

**PCA CASE NO. 2009-23**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED  
IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF  
AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE  
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT,  
SIGNED 27 AUGUST 1993 (THE “TREATY” OR “BIT”) AND THE UNCITRAL  
ARBITRATION RULES 1976 (THE “UNCITRAL ARBITRATION RULES”)**

**BETWEEN: –**

- 1. CHEVRON CORPORATION (“Chevron”)**
- 2. TEXACO PETROLEUM COMPANY (“TexPet”)**  
**(both of the United States of America)**

*The First and Second Claimants*

**- and -**

**THE REPUBLIC OF ECUADOR**

*The Respondent*

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**Second Partial Award on Track II  
dated 30 August 2018**

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**The Arbitration Tribunal:**

**Dr Horacio A. Grigera Naón  
Professor Vaughan Lowe QC  
V.V. Veeder (President)**

**Secretary to the Tribunal: Martin Doe**

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## **A: SELECTED ABBREVIATIONS**

<i>Aguinda Litigation</i>	Litigation initiated by complaint filed by María Aguinda and others against Texaco before the US District Court for the Southern District of New York, USA on 3 November 1993.
<i>April Hearing</i>	Hearing on Track I(b) held on 28-29 April 2014.
<i>Chevron</i>	The First Claimant, Chevron Corporation, a legal person organised under the laws of the USA.
<i>February Hearing</i>	Hearing on interim measures held on 11 February 2012.
<i>Jurisdiction Hearing</i>	Hearing on jurisdiction held on 22-23 November 2010.
<i>Lago Agrio Litigation</i>	Litigation initiated by Ángel Piaguage and others against Chevron by a complaint (the “Lago Agrio Complaint”) filed before the Superior Court of Justice of Nueva Loja in Ecuador (the “Lago Agrio Court”) on 7 May 2003. The Lago Agrio Court issued a judgment on 14 February 2011 and a clarification order on 4 March 2011 (the “Lago Agrio Judgment”). The Lago Agrio Judgment was affirmed by the Lago Agrio Appellate Court by its judgment dated 3 January 2012 and a clarification order dated 13 January 2012 (the “Lago Agrio Appellate Court Judgment”). The National (Cassation) Court of Justice of Ecuador affirmed the Lago Agrio Judgment in part by its Judgment dated 12 November 2013 (the “Cassation Court Judgment”). The Constitutional Court of Ecuador affirmed the Cassation Court Judgment, dismissing Chevron’s extraordinary action for protection, by its Judgment dated 27 June 2018 (the “Constitutional Court Judgment”).
<i>November Hearing</i>	Hearing on Track I held on 26-28 November 2012.
<i>TexPet</i>	The Second Claimant, Texaco Petroleum Company, a legal person organised under the laws of the USA, currently a wholly-owned indirect subsidiary of Chevron. Until 2001, TexPet was a wholly-owned direct subsidiary of Texaco.
<i>Texaco</i>	Texaco Inc., a legal person organised under the laws of the USA.
<i>Treaty (or BIT)</i>	Treaty between the USA and Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993, in effect from 11 May 1997.

<i>PetroEcuador</i>	Empresa Pública de Hidrocarburos del Ecuador, an Ecuadorian State-owned oil corporation; successor to Corporación Estatal Petrolera Ecuatoriana, or “CEPE”, from 1989.
<i>RICO Litigation</i>	Litigation initiated by Chevron on 1 February 2011 before the US District Court for the Southern District of New York, USA against Stephen Donziger and others pursuant to (inter alia) 18 USC Section 1962 (Racketeer Influenced and Corrupt Organizations), leading to the RICO trial in October-November 2013 and the RICO Judgment of 4 March 2014, affirmed by the US Court of Appeals for the Second Circuit by its judgment of 8 August 2016 and the US Supreme Court’s denial of the appellants’ petition for certiorari on 19 June 2017.
<i>Site Visit</i>	Tribunal’s site visit in the Sucumbíos and Orellana Provinces of the Oriente in Ecuador on 4-10 June 2015. The Site Visit included the following sites: Shushufindi-34, Aguarico-06, Shushufindi-55 and Lago Agrio-02.
<i>Track II Hearing</i>	Hearing on Track II held on 21 April-8 May 2015.
<i>UNCITRAL Arbitration Rules</i>	Arbitration Rules of the United Nations Commission on International Trade Law (1976).
<i>Unfiled Materials</i>	Materials allegedly incorporated into the Lago Agrio Judgment (without attribution) which were allegedly never filed by the Lago Agrio Plaintiffs during the Lago Agrio Litigation.
<i>Zambrano Computers</i>	Two Hewlett Packard computers used by Judge Zambrano during the Lago Agrio Litigation. The first (serial number MXJ64005TG) was manufactured and shipped in 2006 (the “Old Computer”), and the second (serial number MXL0382C3D) was manufactured, purchased and made available to Judge Zambrano in November 2010 (the “New Computer”).

***B: SELECTED DRAMATIS PERSONAE***

<i>Aguinda Plaintiffs</i>	Plaintiffs in the Aguinda Litigation, initiated by complaint filed before the US District Court for the Southern District of New York on 3 November 1993.
<i>Douglas Beltman</i>	Consultant, Stratus Consulting, Inc; technical expert for the Lago Agrio Plaintiffs.
<i>Lawrence W. Barnthouse</i>	Technical expert for the Lago Agrio Plaintiffs; one of the “cleansing experts” for the Cabrera Report.
<i>Joseph Berlinger</i>	Director of the documentary film <i>Crude</i> (2009).
<i>Cristóbal Bonifaz</i>	Legal representative acting for the Aguinda Plaintiffs and the Lago Agrio Plaintiffs.
<i>Ms “C”</i>	Temporary student secretary employed by Judge Zambrano during the Lago Agrio Litigation, from mid-November 2010 to February 2011. The Tribunal has elected not to give her full name in this Award. (The Parties are aware of her full name).
<i>Richard Stalin Cabrera Vega</i>	Global assessment expert of the Lago Agrio Court in the Lago Agrio Litigation; purported author of the Cabrera Report.
<i>Charles W. Calmbacher</i>	Technical expert retained in 2004 by the Lago Agrio Plaintiffs to act as a judicial inspection expert in the Lago Agrio Litigation.
<i>Ximera Centeno</i>	Employee at Selva Viva (an Ecuadorian legal entity).
<i>Richard W. Clapp</i>	Epidemiologist; technical expert for the Lago Agrio Plaintiffs; principal author of the ‘Clapp Report’.
<i>John Connor</i>	President, GSI Environmental Inc; technical expert for the Claimants; a defendant in US Section 1782 proceedings initiated by Ecuador for discovery for use in this arbitration.
<i>Steven Donziger</i>	USA attorney, acting as representative of the Aguinda Plaintiffs and the Lago Agrio Plaintiffs.
<i>Graham Erion</i>	USA attorney, author of the ‘Erion Memorandum’ (2008).
<i>Pablo Fajardo Mendoza</i>	Ecuadorian attorney, acting as representative of the Lago Agrio Plaintiffs.
<i>Alberto Guerra Bastidas</i>	Ecuadorian judge, Lago Agrio Court, presiding over the Lago Agrio Litigation from May 2003 to February 2004.

<i>Judith Kimerling</i>	USA attorney; Professor of Law and Policy, The City University of New York, Queens College and School of Law, USA; author on the Amazon; legal representative of the plaintiffs in the Huaorani Litigation.
<i>Joseph Kohn</i>	USA attorney, of Kohn, Swift & Graf, acting as representative of the Lago Agrio Plaintiffs; non-party funder of the Lago Agrio Litigation.
<i>Lago Agrio Plaintiffs</i>	Plaintiffs in the Lago Agrio Litigation, initiated by a Complaint filed in the Lago Agrio Court on 7 May 2003.
<i>Anne Maest</i>	Consultant, of Stratus Consulting, Inc; technical expert for the Lago Agrio Plaintiffs.
<i>Nicholas Moodie</i>	Australian legal intern, assistant to the Lago Agrio Plaintiffs' representatives; author of the 'Moodie Memorandum' (2009).
<i>Rodrigo Pérez Pallares</i>	Legal representative of TexPet; signatory of the 1995 Settlement Agreement (with the 1998 Final Release).
<i>Alejandro Ponce Villacís</i>	Ecuadorian attorney, acting as representative of the Lago Agrio Plaintiffs.
<i>Julio Prieto Méndez</i>	Ecuadorian attorney, acting as representative of the Lago Agrio Plaintiffs.
<i>Ricardo Reis Veiga</i>	Vice-President, TexPet; signatory of the 1995 Settlement Agreement (with the 1995 Remedial Action Plan and the 1998 Final Release).
<i>Ramiro Fernando Reyes</i>	Petroleum and environmental engineer; technical expert for the Lago Agrio Plaintiffs.
<i>David Russell</i>	Environmental expert, of Global Environmental Operations, Inc; technical expert for the Lago Agrio Plaintiffs.
<i>Juan Pablo Sáenz</i>	Ecuadorian attorney, acting as representative of the Lago Agrio Plaintiffs.
<i>Norman Alberto Wray</i>	Ecuadorian attorney, and, at different times, judge of the Ecuadorian Supreme Court and representative of the Lago Agrio Plaintiffs.
<i>Luis Yanza</i>	Director of the "Frente de Defensa La Amazonia" (the Amazon Defense Front or ADF); acting as representative of the Lago Agrio Plaintiffs.
<i>Germán Yáñez</i>	Ecuadorian judge, Lago Agrio Court, presiding over the Lago Agrio Litigation from February 2006 to October 2007.

*Nicolás Augusto Zambrano*

Ecuadorian judge, Lago Agrio Court, presiding over the Lago Agrio Litigation from (i) October 2009 to March 2010 and (ii) October 2010 to February/March 2011.

***C: GLOSSARY OF PRINCIPAL WRITTEN SUBMISSIONS 2009-2016***

<i>C-NoA Sept. 2009</i>	Claimants' Notice of Arbitration dated 23 September 2009.
<i>C-IM Apr. 2010</i>	Claimants' Request for Interim Measures dated 1 April 2010.
<i>R-IM May 2010</i>	Respondent's Response to Claimants' Request for Interim Measures dated 3 May 2010.
<i>R-Jur. May 2010</i>	Respondent's Summary Description of its Preliminary Jurisdictional and Admissibility Objections dated 3 May 2010.
<i>C-IM May 2010</i>	Claimants' Reply in Support of Interim Measures dated 7 May 2010.
<i>R-Jur. July 2010</i>	Respondent's Memorial on Jurisdictional Objections dated 26 July 2010.
<i>C-Jur. Sept. 2010</i>	Claimants' Counter-Memorial on Jurisdiction dated 6 September 2010.
<i>R-Jur. Oct. 2010</i>	Respondent's Reply Memorial on Jurisdictional Objections dated 6 October 2010.
<i>C-Mer. Sept. 2010</i>	Claimants' Memorial on the Merits dated 6 September 2010 (as amended on 23 September 2010).
<i>C-Jur. Nov. 2010</i>	Claimants' Rejoinder on Jurisdiction dated 6 November 2010.
<i>R-TI July 2012</i>	Respondent's Track I Counter-Memorial on the Merits dated 3 July 2012.
<i>C-Mer. Mar. 2012</i>	Claimants' Supplemental Memorial on the Merits dated 20 March 2012.
<i>C-TI Aug. 2012</i>	Claimants' Reply Memorial on the Merits Track I dated 29 August 2012.
<i>R-TI Oct. 2012</i>	Respondent's Track I Rejoinder on the Merits dated 26 October 2012.
<i>C-TI Nov. 2012</i>	Claimants' document submitted at the Track I Hearing in November 2012, setting out their prayer for relief.
<i>R-TII Feb. 2013</i>	Respondent's Track II Counter-Memorial on the Merits dated 18 February 2013.



<i>R-Show Cause Apr. 2013</i>	Respondent’s letter to the Tribunal on “Show Cause” and “Reconsideration” dated 15 April 2013.
<i>C-Show Cause May 2013</i>	Claimants’ Initial Pleading on “Show Cause” and “Reconsideration” dated 6 May 2013.
<i>R-IM June 2013</i>	Respondent’s Request for Enforcement of Interim Measures dated 3 June 2013.
<i>C-TII June 2013</i>	Claimants’ Reply Memorial–Track II dated 5 June 2013 (as amended on 12 June 2013).
<i>C-IM June 2013</i>	Claimants’ Response to Respondent’s Request for Enforcement of Interim Measures dated 17 June 2013.
<i>R-IM July 2013</i>	Respondent’s Reply in Support of its Request for Enforcement of Interim Measures dated 17 July 2013.
<i>R-Show Cause July 2013</i>	Respondent’s Reply on “Show Cause” and “Reconsideration” dated 19 July 2013.
<i>C-IM Aug. 2013</i>	Claimants’ Response to Respondent’s Reply in Support of its Request for Enforcement of Interim Measures dated 8 August 2013.
<i>C-Show Cause Aug. 2013</i>	Claimants’ Rejoinder on “Show Cause” and “Reconsideration” dated 30 August 2013.
<i>R-TII Dec. 2013</i>	Respondent’s Track II Rejoinder on the Merits dated 16 December 2013.
<i>C-TI Jan. 2014</i>	Claimants’ Supplemental Memorial on Track I dated 31 January 2014.
<i>R-TI Mar. 2014</i>	Respondent’s Track I Supplemental Counter-Memorial on the Merits dated 31 March 2014.
<i>C-TII May 2014</i>	Claimants’ Supplemental Memorial on Track II dated 9 May 2014.
<i>C-TII Aug. 2014</i>	Claimants Post-Submission Insert to their Supplemental Memorial on Track II – Examination of Zambrano Computer Hard Drives dated 15 August 2014.
<i>R-TII Nov. 2014</i>	Respondent’s Track II Supplemental Counter-Memorial on the Merits dated 7 November 2014.
<i>C-TII Jan. 2015</i>	Claimants’ Reply to the Respondent’s Supplemental Track II Memorial dated 14 January 2015.
<i>R-TII Mar. 2015</i>	Respondent’s Track II Supplemental Rejoinder on the Merits dated 17 March 2015.

<i>C-TI July 2015</i>	Claimants' Post-Track II Hearing Brief on Track I Issues dated 15 July 2015.
<i>R-TI July 2015</i>	Respondent's Track IB Post-Hearing Memorial dated 15 July 2015.
<i>C-TII Aug. 2016</i>	Claimants' Submission Concerning Digital Forensic Evidence and the Report of the Tribunal-Appointed Digital Forensics Expert dated 12 August 2016.
<i>R-TII Aug. 2016</i>	Respondent's Track II Supplemental Memorial on the Forensic Evidence of the Republic of Ecuador dated 12 August 2016.
<i>C-TII Aug. 2016</i>	Claimants' Reply Submission Concerning Digital Forensic Evidence and the Report of the Tribunal-Appointed Digital Forensics Expert dated 26 August 2016.
<i>R-TII Aug. 2016</i>	Respondent's Track II Supplemental Reply on the Forensic Evidence of the Republic of Ecuador dated 26 August 2016.

## **D: SELECTED LEGAL MATERIALS**

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*The Factory at Chorzów (Germany v. Poland)*, PCIJ, Judgment (Jurisdiction), 26 July 1927, 1927 PCIJ Series A No. 9; Judgment (Merits), 13 September 1928, 1928 PCIJ Series A No. 17, CLA-406.

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*Limited Liability Company AMTO v. Ukraine*, SCC Arb. No. 080/2005, Final Award, 26 March 2008, RLA-343.

*Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, RLA-651.

*Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, CLA-299.

*Estate of Jean-Baptiste Caire (France) v. United Mexican States*, French-Mexican Claims Commission, Decision No. 33, 7 June 1929, V RIAA 516, CLA-597.

*Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Interim Award, 1 December 2008, CLA-1; Partial Award on the Merits, 30 March 2010, CLA-47.

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*EnCana Corporation. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, RLA-41.

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*Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, CLA-176.

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*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, CLA-7.

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***PART I***  
***THE ARBITRATION – TRACK II***

***A: The Parties and Other Persons***

- 1.1 *The First Claimant:* The First Claimant is Chevron Corporation, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583, U.S.A. (for ease of reference, herein called “Chevron”).<sup>1</sup>
- 1.2 *The Second Claimant:* The Second Claimant is Texaco Petroleum Company, also a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583 U.S.A. (for ease of reference, herein called “TexPet”).
- 1.3 Until 2001, TexPet was a wholly-owned indirect subsidiary of Texaco Inc., a legal person organised under the laws of the United States of America (for ease of reference, herein called “Texaco”); and thereafter, as from 2001, TexPet became and remains a wholly-owned indirect subsidiary of Chevron.
- 1.4 *The Claimants’ Legal Representatives:* The Claimants are represented by: Mr Hewitt Pate (General Counsel of the First Claimant); Mr Ricardo Reis Veiga, Mr Jose L. Martin and Mr Andrés R. Romero (in-house counsel of the First Claimant); R. Doak Bishop Esq, Tracie Renfroe Esq, Wade M. Coriell Esq, David H. Weiss Esq, Carol Wood Esq, Elizabeth Silbert Esq, Sara McBrearty Esq, Eldy Quintanilla Roché Esq, Sara McBrearty Esq, Anisha Sud Esq, and Ginny Castelan Esq (all of King & Spalding LLP, Houston, Texas, USA); Edward G. Kehoe Esq, Caline Mouawad Esq, Isabel Fernández de la Cuesta Esq, John Calabro Esq and Jessica Beess und Chrostin Esq (all of King & Spalding LLP, New York, New York, USA); Brian A. White Esq and Amelia S. Magee Esq (of King & Spalding, Atlanta, Georgia, USA); Professor James Crawford SC (of London, United Kingdom, until November 2014); and Professor Jan Paulsson and Luke Sobota Esq (both of Three Crowns LLP, Washington DC, USA, from May 2013).

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<sup>1</sup> Defined Terms, here and below, are listed in the Abbreviated Terms and Glossary above.

- 1.5 *The Respondent:* the Respondent is the Republic of Ecuador. It has owned and controlled at all material times Empresa Estatal de Petróleos del Ecuador (herein called “PetroEcuador”, known earlier as its predecessor “CEPE”), a legal person formed under the laws of Ecuador.
- 1.6 *The Respondent’s Legal Representatives:* The Respondent is represented by: Dr Diego García Carrión (Procurador General del Estado, until February 2018); Dr Rafael Parreño Navas (acting Procurador General del Estado, from February 2018 until August 2018); Dr Íñigo Salvador Crespo (Procurador General del Estado, from August 2018); Dra Blanca Gómez de la Torre (Directora de Asuntos Internacionales y Arbitraje, Procuraduría General del Estado, until August 2018); Dra Claudia Salgado Levy (Directora de Asuntos Internacionales y Arbitraje, Procuraduría General del Estado, from August 2018); Dra Christel Gaibor, Mr Luis Felipe Aguilar, Ms Daniela Palacios, Ms Maria Teresa Borja, Mr Xavier Rubio and Macarena Bahamonde (of the Procuraduría General del Estado) (all of Quito, Ecuador); Eric W. Bloom Esq, Tomás Leonard Esq, Nicole Silver Esq, Eric Goldstein Esq, Carolina Romero Acevedo and Kathy Ames Valdivieso (all of Winston & Strawn LLP, Washington DC, USA); Ricardo Ugarte Esq (of Winston & Strawn LLP, Chicago, Illinois, USA); Nassim Hooshmandnia Esq (of Winston & Strawn LLP, Hong Kong, China); Professor Pierre Mayer (of Paris, France); Professor Eduardo Silva Romero, José Manuel García Represa Esq and Audrey Caminades Esq (all of Dechert LLP, Paris, France); Dr Álvaro Galindo Cardona (of Dechert LLP, Washington DC, USA). The Respondent was also represented in earlier proceedings by Professor Zachary Douglas QC and Mr Luis González García (both of Matrix Chambers, London) and Gregory Ewing Esq (currently of David, Agnor, Rapaport & Skalny, Columbia, MD, USA).
- 1.7 *Other Persons:* These other persons include the following, none of whom are parties to this arbitration; namely the “Lago Agro Plaintiffs” in the legal proceedings in Ecuador known as the “Lago Agrio Litigation”; the “Aguinda Plaintiffs” in the earlier legal proceedings in New York known as the “Aguinda Litigation”; the several respondents in the legal proceedings in the USA known as the “US 1782 Litigation”; the several defendants in the legal proceedings known as the “RICO Litigation” in New York; and the parties in the legal proceedings known as the “Huaorani Litigation” in New York.

These persons' legal representatives and advisers in the USA and Ecuador are not parties to, nor legally represented in, these arbitration proceedings.

- 1.8 Texaco, TexPet's parent company until 2001, is not a named party to these arbitration proceedings; nor is it legally represented in these proceedings. Texaco was a party to the Aguinda Litigation; but it was not a party to the Lago Agrio Litigation.
- 1.9 PetroEcuador is not a named party to these arbitration proceedings; nor is it legally represented in these arbitration proceedings. PetroEcuador was not a party to the Aguinda Litigation or the Lago Agrio Litigation.
- 1.10 Dr (formerly, Judge) Nicolás Augusto Zambrano Lozada, Dr (formerly, Judge) Alberto Guerra Bastidas and Steven Donziger Esq are not named parties to these arbitration proceedings; nor are they legally represented in these arbitration proceedings.

***B: The Arbitration Agreement***

- 1.11 The arbitration agreement invoked by the Claimants is contained in Article VI of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (the "Treaty"), providing, *inter alia*, as follows:

Article VI(2): *"In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:*

- (a) *to the courts or administrative tribunals of the Party that is a party to the dispute; or*
- (b) *in accordance with any applicable, previously agreed dispute-settlement procedures; or*
- (c) *in accordance with the terms of paragraph 3".*

Article VI(3): *"(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*

...

- (iii) *in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); ..."*

Article VI(4): “Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”) ...”

Article VI(5): “Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.”

Article VI(6): “Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.”

(For ease of reference, these terms cited from Article VI of the Treaty, with the UNCITRAL Arbitration Rules (1976), are herein collectively called the “Arbitration Agreement”).

- 1.12 Pursuant to Article VI(3)(a)(iii) of the Treaty (cited above), the Arbitration Agreement incorporates the UNCITRAL Arbitration Rules (1976) (the “UNCITRAL Arbitration Rules”).
- 1.13 Pursuant to Article 3(2) of the UNCITRAL Arbitration Rules, these arbitration proceedings are deemed to have commenced on 29 September 2009.
- 1.14 By agreement of the Parties (as confirmed by the Tribunal’s Agreed Procedural Order No 1), the place (or legal seat) of this arbitration is The Hague, the Netherlands within the meaning of Article 16 of the UNCITRAL Arbitration Rules. The Netherlands is a Contracting State to the 1958 New York Convention.
- 1.15 By further agreement of the Parties (as also confirmed by the Tribunal’s Agreed Procedural Order No 1), English and Spanish are the official languages of this arbitration within the meaning of Article 17 of the UNCITRAL Arbitration Rules; and, as between them, English is to be the authoritative language, with all oral proceedings to be simultaneously interpreted and transcribed into English and Spanish.

***C: The Arbitral Tribunal***

1.16 Pursuant to the Arbitration Agreement, the Tribunal is comprised of three arbitrators appointed thereunder as follows:

\* *Dr Grigera Naón*: In their Notice of Arbitration dated 23 September 2009, the Claimants notified the Respondent of their appointment as co-arbitrator of Dr Horacio A. Grigera Naón, of 5224 Elliott Road, Bethesda, Maryland 20816, United States of America.

\* *Professor Lowe*: On 4 December 2009, the Respondent notified the Claimants of its appointment as co-arbitrator of Professor Vaughan Lowe QC, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.

\* *Mr Veeder*: By email of 22 January 2010, the Claimants informed the Permanent Court of Arbitration ("PCA") that the two co-arbitrators were unable to agree on the appointment of the presiding third arbitrator. Pursuant to the agreement between the Parties concerning the selection of the presiding third arbitrator, the PCA was requested to act as appointing authority and "if the party appointed arbitrators cannot agree on the President by Jan. 22 [2010], then the PCA will appoint the President but only after the PCA provides the parties an opportunity to comment on the candidate under consideration by the PCA." Accordingly, on 25 February 2010 and in accordance with the Parties' agreement, the Secretary-General of the PCA appointed as the presiding arbitrator Mr V.V. Veeder, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.

(Professor Lowe and Mr Veeder are individual members of the English Bar. As such, albeit from the same barristers' chambers, they practise as arbitrators independently from each other, as disclosed by Mr Veeder in his Declaration of Acceptance and Statement of Impartiality and Independence dated 26 January 2010).

1.17 By further agreement of the Parties, the PCA's International Bureau was appointed to administer these arbitration proceedings, with Mr Martin Doe (of the PCA) acting as Secretary to the Tribunal.

1.18 In its Procedural Order No. 32 dated 26 March 2015, by consent of the Parties and upon the terms set out, the Tribunal appointed Ms Jessica Wells as an additional Secretary to the Tribunal in this arbitration.

***D: The Arbitral Procedure***

1.19 *Earlier Orders, Decision and Awards in Tracks I and IB:* This Award follows three Orders on Interim Measures, five Awards, a Decision, and more than 57 procedural orders made in these arbitration proceedings. The operative parts of these Orders on Interim Measures, Awards and Decision are cited below in Annex 1 to this Part I. The Tribunal's Procedural Orders relevant to Track II are listed below in Annex 2 to this Part I.

1.20 This Award is made in Track II of this arbitration, following Track I and Track Ib. It serves no purpose to revisit here the full procedural history of these arbitration proceedings from February 2010. For simplicity's sake, the Tribunal hereby incorporates by reference Part I of its Third Interim Award on Jurisdiction, Part A of its First Partial Award on Track I and Part B of its Decision on Track IB. It here includes only a summary of the major procedural events following the Tribunal's Decision on Track IB dated 12 March 2015 (the "Decision on Track IB").

1.21 *Orders for Interim Measures, Awards and Decision:* As already indicated, the operative parts of the Tribunal's three Orders for Interim Measures dated 14 May 2010, 6 December 2010 and 7 February 2011, its five Awards dated 25 January 2012, 16 February 2012, 27 February 2012, 7 February 2013, 17 September 2013 and its Decision dated 12 March 2015 are cited below in Annex 1 to this Part I.

1.22 *Track II Procedure:* The Tribunal issued its Decision on Track IB on 12 March 2015. The Tribunal there decided (by a majority), in the form of a decision under the Arbitration Agreement: that (i) the Complaint dated 7 May 2003 of the Lago Agrio Plaintiffs in the Lago Agrio Litigation, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement as diffuse claims; (ii) the Complaint was not wholly barred at its inception by *res judicata* under Ecuadorian law, by virtue of the 1995 Settlement Agreement; and (iii) the Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in the

Aguinda Litigation in New York. The Tribunal expressly reserved its powers to address and decide the remainder of the Parties' claimed relief in Track IB by one or more further orders, decisions or awards at a later stage of these arbitration proceedings.

- 1.23 On 12 March 2015, the Tribunal issued Procedural Orders No. 29 and 30. In Procedural Order No. 29, the Tribunal ordered (by consent of the Parties) an amendment to the Confidentiality Clause forming part of Procedural Order No. 26 so as to exclude from confidentiality certain passages addressing the results of the joint inspection of Judge Zambrano's computer hard drives in the Parties' respective memorials of 7 November 2014 and 14 January 2015. In Procedural Order No. 30, the Tribunal designated four sites for the purpose of its Site Visit in Ecuador and decided upon a number of procedural matters related to the Site Visit.
- 1.24 On 26 March 2015, the Tribunal issued Procedural Orders No. 31 and 32. In Procedural Order No. 31, the Tribunal ordered that the Parties' outside counsel and their law firms refrain from making any public statement that might aggravate the Parties' dispute. In Procedural Order No. 32, as already indicated above, the Tribunal appointed Ms Jessica Wells as an additional Secretary to the Tribunal in these arbitration proceedings.
- 1.25 On 27 March 2015, the Tribunal issued Procedural Order No. 33. The Tribunal there indicated its wish to request Dr Zambrano to attend the Track II Hearing as a factual witness. It circulated a draft letter to Dr Zambrano for the Parties' comments. The Tribunal's letter to Dr Zambrano was sent to him on 1 April 2015.
- 1.26 Earlier, on 12 May 2014, by Procedural Order No 26 and upon the terms there set out, the Tribunal appointed Ms Kathryn Owen as the Tribunal's forensic expert under the Arbitration Agreement (namely, Article 27(1) of the UNCITRAL Arbitration Rules). On 30 March 2015, the Tribunal issued Procedural Order No. 34 whereby it renewed the appointment of Ms Kathryn Owen as an expert to the Tribunal.
- 1.27 On 7 April 2015, the Tribunal held a procedural meeting with the Parties (by telephone conference-call) to prepare for the Track II Hearing and also to address the Parties' several outstanding procedural applications. On 9 April 2015, the Tribunal issued Procedural Order No. 35. It there decided certain procedural and logistical matters relating to the Track II Hearing.

- 1.28 On 14 April 2015 and again on 16 April 2015, the Claimants requested “an immediate order dissolving the confidentiality provisions of Procedural Orders No. 26 and 29 so that Claimants would be free to disclose publicly the evidence found on [Judge Zambrano’s Computers’ hard drives] and Mr Lynch’s expert analysis of that evidence”, in response to the “[public] leaking [of] a copy of the November 7, 2014 report of Ecuador’s forensics expert, J. Christopher Racich.” On 18 April 2015, the Tribunal informed the Parties that it could not convene an urgent telephone conference in order to decide the Claimants’ application, but requested that the Claimants notify the Tribunal if any application was made to use Mr Racich’s expert report in the appellate proceedings then pending before the US Court of Appeals for the Second Circuit in the RICO Litigation.
- 1.29 On 16 April 2015, the Claimants informed the Tribunal of the Parties’ agreement on all aspects of the Site Visit Protocol, except for the presence of an audio/video team to be brought by each Party. On 17 April 2015, the Respondent submitted its comments on the presence of an audio/video team during the Site Visit. In the event, material parts of the Tribunal’s Site Visit were filmed; and the sole copy of that confidential film was lodged with the PCA for safe-keeping (where it remains as at the date of this Award).
- 1.30 Between 21 April 2015 and 8 May 2015, the Track II Hearing took place in Washington, DC, USA (the “Track II Hearing”). It is described separately below.
- 1.31 At the Track II Hearing, on 5 May 2015, the Tribunal circulated its Draft Procedural Order No. 36 together with the draft Site Visit Protocol. Procedural Order No. 36, formalising the Site Visit Protocol, was issued on 7 May 2015, as executed by the Parties, the Tribunal, and the Secretary-General of the PCA. Also during the Track II Hearing, on 8 May 2015, the Tribunal issued Procedural Order No. 37. It there rescinded the confidentiality clauses of Procedural Orders No. 26 and 29, save in respect of the images of Judge Zambrano’s computer hard drives that were obtained by the Parties pursuant to Procedural Order No. 26.
- 1.32 On 4 to 10 June 2015, the Tribunal’s Site Visit (accompanied by the Parties) took place in the Sucumbíos and Orellana Provinces of the Oriente in Ecuador. It is described separately below.



- 1.33 On 18 June 2015, the Tribunal issued Procedural Order No. 38, an “Omnibus Order”. The Tribunal there decided a number of procedural applications made by the Parties.
- 1.34 On 24 November 2015, the Tribunal issued Procedural Order No. 39. It there (i) addressed an application for interim measures made by the Respondent regarding USTR and US trade preference benefits; (ii) requested the Claimants to confirm the terms of the relief sought for Track I; and, as already indicated above, (iii) extended the appointment of Ms Kathryn Owen as an expert to the Tribunal in accordance with the Revised Terms of Reference therein contained (subject to further comments from the Parties). On 14 December 2015, the Tribunal issued Procedural Order No. 40. It there confirmed the Revised Terms of Reference for the extension of the appointment of Ms Owen as an expert to the Tribunal under the Arbitration Agreement.
- 1.35 On 5 February 2016, Ms Owen’s Final Report was sent to the Parties (“Ms Owen’s Final Report”).
- 1.36 On 29 February 2016, the Tribunal issued Procedural Order No. 41. The Tribunal there invited the Parties’ comments upon Ms Owen’s Final Report. In Procedural Order No. 42, issued on 16 March 2016, the Tribunal approved and agreed to send to Ms Owen part of the documentation submitted by the Parties in response to Procedural Order No. 41.
- 1.37 Ms Owen’s Revised Final Report was sent to the Parties on 3 June 2016 (“Ms Owen’s Revised Final Report”). In Procedural Order No. 43 dated 8 June 2016, the Tribunal enquired whether the Parties requested that an oral hearing be held for the Parties to question Ms Owen and make submissions on her report under the Arbitration Agreement (namely, Article 27(4) of the UNCITRAL Arbitration Rules). By letters dated 10 June and 17 June 2016, the Claimants and the Respondent respectively stated that they did not request any hearing on Ms Owen’s report under the Arbitration Agreement.
- 1.38 On 18 June 2016, the Respondent requested that additional materials be admitted to the evidential record under Section 4 of Procedural Order No. 41. The Claimants consented to the Respondent’s request on 27 June 2016. These materials were duly admitted.

- 1.39 On 2 July 2016, the Tribunal issued Procedural Order No. 44. The Tribunal there recorded the agreement reached by the Parties on a number of procedural issues (as outlined in the Claimants' letter of 27 June 2016). It also ordered that the Parties make two rounds of simultaneous submissions on the significance of Ms Owen's Revised Final Report and Ms Owen's responses to the Parties' questions. The Parties did so on 12 August and 26 August 2016, respectively.
- 1.40 On 10 August 2016, the Claimants provided the Tribunal with a copy of the judgment dated 9 August 2016 of the Second Circuit in the RICO Litigation (the "Judgment of the Second Circuit"). On 16 August 2016, the Respondent submitted its comments on the Judgment of the Second Circuit. On 18 August 2016, the Claimants submitted further comments on the Judgment of the Second Circuit. On 29 August 2016, the Tribunal issued Procedural Order No. 45. The Tribunal there admitted the Judgment of the Second Circuit into the evidential record. It also noted that there could be no issue estoppel or *res judicata* applicable to the arbitration proceedings arising from the RICO Litigation, *inter alia*, for want of sufficient privity under international law between the Parties; and that the Parties had agreed that evidence adduced before the US Courts in the RICO Litigation, as filed in this arbitration with the Tribunal's approval, was to be treated as evidence adduced in this arbitration.
- 1.41 At the same time, the Tribunal requested that the Parties submit a copy of an *amicus* brief submitted by Ecuador to the Second Circuit in the RICO Litigation (the "RICO Amicus Brief"). The Claimants provided this RICO Amicus Brief on 30 August 2016.
- 1.42 On 31 August 2016, the Respondent submitted certain comments in relation to the RICO Amicus Brief and Procedural Order No. 45, noting "that the Tribunal has admitted evidence from those [USA] proceedings as it was submitted by the parties in their respective briefs and memorials"; and that certain FTP materials (exceeding 18.3 GB) proffered by the Claimants on 23 December 2013 had not been admitted by the Tribunal with its approval into the arbitration's evidential record.
- 1.43 On 19 September 2016, the Tribunal issued Procedural Order No. 46, whereby (*inter alia*) the Tribunal decided not to hold an oral hearing to question Ms Owen in connection with her Revised Final Report under the Arbitration Agreement. It also

confirmed the Respondent's understanding regarding the Claimants' FTP materials, as expressed in the Respondent's letter dated 31 August 2016.

- 1.44 On 26 June 2017, the Claimants informed the Tribunal that the US Supreme Court had issued a decision in the RICO Litigation (the "Supreme Court's Decision"). On 27 June 2017, the Tribunal requested a copy of the Supreme Court's Decision, which the Claimants provided on 29 June 2017.
- 1.45 On 12 July 2017, the Respondent requested that the Tribunal terminate the orders made in its First, Second and Fourth Interim Awards. On 19 July 2017, the Claimants requested that these orders remain in force. On 21 July 2017, the Tribunal requested that the Parties respond to a series of queries by the Tribunal in connection with their respective applications regarding these Awards. It also requested a copy of the judgment of The Hague Court of Appeal of 18 July 2017, denying the Respondent's appeal seeking to set aside the Tribunal's Awards (the "Judgment of The Hague Court of Appeal"). On 25 July 2017, the Claimants provided a copy of the Judgment of The Hague Court of Appeal. On 1 August 2017, the Parties provided their respective written responses to the Tribunal's queries of 21 July 2017. On 31 October 2017, the Tribunal issued Procedural Order No. 47, whereby it dismissed the Respondent's application of 12 July 2017 and confirmed that its First, Second and Fourth Interim Awards remained in full force and effect.
- 1.46 On 5 February 2018, the Tribunal requested that the Parties provide it with certain additional information regarding the status of the related legal proceedings and identify which parts of their respective prayers for relief from the outset of the arbitration remained extant for Track II and Track III. The Tribunal otherwise advised the Parties that it was approaching the end of its deliberations and intended formally to "close the hearings" under Article 29 of the UNCITRAL Rules as regards all issues to be addressed in its award under Track II. On 19 March and 20 April 2018 the Parties provided their respective comments to the Tribunal's letter of 5 February 2018. On 23 April 2018, the Claimants requested the Tribunal's permission to respond to the Respondent's letter of 20 April 2018, which the Tribunal denied on 25 April 2018. On 30 April 2018, the Tribunal issued Procedural Order No. 48, whereby it declared the record closed under Article 29 of the UNCITRAL Rules as regards all issues to be addressed by the Tribunal in its Track II award.

1.47 *Written Pleadings:* Pursuant to the Tribunal’s procedural orders, the Parties submitted the following written pleadings during or relevant to Track II (in addition to other written pleadings under Track I, Ib and III):

- (i) The Claimants’ Notice of Arbitration, dated 23 September 2009 (“C-NoA Sept. 2009”);
- (ii) The Claimants’ Request for Interim Measures, dated 1 April 2010 (“C-IM Apr. 2010”);
- (iii) The Respondent’s Response to Claimants’ Request for Interim Measures dated 3 May 2010 (“R-IM May 2010”);
- (iv) The Respondent’s Summary Description of its Preliminary Jurisdictional and Admissibility Objections dated 3 May 2010 (“R-Jur. May 2010”);
- (v) The Claimants’ Reply in Support of Interim Measures dated 7 May 2010 (“C-IM May 2010”);
- (vi) The Respondent’s Memorial on Jurisdictional Objections dated 26 July 2010 (“R-Jur. July 2010”);
- (vii) The Claimants’ Counter-Memorial on Jurisdiction dated 6 September 2010 (“C-Jur. Sept. 2010”);
- (viii) The Respondent’s Reply Memorial on Jurisdictional Objections dated 6 October 2010 (“R-Jur. Oct. 2010”);
- (ix) The Claimants’ Memorial on the Merits dated 6 September 2010 (as amended on 23 September 2010) (“C-Mer. Sept. 2010”);
- (x) The Claimants’ Rejoinder on Jurisdiction dated 6 November 2010 (“C-Jur. Nov. 2010”);
- (xi) The Respondent’s Track 1 Counter-Memorial on the Merits dated 3 July 2012 (“R-TI July 2012”);
- (xii) The Claimants’ Supplemental Memorial on the Merits dated 20 March 2012 (“C-Mer. Mar. 2012”);
- (xiii) The Claimants’ Reply Memorial on the Merits Track 1 dated 29 August 2012 (“C-TI Aug. 2012”);
- (xiv) The Respondent’s Track 1 Rejoinder on the Merits dated 26 October 2012 (“R-TI Oct. 2012”);
- (xv) The Claimants’ document submitted at the Track 1 Hearing in November 2012, claiming their prayer for relief (“C-TI Nov. 2012”);

- (xvi) The Respondent’s Track 2 Counter-Memorial on the Merits dated 18 February 2013 (“R-TII Feb. 2013”);
- (xvii) The Respondent’s letter to the Tribunal on “Show Cause” and “Reconsideration” dated 15 April 2013 (“R-Show Cause Apr. 2013”);
- (xviii) The Claimants’ Initial Pleading on “Show Cause” and “Reconsideration” dated 6 May 2013 (“C-Show Cause May 2013”);
- (xix) The Respondent’s Request for Enforcement of Interim Measures dated 3 June 2013 (“R-IM June 2013”);
- (xx) The Claimants’ Reply Memorial–Track II dated 5 June 2013 (as amended on 12 June 2013) (“C-TII June 2013”);
- (xxi) The Claimants’ Response to Respondent’s Request for Enforcement of Interim Measures dated 17 June 2013 (“C-IM June 2013”);
- (xxii) The Respondent’s Reply in Support of its Request for Enforcement of Interim Measures dated 17 July 2013 (“R-IM July 2013”);
- (xxiii) The Respondent’s Reply on “Show Cause” and “Reconsideration” dated 19 July 2013 (“R-Show Cause July 2013”);
- (xxiv) The Claimants’ Response to Respondent’s Reply in Support of its Request for Enforcement of Interim Measures dated 8 August 2013 (“C-IM Aug. 2013”);
- (xxv) The Claimants’ Rejoinder on “Show Cause” and “Reconsideration” dated 30 August 2013 (“C-Show Cause Aug. 2013”);
- (xxvi) The Respondent’s Track 2 Rejoinder on the Merits dated 16 December 2013 (“R-TII Dec. 2013”);
- (xxvii) The Claimants’ Supplemental Memorial on Track 1 dated 31 January 2014 (“C-TI Jan. 2014”);
- (xxviii) The Respondent’s Track 1 Supplemental Counter-Memorial on the Merits dated 31 March 2014 (“R-TI Mar. 2014”);
- (xxix) The Claimants’ Supplemental Memorial on Track 2 dated 9 May 2014 (“C-TII SMem. May 2014”);
- (xxx) The Claimants’ Post-Submission Insert to their Supplemental Memorial on Track 2 – Examination of Zambrano Computer Hard Drives dated 15 August 2014 (“C-TII Aug. 2014”);
- (xxxi) The Respondent’s Track 2 Supplemental Counter-Memorial on the Merits dated 7 November 2014 (“R-TII Nov. 2014”);

- (xxxii) The Claimants' Reply to the Respondent's Supplemental Track 2 Memorial dated 14 January 2015 ("C-TII Jan. 2015");
- (xxxiii) The Respondent's Track 2 Supplemental Rejoinder on the Merits dated 17 March 2015 ("R-TII Mar. 2015");
- (xxxiv) The Claimants' Post-Track II Hearing Brief on Track I Issues dated 15 July 2015 ("C-TI July 2015");
- (xxxv) The Respondent's Track 1B Post-Hearing Memorial dated 15 July 2015 ("R-TI July 2015");
- (xxxvi) The Claimants' Submission Concerning Digital Forensic Evidence and the Report of the Tribunal-Appointed Digital Forensics Expert dated 12 August 2016 ("C-TII Aug. 2016");
- (xxxvii) The Respondent's Track 2 Supplemental Memorial on the Forensic Evidence of the Republic of Ecuador dated 12 August 2016 ("R-TII Aug. 2016");
- (xxxviii) The Claimants' Reply Submission Concerning Digital Forensic Evidence and the Report of the Tribunal-Appointed Digital Forensics Expert dated 26 August 2016 ("C-TII Aug. 2016"); and
- (xxxix) The Respondent's Track II Supplemental Reply on the Forensic Evidence of the Republic of Ecuador dated 26 August 2016 ("R-TII Aug. 2016").

1.48 Whilst the Parties have submitted during these proceedings other written pleadings touching upon issues decided in this Partial Award, the Tribunal considers that their respective claims for relief in Track II can fairly be taken for present purposes from the pleadings listed in Annex 3 to this Part I, save where otherwise indicated below.

1.49 *Written Factual Testimony:* In this arbitration, the Claimants submitted the following written factual testimony relevant to Track II:

- (i) The witness statement of Rodrigo Pérez Pallares dated 4 September 2010;
- (ii) The first witness statement of Ricardo Reis Veiga dated 27 August 2010;
- (iii) The witness statement of Frank G. Soler dated 27 August 2012; and
- (iv) The second witness statement of Ricardo Reis Veiga dated 28 August 2012.

1.50 *Written Expert Testimony:* In this arbitration the Claimants submitted the following written expert testimony relevant to Track II:

- (i) The expert report of Robert Wasserstrom dated 28 August 2010;

- (ii) The first expert report of Ángel R. Oquendo dated 2 September 2010;
- (iii) The first expert report of Vladimiro Álvarez Grau dated 2 September 2010;
- (iv) The first expert report of Enrique Barros Bourie dated 3 September 2010;
- (v) The second expert report of Enrique Barros Bourie dated 3 September 2010;
- (vi) The first expert report of César Coronel Jones dated 3 September 2010;
- (vii) The second expert report of César Coronel Jones also dated 3 September 2010;
- (viii) The first expert report of David D. Caron dated 3 September 2010;
- (ix) The first expert report of Gregory S. Douglas dated 3 September 2010;
- (x) The first expert report of Gustavo Romero Ponce dated 3 September 2010;
- (xi) The first expert report of John A. Connor dated 3 September 2010;
- (xii) The expert report of Brent K. Kaczmarek dated 6 September 2010;
- (xiii) The first expert report of Michael L. Younger dated 21 December 2011;
- (xiv) The first forensic report of Robert A. Leonard dated 5 January 2012;
- (xv) The first expert report of Gerald R. McMEnamin dated 20 January 2012;
- (xvi) The second expert report of Vladimiro Álvarez Grau dated 10 March 2012;
- (xvii) The first expert report of Mitchell A. Seligson dated 12 March 2012;
- (xviii) The first expert report of Jan Paulsson dated 12 March 2012;
- (xix) The second expert report of David D. Caron dated 24 August 2012;
- (xx) The third expert report of Enrique Barros Bourie dated 27 August 2012;
- (xxi) The expert report of William T. Allen dated 27 August 2012;
- (xxii) The second expert report of Gustavo Romero Ponce dated 27 August 2012;
- (xxiii) The third expert report of César Coronel Jones dated 28 August 2012;
- (xxiv) The second expert report of Ángel R. Oquendo dated 28 August 2012;
- (xxv) The fourth expert report of Enrique Barros Bourie. dated 19 November 2012;
- (xxvi) The fourth expert report of César Coronel Jones dated 19 November 2012;
- (xxvii) The first expert report of Weston Anson dated 6 May 2013;
- (xxviii) The second expert report of Mitchell A. Seligson dated 23 May 2013;
- (xxix) The second forensic report of Robert A. Leonard dated 24 May 2013;
- (xxx) The expert report of Adam Torres dated 24 May 2013;
- (xxxi) The expert report of William D. Bellamy dated 30 May 2013;
- (xxxii) The first expert report of Thomas E. McHugh dated 30 May 2013;
- (xxxiii) The first expert report of Robert E. Hinchee dated 31 May 2013 (including the exhibited opinions of James I. Ebert and of William D. Di Paolo and Laura B. Hall);

- (xxxiv) The first expert report of Suresh H. Moolgavkar dated 31 May 2013;
- (xxxv) The expert report of Pedro J.J. Álvarez dated 31 May 2013;
- (xxxvi) The expert report of Douglas Southgate dated 31 May 2013;
- (xxxvii) The second expert report of Michael L. Younger dated 31 May 2013;
- (xxxviii) The second expert report of Gregory S. Douglas dated 1 June 2013;
- (xxxix) The third expert report of Vladimiro Álvarez Grau dated 3 June 2013;
- (xl) The fifth expert report of Enrique Barros Bourie dated 3 June 2013;
- (xli) The second expert report of John A. Connor dated 3 June 2013;
- (xlii) The fifth expert report of César Coronel Jones dated 3 June 2013;
- (xliii) The first forensic report of Patrick Juola dated 3 June 2013;
- (xliv) The second expert report of Jan Paulsson dated 3 June 2013;
- (xlv) The expert report of Santiago Velázquez Coello dated 3 June 2013;
- (xlvi) The first expert report of Jorge Wright-Ycaza dated 3 June 2013;
- (xlvii) The second expert report of Weston Anson dated 30 August 2013;
- (xlviii) The first forensic report of Spencer Lynch (of Stroz Friedberg) dated 7 October 2013;
- (xlix) The third expert report of John A. Connor dated 7 May 2014;
- (l) The sixth expert report of César Coronel Jones dated 7 May 2014;
- (li) The second expert report of Thomas E. McHugh dated 7 May 2014;
- (lii) The second expert report of Robert E. Hinchee dated 9 May 2014;
- (liii) The second expert report of Suresh H. Moolgavkar dated 9 May 2014;
- (liv) The second forensic report of Patrick Juola dated 12 August 2014;
- (lv) The second forensic report of Spencer Lynch (of Stroz Friedberg) dated 15 August 2014;
- (lvi) The third expert report of Robert E. Hinchee dated 11 January 2015;
- (lvii) The sixth expert report of Enrique Barros Bourie dated 12 January 2015;
- (lviii) The second expert report of Jorge Wright-Ycaza dated 12 January 2015;
- (lix) The seventh expert report of César Coronel Jones dated 13 January 2015;
- (lx) The expert report of Juan Carlos Riofrío Martínez-Villalba dated 13 January 2015;
- (lxi) The third expert report of Gregory S. Douglas dated 14 January 2015;
- (lxii) The fourth expert report of John A. Connor dated 14 January 2015;
- (lxiii) The third expert report of Thomas E. McHugh dated 14 January 2015;



(lxiv) The third forensic report of Spencer Lynch (of Stroz Friedberg) dated 14 January 2015; and

(lxv) The third expert report of Suresh H. Moolgavkar dated 14 January 2015.

1.51 The Respondent submitted the following written factual testimony relevant to Track II:

(i) The witness statement of Norman Alberto Wray dated 10 December 2013;

(ii) The witness statement of Servio Amable Curipoma Sisalima dated 12 December 2013;

(iii) The witness statement of José León Guamán Romero dated 12 December 2013;

(iv) The witness statement of Mercedes Micailina Jaramillo Jiménez dated 13 December 2013; and

(v) The witness statement of Manuel Benjamin Pallares Carrión dated 14 December 2013.

1.52 The Respondent submitted the following written expert testimony relevant to Track II:

(i) The first expert report of Roberto Salgado Valdez dated 1 October 2010;

(ii) The first expert report of Genaro Eguiguren dated 4 October 2010;

(iii) The second expert report of Genaro Eguiguren dated 2 July 2012;

(iv) The second expert report of Roberto Salgado Valdez dated 2 July 2012;

(v) The first expert report of Gilles Le Chatelier dated 2 July 2012;

(vi) The second expert report of Gilles Le Chatelier dated 25 October 2012;

(vii) The third expert report of Genaro Eguiguren dated 26 October 2012;

(viii) The third expert report of Roberto Salgado Valdez dated 26 October 2012;

(ix) The first expert report of Fabián Andrade Narváez dated 18 February 2013;

(x) The first expert report of Kenneth J. Goldstein and Jeffrey W. Short (of the Louis Berger Group) dated 18 February 2013 (including the annexed opinions of Harlee S. Strauss and Edwin Theriot);

(xi) The first expert report of Philippe Grandjean dated 22 November 2013;

(xii) The first expert report of Jeffrey W. Short dated 11 December 2013;

(xiii) The expert report of Edwin Theriot dated 12 December 2013;

(xiv) The second expert report of Kenneth J. Goldstein and Jeffrey W. Short (of the Louis Berger Group) dated 16 December 2013;

(xv) The expert report of Kenneth A. Kaigler dated 16 December 2013;

- (xvi) The first expert report of J. Christopher Racich dated 16 December 2013;
- (xvii) The first expert report of Harlee S. Strauss dated 16 December 2013;
- (xviii) The expert report of Paul H. Templet dated 16 December 2013;
- (xix) The expert report of Jan M. van Dunné dated 27 March 2014;
- (xx) The second expert report of Fabián Andrade Narváez dated 7 November 2014;
- (xxi) The third expert report of Kenneth J. Goldstein and Edward A. Garvey (of the Louis Berger Group) dated 7 November 2014;
- (xxii) The second expert report of Philippe Grandjean dated 7 November 2014;
- (xxiii) The first expert report of Blanca Laffon dated 7 November 2014;
- (xxiv) The second expert report of J. Christopher Racich dated 7 November 2014;
- (xxv) The second expert report of Jeffrey W. Short dated 7 November 2014;
- (xxvi) The second expert report of Harlee S. Strauss dated 7 November 2014;
- (xxvii) The third expert report of Fabián Andrade Narváez dated 16 March 2015;
- (xxviii) The fourth expert report of Kenneth J. Goldstein and Edward A. Garvey (of the Louis Berger Group) dated 16 March 2015;
- (xxix) The third expert report of Philippe Grandjean dated 16 March 2015;
- (xxx) The second expert report of Blanca Laffon dated 16 March 2015;
- (xxxi) The third expert report of J. Christopher Racich dated 16 March 2015;
- (xxxii) The third expert report of Jeffrey W. Short dated 16 March 2015; and
- (xxxiii) The third expert report of Harlee S. Strauss dated 16 March 2015.

1.53 The following joint expert reports were submitted to the Tribunal:

- (i) The joint expert report of Enrique Barros Bourie, César Coronel Jones and Roberto Salgado dated 6 August 2012;
- (ii) The joint expert report of Enrique Barros Bourie, César Coronel Jones, Genaro Eguiguren, Ángel R. Oquendo and Gustavo Romero dated 7 August 2012; and
- (iii) The joint expert report of Gilles Le Chatelier and Ángel R. Oquendo dated 7 August 2012.

1.54 Throughout this Award, these witness statements or expert reports are referred to in abbreviated form by the witness or expert's last name and the number of the relevant statement or report, as follows: "Reis Veiga WS 1" signifies the first witness statement of Ricardo Reis Veiga dated 27 August 2010 and "Leonard ER 1" signifies the first forensic report of Robert A. Leonard dated 5 January 2012.

- 1.55 *The Tribunal's Expert*: As already indicated above, by its Procedural Order No. 26 dated 12 May 2014 under the Arbitration Agreement made by consent of the Parties, the Tribunal appointed Ms Owen as the Tribunal's forensic expert for the purpose of undertaking the imaging and safe-keeping of Judge Zambrano's hard drives in Ecuador, with the Parties' respective forensic experts present during this exercise. As also already indicated, Ms Owen's mandate was renewed and expanded pursuant to Procedural Order No. 34 dated 30 March 2015 and Procedural Order No. 40 dated 14 December 2015. Ms Owen submitted her Revised Final Report on 3 June 2016.
- 1.56 *The Track II Hearing*: Issues under Track II were addressed by the Parties at the oral hearing at the World Bank, in Washington DC, USA held from 21 April 2015 to 8 May 2015, with the assistance of English and Spanish interpreters and recorded in the form of both English and Spanish transcripts (the "Track II Hearing"). The references below are made to the English version of the transcript, as follows: "D1.10" signifies the first day, at page 10. As regards witness examinations, "x" signifies direct examination, "xx" signifies cross-examination, "xxx" signifies re-direct examination and "QT" signifies questions from the Tribunal.
- 1.57 The Claimants and the Respondent were represented respectively at the Track II Hearing by those persons listed in the verbatim transcript; and it serves no purpose here listing these persons by name, save as follows.
- 1.58 For the Claimants, opening oral submissions were made by the First Claimant's General Counsel Mr Hewitt Pate [D1.10], Professor Paulsson [D1.13; D1.141], Doak Bishop Esq [D1.24], Wade Coriell Esq [D1.94] and Tracie Renfroe Esq [D1.119].
- 1.59 For the Respondent, opening oral submissions were made by the Respondent's Procurador General Diego García Carrión [D1.172], Eric W. Bloom Esq [D1.177; D1.241; D1.295], Professor Silva Romero [D1.184], Dra Blanca Gómez de la Torre [D1.197], Professor Mayer [D1.206], Ricardo Ugarte Esq [D1.223], Tomás Leonard Esq [D1.242], Gregory Ewing Esq [D1.271; D1.306], Nicole Silver Esq [D1.286] and Eric Goldstein Esq [D1.319].
- 1.60 For the Claimants, closing oral submissions were made by Doak Bishop Esq [D12.2506; D12.2634; D12.2680], Tracie Renfroe Esq [D12.2516; D12.2607], Wade Coriell Esq [D12.2525], David Weiss Esq [D12.2559], Professor Paulsson [D12.2570; D12.2735],

Caline Mouawad Esq [D12.2651], Elizabeth Silbert Esq [D12.2668], Edward G. Kehoe Esq [D12.2708] and Mr Hewitt Pate [D12.2753].

- 1.61 For the Respondent, closing oral submissions were made by the Respondent's Procurador General Diego García Carrión [D13.2786], Eric W. Bloom Esq [D13.2792, D13.2829], Eric Goldstein Esq [D13.2804, D13.2851], Gregory Ewing Esq [D13.2808, D13.2882, D13.2906], Nassim Hooshmandnia Esq [D13.2819], Nicole Silver Esq [D13.2896], Tomás Leonard Esq [D13.2911; D13.3022], Professor Silva Romero [D13.2942], Professor Mayer [D13.2965], Dra Blanca Gómez de la Torre [D13.2978], Ricardo Ugarte Esq [D13.2983], Mark Bravin Esq [D13.3011], Ms Daniela Palacios [D13.3025], Ms Maria Teresa Borja [D13.3028] and Mr Luis Felipe Aguilar [D13.3031].
- 1.62 The Claimants tendered eight oral witnesses at the Track II Hearing who were all cross-examined by the Respondent: (i) Robert A. Leonard [D2.381x & 401xx]; (ii) Patrick Juola [D2.455x, 483xx & 580xxx]; (iii) Alberto Guerra Bastidas [D3.598x, 604xx, D4.769xx, 859xxx, 890QT & 898xxx]; (iv) Spencer Lynch [D5.936x, 965xx & 1126xxx]; (v) John A. Connor [D6.1288x, 1328xx, D7.1471xx & 1571xxx]; (vi) Gregory S. Douglas [D7.1606x, 1641xx, D8.1702xx & 1759xxx]; (vii) Thomas McHugh [D8.1778x, 1804xx, 1850xxx & 1861QT]; and (viii) Robert E. Hinchee [D9.1879x, 1904xx & 2002xxx].
- 1.63 The Respondent tendered five oral witnesses at the Track II Hearing who were all cross-examined by the Claimants: (i) J Christopher Racich [D5.1139x, 1158xx, D6.1216xx & 1270xxx]; (ii) Harlee Strauss [D9.2009x, 2035xx, 2107xxx & 2110QT]; (iii-iv) Edward A. Garvey and Kenneth J. Goldstein [D10.2135x, 2166xx, 2265xxx & 2272QT]; and (v) Fabián Andrade Narváez [D10.2286x, 2312xx, D11.2359xx, 2409xxx, 2439QT, 2450xxx & 2453xx].
- 1.64 *The Site Visit:* By Procedural Order No. 36 dated 7 May 2016, the Tribunal, the Parties and the Secretary-General of the PCA executed the Site Visit Protocol for the Tribunal's visit to four sites in Ecuador. The Site Visit included four sites within the area of the former Concession: (i) Shushufindi-34 (on 7 June 2015), (ii) Aguarico-06 (on 8 June 2015), (iii) Shushufindi-55 (also on 8 June 2015) and (iv) Lago Agrio-02 (on 9 June 2015). During the Site Visit, the Parties' legal representatives and experts addressed the

participants at each of these four sites, as recorded in the English verbatim transcript. The references below are made to this transcript, as follows: “S1.10” signifies the first site, at page 10 of the transcript.

- 1.65 For the Claimants, the Site Addresses were made by Doak Bishop Esq [S1.37], Tracie Renfroe Esq [S1.40, S1.73, S4.328, S4.364], Mr John Connor [S1.48, S2.165, S3.249, S3.260, S4.340], Dr Thomas E. McHugh [S1.65, S2.157, S2.184, S3.264, S4.339], Carol Wood Esq [S2.151, S2.159, S2.187, S4.358] and Jamie M. Miller Esq. [S3.242, S3.259, S3.263, S3.267].
- 1.66 For the Respondent, the Site Addresses were made by Procurador General Diego García Carrión [S1.6], Gregory L. Ewing Esq [S1.9, S1.78, S1.91, S2.107, S2.133, S2.191, S2.202, S3.213, S3.271, S3.278, S4.292, S4.319, S4.323, S4.378], Dr Edward A. Garvey [S1.18, S1.85, S2.120, S2.195, S2.203, S3.227, S3.274, S3.284, S4.301, S4.322, S4.375] and Eric W. Bloom Esq [S4.384].
- 1.67 *Track II Procedural Orders:* The Tribunal has issued 38 orders relevant to Track II: PO Nos 10-11, 16, 18-23 and 25 to 50 as listed in Annex II to this Part I and marked “\*”.
- 1.68 *Enforcement:* From May 2012 onwards, the Lago Agrio Plaintiffs sought to enforce and execute the Lago Agrio Judgment in (i) Ecuador, (ii) Canada, (iii) Brazil and (iv) Argentina against Chevron, TexPet and certain of Chevron’s associated companies. A summary of these enforcement proceedings is provided in Annex 4 to Part I of this Award.

***E: The Parties’ Respective Claims for Relief***

- 1.69 In their several written submissions relevant to Track II (including submissions in Track I, Ib and III), the Parties pleaded their respective formal prayers, as set below out in Annex 3 to this Part I, as clarified by their respective letters dated 19 March and 20 April 2018.

***F: “Closing the Record”***

- 1.70 By letter dated 5 March 2018 and its Procedural Order No. 48 dated 30 April 2018, the Tribunal ‘closed’ the record of this arbitration as regards the issues under Track II that were to be decided in this Award.

1.71 On 27 June 2018, the Respondent's Constitutional Court issued its Judgment,<sup>2</sup> dismissing Chevron's extraordinary action for protection against the Lago Agrio Judgment (2011),<sup>3</sup> as also decided by the Lago Agrio Appellate Court's Judgment (2012)<sup>4</sup> and the Cassation (National) Court's Judgment (2013).<sup>5</sup> By its Procedural Order No. 49 of 12 July 2018, the Tribunal admitted into the record of this arbitration the Constitutional Court's Judgment (in its original Spanish version, followed by the Parties' agreed English translation). At the Tribunal's request, confirmed by the Tribunal's Agreed Procedural Order of 19 July 2018, the Parties made their respective written submissions on the Constitutional Court's Judgment by letters dated 25 July 2018. Subsequently, prior to the issue of this Award, the Tribunal re-closed the record of this arbitration as regards the issues under Track II that are decided in this Award, by Procedural Order No. 50 and letter dated 13 August 2018.

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<sup>2</sup> C-2551.

<sup>3</sup> C-931.

<sup>4</sup> C-991.

<sup>5</sup> C-1975.

**PART I – ANNEX 1**

**THE TRIBUNAL'S ORDERS ON INTERIM MEASURES,  
AWARDS AND DECISION  
(OPERATIVE PARTS)**

**A: Order on Interim Measures dated 14 May 2010, Operative Part (pp. 5-6):**

*“1. Until further decision the Tribunal takes, pursuant to Article 26(1) of the UNCITRAL Rules, the following interim measures up to and including the next procedural meeting beginning on 22 November 2010:*

*(i) The Claimants and the Respondent are both ordered to maintain, as far as possible, the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings;*

*(ii) The Claimants and the Respondent are both ordered to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal;*

*(iii) The Claimants and Respondent are both ordered not to exert, directly or indirectly, any unlawful influence or pressure on the [Lago Agrio] Court addressing the pending litigation in Ecuador known as the Lago Agrio Case [The Lago Agrio Litigation];*

*(iv) The Claimants and Respondent are ordered to inform the Tribunal (in writing) of the likely date for the issue by the Court of its judgment in the Lago Agrio Case as soon as such date becomes known to any of them;*

*(v) The Respondent is ordered to communicate (in writing and also by any other appropriate means) the Tribunal's invitation to the [Lago Agrio] Court to make known as a professional courtesy to the Tribunal the likely date for the issue of its judgment in that Case; and, to that end, the Respondent is ordered to send to the Court the full text in Spanish and English of the Tribunal's present order.<sup>6</sup>*

*(vi) The Respondent is ordered to facilitate and not to discourage, by every appropriate means, the Claimants' engagement of legal experts, advisers and representatives from the Ecuadorian legal profession for the purpose of these arbitration proceedings (at the Claimants' own expense).*

*2. This Order is and shall remain subject to modification in the light of any future event, upon the Tribunal's own motion or upon any Party's application, particularly in the light of any new development in the Lago Agrio Case [the Lago Agrio Litigation] and the issue of the [Lago Agrio] Court's judgment in such Case; and any of the Parties may apply to the Tribunal for such modification upon 24 hours' written notice.*

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<sup>6</sup> This was done. The Respondent submitted this letter to the Lago Agrio Court on 21 May 2010 (R-116). The Lago Agrio Court provided a response to the Tribunal's invitation by letter dated 17 June 2018 (R-118).

3. This Order is made strictly without prejudice to the merits of the Parties' procedural and substantive disputes, including the Respondent's jurisdictional and admissibility objections and the merits of the Claimants' claims."

**B: Order No 2 on Interim Measures dated 6 December 2010, Operative Part (pp. 5-6):**

"1. Until further decision the Tribunal takes, pursuant to Article 26(1) of the UNCITRAL Rules, the following interim measures up to and including the date of issuance of the Tribunal's decision on jurisdiction:

(i) The Claimants and the Respondent are both ordered to maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings;

(ii) The Claimants and the Respondent are both ordered to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal;

(iii) The Claimants and Respondent are both ordered not to exert, directly or indirectly, any unlawful influence or pressure on the [Lago Agrio] Court addressing the pending litigation in Ecuador known as the Lago Agrio Case [Lago Agrio Litigation];

(iv) The Claimants and Respondents are ordered to inform the Tribunal (in writing) of the likely date for the issue by the Court of its judgment in the Lago Agrio Case as soon as such date becomes known to any of them;

(v) The Tribunal has decided, of its own motion, to write a letter to the Court in the Lago Agrio Case (in the form of the draft attached) inviting that Court to make known as a professional courtesy to the Tribunal the likely date for the issue of its judgment in that Case;<sup>7</sup> and

(vi) The Respondent is ordered to facilitate and not to discourage, by every appropriate means, the Claimants' engagement of legal experts, advisers and representatives from the Ecuadorian legal profession for the purpose of these arbitration proceedings (at the Claimants' own expense).

2. This Order is and shall remain subject to modification in the light of any future event, upon the Tribunal's own motion or upon any Party's application, particularly in the light of any new development in the Lago Agrio Case and the issue of the Court's judgment in such Case; and any of the Parties may apply to the Tribunal for such modification upon 24 hours' written notice.

3. This Order is made strictly without prejudice to the merits of the Parties' procedural and substantive disputes, including the Respondent's jurisdictional and admissibility objections and the merits of the Claimants' claims."

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<sup>7</sup> The Tribunal sent such a letter on 6 December 2010.



**C: Further Order on Interim Measures dated 28 January 2011, Operative Part, Paragraph C (pp. 3-4)**

“(C) Pending such oral hearing [i.e. the Hearing at the Peace Palace on 6 February 2011] or further order (on application by any Party or by the Tribunal upon its own initiative), the Tribunal takes the following interim measures pursuant to Article 26 of the UNCITRAL Arbitration Rules:

1. The Tribunal re-confirms Paragraphs 1(i) to (iv) of its Order dated 14 May 2010 (as amended); namely:

(i) The Claimants and the Respondent are both ordered to maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings;

(ii) The Claimants and the Respondent are both ordered to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal;

(iii) The Claimants and the Respondent are both ordered not to exert, directly or indirectly, any unlawful influence or pressure on the Court addressing the pending litigation in Ecuador known as the Lago Agrio Case;

(iv) The Claimants and the Respondent are ordered to inform the Tribunal (in writing) of the likely date for the issue by the Court of its judgment in the Lago Agrio Case as soon as such date becomes known to any of them;

2. Whilst the Lago Agrio plaintiffs are not named parties to these arbitration proceedings and the Respondent is not a named party to the Lago Agrio Case, the Tribunal records that, as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One of the International Law Commission’s Articles on State Responsibility;

3. If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission’s Articles on State Responsibility; and

4. This order for further interim measures is made by the Tribunal strictly without prejudice to any Party’s case as regards the Tribunal’s jurisdiction, the Claimants’ First and Second Applications, the Respondent’s opposition to these First and Second Applications and any claim or defence by any Party as to the merits of the Parties’ dispute.”

**D: Order on Interim Measures dated 9 February 2011, Operative Part (pp. 3-4):**

“(A) As to jurisdiction, the Tribunal records that it has not yet determined the Respondent’s challenge to its jurisdiction (as recorded in the fourth preamble to its Order of 28 January 2011). Nonetheless, for the limited purpose of the present decision, the Tribunal provisionally assumes that it has the jurisdiction to decide upon the Claimants’ Second Application for

*Interim Measures on the ground that the Claimants have established, to the satisfaction of the Tribunal, a sufficient case for the existence of such jurisdiction at this preliminary stage of these arbitration proceedings under the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the “BIT”), incorporating by reference the 1976 UNCITRAL Arbitration Rules (“the UNCITRAL Rules”);*

*(B) The Tribunal notes that: (1) Article 26 of the UNCITRAL Rules permits a tribunal, at the request of a party, to take interim measures (established in the form of an order or award) in respect of the subject-matter of the parties’ dispute; (ii) Article 32(1) of the UNCITRAL Rules provides that any award is final and binding on the parties, with the parties undertaking to carry out such award without delay; and (iv) Articles VI.3(6) of the BIT provides (inter alia) that an award rendered pursuant to Article VI.3(a)(iii) of the BIT under the UNCITRAL Rules shall be binding on the parties to the dispute, with the Contracting Parties undertaking to carry out without delay the provisions of any such award and to provide in its territory for its enforcement;*

*(C) As to form, the Tribunal records that, whilst this decision under Article 26 of the UNCITRAL Rules is made in the form of an order and not an interim award, given the urgency required for such decision, the Tribunal may decide (upon its own initiative or any Party’s request) to confirm such order at a later date in the form of an interim award under Articles 26 and 32 of the UNCITRAL Rules, without the Tribunal hereby intending conclusively to determine the status of this decision, one way or the other, as an award under the 1958 New York Convention.*

*(D) As to the grounds for the Claimants’ Second Application, the Tribunal concludes that the Claimants have made out a sufficient case, to the Tribunal’s satisfaction, under Article 26 of the UNCITRAL Rules, for the order made below in the discretionary exercise of the Tribunal’s jurisdiction to take interim measures in respect of the subject-matter of the Parties’ dispute;*

*(E) Bearing in mind the Respondent’s several obligations under the BIT and international law, including the Respondent’s obligation to carry out and provide for the enforcement of an award on the merits of the Parties’ dispute in these arbitration proceedings (assuming this Tribunal’s jurisdiction to make such an award) the Tribunal orders:*

*(i) the Respondent to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case; and*

*(ii) the Respondent’s Government to inform this Tribunal, by the Respondent’s legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this order for interim measures;*

*pending further order or award in these arbitration proceedings, including the Tribunal’s award on jurisdiction or (assuming jurisdiction) on the merits;*

*(F) The Tribunal records that it is common ground between the Claimants and the Respondent in these proceedings, as also re-confirmed by the Respondent at the oral hearing on 6 February 2011 (page 107 of the English transcript and page 101 of the Spanish transcript) that, under Ecuadorean law, a judgment entered in a domestic proceeding at first instance (such as a first-instance judgment in the Lago Agrio Case) is not final, conclusive or enforceable during the*

*pendency of a first-level appeal until at least such time as that appeal has been decided by the first-level appellate court;*

*(G) The Tribunal continues Paragraph C (1) to (3) of its order of 28 January 2011 (which order is incorporated by reference herein);*

*(H) The Tribunal decides further that the Claimants shall be legally responsible, jointly and severally, to the Respondent for any costs or losses which the Respondent may suffer in performing its obligations under this order, as may be decided by the Tribunal within these arbitration proceedings (to the exclusion of any other jurisdiction;*

*(I) This order shall be immediately final and binding upon all Parties, subject only to any subsequent variation made by the Tribunal (upon either its own initiative or any Party's request); and*

*(J) This order, as with the earlier order of 26 [sic: 28] January 2011,<sup>8</sup> is made by the Tribunal strictly without prejudice to any Party's case as regards the Tribunal's jurisdiction, the Claimant's First Application made by letter dated 12 December 2010, the Respondent's opposition to such First Application, and to any claim or defence by any Party as to the merits of the Parties' dispute."*

***E: Procedural Order No 7 dated 16 March 2011, Paragraphs 1-10:***

*"1. The Tribunal here addresses the four disputed applications in these arbitration proceedings regarding the Tribunal's several orders for interim measures dated 14 May 2010, 28 January 2011 and 9 February 2011; namely: (i) the first application by the Claimants made by letter dated 23 February 2011; (ii) the second application by the Respondent made by letter dated 24 February 2011; (iii) the third application by the Respondent made by letter dated 28 February 2011; and (iv) the fourth application by the Claimants made by letter dated 4 March 2011.*

*2. First Application: As regards the first application by the Claimants for further interim measures against the Respondent in regard to the criminal proceedings in Ecuador concerning (inter alios) two of the Claimants' legal representatives (Messrs Ricardo Veiga and Rodrigo Pérez), the Tribunal refers to the Claimants' letter dated 23 February 2011, the Claimants' email message dated 25 February 2011 and the Respondent's letter dated 10 March 2011.*

*3. Having considered the Parties' written submissions listed in paragraph 2 above (with attached exhibits), together with all other relevant circumstances in this case, the Tribunal does not consider it appropriate to grant the Claimants' application pleaded specifically at page 21 of their letter dated 23 February 2011, beyond maintaining the Tribunal's existing orders for interim measures.*

*4. Second Application: As regards the second application made by the Respondent seeking the revocation of the Tribunal's order dated 9 February 2011, the Tribunal refers to Part II of the Respondent's letter dated 24 February 2011 and the Claimants' letter dated 4 March 2011.*

*5. Having considered the Parties' written submissions listed in paragraph 4 above (with attached exhibits), together with all other relevant circumstances in this case, the Tribunal does*

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<sup>8</sup> This order of 28 January was mis-dated 26 January 2011.

*not consider it appropriate to grant the Respondent's application or the Claimants' counter-application, beyond maintaining its existing order for interim measures dated 9 February 2011.*

*6. Third Application: As regards the third application made by the Respondent in regard to alleged violations by the Claimants of the Tribunal's orders for interim measures and for further interim measures, the Tribunal refers to the Respondent's letter dated 28 February 2001 and the Claimants' letters dated 4 and 10 March 2001.*

*7. Having considered the Parties' written submissions listed in paragraph 6 above (with attached exhibits), together with all other relevant circumstances in this case, the Tribunal does not consider it appropriate to grant the Respondent's application pleaded specifically at page 3 of its letter dated 28 February 2011, beyond maintaining the Tribunal's existing orders for interim measures.*

*8. Fourth Application: As regards the fourth application made by the Claimants in regard to alleged violations by the Respondent of the Tribunal's order dated 9 February 2011, the Tribunal refers to the Claimants' letter dated 4 March 2011.*

*9. Having considered the written submissions listed in paragraph 8 above (with attached exhibits), together with all other relevant circumstances in this case, the Tribunal does not consider it appropriate to grant the Claimants' application, beyond maintaining the Tribunal's existing order for interim measures dated 9 February 2011.*

*10. This procedural order shall not prejudice any issue as regards jurisdiction, admissibility or merits in these proceedings; nor shall it preclude any future application by any Party for interim measures or like relief in the event of any change in relevant circumstances."*

***F: First Interim Award on Interim Measures dated 25 January 2012, Operative Part (pp. 16-17):***

*" 1. Pursuant to Paragraph (C) of its Order dated 9 February 2011 and upon the following terms, the Tribunal confirms and re-issues such Order as an Interim Award pursuant to Articles 26 and 32 of the UNCITRAL Arbitration Rules, specifically Paragraph (E) of such Order; namely (as here modified):*

*2. Bearing in mind the Respondent's several obligations under the Treaty and international law, including the Respondent's obligation to carry out and provide for the enforcement of an award on the merits of the Parties' dispute in these arbitration proceedings (assuming this Tribunal's jurisdiction to make such an award), the Tribunal orders:*

*(i) the Respondent to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case; and*

*(ii) the Respondent's Government shall continue to inform this Tribunal, by the Respondent's legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this Interim Award;*

*pending the February Hearing's completion and any further order or award in these arbitration proceedings;*

3. *This Interim Award is and shall remain subject to modification (including its extension or termination) by the Tribunal at or after the February Hearing; and, in the meantime, any of the Parties may also apply to the Tribunal for such modification upon 72 hours' written notice for good cause shown;*

4. *This Interim Award is made strictly without prejudice to the merits of the Parties' substantive and other procedural disputes, including (but not limited to) the Parties' respective applications to be heard at the February Hearing;*

5. *This Interim Award shall take effect forthwith as an Interim Award, being immediately final and binding upon all Parties as an award subject only to any subsequent modifications herein provided, whether upon the Tribunal's own initiative or any Party's application; and*

6. *This Interim Award, although separately signed by the Tribunal's members on three signing pages, constitutes an 'interim award' signed by the arbitrators under Article 32 of the UNCITRAL Arbitration Rules."*

**G: *Second Interim Award on Interim Measures dated 16 February 2012, Operative Part (pp. 2-4) (issued after the February Hearing):***

*"1. The Tribunal determines that: (i) Article 26 of the UNCITRAL Rules (forming part of the arbitration agreement invoked by the Claimants under the Treaty) permits this Tribunal, at the request of a Party, to take interim measures (established in the form of an order or award) in respect of the subject-matter of the Parties' dispute; (ii) Article 32(1) of the UNCITRAL Rules permits this Tribunal to make (inter alia) an award in the form of an interim award; (iii) Article 32(2) of the UNCITRAL Rules provides that any award by this Tribunal is final and binding on the Parties, with the Parties undertaking to carry out such award without delay; and (iv) Articles VI.3(6) of the Treaty provides (inter alia) that an award rendered by this Tribunal pursuant to Article VI.3(a)(iii) of the Treaty under the UNCITRAL Rules shall be binding on the parties to the dispute (i.e. the Claimants and the Respondent), with the Contracting Parties (i.e. here the Respondent) undertaking to carry out without delay the provisions of any such award and to provide in its territory for its enforcement;*

*2. The Tribunal determines further that the Claimants have established, for the purpose of their said applications for interim measures, (i) a sufficient case as regards both this Tribunal's jurisdiction to decide the merits of the Parties' dispute and the Claimants' case on the merits against the Respondent; (ii) a sufficient urgency given the risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties' dispute by any final award; and (iii) a sufficient likelihood that such harm to the Claimants may be irreparable in the form of monetary compensation payable by the Respondent in the event that the Claimants' case on jurisdiction, admissibility and the merits should prevail before this Tribunal;*

*3. Bearing in mind the Respondent's several obligations under the Treaty and international law, including the Respondent's obligation to carry out and provide for the enforcement of an award on the merits of the Parties' dispute in these arbitration proceedings and the Tribunal's mission (required under the arbitration agreement) efficaciously and fairly to decide the Parties' dispute by a final award, the Tribunal hereby orders:*

*(i) the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments by the Provincial Court of*

*Sucumbíos, Sole Division (Corte Provincial de Justicia de Sucumbíos, Sala Unica de la Corte Provincial de Justicia de Sucumbíos) of 3 January 2012 and of 13 January 2012 (and, to the extent confirmed by the said judgments, of the judgment by Judge Nicolás Zambrano Lozada of 14 February 2011) against the First Claimant in the Ecuadorian legal proceedings known as “the Lago Agrio Case”;*

*(ii) in particular, without prejudice to the generality of the foregoing, such measures to preclude any certification by the Respondent that would cause the said judgments to be enforceable against the First Claimant; and*

*(iii) the Respondent’s Government to continue to inform this Tribunal, by the Respondent’s legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of its legal obligations under this Second Interim Award;*

*until any further order or award made by the Tribunal in these arbitration proceedings;*

*4. The Tribunal determines that the Claimants shall be legally responsible, jointly and severally, to the Respondent for any costs or losses which the Respondent may suffer in performing its legal obligations under this Second Interim Award, as may be decided by the Tribunal within these arbitration proceedings (to the exclusion of any other jurisdiction); and further that, as security for such contingent responsibility the Claimants shall deposit within thirty days of the date of this Second Interim Award the amount of US\$ 50,000,000.00 (United States Dollars Fifty Million) with the Permanent Court of Arbitration in a manner to be designated separately, to the order of this Tribunal;*

*5. The Tribunal dismisses the application made by the Respondent to vacate its order for interim measures of 9 February 2011;*

*6. The Tribunal’s existing orders for interim measures (as recited in the First Interim Award) and the First Interim Award shall continue to have effect subject to the terms of this Second Interim Award;*

*7. This Second Interim Award is and shall remain subject to modification at any time before the Tribunal’s final award in these arbitration proceedings; and, in the meantime, any of the Parties may also apply to the Tribunal for such modification upon seventy-two hours’ written notice for good cause shown, including any material change in the legal or factual circumstances prevailing as at the date of the Hearing;*

*8. This Second Interim Award is made strictly without prejudice to the merits of the Parties’ substantive and other procedural disputes, including the Respondent’s objections as to jurisdiction, admissibility and merits;*

*9. This Second Interim Award shall take effect forthwith as an Interim Award, being immediately final and binding upon all Parties as an award subject only to any subsequent modification as herein provided, whether upon the Tribunal’s own initiative or any Party’s application; and*

*10. This Interim Award, although separately signed by the Tribunal’s members on three signing pages constitutes an ‘interim award’ signed by the three arbitrators under Article 32 of the UNCITRAL Arbitration Rules.”*

***H: Third Interim Award on Jurisdiction and Admissibility of 27 February 2012, Operative Part (issued following the Hearing on Jurisdiction held on 22 and 23 November 2010 in London – the “Jurisdiction Hearing” – and after the February Hearing):***

*“5.1 For the reasons set out above, the Tribunal here decides as a third interim award:*

*5.2 The Tribunal declares that it has jurisdiction to proceed to the merits phase of these arbitration proceedings with the claims pleaded in the Claimant’s [sic: Claimants’] Notice of Arbitration dated 23 September 2009, subject to the following sub-paragraphs;*

*5.3 A regards the claims pleaded by the Second Claimant (Texaco Petroleum Company or “TexPet”) in the Claimants’ said Notice of Arbitration, to reject all objections made by the Respondent as to jurisdiction and admissibility by its Memorial on Jurisdiction and Admissibility dated 26 July 2010, its Reply Memorial on Jurisdiction Objections dated 6 October 2010 and its further submissions at the Jurisdiction Hearing on 22 and 23 November 2010;*

*5.4 As regards the claims pleaded by the First Claimant (Chevron Corporation or “Chevron”) in the Claimants’ said Notice of Arbitration, to reject all objections made by the Respondent as to jurisdiction and admissibility in its said memorials and further submissions, save those relating to the jurisdictional objections raised against the First Claimant as a investor under Article I(1)(a) alleging a “direct” investment under Article VI(1)(c) and an “investment agreement” under Article VI(1)(a) of the Ecuador–USA Treaty of 27 August 1993 which are joined to the merits of the First Claimants’ [sic: Claimant’s] claims under Article 21(4) of the UNCITRAL Arbitration Rules forming part of the Parties’ arbitration agreement under the Treaty; and*

*5.5 As regards the Parties’ respective claims for costs, the Tribunal here makes no order save to reserve in full its jurisdiction and powers to decide such claims by a later order or award in these arbitration proceedings.”*

***I: Fourth Interim Award on Interim Measures of 7 February 2013, Operative Part (p. 31) (issued after the Hearing on 26-28 November 2012 and further written submissions – the “November Hearing”):***

*“1) The Tribunal declares that the Respondent has violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina;*

*2) The Tribunal decides that the Respondent shall show cause, in accordance with a procedural timetable to be ordered by the Tribunal separately, why it (the Respondent) should not compensate the First Claimant for any harm caused by the Respondent’s violations of the First and Second Interim Awards;*

*3) The Tribunal declares and confirms that the Respondent was and remains legally obliged under international law to ensure that the Respondent’s commitments under the Treaty and the UNCITRAL Rules are not rendered nugatory by the finalisation, enforcement or execution of the Lago Agrio Judgment in violation of the First and Second Interim Awards; and*

4) *The Tribunal states expressly that: (i) it has not yet decided any of the substantive merits of the Parties' dispute; and (ii) this award is made strictly without prejudice to those merits, including all claims advanced by the Claimants and all defences advanced by the Respondent.*"

***J: First Partial Award on Track I dated 17 September 2013, Operative Part, Paragraph 112:***

*"112. For the reasons set out above, the Tribunal finally decides and awards as follows in Track I of these arbitration proceedings:*

*(1) The First Claimant ("Chevron") and the Second Claimant ("TexPet") are both "Releasees" under Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release;*

*(2) As such a Releasee, a party to and also part of the 1995 Settlement Agreement, the First Claimant can invoke its contractual rights thereunder in regard to the release in Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release as fully as the Second Claimant as a signatory party and named Releasee;*

*(3) The scope of the releases in Article 5 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release made by the Respondent to the First and Second Claimants does not extend to any environmental claim made by an individual for personal harm in respect of that individual's rights separate and different from the Respondent; but it does have legal effect under Ecuadorian law precluding any "diffuse" claim against the First and Second Claimants under Article 19-2 of the Constitution made by the Respondent and also made by any individual not claiming personal harm (actual or threatened); and*

*(4) Save as aforesaid, the Tribunal does not here decide (one way or the other) any part of the formal relief claimed by the Parties respectively in regard to Track I, reserving to itself its full powers and discretion to do so in one or more later awards."*

***K: Decision (by a majority) on Track IB Issues dated 12 March 2015: Operative Part, Paragraphs 186-187:***

*"186. For the reasons set out above, as regards the said Issue (ii) in Track IB of this arbitration, the Tribunal decides (but does not award) that:*

*(1) The Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement (as invoked by the Claimants);*

*(2) The Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement (as invoked by the Claimants); and*

*(3) The Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York.*

*187. No other part of the Parties' claimed relief in Track IB is here decided by the Tribunal; and the Tribunal retains in full its jurisdiction and powers to address and decide such relief (including costs) by one or more further orders, decisions or awards at a later stage of these arbitration proceedings."*



**PART I – ANNEX 2**

**THE TRIBUNAL’S PROCEDURAL ORDERS  
(including Orders for Interim Measures (“OIM”))**

“\*” indicates those orders relevant to Track II.

