effectively destroyed by the Court's refusal to consider those defenses prior to a long and

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[1158] **CLA-219**, *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, Mar. 29, 2005 ("*Petrobart* Award") (Hans Danelius; Ove Bring; and Jeroen Smets).

[1159] *Id.* ¶ 132.

[1160] *Id.* ¶ 133.

[1161] *Id.* ¶ 414.

[1162] *Id.* ¶ 415.

expensive litigation on the merits. *Third*, despite Claimants' repeated protestations to the Ecuadorian courts, Claimants have been denied the basic right to due process in an unbiased, impartial and independent judiciary, both in the Lago Agrio Litigation and Criminal Proceedings. A finding that Ecuador failed to provide an effective means for enforcing any of these three independent rights is sufficient for a finding that Ecuador is liable for violating the BIT.

474. *First*, Ecuador has not provided Claimants with an effective means of enforcing its *res judicata* right to the finality of the Settlement and Release Agreements, on the basis of which TexPet settled all public environmental claims against it and its affiliates arising out of Consortium operations. *Res judicata* in this context means a right to be free of any further judicial process on an already-settled claim.[1163] Under any "effective" system of law, the *res judicata* effect of the Settlement and Release Agreements ought to have led to the early dismissal of the Lago Agrio Litigation, before Chevron was forced to litigate the entire case over the course of seven years. The fact that Chevron could in theory succeed on its *res judicata* defense at the end of a years-long merits proceeding would not vindicate that right, because the Settlement and Release Agreements explicitly provide a right to be free of any further litigation. By forcing Chevron to litigate already-settled claims on their merits, Ecuador's courts have already sent the message that no Government settlement or release is reliable. No investor could have any sense of stability under such a framework. Under Ecuador's purported view, even if Chevron were to prevail on *res judicata* at the end of the day, another plaintiff could come along with the same public environmental claims and force Claimants to defend yet another years-long merits proceeding on the same claims.

475. Under Ecuadorian law, public environmental claims like those of the Lago Agrio Plaintiffs are to be litigated in verbal summary proceedings, which are designed to be expedited. Those proceedings require a judge to reserve all rulings for the end of the case.[1164] This rule might make sense in certain cases, when the issues are simple and straightforward, the evidence is manageable, and the case can be decided quickly.[1165] Indeed, Ecuadorian law provides for all

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[1163] *See infra* § III.C.

[1164] **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Art. 844.

[1165] C. Coronel Expert Report, ¶¶ 108, 116.

such cases to be decided within one or two months of their filing.[1166] But in a case like the Lago Agrio Litigation—with hundreds of thousands of pages of evidence to be reviewed, numerous expert reports to consider, and dozens of judicial inspections over seven years of litigation—the failure of a judge preliminarily to decide certain dispositive issues like jurisdiction and *res judicata* can seriously damage if not eviscerate any right a defendant has to be free from that litigation. Here, because the procedural mechanisms provided by Ecuadorian law do not require (or even permit) a preliminary ruling on Chevron's *res judicata* defense before years of litigation of already-settled claims takes place,[1167] Chevron has no "effective means" of enforcing its right to be free of such litigation in the first place. As Professor Caron concludes, "effective means" in this context would "require deciding, one way or another, on an objection based on res judicata at the start of potential re-litigation."[1168]

476. *Second*, Ecuador has similarly denied Chevron the right to have its preliminary jurisdictional objections heard and decided at the proper time. In an ordinary case, Ecuadorian law requires that questions of jurisdiction and competence should be decided at the beginning of the lawsuit, if sufficient evidence is available at that time.[1169] At the outset of the Lago Agrio Litigation in 2003, Chevron raised objections to the Court's exercise of jurisdiction.[1170] Specifically, it argued that jurisdiction was wholly improper because Chevron had never

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[1166] *Id.* ¶¶ 116-117.

[1167] *Id*. ¶¶ 109-113.

[1168] D. Caron Expert Report, ¶ 159.

[1169] **Exhibit C-400,** Article 129 of the Organic Code of the Judiciary provides:

> In addition to the duties of any judicial officer, the judges, have the following generic powers and duties:
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> 9. At any stage of the proceedings, the judges that become aware that they have no competence to hear the case on account of personal, territory or grade venue reasons, should refrain from hearing it, without declaring invalid the process they will pass it to the competent court or judge that should, from the point at which inhibition occurred, continue hearing the case.
>
> If the incompetence is due to the subject matter, he will declare it null and void and will send the process to the competent court or judge for that would initiate the proceeding, but the time between the filing of the lawsuit and the declaration of nullity will not be computed in terms of the statute of limitations of the right or action.

[1170] For a detailed discussion of Claimants' jurisdictional objections in the Lago Agrio Litigation, *see* Claimants' Counter-Memorial on Jurisdiction, Sept. 6, 2010, at § III.B.4.

operated in Ecuador, had a domicile there, or maintained business contacts there.[1171] The Plaintiffs offered no evidence that Chevron was the alter ego of TexPet, an entity that ceased operating in Ecuador over a decade before Chevron acquired shares in Texaco, Inc.—TexPet's fourth-level parent company—in 2001. But apparently relying on the manifestly unsuitable procures of a verbal summary proceeding, the Lago Agrio Court refused to rule on Chevron's objections and instead has been illegally exercising *de facto* jurisdiction over Chevron for more than seven years, thus forcing Chevron to litigate the merits of the case and incur significant undue expenses.

477. The verbal summary procedure under the 1999 EMA has deprived Chevron of the means to assert another meritorious defense: That Petroecuador or the Government are the only proper defendants to the claims in Lago Agrio. Chevron's jurisdictional rights are similar to Claimants' *res judicata* rights—at issue is not merely the right to succeed in litigation on a particular defense, but the right to be free from judicial process in the first place. If the judges in the Lago Agrio Litigation have simply ignored and refused to rule on Chevron's jurisdictional objections despite having discretion to do so, then by definition they have failed effectively to enforce—and in fact have eviscerated—the right at issue. If the verbal summary procedure does not permit a judge to rule on such objections until a case is fully litigated on the merits—even if that may, as here, take several years and cost the defendant several millions of dollars—then again, the right to be free from judicial process effectively has been eviscerated. Either way, Ecuador has failed to provide Claimants with an "effective means" of enforcing that right, and thus, is in breach of Article II(7) of the BIT.

478. *Third*, Ecuador has provided Claimants with no "effective means" to protect their due process rights in the Lago Agrio Litigation and Criminal Proceedings. The Ecuadorian Courts' due process violations include at least the following:

- Rejecting Chevron's motion to annul the biased rulings of Judge Juan Núñez after he had been videotaped in a bribery scheme involving the Lago Agrio judgment

[1171] **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.).

and had expressed repeatedly his predilection to rule against Chevron before reviewing the evidence in the case.[1172]

- Refusing to remove from the record fraudulent evidence submitted by the Plaintiffs, including (1) two falsified reports by their environmental expert Charles Calmbacher regarding contamination, complete with false conclusions contrary to the evidence he reviewed;[1173] and (2) unscientific data from an unaccredited laboratory.[1174]

- Ending prematurely the Phase I judicial inspections, with fewer than half of the Phase I sites inspected and only one settling expert report completed;

- Appointing the Plaintiffs' hand-picked global assessment expert Richard Cabrera, in violation of the parties' express agreement and the procedural law of the case.[1175] This act is compounded by the recent evidence that the presiding judge met covertly with Plaintiffs' representatives regarding Mr. Cabrera's appointment before the Court appointment was made.[1176]

- Repeatedly failing—first by Judge Núñez, and later by Judge Ordóñez—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, numerous motions regarding the excessive scope of the Cabrera reports, a motion for Mr. Cabrera to disclose all information about his process and methodology, and a motion to depose Mr. Cabrera.[1177]

- Ignoring or rejecting all of Chevron's objections to Mr. Cabrera's fraudulent acts, including: meeting with the Plaintiffs both before and after his appointment as a "neutral expert;[1178] accepting improper payments from the Plaintiffs' representatives; relying upon a survey administered by the ADF (the Plaintiffs' requested beneficiary of the Lago Agrio judgment) in assessing billions of dollars in damages related to purported cancer; allowing the Plaintiffs' representatives to

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[1172] **Exhibit C-230**, Lago Agrio Court Order Denying Chevron's Motion to Recuse, Oct. 21, 2009, at 4:05 p.m.

[1173] **Exhibit-C-186**, Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 114:1-21, 116:11-117:20.

[1174] *See supra* §§ II.G.2, 4 (discussing the non-credible nature of Plaintiffs' laboratory and scientific data).

[1175] *See supra* § II.G.3.

[1176] **Exhibit C-360**, *Crude* Outtakes, Mar. 6, 2007, at CRS210-02-01.

[1177] *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.

[1178] **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at CRS191-00-CLIP 03; **Exhibit C-360**, *Crude* Outtakes, June 4, 2007, at CRS347-00-CLIP 01.

assist in his fieldwork; and allowing Plaintiffs' environmental consultants to ghost-write large portions of his report.[1179]

- Refusing to address evidence that the Plaintiffs' consultants, UBR also served on Mr. Cabrera's team, leading a U.S. District Court to conclude that such "covert[]" maneuvering "can only be viewed as a fraud upon that tribunal."[1180]

- Attempting to preclude Chevron's right to set the record straight in the Lago Agrio Litigation by ignoring the videotape and other evidence of fraud by the Plaintiffs and Mr. Cabrera in the conduct of the litigation.[1181]

- Repeatedly refusing to archive the case file in the Criminal Proceedings despite several requests by two different Prosecutors General; the President of the Supreme Court's improper "acceptance" of the case file and improper notification of the defendants; and the pursuit of the Criminal Proceedings barred by the statute of limitations, all in violation of Ecuadorian criminal procedure.[1182]

479. Ecuador cannot credibly argue that these decisions are the result of a legal system that "effectively" safeguards an investor's rights. To the contrary, the Ecuadorian judicial system has shown itself to be biased and politicized in all matters that concern State interests. A number of independent organizations have recently noted the demise of an independent judiciary in Ecuador:

[1179] *See supra* § II.G.3 (discussing Cabrera reports in detail). *See* **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before the Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m.; *see also supra* § II.G.4 (containing a bullet-point summary of the Court's rulings regarding fraud and improprieties surrounding the Cabrera report).

[1180] **Exhibit C-629**, *In re Chevron*, U.S. District Court of New Jersey, June 11, 2010 Hearing, at 33, 43.

[1181] **Exhibit C-361**, Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.

[1182] *See supra* § II.J; **Exhibit C-240**, Court Order Transferring Prosecutor General's Opinion to Comptroller General, Jan. 12, 2007, at 10:05 a.m.; **Exhibit C-261**, Resolution, Supreme Court of Justice, First Criminal Chamber, Sept. 16, 2008, at 9:30 a.m. ("Based on the foregoing and because the most recent filings by the Office of the State Prosecutor were improperly assigned, since this Division lacks jurisdiction to hear the present case, accordingly, it is ordered that the record be sent to the President of the Supreme Court of Justice."); **Exhibit C-262,** Court Order Accepting the Criminal Case from the First Chamber of the Supreme Court, Sept. 19, 2008, at 11:00 a.m. *See also* **Exhibit C-263**, Motion by Dr. Jaime Donoso Jaramillo and Dr. Emiliano Donoso Vinueza to the Supreme Court, Sept. 25, 2008, at 4:15 p.m. A few weeks after Judge Gómez improperly asserted jurisdiction over the criminal case, Prosecutor General Pesántez requested that Judge Gómez abstain from hearing the case so as to "avoid future possible causes of nullity in these proceedings," on the basis that Ecuadorian procedural law requires that criminal proceedings be assigned to courts by lottery. **Exhibit C-264**, Motion by Dr. Prosecutor General Washington Pesántez to the Supreme Court, Oct. 13, 2008, at 11:45 a.m.

- "Systemic weakness and susceptibility to political or economic pressures in the rule of law constitute the most important problem faced by U.S. companies investing in or trading with Ecuador."[1183]

- "[T]he judiciary in Ecuador is almost universally seen as corrupt and, in recent years, increasingly compliant with the wishes of the executive."[1184]

- "There continue[] to be problems … [with] corruption and denial of due process within the judicial system … The media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature."[1185]

- The U.S. State Department has repeatedly reported that Ecuador employs its criminal justice system "as a means of harassment in civil cases."[1186]

In addition to these external reports of political pressure, Ecuadorian officials themselves have bemoaned the state of the judiciary. President Correa himself recently conceded that the Ecuadorian judiciary is "good for nothing" and undergoing a "grave problem."[1187] In recent years, he announced that "Ecuador is not currently living under the rule of law""[1188] and that the judicial branch is the "worst" State institution due to the "mediocrity" of its officials.[1189] Moreover, international tribunals have acknowledged that disputes between Ecuador and major international oil companies are politicized to the point of denying any measure of "impartial justice."[1190] Even the Plaintiffs' lead lawyer, Steven Donziger, has admitted in private that the

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[1183] **Exhibit C-124**, U.S. State Dept., *2009 Investment Climate Statement: Ecuador*, Feb. 2009, at 24.

[1184] **Exhibit C-630**, International Assessment and Strategy Center, Ecuador at Risk: Drugs, Thugs, Guerillas, and the Citizens' Revolution, at 29 (Jan. 2010).

[1185] **Exhibit C-165**, U.S. State Department, *2009 Report on Human Rights Practices: Ecuador,* at 1, 4.

[1186] **Exhibit C-307**, U.S. State Department, *2008 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm; **Exhibit C-308**, U.S. State Department, *2007 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100638.htm; **Exhibit C-309**, U.S. State Department, *2006 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm; **Exhibit C- 165**, U.S. State Department, *2009 Report on Human Rights Practices: Ecuador*.

[1187] **Exhibit C-631**, Presidential Weekly Radio Address, July 10, 2010.

[1188] **Exhibit C-121**, Gonzalo Ruiz Álvarez, *And the Rule of Law?*, EL COMERCIO, Nov. 11, 2008; **Exhibit C-122,** Sebastián Mantilla Baca, *Ecuador Adrift*, EL COMERCIO, Nov. 12, 2008.

[1189] **Exhibit C-123,** *Rafael Correa: the Executive can press Courts to 'fulfill their duties'*, EL HOY, Nov. 8, 2008.

[1190] As the *Encana* tribunal concluded in 2006, "it is difficult to see how any oil company . . . could have received impartial justice [in Ecuador]." **RLA-41**, *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award, Feb. 3, 2006 ("*Encana* LCIA Award"), ¶ 198 (James Crawford (President); Horacio Grigera Naon; and Christopher Thomas).

Ecuadorian judiciary is "institutionally weak," "corrupt," and that "a fair trial in Ecuador is impossible."[1191]

480. This institutional weakness is vividly illustrated in this case; political pressure by Ecuador's Government has denied Chevron any "effective means" that the law might have provided.[1192] For instance, weeks after Chevron notified Ecuador of its responsibilities under the Settlement and Release Agreements—through an Answer in the Lago Agrio Litigation and by letter to the Minister of Energy and Mines—the Comptroller General's Office filed a Criminal Complaint against Chevron's lawyers and former Petroecuador and Ecuador officials, claiming that the releases were obtained by fraud. After President Correa's campaign manager signed an *amicus* brief urging the Lago Agrio Court to accept the Plaintiffs' request to "relinquish" the remaining judicial inspections, the Court granted the motion (after twice previously denying Plaintiffs' requests). After President Correa met privately with judges to personally request "expediency in cases of interest to Ecuador," Judge Núñez publicly announced that the case "has taken too long" and pledged that the trial should finish within the year. Most recently, once the *Crude* outtakes were turned over to Chevron by order of a U.S. federal court, detailing the collusive intermeddling of Ecuador in the Lago Agrio Litigation, the presiding judge in Ecuador hastily issued an order restricting Chevron's right to file new pleadings, even though the evidentiary phase was not closed yet.[1193]

481. As the evidence demonstrates, the Ecuadorian Government has gone far beyond sending a single letter to the Lago Agrio Court (which at least one tribunal has deemed to constitute a breach of the "effective means" clause).[1194] It has engaged, as a prior tribunal between these same parties put it, in "extreme interference in the judicial proceedings."[1195] This pattern of conduct by the Ecuadorian State to dictate the outcome of the Lago Agrio case and the Criminal Proceedings plainly denies Claimants "effective means" as defined by those tribunals. In all, and contrary to Ecuador's Article II(7) obligation, *no* means exist for Claimants in

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[1191] **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2006, at CRS053-02-CLIP 01.

[1192] *Supra* pp. 148-153.

[1193] **Exhibit C-361**, Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.

[1194] *See* **CLA-219**, *Petrobart* Award, ¶ 120.

[1195] **CLA-47,** *Commercial Cases Dispute* Partial Award on Merits, ¶ 248.

Ecuadorian courts to meaningfully enforce the rights that both contract and the Rule of Law have provided them.

B. Ecuador Has Failed to Treat Claimants' Investments Fairly and Equitably

482. Article II(3)(a) of the U.S.-Ecuador BIT states: "Investment shall at all times be accorded fair and equitable treatment."[1196] In recent years, a considerable body of case law has given specific meaning and content to the fair and equitable treatment ("FET") standard, which has emerged as the dominant rule of protection in investment treaty law.[1197] Although the FET standard is inherently flexible and applicable to many types of host State conduct, international tribunals and scholars have articulated several categories of behavior that constitute clear violations. A partial list includes the State's obligations (1) to ensure due process; (2) not to frustrate an investor's legitimate expectations; (3) to act in good faith; (4) to refrain from

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[1196] **Exhibit C-279,** U.S.-Ecuador BIT, Art. II(3)(a).

[1197] More than 20 BIT tribunals in recent years have determined that a State's conduct breached the FET standard. **CLA-220**, *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 ("*CME* Partial Award"), ¶ 611 (Wolfgang Kühn (Chairman); Stephen M. Schwebel; and Jaroslav Hándle); **CLA-31**, *Tecmed* Award ¶ 154; **CLA-42**, *Waste Management* Award, ¶ 98; **CLA-221**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 ("*MTD* Award"), ¶ 113-15 (Andrés R. Sureda (President); Marc Lalonde; and Rodrigo Oreamuno Blanco); **RLA-57**, *Occidental Exploration and Prod. Co. v. Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004 ("*Occidental I* Award"), ¶¶ 183-84 (Francisco O. Vicuña (President); Charles N. Brower; and Patrick Barrera Sweeney); **CLA-219**, *Petrobart* Award, ¶ 76; **CLA-88**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ("*CMS* Award"), ¶¶ 274-6 (Francisco O. Vicuña (President); Marc Lalonde; and Francisco Rezek); **CLA-210**, *Eureko* Partial Award, ¶ 234; **CLA-222**, *Bogdanov and ors v Moldova*, Ad hoc—SCC Arbitration Rules, Award, Sept. 22, 2005 ("*Bogdanov* Award"), ¶ 16 (Guiditta Cordero Moss (Sole Arbitrator)); **CLA-223**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Final Award, Jan. 26, 2006 ("*International Thunderbird* Final Award") ¶ 147 (Albert Jan Van den Berg (President); Thomas W Wälde; and Lic Agustín Portal-Ariosa); **CLA-224**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 ("*Saluka* Partial Award"), ¶ 302 (Arthur Watts (President); L Yves Fortier; and Peter Behrens); **CLA-225**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006 ("*Azurix* Award"), ¶¶ 374, 377 (Andrés R. Sureda (President); Elihu Lauterpacht; and Daniel H. Martins); **CLA-116**, *ADC Affiliate Ltd and ADC and ADMC Management Ltd v. Hungary*, ICSID Case No ARB/03/16, Final Award on Jurisdiction, Merits and Damages, Oct. 2, 2006 ("*ADC* Award"), ¶ 445 (Neil Kaplan (President); Charles N. Brower; and Albert Jan Van den Berg); **CLA-208**, *LG&E* Decision on Liability, ¶¶ 124-25; **CLA-226**, *PSEG Global Inc. v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ("*PSEG* Award"), ¶ 240 (Francisco O. Vicuña (President); L Yves Fortier; and Gabrielle Kaufmann-Kohler); **CLA-227**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 ("*Siemens* Award"), ¶¶ 289-309 (Andres R. Sureda (President); Charles N. Brower; Domingo Bello Janeiro); **CLA-228**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ("*Vivendi II* Award"), ¶ 7.4.18-46 (J. William F Rowley (President); Gabrielle Kaufmann-Kohler; and Carlos Bernal Verea*)*; **CLA-100**, *BG Group Plc v. Argentina*, UNCITRAL, Final Award, Dec. 24, 2007 ("*BG Group* Final Award") (Guillermo A. Alvarez (President); Alejandro M. Garro; and Albert Jan Van den Berg); **CLA-40**, *Waguih Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 ("*Siag* Award"), ¶ 450 (David AR Williams (President); Michael Pryles; Francisco O. Vicuña).

coercion or harassment; and (5) to promote and protect investment. Ecuador's conduct in this dispute has fallen far short of these obligations.

1. Ecuador Failed to Extend Due Process Rights to Claimants and Their Representatives

483. Fair procedure is an elementary requirement of the Rule of Law and a vital element of fair and equitable treatment.[1198] The FET standard under Article II(3)(a) of the U.S.-Ecuador BIT itself requires the State to provide due process to foreign investors:

> The minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings[.][1199]

Thus, a dearth of fair procedure and serious procedural shortcomings violate the FET standard.[1200]

484. Several international tribunals have found a State in violation of the FET standard due to a lack of due process in administrative or judicial proceedings.[1201] According to the *Tecmed* Tribunal, "[i]t is understood that the fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses ' … the international

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[1198] **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 142 (Oxford Univ. Press 2008).

[1199] **CLA-42**, *Waste Management* Award, ¶ 98.

[1200] *See generally* **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 142-144 (Oxford Univ. Press 2008); *see also Loewen Group Inc. and Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, June 25, 2003 ("*Loewen* Award") (Anthony Mason (President); Lord Mustill; and Abner J. Mikva), ¶ 121 (finding that the "whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.").

[1201] *See, e.g.*, **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 142-144 (Oxford Univ. Press 2008); *see also* **CLA-44**, *Loewen* Award, ¶ 121 (Tribunal finding that the "whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."); **CLA-41**, *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 ("*Metalclad* Award") (Elihu Lauterpacht (President); Benjamin R. Civiletti; José L. Siqueiros) (finding a violation of the FET guarantee when a Mexican municipality refused to grant a foreign investor a construction permit without affording the investor an opportunity to appear at the permit meeting); **CLA-31**, *Tecmed* Award, ¶ 201 (holding that Mexico violated the FET standard when its environmental regulatory authority failed to notify the investor that it was revoking its license to operate a landfill).

law requirements of due process, economic rights, obligations of good faith and natural justice.'"[1202] In general, a State's procedural actions may violate the FET standard when a lack of due process results in "an outcome that offends a sense of judicial propriety."[1203] According to the *Mondev* tribunal:

> the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[1204]

485. Professor Campbell McLachlan has stressed, in particular, the need for an investor to be able to claim due process violations under the investment treaty system without exhausting local remedies (which, in this case, would entail waiting for a prejudged enormous and catastrophic court judgment and then filing a futile appeal, which one of the presiding judges has conceded will be merely a "formality"):

> As a general proposition, an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act. But it is quite another matter to import the full rigor of the local remedies rule into investment arbitration on the ground that, in the absence of evidence of full exhaustion, there could be no breach of the treaty standard. In this respect, one must be very careful not to borrow principles from customary international law which are inconsistent with the hybrid nature of investment arbitration . . . to insist on a strict application of this requirement in investor-State arbitration is simply inconsistent with the creation of a right to arbitration by investors directly.[1205]

486. Professor McLachlan goes on to note that a number of tribunals have rendered awards in favor of claimants based on unjust local administrative decisions, even though the

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[1202] **CLA-31**, *Tecmed* Award, ¶ 153 n.189, quoting *S.D. Myers* Partial Award, ¶ 134.

[1203] **CLA-44**, *Loewen* Award, ¶ 132.

[1204] **CLA-7**, *Mondev Int'l. Ltd. v. United States*, ICSID Case No ARB(AF)/99/2, Award, Oct. 11, 2002 ("*Mondev* Award"), ¶ 127 (Ninian Stephen (President); James R. Crawford; and Stephen M. Schwebel).