<b><i>PO Number</i></b>	<b><i>Date</i></b>	<b><i>Subject-Matter</i></b>
PO (not numbered)	9 April 2010	Procedural Meeting on Interim Measures
PO (not numbered)	27 April 2010	Procedural Meeting on Interim Measures
OIM No 1	14 May 2010	Maintenance of status quo
PO No 01	18 May 2010	Terms of Appointment of the Tribunal
PO No 04	14 June 2010	Alleged breaches of OIM 1
PO No 05	7 July 2010	Rules Jurisdictional Phase
PO No 06	4 November 2010	Hearing on Jurisdiction/Admissibility
OIM No 2	6 December 2010	Maintenance of status quo
PO/OIM	18 January 2011	Two Applications from the Claimants
OIM	9 February 2011	Jurisdiction over Request for Interim Measures
PO No 07	16 March 2011	Applications on Interim Measures
PO No 08	18 April 2011	Amicus Petitions
PO No 09	28 September 2011	Claimants’ Request for Conference Call
PO No 10*	10 April 2012	Twin-Track Procedure
PO No 11*	15 May 2012	Schedule Track I and Track II
PO No 12	29 June 2012	Claimants’ application for revised interim measures; Respondent’s application on other matters
PO No 13	16 November 2012	Hearing 26-28 November 2012
PO No 14	22 November 2012	Claimants’ Applications regarding the 26-28 November 2012 Hearing
PO No 15	14 February 2013	Parties’ Applications in relation to Fourth Award on Interim Measures
PO No 16*	19 March 2013	Procedural Timetable
PO No 17	5 June 2013	Confidentiality and Time Extension
PO No 18*	9 August 2013	“Bifurcation” of Track II Hearing
PO No 19*	10 October 2013	Alberto Guerra’s requested Deposition

PO No 20*	11 November 2013	Claimants' Request for Respondent to produce Expert Report of the Forensic analysis of Judge Zambrano's computers
PO No 21*	11 November 2013	Scope of Issues Track II Hearing
Urgent PO*	5 December 2013	Judgement of the National Court of 12 November 2013
PO No 22*	2 January 2014	Procedural disputes on Track II Hearing
PO No 23*	10 February 2014	I-III Track Procedure, with Procedural Calendar
PO No 24	13 March 2014	Scope of Track IB
PO No 25*	14 March 2014	Respondent's Requests for Document Production
PO No 26*	12 May 2014	Procedural Directions on Examination of Zambrano Hard Drives, Appointment of Ms Kathryn Owen as Tribunal Expert
PO No 27*	13 August 2014	Site Visit
PO No 28*	4 September 2014	Respondent's applications regarding Site Visit
PO No 29*	12 March 2015	Amendment to Confidentiality Clause
PO No 30*	12 March 2015	Format of the Site Visit
PO No 31*	26 March 2015	Counsel Communication with the Press
PO No 32*	26 March 2015	Appointment of Jessica Wells as Additional Secretary
PO No 33*	27 March 2015	Tribunal's invitation to Dr Zambrano to attend the Track II Hearing
PO No 34*	30 March 2015	Renewal of Ms Kathryn Owen's Appointment as Tribunal Expert
PO No 35*	9 April 2015	Hearing Track II
PO No 36*	7 May 2015	Site Visit Protocol
PO No 37*	8 May 2015	Rescinding Confidentiality Clause
PO No 38*	18 June 2015	"Omnibus Order"
PO No 39*	24 November.2015	Decision on various applications
PO No 40*	14 December 2015	Revised Terms of Reference of Ms Owen
PO No 41*	29 February 2016	Inviting Comments on Ms Owen's Report
PO No 42*	16 March 2016	Documentation for Ms Owen
PO No 43*	8 June 2016	Hearing on Ms Owen's Report
PO No 44*	2 July 2016	Inviting Submissions on Ms Owen's Final Report
PO No 45*	29 August 2016	Judgment of the Second Circuit of 8 August 2016

PO No 46*	19 September 2016	Declining Hearing on Ms Owen’s Final Report, Amicus brief of 8 July 2014 filed by Ecuador before the US Court of Appeals for the Second Circuit, Evidence from USA Proceedings
PO No 47*	31 October 2016	Respondent’s application to the Tribunal to terminate its First, Second and Fourth Interim Awards
PO No 48*	30 April 2018	“Closing the Record” for Track II
PO No 49*	12 July 2018	Admission into the record of the Judgment of the Constitutional Court of 27 June 2018
PO (not numbered)*	19 July 2018	Agreed Procedure for the Parties’ written submissions on the Constitutional Court’s Judgment
PO No 50*	13 August 2018	Re-closing the Record for Track II
PO No 51*	26 August 2018	Procedure for the Track II Award’s 7-day Embargo

**PART I – ANNEX 3**

**THE PARTIES' RESPECTIVE CLAIMS FOR RELIEF**

**(1) The Claimants**

In their letter dated 19 March 2018 the Claimants indicated the parts of their requests for relief that remained extant for Track II and separately Track III. What follows are the Claimants' prayers of relief from the outset of the arbitration, highlighting **in bold** the relief extant for Track II (highlighted in green in the original), in underscore the relief extant for Track III (highlighted in blue in the original) and **in bold and underscore** the relief relevant to both Tracks II and III (highlighted in purple in the original).

**A3.1 In their Memorial on the Merits dated 6 September 2010, the Claimants made the following request for relief (footnotes here omitted):**

*"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 Treaty, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, and to observe obligations it entered into under the investment agreements.*
- 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.*
15. *Awarding both pre- and post-award interest (compounded quarterly) until the date of payment.*
16. *Any other and further relief that the Tribunal deems just and proper."*

**A3.2 In their Supplemental Memorial on the Merits dated 20 March 2012, the Claimants made the following request for relief (footnotes here omitted):**

- “137. Accordingly, Claimants request an Order and Award granting the following relief:
1. *Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human*

*health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador;*

2. *Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements;*
3. *Declaring that Ecuador has breached the U.S.-Ecuador Treaty, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, and to observe obligations it entered into under the investment agreements;*
4. *Declaring that Ecuador has committed a denial of justice under customary international law;*
5. *Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation;*
6. *Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable;*
7. *Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation;*
8. *Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable;*
9. *Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices;*
10. *Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive;*
11. *Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in to the Lago Agrio Judgment;*
12. *Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio Judgment;*
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;*

*15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment; and*

*16. Any other and further relief that the Tribunal deems just and proper."*

**A3.3 At the Track 1 Hearing on the Merits in November 2012, by a written document, the Claimants made the following request for relief:**

*"I. Request for an Immediate Interim Award as a Result of Ecuador's Breaches of the First and Second Interim Awards:*

*1. Declare that Ecuador is in breach of the First and Second Interim Awards;*

*2. Declare that pending the outcome of this arbitration, the Lago Agrio Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; and*

*3. Declare that Ecuador is responsible to Claimants in indemnification and damages for all damages, costs, expenses, and attorneys' fees incurred by Claimants as a result of its breach.*

*II. Request for a Partial Final Award as a Result of Track 1:*

*A. Declaratory Relief*

*(i) Scope of the Settlement Agreements*

*1. Declare that both Claimants are "Releasees" under the Settlement Agreements, and were released from all diffuse environmental claims arising from TexPet's operations in Ecuador; and*

*2. Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment is based) are the same diffuse environmental claims settled and released in the Settlement Agreements.*

*(ii) Legal Effect of the Settlement Agreements*

*4. Declare that the Lago Agrio Judgment is a nullity as a matter of international law;*

5. *Declare that enforcement of the Lago Agrio Judgment within or without Ecuador would be inconsistent with Ecuador's obligations under the Settlement Agreements, the BIT and international law;*

**6. *Declare that Claimants have no liability or responsibility for satisfying the Lago Agrio Judgment because they were fully released for all such claims by the Settlement Agreements;***

**7. *Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment were based) are barred by res judicata and collateral estoppel;***

8. *Declare that under the Settlement Agreements, Claimants have no further liability or responsibility for diffuse environmental claims in Ecuador for Environmental Impact arising out of the Consortium's operations, or for performing any further environmental remediation;*

9. *Declare that Ecuador (through its various branches of Government) has breached the Settlement Agreements, inter alia, by refusing to specifically perform the Settlement Agreements, by refusing to ensure Claimants' enjoyment of their releases and their right to be free of litigation, by refusing to dismiss the Lago Agrio Plaintiffs' claims, by refusing to indemnify Chevron for the Lago Agrio Plaintiffs' claims, by seeking to nullify the Settlement Agreements by illegitimate means, and by refusing to comply with this Tribunal's Interim Awards;*

10. *Declare that Ecuador's actions have breached the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, effective means of enforcing rights, and to observe obligations it entered into under the overall investment agreements; and*

11. *Declare that: (i) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (ii) any enforcement of the Judgment would place Ecuador in violation of its international-law obligations; (iii) the Judgment violates international public policy and natural justice, and as a matter of international comity and public policy, the Judgment should not be recognized and enforced.*

#### ***B. Injunctive Relief***

1. *Order Ecuador to use all measures necessary to comply with its obligations under the Settlement Agreements to release Claimants (and to ensure that Claimants may effectively enjoy the benefits of such releases) from any liability or responsibility for the Lago Agrio Judgment in Ecuador or in any other country;*

2. *Order Ecuador to use all measures necessary to prevent the Lago Agrio Judgment from becoming final, conclusive, or enforceable in Ecuador or in any other country;*

3. *Order Ecuador to use all measures necessary to stay or enjoin enforcement of the Lago Agrio Judgment, including enjoining the Lago Agrio Plaintiffs from obtaining any related attachments, levies, or other enforcement devices in Ecuador or in any other country;*



4. Order Ecuador to use all measures necessary to revoke and nullify the Judgment;

5. Order Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Judgment were released by the Government; (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; (iii) the Judgment is a legal nullity; (iv) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (v) any enforcement of the Judgment would place Ecuador in violation of its international-law obligations; (vi) the Judgment violates international public policy and natural justice; (vii) any enforcement proceedings should be stayed pending the Tribunal's final award in this arbitration; and (viii) as a matter of international comity and public policy, the Judgment should not be recognized and enforced; and

6. Order that, in the event that any court orders the recognition or enforcement of the Lago Agrio Judgment, Ecuador must satisfy the Judgment directly.

*C. Damages, Costs and Attorneys' Fees*

1. Award Claimants full indemnification and damages against Ecuador in connection with the Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment;

2. Award Claimants any sums of money that the Lago Agrio Plaintiffs or others collect against Claimants or their affiliates in connection with enforcing the Judgment in any forum, with such sums to be paid by Respondent;

3. Award all costs and attorneys' fees incurred by Claimants in (i) defending the Lago Agrio Litigation, (ii) pursuing this arbitration, (iii) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this arbitration through litigation in the United States; and (iv) preparing for and defending against enforcement actions brought by the Lago Agrio Plaintiffs. These amounts will be quantified at the time and in the manner ordered by this Tribunal;

4. Award both pre- and post-award interest (compounded quarterly) until the date of payment; and

5. Award such other and further relief that the Tribunal deems just and proper, including any specific relief appropriate to wipe out all consequences of Respondent's breaches of the Settlement Agreements and its violations of its obligations under the Interim Awards, the BIT and international law."

**A3.4 In their Amended Reply Memorial – Track II dated 12 June 2013, the Claimants made the following request for relief (footnotes here omitted):**

**"424. The unique circumstances of this case require a combination of remedies that includes declarative, injunctive and monetary relief to prevent further (and**

*unprecedented) injury to Claimants, and to compensate them for losses resulting from Ecuador's breaches of its contractual, Treaty, and international law obligations, Claimants request a Final Award on the Merits including 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, punitive damages or penalties, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador;*
- 2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements;*
- 3. Ordering Ecuador to specifically perform the Settlement and Release Agreements;*
- 4. Declaring that Ecuador has breached the U.S.-Ecuador Treaty, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, national treatment, and to observe obligations it entered into with regard to investments;*
- 5. Declaring that Ecuador has committed a denial of justice under customary international law;*
- 6. Declaring that under the Treaty and applicable international law, Chevron is not liable for the Judgment;*
- 7. Declaring that Ecuador is exclusively liable for the Judgment;*
- 8. Nullifying the existence, validity, and all effects of the Judgment, and declaring that the Judgment is a nullity as a matter of international law;*
- 9. Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment, including enjoining the nominal Plaintiffs or any Trust from obtaining any related attachments, levies or other enforcement devices;*
- 10. Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly;*
- 11. Awarding Claimants indemnification against Ecuador in connection with the Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment;*
- 12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing the Judgment, including the amounts embargoed thus far;*

13. *Declaring that: (i) the Judgment is not final, enforceable, or conclusive under Ecuadorian and/or international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (ii) any enforcement of the Judgment places Ecuador in violation of its international law obligations; (iii) the Judgment violates international public policy and natural justice, and as a matter of international comity and public policy, the Judgment should not be recognized and enforced;*
14. ***Ordering Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Judgment that: (i) the claims that formed the basis of the Judgment were released by the Government; (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; (iii) the Judgment is a legal nullity; (iv) the Judgment is not final, enforceable, or conclusive under Ecuadorian and/or international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (v) any enforcement of the Judgment places Ecuador in violation of its international law obligations; (vi) the Judgment violates international public policy and natural justice; (vii) any enforcement proceedings should be dismissed; and (viii) as a matter of international comity and public policy, the Judgment should not be recognized and enforced;***
15. *Awarding all costs and attorneys' fees incurred by Claimants in inter alia (1) pursuing this Arbitration, (2) uncovering the collusive fraud through investigation and discovery proceedings in the United States, and (3) defending against enforcement of the Lago Agrio Judgment in various jurisdictions including Argentina, Brazil, and Canada, as well as other attorneys' fees incurred in related matters;*
16. *Awarding both pre- and post-award interest (compounded quarterly) until the date of payment; and*
17. ***Any other and further relief that the Tribunal deems just and proper."***

**A3.4 In their Supplemental Memorial on Track 1 dated 31 January 2014 (Paragraph 32), the Claimants made the following request for relief:**

**A. Declaring that:**

- (1) *The Lago Agrio Litigation is exclusively a diffuse-rights case.*
- (2) *The 1999 EMA has no legal effect on the Settlement and Release Agreements.*
- (3) *The Lago Agrio Litigation was barred at its inception by res judicata.*
- (4) *By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the BIT.*

(5) *By issuing the Lago Agrio Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and also violated Chevron's rights under the BIT.*

(6) *The Lago Agrio Judgment is a nullity as a matter of Ecuadorian law.*

(7) *The Lago Agrio Judgment is a nullity as a matter of international law.*

(8) *The Lago Agrio Judgment is unlawful and consequently devoid of any legal effect.*

(9) *The Lago Agrio Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.*

(10) *The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognized and enforced.*

(11) *By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions.*

(12) *Ecuador is in breach of its obligations under the BIT, and must compensate Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment.*

*B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):*

(1) *To take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian law.*

(2) *To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment.*

(3) *To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*

(4) *To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the BIT.*

*Claimants also request that the Tribunal provide for a subsequent phase in this arbitration to determine all costs and attorneys' fees that should be awarded to Claimants for being forced to (i) pursue this arbitration; (ii) uncover the Judgment fraud; and (iii) defend against enforcement of the Lago Agrio Judgment in any jurisdiction."*

**A3.5 In their Supplemental Memorial on Track II dated 9 May 2014, the Claimants made the following request for relief:**

*"A. Declaring that:*

- 1. By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law in breach of the provisions of the BIT.*
- 2. By issuing the Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and, in doing so, violated Chevron's rights under the BIT.*
- 3. The court rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere to try the Lago Agrio case and to pass judgment.*
- 4. The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.*
- 5. The Judgment is a nullity as a matter of international law.*
- 6. The Judgment is unlawful and consequently devoid of any legal effect.*
- 7. The Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.*
- 8. The Judgment is contrary to international public policy.*
- 9. The Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Judgment should not be recognized and enforced.*
- 10. By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment.*

*B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):*

- 1. To take all measures necessary to set aside or nullify the Judgment under Ecuadorian law.*

2. *To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Judgment.*

3. *To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*

4. *To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Judgment that: (i) the claims that formed the basis of the Judgment were validly released under Ecuadorian law by the Government; (ii) the Judgment is a legal nullity; and (iii) any enforcement of the Judgment will place Ecuador in violation of its obligations under the BIT.*

5. *To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent's possession.*

*C. Awarding Claimants:*

1. *All costs and attorneys' fees incurred by Claimants in (i) pursuing this arbitration; (ii) uncovering the Judgment fraud; and (iii) defending against enforcement of the Lago Agrio Judgment in any jurisdiction.*

2. *Indemnification for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant.*

3. *Indemnification for any and all sums that the Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with the Judgment.*

4. *Moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's illegal conduct.*

5. *Both pre- and post-award interest (compounded quarterly) until the date of payment."*

**A3.6 *In their Post-Submission Insert to the Claimants' Supplemental Memorial on Track II – Examination of Zambrano Computer Hard Drives dated 15 August 2014, the Claimants made the following request for relief:***

“59. *Therefore, for the reasons stated above and in Claimants' previous submissions to the Tribunal, Claimants request the Tribunal make the findings and grant them the relief as set forth most recently in Claimants' Supplemental Memorial on Track II.*”

**A3.7 *In their Supplemental Reply to the Respondent's Supplemental Track II Counter-Memorial dated 14 January 2015, the Claimants made the following request for relief:***

“435. *For the reasons stated above, and as set out in Claimants’ previous memorials and other submissions, Claimants ask the Tribunal for a Final Award granting them the combination of remedies, including declarative, injunctive, and monetary relief, to prevent further injury to Claimants and to compensate them for losses resulting from Ecuador’s breaches of its contractual, Treaty, and international law obligations, as set out below:*

**A. Declaring that:**

1. *By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law and breached provisions of the Treaty.*
2. *By issuing the Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and in doing so, violated Chevron’s rights under the Treaty.*
3. *The court rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere to try the Lago Agrio case and to pass judgment.*
4. *The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.*
5. *The Judgment is a nullity as a matter of international law.*
6. *The Judgment is unlawful and consequently devoid of any legal effect.*
7. *The Judgment is a violation of Chevron’s rights under the Treaty, and is not entitled to enforcement within or without Ecuador.*
8. *The Judgment is contrary to international public policy.*
9. *The Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Judgment should not be recognized and/or enforced.*
10. ***By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the Treaty, and must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment.***

**B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):**

1. *To take all measures necessary to set aside or nullify the Judgment under Ecuadorian law.*
2. *To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Judgment.*

3. *To take all measures necessary to prevent the Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*
4. *To make a written representation to any court in which the Plaintiffs or any Trust attempt to recognize and/or enforce the Judgment that: (i) the claims that formed the basis of the Judgment were validly released under Ecuadorian law by the Government; (ii) the Judgment is a legal nullity; and (iii) any enforcement of the Judgment will place Ecuador in violation of its obligations under the Treaty.*
5. *To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent's possession.*

C. Awarding Claimants:

1. All costs and attorneys' fees incurred by Claimants in (i) pursuing this arbitration; (ii) uncovering the Judgment fraud; and (iii) defending against enforcement of the Lago Agrio Judgment in any jurisdiction.
2. Indemnification for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant.
3. Indemnification for any and all sums that the Plaintiffs collect against Claimants or their affiliates in connection with the Judgment.
4. Moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's illegal conduct.
5. Both pre- and post-award interest (compounded quarterly) until the date of payment.

**A3.8 In their Post-Track II Hearing Brief on Track I Issues dated 15 July 2015, the Claimants made the following request for relief:**

“46. **Claimants request relief that effectively protects their rights and reverses the harmful effects of Ecuador's breaches of the Settlement and Release Agreements and its international law obligations. To achieve this result, Claimants respectfully request a Final Award:**

**A. Declaring that:**

- 1) **The Lago Agrio Litigation is exclusively a diffuse-rights case.**
- 2) **The 1999 EMA has no legal effect on the Settlement and Release Agreements.**
- 3) **The Lago Agrio Litigation was barred at its inception by res judicata.**



- 4) *By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the Treaty.*
- 5) *By issuing the Lago Agrio Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996 and 1998 Settlement and Release Agreements, and also violated Chevron's rights under the Treaty.*
- 6) *The Lago Agrio Judgment is a nullity as a matter of international law.*
- 7) *The Lago Agrio Judgment is unlawful and consequently devoid of any legal effect.*
- 8) *The Lago Agrio Judgment is a violation of Chevron's rights under the Treaty, and is not entitled to enforcement within or without Ecuador.*
- 9) *The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognized and enforced.*
- 10) *By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the Treaty, and must compensate Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment.*

***B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):***

- 1) *To take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian law.*
  - 2) *To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment.*
  - 3) *To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*
  - 4) *To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the Treaty.*
47. *Claimants' requested relief is without prejudice to all other remedies sought in relation to Track II or any other remedy that may effectively protect Claimants' rights, including a damage remedy as part of Track III."*

## **(2) The Respondent**

In its letter dated 20 April 2018, the Respondent indicated the parts of its requests for relief that remained extant for Track II and separately Track III. What follows are the Respondent's prayers of relief from the outset of the arbitration, highlighting **in bold** the relief extant for Track II (indicated in red in the original) and in underscore the relief extant for Track III (indicated in blue in the original).

### **A3.9 In its Track I Counter-Memorial dated 3 July 2012, the Respondent made the following request for relief (with sub-paragraphs here added for ease of reference):**

*“263. [1] Based on the foregoing, the Republic respectfully requests that the Tribunal declare that it does not have jurisdiction over Chevron's claims under the Settlement and Release Agreements and reject TexPet's contractual claims under the 1995 Settlement Agreement. In particular, the Republic requests that the Tribunal:*

*[2] Dismiss Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release for lack of jurisdiction under Article VI(1)(a) of the Treaty;*

*[3] Dismiss Chevron's claims for lack of jurisdiction under Article VI(1)(c) of the Treaty to the extent that its treaty claims are predicated on breach of the 1995 Settlement Agreement and/or the 1998 Final Release;*

*[4] Dismiss Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release on the merits, should the Tribunal find that Chevron has standing in this Arbitration as a matter of jurisdiction;*

*[5] Dismiss TexPet's claims under the 1995 Settlement Agreement on the merits;  
 Declare specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;*

*[6] Dismiss all of Claimants' claims as they relate to the 1996 Local Settlements, both as a matter of jurisdiction and on the merits;*

*[7] Declare further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties;*

*[8] Declare that the 1995 Settlement Agreement has no effect on third parties, and specifically, that the release of liability contained therein does not extend to rights and claims potentially held by third parties or could otherwise bar third-party claims arising from the environmental impact of TexPet's operations in Ecuador against TexPet or any of the defined Releasees;*

*[9] Award Respondent all costs and attorneys' fees in connection with this phase of the proceedings;*

*[10] Award Respondent any further relief that the Tribunal deems just and proper.”*

**A3.10 In its Track 1 Rejoinder Memorial dated 16 December 2013, the Respondent made the following request for relief (with sub-paragraphs here added for ease of reference):**

*“192. Based on the foregoing, the Republic respectfully requests that the Tribunal issue an Award that:*

*[1] Denies all the relief and each remedy requested by Claimants in relation to Track 1, including the relief and remedies requested in Paragraph 272 of Claimants’ Reply on the Merits;*

*[2] Declares that Chevron is not a “Releasee” under the 1995 Settlement Agreement and therefore has no basis to assert claims under Article VI(1)(a) of the Treaty.*

*[3] Dismisses Chevron’s claims under the 1995 Settlement Agreement and the 1998 Final Release on the merits, should the Tribunal find that Chevron has standing in this Arbitration as a matter of jurisdiction;*

*[4] Declares that TexPet does not have standing to assert claims under the 1995 Settlement Agreement as a matter of Ecuadorian law;*

*[5] Dismisses TexPet’s claims under the 1995 Settlement Agreement and the 1998 Final Release on the merits;*

*[6] Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;*

*[7] Dismisses all of Claimants’ claims as they relate to the 1996 Local Settlements, both as a matter of jurisdiction and on the merits;*

*[8] Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by, or judgments or other relief obtained by, third parties including the claims filed by the Lago Agrio Plaintiffs, the Lago Agrio Judgment, and the enforcement thereof;*

*[9] Declares that the 1995 Settlement Agreement has no effect on third parties, and specifically, that the release of liability contained therein does not extend to rights and claims potentially held by third parties or could otherwise bar third-party claims arising from the environmental impact of TexPet’s operations in Ecuador against TexPet or any of the defined Releasees;*

*[10] Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel;*

*[11] Awards Respondent all costs and attorneys’ fees incurred by Respondent in connection with this phase of the proceedings; and that*

*[12] Awards Respondent any further relief that the Tribunal deems just and proper.”*

**A3.11 In its Track I Supplementary Counter-Memorial dated 31 March 2014, the Respondent made the following request for relief:**

*“143. Based on the foregoing, together with the Republic’s previous Track I submissions and argument and testimony presented in the November 2012 Hearing on the Merits, the Republic respectfully requests that the Tribunal issue an Award that:*

- a. Denies all the relief and each remedy requested by Claimants in relation to Track I, including the relief and remedies requested in Paragraph 32 of Claimants’ Supplemental Track I Memorial;*
- b. **Dismisses on the merits Chevron’s claims under the 1995 Settlement Agreement and the 1998 Final Release;***
- c. **Dismisses on the merits TexPet’s claims under the 1995 Settlement Agreement and the 1998 Final Release;***
- d. **Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;***
- e. **Dismisses all of Claimants’ claims as they relate to the 1996 Local Settlements, reached between TexPet and local government entities;***
- f. **Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel;***
- g. Awards Respondent all costs and attorneys’ fees incurred by Respondent in connection with this phase of the proceedings; and*
- h. Awards Respondent any further relief that the Tribunal deems just and proper.”*

**A3.12 In its Track II Counter Memorial on the Merits dated 18 February 2013, the Respondent made the following request for relief:**

*“542. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award that grants the following relief:*

- a. **Declaring that the Tribunal lacks jurisdiction over Claimants’ denial of justice claims, or that it refuses to exercise such jurisdiction because such claims are too remote to any investment.***
- b. **Alternatively, dismissing Claimants’ denial of justice and Treaty claims due to the failure of Chevron to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.***
- c. **Alternatively, dismissing Claimants’ Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement do not exist or were not breached.***

- d. *Alternatively, even if the 1995 Settlement Agreement has been breached by the Republic, dismissing all of Claimants' Treaty claims, inter alia, because Claimants have separately failed to establish that the Republic has violated the effective means clause; the fair and equitable treatment clause; the full protection and security clause; the arbitrary and discriminatory treatment clause.*
  - e. *Alternatively, even if the 1995 Settlement Agreement has been breached by the Republic, dismissing Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.*
  - f. *Otherwise dismissing all of Claimants' claims against the Republic in these arbitration proceedings as meritless.*
  - g. *Awarding all costs and attorneys' fees incurred by the Republic in this arbitral proceeding.*
  - h. *Any other and further relief that the Tribunal deems just and proper.*
543. *To the extent the Tribunal finds the Republic responsible for a violation of international law, the Republic requests that the Tribunal conduct a further phase (Track 3) of the arbitration sufficient to determine Chevron's actual liability in fact for the claims asserted against it in Lago Agrio and to fashion a final award that takes into consideration such established liability.*
544. *The Republic reincorporates by reference its Request for Relief in Track I to the extent that such Request remains pending.*
545. *The Republic reserves its rights to supplement its pleadings and request for relief."*

**A3.13 In its Track II Rejoinder on the Merits dated 16 December 2013, the Respondent made the following request for relief (footnotes here omitted):**

- "387. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award, in which the Tribunal:*
- a. *Denies all the relief and each remedy requested by Claimants in relation to Track II, including the relief and remedies requested in Paragraph 424 of Claimants' Amended Track II Reply on the Merits.*
  - b. *Declares that it lacks jurisdiction over Claimants' denial of justice claims, or refuses to exercise such jurisdiction because such claims are too remote to any investment.*
  - c. *Alternatively, dismisses Claimants' denial of justice and Treaty claims due to Chevron's failure to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.*

- d. *Alternatively, dismisses Claimants' Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements do not exist or were not breached.*
  - e. *Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements was breached by the Republic, dismisses all of Claimants' Treaty claims because Claimants have separately failed to establish that the Republic has violated any of the Treaty's provisions.*
  - f. *Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements has been breached by the Republic, dismisses Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.*
  - g. *Alternatively, even if any of Claimants' Treaty or denial of justice claims are upheld, declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.*
  - h. *Alternatively, even if any of Claimants' claims are upheld, orders the arbitration proceedings to continue to Track 3, so that the Tribunal may assess what Chevron's liability should have been for the claims asserted in Lago Agrio so that the Tribunal may fashion a final award that takes into consideration such liability.*
  - i. *Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties.*
  - j. *Declares that the 1995 Settlement Agreement has no effect on the claims brought in the Lago Agrio Litigation.*
  - k. *Otherwise dismisses all of Claimants' claims against the Republic in these arbitration proceedings as meritless.*
  - l. *Orders, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon.*
  - m. *Awards any other and further relief that the Tribunal deems just and proper.*
388. *The Republic reincorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial on the Merits to the extent that such Request remains pending.*
389. *The Republic reserves its rights to supplement its pleadings and request for relief.”*

**A3.14 In its Track II Supplemental Counter-Memorial dated 7 November 2014, the Respondent made the following request for relief (footnotes here omitted):**

- “481. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:
- a. Declaring that it lacks jurisdiction over Claimants’ denial of justice and Treaty claims against the Republic.
  - b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, it should dismiss Claimants’ denial of justice and Treaty claims against the Republic as meritless.
  - c. Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.
  - d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.
  - e. Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 199 of their Supplemental Track II Memorial on the Merits.
482. Alternatively, if any of Claimants’ claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:
- a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron’s actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes into consideration such liability.
  - b. Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants’ request for attorneys’ fees incurred in any enforcement action in any jurisdiction.
  - c. Declares that Claimants are not entitled to moral damages.
  - d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.
483. In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic’s legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.

484. *The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial and Rejoinder on the Merits to the extent that such Requests remain pending.”*

**A3.15 In its Track II Supplemental Rejoinder on the Merits dated 17 March 2015 the Respondent made the following request for relief (footnotes here omitted):**

“446. *For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:*

- a. Declaring that it lacks jurisdiction over Claimants’ denial of justice and related treaty claims against the Republic.*
- b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, dismissing Claimants’ denial of justice and related treaty claims against the Republic as not ripe for adjudication under international law in light of Claimants’ failure to exhaust available local remedies, and as otherwise meritless.*
- c. Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.*
- d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.*
- e. Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 435 of their Supplemental Track II Reply.*

447. *Alternatively, if any of Claimants’ claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:*

- a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron’s actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes into consideration such liability.*
- b. Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants’ request for attorneys’ fees incurred in any enforcement action in any jurisdiction.*
- c. Declares that Claimants are not entitled to moral damages.*
- d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.*



448. *In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.*

449. *The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial, Rejoinder, and Supplemental Counter-Memorial, to the extent that such Requests remain pending.”*

***A3.16 Paragraph 449 of the Respondent's Track II Supplemental Rejoinder on the Merits (cited immediately above):***

The Respondent here incorporated by general reference certain pending relief requested in its earlier pleadings submitted under both Track I and Track II, namely, as cited above (i) as to Track I, the Respondent's Track 1 Counter-Memorial (Paragraph 263), the Respondent's Track I Rejoinder (Paragraph 192), the Respondent's Track I Supplemental Counter-Memorial (Paragraph 143); and (ii) as to Track II, the Respondent's Track II Counter-Memorial on the Merits (Paragraph 542), the Respondent's Track II Rejoinder on the Merits (Paragraph 387), the Respondent's Track II Supplemental Counter-Memorial (Paragraphs 481-483).

***A3.17 The Respondent's Track 1B Post-Hearing Memorial dated 15 July 2015:***

The Respondent requested relief as there more generally set out, without a formal prayer for relief.

**PART I – ANNEX 4**

**THE ENFORCEMENT PROCEEDINGS<sup>9</sup>**

1. From 2012 onwards, the Lago Agrio Plaintiffs have sought to enforce and execute the Lago Agrio Judgment in (i) Ecuador, (ii) Canada, (iii) Brazil and (iv) Argentina against the First Claimant (Chevron), the Second Claimant (TexPet) and/or the First Claimant’s associated companies (for ease of reference, here collectively called “Chevron” save where indicated otherwise).<sup>10</sup>
  
2. (i) **Ecuador:** On 15 October 2012, the Provincial Court for Sucumbíos ordered that the Lago Agrio Judgment’s execution “be applicable to the entirety of the assets of Chevron Corporation, until such time as the entire obligation has been satisfied.”<sup>11</sup> Assets subject to the attachment order included Chevron’s intellectual property in Ecuador, including certain trademarks owned by Chevron Intellectual Property LLC, its bank accounts in Ecuador or transfers through the Ecuadorian banking system and TexPet’s bank account at Banco Pichincha in Ecuador. On 25 October 2012, the Court extended the attachment order to additional trademark and intellectual property in Ecuador.<sup>12</sup>
  
3. The Lago Agrio Plaintiffs have attempted to seize Chevron’s other assets under the attachment order in Ecuador. In two motions dated 30 January 2015, the Lago Agrio Plaintiffs asked the Court to instruct the Ecuadorian Intellectual Property Institute (“EIPI”) to renew certain trademarks owned by Chevron Intellectual Property LLC and separately order those trademarks embargoed pursuant to the Court’s enforcement orders. On 5 April 2016, the Lago Agrio Plaintiffs asked the Court to appoint a depository to withdraw funds that were seized from TexPet’s bank account at Banco Pichincha in Ecuador. On 11 April 2016, the Lago Agrio Plaintiffs requested that the Court rule on the Lago Agrio Plaintiffs’ prior application for the EIPI to renew and embargo certain trademarks. On 7 June 2016, the Lago Agrio Plaintiffs requested that the court formally notify Ecuador of the 27 June 2013 attachment of the *Commercial Cases* Award. On 12

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<sup>9</sup> This annex re-states, for the most part, the recital to the Tribunal’s Procedural Order No 47 dated 31 October 2017.

<sup>10</sup> This information is largely derived from the Claimants’ letters dated 19 July 2017, 1 August 2017 and 19 March 2018; and the Respondent’s letters dated 1 August 2017 and 20 April 2018. (The Respondent is not a named party to any of these enforcement proceedings).

<sup>11</sup> C-1532.

<sup>12</sup> C-1541.

July 2016, the Court, *inter alia*, denied the Lago Agrio Plaintiffs' 5 and 11 April 2016 motions, and granted their 7 June 2016 request.

4. On 21 July 2016, the Lago Agrio Plaintiffs filed a motion requesting that the Court cancel the embargo of the *Commercial Cases Award*. The Court granted this motion on the same day. On 22 July 2016, Ecuador paid the *Commercial Cases Award* to Chevron in full.
5. In the meantime, to the Tribunal's current understanding, these enforcement actions in Ecuador remain pending against Chevron.
6. **(ii) Canada:** On 30 May 2012, the Lago Agrio Plaintiffs brought legal proceedings in Ontario, Canada to enforce the Lago Agrio Judgment against Chevron Corporation and Chevron Canada Limited (the latter being an indirect subsidiary of Chevron Corporation) in the principal sum of US\$ 18.26 billion. By its judgment dated 1 May 2013, the Ontario Superior Court denied enforcement of the judgment and ordered a stay of the proceedings.<sup>13</sup>
7. The case proceeded to the Canadian Supreme Court. In September 2015, the Canadian Supreme Court rejected Chevron's jurisdictional challenge. The Supreme Court confirmed that it had jurisdiction over Chevron to decide the Lago Agrio Plaintiffs' request to recognise the Lago Agrio Judgment.<sup>14</sup> After Chevron and Chevron Canada Limited filed answers in October 2015, the parties filed cross-motions for summary judgment, with the defendant parties seeking to dismiss Chevron Canada Limited from the action based (*inter alia*) on its separate corporate identity.
8. On 20 January 2017, after discovery, written pleadings and oral argument, the Ontario Superior Court granted a motion for summary judgment in favour of Chevron Canada Limited, deciding that it was a separate entity from Chevron, was not a party to the Lago Agrio Litigation, nor a debtor under the Lago Agrio Judgment, and, therefore, to be dismissed from the case. The Lago Agrio Plaintiffs appealed that decision. A hearing of that appeal was scheduled for 10-11 October 2017, and later for 17-18 April 2018. It appears that judgment was reserved.<sup>15</sup>

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<sup>13</sup> C-1627.

<sup>14</sup> C-2524.

<sup>15</sup> See now the Judgment dated 23 May 2018 of the Court of Appeal for Ontario, *Yaiguaje v Chevron Corporation*, 2018 ONCA 472.

9. Earlier, in October 2016, the Lago Agrio Plaintiffs moved to amend their statement of claim to add Chevron Canada Capital Company (another indirect subsidiary of Chevron Corporation) as an additional defendant. The Court dismissed this motion to amend on 25 January 2017. The Lago Agrio Plaintiffs appealed that decision also. This appeal was also scheduled to be heard on 17-18 April 2018. It appears that judgment was here also reserved.<sup>16</sup>
10. In the meantime, to the Tribunal's current understanding, this recognition action in Canada remains pending against Chevron.
11. *(iii) Brazil:* On 27 June 2012, the Lago Agrio Plaintiffs sought recognition of the Lago Agrio Judgment in Brazil. On 2 February 2015, the Superior Tribunal de Justiça ordered that the case file be given to the Brazilian Federal Prosecutor's Office to issue an opinion on the recognition claim. On 11 May 2015, the Federal Prosecutor issued an opinion (published on 13 May 2015) recommending that the Superior Tribunal de Justiça not recognize the Lago Agrio Judgment, concluding that recognising the Lago Agrio Judgment would be contrary to Brazilian public order. The Federal Prosecutor's opinion is a non-binding recommendation; and it has not been accepted (or rejected) by the Brazilian Court.
12. On 29 November 2017, the Court held a judgment session, wherein it rejected the request of the Lago Agrio Plaintiffs for recognition of the Lago Agrio Judgment. The Court published its final judgment on 15 March 2018.<sup>17</sup> According to the Claimants, the parties may seek clarification of this decision or may choose to appeal it.<sup>18</sup> The Respondent argues that the Court's decision is, in fact, final in all respects, since the only appeal available (a "recurso extraordinário" before the Supreme Court of Brazil) is limited in scope and restricted to the review of matters pertaining to the Federal Constitution, and there are no constitutional matters at issue involved in this decision.<sup>19</sup>
13. In the meantime, to the Tribunal's current understanding, this recognition action in Brazil remains pending against Chevron.

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<sup>16</sup> See now *Yaiguaje v Chevron Corporation*, supra.

<sup>17</sup> C-2546.

<sup>18</sup> See the Claimants' letter dated 19 March 2018.

<sup>19</sup> See the Respondent's letter dated 20 April 2018.

14. *(iv) Argentina:* On 12 November 2012, the Lago Agrio Plaintiffs filed enforcement proceedings in Argentina, seeking recognition of the Lago Agrio Judgment. Upon request from the Civil Court, on 30 March 2016, the Public Prosecutor issued an opinion to the effect that the Lago Agrio Judgment should not be recognized. The Public Prosecutor ratified that opinion on 20 December 2016. As in Brazil, the Public Prosecutor's opinion in Argentina is a non-binding recommendation; and it has not been accepted (or rejected) by the Argentinian Civil Court.
15. In September 2017, Chevron requested a final judgment dismissing the enforcement proceedings, which was granted by the Civil Court on 31 October 2017. The Lago Agrio Plaintiffs appealed that decision; and the appeal is pending.<sup>20</sup>
16. In the meantime, to the Tribunal's current understanding, this recognition action in Argentina remains pending against Chevron.

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<sup>20</sup> See the Claimants' letter dated 19 March 2018. See also the Respondent's letter dated 20 April 2018.

***PART I – ANNEX 5***

***THE ECUADOR-USA TREATY<sup>21</sup>***

***Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment***

The United States of America and the Republic of Ecuador (hereinafter the “Parties”);

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the wellbeing of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

**Article I**

1. For the purposes of this Treaty,

(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:

literary and artistic works, including sound recordings;

inventions in all fields of human endeavour;

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<sup>21</sup> Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, entered into force May 11, 1997 (C-279). Neither Party has raised any issue of a difference of meaning as between the English and Spanish versions of the Treaty.

industrial designs;  
semiconductor mask works;  
trade secrets, know-how, and confidential business information; and  
trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

(b) “company” of a party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) “national” of a Party means a natural person who is a national of a Party under its applicable law; associate

(d) “return” means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) “associated activities” include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(f) “state enterprise” means an enterprise owned, or controlled through ownership interests, by a Party.

(g) “delegation” includes a legislative grant, and a government order, directive or other act transferring to a state enterprise or monopoly, or authorizing the exercise by a state enterprise or monopoly, of governmental authority.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

## **Article II**

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol.

Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either

Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

**2. (a)** Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.

**(b)** Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.

**(c)** Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.

**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.

**(b)** Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

**(c)** Each Party shall observe any obligation it may have entered into with regard to investments.

**4.** Subject to, the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

**5.** Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

**6.** Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

**7.** Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

**8.** Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

**9.** The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Republic of Ecuador under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America



resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

**10.** The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

### **Article III**

**1.** Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable.

**2.** A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.

**3.** Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

### **Article IV**

**1.** Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory, Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

**2.** Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

**3.** Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

## **Article V**

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

## **Article VI**

**1.** For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

**2.** In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3.

**3.** (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

- (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or
- (ii) to the Additional Facility of the Centre, if the Centre is not available; or
- (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

**4.** Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

- (a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
- (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

## **Article VII**

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

## **Article VIII**

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

## **Article IX**

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

## **Article X**

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

## **Article XI**

This Treaty shall apply to the political subdivisions of the Parties.

## **Article XII**

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol and Side Letter shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA

FOR THE REPUBLIC OF ECUADOR

***Tratado entre la República del Ecuador y los Estados Unidos de América sobre promoción y la protección de inversiones***

La República del Ecuador y los Estados Unidos de América, en adelante, “las Partes”;

Deseando promover una mayor cooperación económica entre ellas, con respecto a las inversiones

hechas por nacionales y sociedades de una Parte en el territorio de la otra Parte;

Reconociendo que el acuerdo sobre el tratamiento a ser otorgado a esas inversiones estimulará el flujo de capital privado y el desarrollo económico de las Partes;

Conviniendo en que, a los fines de mantener un marco estable para las inversiones y la utilización más eficaz de los recursos económicos, es deseable otorgar un trato justo y equitativo a las inversiones;

Reconociendo que el desarrollo de los vínculos económicos y comerciales puede contribuir al bienestar de los trabajadores en las dos Partes y promover el respeto por los derechos laborales reconocidos internacionalmente; y

Habiendo resuelto concertar un tratado sobre la promoción y la protección recíproca de las inversiones,

Han acordado lo siguiente:

**Artículo I**

**1.** A efectos del presente Tratado:

**a)** “Inversión” significa todo tipo de inversión tales como el capital social, las deudas y los contratos de servicio y de inversión, que se haga en el territorio de una Parte y que directa o indirectamente sea propiedad de nacionales o sociedades de la otra Parte o esté controlada por dichos nacionales o sociedades, y comprende:

**i)** Los bienes corporales e incorporeales, incluso derechos tales como los de retención, las hipotecas y las prendas;

**ii)** Las sociedades o las acciones de capital u otras participaciones o en sus activos;

**iii)** El derecho al dinero o alguna operación que tenga valor económico y que esté relacionada con una inversión;

**iv)** La propiedad intelectual que, entre otros, comprende los derechos relativos a: las obras artísticas y literarias, incluidas las grabaciones sonoras, los inventos en todos los ámbitos del esfuerzo humano, los diseños industriales, las obras de estampado de semiconductores, los secretos comerciales, los conocimientos técnicos y la información comercial confidencial, y las marcas registradas, las marcas de servicio y los nombres comerciales, y

**v)** Todo derecho conferido por la ley o por contrato y cualesquiera licencias y permisos conferidos conforme a la Ley.

**b)** “Sociedad” es una parte que significa cualquier clase de sociedad anónima, compañía, asociación, sociedad comanditaria u otra entidad legalmente constituida conforme al ordenamiento interno de una

Parte o de una subdivisión política de la misma, tenga o no fines de lucro o sea de propiedad privada o pública;

c) “Nacional” de una Parte significa la persona natural que sea nacional de una Parte de conformidad con su legislación.

d) “Rendimiento” significa la cantidad derivada de una inversión o vinculada a ella, incluidos los beneficios, los dividendos, los intereses, las plusvalías, los pagos de regalías, los honorarios de gestión, asistencia técnica u otra índole, las rentas en especie.

e) “Actividades afines” significa la organización, el control, la explotación, el mantenimiento y la enajenación de sociedades, sucursales, agencias, oficinas, fábricas u otras instalaciones destinadas a la realización de negocios; la celebración, el cumplimiento, y la ejecución de contratos; la adquisición, el uso, la protección y la enajenación de todo género de bienes, incluidos los derechos de propiedad intelectual; el empréstito de fondos; la compra, emisión y venta de acciones de capital y de otros valores, y la compra de divisas para las importaciones.

f) “Empresa estatal” significa la empresa que sea propiedad de una de las Partes o que esté controlada por esa Parte mediante derechos de propiedad.

g) “Delegación” significa la concesión legislativa y la orden, norma u otra disposición oficial que transfieran autoridad gubernamental a una empresa o monopolio estatal, o le autoricen el ejercicio de dicha autoridad.

2. Cada Parte se reserva el derecho de denegar a cualquier sociedad los beneficios del presente Tratado si dicha sociedad está controlada por nacionales de un tercer país y, en el caso de una sociedad de la otra Parte, si dicha sociedad no tiene actividades comerciales importantes en el territorio de la otra Parte o está controlada por nacionales de un tercer país con el cual la parte denegante no mantiene relaciones económicas normales.

3. Ninguna modificación en la forma en que se invierten o reinvierten los activos alterará el carácter de los mismos en cuanto inversión.

## **Artículo II**

1. Cada Parte permitirá y tratará las inversiones y sus actividades afines de manera no menos favorable que la que otorga en situaciones similares a las inversiones o actividades afines de sus propios nacionales o sociedades, o las de los nacionales o sociedades de cualquier tercer país, cualquiera que sea la más favorable, sin perjuicio del derecho de cada Parte a hacer o mantener excepciones que correspondan a alguno de los sectores o asuntos que figuran en el Anexo del presente Tratado. Cada Parte se compromete a notificar a la otra Parte, con anterioridad a la fecha de entrada en vigor del presente Tratado o en dicha fecha, todo ordenamiento interno del cual tenga conocimiento referente a los sectores o asuntos que figuran en el Anexo. Cada Parte se compromete igualmente a notificar a la otra Parte toda futura excepción con respecto a los sectores o asuntos que figuran en el Anexo y a limitar dichas excepciones al mínimo. Las excepciones futuras de cualquiera de las Partes no se aplicarán a las inversiones existentes en los sectores o asuntos correspondientes en el momento en que dichas excepciones entren en vigor. El trato que se otorgue conforme a los términos de una excepción será, salvo que se especifique lo contrario en el Anexo, no menos favorable que el que se otorgue en situaciones similares a las inversiones o actividades afines de los nacionales o sociedades de cualquier tercer país.

## **2.**

**a)** Lo dispuesto en el presente Tratado no impedirá que las Partes mantengan o establezcan empresas estatales.

**b)** Cada parte se asegurará de que las empresas estatales que mantenga o establezca actúen de manera compatible con las obligaciones de esa Parte en virtud del presente Tratado, cuando ejerzan cualquier facultad reguladora, administrativa o pública que le haya sido delegada por esa Parte como, por ejemplo, la facultad de expropiar, otorgar licencias, aprobar operaciones comerciales o imponer cuotas, derechos u otros gravámenes.

**c)** Cada parte se asegurará de que las empresas estatales que mantenga o establezca concedan el mejor trato, ya sea el nacional o el de la nación más favorecida, a la venta de sus bienes o servicios en el territorio de la Parte.

## **3.**

**a)** Las inversiones, a las que se concederá siempre un trato justo y equitativo, gozarán de protección y seguridad plenas y, en ningún caso, se le concederá un trato menos favorable que el que exige el derecho internacional.

**b)** Ninguna de las Partes menoscabará, en modo alguno, mediante la adopción de medidas arbitrarias o discriminatorias, la dirección, la explotación, el mantenimiento, la utilización, el usufructo, la adquisición, la expansión o la enajenación de las inversiones. Para los fines de la solución de diferencias, de conformidad con los Artículos VI y VII, una medida podrá tenerse por arbitraria o discriminatoria aun cuando una parte haya tenido o ejercido la oportunidad de que dicha medida se examine en los tribunales o en los tribunales administrativos de una de las Partes.

**c)** Cada Parte cumplirá los compromisos que haya contraído con respecto a las inversiones.

**4.** Sin perjuicio de las leyes relativas a la entrada y permanencia de extranjeros, se permitirá a los nacionales de cada Parte la entrada y permanencia en el territorio de la otra Parte a fines de establecer, fomentar o administrar una inversión, o de asesorar en la explotación de la misma, en la cual ellos, o una sociedad de la primera Parte que los emplee, hayan comprometido, o estén en curso de comprometer, una cantidad importante de capital u otros recursos.

**5.** A las sociedades que estén legalmente constituidas conforme al ordenamiento interno de una Parte, y que constituyan inversiones, se les permitirá emplear al personal administrativo superior que deseen, sea cual fuera la nacionalidad de dicho personal.

**6.** Como condición para el establecimiento, la expansión el mantenimiento de las inversiones, ninguna de las Partes establecerá requisitos de cumplimiento que exijan o que hagan cumplir compromisos de exportación con respecto a los bienes producidos, o que especifiquen que ciertos bienes o servicios se adquieran en el país, o que impongan cualesquiera otros requisitos parecidos.

**7.** Cada parte establecerá medios eficaces para hacer valer las reclamaciones y respetar los derechos relativos a las inversiones, los acuerdos de inversión y las autorizaciones de inversión.

**8.** Cada Parte públicos las leyes, los reglamentos, las prácticas y los procedimientos administrativos y los fallos judiciales relativos a las inversiones o que las atañan.

**9.** El trato otorgado por los estados Unidos de América a las inversiones y actividades afines de los nacionales y de las sociedades de la República del Ecuador, conforme a las disposiciones del presente

Artículo será, en cualquiera de los estados, territorios o posesiones de los Estados Unidos de América, no menos favorable que el trato que se otorgue a las inversiones y actividades afines de los nacionales

de Estados Unidos de América que residan en los demás estados, territorios o posesiones de los Estados Unidos de América, y a las sociedades constituidas legalmente, conforme al ordenamiento interno de dichos otros estados, territorios o posesiones.

**10.** Las disposiciones del presente Tratado relativas al trato de nación más favorecida no se aplicara las ventajas concedidas por cualquiera de las Partes a los nacionales o las sociedades de ningún tercer país de conformidad con:

**a)** Los compromisos vinculantes de esa Parte que emanen de su plena participación en uniones aduaneras o en zonas de libre comercio o,

**b)** Los compromisos vinculantes de esa Parte adquiridos en virtud de cualquier convenio internacional multilateral amparado por el Acuerdo General sobre Aranceles Aduaneros y Comercio que entre en vigencia tras la firma del presente Tratado.

### **Artículo III**

**1.** Las inversiones no se expropiarán ni nacionalizarán directamente, ni indirectamente mediante la aplicación de medidas equivalentes a la expropiación o nacionalización (expropiación”), salvo que ello se efectúe con fines de interés público, de manera equitativa y mediante pago de una indemnización pronta, adecuada y efectiva, y de conformidad con el debido procedimiento legal y los principios generales de trato dispuestos en el párrafo 3 del Artículo II. La indemnización equivaldrá el valor justo en el mercado que tenga la inversión expropiada inmediatamente antes de que se tome la acción expropiatoria o de que ésta se llegue a conocer, si ello ocurre con anterioridad; se calculará en una moneda autorizable libremente, al tipo de cambio vigente en el mercado en ese momento; se pagará sin dilación; incluirá los intereses devengados a un tipo de interés comercialmente razonable desde la fecha de la expropiación; será enteramente realizable, y será transferible libremente.

**2.** El nacional o sociedad de una Parte que sostenga que su inversión le ha sido expropiada total o parcialmente tendrá derecho a que las autoridades judiciales o administrativas competentes de la otra Parte examinen su caso con prontitud para determinar si la expropiación ha ocurrido y, en caso afirmativo, si dicha expropiación y la indemnización correspondiente se ajustan a los principios del derecho internacional.

**3.** A los nacionales o las sociedades de una Parte cuyas inversiones sufran pérdidas en el territorio de la otra Parte con motivo de guerra o de otro conflicto armado, revolución, estado nacional de excepción, insurrección, disturbios entre la población u otros acontecimientos similares, la otra Parte les otorgará, con respeto a las medidas que adopte en lo referente a dichas pérdidas, un trato menos favorable que el trato más favorable que otorgue a sus propios nacionales o sociedades o a los nacionales o las sociedades de cualquier tercer país.

### **Artículo IV**

Cada parte permitirá que todas las transferencias relativas a una inversión que se envíen a su territorio o se saquen del mismo realicen libremente y sin demora. Dichas transferencias comprenden: a) los rendimientos; b) las indemnizaciones en virtud del Artículo III; c) los pagos que resulten de diferencias en materia de inversión; d) los pagos que se hagan conforme a los términos de un contrato, entre ellos, las amortizaciones de capital y los pagos de los intereses devengados en virtud de un convenio de préstamo; e) el producto de la venta o liquidación parcial o total de una inversión, y f) los aportes adicionales al capital hechos para el mantenimiento o fomento de una inversión.



## **Artículo V**

Las Partes convienen en consultarse con prontitud, a solicitud de cualquier de ellas, para resolver las diferencias que surjan en relación con el presente Tratado o para considerar cuestiones referentes a su interpretación o aplicación.

## **Artículo VI**

**1.** A efectos del presente Artículo una diferencia en materia de inversión es una diferencia entre una Parte y un nacional o una sociedad de la otra Parte, que se deba o sea pertinente a: a) un acuerdo de inversión concertado entre esa parte y dicho nacional o sociedad; b) una autorización para realizar una inversión otorgada por la autoridad en materia de inversiones extranjeras de una Parte a dicho nacional o sociedad, o c) una supuesta infracción de cualquier derecho conferido o establecido por el presente Tratado con respecto a una inversión.

**2.** Cuando surja una diferencia en materia de inversión, las partes en la diferencia procurarán primero resolverla mediante consultas y negociaciones. Si la diferencia no se soluciona amigablemente, la sociedad o el nacional interesado, para resolverla, podrá optar por someterla a una de las siguientes vías, para su resolución:

- a) Los tribunales judiciales o administrativos de la Parte que sea parte en la diferencia, o
- b) A cualquier procedimiento de solución de diferencias aplicable y previamente convertido, o
- c) Conforme a lo dispuesto en el párrafo 3 de este Artículo.

**3.**

a) Siempre y cuando la sociedad o el nacional interesado no haya sometido la diferencia, para su solución, según lo previsto por el inciso a) o el inciso b) del párrafo 2 y hayan transcurrido seis meses desde la fecha en que surgió la diferencia, la sociedad o el nacional interesado podrá optar con consentimiento por escrito a someter la diferencia, para su solución, al arbitraje obligatorio:

i) Del centro internacional de Arreglo de Diferencias relativas a Inversiones (“el Centro”) establecido por el Convenio sobre el Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros estados, hecho en Washington el 10 de marzo de 1965 (“Convenio del CIADI”), siempre que la Parte sea parte en dicho Convenio; o

ii) Del Mecanismo Complementario del Centro, de no ser posible recurrir a éste; o

iii) Según las Reglas de Arbitraje de la Comisión de las Naciones Unidas sobre Derecho Internacional (CNUDMI), o

iv) De cualquier otra institución arbitral o conforme a otra norma de arbitraje, según convenga las partes en la diferencia.

b) Una vez que la sociedad o el nacional interesado dé su consentimiento, cualquiera de las partes en la diferencia podrá iniciar el arbitraje según la opción especificada en el consentimiento.

**4.** Cada una de las Partes consiente en someter cualquier diferencia en materia de inversión al arbitraje obligatorio para su solución, de conformidad con la opción especificada en el consentimiento por escrito del nacional o de la sociedad, según el párrafo 3. Ese consentimiento, junto con el consentimiento por escrito del nacional o la sociedad, cuando se da conforme el párrafo 3, cumplirá el requisito de:

**a)** Un “consentimiento por escrito” de las partes en la diferencia a efectos del Capítulo II de la Convención del CIADI (Jurisdicción del Centro) y a efectos de las normas del Mecanismo Complementario, y

**b)** Un “acuerdo por escrito” a efectos del Artículo II de la Convención de las Naciones Unidas sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, hecha en Nueva York el 10 de 1958 (“Convención de Nueva York”).

**5.** Todo arbitraje efectuado de conformidad con la cláusula ii, iii o iv del inciso a), párrafo 3 del presente Artículo, tendrá lugar en un estado que sea Parte en la Convención de Nueva York.

**6.** Todo laudo arbitral dictado en virtud de este Artículo será definitivo y obligatorio para las partes en la diferencia. Cada Parte se compromete a aplicar sin demora las disposiciones de dicho laudo y a garantizar su ejecución en su territorio.

**7.** En todo procedimiento relativo a una diferencia en materia de inversión, las Partes no emplearán como defensa, reconvencción, derecho de contra reclamación o de otro modo, el hecho de que la sociedad o el nacional interesado ha recibido o recibirá, según los términos de un contrato de seguro de garantía, alguna indemnización u otra compensación por todos sus supuestos daños o por parte de ellos.

**8.** A efectos de un arbitraje efectuado según lo previsto en el párrafo 3 del presente Artículo, toda sociedad legalmente constituida conforme al ordenamiento interno de una Parte o subdivisión política de la misma que, inmediatamente antes de ocurrir el suceso o los sucesos que dieron lugar a la diferencia, constituyera una inversión de nacionales o de sociedades de la otra Parte, deberá ser tratada como nacional o sociedad de esa otra Parte, conforme al inciso b), párrafo 2, del Artículo 25 de la Convención del CIADI.

## **Artículo VII**

**1.** Toda diferencia entre las Partes concerniente a la interpretación o aplicación del presente Tratado que no se resuelva mediante consultas u otras vías diplomáticas, se presentará, a solicitud de cualquiera de las Partes, a un tribunal de arbitraje para que llegue a una decisión vinculante conforme a las normas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI), excepto en cuanto dichas normas hayan sido modificadas por las partes o por los árbitros.

**2.** En el plazo de dos meses a partir de la recepción de la solicitud, cada Parte nombrará a un árbitro. Los dos árbitros nombrarán como presidente a un tercer árbitro que sea nacional de un tercer Estado. Las Normas de la CNUDMI relativas al nombramiento de vocales para las juntas de tres miembros se

aplicarán, *mutatis mutandis*, al nombramiento de la junta arbitral, salvo que la autoridad denominativa a la que hacen referencia esas reglas será el Secretario General del Centro.

**3.** Salvo acuerdo en contrario, todos los casos se presentarán y todas las audiencias concluirán en un plazo de seis meses a partir del nombramiento del tercer árbitro, y el Tribunal dictará su laudo en un plazo de dos meses a partir de la fecha de las últimas presentaciones o de la fecha de clausura de las audiencias, si esta última fuese posterior.

**4.** Los gastos incurridos por el Presidente y los árbitros, así como las demás costas del procedimiento, serán sufragados en partes iguales por las partes. Sin embargo. El Tribunal podrá, a su discreción, ordenar que una de las Partes pague una proporción mayor de las costas.

### **Artículo VIII**

El presente Tratado no menoscabará:

**a)** Las leyes, los reglamentos, las prácticas y los procedimientos administrativos y los fallos administrativos y judiciales de cualquiera de las Partes;

**b)** Los compromisos jurídicos internacionales, ni

**c)** Los compromisos asumidos por cualquier de las Partes incluidos los que estén incorporados a los acuerdos o a las autorizaciones de inversión, que otorguen a las inversiones o a las actividades afines un trato más favorable que el que les otorga el presente Tratado en situaciones parecidas.

### **Artículo IX**

**1.** El presente Tratado no impedirá la aplicación por cualquiera de las Parte de las medidas necesarias para el mantenimiento de orden público, el cumplimiento de sus compromisos respecto del mantenimiento o la restauración de la paz o seguridad internacionales, o la protección de los intereses esenciales de su seguridad.

**2.** El presente Tratado no impedirá que cualquiera de las Partes prescriba trámites especiales con respecto al establecimiento de inversiones, pero dichos trámites no menoscabarán la esencia de cualquiera de los derechos que se anuncian en el presente Tratado.

### **Artículo X**

**1.** En lo relativo a sus normas tributarias, cada Parte deberá esforzarse por actuar justa y equitativamente en el trato de las inversiones de los nacionales y las sociedades de la otra Parte.

**2.** No obstante, las disposiciones del presente Tratado, especialmente de los Artículos VI y VII del mismo, se aplicarán a cuestiones tributarias solamente con respecto a:

**a)** La expropiación, de conformidad con el Artículo III;

**b)** Las transferencias, de conformidad con el Artículo IV, o

**c)** La observancia y el cumplimiento de los términos de un acuerdo o autorización en materia de inversión, tal como se menciona en el inciso a) o el inciso b), en la medida en que estén sujetas a las disposiciones sobre la solución de diferencias de un Convenio para evitar la doble imposición tributaria concertado entre las dos Partes, o que se hayan suscitado de conformidad con dichas disposiciones y no se hayan resuelto en un plazo razonable.

## **Artículo XI**

El presente Tratado se aplicará a las subdivisiones políticas de las Partes.

## **Artículo XII**

1. El presente Tratado entrará en vigor treinta días después de la fecha de canje de los instrumentos de ratificación y permanecerá en vigor por un período de 10 años y continuará en vigor a menos que se denuncie de conformidad con las disposiciones del párrafo 2 del presente Artículo. El presente Tratado se aplicará a las inversiones existentes en el momento de su entrada en vigor y a las inversiones que se efectúen o adquieran posteriormente.

2. Cualquiera de las Partes podrá denunciar el presente Tratado al concluir el período inicial de diez años, o en cualquier momento posterior, mediante notificación por escrito a la otra Parte con un año de antelación.

3. Con respecto a las inversiones efectuadas o adquiridas antes de la fecha de terminación del presente Tratado, y a las cuales el presente Tratado sea por lo demás aplicable, las disposiciones de todos los demás artículos del presente Tratado continuarán en vigor durante un período adicional de diez años después de la fecha de terminación.

4. El Protocolo y la Carta Anexa formarán parte integral del presente Tratado.

EN FE DE LO CUAL, los respectivos plenipotenciarios han firmado el presente Tratado.

HECHO en Washington a los veinte y siete días del mes de agosto de mil novecientos noventa y tres, en dos textos en los idiomas español e inglés, ambos igualmente auténticos.

POR LA REPUBLICA DE ECUADOR

POR LOS ESTADOS UNIDOS DE AMERICA

***PART II***  
***THE PRINCIPAL ISSUES***

***A: Introduction***

- 2.1 The several claims made by the Claimants and the several responses made by the Respondent in this arbitration are recorded in their respective pleaded requests for relief. These pleadings are fully set out in Annex 3 to Part I of this Award, above. As there formulated, these comprise a range of specific requests, reflecting the particular facts of the Parties' dispute arising from the Lago Agrio Litigation and the Judgments of the Lago Agrio Court, the Lago Agrio Appellate Court, the Cassation (National) Court and the Constitutional Court of the Respondent.
- 2.2 These facts were first pleaded in the Claimants' Notice of Arbitration of 23 September 2009 and disputed by the Respondent's initial pleading of 3 May 2010, during the pendency of the Lago Agrio Litigation (begun in 2003) but before the Judgments of the Lago Agrio Court (2011), the Lago Agrio Appellate Court (2012), the Cassation Court (2013) and the Constitutional Court (2018). As the Parties' dispute continued and deepened from 2009 onwards, after the commencement of this arbitration, the Parties' respective pleadings have correspondingly developed to take account of these new and other events, up to 25 July 2018.
- 2.3 These disputed facts and requests are, however, all focused on the overall dispute that lay and continues to lie at the heart of this case between the Claimants and the Respondent.
- 2.4 In brief, the Claimants assert that TexPet (with Texaco) made an investment in the form of an oil concession in the Oriente, Ecuador (beginning in 1964); that this investment was subsequently acquired by Chevron when it "merged" with Texaco and acquired TexPet, as Texaco's subsidiary (in 2001); that the Respondent agreed (in 1995-1998) on the extent of the responsibility of TexPet, Texaco and subsequently Chevron for clean-up operations and on the extent of their residual liability for environmental harm in the concession area; that, in breach of that agreement, the Respondent facilitated legal proceedings by the Lago Agrio Plaintiffs in the form of the Lago Agrio Litigation

against Chevron; that such proceedings were subject to procedural fraud and judicial misconduct by judges of the Lago Agrio Court; that the Lago Agrio Judgment was ‘ghostwritten’ by representatives of the Lago Agrio Plaintiffs in corrupt collusion with the presiding judge of the Lago Agrio Court; that the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court left such fraud, misconduct and corruption unremedied; that the Lago Agrio Appellate Court rendered enforceable the Lago Agrio Judgment, within and without Ecuador (in 2012); and that the Respondent (by its judicial branch, aided and abetted by its executive branch) failed to provide to both Chevron and TexPet the legal protections to which they were entitled in the Lago Agrio Litigation.

- 2.5 The Claimants (as USA nationals) contend that these facts disclose multiple breaches by the Respondent of their rights under the Treaty (including customary international law); that many of these breaches have a continuing character that was renewed, repeated and maintained in successive factual developments; and that these international wrongs have caused and are still causing injuries to each of them; and that the Claimants (particularly Chevron) became and remain exposed to potentially disastrous legal proceedings for the enforcement of the corrupt Lago Agrio Judgment in multiple jurisdictions, not limited to Ecuador or the USA.
- 2.6 The Claimants contend that these breaches of the Treaty are rooted in: (i) the failure of the Respondent to give effect to the agreements made by the Respondent concerning the responsibility and residual liability for environmental damage (collectively, the “1995 Settlement Agreement”); (ii) the issuing, rendering enforceable and maintaining the enforceability of the Lago Agrio Judgment (as varied by the Cassation Court); and (iii) the failure of the Respondent to take effective steps to address and remedy the procedural fraud, judicial misconduct and ‘ghostwriting’ of the Lago Agrio Judgment.
- 2.7 The Claimants assert that this Tribunal has jurisdiction under the Treaty to decide their claims; and, also, that their claims are admissible in this arbitration under the Treaty.
- 2.8 In brief, the Respondent denies: (i) that Chevron has, or has had, any investment in Ecuador relevant to the Treaty; (ii) that this Tribunal has any jurisdiction to address the Claimants’ claims under the Treaty; (iii) that the Claimants’ claims are admissible in

this arbitration under the Treaty; and (iv) that the Claimants' cases, on their merits, entitle either of them to any of the relief which they claim in this arbitration.

- 2.9 In this arbitration, the procedural fraud, judicial misconduct and corruption in the Lago Agrio Litigation and the Lago Agrio Judgment (as alleged by the Claimants and denied by the Respondent), taken together, were commonly referred to by the Parties as a 'denial of justice'. The Tribunal is content to adopt that usage. In doing so, however, the Tribunal draws attention to the fact that its mandate in this arbitration is focused on the question of alleged breaches of the Treaty (including customary international law). The Treaty does not make express provision for denial of justice.
- 2.10 The principal issues to be addressed by the Tribunal in this Award, under Track II of this arbitration, are whether the Tribunal has any jurisdiction over Chevron's claims under the Treaty; (if so) whether such claims are admissible under the Treaty; if so, whether any alleged conduct attributable to the Respondent amounts to a violation of the Treaty (including customary international law); if and to the extent that these questions are answered affirmatively, to what forms of relief are Chevron and TexPet entitled under the Treaty (including customary international law); and, in any event, to what forms of relief is the Respondent entitled under the Treaty (including, again, customary international law).
- 2.11 These principal issues subsume a mass of lesser factual, expert, forensic and legal issues. For the purpose of this Award, the Tribunal has addressed these issues in the several Parts that follow. For ease of reference, the subject-matters of these different Parts are described below.
- 2.12 The Tribunal does not here revisit its determinations made in its earlier awards, orders and decision. This Award is limited to issues arising in Track II of this Arbitration, as identified by the Parties up to 25 July 2018. Thus, this Award does not address issues already decided in Tracks 1 and 1B or still to be addressed in Track III of this arbitration. Moreover, the Tribunal has not thought it necessary to decide all the issues listed for Track II by the Parties.

***B: The Principal Legal and Other Texts – Part III***

- 2.13 For ease of later reference in this Award, Part III of this Award sets out, verbatim, relevant texts from the Treaty, the UNCITRAL Arbitration Rules (forming part of the Parties' Arbitration Agreement derived from the Treaty), the 1995-1998 Settlement and Release Agreements, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the ILC Articles on State Responsibility, the 1985 UN Basic Principles on the Independence of the Judiciary, the 1998 Ecuadorian Constitution, the Ecuadorian Civil Code, the Ecuadorian Environmental Management Act 1999 and the Ecuadorian Collusion Prosecution Act.
- 2.14 The full text of the Treaty (in English and Spanish) is appended to Part I, as Annex 5.

***C: The Facts and Other Matters – Parts IV and V***

- 2.15 *Part IV* of this Award sets out the facts and other matters, including the non-computer expert evidence, relevant to the Tribunal's decisions in this Award. Part IV also contains an annotated chronology of these evidential materials from 1964 to 2018, as found by the Tribunal.
- 2.16 Annex 6 to Part IV contains a map of Ecuador, showing the Oriente and the area of the oil concession granted by the Respondent to (inter alios) TexPet.
- 2.17 In Part V of this Award, the Tribunal addresses the Judgments of the Lago Agrio Court, the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court.
- 2.18 Annex 7 to Part V contains an extract from the Lago Agrio Judgment, addressing the "merger" between Texaco and Chevron in 2001. Annex 8 to Part V reproduces exhibits from the expert evidence relating to the 'ghostwriting' of the Lago Agrio Judgment. Annex 9 to Part V reproduces a marked-up version of part of the Lago Agrio Judgment from the expert evidence relating to the 'ghostwriting' of the Lago Agrio Judgment.
- 2.19 The Tribunal summarises its Conclusions regarding these evidential materials, as found in Parts IV and V (including the four Judgments), at the end of Part V.



***D: Forensic (Computer) Evidence – Part VI***

- 2.20 In Part VI of this Award, the Tribunal addresses the expert evidence addressed by the Parties' forensic computer expert witnesses (with the Tribunal's forensic computer expert).
- 2.21 The Tribunal summarises its Conclusions regarding this forensic expert evidence at the end of Part VI.

***E: Jurisdiction and Admissibility – Part VII***

- 2.22 In Part VII of this Award, the Tribunal addresses the issues of jurisdiction and admissibility arising from the Parties' respective pleadings.
- 2.23 The Tribunal summarises its Conclusions regarding jurisdiction and admissibility at the end of Part VII.

***F: Merits – Part VIII***

- 2.24 In Part VIII of this Award, the Tribunal addresses the merits of the Claimants' claims and the Respondent's defences.
- 2.25 The Tribunal summarises its Conclusions regarding these merits at the end of Part VIII.

***G: Forms of Relief – Part IX***

- 2.26 In Part IX of this Award, the Tribunal addresses (seriatim) the forms of relief requested by the Claimants and the Respondent in Track II of this arbitration, together with certain miscellaneous matters.

***H: The Operative Part – Part X***

- 2.27 In Part X, the Tribunal sets out the Operative Part of this Award, derived from the Parties' requests for relief in Track II of this arbitration and consequential upon the Tribunal's earlier decisions in this and previous Awards, Orders and Decision.



## **PART III**

### **PRINCIPAL LEGAL AND OTHER TEXTS**

#### ***A: Introduction***

- 3.1 For ease of reference later, it is here appropriate to cite in full the principal legal and other texts to which the Tribunal refers later in this Award; namely extracts from the Treaty, the UNCITRAL Arbitration Rules, the 1995-1998 Settlement and Release Agreements, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the ILC Articles on State Responsibility, the 1985 UN Basic Principles on the Independence of the Judiciary, the 1998 Ecuadorian Constitution, the Ecuadorian Civil Code, the Ecuadorian Environmental Management Act 1999 and the Ecuadorian Collusion Prosecution Act.

#### ***B: The Treaty***

- 3.2 The Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (herein called the “Treaty”) provides as follows.

- 3.3 *Preamble:* The Treaty’s Preamble provides as follows:

*“The United States of America and the Republic of Ecuador (hereinafter the “Parties”);*

*Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;*

*Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;*

*Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;*

*Recognizing that the development of economic and business ties can contribute to the wellbeing of workers in both Parties and promote respect for internationally recognized worker rights; and*

*Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;*

*Have agreed as follows: ...”*

3.4 *Article I(1): Article I(1) of the Treaty provides, in material part, as follows:*

*“For the purposes of this Treaty,*

- (a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
  - (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
  - (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
  - (iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
  - (iv) intellectual property which includes, inter alia, rights relating to: ... and*
  - (v) any right conferred by law or contract, and any licences and permits pursuant to law;*
- (b) “company” of a party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled; ...”*

3.5 *Article I(3): Article I(3) of the Treaty provides as follows:*

*“Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.”*

3.6 *Article II(3): Article II(3) of the Treaty provides as follows:*

- “(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.*
- (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measures in the courts or administrative tribunals of a Party.*
- (c) Each Party shall observe any obligation it may have entered into with regard to investments.”*

3.7 *Article II(7): Article II(7) of the Treaty provides as follows:*

*“7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”*

3.8 *Article VI: Article VI of the Treaty provides, in material part, as follows:*

- “1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*
- 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:*
  - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or*
  - (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*
  - (c) in accordance with the terms of paragraph 3.*

3. (a) *Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); ...*
4. *Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: .. (b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”) ...”*
5. *Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.*
6. *Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement ...”*

3.9 *Article XI:* Article XI of the Treaty provides:

*“This Treaty shall apply to the political subdivisions of the Parties.”*

3.10 *Article XII(1):* Article XII(1) of the Treaty provides, in material part, as follows:

*“This Treaty ... shall apply to investments existing at the time of entry into force as well as to investments made or acquired hereafter.”*

***C: The UNCITRAL Arbitration Rules***

3.11 *Article 20:* Article 20 of the UNCITRAL Arbitration Rules, “Amendment”, provides (inter alia) as follows:

*“During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstance. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.”*

3.12 *Article 24(1)*: Article 24(1) of the UNCITRAL Arbitration Rules provides as follows:

*“Each party shall have the burden of proving the facts relied on to support his claim or defence.”*

3.13 *Article 27*: Article 27 of the UNCITRAL Arbitration Rules, “Experts”, provides as follows:

*“1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.*

*2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.*

*3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.*

*4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.”*

3.14 *Article 32*: Article 32 of the UNCITRAL Arbitration Rules, “Form and Effect of the Award”, provides (inter alia) as follows:

*“1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.*

*2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay. ...*

*5. The award may be made public only with the consent of both parties. ...*

*7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.”*

***D: The 1995-1998 Settlement and Release Agreements***

- 3.15 The term “1995-1998 Settlement and Release Agreements” as generally used in this Award (save where the context requires otherwise) comprises three sets of contractual documentation: (i) the 1995 Settlement Agreement of 4 May 1995; (ii) the 1996 Municipal and Provincial Releases; and (iii) the 1998 Final Release.<sup>1</sup> This documentation was made in Spanish; and the citations below are all English translations.
- 3.16 (1) *The 1995 Settlement Agreement*: On 4 May 1995, the Respondent acting by its Ministry of Energy and Mining (“the Ministry”) and PetroEcuador as “one Party” and TexPet as “the other party” initialled and signed a written agreement entitled “Contract for Implementing of Environmental, Remedial Work and Release from Obligations, Liability and Claims”.
- 3.17 The 1995 Settlement Agreement was made on the Ministry’s headed note-paper with the Respondent’s coat-of-arms; and it was signed for that Ministry by the Minister of Energy and Mines. It was also signed by a senior officer of PetroEcuador and two representatives of TexPet (now, but not then, indirectly owned by Chevron): Dr Ricardo Reis Veiga and Mr Rodrigo Pérez Pallares.
- 3.18 The 1995 Settlement Agreement provided in the final two paragraphs of its preamble that TexPet agreed to undertake the “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.” By Article 1.3, the term “Environmental Impact” included: “[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.”
- 3.19 As contemplated in the earlier 1994 MOU between the same signatory parties (which was to be substituted and become void by Article 9.6 and the last paragraph of Annex “A” of the 1995 Settlement Agreement), the 1995 Settlement Agreement, subject to its terms: (i) released TexPet from the Respondent’s and PetroEcuador’s claims based upon Environmental Impact (except for claims related to TexPet’s performance of the Scope

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<sup>1</sup> These documents were more fully set out and considered in the Tribunal’s First Partial Award, which also contained a copy of the full version of the Settlement Agreement as signed by the parties (in Spanish).



of Work); and (ii) provided that TexPet would be released from all remaining environmental liability upon completion of the remediation obligations described in that Scope of Work.