[1205] **CLA-229**, Campbell McLachlan, *International Investment Arbitration* 231-32 (Oxford Univ. Press 2007).

claimants had not applied for review of those decisions in local courts.[1206] Citing *Mondev*, Professor McLachlan concludes that "a serious failure to accord due process before national courts can form the subject of a treaty claim" even if all local remedies have not been exhausted.[1207] And the *Commercial Cases Dispute* Partial Award affirms Professor McLachlan's conclusion. As that Tribunal concluded, although the local remedies rule generally applies to denial of justice claims under customary international law, "Claimants' claims for BIT violations … are not subject to that same strict requirement of exhaustion."[1208] As with Article II(7) regarding "effective means," the burden of proving the genuine availability of local remedies for Claimants to redress due process violations under Article II(3) rests with Ecuador.[1209] Claimants submit that such a showing is impossible, given the politicization and corruption surrounding the Lago Agrio Litigation and the Criminal Proceedings.[1210]

487. The Lago Agrio Court has committed numerous violations of Chevron's due process rights through its "improper and discreditable decisions," none of which can adequately be redressed in Ecuador. Each of these decisions—discussed above in Section IV A—is so destructive of Chevron's rights, especially considering the enormity of the promised final judgment, that they constitute a present violation of the FET standard. While Chevron repeatedly has notified the Lago Agrio Court of the Plaintiffs' wrongdoing, the Court has taken no action (and in fact, at the Plaintiffs' request has recently said that it ignore such evidence), meaning that Claimants' due process rights continue to be ignored.[1211]

[1206] **CLA-229**, Campbell McLachlan, *International Investment Arbitration* 233 (Oxford Univ. Press 2007). The Plaintiffs have discussed meetings with justices on the Ecuadorian Supreme Court, and several *Crude* clips underscore the involvement of the judiciary's highest levels in corruption. *See* **Exhibit C-360**, *Crude* Outtakes, Mar. 5, 2007, CRS208-04-CLIP 04, CRS208-06-CLIP 02 (in which Donziger discussed a meeting with the Supreme Court, right after the Supreme Court President failed to archive the Criminal Proceedings in violation of Ecuadorian law); **Exhibit C-360**, *Crude* Outtakes, Mar. 5, 2007, CRS208-02-CLIP 01 (in which Donziger said, "the judge, right now, is falling into the trap of Chevron. He's just not moving on a key issue and we're meeting with a Supreme Court judge today to talk about it.").

[1207] **CLA-229**, Campbell McLachlan, *International Investment Arbitration* 233 (Oxford Univ. Press 2007).

[1208] **CLA-47**, *Chevron* Partial Award on Merits, ¶ 321.

[1209] *See supra* ¶ 487.

[1210] *Id.*

[1211] See supra § II.G.4 (containing a summary of the Court's numerous orders rejecting Chevron's evidence of fraud and collusion between Court-appointed experts and the Plaintiffs).

488. Like the Lago Agrio Court's failure to follow proper procedure, Ecuador's political interference in the Lago Agrio Litigation also violates Claimants' right to due process. The facts in the Lago Agrio Litigation are far more egregious than those in *Petrobart v. Kyrgyzstan,*[1212] in which the government interfered in the execution of a judgment favoring the claimant and subsequently bankrupted the liable State-owned entity, and the tribunal found that such conduct constituted a violation of the FET standard.[1213]

489. Claimants have also suffered numerous legal irregularities and violations that have characterized the Criminal Proceedings, including at least the following:

- Despite multiple requests by two different Prosecutors General, the Ecuadorian courts refused to archive the case file of the Falsification Proceedings, thereby allowing the case to stay in existence and to continue to serve as an intimidation and pressure mechanism.
- Although required to issue an opinion within six days after the time period for the Prosecutorial Investigation lapses, the Prosecutor General failed to do so and allowed the Prosecutorial Investigation to lay dormant for almost eight months before issuing a formal accusation. In so doing, again, the Prosecutor General allowed the case to continue to serve as an intimidation and pressure mechanism.
- The Ecuadorian courts notified the defendants of and proceeded with the Prosecutorial Investigation, despite the expiration of the statute of limitations.
- Both judges and prosecutors involved in the case have withdrawn in the interest of preserving any eventual conviction, but only after committing procedural wrongs that (1) ensured the satisfaction of Ecuador's political goals; and (2) remained in effect despite the officers' withdrawal.

490. In addition to serving as a pressure tactic for Chevron to settle the case and as a signal to the Lago Agrio Court of the Correa administration's wishes, these proceedings caused a significant disruption within Chevron's in-house legal team and hindered its defense of the Lago Agrio Litigation.[1214] The Criminal Proceedings have continually offended standards of judicial propriety, equal treatment, and due process, and in no way could be found to conform to the FET standard.

[1212] **CLA-219**, *Petrobart* Award.

[1213] *Id.* ¶ 121.

[1214] *See* R. Veiga Witness Statement; R. Pérez Witness Statement.

2. Ecuador Frustrated Claimants' Legitimate Expectations by Colluding with the Plaintiffs and Politicizing the Lago Agrio Litigation

491. The fair and equitable treatment standard, embodied in Article II(3)(a) of the U.S.-Ecuador BIT, prohibits host States from engaging in conduct that frustrates the legitimate expectations of investors. At least 12 investment tribunals have found that the FET standard is violated when a state frustrates an investor's legitimate expectations.[1215] For example, in *Saluka v. Czech Republic*, the tribunal stressed the significance of an investor's legitimate expectations:

> [A]n investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard…the [State] must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of the investors' legitimate and reasonable expectations.[1216]

492. With respect to an investor's expectation that the State will act transparently, the *Tecmed* tribunal has stated that a foreign investor:

> expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . The investor also expects the State to use the legal instruments that

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[1215] *See, e.g.*, **CLA-224**, *Saluka* Partial Award; **CLA-31**, *Tecmed* Award; **CLA-92**, *CME* Partial Award; **CLA-42** *Waste Management* Award; **RLA-57**, *Occidential I* Award; **CLA-210**, *Eureko* Partial Award; **RLA-40**, *Duke v. Ecuador*, Award; **CLA-230**, *Jan de Nul NV and Dredging Int'l. NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, Oct. 24, 2008 ("*Jan de Nul* Award") (Gabrielle Kaufmann-Kohler (President); Pierre Mayer; and Brigitte Stern*)*; **CLA-231**, *Rumeli Telekonz AS and Telsim Mobil Telekomikasvon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/ 16, Award, July 21, 2008 ("*Rumeli* Award") (Bernard Hanotiau (President); Marc Lalonde; and Stewart Boyd); **CLA-82**, *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, Apr. 22, 2008 ("*Pey Casado* Award") (Pierre Lalive (President); Mohammed Chemloul; and Emmanuel Gaillard); **CLA-92**, *CME* Partial Award, ¶ 611; **CLA-232**, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 2, 2009 ("*EDF* Award"), ¶ 221 (Piero Bernardini (President); Arthur W Rovine; and Yves Derains).

[1216] **CLA-224**, *Saluka* Partial Award, ¶ 302.

> govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[1217]

493. The case of *Biwater v. Tanzania* also illustrates that a host State breaches the FET standard by frustrating an investor's legitimate expectations.[1218] In *Biwater*, the Tanzanian regulatory authority had assured the investor, a water utility company, that it would "manage the public's expectations" during the transition from public to private-sector control of water and sewage services.[1219] Instead, the Tanzanian officials announced at a specially-convened, televised press conference that due to the claimant's "poor performance," its lease contract "had been terminated."[1220] At the same press conference, Tanzanian officials announced that a new, state-run entity was taking over, and that the claimant's staff and senior management would be leaving the country.[1221]

494. The tribunal held that this public disparagement of the claimant violated the FET standard, in part because it departed from the claimant's legitimate expectations.[1222] Regardless of the quality of Biwater's performance, the tribunal held that it "still had a right to the proper and unhindered performance of the contractual termination process . . . [T]he Republic's public statements at this time constituted an unwanted interference in this. They inflamed the situation, and polarized public opinion still further," "thereby ensuring that the claimant's contractual termination process could not "follow a normal contractual course."[1223]

495. Here, Ecuador frustrated Claimants' legitimate expectations in various ways. Most fundamentally, it "eviscerat[ed] the arrangements"[1224] on which TexPet relied in choosing to invest in Ecuador, by seeking to undermine the specific assurances of finality that it gave

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[1217] **CLA-31**, *Tecmed* Award, ¶ 154.

[1218] **CLA-137**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ("*Biwater* Award") (Bernard Hanotiau (President); Gary B. Born; and Toby T. Landau).

[1219] *Id.* ¶ 550.

[1220] *Id.* ¶ 551.

[1221] *Id.* ¶ 551.

[1222] *Id.* ¶¶ 550-553, 627.

[1223] *Id.* ¶ 627.

[1224] **CLA-92**, *CME* Partial Award, ¶ 611.

TexPet via the Settlement and Release Agreements with the Ecuadorian State and its political subdivisions.[1225] In reliance on Ecuador's assurances, TexPet invested approximately US$ 40 million for environmental remediation and community development projects in Ecuador. The responsible Ecuadorian ministries and agencies oversaw, inspected, and approved all of the remediation and reclamation work, and the Government itself signed the final release.[1226] But the current Ecuadorian Government has disregarded these contractual and legal assurances, thereby unreasonably frustrating TexPet's good-faith settlement of all public environmental claims relating to Consortium operations. The Lago Agrio Plaintiffs' representatives had direct involvement in the drafting and passage of the 1998 Constitution and the 1999 EMA—the very same laws that enabled the Plaintiffs to sue in Lago Agrio for already-released public environmental claims, without having to prove individualized damage.[1227] At least since that time, Ecuador has engaged in a concerted campaign, along with the Lago Agrio Plaintiffs, to exploit Claimants for damages that do not exist or that are the responsibility of the Government and Petroecuador.

496. The Ecuadorian Government has also publicly disparaged Claimants and their individual employees on numerous occasions.[1228] This conduct far exceeds that of the Tanzanian

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[1225] *See* **Exhibit C-17**, Memorandum of Understanding among the Republic of Ecuador, Petroecuador and Texaco Petroleum Col., Article IV, Dec. 14, 1994 ("MOU"); **Exhibit C-23**, 1995 Settlement Agreement; **Exhibit C-31,** Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect's Office of Sucumbíos, May 2, 1996; **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996; **Exhibit C-28,** Release with Municipality of Shushufindi, May 2, 1996; **Exhibit C-29,** Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996; **Exhibit C-30** Release with Municipality of Lago Agrio, May 2, 1996; **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, Apr. 26, 1996; **Exhibit C-53,** Final Certification Between the Republic of Ecuador, Petroecuador, PetroProduccion and TexPet, Sept. 30 1998 ("1998 Final Release").

[1226] **Exhibit C-53**, 1998 Final Release.

[1227] *See supra* § II.G.1.a.

[1228] *See*, *e.g.,* **Exhibit C-168**, Press Release, *The Government Backs Actions of Assembly of Persons Affected by Texaco Oil Company,* Government of Ecuador Secretary General of Communications, The government backs actions of the assembly of persons affected by Texaco Oil Company, Mar. 20, 2007 ("The President of the Republic, Rafael Correa, offered all the support of the National Government to the Assembly of the Parties Affected by Texaco Oil Company"); **Exhibit C-561**, Press Release, Office of President Rafael Correa, The President will visit the Province of Orellana and Sucumbíos, Apr. 25, 2007; **Exhibit C-170**, Press Release, Office of President Rafael Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007; **Exhibit C-171**, Radio Caravana, Presidential Weekly Radio Address, Apr. 28, 2007; **Exhibit C-173**, Excerpt from Transcript of Weekly Presidential Radio Address, Canal del Estado, Aug. 9, 2008; **Exhibit C-174**, *Ecuador says to meet Chevron over $16 billion lawsuit*, REUTERS, Aug. 16, 2008.

officials in *Biwater v. Tanzania*.[1229] While in *Biwater* the tribunal held that publicly disparaging comments made at a single, televised press conference constituted a sufficient basis for a breach of the FET standard,[1230] President Correa has launched a public campaign to vilify the Claimants, involving weekly radio addresses, television broadcasts on multiple Ecuadorian television stations, press releases, and numerous public statements.[1231] President Correa has levied accusations against Claimants,[1232] condemned and threatened criminal prosecutions against their Ecuadorian attorneys,[1233] and attempted to exploit Ecuadorian public opinion by making the case against Claimants a national cause.[1234] In short, President Correa has gone far beyond the inequitable conduct in *Biwater* and has to a much greater degree "inflamed the situation" and

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[1229] **CLA-137**, *Biwater* Award.

[1230] *Id.* ¶ 627.

[1231] *See*, *e.g.*, **Exhibit C-243,** Transcript of Statements by Rafael Correa Broadcast on Teleamazonas, Apr. 26, 2007; **Exhibit C-561**, Press Release, Office of President Rafael Correa, The President will visit the Province of Orellana and Sucumbios, Apr. 25, 2007; **Exhibit C-170**, Press Release, Office of the President Rafael Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007; **Exhibit C-173,** Excerpt from Transcript of Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008; *See also* **Exhibit C-251**, Presidential Weekly Radio Address, Aug. 16, 2008; **Exhibit C-173,** Excerpt from Transcript of Weekly Presidential Radio Address, Canal del Estado, Aug. 9, 2008; **Exhibit C-242,** Office of President Rafael Correa, Press Release, *President calls upon district attorney to allow a criminal case to be heard against Petroecuador officers who accepted the remediation performed by Texaco*, Apr. 26, 2007; **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007; *See e.g.,* **Exhibit C-168,** Press Release, Government of Ecuador Secretary General of Communications, *The government backs actions of the assembly of persons affected by Texaco Oil Company*, Mar. 20, 2007 ("The President of the Republic, Rafael Correa, offered all the support of the National Government to the Assembly of Parties Affected by Texaco Oil Company"); **Exhibit C-174,** *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS, Aug. 16, 2008.