3.20 Article 1.12 of the 1995 Settlement Agreement defined such release, as follows:

*“The release, under the provisions of Article V of this Contract, of all legal and contractual obligations and liability, towards the Government and Petroecuador, for the Environmental Impact arising from the Operations of the Consortium, including any claims that the Government and Petroecuador have, or may have against Texpet, arising out of the Consortium Agreements.”*

3.21 The term “Operations of the Consortium” was defined as “Those oil exploration and production operations carried out under the Consortium Agreement”, i.e. the 1973 Concession Agreement.

3.22 Article 5.1 of the 1995 Settlement Agreement (“Article V”) provides (inter alia), in material part:

*“On the execution date of this Contract [i.e. 4 May 1995], and in consideration of Texpet’s agreement to perform the Environmental Remedial Work in accordance with the Scope of Work set out in Annex A, and the Remedial Action Plan, the Government and Petroecuador shall hereby release, acquit and forever discharge Texpet, Texaco Petroleum Company, Compañía Texaco de Petróleos del Ecuador, S.A., Texaco Inc., and all their respective agents, servants, employees, officers, directors, legal representatives, insurers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principals and subsidiaries (hereinafter referred to as ‘the Releasees’) of 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) ...”*

3.23 The Ecuadorian Government’s “claims” were addressed in Article 5.2. It provides:

*“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 (including, but not limited to, causes of action under Article 19-2 of the Political Constitution of the Republic of Ecuador, Decree No. 1459 of 1971, Decree No. 925 of 1973, the Water Act, R.O. 233 of 1973, ORO No. 530 of 1974, Decree No. 374 of 1976, Decree No. 101 of 1982, or Decree No. 2144 of 1989, or any other applicable law or regulation of the Republic of Ecuador), 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.”*

- 3.24 The reference in Article 5.2 to Article 19-2 of the Ecuadorian Constitution (being the 1978 Constitution effective in 1979 and, as later amended, in force in 1995) signified a cause of action available to the Respondent under Title II, Section 1 (On the Rights of People/Individuals)<sup>2</sup> whereby the Ecuadorian State guaranteed to each person, inter alia (in English translation): “... the right to live in an environment that is free from contamination. It is the duty of the State to ensure that this right is not negatively affected and to foster the preservation of nature ...”. The reference to Decree No. 374 of 1976 signified a cause of action available to the Respondent on the prevention and control of pollution. The reference to the Water Act of 1973 and Decree No. 2144 of 1989 signified causes of action available to the Respondent in regard to water resources and water contamination. The reference to ORO No 530 signified the Regulations for the Exploration and Exploration of Hydrocarbons of 9 April 1974.
- 3.25 (ii) *The 1996 Municipal and Provincial Releases*: As provided by Annex “A” to the Settlement Agreement, TexPet subsequently settled disputes with the four municipalities of the Oriente Region (Sushufindi, Francisco de Orellana (Coca), Lago Agrio and Loya de los Sachas), under written agreements made with these municipalities, as also the Province of Sucumbíos and the Napo consortium of municipalities (the “1996 Municipal and Provincial Releases”).
- 3.26 Under these six settlements, four of which were approved by the Ecuadorian Courts owing to their nature as extant litigious disputes, TexPet, together with non-signatory parties, were released from liability to these municipalities for the Consortium’s activities in the area of the concession. The 1996 Municipal and Provincial Releases provided (inter alia) for releases in somewhat different terms from Article 5.1 of the Settlement Agreement.

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<sup>2</sup> As recorded in the Tribunal’s First Partial Award, the Claimants translate the Spanish term “las personas” as “people” or “persons”; and the Respondent as “individuals” and “persons”. For present purposes, the difference is immaterial.

3.27 (iii) *The 1998 Final Release*: On 30 September 1998, pursuant to the Settlement Agreement, the Respondent (acting by its Minister of Energy and Mines), PetroEcuador, PetroProduccion and TexPet executed the “Acta Final” (or Final Release), certifying that TexPet had performed all its obligations under the 1995 Settlement Agreement and, in accordance with its terms, releasing TexPet from (as specified) any environmental liability arising from the Consortium’s operations.

3.28 Article IV of the Final Release provided (inter alia) in material part as follows:

*“ ... The Government and PetroEcuador proceed to release, absolve and discharge TexPet, Texas Petroleum Company, Compañía Texaco de Petróleos del Ecuador, S.A., Texaco Inc., and all their respective agents, servants, employees, officers, directors, legal representatives, insurers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principals, 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 [the 1995 Settlement Agreement] ....”*

3.29 The wording of the release in Article IV of the Final Release is materially the same linguistically as the wording Article 5.1 of the Settlement Agreement.

#### ***E: The Universal Declaration of Human Rights***

3.30 *Article 10*: Article 10 of the Universal Declaration of Human Rights reads as follows:

*“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”*

#### ***F: The International Covenant on Civil and Political Rights***

3.31 *Article 2*: Article 2 of the International Covenant on Civil and Political Rights provides as follows:

*“1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in*

*accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

*3. Each State Party to the present Covenant undertakes:*

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”*

3.32 *Article 14:* Article 14 of the International Covenant on Civil and Political Rights provides, in material part:

*“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*

### ***G: The ILC Articles on State Responsibility***

3.33 *Article 16:* Article 16 of the ILC Articles on State Responsibility, “Aid or assistance in the commission of an internationally wrongful act”, provides as follows:

*“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
- (b) the act would be internationally wrongful if committed by that State.”*

3.34 *Article 28:* Article 28 of the ILC Articles on State Responsibility, “Legal consequences of an internationally wrongful act”, provides as follows:

*“The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.”*

3.35 *Article 29*: Article 29 of the ILC Articles on State Responsibility, “Continued duty of performance”, provides as follows:

*“The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.”*

3.36 *Article 30*: Article 30 of the ILC Articles on State Responsibility, “Cessation and non-repetition”, provides as follows:

*“The State responsible for the internationally wrongful act is under an obligation:*

*(a) to cease that act, if it is continuing;*

*(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”*

3.37 *Article 31*: Article 31 of the ILC Articles on State Responsibility, “Reparation”, provides as follows:

*“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*

*2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”*

3.38 *Article 32*: Article 32 of the ILC Articles on State Responsibility, “Irrelevance of internal law”, provides as follows:

*“The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.”*

3.39 *Article 33*: Article 33 of the ILC Articles on State Responsibility, “Scope of international obligations set out in this part”, provides as follows:

*“1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.*

*2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”*

3.40 *Article 34*: Article 34 of the ILC Articles on State Responsibility, “Forms of Reparation”, provides as follows:

*“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”*

3.41 *Article 35*: Article 35 of the ILC Articles on State Responsibility, “Restitution”, provides as follows:

*“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*

*(a) is not materially impossible;*

*(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”*

3.42 *Article 36*: Article 36 of the ILC Articles on State Responsibility, “Compensation”, provides as follows:

*“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”*

3.43 *Article 37*: Article 37 of the ILC Articles on State Responsibility, “Satisfaction”, provides as follows:

*“1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.*

*2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.*

*3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”*

3.44 *Article 38*: Article 38 of the ILC Articles on State Responsibility, “Interest”, provides as follows:

*“1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*

*2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”*

3.45 *Article 39*: Article 39 of the ILC Articles on State Responsibility, “Contribution to the Injury”, provides as follows:

*“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”*

***H: The UN Basic Principles on the Independence of the Judiciary***<sup>3</sup>

3.46 *UN Basic Principles*: The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, provides (inter alia) as follows:

*“1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*

*2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

*3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*

*4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or*

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<sup>3</sup> CLA-293.

*commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

*5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*

*6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*

*7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”*

### **I: The Ecuadorian Constitution**

3.47 *Article 19-2:* Article 19-2 of the 1998 Ecuadorian Constitution provides:

*“Notwithstanding other rights which are necessary for the full moral and material development that is derived from the nature of the person, the State guarantees: ... 2. The right to live in an environment free of pollution. It is the duty of the State to ensure that this right is not affected and to promote the preservation of nature. The law shall establish the limitations on the exercising of certain rights and freedoms, to protect the environment;”*

*(In the original Spanish: “Sin perjuicio de otros derechos necesarios para el pleno desenvolvimiento moral y material que se deriva de la naturaleza de la persona, el Estado le garantiza: (...) 2. El derecho de vivir en un medio ambiente libre de contaminación. Es deber del Estado velar para que este derecho no sea afectado y tutelar la preservación de la naturaleza. La ley establecerá las restricciones al ejercicio de determinados derechos o libertades, para proteger el medio ambiente;”).*

3.48 *Article 23(15):* Article 23(15) of the 1998 Ecuadorian Constitution provides:

*“Without prejudice to the rights established in the Constitution and the international instruments currently in force, the State recognizes and guarantees the following to the people: ... 15. The right to file complaints and petitions to the authorities, but under no circumstances on behalf of the people, and to receive attention or relevant responses within an appropriate period.”*

*(In the original Spanish: “Sin perjuicio de los derechos establecidos en esta Constitución y en los instrumentos internacionales vigentes, el Estado reconocerá y garantizará a las personas los siguientes : (...) 15. El derecho a dirigir quejas y peticiones a las autoridades, pero en ningún caso en nombre del pueblo; y a recibir la atención o las respuestas pertinentes, en el plazo adecuado.”).*



3.49 *Article 75*: Article 75 of the 2008 Ecuadorian Constitution provides:

*“Each individual has the right to free access to justice and effective, impartial and expeditious protection of his rights and interests, subject to the principles of immediacy and celerity. In no case a person shall be left defenseless. Noncompliance with judgments shall be punished by law.”*

*(In the original Spanish: “Toda persona tiene derecho al acceso gratuito a la justicia y a la tutela efectiva, imparcial y expedita de sus derechos e intereses, con sujeción a los principios de inmediación y celeridad; en ningún caso quedará en indefensión. El incumplimiento de las resoluciones judiciales será sancionado por la ley.”).*

3.50 *Article 76(7)(k)*: Article 76(7)(k) of the 2008 Ecuadorian Constitution provides:

*“The right of persons to a defense shall include the following guarantees: ... k) To be judged by an independent, impartial and competent judge. No one shall be judged by extraordinary courts or special commissions created for this purpose.”*

*(In the original Spanish: “El derecho de las personas a la defensa incluirá las siguientes garantías: (...) k) Ser juzgado por una jueza o juez independiente, imparcial y competente. Nadie será juzgado por tribunales de excepción o por comisiones especiales creadas para el efecto.”).*

#### ***J: The Ecuadorian Civil Code***<sup>4</sup>

3.51 *Article 7*: Article 7 of the Civil Code provides:

*“The law does not provide except for the future; it has no retroactive effect; and when a later law conflicts with a prior law, the following rules shall be observed:  
...*

*18. The laws in effect when a contract is executed shall be deemed incorporated into such contract.*

*This provision shall not apply to: (1) laws about how to sue for rights resulting from the contract and (2) laws indicating penalties for a violation of the contractual provisions, since the violation will be punished in accordance with the law under which it was committed;*

*...*

*20. Laws concerning the hearing of and procedure in lawsuits shall prevail over prior laws from the time at which they take effect. But time periods that have already*

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<sup>4</sup> As of 24 June 2005 (RLA-163). See also C-34.

*begun to run, and any proceedings that have already commenced, shall be governed by the law that was in effect at that time;”*

*(In the original Spanish: “La ley no dispone sino para lo venidero: no tiene efecto retroactivo; y en conflicto de una ley posterior con otra anterior, se observarán las reglas siguientes: (...)*

*18. En todo contrato se entenderán incorporadas las leyes vigentes al tiempo de su celebración.*

*Exceptúanse de esta disposición: 1ro., las leyes concernientes al modo de reclamar en juicio los derechos que resultaren del contrato; y, 2., las que señalan penas para el caso de infracción de lo estipulado en los contratos; pues ésta será castigada con arreglo a la ley bajo la cual se hubiere cometido;*

*(...)*

*20. Las leyes concernientes a la sustanciación y ritualidad de los juicios, prevalecen sobre las anteriores desde el momento en que deben comenzar a regir. Pero los términos que hubieren comenzado a correr, y las actuaciones y diligencias que ya estuvieren comenzadas, se regirán por la ley que estuvo entonces vigente;”).*

3.52 *Article 18:* Article 18 of the Civil Code provides:

*“Judges shall not suspend or deny the administration of justice because of the obscurity or lack of a law. In such cases, they shall adjudicate in accordance with the following rules:*

*1. When the meaning of the law is clear, they shall not disregard its literal meaning, on the pretext of determining the spirit of the law.*

*However, to interpret an obscure provision of a law, they may indeed resort to its intent or spirit as clearly manifested in the law itself, or to the trustworthy history of the law’s establishment;*

*2. The words in the law shall be understood in their natural and obvious meaning, in accordance with the general use of the words themselves, but when the legislator has expressly defined them for certain subjects, the words shall be given their legal meaning;*

*3. The technical words from any science or art shall be taken in the meaning given to them by those practicing the same science or art; unless it clearly appears that they have been taken to mean something different;*

*4. The context of a law shall be used to interpret the meaning of each of its parts, so that the due connection and harmony exists among all of them.*

*Obscure passages in a law may be illustrated by means of other laws, particularly if they deal with the same topic;*

*5. The favorable or odious aspect of a provision shall not be taken into account to broaden or restrict its interpretation. The scope that shall be given to any law shall be determined through its genuine meaning and in accordance with the foregoing rules of interpretation.*

*6. In cases where the foregoing rules of interpretation cannot be applied, obscure or contradictory passages shall be interpreted in the manner that is most consistent with the general spirit of the law and natural fairness; and,*

*7. If there is no law, the laws governing analogous cases shall be applied, and if there are no such laws, then the general principles of universal law shall be used.”*

*(In the original Spanish: “Los jueces no pueden suspender ni denegar la administración de justicia por oscuridad o falta de ley. En tales casos juzgarán atendiendo a las reglas siguientes:*

*1a.- Cuando el sentido de la ley es claro, no se desatenderá su tenor literal, a pretexto de consultar su espíritu.*

*Pero bien se puede, para interpretar una expresión oscura de la ley, recurrir a su intención o espíritu claramente manifestados en ella misma, o en la historia fidedigna de su establecimiento;*

*2a.- Las palabras de la ley se entenderán en su sentido natural y obvio, según el uso general de las mismas palabras; pero cuando el legislador las haya definido expresamente para ciertas materias, se les dará en éstas su significado legal;*

*3a.- Las palabras técnicas de toda ciencia o arte se tomarán en el sentido que les den los que profesan la misma ciencia o arte, a menos que aparezca claramente que se han tomado en sentido diverso;*

*4a.- El contexto de la ley servirá para ilustrar el sentido de cada una de sus partes, de manera que haya entre todas ellas la debida correspondencia y armonía.*

*Los pasajes oscuros de una ley pueden ser ilustrados por medio de otras leyes, particularmente si versan sobre el mismo asunto;*

*5a.- Lo favorable u odioso de una disposición no se tomará en cuenta para ampliar o restringir su interpretación. La extensión que deba darse a toda ley se determinará por su genuino sentido y según las reglas de interpretación precedentes;*

*6a.- En los casos a que no pudieren aplicarse las reglas de interpretación precedentes, se interpretarán los pasajes oscuros o contradictorios del modo que*

*más conforme parezca al espíritu general de la legislación y a la equidad natural;*  
y,

*7a.- A falta de ley, se aplicarán las que existan sobre casos análogos; y no habiéndolas, se ocurrirá a los principios del derecho universal.”).*

3.53 *Article 1530:* Article 1530 of the Civil Code provides:

*“The creditor can act against all the joint and several debtors jointly, or against any of them, at his discretion, without the latter being able to oppose the benefit of division.”*

*(In the original Spanish: “El acreedor podrá dirigirse contra todos los deudores solidarios juntamente, o contra cualquiera de ellos a su arbitrio, sin que por éste pueda oponérsele el beneficio de división.”).*

3.54 *Article 1538:* Article 1538 of the Civil Code provides:

*“The joint and several debtor who has paid the debt, or has canceled it through any of the means equivalent to payment, remains subrogated in the creditor's legal action with all his privileges and securities, but is limited, vis-a-vis each of the co-debtors, to this co-debtor's part or share of the debt.”*

*(In the original Spanish: “El deudor solidario que ha pagado la deuda, o la ha extinguido por alguno de los medios equivalentes al pago, queda subrogado en la acción del acreedor con todos sus privilegios y seguridades; pero limitada, respecto de cada uno de los codeudores, a la parte o cuota que tenga este codeudor en la deuda.”).*

3.55 *Article 1561:* Article 1561 of the Civil Code provides:

*“Every contract legally executed is the law for the contracting parties and cannot be invalidated except by the mutual agreement of the parties or for legal reasons.”*

*(In the original Spanish: “Todo contrato legalmente celebrado es una ley para los contratantes, y no puede ser invalidado sino por su consentimiento mutuo o por causas legales.”).*

3.56 *Article 1562:* Article 1562 of the Civil Code provides:

*“Contracts should be performed in good faith, and thus obligate, not only what is expressly provided for, but all things that precisely emanate from the nature of the obligation whether by law or custom.”*

*(In the original Spanish: “Los contratos deben ejecutarse de buena fe, y por consiguiente obligan, no sólo a lo que en ellos se expresa, sino a todas las cosas*

*que emanan precisamente de la naturaleza de la obligación, o que, por la ley o la costumbre, pertenecen a ella.”).*

3.57 *Article 1572:* Article 1572 of the Civil Code provides:

*“Damages include consequential damages and lost profit, regardless of whether they result from failure to comply with the obligation, or improper performance of the obligation or delay in the performance. The foregoing rule does not apply to cases in which the law limits the damages to consequential damages. It also does not apply to damages for pain and suffering as granted by Title XXXIII of Book IV of this Code.”*

*(In the original Spanish: “La indemnización de perjuicios comprende el daño emergente y el lucro cesante, ya provengan de no haberse cumplido la obligación, o de haberse cumplido imperfectamente, o de haberse retardado el cumplimiento. Exceptúanse los casos en que la ley la limita al daño emergente. Exceptúanse también las indemnizaciones por daño moral determinadas en el Título XXXIII del Libro IV de este Código.”).*

3.58 *Article 2214:* Article 2214 of the Civil Code provides:

*“Whoever commits an offense or tort resulting in harm to another shall indemnify the affected party, without detriment to the penalty provided by law for such offense or tort.”*

*(In the original Spanish: “El que ha cometido un delito o cuasidelito que ha inferido daño a otro, está obligado a la indemnización; sin perjuicio de la pena que le impongan las leyes por el delito o cuasidelito.”).*

3.59 *Article 2217:* Article 2217 of the Civil Code provides:

*“If an intentional or unintentional tort has been committed by two or more persons, each of them shall be joint and severally liable for any damage stemming from the same intentional or unintentional tort, except for the exceptions in Articles 2223 and 2228.”*

*(In the original Spanish: “Si un delito o cuasidelito ha sido cometido por dos o más personas, cada una de ellas será solidariamente responsable de todo perjuicio procedente del mismo delito o cuasidelito, salvo las excepciones de los Arts. 2223 y 2228.”).*

3.60 *Article 2229:* Article 2229 of the Civil Code provides:

*“As a general rule, all damages that can be attributed to malice or negligence by another person must be compensated for by that person. Individuals especially obligated to this compensation include: 1. An individual who causes fires or explosions recklessly; 2. An individual who recklessly shoots a firearm; 3. An*

*individual who removes flagstones from a trench or pipe in the street or along a road without necessary precautions to prevent those traveling during the day or night from falling; 4. An individual who, obligated to build or repair an aqueduct or bridge that crosses a road, maintains it in such a state that it causes injury to those who cross it; and, 5. An individual who manufactures and circulates products, objects, or devices that cause accidents due to construction or manufacturing defects, shall be held liable for the respective damages.”*

*(In the original Spanish: “Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona debe ser reparado por ésta. Están especialmente obligados a esta reparación: 1. El que provoca explosiones o combustión en forma imprudente; 2. El que dispara imprudentemente una arma de fuego; 3. El que remueve las losas de una acequia o cañería en calle o camino, sin las precauciones necesarias para que no caigan los que por allí transitan de día o de noche; 4. El que, obligado a la construcción o reparación de un acueducto o puente que atraviesa un camino, lo tiene en estado de causar daño a los que transitan por él; y, 5. El que fabricare y pusiere en circulación productos, objetos o artefactos que, por defectos de elaboración o de construcción, causaren accidentes, responderá de los respectivos daños y perjuicios.”).*

3.61 Article 2236: Article 2236 of the Civil Code provides:

*“As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.”*

*(In the original Spanish: “Por regla general se concede acción popular en todos los casos de daño contingente que por imprudencia o negligencia de alguno amenace a personas indeterminadas. Pero si el daño amenazare solamente a personas determinadas, sólo alguna de éstas podrá intentar la acción.”).*

### ***K: The Ecuadorian Code of Civil Procedure***

3.62 Article 355(3): Article 355(3) of the Code of Civil Procedure (now re-numbered Article 346(3)) provides:

*“Substantive formalities which are common to all proceedings and instances, are:  
... 3. Legal capacity;”*

*(In the original Spanish: “Son solemnidades sustanciales comunes a todos los juicios e instancias: (...) 3. Legitimidad de personería;”).*

***L: The Environmental Management Act (EMA)***

3.63 *Article 1:* Article 1 of the Environmental Management Act 1999 provides:

*“This Act establishes the principles and guidelines for environmental policy, determines the obligations, responsibilities and levels of participation of the public and the private sectors in environmental management and indicates the permissible limits, controls and punishments in this field.”*

*(In the original Spanish: “La presente Ley establece los principios y directrices de política ambiental; determina las obligaciones, responsabilidades, niveles de participación de los sectores público y privado en la gestión ambiental y señala los límites permisibles, controles y sanciones en esta materia.”).*

3.64 *Article 2:* Article 2 of the Environmental Management Act 1999 provides:

*“Environmental management is subject to the principles of solidarity, mutual responsibility, cooperation, coordination, recycling and reutilization of waste, use of environmentally sustainable alternative technologies and respect for traditional cultures and practices.”*

*(In the original Spanish: “La gestión ambiental se sujeta a los principios de solidaridad, corresponsabilidad, cooperación, coordinación, reciclaje y reutilización de desechos, utilización de tecnologías alternativas ambientalmente sustentables y respecto a las culturas y prácticas tradicionales.”).*

3.65 *Article 41:* Article 41 of the Environmental Management Act 1999 provides:

*“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.”*

*(In the original Spanish: “Con el fin de proteger los derechos ambientales individuales o colectivos, concédese acción pública a las personas naturales, jurídicas o grupo humano para denunciar la violación de las normas de medio ambiente, sin perjuicios de la acción de amparo constitucional previsto en la Constitución Política de la República.”).*

3.66 *Article 42:* Article 42 of the Environmental Management Act 1999 provides:

*“Any individual, legal entity or human group can be heard in criminal, civil, or administrative proceedings filed for violations of an environmental nature, after posting a slander bond even if their own rights have not been violated.*

*The President of the Superior Court of the place where the harm to the environment occurred shall have jurisdiction to hear the actions that may be brought as a result of such harm. If the harm covers various jurisdictions, any of the presidents of the superior courts of those jurisdictions shall have jurisdiction.”*

*(In the original Spanish: Toda persona natural, jurídica o grupo humano podrá ser oída en los procesos penales, civiles o administrativos, previa fianza de calumnia, que se inicien por infracciones de carácter ambiental, aunque no haya sido vulnerados sus propios derechos.*

*El Presidente de la Corte Superior del lugar en que se produzca la afectación ambiental será el competente para conocer las acciones que se propongan a consecuencia de la misma. Si la afectación comprende varias jurisdicciones, la competencia corresponderá a cualquiera de los presidentes de las cortes superiores de esas jurisdicciones.”).*

3.67 *Article 43:* Article 43 of the Environmental Management Act 1999 provides:

*“The individuals, legal entities or human groups linked by a common interest and affected directly by the harmful act or omission may file before the court with jurisdiction actions for damages and for deterioration caused to health or the environment, including biodiversity and its constituent elements.*

*Without prejudice to any other legal actions that might be available, the judge shall order the party responsible for the damage to pay compensation in favor of the community directly affected and to repair the harm and damage caused. The judge shall also order the responsible party to pay ten percent (10%) of the value of the compensation in favor of the plaintiff.*

*Without prejudice to these payments, and in the event that the community directly affected cannot be identified or such community is the entire community, the judge shall order that payment of damages be made to the institution that performs the remediation work, in accordance with this law.*

*In any event, the judge shall determine in his ruling, in accordance with the experts’ reports that may be ordered, the amount required to remediate the damage caused and the amount to be given to the members of the community directly affected. The judge shall also determine the individual or legal entity that shall receive payment and perform the remediation work.*

*Claims for damages originating from harm to the environment shall be heard in verbal summary proceedings.”*

*(In the original Spanish: “Las personas naturales, jurídicas o grupos humanos, vinculados por un interés común y afectados directamente por la acción u omisión dañosa podrán interponer ante el Juez competente, acciones por daños y perjuicios*



y por el deterioro causado a la salud o al medio ambiente incluyendo la biodiversidad con sus elementos constitutivos.

*Sin perjuicio de las demás acciones legales a que hubiere lugar, el juez condenará al responsable de los daños al pago de indemnizaciones a favor de la colectividad directamente afectada y a la reparación de los daños y perjuicios ocasionados. Además condenará al responsable al pago del diez por ciento (10%) del valor que represente la indemnización a favor del accionante.*

*Sin perjuicio de dichos pagos y en caso de no ser identificable la comunidad directamente afectada o de constituir ésta el total de la comunidad, el juez ordenará que el pago que por reparación civil corresponda se efectúe a la institución que debe emprender las labores de reparación conforme a esta Ley.*

*En todo caso, el juez determinará en sentencia, conforme a los peritajes ordenados, el monto requerido para la reparación del daño producido y el monto a ser entregado a los integrantes de la comunidad directamente afectada. Establecerá además la persona natural o jurídica que deba recibir el pago y efectuar las labores de reparación.*

*Las demandas por daños y perjuicios originados por una afectación al ambiente, se tramitarán por la vía verbal sumaria.”).*

### **M: The Collusion Prosecution Act (CPA)**

3.68 *Article 1:* Article 1 of the Collusion Prosecution Act provides:

*“Any person who has suffered harm, in any way, by a collusive procedure or act, e.g., if he/she has been deprived of the ownership, possession or occupancy of a piece of real property, or of any right in rem of use, usufruct, occupancy, easement or antichresis over such piece of real property or other rights that are legally due to such person, may file an action before the civil and commercial judge of the domicile of any of the defendants.”*

*(In the original Spanish: El que mediante algún procedimiento o acto colusorio hubiere sido perjudicado en cualquier forma, como entre otros, en el caso de privársele del dominio, posesión o tenencia de algún inmueble, o de algún derecho real de uso, usufructo, habitación, servidumbre o anticresis constituido sobre un inmueble o de otros derechos que legalmente le competen, podrá acudir con su demanda ante la jueza o juez de lo civil y mercantil del domicilio de cualquiera de los demandados.”).*

3.69 *Article 5:* Article 5 of the Collusion Prosecution Act provides:

*“Once the conciliation hearing has taken place and if the proceedings continue, the judge shall grant a ten day period for evidence. The judge shall request the record of the proceedings where the collusion allegedly played a role, as well as that of*

*the associated proceedings, if any, and shall order, ex officio or at the request of the interested party, any evidence that deemed necessary for clarification of facts.*

*If the requested proceedings are ongoing, a copy shall be requested.”*

*(In the original Spanish: “Realizada la junta de conciliación, caso de continuarse el juicio, la jueza o juez concederá el término de diez días para la prueba; pedirá entonces el juicio en que se pretende haber incidido la colusión, y los procesos conexos, si los hubiere, y ordenará, de oficio o a petición de parte, las pruebas que estimare procedentes para el esclarecimiento de los hechos.*

*Si los procesos pedidos estuvieren en trámite, se ordenará conferir copia.”).*

3.70 Article 6: Article 6 of the Collusion Prosecution Act provides:

*“The judge shall issue the decision within a period of fifteen days. If the grounds for the claim are confirmed, measures to void the collusive proceeding will be issued, invalidating the act or acts, and contract or contracts affected by it, as the case may be, and redressing the harm caused, by restoring to the affected party the possession or holding of the property in question, or the enjoyment of the respective right, and, as a general matter, restoring the things to the state prior to the collusion.*

*If the lawsuit was brought also against judges and attorneys, and there is proof that they participated maliciously, the judge shall forward copies of the court file to the Judiciary Council to initiate proceedings for removal from office or suspension of the professional practice, as the case may be, without detriment to sentencing them to joint payment of compensation for damages.*

*Once the judgment becomes final and enforceable, the damages amount shall be liquidated by the trial court, in a separate record. Once the amount has been determined, it shall be collected by attachment order.”*

*(In the original Spanish: “La jueza o juez expedirá el fallo dentro del término de quince días. De encontrar fundada la demanda, se dictarán las medidas para que quede sin efecto el procedimiento colusorio, anulando el o los actos, contrato o contratos que estuvieren afectados por el, según el caso, y se reparen los daños y perjuicios ocasionados, restituyéndose al perjudicado la posesión o tenencia de los bienes de que se trate, o el goce del derecho respectivo, y, de manera general, reponiendo las cosas al estado anterior de la colusión.*

*Si la demanda se hubiere dirigido también contra los jueces y abogados, y se probare que han intervenido maliciosamente, la jueza o juez remitirá copias del expediente al Consejo de la Judicatura para que se inicien los expedientes de destitución o de suspensión del ejercicio profesional, según sea el caso, sin perjuicio de condenarlos, a unos y a otros, al pago solidario de los daños y perjuicios ocasionados.*

*Ejecutoriada la sentencia se liquidarán los daños y perjuicios ante el tribunal de primera instancia, en cuaderno separado. Determinado el monto, se lo cobrará con apremio real.”).*

3.71 *Article 7:* Article 7 of the Collusion Prosecution Act provides:

*“The affected party may bring a private criminal action seeking a punishment ranging from one month to a year of imprisonment for those responsible for the collusion. The statute of limitations period for such action shall begin on the day on which the judgment in civil proceedings became final and enforceable.”*

*(In the original Spanish: “El afectado podrá iniciar la correspondiente acción penal privada, para que se imponga a los responsables de la colusión la pena de un mes a un año de prisión por el cometimiento de la colusión. El plazo de prescripción de la acción comenzará a correr desde el día en que se ejecutorie la sentencia en el juicio civil.”).*



***PART IV***  
***THE FACTS AND OTHER MATTERS***

***A: Introduction***

- 4.1. In Parts IV, V and VI of this Award, the Tribunal considers the Claimants' allegations that several judges of the Lago Agrio Court misconducted and misdecided the Lago Agrio Litigation, in breach of the protections provided to the Claimants by the Treaty. The Tribunal considers, in particular, the Claimants' allegation that Judge Zambrano did not write the Lago Agrio Judgment of 14 February 2011 (with its Clarification Order of 4 March 2011); but, rather, that the Lago Agrio Judgment was 'ghostwritten', with Judge Zambrano's corrupt connivance, by certain of the Lago Agrio Plaintiffs' representatives.<sup>1</sup> In addition, the Tribunal considers the Claimants' allegations that the Respondent's Government improperly intervened in the Lago Agrio Litigation, also in breach of the protections provided to the Claimants by the Treaty.
- 4.2. These allegations are denied by the Respondent.
- 4.3. In this Part IV, as already indicated, the Tribunal addresses the evidence relevant to the issues regarding the alleged judicial misconduct, improper intervention by the Government and the 'ghostwriting' of the Lago Agrio Judgment. In Part V, the Tribunal addresses specific aspects of the Lago Agrio Judgment of 14 February 2011, the Lago Agrio Appellate Judgment of 3 January 2012,<sup>2</sup> the Cassation Court Judgment of 12 November 2013<sup>3</sup> and the Constitutional Court Judgment of 27 June 2018.<sup>4</sup> In Part VI, the Tribunal considers separately the forensic computer evidence adduced by the Parties' forensic expert witnesses in support of their respective cases as to the 'ghostwriting' of the Lago Agrio Judgment, including earlier orders issued by Judge Zambrano.
- 4.4. As regards the factual issues (including the expert and forensic issues), the Claimants bear the legal burden of proving the facts upon which they rely to support their claims,

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<sup>1</sup> C-931, C-1367 & R-1193.

<sup>2</sup> C-991 (see also the Clarification Order of 13 January 2012, C-2314).

<sup>3</sup> C-1975.

<sup>4</sup> C-2551.

under Article 24(1) of the UNCITRAL Arbitration Rules.<sup>5</sup> Whilst the evidential burden may shift from one side to the other depending on the evidence, it remains always for the Claimants to prove their positive case.

- 4.5. The Tribunal emphasises, at the outset, that the focus of its inquiry is the conduct of the Respondent acting through its judicial branch, in the form of the Lago Agrio Court, the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court, and through its executive branch. To that inquiry, the conduct of the Lago Agrio Plaintiffs' representatives is incidental, albeit relevant as part of the factual background to the conduct of the Respondent's Courts and Government.
- 4.6. Accordingly, the Tribunal does not rely upon the judgments of the New York Courts in the RICO Litigation, to which the Respondent was not a party and which bore no legal relationship to the Treaty on which the Tribunal must rest its jurisdiction and apply, as the applicable law, international law to the Parties' dispute in this arbitration under the Treaty.

***B: Evidential Sources***

- 4.7. The evidence of relevant factual materials is extensive, complicated and much disputed, taking place over several decades. The Tribunal has preferred to rely, where it can, upon contemporary written materials, rather than upon the unsupported oral testimony of certain witnesses who testified before this Tribunal and elsewhere. However, even this explanation is incomplete, particularly as regards three individuals: (i) Dr Zambrano; (ii) Mr Steven Donziger; (ii) certain of the Lago Agrio's other representatives in Ecuador and the USA; and (iv) Dr Alberta Guerra Bastidas.
- 4.8. (1) *Dr Zambrano*: Judge Zambrano issued procedural orders in the Lago Agrio Litigation during his two periods presiding over the Lago Agrio Litigation: (i) from October 2009 to March 2010 and (ii) from October 2010 to March 2011. He also delivered the Lago Agrio Judgment and its Clarification on 14 February and 4 March 2011 respectively.<sup>6</sup>

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<sup>5</sup> The text of Article 24(1) of the UNCITRAL Arbitration Rules is set out in Part III of this Award.

<sup>6</sup> C-931, C-971.

- 4.9. At the procedural meeting held with the Parties on 21 January 2014, the Tribunal indicated its concern to the Parties that very serious allegations were being made in this arbitration against Dr Zambrano (by then no longer a judge) in circumstances where he might not be called as a witness by any of the Parties. In that event, Dr Zambrano would not be afforded an opportunity to appear before the Tribunal, so as to testify in response to the allegations made against him as the Judge presiding over the Lago Agrio Litigation, first, from October 2009 to March 2010 and, second, from 11 October 2010 to 4 March 2011. In those circumstances the Tribunal stated that it would be appropriate for the Tribunal itself to extend an invitation to Dr Zambrano to attend, as a factual witness, the hearing then scheduled to take place at the World Bank in Washington D.C., USA from 21 April to 8 May 2015 (“the Track II Hearing”).
- 4.10. On 8 December 2014, the Claimants indicated that they wished to question Dr Zambrano at the Track II Hearing and asked whether “Ecuador would facilitate and ensure the appearance of Mr Zambrano at the hearing...”. By the Claimants’ subsequent list of witnesses contained in their letter dated 20 March 2015, the Claimants again confirmed their wish to question Dr Zambrano as a factual witness at the Track II Hearing. It was self-evident that the Claimants were not themselves in a position to call Dr Zambrano (being resident in Ecuador) as a witness at the Track II Hearing in the USA.
- 4.11. By letter dated 11 December 2014, the Office of the Attorney-General of Ecuador informed Dr Zambrano of: (i) the Tribunal’s invitation to him to attend the Track II Hearing to address the allegations made against him and (ii) the Claimants’ wish to question him during that Hearing. The Tribunal is satisfied that this information did reach Dr Zambrano personally; but there was no response from him to the Tribunal.
- 4.12. On 10 January 2015, the Office of the Attorney General of Ecuador sent a further letter repeating the Tribunal’s invitation. The Tribunal is satisfied that this information also reached Dr Zambrano personally; but there was again no response from him to the Tribunal.
- 4.13. By letter to the Tribunal dated 28 January 2015, the Respondent stated that Dr Zambrano was not under the control of the Respondent; that he was a part-time consultant for an Ecuadorian company (in Ecuador) in which the Government of Ecuador had an

ownership interest; but that neither the Office of the Attorney General nor the Respondent's outside counsel had any relations with Dr Zambrano.

- 4.14. The Claimants, by letter to the Tribunal dated 9 February 2015, contended that Dr Zambrano was under the Respondent's control and that the Respondent had the power to cause Dr Zambrano to appear at the Track II Hearing as a witness. The Claimants requested the Tribunal to draw adverse inferences against the Respondent in the event that Dr Zambrano should not give evidence at the Track II Hearing.
- 4.15. At the procedural meeting held with the Parties on 10 March 2015, the Tribunal noted that, in light of the judgment (then under appeal) of the United States District Court for the Southern District of New York in *Chevron Corporation v Stephen Donziger* (the "RICO Litigation" in New York),<sup>7</sup> it might be thought awkward for Dr Zambrano to attend the Track II Hearing in person in the USA. If so, the Tribunal was therefore minded, as a less preferred alternative, to invite Dr Zambrano to give evidence by video-link from Ecuador. The Parties' counsel indicated that they would need to take instructions from their respective clients on this proposal. The Claimants also noted that their immediate reaction was that it would not be possible to conduct a full cross-examination by video-link, not least because it would be necessary to provide Dr Zambrano with copies of all relevant documents on which the Claimants might wish to question him.
- 4.16. The Tribunal understood at this time that, without more, Dr Zambrano would not be a witness at the Track II Hearing.
- 4.17. In these circumstances, the Tribunal re-stated to the Parties its wish to hear Dr Zambrano's factual testimony, it at all possible. For that purpose, the Tribunal confirmed its invitation to Dr Zambrano as a witness to attend the Track II Hearing in person or, if that was not possible, to participate by video link from Ecuador. The Tribunal considered that, as a matter of basic fairness, Dr Zambrano should be given a reasonable opportunity to participate in the Track II Hearing as a witness (subject to questioning by the Parties and the Tribunal), so as to respond to the allegations made against him in this arbitration.

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<sup>7</sup> C-2135 and C-2136 (the "RICO Judgment").



- 4.18. The Tribunal therefore decided, as recorded in its Procedural Order No. 33 of 27 March 2015, that the Tribunal would invite Dr Zambrano itself, directly, to attend the Track II Hearing as a factual witness either (preferably) in person at the World Bank in Washington DC, USA or (in the less preferred alternative) via video-link from Ecuador from an appropriate place convenient for Dr Zambrano and the PCA. A draft of the Tribunal's proposed letter to Dr Zambrano to this effect was attached as Annex A to this Procedural Order, in Spanish and English translation, as to which the Parties' comments were invited.
- 4.19. The Tribunal also decided that: Dr Zambrano should be free to accept or refuse the Tribunal's invitation, as he wished, without any interference from the Parties; in the event that Dr Zambrano accepted the Tribunal's invitation to testify, the Parties should do everything in their power to facilitate his participation as a factual witness during the Track II Hearing; the reasonable costs of Dr Zambrano's participation, whether it be in person or by video-link, should be paid by the PCA out of the Parties' deposits held by the PCA; and the date(s) and format of Dr Zambrano's participation during the Track II Hearing would be specified later by the Tribunal, following consultations with Dr Zambrano and the Parties.
- 4.20. In the event that Dr Zambrano decided to attend the Track II Hearing via video-link only, the Tribunal decided that: the Parties should by a date to be specified later by the Tribunal (following further consultation with the Parties) compile an electronic file containing copies of any documents on which they wished to question Dr Zambrano and transmit that file to the PCA; a representative of the PCA would travel to Ecuador in order to provide Dr Zambrano with copies of the documents so identified and to provide any assistance to Dr Zambrano that he might require during the video conference; the Parties and the Tribunal could question Dr Zambrano during the video conference from the Hearing at the World Bank; no representative of any Party should be present with Dr Zambrano in Ecuador; the PCA would liaise directly with Dr Zambrano in relation to the location and other arrangements for the video conference and would ensure that all necessary logistical arrangements were in place; and the Tribunal would make a further procedural order following consultations with the Parties to regulate the procedure for the video conference.

- 4.21. By letter dated 1 April 2015, at the Tribunal’s direction, the PCA sent the following letter to Dr Zambrano, enclosing the Tribunal’s written invitation to testify as a witness at the Track II Hearing, in Spanish (Dr Zambrano does not know English):

*“Estimado Dr. Zambrano:*

*Me pongo en contacto con Ud. en mi capacidad de Secretario del Tribunal en el caso CPA N° 2009-23: “Chevron Corporation y Texaco Petroleum Company c. República del Ecuador” con el fin de hacerle llegar una comunicación del Señor V.V. Veeder, Presidente del Tribunal Arbitral en dicho procedimiento, invitándole a participar en una audiencia que tendrá lugar del 21 de abril al 5 de mayo de 2015 en la sede del Banco Mundial en Washington DC, EE.UU. A tales efectos, ruego sírvase encontrar adjunta a continuación copia de la misma.*

*Para el caso en que decida aceptar la invitación del Tribunal para participar en esta audiencia, le ruego se ponga en contacto conmigo en la mayor brevedad en los siguientes contactos: [The Tribunal’s Secretary, the PCA with full contact details supplied].*

*Le ruego, a este efecto, que me avise a más tardar el viernes 10 de abril de 2015 si aceptará la invitación del Tribunal, ya que después de esta fecha no será posible tomar los arreglos necesarios para su participación.*

*Desde ya le agradezco su atención para con este tema y no dude contactar conmigo para cualquier pregunta que le surja en relación con esta carta. Muy atentamente, Martín Doe Rodríguez ... ”<sup>8</sup>*

- 4.22. The Tribunal’s enclosed invitation read:

*“Estimado Dr. Zambrano,*

*Como tal vez ya sea de su conocimiento, Chevron Corporation y Texaco Petroleum Company (las “Demandantes”) iniciaron en 2009 un arbitraje internacional frente a la Corte Permanente de Arbitraje en la Haya (la “CPA”) bajo el Reglamento de Arbitraje de la CNUDMI en contra del Estado de Ecuador como Demandada de*

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<sup>8</sup> In English: “Dear Dr Zambrano, I reach out to you in my capacity as Secretary to the Tribunal in PCA Case No. 2009-23: Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador to convey a communication from Mr V.V.Veeder, President of the Arbitral Tribunal in said proceeding, inviting you to participate in a hearing that will take place between 21 April and 5 May 2015 at the World Bank headquarters in Washington DC, U.S.A. Please find attached a copy of said communication. In the event that you decide to accept the Tribunal’s invitation to participate in this hearing, I invite you to promptly contact me at the following coordinates: [The Tribunal’s Secretary, the PCA with full contact details supplied]. I would be grateful, in this regard, if you could let me know by Friday, 10 April 2015 whether you will accept the Tribunal’s invitation, as it will not be possible to make all the necessary arrangements for your participation past that date. I am very grateful for your attention on this matter at this stage and do not hesitate to contact me for any questions that you may have in connection with this letter. Kind regards, Martin Doe Rodríguez”.

*acuerdo con un Tratado entre Ecuador y los Estados Unidos de América (el “Tratado”).*

*Le escribimos a usted en nuestra capacidad de Tribunal Arbitral nombrado de acuerdo con el Tratado para decidir la disputa entre las Demandantes y la Demandada.*

*En este procedimiento arbitral, las Demandantes alegan que la Demandada ha violado sus obligaciones de derecho internacional, inter alia, a través de las acciones y omisiones del Poder Judicial ecuatoriano durante el caso de Lago Agrio. La Demandada niega las alegaciones de las Demandantes y se opone a la base legal jurisdiccional para las demandas de las Demandantes bajo el Tratado.*

*Se celebrará con las Demandantes y la Demandada una audiencia en este arbitraje que tendrá lugar en el Banco Mundial en Washington DC, EE.UU. del 21 de abril al 5 de mayo de 2015.*

*Si fuera del todo posible, el Tribunal Arbitral quisiera recibir su testimonio sobre los hechos del caso. Por este motivo, el Tribunal le invita a presentarse como testigo en esta audiencia, o si eso no fuera posible, que participe por medio de una videoconferencia.*

*Si acepta esta invitación, la CPA se encargará de los arreglos necesarios para su participación, incluyendo para cubrir sus gastos razonables.*

*El Tribunal ha informado a ambas las Demandantes y la Demandada de su intención de extenderle esta invitación y las Partes no han planteado ninguna objeción al respecto.*

*Esperamos su pronta respuesta, antes del viernes 10 de abril de 2015.*

*Atentamente, [The President of the Tribunal].”<sup>9</sup>*

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<sup>9</sup> In English: “Dear Dr Zambrano, As you will be aware, Chevron Corporation and Texaco Petroleum Company (the “Claimants”) have commenced an international arbitration before the Permanent Court of Arbitration at The Hague (the “PCA”) under the UNCITRAL Arbitration Rules against the State of Ecuador as the Respondent, pursuant to a Treaty between Ecuador and the United States of America (the “Treaty”). We write to you as the Arbitration Tribunal appointed under the Treaty to decide the dispute between the Claimants and the Respondent. In this arbitration, the Claimants allege that the Respondent breached its obligations under international law by, inter alia, the actions and omissions of the Respondent’s judicial branch during the Lago Agrio Litigation. The Respondent denies the Claimants’ allegations and also objects to the jurisdictional basis for the Claimants’ claims under the Treaty. There is to be an oral hearing in this arbitration to take place with the Claimants and the Respondent at the World Bank in Washington DC, USA from 21 April to 8 May 2015. The Arbitral Tribunal would wish to hear your factual testimony, if at all possible. For that purpose the Tribunal invites you as a witness to attend this hearing or, if that is not possible, to participate by video link. In the event of your accepting this invitation, the PCA will make further arrangements for your participation, including provision for your reasonable expenses. This invitation is made by the Arbitration Tribunal with the support of both the Claimants and the Respondent. We look forward to your early response, but no later than 7 April 2015. Yours etc.”.

- 4.23. At the procedural meeting held with the Parties on 8 April 2015, the Tribunal reported that the above correspondence had been delivered to Dr Zambrano in Manta, Ecuador, as confirmed by the courier's receipt signed for Dr Zambrano on 7 April 2015.<sup>10</sup> The Tribunal is satisfied that this correspondence reached Dr Zambrano personally; but there was again no response from him to the Tribunal.
- 4.24. The Tribunal regrets that Dr Zambrano did not testify before this Tribunal. The Tribunal recognises, however, that it was his right to choose not to do so. Further, on the materials available in this arbitration, the Tribunal accepts, as submitted by the Respondent, that his choice was not induced by the Respondent. In these circumstances, the Tribunal does not think it appropriate to draw any adverse inference against the Respondent, as requested by the Claimants, for Dr Zambrano's absence as a witness in this arbitration.
- 4.25. Dr Zambrano did testify, on oath, in the RICO Litigation, before the United States District Court for the Southern District of New York (Judge Kaplan). His testimony, in the form of a statement, deposition and trial testimony, is available to this Tribunal as evidence by agreement of the Parties (as submitted by the Parties with their respective written pleadings).<sup>11</sup> The Tribunal has made extensive use of it.
- 4.26. (2) *Mr Donziger*: Mr Steven Donziger is not an Ecuadorian lawyer or a citizen of Ecuador; nor is he to be regarded as an agent (or organ) of the Respondent for the purpose of attribution under international law. He is a citizen of the USA, resident in New York and a member of the New York Bar (currently suspended). For many years, since at least 1993, he acted as a representative of the Aguinda Plaintiffs first in the Aguinda Litigation in New York and, subsequently, of the Lago Agrio Plaintiffs in the Lago Agrio Litigation in Ecuador. He is Spanish-speaking.
- 4.27. The Tribunal would have wished to hear Mr Donziger testify personally in this arbitration. Mr Donziger was an important actor in the Lago Agrio Litigation leading up to the Lago Agrio Judgment and Clarification Order. However, it soon became apparent to the Tribunal that Mr Donziger would not be called as a witness by any Party to this arbitration. Nor was he. Moreover, as the principal defendant in the RICO Litigation brought by Chevron in New York, Mr Donziger clearly had other more pressing

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<sup>10</sup> Transcript of the Procedural Meeting of 8 April 2015, p. 6; DHL Tracking Receipt for Waybill 4385719144.

<sup>11</sup> See the Tribunal's Procedural Order 45, para 5, and the Respondent's email message dated 31 August 2016 to the Tribunal.

personal priorities than assisting this Tribunal as a witness. It was therefore pointless for the Tribunal itself to extend an invitation to him to testify at the Track II Hearing. Further, Mr Donziger was afforded a full opportunity to defend himself against Chevron's allegations of 'ghostwriting' and other improper conduct in the RICO Litigation.

- 4.28. Mr Donziger did testify at length, on oath, in the RICO Litigation in New York. His testimony, in the form of depositions and trial testimony, is available to this Tribunal with the Parties' agreement (also, as submitted by the Parties with their respective written pleadings).<sup>12</sup> As with Dr Zambrano's testimony, the Tribunal has made extensive use of it.<sup>13</sup>
- 4.29. The Tribunal has also made extensive use of Mr Donziger's personal notebook (or "diary"). This was originally a private document written by Mr Donziger for his own personal use only. It was disclosed by Mr Donziger to Chevron under court orders in the US Section 1782 and RICO Litigation brought by Chevron against Mr Donziger, along with his private email correspondence and computer hard drives. As a resident of New York, Mr Donziger was (and remains) subject to the jurisdiction of the courts of the USA.
- 4.30. The Tribunal has made use of Mr Donziger's diary and emails with caution. What is written in a private diary and also in private emails to close colleagues cannot always be taken literally by third persons, long after the event. In the Tribunal's view, even the starkest statement has to be assessed in context and in the light of other circumstances prevailing at the time.
- 4.31. There is a further qualification. By October 2010, Mr Donziger's emails and computers in the USA had been seized by Chevron under orders from US Courts. Thereafter, if not months before, the form and content of communications between Mr Donziger in New York and his colleagues in Ecuador doubtless underwent a precautionary change.

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<sup>12</sup> Again, see the Tribunal's Procedural Order 45, para 5, and the Respondent's email message dated 31 August 2016 to the Tribunal.

<sup>13</sup> The Tribunal has not made use of the full materials in the RICO Litigation, said to be 3,750 exhibits totaling more than 82,800 pages, a 2,970 page transcript of the trial, 1,033 pages of written direct testimony and 7,340 pages of depositions. The Respondent recorded an objection to the Claimants' late submission of these full materials, which was accepted by the Tribunal.

- 4.32. Even earlier, in his email to Mr Donziger of 30 March 2010, Mr Prieto (one of the Lago Agrio Plaintiffs' representatives in Ecuador) had already expressed grave concerns about 'going to jail' because of email disclosures to Chevron likely to be ordered by the US Courts in the US Section 1782 Litigation (see the chronology below). Even before any court orders for such disclosure, certain of the Lago Agrio Plaintiffs' representatives had resorted to using code-words in their email messages to each other (see also the chronology below). It follows that the content of certain emails from at least October 2010 onwards is likely to have been tailored by certain of these representatives, if email was used by them for certain purposes at all.
- 4.33. As regards both Mr Donziger and other representatives of the Lago Agrio Plaintiffs, the Tribunal has made extensive use of the offcuts from the documentary film "Crude". These offcuts were never intended to be made public. As described further below, these offcuts (totalling about 600 hours of video film) were disclosed to Chevron under court orders in the US Section 1782 Litigation brought by Chevron against the film's director, Mr Joseph Berlinger.<sup>14</sup>
- 4.34. (3) *The Lago Agrio Plaintiffs' Representatives*: The Lago Agrio Plaintiffs' representatives and legal advisers, at different times, included Mr Norman Alberto Wray (a senior Ecuadorian lawyer and former judge of the Ecuadorian Supreme Court), Mr Cristóbal Bonifaz (of Amherst, MA, USA), Mr Pablo Fajardo Mendoza (from 2005), Mr Juan Pablo Sáenz, Mr Julio Prieto Méndez, Mr Alejandro Ponce Villacis, Mr Luís Yanza (a director of the "Frente de Defensa La Amazonia" or "Frente" and, in English, the "Amazon Defence Front" or "ADF"), Mr Icocha Manuel Tegautal, Mr Joseph Kohn (of Kohn, Swift & Graf, Philadelphia, PA, USA); Patton Boggs (a law firm in Washington DC, USA from about August 2010) and, as already indicated, Mr Donziger. The funding for such legal representation came principally from Mr Kohn (until 2010), Mr Russell DeLeon,<sup>15</sup> Patton Boggs and (from 2010) Burford Capital, in return for success fees calculated on recoveries from Chevron upon the eventual enforcement of the Lago Agrio Judgment. Other non-party funders appear to have become involved in the Lago Agrio Judgment's enforcement proceedings outside Ecuador.

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<sup>14</sup> C-649, C-359.

<sup>15</sup> Mr DeLeon also partly financed the making of the documentary film "Crude" directed by Mr Joseph Berlinger.

- 4.35. As regards the Lago Agrio Plaintiffs’ representatives in Ecuador, especially Mr Fajardo, Mr Sáenz, Mr Prieto and Mr Yanza,<sup>16</sup> there is little evidence in this arbitration of what they said and did other than what is recorded in the “Crude” off-cuts and their written communications to and from Mr Donziger, as disclosed to Chevron in the US 1782 and RICO Litigation. Details of several significant events and relevant materials within Ecuador are therefore missing from the evidence adduced by the Parties in this arbitration. None of these individuals gave evidence in the RICO Litigation; they are not subject to the jurisdiction of the courts of the USA; and it was not in the power of this Tribunal or the Parties to compel their attendance as witnesses in these arbitration proceedings. Amongst this group, the leading figure in the Lago Agrio Litigation was Mr Fajardo, an Ecuadorian lawyer of conspicuous ability and industry who worked closely with Mr Donziger.
- 4.36. (4) *Dr Guerra*: Dr Alberto Guerra Bastidas testified under oath at the Track II Hearing, called by the Claimants, cross-examined by the Respondent and questioned by the Tribunal.<sup>17</sup> The Respondent strongly impugned his credibility as a witness. Dr Guerra also testified under oath in the RICO Litigation and at the RICO trial in New York, where he was deposed and also cross-examined.<sup>18</sup> Dr Guerra’s testimony in the form of his several written witness statements, depositions and oral testimony was adduced by the Claimants in this arbitration.
- 4.37. In the Tribunal’s view, particular caution is required in assessing Dr Guerra’s testimony. In the past, Dr Guerra has conducted himself with less than probity. For the present, whilst the Claimants have taken steps to protect the integrity of his testimony (in this and other related legal proceedings), there exists still a risk that Dr Guerra could colour his testimony to favour the Claimants as his benefactors during his exile from Ecuador.
- 4.38. Yet, whatever happened in the past and however great that incentive might be, having seen and heard him in person subject to vigorous cross-examination by the Respondent, the Tribunal considers that Dr Guerra was a witness of truth in his testimony at the Track

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<sup>16</sup> These and other individuals are described in the Selected Dramatis Personae above at page xiii.

<sup>17</sup> Track II Hearing D3.593-758; D4.852-900. Dr Guerra was also deposed by the Respondent in this arbitration on 5 November 2013, R-907. He testified at the RICO trial on 23-25 October 2013 (C-1978).

<sup>18</sup> Dr Guerra’s written testimony before the Track II Hearing comprises his declaration of 17 November 2012, C-1616a; his first supplemental declaration of 13 January 2013, C-1648; his second supplemental declaration of 11 April 2013, R-1331 & C-1828; his witness statement of 9 October 2013, C-2358 & C-2386; and his RICO deposition of 2 May 2013, R-906 and C-1888.

II Hearing. The Tribunal has therefore relied upon his testimony where it can be corroborated by other evidence, at least in part. The Tribunal also notes that, in one material respect regarding the conduct of Respondent's executive branch towards the Lago Agrio Litigation, Dr Guerra gave evidence at the Track II Hearing that unequivocally supported the Respondent's case (to which the Tribunal returns below).

***C: Ecuador's Oriente and its Inhabitants***

- 4.39. The Oriente area of Ecuador is situated in the eastern part of the country, within the Amazon basin, bordering on Columbia (to the north) and Peru (to the south). In describing the Oriente and its inhabitants, the Tribunal can do no better than to cite the work of Professor Kimerling and her colleagues in *Amazon Crude*, written more than 25 years ago (with footnotes here omitted):<sup>19</sup>

*“The tropical forests of the Oriente are among the most biologically diverse natural ecosystems on earth - a treasure trove of rare and unique species and a potential source of medicines, fruits, nuts, and other forest foods and products. Ecuador's ancient rain forests lie at the headwaters of the Amazon River system and help control flooding and erosion, even in the river's lower reaches. The Oriente's forests also help regulate the region's rainfall and climate. The forest is a storehouse of carbon. When it is burned or cleared, carbon dioxide is released into the atmosphere, heightening the potential for global warming. The rain forests of the Oriente are also home to the region's indigenous peoples who depend on the forest for their livelihoods. Without the forest, Amazonian peoples would be threatened with cultural and, in some cases, physical extinction ...”.*

*“Ecuador's Oriente has a rich heritage of indigenous cultures and is home to eight groups of indigenous people. Estimates of the Oriente's indigenous population range from 90,000 to 250,000 – 25 to 50 percent [of] the region's total population. Two groups, the Quichua and the Shuar, together account for the great majority of indigenous people in the Oriente. The balance of the population is found among the Achuar, Cofan, Huaorani, Shiwiar, Secoya, and Siona. The Huaorani number roughly 1,580 individuals, the Shiwiar some 600, and together the Secoya and Siona number about 350. The Cofan population, once 15,000, is now approximately 300 [citation omitted].”*

*“Indigenous peoples have lived in Amazonia for thousands of years in harmony with their rain forest environment. Since the Spanish arrived in Ecuador nearly 500 years ago, the Oriente has been a magnet for fortune-seekers and missionaries. Spanish adventurers first entered upper Amazonia in what is now Ecuador, and the first mission bases were established there in the sixteenth century. It was not until the rubber extraction boom began in the late 1800s, however, that dreams of easy wealth first came true in Amazonia. A handful of 'rubber barons' became rich, but*

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<sup>19</sup> R-473, pp. 33-34.



*at great expense to the people. Their atrocities throughout Amazonia are well-documented. Thousands of indigenous people in Ecuador, Peru, and Colombia were killed [citation omitted]. The boom ended in the early 1900s, when rubber seeds were smuggled out of Brazil and successfully cultivated on plantations in Malaysia.”*

- 4.40. This case concerns only a part of Ecuador’s Oriente, a former concession area in the north-east close to the Colombian border, near the town of Lago Agrio in the Province of Sucumbíos (see the map in Annex 6 to this Part IV below).

***D: Ecuador’s Government and Judiciary***

- 4.41. (1) *The Ecuadorian Government:* From 1964 onwards, Ecuador had a succession of governments of different political and economic persuasions. In February 1964, when the 1964 Concession Agreement was executed, Ecuador was governed by a military junta. It was succeeded by another military junta. In 1969, President José Ibarra became the President of Ecuador. In 1972, a military junta took power in Ecuador under General Guillermo Rodríguez Lara. During this régime, the 1973 Concession Agreement was executed.
- 4.42. In 1979, President Jaime Roldós Aguilera took office as the President of Ecuador, succeeded (on President Roldós’ death) by President Osvaldo Hurtado Larrea in 1981. In 1984, President León Febres Cordero Rivadeneira took office as President of Ecuador, followed in 1988 by President Rodrigo Borja Cevallo and in 1992 by President Sixto Durán Ballén. During this régime, the Aguinda Litigation was commenced in New York in 1993; and the 1995 Settlement Agreement was executed, as also the 1995 Remedial Action Plan.
- 4.43. In 1996, President Abdalá Bucaram took office as President of Ecuador, later (in February 1997) removed from office by the Congress and succeeded by an interim presidency, that included President Fabian Alarcón. In 1998, President Jamil Mahuad took office as the President of Ecuador, later forced into exile by a military coup in January 2000. During these régimes, the 1998 Final Release was executed.
- 4.44. In 2002, President Lucio Gutiérrez took office as the President of Ecuador, but was later removed from office by the Congress in 2005 and succeeded by an interim presidency under President Alfredo Palacio. During the early part of this régime, the Lago Agrio Litigation was commenced in Ecuador in 2003.

- 4.45. In January 2007, President Rafael Correa took office as the President of Ecuador, being re-elected in 2009 and 2013. During this régime, the Lago Agrio Court, the Lago Agrio Appellate Court and the Cassation Court issued their respective judgments in 2011, 2012 and 2013 respectively. President Correa had left office (in 2017) at the time of the Constitutional Court’s Judgment (2018).
- 4.46. Until recently, at least, Ecuador was a country marked by political, economic and institutional instability that began long before President Correa’s election in 2007.
- 4.47. The Claimants’ case, as regards the Respondent’s executive branch, is directed principally at President Correa and his political administration during the period from 2007 onwards, during the pendency of the Lago Agrio Litigation.
- 4.48. (2) *The Ecuadorian Judiciary*: The relevant court in the Oriente, the Sucumbíos Provincial Court of Justice of Nueva Loja in Lago Agrio (the “Lago Agrio Court”), operated on a meagre budget under a swift succession of presiding judges responsible for the Lago Agrio Litigation. It was not designed for and had never previously experienced any case of the size, duration, complexity and controversy comparable to the Lago Agrio Litigation. At the Track II Hearing, the Respondent’s Counsel stated that the Lago Agrio Litigation grew to become 2,000 times the size of the typical Ecuadorian lawsuit.<sup>20</sup>
- 4.49. The Lago Agrio Litigation was heard by the Lago Agrio Court before a succession of Lago Agrio Judges between May 2003 and March 2011, a period of almost eight years; namely: (i) Judge Guerra (13 May 2003 – 3 February 2004), (ii) Judge Novillo (4 February 2004 – 1 February 2006), (iii) Judge Yáñez (2 February 2006 – 2 October 2007), (iv) Judge Novillo, again (3 October 2007 – 24 August 2008), (v) Judge Núñez (25 August 2008 – 20 October 2009), (vi) Judge Zambrano (21 October 2009 – 11 March 2010), (vii) Judge Ordóñez (12 March 2010 – 10 October 2010) and lastly (viii), Judge Zambrano, again (11 October 2010 – 29 February 2011). It was Judge Zambrano who issued the Lago Agrio Judgment and its Clarifying Order on 14 February 2011 and 4 March 2011 respectively.

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<sup>20</sup> Track II Hearing D1.327.

- 4.50. Judges Núñez and Judge Ordóñez were recused as judges in the Lago Agrio Litigation, respectively in August 2009 and October 2010. Unconnected with the Lago Agrio Litigation, Judge Guerra was dismissed from the Ecuadorian judiciary in May 2008. In 2012, also unconnected with the Lago Agrio Litigation, one year after the Lago Agrio Judgment, Judge Zambrano was also dismissed from the Ecuadorian judiciary.
- 4.51. The Claimants' case, as regards the Ecuadorian judiciary, is directed principally at Judge Zambrano during the two periods when he presided over the Lago Agrio Litigation, from (i) October 2009 to March 2010 and (ii) October 2010 to March 2011.
- 4.52. It is necessary to note that the Lago Agrio Court operated on limited resources. From his time as a judge of the Lago Agrio Court, Dr Guerra gave, as an example, the fact that even court seals had to be procured by the judge or clerk using their own money.<sup>21</sup> The Tribunal also notes that Judge Zambrano had personally to arrange for a temporary student secretary, ostensibly at his own immediate expense, whilst presiding over the Lago Agrio Litigation. He had no law clerk or legal assistant.
- 4.53. More generally, the Tribunal also refers to part of the statement made by the Respondent's Attorney-General at the Jurisdictional Hearing, as recorded in its Third Interim Award. There, the Attorney-General stated (as translated into English):<sup>22</sup>

*“... As a first point, I would like to talk about the present justice system in Ecuador. In the year 2008, the latest Constitutional Assembly in Ecuador as an expression of sovereign expression of the Ecuadorian nation approved the new Constitution that rules our country at the moment ...*

*In terms of the justice administration, the new Constitution consolidated previous efforts of the judicial reform of Nineties. Although still we are not in the position that we would like to be, we are achieving important progress in this ambit. First of all, we have to concentrate the existence of Courts and other Tribunals to marginal places allowing better access to justice. [Secondly,] There is an improvement in justice efficiency in relation to the number of cases that are resolved. Thirdly, we have achieved greater transparency and publicity in terms of the activities of the judiciary; and, fourthly, we have developed norms that rules behaviour of judges and lawyers.*

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<sup>21</sup> Track II Hearing D3.645.

<sup>22</sup> Third Interim Award, pp. 73ff.

*In this way, in our system of justice is an improvement. There is advancement. We continuously improve trying to achieve high standards, standards of efficiency for the benefit of the Ecuadorian society.*

*... I accepted my designation, and I have done my job as Procurador of the State of the Republic of Ecuador convinced and respectful of the autonomy of the functions of the State because I am convinced of the independency of the justice system of my country and the process of change. But by the same token I am very conscious of the difficult problems affecting our systems still. We still have delays in processes in front of our courts. We have complaints against dishonest Courts, and we have problems of salaries for judges and magistrates and lawyers. But I am conscious of our problems.*

*... We know our deficiencies, but we are working to correct them.”*

- 4.54. There was another factor especially relevant to Judge Zambrano: Judge Zambrano was not experienced in handling and deciding civil cases, let alone large and complex cases.

***E: The 1964 and 1973 Concessions***

- 4.55. On 21 February 1964, the Respondent granted oil exploration and production rights in Ecuador’s Oriente region to TexPet (a subsidiary of Texaco) and the Ecuadorian Gulf Oil Company (a subsidiary of Gulf) under a written concession made with these companies’ local subsidiaries operating as a Consortium (“the 1964 Concession Agreement”).<sup>23</sup> TexPet was the “Operator” for the Consortium under the Texaco-Gulf Joint Operating Agreement of 1 January 1965.<sup>24</sup>
- 4.56. In 1967, the Consortium discovered significant deposits of crude oil in the Oriente and drilled its first wells. By 1969, the Consortium had found considerable reserves of crude oil.
- 4.57. By 1972, the Consortium had developed nine oil fields and constructed an oil pipeline over the Andes to the Pacific coast (the “SOTE” pipeline).
- 4.58. On 6 August 1973, the Respondent, TexPet and Gulf entered into a further concession agreement with a term expiring on 6 June 1992 (“the 1973 Concession Agreement”).<sup>25</sup> It was also agreed (inter alia) to grant an option to acquire an interest in the Consortium

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<sup>23</sup> C-6.

<sup>24</sup> C-409.

<sup>25</sup> C-7.

to the Ecuadorian State Oil Corporation, CEPE (abbreviated from Corporacion Estatal Petrolera Ecuatoriana, later succeeded by PetroEcuador).<sup>26</sup>

- 4.59. The 1973 Concession Agreement imposed environmental and related obligations on the Contractors (TexPet and Gulf) and the Operator (TexPet). Pursuant to Section 46.1 (Preservation of Natural Resources), the Contractors “shall adopt all convenient measures for the preservation of the flora, fauna and other natural resources, and they all [shall] also refrain from polluting water courses, the atmosphere and the soil, under supervision of the relevant Government agencies.” Section 51.1 provided: “Upon termination of this contract as a result of the expiration of its term ..., the contractors shall deliver to CEPE, for no consideration and in good production conditions, all the commercially exploitable hydrocarbon reserves, any wells in activity at that moment, ... and any other real and personal property that [they] acquired in connection with this contract, provided that all such property shall be in good condition.” Section 40.1 provided: “The contractors shall use modern and efficient machinery, and they shall use the most adequate technology and methods in their activities so as to obtain the highest productivity in the exploitation of deposits, observing at all times the reserve preservation policy laid out by the Government...”
- 4.60. In 1974, CEPE (PetroEcuador) exercised its option under the 1973 Concession Agreement, thereby acquiring a 25% stake in the Consortium.<sup>27</sup> TexPet and Gulf each retained a 37.5% interest in the Consortium.
- 4.61. On 21 December 1976: CEPE (PetroEcuador) acquired Gulf’s remaining interest, thereby owning a 62.5% interest in the Consortium. (TexPet retained its 37.5% minority interest until the Consortium ended in 1992).<sup>28</sup>
- 4.62. On 30 June 1990, TexPet ceased to act as the “Operator” under the 1973 Concession Agreement, after 25 years (1965 to 1990). From 1 July 1990 onwards, PetroEcuador (by its subsidiary, Petroamazonas) became the “Operator” under the 1973 Concession Agreement.<sup>29</sup> TexPet, as an Operator, left the Oriente in 1990.

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<sup>26</sup> C-7, Articles 4, 28 & 29.

<sup>27</sup> C-417.

<sup>28</sup> C-8.

<sup>29</sup> C-418.

- 4.63. On 6 June 1992, the term of the 1973 Concession Agreement expired. TexPet, as a Contractor, left Ecuador. There was then no longer any presence by TexPet in the concession area or Ecuador in any capacity. Texaco (TexPet's parent company) was itself never active in the concession area. Nor was Chevron at any time, before or after 1992, engaged in activities in the concession area. (Chevron only became TexPet's ultimate parent some ten years later, after the "merger" between Texaco and Chevron in 2001).
- 4.64. As at 1992, the Consortium with, as Operator TexPet (from 1965 to 1990) and CEPE/PetroEcuador (from 1990 to 1992), had developed within the concession area 16 production fields, with 321 wells, 18 production stations, 6 base camps and hundreds of miles of associated pipelines, together with the SOTE pipeline over the Andes. The Consortium's activities had generated about US\$ 23.3 billion in revenues, of which about US\$ 22.67 billion (97.3%) was received by the Respondent in the form of income taxes, royalties, contribution for domestic consumption and gross profit on PetroEcuador's share in the Consortium.<sup>30</sup> TexPet itself had received about US\$ 480 million in revenues.<sup>31</sup> The Consortium had helped to make Ecuador the second largest oil exporter in Latin America (after Venezuela), doubling Ecuador's per capita GDP, but making its national budget heavily dependent on oil revenues.
- 4.65. From 1992 to 2008, after TexPet's departure from Ecuador, PetroEcuador's subsequent operations in the area of the former concession in the Oriente generated about 1.2 billion barrels of crude oil, representing a market value of about US\$ 57 billion.<sup>32</sup>
- 4.66. The 1995 Settlement Agreement,<sup>33</sup> the 1995 Remedial Action Plan<sup>34</sup> and the 1998 Final Release<sup>35</sup> addressed environmental issues arising from the 1964 and 1973 Concession Agreements. The Settlement Agreement was signed for TexPet by its Vice-President, Mr Ricardo Reis Veiga and by its legal representative, Dr Rodrigo Pérez Pallares. The 1995 Remedial Action Plan was signed for TexPet by Mr Veiga. The 1998 Final Release was signed for TexPet by Mr Veiga and Dr Pérez.

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<sup>30</sup> Kaczmarek ER1, Table 1 and para 84.

<sup>31</sup> Kaczmarek ER1, para 84, Figure 5.

<sup>32</sup> C-436, pp. 1 & 7.

<sup>33</sup> C-23.

<sup>34</sup> R-610.

<sup>35</sup> C-53.

- 4.67. To perform the remediation work for environmental damage under the 1995 Settlement Agreement, TexPet selected Woodward-Clyde, a well-known engineering firm specialising in environmental remediation. Woodward-Clyde prepared the Remedial Action Plan in accordance with the 1995 Settlement Agreement. The Plan identified the specific pits at each site that required remediation and the remedial action to be taken at each site. In September 1995, the Respondent, PetroEcuador, TexPet and Woodward-Clyde approved the Remedial Action Plan. Between October 1995 and September 1998, Woodward-Clyde conducted the remediation required by the 1995 Settlement Agreement and the 1995 Remedial Action Plan (at TexPet's expense).
- 4.68. In all, TexPet spent approximately US\$ 40 million on environmental remediation and community development in Ecuador under the 1995 Settlement Agreement and the Remedial Action Plan (together with the 1996 Municipal and Provincial Releases).
- 4.69. On 30 September 1998, the Respondent, PetroEcuador and TexPet signed the Final Release (the "Acta Final"), certifying that TexPet had performed all its obligations under the 1995 Settlement Agreement.
- 4.70. In its Third Interim Award, First Partial Award and Decision in this arbitration, the Tribunal has already considered at some length and made certain decisions upon the meaning and effect of the 1995 Settlement Agreement. It is unnecessary to repeat those decisions here, which remain in effect (see Annex 1 to Part 1 for the Operative Parts of the Third Interim Award, First Partial Award and Decision).

***F: Crude Oil Pollution in the Oriente***

- 4.71. There is today crude oil pollution in the former concession area of the Oriente, including pollution lying close to human habitation. The Tribunal has seen such pollution, albeit only briefly during its site-visit to four sites in the former concession area in June 2015.<sup>36</sup> More significantly, the fact of such pollution has never been denied by the Claimants themselves. Rather, the technical and legal issues concern the nature, effect, timing and cause of such pollution, including the role played by PetroEcuador (both before and, particularly, after TexPet's departure from the concession area as Operator in 1990).

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<sup>36</sup> These sites were: (i) Shushufindi Field: SSF-34 Well Site; (ii) Aguarico Field: AG-06 Well Site; (iii) Shushufindi Field: SSF-55 Well Site; and (iv) Lago Agrio Field: LA-02 Well Site. The Parties' presentations at each site were recorded by verbatim transcript and film. (This film is kept by the PCA, by order of the Tribunal).

4.72. The origin of such crude oil pollution, apart from accidental leaks and spills, derives principally from a mixture of oil and “produced water” in pits, subject to run-off into adjoining land and water courses. It was described by the Respondent (with its expert Dr Garvey) as follows during the Tribunal’s site-visit to the SSF-34 Well Site (The site was originally drilled in 1973 and “shut in”, or abandoned, by TexPet in 1983; it then comprised a plugged well and three pits; and, where cleared of encroaching jungle, the land is currently used for subsistence farming, with chocolate cacao plants and natural papaya trees):<sup>37</sup>

*“When TexPet came and drilled oil, they set up their oil rig here where the hole in the ground is; and to get to the oil it’s approximately 3,000 meters deep. So 9 to 10,000 feet is where the oil-producing layers are in this area. To drill down that far, there’s a significant amount of rock and dirt that came out of the hole; and they had to have some place to put that. These are called cuttings pits or reserve pits. And this large pit over here to the side probably started off as a cuttings and reserve pit, so the debris would [be] placed immediately to the side of the well. When you’re drilling a well, to get the debris to come out, you have to force drilling mud, which is a sort of a thick mud that, as you push it down, it pushes the rocks and the debris out; and to make drilling mud, you need a significant amount of water ... After the well was drilled and they reached the oil layers, this pit and these reserve pits would often end up filled with oil ...”*

*“... In order for us to find oil present to the surface, the reservoir that’s supplying this oil has to be quite large because it has to have been insulated from weathering for 30 years. How was it insulated? ... We have leaf litter falling on top of the pit. It prevents oxygen from penetrating into the underground; and, as a result, the oil here is effectively capped temporarily by this leaf litter and prevented from weathering. What does that mean? Well, it means that a small disturbance ... that a farmer might make would very quickly release the oil back to the surface here. Additionally, a large change in the water table ... could also push the oil upward above it. This may, in fact, be the reason we see oil at the surface here ...”.*

4.73. This general description does not include the range and complexity of the environmental issues raised by the Parties and their respective expert witnesses in regard to crude oil pollution in the former concession area, as also the legal issues arising from such pollution and the 1995 Settlement Agreement.

#### ***G: The Lawsuits, Arbitrations, Prosecutions and Investigations***

4.74. The crude oil pollution in the concession area has given rise to extensive legal disputes over the last 25 years, producing multinational lawsuits and arbitrations on a scale

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<sup>37</sup> Site-Visit Transcript S1.12ff; S1.25ff.



unprecedented in the collective experience of this Tribunal. For ease of reference later, it is necessary to list these principal lawsuits and arbitrations at the outset. The Tribunal here also addresses the criminal prosecutions and investigations in Ecuador.

- 4.75. (1) *The Aguinda Litigation (New York)*: The Aguinda Complaint was filed in the District Court for the Southern District of New York on 3 November 1993. It pleaded a claim by the Aguinda Plaintiffs as a putative (uncertified) class action under the USA's Federal Rules of Procedure, by named individuals and "on behalf of a class of all others similarly situated" for personal injuries and property damage caused by the defendant's wrongdoing.<sup>38</sup> The original defendant was Texaco.
- 4.76. As pleaded, the named individuals and unnamed class members estimated as numbering 30,000 were all resident in Ecuador from 1972 onwards within a geographical area defined by latitude and longitude, south of the Colombian border.<sup>39</sup> This complaint asserted individual civil claims for personal injury and property damage, aggregated as members of the same putative class. The causes of action were pleaded in tort, including negligence, public nuisance, private nuisance, strict liability, trespass and civil conspiracy, with relief claimed as compensatory damages, punitive damages and equitable relief to remedy the alleged pollution and contamination "of the plaintiffs' environment and the personal injuries and property damage caused thereby" (page 4).
- 4.77. As decided by this Tribunal in its Decision on Track 1B,<sup>40</sup> the Aguinda Complaint in New York was not a 'diffuse' claim. This much, at least, is common ground between the Parties.<sup>41</sup> As the Claimants acknowledged at the April Hearing (on Track 1B): "... both Parties agree that what was at issue in Aguinda were individual claims, aggregate[d] individual claims."<sup>42</sup>
- 4.78. As recorded by the US Court of Appeals for the Second Circuit in its judgment of 5 August 1997, the Aguinda Plaintiffs' claims for equitable relief in the Complaint were later elaborated: "Though the complaints make only a general demand for equitable relief, the plaintiffs clarified their demand somewhat during discovery. The relief they seek includes the following: undertaking or financing environmental cleanup, to include

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<sup>38</sup> C-14, pp. 2-3.

<sup>39</sup> C-14, pp. 17-19.

<sup>40</sup> Decision on Track 1B, Paragraphs 147-149.

<sup>41</sup> Track II Hearing D1.97.

<sup>42</sup> April Hearing D2.372.

access to potable water and hunting and fishing grounds, renovating or closing the Trans-Ecuadoran Pipeline, creation of an environmental monitoring fund, formulating standards to govern future Texaco oil development, creation of a medical monitoring fund, an injunction restraining Texaco from entering into activities that run that run a high risk of environmental or human injuries, and restitution.”<sup>43</sup>

- 4.79. By its judgment dated 12 November 1996, the US District Court for the Southern District of New York (Judge Rakoff) dismissed the Aguinda Complaint.<sup>44</sup> Apart from applying the doctrine of forum non conveniens (in favour of the Ecuadorian Courts), the judgment referred to the Aguinda Plaintiffs’ failure to join, as indispensable parties, PetroEcuador and Ecuador:

*“... this Court further concludes that there is another independently- sufficient reason why this action must be dismissed: plaintiffs’ failure to join indispensable parties, namely, Petroecuador and the Republic of Ecuador. The extensive equitable relief sought by the plaintiffs-ranging from total environmental ‘clean-up’ of the affected lands in Ecuador to a major alteration of the consortium’s Trans-Ecuador pipeline [i.e. the “SOTE” pipeline] to the direct monitoring of the affected lands for years to come cannot possibly be undertaken in the absence of Petroecuador, which has owned 100% of the consortium since 1992 and 100% of the pipeline since 1986, or the Republic of Ecuador, which has helped supervise the consortium’s activities from the outset and which owns much, if not all, of the affected lands. Petroecuador and the Republic of Ecuador thus are necessary ‘persons to be joined if feasible’ under either and both prongs of Fed.R.Civ.P. 19(a) ...”*

- 4.80. By its judgment of 12 August 1997, the US District Court for the Southern District of New York (Judge Rakoff) denied Ecuador’s request to join the Aguinda Complaint as an intervener.<sup>45</sup>
- 4.81. The Aguinda Plaintiffs (and Ecuador) appealed to the US Court of Appeals for the Second Circuit. By its judgment of 5 October 1998, the Second Circuit vacated Judge Rakoff’s orders and remitted the case to him at the US District Court for reconsideration.<sup>46</sup> It held (inter alia) that dismissal on the ground of forum non conveniens was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador.