[1232] **Exhibit C-561**, Press Release, Office of President Rafael Correa, *The President will visit the Province of Orellana and Sucumbíos*, Apr. 25, 2007; **Exhibit C-170,** Office of the President Rafael Correa, Press Release, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007; **Exhibit C-173,** Excerpt from Transcript of Weekly Presidential Radio Address. Canal del Estado, Aug. 9, 2008; **Exhibit C-243**, Transcript of Statements by Rafael Correa Broadcast on Teleamazonas, Apr. 26, 2007. *See also* **Exhibit C-251**, President Rafael Correa's Weekly Radio Address, Aug. 16, 2008; **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007.

[1233] **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007; **Exhibit C-173,** Excerpt from Transcript of Weekly Presidential Radio Address. Canal del Estado, Aug. 9, 2008; **Exhibit C-242,** Office of President Rafael Correa, Press Release, *President calls upon district attorney to allow a criminal case to be heard against Petroecuador officers who accepted the remediation performed by Texaco*, Apr. 26, 2007.

[1234] *See*, *e.g.*, **Exhibit C-168,** Press Release, Government of Ecuador Secretary General of Communications, *The Government Backs Actions of Assembly of Persons Affected by Texac*o *Oil Company*, Government of Ecuador Secretary General of Communications, Mar. 20, 2007 ("The President of the Republic, Rafael Correa, offered all the support of the National Government to the Assembly of Parties Affected by Texaco Oil Company"); **Exhibit C-171,** President Rafael Correa's Weekly Radio Program, Radio Caravana, Apr. 28, 2007; **Exhibit C-174**, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS, Aug. 16, 2008.

"polarized public opinion" in Ecuador.[1235] These public statements are only the most visible sign of collusion between the Government and the Plaintiffs' lawyers. No investor would expect a government official, responsible for respecting and upholding government commitments, to seek to undermine or destroy such a contract in order to obtain a financial windfall or achieve political gains. Yet that is exactly what Ecuadorian officials have done repeatedly and in concert with the Lago Agrio Plaintiffs. A few examples include the following:

- Plaintiffs' lawyer Cristobal Bonifaz publicly stated that "the plaintiffs and their attorneys have agreed—in legal documents—not to sue the State should it be found that the State was jointly responsible with Texaco for causing environmental damage."[1236]
- The Attorney General's office worked secretly with the Plaintiffs to undermine the Settlement and Release Agreements. In response to ADF representative Luis Yanza's e-mail asking "the Government and the Attorney General to play for our side," Deputy AG Escobar squarely admitted that the Government was "searching for a way to nullify" the Settlement and Release Agreements, and was even willing to exploit its criminal justice system to do so.[1237]
- President Correa met privately with the Lago Agrio Plaintiffs on numerous occasions and told them that "if we put in a little effort, before getting the public involved, the Prosecutor will yield, and will re-open that investigation into the fraud of – of the contract between Texaco and the Ecuadorian Government."[1238]
- The Constituent Assembly has exhibited open support for the Plaintiffs,[1239] at the same time that it threatened to dismiss or prosecute non-subservient judges.[1240]

[1235] **CLA-137**, *Biwater* Award, ¶ 627.

[1236] **Exhibit C-77**, *Texaco-The Time has come*, EL HOY, Apr. 14, 1997.

[1237] **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray *et al*., Aug. 10, 2005.

[1238] **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, CRS-376-03-CLIP-01.

[1239] For example, Assembly member Manuel Mendoza stated that we "*provide frontal support to the unceasing struggle of*" the plaintiffs. **Exhibit C-568**, Noticias TV, Cable Noticias Estelar, Feb. 12, 2008 (quoting Assembly member Manuel Mendoza); **Exhibit C-202**, Chevron's Rebuttal to Expert Cabrera's First Report, filed Sept. 15, 2008 at 2:14 p.m., *Record* at 141082, 141277.

[1240] The Constituent Assembly enacted the following as its first official mandate in November 2007:

> [T]he decisions of the Constituent Assembly are superior to any other rule in the judicial system, and compliance with them is mandatory for all persons, entities and other public authorities without any exceptions whatsoever. No decision of the Constituent Assembly shall be subject to the oversight of, or be challenged by, any agency of the current government.

- The Lago Agrio Plaintiffs have worked "hand in hand" with lawyers for the Republic of Ecuador, describing their collaboration as a "joint defense."[1241]

- Various Ecuadorian Ministries along with Petroecuador have provided direct assistance to the Plaintiffs, granting them exclusive access to Petroecuador's library and awarding the ADF lucrative money grants, with no assurance that this money is unrelated to the Lago Agrio Litigation.[1242]

This "exercis[e] of State[] discretion on the basis of corruption"[1243] fundamentally breaches Claimants' legitimate expectations.

497. Fourth, Judge Núñez's engagement in an apparent bribery scheme and pre-determination of the Lago Agrio Litigation likewise betrayed Claimants' legitimate expectations. Judge Núñez pre-determined the Lago Agrio outcome before he had even begun reviewing the nearly 150,000 pages of evidence in the case.[1244] He made no secret of his bias favoring the Lago Agrio Plaintiffs,[1245] and he declared that any appeal by Chevron would be a mere "formality."[1246] Clear and convincing evidence shows Judge Núñez's involvement in a scheme by purported Ecuadorian Government representatives to award remediation contracts in exchange for a US$ 3 million bribe, purportedly to be split among Judge Núñez, the office of the Presidency, and the Lago Agrio Plaintiffs.[1247] The Ecuadorian Government has ignored this

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> Judges and tribunals that process any action contrary to the decisions of the Constituent Assembly shall be dismissed from their post and subject to corresponding prosecution.

Exhibit C-104, Constituent Assembly, Mandate 1, Official Registry No. 223, Nov. 30, 2007.

[1241] **Exhibit C-360**, *Crude* Outtakes, Dec. 6, 2006, at CRS167-01-CLIP 01.

[1242] **Exhibit C-552**, Ministry Agreement No. 164, Official Registry No. 26, Feb. 22, 2007; **Exhibit C-553**, María Augusta Sandoval, *Environmental Remediation Plan in Motion*, EL TELEGRAFO, Aug. 12, 2008; **Exhibit C-554**, *The Remediation Took a First Step*, EL COMERCIO, Dec. 24, 2008.

[1243] *See* **CLA-232**, *EDF* Award, ¶ 221.

[1244] **Exhibit C-224,** Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12 (nothing that Judge Núñez "will begin reviewing…[the] evidence after reports on the effects of the discharges on fishing and agriculture are completed").

[1245] **Exhibit C-225,** *Justice or Extortion? The Hounding of an American Oil Company*, THE ECONOMIST, May 23, 2009, at 2; **Exhibit C-222**, Simon Romero and Clifford Kraus, *In Ecuador, Resentment of an Oil Company Oozes*, THE NEW YORK TIMES, May 15, 2009.

[1246] **Exhibit C-267,** Bribery Transcript Pertaining to Recording 3, at 32.

[1247] **Exhibit C-267**, Bribery Transcript Pertaining to Recording 4, at 8. In a radio interview after the recordings had been made public, Mr. García described himself as "one of the members of Movimiento País, I am one more who believes in the revolution, I support the thinking of our leader." **Exhibit C-570**, *Interview with Patricio García*, La Luna Radio, Sept. 4, 2009; **Exhibit C-267**, Bribery Transcript Pertaining to Recording 1, at 34; *id.*,

apparent corruption, instead incredibly seeking to distort the evidence by falsely accusing Claimants of espionage.[1248]

498. The State's actions conducted behind-the-scenes are also patent "exercis[es] of State[] discretion on the basis of corruption," which fundamentally breach Claimants' legitimate expectations. As portrayed in a timeline of events set out in Section II.H.4, the Government's overt and covert support of the Plaintiffs directly affected the Court's decisions in the Lago Agrio Litigation and the conduct of the Criminal Proceedings.

499. Further, the substance of the Criminal Proceedings also involves a fundamental breach of Claimants' legitimate expectations. As set forth above, the CG Report, the prosecutorial investigation order, and the Prosecutorial Opinion—together with the underlying technical analyses and alleged expert reports—wholly disregard the parameters of the RAP and seek to hold Claimants' lawyers criminally liable on an entirely different basis. The Criminal Proceedings essentially allege that TexPet's remediation was not successful because there are pits that were not remediated and because some of the remediated pits exceed 1,000 mg/kg TPH. But in order to reach those conclusions, the Comptroller General, the Prosecutor General, and the various experts had to resort to (1) citing pits that were not included in the RAP at all or were included in the RAP but designated as "No Further Action" or "Change of Condition" (and thus did not fall within TexPet's remediation obligations); and (2) applying a remediation standard different than the one agreed to by the parties in the RAP. When investing US$ 40 million and more than three years under the RAP, TexPet legitimately expected that its performance of its contractual obligations would be assessed in accordance with the terms of its agreements with Ecuador, not on a wholly different basis intended to fabricate criminal liability where none exists. Ecuador's initiation and pursuit of the Criminal Proceedings on this arbitrary basis thus constitute a breach of Claimants' legitimate expectations.

Bribery Transcript Pertaining to Recording 3, at 34; *id.*, Bribery Transcript Pertaining to Recording 4, at 13-14 *id.*, Bribery Transcript Pertaining to Recording 1, at 6; *id.*, Bribery Transcript Pertaining to Recording 4, at 2-3.

[1248] **Exhibit C-632**, Jeanneth Valdivieso, *Ecuador Judge, Chevron Dispute Secret Recordings*, ASSOCIATED PRESS, Sept. 2, 2009.

3. Ecuador Acted in Bad Faith Toward Claimants

500. Good faith is inherent in the FET standard,[1249] as it is "an expression of the *bona fide* principle recognized in international law."[1250] Accordingly, a State that acts in bad faith breaches the fair and equitable treatment obligation, although that obligation can also be breached in other ways (*i.e.* proof of bad faith is sufficient but not necessary).[1251] Good faith requires a State to "implement[] its policies *bona fide* by conduct that is, as far as it affects the investment, reasonably justifiable by public policies and that . . . does not violate the requirements of consistency, transparency, even-handedness, and non-discrimination."[1252]

501. The tribunal in *Waste Management v. Mexico* held that a deliberate conspiracy—defined as "a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement"—violates the FET standard.[1253] Similarly, a host State's attempt to solicit a bribe or engage in other corruption violates the FET standard.[1254] This good-faith obligation reaches less egregious conduct, requiring a State to "act in good faith and form, and not deliberately set out to destroy or frustrate the investment by improper means."[1255] In addition, good faith requires that a State's conduct not violate the requirements of "consistency, transparency, even-handedness and non-discrimination."[1256] The Government's refusal to honor the Settlement and Release Agreements, its covert contacts with the Plaintiffs,

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[1249] **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 134 (Oxford Univ. Press 2008); *see also* **CLA-229**, Campbell McLachlan, INTERNATIONAL INVESTMENT ARBITRATION 243 (Oxford Univ. Press 2007) ("[I]f the government does act in bad faith, that will be likely to satisfy the standard."); **CLA-233**, Stephen Vasciannie, *The Fair and Equitable Standard in International Investment Law and Practice*, 17 BRIT. Y.B. INT'L L. 102-103 (1999) ("States would fail to meet…the fair and equitable treatment standard, if, among other things, their acts amounted to bad faith.").

[1250] **CLA-31**, *Tecmed* Award, ¶ 153.

[1251] *See, e.g.* **CLA-7**, *Mondev* Award, ¶ 116 ("[A] State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."); **CLA-44**, *Loewen* Award, ¶ 132 ("Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to breach of international justice."); **CLA-227**, *Siemens* Award, ¶ 295.

[1252] **CLA-224**, *Saluka* Partial Award, ¶ 307.

[1253] **CLA-42**, *Waste Management* Award, ¶ 138.

[1254] *See*, *e.g.*, **CLA-232**, *EDF* Award, ¶ 221 ("The Tribunal shares the Claimant's view that a request for bribery by a State agency is a violation of the fair and equitable treatment obligation").

[1255] **CLA-42**, *Waste Management* Award, ¶ 138.

[1256] **CLA-224**, *Saluka* Partial Award, ¶ 307.

and its officials' repeated vilification of Claimants provide examples of inconsistent, non-transparent, and discriminatory conduct:

- Despite its negotiating position in the mid-1990s and its express representations to U.S. courts during that same time, Ecuador altered its legislative landscape after TexPet left the country to allow private parties to bring the State's diffuse, environmental claims—the same claims it settled for good consideration.