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<sup>43</sup> C-291, p. 5.

<sup>44</sup> C-477.

<sup>45</sup> See C-291, p. 12.

<sup>46</sup> See C-291, p. 1.

- 4.82. By its judgment dated 30 May 2001, the US District Court for the Southern District of New York (Judge Rakoff) dismissed the Aguinda Complaint for a second time.<sup>47</sup> The Court ordered an unconditional stay on the ground of forum non conveniens because the case had “everything to do with Ecuador and nothing to do with the United States [of America]”. As there also recorded: “Following remand [by the Second Circuit to Judge Rakoff], Texaco provided the missing commitment to submit to the jurisdiction of the courts of Ecuador” (page 4 of the judgment).
- 4.83. This undertaking in favour of Ecuadorian jurisdiction took the form of a Notice of Agreements made by Texaco on 11 January 1999.<sup>48</sup> It provides (in material part) as follows:

*“Section A - Actions to Which Agreements Apply: Texaco Inc.’s agreements herein apply only to a lawsuit that meets all the following conditions:*

- 1. The lawsuit must be brought by a named plaintiff in Aguinda. et al. v, Texaco Inc., Case No. 93 Civ. 7527 (JSR) (hereafter “Aguinda”).*
- 2. The lawsuit must have been filed in an appropriate court of competent civil jurisdiction in Ecuador;*
- 3. The lawsuit must arise out of the same events and occurrences alleged in the Aguinda Complaint filed in this Court on November 3, 1993.*
- 4. To insure prompt notice, a copy of each Complaint intended to be filed by Aguinda plaintiffs (or any of them) in Ecuador must have been delivered to Texaco Inc.’s designated representative in Ecuador identified in Section B(1) below not later than the actual date on which it is filed.*

*Section B - Agreements: With respect to any lawsuit that meets the conditions set forth above (a “Foreign Lawsuit”), Texaco Inc. hereby makes the following agreements:*

- 1. Texaco Inc. will accept service of process in a Foreign Lawsuit in accordance with the applicable law of Ecuador. Texaco Inc.’s designated representative in Ecuador authorized to accept service of process in a Foreign Lawsuit shall be: [Name and address of Texaco’s representative in Quito Ecuador here omitted]. The authority of [Texaco’s representative] to accept service of process in a Foreign Lawsuit will become effective upon final dismissal of this action and judgment by*

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<sup>47</sup> C-10.

<sup>48</sup> R-3 (as more fully described in this Tribunal’s Third Interim Award on Jurisdiction and Admissibility, para 3.32).

*this Court. (The judgment shall become “final” upon the exhaustion of all available appeals or, if no appeal is filed, the time for filing appeals has expired.)*

*2. In any such Foreign Lawsuit, Texaco Inc. will waive and/or not assert an objection based on lack of in personam jurisdiction to the civil jurisdiction of a court of competent jurisdiction in Ecuador.*

*3. In any such Foreign Lawsuit, Texaco Inc. will waive any statute of limitations-based defense that matured during the period of time between: (a) the filing date of the Aguinda Complaint in this Court (i.e. November 3, 1993), and (b) the 60th day after the dismissal of this action and judgment becomes final, as defined in Section B(1) above. Texaco Inc., however, is not waiving any statute of limitations-based rights or defenses with respect to the passage of time prior to November 3, 1993, and Texaco Inc. expressly reserves its right to contend in a Foreign Lawsuit that plaintiffs’ claims were barred, in whole or in part, by the applicable statute of limitations as of November 3, 1993 when they filed their Complaint in this Court.*

*4. Texaco Inc. agrees that discovery conducted to date during the pendency of Aguinda in this Court may be used by any party in a Foreign Lawsuit, including Texaco Inc., to the same extent as if that discovery had been conducted in proceedings there, subject to all parties’ rights to challenge the admissibility and relevance of such discovery under the applicable rules of evidence.*

*5. Texaco Inc. agrees to satisfy a final judgment (i.e. a judgment with respect to which all appeals have been exhausted), if any, entered against it in a Foreign Lawsuit in favor of a named plaintiff in Aguinda, subject to Texaco Inc.’s reservation of its right to contest any such judgment under New York’s Recognition of Foreign Country Money Judgments Act, 7B N.Y. Civ. Prac. L&R § 5301-09 (McKinney 1978).”*

(This undertaking, as varied, came into effect with the eventual stay of the Aguinda Litigation on 16 August 2002, i.e. after Texaco’s “merger” with Chevron in 2001).

4.84. In 2001, the Aguinda Plaintiffs appealed from Judge Rakoff’s dismissal to the US Court of Appeals for Second Circuit. By its judgment dated 16 August 2002, the Second Circuit affirmed, as modified, Judge Rakoff’s Order.<sup>49</sup>

4.85. The Second Circuit recorded (page 4): “Texaco consented to personal jurisdiction in Ecuador as to the Aguinda plaintiffs ... in ... Ecuador .... Texaco stipulated it would waive its statute of limitations defenses that matured during the period of time between the filing of the complaint and the 60th day after the dismissal of the action by the district court. It preserved such defenses, however, with respect to the passage of time prior to

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<sup>49</sup> C-65.

the initial filing of the complaints. It also offered to stipulate that plaintiffs could utilize the discovery obtained thus far in resumed proceedings in Ecuador or Peru. Texaco then renewed its motion to dismiss by reason of forum non conveniens.” The Second Circuit decided (page 8): “The district court’s judgment dismissing for forum non conveniens is affirmed, subject to the modification that the judgment be conditioned on Texaco’s agreement to waive defenses based on statutes of limitation for limitation periods expiring between the institution of these actions [i.e. 3 November 1993] and a date one year subsequent to the final judgment of dismissal. “ The Tribunal understands that Texaco agreed to vary its condition regarding limitation, as directed by the Second Circuit.

- 4.86. Much later, in 2011, the US Court of Appeals for the Second Circuit decided in the New York Stay Legal Proceedings (described below) that Texaco’s undertaking (of 1999, as varied) bound Chevron, albeit a distinct and separate legal person under the laws of the USA. The Second Circuit held :<sup>50</sup>

*“Chevron Corporation claims, without citation to relevant case law, that it is not bound by the promises made by its predecessors in interest Texaco and Chevron-Texaco, Inc. However, in seeking affirmation of the district court’s forum non conveniens dismissal, lawyers from Chevron-Texaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs’ complaint. In so doing, Chevron-Texaco bound itself to those concessions. In 2005, Chevron-Texaco dropped the name “Texaco” and reverted to its original name, Chevron Corporation. There is no indication in the record before us that shortening its name had any effect on Chevron-Texaco’s legal obligations. Chevron Corporation therefore remains accountable for the promises upon which we and the district court relied in dismissing [the Aguinda] Plaintiffs’ action.”<sup>51</sup>*

- 4.87. The Tribunal acknowledges the continuing controversy as to whether or not Texaco’s 1999 undertaking (as varied) binds Chevron, as distinct from Texaco. Although other legal materials suggest otherwise, this decision of the Second Circuit ostensibly binds both Chevron and the Respondent as a matter of issue (or collateral) estoppel and judicial estoppel under the laws of the USA. (For reasons explained in Part VIII below, the Tribunal does not think it necessary or appropriate to decide this controversy, one way or the other, in this Award).

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<sup>50</sup> CLA-435; R-247.

<sup>51</sup> CLA-435; R-24, fn 3.

- 4.88. During the Aguinda Litigation, in support of its case on forum non conveniens, Texaco generally lauded the Ecuadorian judicial system as the forum for its disputes with the Aguinda Plaintiffs. In the words of one of Texaco's expert witnesses testifying in 2000: "Despite isolated problems that may have occurred in individual criminal proceedings, Ecuador's judicial system is neither corrupt nor unfair. Such isolated problems are not characteristic of Ecuador's judicial system, as a whole".<sup>52</sup>
- 4.89. (2) *The Lago Agrio Litigation (Ecuador)*: The Lago Agrio Plaintiffs' Complaint against Chevron as the sole named defendant is, in its original Spanish version, a document of 17 pages.<sup>53</sup> It was filed with the Lago Agrio Court on 7 May 2003. By this time, the "merger" between Texaco and Chevron had taken place (in 2001).
- 4.90. The Lago Agrio Complaint begins with the list of the 48 individual plaintiffs, all being (as translated into English) "domiciled in the Secoya Community of San Pablo de Aguatico, Canton of Shushufundi, Province of Sucumbíos" and "Ecuadorian nationals engaged in farming activities." These plaintiffs are described as having been the same Aguinda Plaintiffs in the stayed Aguinda Litigation New York, having there sought "enforcement of their own rights as well as those of other people in the same class, as the term is used in [New York's] procedural rules to designate the people who might find themselves in an identical legal situation with regard to the specifics of the lawsuit [i.e. the Aguinda Litigation]" (Paragraph 8).
- 4.91. Part I of the Lago Agrio Complaint pleads the alleged "background" to the case, including the 1998 Final Release (forming part of the 1995 Settlement) and the "merger" between Texaco and Chevron. Part II pleads the alleged "contaminating methods employed by Texaco". Part III pleads the alleged consequential "damage and the affected population". Its Paragraph III.2 pleads, as a matter of causation, the alleged consequences to the health and life expectancy of the population, including but not expressly so, the Lago Agrio Plaintiffs. Part IV pleads "Texaco Inc.'s liability". In the latter's Paragraph IV.9, Texaco's liability and remedial obligation were allegedly "passed on to" Chevron by virtue of the "merger" between the two corporations" described in Paragraph I.12. Thus far, apart from the allegations directed expressly

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<sup>52</sup> C-2541; R-1222A, Section II.E, fn 6.

<sup>53</sup> C-71.

against Chevron, there is a broad similarity between the complaint in the Aguinda Litigation and the complaint in the Lago Agrio Litigation.

- 4.92. Part V of the Lago Agrio Complaint pleads the “legal basis” for the claim under the laws of Ecuador. It invokes Articles 2241 and 2256 of the Civil Code (Paragraph V.1); Articles 23.6 and 86 of the Constitution (Paragraph V.3(a)); Article 2260 of the Civil Code, later re-numbered as Article 2236 (Paragraph V.1(b)); and Articles 41 and 43 of the 1999 Environmental Management Act, the “EMA” (Paragraph V.3(c)).<sup>54</sup> These EMA provisions are alleged to establish “a public action” (“acción pública”) based on the breach of environmental laws” and “the right of legal entities, individuals or human groups bound by a common interest and directly affected by a harmful action or omission, to bring an action for damages based on the harm to their health and environment, including the biodiversity along with its constituting elements.”<sup>55</sup>
- 4.93. Part VI of the Lago Agrio Complaint pleads the “prayer for relief”. Such relief is claimed by the Lago Agrio Plaintiffs “in our capacity as members of the affected communities and in safeguard of their recognized collective rights”.<sup>56</sup> The relief claims specific remedial and ancillary works, with the necessary funds to be paid by Texaco to the Amazon Defense Front (the “ADF”), together with 10% of such value payable (with litigation costs) to the ADF “by express request of the plaintiffs”. It does not expressly claim compensation for personal harm particular to the individual Lago Agrio Plaintiffs, or any of them. Part VI addresses “jurisdiction, amount of claim and procedure”, invoking (inter alia) Articles 42(2) and 43 of the EMA. Part VIII addresses “notices”.
- 4.94. The Lago Agrio Court issued its Judgment in the Lago Agrio Litigation on 14 February 2011 (with its Clarification Order of 4 March 2011), adverse to Chevron. Chevron initiated three successive appeals against the Lago Agrio Judgment, resulting in the Judgments of the Appellate Court (2012), the Cassation Court (2013) and the Constitutional Court (2018).

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<sup>54</sup> These texts are set out above, in both the original Spanish and English translation: see Part I, Annex 5.

<sup>55</sup> In the original Spanish: “[la Ley de Gestión Ambiental] reconoce a las personas naturales o jurídicas y a los grupos humanos vinculados por un interés común y afectados directamente por la acción u omisión dañosa, el derecho a interponer acciones por daños y perjuicios y por el deterioro causado a la salud o al medio ambiente, incluyendo la biodiversidad con sus elementos constitutivos”.

<sup>56</sup> In the original Spanish, “como miembros de las comunidades afectadas y en guardia de los derechos reconocidos colectivamente a éstas ...”.

- 4.95. (3) *The “Commercial Cases” Arbitration (The Hague)* This arbitration, known as the “Commercial Cases Arbitration”, was brought under Article VI of the Treaty, applying the UNCITRAL Arbitration Rules (1976) before the Permanent Court of Arbitration at The Hague, the Netherlands (PCA Case No. 2007-02/AA277), by Chevron and TexPet as the claimants, against Ecuador, as the respondent. This UNCITRAL arbitration was commenced on 21 December 2006.
- 4.96. The Commercial Cases tribunal made an interim award on jurisdiction of 1 December 2008, a partial award on the merits of 30 March 2010<sup>57</sup> and a final award of 31 August 2011.<sup>58</sup> The tribunal rejected the respondent’s jurisdictional objections; the tribunal found a breach by the respondent of its obligation under Article II(7) of the Treaty (“effective means”),<sup>59</sup> through the undue delay of the Ecuadorian courts in deciding TexPet’s seven cases asserting contractual claims for payment under the two Concession Agreements of 1964 and 1973; and the tribunal held the respondent liable for damages in the principal amount of US\$ 77.74 million, together with pre-award and post-award compound interest.
- 4.97. Under challenge by the respondent, the awards in the Commercial Cases were upheld by the Dutch courts: namely, the Hague District Court (2012), the Hague Court of Appeal (June 2013) and the Hoge Raad (26 September 2014).<sup>60</sup> In the USA, the US District Court for the District of Columbia recognised and enforced the final award under the 1958 New York Convention in 2013.<sup>61</sup> The US Court of Appeals for the District Court of Columbia Circuit dismissed the respondent’s appeal on 4 August 2015.<sup>62</sup>
- 4.98. To the Tribunal’s understanding, on 22 July 2016, Ecuador (as the respondent) paid to Chevron and TexPet the sums due under the awards made in the Commercial Cases Arbitration.<sup>63</sup>

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<sup>57</sup> CLA-47.

<sup>58</sup> RLA-351.

<sup>59</sup> Article II(7) of the USA-Ecuador BIT provides: “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.” (In the Spanish version, it reads “Cada parte establecerá medios eficaces para hacer valer las reclamaciones y respetar los derechos relativos a las inversiones, los acuerdos de inversión y las autorizaciones de inversión.”).

<sup>60</sup> C-1930, C-1931; see the Claimants’ letter to the Tribunal dated 26 September 2014.

<sup>61</sup> C-1927, C-1932.

<sup>62</sup> C-2523.

<sup>63</sup> See the Claimants’ letter to the Tribunal dated 19 March 2018, p. 7.



- 4.99. Apart from the Commercial Cases tribunal’s interpretation of Article II(7) of the Treaty (to which the Tribunal returns in Part VII below), this Tribunal does not consider that the Commercial Cases Arbitration provides any specific guidance to the relevant issues in this arbitration.
- 4.100. As to Article II(7), the Tribunal notes that the Commercial Cases tribunal decided in its Partial Award that Ecuador’s obligation as to “effective means” constitutes a *lex specialis* and not a restatement of customary international law on denial of justice, that the failure of domestic courts to enforce rights effectively would constitute a violation of Article II(7); and that the host State’s treaty obligation was a positive obligation to provide “effective means”, as opposed to a mere negative obligation not to interfere in the functioning of those means.<sup>64</sup> It also notes the Commercial Cases tribunal’s reference to the “measure of deference” to be afforded to a domestic judicial system and that the tribunal was “not empowered [by Article II(7) of the Treaty] to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.”<sup>65</sup> (The Tribunal returns to these matters also, in Part VII, below).
- 4.101. (4) *The Ecuador-USA Treaty Arbitration (PCA)*: This was an inter-state arbitration brought on 28 June 2011 by Ecuador (as the claimant) against the USA (as respondent) under Article VII of the Treaty providing for State-State arbitration,<sup>66</sup> resulting in an award dated 29 September 2012 dismissing Ecuador’s claim for want of jurisdiction.<sup>67</sup> That claim concerned (inter alia) the interpretation of “effective means” in Article II(7) of the Ecuador-USA Treaty (i.e. the same Treaty in this case), as decided in the partial award issued in the Commercial Cases Arbitration.
- 4.102. (5) *The AAA Arbitration (New York)*: This arbitration was commenced in June 2004 before the American Arbitration Association (the “AAA”) in New York under an arbitration agreement allegedly contained in the 1965 Joint Operating Agreement (the

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<sup>64</sup> See CLA-47, paras 241, 243, 244, 248.

<sup>65</sup> CLA-47, para 246.

<sup>66</sup> Article VII(1) of the Ecuador-USA Treaty provided (inter alia): “Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law ...”

<sup>67</sup> *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, Award, 29 September 2012.

“1965 JOA”) and a draft JOA of 1974 under the 1964 and 1973 Concession Agreements (i.e. it was not brought under the Treaty).

- 4.103. The claimants were Chevron and TexPet, asserting a contractual indemnity for environmental damage from the respondents, Ecuador and PetroEcuador. The respondents applied in New York to the US District Court for the Southern District of New York for a stay of the AAA Arbitration. By orders of the US District Court (Judge Sand), the AAA Arbitration was partially stayed in June 2007,<sup>68</sup> affirmed on appeal by the US Court of Appeals for the Second Circuit on 7 October 2008.<sup>69</sup> The US Supreme Court denied Chevron’s petition for a writ of certiorari in June 2009.<sup>70</sup>
- 4.104. (6) *The New York Stay Legal Proceedings (New York)*: On 14 January 2010, the Respondent and the Lago Agrio Plaintiffs applied to the US District Court for the Southern District of New York to stay this arbitration between the Claimants and the Respondent under the Treaty. Their application was rejected by the District Court (Judge Sand) on 16 March 2010.<sup>71</sup> On appeal, the District Court’s judgment was upheld by the US Court of Appeals for the Second Circuit on 17 March 2011.<sup>72</sup>
- 4.105. In its judgment, the Second Circuit recognised the autonomous nature, or ‘separability’, of the Treaty from the arbitration agreement between the Claimants and the Respondent derived from the Treaty:

*“At the outset, we note that Chevron is not a party to the BIT. Unlike the more typical scenario where the agreement to arbitrate is contained in an agreement between the parties to the arbitration, here the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty. In the end, however, this proves to be a distinction without a difference, since Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate.”<sup>73</sup>*

- 4.106. (7) *The Section 1782 Litigation (USA)*: Beginning in December 2009, Chevron initiated numerous legal proceedings in several US District Courts in the USA under U.S.C. Section 1782 in order to obtain discovery for use in the Lago Agrio Litigation, the

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<sup>68</sup> R-73.

<sup>69</sup> R-74.

<sup>70</sup> R-75.

<sup>71</sup> CLA-168.

<sup>72</sup> R-247; CLA-435.

<sup>73</sup> R-247, pp. 12-13; CLA-435, p. 10.

Veiga-Pérez Criminal Prosecutions and this arbitration. These proceedings were directed to (inter alios) Mr Donziger, Mr Berlinger, Mr Bonifaz, Mr Kohn, Mr Wray, Dr Calmbacher, Mr Champ, Mr Rourke, Stratus Consulting Inc., E-Tech and Banco Pichincha. The Respondent, in turn, later initiated legal proceedings in the USA under U.S.C. Section 1782 in order to obtain discovery for use in this arbitration, including (as later described in Part VII below) Mr Connor.

- 4.107. Title 28, Section 1782 of the U.S. Code permits a US district court, upon the application of any interested person, to order a person found or residing within the district “to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal”. The factors to be considered in exercising this discretionary power are set out in the US Supreme Court’s judgment in *Intel Corp. v Advanced Memo Devices Inc.* 542 US 241 (2004). Section 1782 does not apply to persons not subject to the jurisdiction of the courts of the USA.
- 4.108. As listed in the RICO Judgment (page 1), the reported US court decisions under Section 1782, relevant to the RICO Litigation and this arbitration, include the following: *In re Chevron Corp.*, 709 F.Supp.2d 283 (S.D.N.Y.) (“Berlinger 1782 I”), aff’d sub nom., *Chevron Corp v. Berlinger*, 629 F.3d 297 (2d Cir.2010); *In re Chevron Corp.*, 736 F.Supp.2d 773 (S.D.N.Y.2010) (“Berlinger 1782 II”); *In re Chevron Corp.*, 749 F.Supp.2d 135 (S.D.N.Y.) (“Donziger 1782 I”), fuller opinion, *In re Chevron Corp.*, 749 F.Supp.2d 141 (S.D.N.Y.) (“Donziger 1782 II, on reconsideration, 749 F.Supp.2d 170 (S.D.N.Y.) (“Donziger 1782 II”) aff’d sub nom., *Lago Agrio Plaintiffs v Chevron Corp.*, Nos. 10-4341-cv, 10-4405-cv (CON), 2010 WL 5151325 (2d Cir. Dec. 15 2010).<sup>74</sup>
- 4.109. (8) *The RICO Litigation (New York)*: This lawsuit was brought by Chevron on 1 February 2011 before the US District Court for the Southern District of New York against Mr Donziger and the Law Offices of Steven R. Donziger (collectively, the “Donziger defendants”), Pablo Fajardo, Luis Yanza, Stratus Consulting, Douglas Beltman, Anne Maest, 47 of the Lago Agrio Plaintiffs and several others.<sup>75</sup> Chevron

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<sup>74</sup> The full list of these 23 or so applications appears in footnote 56 of Mr T. Boutros’s article “Ten Lessons from the Chevron Litigation: The Defense Perspective”, R-893.

<sup>75</sup> C-916.

claimed, as originally pleaded, damages and injunctive relief for a pattern of racketeering activity and violations of 18 USC Section 1962 and New York law.

4.110. It is unnecessary here to address the numerous interlocutory orders and judgments made in the RICO Litigation by the US District Court for the Southern District of New York and the US Court of Appeals for the Second Circuit. As listed in the RICO Judgment, these include: *Chevron Corp. v. Donziger*, 768 F.Supp 581 (S.D.N.Y.2011) (“Donziger I”) (granting preliminary injunction); *Chevron Corp v. Donziger*, No. 11 Civ.0691(LAK),2011 WL 979609 (S.D.N.Y. Mar.7,2011) (“Donziger II”) (denying motion to transfer case to another judge); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 1408386 (S.D.N.Y. Apr. 6, 2011) (“Donziger II”) (denying stay pending appeal and other relief); *Chevron Corp. v. Donziger*, - F. Supp. 2d - 2011 WL 1465679 (S.D.N.Y. Apr. 15, 2011) (“Donziger IV”) (granting separate trial and expedited discovery on claim for declaratory judgment); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 1560926 (S.D.N.Y. Apr. 18, 2011) (“Donziger V”) (denying motion to stay certain aspects of preliminary injunction pending appeal); *Chevron Corp. v. Donziger*, - F. Supp. 2d -, No. 11 Civ. 0691 (LAK), 2011 WL 1747046 (S.D.N.Y. May 9, 2011) (“Donziger VI”) (denying recusal motion); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 2150450 (S.D.N.Y. May 31, 2011) (“Donziger VII”) (granting in part and denying in part motion to intervene); *Chevron Corp. v. Salazar*, No. 11 Civ. 3718 (LAK), 2011 WL 2326893 (S.D.N.Y. Jun. 14, 2011) (“Salazar I”) (denying motion to stay pending intervention appeal); *Chevron Corp. v. Salazar*, No. 11 Civ. 3718 (LAK), 2011 WL 2581784 (S.D.N.Y. Jun. 24, 2011) (“Salazar II”) (denying motion to stay discovery); *Chevron Corp. v. Salazar*, - F. Supp. 2d -, 2011 WL 2556046 (S.D.N.Y. Jun. 28, 2011) (“Salazar III”) (denying motion to compel deposition).

4.111. The RICO trial took place before the US District Court New York (Judge Kaplan) over seven weeks from 15 October to 26 November 2013. Its proceedings were recorded by verbatim transcript.<sup>76</sup> The District Court issued its judgment on 4 March 2014 in favour of Chevron and against the Donziger defendants.<sup>77</sup> Not counting its lengthy appendices, the RICO Judgment extends over 485 pages. Its conclusion reads in part: “The saga of

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<sup>76</sup> See C-2365 to C-2384.

<sup>77</sup> C-2135 & 2136.

the Lago Agrio case is sad. It is distressing that the course of justice was perverted. The LAPs [Lago Agrio Plaintiffs] received the zealous representation they wanted, but it is sad that it was not always characterised by honor and honesty as well. It is troubling that .... what happened here probably means that ‘we’ll never know whether or not there was a case to be made against Chevron’ ...”

- 4.112. On 8 August 2016, the Second Circuit affirmed the Judgment of the US District Court; and it dismissed the appeal by the Donziger defendants.<sup>78</sup> For this appeal, Ecuador (not being a disputing party) submitted to the Second Circuit an amicus brief dated 8 July 2014.<sup>79</sup>
- 4.113. On 19 June 2017, the US Supreme Court denied the Donziger defendants’ petition of certiorari from the judgment of the Second Circuit,<sup>80</sup> as notified by the Claimants’ letter dated 29 June 2017 to the Tribunal.
- 4.114. On 28 February 2018, the US District for the Southern District of New York (Judge Kaplan) issued its judgment regarding the allocation and assessment of costs incurred by the Parties in the RICO Litigation, as reserved in the RICO Judgment.<sup>81</sup> The Court ordered Mr Donziger to pay US\$ 944,463.85 to Chevron towards its legal costs.
- 4.115. (9) *The Huaorani Litigation (New York)*: This lawsuit was brought before the New York Supreme Court on 2 September 2014 by Kempera Baihua Hunai and 41 others from the Huaorani community in the Oriente against the same Donziger defendants and the Amazon Defence Front. The plaintiffs, legally represented by Professor Judith Kimerling<sup>82</sup>, claimed from the Donziger defendants a proportional share in the proceeds of the Lago Agrio Judgment, pleading (inter alia) breaches of fiduciary duty, unjust enrichment, constructive trust and ancillary relief.

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<sup>78</sup> C-2540.

<sup>79</sup> C-2541; R-1222A.

<sup>80</sup> C-2542.

<sup>81</sup> See C-2547.

<sup>82</sup> Professor Kimerling has studied and written extensively on the indigenous peoples of the Amazon, since 1989. Several of her materials were submitted in evidence by the Parties: see (i) J. Kimerling, “The Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and *Aguinda v Texaco*” (2006) 38 New York University Journal of International Law and Politics 413: C-483; (ii) J. Kimerling, “Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon” (1991) 14 Hastings International and Comparative Law Review 849: R-472; and (iii) J. Kimerling et. al, *Amazon Crude* (1991): R-473. For a time, Professor Kimerling was professionally involved as a consultant to the Aguinda Plaintiffs in the Aguinda Litigation in New York. She was not a witness in this arbitration.

4.116. The same plaintiffs had earlier applied to join, as interveners, in the RICO Litigation. The US District Court for the Southern District of New York (Judge Kaplan) had denied their request by order dated 14 January 2013, leaving them “free to pursue their claims in independent actions in the New York State and doubtless other courts.” In this Huaorani litigation, the Donziger defendants were represented by Mr Steven Donziger. It appears that the ADF took no part in this litigation, not being subject to the non-consensual jurisdiction of the New York Courts.

4.117. The Huaorani complaint was described, in the first instance judgment of the New York Supreme Court, as follows:

*“... Broadly speaking, plaintiffs allege that Donziger and the ADF are seeking complete control of the proceeds of the Lago Agrio litigation, for their own benefit and to the detriment of the Huaorani ... Plaintiffs allege that the Donziger defendants have ... claimed to represent all of the indigenous people, including plaintiffs and other Huaorani, in activities related to the Lago Agrio. However, it is plaintiffs’ position that plaintiffs never authorised such representation and that there is no written retainer agreement, nor any other agreement, which sets forth Donziger or ADF’s obligations to plaintiffs in connection with the Lago Agrio Litigation. Nevertheless, plaintiffs allege that as a result of Donziger’s and ADF’s representations that Donziger is counsel for plaintiffs in the Lago Agrio litigation and that ADF brought the Lago Agrio litigation on behalf of all of the Ecuadorian people harmed by Texaco’s operations, including the Huaorani, the Donziger defendants and ADF owe plaintiffs a fiduciary duty, including a duty to protect their interests in the Lago Agrio litigation, a duty to notify plaintiffs of any arrangements with third parties (investors, funders, and/or the Republic of Ecuador) regarding the proceeds of the judgment, and a duty to notify plaintiffs of enforcement efforts, settlement negotiations or any other significant developments regarding the proceeds of the litigation.*

*Plaintiffs claim, on information and belief, that the money that the Donziger defendants and ADF collect will be ‘dissipated and funnelled to off-shore havens beyond the reach of US Courts and that the Donziger Defendants and ADF intend to assign away [the Huaorani’s] interest in the Lago Agrio judgment in exchange for money’. It is plaintiffs’ position that the Donziger defendants and ADF have agreements with investors and funders in exchange for interests in the judgments and that they have already collected more than \$10 million by selling shares in the judgment, that the Republic of Ecuador expects to receive at least 90% of the proceeds of the judgment; and that the Donziger defendants and ADF intend to distribute the remaining proceeds of the judgment to lawyers and investors before passing the remaining money to Ecuadorian trusts controlled by ADF.” (pp. 4-5).*

4.118. Whilst opposing the Huaorani plaintiffs’ complaint as regards both the Court’s exercise of jurisdiction and the merits, the Donziger defendants are recorded, in the judgment, as

accepting: “that ADF agrees that the Huaorani people should benefit from the Lago Agrio litigation” (p.12, footnote 1). The judgment also records that the ADF executed a retainer agreement with the Donziger defendants in New York (pp. 13 & 15-16). There is no similar reference to any retainer or other agreement with the individual Huaorani plaintiffs; and, indeed, the judgment refers to Mr Donziger’s “purported clients”, not “clients” (p. 15).

- 4.119. By its judgment issued on 29 August 2014, the New York Supreme Court stayed the lawsuit under the New York legal doctrine of forum non conveniens and dismissed the plaintiffs’ complaint.<sup>83</sup> The plaintiffs appealed to the New York Supreme Court, Appellate Division, First Department. By its judgment issued on 16 June 2015, that Court affirmed the Supreme Court’s order for a stay.<sup>84</sup>
- 4.120. The Huaorani Litigation is factually significant. First, it confirms that Mr Donziger, with his colleagues in Ecuador (including the ADF), had no written retainer or power of attorney to act in the Lago Agrio Litigation on behalf of any member of the Huaorani community as individuals. Second, it confirms that Mr Donziger and his Ecuadorian colleagues (including the ADF) intended that, nonetheless, the Lago Agrio Judgment should accrue (in part) for the benefit of the members of the Huaorani community as a whole.
- 4.121. The Tribunal here notes again the broad language of the Lago Agrio Complaint: it alleges legal injury to and relief for all affected persons within a large geographical area, including expressly members of the Huarani community.<sup>85</sup> The Tribunal also notes that none of the named Aguinda Plaintiffs or the named Lago Agrio Plaintiffs were members of the Huaorani community.<sup>86</sup> (These matters are relevant to the Tribunal’s later consideration of the “diffuse” nature of Chevron’s legal liability in the Lago Agrio Judgment, to which the Tribunal returns in Part V below)
- 4.122. (10) *The Veiga-Pérez Criminal Prosecutions (Ecuador)*: In 2003, the Respondent’s Comptroller-General initiated criminal proceedings, later to become prosecutions, against (inter alios) Mr Veiga (a national of the USA) and Dr Pérez (a national of

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<sup>83</sup> RLA-685.

<sup>84</sup> RLA-686.

<sup>85</sup> C-71, section III.

<sup>86</sup> See C-483, p. 476 (as regards the Aguinda Complaint in New York); p. 631 (as regards the Lago Agrio Complaint).

Ecuador). These proceedings are also called “the criminal indictments” in this arbitration.

- 4.123. These Criminal Prosecutions alleged “falsity in a notarial instrument” (later “ideological falsehood”) under Articles 338 and 339 of the Ecuadorian Penal Code, committed by Mr Patricio Rivadeneira (the former Minister of Energy and Mines), Dr Ramiro Gordillo (the former Executive President of PetroEcuador), Mr Luis Alban Granizo (the former Manager of Petroproduccion), Mr Veiga and Dr Pérez (TexPet’s Vice-President and legal representative, respectively). The alleged falsity concerned the 1995 Settlement Agreement (with associated documentation), signed by the Ministry of Energy and Mines, PetroEcuador and TexPet.
- 4.124. The Lago Agrio Plaintiffs’ representatives co-operated with members of President Correa’s administration to bring these prosecutions in an attempt to nullify the effect of Chevron’s reliance upon the 1995 Settlement Agreement as a defence in the Lago Agrio Litigation.
- 4.125. For example, in her email dated 10 February 2005 to the Lago Agrio Plaintiffs’ representatives, Dr Escobar described her meeting on 8 February 2005 with members of the Presidential Office, as follows:<sup>87</sup>

*“... I explained to Dr González [the Legal Under-Secretary General of the Presidential Office] that .... [w]ith respect to the topic of the contract, I explained that the Attorney General’s Office [sic] 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.”*

(The “remediation contract” and “final acta” were references to the 1995 Settlement Agreement and the 1998 Final Release. The “State’s defense” referred to the pending AAA Arbitration in New York, described above).

- 4.126. Later, in his email dated 10 February 2006 to the Lago Agrio Plaintiffs’ representatives, Mr Donziger stated “... Now that we have the inspections schedule, it’s time to request Ricardito [sic] Reis Veiga as a witness. Pablo [Fajardo] has the questions. We exploit that for the press to further create the image of fraud, to put a face on the fraud, perhaps

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<sup>87</sup> C-694.



during the mobilization and press conference about fraud. In the US it's going to be a bombshell with the press. We should set a date. Poor him ...".<sup>88</sup> In his email message dated 1 October 2007 to Messrs Prieto, Donziger, Yanza, Saenz and Ponce, Mr Fajardo stated: "... Today I went to the Supreme Court to look for the file on the issue regarding the prosecutor's office ... Now the file is being reviewed by one of the assistants to the Chief Justice of the Supreme Court. Tomorrow we will meet with the Chief Justice of the Supreme [Court] to move this issue forward ...".<sup>89</sup>

- 4.127. By its decision dated 9 August 2006, for want of any evidence of criminal conduct, the Office of the Prosecutor-General dismissed these criminal prosecutions.<sup>90</sup> However, by its decision dated 31 March 2008, "in the light of new elements", the Office of the Prosecutor-General re-opened the criminal prosecutions.<sup>91</sup>
- 4.128. One of these elements included President Correa's visit to the former concession area in April 2007, organised by the Lago Agrio Plaintiffs' representatives. During his visit, the President was accompanied by Messrs Fajardo and Yanza. As reported by "A-F.L./Presidential Press":<sup>92</sup>

*"Today, President Rafael Correa called upon the District Attorney of Ecuador to allow a criminal case to be heard against the Petroecuador officers who approved the petroleum remediation in Ecuador's Amazonia performed by the multinational company, Texaco. The petition was made after a visit was made to the covered pits of Well 7 (Shushufindi), supposedly remediated by the oil company in the 1990s. Residents in the area said that the oil company did not solve the problem, rather just covered the crude waste pits with dirt. Those affected emphasized that the waste also contaminates the river around which indigenous communities traditionally live. Similarly, some residents in the area stated their complaints about the activities being carried out by Petroecuador in the area. One person reported to the president and the Minister of Health, Caroline Chang, on a disease he has, allegedly linked to oil activities, asking the government for help. During the president's visit, the visitors became familiar with some sites where oil waste remains in spite of the fact that an environmental remediation was carried out. The others who participated in this visit were the Minister of Health, Caroline Chang; the Minister of Tourism, Marfa Isabel Salvador; the Minister of the Environment, Ana Alban; the Minister of Energy, Alberto Acosta, Petroecuador's president, Carlos Pareja; and the Secretary of Communication, Monica Chuji."*

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<sup>88</sup> C-777.

<sup>89</sup> C-743.

<sup>90</sup> C-234.

<sup>91</sup> C-247.

<sup>92</sup> C-242.

- 4.129. By its order dated 16 September 2008, the Supreme Court (First Criminal Division) decided that the prosecutorial record be sent to the President of the Supreme Court of Justice, for trial.<sup>93</sup> By order dated 19 September 2008, the President of the Court accepted the case for prosecution.<sup>94</sup> Subsequently, by its lengthy opinion dated 29 April 2010 (based on 65 binders comprising 6,492 documents), the Office of the Prosecutor-General decided that there was relevant evidence of criminal conduct, by (inter alios) Mr Veiga and Dr Pérez, requesting that a summons for trial be issued to the defendants by the National Court of Justice (First Criminal Division).<sup>95</sup> By its order dated 15 February 2011, the Court fixed 2 March 2011 as the date of the preliminary hearing in Quito.<sup>96</sup> By its order dated 24 February 2011, the Court adjourned that hearing.<sup>97</sup>
- 4.130. By its order dated 1 June 2011, after the resumed preliminary hearing, the National Court of Justice (First Criminal Division) declared the nullity of the Criminal Prosecutions against (inter alios) Mr Veiga and Dr Pérez.<sup>98</sup> By that date, the Lago Agrio Judgment and its Clarification Order had been issued (on 14 February and 4 March 2011).
- 4.131. In September 2013, the Respondent resumed criminal investigations of individuals who signed the 1995 Settlement Agreement and related documentation. These proceedings were and remain confidential under Ecuadorian law. The Tribunal has not been informed whether any of Chevron's representatives are the target of such investigations.<sup>99</sup>
- 4.132. *(11) Enforcement Litigation (Ecuador)*: Since 30 May 2012, the Lago Agrio Plaintiffs have sought to enforce the Lago Agrio Judgment in (i) Ecuador, (ii) Canada, (iii) Brazil and (iv) Argentina. As regards Canada, Brazil and Argentina, these enforcement proceedings have already been summarised in Annex 4 to Part I above.
- 4.133. As to Ecuador, on 1 March 2012, the Lago Agrio Appellate Court declared the Lago Agrio Judgment enforceable; on 3 August 2012, the Lago Agrio Court ordered Chevron

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<sup>93</sup> C-261.

<sup>94</sup> C-262.

<sup>95</sup> C-346.

<sup>96</sup> C-935.

<sup>97</sup> C-961.

<sup>98</sup> R-250.

<sup>99</sup> See Track II Hearing D13.3031-3032; and see also the Claimants' letter to the Tribunal dated 19 March 2018.

to pay the judgment debt within 24 hours; and on 13 October 2012, the Lago Agrio Court ordered that the Lago Agrio Judgment's execution "be applicable to the entirety of the assets of Chevron Corporation, until such time as the entire obligation has been satisfied." Assets subject to the attachment order included Chevron's subsidiaries' intellectual property assets in Ecuador (including certain trademarks owned by Chevron Intellectual Property LLC, indirectly owned by Chevron), bank accounts in Ecuador and bank transfers through the Ecuadorian banking system, in addition to the modest funds found in TexPet's bank account at Banco Pichincha in Ecuador (US\$ 358.00). On 25 October 2012, the Court extended the attachment order to additional trademark and intellectual property in Ecuador indirectly owned by Chevron. (At the Track II Hearing, the Tribunal was informed that these trademarks in Ecuador had no commercial value).<sup>100</sup>

- 4.134. On 27 June 2013, the Lago Agrio Court granted the Lago Agrio Plaintiffs' application to garnishee the payment due from the Respondent to Chevron and TexPet under the awards issued in the Commercial Cases Arbitration.<sup>101</sup> This order was notified to the Respondent under the Court's Order of 12 July 2016. On 21 July 2016, the Order was discharged by the Court upon the application to the Court by Mr Fajardo acting as the Lago Agrio Plaintiffs' representative. With the Respondent's payment of the Commercial Cases awards to Chevron and TexPet on 22 July 2016, these garnishee proceedings came to an end without any benefit to the Lago Agrio Plaintiffs.
- 4.135. The Lago Agrio Plaintiffs have made further attempts to seize assets in Ecuador indirectly owned by Chevron under these attachment orders. For example, in two motions dated 30 January 2015, the Lago Agrio Plaintiffs asked the Lago Agrio Court to instruct the Ecuadorian Intellectual Property Institute ("EIP") to renew certain trademarks owned by Chevron Intellectual Property LLC and separately to order those trademarks embargoed pursuant to the Court's enforcement orders. On 5 April 2016, the Lago Agrio Plaintiffs requested the Court to appoint a depository to withdraw the funds that were seized from TexPet's bank account at Banco Pichincha. On 11 April 2016, the Lago Agrio Plaintiffs requested that the Court rule on the Lago Agrio

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<sup>100</sup> Track II Hearing D1.218-219.

<sup>101</sup> C-1921; see also the Claimants' letters to the Tribunal dated 4 September 2013 and 19 March 2018, p. 7.

Plaintiffs' prior application for the EIPi to renew and embargo certain trademarks. On 12 July 2016, the Court refused these applications of 5 and 11 April 2016.

- 4.136. To date, no monies (apart, possibly, from the sum of US\$ 358.00) have been recovered from Chevron, TexPet or its other subsidiaries in any enforcement proceedings of the Lago Agrio Judgment by the Lago Agrio Plaintiffs in Ecuador or elsewhere.
- 4.137. (12) *The Gibraltar Litigation*: Chevron began legal proceedings in Gibraltar against certain non-party funders of the Lago Agrio Litigation and ostensible beneficiaries of and administrators for recoveries from the enforcement of the Lago Agrio Judgement, including Mr DeLeon, the Woodsford Group and other defendants. The defendants applied to strike out Chevron's action. The Gibraltar Court refused their application, with the Court expressing surprise in its judgment that the Ecuadorian Courts had not ordered a re-hearing of the Lago Agrio Litigation.<sup>102</sup>
- 4.138. (13) *The Criminal Investigations (Ecuador)*: The Respondent's criminal prosecutors initiated one or more investigations of specific individuals in the conduct of the Lago Agrio Litigation. As stated in the Respondent's letter of 21 July 2016 to the Tribunal and confirmed by its Counsel at the Track II Hearing,<sup>103</sup> the details of these investigations were and remain confidential under the Criminal Code of Ecuador, even from the Respondent's Attorney-General.
- 4.139. One such individual was Judge Núñez, with an investigation begun in 2009 for bribery (with others). These criminal investigations were closed in 2013.<sup>104</sup> Another is Dr Guerra, begun in 2013.<sup>105</sup> The Tribunal was informed by the Claimants that this criminal investigation remains pending.
- 4.140. To date, no prosecution has been brought against Dr Zambrano, Dr Guerra or any of the Lago Agrio Plaintiffs' representatives in Ecuador. However, as the Respondent stated, any criminal investigations into these individuals would be confidential under Ecuadorian law.

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<sup>102</sup> Track II Hearing D.12.2767-2768.

<sup>103</sup> Track II Hearing D13.3031-3032.

<sup>104</sup> C-1917.

<sup>105</sup> See the Claimants' letter to the Tribunal dated 19 March 2018, p. 4.

4.141. (14) *This Treaty Arbitration (The Hague)*: This arbitration was commenced by Chevron and TexPet against the Respondent by the Claimants' Notice of Arbitration dated 23 September 2009 under the Treaty and the UNCITRAL Arbitration Rules (the "Notice of Arbitration").

4.142. This Notice of Arbitration, which pre-dated the Lago Agrio Judgment of 14 February 2011, claimed (inter alia) the following relief under the Treaty:

*" ... (3) An order and award requiring Ecuador to inform the court in the Lago Agrio Litigation that TexPet, its parent company, affiliates, and principals have been released from all environmental impact arising out of the former Consortium's activities and that Ecuador and Petroecuador are responsible for any remaining and future remediation work;*

*(4) A declaration that Ecuador or Petroecuador is exclusively liable for any judgment that may be issued in the Lago Agrio Litigation;*

*(5) An order and award requiring Ecuador to indemnify, protect and defend Claimants in connection with the Lago Agrio Litigation, including payment to Claimants of all damages that may be awarded against Chevron in the Lago Agrio Litigation;*

*(6) An award for all damages caused to Claimants, including in particular all costs including attorneys' fees incurred by Claimants in defending the Lago Agrio Litigation and the criminal indictments; ... "*

4.143. The Notice of Arbitration pleaded several events allegedly taking place within the Lago Agrio Litigation up to September 2010, amounting to a "judicial farce". These included allegations relating to Mr Cabrera (as the Lago Agrio Court's global expert) and the Cabrera Reports, as to which it alleged 'collaboration' with the Lago Agrio Plaintiffs' representatives. It also alleged gross misconduct by the Lago Agrio Court, including Judge Núñez's improper predisposition towards the Lago Agrio Plaintiffs (until his recusal in August 2009) and the Respondent's resort to the Veiga and Pérez Criminal Prosecutions, in collusion with the Lago Agrio Plaintiffs' representatives, in an attempt to subvert Chevron's defences based on the 1995 Settlement Agreement in the Lago Agrio Litigation.

4.144. Following the Notice of Arbitration, as and when new evidential materials became available to them, the Claimants supplemented their pleaded case against the Respondent, in accordance with procedural orders made by the Tribunal and the

UNCITRAL Arbitration Rules (as did, conversely, the Respondent). In particular, by their Supplemental Memorial on the Merits of 20 March 2012, the Claimants introduced a new allegation that the Lago Agrio Court’s judgment of 14 February 2011 (as issued by the Lago Agrio Court and affirmed and, on 1 March 2012, declared enforceable by the Lago Agrio Appellate Court) had been corruptly ‘ghostwritten’ by representatives of the Lago Agrio Plaintiffs in collusion with Judge Zambrano. (The Tribunal returns to this allegation at length below).

- 4.145. To date, the Tribunal has made five awards in this arbitration: (i) the First Interim Award dated 25 January 2012; (ii) the Second Interim Award dated 16 February 2012; (iii) the Third Interim Award dated 27 February 2012; (iv) the Fourth Interim Award dated 7 February 2013; and (v) the First Partial Award on Track 1 dated 17 September 2013. It has also made 55 procedural orders, including its orders for interim measures dated 14 May 2010, 6 December 2010, 28 January 2011, 9 February 2011 and 16 March 2011. These awards and orders are listed in Annexes 1 and 3 to Part I above.
- 4.146. The Respondent applied to annul the Tribunal’s five awards before the Hague District Court and Court of Appeal. The Hague District Court rejected the Respondent’s applications, by its judgment dated 20 January 2016.<sup>106</sup> By its judgment dated 18 July 2017,<sup>107</sup> the Court of Appeal of The Hague confirmed the decision of the District Court “with an improvement of the legal grounds”. The Respondent was entitled under Dutch law, to appeal from this judgment to the Supreme Court of The Netherlands (the “Hoge Raad”).
- 4.147. By letter dated 1 August 2017, the Respondent notified the Tribunal that it was “currently evaluating” whether to initiate such an appeal. On 18 October 2017, the Respondent lodged a cassation appeal to the Hoge Raad. These appellate proceedings remain pending before the Hoge Raad, as of the date of this Award.<sup>108</sup>
- 4.148. By letter dated 12 July 2017, the Respondent requested that the Tribunal “terminate” its First, Second and Fourth Interim Awards for the reasons there set out, principally because “recent events in U.S. courts and in enforcement courts demonstrate that

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<sup>106</sup> See the Claimants’ letters to the Tribunal dated 1 August 2017 and 19 March 2018, p. 2, and the Respondent’s letter dated 20 April 2018, p. 2.

<sup>107</sup> C-2545.

<sup>108</sup> See the Claimants’ letter to the Tribunal dated 19 March 2018, p. 2, and the Respondent’s letter to the Tribunal dated 20 April 2018, p. 2.

Chevron faces no current imminent threat of irreparable harm” (pp. 4-5). By letter dated 19 July 2017, the Claimants opposed the Respondent’s request. By its Procedural Order No 47 dated 31 October 2017, the Tribunal dismissed the Respondent’s request for the reasons and upon the terms there set out.

***H: The Tribunal’s Annotated Chronology 1993-2018***

- 4.149. The Tribunal has found it necessary to set out the relevant facts, as it finds them on the evidence, in the form of an annotated chronology: from 1993 to the Lago Agrio Judgment and Clarification Order of 14 February and 4 March 2011; and from March 2011 to 2018. The events there described should be read with the documentary evidence referenced in the corresponding footnotes.
- 4.150. As regards an overall account of the Aguinda Litigation and the Lago Agrio Litigation, the Tribunal emphasises that these chronologies, albeit lengthy, are incomplete. They nonetheless suffice for the purpose of this Award.
- 4.151. Documentation in Spanish is here reproduced in English translations prepared by the Parties for the Tribunal.

***1993***

- 4.152. *3 November 1993*: As already indicated, the Aguinda Plaintiffs begin the Aguinda Litigation before the US Federal Court for the Southern District of New York, USA in 1993.<sup>109</sup> It is a putative (not certified) class action pleading several torts against Texaco, in negligence, nuisance, strict liability, trespass, conspiracy and violations of the law of nations under the US Alien Tort Claims Act. The complaint is brought in New York because, at the time, Texaco’s headquarters were located at White Plains, New York. It lists 76 named plaintiffs, including 15 Kichwa (including Maria Aguinda), 24 Secoya and 37 non-indigenous “colonists”. There are no named plaintiffs from the Cofán, Siona and Huaorani communities. However, the size of the putative class, estimated at 30,000 affected persons, is defined geographically to include members of these communities; but no class is ever certified by the Court.

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<sup>109</sup> C-14.

- 4.153. Texaco denies any liability to the Aguinda Plaintiffs and applies to dismiss the proceedings on two grounds: (i) forum non conveniens (in favour of the Ecuadorian Courts) and (ii) the Aguinda Plaintiffs' failure to join as parties indispensable third persons (namely PetroEcuador and Ecuador).
- 4.154. The Aguinda Plaintiffs are represented in the Aguinda Litigation by US lawyers, including Mr Cristóbal Bonifaz, Mr Steven Donziger and Mr Joseph Kohn (of Kohn, Swift and Graf, a law firm in Philadelphia with significant financial resources). The case is assigned to Judge Broderick; he died in March 1995; and the case is then re-assigned to Judge Rakoff.

### ***1994***

- 4.155. *1994*: Between May and August 1994, four municipalities in the Oriente, Shushufindi, Francisco de Orellana (Coca), Lago Agrio and La Joya de los Sachas, begin legal proceedings against TexPet before the Ecuadorian Courts (the "Municipal Lawsuits"), seeking compensation for environmental harm and injuries to their communities allegedly caused by the former Consortium's operations and also orders requiring TexPet to remediate the alleged contamination within the area of the former Concession.<sup>110</sup> In May 1995, as part of the consideration for the release under the 1995 Settlement Agreement, TexPet agrees to negotiate settlements of the Municipal Lawsuits. TexPet and the four Municipalities subsequently agree settlements in 1996, approved by the Ecuadorian Courts between May and September 1996.
- 4.156. *14 December 1994*: A Memorandum of Understanding is made between the Respondent, PetroEcuador and TexPet (the "MOU").<sup>111</sup> In summary, the MOU provides that the parties would develop a detailed scope of environmental remedial work; that TexPet would perform such work; and that, after the completion of such work, the parties would negotiate "the full and complete release of TexPet's obligations for environmental impacts arising from the operations of the Consortium."<sup>112</sup>

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<sup>110</sup> C-320 & C-321 (Shushufindi); C-325 (Orellana); C-323 (Lago Agrio); and C-322 (La Joya de los Sachas).

<sup>111</sup> C-17.

<sup>112</sup> C-17, Article IV.



## **1995**

- 4.157. *4 May 1995*: The Respondent, PetroEcuador and TexPet conclude the Settlement Agreement.<sup>113</sup> It provides (inter alia): “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”; the agreed scope of the environmental remedial work is attached as Annex A; and “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”.<sup>114</sup>
- 4.158. By Article 5.1 of the 1995 Settlement Agreement, the Respondent and PetroEcuador release, acquit and forever discharge TexPet and its fellow “Releasees” of “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 shall be released as the Environmental Remedial Work is performed to the satisfaction of the Government and Petroecuador ...”. The Settlement Agreement thereby envisages a two-stage process for this release. First, all claims by the Respondent and PetroEcuador against the Releasees are released, excepting those covered by the Scope of Work; and, later, the latter are also released if the remedial work is performed by TexPet to the satisfaction of the Respondent and PetroEcuador.
- 4.159. The 1995 Settlement Agreement is signed for the Respondent by the Minister of Energy and Mines (Dr Galo Abril Ojeda), for PetroEcuador by its Executive President (Dr Fererico Vintimilla Ojeda) and for TexPet by its Vice-President (Mr Veiga) and its legal representative (Dr Pérez). Later, in February 2008, Mr Veiga and Dr Pérez were defendants in the Criminal Prosecutions brought by the Respondent in relation to the 1995 Settlement Agreements (see above).

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<sup>113</sup> C-23.

<sup>114</sup> C-23, Recitals, p. 3; Article 5.1. In Part III above, the Tribunal has set out more fully the relevant extracts from the 1995 Settlement Agreement, as also of the 1996 Municipal and Provincial Releases and the 1998 Final Release.

4.160. The definition of “Environmental Impact” under the 1995 Settlement Agreement is broad, including any “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.”<sup>115</sup>

4.161. By Article 5.2, the definition of the “claims” to be released under the 1995 Settlement Agreement is also broad:

*“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, whether sounding in contract or tort, constitutional, statutory, or regulatory causes of action or penalties (including, but not limited to, causes of action under Article 19-2 of the Political Constitution of the Republic of Ecuador, Decree No. 1459 of 1971, Decree No. 925 of 1973, the Water Act, R.O. 233 of 1973, ORD No. 530 of 1974, Decree No.374 of 1976, Decree No. 101 of 1982, or Decree No 2144 of 1989, or any other applicable law or regulation of the Republic of Ecuador), 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.”<sup>116</sup>*

4.162. *Effect:* As already decided by the Tribunal, as here confirmed, the 1995 Settlement Agreement was made by the Respondent, acting by its Government, including the Ministry of Energy and Mines: see the Tribunal’s First Partial Award at paragraph 25.

4.163. *8 September 1995:* The Remedial Action Plan, prepared by (inter alios) Woodward-Clyde International Inc (the “RAP”), is agreed by TexPet, PetroEcuador and the Respondent’s Ministry of Energy and Mines.<sup>117</sup>

## **1996**

4.164. *May-September 1996:* The Municipal Settlements (also called the “Municipal and Provincial Releases”) are agreed between TexPet and four municipalities in the Oriente

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<sup>115</sup> C-23, Article 1.3.

<sup>116</sup> C-23, Article 5.2.

<sup>117</sup> R-610; Connor ER, p. 7.

(Shushufindi, Francisco de Orellana, Lago Agrio and La Joya de los Sachas), pursuant to Paragraph VII(C) of Annex A of the 1995 Settlement Agreement and approved by the Ecuadorian Courts.<sup>118</sup>

4.165. The approved releases provide, in materially similar terms that the representatives of the municipality (here Lago Agrio):

*“... 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, and all their agents, employees, executives, directors, representatives, insurers, lawyers, guarantors, heirs, administrators, contractors, subcontractors, successors or predecessors, 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 Canton of Lago Agrio, Province of Sucumbíos, which in part comprises the area of the oil concession ...”*<sup>119</sup>

4.166. The Tribunal has seen no evidence in this arbitration that any of these municipalities sought authority to settle the individual claims by any person for personal harm. As with the 1995 Settlement Agreement, the Tribunal concludes that such individual claims were unaffected by these Municipal Settlements. Indeed, the Claimants have not here contended otherwise. (The Tribunal addresses the issue of “diffuse” claims separately below).

4.167. *20 November 1996*: A “waiver of rights” is ostensibly granted in favour of the Respondent and PetroEcuador by the Aguinda Plaintiffs’ representatives, Mr Bonifaz and Mr Kohn.<sup>120</sup> It is made in the USA in the Spanish language before notaries public of Massachusetts and Pennsylvania (being the respective domiciles of Messrs Bonifaz and Kohn) by reference to the pending Aguinda Litigation in New York. Messrs Bonifaz and Kohn appear “in their capacities as lead attorneys for the plaintiffs [in the Aguinda Litigation], with full legal capacity to execute this document on behalf of the plaintiffs and of all other U.S. lawyers who, on behalf of the plaintiffs, are involved in the case ...” .

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<sup>118</sup> C-27 to C-32 and C-35 to C-41.

<sup>119</sup> C-30, p. 7 (settlement) and C-26 (court approval) for Lago Agrio.

<sup>120</sup> C-911.

4.168. The Tribunal has seen no evidence in this arbitration that Messrs Bonifaz and Mr Kohn sought or received express authority to settle individual claims by any person represented by them in the Aguinda Litigation (or to be represented by them in the later Lago Agrio Litigation). If it existed, given the terms of this waiver made by and on behalf of private persons, it would be limited to the plaintiffs named in the Aguinda Complaint advancing individual claims for personal harm; and, ostensibly at least, it would not extend to other persons not so named or any person alleging only “diffuse” rights.

4.169. The Respondent and PetroEcuador, as beneficiaries, are not signatories to the waiver, it being only there recorded that:

*“The Government of Ecuador, through its counsel, the Attorney General of Ecuador, Dr Leonidas Plaza Verduga, has decided to become involved in this case not as a party to the lawsuit [the Aguinda Litigation], but [on behalf] of the Republic of Ecuador consequently states that it is willing to allow execution in its territory of any environmental remediation measures the Court may order the defendant company to perform in accordance with the remedies the plaintiffs seek. At the same time Ecuador requests that the compensation sought in the above-mentioned case be paid exclusively by TEXACO and that the Republic of Ecuador, PETROECUADOR and its affiliate companies or any other Ecuadorian public sector institution or agency not under any circumstance be required to pay such compensation.”*

4.170. Under the waiver, the Aguinda Plaintiffs “represented” by Messrs Bonifaz and Kohn):

*“(1) ... expressly waive the right to file any claim against the Ecuadorian State, PETROECUADOR and its affiliate companies or any other Ecuadorian public sector institution or agency, if in any eventuality the Federal Court of New York attributes to Ecuador or to the other institutions mentioned, any part of the compensation claimed by the plaintiffs for personal or environmental damage generated by the oil production activity TEXACO carried out in Ecuador.”*

*(2) This waiver includes the impossibility of filing any court action against the Ecuadorian State, Petroecuador and its affiliate companies, or any other Ecuadorian public sector institution or agency, whether in the United States of America or in Ecuador, claiming payment of any compensation that the Court of the Southern District of New York or other U.S. Court might impose upon the Ecuadorian State, PETROECUADOR and its affiliate companies or any other Ecuadorian public sector institution or agency on account of the acts that form the basis for the Aguinda v. TEXACO case.*

*(3) If TEXACO were to sue the Ecuadorian State, PETROECUADOR and its affiliate companies, or any other Ecuadorian public sector institution or agency in*

*U.S. court to obtain a contribution to any possible judgment against TEXACO in the U.S. District Court of New York, then we will reject any decision that the New York Court makes in said regard in favor of TEXACO, and we expressly waive the right to collect any amount whatsoever arising from such decision.*

*(4) In addition, we agree to cooperate and at all times assist the attorneys of the Ecuadorian State, PETROECUADOR and its affiliate companies or any other Ecuadorian public sector institution or agency / the Ecuadorian Government in the Aguinda v. TEXACO case.”*

- 4.171. As between the Respondent and the Aguinda Plaintiffs, the Respondent was thereby ostensibly immunised by the terms of this waiver. It is not clear to the Tribunal whether it was intended that the Respondent was thereby to become immune from the Lago Agrio Plaintiffs’ claims in the subsequent Lago Agrio Litigation. Whether or not that was so as a matter of any applicable law or laws, such was nevertheless the factual position. In the US Section 1782 Litigation, Mr Bonifaz later testified that it would have been futile for the Aguinda Plaintiffs to try to sue the Respondent in Ecuador: “... the fact is that you can sue Ecuador; you’re never going to be able to collect.”<sup>121</sup> Mr Donziger also stated, as privately recorded on film on 16-17 November 2007 in Ecuador, that “the government here will never pay for any judgment”.<sup>122</sup>
- 4.172. It is nonetheless clear that the waiver could have no legal effect on claims against the Respondent or PetroEcuador by Texaco (or by TexPet and Chevron), both in the USA and Ecuador. However, it is common ground that such a claim could not be made by Chevron against PetroEcuador or the Respondent within the Lago Agrio Litigation, being “summary proceedings” as a matter of Ecuadorian civil procedure.<sup>123</sup>
- 4.173. The Tribunal records its disquiet at the paucity of the evidence regarding this waiver. It is possible that its purpose may have been limited in scope and time, given the pending controversy before the US District Court (Judge Rakoff) in New York over the application by the Respondent and PetroEcuador to intervene in the Aguinda Litigation as co-plaintiffs, supporting the Aguinda Plaintiffs, and Texaco’s opposition to that application (see above).

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<sup>121</sup> C-1220, at 19-20.

<sup>122</sup> C-360, Crude Outtakes, CRS-116-01-CLIP-01, p. 139 [03:20-03:30].

<sup>123</sup> Track II Hearing D13.2938.

4.174. Mr Bonifaz testified, in the US Section 1782 Litigation, that the waiver had originated from a comment by Judge Rakoff that, if the Respondent did intervene in the Aguinda Litigation, “Texaco might bring counterclaims against it”.<sup>124</sup> According to Mr Bonifaz, the waiver was drafted by the Respondent; and: “There’s no question there was a quid pro quo here. In other words, okay, Mr Leonidas Plaza [the Respondent’s Attorney-General at the time], I’ll sign this thing and you intervene in New York. Well, that government lasted one year. And once the old government lasted a year, the government all of a sudden wrote a letter to the court - the new government of Alarcón [President Fabian Alarcón] wrote a letter to the court saying something to the effect that we’re not going to intervene; we’re backing off out of that intervention, but we are going to support the plaintiffs.”<sup>125</sup>

4.175. In any event, whatever the explanation for this waiver, on 12 August 1997, the US District Court (Judge Rakoff) denies the application by Ecuador to intervene in the Aguinda Litigation. This order is not vacated by the US Court of Appeals for the Second Circuit.<sup>126</sup>

4.176. *12 November 1996*: The US District Court (Judge Rakoff) grants Texaco’s application to stay the Aguinda Plaintiffs’ complaint.<sup>127</sup> (This decision was later reversed by the U.S. Court of Appeals for the Second Circuit on 5 October 1998: see below).

### ***1997***

4.177. *11 May 1997*: The Ecuador-USA Treaty (or BIT) agreed in 1993 comes into effect on 11 May 1997.<sup>128</sup>

### ***1998***

4.178. *30 September 1998*: The Final Release is issued, signed by PetroEcuador, the Ministries and TexPet (the “Acta Final”),<sup>129</sup> after 52 RAP Actas and 19 Approval Actas.<sup>130</sup> In summary, within the former concession area, a total of 250 pits and 7 spills at 133 well

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<sup>124</sup> C-1220, p. 14.

<sup>125</sup> C-1220, p. 33.

<sup>126</sup> See C-291, p. 2.

<sup>127</sup> C-477.

<sup>128</sup> C-279.

<sup>129</sup> C-457.

<sup>130</sup> Connor ER1, p. 7; Track II Hearing D6.1295-1297 (Slide 9).

sites in 10 fields had been investigated under the RAP, with remedial action taken at 168 of these locations; and the balance (of 89) not subjected to remedial action because it was not required under the RAP.<sup>131</sup>

4.179. Whilst there was later much disquiet within the Respondent's Government as to the making of the 1995 Settlement Agreement (with the 1998 Final Release), there is no cogent evidence before this Tribunal that TexPet (or Texaco) violated the terms of the 1995 Settlement, the RAP or any Acta.

4.180. To the contrary, Mr Giovanni Rosania Schiavone, the Respondent's Under-Secretary of Environmental Protection (1995-1996) testified in this arbitration, as to his signing of Actas:

*“Q..... The signing of those Actas represented to your knowledge and expertise and opinion that the work TexPet had promised to do was done successfully and completely with respect to the Acta that you signed? A. That's correct. The technical work – I insist the technical work and environmental work was done well, and we accepted that the problem had been corrected, environmental problem in that area had been corrected.”<sup>132</sup>*

4.181. In May 2006, Mr Manuel Muñoz as the Director of DINAPA (the National Environmental Protection Management of the Ministry of Energy) was to inform a Commission of the Congress:

*“I would like to share with you some very important news which are very interesting but have not come to public notice. Petroproducción [PetroEcuador] was left with a very considerable debit side derived from the pits left by Texaco. Texaco completed the remediation of the pits that were their responsibility; this was 33% of the total. However, 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.”<sup>133</sup>*

4.182. In July 2006, in her expert report to the Office of the Prosecutor, Ms Adriana Enriquez Sanchez was to conclude:

*“The purpose of this examination was 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. The Technical-Visual examination was conducted on the pits at certain oil wells in the following fields: Sacha,*

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<sup>131</sup> C-43, section 3.1.

<sup>132</sup> November Hearing D1.146.

<sup>133</sup> C-58, p. 1.

*Shushufindi, Guanta and Lago Agrio ... The surface of the soil in the remediated pits contains a great deal of organic material and there is no evidence of hydrocarbons, for which reason it does not represent a risk to human life, flora or wildlife. Similarly, no remains or leaks of hydrocarbons into the soil around the pits could be seen.*"<sup>134</sup>

4.183. Later, in his email to Mr Donziger dated 1 August 2008, the Lago Agrio Plaintiffs' expert, Mr Beltman, was to state: "I did not find any clear instances where TexPet did not meet the conditions required in the cleanup."<sup>135</sup> (This email message is quoted more fully in the chronology below, under "1 August 2008").

4.184. *5 October 1998*: The US Court of Appeals for the Second Circuit reverses the decision of Judge Rakoff and remits the Aguinda Litigation to him.<sup>136</sup> In May 2001, Judge Rakoff again stays the Aguinda Plaintiffs' complaint, in favour of Ecuadorian jurisdiction.<sup>137</sup>

### **1999**

4.185. *1999*: The Environmental Management Act 1999 is enacted in Ecuador (the "EMA").

### **2001**

4.186. *9 October 2001*: Texaco Inc. merges with Keepep Inc., a wholly-owned subsidiary of Chevron Corporation, with Texaco Inc. emerging as the surviving corporation in the merger and becoming a direct subsidiary of Chevron Corporation,<sup>138</sup> and with the parent company changing its name in turn to "ChevronTexaco Corporation".<sup>139</sup> (In 2005, ChevronTexaco Corporation drops the name "Texaco" and is (re-) named Chevron Corporation). It is necessary, given the terms of the Lago Agrio Judgment, to describe more fully the form and effect of this merger under its applicable law, the laws of Delaware, USA.

4.187. The Tribunal refers to the written testimony of Mr Frank Soler.<sup>140</sup> He was personally involved for Chevron in the implementation of the Agreement and Plan of Merger of 15

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<sup>134</sup> C-592, p. 3.

<sup>135</sup> C-2043, p. 2.

<sup>136</sup> R-29.

<sup>137</sup> C-10.

<sup>138</sup> C-68, C-69, C-70.

<sup>139</sup> C-69, p. 2.

<sup>140</sup> Soler WS, paras 9-26. Mr Soler's witness statement, as also Professor Allen's expert report (see below), were adduced by the Claimants in support of their submissions as to the legal effects of "merger" in C-TI Rep. Mer. Aug. 2012, paras 177-185.



October 2000 between Chevron, Texaco and Keeppep Inc. (the "Agreement and Plan of Merger")<sup>141</sup> under a legal procedure known under the laws of Delaware as a "reverse triangular merger". At all material times, Chevron, Texaco and Chevron's subsidiary, Keeppep Inc, were companies incorporated in the State of Delaware.

- 4.188. Mr Soler testified that on 9 October 2001, Texaco merged with Keeppep Inc., a wholly-owned subsidiary of Chevron, in accordance with Section 1.1 of the Agreement and Plan of Merger; Texaco emerged as the surviving corporation from its merger with Keeppep Inc; and, as a result, Texaco became a wholly-owned direct subsidiary of Chevron; Chevron's stock in Keeppep Inc. was converted into stock in Texaco, while each share of Texaco common stock held by Texaco's shareholders was converted into the right to receive 0.77 shares of Chevron's common stock, which equated in value to approximately US\$ 38.012 billion.
- 4.189. In accordance with Section 2.1(a) of the Agreement and Plan of Merger, so Mr Soler testified, Chevron changed its name to "ChevronTexaco Corporation"; Texaco continued to exist as a subsidiary of ChevronTexaco Corporation; and the change in name from "Chevron Corporation" to "ChevronTexaco Corporation" did not affect Chevron's corporate structure.
- 4.190. Thus, according to Mr Soler, with this "merger", Chevron acquired all of Texaco's stock; Chevron did not acquire any of Texaco's assets or liabilities (because Texaco remained a separate corporation); and Texaco retained ownership of all of its assets and liabilities, consisting primarily of ownership interests in Texaco's subsidiary companies, including TexPet.
- 4.191. The legal effects of this "reverse triangular merger" were the subject of expert testimony by Professor William T. Allen, formerly the Chancellor (or Chief Judge) of the Court of Chancery of the State of Delaware. In his expert report,<sup>142</sup> Professor Allen testified that under Delaware law, Chevron did not assume or otherwise become liable for any obligations of Texaco as a result of the "merger"; the judicial doctrine of piercing the corporate veil, under Delaware law, does not impose upon Chevron liability for any obligations of Texaco relating to events that occurred prior to the date of the "merger";

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<sup>141</sup> Soler WS, para 4.

<sup>142</sup> Allen ER, sections 3-8.

Chevron had no capacity to “control and dominate” the management of Texaco prior to the “merger”; the “merger” itself did not constitute any wrong to then existing or future creditors of Texaco, since under Delaware law, which governed the effects of the “merger”, those persons were left in precisely the same position vis-a-vis Texaco’s assets and liabilities as they were before the “merger”; and those assets and liabilities remained unaffected by the “merger”.

- 4.192. The Tribunal accepts the factual testimony of Mr Soler and, as to the laws of Delaware, the expert testimony of Professor Allen. It concludes that, as a matter of Delaware law, Chevron did not succeed to the liabilities of Texaco or TexPet incurred before the merger in 2001, including liabilities resulting from their respective activities in Ecuador from 1964 to 1992.

### **2002**

- 4.193. *16 August 2002*: The stay of the Aguinda Litigation in New York takes effect, with Texaco’s undertaking in favour of Ecuadorian jurisdiction and the dismissal of the Aguinda Plaintiffs’ appeal from the decision of Judge Rakoff by the US Court of Appeals for the Second Circuit.<sup>143</sup>

### **2003**

- 4.194. *7 May 2003*: The Lago Agrio Plaintiffs file their Complaint in the Lago Agrio Court in Ecuador against “Texaco Inc.” as the only named defendant in the title page (“the Lago Agrio Litigation”).<sup>144</sup>
- 4.195. The Complaint is drafted by Mr Alberto Wray, the senior Ecuadorian lawyer acting for the Lago Agrio Plaintiffs in Ecuador. He testified: “I wrote the claim submitted in Lago Agrio in 2003 by the members of the ‘Frente de Defensa de la Amazonia’ (‘the plaintiffs’) ... As the author of the Complaint, I intended to preserve to the extent possible the claims that had been raised and pursued in the *Aguinda* case in New York. Since Ecuadorian law does not contemplate an equivalent of a class action, I based the claims on, *inter alia*, Article 2260 of the Civil Code,<sup>145</sup> which grants any individual or

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<sup>143</sup> C-65.

<sup>144</sup> C-71.

<sup>145</sup> Article 2236 of the Civil Code (formerly Article 2260) of the Civil Code provides (in the original Spanish and in its English translation): “*Por regla general se concede acción popular en todos los casos de daño contingente*

group of individuals a right of action to compel the removal of any threat of damage, including an environmental threat.”<sup>146</sup>

- 4.196. As the Tribunal decided in its Decision on Track IB (by a majority), the Complaint includes both claims made by individuals for personal harm (not being diffuse claims) and diffuse claims.
- 4.197. At this time, the assigned judge in Lago Agrio is Judge Guerra, as the President of the Superior Court of Nueva Loja (the “Lago Agrio Court”).
- 4.198. The Tribunal understands that the title page for the court file on the Lago Agrio Litigation was mistakenly prepared by the Lago Agrio Court clerk and that the correct name of the defendant should have been “ChevronTexaco Corporation”, as appears from page 7 of the Complaint.<sup>147</sup> For ease of reference, the Tribunal refers to this defendant in the Lago Agrio Litigation as “Chevron”. Texaco and TexPet are not named parties to the Lago Agrio Litigation.
- 4.199. Chevron was therefore the sole defendant named in the Lago Agrio Litigation. At first sight, it was a strange decision by the Lago Agrio Plaintiffs. Chevron itself had never done business in Ecuador; nor had it participated in any capacity under the 1964 or 1973 Concession Agreements; nor was it a signatory party to the 1995 Settlement Agreement (including the 1998 Final Release). At this time, Chevron and its subsidiaries had no significant assets in Ecuador. Under US and Delaware laws, as its personal law, Chevron was and remained a legally distinct and separate company from both Texaco and TexPet.
- 4.200. Later, Mr Donziger complained that the Lago Agro Plaintiffs’ senior Ecuadorian lawyer (Mr Alberto Wray) had made a mistake in naming “the wrong party” as the defendant: “... This goes back to Alberto’s errors: suing the wrong party in the complaint, then asking for too many inspections rather than controlling the process, capitulating on the field lab at the first complaint, letting work visa slide at first inspection, signing the Plan

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*que por imprudencia o negligencia de alguno amenace a personas indeterminadas. Pero si el daño amenazare solamente a personas determinadas, sólo alguna de éstas podrá intentar la acción.*” (“As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.”). The relevant texts of the Civil Code are set out in Part III of this Award, above.

<sup>146</sup> Wray WS, paras 3, 5.

<sup>147</sup> Track II Hearing D13.2920-2962.

of Analysis – most all of these a function of his inability to take on the TEX [Texaco] lawyers and take control of the litigation.”<sup>148</sup>

- 4.201. Mr Wray ceased acting as the Lago Agrio Plaintiffs’ senior lawyer in June 2005, when Mr Donziger assumed a more prominent role, together with Mr Fajardo and Mr Luis Yanza. Mr Wray had no participation in the Lago Agrio Litigation as the Lago Agrio Plaintiffs’ “procurador” after February 2006.<sup>149</sup> As Mr Donziger later testified in his US deposition in the RICO Litigation, in response to the question whether Mr Wray’s role had then been terminated or reduced: “I wouldn’t say reduced. I would say it evolved to something different ... when the case began in Ecuador, he [Mr Wray] was the procurador common, which is the position that Pablo Fajardo occupies today [December 2010], and there came a time when he [Mr Wray] didn’t want to continue in that role for a variety of reasons, so he evolved into a different role, where he was, I would say, more eminent – he would sort of advise the lawyers on the Lago Agrio team about Ecuadorian law issues.”<sup>150</sup> (The Tribunal has seen no evidence connecting Mr Wray with any improper conduct alleged by the Claimants against the Lago Agrio Plaintiffs’ representatives).
- 4.202. In any event, the named defendant in the Lago Agrio Complaint is never amended by the Lago Agrio Plaintiffs. The sole defendant remains Chevron, allegedly standing in the shoes of Texaco and TexPet as result of the “merger” between Chevron and Texaco in 2001.
- 4.203. As already indicated above, in this Award the Tribunal refers to the defendant in the Lago Agrio Litigation as “Chevron”, although others at the time also referred to it as “Chevron-Texaco” and “Texaco”.
- 4.204. The Lago Agrio Plaintiffs’ technical experts are to include Mr David Russell (subsequently replaced by Stratus Consulting), Mr Douglas Beltman (of Stratus Consulting), Dr Anne Maest (also of Stratus Consulting), Dr Charles Calmbacher (used as the first judicial inspection expert), Mr Edison Camino, Dr Castro and Mr Oscar Davila (used as experts for the judicial inspections).

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<sup>148</sup> C-716, p. 85 of 111 (24 January 2006).

<sup>149</sup> Wray WS, para 6.

<sup>150</sup> C-697, pp. 609-610.

- 4.205. *13 May 2003*: The Lago Agrio Court (Judge Guerra) assumes jurisdiction over the Lago Agrio Complaint, ruling against Chevron’s jurisdictional objection. Judge Guerra orders the case to proceed as a summary verbal proceeding under the provisions of Article 43 of the Environmental Management Act 1999 and Articles 843 et seq of the Code of Civil Procedure.<sup>151</sup> As already indicated, it is common ground between the Parties that such a summary proceeding does not allow Chevron to implead PetroEcuador.<sup>152</sup>
- 4.206. *June 2003*: At this time, when Mr Fajardo had not yet joined the Lago Agrio Plaintiffs’ legal representatives, Mr Fajardo writes, as later recorded in the Final Report FLACSO-PetroEcuador Project Phase II of November 2003 “on the socio-environmental conflicts at the Sacha and Shushufindi fields (1994-2002)”:

*“They [Petroproducción and PetroEcuador ] are not trustworthy because Petro does not practice what it preaches. Even since Texaco 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.”*<sup>153</sup>

Mr Fajardo is described in the Report as the president of the Shushufindi Human Rights Commission and legal advisor of the Frente de Defensa de la Amazonía.

- 4.207. *21 October 2003*: A “conciliation hearing” is held before Judge Guerra on 21 October 2003. At this hearing, Chevron files its Response to the Lago Agrio Complaint. Its response, inter alia, challenges the jurisdiction of the Lago Agrio court over Chevron and, without prejudice to its jurisdictional challenge, also responds to the substance of the Complaint.<sup>154</sup>
- 4.208. *29 October 2003*: The Lago Agrio Court (Judge Guerra) orders an “expertise” in two phases. The first phase is to involve the carrying out of judicial inspections of 25 sites requested by Chevron and 97 sites requested by the Lago Agrio Plaintiffs. Each side would appoint their own experts to conduct these inspections. The second phase, requested by the Lago Agrio Plaintiffs, envisages: “an expert examination intended to confirm the environmental effects of hydrocarbon production activities in all the fields

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<sup>151</sup> C-492.

<sup>152</sup> See Track II Hearing D12.2605; C-Mem. Mer. Sept. 2010, para 176, citing Coronel ER1, para 114.

<sup>153</sup> C-184, p. 77.

<sup>154</sup> C-72.

used by TEXACO for production in its role as operator of the Consortium ... this same procedure shall have the participation of Experts appointed and installed for the inspection noted in subheading I...”.<sup>155</sup>

## **2004**

- 4.209. *7 August 2004*: The Lago Agrio Plaintiffs and Chevron agree terms of reference in the Lago Agrio Litigation, contemplating that the Lago Agrio Court would appoint a panel of independent settling experts [“dirimentes”] to resolve any differences between the reports of the experts of the Lago Agrio Plaintiffs and Chevron conducting the judicial inspections.<sup>156</sup> The parties’ agreement is recorded in a 91-page document, comprising: (i) terms of reference for the experts who would be carrying out the judicial inspections; (ii) a detailed sampling plan; (iii) ten “standard operating procedures” covering the taking of different samples from various locations, the decontamination of equipment etc; and (iv) an analysis plan, prepared in accordance with USEPA guidelines [“USEPA” denotes the United States Environmental Protection Agency], which covered (inter alia) data quality objectives, data validation and laboratory procedures.<sup>157</sup>
- 4.210. *26 August 2004*: The Lago Agrio Court (now Judge Novillo) orders the parties to comply with the agreed terms of reference.<sup>158</sup>
- 4.211. *Summer 2004*: The judicial site inspections begin in the Lago Agrio Litigation.
- 4.212. At first, the Lago Agrio Plaintiffs send their samples to be tested at a laboratory in the USA, Analytical Services Inc. However, this proves unsatisfactory because of the time that samples are held before analysis and also because the samples are inspected upon entry into the USA, which breaks the chain of custody. The Lago Agrio Plaintiffs then use the Catolica laboratory in Quito and subsequently a laboratory in Quito called HAVOC.<sup>159</sup> The latter became a subject of major controversy between the parties.
- 4.213. During the course of 2004, Dr Calmbacher carries out judicial inspections at Sacha 6, Sacha 21, Sacha 94 and Shushufindi 48 for the Lago Agrio Plaintiffs.<sup>160</sup> Later,

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<sup>155</sup> C-176, pp. 6-7.

<sup>156</sup> C-177, pp. 1-2.

<sup>157</sup> C-177.

<sup>158</sup> C-496.

<sup>159</sup> C-186, pp. 55-59.

<sup>160</sup> C-186, p. 60.

Dr Calmbacher testified that certain expert reports submitted in his name by the Lago Agrio Plaintiffs' representatives during the judicial inspections were falsified by them, and that the sites that he inspected, in fact, did not indicate a danger to human health or pose a risk to the environment.<sup>161</sup>

4.214. *1 November 2004*: In his email message to Mr Donziger of 1 November 2014, reporting on sampling analyses, Mr David Russell (of Global Environmental Operations, as one of the Lago Agrio Plaintiffs' environmental experts) writes: "... Based upon a meeting in New York with the Attorneys on Thursday of last week, we need to stop analysing for BTEX and GRO. TPH and DRO are fine, but the analysis and reporting of GRO and BTEX data is self-defeating except to show that the contamination is much more recent than we would desire, and that would lead to an argument that the contamination is by PetroEcuador rather than Texaco. This is especially true for BTEX Data. ...".<sup>162</sup>

4.215. It will be recalled that TexPet had left Ecuador in 1992 and that, ostensibly, the Lago Agrio Plaintiffs had "waived" their rights against PetroEcuador on 20 November 1996 (see above). PetroEcuador continued operations in the former concession area by itself, from 1992 onwards.

4.216. *27 November 2004*: The Lago Agrio Plaintiffs' Ecuadorian lawyer, Mr Alberto Wray, writes to Mr Donziger that the first two judicial inspection reports by Dr Calmbacher show that "hydrocarbons are below detection limits" and do "not help" the Lago Agrio Plaintiffs' case.<sup>163</sup>

4.217. *27 December 2004*: In his memorandum of 27 December 2004 to Mr Donziger, Mr Russell states, as regards DROs:

*"Now what we are analyzing is TPH and DRO. That leaves RRO, GRO, and NNO as unknowns. If you will recall, we stopped analyzing GRO at Cristobal's insistence because it helps Texaco prove their case. The problem comes in when we look for components of the DROs which are harmful. The PAH, or Polynuclear Aromatic Hydrocarbon compounds. These compounds are powerful carcinogens, and if present in quantity would amount to a slam dunk for proving harm to people. The problem is that so far, they are not there or are not detected, even after we lower the detection limit ... Right now, we can't prove harm except by inference and*

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<sup>161</sup> C-186, pp. 61-63; 112-115; 117; 135.

<sup>162</sup> C-2044 ("BTEX" denotes Benzene, Toluene, Ethylbenzene and Xylene; "TPH" denotes Total Petroleum Hydrocarbons; "GRO" denotes Gasoline Range Organics; "DRO" denotes Diesel Range Organics; and "RRO" denotes Residual Range Organics).

<sup>163</sup> C-1192.

*claims that TPH is harmful, that DRO is harmful, and that RRO.s are harmful. But the problem is that there is nothing specific.”<sup>164</sup>*

**2005**

4.218. *11 February 2005*: Mr Russell notes in an email message dated 11 February 2005 to Mr Donziger:

*“From the data I have seen so far, we are not finding any of the highly carcinogenic compounds one would hope to find when investigating the oil pits. That does not discount the findings of the metals, but I fear that may not be enough. I believe that we need a big smoking gun which will link Chevron-Texaco to cancer in and through the oil, and not through just the drilling muds and chrome and other heavy metals. There are two possible reasons for the lack of finding organic carcinogenic compounds in the oils at this time: 1) the compounds (primarily PAH) have been fully degraded or 2) because the compounds are soluble, they may have escaped the pits and are found in the groundwater outside the pit areas. Either or both of these scenarios are possible. We won’t know until we begin a comprehensive look for the compounds outside the pit areas, and examine the groundwater closely.”<sup>165</sup>*

4.219. Mr Russell is subsequently dismissed as an expert by Mr Donziger and replaced by experts from Stratus Consulting. Later, on 14 February 2006, Mr Russell instructs Mr Donziger to cease using his (Mr Russell’s) original estimate of clean-up costs of US\$ 6.14 billion because it was “too high by a substantial margin, perhaps by a factor of ten or more” (see below).

4.220. *10 August 2005*: Dr Martha Escobar Koziel (of the office of the Attorney General of Ecuador) sends an email message dated 10 August 2005 to Mr Wray, Mr Bonifaz and others regarding the nullification of the 1995 Settlement Agreement and Final Release, following a visit by Chevron’s representatives to the President.<sup>166</sup> It states, in material part:

*“On the afternoon of August 8, I was in the Office of the President of the Republic; Dr Gonzalez, the Legal Undersecretary General, invited me to a meeting to discuss TEXACO; he confirmed that the previous week (he did not say what day) high-ranking TEXACO officials had been there; he did not give me names either, but he indicated that there had been a Brazilian (must be Reis Vega), an Argentine, a bearded American (he said he was a lawyer), and Dr Pérez (who has always been*

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<sup>164</sup> C-1032.

<sup>165</sup> C-1050.

<sup>166</sup> This President was President Palacio (not President Correa). Ms Escobar was one of the lawyers assigned by the Respondent to assist outside counsel in the proceedings between Chevron and Ecuador in New York: see Track II Hearing D13.2802.



*the legal representative in Ecuador) and an official from the Ministry of Energy and Mines (whose name he did not know because he did not leave his card). According to Dr Gonzalez, he and Max Donoso received them and later they spoke for a few minutes with the President of the Republic.*

*In the meeting, both the Ministry official as well as those from Texaco left an “Aide Memoire” (I have a copy of the Ministry’s, but so far they have not sent me Texaco’s). The purpose of the visit - says Gonzalez - was to propose that the State intervene in the Sucumbíos trial and allege the existence of the environmental remediation contract and the final acta de entrega-recepcion [i.e. delivery-receipt], or that a public declaration be made at the highest levels on the existence and fulfilment of that contract; in exchange, TEXACO would be willing to drop the arbitration in New York [i.e. the AAA arbitration]. They also expressed their total disagreement with the State having contracted lawyers linked to the indigenous plaintiffs.*

*According to Dr Gonzalez, both he and the President of the Republic told TEXACO that they would transmit the proposal to the State’s Attorney General, given that it is an autonomous entity and they should not confuse the attorney of the State with the attorney of the President of the Republic, and that the invitation they extended to me was precisely for that reason.*

*I explained to Dr Gonzalez that the decision to accept the sponsorship of Terry Collingsworth and Cristobal was an economic one since it did not cost the State anything.<sup>167</sup> With respect to the topic of the contract, I explained that the Attorney General’s Office and all of us working on the State’s defense were searching for a way to nullify or undermine the value of the remediation contract and the final acta and that our greatest difficulty lay in the time that has passed.*

*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’s Office conduct another audit (that also seems unlikely to me given the time); he wants to criminally try those who executed the contract (that also seems unlikely to me, since the evidence of criminal liability established by the Comptroller’s Office was rejected by the prosecutor).<sup>168</sup>*

4.221. 29 September 2005: In his email message to Mr Kohn, acknowledging the legal impediment posed by the 1995 Settlement Agreement to the Lago Agrio Plaintiffs’ claims, Mr Donziger notes: the “idea is to use it [i.e. fraud] to convince the government to take action against Chevron to nullify the remediation contract ... this could be very important.”<sup>169</sup> This “remediation contract” was a reference to the 1995 Settlement

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<sup>167</sup> Mr Cristóbal Bonifaz and Mr Terry Collingsworth (representing the Lago Agrio Plaintiffs) were simultaneously acting for the Republic of Ecuador and PetroEcuador in the legal proceedings in New York to stay the AAA Arbitration.

<sup>168</sup> C-166.

<sup>169</sup> C-874.

Agreement (including the 1998 Final Release); and the “fraud” referred to the criminal prosecution for fraud against those persons who had signed the 1995 Settlement Agreement and Final Release (including, particularly, Mr Veiga and Dr Pérez as TexPet’s representatives).

- 4.222. *4 October 2005*: Mr Donziger records in his diary that: “We pitched the criminal case to Archie [Archie Avila, an Ecuadorian lawyer]. Idea to pressure the company, get major press in US via Lehane [Christopher Lehane, a US attorney], and compel the Ec gov [Ecuadorian Government] to act against the company legally to nullify the remediation contract.”<sup>170</sup>
- 4.223. *6 October 2005*: In his diary, Mr Donziger notes: “The key issue is [the] criminal case. Can we get that going? What does it mean? I really want to consolidate control with contract [the 1995 Settlement Agreement] before going down a road that I think could force them to the table for a possible settlement ... RV [Mr Reis Veiga] likely will be knocked out of the box by the criminal investigation and being called as a witness.”<sup>171</sup>
- 4.224. *18 November 2005*: At this time, Mr Donziger agrees to pay covertly, as a bribe, Mr Fernando Reyes and Mr Gustavo Pinto to act nominally as “independent experts” for the purpose of monitoring the settling experts, but answerable to him.<sup>172</sup> In his diary entry for 18 November 2005, Mr Donziger notes: “Deal with Gustavo Pinto – feel like I have gone over to the dark side. First meeting like that that I was not eaten alive. Made modest offer, plus bonus. Agreed to keep it between us, no written agreement. Independent monitoring.”<sup>173</sup>
- 4.225. From the evidence before the Tribunal, this seems to have been a significant turning-point for Mr Donziger. Contrary to his inclination, he was doing something that was manifestly wrong by any standard for the administration of justice; and he knew it. Wrong as this was, much worse was to follow.

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<sup>170</sup> C-716, p. 108 of 112 (4 October 2005).

<sup>171</sup> C-716, p. 105 of 112 (6 October 2005).

<sup>172</sup> C-1632, para 11.

<sup>173</sup> C-716, p. 98 of 111 (18 November 2005).

## 2006

- 4.226. 2006: By 2006, Mr Donziger had by now assumed the leading role amongst the representatives of the Lago Agrio Plaintiffs, working closely with Mr Fajardo in Ecuador.
- 4.227. 27 January 2006: 35 of the 123 judicial inspections have been completed. The Lago Agrio Plaintiffs apply to withdraw from the 26 pending inspections at Sacha Central and Shushufindi on the basis that these are no longer necessary since “the environmental and social reality, as well as that of chemical or toxic components reported, is virtually the same; there are no major differences between one site and any other. From this, it can be concluded that the defendant Chevron (formerly Texaco) used the same operating practices at all of the sites in these Sacha and Shushufindi fields, and possibly in the entire concession area...”. The Lago Agrio Plaintiffs further argue that the “Global Assessment”, namely the audit of the entire Concession Area requested by them and ordered by Judge Guerra in his Order of 29 October 2003, would provide a detailed and complete study of each site affected by Texaco.<sup>174</sup>
- 4.228. 1 February 2006: A settling expert report is made on the judicial inspection of a former concession site that TexPet had remediated under the 1995 Settlement Agreement, Sacha 53.<sup>175</sup> The settling experts who reviewed the parties’ experts’ reports on Sacha 53 conclude that the Lago Agrio Plaintiffs had failed to substantiate their claims of environmental contamination. They found that TexPet’s remediation was adequately performed and met Ecuadorian standards. They could not attribute to TexPet unremediated oil contamination near Sacha 53, which could have been caused by PetroEcuador after it assumed operations as “Operator” in 1990. This was the only site report made by the settling experts.
- 4.229. Dr Ramiro Fernando Reyes Cisneros was a petroleum and environmental engineer retained by the Lago Agrio Plaintiffs. In February and March 2006, Dr Reyes attends several meetings with representatives of the Lago Agrio Plaintiffs, including Mr Donziger, Mr Fajardo and Mr Yanza. Later, in 2012, Dr Reyes testifies in the US Section 1782 Litigation:

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<sup>174</sup> C-188, p. 2.

<sup>175</sup> Connor ER2, Exhibit 48, at paras 4, 6.

*“In these meetings Mr Donziger was very upset by the findings of the settling experts’ report [on Sacha 53], and he complained that the report supported Chevron’s position and did not support the plaintiffs’ position ... During our discussions, Mr Donziger told us that our report should establish that the findings of the settling experts’ report on Sacha 53 were wrong, that they lacked objectivity and were biased toward Chevron, and therefore the report should be discounted. However, in my professional opinion the evidence did not support Mr Donziger’s position and I could not twist my professional assessments to make them fit the plaintiffs’ interests ... Mr Donziger expressed disappointment with our report and never asked us to submit it to the Court.”<sup>176</sup>*

4.230. *14 February 2006:* By letter dated 14 February 2006, Mr David Russell instructs Mr Donziger that he should not use his name as an expert supporting the quantum of the Lago Agrio Plaintiffs’ case; namely US\$ 6.14 billion for clean-up costs (see above). His letter states:

*“To date I have seen no data which would indicate that there is any significant surface or groundwater contamination caused by petroleum sources in Ecuador. Moreover, there was not, and is not any effort being made by the Plaintiffs in Aguinda vs Texaco to characterize the groundwater or the surface waters. As I recall there was substantial opposition by Cristobal [Bonifaz] toward doing any work in this area because of the costs of the Investigation. As the surface and groundwater cleanup represent a very large portion of the cost estimate, (over half), this further invalidates the 2003 cost estimate. As such, it would cause me to state that the 2003 cost estimate is too high by a substantial margin, perhaps by a factor of ten, or more.”*

4.231. In his later affidavit sworn on 8 May 2013, Mr David Russell testified: “As the lead environmental scientist for the plaintiffs in their case against Chevron in Ecuador [from late 2003 to early 2005], I spent several months investigating the environment at the oil production sites in the Oriente. I found that the environmental evidence did not and does not support the plaintiffs’ claims. I saw no evidence of any widespread health effects caused by oil contamination from Texaco, and no evidence of drinking water contaminated with petroleum from Texaco’s operations ... there was no evidence linking residents’ health problems to Texaco operations. The idea that the cleanup of the oil pits in the area would require billions of dollars is nonsense.”<sup>177</sup>

4.232. *March 2006ff:* During his period in office for the Lago Agrio Litigation (see above), Judge Yáñez holds private meetings with Messrs Donziger and Fajardo nine times or

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<sup>176</sup> C-1632, paras 19-20.

<sup>177</sup> C-1631, paras 3, 31.

more during 2006 and 2007, at his house, a warehouse and elsewhere, to discuss the withdrawal of judicial inspections and the appointment of a sole global expert. In March 2006, Mr Donziger notes in his diary that: "... due to some good strategising and some counter-pressure, the court is now in play, up for grabs, and accessible."<sup>178</sup> These meetings were not disclosed to or known by Chevron at the time.

4.233. *4 March 2006*: Mr Fajardo reports to his legal colleagues by email dated 4 March 2006 that Judge Yáñez had told him that the Lago Agrio Plaintiffs' request to withdraw [i.e. terminate] the judicial inspections had "no legal basis."<sup>179</sup>

4.234. *8 March 2006*: At a judicial inspection of the Sacha Sur Station, Mr Donziger and a group of protesters are excluded from the site by police. Mr Donziger insists that the people had a right to enter and demanded that Judge Yáñez come to the gate to "enforce the law". Mr Donziger warns that: "they're provoking a violent incident."<sup>180</sup>

4.235. *11 March 2006*: Mr Donziger describes a private meeting with Judge Yáñez on the day before the San Carlos judicial inspection.<sup>181</sup> He notes in his diary:

*"These judges are really not very bright – it is like a vocational job to them, they deal with resolving disputes at a very basic level, there is little or no intellectual component to the law... The concepts of tort law and joint and several liability are acceptable in Ecuador, but nobody uses them, so judges have no exposure to them. That part of the case is a real uphill battle. But I keep thinking of what Mateo<sup>182</sup> told me - the only way we will win this case is if the judge thinks he will be doused with gasoline and burned if he rules against us. Given the morality or immorality of Ecuador's justice system, that type of comment did not even shock me. It is part of the rules of the game here."*

4.236. In his later US deposition, Mr Donziger testifies: "I remember being shocked by Mateo's statement. I never thought that he meant it literally. But I did think that he meant it in the sense that there was a general feeling among the people we worked with that Chevron had bought the court and bought the judges based on their long history of the way they operated in Ecuador."<sup>183</sup> And we needed to be aware of that to combat that kind

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<sup>178</sup> C-716, p. 73 of 111 (11 March 2006).

<sup>179</sup> C-1081.

<sup>180</sup> C-360, 8 March 2006, at CRS-028-01, pp. 10-11 [00:32-00:45].

<sup>181</sup> C-716, p. 73 of 111 (11 March 2006).

<sup>182</sup> Mr Donziger identified "Mateo" as an associate in Mr Ponce's law firm in Ecuador (representing the Lago Agrio Plaintiffs): C-952, p. 1287.

<sup>183</sup> As already noted, Chevron had never operated in Ecuador: Mr Donziger is here referring to TexPet.

of institutional corruption.”<sup>184</sup> When pressed on this inconsistency, Mr Donziger testified: “People can change their opinions, sir. I remember specifically when he told me that being shocked. When I reflected on it and understood how I felt the Ecuadorian legal system had been abused by Texaco and Chevron over a period of decades, I think I changed my opinion when I wrote that.”<sup>185</sup>

4.237. *11 March 2006*: In this diary entry, Mr Donziger also describes another private meeting with Judge Yáñez: “– had lunch with him the previous Friday in the Cangrejo Rojo I love it – this lobbying. I am good at it. But I hate it, hate that it is necessary, hate that it is part of the legal culture... I think it runs counter to any good person... I gave the judge a one-page memo on the law, and showed him the graphs from SA-53, the site where the peritos had derimido supposedly. We talked about the theory, about the need to let the people in San Carlos speak, about the need not to cancel the inspection, to not have another Guanta.”<sup>186</sup> This conversation and documentation was not disclosed to or known by Chevron at the time.

4.238. *11 March 2006*: Mr Donziger’s diary records that “Bonifax fired”.<sup>187</sup> This was a reference to Mr Cristóbal Bonifaz, being dismissed as a legal representative of the Lago Agrio Plaintiffs.

4.239. *30 March 2006*: Chevron had filed a motion before the Ecuadorian judge in Quito on 24 March 2006, seeking an order for the judicial inspection of the HAVOC laboratory. This laboratory was analysing the soil and water samples which the Lago Agrio Plaintiffs had obtained from TexPet’s sites in the former concession area. Mr Donziger asserts, privately on camera: “They’re trying to harass the lab out of business, and extract information that they can use, you know, as part of their publicity campaign to damage the lab and get rid of its clients...”<sup>188</sup> On this day, Mr Donziger explains privately on camera: “...we’re going down and we’re gonna confront the judge, who we believe is paid by Texaco; we believe he is corrupt, and we’re gonna confront him, uh...with – with our ...suspicions about his corruption, and let him know what time it is.”<sup>189</sup> Mr Donziger states, again privately on camera, “This is something that you would

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<sup>184</sup> C-952, pp. 1288-1289.

<sup>185</sup> C-952, pp. 1290-1291.

<sup>186</sup> C-716, p. 73 of 111 (11 March 2006); C-952, pp. 1287-1288.

<sup>187</sup> C-716, p. 74 of 111 (11 March 2006).

<sup>188</sup> C-360, 30 March 2006, at CRS-052-00-CLIP 01, p. 35 [3:55-4:05].

<sup>189</sup> C-360, 30 March 2006, at CRS-052-00-CLIP 01, p. 35 [4:12-4:25].

never do in the United States. I mean, this is something you would – I mean, this is just out of bounds, both in terms of judicial behaviour, and what – what lawyers would do. But Ecuador, you know, there’s almost no rules here. And this is how the game is played, it’s dirty.”<sup>190</sup> Mr Donziger continues, privately on camera: “So we are going down to have a little chat with the judge today, we’ll see what happens”.<sup>191</sup>

4.240. 30 March 2006: Mr Donziger further explains, privately on camera: “... this is part – this is one more battle, it’s been going on now for several weeks: we’ve already met with the judge [in Quito] once, we’re meeting with him again. And the only language that I believe this judge is gonna understand is one of pressure, intimidation and humiliation. And that’s what we’re doing today. ... We’re going to scare the judge, I think today. We’re gonna let him know what time it is. I hate doing it. I hate doing this stuff. I don’t feel comfortable doin’ it. As a lawyer I never do this. You don’t have to do it in the United States. It’s, it’s dirty. I hate it. Hate it, but it’s necessary. I’m not lettin’ ‘em get away with this stuff.”<sup>192</sup>

4.241. There is no justification for Mr Donziger’s improper conduct. There may, however, be one or more explanations. It is possible to infer, at least until this time, that Mr Donziger honestly believed that Chevron was misconducting itself in much the same way towards the Lago Agrio Plaintiffs, and to greater effect. From all the evidence seen by the Tribunal, however, there was no reasonable basis for Mr Donziger’s belief (if it existed) that Chevron was conducting itself improperly in the Lago Agrio Litigation.

4.242. There is another possible explanation. It was Texaco that had ensured that the Aguinda Complaint be stayed in New York in favour of Ecuadorian jurisdiction. As Mr Donziger and his colleagues knew, that jurisdiction was not chosen by Texaco because it feared the Ecuadorian legal system or the Government of Ecuador (as then constituted).

4.243. Mr Wray, as the Lago Agrio Plaintiffs’ senior legal representative (until 2005/2006), testified in the US 1782 Litigation, in 2010:<sup>193</sup>

*“... since the beginning of the case and it was clear that the respondents’ strategies consisted of blaming PetroEcuador of the contamination, I believed it was necessary for PetroEcuador to appear in the case as a third party defending itself*

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<sup>190</sup> C-360, 30 March 2006, at CRS-052-00-CLIP 01, p. 35 [4:29-4:40].

<sup>191</sup> C-360, 30 March 2006, at CRS-052-00-CLIP 01, p. 39 [6:16-6:30].

<sup>192</sup> C-360, 30 March 2006, at CRS-052-00-CLIP-06, p. 39 [8:15-8:44].

<sup>193</sup> R-198, pp. 77-78 (under Court Order dated 3 November 2010, R-253).

*from the accusations made by Texaco. When the case started, it was not possible to have any relationship with the government with PetroEcuador, at least for myself. I was very critical and actually I opposed the government at that time so that in the beginning it was not possible to do it. Moreover, it was clear that just as soon as the case began, that at that time PetroEcuador's authorities were rather inclined towards favoring the respondents, and this became clear of some statements, and I don't remember if it was made by either the Minister of Energy or Ecuador's President. And because of the fact of the legal team defended Texaco at that time was getting the clear support of the government at the time, at least to the extent that they were able to or they allowed them to -- to reside within a military complex in Lago Agrio when all the judicial inspections began. So meanwhile the team of the petitioners, the claimants, us, had to -- had to stay at hotels in the area or rent an apartment for the case. The Chevron/Texaco team was staying within a military government complex ...”.*

4.244. Following Mr Correa's election as President of Ecuador in January 2007, Chevron's relations with the Respondent's Government were to undergo a significant change, for the worse.

4.245. Returning to the events of 30 March 2006 regarding the HAVOC laboratory, Mr Donziger brings video cameras into the chambers of the judge hearing the parties' dispute in Quito. Mr Donziger there tells the judge that Texaco's lawyers were “playing dirty” and “trying to corrupt the legal process...”. Mr Donziger repeatedly accuses Dr Larrea, one of Chevron's lawyers, of being “a corrupt attorney”.<sup>194</sup> The judge suspends the hearing, which appears from the video to have become unruly resulting from Mr Donziger's aggressive conduct.<sup>195</sup>

4.246. Mr Donziger later states, privately on camera, that: “the judicial system here is so utterly weak ... [T]he only way that you can secure a fair trial is if you do things like that ... like go in and confront the judge with media around. And fight and yell and scream and make a scene.”<sup>196</sup> In Mr Donziger's own words, what he achieved “would never happen in any judicial system that had integrity.”<sup>197</sup>

4.247. In his US deposition in the RICO Litigation, Mr Donziger is asked about this incident:

*Q: Did you pressure the judge in Ecuador who had approved the inspection of HAVOC Lab to change his opinion? A: I wouldn't characterise it as pressure. We went in and felt like he had made a decision that had no legal basis and had been*

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<sup>194</sup> C-360, 30 March 2006, at CRS-052-00, p. 51ss.

<sup>195</sup> C-360, 30 March 2006, at CRS-052-00, p. 51ss.

<sup>196</sup> C-360, 30 March 2006, at CRS-053-02-CLIP 01 (also CRS-052-00-CLIP 06), p. 91 [00:08-00:21].

<sup>197</sup> C-360, 30 March 2006, at CRS-053-02-CLIP 01, p. 91 [00:24-00:27].



*done ex parte and we wanted to be heard. So members of our legal team, including myself, went to his office in a scene that is depicted in the movie Crude, to try to persuade him to cancel his order.*

*Q: And going into that meeting didn't you say that you understood the only language the judge would understand was pressure, intimidation and humiliation?*

*A: I don't know. What I did, though, was entirely proper and was captured in the movie.*<sup>198</sup>

4.248. *30 March 2006:* Mr Donziger, privately on camera, further asserts that Texaco's lawyers had "got to that judge first ... I believe they have paid him, and paid the secretary, probably a hundred bucks ... And they signed these illegal documents forcing an inspection of a lab, in an effort to destroy our case." Mr Donziger continues: "if it turns out that if a thousand people need to come up from Quito and surround that lab to prevent this inspection from happening, we'll consider doing it. 'Cause this is hand-to-hand combat."<sup>199</sup>

4.249. Later, in his US deposition in the RICO Litigation, Mr Donziger was asked whether he had any evidence that the Quito judge had received monies from Chevron in return for ordering the inspection of the HAVOC laboratory. Mr Donziger testified:

*"... A: We believed the judge was corrupt, but we didn't have evidence he had actually been paid.*

*Q: Did you have any factual basis for believing the judge was corrupt? A: Yes.*

*Q: What was your factual basis? A: His decision was illegal, inappropriate, bizarre, irregular, and fit into Chevron's – what we believe was Chevron's corrupt scheme to intimidate the court. And the whole thing we believed was corrupt. So therefore, since he did it, we believed he was corrupt".*<sup>200</sup>

(This Tribunal has been shown no evidence that the Quito judge was corrupted by Chevron, as alleged by Mr Donziger or otherwise).

4.250. *30 March 2006:* Mr Donziger states, privately on camera: "We have concluded that we need to do more, politically, to control the court, to pressure the court. We believe they

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<sup>198</sup> C-943, pp.1834-1835.

<sup>199</sup> C-360, 30 March 2006, at CRS-053-02-CLIP 01, p. 91 [00:39-00:54, 01:00-01:10].

<sup>200</sup> C-943, pp. 1840-1841.

make decisions based on who they fear the most, not based on what the laws should dictate.”<sup>201</sup>

- 4.251. *5 April 2006*: Ms Leila Salazar, one of the Lago Agrio Plaintiffs’ representatives privately tells Mr Donziger and Mr Alejandro Ponce that the judge would “be killed” if he rules in favour of Chevron, as recorded on camera. Mr Donziger replies, “[h]e might not be, but ... he thinks he will be. Which is just as good.” Mr Donziger further states, “[The judges] don’t have to be intelligent enough to understand the law, just as long as they understand the politics.”<sup>202</sup>
- 4.252. *30 May 2006*: A meeting is held between Messrs Donziger, Fajardo and others representing the Lago Agrio Plaintiffs to decide whether to petition the Lago Agrio Court for a global expert. Mr Donziger notes: “Pablo [Fajardo] and our legal team keep insisting that the solution is for the judge (then Judge Yáñez) to appoint someone who is favorable to us ... I don’t trust this approach, given our experience so far.”<sup>203</sup>
- 4.253. *2 June 2006*: Mr Donziger notes in his diary: “I told them we need a massive protest on the court, and only after that should we talk to the judge [Judge Yáñez] about what he needs to do. The judge needs to fear us for this to move how it needs to move, and right now there is no fear, no price to pay for not making these key decisions.”<sup>204</sup>
- 4.254. *8 June 2006*: The Lago Agrio Court (Judge Yáñez) denies the Lago Agrio Plaintiffs’ request to terminate the judicial inspections and sets dates for “the performance of judicial inspections in June and July [2006] ... in response to the requests of both parties. The Court may subsequently order performance of the requested proceedings that remain pending in this document.”<sup>205</sup>
- 4.255. *14 June 2006*: By email to Mr Alejandro Villacis, Mr Donziger calls for the preparation of “a detailed plan with the necessary steps to attack the judge [Judge Yáñez] through legal, institutional channels and through any other channel you can think of.”<sup>206</sup>

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<sup>201</sup> C-360, 30 March 2006, at CRS-350-04-CLIP 01, p. 566 [01:18-01:29]; C-1614, p. 3.

<sup>202</sup> C-360, 5 April 2006, at CRS-129-00-CLIP 02, pp. 144-145 [00:40-01:47].

<sup>203</sup> C-716, p. 63 of 111 (31 May 2006).

<sup>204</sup> C-716, p. 62 of 111 (2 June 2006).

<sup>205</sup> C-1633, pp. 8-9.

<sup>206</sup> C-1285.

- 4.256. *19 June 2006*: The Lago Agrio Court (Judge Yáñez) denies the Lago Agrio Plaintiffs' request to terminate the judicial inspections a second time, again citing the parties' agreement for such inspections.<sup>207</sup>
- 4.257. *21 July 2006*: By this date, 42 of the 123 judicial inspections requested by the parties have been completed. The Lago Agrio Plaintiffs apply to the Lago Agrio Court, to waive their right to carry out "at this stage of the lawsuit" the judicial inspections requested by them at Sacha, Aguarico, Guanta, Auca, Cononaco, Lago Agrio, Yuca and Parahuaco Fields.<sup>208</sup>
- 4.258. *25 July 2006*: Mr Donziger notes in his diary: "Our issues first and foremost are whether the judge [Judge Yáñez] will accept the renuncia of the inspections. ... If it doesn't happen, then we are in all-out war with the judge to get him removed."<sup>209</sup>
- 4.259. *25 July 2006*: In his diary, on the same day, Mr Donziger notes:<sup>210</sup> "... At which pt I launched into my familiar lecture about how the only way the court will respect us is if they fear us – and that the only way they will fear us is if they think we have come control over their careers, their jobs, their reputations – that is to say, their ability to earn a livelihood."
- 4.260. *26 July 2006*: Mr Donziger writes in his email message to Mr Kohn (of Kohn, Swift & Graf) in the USA, entitled "Potentially Huge": "Pablo [Fajardo] met with the judge today [Judge Yáñez]. The judge, who is on his heels from the charges of trading jobs for sex in the court, said he is going to accept our request to withdraw the rest of the inspections. ... The judge also I believe wants to forestall the filing of a complaint against him by us, which we have prepared but not yet filed."<sup>211</sup>
- 4.261. This was a private meeting between Judge Yáñez and Mr Fajardo not known by or disclosed to Chevron at the time. Judge Yáñez' decision to accede to the Lago Agrio Plaintiffs' applications was the direct result of the blackmail committed by Mr Fajardo,

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<sup>207</sup> C-191.

<sup>208</sup> C-505.

<sup>209</sup> C-716, p. 56 of 109; pp. 57-58 of 111 (25 July 2006).

<sup>210</sup> C-716, p. 57 of 111, p. 55 of 109 (25 July 2006).

<sup>211</sup> C-760, p. 1.

with the knowledge and support of Messrs Donziger and others representing the Lago Agrio Plaintiffs.

- 4.262. *22 August 2006*: By court order, the Lago Agrio Court (Judge Yáñez) terminates the remaining 64 judicial inspections, in response to the application made by the Lago Agrio Plaintiffs and opposed by Chevron.<sup>212</sup>
- 4.263. *13 September 2006*: Mr Donziger notes in his diary: “Legal case: going well with [Judge] Yáñez decision to cancel inspections ... We wrote up a complaint against Yáñez, but never filed it, while letting him know we might file it if he does not adhere to the law and what we need ...”.<sup>213</sup>
- 4.264. *11 October 2006*: In a private meeting (not known by or disclosed to Chevron at the time), Judge Yáñez tells Mr Fajardo that he would not permit Chevron to assert any further challenges to the Lago Agrio Plaintiffs’ request for the waiver (i.e. termination) of judicial inspections. Mr Fajardo reports by email to Mr Donziger: “The President [of the Court] was clear and said that he will not permit any further collateral issues about the waiver of our inspections.”<sup>214</sup>
- 4.265. *3 November 2006*: In an email message to Mr Neil Mitchell of Winston & Strawn (as lawyers acting for Ecuador in the USA), relating to Mr Reis Veiga’s deposition in the USA, Mr Donziger writes: “It would help us for you to keep RV [Mr Veiga] on the hot seat for as long as possible and press him in a number of areas that will make him uncomfortable... Remember, the info on the fraud issue is still useful for us in Lago and in the ongoing criminal investigation in Ecuador – thus, if you could put on the ‘investigatory’ hat in this regard that would be helpful. The way to justify it is that this all goes to his credibility...”<sup>215</sup> As Mr Donziger knew, this “fraud issue” and “criminal investigation” impugned the legal validity of the 1995 Settlement Agreement signed by Mr Veiga and Dr Pérez, which the Lago Agrio Plaintiffs were seeking to negate in the Lago Agrio Litigation.
- 4.266. *4 December 2006*: The Lago Agrio Plaintiffs request that the Lago Agrio Court “immediately order the performance of the expert assessment for purposes of verifying

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<sup>212</sup> C-195.

<sup>213</sup> C-716, pp. 56 of 111, 54 of 109 (13 September 2006).

<sup>214</sup> C-1261, p. 1.

<sup>215</sup> C-794, pp. 1-2.

the environmental effects of the activities associated with the production of hydrocarbons at all the fields operated by” TexPet [i.e. the “global assessment”].<sup>216</sup>

4.267. *16 December 2006*: Mr Donziger notes in his diary, regarding the proposed appointment of Mr Cabrera as the Court’s sole global assessment expert: “I see using E-tech [E-Tech, a firm of environmental experts acting for the Lago Agrio Plaintiffs] to give him cover, but he has to totally play ball with us and let us take the lead while projecting the image that he is working for the court.”<sup>217</sup>

## **2007**

4.268. *15 January 2007*: President Rafael Correa assumes office as the President of Ecuador, for the first time.

4.269. *22 January 2007*: Having by order terminated the procedure for the judicial inspections,<sup>218</sup> the Lago Agrio Court (Judge Yáñez) orders both sides to appear before him so that, if possible, they could mutually indicate the experts who would participate in the global expert assessment.<sup>219</sup>

4.270. *19 January 2007*: Mr Donziger notes in his diary: “Met with the judge [Judge Yáñez] last night in house. Humble house, furniture. Made tea. I really like the guy. Remember last August I wanted to ride the wave and get him off the case? This was an example of Pablo’s [Pablo Fajardo] total intelligence. We saved him, and now we are reaping the benefits.”<sup>220</sup> Mr Donziger also notes, in the same diary entry: “Guerra will be the judge to decide the case. We have to start lobbying him, working with him.” None of this was disclosed to or known by Chevron at the time.

4.271. *31 January 2007*: During a meeting between Mr Donziger and Mr Kohn privately recorded on film, regarding the Respondent’s criminal prosecution of the two Chevron attorneys, Mr Reis and Dr Pérez, Mr Donziger reports that Chevron is alleging a

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<sup>216</sup> C-189, p. 1.

<sup>217</sup> C-716, p. 32 of 111; p. 30 of 109 (16 December 2006).

<sup>218</sup> C-196.

<sup>219</sup> C-196.

<sup>220</sup> C-716, p. 27 of 111; p. 26 of 109 (19 January 2007).

conspiracy between the Lago Agrio Plaintiffs’ representatives and the Government of Ecuador – to which Mr Kohn replies: “if only they knew”.<sup>221</sup>

4.272. *3 March 2007*: The Lago Agrio Plaintiffs’ representatives, including Messrs Donziger and Fajardo, and their experts meet (privately) Mr Cabrera, as the Court’s sole global assessment expert in the Lago Agrio Litigation soon to be formally appointed by the Lago Agrio Court (Judge Yáñez).

4.273. At this meeting, recorded privately on film, Mr Fajardo identifies six steps that the Lago Agrio Plaintiffs should take, specifically: (1) “[k]eep up the pressure and constant oversight in the court”; (2) “[m]ake certain that the expert [i.e. Mr Cabrera] constantly coordinates with the plaintiffs’ technical and legal team”; (3) “[t]he plaintiffs’ 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) “provide the facilities and necessary support to the field team”; and (6) “support the expert in writing the report.”

4.274. Mr Fajardo emphasises that the entire Lago Agrio 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.”

4.275. One of the meeting’s participants then asks whether the final report would be prepared by the expert (i.e. Mr Cabrera). Mr Fajardo states that the expert will “sign the report and review it. But all of us ... have to contribute to that report.” Dr Anne Maest (of Stratus Consulting) asks, “together?”, which Mr Fajardo confirms. Dr Maest then says, “But not Chevron,” to which everyone laughs.<sup>222</sup> Towards the end of the meeting, Mr Donziger states: “We could jack this thing up to thirty billion dollars in one day.”<sup>223</sup>

4.276. The same meeting is described by Mr Donziger in his diary, as follows:

*“... Technical meeting on Sat in office: Richard [Cabrera] there. Sat had all-day Tech meeting in the office - unusual for a ‘dia laboral’ as Pablo [Fajardo] put it. Richard and Fernando [Reyes] there, as was Ann [Maest], Dick [Kamp], and*

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<sup>221</sup> C-360, 31 January 2007, at CRS-169-05-CLIP 09, p. 252 [00:19].

<sup>222</sup> C-360, 3 March 2007, at CRS-191-00-CLIP 03, pp. 312-314 [03:08-04:36].

<sup>223</sup> C-360, 3 March 2007, at CRS-193-00-CLIP-01, pp. 321-322 [3:37-3:38].

*Champ [Charlie Kamp]. Pablo delivered first; excellent, then Olga Lucia, the best I have seen her; then Champ. Great spirit and energy in the room. It made me realize how much we have accomplished. ... I spend the whole day making comments and mostly directing them to Richard. We laid out our entire case and legal theory - what a benefit! We need to do the same with the judge ... ”.*<sup>224</sup>

- 4.277. No-one present at this meeting could have misunderstood the plan, namely to have Mr Cabrera formally appointed as the sole expert to the Lago Agrio Court, for the Lago Agrio Plaintiffs’ representatives and advisers (but not Mr Cabrera) covertly to write the Cabrera Report and to disguise that report, dishonestly, as the work of Mr Cabrera. Astonishingly, all this was willingly recorded on film by the meeting’s participants, including Mr Cabrera, Mr Fajardo and Mr Donziger. Needless to say, none of this was disclosed to or known by Chevron at the time.
- 4.278. *4 March 2007*: Mr Donziger and the Lago Agrio Plaintiffs’ US experts meet to discuss their private meeting held with Mr Cabrera on the previous day. The experts include Dr Maest, Dr Kamp and Mr Champ. The meeting appears to have taken place in a restaurant (as privately recorded on film). These experts advise Mr Donziger that no evidence of groundwater contamination exists. Dr Maest states: “And right now all the reports are saying it’s just at the pits and the stations and nothing has spread anywhere at all”.<sup>225</sup> Mr Donziger replies: “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 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.”<sup>226</sup>
- 4.279. In his US deposition, Mr Donziger was asked whether when he made this statement he believed it to be true. He testified: “I think I made that statement for dramatic effect”.<sup>227</sup> The Tribunal does not understand this explanation.
- 4.280. The participants in the meeting later discuss whether it would be helpful to test a specific site and the particular manner of doing it, also as privately recorded on film. Mr Champ states “I know we have to be totally transparent with Chevron in showing them what we

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<sup>224</sup> C-716, p. 8 of 111; p. 6 of 109 (7 March 2007).

<sup>225</sup> “It” denotes groundwater contamination. C-360, 4 March 2007, at CRS-195-05-CLIP 01, pp. 327-329 [01:39-01:45].

<sup>226</sup> C-360, 4 March 2007, at CRS-195-05-CLIP 01, pp. 327-329 [02:00-03:06].

<sup>227</sup> C-715, pp. 798-799.

are doing”, to which Mr Donziger replies “Well, no, no, no, because they will find out everything we do”. Dr Maest then suggests “Yeah, we don’t have to give them our plan. I don’t think, do we? Mr Donziger replies “Well, it’s a little unclear. Nobody’s ever done this before. This is so crazy. Our goal is that they don’t know shit - and that’s why they’re so panicked - there’s no way they can control this, because they didn’t ask for it.”<sup>228</sup>

- 4.281. *4 March 2007*: During a discussion with the Lago Agrio Plaintiffs’ experts (except Mr Champ) following the above meeting, Mr Donziger explains as privately recorded on film, “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. ... And, say, [Chevron] had a huge victory; they knocked out ninety per cent of the damage claim.”<sup>229</sup>
- 4.282. *6 March 2007*: During a meeting with Stratus Consulting and others (including Dr Maest), Mr Donziger states, as privately recorded on film: “Now, I once worked for a lawyer who said something I’ve never forgotten. He said, ‘Facts do not exist. Facts are created.’” Everyone laughs. Mr Donziger continues, “[a]nd ever since that day, I realized how the law works.”<sup>230</sup>
- 4.283. *19 March 2007*: The Lago Agrio Court (Judge Yáñez) formally appoints Mr Cabrera as the sole expert for conducting the global expert assessment upon the request of the Lago Agrio Plaintiffs, opposed by Chevron.<sup>231</sup>
- 4.284. *20 March 2007*: A meeting takes place between President Correa with members of the Ecuadorian Government, including the Environment Minister, Ms Anita Albán, Mr Xavier Garaicoa Ortiz (of the Procuraduría General); Mr Alexis Mera (the President’s legal adviser), PetroEcuador and representatives of the ADF and the Lago Agrio Plaintiffs, Mr Yanza, Mr Ponce, Ms Yepez and Ms Lupita Heredia.<sup>232</sup>
- 4.285. As subsequently reported by Ms Yepez in her email to Mr Donziger dated 21 March 2007:<sup>233</sup>

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<sup>228</sup> C-360, 4 March 2007, at CRS-196-00-CLIP 01, pp. 334-335 [00:17-00:41].

<sup>229</sup> C-360, 4 March 2007, at CRS-196-01-CLIP 01, pp. 342-343 [00:39-00:51].

<sup>230</sup> C-360, 6 March 2007, at CRS-195-05-CLIP 01, pp. 327-329 [21:28-21:39].

<sup>231</sup> C-197.

<sup>232</sup> Track II Hearing, Claimants’ Opening Oral Submission, Slide 5.

<sup>233</sup> C-1005.



*“... The Prez [President Correa] was very upset at Texaco. He asked the Attorney General to do everything necessary to win the trial and the arbitration in the U.S. He asked his team to urgently work on the matter. This Saturday he will report on the matter on national television. Officially now at that time he will clarify several points in order not to hurt us in the trial. He ordered that a cabinet be formed in the Amazon, inviting or bringing the press so they can visit the places affected by Texaco with his team. He also said that he would like to figure out a legal and judicial way to try Texaco for genocide. He gave us fabulous support. He even said that he would call the judge. I don't know if this could also hurt us, but the attorneys and Luis [Yanza] have to pay closer attention to delicate matters.”*

4.286. The Tribunal has seen no evidence that the Respondent's President (or any officer on his behalf) called any judge at the Lago Agrio Court, then or later.

4.287. *26 March 2007:* In his email messages to Mr Donziger dated 26 March 2007, Mr Fajardo refers to Judge Yáñez as the “cook,” the Lago Agrio Court's global assessment expert, Mr Cabrera, as the “waiter”, the “menu” as the work plan, the “other restaurant” as Chevron, and the “messenger” as Mr Fajardo.”<sup>234</sup>

*“Today the cook met with the waiter to coordinate the menu. What is new is that in view of the other restaurant's challenge, the cook has the idea of putting in another waiter, to be on the other side. This is troublesome. I suggest we activate alarms, contacts, strategies, pressures in order to avoid this happening. It is necessary to do it urgently.”*

*“The Lago Agrio messenger is waiting to meet this afternoon with the cook, to listen to his position. I suggest that the heads of Quito, Lago Agrio and NY talk at six thirty, Ecuador time. By this time the messenger will already have some news regarding what the cook is saying.”*

4.288. Mr Donziger later confirmed in his testimony at the RICO trial that the “cook” referred to Judge Yáñez, the “waiter” referred to Mr Cabrera, and the “other restaurant” referred to Chevron.<sup>235</sup> He also confirmed that the appointment of a second global assessment expert, as intimated by Judge Yáñez, was (in the words of his email to Mr Fajardo) “unacceptable”. No such second expert is appointed by the Lago Agrio Court. None of this was disclosed to or known by Chevron at the time.

4.289. *29 March 2007:* In advising the Lago Agrio Plaintiffs during a private meeting, President Correa's legal adviser, Mr Alexis Mera, recommends that the Lago Agrio Plaintiffs pressure the Prosecutor-General to “reopen” the investigation: “you have to

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<sup>234</sup> C-917.

<sup>235</sup> C-2382, pp. 2548-2550.

take the people from the Orient[e] there [the Public Prosecutor’s Office], hold a demonstration ... [T]hat’s how this country works.” In response, the Lago Agrio Plaintiffs’ representatives tell Mr Mera that “although we could mobilize people, the – the official nature of the President could do much more in this case ... an interest by the Executive Branch - and pressure on the Public Prosecutor’s Office ... could do a lot on this subject.” When the Lago Agrio Plaintiffs’ representatives continue to press that the Executive Branch’s involvement would have a “political impact” on the case, Mr Mera agrees, saying: “I do understand the whole political thing.”<sup>236</sup>

4.290. *27 April 2007*: President Correa visits the former concession area in the Oriente, with Mr Fajardo and Mr Yanza. (Mr Donziger is not present). Shortly thereafter, the President calls for the criminal prosecution of the Ecuadorian Government’s officials who signed the 1995 Settlement Agreement and also of TexPet’s representatives, i.e. Mr Veiga and Dr Pérez (see the Criminal Prosecutions above).

4.291. *6 June 2007*: During a meeting of the Lago Agrio Plaintiffs’ advisers, recorded privately on film, Mr Donziger proposes to “take over the [Lago Agrio] court with a massive protest,” in order to “shut the court down for a day.” He states that there was an “institutional weakness in the judiciary,” and that “they [the judges] make decisions based on who they fear [the] most.”<sup>237</sup> Mr Donziger also describes, privately on film, the “need to make facts ... that help us” even though “the facts that we need don’t always exist.”<sup>238</sup>

4.292. *7 June 2007*: Mr Fajardo states, privately on film, that the Lago Agrio Plaintiffs need to increase pressure on the Lago Agrio Court to swear in Mr Cabrera: “the judge [i.e. now Judge Yáñez] is scared shitless.”<sup>239</sup>

4.293. *13 June 2007*: Less than one week later, the Lago Agrio Court (Judge Yáñez) swears in Mr Cabrera as the Court’s sole “global assessment expert”. At this ceremony, Mr Cabrera takes an oath “to perform his duties faithfully” and “with complete impartiality and independence” from the disputing parties.<sup>240</sup> Mr Cabrera was thereby to act as a

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<sup>236</sup> C-360, 29 March 2007, CRS-221-02-CLIP 01, pp. 419, 422, 432 [00:28-00:33; 04:00-04:10; 13:25-13:28].

<sup>237</sup> C-360, 6 June 2007, at CRS-350-04-CLIP 01 at 566-567 [00:32-01:40]; Track II Hearing, Claimants’ Opening Oral Submission, Slide 11.

<sup>238</sup> C-360, 6 June 2007, at CRS-375-00-CLIP 05, p. 600.

<sup>239</sup> C-360, 7 June 2007, at CRS-376-03-CLIP 10, p. 613 [00:14-00:17].

<sup>240</sup> C-363, p. 4.

court expert, appointed by the Lago Agrio Court to act as a neutral expert to the Court. This was not to be.

- 4.294. *13 June 2007*: Mr Donziger states privately on film that Judge Yáñez “never would have [appointed Mr Cabrera] had we not really pushed him.” He then states: “It’s just like – you know? ... All of this bullshit about the law and the facts – and it factors into it because it affects the level of force... At the end of the day, it is about brute force, who could apply the pressure and who could withstand the pressure and can you get them to the breaking point ...”.<sup>241</sup>
- 4.295. When asked about this statement in his US deposition, Mr Donziger testified that he made it for “dramatic effect”.<sup>242</sup> Again, the Tribunal does not understand this explanation. Nonetheless, the Tribunal infers that Mr Donziger’s reference to “brute force” and “breaking point” includes the improper treatment to which Judge Yáñez was deliberately subjected by Mr Donziger and his colleagues, without which Judge Yáñez would not have appointed Mr Cabrera as the Court’s sole Global Assessment expert.
- 4.296. *4 July 2007*: Mr Cabrera ostensibly begins work as the designated sole global assessment expert to the Lago Agrio Court, with his technical team.
- 4.297. *17 July 2007*: Mr Donziger sends an email message to Mr Fajardo: “Ideas para reunion con Richard [Cabrera]”.<sup>243</sup> It reads:

*“Commanders of the Urban and North Front:*

*These are the fastest ideas:*

*1) That we think that Richard should suspend his work in the field and we should not pay the team until after the recess. We just need him to tell the team and Texaco that he’s going to start all over after the recess so there is nothing strange, everything appears normal.*

*2) When I get there, we’ll re analyze the work and the budget with Richard. And we’ll adjust with a much smaller team. My tendency is to stop Richard from working much more in the field... or, if he continues doing it, he should continue under the*

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<sup>241</sup> C-360, 13 June 2007 at CRS-361-11, CLIP 01, pp. 592-593 [00:24-00:44].

<sup>242</sup> C-715, pp. 801-804.

<sup>243</sup> C-2319.

*most strict control with an extremely limited number of samples. And we'll change the focus of the data at our offices.*

*3) It is key to have deadlines to receive drafts from all the consultants, such as the biologists, the water man, and so on. Personally, I don't want to wait for the 'final' product to determine if the work is useful or not, or we will be screwed because they will ask for even more money to make the changes if we are not properly informed of everything during the process.*

*4) The main problem with Richard is the lack of money and the distraction of the most important proof of the case, that is, the 80,000 chemical results that we already have. The most important thing of the field is the subterranean water and I think that we don't even have that planned, and now I'm worried because we don't have the money to do it.*

*I think that, without realizing it, we are being quite similar to the style of Wray/Pareja/Russell, that is, we are trying to do too much, producing waste and delaying for lack of budget, and, without realizing it, we are helping the enemy's strategy of delaying the trial.*

*I'll talk to you later on the phone. It is all about money, I know, but it is also about strategy.*

*Thank you, my bosses."*

4.298. 23 July 2007: Mr Cabrera's letter to the Lago Agrio Court denies that he has "any relation or agreements with the plaintiff;" and he states that "it seems to me to be an insult against me that I should be linked with the attorneys of the plaintiffs."<sup>244</sup>

4.299. 3 September 2007: Chevron again seeks inspections of the HAVOC Lab, which had been ordered by the Quito Court. Mr Donziger explains in an email message to Mr Fajardo and others: "An inspection of [the HAVOC Lab] would be a disaster for the Lago Agrio case. ... I say that we ... accuse all of them, including the judge [i.e. the Judge in Quito], of corruption for still even thinking of ordering an illegal inspection with no basis in the law in order to favour a corrupt transnational that is killing innocent Ecuadorians."<sup>245</sup> (It is not entirely clear to the Tribunal exactly why such an inspection would have been a "disaster" for the Lago Agrio Plaintiffs' case).

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<sup>244</sup> C-366.

<sup>245</sup> C-1033.

4.300. By now, the Lago Plaintiffs’ representatives maintain a “secret” bank account at the Banco Pichincha for the purpose of making covert payments to Mr Cabrera.<sup>246</sup> This was one of the accounts used by Selva Viva, an Ecuadorian legal entity controlled by certain of the Lago Agrio Plaintiffs’ representatives for the purpose of the Lago Agrio Litigation. Mr Donziger is the president of Selva Viva. One of its employees involved in banking transactions, is Ms Ximera Centeno. The Lago Agrio Plaintiffs’ internal documents identify her as the Lago Agrio Plaintiffs’ librarian, receptionist and payment administrator.<sup>247</sup> (As described below, Ms Centeno also made monetary deposits to Mr Guerra on behalf the Lago Agrio Plaintiffs’ representatives).

4.301. *12 September 2007*: The Lago Agrio Plaintiffs’ representatives are now paying more than US\$ 100,000 to Mr Cabrera through the “secret” bank account, including a single payment of US\$ 30,000.<sup>248</sup> As Mr Yanza states in an email message of 12 September 2007 to Mr Donziger:

*“... I think we should plan ahead and not give those Texaco bastards the pleasure, using the same mechanism from weeks ago, that is, he [Mr Kohn] sends us money to our secret account, to give to Wuao [Mr Cabrera], [to] not stop the work. I estimate it will be about 30,000, but since there are expenses from the last work day in the south, it might be another 20,000. In any case, this money will then be reimbursed to SV [Selva Viva] once the judge orders us to pay. To conclude, please explain this situation to JK [Mr Kohn] so he can transfer 30 [US\$ 30,000] to our Secret Account and 20 to SV, but he could send the 50 to the secret account and then we could pass the 20 to SV to save time and paperwork. I know it’s difficult for you to be dealing with JK about money all the time, but it is necessary and urgent to solve this to prevent those bastards from having the pleasure. Call us in 5 minutes....”<sup>249</sup>*

4.302. At the RICO trial in New York, Mr Donziger testified that he could not recall “any other purpose for which this secret account was established”, other than to pay Mr Cabrera.<sup>250</sup>

4.303. On the evidence adduced in this arbitration, the Tribunal finds that these payments to Mr Cabrera were made corruptly as bribes by certain of the Lago Agrio Plaintiffs’ representatives, including Mr Fajardo, Mr Yanza and Mr Donziger.

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<sup>246</sup> C-1661, p. 37.

<sup>247</sup> Torres ER, p. 24; Exhibit 49.

<sup>248</sup> C-1053; see also C-1661, C-1750 & C-1744.

<sup>249</sup> C-1053.

<sup>250</sup> C-1041, pp. 4414-4415. Mr Donziger confirmed that “Wuao” was one of the names that was used by him and others for Mr Cabrera: C-2382, p. 2550.

- 4.304. *3 October 2007*: The Lago Agrio Court (now Judge Novillo) orders Mr Cabrera to be “responsible for the entire report, the methodology used, for the work done by his assistants, etc.” The Court also orders Mr Cabrera to “observe and ensure ... the impartiality of his work, and the transparency of his activities as a professional appointed by ... the court”. The Court states that the role of the expert was one of complete impartiality and transparency with respect to the parties and their attorneys. The Court also states that Mr Cabrera “... is an auxiliary to the Court for purposes of providing to the process and to the Court scientific elements for determining the truth.”<sup>251</sup>
- 4.305. In his capacity as the sole global assessment expert, Mr Cabrera was at all material times an auxiliary associate of the Lago Agrio Court and, thus, an officer of the Respondent’s judicial branch. He was not permitted under Ecuadorian law to be the representative of or adviser to any disputing party to the Lago Agrio Litigation.
- 4.306. *11 October 2007*: Further questions arise from Chevron as to the independence of Mr Cabrera from the Lago Agrio Plaintiffs’ representatives. On 11 October 2007, Mr Cabrera files a formal signed statement addressed to the Lago Agrio Court.<sup>252</sup> It reads (inter alia) as follows:

*“(1) It is public knowledge that various questions have been raised with regard to my appointment, my work and the other technical officers that are working on the expert examination.*

*(2) Your Honor, being the professional that I am and in compliance with the orders issued by you regarding my designation, confirmation and acceptance of my appointment as Expert, I have performed my work with absolute impartiality, honesty, transparency and professionalism.*

*(3) I reject the descriptions or attacks that have been leveled against me alleging that I am biased toward one of the parties, and I also reject the unfounded accusations that I am performing my work surreptitiously. That is completely untrue. Both sides to this case have witnessed, on a daily basis, the sampling work performed, the sampling procedure employed, the number of samples collected, in addition to other activities.*

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<sup>251</sup> C-364, p. 2.

<sup>252</sup> C-367, p. 2.

*(4) I have complied with your orders and have provided sufficient advance notice to both litigating parties under the same conditions with regard to the sites where I planned to collect samples or perform the respective study.*

*(5) Furthermore, both parties were initially signing the sample control sheet, but during the sampling process, first the defendant refused to sign that document, and then the plaintiff also refused to sign. I could not, in my capacity as an expert, obligate the parties to sign said document.*

*(6) The task assigned to me includes evaluating the damage sustained by waters, soils, plant cover and fauna, among other activities. It is clear that I could not perform a job of this magnitude alone, and have therefore employed several technical officers and experts to perform these tasks under my coordination and responsibility. Once I submit my report to this court, Your Honor, the names of all of the technical officers that have collaborated in the study under my responsibility will be made public. Thus far, Your Honor, all I have done is attempt to plan and conduct the expert examination in the most complete, efficient and professional manner possible.”*

4.307. In particular, as to his alleged relationship with the Lago Agrio Plaintiffs, Mr Cabrera declares to the Lago Agrio Court:

*“The defendant’s attorneys allege that the plaintiff [sic: plaintiffs] 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. With regard to personnel, I admit that initially, a person associated with the plaintiff did provide me with logistical support for the expert examination, but this has had no bearing on the core subjects of the expert examination, and therefore no influence or actual relationship exists. After the first days, I decided to rectify this situation and not allow any person associated with the parties to participate in my work in order to avoid absurd or ill-intentioned comments.*

*Worse still is the accusation of the plaintiff’s [sic: “defendants”] attorneys that the conduct of the other technical officers is a ‘decoy’, a ploy to conceal preexisting information provided by the plaintiff that I allegedly will simply attach to my expert report. I condemn this assertion because it has no basis and there is no evidence to support it, and I demand that these attorneys refrain from saying these kinds of things about me in the future.”*

4.308. These statements of impartiality and independence from the Lago Agrio Plaintiffs’ representatives were made falsely by Mr Cabrera.

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4.309. 2 January 2008: In his email message dated 2 January 2008 (headed “Necessary Tasks to be Completed in the Year 2008” and “Specific Tasks”) to Messrs Donziger, Saenz, Prieto, Yanza, Ponce and Alexandra Anchundia, Mr Fajardo includes: “6. Coordinate with the President of the Republic for defense on the accusation of denial of justice.”<sup>253</sup>

4.310. 13-19 January 2008: Mr Beltman (in charge of Stratus Consulting’s “Ecuador Project” for the Lago Agrio Plaintiffs) and Dr Maest travel to Ecuador, at Mr Donziger’s request, to meet Mr Cabrera privately, with certain of the Lago Agrio Plaintiffs’ representatives. This meeting is not disclosed to or known by Chevron at the time. In his later witness statement, Mr Beltman testifies that:

*“15. Based on that meeting with Cabrera and a review of his background, Cabrera lacked the skill, qualifications, and experience to conduct or review a multi-disciplinary environmental damages assessment himself.*

*16. At no time did I ever see any indication of an independent Cabrera "team" nor did I ever meet anyone I understood to be a member of Cabrera's "independent team." To the contrary, individuals that I am aware of who assisted in preparing the Cabrera Report were affiliated with or working at the direction of Donziger and the LAPs' representatives.*

*17. At no point during Stratus's time working on the Ecuador Project, including at the January 2008 meeting, did I have an understanding that Cabrera was preparing his own report. It was clear from statements Donziger and others made that the LAPs' team expected the Lago Agrio court to rely upon the Cabrera Report in rendering its judgment.”<sup>254</sup>*

4.311. 22 February 2008: In his email message to his colleagues at Stratus Consulting, Mr Beltman writes: “The project is at a key point right now. We have to write, over the next 2 to 3 weeks, probably the single most important technical document for the case. The document will pull together all of the work over the last 15 or so years on the case and make recommendations for the court to consider in making its judgment ...”<sup>255</sup> This “document” was to be the “Cabrera Report”.

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<sup>253</sup> C-805, p. 2.

<sup>254</sup> C-1611A, paras 15-17.

<sup>255</sup> C-1758, p. 1.



- 4.312. *26 February 2008*: Mr Beltman sends to his colleagues within Stratus Consulting an outline and chart showing how they should falsely “attribute” their work on the Cabrera Report to Mr Cabrera’s “team.” The chart identifies who would be responsible for drafting each section, the reviewer/approver, and to whom it would be falsely attributed.<sup>256</sup>
- 4.313. *12 March 2008*: Stratus Consulting exchanges English language drafts of the “Cabrera Report” (Mr Cabrera does not speak English). Mr Beltman emails the English draft report for Spanish translation to “info@translatingspanish.com,” stating that “[t]he main [Cabrera] report (the one attached to this email) is the highest priority.” Mr Beltman notes that he would travel to Quito to review and make revisions to the report in Spanish.<sup>257</sup>
- 4.314. *31 March 2008*: The Respondent resumes the Criminal Prosecutions against (inter alios) Mr Veiga and Dr Pérez, as the signatories to the 1995 Settlement Agreement for TexPet.<sup>258</sup>
- 4.315. *31 March 2008*: The Lago Agrio Plaintiffs’ representatives and advisers work on the so-called “Cabrera Report” until its filing in the Lago Agrio Court.
- 4.316. According to Mr McGowan’s expert testimony (of Stroz Friedberg, for Chevron in the US Litigation), the Lago Agrio Plaintiffs’ representatives saved the latest version of the “Cabrera Report” on 31 March 2008 at 11:09 EST, and, “[t]he text of [the Lago Agrio Plaintiffs’ report] ... is identical to text of the report filed by Richard Stalin Cabrera Vega on April 1, 2008.”<sup>259</sup>
- 4.317. *1 April 2008*: Mr Cabrera formally files the Cabrera Report with the Lago Agrio Court. It advises the Court that Chevron should pay compensation in excess of US\$ 16 billion.<sup>260</sup> Mr Cabrera files an amended expert report in November 2008, with a revised figure for compensation of US\$ 27.3 billion. (The Tribunal hereon refers to these

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<sup>256</sup> C-1078.

<sup>257</sup> C-855, p. 1; see also C-1611A, paras 22-27, 38-45 & 59-60.

<sup>258</sup> See R-250.

<sup>259</sup> C-1048, paras 8, 24, 27.

<sup>260</sup> C-201.

two reports collectively, save where the contexts requires otherwise, as the “Cabrera Report”).

4.318. Later, in US legal proceedings, Mr Beltman and Mr Donziger both admitted that Stratus Consulting covertly wrote Mr Cabrera’s Report.<sup>261</sup> In this arbitration, the Respondent does not dispute that certain of the Lago Agrio Plaintiffs’ experts wrote the Cabrera Report.<sup>262</sup>

4.319. *1 August 2008*: Mr Beltman (of Stratus Consulting) reports in his email message, headed “Plan de Trabajo - Texpet cleanup”, to Mr Fajardo and Mr Donziger:<sup>263</sup>

*“One of our tasks for the comments on the Cabrera Report in the Plan de Trabajo is to conduct a technical analysis of whether the Texpet cleanup in the 1990s complied with the technical requirements for the cleanup. Cabrera already points out that the Texpet work did not actually clean up the pits, and the idea of this analysis was to determine if we could further criticize the Texpet cleanup for not complying with the technical requirements ... Although there are some ambiguities of language and potential legal issues (such as apparent contradictions between the March 1995 Statement of Works and the RAP) I did not find any clear instances where Texpet did not meet the conditions required in the cleanup. The very large exception, of course, is that sampling during the judicial inspections and by Cabrera showed that the “cleaned” pits are still contaminated – however the sampling done by Woodward Clyde post-cleanup allowed the pits to be in compliance with the contract requirements. This important discrepancy has already been addressed by Cabrera in his report. There is also the issue that the RAP conflicts with Ecuadorian laws, but again I didn’t evaluate that here. Therefore, I do not have any comments to prepare on this aspect of the Cabrera Report.”*

4.320. *9 August 2008*: During his weekly presidential address, President Correa referred to the Government’s support for the Lago Agrio Plaintiffs in the Lago Agrio Litigation, as follows:

*“ ... Well, on Saturday the eighth, at 9:30, we had a working meeting on the Texaco case, so let’s go to that, let’s go to radio link number 81. Why did we have the working meeting on the Texaco case? You know that there’s a lawsuit filed by the communities, the Amazon Defense Front, against Texaco Chevron, for all of the pollution that it left in the Amazon. So then, Texaco Chevron is asking to meet with the government. Well, I’ve told our comrades about that, to ask them what they thought, and we’ve agreed that we would meet with them, but with our comrades from the Amazon Defense Front present. We’re not one of those right-wing sell-out governments that supported this multinational company and betrayed our people.*

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<sup>261</sup> C-1611A, paras 12, 22-23, 27 & 44-46; C-902, p. 2253.

<sup>262</sup> R-TII CMem. Mer. Feb. 2013, Annex E, para 9.

<sup>263</sup> C-2043.

*But neither are we going to get involved in this, because it might be prejudicial to our comrades, because it's a case that's in the hands of the court, right? It's a court case. But previous governments supported Texaco Chevron and betrayed our people: they signed agreements saying that everything was resolved, which has been one of the principal arguments by Texaco Chevron in its defence, when in fact nothing was resolved. Now the Prosecutor General [Mr Washington Pesántez], has, very properly, opened an investigation to punish those people, because it was a lie: there was nothing, nothing resolved, nothing cleaned up, of all the pollution. So then, they probably want us to mediate the case, etc. If we can help, all the better, but if we meet with Texaco Chevron, we're also going to meet with our comrades from the Amazon Defense Front. That's what were going to say very clearly to our comrades from that group, who are extraordinary people. They're real heroes there, heroes that I would call anonymous heroes, don't you agree? One Luis Yanza, one Pablo Fajardo, who have fought for years for their people, for their Amazon, for the ecosystems, for nature, don't you agree? Congratulations, but watch out. There's not going to be any more of those sell-out governments. We're not going to get involved in the case, because it's a court case and we might hurt them. They've already made accusations that the State was pressuring the judges - haven't they? - to prejudice the case, but comrades ... I mean that if we receive Chevron Texaco, it will be with you there. And if we can help in some way to mediate, etc., well, all the better, but based on justice, not based on power ... ”.*<sup>264</sup>

4.321. 9 August 2008: In an exchange of email messages, Messrs Fajardo and Donziger state that they should be “doing everything to prepare the court to issue a quick Judgment and in such a way that it can be enforced in the U.S. before appeals in Ecuador.” They confirm that they soon will “start the work with the new judges.”<sup>265</sup> The latter was a reference to the imminent end of Judge Novillo’s term on 24 August 2008 as the Lago Agrio Judge presiding over the Lago Agrio Litigation, when he was succeeded by Judge Núñez. The earlier reference to the enforcement of a “quick judgment” referred to the strategy described later in the Invictus Memorandum prepared by Patton Boggs in or about August 2010 (see below).

4.322. 13 August 2008: By email message dated 13 August 2008 to Mr Fajardo, Mr Donziger states: “If you repeat a lie a thousand times it becomes the truth.”<sup>266</sup>

4.323. 26 August 2008: The Respondent’s Prosecutor General Washington Pesántez Muñoz brings criminal charges against (inter alios) Mr Reis and Dr Pérez, as TexPet’s co-

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<sup>264</sup> C-173.

<sup>265</sup> C-993.

<sup>266</sup> C-1630.

signatories to the 1995 Settlement Agreement (with related agreements), under Articles 338 and 339 of the Criminal Code.<sup>267</sup>

## **2009**

- 4.324. *January 2009*: The film “Crude”, directed by Mr Joseph Berlinger, is shown at the Sundance Film Festival in Utah, USA. The film was principally funded by Mr Russell DeLeon, at the time a major non-party funder for the Lago Agrio Plaintiffs in the Lago Agrio Litigation.
- 4.325. The film was subsequently released to the public. Chevron’s legal advisers noted that one of these public releases was differently edited, suggesting that the unpublished outtakes might contain relevant material. In particular, that public version showed Dr Carlos Martín Beristain (a member of Mr Cabrera’s team) appearing to work privately with the Lago Agrio Plaintiffs’ representatives. Mr Berlinger testified that he had removed from other versions of the film these scenes of Dr Beristain at the express request of the Lago Agrio Plaintiffs’ representatives. (It is not clear why the other public version was not similarly edited; but it had significant consequences for the Lago Agrio Litigation).
- 4.326. Chevron brought legal proceedings in New York against Mr Berlinger and others to produce unpublished outtakes from the film “Crude” showing the representatives for the Lago Agrio Plaintiffs, private or court-appointed experts in that proceeding and current or former officials of the Government of Ecuador. On 15 July 2010, Chevron obtained copies of these outtakes, amounting to about 600 hours (compared to some 90 minutes of edited film), by court order made by the US District Court for the Southern District of New York (Judge Kaplan) under Section 1782 affirmed (as modified) on appeal by the US Court of Appeals for the Second Circuit on 15 July 2010.<sup>268</sup>
- 4.327. Subsequently, as a result of these “Crude outtakes”, Chevron also obtained other documentation, in the US Section 1782 Litigation, from Mr Donziger, Stratus Consulting and several others. Chevron also took depositions and witness statements from several persons, including Dr Calmbacher, Mr Beltman, Dr Maest and, for 13 days,

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<sup>267</sup> C-252; Reis Veiga WS, para 52.

<sup>268</sup> C-359.

Mr Donziger himself.<sup>269</sup> This unprecedented mass of evidential material, ordinarily protected by journalistic or legal privileges, was a major development for Chevron's case, both for its RICO Litigation in New York and also for this arbitration under the Treaty. It was the product of more than 20 actions brought by Chevron in different US Federal Courts across the USA.<sup>270</sup> As of January 2009, however, all this still lay in the future.

4.328. *5 January 2009*: Mr Donziger notes in a private email message to himself, regarding his "Strategic Plan for 2009 Ecuador": "... speed to finish, deal with release, number, reasoned opinion, relationship to alegato, final order for U.S. enforcement, ask for bond and interest to run."<sup>271</sup> In the Tribunal's view, the reference to the "reasoned opinion", in the context of other work to be performed by the Lago Agrio Plaintiffs' representatives, likely signified a tentative plan already formed by such representatives covertly to contribute to or draft material parts of the Lago Agrio Judgment.

4.329. *14 January 2009*: The Lago Agrio Plaintiffs' representative, Mr Prieto, writes to Mr Donziger and others in early 2009:

*"... Let's keep in mind that Texaco is alleging in the United States that the Ecuadorian courts can be politically influenced, and that the Lago Agrio Court is under enormous pressure. The pressure should be felt by the judge, but should be subtle enough that it can't be alleged that he acted due to that pressure ... To understand it, let's think about when [President] Correa visited the region and publicly condemned Texaco. It was definitely a media victory, but Correa's words that day are the basis for Texaco's main argument for saying that the Lago Agrio judge isn't independent and that he obeys Correa's orders. To summarize, this strategy should be as follows: 'increase the pressure on the Court, but without negatively impacting its image of independence.' The political pressure can be in the form of direct calls to the judge. Preferably avoid public threats!! Social and media pressure can be brought to bear in their full force – because no one can silence the voice of society itself – but it's different than the voice of the State, which supposedly remains impartial ..."*<sup>272</sup>

4.330. *4 February 2009*: In an email message to Mr Donziger, Mr Sáenz wrote: "Dude, if the guys at Jones Day [Chevron's US lawyers] get a hold of this [i.e. the collusive abuse of Criminal Prosecutions against TexPet's two representatives to invalidate the 1995

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<sup>269</sup> Mr Donziger's deposition ended on 31 January 2011. Chevron issued its RICO legal proceedings in New York against him and others the next day, on 1 February 2011.

<sup>270</sup> See the "US Section 1782 Litigation" above.

<sup>271</sup> C-1137, p. 2.

<sup>272</sup> C-1284, p. 1.

Settlement Agreement in the Lago Agrio Litigation] it's gonna hurt us. It's pretty much irrefutable evidence of us collaborating with the fiscalia to get Reis Veiga and Pérez convicted.”<sup>273</sup> Mr Donziger responds, by email: “... nothing Chevron says sticks these days, people bring evidence of crimes to prosecutors all the time ... you must understand we are not collaborating with the fiscalia -- we are providing the fiscalia information about a crime, which is appropriate, and that's a big difference.”<sup>274</sup>

4.331. *4 March 2009*: By declaration addressed to the Lago Agrio Court (Judge Núñez), in response to further accusations of impropriety made by Chevron's Ecuadorian lawyers, Mr Cabrera again attests to his impartiality and independence before the Lago Agrio Court. He states (inter alia):

*“... All my work has been public. I have concealed absolutely nothing, my report has been submitted to the Court of Justice to which both parties have had access, I believe, without the least impediment. If my work had been clandestine, the parties would not have been able to photograph the sampling, would not have been able to observe everything that was done in the field, would not have criticized the minor technical details in the field so much”; and “... All the work done was planned, directed, and approved by me, as the person responsible for the expert examination.”*<sup>275</sup>

This statement was false.

4.332. *5 June 2009*: Mr Fajardo informs Mr Donziger that he is giving one of the Lago Agrio Plaintiffs' legal interns “a research assignment for our legal alegato and the judgment, but without him knowing what he is doing.”<sup>276</sup> In the Tribunal's view, the latter phrase is a reference to a covert plan for the ‘ghostwriting’ of the Lago Agrio Judgment. Thus, from Mr Fajardo's perspective, this mischief could not be made known to the legal intern.

4.333. *18 June 2009*: Mr Fajardo sends an email message to Mr Donziger, headed “Trust”, which includes a “transcription” of part of the Ecuadorian court decision in *Andrade v. Conelec* (i.e. the “Fajardo Trust Email”).<sup>277</sup> That transcription contains clerical mistakes not found in any published version of the court decision itself.<sup>278</sup> Later, these same

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<sup>273</sup> C-804, p. 2.

<sup>274</sup> C-804, p. 2.

<sup>275</sup> C-365, paras 2.1b & 2.2-3.

<sup>276</sup> C-995.

<sup>277</sup> C-997, C-1216.

<sup>278</sup> Contrast C-997 and C-998.

mistakes appear verbatim in the Lago Agrio Judgment.<sup>279</sup> In addition, this email proposes a “trust” as “the method to execute a judgment”. In the Tribunal’s view, this is the origin of Part 15 of the Lago Agrio Judgment for a “trust” to be formed as the payee of any proceeds from the enforcement of the Judgment, controlled by the ADF and persons designated by the ADF. (The Tribunal returns to these matters below, also in Part V).

- 4.334. *18 June 2009*: Mr Fajardo sends an email message to Mr Donziger, attaching the Ecuadorian decision in *Delfina Torres v. Petroecuador*<sup>280</sup> and noting that: “[t]he arguments by the magistrates are very interesting, I think they serve us well for our alegato and ... [sic]” The use of an ellipsis was a veiled reference to the covert plan for ‘ghostwriting’ the Lago Agrio Judgment, given Mr Fajardo’s reference only two weeks earlier to the “alegato and the judgment” (see above under “5 June 2009”).<sup>281</sup>
- 4.335. *19 June 2009*: The Lago Agrio Plaintiffs’ representatives hold an important meeting in Ecuador. According to Mr Fajardo’s email message to Mr Donziger, the participants are to discuss “all of the outcome of the case and what to do, how much money to put in, how to distribute the items and everything.”<sup>282</sup>
- 4.336. *22 June 2009*: In response to a newspaper article entitled “State Assumes Environmental Clean Up,” Mr Fajardo emails his colleagues, expressing concerns that [Chevron] would “say that the State finally assumed its duty and is going to clean up what it ought to.” By email headed “Worrisome”, Mr Donziger responds to Mr Sáenz and copied to his other colleagues, “You have to go to [President] Correa to put an end to this shit once and for all.”<sup>283</sup> Whilst the Ecuadorian Government’s initiative (if such it was) could have benefited the affected local communities, PetroEcuador’s remediation activities were seen by Mr Donziger and his colleagues (including Messrs Fajardo, Sáenz, Yanza and Prieto) as an unwelcome threat to their strategy in the Lago Agrio Litigation. The Tribunal infers that the reason for their concerns was the inconsistency with their strategy that Chevron was to be the only person to be held responsible for such pollution and resulting compensation in a significant amount, to the exclusion of PetroEcuador

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<sup>279</sup> Contrast C-997 and C-998; see C-931, p. 186.

<sup>280</sup> C-1586, RLA-286.

<sup>281</sup> C-1138.

<sup>282</sup> C-996.

<sup>283</sup> C-1163.

and the Respondent. Given (inter alia) the low estimate for PetroEcuador's remediation costs and the terms of the unilateral waiver of 20 November 1996 ostensibly immunizing PetroEcuador and the Respondent from any like responsibility (see above), such concerns are understandable.

4.337. *26 July 2009*: Mr Fajardo, in his email message to Mr Donziger, attaches links and texts, adding: "Some of them are very interesting and, as a matter of fact, will help us with the alegato work and ... [sic]".<sup>284</sup> The same point arises regarding the ellipsis. It referred to the covert plan for ghostwriting the Lago Agrio Judgment (see above).

4.338. *7 August 2009*: In his email message to Mr Donziger headed "Meeting with Ecuador Lawyers",<sup>285</sup> Mr Kohn (of Kohn, Swift & Graf) writes (inter alia): "In order to be effective at all in developing a judgment that will be enforceable in the US and elsewhere we need to be involved in the preparation of the final submission and proposed judgment, the major task we have all agreed upon repeatedly our firm would work on. We have been discussing meeting with our Ecuador lawyers since April or May to begin a working process to get this done ...". This reference to "developing a judgment" is ambiguous; but it becomes clearer in later exchanges in September 2009.

4.339. *31 August 2009*: Chevron publicises its allegations that it has videotaped evidence of a bribery scheme implicating Judge Nuñez. This had allegedly taken place between 11 May and 22 June 2009 during four private meetings between Judge Nuñez, prospective remediation contractors and persons ostensibly representing the Government.<sup>286</sup> These allegations depend upon the evidence of Mr Diego Borja (one of the contractors) and video-tapes.<sup>287</sup> The latter prove inconclusive; and Mr Borja is soon revealed to be an unreliable witness. Judge Nuñez denies any allegation of impropriety; but, after the Ecuadorian judicial authorities begin an investigation, he recuses himself from the Lago Agrio Litigation.

4.340. *10 September 2009*: The minutes of a meeting between Mr Donziger and lawyers from Kohn, Swift & Graf refer to the "Creation of Final Order," including subheadings for "Trust or 2 phases" (under Section XI). Read with the next email, this means the

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<sup>284</sup> C-1140.

<sup>285</sup> C-994.

<sup>286</sup> Track II Hearing D1.179.

<sup>287</sup> C-267.



operative part of the Lago Agrio Judgment; i.e. the covert plan for ghostwriting the Lago Agrio Judgment.<sup>288</sup>

- 4.341. *11 September 2009*: A lawyer from Kohn, Swift & Graf incorporates the minutes of the meeting of 10 September 2009 into an “Ecuador Task List”, sent to, amongst others, Mr Donziger and Mr Kohn. It states (inter alia): “KSG will continue to discuss and think about how to structure the judgment” (Section IIC under “Legal Issues”).<sup>289</sup> This is again a reference to the covert plan for ‘ghostwriting’ the Lago Agrio Judgment.
- 4.342. *13 September 2009*: When the controversy over Judge Núñez emerges and his replacement by Judge Zambrano becomes likely, the Lago Agrio Plaintiffs’ lawyers speculate that someone other than Judge Zambrano would draft Judge Zambrano’s orders. They wonder in their internal emails who that someone would be. As stated in Mr Fajardo’s email to Mr Donziger dated 13 September 2009, “I understand that Zambrano himself asked [Judge] Núñez, should the case fall to him, that Núñez help him with the orders. That would help with the continuity. The problem is, who will carry more weight: Núñez on the one hand, or Liliana [Suárez, the Lago Agrio Court’s clerk] and [Dr] Guerra on the other...”<sup>290</sup> It appears that the Lago Agrio Plaintiffs’ representatives and Judge Zambrano chose Dr Guerra. (By now, Dr Guerra was no longer a judge, having been dismissed from the Ecuadorian judiciary in May 2008).
- 4.343. *15 September 2009*: Mr Fajardo sends an email to Messrs Yanza, Prieto, Saenz and Donziger referring to Judge Zambrano and Dr Guerra as the “puppet” and “puppeteer,” respectively: “I think everything is quiet ... The puppeteer is pulling the string and the puppet is returning the package ... By now it’s pretty safe that there won’t be anything to worry about ... The puppet will finish off the entire matter tomorrow ... I hope they don’t fail me ...”<sup>291</sup> (Judge Zambrano was not yet formally re-appointed as the judge of the Lago Agrio Court presiding over the Lago Agrio Litigation).

- 4.344. In his testimony at the RICO trial, Mr Donziger testified:

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<sup>288</sup> C-1141, item XI.

<sup>289</sup> C-1071.

<sup>290</sup> C-1650, p. 1.

<sup>291</sup> C-1652.

*Q: Sir you recall in August 2009, Judge Núñez was the subject of recusal proceedings, correct, sir? A: I remember due to the Borja scandal that Judge Núñez, I think he removed himself from the case.*

*Q: And you knew that Judge Zambrano would be the person taking over the case from Judge Núñez, correct? A: I think I might have been told that by local counsel.*

*Q: And isn't it also the fact that at the time your local Ecuadorian legal team told you that Zambrano was talking to Núñez about Núñez potentially helping him with orders? A: It's possible. I don't remember specifically.<sup>292</sup>*

*... Q: Is the puppet Mr Zambrano that's referred to in these emails? A: As I've testified, I have no recollection of who it referred to. I don't even know if I knew at the time. I don't think I paid a whole lot of attention to these emails. However, as I sit here today, I have an understanding of who I think it was and it's not, it is not Zambrano."<sup>293</sup>*

4.345. The Tribunal considers that the use of code-names at this time is likely the sign of nefarious conduct and guilty minds by the sender and recipients; and that the “puppet” was a code name for Judge Zambrano. There is no other cogent explanation. (Judge Zambrano formally became the Lago Agrio Court’s judge hearing the Lago Agrio Litigation on 21 October 2009).

4.346. *23 September 2009*: The Claimants commence these arbitration proceedings against the Respondent under the Treaty, by their Notice of Arbitration dated 23 September 2009. It was received by the Respondent on 29 September 2009.