- The Government failed to perform in good faith its commitments under the Settlement and Release Agreements, as recognized by Ecuador's National Director of Environmental Protection, "[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."[1257]

- Deputy Attorney General Martha Escobar privately communicated to the Plaintiffs' counsel that the Attorney General's Office was "searching for a way to nullify or undermine the value of the remediation contract and the final acta," and that the Attorney General himself wanted to "criminally try those who executed the contract."[1258]

- The Plaintiffs enjoyed a number of covert meetings with the President of the Republic,[1259] the Vice President's office,[1260] officials within Petroecuador,[1261] Supreme Court justices,[1262] and even the presiding judge himself.[1263] The Plaintiffs met with these officials to talk about the Lago Agrio Litigation and Criminal Proceedings, to forge agreements regarding the distribution of remediation contracts, and to collude with the judiciary itself to achieve the Plaintiffs' goals.

- The Lago Agrio Court participated in a number of improper *ex parte* meetings with the Plaintiffs related to the abandonment of the judicial inspections and the appointment of Mr. Cabrera as global assessment expert.

[1257] **Exhibit C-58,** DINAPA's Muñoz Appears Before Congress, May 10, 2006.

[1258] **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray et al., Aug. 10, 2005.

[1259] **Exhibit C-360**, *Crude* Outtakes, Dec. 8, 2006, CRS130-00-CLIP-01 (Mr. Donziger says he has met President Correa, that the Plaintiffs' team "is tight with him," and that his win puts the Plaintiffs "in a significantly improved position"); *id.,* June 7, 2007, at CRS-376-03-CLIP-01; *id.,* at CRS162-03-CLIP 01.

[1260] *Id.,* Mar. 30, 2007, CRS223-02-CLIP 01.

[1261] *Id.,* Dec. 6, 2006, CRS138-01-CLIP 01; *id*., at CRS161-01-02-CLIP 01.

[1262] *Id.,* Mar. 5, 2007, at CRS208-04-CLIP 04, CRS208-06-CLIP 02 (in which Donziger discussed a meeting with the Supreme Court, right after the Supreme Court President failed to archive the Criminal Proceedings in violation of Ecuadorian law); *id.,* Mar. 5, 2007, at CRS208-02-CLIP 01 (in which Donziger says, "the judge, right now, is falling into the trap of Chevron. He's just not moving on a key issue and we're meeting with a Supreme Court judge today to talk about it.").

[1263] *Id.,* Mar. 6, 2007, at CRS210-02-CLIP 01; *Id.,* Mar. 5, 2007, at CRS-208-02-CLIP 01.

- The Lago Agrio Court appointed Mr. Cabrera as the "neutral" global assessment expert, knowing that he had been non-transparently hand-picked by the Plaintiffs.
- The Lago Agrio Court issued a number of bad-faith, politically-motivated decisions, including the most recent decision to restrict Chevron's right to file new pleadings in the record just two weeks after Chevron obtained the explosive *Crude* footage implicating the Plaintiffs, the Court, and Government officials in fraud.[1264]

502. The bribery scandal involving Judge Núñez and other purported Government officials provides another extreme example of Ecuador's bad faith. According to the audiovisual recordings, in order to secure payment of the requested bribe, the purported Government representatives assured the contractors that Judge Núñez would find Chevron liable—even though the proceeding was ongoing and evidence was still being received—and that the judgment would require Chevron to pay the Government billions of dollars for environmental remediation. Judge Núñez met twice with private contractors to discuss the case. In the recordings, the purported Government representatives indicate that:

- The Ecuadorian Government managed Judge Núñez in his conduct of the case.[1265]
- "Chevron is going to lose the trial."[1266]
- The Government will provide lawyers to help craft the opinion against Chevron.[1267]
- The President's legal advisor has instructed Judge Núñez on how to route the judgment money.[1268]
- The judge is on board with the scheme, and Patricio García will deliver Judge Núñez's share of the bribe money to him.[1269]

[1264] **Exhibit C-361,** Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.

[1265] **Exhibit C-267**, Bribery Transcript Pertaining to Recording 2, May 15, 2009, at 19; *id*., Bribery Transcript Pertaining to Recording 4, June 22, 2009, at 4-5.

[1266] *Id.,* Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 17.

[1267] *Id.,* Bribery Transcript Pertaining to Recording 1, May 11, 2009, at 34.

[1268] *Id.,* Bribery Transcript Pertaining to Recording 2, May 15, 2009, at 4; *id*., Bribery Transcript Pertaining to Recording 4, June 22, 2009, at 2-5.

[1269] *Id.,* Bribery Transcript Pertaining to Recording 4, June 22, 2009, at 2-3.

503. Separately, Judge Núñez made several bad-faith representations regarding his predetermination of the Lago Agrio judgment and his bias against Chevron. During the videotaped meetings, Judge Núñez stated:

- He will find Chevron guilty.[1270]
- The award will be made in part to the Government.[1271]
- He will issue the ruling in October or November 2009.[1272]
- The appeal process to the full chamber of the provincial court is only a "formality."[1273]

The evidence of Judge Núñez's corruption and bias against Claimants is indisputable. Moreover, because his successor Judge Ordóñez refused to annul Judge Núñez's rulings, his bad-faith judicial decisions continue to taint the trial and undermine Claimants' basic rights.

504. Finally, Ecuador is pursuing the Criminal Proceedings against Claimants' attorneys in bad faith. A tribunal may find evidence of bad faith when the State's actions are based on unfair motives or policies that are not reasonably justifiable.[1274] In *Bayindir v. Pakistan*, the tribunal decided that evidence of bad faith on the part of Pakistan gave the tribunal jurisdiction to decide the dispute on the merits, because the very presence of bad faith implicated a BIT violation.[1275] The investor, a Turkish company, had executed a contract with the Pakistani government to construct a highway.[1276] While construction was underway, the Pakistani government terminated the contract, evacuated the site, and entrusted the completion of the

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[1270] *Id.,* 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.").

[1271] *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.

[1272] **Exhibit C-267**, Bribery Transcript Pertaining to Recording 2, May 15, 2009, at 7-8; *id*., Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 31.

[1273] *Id.,* Bribery Transcript Pertaining to Recording 3, June 5, 2009, at 32.

[1274] *See* **CLA-72**, *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005 ("*Bayindir* Decision on Jurisdiction") (Gabrielle Kaufmann-Kohler (President); Karl-Heinz Böckstiegel; and Sir Franklin Berman); **CLA-224**, *Saluka* Partial Award.

[1275] **CLA-72**, *Bayindir* Decision on Jurisdiction, ¶ 250.

[1276] *Id.* ¶ 12.

project to a local contractor.[1277] The investor claimed that its expulsion by the Pakistani government was based on "local favoritism" and "bad faith."[1278] While the Pakistani government justified the expulsion on the basis of delay, the investor brought forth evidence that the real motivation for the expulsion was the World Bank's unfavorable view of the project and governmental budgetary constraints.[1279] In its Decision on Jurisdiction, the tribunal held that "the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT."[1280]

505. Here, Claimants have provided extensive evidence of Ecuador's bad faith in pursuing the Criminal Proceedings. Government officials, including President Correa, pressured prosecutors to file unfounded charges by calling for the criminal prosecution of those who signed the 1998 Final Release. These officials also communicated with the Plaintiffs that Ecuador's ultimate goal was to undermine the validity of the release agreements and thereby help the Lago Agrio Plaintiffs win their case. Moreover, Ecuador's bad faith is evident from its determination to pursue the Criminal Proceedings (1) in repeated breach of Ecuadorian criminal procedural law; (2) notwithstanding the expiration of the statute of limitations; and (3) by ignoring the terms of the RAP. Thus, Claimants have proffered sufficient evidence to demonstrate that the Criminal Proceedings are being prosecuted in bad faith.

4. Ecuador Coerced and Harassed Claimants

506. The FET standard also protects investors from coercion or harassment by the host State. The tribunal in *Saluka v. Czech Republic* held that the "host state . . . must grant the investor freedom from coercion or harassment."[1281] The tribunal in *Tokios Tokeles v. Ukraine* declared that a "deliberate campaign" to punish an investor is the "clearest infringement one could find of the provisions and aims of the [Investment] Treaty."[1282] Likewise, the *Tecmed* and

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[1277] *Id.* ¶ 242.

[1278] *Id.* ¶ 242.

[1279] *Id.* ¶ 242.

[1280] *Id.* ¶ 250.

[1281] *Saluka* Partial Award, ¶ 308.

[1282] **CLA-38**, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, June 29, 2007 ("*Tokios* Award"), ¶ 123 (Lord Mustill (President); Daniel Price; and Piero Bernardini).

Desert Line tribunals held that use of "coercion" or "duress" contravenes the State's obligation to provide fair and equitable treatment.[1283] Whether a State's actions rise to the level of coercion or harassment largely may depend on the intent behind the acts.[1284] In any event, treatment of the investor should never be more severe than that afforded other foreign or national investors.[1285]

507. Harassment based on an intent to undermine the investment—the very conduct at issue here—is a clear violation of the FET standard. Politically-motivated harassment, or conduct targeted at harming the investment, has been particularly rebuked by the *Vivendi* tribunal:

> Under the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a "do no harm" standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation.[1286]

508. In *Vivendi*, the tribunal decided that Argentina breached the FET standard by imposing charges and fines on the investment in order to coerce a renegotiation. The facts in this case are much more compelling. Here, multiple branches of the Ecuadorian Government have conspired to destroy the value of Claimants' investment rights in the Settlement and Release Agreements, and have publicly charged their individual employees with committing criminal acts in order to do so.

509. The Criminal Proceedings provide the most pointed example of Ecuador's coercive and harassing behavior toward Claimants. Indeed, the facts underlying these proceedings go far beyond what earlier investment tribunals considered to be violations of the FET standard. In *Pope & Talbot, Inc. v. Canada*, the claimant asserted that the government had violated the FET standard by subjecting it to an aggressive regulatory "verification review," in

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[1283] **CLA-31**, *Tecmed* Award, ¶ 163; **CLA-234**, *Desert Line Projects LLC v. Yemen*, ICSID Case No ARB05/17, Award, Feb. 6, 2008 ("*Desert Line* Award"), ¶ 194 (Pierre Tercier (President); Jan Paulsson; and Ahmed Sadek El-Kosheri).

[1284] *See* **CLA-37**, *Pope and Talbot Inc. v Canada*, Ad hoc—UNCITRAL, Award on Merits, May 31, 2002 ("*Pope and Talbot* Award on Merits"), ¶¶ 156-181 (Lord Dervaird (President); Benjamin J. Greenberg; and Murray J. Belman).

[1285] **CLA-235** Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 169 (Oxford Univ. Press 2008).

[1286] **CLA-228**, *Vivendi II* Award, ¶ 7.4.39.

which the claimant was denied requests for information, required to incur expense and disruption in responding to requests, and subjected to threats.[1287] The government offered no justification for its conduct, and the tribunal found that the regulatory agency's behavior toward the investor was "more like combat than cooperative regulation."[1288] Because the government was unable to justify its conduct, the tribunal concluded that these "threats and misrepresentation[s]" constituted a breach of the FET standard.[1289] The *Tokios Tokeles v. Ukraine* tribunal similarly pronounced that a host State's "manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings . . . may be a breach, or an element in a breach, of an investment treaty."[1290]

510. The conduct of the Ecuadorian Government and courts in prosecuting the frivolous Criminal Proceedings goes well beyond the level of aggressive regulatory behavior. The pursuit of criminal actions entails not only a threat to reputation and business security, but also to individual liberty and safety. Examples of Ecuador's harassing behavior related to the Criminal Proceedings include the following:

- The Comptroller General's 2003 Criminal Complaint against Claimants' lawyers directly sought to undermine the Settlement and Release Agreements at the heart of Chevron's defense in the Lago Agrio Litigation. The Criminal Complaint was filed (1) three weeks after Claimants notified Ecuador that the Lago Agrio claims fell within the scope of the agreements;[1291] and (2) one week after Chevron filed its Answer to the Lago Agrio Complaint, stating that the Plaintiffs' claims should be directed to Ecuador and Petroecuador.[1292]

- Deputy Attorney General Martha Escobar worked privately with the Plaintiffs to undermine the Settlement and Release Agreements and press bogus criminal charges. As she wrote, "[T]he Attorney General's Office and all of us working on the State's defense were searching for a way to nullify or undermine the value of the remediation contract and the final acta and that our greatest difficulty lay in

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[1287] **CLA-37**, *Pope and Talbot* Award on Merits, ¶¶ 156-181.

[1288] *Id.* ¶ 181.

[1289] *Id.* ¶¶ 67-69.

[1290] *See* **CLA-38**, *Tokios* Award, ¶ 133. The *Tokeles* tribunal went on to find no breach of the BIT because the claimant had failed to rebut the validity of the claims against it. Unlike that case, however, Claimants have here demonstrated the falsity of the allegations contained in the criminal complaint.