4.347. *Early October 2009*: Dr Guerra contacts Chevron’s Ecuadorian lawyers with an offer to fix with Judge Zambrano both the motion annulling Judge Núñez’s rulings and “the entire case”. Chevron declines his offer. Dr Guerra repeats his offer one or two months later. Chevron again declines his offer. Dr Guerra knew that his offers to Chevron were illegal under Ecuadorian law.

4.348. Dr Guerra describes these events in his First Declaration, as follows:

*“Once it became clear that Mr Núñez would have to withdraw from the Chevron case, Mr Zambrano asked me to attempt, through friends of mine, to get in touch with the attorneys for Chevron in order to negotiate an agreement by which the company would pay Mr Zambrano and me for issuing the final judgment in Chevron’s favor. Mr Zambrano told me that Chevron would have much more money*

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<sup>292</sup> C-2382, p. 2590.

<sup>293</sup> C-2382, p. 2593.

*than the Plaintiffs for this agreement, and therefore we could get a better deal and greater profits for ourselves. I do not recall the exact date, but approximately between August and October of 2009, I approached attorney Alberto Racines, of Mr Adolfo Callejas' law firm, to tell him I could establish a direct connection with Judge Zambrano so they could discuss and negotiate important and decisive issues in the case, including the judgment. For several weeks I insisted on this deal with Mr Racines, but he rejected my proposal and a relationship with Chevron was never achieved. It was publicly known that I was close to Mr Zambrano, and some attorneys in the city of Lago Agrio, including an attorney close to Chevron's local attorneys, knew that I was writing rulings on his behalf. Now, it must be clearly stated that I have no personal knowledge that Chevron's attorneys ever knew about my agreement with Mr Zambrano and, obviously, Chevron's representatives never paid me for any work I did on behalf of Judge Zambrano.”<sup>294</sup>*

4.349. This account was repeated in Dr Guerra's testimony at the RICO trial<sup>295</sup> and at the Track II Hearing.<sup>296</sup> It is materially corroborated by the contemporaneous affidavit of Dr Racines dated 16 October 2009;<sup>297</sup> and, indirectly, by the affidavit of Dr Adolfo Callejas Ribadeneira to whom Dr Racines reported at the time.<sup>298</sup> Whilst, as recorded earlier in this Part IV, the Tribunal exercises caution in accepting Dr Guerra's testimony (for the reasons there explained), the Tribunal accepts this testimony, with its material corroboration, as truthful.

4.350. In his First Declaration, Dr Guerra also testified as follows:

*“Following Chevron's rejection of any negotiation regarding the judgment, I arranged a meeting with Mr Pablo Fajardo at Mr Zambrano's suggestion. Mr Zambrano told me to have that meeting because he had reached an agreement with the Plaintiffs' representatives to quickly move the case along in their favor, but he did not tell me the details of that agreement. Mr Fajardo and I met in Quito, at the corner of Río Coca and 6 de Diciembre streets, and we discussed my role as ghostwriter for Mr Zambrano and we agreed on 3 things: (1) I would make the case move quickly; (2) Chevron's procedural options would be limited by not granting their motions on alleged essential errors in rulings I was to write, so the case would not be delayed; and (3) the Plaintiffs' representatives would pay me approximately USD \$1,000 per month for writing the court rulings Mr Zambrano was supposed to write. My understanding was that I had to follow these guidelines during the remainder of the case. After a short time, I met with Messrs Fajardo, Donziger and Yanza in the Honey & Honey Restaurant located on Eloy Alfaro and Portugal streets ... “.<sup>299</sup>*

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<sup>294</sup> C-1616A, para 12.

<sup>295</sup> C-2370, p. 916.

<sup>296</sup> Track II Hearing D3.691ff.

<sup>297</sup> R-1219.

<sup>298</sup> R-1218, paras 4-5.

<sup>299</sup> C-1616A, para 13.

- 4.351. This first restaurant meeting in late 2010 is described separately below. Dr Guerra's account is materially corroborated by subsequent events and forensic evidence regarding his drafting of court orders for Judge Zambrano in the Lago Agrio Litigation. Dr Guerra knew that his drafting of court orders for Judge Zambrano was illegal under Ecuadorian law, as did Judge Zambrano.
- 4.352. *20-21 October 2009* – Draft Orders #1 and #2 are last saved on Dr Guerra's computer.<sup>300</sup> Judge Zambrano's order based on Dr Guerra's Draft Orders #1 and #2 is issued in the Lago Agrio Litigation.<sup>301</sup>
- 4.353. *21 October 2009*: Judge Zambrano has assumed jurisdiction over the Lago Agrio Litigation. In his order of 21 October 2009, Judge Zambrano denies Chevron's motion to annul Judge Núñez's rulings. This motion had been made on the ground that Judge Núñez had recused himself after making statements indicating bias and prejudgment in the Lago Agrio Litigation.
- 4.354. *25 October 2009*: The Lago Agrio Plaintiffs' representatives seek to employ a new lawyer to assist in "organizing the office's legal information for the alegato and the other project." In context, the reference to this unnamed "other project" refers to the covert plan to 'ghostwrite' the Lago Agrio Judgment.
- 4.355. *27 October 2009*: In his email to Mr Donziger dated 27 October 2009, Mr Fajardo (again) refers to Dr Guerra as the "puppeteer", Judge Zambrano as the "puppet" and the Lago Agrio plaintiffs' representatives as "the audience" when he sends to Messrs Donziger and Yanza an email message with the subject "News." The email states: "The puppeteer won't move his puppet until the audience doesn't pay him something ..."<sup>302</sup> As before, this use of code-names indicates nefarious conduct and guilty minds by both sender and recipient.
- 4.356. *20 October 2009*: A draft order is last saved on Dr Guerra's computer prior to Judge Zambrano issuing an order with materially matching text (on 27 October 2009).<sup>303</sup>

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<sup>300</sup> Lynch ER1, Table 4.

<sup>301</sup> Lynch ER1, Table 4; Lynch ER1, Exhibit 22; and see C-230, p. 2.

<sup>302</sup> C-1617A.

<sup>303</sup> C-1616A, Attachment O.

- 4.357. *29 October 2009*: The sum of US\$1,000 is withdrawn from the Selva Viva bank account.<sup>304</sup> The bank records of Dr Guerra's bank account show a contemporaneous deposit of US\$1,000.<sup>305</sup> The Tribunal finds that this payment, as also subsequent payments to Dr Guerra, were bribes made by the Lago Agrio Plaintiffs' representatives to Dr Guerra.
- 4.358. *27 October 2009*: Judge Zambrano issues his order based on Dr Guerra's draft order (of 20 October 2009).<sup>306</sup>
- 4.359. *18 November 2009*: Dr Guerra last saves Draft Orders #3 and #4 to his computer with text substantially identical to the text of an order issued five days later by Judge Zambrano (on 23 November 2009).<sup>307</sup>
- 4.360. *19 November 2009*: Dr Guerra ships a package to Ms Narcisa Leon (a Lago Agrio Court employee).<sup>308</sup> The Tribunal finds that this package included Dr Guerra's draft order intended for Judge Zambrano.
- 4.361. *23 November 2009*: Judge Zambrano issues an order with text materially identical to text found in the drafts saved on Dr Guerra's computer five days earlier (18 November 2009).<sup>309</sup>
- 4.362. *26-27 November 2009*: The sum of US\$1,000 is withdrawn from the Selva Viva bank account.<sup>310</sup> A deposit of US\$1,000 in cash is made contemporaneously to Dr Guerra's bank account.<sup>311</sup>
- 4.363. *27 November 2009*: Mr Yanza sends an email to Mr Donziger, stating: "[I]t is important to clarify on this that the budget is higher in relation to the previous months, since we are paying the puppeteer [i.e. Dr Guerra] ... In addition, in reviewing the accounts with Alexandra [Achundia], we have not included in the debits report from the previous months some expenses that we incurred months ago, for example, when we bought ...

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<sup>304</sup> C-1661, p. 2.

<sup>305</sup> Torres ER, Exhibit 50, p. 3.

<sup>306</sup> C-878.

<sup>307</sup> C-1616A, Attachment P; Lynch ER1, Table 4.

<sup>308</sup> C-1616A, Attachment F.

<sup>309</sup> Lynch ER1, Exhibit 23; Table 4.

<sup>310</sup> C-1661, p. 2.

<sup>311</sup> Torres ER, Exhibit 51, p. 3.

another computer (because we had to give one to the man).”<sup>312</sup> The Tribunal has not found it possible, with sufficient probability, to identify this “man” or the purpose for which this computer was supplied to him.

4.364. *29-30 November 2009*: Draft order #5 is last saved to Dr Guerra’s computer.<sup>313</sup> Dr Guerra ships a package to Ms Narcisa Leon of the Lago Agrio Court.<sup>314</sup> The Tribunal finds that this package included Dr Guerra’s draft intended for Judge Zambrano. The next day, Judge Zambrano issues an order in the Lago Agrio Litigation with text substantially identical to the text from the Draft Order #5 saved to Dr Guerra’s computer one day earlier.<sup>315</sup>

4.365. *6-7 December 2009*: Draft Order #6 is last saved to Dr Guerra’s computer.<sup>316</sup> The next day, Judge Zambrano issues an order in the Lago Agrio Litigation with text that matches the text of the draft order saved to Dr Guerra’s computer one day earlier.<sup>317</sup>

4.366. *12-14 December 2009*: Draft Order #7 last saved on Dr Guerra’s computer.<sup>318</sup> Two days later, an order based on Draft Order #7 is issued by Judge Zambrano in the Lago Agrio Litigation.<sup>319</sup>

4.367. *19 December 2009*: Draft Order #8 is last saved on Dr Guerra’s computer.<sup>320</sup>

4.368. *22-23 December 2009*: The sum of US\$1,000 is withdrawn from the Selva Viva bank account.<sup>321</sup> Ms Ximena Centeno (of Selva Viva) deposits contemporaneously US\$1,000 into Dr Guerra’s bank account at Banco Pichincha.<sup>322</sup>

4.369. *29 December 2009*: Mr Fajardo reassures Mr Donziger that he was “99.9 percent sure” that the “plan for the judgment” would be fulfilled; but that he could not send any details by email.”<sup>323</sup> By this last comment, the Tribunal understands that Mr Fajardo was already aware that Chevron might obtain, by court order in the USA, access to Mr

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<sup>312</sup> C-1657, p. 2.

<sup>313</sup> C-1616A, Attachment Q; Lynch ER1, Table 4.

<sup>314</sup> C-1616A, Attachment F.

<sup>315</sup> C-1809; Lynch ER1, Table 4.

<sup>316</sup> C-1616A, Attachment R.

<sup>317</sup> C-1812; Lynch ER1, Table 4.

<sup>318</sup> Lynch ER1, Table 4.

<sup>319</sup> Lynch ER1, Table 4.

<sup>320</sup> Lynch ER1, Table 4; C-1616A, Attachment F.

<sup>321</sup> C-1661, p. 51.

<sup>322</sup> Torres ER, Exhibit 24.

<sup>323</sup> C-1001.

Donziger's email messages (as it eventually did). It was thus necessary for Mr Fajardo to be discreet in the use of language in referring to the covert plan for the 'ghostwriting' of the Lago Agrio Judgment.

4.370. As for the reference to the "plan for the judgment", Mr Donziger confirmed in the RICO Litigation that the Lago Agrio Plaintiffs "never publicly on the record submitted a proposed judgment in Lago Agrio."<sup>324</sup> The Tribunal considers that Mr Fajardo's phrase referred to the covert plan to 'ghostwrite' the Lago Agrio Judgment.

## **2010**

4.371. *5 January 2010*: Order based on Dr Guerra's Draft Order #8 (of 19 December 2009) is issued by Judge Zambrano in the Lago Agrio Litigation.<sup>325</sup>

4.372. *16-19 January 2010*: Draft Order #9 last saved on Dr Guerra's Computer.<sup>326</sup> Order of 19 January 2010 based on Dr Guerra's Draft Order #9 is issued by Judge Zambrano in the Lago Agrio Litigation.<sup>327</sup>

4.373. *29 January - 2 February 2010*: Draft Order #10 is last saved on Dr Guerra's Computer.<sup>328</sup> Four days later, the order based on Draft Order #10 is issued by Judge Zambrano in the Lago Agrio Litigation.<sup>329</sup>

4.374. *5 February 2010*: Ms Ximena Centeno (of Selva Viva) deposits the sum of US\$1,000 into Dr Guerra's bank account at Banco Pichincha.<sup>330</sup>

4.375. *18 February 2010*: A Draft Order #11 has been saved to Dr Guerra's computer. On 18 February 2010, the order based on Dr Guerra's draft order is issued by Judge Zambrano in the Lago Agrio Litigation.<sup>331</sup> On 7 March 2010, Draft Order #11 is last saved on Dr Guerra's Computer, using the "Save As" function indicating the existence of an earlier draft.<sup>332</sup>

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<sup>324</sup> C-1003 (updated), p. 4758.

<sup>325</sup> Lynch ER1, Table 4.

<sup>326</sup> Lynch ER1, Table 4.

<sup>327</sup> Lynch ER1, Table 4.

<sup>328</sup> Lynch ER1, Table 4.

<sup>329</sup> Lynch ER1, Table 4.

<sup>330</sup> Torres ER, Exhibit 25.

<sup>331</sup> Lynch ER1, Table 4.

<sup>332</sup> Lynch ER1, Table 4; Track II Hearing D5.942.

4.376. *11 March 2010*: Judge Zambrano is succeeded by Judge Ordóñez in the Lago Agrio Litigation.

4.377. *30 March 2010*: In his email message, Mr Prieto (in Ecuador) writes to Mr Donziger (copied to Messrs Fajardo, Yanza and Saenz) to complain at the result of the production to Chevron of the ‘Crude outtakes’ and other materials in the legal proceedings in the USA:

*“Today Pablo [Fajardo] and Luís [Yanza] were kind enough to tell us what was going on in Denver [this was a reference to Chevron’s legal proceedings against Stratus Consulting before the US Federal Court in Denver under US Section 1782], and the fact that certainly ALL will be made public, including correspondence. [T]he problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail), and we are not willing to minimize our concern and to sit to wait for whatever happens. For us its NOT acceptable for the correspondence, the emails, between Stratus Consulting and Juanpa and myself be divulged. To avoid this, we have decided to file a writ of protection before a judge in Ecuador, asking the judge to write to the judge in Denver not to reveal the correspondence because this would affect our fundamental rights. This is an idea that may not work, but with adequate support perhaps we can do it. I am telling you so you’ll know. We will send you the document.”<sup>333</sup>*

4.378. The reference to “jail” is significant. Criminal proceedings could have arisen from unlawful conduct over the bribing of Messrs Reyes and Pinto, the blackmailing of Judge Yáñez, the corrupt collusion with Mr Cabrera, the ‘ghostwriting’ of Mr Cabrera’s Report, the bribes paid to Dr Guerra for drafting Judge Zambrano’s orders, the inappropriate private meetings with several judges of the Lago Agrio Court, the collusive criminal proceedings against Mr Veiga and Dr Pérez and the covert plan for ‘ghostwriting’ the Lago Agrio Judgment. (There was apparently no written reply from Mr Donziger to this email message).

4.379. *14 May 2010*: This Tribunal issues its Order on Interim Measures dated 14 May 2010: see its Operative Part above in Annex 1(A) to Part I above.

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<sup>333</sup> C-930. These legal proceedings were an application by Chevron to the US District Court of Colorado under Section 1782 made on 18 December 2009. It eventually resulted in an order against Stratus Consulting of 1 October 2010.



4.380. *17 June 2010*: By letter dated 17 June 2010 to the Tribunal’s Secretary, responding to Paragraph 1(v) of its Order on Interim Measures dated 14 May 2010, the Lago Agrio Court (Judge Ordóñez) writes as follows:

*“Through this letter, I want to communicate that the Attorney General’s Office of the Republic of Ecuador has informed me of the Order on Provisional Measures, dated May 14, 2010, ordered by the Tribunal chaired by you within the international arbitration filed by the companies Chevron Corporation and Texaco Petroleum Company against Ecuador, where I am invited to give an indication, as a professional courtesy to the Arbitration Tribunal, of the possible date for the issuance by the Presidency of the Provincial Court of Justice of Sucumbíos, of a decision regarding lawsuit No.-002- 2003-P-CSNL, which is brought by María Aguinda and others against the Company Chevron Corporation, for compensation for environmental damages.*

*In this regard, I must inform you that, within Ecuadorian procedural rules, there are no provisions that enable me to state a precise date for the issuance of the decision regarding said lawsuit; however, taking into consideration the length of the proceedings (185,152 pages), according to my professional experience as a Judge and my study of the proceedings to date, I foresee that a decision may possibly be arrived at in 8 to 10 months; nevertheless, this period may vary due to reasons beyond our control, or events we cannot foresee at this time in connection with the proceedings.”<sup>334</sup>*

4.381. *July 2010*: The Lago Agrio Plaintiffs’ representatives dismiss Mr Kohn and his law firm as advisers and funders from the Lago Agrio Litigation.<sup>335</sup>

4.382. *14 July 2010: Forensic Evidence* (See Part VI):<sup>336</sup> Windows XP is installed on the “Old Computer” of Judge Zambrano. A significant amount of data was then copied to the Old Computer.<sup>337</sup> The transfer included documents named “Caso Texaco.doc” and “Providencias.doc”.<sup>338</sup>

4.383. The Old Computer was not found to contain any of the nine draft orders prepared by Dr Guerra for the Lago Agrio Court during Judge Zambrano’s first period as the judge presiding over the Lago Agrio Litigation (21 October 2009 to 11 March 2010). The subsequent installation of Windows XP on 14 July 2010 is the likely explanation.

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<sup>334</sup> R-118 (sent with the Respondent’s assistance, as requested by the Tribunal).

<sup>335</sup> C-2374, pp. 1510-1511.

<sup>336</sup> These references to the Forensic Evidence should be read with their corresponding fuller explanations in Part VI below. To avoid repetition, such explanations are not set out in this Part IV.

<sup>337</sup> Lynch ER2, p. 11.

<sup>338</sup> Lynch ER2, Exhibit 23.

- 4.384. *23 July 2010*: A Western Digital 120 GB hard drive is attached as an external storage device to Dr Guerra's computer. The 11 Draft Orders were copied to the computer hard drive as part of a much larger transfer process during which 4,325 files and folders were placed on the computer hard drive.<sup>339</sup> An operating system was installed on Dr Guerra's Hard Drive. 11 Documents were created on Dr Guerra's Hard Drive.<sup>340</sup>
- 4.385. *2 August 2010*: The false origins of the "Cabrera Reports" are raised by Chevron in the Lago Agrio Litigation. Chevron had received the off-cuts from "Crude" in July 2010. Following an application in the Lago Agrio Litigation, the Lago Agrio Court (Judge Ordóñez) issues an order allowing the reports attributed to Mr Cabrera to be substituted by 'cleansing' expert reports, to be submitted within 45 days.<sup>341</sup>
- 4.386. *18 August 2010*: The Lago Agrio Plaintiffs' representatives consider the effect of Mr Cabrera's departure as the Lago Agrio Court's sole global assessment expert and his replacement with the parties' cleansing experts. This includes an email message, marked "privileged and confidential – attorney work product", from Mr Small (of Patton Boggs) to Mr Donziger: "While our new expert [sic] will most likely rely on some of the same data as Cabrera (and come to the same conclusions as Cabrera) ... we probably wouldn't want to draw that much attention to Cabrera ... our expert might address Cabrera's findings in such a subtle way that someone reading the new expert report (the Court in Lago or an enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages."<sup>342</sup>
- 4.387. None of the Lago Agrio Plaintiffs' cleansing experts visit Ecuador, inspect the former concession area or conduct any sampling or environmental testing, as Mr Donziger later confirmed during his testimony in the RICO Litigation.<sup>343</sup> The Lago Agrio Plaintiffs produce their seven expert reports on 16 September 2010, submitted to the Lago Agrio Court within the 45 days' time limit.<sup>344</sup>

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<sup>339</sup> Lynch ER1, p. 9, fn 6.

<sup>340</sup> Lynch ER1, para 15; Racich ER2 paras 7(a) & 11.

<sup>341</sup> C-361.

<sup>342</sup> C-1250.

<sup>343</sup> C-1087; pp. 1652-1653.

<sup>344</sup> C-1087; pp. 1652-1653.

- 4.388. One of the Lago Agrio Plaintiffs’ cleansing experts, Dr Lawrence W. Barnthouse, relies upon the Cabrera Report “to see exactly how he [Cabrera] had done it.”<sup>345</sup> The Lago Agrio Judgment in turn relies upon Dr Barnthouse to arrive at its damages of US\$ 200,000,000 for the recovery of flora, fauna and aquatic life.<sup>346</sup> Hence, the Lago Agrio Judgment indirectly relies upon the Cabrera Report.<sup>347</sup> The Tribunal returns to this matter below: see Part V.
- 4.389. For its damages of US\$ 5.396 billion for soil remediation, the Lago Agrio Judgment’s calculation based upon 880 pits can only be traced back to Annex H1 to the Cabrera Report (“Anexo H1”) and not, as the Judgment and the Clarification Order state, “various aerial photographs”.<sup>348</sup> Anexo H1 to the Cabrera Report had not, in fact, been drafted by Mr Cabrera, but prepared by Stratus and falsely attributed to Mr Cabrera by the Lago Agrio Plaintiffs’ representatives. The Tribunal returns to this matter below: see Part V.
- 4.390. *August 2010*: In or about August 2010, Patton Boggs produce for the representatives of the Lago Agrio Plaintiffs a lengthy undated memorandum entitled “Path Forward: Securing and Enforcing Judgment and Reaching Settlement” or, in shorthand, the “Invictus Memorandum”.<sup>349</sup> It sets out (inter alia) a legal strategy for seizing Chevron’s assets outside Ecuador in multiple jurisdictions, including the arrest of Chevron’s vessels.<sup>350</sup> These jurisdictions included the USA, the Philippines, Singapore, Australia, Argentina, Brazil, Columbia, Venezuela, Canada, Kuwait, Nigeria, Saudi Arabia, South Africa, South Korea, Belgium, Indonesia, The Netherlands, the United Kingdom, Trinidad and Tobago, New Zealand and Russia.
- 4.391. The conclusion of the Invictus Memorandum reads (in part):

*“After approximately seventeen total years of litigation in the United States and in Ecuador, the case against Chevron now enters its most critical, multi-faceted, and labor-intensive phase. As described herein, there are challenges and risks, but all are manageable. With the ultimate goal of effecting a swift and favorable settlement*

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<sup>345</sup> C-899, pp. 55 & 165.

<sup>346</sup> C-931, page 182.

<sup>347</sup> C-931, p. 182.

<sup>348</sup> C-931, pp. 124-125; C-1367, p. 15.

<sup>349</sup> It was doubtless called “Invictus” after the well-known poem by William Ernest Henley.

<sup>350</sup> C-903.

*in mind, the strategy of Plaintiffs' Team over the coming months preceding and following entry of a judgment will incorporate the following components: ...*

*\* Securing a defensible and enforceable judgment in Ecuador by executing an effective alegato finale and submitting a persuasive, thoughtful submission on damages that will, in many ways, moot Chevron's criticism of the Cabrera Report ...*

*\* Identifying jurisdictions globally that are most hospitable to an enforcement action, with the goal that careful selection and an investment of time on the front end will simplify the process substantially on the back-end.*

*\* Identifying Chevron's most vulnerable assets and determining whether pre-judgment attachment is a viable option for placing settlement pressure on Chevron in the various jurisdictions where enforcement is contemplated... ”*

4.392. Later, as reported in *ecuardoinmediato.com* on 3 March 2012 (shortly after the Lago Agrio Judgment became enforceable),<sup>351</sup> Mr Sáenz (of the Lago Agrio representatives) stated: “ ... we can immediately go to carry out the compulsory enforcement of the judgment. We have several teams around the world who are ready to seize tankers, shares, production. In view of the fact that Chevron has no significant assets in this country, assets in Panama and Venezuela may be seized, for which the timing has been analysed and the trust was signed yesterday, the attorney says”. (This trust was created under the terms of the Lago Agrio Judgment, designating it the beneficiary of the judgment's proceeds: see Part V below).

4.393. *5 September 2010*: In his email message, Dr Guerra writes to Mr Donziger:<sup>352</sup>

*“Alberto Guerra Bastidas here, apart from a warm greeting, I would appreciate your helping my daughter Gabriela Guerra with respect to the mechanics of obtaining her residence in the United States. She entered [the USA] last October of 2009 with a tourist visa. Later, in June of 2010 she changed her status from tourist to student, so she is legal for one year until June 2011. She has an American boyfriend who for the purpose of making her legal, and for love, she says, they want to get married. Questions: is it more convenient to have the wedding in the US or in Ecuador. With the marriage how long will it take to get the residency worked out. What is an estimate of the cost of the procedures – and attorney's fees. By the way, my daughter is in Chicago. I will support the matter of Pablo Fajardo so it will come out soon and well.”*

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<sup>351</sup> C-1133 (updated), p. 2.

<sup>352</sup> Torres ER, Exhibit 26.

- 4.394. The last sentence in Dr Guerra’s email is ambiguous; but, in context and as explained by Dr Guerra himself at the Track II Hearing,<sup>353</sup> it indicates, at the very least, an inappropriate willingness to assist Mr Fajardo in the Lago Agrio Litigation. There is no reply in evidence before this Tribunal from Mr Donziger to Dr Guerra.
- 4.395. *17 September 2010*: The Lago Agrio Court (Judge Ordóñez) issues its procedural order (autos para sentencia), closing the evidential file in the Lago Agrio Litigation and preparing the case for judgment.<sup>354</sup> Later, Judge Ordóñez recuses himself on 10 October 2010; he is succeeded by Judge Zambrano on 11 October 2010; and by his procedural order of 11 October 2010, Judge Zambrano revokes Judge Ordóñez’s order of 17 September 2010.<sup>355</sup>
- 4.396. *October 2010*: By October 2010, Chevron has filed several US Section 1782 applications in the USA, against Mr Donziger, Stratus Consulting and others; and it had already received multiple document productions from Mr Donziger and Stratus Consulting, in addition to the “Crude Outtakes”.
- 4.397. *6 October 2010*: As he subsequently testified by affidavit, Dr Enrique Carvajal Salas (a lawyer for Chevron in Ecuador) describes a meeting with a friend in Quito on 6 October 2010:

*“In that meeting, my ... friend told me, based on his discussion with Dr Guerra, that Judge Zambrano would no longer try to reach some agreement with Chevron because he was aware that the company would not make financial arrangements with anybody, but, instead, that Judge Zambrano was sure to do so with the plaintiffs [i.e. the [Lago Agrio Plaintiffs]]. I understood this to mean that Judge Zambrano would reach an agreement with the plaintiffs to receive money from them in exchange for issuing the judgment in the Aguinda case in their favor.”<sup>356</sup>*

- 4.398. Subsequently, in “late April 2012” after the Lago Agrio Judgment had been issued, Dr Carvajal runs into Dr Guerra, they greet each other, and: “As I walked away, Dr Guerra came running up behind me. When I turned around, Dr Guerra said, ‘Dr Carvajal, I want to tell you that I would like to make any kind of statement about the fact that I helped to prepare the first instance judgment’. I immediately answered: ‘You, and who else?’

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<sup>353</sup> Track II Hearing D4.890.

<sup>354</sup> C-642.

<sup>355</sup> C-643.

<sup>356</sup> R-1318, para 5; see also R-1218, para. 8.

After some hesitation, he answered: ‘Fajardo and Zambrano’. Then he added: ‘I am willing to make a public statement ...’.<sup>357</sup>

4.399. Dr Carvajal’s testimony as regards both events is corroborated by the affidavit of Dr Adolfo Callejas Ribadeneira, to whom Dr Carvajal reported at the time.<sup>358</sup>

4.400. In his affidavit, Dr Callejas describes another event taking place in “approximately the last quarter of 2010”:

*“... another one of the lawyers on my legal team in the Aguinda case, Dr Patricio Efrain Campuzano Merino, told me that, earlier that day, he received a telephone call from ... who said she had something important to discuss with him regarding the Aguinda case, and that he met her shortly thereafter. Dr Campuzano told me that, in his meeting with ... she said that Judge Zambrano wanted to know whether Chevron would be interested in drafting the final judgment of the trial court in favour of Chevron in the Aguinda case. Dr Campuzano told me that he understood Dr Guerra had conveyed that information to ... Based on Dr Campuzano’s recitation of his discussion with ... I understood ... to mean that Chevron could pay an amount of money to Judge Zambrano to obtain and ghostwrite a judgment in its favour in the Aguinda case. I replied to Dr Campuzano with a firm, ‘No’ ...”.*<sup>359</sup>

4.401. *11 October 2010: Forensic Evidence* (See Part VI): A user of Judge Zambrano’s Old Computer creates a new document,<sup>360</sup> “Providencias.docx”, from some or all of the “Providencias.doc” document.<sup>361</sup> (The latter document had been transferred to Judge Zambrano’s Old Computer in July 2010: see above).

4.402. *10-13 October 2010*: Judge Ordoñez is recused following Chevron’s application of 26 August 2010 alleging untimely conduct and bias.<sup>362</sup> Judge Zambrano again assumes judicial responsibility for the Lago Agrio Litigation. He issues an order rejecting most of Chevron’s pending motions; and he threatens to sanction Chevron’s lawyers if they file further motions seeking to revoke the Court’s prior orders.<sup>363</sup>

4.403. *18 October 2010: Forensic Evidence* (See Part VI): Microsoft Excel is active on Judge Zambrano’s Old Computer for two minutes.<sup>364</sup>

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<sup>357</sup> R-1318, para 6.

<sup>358</sup> R-1218, paras 8 and 9.

<sup>359</sup> R-1218, para 7.

<sup>360</sup> Lynch ER2, Exhibit 23.

<sup>361</sup> Lynch ER2, p. 27.

<sup>362</sup> C-1289.

<sup>363</sup> C-644.

<sup>364</sup> Lynch ER2, Table 6.

4.404. *September-October 2010*: Dr Guerra meets the Lago Agrio Plaintiffs’ lawyers twice at the Honey & Honey restaurant in Quito.

4.405. According to Dr Guerra, the first occasion is for Messrs Fajardo and Yanza to thank him (Dr Guerra) for his help in writing orders and “steer[ing]” the case in their favour. The second occasion is for Messrs Fajardo, Yanza and Donziger to discuss paying Dr Guerra and Judge Zambrano for a judgment drafted (i.e. ‘ghostwritten’) by the Lago Agrio Plaintiffs’ representatives. According to Dr Guerra, Judge Zambrano later informs Dr Guerra that he (Judge Zambrano) had made direct contact with Mr Fajardo, and that the Lago Agrio Plaintiffs’ representatives had agreed to pay US\$ 500,000 in exchange for allowing them to write the Lago Agrio Judgment, from which Dr Guerra would receive “a proper benefit”.<sup>365</sup> Judge Zambrano tells Dr Guerra that he would share part of the money with him, once it was paid to him.<sup>366</sup>

4.406. At the RICO trial in New York, Dr Guerra testified as follows:

*“Q. What if anything happened at that meeting at the Honey [&] Honey restaurant?  
A. At that meeting I took it upon myself to summarize in detail the proposal made by Mr Zambrano, and I obviously stated expressly regarding his intent of receiving at least \$500,000 ... Mr Donziger and the whole group ... stated that they regretted it very much, but that for the time being, at that time they didn’t have the money that Mr Zambrano was requesting.”<sup>367</sup>*

4.407. At the Track II Hearing in this arbitration, Dr Guerra testified orally in similar terms:

*“Q. Did you have a meeting with anyone in September or October 2010, at the Honey [&] Honey restaurant in Quito? A. I did. At that time I met with Mr Steven Donziger, with Pablo Fajardo, Luis Yanza, who represented the Plaintiffs against Chevron in Ecuador.*

*Q. What did you say to them at that meeting? A. Specifically at that meeting, I conveyed a message from Judge Nicolas Zambrano related to the fact that he would accept for them to prepare the draft Judgment in the Chevron Case, in exchange of the sum of at least \$500,000”<sup>368</sup>*

4.408. At the RICO trial in New York, Mr Donziger testified that he met Dr Guerra at a restaurant in Quito in late 2010 and that Dr Guerra there solicited a bribe from him:

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<sup>365</sup> Track II Hearing D3.725.

<sup>366</sup> C-2358 (also C-2386), paras 41-43.

<sup>367</sup> C-2371, pp. 995-996.

<sup>368</sup> Track II Hearing D3.600.

*“Q: You admit, sir, that you met with Mr Guerra [at] a restaurant called the Honey [&] Honey in late 2010, correct, sir? A: I met with him at a restaurant in Quito.*

*Q: And it was Mr Fajardo who arranged that meeting, correct, sir? A: I believe so.*<sup>369</sup>

...

*Q: So [Dr Guerra] made clear to you in exchange for a \$500,000 bribe, he could fix the case with the judge on the Lago Agrio case at the time, correct, sir? A: Something to that effect, yeah. He basically said he could get it done for a payment.”*

*Q: And your testimony, sir, is you told [Dr Guerra] no, we can’t do that, correct, that’s your testimony? A: Yes.”*<sup>370</sup>

4.409. 27 October 2010: Judge Zambrano issues an order refusing to consider evidence of the “Cabrera fraud” in the Lago Agrio Litigation, following a request by Chevron to admit such evidence.<sup>371</sup>

4.410. 31 October 2010: The Intercreditor Agreement is executed, in counterparts, by Mr Donziger, Mr Fajardo, Patton Boggs, Mr Yanza, the ADF and others on the distribution of proceeds from the Lago Agrio Litigation. The Lago Agrio Plaintiffs rank ninth and last in the “distribution waterfall” (Clause 3.2.9).<sup>372</sup> This Agreement accompanied the “Burford Funding Agreement”, also of 31 October 2010.<sup>373</sup>

4.411. In his deposition in the US Section 1182 Litigation on 1 December 2010, Mr Donziger stated that it is possible that he might receive personally “hundreds of millions” of US dollars from a favourable judgment in the Lago Agrio Litigation.<sup>374</sup>

*“Q. Is it fair to say that you have an expectation that you, Steven Donziger, might receive as much as hundreds of millions of dollars in the event that there is a judgment in favor of the plaintiffs in that case?... A. It is possible. It depends on the amount of the overall recovery. I misspoke two questions ago. I don’t know if it would be appropriate to try to correct something.*

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<sup>369</sup> C-2382, p. 2597.

<sup>370</sup> C-2382, pp. 2597-2598.

<sup>371</sup> C-878.

<sup>372</sup> C-1218.

<sup>373</sup> C-1217.

<sup>374</sup> C-697, pp. 547-549.



*Q. Please go ahead. A. The amount -- the top end of the overall recovery of attorneys' fees is now lower than that agreement based on an oral understanding with the clients. It is lower than 25 percent.*

*Q. What is it now? A. It is 20 percent.*

*Q. And when was that changed? A. This year, a few months ago. I don't know when exactly.*

*Q. And for what reason? A. Various reasons, but that [sic] this stage of the case we are trying to bring in new firms and funds to sustain the case. So in coming up with a formula that would make all of that work, the total amount of the attorneys' fees dropped.”<sup>375</sup>*

4.412. The Tribunal has also been shown a “pie chart” produced for the US State Department of 20 December 2011 (after the Lago Agrio Judgment), showing the following figures:<sup>376</sup> From a “total recovery” by external “Funders, Lawyers, and Advisors” of US\$ 5,741,211,538 on US\$ 18,156,936,000, Donziger & Associates would receive US\$ 1,143,886,968, Mr Fajardo US\$ 363,138,720, Patton Boggs US\$ 435,768,464 and the Burford Group (as the major non-party funder) US\$ 1,006,802,101.<sup>377</sup> Mr Donziger had earlier prepared (for internal use only) documents showing other figures for shares in the proceeds of a successful Lago Agrio Judgment, including Mr DeLeon, Mr Yanza & Mr Fajardo, on 13 April 2009<sup>378</sup> and February 2010.<sup>379</sup> The Lago Agrio Complaint had requested that the ADF be the payee of Chevron’s judgment debt, together with 10% of the judgment’s value. (The Lago Agrio Judgment was to award this 10% in the sum of US\$ 864 million or, potentially, US\$ 1.82 billion).

4.413. *4 November 2010: Forensic Evidence* (See Part VI): Microsoft Excel is active on Judge Zambrano’s Old Computer for one minute.<sup>380</sup>

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<sup>375</sup> Later, at the RICO trial, Mr Donziger also testified that he stood to receive US\$ 600 million personally from the proceeds of the Lago Agrio Judgment: see C-2381, p. 2490.

<sup>376</sup> R-1082 (it appears that this information originated from Chevron).

<sup>377</sup> Burford’s interest in the Lago Agrio Litigation, as a non-party funder, began in or about September 2010 [C-779]. It resulted in the Funding Agreement dated 31 October 2010, signed by Treca Financial Solutions (as the “Funder”) and by the ADF and Messrs Donziger, Fajardo and Yanza (“for the Claimants”) (C-1217), on the same day as the Intercreditor Agreement (C-1218).

<sup>378</sup> C-748.

<sup>379</sup> C-767 to C-770.

<sup>380</sup> Lynch ER2, Table 6.

- 4.414. 25 November 2010: Forensic Evidence (See Part VI): First User Account, named HP, is created on Judge Zambrano's "New Computer".<sup>381</sup>
- 4.415. 2 December 2010: Forensic Evidence (See Part VI): Fielweb.com is accessed using the Old Computer.<sup>382</sup>
- 4.416. 6 December 2010: This Tribunal issues its Second Order on Interim Measures dated 6 December 2010: see Annex 1(B) to Part I above.
- 4.417. Pursuant to this procedural order, the Tribunal (by its President) writes to Judge Zambrano at the Lago Agrio Court the following letter of 6 December 2010 (in both English and Spanish):

*"I have the pleasure of addressing you in my capacity as President of the Arbitral Tribunal presiding over the international arbitration captioned PCA Case No. 2009-23: 'Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador'.*

*In that capacity, and on behalf of the Arbitral Tribunal, I write in order to invite you, as a professional courtesy, and in conformity with your duties to the Parties in the case named in the subject line above, to make known to the Arbitral Tribunal and to the Parties to that case, as far in advance as may be reasonably possible, the likely date that you will render judgment on the merits in that case.*

*I make reference in this regard to the letter dated 17 June 2010 from the Presidency of the Provincial Court of Sucumbios, wherein Judge Leonardo Isaac Ordóñez Piña, formerly seized of the case, kindly responded to a similar prior invitation from the Arbitral Tribunal transmitted by the Attorney General and stated at that time that 'taking into consideration the length of the proceedings (185,152 pages), according to my professional experience as a Judge and my study of the proceedings to date, I foresee that a decision may possibly be arrived at in 8 to 10 months' <sup>383</sup>*

*I request, for the above purpose, and to avoid any delays in the communication of this information to the Arbitral Tribunal, that this information be transmitted, in addition to any other means, also by e-mail and facsimile, to the following person and address:*

*Martin Doe Permanent Court of Arbitration, [postal, fax and email addresses supplied.*

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<sup>381</sup> Lynch ER2, p. 12.

<sup>382</sup> Lynch ER3, p. 13.

<sup>383</sup> R-118 (as sent with the Respondent's assistance: see above).

*In the event it is possible for you to transmit this communication also by courier, I enclose herein a prepaid FedEx envelope with the above address, in order to allow transmission to the Arbitral Tribunal also by that means.*

*I thank you kindly in advance for your attention to this matter and your acceptance of the request set out in this letter ....”*

4.418. The Tribunal receives no response to this letter from the Lago Agrio Court or Judge Zambrano as the judge now presiding over the Lago Agrio Litigation.

4.419. *7 December 2010: Forensic Evidence* (See Part VI): First apparent use of the HP Account on Judge Zambrano’s New Computer.<sup>384</sup>

4.420. *17 December 2010*: In his email dated 17 December 2010 to certain of the Lago Agrio Plaintiffs’ representatives, including Mr Donziger, Mr Fajardo writes:

*“I hereby express my deep concern given the noncompliance with the completion of the legal argument for the main case, or the Lago Agrio case.*

*I imagine that you are all aware of this – that the case is closing in Ecuador. From our analysis, we can deduce that the Judge can issue a writ for judgment at any time, any day; this means that we must have our legal argument ready, defined and we must all be in agreement with it, in order to submit it to the Court at any time.*

*We have spoken a great deal on this matter. We have reached agreements to finish as quickly as possible, but to date, there is no real response. My friends, I think we cannot wait any longer. Thus, given this noncompliance, we will develop a second alternative.*

*The subsidiary alternative, is that we will draft an argument solely with the vision of Ecuador, in the event that we must submit the argument in the next days, we will present only the document that we prepare – the rest will be set on a back-burner, if it is completed some day. I hope that this decision does not cause internal problems, but it is the option that would allow us to meet the Court’s demands, in the event that we have to do so.*

*The only possibility, if we are able to prepare the document and we can later correct it in Ecuador, and finally, we can submit it with the Court without any problem, is for the Judge not to issue a writ for judgment; but this scenario is not within our reach. This judge is very firm and exercises a great deal of authority; he is punishing any attempt to delay the proceeding.*

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<sup>384</sup> Lynch ER2, p. 12

*Further, in the event that a writ for judgment is issued, it is certain that Chevron will timely submit its argument, which would be an enormous disadvantage for us if we fail to submit the document.*

*I need immediate answers.”<sup>385</sup>*

- 4.421. The terms of this email are, ostensibly, inconsistent with Mr Fajardo’s knowledge of any scheme whereby certain of the Lago Agrio Plaintiffs’ representatives were then ‘ghostwriting’ the Lago Agrio Judgment. The explanation, however, is straightforward. The recipients of this email included persons who had no such knowledge; and it would have served no purpose for Mr Fajardo to inform them otherwise. Several of the recipients were also amenable to the jurisdiction of the US Courts, including discovery under Section 1782. Moreover, as already indicated, Mr Fajardo knew by this time that any email to Mr Donziger would likely end up in the hands of Chevron as a result of US litigation – as it did.
- 4.422. *17 December 2010*: Judge Zambrano issues “autos para sentencia”, formally closing the evidentiary phase of the proceedings in the Lago Agrio Litigation.<sup>386</sup>
- 4.423. *20 December 2010*: In his email dated 20 December 2010 to certain of the Lago Agrio Plaintiffs’ representatives, including Mr Donziger, Mr Fajardo writes of his concern as to “how the Judge will respond to this new argument set forth by Chevron ….”<sup>387</sup> This concern is again, ostensibly, inconsistent with Mr Fajardo’s knowledge of any scheme whereby certain of the Lago Agrio Plaintiffs’ representatives were then ‘ghostwriting’ the Lago Agrio Judgment. In the Tribunal’s view, again, the explanation lies in the range of recipients who were not privy to the ‘ghostwriting’ or subject to the jurisdiction of the USA courts.
- 4.424. *21 December 2010: Forensic Evidence* (See Part VI): “Providencias.docx” is saved by a user of the Old Computer. It had been open for 2,107 minutes (35.12 hours) in the period between 11 October 2010 and 21 December 2010. At this stage the document contained 42% of the text of the Lago Agrio Judgment.<sup>388</sup> This version of

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<sup>385</sup> R-988.

<sup>386</sup> C-894.

<sup>387</sup> R-989.

<sup>388</sup> Lynch ER2, Exhibit 23; Racich ER2, para 13.

“Providencias.docx” is the earliest file found on the Zambrano Computers that contains text of the Lago Agrio Judgment.

4.425. *28 December 2010: Forensic Evidence* (See Part VI): “Providencias.docx” is saved on the Old Computer. The document had been open for 1,046 minutes (17.5 hours) since 21 December 2010, making a total of 3,153 minutes (52.62 hours) for the period between 11 October 2010 and 28 December 2010. This version of “Providencias.docx” contains 66% of the text of the Lago Agrio Judgment.<sup>389</sup>

4.426. This version also contains text and nine citations to US court decisions materially identical to the unfiled Erion Memorandum of the Lago Agrio Plaintiffs’ representatives; and two citations to legal materials in the unfiled Moodie Memorandum of the Lago Agrio Plaintiffs’ representatives. (These wordings are subsequently edited for the final version Lago Agrio Judgment, as issued). Text and statistics from the unfiled Selva Database are also contained in this version of “Providencias.docx”. (The Tribunal returns to these matters in Parts V and VI below).

4.427. *31 December 2010*: In his email dated 31 December 2010 to the Lago Agrio Plaintiffs’ representatives, Mr Fajardo writes:

*“...no one knows when the Judge may issue his judgment; he could do so within two weeks, or within many months or even years. If he does so many months from now, the judge may possibly consider the legal reports [“informes en derecho”]; but if the judge issues his judgment soon, the document will remain in our hands and will be useless. We will not run this risk... I’m sorry my friend, but we are behind schedule with this memorandum of law, which could have serious consequences for the case”.*<sup>390</sup>

4.428. Again, the terms of this email are, ostensibly, inconsistent with Mr Fajardo’s knowledge of any scheme whereby certain of the Lago Agrio Plaintiffs’ representatives were then ‘ghostwriting’ the Lago Agrio Judgment. The explanation, however, is again straightforward. The recipients of this email included a person in the USA who had no knowledge of ‘ghostwriting’; and it would have served no good purpose (from Mr Fajardo’s perspective) to inform him otherwise. Moreover, Mr Fajardo must have been

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<sup>389</sup> Lynch ER2, Exhibit 23; Racich ER2, para 14.

<sup>390</sup> R-896.

by now well aware that any email message to Mr Donziger would fall into the hands of Chevron under US Court orders, sooner or later.

## 2011

- 4.429. 4 January 2011: *Forensic Evidence* (See Part VI): “fielweb.com” is accessed using Judge Zambrano’s Old Computer.<sup>391</sup>
- 4.430. 4 January 2011: *Forensic Evidence* (See Part VI): “windowslivetranslator.com” is accessed using Judge Zambrano’s New Computer. This website, used for the first time, does not explain how Spanish text translated from English language case-law is contained in the earlier “Providencias.docx” of 28 December 2010.
- 4.431. 8 January 2011: In his email dated 8 January 2011 to the Lago Agrio Plaintiffs’ representatives headed “Chevron’s Alegato”), Mr Fajardo again writes in terms, ostensibly, inconsistent with any knowledge on his part of a covert scheme to ‘ghostwrite’ the Lago Agrio Judgment:

*“Friends, this is to let you know that I spent several hours yesterday visiting the Court of Justice of Sucumbíos and reviewing the latest motions filed by Chevron. I found that Chevron, on Thursday, January 6, 2011, at 5:55 p.m., had already filed their legal alegato. It is a short 292 page document and their theories are amply briefed. As you can see, my concerns are well founded. Chevron has gotten ahead of us by filing their alegato, while we are still writing ours. All the more reason to speed up our work, otherwise the Judge could be convinced by Chevron’s theory ...”*<sup>392</sup>

- 4.432. Again, however, the Tribunal considers that explanation is the same as with his email messages of 17, 20 and 31 December 2010. (Moreover, by January 2011, the Federal Court in New York had ordered Mr Donziger to disclose his computers’ hard drives, in addition to email messages and other documentation).
- 4.433. 17 January 2011: The Lago Agrio Plaintiffs file their alegato with the Lago Agrio Court.<sup>393</sup> It is a pleading of some 118 pages. In the alegato, it is submitted (inter alia) that the Ecuadorian legal system “recognizes circumstances when it is appropriate to

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<sup>391</sup> Lynch ER3, p. 13.

<sup>392</sup> R-897, p. 2.

<sup>393</sup> R-195.

hold a parent company liable for the actions of a separately established subsidiary (page 94). It concludes:

*“Chevron’s attempt to now pretend that it and Texaco and Texpet are genuinely independent and invoke the corporate veil to avoid liability is clearly an abuse and manipulation of the legal instrument of corporate separation, and fraudulent perhaps by design but in any event in result, which, as discussed above, is all that is required to pierce the corporate veil under Ecuadorian law. Moreover, Chevron’s attempt to shift liability to flagrantly undercapitalized entities (Texaco and TexPet) is also clear evidence of fraud (by result or by intent) sufficient to pierce the corporate veil. Finally, the fact that Chevron is invoking this immunity strategy even after explicitly promising to the U.S. court and the plaintiffs that it would submit to litigation of these claims in Ecuador and abide by any judgment, is simply more evidence of fraud that justifies lifting the corporate veil in this case.”* (page 99).

- 4.434. This legal argument, whereby Chevron was to stand in the shoes of both Texaco and TexPet, was essentially adopted in the Lago Agrio Judgment: see the “merger” issue in Part V below.
- 4.435. *19 January 2011: Forensic Evidence* (See Part VI): “Caso Texaco.doc” is saved by a user of the Old Computer. At this time, the document contains 11% of the text of the Lago Agrio Judgment. This block of text is absent in the previous recoverable instance of Caso Texaco.doc dated 5 January 2011 and the next recoverable instance dated 4 March 2011.<sup>394</sup>
- 4.436. *21 January 2011: Forensic Evidence* (See Part VI): “Providencias.docx” is saved using “Save As” function, which re-set the edit time to 0 and the revision count to 2.<sup>395</sup>
- 4.437. *28 January 2011*: This Tribunal issues its Procedural Order and Further Order on Interim Measures dated 28 January 2011: see Annex 1(C) to Part I above.
- 4.438. *31 January 2011: Forensic Evidence* (See Part VI): Microsoft Excel is active on Judge Zambrano’s Old Computer for one minute.<sup>396</sup>
- 4.439. *1 February 2011*: Chevron issues its RICO Complaint in New York in the RICO Litigation, before the Lago Agrio Judgment.<sup>397</sup> At the time of issue, the Complaint

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<sup>394</sup> Lynch ER2, Exhibit 23; Racich ER2, para 26.

<sup>395</sup> Lynch ER2, Exhibit 23; Racich ER2, para 16.

<sup>396</sup> Lynch ER2, Table 6.

<sup>397</sup> C-916.

focuses on the ‘fraud’ in the Lago Agrio Litigation, the Cabrera Report and the “cleansing reports”. Later, on 15 February 2011 (one day after the Lago Agrio Judgment), Chevron alleges in the RICO Litigation that the Lago Agrio Judgment was corruptly “ghostwritten” by the Lago Agrio Plaintiffs’ representatives.<sup>398</sup>

4.440. *9 February 2011*: This Tribunal issues its Procedural Order on Interim Measures dated 9 February 2011: see Annex 1(D) to Part I above. This Order requires (inter alia) the Respondent “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case.” (This Procedural Order was maintained and restated in the Tribunal’s Order on Interim Measures of 16 March 2011, its First Interim Award on Interim Measures dated 25 January 2012, and its Second Interim Award on Interim Measures dated 16 February 2012: see also Annex 1 to Part I above).

4.441. *14 February 2011: Forensic Evidence* (See Part VI): The SATJE logs show that a document with the “Providencia Name” *Sentencia* was uploaded by a person logged in as “zambranon”.<sup>399</sup>

4.442. *14 February 2011*: The Lago Agrio Court issues Judge Zambrano’s Lago Agrio Judgment (later clarified on 4 March 2011). It awards damages payable by Chevron in the amount of US\$ 8.6 billion, with an additional US\$ 8.6 billion in the event that a public apology is not made by Chevron within 15 days “as a symbolic measure of moral redress and of recognition of the effects of its misconduct, as well as a guarantee of no repetition.”<sup>400</sup> A further 10% of the Judgment is awarded to the Amazon Defense Front, amounting to US\$ 864 million (or, potentially, US\$ 1.82 billion). The damages are to be paid into a trust to be established with the ADF as beneficiary.<sup>401</sup> (The Lago Agrio Judgment is considered at greater length in Part V(B) below).

4.443. As of this date, no final draft or issued version of the Lago Agrio Judgment can be found on the Zambrano Computers.

4.444. *4 March 2011: Forensic Evidence* (See Part VI): “Providencias.docx” is saved by a user of the Old Computer. Between 21 January and 4 March 2011, the document had been

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<sup>398</sup> R-1320.

<sup>399</sup> Racich ER3, para 25.

<sup>400</sup> C-931, p.186.

<sup>401</sup> C-931, pp. 186-187.



open for at least 3,500 minutes. As of 4 March 2011, “Providencias.docx” contains 99% of the text of the Lago Agrio Judgment. It also contains 24 pages of other orders in the Lago Agrio Litigation.<sup>402</sup>

- 4.445. *4 March 2011*: The Lago Agrio Judgment is clarified by Judge Zambrano by a Clarification Order on 4 March 2011.<sup>403</sup> (The Clarification Order is considered at greater length in Part V below).
- 4.446. *16 March 2011*: This Tribunal issues its Procedural Order No 7 dated 16 March 2011, maintaining its Order for Interim Measures dated 9 February 2011 (Paragraph 9): see Annex 1(E) to Part I above.
- 4.447. *18 March 2011: Forensic Evidence (See Part VI)*: “Providencias.docx” is saved for a final time by a user on Judge Zambrano’s Old Computer. It had been saved four times since 4 March 2011 and had been open for at least 71 minutes between saves.<sup>404</sup>
- 4.448. *1 June 2011*: The National Court of Justice (First Criminal Chamber) dismisses the Criminal Prosecutions brought by the Respondent against (inter alios) Mr Reis Veiga and Dr Pérez for “ideological falsehood” in February 2008.<sup>405</sup> Dr Pérez was then permitted to leave Ecuador and re-join his family abroad. He died shortly thereafter.
- 4.449. *29 November 2011*: The Judiciary Council of Sucumbíos appoints the remaining two members of the Lago Agrio Appellate Court. It starts work on the appeal from the Lago Agrio Judgment.<sup>406</sup>

## **2012**

- 4.450. *3 January 2012*: By its judgment of 3 January 2012, extending over 16 pages, the Lago Agrio Appellate Court affirms the Lago Agrio Judgment.<sup>407</sup> It upholds the punitive damages award of US\$ 8.64 billion because Chevron had refused publicly to “apologise”. It also decides that it cannot address Chevron’s “fraud” allegations, including the ‘ghostwriting’ of the Lago Agrio Judgment. It is otherwise, ostensibly, a

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<sup>402</sup> Lynch ER2, Exhibit. 23.

<sup>403</sup> C-1367; R-1193.

<sup>404</sup> Lynch ER2, Exhibit 23.

<sup>405</sup> R-250.

<sup>406</sup> C-1065.

<sup>407</sup> C-991.

*de novo* hearing based on the evidence filed in the Lago Agrio Court. Given the volume and complexity of that evidence, if it was a *de novo* hearing, it was a judicial feat of Olympic proportions achieved within only a few months. (The Lago Agrio Appellate Court’s judgment is considered at greater length in Part V below).

4.451. *13 January 2012*: The Appellate Court issues a Clarification Order of its Appellate Judgment on 13 January 2012.<sup>408</sup> It effectively grants the Lago Agrio Plaintiffs’ requests for clarification, including a statement that the Appellate Court had considered and rejected evidence of the fraudulent conduct of the Lago Agrio Plaintiffs’ representatives. (The Clarification Order is considered at greater length in Part V below).

4.452. *20 January 2012*: Chevron files a cassation appeal from the Lago Agrio Appellate Court to the Cassation Court.<sup>409</sup> In that appeal, Chevron requests the suspension of the enforcement of the Lago Agrio Judgment, as upheld by the Appellate Court by its Judgment of 3 January 2012 and Clarification Order of 13 January 2012. The appeal refers (*inter alia*) to this Tribunal’s orders for interim measures, including its Order of 9 February 2011, ordering the Respondent to suspend the enforcement of the Lago Agrio Judgment (see Annex 1 to Part I above). Chevron also requests an exemption from the requirement to post a bond to suspend the enforcement of the Lago Agrio Judgment pending the cassation appeal, as provided by Article 11 of the Ecuadorian Cassation Act.

4.453. *25 January 2012*: This Tribunal issues its First Interim Award on Interim Measures dated 25 January 2012: see Annex 1(F) to Part I above. This Award requires (*inter alia*) the Respondent: “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case”; and to “continue to inform this Tribunal, by the Respondent’s legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this Interim Award; pending the February Hearing’s completion and any further order or award in these arbitration proceedings.”

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<sup>408</sup> C-2314; see also R-299.

<sup>409</sup> C-1068.

- 4.454. *26 January 2012*: The Respondent’s Attorney-General sends letters to President Correa, the Ministry of Foreign Affairs, the President of the Judiciary Council and the President of the National (Supreme) Court of Justice.<sup>410</sup> These letters inform their recipients of the content of this Tribunal’s First Interim Award on Interim Measures dated 25 January 2012.
- 4.455. *February 2012*: Judge Zambrano is disciplined twice by the Judicial Council; and in February/May 2012, he is dismissed from judicial office, for reasons unconnected with the Lago Agrio Litigation.<sup>411</sup> In April 2013 Dr Zambrano resumes employment as a legal adviser to a subsidiary of PetroEcuador, the Refinery of the Pacific.<sup>412</sup>
- 4.456. *16 February 2012*: This Tribunal issues its Second Interim Award on Interim Measures dated 16 February 2012: see Annex 1(G) to Part I above.
- 4.457. This Second Interim Award requires (inter alia) the Respondent (whether by its judicial, legislative or executive branches) “to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments by the Provincial Court of Sucumbíos, Sole Division (Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos) of 3 January 2012 and of 13 January 2012 (and, to the extent confirmed by the said judgments, of the judgment by Judge Nicolás Zambrano Lozada of 14 February 2011) against the First Claimant in the Ecuadorian legal proceedings known as “the Lago Agrio Case”; and “in particular, without prejudice to the generality of the foregoing, such measures to preclude any certification by the Respondent that would cause the said judgments to be enforceable against the First Claimant”; and the Respondent by its Government “to continue to inform this Tribunal, by the Respondent’s legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of its legal obligations under this Second Interim Award; until any further order or award made by the Tribunal in these arbitration proceedings.”
- 4.458. *16-17 February 2012*: The Respondent’s Attorney-General sends letters to President Correa, the President of the Judiciary Council, the Ministry of Foreign Affairs, the

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<sup>410</sup> R-387; R-386; R-388; and R-389.

<sup>411</sup> C-1829; C-2116.

<sup>412</sup> C-1980, pp. 1791-1792.

President of the National (Supreme) Court of Justice, the President of the Sole Chamber of the Provincial Court of Sucumbíos and the Conjueza of the Provincial Court of Sucumbíos dated 16 February 2012.<sup>413</sup> The Attorney sends letters to the President of the National Assembly and the Conjueza of the Provincial Court of Sucumbíos dated 17 February 2012.<sup>414</sup> These letters inform their recipients of the content of this Tribunal's Second Interim Award on Interim Measures dated 16 February 2012.

- 4.459. *17 February 2012*: By its Order of 17 February 2012, the Lago Agrio Appellate Court denies Chevron's request for the suspension of the enforcement of the Lago Agrio Judgment pending Chevron's cassation appeal. Its Order refers to Chevron's failure to post a bond.<sup>415</sup> It decides that Ecuadorian law requires the Lago Agrio Judgment to be declared immediately enforceable.<sup>416</sup> Subsequently, on 1 March 2012, the Appellate Court denies Chevron's application to revoke its Order of 17 February 2012.<sup>417</sup>
- 4.460. *24 February 2012*: Chevron requests the Lago Agrio Appellate Court to revoke its Order of 17 February 2012, denying Chevron's request to suspend the Lago Agrio Judgment's enforcement.<sup>418</sup>
- 4.461. *27 February 2012*: This Tribunal issues its Third Interim Award on Jurisdiction and Admissibility dated 27 February 2012: see Annex 1(H) to Part I above. It there decides (inter alia), in Paragraph 5.4:

*“As regards the claims pleaded by the First Claimant (Chevron Corporation or “Chevron”) in the Claimants’ said Notice of Arbitration, to reject all objections made by the Respondent as to jurisdiction and admissibility in its said memorials and further submissions, save those relating to the jurisdictional objections raised against the First Claimant as a investor under Article I(1)(a) alleging a “direct” investment under Article VI(1)(c) and an “investment agreement” under Article VI(1)(a) of the Ecuador–USA Treaty of 27 August 1993 which are joined to the merits of the First Claimants’ claims under Article 21(4) of the UNCITRAL Arbitration Rules forming part of the Parties’ arbitration agreement under the Treaty; ...”.*

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<sup>413</sup> R-390; R-391; R-393; R-395; and R-397.

<sup>414</sup> R-394; and R-396.

<sup>415</sup> See C-1114, p. 4.

<sup>416</sup> R-398.

<sup>417</sup> R-399; C-1114.

<sup>418</sup> C-1114.

- 4.462. *1 March 2012*: By its Order of 1 March 2012, the Lago Agrio Appellate Court denies Chevron's request of 23 February 2012. It confirms that the Lago Agrio Judgment, as upheld by the Appellate Court, is now enforceable.<sup>419</sup> This Tribunal treats the Order of 1 March 2012 as the certificate of enforceability in Ecuador of the Lago Agrio Judgment by the Respondent. It was issued and maintained in non-compliance with the Tribunal's several Orders for Interim Measures.
- 4.463. *4 March 2012*: The Lago Agrio Appellate Court denies Chevron's other requests regarding the Lago Agrio Judgment.<sup>420</sup>
- 4.464. *30 May 2012*: The Lago Agrio Plaintiffs commence legal proceedings in Canada to enforce the Lago Agrio Judgment against Chevron and one of its subsidiaries: see Annex 4(ii) to Part I above.
- 4.465. *27 June 2012*: The Lago Agrio Plaintiffs commence legal proceedings in Brazil to enforce the Lago Agrio Judgment against Chevron: see Annex 4(iii) to Part I above.
- 4.466. *9 July 2012: Forensic Evidence* (See Part VI): 4,701 files are created on Judge Zambrano's New Computer.<sup>421</sup>
- 4.467. *3 August 2012*: The Lago Agrio Court orders Chevron to pay the Lago Agrio Judgment in the sum of US\$ 19,041,414,529.00, within 24 hours.<sup>422</sup>
- 4.468. *26 September 2012: Forensic Evidence* (See Part VI): 2,202 files are created on the Old Computer between 3.25pm and 3.29pm. All files were subsequently deleted.<sup>423</sup>
- 4.469. *15 October 2012*: The Lago Agrio Court orders the execution of the Lago Agrio Judgment against assets owned by Chevron and its subsidiaries in Ecuador, including (by name) assets owned by TexPet.<sup>424</sup>

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<sup>419</sup> C-1114 (updated).

<sup>420</sup> C-1367.

<sup>421</sup> Lynch ER2, p. 12.

<sup>422</sup> C-1404.

<sup>423</sup> Lynch ER2, p. 11.

<sup>424</sup> C-1532.

4.470. 12 November 2012: The Lago Agrio Plaintiffs commence legal proceedings in Argentina to enforce the Lago Agrio Judgment against Chevron: see Annex 4(iv) to Part I above.

### 2013

4.471. 7 February 2013: This Tribunal issues its Fourth Interim Award on Interim Measures dated 7 February 2013 see Annex 1(I) to Part I above. The Tribunal (inter alia) there declares that the Respondent “has “violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina.”

4.472. 28 March 2013: Dr Zambrano signs his sworn Declaration in the RICO Litigation, shortly before commencing his new employment in Ecuador, with a subsidiary of PetroEcuador.

4.473. 21 March 2013: In his witness statement in the RICO Litigation,<sup>425</sup> Mr Beltman (of Stratus Consulting) admits that Mr Cabrera did not write the Cabrera Report filed in April 2008, as follows:

*“I prepared the first drafts of substantial parts of ... the main body of the Cabrera Report. At Donziger’s direction, I drafted my portions of the report in the first person as though it was written by Richard Cabrera. I supervised the preparation by Dr Maest and other Stratus personnel or subcontractors of 11 of the 24 sub-reports and appendices, known as Annexes, to the Cabrera Report” ... “Donziger and Fajardo told me to whom authorship of the various Cabrera Report Annexes should be attributed, and I recorded those names in a table. Donziger told me that the reason for the attribution was to make it more difficult to uncover that Stratus had written the Annexes. Donziger told Stratus to indicate on the draft Summary Report that it was written ‘By Richard Cabrera’ and instructed Stratus to draft its portions of the Summary Report in the first person ” ... “I understood that portions of the Cabrera Response that Stratus was drafting would be filed with the Lago Agrio court as if written by Cabrera. My discussions about this work with Donziger and the LAPs’ representatives confirmed that Donziger and the LAPs’ team wanted the Cabrera’s Responses to increase the damages assessed by billions of dollars.” ... “I understood that Cabrera filed the ‘Cabrera Response’ based at least in part on text written by the LAPs’ representatives and consultants, including Stratus, on November 17, 2008. The Cabrera Response incorporated work, calculations, and*

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<sup>425</sup> C-1611A, paras 12, 16, 22, 23, 27, 44-47; C-1611a.

*text written by Stratus, among others, and increased the damages assessed in the Cabrera Report from \$16 billion to \$27 billion ....”.*

4.474. *31 August 2013*: President Correa launches a political and publicity campaign, called “La Mano Sucia de Chevron” (“the Dirty Hand of Chevron”) to facilitate (inter alia) payment of the Lago Agrio Judgment by Chevron. This campaign’s implementation over the next several years includes several statements by President Correa during his weekly broadcasts and statements by his Government’s ministers and diplomats, hostile to Chevron.

4.475. *September 2013*: The Prosecutor General of Ecuador returns to Chevron three boxes of evidence on the “ghostwriting” of the Lago Agrio Judgment, sent by Chevron (listed as 9,014 pages and two CDs). He states that the case in question is a civil proceeding in which the Prosecutor General’s office does not participate.<sup>426</sup>

4.476. *17 September 2013*: This Tribunal issues its First Partial Award on Track I dated 17 September 2013 (see Annex 1(J) to Part I above). It there decides (inter alia):

*“(1) The First Claimant (“Chevron”) and the Second Claimant (“TexPet”) are both ‘Releasees’ under Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release;*

*(2) As such a Releasee, a party to and also part of the 1995 Settlement Agreement, the First Claimant can invoke its contractual rights thereunder in regard to the release in Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release as fully as the Second Claimant as a signatory party and named Releasee;*

*(3) The scope of the releases in Article 5 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release made by the Respondent to the First and Second Claimants does not extend to any environmental claim made by an individual for personal harm in respect of that individual’s rights separate and different from the Respondent; but it does have legal effect under Ecuadorian law precluding any “diffuse” claim against the First and Second Claimants under Article 19-2 of the Constitution made by the Respondent and also made by any individual not claiming personal harm (actual or threatened); ...”.*

4.477. *12 November 2013*: The Cassation (National) Court issues its Judgment affirming part of the Lago Agrio Judgment; but it nullifies the punitive damages imposed for Chevron’s omission to “apologise”, as required by that Judgment and as upheld by the

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<sup>426</sup> C-2305.

Appellate Court.<sup>427</sup> As a result, the Cassation Court reduces the Lago Agrio Judgment’s award of damages to US\$ 8,000,646,160. (The Cassation Court’s Judgment is considered at greater length in Part V below).

4.478. *15 October – 26 November 2013*: The RICO trial in New York is heard before the US District Court for the Southern District of New York (Judge Kaplan). The plaintiff was Chevron and the defendants included Steven Donziger, the Law Offices of Steven R. Donziger and Donziger Associates PLLC (the “Donziger defendants”), with Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (two of the Lago Agrio Plaintiffs).

4.479. During the RICO trial, the following factual witnesses were examined orally, amongst others: Dr Zambrano, Mr Donziger and Dr Guerra.

4.480. *23 December 2013*: Chevron submits an “extraordinary action for protection to the Constitutional Court.”<sup>428</sup> It is admitted for consideration by the Constitutional Court on 20 March 2014.

## **2014**

4.481. *4 March 2014*: The US District Court for the Southern District of New York (Judge Kaplan) issues its judgment and related Orders in the RICO Litigation (“the RICO Judgment”).<sup>429</sup>

4.482. The US District Court states in the “Conclusion” to the RICO Judgment (with references here omitted):

*“The saga of the Lago Agrio case is sad. It is distressing that the course of justice was perverted. The LAPs received the zealous representation they wanted, but it is sad that it was not always characterized by honor and honesty as well. It is troubling that, in the words of Jeffrey Shinder [a New York attorney retained by the Lago Agrio Plaintiffs], what happened here probably means that ‘we’ll never know whether or not there was a case to be made against Chevron.’*

*But we have come full circle. As the Court wrote at the outset, [t]he issue in this case is not what happened in the Oriente more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. The issue here, instead, is*

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<sup>427</sup> C-1975.

<sup>428</sup> See the Claimants’ letter dated 19 March 2018, p. 2; and the Respondent’s letter dated 20 April 2018, pp. 1-2.

<sup>429</sup> C-2135.



*whether a court decision was procured by corrupt means, regardless of whether the cause was just.’*

*The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.*

*The foregoing, together with the appendices to this opinion, constitute the Court’s findings of fact and conclusions of law. Defendants’ motions to dismiss are denied.”*

4.483. In the Order appended to the RICO Judgment, the Court orders, adjudges and decrees as regards the Donziger Defendants and the LAP Representatives (inter alia) as follows:<sup>430</sup>

*“1. The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that Donziger has received, or hereafter may receive, directly or indirectly, or to which Donziger now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world including, without limitation, all rights to any contingent fee under the Retainer Agreement and all stock in Amazonia. Donziger shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.*

*2. The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that the LAP Representatives, and each of them, has received, or hereafter may receive, directly or indirectly, or to which the LAP Representatives, and each of them, now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world. The LAP Representatives, and each of them, shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.*

*3. Donziger shall execute in favor of Chevron a stock power transferring to Chevron all of his right, title and interest in his shares of Amazonia, and Donziger and the LAP Representatives, and each of them, shall execute such other and further documents as Chevron reasonably may request or as the Court hereafter may order to effectuate the foregoing provisions of this Judgment.*

*4. Donziger and the LAP Representatives, and each of them, is hereby enjoined and restrained from:*

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<sup>430</sup> C-2134. The “Donziger Defendants” were defined as Steven Donziger, the Law Offices of Steven R. Donziger and Donziger Associates PLLC. The “LAP Representatives” were defined as Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje.

*4.1 Filing or prosecuting any action for recognition or enforcement of the Judgment or any New Judgment or seeking the seizure or attachment of assets based on the Judgment or any New Judgment, in each case in any court in the United States.*

*4.2. Seeking prejudgment seizure or attachment of assets based upon the Judgment or any New Judgment, in each case in any court in the United States.*

*5. Donziger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein.*

*6. Notwithstanding anything to the contrary in this Judgment, nothing herein enjoins, restrains or otherwise prohibits Donziger, the LAP Representatives, or any of them, from (a) filing or prosecuting any action for recognition or enforcement of the Judgment or any New Judgment, or any for prejudgment seizure or attachment of assets based in courts outside the United States; or (b) litigating this action or any appeal of any order or judgment issued in this action.*

...

*8. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Judgment is binding upon the parties; their officers, agents, servants, employees, and attorneys; and other persons who are in active concert and participation with any of the foregoing.*

...

*9. Chevron shall recover of Donziger and the LAP Representatives, and each of them, jointly and severally, the costs of this action pursuant to Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920 ...”*

4.484. The RICO Judgment is appealed by the Donziger Defendants to the US Court of Appeals for the Second Circuit.

### **2015-2018**

4.485. *12 March 2015*: This Tribunal issues its Decision on Track IB (see Annex 1(K) to Part I above). It there decides (inter alia), by a majority:

*“(1) The Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement (as invoked by the Claimants);*

(2) *The Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement (as invoked by the Claimants); and*

(3) *The Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York.*”

4.486. *20 April 2015:* The RICO appellate hearing is heard before the US Court of Appeals for the Second Circuit. (Its judgment, dismissing the appeal, is issued on 8 August 2016. The US Supreme Court denies *certiorari* on 29 June 2017).

4.487. *13 July 2016:* By letter with attachments dated 21 July 2016, the Respondent informs the Tribunal as follows:

*“By letter dated 13 July 2016 [a copy of which was attached, with an English translation] the State’s prosecutor [the Fiscalía General del Estado, or “FGE”] ordered the Attorney General’s Office to produce within 15 days certified copies of any testimony given by Mr Steven Donziger that is part of the record of these arbitral proceedings. The letter notes that the Office of the Prosecutor opened this preliminary investigation, Case No. 235-2010, in response to a 7 June 2010 letter from Thomas F. Cullen, counsel for Chevron Corporation. The investigation, which is now in its sixth year but obviously active, includes ‘three boxes of documents’ furnished to Prosecutor by Chevron. According to Claimants, this is the criminal investigation requested by Chevron into the alleged ‘extensive evidence of wholesale corruption in the court process.’ See Claimants’ Suppl. Track II Memorial ¶ 37. <sup>431</sup>*

*As we have advised previously, criminal investigations are governed by rules of secrecy. The Office of the Attorney General does not know the subjects or the direction of the investigation. However, under Ecuadorian law, Chevron - as the complaining party - at all times had access to the investigatory developments and either knew or should have known of the pendency of the investigation and the Prosecutor’s decision to consider the documents furnished by Chevron.”*

4.488. As the FGE letter makes clear, this preliminary investigation “for the suspected crime of forging public documents” followed the report made by Mr Cullen (of Chevron) on 7 June 2010 to the “Fiscalía Provincial de Sucumbíos.” The investigation is said to

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<sup>431</sup> The Claimants’ pleading reads: “...it was Ecuador and its courts that did nothing to stop or correct the fraud, despite the extensive evidence of wholesale corruption in the court process. The Lago Agrio Court denied every motion filed by Chevron that brought the Cabrera’s misconduct and the fraud to the Court’s attention. Neither the Lago Agrio Court nor any other authority in Ecuador did anything to sanction the Lago Agrio Plaintiffs or their representatives, or the judges in the Lago Agrio Litigation, with respect to the Cabrera fraud. Instead, those State authorities ignored Chevron’s complaints and the uncontradicted evidence exposing that corruption. This failure to take legal action against those involved in the Cabrera fraud constitutes ratification of those actions by the State.”

include a written report dated 31 July 2014 consisting of 14,791 pages made by the “Fiscal” of the Province of Sucumbíos to the FGE.

4.489. *19 March 2018*: By letter (with attachments) dated 19 March 2018, the Claimants inform the Tribunal about the status of the criminal investigations against the Lago Agrio Plaintiffs’ representatives (footnotes here omitted):

*“Beginning in August 2009, Chevron has sent a series of letters to Ecuador’s Prosecutor General and local prosecutors, summarizing the evidence of the LAPs’ misconduct, attaching the evidence, and requesting criminal investigations. In response, three preliminary investigations were opened: (a) the Prosecutor General opened a preliminary investigation in September 2009 into an alleged bribery solicitation scheme involving former Judge Juan Núñez, who was then presiding over the Lago Agrio case pending in the Sucumbíos Provincial Court, and other third parties; (b) the Sucumbíos Provincial Prosecutor opened a preliminary investigation in April 2010 into the alleged crime of falsification of documents committed by the LAPs’ representatives; and (c) the Sucumbíos Provincial Prosecutor opened a preliminary investigation in July 2010 into the alleged crime of perjury committed by Richard Cabrera and others.*

*The first preliminary investigation focused on an alleged bribery solicitation scheme in which then Judge Núñez and the other participants were recorded on video discussing the payment of a bribe in exchange for the issuance of a multi-billion dollar judgment against Chevron in the Lago Agrio case. Despite the unrefuted evidence provided by Chevron, Ecuador’s Prosecutor General not only rejected Chevron’s complaints and refused to bring charges against Judge Núñez or others, but accused Chevron’s counsel of being “malicious and reckless” in filing the complaint and having caused “damage to Ecuador’s national image.” At the Prosecutor’s request and over Chevron’s objections, the National Court of Justice closed the investigation on September 30, 2013, and found that Chevron’s counsel’s letter – which had prompted the investigation – was reckless and malicious.*

*The second and third preliminary investigations focus on the LAPs’ ghostwriting of the Cabrera report and supplemental report and their ghostwriting of official communications filed by Cabrera, while the third preliminary investigation also focuses on the LAPs’ falsification of the Calmbacher report and their ghostwriting of the Lago Agrio Judgment. Over the years, the Sucumbíos Provincial Prosecutor has received from Chevron several formal submissions in these investigations detailing the overwhelming evidence of misconduct and fraud. Yet to this day, these investigations remain pending, and the Prosecutor has not brought formal charges against anyone concerning these investigations.”*

4.490. *20 April 2018*: By letter (with attachments) dated 20 April 2018, the Respondent provides the following update on the status of the Criminal Investigations in Ecuador:

*“The Office of the Procurador (the Attorney General with respect to civil matters) received a request for documents and transcripts in its possession relating to the testimony of Steven Donziger, a request with which the Procurador has complied. The caption of the correspondence, and the nature of the request, plainly indicate that, at least at the time of that request (see Respondent’s Letter to the Tribunal dated 21 July 2016), there was an active and ongoing investigation into Chevron’s allegations that Mr Donziger and others acted unlawfully in respect to the Lago Agrio court proceedings. The Office of the Procurador is unaware if that matter has been closed, that is, it is unaware of any court order granting an application to close the matter. We thus have every reason to believe that the investigation remains open and active. As the complaining party, Chevron would, in the regular course, be apprised of any decision to charge any persons of a crime arising out of that investigation, or alternatively, upon the closure of the investigation.*

*Like the investigation of Mr Donziger and his associates, the investigation of Mr Guerra - consistent with the rules governing criminal investigations - is not a public investigation. Like any other criminal investigation, the subject of that investigation, here, Mr Guerra, would be apprised of any decision to charge him (or any person) of a crime arising out of that investigation, or alternatively, upon the closure of the investigation. Claimants have reported that the Prosecutor has filed a motion to close the case. Ecuador has no information contrary to Chevron’s representation. We note that a motion to close the case - while available to Chevron’s client, Mr Guerra - is not available to the Republic’s civil attorneys and is not a public document. If and when granted, however, the Court’s order will be public and the matter closed.”*

4.491. As at the date of this Award, whilst criminal investigations may be continuing in a confidential manner, there is no material before the Tribunal as to its further progress, scope or end-result. In the meantime, the Lago Agrio Plaintiffs are still seeking to enforce the Lago Agrio Judgment outside Ecuador, as summarised above and, probably, elsewhere as envisaged by the “Invictus” Memorandum (see above).

4.492. *27 June 2018*: The Constitutional Court issues its Judgment on 27 June 2018, affirming the Judgment of the Cassation (National) Court (2013), following public hearings held on 16 July 2015 and 22 May 2018. The Constitutional Court declares that there is no violation of constitutional law, as alleged by Chevron; the Court rejects the extraordinary action of protection made by Chevron; and it orders its judgment “[t]o be recorded, published and enforced.”<sup>432</sup>

4.493. The Tribunal turns, in the next Part V of this Award, to the Lago Agrio Court Judgment, the Lago Agrio Appellate Judgment, the Cassation Court Judgment and the Judgment

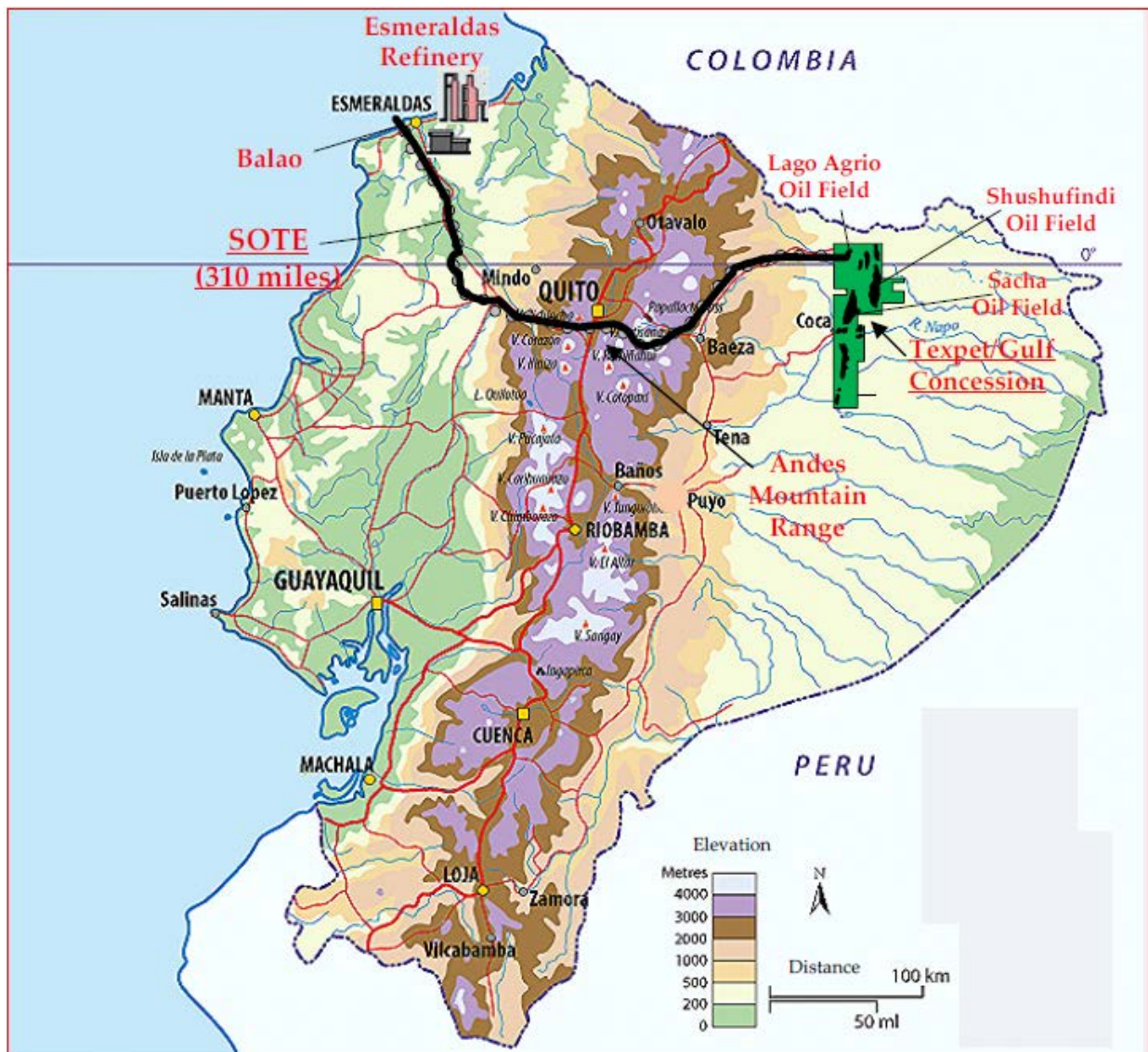
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<sup>432</sup> C-2551.

of the Constitutional Court, followed by its Conclusions in regard to the principal factual and other matters addressed in both Parts IV and V of this Award.

PART IV – ANNEX 6

MAP OF THE ORIENTE AND CONCESSION AREA<sup>433</sup>



<sup>433</sup> Kaczmarek ER, p. 14.





## ***PART V***

### ***THE LAGO AGRIO, APPELLATE, CASSATION AND CONSTITUTIONAL COURT JUDGMENTS***

#### ***A: Introduction***

- 5.1. In this Part V, the Tribunal addresses the factual and non-forensic issues relating to the Lago Agrio Judgment of 14 February 2011, the judgment of the Lago Agrio Appellate Court of 3 January 2012, the judgment of the Cassation Court of 12 November 2013 and the judgment of the Constitutional Court of 27 June 2018.

#### ***B: The Lago Agrio Judgment (2011)***

- 5.2. On 14 February 2011, as indicated above, the Lago Agrio Court (Judge Zambrano) issues the Lago Agrio Judgment.<sup>1</sup> The Lago Agrio Judgment is later clarified by the Lago Agrio Court (Judge Zambrano) by a Clarification Order on 4 March 2011.<sup>2</sup> It awards US\$ 18.2 billion in damages to be paid by Chevron, including US\$ 8.6 billion as punitive damages subject to a timely public apology by Chevron, with a 10% award to the ADF.
- 5.3. The Lago Agrio Judgment extends to about 88,000 words and 188 pages, typed in single spacing in unbroken text, with no line or paragraph numbering, page breaks or table of contents. It is divided into 15 Parts, with many internal sub-sections. Part 1 on “Competence” or jurisdiction (p.4), Part 2 on the form of Lago Agrio Litigation (p.6), Part 3 on Chevron’s defences (p.6), Part 4 on the Parties’ motions (p.35), Part 5 on due process (p.60), Part 6 on Ecuadorian environmental legislation (p.60), Part 7 on the basis of civil liability (p.74), Part 8 on the nature of the Lago Agrio Plaintiffs’ claims, including Article 43 of the EMA (p.90), Part 9 on the material facts (p.92), Part 10 on causation (p.154), Part 11 on “fault” (p.175), Part 12 on the 1995 Settlement Agreement (p.175), Part 13 on measures of redress for the harm (p.176), Part 14 on Chevron’s “bad

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<sup>1</sup> C-931.

<sup>2</sup> C-1367; R-1193.

faith” and punitive damages (p.184), and Part 15 on the establishment of a commercial trust as the beneficiary of compensation (p.186).

- 5.4. At least at first sight, particularly to a non-lawyer unfamiliar with the Lago Agrio Litigation, the Lago Agrio Judgment appears to be a lengthy, detailed, reasoned and powerful decision.
- 5.5. As to non-punitive damages, the Lago Agrio Judgment awards: (i) US\$ 5,396,160,000 to “recover the natural condition of the soil impacted by TexPet’s activities”;<sup>3</sup> (ii) US\$ 1.4 billion for a “health improvement plan” to “cover the health needs created by the public health problem occasioned by the acts of the defendant [sic: Chevron]”;<sup>4</sup> (iii) US\$ 100 million for a “community reconstruction and ethnic reaffirmation program” to redress “cultural harm”;<sup>5</sup> (iv) US\$ 150 million for the construction of “a potable water system or systems” to “benefit the persons who inhabit the area that was operated by the defendant [sic: Chevron]”;<sup>6</sup> (v) US\$ 800 million for “a plan of health which shall necessarily include treatment for the persons who suffer from cancer that can be attributed to TexPet’s operation in the Concession” (not being the Lago Agrio Plaintiffs);<sup>7</sup> (vi) US\$ 200 million “to recover the native flora, fauna, and the aquatic life of the zone”;<sup>8</sup> and (vii) US\$ 600 million for “the cleanup of groundwater”.<sup>9</sup>
- 5.6. As to the “trust” as the beneficiary of compensation, the Lago Agrio Judgment envisages a “commercial trust, to be administered by one of the fund [i.e. the ADF] and trust administrator companies located in Ecuador.”<sup>10</sup> The beneficiary of the trust “shall be the Amazon Defense Front or the person or persons it designates, considering that ‘those affected’ by the environmental harm are undetermined ...”. The “representatives of the Defense Front, or those they designate on behalf of the affected persons, will constitute the board of the trust ...”. Thus, the proceeds of the Lago Agrio Judgment were to be controlled by the ADF and not, at least directly, by the individuals comprising the Lago Agrio Plaintiffs.

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<sup>3</sup> C-931, p. 181.

<sup>4</sup> C-931, p. 183.

<sup>5</sup> C-931, p. 183.

<sup>6</sup> C-931, pp. 182-183.

<sup>7</sup> C-931, p. 184.

<sup>8</sup> C-931, p. 182.

<sup>9</sup> C-931, p. 179.

<sup>10</sup> C-931, pp. 186-187.

- 5.7. In addition, Chevron was ordered “to satisfy an additional 10% of the amount ordered as reparation of harm in [the] name of the Amazon Defense Front, with costs.”<sup>11</sup> Apart from costs, this “reparation” appears to represent a payment due from Chevron of either US\$ 1.82 billion or US\$ 864 million to the ADF.
- 5.8. The actual drafting of the Lago Agrio Judgment is, inevitably, the subject of a wide-ranging controversy between the Parties. The forensic expert issues are considered in the next Part VI of this Award. For the time being, the Tribunal confines itself to factual and other non-forensic expert issues below, in this Part V.
- 5.9. Dr Zambrano testified in the RICO Litigation that he started drafting the Judgment in mid-November 2010, after the Lago Agrio Court had purchased the “New Computer” for his use.
- 5.10. Dr Zambrano also testified that he prepared the Judgment all by himself (with the assistance of his student secretary, Ms “C”)<sup>12</sup> between mid-November 2010 and 14 February 2011, a period of three months when he also had to attend to other unrelated cases pending before him in the Lago Agrio Court. He also testified, more than once, that he had prepared the whole of the Judgment on the New Computer because it was “the more modern computer.”<sup>13</sup> In fact, based on objective evidence, his use of the New Computer could not have begun before 26 November 2010.<sup>14</sup>
- 5.11. If Dr Zambrano is correct, he drafted the Lago Agrio Judgment in a period of less than three months, or 81 consecutive days (i.e. 26 November 2010 to 14 February 2011), based on a court file of some 237,000 pages that included more than 100 expert reports and many legal submissions. Given his other work on unrelated court cases, whilst not absolutely impossible, this achievement within such a short time seems inherently unlikely.
- 5.12. During this period, Judge Zambrano gave several interviews to the press. In the report published by *Reuters* on 31 January 2011,<sup>15</sup> Judge Zambrano is described as follows:

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<sup>11</sup> C-931, pp. 187-188.

<sup>12</sup> The identity of Ms “C” is known to the Parties and the Tribunal. As explained in the Selected Dramatis Personae in this Award, the Tribunal thinks it unnecessary to give her full name in this Award.

<sup>13</sup> C-1979, p. 196.

<sup>14</sup> Lynch ER 2, p. 9.

<sup>15</sup> C-919.

“... *The chairs and sofa in Zambrano’s office are littered with 100-page makeshift notebooks full of evidence, each packet held together with white string. ‘There’s barely any place left to sit,’ Zambrano joked with Reuters during a recent visit to his chambers in Lago Agrio, a hardscrabble Amazon town near the Colombian border. ‘I have about 500 notebooks to go,’ he said, holding his battered reading glasses in his hand and smiling. ‘Not much.’ He has already gone through 1,500 of the packets and is widely expected to issue his verdict later this year, although he declined to comment on the possible timing of his ruling ...*”

It is impossible for the Tribunal to accept these statements literally.

- 5.13. Each of these “notebooks” or “packets” (i.e. *cueros*) contain some 100 pages, so that 1,500 *cueros*, as reported, would correspond to some 150,000 pages.<sup>16</sup> With 500 *cueros* “to go”, it would mean that Judge Zambrano had still to study 50,000 pages in the 14 or so days remaining before the Lago Agrio Judgment was issued on 14 February 2011, an average of about 3,500 pages daily without allowing any time for drafting the Judgment or other unrelated judicial work. As for the 150,000 pages already studied before 31 January 2011, that would mean an average of about 2,230 pages daily (from 26 November 2010, running consecutively), again without allowing any time for drafting the Judgment, other unrelated judicial work or non-working days.
- 5.14. Even allowing for the facts that not every page in every *cuero* might require Judge Zambrano’s consideration, that he might be a better than average speed-reader of technical documentation and that he might be a superlatively efficient judicial draftsman, there still arise troubling questions as to the feasibility of his preparing, alone, the Lago Agrio Court Judgment from the court file in the time and manner described by him.
- 5.15. The Tribunal notes the expert report of Professor Keith Rayner, a cognitive psychologist and specialist in the scientific study of reading, adduced by the Claimants.<sup>17</sup> He concluded that: “given the limitations on human readers processing capabilities (both in terms of acuity limitations and attention limitations), reading rate with good comprehension is limited to 300-400 wpm”. Thus, so the Tribunal calculates, if the 2,000 or so *cueros* (corresponding to 200,000 pages) averaged 300 words a page (as Professor Rayner calculated), Judge Zambrano would have needed, with a reading rate

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<sup>16</sup> In Judge Zambrano’s interview with *Expreso* on 18 December 2010, there is a reference to “2,122 *cueros*”, corresponding to about 212,200 pages (C-896, p. 1).

<sup>17</sup> See C-1036.

of 300 words per minute, at least 138 consecutive 24-hour working days to study the court file. On the account given by Judge Zambrano, he did not have the time to achieve this.

- 5.16. As to research into foreign laws, Dr Zambrano (who does not speak English) testified that his temporary student secretary (Ms “C”) undertook legal research on the Internet and found the cases from America, Australia and England cited in the Lago Agrio Judgment, using Internet services for translation into Spanish.<sup>18</sup> As explained below, there arise troubling questions as to such foreign legal research, as described by him.
- 5.17. In the Tribunal’s view, as also explained later below, the circumstantial and other evidence, including testimony by Dr Zambrano in the RICO Litigation, does not support Dr Zambrano’s account of writing the Lago Agrio Judgment. Conversely, as explained below, it supports the Claimants’ case that the Lago Agrio Judgment was not prepared by Judge Zambrano, but, at least in material part, that it was ‘ghostwritten’ by certain of the Lago Agrio Plaintiffs’ representatives with Judge Zambrano’s corrupt connivance.

***C: The Lago Agrio Judgment – The “Merger” between Texaco and Chevron***

- 5.18. The Lago Agrio Judgment contains a lengthy passage addressing the issue of the “merger” (“fusión” in Spanish) between Texaco and Chevron, resulting in Chevron standing in the shoes of both Texaco and (as Texaco’s “fourth level subsidiary”) TexPet. It is best cited at length from pp. 6-26 of the Lago Agrio Judgment, as set out below (with added line references for ease of reference) in Annex 7 to this Part V.<sup>19</sup> It proceeds on the basis that Chevron is the sole defendant in the Lago Agrio Litigation; it accepts that Texaco “is not a party in this lawsuit” (Line 204); and it assumes that TexPet also is not a co-defendant in the Lago Agrio Litigation.
- 5.19. In brief, the Lago Agrio Judgment lifts the “corporate veils” between Chevron, Texaco and TexPet, so that Chevron bears the obligations and liabilities of both Texaco and TexPet. It invokes, in numerous passages, the principle of good faith under Ecuadorian law (Lines 163, 174, 221, 293, 310, 332 and 446). It notes: “It is appropriate to recall that in our legal system the principle prevails that that no one can benefit from his bad faith” (Lines 221-222). In support, it refers to foreign legal materials, including court

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<sup>18</sup> C-1980, p. 1620.

<sup>19</sup> C-931, Part 3.1, pp. 6-26.

judgments and laws of the state of Delaware, the USA and North America (Lines 251, 309, 312, 314 and 329).

- 5.20. As regards the “merger” between Chevron and Texaco, it attributes “serious doubts as to the good faith with [sic: which] the defendant [Chevron] acted in this lawsuit” (Lines 332-333). It decides: “The law serves justice, and cannot allow legal institutions to be manipulated for illegitimate purposes, such as to favour a fraud or to promote injustice, which would be the case of transferring the assets to one corporation ‘free of responsibility’, while the responsibilities are kept in a company ‘free of assets’, the way the defendant tries to have us understand the transaction that took place between Chevron and Texaco, in which the new company benefits from the combined companies, but fails to mention the obligations.” (Lines 237-243).
- 5.21. As to the undertaking made by Texaco as a condition of the stay of proceedings in the Aguinda Litigation, it decides: “In this way the obligation to submit to Ecuadorian justice pending on Texaco Inc. was also transmitted to new company Chevron Texaco Corporation, so that consequently Chevron Corp. cannot allege that it never operated in Ecuador to give grounds for lack of a legitimate opposing party” (Lines 299-302). It concludes: “It is appropriate, for the purposes of justice, to impose on Chevron Corp., which benefits from the ‘merger’, the obligations of Texaco Inc.” (Lines 325-327).
- 5.22. As regards TexPet, it accepts the Lago Agrio Plaintiffs’ Complaint that: “In reality, Texpet was nothing more than a screen behind which Texaco Inc. acted...” (Lines 339-340). It finds: “In this case, it has been proven that in reality TexPet and Texaco Inc. functioned in Ecuador as a single and inseparable operation.” (Lines 627-628). It concludes: “... considering the foregoing analysis, the exceptional but justified need has been established in this case to lift any corporate veil that separates [Texaco from TexPet] given that it has been proven that it [TexPet] was a company with a capital very inferior to the volume of its operations, that required constant authorizations and investments from the parent company [Texaco] to carry out the normal course of business of its commercial activity, that the executives were the same in both companies, and principally the obvious fact that not lifting the corporate veil would imply a ‘manifest injustice’.” (Lines 664-671).

5.23. The Tribunal returns to the legal consequences of this analysis below in Part VII, on the issue of jurisdiction under the Treaty.

***D: The Lago Agrio Judgment – “Unfiled Materials”***

5.24. The Claimants contend that the Lago Agrio Judgment incorporates (without attribution) eight sets of material which were never actually filed by the Lago Agrio Plaintiffs during the Lago Agrio Litigation, and were thus never seen by the Claimants during that Litigation. The Claimants allege that these materials were corruptly used by the Lago Agrio Plaintiffs’ representatives, with Judge Zambrano’s connivance, in the ‘ghostwriting’ of the Lago Agrio Judgment.

5.25. These eight materials are: (1) the Clapp Report;<sup>20</sup> (2) the Draft Alegato;<sup>21</sup> (3) the Erion Memorandum;<sup>22</sup> (4) the Fajardo Trust Email;<sup>23</sup> (5) the Fusión Memorandum;<sup>24</sup> (6) the January and June Index Summaries;<sup>25</sup> (7) the Moodie Memorandum;<sup>26</sup> and (8) the Selva Viva Database.<sup>27</sup>

5.26. The Respondent accepts that three of these materials were used in the Lago Agrio Judgment: (1) the Clapp Report, (5) the Fusión Memorandum and (8) the Selva Viva Database.<sup>28</sup>

5.27. There is, however an important preliminary issue as to whether any of these “unfiled” materials were in fact unfiled with the Lago Agrio Court. The files of the Lago Agrio Litigation held (on paper) by the Lago Agrio Court comprised approximately 217,000 pages of documentation.

5.28. The Claimants contend that under Ecuadorian law, as Dr Santiago Velázquez Coello testified, every document added to the court record of the Lago Agrio Litigation was required to be acknowledged by a court order, hand-numbered by the Court’s clerk and invariably sewn into a “cuerpo”, each of which consisted of 100 pages of

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<sup>20</sup> C-2423.

<sup>21</sup> C-1565.

<sup>22</sup> C-2416.

<sup>23</sup> C-997.

<sup>24</sup> C-2118.

<sup>25</sup> See C-1800 (January); C-2315 (June).

<sup>26</sup> C-1645; R-1018.

<sup>27</sup> C-2316.

<sup>28</sup> Track II Hearing D1.32, 70 & 328.

documentation. Further, under no circumstances may an Ecuadorian judge base his judgment on a document not so included in the court record.<sup>29</sup>

- 5.29. As already indicated, the Respondent does not dispute the use of certain of these materials in the Lago Agrio Judgment; but it disputes that any of them were not filed by the Lago Agrio Plaintiffs with the Lago Agrio Court.<sup>30</sup> The Respondent contends that the Lago Agrio Court could have maintained its records improperly or that these materials had been presented to the Court in person or informally by the Lago Agrio Plaintiffs' representatives during one or more of the judicial inspections (attended by Chevron's representatives). The Respondent concludes that, in these circumstances, it is quite impossible for any person to know the universe of the documents submitted to the Lago Agrio Court.<sup>31</sup> The Respondent does not, however, seek to defend the use by an Ecuadorian Court of evidential materials not openly submitted by the disputing parties to an Ecuadorian court, formally or informally.
- 5.30. The Claimants adduced expert testimony from Dr Patrick Juola and Mr Samuel Hernandez. These experts conducted different forms of review of the Lago Agrio Court's record. These reviews included both OCR and hand-review. As to the latter, Dr Juola testified that about 100,000 pages of the record were hand-reviewed.<sup>32</sup> In their expert testimonies, both Dr Juola and Mr Hernandez confirmed that none of these eight materials are to be found in the court record. As to the Respondent's allegation that these materials were submitted informally, the unfiled documents were not found amongst the papers of Chevron's lawyers (who attended the judicial inspections), which (according to these experts) discounts this 'informal' explanation. The Tribunal accepts this expert evidence.
- 5.31. There is a third explanation provided by Judge Zambrano himself. In his Declaration in the RICO Litigation in the USA, Dr Zambrano testified how the content of the Lago Agrio Plaintiffs' "unfiled documents" appeared in the Lago Agrio Judgment:

*"[O]ccasionally documents related to the case that were not incorporated into the process were left at the door to my office at the Court. ... I verified all of that information regarding the case, that is to say, I made sure that it was not false*

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<sup>29</sup> Velázquez ER 1, pp. 3-5.

<sup>30</sup> Track II Hearing D1.328.

<sup>31</sup> Track II Hearing D1.326.

<sup>32</sup> Track II Hearing D2.503.



*information and also that the basis for such information is in the record. This was relevant information that, as I read it, I realized it could be of use in my decision.*”<sup>33</sup>

- 5.32. The Tribunal notes that this third explanation required the “basis” for such additional documentary information to have been “in the record” of the Lago Agrio Court. Such information could not, therefore be entirely new, unfiled information. The eight materials at issue were new information. Accordingly, in the Tribunal’s view, this third explanation must be discounted. The Tribunal also notes that the Lago Agrio Judgment itself states: “... the Presidency should only consider the elements that form part of the proceeding ...”. (see Annex 7 to this Part V below, Lines 41-42).
- 5.33. Whilst it is near-impossible to prove conclusively a negative, the Tribunal accepts, as the overwhelmingly probable explanation, that none of these eight materials had been filed with the Lago Agrio Court; that all were ‘new’ documents (without “a basis ... in the record”); and that none were disclosed to or known by Chevron in the Lago Agrio Litigation, whether formally or informally. It is significant that all these materials favour the Lago Agrio Plaintiffs, not Chevron. It is also significant that the Respondent has not advanced any cogent explanation to this Tribunal, from any factual or expert witness, as to why these eight materials cannot be found in the record held by the Lago Agrio Court. It is also significant that the Respondent has not produced any of the disputed documents from the court record. At this point, the evidential burden of proof shifted to the Respondent. It was not discharged by the Respondent.
- 5.34. As explained below, the Tribunal finds, based on the evidence as a whole, that the contents of these unfiled materials were used by certain of the Lago Agrio representatives for the purpose of ‘ghostwriting’ the Lago Agrio Judgment.
- 5.35. (1) *The Clapp Report*: In brief, this document is a 37 page report of November 2006, drafted in Spanish by Dr Richard W. Clapp and others, as experts to the Lago Agrio Plaintiffs.<sup>34</sup> The report addresses the health impacts of TexPet’s exploitation of the concession, concluding (inter alia) that soil and water samples indicated an excess of lead in the former Concession Area.

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<sup>33</sup> C-1981, para 16.

<sup>34</sup> C-2423; R-1012.

- 5.36. The Respondent accepts that the Clapp Report was used in the Lago Agrio Judgment. There is no evidence showing that this document was ever submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court.
- 5.37. Parts of the Clapp Report (not already covertly used by the Lago Agrio Plaintiffs' representatives in Annex K to the Cabrera Report) appear in Part 9 of the Lago Agrio Judgment in regard to contamination.<sup>35</sup> There is no evidence that these parts of the Clapp Report were submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court. No such documentation can be found in the record of the Lago Agrio Court. The Respondent speculates that this unfiled documentation was informally submitted by the Lago Agrio Plaintiffs' representatives at a judicial inspection in April 2007. At that time, the judge of the Lago Agrio Court was Judge Yáñez (not Judge Zambrano). There is no evidence to support such speculation; and the Tribunal does not accept it.
- 5.38. Dr Leonard testified as to verbatim strings of words copied from the unfiled parts of the Clapp Report into the Lago Agrio Judgment, such as the latter's conclusion that oil and water samples indicated an excess of lead creating a real risk of lead poisoning.<sup>36</sup> That is self-evident from a comparison between page 7 of the Clapp Report and pages 109 to 110 of the Lago Agrio Judgment (in the original Spanish version): see Dr Leonard's Example 11 of his second expert report, reproduced below in Annex 8(1) to this Part V.
- 5.39. These are also evident from Dr Leonard's Exhibit 5 in his second expert report, reproduced as Annex 9 to this Part V (pp. 116-117). It is a copy of the Lago Agrio Judgment highlighted to show strings of text and symbols which were copied from the Lago Agrio Plaintiffs' unfiled materials: for the Clapp Report (original pp. 109-110).
- 5.40. The Tribunal concludes that material parts of the unfiled Clapp Report were used in the 'ghostwriting' of the Lago Agrio Judgment.
- 5.41. (2) *The Draft Alegato*: In brief, this document is a draft Alegato ("argument") of 11 November 2010, drafted in Spanish ostensibly for submission to the Lago Agrio Court.<sup>37</sup> It is a different document from the Alegatos actually filed by the Lago Agrio

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<sup>35</sup> C-931, Part 9, pp. 109-110.

<sup>36</sup> Leonard ER 2, Example 11, p. 34.

<sup>37</sup> C-1565.

Plaintiffs with the Lago Agrio Court on 23 December 2010, 17 January 2011 and 1 February 2011.

- 5.42. There is no evidence that this draft Alegato was ever submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court in the Lago Agrio Litigation.
- 5.43. In his expert testimony, Dr Leonard identified in the Lago Agrio Judgment several strings of texts and symbols in the unfiled draft Alegato that were not present in the filed Alegatos:<sup>38</sup> see his Example 14 in his second expert report comparing the unfiled draft Alegato (page 61) with the Lago Agrio Judgment (page 24) and the filed Final Alegato (page 99), reproduced in Annex 8(2) below.
- 5.44. These are also evident from Dr Leonard's Exhibit 5 in his second expert report, reproduced as Annex 9 to this Part V: for the unfiled Draft Alegato, see pp. 23-24 (original pp. 93-94).
- 5.45. The Tribunal concludes that material parts of the unfiled Draft Alegato were used in the 'ghostwriting' of the Lago Agrio Judgment.
- 5.46. (3) *The Erion Memorandum*: In brief, this document of 18 August 2008, attached to an email from Mr Erion to Mr Donziger of 11 November 2009, is a six-page research note, written in English by Mr Graham Erion, a US lawyer working as an intern with the Lago Agrio Plaintiff's legal representatives.<sup>39</sup> It addresses Chevron's case that it was not a proper defendant in the Lago Agrio Litigation because (inter alia) the "reverse triangular merger" between Chevron and Texaco maintained Texaco's separate corporate identity. The author analyses the factual materials and the principles of Delaware and other US laws on merger and on piercing the corporate veil by the Delaware Courts, as regards Texaco, TexPet and Chevron.
- 5.47. There is no evidence showing that this document was ever submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court.
- 5.48. It is evident that parts of the Erion Memorandum are reproduced (in Spanish) in the draft judgment of 21 December 2010 (the "21/12 Providencias") on Judge Zambrano's Old

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<sup>38</sup> Leonard ER 1, Exhibits A & C; Leonard ER 2, Exhibits 5 & 7.

<sup>39</sup> C-2416. (The Tribunal has seen no evidence connecting Mr Erion personally with any improper conduct alleged by the Claimants against the Lago Agrio Plaintiff's representatives).

Computer, including the citation to four US judgments from New Jersey and Oklahoma: see page 3 of the Erion Memorandum and page 16 of the 21/12 Providencias. Without citing the names of these US cases, the Lago Agrio Judgment refers to their principles on substance (over form), manifest injustice and patent injustice decided “by the Courts of the US” (pages 15- 16).

- 5.49. In his expert testimony, Dr Leonard identified the use of the Erion Memorandum in the Lago Agrio Judgment: see the example comparing the Erion Memorandum (page 5), the “21/12 Providencias” (page 14) and the Lago Agrio Judgment (page 13), reproduced in Annex 8(3) below.
- 5.50. The Tribunal concludes that material parts of the unfiled Erion Memorandum were used in the ‘ghostwriting’ of the Lago Agrio Judgment.
- 5.51. (4) *The Fajardo Trust Email*: In brief, this document is a 1½ page email sent by Mr Fajardo to Messrs Prieto, Saenz and Donziger on 18 June 2009.<sup>40</sup> As explained in Part IV above, it also sets out an unidentified extract of text in Spanish from the decision of the Ecuadorian Supreme Court in *Andrade v Conelec* (No. 168-2007, of 11 April 2007), relating to the establishment of a trust to hold an award of damages made by a court.
- 5.52. There is no evidence showing that any part of this document was ever submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court in the Lago Agrio Litigation.
- 5.53. As Dr Leonard testified, the email contains errors, misquotations, miscitations and strings of words that are to be found, verbatim, in the Lago Agrio Judgment but not in the official report of the *Andrade* judgment.<sup>41</sup> That is evident from a comparison between the first page of the email and page 186 of the Lago Agrio Judgment: see Annex 8(4) below, reproducing Dr Leonard’s Example 9 from his second expert report.
- 5.54. These are also evident from Dr Leonard’s Exhibit 5 in his second expert report, reproduced as Annex 9 to this Part V: for the unfiled Fajardo Trust Email, see page 110 (original p 186).

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<sup>40</sup> C-997; C-1216.

<sup>41</sup> Leonard ER 2, Example 10, p. 32.

- 5.55. The Respondent’s explanation for this coincidence is that both Mr Fajardo and Judge Zambrano were coincidentally working from an unofficial version of the Supreme Court’s judgment, even where, in the same Lago Agrio Judgment, Judge Zambrano cites the official version of that Supreme Court judgment. The Respondent’s explanation is speculation unsupported by any cogent evidence. It is not accepted by the Tribunal.
- 5.56. The Tribunal concludes that material parts of the unfiled Fajardo Trust Email were used in the ‘ghostwriting’ of the Lago Agrio Judgment.
- 5.57. (5) *The Fusión Memorandum*: In brief, this document is a 20-page memorandum in the Spanish language that appears to have been drafted on or shortly before 15 November 2007. It was sent by email dated 15 November 2007 from Mr Sáenz to (inter alios) Messrs Donziger, Ponce and Prieto.<sup>42</sup> The memorandum (inter alia) describes: (i) the factual nature of the relationship between Texaco Inc and Texpet; and (ii) the nature of the “merger” between Texaco and Chevron.
- 5.58. As Dr Leonard testified, substantial parts of the Fusión Memorandum appear verbatim in the Lago Agrio Judgment.<sup>43</sup> The Judgment shares the same identical or near-identical strings of more than 90 words; the same idiosyncratic use of shorthand references; and out-of-order numerical ordering. That is evident from pages 20, 21 and 24 of the Lago Agrio Judgment: see Annex 8(5) below, reproducing Example 1 to Dr Leonard’s second expert report (comparing page 8 of the Fusión Memorandum and page 24 of the Lago Agrio Judgment). It is also evident (as regards out-of-order numbering) at page 5 of the Fusión Memorandum and page 21 of the Lago Agrio Judgment (re “6964”)<sup>44</sup> see also Annex 8(5) below.
- 5.59. It is also evident from Dr Leonard’s Exhibit 5 in his second expert report, reproduced as Annex 9 to this Part V: for the Fusión Memorandum, see pages 90-92 and 94-95 (original pp. 20, 21, 22, 24 & 25).
- 5.60. The Respondent does not dispute that the Fusión Memorandum was used in the Lago Agrio Judgment. It contends, however, that its subject-matter, i.e. the “merger” between

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<sup>42</sup> C-2118.

<sup>43</sup> Leonard ER 2, pp. 14-18.

<sup>44</sup> Leonard ER 2, p. 18.

Texaco and Chevron, was debated between the parties during the judicial inspection on 12 June 2008.<sup>45</sup>

- 5.61. At that time, the Lago Agrio Litigation was assigned to Judge Novillo (not Judge Zambrano). No evidence supporting the document's use exists in any of the email messages passing between the Lago Agrio plaintiffs' representatives at the time of this judicial inspection, where the documents to be submitted to the Lago Agrio Court were being considered by them, including documentation on "fusión". In none of these messages dated 9 June 2008, passing between Mr Donziger, Mr Sáenz and Mr Erion is the Fusión Memorandum listed amongst those documents.<sup>46</sup> Further, the Fusión Memorandum does not appear in the Lago Agrio Court's formal protocol and acta recording documentation submitted by the parties during this judicial inspection.<sup>47</sup>
- 5.62. If the Fusión Memorandum was nonetheless then informally submitted to the Lago Court by the Lago Agrio Plaintiffs' representatives and unrecorded, it is significant that no witness from the Lago Agrio Court was called by the Respondent to support the suggestion made by the Respondent. In the circumstances, that suggestion remains unproven speculation. It is not accepted by the Tribunal.
- 5.63. The Tribunal concludes that material parts of the unfiled Fusión Memorandum were used in the 'ghostwriting' of the Lago Agrio Judgment.
- 5.64. (6) *The January and June Index Summaries*: In brief, these materials in the form of Excel spreadsheets, of 39 pages and 191 pages respectively, comprise tables identifying documents filed in the court record of the Lago Agrio Litigation, prepared internally by the Lago Agrio Plaintiffs' representatives in January 2007 and June 2007 respectively.<sup>48</sup>
- 5.65. There is no evidence that these Index Summaries were submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court in the Lago Agrio Litigation. Neither can be found in the record of the Lago Agrio Court in any form.
- 5.66. In his expert testimony, Dr Leonard testified that he found multiple examples of identical errors, identical or near-identical words strings and incorrect citations in these

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<sup>45</sup> Track II Hearing D1.329.

<sup>46</sup> C-1638; C-1639 & C-1640.

<sup>47</sup> R-530; R-660.

<sup>48</sup> C-1800 (January); C-2315 (June).

Index Summaries that were repeated in the Lago Agrio Judgment.<sup>49</sup> For example, the court record refers to “75003” whereas both the June Index Summary and the Lago Agrio Judgment (at pp. 142 and 150) refer mistakenly to “75013”.<sup>50</sup> Annex 8(6) below reproduces Example 7 from Dr Leonard’s second expert report, comparing identical or near-identical word strings in the unfiled Index Summaries and the Lago Agrio Judgment with the filed record.

- 5.67. These are also evident from Dr Leonard’s Exhibit 5 in his second expert report, reproduced as Annex 9 to this Part V: for the Index Summaries, see pages 88-89, 96-97, and 100-109 (original pp. 6, 7, 100, 101, 114, 127, 128, 129, 133, 137, 138, 142, 146 & 150).
- 5.68. In his testimony at the RICO trial in New York, Dr Zambrano admitted that he did not know what an Excel spreadsheet was.<sup>51</sup> The actual use, or non-use, of Excel on the Zambrano Computers is considered in Part VI below. These evidential materials confirm that Dr Zambrano did not himself use the January and June Index Summaries, notwithstanding their use in the Lago Agrio Judgment.
- 5.69. The Tribunal concludes that material parts of the unfiled January and June Index Summaries were used in the ‘ghostwriting’ of the Lago Agrio Judgment.
- 5.70. (7) *The Moodie Memorandum*: In brief, this document is a 13-page memorandum in English, headed “The standard of proof in US common-law toxic tort negligence claims.”<sup>52</sup> It was sent by Mr Nicholas Moodie, an Australian legal intern working with the Lago Agrio Plaintiffs’ representatives, to Mr Prieto and Mr Saenz on 2 February 2009.<sup>53</sup> In this memorandum, Mr Moodie analyses Californian and Australian case law regarding causation and burden of proof in medical tort cases and considers how the tests identified in such case law might be applied to Chevron in the Lago Agrio Litigation.

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<sup>49</sup> Leonard ER 2, pp. 22-30 & Exhibit 4, pp. 10-20.

<sup>50</sup> Leonard ER 2, p. 29.

<sup>51</sup> C-1979, p. 278.

<sup>52</sup> C-1645.

<sup>53</sup> C-1645, p. 1. (The Tribunal has seen no evidence connecting Mr Moodie personally with any improper conduct alleged by the Claimants against the Lago Agrio Plaintiff’s representatives).

- 5.71. The Moodie Memorandum’s particular use of the “substantial factor” test for causation in asbestos cases under Californian law is repeated in parts of the Lago Agrio Judgment (pp. 89-90). Annex 8(7) below reproduces these passages.
- 5.72. As Professor Michael Green testified, this “substantial factor” test and other features taken from Californian law make it at least highly unlikely that the passages in the Lago Agrio Judgment were prepared independently of the Moodie Memorandum.<sup>54</sup>
- 5.73. As to the Moodie Memorandum’s use of Australian law, Mr James Spigelman AC QC (formerly the Chief Justice of New South Wales) testified that the Memorandum’s particular descriptions of Australian case law were inapposite as a matter of Australian law; yet the same inapposite factors were used in the Lago Agrio Judgment, using identical language (allowing for translation).<sup>55</sup>
- 5.74. Professor Green also referred to the idiosyncratic use of two common law jurisdictions for the purpose of applying principles of Ecuadorian law, a civil law system, in the Lago Agrio Judgment.
- 5.75. The Tribunal concludes that material parts of the unfiled Moodie Memorandum were used in the ‘ghostwriting’ of the Lago Agrio Judgment.
- 5.76. (8) *The Selva Viva Database*: In brief, the compilation of this electronic database<sup>56</sup> was substantially completed by Hydrosphere Resource Consultants, a contractor working with E-Tech and Stratus Consulting, both acting as environmental experts for the Lago Agrio Plaintiffs. Hydrosphere was asked to digitise data in electronic from hard copy documentation, principally inspection reports, soil samples and water samples, for use by the Lago Agrio Plaintiffs’ legal representatives. The database was created in about April-June 2007 by Ms Laura Belanger, Mr John Rodgers and several others in Ecuador and Boulder, Colorado. It was delivered to Dr Anne Maest (of Stratus Consulting) and Mr Donziger.<sup>57</sup> It was then completed and maintained for the Lago Agrio Plaintiffs by Selva Viva, the company controlled by certain of the Lago Agrio Plaintiffs’ representatives. It comprises three Excel spreadsheets.

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<sup>54</sup> C-1646, paras 19-20.

<sup>55</sup> C-1647, paras 8-21.

<sup>56</sup> C-2316.

<sup>57</sup> C-1224, pp. 47ff.



- 5.77. The Respondent accepts that the Silva Viva Database was used in the Lago Agrio Judgment. There is no evidence showing that this material was ever submitted by the Lago Agrio Plaintiffs to the Lago Agrio Court.
- 5.78. The Respondent’s speculation that the database was submitted to the Lago Agrio Court informally during a judicial inspection is unsupported by any evidence. The Tribunal has noted the evidence of Mr Rosero who sought to copy the CDs and DVDs in the record of the Lago Agrio Court and found that 11 of these devices could not be duplicated or read.<sup>58</sup> These 11 devices were all submitted to the Lago Agrio Court on behalf of Chevron and not the Lago Agrio Plaintiffs’ representatives. Thus, contrary to the Respondent’s submission, these files do not show that Dr Juola’s analysis of the court record was incomplete and therefore unreliable.
- 5.79. The Claimants allege that there are numerous irregular commonalities between the Selva Viva Database and the Lago Agrio Judgment that are not consistent with any data filed with the Lago Agrio Court. The Claimants allege that these commonalities can only be explained by the copying of the unfiled database into the Judgment, i.e. ‘ghostwriting’. Their allegations depend upon the expert evidence summarised below.
- 5.80. Mr Spencer Lynch (of Stroz Friedberg) is an expert in digital forensics. He was called by the Claimants. In his first expert report, Mr Lynch compared the environmental data at pages 101 – 112 of the Lago Agrio Judgment with the “Filed Lab Results in the official court record” and with the “Unfiled Selva Viva Database”.
- 5.81. Mr Lynch identified nine categories of naming and data irregularities:<sup>59</sup>

*“[i] SV and TX Suffixes – Many of the sampling results set forth in the Judgment on pages 104 through 112 end with the suffix “\_sv” or “\_tx.” However, a review of the Judicial Inspection Reports and Filed Lab Results provided to me did not identify a single sample result referenced in this manner. In contrast, a review of the data within the Unfiled Selva Viva Data Compilation showed that a majority of the sampling results referenced in the reviewed portion of the Judgment contained these “\_sv” or “\_tx” suffixes. Figures 1 and 2 show examples of data in the Filed Lab Results and the Unfiled Selva Viva Data Compilation, respectively. Figure 3 shows a list of sampling results extracted from the Judgment where the names*

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<sup>58</sup> R-1176; C-2424.

<sup>59</sup> Lynch ER 1, paras 58-70.

*match the Unfiled Selva Viva Data Compilation but do not match any of the Filed Lab Results.*

*[ii] Parentheses Placement – Further review of the sampling results listed in the Judgment show another naming convention used in the Unfiled Selva Viva Data Compilation but not in the Filed Lab Results. Both the Judgment and the Unfiled Selva Viva Data Compilation used a naming convention ending with numeric ranges and an “m” or “cm” enclosed within parentheses. In contrast, the Filed Lab Results in the court record used a naming convention that ended with numeric ranges in parentheses, followed by an “m” or “cm” outside of the parentheses. Figures 4 and 5 show data for the same inspection location from the Filed Lab Results and the Unfiled Selva Viva Data Compilation. Figure 6 shows a comparison of the affected names across these data sources and the Judgment.*

*[iii] Underscore Separators – Stroz Friedberg found another naming irregularity in the Judgment that shows its reliance on the Unfiled Selva Viva Data Compilation. When discussing benzene results on page 108, the Judgment referred to sample result “SA\_13\_JI\_AM1\_0.1M.” This name contained underscores between various parts of the title, and this naming format matches that used in the Unfiled Selva Viva Data Compilation. In contrast, the Filed Lab Results contained no such underscores. Instead, data for the SA13 sample clearly shows dashes used as separators within the title of the sample result. Figures 7 and 8 show the data for this sample in the Filed Lab Results and the Unfiled Selva Viva Data Compilation, respectively.*

*[iv] Incorrectly Identified Expert – Finally, page 108 of the Judgment stated, “Chevron’s expert, John Connor, submitted results showing 9.9 and 2.3 mg/Kg (see samples JL-LAC-PIT1-SD2-SU1.R (1.30-1.90) M y JI-LAC-PIT1-SD1-SU1-R (1.6-2.4)M) during the judicial inspection in Lago Agrio Central...” (from translation). The Unfiled Selva Viva Data Compilation also shows John Connor as the examiner responsible for that test data. However, the Judicial Inspection Report filed with the Court shows Professor Fernando Morales as Chevron’s expert for that inspection, not John Connor.*

...

*[v] Non-Detects – Based on data that Stroz Friedberg has reviewed in this case, I am aware that some environmental sampling procedures have a detection limit based on the equipment, the methods used in the sampling procedure, and/or the substance being tested. Samples under a detection limit often are referred to as a “non-detect” and, when a non-detect is recorded, it often is shown as a less-than sign (“<”) followed by a number that represents the minimum concentration of a substance that can be detected by the applied test or sampling method. In this case, the Filed Lab Results show that the concentrations of mercury for various inspection sites were recorded as non-detects, and expressed as “<7.” The Judgment, however, dropped the “<” and failed to acknowledge that the level of mercury fell below detectible levels for several sites. Instead, the Court stated in its decision that “alarming levels of mercury have been found” with “several samples reaching 7mg/Kg” of mercury.”*

*The evidence again revealed that the Court likely relied on and subsequently misinterpreted the Unfiled Selva Viva Data Compilation, rather than relying on the Filed Lab Results submitted with the Judicial Inspection Reports. The Unfiled Selva Viva Data Compilation placed the “<” in a separate column, as described in the email thread dated March 4, 2008 and found in the SN 049997-SN 050000.pdf. The Unfiled Selva Viva Data Compilation listed the “7” in its own column, and the Court appeared to have misinterpreted this as the actual concentration of mercury for various sites. In doing so, the Judgment eliminated any non-detect results and made mercury levels appear higher and more certain than the actual filed results. The Judgment appears to have made the same mistake with respect to concentrations of benzene and toluene at other sites. Figures 9 and 10 show an example of the Filed Lab Results versus the spreadsheets from the Unfiled Selva Viva Data Compilation. Figure 11 shows a comparison of the non-detects located in the Unfiled Selva Viva Data Compilation and the Filed Lab Results relative to how they appear in the Judgment.*

*[vi] Milligram (mg) vs. Microgram (µg) – While comparing data points, Stroz Friedberg observed instances where concentrations of substances at specific sites were listed in both the Judgment and the Unfiled Selva Viva Data Compilation as milligrams per kilogram (mg/Kg). However, the Filed Lab Results indicate that concentrations for those same substances and sites should have been listed as micrograms per kilogram (µg/Kg) – a thousand times less concentrated than the levels reported in the Judgment. Again, the Unfiled Selva Viva Data Compilation appears to be the source of the erroneous information cited. Figures 12 and 13 show examples of the Filed Lab Results and corresponding data from the Unfiled Selva Viva Data Compilation. Figure 14 shows a comparison of the concentrations referenced in the Judgment and data for those sites reflected in the Filed Lab Results and the Unfiled Selva Viva Data Compilation, respectively.*

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*[vii] Chevron TPH Results – On page 102 of the Judgment, the author referred to 1,984 TPH test results “... brought by the defendants’ experts....” Based on Stroz Friedberg’s review of The Connor Report and Anexo B to the Cabrera Report, this number appears to be too high. Those reports indicate that between 932 and 964 soil samples were taken by Chevron. An examination of the Unfiled Selva Viva Data Compilation confirmed that 1,984 was inaccurate and based on the Unfiled Selva Viva Data Compilation and not documents filed with the Court. In short, the Unfiled Selva Viva Data Compilation broke the TPH results down into two parts, and the Judgment appears to have made the mistake of double-counting these test results. Stroz Friedberg found this error when it sorted the Unfiled Selva Viva Data Compilation by the following columns and unique entries: “Fuente de datos” (Texaco); “Matriz” (Suelo); and “Parametro” (“Begins with” TPH). This sorting had the effect of limiting results to soil samples attributed to Chevron and analyzed for TPH. When Stroz Friedberg did this sorting, it found that the count of all Chevron’s TPH test results in the Unfiled Selva Viva Data Compilation equaled the number cited in the Judgment – 1,984. However, the TPH results in the Unfiled Selva Viva Data Compilation contained two parts – one row for Diesel Range*

Organics (DRO) readings and one row for Gasoline Range Organics (GRO) readings (See Figure 15).

*The Judgment stated that DRO and GRO readings “have to be added up to in order to have a relatively comparable equivalence with TPHs.” However, to reach 1,984 TPH results for Chevron, it is necessary to count the DRO and GRO readings for the same sample as separate TPH results. The resulting 1,984 number was inconsistent with the court record because, when Stroz Friedberg counted just the TPH results from the Filed Lab Results in the record, it arrived at a number (935) that was approximately half that of the number cited in the Judgment and generally consistent with the counts given in The Connor Report (932) and Anexo B to the Cabrera Report (964). Based on this analysis, Stroz Friedberg concludes that the most likely reason the Judgment effectively double counted most of Chevron’s TPH results was its author’s reliance on the Unfiled Selva Viva Data Compilation, where the DRO and GRO readings for Chevron appeared in separate rows.*

*[viii] Lago Agrio Plaintiff TPH Results – In addition to the erroneous reporting of 1,984 Chevron TPH results described above, the Judgment inaccurately counted the Lago Agrio plaintiffs’ TPH results, again based on its apparent reliance on the Unfiled Selva Viva Data Compilation. When discussing TPH levels, the Judgment stated, in part, “[t]he plaintiffs’ expert have submitted 420 results” for TPH soil sample. Stroz Friedberg again found that this number was overstated. As a preliminary matter, The Connor Report and Anexo B to the Cabrera Report indicate that between 308 and 339 soil samples were taken by the plaintiffs. To perform the analysis, Stroz Friedberg reviewed entries associated with the plaintiffs’ data in the Unfiled Selva Viva Data Compilation. Stroz Friedberg sorted the data first on the column and unique item labeled “Fuente de datos” (Demandantes), then on “Matriz” (Suelo), and finally on “Parametro” (“Begins with” TPH). This sorting had the effect of limiting results to soil samples attributed to the Lago Agrio plaintiffs and analyzed for TPH. This yielded 420 results, thereby showing a match between the Unfiled Selva Viva Data Compilation and the Judgment. Once again, there were many instances where DRO and GRO tests were counted as individual results, rather than being combined to represent one TPH value. Further distorting plaintiffs’ numbers in the Judgment, some test sites in the Unfiled Selva Viva Data Compilation listed both the DRO and GRO individual tests, as well as a separate TPH value that combined these two tests. Figure 16 shows an example of this data extracted from the Unfiled Selva Viva Data Compilation. Based on this analysis, Stroz Friedberg concludes that reliance on the Unfiled Selva Viva Data Compilation resulted in a substantial over counting of the plaintiffs’ test results within the Judgment.*

*[ix] Computed Percentages – The erroneous TPH counts in the Judgment had the additional effect of distorting the sample percentages listed in the decision. Stroz Friedberg was able to use the “DA00000040.xls” spreadsheet containing the Unfiled Selva Viva Data Compilation to reproduce the percentages listed in the Judgment. Stroz Friedberg did so by sorting the Unfiled Selva Viva Data Compilation spreadsheet to represent the three groups of “Texaco,” “Demandantes,” and “Corte,” removing any reference to “Cabrera” from the Perito column, and then grouping by the three categories discussed in the Judgment*

(*<1000, 1000-5000, >5000*). Stroz Friedberg then divided the sums in each of these columns by the inaccurate TPH counts listed in the Judgment. The percentages listed in the Judgment, along with the percentages computed using the Unfiled Selva Viva Data Compilation, are shown in Figure 17. The percentages are almost identical, and any slight differences between the Judgment and the Unfiled Selva Viva Data Compilation appear to be due to variations in decimal rounding.”

5.82. For the reasons set out in his expert report, Mr Lynch concluded:<sup>60</sup>

*“Analysis of the 2011 Judgment indicates that it was derived from material not filed with the Court in the Lago Agrio litigation in Ecuador. Over 100 specific and repeated naming and data irregularities indicate that the data points cited in the 2011 Judgment were copied, cut-and-pasted, or otherwise taken directly from the Unfiled Selva Viva Data Compilation. Other forensic evidence shows that it is highly unlikely that the TPH counts, statistical percentages, or pit counts discussed in this report and cited in the 2011 Judgment were independently derived from the Filed Lab Results.”*

5.83. Mr Lynch’s report replaced the earlier reports of Mr Michael L. Younger (also of Stroz Friedberg), who had also earlier testified as an expert in digital forensics called by the Claimants and concluded that the Selva Viva database contains errors and commonalities that are to be found in the Lago Agrio Judgment.<sup>61</sup> (Mr Younger withdrew on grounds of ill-health; and his expert testimony was adopted by Mr Lynch, his replacement).

5.84. The Tribunal concludes that material parts of the Selva Viva Database were used in the ‘ghostwriting’ of the Lago Agrio Judgment.

5.85. In summary, the Tribunal finds that Lago Agrio Judgment made improper use of these eight unfiled materials in the possession of the Lago Agrio Plaintiffs’ representatives. Based on the evidence adduced before this Tribunal, the Tribunal finds that such use resulted from the corrupt conduct of Judge Zambrano in permitting certain of the Lago Agrio Plaintiffs’ representatives to ‘ghostwrite’ material parts of the Lago Agrio Judgment.

### ***E: The Lago Agrio Judgment – Forensic Linguistics***

5.86. Professor Gerald R. McMenamain, called by the Claimants, is a specialist expert in forensic linguistics, including Spanish linguistics. He compared the language of the

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<sup>60</sup> Lynch ER 1, para 119.

<sup>61</sup> Younger ER 1, p. 19.

Lago Agrio Judgment with 36 other known writings by Judge Zambrano from 2009 to 2011.

- 5.87. In his expert report, Professor McMenamain analysed an aggregate set of seven patterned and re-occurring “markers of writing style”; namely: (a) divisions of text into headings and subheadings; (b) dollar amounts; (c) form of writing the year: “2.010” v “2010”; (d) sentence – initial spacing of open quotes; (e) sentence – final punctuation of close quotes (f) form of textual ellipsis: “[. . .]” or “. . .”; (g) capitalization of month in dates: “octubre” or “Octubre”.
- 5.88. His report’s statistical analyses are not easily summarised or capable of reproduction here. The Tribunal therefore takes only one illustrative example, namely (c) the form of writing the year, in “marked” form (i.e. writing the four-digit year by placing a point to separate the thousands place from the remaining number-places to its right, e.g. “2.011”) and the “unmarked” form (i.e. without any punctuation, e.g. “2011”). The report concludes as to the different uses of these marked and unmarked forms:

*“Judge Zambrano’s [known writings] demonstrate this unmarked form in just 21% of its 759 occurrence-opportunities, and Zambrano’s KNOWN writings also demonstrate a very much higher incidence of the marked form: e.g., 2.011. In 79% of the 759 occurrence-opportunities, the year is written with a point between the thousands and hundreds places, i.e., like the 2.011 in 03 de febrero del 2.011(See Exhibits C-3).*

...

*It is telling that the marked form of the year (e.g., 2.010) appears in the [Lago Agrio Judgment] less than 1% of the time (once in 224 occurrence-opportunities), but that same marked form occurs in the KNOWN-Zambrano writings 80% of the time (600 times in 750 occurrence-opportunities). This indicates the probability that authors other than Judge Zambrano wrote those sections of the [Judgment] that contain references to years as expressed in dates.”*

- 5.89. Professor McMenamain, having analysed the linguistic evidence on all seven markers, concluded that it is “highly probable” that the Lago Agrio Judgment has “multiple authors” and that Judge Zambrano “did not author a significant amount” of the Judgment.<sup>62</sup>

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<sup>62</sup> McMenamain ER, para 9.

5.90. Professor McMenamain was not subjected to cross-examination by the Respondent at the Track II Hearing. Whilst the Tribunal accords weight to his expert testimony, it does not regard his opinions as conclusive on the issue of ‘ghostwriting’.

***F: The Lago Agrio Judgment – The Cabrera Report: Dr Barnthouse***

5.91. The Lago Agrio Judgment expressly disclaims any reliance on the Cabrera Report. Ostensibly, it accepted Chevron’s petition that the Cabrera Report was not be taken into account for the Lago Agrio Judgment.<sup>63</sup> It appears, at first sight, not to have done so.

5.92. However, it did take the Cabrera Report into account indirectly. As already indicated above in Part IV (see paras 4.402), the Lago Agrio Judgment made use of Dr Barnthouse’s expert testimony resting on the “Cabrera Report” (e.g. see page 57ff of the Judgment) and the pit calculations in Annex H1 to the “Cabrera Report”.

5.93. Moreover, as considered immediately below, the Lago Agrio Judgment relied on the Cabrera Report for the number of oil pits requiring remediation.

***G: The Lago Agrio Judgment – The Cabrera Report: The Oil Pits***

5.94. The Lago Agrio Judgment orders the payment by Chevron of US\$ 5.396 billion for soil remediation in areas of the former Concession.<sup>64</sup> It calculates the figure of US\$ 5.396 billion by multiplying the number of oil pits requiring remediation, the volume of soil per pit requiring remediation and the unit cost of remediation.

5.95. As to the number of oil pits requiring remediation, the Lago Agrio Judgment finds 880 pits attributable to Chevron (i.e. from TexPet’s operations in the concession area), leading to the calculation of US\$ 5.396 billion. The specific number of “880” pits is therefore an essential part in the calculation of the figure of US\$ 5.396 billion.

5.96. In regard to these 880 pits, the Lago Agrio Judgment states:<sup>65</sup>

*“Thus, to conclude with the analysis of the presence of hazardous elements resulting from the operations of Texpet in the Consortium, and considering that the results of most of the expert reports are similar: ... 2. The contamination in the area of the concession extends to 7,392,000 cubic meters (m3), a figure that is arrived*

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<sup>63</sup> C-931, p. 51.

<sup>64</sup> C-931, p.181.

<sup>65</sup> C-931, pp 124-125.

*at considering that we have 880 pits (proven through aerial photographs certified by the Geographic Military Institute which appear throughout the record, analyzed together with the official documents of Petroecuador submitted by the parties and especially by the expert Gerardo Barros, and aggravated by the fact that the defendant has not submitted the historical archives that record the number of pits, the criteria for their construction, use or abandonment) of an area of 60 x 40 meters, and because of the possibility of leaks and spills, it should be remediated in an area of at least 5 meters around the pits, and the pits have a depth of 2.40 meters (which is a reasonable estimate, considering that the pits have different dimensions, and as we noted above, the defendant has not presented an archive or historical record that details the number or the dimensions specified for the construction of the pits.”*

5.97. The Clarification Order states, as to the identification of relevant pits:<sup>66</sup>

*“... it is emphasized that, as explained in the judgment, the Court analyzed the various aerial photographs that form a part of the record and that were certified by the military Geographic Institute. The Court found this method appropriate since all of the photographs are from before 1990, and cannot reflect the existence of pits constructed after Petroecuador assumed the operations. Thus, they only reflect those constructed by Texpet ...”.*

5.98. LBG: The Tribunal has considered the Respondent’s evidence, especially the several expert reports of Kenneth J. Goldstein, Jeffrey W. Short and Edward A. Garvey (of the Louis Berger Group). The Tribunal does not consider that their testimony answers the criticism made by the Claimants’ expert witnesses in regard to the specific number of 880 pits used in the Lago Agrio Judgment.

5.99. In their first report (of 2013), Messrs Goldstein and Short testified:

*“The RAP [i.e. the 1995 Remedial Action Plan] purported to identify the number of pits and affected soil areas resulting from spills that were present at each well site and production station identified in the SOW [i.e. the Scope of Work] and assessed applicable remediation requirements Conservatively assuming 3 pits per well site and 5 pits per production station, it is reasonable to estimate there were about a thousand pits scattered across the Concession Area.”<sup>67</sup>*

5.100. However, this historical estimate was made for all pits in the former concession area. It therefore included pits that were not contaminated and contaminated pits that had been remediated under the 1995 Settlement Agreement. It cannot provide evidence

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<sup>66</sup> C-1367, p. 15.

<sup>67</sup> LBG (Goldstein & Short) ER 1, p. 28.



supporting the specific number of 880 pits requiring remediation, as found the Lago Agrio Judgment.

- 5.101. In their supplemental report (of 2015), Messrs Goldstein and Garvey also testified that the “880 pit count in the Judgment is reasonable as confirmed by our review of the record and TexPet documents produced by Claimants”.<sup>68</sup> The detailed analysis that follows is directed only at the reasonableness of the number of 880 pits. It does not in fact confirm that specific number; nor does it identify the contemporary evidential materials that could support that specific number. The issue of reasonableness is not here the critical question, which is directed at the evidence supporting the specific number of 880 pits used in the Lago Agrio Judgment.
- 5.102. The Lago Agrio Judgment cites, in the passage above, three sources to prove its number of 880 pits. This Tribunal has been shown no cogent evidence that the specific number of 880 pits was derived from any of these three sources.
- 5.103. The first, the “aerial photographs certified by the Geographic Military Institute” did not list 880 pits. (The possible use of these photographs as a scientific method of identifying and calculating 880 pits is considered separately below). The “official documents of PetroEcuador” did not list 880 pits. Nor did Dr Barros list 880 pits (as the expert appointed by the Lago Agrio Court).<sup>69</sup>
- 5.104. The Tribunal turns to the explanations provided by Dr Robert E. Hinchee, Dr James Ebert (of Ebert & Associates), Mr Spencer Lynch (of Stroz Friedberg), Mr Michael Younger (also of Stroz Frieberg) and Mr William Di Paolo & Ms Laura Hall (both of Di Paolo Consulting), as the Claimants’ expert witnesses. These experts addressed (inter alia) the aerial photographs certified by the Geographic Military Institute and “Anexo H1” to the Cabrera Report. These photographs were in the filed record before the Lago Agrio Court. The Lago Agrio Judgment records that no use is there made of the Cabrera Reports.
- 5.105. The question arises, as the Respondent at least implicitly contends and the Claimants dispute,<sup>70</sup> whether it was scientifically possible for Judge Zambrano to identify and

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<sup>68</sup> LBG (Goldstein & Garvey) ER 4, pp. 8-10.

<sup>69</sup> See Hinchee ER 1, p. 6, fns 25 & 26.

<sup>70</sup> R-TII SCMem. Nov. 2014, paras 161ff; Track II Hearing D1.299ff; C-TII Rep. June 2013, para 86; Track II Hearing D1.50ff.

calculate the number of 880 pits by studying these photographs and, if not, the further question as to where that number of 880 pits originated.

5.106. *Dr Hinchee*: In his first expert report, relying in part upon the expert reports of Dr Ebert and Mr Di Paolo & Ms Hall, Dr Hinchee concluded that none of the materials cited as proof in the Lago Agrio Judgment supported the number of 880 pits, including the aerial photographs.<sup>71</sup>

5.107. In his third expert report, as to the pit count, Dr Hinchee also testified (with footnoted references here omitted):

*“In 2007, Petroecuador estimated only 370 pits required remediation in the former Concession. As a result of its ongoing remediation, in 2009, Petroecuador estimated only 86 pits in the former Concession required remediation. These estimates demonstrate the unreasonableness of the Judgment’s 880 pit count.”*<sup>72</sup>

5.108. Again, the Tribunal sets aside any issue of reasonableness in regard to the number of 880 pits. As already indicated, that is not here the critical question.

5.109. *Dr Ebert*: In his report (as an expert photogramaticist), Dr Ebert stated that the aerial photographs were monoscopic (i.e. not stereoscopic), low resolution and black-and-white panchromatic images; and, also, that there were no aerial photographs for approximately 114 out of 343 sites in the record (i.e. only 33.2%).

5.110. Dr Ebert concluded:

*“Based on my analysis of the aerial photographs in the record, and other data provided to me, I have concluded, to a reasonable degree of scientific certainty that it is highly unlikely, if not impossible, that Judge Zambrano could have arrived in a valid manner at the 880 pit figure from the aerial photographs in the record. Indeed, given that Judge Zambrano has no identified experience or training in interpreting aerial photographs, and thus the aerial photographs in the record likely were largely incomprehensible to him, it is impossible that he could have reached any appropriate conclusion from a review of the aerial photographs in the record. Rather, it is far more likely that the Sentencia [i.e. the Lago Agrio Judgment] includes an 880 pit count by relying on the data in the Cabrera and/or the Stratus tables.”*<sup>73</sup>

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<sup>71</sup> Hinchee ER 1, pp. 6-7.

<sup>72</sup> Hinchee ER 3, p. 11.

<sup>73</sup> Hinchee ER 1, Exhibit 22 (Opinion of Dr Ebert), p. 2.

5.111. *Mr Lynch*: Mr Lynch testified that the number of 880 pits in the Lago Agrio Judgment was calculated from the total number of 916 pits listed in “Anexo H1” to the Cabrera Report.<sup>74</sup> This “Anexo H1” is entitled “History and Inventory of Waste Pits Opened by the Company’s Operation Texpet in the Ecuadorian Amazon”.<sup>75</sup> It is derived, subject to one material discrepancy addressed below, from the “Stratus Compilation” prepared as an Excel document for the Lago Agrio Plaintiffs’ representatives.<sup>76</sup>

5.112. Mr Lynch removed from the total number of 916 the number of pits attributed in “Anexo H1” to PetroEcuador and those pits listed as having no environmental impact, leaving the pit number of 880 attributed to Chevron, i.e. the same number of pits used in the Lago Agrio Judgment.

5.113. The Tribunal does not accept the Respondent’s criticisms that Mr Lynch performed this calculation in an arbitrary manner, given that “Anexo H1” lists 916 pits and that the Stratus Compilation (in Excel format) lists 917 pits.<sup>77</sup> The discrepancy relates to one pit mistakenly included in the latter document as a pit within the concession area, as Mr Lynch explained in his first expert report.<sup>78</sup>

5.114. Mr Lynch testified:<sup>79</sup>

*“Relying on ... Dr Ebert’s opinion that it was not as the [Lago Agrio] judgment describes based on the aerial photographs, the only source that I have seen is an original version of Anexo H1, an Excel version, and then Anexo H1 itself. And my opinion is that it is more likely than not, given the analysis that I performed and the data that I had available to me, that it was derived from Anexo H1 or the original Excel version.”*

5.115. In his expert report (confirming the findings of the earlier expert report of Mr Younger), for the reasons there set out, Mr Lynch concluded (with footnotes here omitted):<sup>80</sup>

*“Pit Counts – On page 125 of the Judgment, the author referred to 880 pits. An examination revealed that this number likely was based on the Stratus Compilation or Anexo H-1. Stroz Friedberg observed that the Stratus Compilation contained almost the exact same data in the exact same format as the information in the Anexo H-1 document filed earlier with the Cabrera Report. Although the Anexo H-1*

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<sup>74</sup> C-2368, pp. 608-613; Lynch ER 1, pp. 29-30.

<sup>75</sup> R-1216.

<sup>76</sup> R-1217.

<sup>77</sup> Track II Hearing D5.1024-1035; and D13.2817; see also R-TII SCMem. Nov. 2014, paras 161ff.

<sup>78</sup> Lynch ER 1, p. 30, fn 23.

<sup>79</sup> C-2368, pp. 639-640.

<sup>80</sup> Lynch ER 1, pp. 29-30.

*document listed 916 pits and the Stratus Compilation had records or rows for 917 pits, Stroz Friedberg observed that the Judgment did not include “no impact” figures or similar entries or those related to “Petroecuador” and “Petroduccion.” Therefore, Stroz Friedberg sorted the “COMENTARIO DEL RAP” column and removed all references to these entries as shown in Figure 18. The result was 880 records – the same number that appeared in the Judgment. Therefore, the count of 880 probably was arrived at by simply sorting on the RAP Comment column within the Stratus Compilation, which itself contains almost the exact same data in the exact same format as Anexo H-1.”*

5.116. *Mr Di Paolo and Ms Hall:* In their expert report, Mr William D. Paolo and Ms Laura Hall stated that Mr Cabrera’s photographic interpretation was incomplete and contradictory:<sup>81</sup>

*“In a document submitted to the Nueva Loja Superior Court in April 2008 by Mr. Richard Cabrera titled “Informe Sumario del Examen Pericial” (translation: Summary Report of Expert Investigation), the number and area of pits at each site are presented in a summary table, Annex H-1, “Inventario de Piscinas” (Pit Inventory). This summary is apparently based solely on aerial photographic interpretations from 1976, 1986, and 1990, but Mr. Cabrera does not provide aerial photographs for 74% of the sites (249 of 335) and he does not perform field verification of 85% (286 of 335) of the sites. Also, he presents contradictory photographic interpretations of the pits in various annexes, as described below.*

*[As to the “Number of Pits”:] Mr. Cabrera alleges the existence of 916 pits at 335 sites using as substantiation his photograph interpretation presented in the table in Annex H-1, even though in the same table he admits that he never observed 156 of the 916 pits that he claims exist, stating in his table that there is “no evidence” of a pit, it is “non-existent,” it is “closed,” or there are “no data” for all 3 years for which he had photos. Therefore, he never observed an open pit for 17% of the pits that he claims exist in his table from Annex H-1. In addition to having incomplete photo interpretations, the interpretations he presents in Annex U4 and Annex E are contradictory. Mr. Cabrera provides photo interpretations for 85 sites in Annex E, “Gráficos y Análisis de Resultados de Diferentes Estudios” (Graphics and Analysis of Results of Different Studies) and for a subset (39) of these sites plus one additional site in Annex U4, “Resultados Sitio por Sitio” (Site by Site Results). As shown in Table 1, below, the contradictions between the number of pits in Mr. Cabrera’s Annex E and his Annex U4, for the 39 sites in common between them, are quite significant.”*

(Table 1 sets out a “Comparison of photo interpretation results from Annex E and Annex H-1 with Annex U4 for the 39 sites that were included in Annex U4”).

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<sup>81</sup> Hinchee ER 1, Exhibit 21 (Opinion of Di Paolo & Hall), p. 7.

5.117. Their expert report then continues:<sup>82</sup>

*“As shown in Table 1, Mr Cabrera identified 118 pits on the photos in Annex E, but only identified 62 pits in Annex U4 at the 39 sites, using the same photos. Nevertheless, Mr Cabrera based his remediation costs on the number and size of pits shown in Annex H-1 even though his own data shown in Annex U4 indicates that there are almost 50% fewer pits that should be used for the cost estimate.”*

5.118. These experts summarise their conclusions as follows, which merit here citing in full (with square brackets here added for ease of reference):<sup>83</sup>

*“[1] Aerial photography can be an excellent tool for making preliminary assessments of oilfield operations, when used by experienced interpreters for a preliminary site assessment and to observe changes over time. However, aerial photography alone is insufficient to accurately assess oil field site details, such as the existence and number of pits or oil spills. It is impossible to discern an oil spill or the presence of oil in a pit using the black and white aerial photographs available from the concession area.*

*[2] Mr Cabrera’s photo interpretation is incomplete since he provides no photos in Annex E or Annex U4 for 249 of the 335 sites (74%) that he claims to have evaluated. Mr Cabrera provides no explanation as to why he does not include the aerial photos for the other 249 sites, and it is impossible to determine how many potential errors Mr Cabrera may have made in photo interpretations for those additional sites.*

*[3] Mr Cabrera’s report contains contradictory photo interpretation results between Annex H-1, Annex E, and Annex U4. In estimating remediation costs, Mr Cabrera focuses on the results presented in Annex H-1 without describing the reasons for the discrepancies between each of the annexes in terms of the number and size of pits. In Annex U4, Mr Cabrera identifies 62 pits at the 39 sites he visited and for which he had aerial photographs in both Annexes E and U4. However, in Annexes E and H-1 he claims there are 118 pits at these same 39 sites and he uses this number to estimate his remediation cost.*

*[4] Not only were the aerial photo interpretations presented by Mr Cabrera incomplete and contradictory, the interpretations he did present were grossly inaccurate with many site features being misidentified, incorrectly outlined, or non-existent. The mistakes made in identifying features at the sites were due to the effects of shadowing; the distribution and size of vegetation; soil moisture differences; use of variable quality, relatively low resolution, black and white (panchromatic) photography; and misrepresentation of the dates of the aerial photography used. The types and number of errors found would indicate the lack of experienced photo interpretation professionals using professional, high-quality stereoscopes, and at*

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<sup>82</sup> Hinchee ER 1, Exhibit 21 (Opinion of Di Paolo & Hall), p. 7.

<sup>83</sup> Hinchee ER 1, Exhibit 21 (Opinion of Di Paolo & Hall), pp. 3-4

*best careless and sloppy protocol, or at worst incompetence and/or falsification of the data.*

*[5] Mr Cabrera’s photographic interpretations might have been improved if (1) the image interpretation results were incorporated and analyzed in a geographic information system (GIS), and (2) multiple, high-resolution aerial photos had been reviewed in stereo by qualified professionals when attempting to discern pits from other site features.*

*[6] Furthermore, Mr Cabrera cannot claim that features he sees on IGM (Instituto Geográfico Militar (translated as: Military Geographical Institute)) aerial photographs are pits or oil spills unless he has completed field observations at the site, and then used those field observations to correct his photographic interpretation. Ground-truthing is critical to verify any air photo interpretations. Remote sensing and photo interpretation standard practices require such site visits and ground observations to validate interpretations from aerial photos or any remotely sensed data.*

*[7] Mr Cabrera failed to correct the errors found in his aerial photographic interpretation of pits based on his own field observations, or the field verification done as part of the Judicial Inspections. Since Mr Cabrera ignored even his own field observations, his alleged pit count is inaccurate, inflated, and without merit for calculating remediation cost estimates. Failure to correct interpretation errors at many sites, even after ground-truthing, would indicate either a gross oversight or the possible intent to falsify the number and size of pits present at these sites.*

*[8] In addition to the mistakes outlined above, Mr Cabrera presented aerial photographic interpretations of well sites drilled by Petroecuador after June 1990, and he included Petroecuador pits in his report and incorrectly attributed them to Texpet. He also interpreted and included in his report pits that were constructed after June 1990 at several production stations. Furthermore, he assessed the status of pits for wells in the Cononaco oil field, saying they were interpreted from 1990 IGM aerial photographs even though IGM never took aerial photographs of this area in their 1989-1992 “Carta Nacional” (translation: National Mapping) aerial survey project for the Oriente region of Ecuador.”*

5.119. Based on these materials, the Tribunal concludes that the Lago Agrio Judgment based its specific number of 880 oil pits on the Cabrera Report and not, as the Lago Judgment falsely states, on the aerial photographs, PetroEcuador’s official documents or Dr Barros. The Tribunal also concludes that the Cabrera Report provided no scientific basis for the specific number of 880 pits used in the Lago Agrio Judgment; and that, contrary to the Respondent’s submission, the Lago Agrio Judgment’s reliance on the Cabrera Report was in no way “in some small fashion”.<sup>84</sup>

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<sup>84</sup> R-TII SCMem. Nov. 2014, p. 82, fn 326.

5.120. The resulting amount of US\$ 5.396 billion awarded as damages for soil remediation in areas of the former Concession was the largest single item of non-punitive damages in the Lago Agrio Judgment. Thus, the use in the Lago Agrio Judgment of the Cabrera Report (with its own methodology) was highly significant and material to its award of damages. It will be recalled that the Cabrera Report was drafted not by Mr Cabrera, but by certain of the Lago Agrio Plaintiffs' representatives and experts in corrupt collusion with Mr Cabrera (see Part IV above).

***H: The Lago Agrio Judgment – Diffuse Liability***

5.121. The Lago Agrio Judgment addressed and decided the Lago Agrio Plaintiffs' claims unequivocally as "diffuse" claims only and not as individual claims made by a plaintiff seeking compensation for personal harm to that individual plaintiff.

5.122. Thus, the Lago Agrio Judgment recognises that what is being decided is not "the existence of harm to the health of specific persons"; or "the existence of harm or injuries to or a specific health problem of a given individual";<sup>85</sup> noting also "that the reparation of particular cases of cancer has not been demanded, nor are such cases identified, thus they are not remediable ...".<sup>86</sup> It also notes that no Lago Agrio Plaintiff had claimed "monetary compensation" for individual "losses of animals and domestic farming,"<sup>87</sup> (The Tribunal decided in its Decision on Track 1B (by a majority) that the original complaint pleaded by the Lago Agrio Plaintiffs could be read as pleading individual claims also, consistent with the individual claims pleaded in the Aguinda Litigation in New York – albeit there reserving the Tribunal's decision as to how these claims were decided in the Lago Agrio Litigation).<sup>88</sup>

5.123. The Tribunal refers to other passages to like effect from the Lago Agrio Judgment and its subsequent Clarification Order of 4 March 2011, including the following:

*\* "[T]he complaint has been signed by 42 citizens, the plaintiffs, who have not requested personal compensation for any harm, but rather have demanded the protection of a collective right in accordance with the formalities provided by the*

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<sup>85</sup> C-931, pp. 139-139.

<sup>86</sup> C-931, p. 184.

<sup>87</sup> C-931, at pp. 147.

<sup>88</sup> See the Decision on Track 1B, paras 183 & 186.

*EMA, the redress of environmental harm, which as has been alleged in this lawsuit, affect more than 30,000 people, these supposedly being undetermined.”<sup>89</sup>*

*\* “[T]he parties potentially affected by the activities of the Consortium are divided into several different human groups, that claim to be united by the fact of being affected by an environmental harm, without all belonging to a single nationality or neighbourhood, but rather who are identifiable for sharing impacts coming from the environmental harm ... connected by one same impact and a common interest in resolving it. In this way, the legal grounds on which the collective right of the plaintiffs to file this claim rests have been established to the satisfaction of the Court, summarized in the fundamental, inalienable, substantive right of action and petition, in the second place in the norms of the Civil Code to give grounds for the right to ask for redress of the harm, and in the third place in the active legal standing of the plaintiffs to be heard in this proceeding in defence of collective rights.”<sup>90</sup>*

*\* “This criterion also agrees with the Resolution of the Constitutional Court 1457, of 18 August 2009, which tells us that, ‘In accordance with the regulation for applying the mechanisms of social participation established in the Law of Environmental Management, collective environmental rights are those rights shared by the community to enjoy a healthy environment that is free of contamination, and involving aesthetic, scenic, recreational and cultural values, physical and mental integrity, and in general, quality of life. And an environmental impact is considered to be every positive or negative change to the environment that is caused directly or indirectly by a project or activity in a determined area. That is, environmental impact is every action of man that produces changes to the physical and human surroundings.’”<sup>91</sup>*

*\* “Finally, with regard to the harm to people’s health, it should be noted that none of these harms or impacts to human health have been proven in a specious manner; that is, proof has not been presented of the existence of harm to the health of specific persons; rather, it has been proved, epidemiologically, that there exists harm to public health. Regarding the lack of proof of the harm or injuries to the health of specific persons, this Presidency notes that the plaintiff point of view is correct in the sense that no medical certificates have been submitted to show the existence of harm or injuries to or a specific health problem of a given individual; therefore, in order to make this decision, we consider, in the first place, that the reparation of particular harm has not been requested, rather the plaintiff requests, in regards to health: ‘contract on charge of the defendant, specialized persons or institutions in order to design and carry out a plan for the health improvement and monitoring of the inhabitants affected by contamination.’ (page 80); thus the submitted evidence does not necessarily refer to the particular harm, but to the harm to public health, which means that the fact that no particular injuries or harm have been proved is irrelevant; and in the second place, that the abovementioned claim is coherent with the object of the complaint, which is the reparation of the environmental harm that, as been shown, are those caused to the environment or some of its components;*

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<sup>89</sup> C-931, p. 33.

<sup>90</sup> C-931, p. 33.

<sup>91</sup> C-931, p. 95.



*thus, we will only analyse the existence of harm to public health and if this harm is directly related to the reported environmental impacts for which reparation is required.”<sup>92</sup>*

*\* “[S]ince as we have seen in this case there is not a demand for reparation of harm to the health of specific individuals, but rather a claim for the ‘contract, on charge of the defendant, of specialized persons or institutions in order to design and carry out a plan for the health improvement and monitoring of the inhabitants affected by contamination’, meaning that what should be analysed is the presence of a public health problem and the causation of this harm applying the mentioned theories.”<sup>93</sup>*

*\*“This possibility of suffering a harm, which in this case is a risk to undetermined individuals, should not leave defenseless those threatened by the contingent harm because the legislator has wisely provided for (Article 2236 of the Civil Code) the popular action suit that has been brought, by means of which have been requested, amongst other things, the removal and the adequate treatment and disposal of the contaminating wastes and materials still present, the cleaning of rivers, streams and lakes, and in general, the cleaning of the soil, plantations and crops and so on, where there are contaminating wastes produced or generated as a consequence of the operations directed by Texaco, which are precisely those contaminants mentioned in the previous lines, included in the reports of the different experts who have submitted their reports, and that threaten with the possibility, admitted by the defendants, to damage undetermined individuals, such as the ones represented by the plaintiffs.”<sup>94</sup>*

*\* The compensation awarded in the Lago Agrio Judgment reflects the diffuse nature of the rights decided by the Lago Agrio Court: over US\$ 6 billion for remediation of state-owned lands; over US\$ 2 billion for a public health system (confirming “that the individualized reparation of the health of the affected persons, who are undetermined, cannot be ordered, but measures can be ordered that equally tackle the problem in a general way”); US\$ 150 million for a potable water system to “benefit the persons who inhabit the area”; and US\$ 100 million for “a community reconstruction and ethnic reaffirmation program.”<sup>95</sup>*

*\* “[W]e must note that the reparation of particular cases of cancer has not been demanded, nor are such cases identified, thus they are not remediable, but rather to the contrary, it is considered that this evidence together with the statistics reflects an aggravating factor to the public health problem referred to above. Considering that the lack of individualization of the victims does not free from the responsibility of repairing such harm, what is appropriate to analyze is who would be the beneficiary of said remediation, therefore, paying attention to the fact that it has that it has been proven that a serious public health problem exists.”<sup>96</sup>*

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<sup>92</sup> C-931, pp. 138-139.

<sup>93</sup> C-931, p. 170.

<sup>94</sup> C-931, p. 174.

<sup>95</sup> C-931, pp. 182-84.

<sup>96</sup> C-931, p. 184.

*\* “The beneficiary of the trust shall be the Amazon Defense Front or the person or persons that it designates, considering that ‘those affected’ by the environmental harm, are undetermined, but determinable, persons united by a collective right.”<sup>97</sup>*

*\* “The additional 10% of the amount ordered as reparation of harm in name of the Amazon Defense Front” can only be granted to those who bring actions on behalf of the community. In other words, nobody is rewarded for filing actions seeking reparation of their personal injuries.”<sup>98</sup>*

5.124. None of these amounts can be understood as an award of compensation for personal harm suffered by an individual Lago Agrio Plaintiff.

5.125. The Clarification Order of 4 March 2011 provides that: “it was clearly established in the Judgment that we are facing a situation of damage to public health, and not to individualised claims for injuries or diseases”.<sup>99</sup> It also provides, in material part:

*\* “The Court points out that the complaint was signed by a group of individuals, the plaintiffs, but they are not suing on their own behalf. Rather, they are suing on behalf of thousands who say they have been affected by the existence of environmental damage. And they filed the complaint to benefit all of these people.”<sup>100</sup>*

*\* “In addition, it is clarified that it does not correspond to the President of this Court to ‘clarify’ the judgment with a list of affected persons, since it was clearly established in the judgment that we are facing a situation of damage to public health, and not to individualised claims for injuries or diseases. Thus, the manner in which the persons affected should be redressed in their health shall be through a health program established as a redress measure in the thirteenth conclusion of law of the judgment.”<sup>101</sup>*

*\* “Concerning the twenty-first request, it is clarified that when mention is made of damage to persons, it is explained in the judgment that what is involved is damage to their culture and damage to their health, but that are a direct consequence of the environmental damage. This should not be confused with personal damage in the sense of damage to individuals. Rather, it should be understood as damage to persons or human beings in general, and should only include such damage as is a direct consequence of the contamination, as is explained in the judgment.”<sup>102</sup>*

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<sup>97</sup> C-931, p. 186.

<sup>98</sup> C-931, p. 187.

<sup>99</sup> C-931, p. 23.

<sup>100</sup> C-1367, p. 4.

<sup>101</sup> C-1367, p. 23.

<sup>102</sup> C-1367, p. 24.

5.126. As already indicated, the Lago Agrio Judgment appears to award US\$ 864 million or potentially US\$ 1.82 billion, to the Amazon Defense Front (the “ADF”) as the judgment debt’s beneficiary to fund generalised remediation projects in the former consortium area, unrelated to any personal harm to any of the Lago Agrio Plaintiffs as individuals. None of the Lago Agrio Plaintiffs’ claims were assigned to the ADF.