[1291] **Exhibit C-78**, Letter from Edward B. Scott to Minister of Energy Carlos Arboleda, Oct. 6, 2003, at 10:42 a.m.

[1292] **Exhibit C-72,** Chevron's Answer to Lago Agrio Complaint, Oct. 21, 2003, at 9:10 a.m.

the time that has passed … The Attorney General … wants to criminally try those who executed the contract.[1293]

- President Correa advised the Plaintiffs on how to apply political pressure in order to have the Prosecutor "yield" and re-open the Criminal Proceedings.[1294]

- President Correa publicly denounced Claimants and their individual employees, calling Mr. Pérez and Mr. Veiga "*vende patrias* . . . who for a fistful of dollars are capable of selling their souls, their country, their families, etc."[1295]

- At the urging of President Correa and the Plaintiffs' lawyers, Prosecutor General Pesántez instituted a formal Prosecutorial Investigation in August 2008, repeating the 2003 Criminal Complaint nearly word for word even though that Complaint had been rejected multiple times on the basis of no evidence.[1296]

- The Prosecutor General's frivolous Prosecutorial Investigation forced Rodrigo Pérez, a lifelong Ecuadorian citizen, to flee Ecuador and move to Miami after working as TexPet's legal representative in Ecuador for more than 30 years.[1297]

- Because of the Criminal Proceedings, Ricardo Veiga is unable to travel to Ecuador due to the risk of arrest or of having his return to the United States restricted. His inability to travel to Ecuador is a limitation on his abilities to peform his professional responsibilities to defend Chevron fully in the Lago Agrio Litigation.[1298]

511. Ecuador's conduct in the Criminal Proceedings is consistent with its established pattern of abusing the criminal justice system to achieve political objectives. For four years in a row, the U.S. State Department has reported that Ecuador frequently employs its criminal justice system "as a means of harassment in civil cases in which one party sought to have the other arrested on criminal charges."[1299] The tribunal in *City Oriente v. Ecuador* concluded that the

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[1293] **Exhibit C-166,** Email exchange between Dr. Martha Escobar to Alberto Wray *et al*, Aug. 10, 2005

[1294] **Exhibit C-360**, *Crude* Outtakes, June 7, 2007, at CRS-376-03-CLIP-01.

[1295] **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007 (emphasis added).

[1296] **Exhibit C-252,** Order from Prosecutor General Washington Pesántez Ordering Prosecutorial Investigation to Begin, Aug. 26, 2008, at 11:00 a.m.; **Exhibit C-253**, Notification of Prosecutorial Investigation from Dr. Carlos Fernandez Idrovo, Comptroller General, to the President of the Supreme Court, Sept. 3, 2008, at 4:13 p.m.

[1297] Claimants' Interim Measures Reply, ¶ 63.

[1298] R. Veiga Witness Statement, ¶ 57.

[1299] **Exhibit C-307**, U.S. State Department, *2008 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm; **Exhibit C-308**, U.S. State Department, *2007 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100638.htm; **Exhibit C-309**, U.S. State Department, *2006 Report on Human Rights Practices: Ecuador*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm; **Exhibit C-165**, U.S. State Department, *2009 Report on Human Rights Practices: Ecuador*.

Government, and particularly the Ecuadorian Prosecutor General, had exploited the country's criminal justice system "as a means to coactively secure payment of the amounts allegedly owed by City Oriente."[1300] This same harassment is present here, as Ecuadorian officials have pursued groundless criminal charges for more than seven years and made countless disparaging statements about Claimants, all in an effort to evade governmental liability in the Lago Agrio Litigation.

5. Ecuador Breached Its Obligation to Promote and Protect Investment

512. The touchstone of FET—whether it be couched in terms of a judicial guarantee of due process, executive good faith or the right to be free from coercion or harassment—requires the host State to actively promote and protect foreign investment. Fair and equitable treatment requires a host State not only to refrain from harming an investment, but also actively to promote and protect it. In *Saluka v. Czech Republic*, the tribunal noted that the FET standard must be read in light of the treaty's purpose, which includes the promotion and encouragement of investment, and at the very least requires a Government to refrain from discouraging investment.[1301] Similarly, the *Azurix v. Argentina* tribunal held that "the standards of conduct agreed to by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT."[1302] The duty to promote may be reinforced by the language of the applicable BIT. Where, as here, the preamble of a BIT recites pro-investment purposes and refers to fair and equitable treatment, the presence of the FET treatment standard links it "directly to the stimulation of foreign investments and the economic development of both contracting parties."[1303]

513. The preamble of the U.S.-Ecuador BIT contains such proactive language, stating that the parties:

[1300] **CLA-15**, *City Oriente Ltd. v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, Nov. 19, 2007 ("*City Oriente* Decision on Provisional Measures") (Juan Fernández-Armesto (President); J Christopher Thomas; and Horacio A Grigera Naón).

[1301] **CLA-224**, *Saluka* Partial Award, ¶ 298.

[1302] **CLA-43**, *Azurix* Award, ¶ 372.

[1303] **CLA-224**, *Saluka* Partial Award, ¶ 298.

> Desir[e] to promote greater economic cooperation between them […] recogniz[e] that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties; [and] agree that fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources[.][1304]

514. More generally, the FET standard requires the host State to exercise due diligence in protecting foreign investment.[1305] Due diligence requires "nothing more or less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[1306] More to the point in this case, due diligence requires a host State to ensure for the investor's investments "the kind of hospitable climate that would insulate them from political risk or incidence of unfair treatment."[1307]

515. In *Biwater*, the State's public disparagement of the claimant violated the FET standard not only for failing to meet the claimant's legitimate expectations, but also for failing to "use due diligence in the protection of [claimant's] investment."[1308] Similarly, in *Vivendi v. Argentina*,[1309] the tribunal found that the FET standard obligated the State to refrain from disparaging or undermining an investment.[1310] In *Vivendi*, a newly-installed Provincial government sought to break with a predecessor government's concession grant to a water utility. The Province sought to rescind or renegotiate the contract and resorted to threats, including delegitimizing the concessionaire's right to collect payment. The tribunal held that "there was no doubt about a government's obligation not to disparage and undercut a concession that has

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[1304] **Exhibit C-279,** U.S.-Ecuador BIT.

[1305] *See* **CLA-236**, Katie Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments, in* August Reinisch (ed.), STANDARDS OF INVESTMENT PROTECTION 118 (Oxford Univ. Press 2008); *See also* **CLA-235**, Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 156 (Oxford Univ. Press 2008).

[1306] *See* **CLA-235**, Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 156 (Oxford Univ. Press 2008).

[1307] **CLA-224**, *Saluka* Partial Award, ¶ 286, citing *Pope and Talbot* Award on Merits.

[1308] **CLA-137,** *Biwater* Award, ¶¶ 550-552.

[1309] **CLA-228**, *Vivendi II* Award.

[1310] *Id.* ¶ 7.4.39.

been properly granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation."[1311]

516. Ecuador's interference in the Lago Agrio Litigation has grossly contradicted its duty to "promote," "protect," or "stimulate" Claimants' investment. As detailed above, Ecuador has all-but rescinded the 1995, 1996, and 1998 Settlement and Release Agreements; failed to enforce Claimants' resulting right to finality and res judicata; denied Claimants any "effective means" of asserting and defending those same rights; and deprived them of any measure of due process with respect to its right to a fair and open hearing on claims that should have been barred by those contracts from the outset. Under any measure, this is not the "fair and equitable treatment" that the Treaty requires.

C. Ecuador Violated Its Obligation to Provide Full Protection and Security to Claimants' Investments

517. Article II(3) of the BIT imposes upon Ecuador another positive obligation: to provide "full protection and security" to Claimants' investments. Contemporary case law and commentators generally agree that this standard imposes an obligation of objective vigilance and due diligence upon States, which "should be legitimately expected to be secured for foreign investors by a reasonably well-organized modern State."[1312]

518. The *AMT* tribunal, examining a BIT provision similar to Article II(3)(a) of the U.S.-Ecuador BIT, described the standard of full protection and security as

> an obligation of vigilance, in the sense that . . . the receiving State of investments . . . shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract

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[1311] *Id.* ¶ 7.4.39.

[1312] *See* **CLA-239**, *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990 ("*AAPL* Award"), 30 I.L.M. 580, 621 (1991) (Ahmed S. El-Kosheri (President); Samuel K.B. Asante; and Berthold Goldman); *see also* **CLA-103**, *American Manufacturing and Trading, Inc. v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award, Feb. 21, 1997 ("*American Manufacturing* Award"), 36 I.L.M. 1531, 1548 (1997) (Sompong Sucharitkul (President); Heribert Golsong; and Kéba Mbaye); **RLA-57**, *Occidental I* Award, ¶ 187 (concluding that treatment that is not fair and equitable entails a violation of the full protection and security standard); **CLA-214**, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995); **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 149 (Oxford Univ. Press 2008) ("The wording of these clauses suggests that the host state is under an obligation to take active measures to protect the investment from adverse effects.").

> from any such obligation. [The State] must show that it has taken all measures of precaution to protect the investments . . . on its territory.[1313]

519. The promise of full protection and security standard is not limited to physical protection and security.[1314] As the *Siemens* tribunal concluded, "based on the definition of investment, which includes tangible *and intangible* assets, . . . the obligation to provide full protection and security is wider than 'physical' protection and security."[1315]

520. In the recent *Vivendi* Award, the tribunal found ample precedent for the proposition that full protection and security "can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized."[1316] And most recently, the tribunal in *National Grid* held that the obligation to "protect and provide constant security"—which it analyzed as co-extensive with the full protection security standard—"does not carry with it the implication that this protection is inherently limited to protection and security of physical assets."[1317] Thus, the full protection and security standard has been held to extend to the *legal* protection of investments as well.[1318]

521. A Respondent State may not claim that the strictures of sovereignty or other legal requirements prevent it from fulfilling its obligation of full protection and security. International tribunals have concluded that when a State enters into a contract that requires it to perform certain undertakings, it cannot later contend that it is legally incapable of fulfilling those

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[1313] **CLA-103**, *American Manufacturing* Award, ¶ 38.

[1314] **CLA-43**, *Azurix* Award, ¶¶ 406-408.

[1315] **CLA-227**, *Siemens* Award, ¶ 303.

[1316] **CLA-227**, *Vivendi II* Award, ¶ 7.4.17 (discussing the following decisions: **CLA-237**, *Case Concerning Elettronica Sicula S.P.A. (ELSI)*, Judgment ("*ELSI* Judgment"), 1989 I.C.J.REP. 15, ¶ 111 (July20); **CLA-238**, *Rankin v. Islamic Republic of Iran*, Iran-U.S. Claims Trib. Case No. 10913, Award No. 326–10913–2, Award, Nov. 3, 1987, 17 IRAN–U.S. C.T.R. 135, ¶ 30 (1988); **CLA-210**, *Eureko* Partial Award, ¶¶ 236–37; *see also* **CLA-240**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, Dec. 29, 2004 ("*CSOB* Award"), ¶ 170 (Hans van Houtte (President); Andreas Bucher; and Piero Bernardini) (characterizing the Slovak Republic's failure to provide CSOB with legal security as a violation of the full protection and security standard).

[1317] **CLA-94**, *National Grid PLC v Argentina*, Ad hoc—UNCITRAL, Award, Nov. 3, 2008 (*National Grid* Award"), ¶ 189 (Andrés R. Sureda (President); Alejandro M. Garro; and Judd L. Kessler).

[1318] **CLA-92**, *CME* Partial Award, ¶ 613; *see also* **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 149 (Oxford Univ. Press 2008) ("The contemporary understanding [of full protection and security] extends beyond physical protection to guarantees against infringements of the investor's rights by the operation of laws and regulations of the host State.").

undertakings.[1319] Such a disavowal of the contract violates the State's obligation to fully protect and secure a claimant's investment.

522. Deliberate actions can violate full protection and security just the same as the failure to act. Again, the award in *Petrobart v. Kyrgyzstan* is particularly instructive.[1320] Interpreting the full protection and security standard under the Energy Charter Treaty, the *Petrobart* tribunal held that the Vice Prime Minister's "blatant interference" with the local court's judicial powers, the court's decision to comply with the Vice Prime Minister's request, the Republic's transfer of the joint-stock company's assets during the stay of execution, and the State's decision to place the company in bankruptcy "in no way represent[ed] the constant protection and security owed by the Kyrgyz Republic to [the claimant's] investment according to the Treaty."[1321]

523. In this case, Ecuador's conduct is the very opposite of "due diligence" and "vigilance." Ecuador has done nothing to protect Claimants' investment—despite Claimants' repeated demands that it do so. Instead, Ecuador has done everything within its power—at times expressly and at other times covertly—to "undermine or nullify the value" of Claimants' investment contracts.[1322]

524. Ecuador's conduct extends, as in *Petrobart*, to willful manipulation of the courts and brazen attempts to undermine Claimants' investments. Ecuador has deliberately damaged Claimants' rights—whether they be conferred by contract or law—by calling publicly for an anti-Chevron verdict in the Lago Agrio Litigation, by cooperating covertly with the Lago Agrio Plaintiffs themselves, and by issuing baseless indictments against Claimants' attorneys.[1323] No

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[1319] *See* **CLA-227**, *Siemens* Award, ¶ 308 (finding that Argentina breached the full protection and security clause by claiming that it was unable to conclude agreements with its Provinces that had been promised in a contract with the investor).

[1320] **CLA-219**, *Petrobart* Award.

[1321] *Id.* ¶ 121.

[1322] *See supra* § III.1.

[1323] *See supra* § IV.H.

"reasonably well-organized state"[1324] could justify Ecuador's public disparagement of TexPet and Chevron or the unfair treatment by Ecuadorian courts.

D. Ecuador's Arbitrary and Discriminatory Measures Impaired Claimants' Investment

525. Article II(3)(b) of the U.S.-Ecuador BIT provides, "Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures, the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal" of investments. In the U.S.-Ecuador BIT, the use of the disjunctive term "or" between "arbitrary" and "discriminatory" means that a measure need only be either arbitrary or discriminatory to violate the BIT. It need not be both. As scholars have noted, "the separate listing of the two standards, typically separated by the word 'or,' suggests that each must be accorded its own significance and scope."[1325]

526. Article II(3)(b) of the BIT further states that, "[f]or the purposes of dispute resolution under Article VI and VII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a party." The Parties have therefore agreed that local remedies need not be exhausted within the Ecuadorian legal system as a precondition to a finding that Article II(3)(b) of the BIT has been violated.

1. Ecuador's Failure to Uphold the Settlement Agreements, or Any Semblance of Due Process in the Lago Agrio Litigation, Can Only Be Founded on Prejudice or Preference Rather than Reason or Fact, and Is Thus Arbitrary Within the meaning of the BIT

527. Tribunals generally characterize arbitrary measures as lacking a rational justification.[1326] Following the Vienna Convention's rule that a treaty's terms should be

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[1324] **CLA-86**, *AAPL* Award, 30 I.L.M. 580, at 612 (1991).

[1325] **CLA-105**, Rudolph Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 176 (Oxford Univ. Press 2008) (citing *Azurix* Award, ¶ 391).

[1326] *See* **CLA-227**, *Siemens* Award, ¶ 318; **CLA-173,** *Lauder v. Czech Republic*, Ad Hoc-UNCITRAL, Final Award, Sept. 3, 2001 ("*Lauder* Final Award"), ¶ 221 (Robert Briner (Chairman); Lloyd Cutler; and Bohuslav Klein) (defining arbitrary state action as "action founded on prejudice or preference rather than on reason or fact").

accorded their ordinary meaning,[1327] *Black's Law Dictionary* defines "arbitrary" as "in an unreasonable manner," "without adequate determining principle," "without fair, solid and substantial cause, that is, without cause based upon the law," "not governed by any fixed rules or standard," "willful and unreasoning action, without consideration and regard for facts and circumstances presented," and "synonymous with bad faith or failure to exercise honest judgment."[1328] In fact, the *Lauder v. Czech Republic* tribunal, interpreting a provision identical to Article II(3)(b) of the U.S.-Ecuador BIT, specifically referred to *Black's Law Dictionary* in defining arbitrary to mean "depending on individual discretion . . . founded on prejudice or preference rather than on reason or fact."[1329]

528. International tribunals have also interpreted "arbitrary" to mean acts that are contrary to the rule of law and due process. As the International Court of Justice defined this test, it involves "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[1330] Claimants have proved that the conduct of the Ecuadorian courts violates basic standards of judicial propriety and due process.[1331] Ecuador's arbitrary conduct includes, at a minimum, the following:

- The filing and pursuit of the Criminal Proceedings in concert with the Lago Agrio Plaintiffs, with the illicit purpose being "to nullify or undermine the value of the remediation contract and the final acta";[1332]
- The abrupt rejection of the judicial inspections, just weeks after President Correa's campaign manager filed an *amicus* brief urging the Court to grant the Plaintiffs' motion to relinquish the remaining inspections;[1333]

[1327] **CLA-10**, Vienna Convention, Art. 31(1).

[1328] **Exhibit C-330,** BLACK'S LAW DICTIONARY 104-105 (6th ed. 1990). Numerous tribunals have defined the term "arbitrary" by reference to BLACK'S LAW DICTIONARY. *See, e.g.*, **CLA-173**, *Lauder* Final Award, ¶ 221; **CLA-227**, *Siemens* Award, ¶ 318; **CLA-43**, *Azurix* Award, ¶ 392.

[1329] **CLA-173**, *Lauder* Final Award, ¶ 221; *see also* **CLA-92,** *CME* Partial Award, ¶ 612 (emphasis added) .

[1330] **CLA-237**, *ELSI* Judgment, 1989 I.C.J. 15, 76 (July 20) ; *see also* **CLA-87**, *Genin v. Estonia*, ICSID Case No. ARB /99/2, Award, June 25, 2001 ("*Genin* Award"), ¶ 371 (L. Yves Fortier (President); Meir Heth; and Albert Jan Van den Berg) (holding that Estonia's revocation of the investor's license was not arbitrary because it did not amount to bad faith, a willful disregard of due process of law, or an extreme insufficiency of action).

[1331] *See supra* § IV.A.

[1332] **Exhibit C-166**, Email from Dr. Martha Escobar to Alberto Wray *et al*., Aug. 10, 2005.

[1333] **Exhibit C-194**, *Amicus Curiae* brief submitted by Gustavo Larrea *et al*., Superior Court of Nueva Loja, July 21, 2006; **Exhibit C-195,** Order of Aug. 22, 2006 at 11:00 a.m.

- The Court's appointment of Richard Cabrera, who was unqualified under Ecuadorian law and who was unilaterally chosen by the Plaintiffs;
- The repeated failure to strike fraudulent evidence from the record, including reports by Mr. Cabrera, Mr. Calmbacher, and Mr. Beristain, despite Chevron's numerous evidentiary submissions undermining these experts;
- The Court's acceptance of the Cabrera report, and its subsequent rejection of more than 100 objections by Chevron to Cabrera's bias, fraud, and commission of essential errors;[1334]
- The Court's retroactive reversal of the burden of proof onto Chevron near the end of the case;[1335] and
- The closure of the evidentiary record in the Lago Agrio Litigation at the Plaintiffs' express request, just two weeks after Chevron obtained explosive evidence of fraud by Plaintiffs, their experts, and the Court in the *Crude* videotapes.[1336]

529. Simply put, Ecuador's failure to honor contractual commitments and its collusion in baseless and biased civil and criminal proceedings meet any definition of arbitrary governmental conduct. In view of the widespread politicization of the Ecuadorian legal system, the control currently exercised by the political branches over the judiciary, and President Correa's public criticism of Chevron, it is clear that the actions of the Government of Ecuador and its courts have acted arbitrarily, in violation of the BIT's prohibitions.

2. Ecuador Discriminated Against Claimants in All Aspects Surrounding the Lago Agrio Litigation

530. According to Professor Kenneth Vandevelde, anti-discrimination provisions in BITs prohibit measures that are both "discriminatory in effect as well as those which are intentionally discriminatory."[1337] Tribunals tend to focus on the discriminatory effect of the

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[1334] **Exhibit C-503**, Chevron's Motion for Terminating Sanctions before Lago Agrio Court, Aug. 6, 2010, at 2:50 p.m.

[1335] **Exhibit C-541**, Lago Agrio Court Order, Aug. 13, 2009, at 2:30 p.m., at No. 3, citing Section 1 of Article 397 of the current Constitution: "The burden of proof about inexistence of potential or real damages shall be upon the promoter of the activity or the defendant."

[1336] **Exhibit C-361,** Lago Agrio Court Order, Aug. 2, 2010, at 9:00 a.m.

[1337] **CLA-89**, Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* 77 (Kluwer 1992).

conduct, regardless of intent.[1338] For example, the tribunal in *Siemens v. Argentina* held that "intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."[1339]

531. In *Saluka v. Czech Republic*, the Czech government failed to treat a foreign banking institution in an "an even-handed and consistent manner" *vis-à-vis* the local state-owned bank.[1340] Both banks suffered due to a systemic debt problem in the Czech Republic, but the Czech Government refused to deal constructively with the foreign investor. Instead, it accorded preferential treatment to the local bank and offered no rational justification for its disparate treatment of the claimant. The tribunal held that bias of this kind against a foreign investor was discriminatory.[1341]

532. Here, the conduct of Ecuador and its courts is discriminatory in both intent and effect. President Correa has made no secret of his prejudice against Chevron. He, along with the Attorney General's Office and the Constituent Assembly, have colluded with the Lago Agrio Plaintiffs in a blatant, concerted effort to discriminate against Chevron.[1342] And in the Ecuadorian court system, discrimination has appeared in the farcical evidence-gathering process and damages report in the Lago Agrio Litigation, as well as the frivolous Criminal Proceedings against Claimants' attorneys.[1343]

533. Some of the Government's more discriminatory public statements against Claimants include the following:

- April 2007**:** President Correa denounces the "barbarity committed by that multinational corporation [Texaco]"[1344] says Chevron "must be held liable," and

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[1338] **CLA-105**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 177-178 (Oxford University Press 2008).

[1339] **CLA-227**, *Siemens* Award, ¶ 321.

[1340] **CLA-224**, *Saluka* Partial Award, ¶ 498-499.

[1341] *Id.*

[1342] *Supra* § II.H.

[1343] *Id.*

[1344] **Exhibit C-170**, Press Release, Office of President Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007.

calls for "criminal actions" to be brought against Claimants' lawyers, who he called "*vende patrias*."[1345]

- August 2008**:** President Correa accuses Texaco, Inc. of lying regarding the remediation, saying "it was a lie: there was nothing, nothing resolved, nothing cleaned up, of all the pollution."[1346]

- July 2009**:** President Correa announces, "I really, really hate the big transnational companies … Chevron-Texaco would never dare do in the United States what it did in Ecuador."[1347]

- March 2010**:** President Correa states that the alleged contamination in Ecuador is a "crime against humanity" that is "thirty times larger" than Exxon Valdez.[1348]

- April 2010**:** President Correa calls Chevron "an open enemy of this country."[1349]

534. Ecuador's treatment of Chevron stands in stark contrast to that enjoyed by Petroecuador, the owner of a 62.5% interest in the former Consortium and now the sole owner and Operator of the oilfields for nearly 20 years. The State-owned oil company became majority owner pursuant to the 1973 Agreement underlying the Consortium. It engaged in the same conduct of which Chevron is being accused in the Lago Agrio Litigation, and it is subject to the same laws and regulations that form the basis of the Plaintiffs' claims. But with the enactment of the EMA and the Plaintiffs' suit filed against Chevron, Petroecuador has enjoyed effective immunity from suit. Chevron, though being sued for Petroecuador's derelictions, has no ability to implead it.[1350] Petroecuador has also enjoyed the Government's preferential treatment at every turn. Petroecuador has faced no consequences for admittedly performing no remediation during the 1990s (while TexPet completed its obligations), and instead allowing the remaining environmental conditions to fester for nearly 20 years:

- Indeed, as late as 2006, Ecuador's National Director of Environmental Protection, admitted that while "[TexPet] completed the remediation of the pits that were their responsibility but . . . Petroecuador, during more than three decades, had

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[1345] **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007.

[1346] **Exhibit C-173**, Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008.

[1347] **Exhibit C-132,** Presidential Weekly Radio Address, July 4, 2009.

[1348] **Exhibit C-564**, *People in the Ecuadorian Amazon Sue Chevron*, Santiago Piedra, APF, March 14, 2010.

[1349] **Exhibit C-332**, *Ecuadorian President will seek nullity of Decision in Chevron's Favor*, EFE, Apr. 3, 2010.

[1350] First Coronel Expert Report, ¶ 114.

done absolutely nothing with regard to the pits that were the state-owned company's responsibility to remediate."[1351]

- Ecuador's Attorney General Diego García has publicly stated that: "the Correa administration's position in this case is clear: The pollution is result of Chevron's actions and not of Petroecuador."[1352]

535. In May 2010 he again "rule[d] out the responsibility of the Ecuadorian government for the environmental damage caused to the Amazonia region by the U.S. oil company Chevron-Texaco."[1353] Moreover, Ombudsman Fernando Gutiérrez concluded that arguments concerning the State's responsibility for the Lago Agrio Plaintiffs' claims "cannot be accepted under any circumstances."[1354]

536. But Petroecuador is the only proper defendant in the Lago Agrio Litigation. *First*, Petroecuador has operated the former Consortium fields for almost 20 years (and has been the sole owner since 1990). Thus it is responsible for any threatening condition that presently exists in the area. As the current owner and Operator, Petroecuador alone is allegedly "*negligent*" for failing to remove any contaminants that threaten future, contingent harm. *Second*, the nature of the Plaintiffs' claim is injunctive, in that it requires the elimination of a threatening condition. Under Ecuadorian law, the current Operator and holder of rights over the area where the allegedly threatening condition exists is the only party capable of fulfilling the terms of the requested injunction.[1355] *Third*, Petroecuador was a party to the Settlement and Release Agreements with TexPet, and, as the continuing Operator of the Concession after TexPet's exit, retained all remaining responsibility for environmental impact in the former Consortium area. The structure of the settlement, under which TexPet performed remediation commensurate with its share of the Consortium, reflected the parties' understanding that Petroecuador would be

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[1351] **Exhibit C-58,** DINAPA's Muñoz Appears Before Congress.

[1352] **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008.

[1353] **Exhibit C-331**, *Attorney General Diego García: The Ecuadorian Government Is Not Responsible for the Environmental Damage Caused by Chevron*, ECUADOR INMEDIATO, May 6, 2010.

[1354] **Exhibit C-268**, *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009.

[1355] Article 1569 of the Civil Code is not applicable because the defendant is not currently in default. Chevron has not failed to perform any *preexisting* legal obligation; to the contrary, the Government of Ecuador certified that TexPet fulfilled all of its contractual remediation responsibilities.

responsible for any further environmental threats in the former concession area, where it continues to operate today.

537. The Government of Ecuador has thus refused to deal in "an even-handed and consistent" manner with Chevron, and has accorded preferential treatment to Petroecuador. This constitutes discriminatory treatment under the BIT.

V. REQUEST FOR RELIEF

538. This Tribunal has the inherent power and authority to award a wide range of remedies. As a leading commentary recently observed:

> There is a wide range of possibilities for non-pecuniary obligations that awards might impose. . . . In the cases so far published, most ICSID tribunals have framed the obligations imposed by their awards in pecuniary terms. This is not due to a belief that they lack the power to proceed otherwise. Rather, the cases involved situations in which the investment relationship had broken down and the claimants had defined their demands in pecuniary terms.[1356]

539. Through this arbitration, Claimants seek to protect and enforce their rights under binding agreements by which Ecuador, Petroecuador and several local governments settled all public environmental claims against TexPet and its affiliates, and released them from all liability for public environmental impacts in Ecuador. Claimants' rights under these Settlement and Release Agreements include the right to (1) be free of any further claims and obligations concerning environmental remediation in Ecuador, (2) Ecuador's good faith performance of the contractual and legal commitments by which it agreed that Claimants would not be liable for any further environmental claims, and (3) Ecuador's specific performance of those agreements.

540. Ecuador is violating Claimants' contractual, legal, and Treaty rights by failing to protect Claimants from, and affirmatively seeking to subject them to, the claims and liabilities

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[1356] **CLA-178,** Christoph Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY 1137 (2d ed., Cambridge Univ. Press, 2009) (citations omitted). *See e.g.,* **CLA-62,** *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004 ("*Enron* Decision on Jurisdiction"), ¶ 81 (Francisco O. Vicuña (President); Albert Jan Van den Berg; and Pierre-Yves Tschanz) in which the Tribunal noted "[a]n examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal with no doubt about the fact that these powers are indeed available."

from which Ecuador previously released Claimants. Ecuador has refused to inform the Lago Agrio Court that Claimants have been released from those claims, and it has refused to absolve Claimants from liability for them. In fact, in breach of its good faith duty to protect and defend Claimants' releases, Ecuador has actively supported the Lago Agrio Plaintiffs in their fraudulent litigation against Chevron as detailed above. To this end, Ecuador has sought to undermine the Settlement and Release Agreements and has signaled to the courts that the only acceptable outcome in Lago Agrio is a massive judgment against Chevron—and it has done so in an environment in which the Ecuadorian judiciary has no independence from this kind of political pressure in a high-profile case in which the Government is interested. As part of these efforts, Ecuador has commenced the substantively baseless and procedurally invalid Criminal Proceedings against Claimants' lawyers who signed the Settlement and Release Agreements.

541. Although the Lago Agrio Plaintiffs purport to seek environmental remediation, the Lago Agrio Litigation is not about environmental remediation. It is a coordinated effort by Ecuador and the Plaintiffs' attorneys to extort billions of dollars from a foreign company through fraudulent litigation.

542. Accordingly, the unique circumstances of this case require a combination of remedies that includes declarative, injunctive, and monetary relief to prevent additional (and massive) injury to Claimants and to compensate them for their losses that have arisen from Ecuador's breaches of its treaty obligations as set forth above.

543. Specifically, in addition to compensating Claimants for their actual damages associated with defending the sham Lago Agrio litigation and related costs (such as public relations expenditures and moral damages), the award in this case must enable Claimants to resist enforcement of a Lago Agrio judgment. Although Claimants seek as one of their remedies an order requiring Ecuador to pay and reimburse Claimants for any and all sums that the nominal Lago Agrio Plaintiffs collect through enforcement of a Lago Agrio judgment, a more meaningful and effective remedy is one that assists Claimants in preventing enforcement of a Lago Agrio judgment in the first instance, for several reasons.

544. First, enforcement of a Lago Agrio judgment imposing any liability on Chevron for environmental impact or remediation effectively will eviscerate Claimants' contract and

Treaty rights. The very essence of Claimants' rights is to be free of any further claims or obligations to pay for environmental impact arising from Consortium-related activities. In these circumstances, allowing a Lago Agrio judgment to be enforced by definition would irreparably destroy this right.

545. Second, a judgment may be filed anywhere in the world and take on a life of its own, depending on the enforcement law of the country where it is filed. Chevron will be forced to dedicate substantial time, money, and resources in defending against enforcement actions. Fighting potential enforcement actions in multiple jurisdictions around the world will be extremely expensive and could disrupt Chevron's subsidiaries' businesses. Chevron should not be compelled to engage in lengthy and costly enforcement disputes around the world when it has already been released from the very claims that formed the basis of the judgment.

546. Third, if the nominal Lago Agrio Plaintiffs succeed in enforcing part or all of a Lago Agrio judgment for the ultimate benefit of Ecuador, those assets likely will be lost forever, and Claimants are extremely unlikely to collect any monetary award that this Tribunal may render in Claimants' favor against Ecuador. Thus, considering its participation in the fraud that has become the Lago Agrio Litigation and Criminal Proceedings, Ecuador is unlikely voluntarily to pay any award that the Tribunal may render that requires Ecuador to reimburse Claimants for any sums that the Lago Agrio Plaintiffs may secure from Chevron. Moreover, Ecuador has made clear that it does not intend to comply with its obligation to satisfy international arbitration awards, generally. For example, after terminating 8 of Ecuador's 24 bilateral investment treaties in November 2008,[1357] President Correa recently requested that the Ecuadorian Congress terminate an additional 13 treaties—including the U.S.-Ecuador BIT at issue in this dispute—because they "expose the country to international arbitration."[1358] President Correa announced further that Ecuador "will not 'pay a single penny'" of an arbitral award in favor of a foreign oil

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[1357] *See* **Exhibit C-300**, *Ecuador Terminates BITs with Eight LatAm States*, GLOBAL ARB. REV., Nov. 5, 2008, *available at* http://www.globalarbitrationreview.com/news/article/14919/ecuador-terminates-bits-eight-latam-states/ (last visited Mar. 31, 2010) ("It is a significant development, and a further sign of the country's reassessment of its international obligations").

[1358] **Exhibit C-141**, *Ecuador to Denounce Remaining BITS*, GLOBAL ARB. REV., Oct. 30, 2009, *available at* http://www.globalarbitrationreview.com/news/article/19251/ecuador-denounce-remaining-bits/ (last visited Mar. 31, 2010). *Id.*; *See also* **Exhibit C-142**, Mercedes Álvaro, *Ecuador President Seeks to End Investment Protection Agreements*, DOW JONES NEWSWIRE, Oct. 28, 2009; **Exhibit C-143**, *At the Point of Annulling 13 Investment Treaties*, EL COMERCIO, Oct. 28, 2009.

company,[1359] and that Ecuador would expel foreign oil companies that choose to file international claims against it.[1360] In his radio address of July 4, 2009, President Correa stated, "I really, really hate the big transnational companies."[1361] Consistent with this rhetoric, Ecuador already has refused to comply with international arbitral awards rendered against it.[1362]

547. 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 and 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

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[1359] **Exhibit C-301**, *Correa: We will not pay a penny of Perenco's claims*, EL COMERCIO, July 23, 2009. *See also* **Exhibit C-140,** *Minister Glas ratifies his rejection towards arbitral award against Alegro*, ECUADOR INMEDIATO, Oct. 27, 2009; **Exhibit C-302,** *The Attorney General's Office and the Comptroller's Office Criticize Justice*, EL HOY, Oct. 27, 2009 ("the Attorney General, Washington Pesántez and the General Comptroller, Carols Pólit, criticized the people who accepted the $5.9 million arbitral award granted by the Chamber of Commerce in Guayaquil.").

[1360] **Exhibit C-129**, *Foreign companies threatened*, EL COMERCIO, June 21, 2009.

[1361] **Exhibit C-132,** Presidential Weekly Radio Address, July 4, 2009.

[1362] **Exhibit C-303**, *Ecuador: Investor Concerns Grow*, LATIN BUSINESS CHRONICLE, July 14, 2009 ("Despite the ICSID tribunal orders, Petroecuador carried out three auctions of the crude oil it has seized from Perenco Ecuador and Burlington."). Although an ICSID tribunal comprised of Lord Bingham (President), Judge Charles N. Brower, and Mr. Christopher Thomas unanimously ordered Ecuador and Petroecuador to cease from "instituting or further pursuing any action . . . to collect from Perenco any payments [they] claim are owed . . . pursuant to Law 42," (**CLA-16**, *Perenco*, ¶ 62), Petroecuador conducted three auctions of oil seized from Perenco. While no buyers materialized at the first auction, Petroecuador—the sole bidder at the second and third auctions—purchased from itself approximately 2.5 million barrels of seized crude at approximately half of the current market price. According to Rodrigo Marquez, Latin American Regional Manager for the Perenco Group, "The Government's conduct in violation of the tribunals' orders has left Perenco Ecuador and Burlington exposed to all the cost and risk of operations at Blocks 7 and 21 with no corresponding revenues. This situation is unsustainable. The consortium cannot be expected to produce oil for the sole benefit of the Government of Ecuador." **Exhibit C-304**, *Perenco and Conoco threaten to suspend Ecuador operations*, GLOBAL ARB. REV., July 15, 2009. *See also* **Exhibit C-305**, *Perenco Will Protect Its Rights in Ecuadorian Oil Seized in Defiance of International Arbitration Tribunal Orders*, REUTERS, July 3, 2009, *available at* http://www.reuters.com/article/pressRelease/idUS35151+03-Jul-2009+PRN20090703 (last visited Mar. 31, 2010); **Exhibit C-306**, Damon Vis-Dunbar, *Ecuador defies provisional measures in dispute with French oil company*, INVESTMENT TREATY NEWS, June 8, 2009.

treatment, and to observe obligations it entered into under the investment agreements.

3. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation.

4. Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable.

5. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation.

6. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable.

7. 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.

8. 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;

9. Ordering Ecuador to dismiss the Criminal Proceedings in Ecuador against Messrs. Ricardo Veiga and Rodrigo Pérez.

10. Ordering Ecuador not to seek the detention, arrest or extradition of Messrs Veiga or Pérez or the encumbrance of any of their property.

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.

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.[1363]

15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment.[1364]

16. Any other and further relief that the Tribunal deems just and proper.

[1363] Several arbitral decicions 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) (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," and stating that awarding moral damages to the claimant company was "equitable" given that the State's illegal measures had "disturbed the [claimant's] activities." ¶ 4.96); **CLA-234**, *Desert Line* Award (awarding moral damages and stating that a "legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation." *Desert Line* Award, ¶ 289).

[1364] Several recent arbitral decisions confirm 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 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.); *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.

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Respectfully submitted,

R. Doak Bishop
Wade M. Coriell
Isabel Fernández de la Cuesta
David H. Weiss
Esteban A. Leccese
Elizabeth Silbert
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, TX 77002
(713) 751-3205
(713) 751-3290 (Facsimile)

Edward G. Kehoe
Caline Mouawad
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036-4003
(212) 556-2100
(212) 556-2222 (Facsimile)

James Crawford SC
Matrix Chambers
Gray's Inn, London

England WC1R 5LN