5.127. This interpretation of the Lago Agrio Judgment is supported by the terms of the subsequent Appellate Judgment and the Order clarifying the Appellate Judgment of 3 and 13 January 2012 respectively. As to the Judgment, the Appellate Court there decided:

*\* “The economic losses suffered by the plaintiffs would constitute a loss and as such they were not alleged in the complaint and neither is there any claim whatsoever for their compensation, for which reason the record contains no grounds that would justify ordering the defendant to indemnify them, even if the existence of those losses were proven in the eyes of the judge.”<sup>103</sup>*

*\* “The national case law does not clearly show any reference to the action for contingent damage, for which reason its non-existent or extremely limited practical application in Ecuador can be affirmed; so there is no opposition to applying the mentioned rule to claims of an environmental character, since the ideas of the legal premise are not in any way inconsistent with that of what happens in the natural kingdom. Art. 2214 of the Civil Code imposes the obligation to redress on who caused the damage to another, and in this case the judgment is sound for establishing damage, with legal responsibility of the defendant and the nexus between the antecedent - oil production activity -, and consequently - environmental damage; not personal damage;. there lies the foundation of the obligation to provide redress; an unintentional tort - infringing Ecuadorian law that causes harm to another -, affecting not only the flora and fauna, but also other interest as a protected legal good - the health of the people in connection with the environment, and its clear result of harm.”<sup>104</sup>*

*\* “[I]t is clarified that the content of the publication must have the same basic elements of a message, and include the following criteria: a) The message of public apology will be distributed in the locations and in the manner described in the first instance judgment; b) The recipient of this message of public apology will be ‘the communities of indigenous peoples, settlers, and in general, all those who have been affected by the damages,’ referred to in the lower court judgment – February 14, 2011 – of the Provincial Court of Justice of Sucumbíos; c) The message offeror or signatory may be an individual but acting as the legal representative of Chevron Corporation, and shall act legitimised in the name of the company Chevron Corporation to do so both in Ecuador and in the United States of America; d) The offeror will offer the recipient their most sincere apologies; e) The offeror must*

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<sup>103</sup> C-991, p. 3.

<sup>104</sup> C-991, pp. 9-10.

*declare that that it laments the following: 1.- The damage caused to the ecosystem; 2.- The damages to the lives and health of the recipients; 3.- The impact suffered by their cultures; e) The offeror must declare that it also recognizes the existence of other irreparable damages and laments them; f) The offeror must recognize that the damages were caused by the implementation of inadequate technology and practices and that the use of available technology that could have prevented; or, at least decreased, the damages was omitted; g) The offeror may clarify that it is making the publication by judicial order and that it does not imply recognition of any obligation nor ulterior, civil nor criminal responsibility.”<sup>105</sup>*

5.128. This analysis as to diffuse and not individual liability is supported by the terms of the later Cassation Court’s Judgment of 12 November 2013. It noted:

*“The Environmental Management Act has foreseen these so-called popular-action lawsuits with regard to the environment and having to do with diffuse rights, under which rule this complaint has been filed. That is to say, as they are collective rights that are established under a popular action lawsuit ... .”<sup>106</sup>*

5.129. This analysis is also supported by the terms of the Constitutional Court’s Judgment of 27 June 2018. It decided that the Lago Agrio Judgment was based on the diffuse right to live in a healthy environment, citing Article 19.2 of the 2008 Constitution and Articles 14 of the current Constitution: the Lago Agrio Litigation is “based on the right of people to live in a healthy environment, and as this is a constitutional and collective right, it must be focussed in our analysis.”<sup>107</sup>

5.130. This analysis is consistent with the powers of attorney granted by the named Lago Agrio Plaintiffs to their representatives. Whatever the position in regard to these powers of attorney (as to which there appears to be an issue), it is clear that these representatives did not have any powers of attorney from individual members of the broader community of 30,000 individuals (see also the Huani Litigation summarised in Part IV above). Moreover, the “waiver of rights” against Ecuador and PetroEcuador ostensibly conceded by the Aguinda Plaintiffs’ representatives (on 26 November 1996) was made without powers of attorney from individuals comprising the broader community.<sup>108</sup>

5.131. It is also consistent with statements made by Mr Donziger. These include the following, taken from the Crude Outtakes: “But, you know, one change is in the beginning we

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<sup>105</sup> R-299, p. 2.

<sup>106</sup> C-1975, p. 185; see also Professor Andrade’s testimony at the Track II Hearing D11.2301ss.

<sup>107</sup> C-2551, p. 91.

<sup>108</sup> C-911.

always felt like the case was only for, to get money to do a proper clean-up. But we, we've broadened that out to really come to the conclusion after a lot of analysis that we should put in every category of damages we possibly can, *other than direct compensation to individuals*"<sup>109</sup> (emphasis here supplied).

5.132. Last but not least, at the Track II Hearing, the Tribunal understood that the Respondent (which was not a party to the Lago Agrio Litigation) accepted that the Lago Agrio Court did not award health-related damages based on any past or existing personal injury to any specific person or persons.<sup>110</sup>

5.133. This factor regarding diffuse rights decided by the Lago Agrio Judgment is relevant to the issue whether under the Treaty the Lago Agrio Judgment is barred by the 1995 Settlement Agreement (with related agreements), as the Claimants contend and the Respondent denies. The Tribunal addresses this issue later in this Award, in Part VIII.

***I: The Lago Agrio Judgment – Judge Zambrano***

5.134. At the later RICO trial in New York, Dr Zambrano testified in writing and orally, subject to cross-examination, in regard to the writing of the Lago Agrio Judgment.<sup>111</sup> Dr Zambrano (who does not speak English) testified in Spanish, interpreted into English. Dr Zambrano was no longer a judge, having been dismissed from Ecuadorian judiciary in 2012.

5.135. As to the authorship of the Lago Agrio Judgment, Dr Zambrano testified at the RICO trial:

*“Q. Now, Mr. Zambrano, am I correct that it is your testimony that you are the sole author of the Lago Agrio Chevron judgment? A. Yes.*

*Q. And that nobody else helped you write even a word of that judgment, that's your testimony, correct, sir? A. No.*

*Q. Who else helped you write even a word of that judgment, sir? A. When I dictated it to the secretary, she would write what I was dictating.*

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<sup>109</sup> C-360, undated, at CRS-269-00- CLIP 01, pp 460-461 [00:41-00:59].

<sup>110</sup> Track II Hearing D1.103-104, 264 & 288.

<sup>111</sup> C-1981 (Declaration); C-1979 (Deposition); C-1980 (RICO Trial Transcript).

*Q. Sir, I'm not talking about the secretary taking dictation. It's your testimony, sir, that every word in that judgment was your words that you dictated, correct, sir, that's your testimony? A. Yes.*

*Q. And it's your testimony that nobody else wrote any of those words, only you dictated and wrote those words, that's your testimony, correct, sir? A. Yes.”<sup>112</sup>*

5.136. As regards Ms “C”, his temporary student secretary, <sup>113</sup> Dr Zambrano testified at the RICO trial:

*“Q. You say she typed into the computer as you dictated the Lago Agrio judgment to her, is that correct, sir? A. Yes ...*

*Q. Did you ever write out exactly what you wanted the judgment to say in longhand and then hand her your handwritten product to just type into the computer? A. No ...*

*Q. Dr Zambrano, did you ever show Ms [“C”] any documents for her to type from”  
A. No ...*

*Q. The words that Ms [“C”] typed into the computer as the Lago Agrio Chevron judgment were all words that you spoke out loud as dictation to her and she then typed them into the computer, correct? A. It was what I was dictating to her.”<sup>114</sup>*

5.137. Dr Zambrano testified, also at the RICO trial, as to his general working methods for drafting at the Lago Agrio Judgment, as follows:

*“For starters, I would arrive at the office at six, 6:30 in the morning, or seven, depending if it was raining. She [Ms “C”] would normally arrive at eight in the morning. She would sit at the computer at the chair that's in front of the table where the [New] computer was, and she would begin the day by taking some of the extracts of items that I had already singled out in some of the cuerpos, the annotations I had made. I would begin dictating by taking a document from here, another one from over here. So you have an idea as to what the office was set up, the cases, I'm sorry, the cuerpos of the trial were laid out. On some of them I had the corresponding annotations. On some occasions I would sit on the piece of furniture that was next to her desk. I would dictate. Other times I would stand up because I would reach for a document or refer to a cuerpo or to some other writing. I would refer to notes that I had made and in my mind I was developing the idea I wanted to state so she would type it accurately.” <sup>115</sup>*

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<sup>112</sup> C-1980, pp. 1603-1604.

<sup>113</sup> Dr Zambrano testified that Ms “C” was a young student whom Judge Zambrano employed temporarily from mid-November 2010, at US\$ 15 a day, at his own expense: C-1980, pp. 1659 & 1664.

<sup>114</sup> C-1980, pp. 1658, 1662 & 1663.

<sup>115</sup> C-1980, pp 1661-1662.

5.138. The Tribunal notes that the Lago Agrio Judgment contains numbers, formulae and abbreviations that do not lend themselves to mere oral dictation; and, in addition, it contains out of order numeric sequences identical to those in the unfiled materials which could not be the result of errors in dictation (see above). Dr Zambrano's account of his working methods is not credible. His account is not accepted by the Tribunal.

5.139. Later, as to authorship and research, Dr Zambrano testified:

*“Q. Did you work long hours to prepare the judgment, sir? A. Yes.*

*Q. Did you pour your heart and soul into working on that judgment, nights, weekends? ... A. I worked many hours, many days, including several weekends.*

*Q. And nobody else provided assistance to you with the research you say you needed to do to write the judgment, correct, sir? ... A. Could you please clarify what you mean by assistance, in what sense?*

*Q. Nobody else provided assistance to you in connection with you preparing the Lago Agrio Chevron judgment, correct, sir? ... A. No.*

*Q. Other than the typist you mentioned earlier, am I correct, sir, that nobody ... A. No one has helped me to write the judgment. I was the one who exclusively drafted it.*

*Q. And nobody helped you do the research you needed to do to write and author the judgment, correct, sir? A. I did the research.”<sup>116</sup>*

5.140. At the RICO trial, as regards the allegation that Dr Guerra played a part in drafting orders in the Lago Agrio Litigation and the Lago Agrio Judgment, Dr Zambrano testified:

*“Q. Did Mr. Guerra help you with drafts in connection with the orders you issued in the Chevron case? A. Never.*

*Q. Sir, am I correct, sir, that it would have been improper under Ecuadorian law to have anyone else help you author the Lago Agrio Chevron judgment? A. Yes.”<sup>117</sup>*

5.141. At the RICO trial, Dr Zambrano admitted that Dr Guerra had drafted *other* orders issued by him:

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<sup>116</sup> C-1980, pp. 1607-1608.

<sup>117</sup> C-1980, pp. 1648-1649.

*“Q: Sir, did there come a time when Mr Guerra was no longer a judge? A: Yes.*

*Q: And you were still a judge when Mr Guerra left the bench, correct? A: Yes.*

*Q: Am I correct, sir, that Mr Guerra helped you with the drafting of orders in your cases back in 2010 and 2011? A: Yes.”<sup>118</sup>*

5.142. Dr Zambrano further testified at the RICO trial that Ms “C” was responsible for carrying out internet research:

*“Q: ... While you were working on the Lago Agrio Chevron judgment, who conducted the Internet searches on the new computer? A: I have stated that it was Ms [“C”].*

...

*Q: Who else conducted Internet searches on the new computer on which you were working on drafting the Lago Agrio judgment? A: I would give the topic to Ms [“C”]. She would find it for me. Even when it was very late, she would take that topic and then bring it back to me.*

*Q: ... She is the only person who did Internet searches you requested on the new computer that you used to draft the Lago Agrio Chevron judgment, correct, sir? A: Yes.*

*Q: Did you do any Internet searches yourself to help you research the Chevron case, without Ms [“C”]’s help, on that new computer?*

*A: No.”<sup>119</sup>*

5.143. At the RICO trial, as regards the use of his “Old” and “New” computers for the Lago Agrio Judgment, Dr Zambrano testified:

*“Q. Mr. Zambrano, I wanted to ask you some questions about the computer in your office on which you dictated to Ms [“C”] the judgment in the Lago Agrio Chevron case. Sir, was this computer an office computer assigned to you by the judicial council? A. Yes.*

*Q. Was this a desktop computer? A. Yes.*

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<sup>118</sup> C-1980, p. 1630.

<sup>119</sup> C-1980, pp. 1683-1684.



*Q. All of the typing of the judgment was done on this one computer, not any other, correct? A. Yes.*

*Q. When you first became a judge in Lago Agrio in 2008, you were assigned a different computer by the judicial council, correct? A. Yes.*

*Q. And then when the court equipment was modernized, you received a new computer from the judicial council, correct? A. Yes.*

*Q. It was on this new computer that the whole writing of the judgment was done, correct? A. Yes.”<sup>120</sup>*

5.144. Dr Zambrano was also questioned during the RICO trial about his use of Excel spreadsheets:

*“Q: Sir, were there ever any Excel spreadsheets left outside your door at the courthouse in these packages you say were left there during the Lago Agrio Chevron case? A: I don’t recall.*

*Q: Do you even know what an Excel spreadsheet is, sir? A: No.*

...

*Q: Sir, how did you calculate the percentages of TPH levels that are in this judgment at pages 101 and 102, if you recall, sir? A: No.*

*Q: Can’t recall, correct? A: I don’t recall exactly.*

...

*The Court: What is your best recollection, sir? The Witness: This was taken from the reports that were being submitted by the experts.”<sup>121</sup>*

5.145. These percentages of TPH were not calculated from expert reports filed in the Lago Agrio Court. Dr Zambrano’s explanation is also inconsistent with his testimony that he dictated the Lago Agrio Judgment to his student secretary. Moreover, Dr Zambrano does not speak English. The term “TPH” (shorthand for total petroleum hydrocarbon) is used multiple times in the Lago Agrio Judgment, whereas the equivalent Spanish term is “HTP”.<sup>122</sup> The explanation lies in the use of “TPH” in the unfiled Fusión Memorandum,

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<sup>120</sup> C-1980, pp. 1678-1679.

<sup>121</sup> C-1980, pp. 1697-1698.

<sup>122</sup> C-1980, p. 1615.

as used in the Lago Agrio Judgment in awarding US\$ 5.4 billion for the cleaning-up of TPH.

5.146. In relation to his workload during the period between October 2010 and February 2011, Dr Zambrano testified at the RICO Trial:

*“Q: Sir, during the period from October 2010 through February 14, 2011, you had many other civil and criminal cases that were assigned to you to decide besides the Lago Agrio Chevron case, correct? A: Yes.*

*Q: And you issued many other orders in your other cases during the period from October 2010 through February 14, 2011, correct, sir? A: Could you please repeat the question?*

*Q: You issued many other orders in your other cases besides the Lago Agrio Chevron case during the period October 2010 to February 14, 2011, correct, sir? A: Yes.*

*Q: In fact, it’s possible that you issued more than 200 written orders or judgments in your other cases besides the Lago Agrio Chevron case between October 2010 and February 14, 2011, correct, sir? ...A: It is likely.”<sup>123</sup>*

5.147. On the specific question of bribery, Dr Zambrano testified at the RICO trial as follows:

*“Q: Dr Zambrano, did you ever solicit a bribe in the Lago Agrio Chevron case from anyone? A: Never, from no one.*

*Q: Did you ever agree to accept a bribe in the Lago Agrio case from anyone? A: I would never do so because it would go against my principles.*

*Q: Did you ever agree for payment or the promise of payment to allow someone else to write a part of the Lago Agrio Chevron judgment? A: No.*

*Q: Can you tell us whether or not you ever agreed in exchange for payment or the promise of payment to, in the Lago Agrio Chevron case, to rule in favor of one particular party? ... A: Never. As I’ve stated, that would go against my principles.”<sup>124</sup>*

5.148. In his RICO Declaration, Dr Zambrano testified:

*“... Since it was a complex and enormous case, I spent many hours working on the case, especially at night. Obviously for logical reasons I spoke to different people, especially Judges and former Judges for their points of view about certain aspects*

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<sup>123</sup> C-1980, pp. 1738-1739.

<sup>124</sup> C-1980, p. 1806.

*of the case. I never consulted with any of the litigant parties. I confirm that I am the only author of the judgment that I issued on February 14, 2011, and of the clarification that I issued on March 4, 2011. I did not receive support or assistance from Dr Alberto Guerra or from any other person, much less from the litigant parties. It is not true that Dr Guerra reviewed the judgment, since neither he nor anyone else reviewed it before it was issued. It is false that Dr Alberto Guerra worked in my home. He has never entered my house in Lago Agrio or in any other province for any reason. I have never told Dr Guerra to approach the parties to ask them for money. I composed and prepared the judgment on the computer that the Judiciary Council had assigned to me, which was in my possession prior to the analysis of the principal subject matter of the trial. For such purpose each of the documents submitted by the litigant parties was reviewed ... ”<sup>125</sup>*

5.149. The Tribunal has tried to give Dr Zambrano, as a witness, the benefit of any reasonable doubt. He was testifying in a foreign procedure through an interpreter; he was addressing events taking place years before; no judge recalls in full the details of his or her judgment years later; he had probably never been cross-examined before; his cross-examiner during his deposition appears to have lost his temper to an extent that would shock any civilian lawyer; and, whilst Dr Zambrano was provided with his own counsel, there was clearly insufficient time for him to brief her on the complexities of the Lago Agrio Litigation and the Ecuadorian legal system. Further, it may be a significant disadvantage for this Tribunal to assess his testimony on transcripts only, without seeing Dr Zambrano testify in person.

5.150. Yet, having made all these and other allowances in his favour, it is clear from the transcripts of his testimony that Dr Zambrano was a most unsatisfactory witness. In short, the Tribunal finds his testimony, on material issues, incredible; and the Tribunal does not accept it.

***J: The Lago Agrio Judgment – Ms “C”***

5.151. For the RICO Litigation in New York, Ms “C” testified, in writing, as Judge Zambrano’s temporary student secretary.<sup>126</sup> Unfortunately, Ms “C” never gave any deposition in the RICO Litigation or oral testimony at the RICO trial. It appears that she could have done so, having received her visa from the USA before the end of the trial in the RICO Litigation; but then the RICO defendants informed the Court that she would not testify

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<sup>125</sup> C-1981, paras 13-15.

<sup>126</sup> C-2458 (Declaration); C-2387 (Direct Examination).

at the RICO trial. As a result of her absence from the RICO trial, Ms “C” was never cross-examined on her written testimony. Ms “C” was not a witness in this arbitration.

5.152. In her first Declaration of 30 October 2013, made in Spanish and sworn before a notary in Lago Agrio, Ms “C” testified (with paragraph numbers here added):

*“[1] ... I declare that during the middle of the month of November of two thousand ten, I was called by Attorney Nicolás Augusto Zambrano Lozada, in order to help him with the digital entry of the cases that he was handling in his role as President of the Provincial Court of Justice of Sucumbíos, and, among others, on one very particular case that I remember, called for DAMAGES being pursued by Ms MARIA AGUINDA ET AL., against CHEVRON CORPORATION, and which was numbered as ZERO ZERO TWO DASH TWO THOUSAND THREE (002-2003).”*

*[2] That my working hours were from eight a.m. to twelve p.m.; and from two p.m. until six p.m., seven p.m., eight p.m., and on some occasions until nine p.m., and that for this I received a daily salary of fifteen United States dollars. Additionally, and in all honesty, I state that on most occasions after I left for my home, attorney Nicolás Augusto Zambrano Lozada continued to work and he would lock the door; I did this until the end of the month of February of two thousand eleven when I told attorney Nicolás Augusto Zambrano Lozada that I would not go anymore, because my university studies did not allow me to do so;*

*[3] Likewise, I must state that during the time that I worked exclusively for attorney Nicolás Augusto Zambrano Lozada, I only received dictation from him, and that he did it from his handwritten notes that he took every day and from the constant review of a large number of binders that case had. I also declare, that when attorney Nicolás Augusto Zambrano Lozada left the office to fulfill his duties, he asked me to also leave and wait for him outside until he returned; he never left me alone in his office, he did not allow it, and he also did not allow outside people to enter it, nor did I ever see attorney Nicolás Augusto Zambrano Lozada, with regard to the referenced case, have any discussion with anyone, at least in my presence.*

*[4] The judgment of the case: María Aguinda et al. against Chevron Corporation dated February fourteenth of the year two thousand eleven, at eight thirty-seven a.m. Likewise, I declare that during the time that I spent in attorney Nicolás Augusto Zambrano Lozada’s office, I did not receive instructions, or dictation, from any other person that were not those from attorney Nicolás Augusto Zambrano Lozada, neither was a pen-drive or CD or another storage device used in the digital entry of the judgment in the case being pursued by María Aguinda et al., against CHEVRON CORPORATION. This is all I have to declare, in all honesty...”<sup>127</sup>*

5.153. In her subsequent witness statement of 12 November 2013, made in Spanish and signed in Quito, Ms “C” testified in similar terms:

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<sup>127</sup> C-2458.

*“1. I am an Ecuadorian citizen of twenty years of age. I have my domicile at ... of the city of Nueva Loja, in the Providence of Sucumbios. I am currently studying law at the Universidad Tecnica Particular de Loja [Private Technical University of Loja], and working at the National Development Bank, in the legal department.*

*2. Between the month of November of the year 2010, and the end of February 2011, I worked for Dr Nicolas Augusto Zambrano Lozada. My work mainly consisted of typing on a computer the text of the ruling of the trial known as “Aguinda, et al. v. Chevron Corporation” (number 002-2003), following the dictation of Dr Zambrano. The ruling was handed down on February 14 of the year 2011.*

*3. The work for Dr Zambrano I performed in his office, in the Provincial Court of Justice of Sucumbios, in the city of Nueva Loja, at a desk with a computer that was available there. For my work, I received the amount of \$15 USD daily, and my work schedule was from 8am to 12pm, and from 2pm to 5, 6, 7, 8 and even until 9pm. When I would leave, Dr Zambrano in many occasions would stay in his office.*

*4. The typing process of the aforementioned ruling was as follows: Dr Zambrano had in his office many files of the record, as well as great quantities of handwritten notes, and other research texts. He would constantly review and contrast these materials, going from one side of his office to the other, as he would dictate the sentence to me while I would type it in the computer. At no time did Dr Zambrano base his dictation on preexisting printed versions of the ruling; I can attest to this because of the slow pace that he had when dictating his ideas, sometimes returning to previous parts and correcting them.*

*5. Another of the tasks entrusted to me by Dr Zambrano was doing general Internet research of rulings and other reference texts, which I would print and hand them over for his reading and analysis. For this, I always used the computer of the Court. I do not remember which were the subjects or matters that he entrusted to me to research.*

*6. Dr Zambrano was always very careful and would verify that his office was always safe, always leaving it locked in his absence. When he was absent during my work schedule, he would ask me to wait for his return outside of his office.*

*7. During the time that I worked for Dr Zambrano typing the ruling, there was never a third person present in his office, and I never received a dictation or instructions from any person other than Dr Zambrano.*

*8. During all of the time of dictation and typing of the ruling, there was never connected to the computer on which I worked any external storage device such as USB drive (pen drive) or external hard drive, nor were there any CD or DVD inserted in the same.”<sup>128</sup>*

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<sup>128</sup> C-2387.

5.154. It is evident that Ms “C”’s written testimony, albeit limited, ostensibly supports the testimony of Dr Zambrano in general terms. However, having not been subjected to any cross-examination at the RICO trial (or in this arbitration), the Tribunal accords her written testimony no weight on any material issue of fact. There also many unanswered questions arising from her testimony, including the scope of her foreign language skills and her abilities as a researcher of foreign legal materials. Ms “C” was a 17 or 18 year-old student paid US\$ 15 an hour; and she was neither a trained legal assistant nor a professional secretary.

5.155. The Tribunal records that there is no evidence before this Tribunal that Ms “C” participated in or was aware of any ‘ghostwriting’ during her brief and limited employment by Judge Zambrano. Moreover, the Tribunal has grave reservations as to the manner in which the two statements were produced in her name in the RICO Litigation.

***K: The Lago Agrio Judgment – Dr Guerra***

5.156. For the RICO trial in New York and for this arbitration, Dr Guerra testified in the form of his three RICO statements,<sup>129</sup> his depositions of 2 May 2013<sup>130</sup> and 5 November 2013;<sup>131</sup> his oral testimony at the RICO trial,<sup>132</sup> his Witness Statement<sup>133</sup> and his oral testimony at the Track II Hearing.<sup>134</sup>

5.157. In his RICO statement, Dr Guerra testified:

*“... 25. In late January or early February of 2011, approximately two weeks before the trial court in the Chevron case issued the judgment, Mr Zambrano gave me a draft of the judgment so that I could revise it. It was through him that I found out that the attorneys for the [Lago Agrio] Plaintiffs had written that judgment and had delivered it to him. Mr Zambrano asked me to work on the document to fine-tune and polish it so it would have a more legal framework. In recalling these facts initially, I assumed I had received the document on a flash drive given to me by Mr Zambrano in the Quito airport, as he usually did with the projects I helped him with. But later on I specifically remembered that I worked on that document in Mr Zambrano’s residence in Lago Agrio using Mr Fajardo’s computer. I do not recall the exact date this happened, but I worked on the draft judgment for several hours*

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<sup>129</sup> C-1616A; C-1648; C-1828; R-1331.

<sup>130</sup> C-1888; R-906.

<sup>131</sup> R-907; C-2358.

<sup>132</sup> C-1978.

<sup>133</sup> C-2358; C-2386.

<sup>134</sup> Track II Hearing D3.594-D4.900.

during two days. Mr Zambrano explicitly asked me not to make copies nor leave traces of this document nor the changes I was making, outside of the file on which I worked.

26. I began to work on the document as soon as I received it. First I read the holding and I began to work on several sections that needed more structure and basis, especially with terminology related to environmental law. I remember that I called Mr Fajardo on his cell phone to ask him about some sections of the document that confused me. Mr Fajardo told me not to worry and that he would e-mail me a memory aid to clarify my questions. Mr Fajardo e-mailed me a document of around 10 to 12 pages titled “Memory Aid,” with some information about the case. In reality, the document did not help me much with my doubts, so that day I worked on punctuation and spelling. I spent the following day making around 20 changes to improve its structure and make it seem more like a judgment issued by the Sucumbíos Court.

27. Overall, I made very few changes to this document—mostly word changes due to personal preference - and the document I returned to Mr Zambrano was not too different from the one the Plaintiffs had given him.

28. Based on what Mr. Zambrano told me, it is my understanding that the Plaintiffs’ attorneys made changes to the judgment up to the very last minute before it was published. But I have never read the final judgment that was published on February 14, 2011 and signed by Judge Zambrano; therefore I don’t know for certain what changes were made after I turned the project over to Mr. Zambrano. After Mr. Zambrano issued the judgment, I assisted him over the phone as he prepared the supplemental and clarification order for the judgment...”<sup>135</sup>

5.158. At the Track II Hearing, Dr Guerra testified that Judge Zambrano gave him a draft of the Lago Agrio Judgment for his review and comments a couple of weeks before the issue of the Judgment on 14 February 2011 (i.e. in the last week of January or the first week of February 2011); and that Dr Zambrano told him he had received it from Mr Fajardo.<sup>136</sup> Judge Zambrano also told Dr Guerra that he (Judge Zambrano) would receive US\$ 500,000 for agreeing to let the Lago Agrio Plaintiffs prepare the Lago Agrio Judgment, to be paid once they “received the product of the judgment when it was implemented.”<sup>137</sup>

5.159. At the Track II Hearing, under cross-examination, Dr Guerra also testified that, upon studying the draft Judgment, he contacted Mr Fajardo for an explanation of certain issues that concerned him. As a result, Mr Fajardo supplied Dr Guerra with a document

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<sup>135</sup> C-1616A, paras 25-28.

<sup>136</sup> Track II Hearing D3.601.

<sup>137</sup> Track II Hearing D3.679-680.

known as “the Memory Aid”.<sup>138</sup> However, this document did not help Dr Guerra; and he did not use it.<sup>139</sup>

5.160. Apart from the Memory Aid, there is no corroboration of these two aspects of Dr Guerra’s testimony from any contemporary documentation or electronic record. The Memory Aid, by itself, is an inconclusive document. In these circumstances, the Tribunal accords little weight to this part of Dr Guerra’s testimony.

***L: The Lago Agrio Judgment – Mr Donziger***

5.161. In his final written testimony, Mr Donziger testified:

*“I did not write the judgment in the Aguinda case in Ecuador. I have no knowledge that anybody on the legal team of the plaintiffs wrote the judgment in this case, or wrote any part of the judgment.*

*I have never met Judge Nicolas Zambrano, nor have I ever communicated with him. Other than his live testimony during this trial, I have never seen Judge Nicolas Zambrano.*

*I did not bribe Judge Zambrano. The allegations by former Judge Alberto Guerra that I was involved in a meeting where I approved a plan suggested by Pablo Fajardo to pay Zambrano \$500,000 is false. Chevron has no evidence that I had any involvement in bribing any judge apart from Guerra’s thoroughly false and corrupt testimony.*

*I have no knowledge of anybody on the plaintiffs’ team paying or seeking to pay Judge Zambrano.”<sup>140</sup>*

5.162. In his depositions, Mr Donziger testified:

*“Q: Did anyone affiliated in any way with the Lago Agrio plaintiffs provide any portion of the text of the Fusión Memo, Exhibit 1806A, in any form to Judge Zambrano prior to February 1<sup>st</sup>, 2011? A: I don’t believe so.*

*Q: Did anyone affiliated in any way with the Lago Agrio plaintiffs provide any portion of the Fusión Memo marked as Exhibit 1806A to anyone associated with Judge Zambrano prior to February 1<sup>st</sup> of 2011? A: I don’t believe so. But to be as clear as possible, it is possible this memo was provided to the court to be put into evidence, or some version of it.*

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<sup>138</sup> R-1331, para 3.

<sup>139</sup> Track II Hearing D4.778-779.

<sup>140</sup> C-2385, paras 71-74.



*Q: Are you aware of an occasion on which Exhibit 1806A, the Fusión memo, was provided to the court in Lago Agrio? A: No.*

*... Q: Prior to February 1<sup>st</sup> of 2011 did anyone affiliated in any way with the Lago Agrio plaintiffs draft a judgment that included any portion of the text of the Fusión memo? A: No, not that I know of.<sup>141</sup>*

*Q: Prior to February 1<sup>st</sup> of 2011, you were involved in having draft Lago Agrio judgments prepared, correct? A: No, I don't believe so.*

*Q: Would you agree that portions of the rest of the Fusión memo, Exhibit 1806A, were at some point in some form provided to Judge Zambrano? A: I wouldn't characterise it that way.<sup>142</sup>*

*... Q: Did the Lago Agrio plaintiff team at any time develop a proposed judgment for the Lago Agrio case? A: I don't believe so. I don't know. It is possible.*

*Q: Did you personally ever draft any portion of a draft judgment for Lago Agrio? A: I don't believe so."<sup>143</sup>*

5.163. In the Tribunal's view, Mr Donziger's guarded answers based on his non-belief, lack of knowledge or even possibilities, when he was one of the principal actors at all material times with personal knowledge of almost every aspect of the Lago Agrio Litigation, are curiously evasive. None can be categorised as an unequivocal denial of the 'ghostwriting' of the Lago Agrio Judgment.

5.164. In the circumstances, the Tribunal does not accept that Mr Donziger had no knowledge, at the time, as to the 'ghostwriting' of the Lago Agrio Judgment by certain of the Lago Agrio Plaintiffs' representatives, in corrupt collusion with Judge Zambrano. The Tribunal finds that Mr Donziger, with others, was privy to such 'ghostwriting' and collusion.

***M: The Judgment of the Lago Agrio Appellate Court (2012)***

5.165. By its judgment of 3 January 2012, extending over 16 pages, the Lago Agrio Appellate Court affirms the Lago Agrio Judgment.<sup>144</sup> It upholds the punitive damages award because Chevron had refused publicly to "apologise". It also decides that it cannot

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<sup>141</sup> C-1003, pp. 4686-4688.

<sup>142</sup> C-1003, p. 4726.

<sup>143</sup> C-1003, pp. 4814-4815.

<sup>144</sup> C-991.

address Chevron's fraud allegations regarding the conduct of the Lago Agrio Litigation. The appeal was otherwise, ostensibly, a *de novo* hearing based on the evidence filed the Lago Agrio Court. Given the volume and complexity of that evidence, grave doubts arise as to the thoroughness required for such a *de novo* hearing,

5.166. As to the nature of the Lago Agrio Plaintiffs' claims decided by the Lago Agrio Court, the Appellate Court confirms that the Lago Agrio Judgment addressed and decided these claims unequivocally as "diffuse" claims and not as individual claims made by a plaintiff seeking compensation for personal harm to that individual plaintiff (see above for the references to the Appellate Court's Judgment and subsequent order clarifying its judgment).

5.167. As to Chevron's "fraud" allegations, this judgment of the Appellate Court reads in part:

*"Mention is also made of fraud and corruption of plaintiffs, counsel and representatives, a matter to which this Division should not refer at all, except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America due to a complaint that has been filed by the very defendant here, Chevron, under what is known as the RICO act, and this Division has no competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice, if that were the case."*<sup>145</sup>

5.168. The Appellate Court issues a Clarification Order of its Appellate Judgment on 13 January 2012. It effectively grants the Lago Agrio Plaintiffs' requests for clarification, including a statement that the Appellate Court had considered and rejected evidence of the fraudulent conduct of the Lago Agrio Plaintiffs' representatives.

5.169. The relevant passage, relating to the Lago Agrio Plaintiffs' seventh request, merits citation in full. It reads (in English translation, with numbered paragraphs here added for ease of reference) as follows:<sup>146</sup>

*"7. [1] In relation to the seventh request for clarification, regarding whether or not the defendant's accusations with respect to irregularities in the preparation of the trial court judgment have been considered, it is clarified that yes such allegations have been considered, but no reliable evidence of any crime have been found."*

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<sup>145</sup> C-991, p. 10.

<sup>146</sup> R-299 (also C-2314), pp. 3-4.

[2] *The Division concluded that the evidence provided by Chevron Corporation, does not lead anywhere without a good dose of imaginative representation, therefore it has not been given any merit, nor has more space been dedicated to it.*

[3] *But it is appropriate to say that the Division rejects in this point, and definitively, as unfounded, the defendant's affirmation in chapter "C" of its legal brief that the judgment has been based on information foreign to the record, or with secret assistance, because, as the Division reviewed and explained in the 3 January 2012 judgment, all the valid evidence that has been considered, that is to say, all of the samples, documents, reports, testimonies, interviews, transcripts and minutes, referred to in the judgment, are found in the record without the defendant identifying any that is not – the defendant's motions simply show disagreement with the reasoning, the interpretation and the value given to the evidence, but they do not identify correctly legal evidence that is in the record.*

[4] *The texts indicated by Chevron Corporation, as an example that the judgment has been based on information foreign to the record, are not considered or put forth as legal evidence, not even by the defendant itself in its claim, for which reason the Division understands that it is not alleging that the judgment has been sustained on evidence foreign to the record.*

[5] *Therefore, starting by considering that only the evidence legally produced is deemed authentic in trial about the facts in dispute, and that which must be in the record, it is concluded that the appealed judgment is based on legally presented evidence, that is in the record, although certainly the reasoning and the interpretation, as human – of the judge – having his intellect as source of origin, are incorporated in the record through his rulings.*

[6] *It is noted that on at least one occasion of which this Division is aware, the defendant provided a considerable amount of information to the President of the Court, related to an arbitration case between Chevron Corporation and the Government of Ecuador. This information was not introduced into the record of case 002-2003 and has not been able to be valued by this Division due to the fact that the defendant has not formally entered it into the lawsuit, but even so, and in the Division's opinion, it was known and studied by the lower court judge.*

[7] *In this scenario, the plaintiffs have denounced that Chevron Corporation alleged in the United States of America, one day after the appealed judgment was issued on 14 February 2011, that it suspected that Judge Zambrano had received 'secret assistance' in drafting the judgment, and therefore now it is untimely to try to say this – before the Division – and not before who ruled on the cause in the first instance so that he clarify them.*

[8] *And there is no explanation for reserving these 'suspicions' in order to put them forth before this Division, if we consider, as the plaintiffs' reference, that the defendant knew of this supposed fact the day following issuance of the judgment. Apart from what has been said, this Division further considers it pertinent to make an observation about the 'secret assistance' that is spoken of for drafting the first*

*instance judgment, and that is because of the sense of logical orientation it is difficult to conceive that, were a secret channel to have existed, used illegally by the plaintiffs to supplement or modify the judgment, that pathway would have allowed for the introduction of arguments that were decisive for the resolution of this lawsuit.*

*[9] The Division cannot fail to observe that the defendant's arguments to uphold its accusations revolve around points that in reality do not provide more information that would shore up the defended position, which put in doubt any attributed secret conspiracy. It would not be fitting, therefore, for the defendant to be able easily to say that what is alleged is just an indication of a greater problem since it is public knowledge that legal proceedings for production of documents proposed by the defendant in the United States of America allowed it to access the vast majority of the internal documents prepared by the plaintiffs' representatives.*

*[10] If there had been any 'secret assistance', the presumed concordance between the plaintiffs' internal documentation, and the text of the judgment would not be limited to a fairly simple interpretation of evidence that is contained in the record. This is a civil proceeding in which the Division does not find evidence of 'fraud' by the plaintiffs or their representatives, such that, as has been said, it stays out of these accusations, preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America. This was a determining factor for the Division's considerations in the judgment that is being clarified, since it is obvious that it was not its responsibility to hear and resolve proceedings that correspond to another jurisdiction, nor was it admissible to detain the processing of this principal lawsuit – or worse, to annul it – in order to discuss and make a pronouncement on the interminable and reciprocal accusations over misconduct of some of the parties' attorneys, experts or contractors, which is why these could not affect the final result of the lawsuit.*

*[11] However, this Division expresses its concern over the possibility that the abuse of right extends abroad, with the same intent shown of depriving the plaintiffs of the right that has been declared in this proceeding. It is clarified that the interests at play in this judicial proceeding exceed the interests of the adversaries or their representatives, who in the event that they feel damaged have their rights preserved to exercise them by independent channels.”<sup>147</sup>*

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<sup>147</sup> The original Spanish reads, in the key first, second and tenth paragraphs above: “7. En relación al séptimo pedido de aclaración, sobre si se ha considerado o no las acusaciones de la parte demandada respecto a irregularidades en la elaboración de la sentencia de primera instancia, se aclara que si ha considerado tales alegaciones, pero no ha encontrado pruebas fehacientes de ningún delito. La Sala concluyo que los indicios aportados por Chevron Corporation, no conducen a ningún lado sin una buena dosis de representación imaginativa, por lo que no se le ha dado ningún mérito ni se le dedico mayor espacio. ... De haber existido “asistencia secreta” alguna, la presunta concordancia entre la documentación interna de los demandantes, y el texto de la sentencia no estaría limitada a una interpretación bastante simple de pruebas que constan en el proceso. Este es un proceso civil en que la Sala no encuentra evidencia de “fraude” de los actores ni sus representantes, de modo que, como lo ha dicho, queda al margen de estas acusaciones, dejando a salvo los derechos de las partes para presentar denuncia formal ante las autoridades penales ecuatorianas o para continuar el curso de las acciones que se han interpuesto en los Estados Unidos de América. Esto fue determinante para las

5.170. This statement in the Clarification Order seems materially inconsistent with the passage in the Appellate Judgment, cited above. In any event, it is somewhat difficult to follow the logic of the Appellate Court. It appears to limit its consideration to “legal evidence that is in the record” of the Lago Agrio Court. Chevron’s complaint was not so limited. Nor could it have been before the Lago Agrio Judgment was issued by the Lago Agrio Court.

5.171. In the circumstances, the Tribunal adopts the expert testimony of Dr Coronel to the effect that “the appellate court specifically refused to fulfil its obligation to perform a comprehensive review of both the facts and the law regarding the dispute, as well as the allegations of fraud, as Chevron Corporation (‘Chevron’) had requested it to do.”<sup>148</sup>

***N: The Judgment of the Cassation Court (2013)***

5.172. *12 November 2013*: The Cassation (National) Court issues its Judgment affirming part of the Lago Agrio Judgment; but it nullifies the punitive damages imposed for Chevron’s omission to “apologise”, as required by that Judgment and as upheld by the Appellate Court.<sup>149</sup> As a result, the Cassation Court reduces the Lago Agrio Judgment’s award of damages to US\$ 8.6 billion, with 10% to be paid to the ADF.

5.173. The grounds for Chevron’s cassation appeal included: (i) the inadequate application, lack of application or erroneous interpretation of procedural rules resulting in the irremediable nullity of the proceedings or in the appellant’s defenselessness, provided they have influenced the judgment and that the respective nullity has not been legally validated; (ii) the judgment’s lack of formal requirements provided for by law or the adoption of incompatible or contradictory decisions in the judgment’s operative part; (iii) an extra petita or infra petita judgment; (iv) the inadequate application, lack of application or erroneous interpretation of applicable evidentiary rules, provided they lead to an erroneous application or to the lack of application of legal rules in the judgment; and (v) the inadequate application, lack of application or erroneous

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*consideraciones de la Sala en la sentencia que se aclara, pues siendo evidente que no le competía entrar en conocimiento y solución de procesos que corresponden a otra jurisdicción, tampoco era admisible detener la tramitación de este juicio principal – o peor, anularlo – para discutir y pronunciarse sobre las interminables y recíprocas acusaciones sobre inconductas de algunos abogados, peritos o contratistas de las partes, por lo que éstas no podrán afectar el resultado final del juicio. ...”.*

<sup>148</sup> Coronel ER 7, para 10.

<sup>149</sup> C-1975.

interpretation of applicable legal rules, including mandatory judicial precedent, which were determinative for the judgment's operative part. In short, these grounds included Chevron's fraud allegations and the 'ghostwriting' of the Lago Agrio Judgment.

5.174. The first 48 pages of the Judgment summarise the cassation claims made by Chevron. At pages 48-51, the Judgment sets forth the limits on the Cassation Court's powers to annul an inferior court's decision. Such limits are essentially of formalistic nature and are listed in Article 346 (formerly 355) of the Ecuadorian Code of Civil Procedure. Consequently, under Ecuadorian law, cassation controls do not extend to the review of evidence. An evaluation of the evidence is permissible only when the inferior decision was manifestly illogical, irrational or arbitrary (see pages 145-166 of the Judgment, No. 8.2ff). The purpose of the cassation review (as the Judgment states) is not to serve as a third instance appeal. It is limited to ensuring that the principles of legality and the respect of the Constitution of Ecuador are safeguarded. The Cassation Court confirms that its controls are limited to judging whether such principles have been infringed by the Appellate Court, but that they do not extend further to the Lago Agrio Judgment.

5.175. Accordingly, the Tribunal concludes that the Cassation Court:

- (a) Did not review de novo the conclusion of the Lago Agrio Court or the confirmation by the Appellate Court of the assertion of jurisdiction over Chevron by the Lago Agrio Court on the basis of the Chevron and Texaco "merger"; the Cassation Court accepted that Chevron voluntarily accepted the jurisdiction of the Ecuadorian courts, particularly of the Lago Agrio Court, in the Aguinda Litigation in New York (Nos. 5.2-5.4, pages 51-67; No. 6.4, pages 110-111);
- (b) Did not review any expert reports as to their legality, consistency, weight, intrinsic value, contradictions, whether they were "ghostwritten" or not, or review their evaluation by Judge Zambrano (No. 5.11, page 85);
- (c) Did not review whether there had been any procedural fraud committed by the Lago Agrio Plaintiffs' representatives; moreover, procedural fraud would not be known under Ecuadorian civil law or criminal law; and it is not a ground to nullify a court decision in Ecuador (No. 5.13, pages 89-91; No. 6.12, pages 120-121);

- (d) Did not pronounce itself on the integrity or independence of Judges Yáñez, Nuñez, Ordoñez, Zambrano or the validity of Dr Calmbacher’s testimony (No. 5.15, pages 93-96);
- (e) Did not consider or determine whether the Lago Agrio Judgment or other court orders in the Lago Agrio Litigation were “ghostwritten” or not (No. 5.16, pages 98-99);
- (f) Did not review whether the Lago Agrio Court’s conclusions on the principle of causality for harm or damages were correct or whether the Lago Agrio Court contradicted itself in the calculation of damages, or whether the damages were correctly calculated by the Lago Agrio Court (Nos. 6.7, 6.8, pages 115- 117); and
- (g) Did not establish whether the Lago Agrio Judgment was based on evidence not asked for, not produced or not ordered in accordance with Ecuadorian law (No. 6.9, pages .118-119).

5.176. The Judgment also rejected the submissions made by Chevron, by the Cassation Court’s decisions:

- (i) The Lago Agrio Court had subject-matter jurisdiction to apply the 1999 EMA; and, thus, the Lago Agrio Plaintiffs had standing to pursue “diffuse” rights (No. 5.6, pages 67-75);
- (ii) Although the Judgment upheld Chevron’s cassation claim of insufficient reasons regarding the falsity of signatures for some of the Lago Agrio Plaintiffs in the Lago Agrio Complaint, the Cassation Court minimises the importance of such falsity. It decides that that such falsity, even if proven true, had been cured by several presentations throughout the Lago Agrio Litigation by representatives duly empowered by such Plaintiffs; and that, in any case, such issues were not for civil courts (nor for the Cassation Court), but for criminal courts to investigate and determine. It also decides that the validity of the powers of attorneys, representing the Lago Agrio Plaintiffs, were public documents whose authenticity could only be challenged in the criminal courts (No. 5.12, pages 86-90; No. 6.2, page 104-106);

- (iii) The 1995 Settlement Agreement lacks the effect of *res judicata* in respect of diffuse rights such as those claimed by the Lago Agrio Plaintiffs; neither the State of Ecuador nor its Municipalities had the exclusive right to advance or protect such rights prior to the 1999 EMA; and, even before the EMA, individuals had the right to advance or assert “diffuse” rights. Therefore, Chevron’s argument that there was a retrospective application of substantive provisions of the EMA by the Lago Agrio Court was unfounded (No. 9.3-9.8, pages 174-202);
- (iv) The Cassation Court applies the 1999 EMA to Chevron, essentially on the basis of Article 396 of the (then current) Ecuadorian Constitution, establishing an objective basis for the causation of harm in Ecuador when attributing environmental liability. Such liability would also carry with it the jurisdiction of Ecuadorian courts to hear and decide claims, even in respect of companies not present in Ecuador and, as well, to dispense with any requirement to identify PetroEcuador’s shared responsibility for environmental damage claimed in the Lago Agrio Litigation against Chevron (No. 6.6, pages 113-115); and
- (v) The Cassation Court concludes that the Lago Agrio Plaintiffs’ claims, as addressed by the Lago Agrio Court and the Appellate Court, were “diffuse” and not individual claims for personal loss or damage suffered by the Lago Agrio Plaintiffs as individuals.

5.177. As regards Chevron’s allegations regarding “procedural fraud”, the Cassation Judgment states, in material part (with citations here omitted):

*“Chevron Corporation alleges that there is a ‘great collusive demonstration’. When collusion is an independent action governed by our Ecuadorian legislation, it is so regulated under the Collusion Prosecution Act; and, as stated by this Division of the Court, it is not possible to seek the cassation of a judgment by making these kinds of allegations, even more so when, according to the cassation appellant’s affirmations, Judge Nuñez was subject to a proceeding before the Judicial Council. Therefore, the affirmation made by the court of appeals is the correct one, as it is not within its scope of that court to have jurisdiction to hear collusive action cases within a summary verbal proceeding, or procedural fraud, judges’ behaviours, proper and improper meetings, the appointment of substitute judges, plaintiffs’ connivance, among other allegations made by the appellant company.*



...

*With respect to the various ancillary proceedings for clarification and expansion alleged in cassation by appellant, which are an essential part of the procedural sequence, also known as horizontal remedies and decided by the court of appeals, in that it lacks jurisdiction to hear and decide cases of procedural fraud, it is for that reason that the order for clarification requested by the parties allows such parties to bring such legal actions as they believe are available to them. In determining in a sufficient and clear manner that there was no procedural fraud in these proceedings, in the opinion of the Appeals Court, does not mean that the order issued on January 3, 2012 is inconsistent with the judgment rendered on January 13, 2012; it is clear that, by preserving the rights and actions of the parties, the court acknowledges the lack of jurisdiction to decide whether or not there has been procedural fraud.*

*The conclusion that emerges from the foregoing is that there is no contradiction between the judgment handed down on January 3, 2012 and the order issued on January 13, 2012, or any kind of arbitrariness. Arbitrariness occurs when the order or judgment go against the law, in this specific case and as already reviewed by this Cassation Court, through the lack of jurisdiction of the court of appeals to decide on matters such as procedural fraud, there is no arbitrariness and, accordingly, Article 281 of the Code of Civil Procedure has not been infringed. For these reasons the charge is dismissed.*

...

*As explained [above], the fact that the Trial Court has determined that there is no evidence of procedural fraud, and at the same time, lacks jurisdiction to decide on such matters, does not mean that there is any inconsistency, because 1) The subject matter of the judgment is not the existence or absence of procedural fraud. 2) Jurisdiction to decide on the existence of procedural fraud does not lie with the trial court or with the Appeals Court.*

*If the Court does not find the evidence required to determine the existence or absence of procedural fraud, this does not, in and of itself, mean that there was none, since under the law of most countries and as discussed and explained in this judgment, such matters are dealt with separately, and the subject matter of the action is the determination of whether or not procedural fraud was committed. The matters in dispute in this case are different, the action is based on other grounds, and it is a summary verbal proceeding, which cannot be used to determine this type of ancillary proceeding.”<sup>150</sup>*

5.178. In thus affirming the Lago Agrio Judgment, the Cassation Court did not review the merits of any of Chevron’s allegations of fraud in the conduct of the Lago Agrio Litigation or the ‘ghostwriting’ of the Lago Agrio Judgment. However, in commenting

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<sup>150</sup> C-1975, pp. 95, 120-121 (regarding Chevron’s Cassation Appeal: C-1068).

upon the Cassation Court's lack of jurisdiction to adjudicate upon Chevron's allegations, the Cassation Court noted that these allegations were being heard in the pending RICO litigation in New York, USA.<sup>151</sup>

5.179. It is not entirely clear to the Tribunal whether the Cassation Court (or, previously, the Appellate Court) was here effectively relinquishing to the US Courts the allegations of fraud advanced by Chevron to impugn the Lago Agrio Judgment. Although that appears to be the conclusion reached much later by the US Court of Appeals for the Second Circuit in the RICO Litigation, the Tribunal does not here assume that this was in fact so.<sup>152</sup> As regards the Cassation Court, that would have been inconsistent with its citation of the Ecuadorian Collusion Prosecution Act (the "CPA"; see above).

***O: The Judgment of the Constitutional Court (2018)***

5.180. *27 June 2018*: The Constitutional Court issues its Judgment on 27 June 2018,<sup>153</sup> affirming the Judgment of the Cassation (National) Court (2013),<sup>154</sup> following public hearings held on 16 July 2015 and 22 May 2018. The Constitutional Court declares that there is no violation of constitutional law, as alleged by Chevron; the Court rejects the Extraordinary Action of Protection made by Chevron; and it orders its judgment "[t]o be recorded, published and enforced."<sup>155</sup>

5.181. The Constitutional Court Judgment includes summaries of the submissions made by Chevron, as well as submissions made by the Lago Agrio Plaintiffs, the ADF, the Office of the Respondent's Attorney-General and amici curiae. The Constitutional Court's reasons for its Judgment extend over some 100 pages (in Spanish), under nine Chapters.<sup>156</sup> For present purposes, its principal reasons may be summarised as follows, with parts of its text meriting full quotation.

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<sup>151</sup> C-1975, pp. 120-121.

<sup>152</sup> In the Second Circuit's Judgment, the Court decided: "*In these circumstances, in which the district court has, on the claims of corruption, granted equitable in personam relief that does not invalidate the Ecuadorian judgment, and in which the Ecuadorian courts have expressly disclaimed jurisdiction to address the corruption claims and stated that the matter is preserved for adjudication in the United States courts, international comity is not an obstacle to the present District Court Judgment.*" (C-2540, p. 116).

<sup>153</sup> C-2551 (being the Parties' agreed translation from the Spanish original text into English).

<sup>154</sup> C-1975.

<sup>155</sup> C-2551, p. 148.

<sup>156</sup> C-2551, pp. 54 to 159. Chapter 1 (pp. 56ff); Chapter 2 (pp. 65ff); Chapter 3 (pp. 81ff); Chapter 4 (pp. 86ff); Chapter 5 (pp. 99ff); Chapter 6 (pp. 113ff); Chapter 7 (pp. 115ff); Chapter 8 (pp. 129ff); and Chapter 9 (pp. 132ff).

- 5.182. Under Chapter 1 of the Judgment, the Constitutional Court decides that there was no infringement of Chevron’s “right to be tried by a competent judge and in pursuance of the corresponding due process of law applicable to each proceedings”; i.e. the Lago Agrio Court, the Lago Agrio Appellate Court and the Cassation Court.
- 5.183. The Constitutional Court affirms (inter alia) the decisions of these three courts that, for the purpose of their jurisdiction (“competence”) and liability to the Lago Agrio Plaintiffs in the Lago Agrio Litigation, Chevron had assumed Texaco’s and TexPet’s liabilities as a result of the “merger” between Texaco and Chevron in 2001. The Constitutional Court decides Chevron’s jurisdictional objection, as follows:<sup>157</sup>

*“... the first item to be discussed within the question put forward above bears relationship with the fact of identifying the linkage or relationship that, according to the affected parties, existed between the defendant company Chevron Corporation and the company that operated in the contaminated area until the year 1992, named TexPet, and that, as determined in the lawsuit for environmental damage, was the person liable for the damage caused. Although this analysis may at first sight be related to the identification of the corresponding, lawful opposing party to this lawsuit, it actually seeks to establish above all a linkage allowing for the determination of the competence of the Ecuadorian judges. That is why, after a lengthy and well-founded analysis made by the lower court judge and ratified by the Court of Appeals and the Cassation Court, it was found that the Ecuadorian company TexPet was an affiliated company of the parent company Texaco Inc., and this latter company had in turn merged with the American company Chevron Corporation, a circumstance that within the corporate setting made it possible to establish that Chevron had undertaken any and all subsequent liabilities for the acts then performed by the company Texaco Inc. and its affiliated companies. As a matter of fact, this conclusion drawn by the trial court judge did not only make it possible to identify the corresponding lawful opposing party within the lawsuit, but it also allowed for the connection of this fact with the events taking place at the Court for the Southern District of New York before the date on which the lawsuit for environmental damages was filed, where within the case for environmental damages entitled *Sequihua v. Texaco [the Aguinda Litigation]*, the American court found that the most appropriate forum to try said controversy was Ecuador, since the alleged damage was caused in said country, a circumstance that was accepted by Texaco Inc., thus opening the way for the Ecuadorian courts to enjoy sufficient competence to hear and settle any lawsuits filed on the grounds of environmental harm then caused by the company TexPet, whose parent company was Texaco Inc. and that now is, on the basis of the merger undergone by said company, according to the Ecuadorian courts, Chevron Corporation.”*

- 5.184. From this and other passages, the Tribunal understands that, for the purposes of both jurisdiction and liability in the Lago Agrio Litigation, the Constitutional Court treats

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<sup>157</sup> C-2551, pp. 62-63.

Chevron as if it were TexPet and Texaco and an active participant in their activities in Ecuador from 1964 onwards in the concession area. This understanding is confirmed by a later passage in the Constitutional Court's Judgment referring to the difficulty in establishing the timing of polluting incidents "from the overall operation of the oil company for about 28 years."<sup>158</sup> In context, this reference targets Chevron as the polluting "oil company" during the period of TexPet's concession from 1964 to 1992, a period of 28 years.

5.185. Under Chapter 2 of the Judgment, the Constitutional Court decides that the Judgment of the Cassation Court did not infringe "the constitutional right to the effective judicial protection by failing to declare the procedural fraud alleged by Chevron."

5.186. The Constitutional Court describes Chevron's allegations of procedural fraud, as follows:<sup>159</sup>

*"... The actions that, in the words of the appellant, have caused a massive fraud or procedural fraud within the lawsuit brought against it, are: the plaintiffs' furtive collaboration in the ghostwriting of the trial court judgment, the influence they exerted for the appointment of the expert witness and the forgery of the expert witness' report that eventually did, whether directly or indirectly, serve as the basis for the assessment of the alleged environmental damage. On such bases, the appellant does hereby sustain that it has been proven in the various judicial stages that there has been a severely gross procedural fraud committed by the attorneys of the plaintiffs with the support of the judicial authorities, by means of the evidence produced at that moment, which was obtained by means of court orders issued in proceedings pursued in the United States of America."*

5.187. The Constitutional Court decides that the Cassation Court had no power to decide Chevron's allegations of procedural fraud. It states, as follows (with footnotes here omitted):

*"... it should be remarked that the cassation appeal does not constitute another trial stage in the court proceedings, wherein issues of fact previously reviewed by the trial court judges can be freely discussed; but rather, it is by means of the cassation appeal that the judges of the National Court of Justice, who are in charge of hearing such an appeal, undertake a review of the jurisdictional activity of the lower trial court judges, in respect of the application of the rules of law within their judgments or orders intended to close declaratory proceedings or trials. It is thereby ruled out any possibility that the cassation court judges may order the production and examination of evidence, make any assessment of the evidentiary*

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<sup>158</sup> C-2551, p. 110.

<sup>159</sup> C-2551, p. 67.

*elements or being to discuss any facts previously heard by the trial court judges, since any such actions would result in an infringement of judicial independence and legal certainty, duly guaranteed by the Constitution of the Republic of Ecuador.”*

5.188. Later, the Constitutional Court concludes:<sup>160</sup>

*“... it is clear that nullity as a procedural concept corresponds to the grounds expressly set out in the Law, therefore, for such nullity to possibly take effect as an argument within a cassation appeal, it must, apart from observing the conditions established in section 3 of the Cassation Act - i.e. exert influence on the decision of the case or not having been legally validated - comply with the requirements established by Law, in the specific case at hand, the Code of Civil Procedure, as it is the currently applicable law at the time of said civil lawsuit; otherwise, the alleged error in the application or interpretation of procedural rules alleged by the company lodging this cassation appeal cannot be analyzed as a ground for the cassation appeal, insofar as it does not represent any materialization of an incurable nullity within the process, as stated by the National Court of Justice [the Cassation Court] in its ruling.*

*This Court, based on the considerations expounded thus far, must specify that the appellant’s allegations concerning the performance of fraudulent acts on the part of and attributable to its counterparty to these proceedings and the judicial authorities involved in trying the case, are not grounds or reasons expressly provided for in the Ecuadorian law as a valid foundation to argue and determine the nullity of the proceedings; otherwise, as analyzed further below and pursuant to the opinions of the National Court of Justice based on the appellant’s arguments, the facts therein alleged would correspond to another type of conducts to be tried by means of the corresponding proceedings, rather than as a ground for procedural nullity. Therefore, as this is an appeal which is extremely formalistic and rigorous, the Cassation Tribunal is called on to strictly observe the legal regulations established in relation thereto, which in the case at hand have not been fulfilled, hence, there has been no concurrence whatsoever of any essential elements necessary for the judges of the National Court of Justice to find the appropriateness of the charges alleged by the appellant as grounds for nullity of the proceedings and for the very cassation appeal.*

*In this respect, it can be noticed that the performance of judges when rendering the judgment subject to appeal is consistent with the nature of the cassation appeal and with the rules governing such subject matter, otherwise, to admit, as sought by the appellant, any argument as a ground for procedural nullity would confront us with a legal system in want of certainty in the application of legal rules and, therefore, inconsistent with the legal framework provided for by our Ecuadorian Constitution.*

*On the other hand, as previously stated, the judges of the Cassation Court sustain within the decision subject to appeal that, should the procedural irregularities alleged by Chevron exist, the Ecuadorian law has already established the corresponding actions of administrative and criminal nature to punish such kind of*

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<sup>160</sup> C-2551, pp. 75-77.

*conducts, notwithstanding the civil liabilities that may arise therefrom. The Cassation Tribunal considers that the arguments expounded by Chevron make reference to the commission of somehow collusive actions, a behavior for which, the judges explain, there is a specific regulation in the Ecuadorian law [Footnote 27 refers to the Collusion Prosecution Act] : likewise, the judges sustain [sic: “judgment?)] that by means of the arguments posed by the company lodging this cassation appeal, its counterparty’s lawyers, expert witnesses and trial court judges are thereby being accused of having committed several crimes, an aspect which is found as inadmissible by the national justices within the context of the cassation appeal at hand. In furtherance of its stance, the appellant argues that the Cassation Tribunal’s refusal to hear and remedy the procedural fraud it reported, constitutes an infringement of its constitutional right subject matter of this legal issue, which, in turn, has led Chevron to a status of deprivation of its right to judicial defense in the proceedings pursued against it.*

*In this respect, this Court does hereby notice, in the first place, that the appellant’s allegation in relation to the fact that the Cassation Tribunal refused to deal with the procedural fraud reported by the company Chevron, lacks every single foundation, since as stated and described in the foregoing paragraphs, the National Court of Justice actually analyzes the arguments proposed by means of the cassation appeal in relation to the performance of fraudulent acts within said judicial proceedings; in spite of this, the fact that the judges know the parties’ allegations does not necessarily entail a favorable decision for either party’s claims, as seems to be the appellant’s intention, when stating that the cassation court judges infringe constitutional rights by not remedying the fraud reported by the appellant.”*

5.189. From these and other passages,<sup>161</sup> the Tribunal concludes that the Constitutional Court both received and understood the factual allegations of procedural fraud made by Chevron, including the ‘ghostwriting’ of the Lago Agrio Judgment; that these allegations were materially the same as the Claimant’s factual allegations made by the Claimants in this arbitration; and that the Constitutional Court decided that both the Constitutional Court and the Cassation Court had no jurisdiction under Ecuadorian law to determine the truth or effect of such allegations upon the status of the Lago Agrio Judgment, including its enforceability and execution within and without Ecuador. (As to the Constitutional Court’s reference to the Collusion Prosecution Act, the Tribunal returns to this issue later below).

5.190. Under Chapter 3 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not infringe “the right to the due process of law as to the guarantee

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<sup>161</sup> See also C-2551, pp. 80 and 81.

enshrined in [Article] 76, paragraph 4 of the Constitution of the Ecuadorian Republic.”<sup>162</sup>

5.191. The Constitutional Court concludes:<sup>163</sup>

*“Ultimately, this Court does hereby notice a series of allegations related to the field of evidence that, far from arguing a constitutional infringement, merely show a dissatisfaction with the assessment made not only by the judicial authority rendering the judgment under discussion herein, but also by the judges acting in the civil lawsuit; a circumstance that, pursuant to the previous findings of this Court, does not pertain to a constitutional sphere and as such, it should not be the subject matter of analysis within the context of this petition.*

*Finally, it is necessary to point out that, once the arguments posed by the appellant with its intention to clearly show that the procurement of evidence occurred in violation of constitutional principles and rights have been analyzed, this Court has not found a clear and well-founded argument that may make it possible to acknowledge such kind of charges, a situation that, as expounded in the foregoing paragraph, would indeed constitute an element to be analyzed by this Court. In this line of thought, it is thus confirmed, based on the foregoing explanations, that the appellant itself expects a decision of the Constitutional Court on some aspects that are beyond the production and procurement of evidence referred to in Article 76, paragraph 4 of the Constitution of the Republic of Ecuador.”*

5.192. Under Chapter 4 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not violate “the constitutional right to legal certainty in connection with the alleged existence of res judicata.”

5.193. The Constitutional Court here considers Chevron’s submissions regarding the 1995 Settlement Agreement. It concludes that the 1995 Settlement Agreement does not preclude the Lago Agrio Complaint because the Ecuadorian State, as a party to the 1995 Settlement Agreement, did not represent or bind the Lago Agrio Plaintiffs; and, since the 1995 Settlement Agreement is deprived of res judicata effects, there is no infringement of the constitutional law principle “non bis in idem” or double jeopardy.<sup>164</sup> The Tribunal returns below to this part of the Constitutional Court’s Judgment.

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<sup>162</sup> Article 76(4) of the Constitution provides: “In all proceedings determining rights and obligations of any kind, the right to due process shall be ensured, and it will include the following basic guarantees: 4. Evidence obtained or taken in violation of the Constitution or the law will have no legal validity and will lack probative value.”

<sup>163</sup> C-2551, pp. 84 and 85.

<sup>164</sup> C-2551, p. 99.

- 5.194. Under Chapter 5 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not violate “the right to legal certainty contained in Article 82 of the Constitution of the Republic, based on the retroactive application of the 1999 Environmental Management Act [the EMA]”.
- 5.195. The Constitutional Court here considers that, in view of the values advanced by the substantive provisions of Ecuadorian law regarding the protection of the environment, including provisions in the Civil Code pre-dating the commencement of activities by Texaco and TexPet in Ecuador, there has not been any retrospective application of Ecuadorian law in the Lago Agrio Litigation that violates constitutional Law.
- 5.196. The Constitutional Court concludes (with footnotes here omitted):<sup>165</sup>

*“It is possible, therefore, to assert that no one has the acquired right to pollute or can claim the existence of a consolidated legal situation when his/her actions damaged the environment and also when there are collective environmental interests at stake. Under this logic, it is absolutely possible and sometimes necessary to enforce the retroactive application of the environmental regulations to the extent that it provides greater levels of protection.*

*In light of the foregoing, it is the understanding of this Court that the application of the second paragraph of article 43 of the Environmental Management Act did not represent a breach of the right to legal certainty, as it addressed the constitutional principle of in dubio pro natura, which requires judges to apply the rule most favorable to nature in cases in which there are doubts about the rules to apply, and was able to protect the right to a healthy environment and nature in the best possible way.”*

- 5.197. From this and other passages, the Tribunal understands that the Constitutional Court is again treating Chevron as TexPet. For example, in a preceding passage, the Constitutional Court refers to “Chevron” refusing “to repair the damage”, namely environmental damage caused by pollution incidents “throughout the entire time”, being the term of TexPet’s Concession Agreements from 1964 to 1992.<sup>166</sup>
- 5.198. Under Chapter 6 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not breach “the right to legal certainty contained in Article 82 of

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<sup>165</sup> C-2251, p. 112.

<sup>166</sup> C-2551, p.111.



the Constitution of the Republic due to the retroactive application of the objective liability regime”.

5.199. The Constitutional Court concludes:<sup>167</sup>

*“The objective liability regime, reversal of the burden of proof, the principle of enforcing the rule most favorable to the protection of nature-related rights and the non-applicability of statute of limitations to environmental rights, configure the constitutional block to protect nature and these objectives were achieved with the application of the regulations by trial court judges and by the National Court of Justice, and this situation must be backed by this Constitutional Court.”*

5.200. These rulings include the judgment of the former Supreme Court in the *Delfina Torres* case (cited above).<sup>168</sup>

5.201. Under Chapter 7 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not breach “the constitutional right to legal certainty in relation to the principle of consistency of legal decisions.”

5.202. The Constitutional Court concludes:<sup>169</sup>

*“... it is apparent that an impact on the environment has a direct effect on the culture of the indigenous communities that inhabit the area where pollution has occurred, as in the specific case of the damages caused in the Amazon. In such a way, having a redress mechanism that tends to remedy the cultural damage produced by environmental pollution caused by the appellant company [sic: Chevron] and as stated by the judge a quo, it is a complementary measure that contributes to redress for damages caused to the flora and fauna of the territory, which are fundamental elements for the development of life and cultural identity of the indigenous population that lived in the concession area. Therefore, this Court not only rejects the petitioner’s argument but also considers that the redress ordered in the ruling to implement a community reconstruction and ethnic reaffirmation program is proper and in no way constitutes a measure that the plaintiffs did not request ...”*

*“Therefore, this Court determines that the contested judgment does not infringe on the principle of non ultra petita applicable to judicial decisions, consequently, it being established that there is no infringement of the right to legal certainty.”*

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<sup>167</sup> C-2551, p. 115.

<sup>168</sup> C-2551, p. 113.

<sup>169</sup> C-2551, pp. 128 and 129.

5.203. Under Chapter 8 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not infringe “the right to due process provided for in Article 76, Number 6 of the Constitution of the Republic”.<sup>170</sup>

5.204. The Constitutional Court concludes:<sup>171</sup>

*“... the principle of proportionality from the punitive sphere, as enunciated in the Constitution of the Republic, must be observed from the perspective that any imposition of excessive and unnecessary sanctions will also represent a restriction or arbitrary deprivation of rights. Circumstance that, in turn, imposes on the legislator the need to establish clear and tolerable limits for each sanction, since, being clear from the aforementioned Constitutional text, it is through the law that the proportionality between the infringement and the sanction will be guaranteed.*

*However, returning to the analysis of the arguments made by the plaintiff [sic: the appellant, Chevron] in relation to the violation of the principle of proportionality, it is necessary to refer to the fact that the compensation for damages ordered by the judge of first instance and ratified by the appeal and cassation judges, irrespective of its origin, is aimed at economic compensation to those affected by the harmful consequences caused by the performance of a wilful act or malfeasance, in this particular case, environmental pollution.*

*Therefore, it is evident that the compensation described as excessive and disproportionate that were ordered in the environmental damages case against Chevron, does not have a punitive nature, that is to say sanctioning, but rather a compensatory nature, that is, redress for the damage caused, as has been noted throughout this ruling and as described in the Environmental Management Act in force on the date the claim was filed.*

*Therefore, it is clear that the principle of proportionality recognized in the Constitution as a guarantee of due process, responds to the idea of controlling and limiting the exercise of the punitive power the State has, avoiding the excessive use of sanctions that entail a deprivation or restriction of rights in order to protect valuable legal assets within society; circumstance not related to the case under analysis, since it has been evidenced that we are facing an economic recovery of the damage, but not before the application of a penalty that represses unlawful conduct.”*

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<sup>170</sup> Article 76(6) of the Constitution provides, in material part: “In all proceedings determining the rights and obligations of any kind, the right to due process shall be ensured, and it will include the following basic guarantees: (6) the law shall establish the proper proportionality between violations and criminal, administrative or other sanctions.”

<sup>171</sup> C-2551, pp. 131 and 132.

5.205. Under Chapter 9 of the Judgment, the Constitutional Court decides that the Cassation Court’s Judgment did not violate “the right to reasoning contained in Article 76, number 7(1) of the Constitution of the Republic”.<sup>172</sup>

5.206. The Constitutional Court listed Chevron’s criticisms of the Cassation Court’s reasoning, as follows:<sup>173</sup>

*“[The Cassation Court] Justice refused to rule on elements such as procedural fraud; the res judicata effect of the 1995 settlement agreement; violation of procedural rules related to competition; judicial inspections; essential error; lack of application of norms related to the assessment of evidence; violation of the dispositive and congruence principles; retroactive application of substantive aspects of the Environmental Management Act; illegal and untimely appointment of the judges who heard the appeal; and lack of reasoning in the appeal decision.”*

5.207. As regards Chevron’s allegations of procedural fraud, the Constitutional Court concludes, approving the Cassation Court’s reasoning, as follows:<sup>174</sup>

*“Even if true, in the review of judgment, it can be seen that when the plaintiffs make allegations regarding procedural fraud within the second clause of Article 3 of the Cassation Act, the National Court of Justice provides a generic answer saying that ‘(...) never identified any law in such allegations, nor has it ever shown how this affected the validity of these proceedings, and therefore such complaints amount to vague allegations, with no legal foundation (...)’. However, further on, when analyzing specific allegations about fraudulent actions of lawyers, the fact that the judgment has not been drafted by the judge who heard the case; falsification of Calmbacher’s expert report; and the lack of impartiality and independence of the judges, the National Court of Justice makes three elements clear: 1) their lack of competence within civil appeal cases to recognize unproven, fraudulent acts; 2) the existence of specific procedural channels to prosecute reported fraudulent acts, and 3) the need for plaintiffs to present their accusations before the appropriate authority.*

*In this sense, although there is no substantive ruling regarding alleged fraudulent acts, that is regarding whether the fraudulent acts existed or not, the National Court of Justice provides an answer based on the rules that regulate cassation appeals and causes for invalidity, concluding that allegations of procedural fraud were not*

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<sup>172</sup> Article 76(7)(1) of the Constitution provides, in material part: “In all proceedings determining rights and obligations of any kind, the right to due process shall be ensured, and it will include the following basic guarantees: (7) Persons’ right to a defence shall include the following guarantees: (1) Decisions made by public authorities must be reasoned. Reasoning will be lacking if the decision does not state the legal rules or principles on which it is based and does not explain how they apply to the facts of the case. Administrative actions, decisions or rulings that are not duly reasoned will be considered void. The responsible public servants shall be sanctioned.”

<sup>173</sup> C-2551, p. 136.

<sup>174</sup> C-2551, p. 138.

*only raised erroneously, but also demanded analysis to be made outside of its actual jurisdiction.”*

5.208. As regards Chevron’s jurisdictional objection, the Constitutional Court concludes, approving the reasoning of the Cassation Court, as follows:<sup>175</sup>

*“The National Court of Justice gives the following premises: 1) Chevron waived the jurisdiction of its domicile, and 2) Chevron submitted voluntarily to Ecuadorian competence; these circumstances are contrasted with the relevant procedural rules and the National Court of Justice arrives at the conclusion that, in effect, the judges that knew the cause of the case, possessed the competence and applied procedural rules adequately.*

*In terms of the legal problem regarding competence, this Court has undertaken an analysis of the reasons that led the National Court of Justice to consider that the procedural rules had been applied and to justify the competence of the national judges in the case. From this analysis, the correct argumentation given by the National Court of Justice is confirmed in greater detail. From the foregoing, it is concluded that the judges of Cassation did indeed rule on the matter and did so in a substantiated manner.”*

5.209. The Constitutional Court also rejects Chevron’s other allegations that the Cassation Court’s Judgment lacks reasons or are irrational, including denial of a procedural opportunity to investigate essential mistakes in the expert evidence presented in the Lago Agrio Litigation, illegal appointment of judges who decided the appeal against the Lago Agrio Judgment, failure to apply norms concerning the evaluation of the evidence and evaluation of the res judicata effects of the 1995 Settlement Agreement.

5.210. The Constitutional Court Judgment was issued after the Track II Hearing, shortly before the Tribunal was to issue its award under Track II. In the circumstances, the Parties addressed the Tribunal on the effect of the Constitutional Court Judgment by their respective written submissions by letters dated 25 July 2018, pursuant to the Tribunal’s Agreed Procedural Order of 19 July 2018.

5.211. In the Claimants’ said submissions of 25 July 2018 (with footnotes here partly omitted), the Claimants contend (inter alia) as follows:

(1) First, the Constitutional Court affirmed the Lago Agrio Judgment and failed to mitigate the denial of justice that ripened years ago. To the extent that Chevron’s

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<sup>175</sup> C-2551, pp. 143 and 144.

“Extraordinary Action of Protection” submitted to the Constitutional Court was a local remedy, so the Claimants conclude, it has been exhausted by the Claimants.

(2) Second, the Constitutional Court refused to consider any of the evidence of fraud presented by Chevron.<sup>176</sup> At the Track II Hearing, the Respondent quoted Article 94 of the Ecuadorian Constitution: “An extraordinary action of protection is available against judgments or final orders by which Constitutional rights were violated by action or omission.”<sup>177</sup> Yet, according to the Constitutional Court, the Respondent’s Appellate and Cassation Courts, seized with evidence that a party had bribed a first-instance judge and ‘ghostwritten’ that judge’s judgment, are required to affirm that judgment; and that such judicial misconduct does not violate the Ecuadorian Constitution.

Instead, so Chevron submits, the Constitutional Court fastened onto the Respondent’s “post hoc contrivance” that a prosecution is required of Chevron under the Collusion Prosecution Action (CPA).<sup>178</sup> The Claimants submit that this reasoning ignores the “ultima ratio rule”; and that a CPA action could not suspend enforcement of the Lago Agrio Judgment. The Claimants further submit that political reality in Ecuador means that no Ecuadorian judge would rule in Chevron’s favour (as contended by the Claimants in their closing oral submissions at the Track II Hearing).<sup>179</sup> In any event, as Chevron concluded at the Track II Hearing: “If Ecuador is correct that its judicial system is powerless to address fraud on direct appeal or even to stay enforcement during the pendency of a CPA action, then its system falls below international standards....”.<sup>180</sup>

(3) Third, as the Constitutional Court judgment records, an “Oversight” Council is currently deciding whether to remove certain judges involved in the Lago Agrio Litigation.<sup>181</sup> The Council’s chairperson filed an amicus brief before the Constitutional Court demanding that the Constitutional Court reject Chevron’s action for protection. Chevron requested the Constitutional Court to delay its ruling on that demand until the judges’ conflict was resolved.<sup>182</sup> The Constitutional Court ignored Chevron’s request.

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<sup>176</sup> C-2551, pp. 65-81.

<sup>177</sup> Track II Hearing, D13; the Respondent’ closing oral submissions - PowerPoint Presentation, at § VI, slide 4, quoting Article 94 of the Ecuadorian Constitution.

<sup>178</sup> C-2551, pp 39-40, 76 and 79-80.

<sup>179</sup> Track II Hearing, D12.2511-2512, 2576-2577 and 2592-2594.

<sup>180</sup> Track II Hearing, D12.2392.

<sup>181</sup> C-2551, pp 43-44, referring to “the Transitional Citizenship Participation and Public Oversight Council”.

<sup>182</sup> C-2551, pp. 43-44.

(4) Fourth, the Constitutional Court decided that the Lago Agrio Judgment is based exclusively on the diffuse right to live in a clean environment: ‘the lawsuit [is] based on the right...to live in a healthy environment, [which] is a constitutional and collective right....’.<sup>183</sup> Moreover, the Constitutional Court expressly cited Article 19.2 of the former Constitution (which recognized that right).<sup>184</sup>

According to the Claimants, the Constitutional Court relied on two erroneous reasons to justify its disregard for the 1995 Settlement Agreement: (i) the 1995 Settlement Agreement did not ‘refer’ to ‘third party’ rights;<sup>185</sup> whereas the Claimants submit that this reasoning ignores the express statements in Articles 1.3, 5.1 and 5.2 of the 1995 Settlement Agreement that it releases claims based upon Article 19.2 of the Constitution;<sup>186</sup> and (ii) the State of Ecuador could not represent this diffuse right<sup>187</sup>; whereas the Claimants submit that Article 19.2 expressly states that “it is the duty of the State” to enforce this diffuse right.<sup>188</sup>

(5) Lastly, so the Claimants submit, the Constitutional Court’s decision confirms that the denial of justice in the present case far surpasses that which occurred in *Loewen v USA* (2003).<sup>189</sup> At the Track II Hearing, in support of its submissions on the Claimants’ non-exhaustion of local remedies, the Respondent contended that Mr Loewen’s “mortal sin” was failing to petition the US Supreme Court regarding the Mississippi judgment.<sup>190</sup> In response, the Claimants compared two fact patterns in its closing oral submissions at the Track II Hearing.<sup>191</sup>

In *Loewen*, so the Claimants submitted, the NAFTA tribunal found that an “outrage” had been committed in the conduct of a trial by court in Mississippi. What should one say if, instead, several appellate jurisdictions up to the US Supreme Court had applauded and endorsed the Mississippi judgment, that prosecutors in the USA had blankly refused

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<sup>183</sup> C-2551, p. 91.

<sup>184</sup> C-2551, p. 92.

<sup>185</sup> C-2551, pp. 96 and 97.

<sup>186</sup> C-23: (Article 5.2: “*claims ... mean any and all claims ... including but not limited to, causes of action under Article 19.2 of the Political Constitution of the Republic of Ecuador*”). The full text of Article 5.2 and other material provisions of the 1995 Settlement Agreement are set out above, in Part III(d) of this Award.

<sup>187</sup> C-2551, p. 98.

<sup>188</sup> C-24 (“*it is the duty of the State to ensure that this right will not be affected and to watch over the protection of nature.*”).

<sup>189</sup> *Loewen v USA*, CLA-44.

<sup>190</sup> Track II Hearing, D1.236.

<sup>191</sup> Track II Hearing, D12.2570-2571.

to consider evidence of gross fraud, that the USA had indicated in formal submissions in a treaty arbitration (such as this arbitration) that the remedy which Mr Loewen was required to exhaust was available in a particular appellate court, that this appellate court then denied having any authority to consider the matter, and that a US Federal Court nevertheless endorsed the Mississippi judgment for enforcement abroad? The Claimants conclude that such facts would be even more ‘outrageous’ than the *Loewen* case; but that, today, those are the facts of the Respondent’s conduct regarding the Lago Agrio Judgment.

5.212. In the Respondent’s said submissions of 25 July 2018 (with footnotes here partly omitted), the Respondent contends:

(1) First, the Constitutional Court, as the highest Ecuadorian Court endowed with the authority to interpret Ecuador’s Constitution, examined Chevron’s claims and, after a thorough and well-reasoned analysis, concluded that the Appellate and Cassation Courts reviewing the Lago Agrio Litigation did not violate any of Chevron’s constitutional rights. Chevron’s claim that multiple Ecuadorian courts over the last decade were engaged in an elaborate conspiracy with former President Correa against Chevron has even less credibility, given that the Constitutional Court rendered its decision under a new administration long at odds with the former President, no longer in office.

(2) Second, the Constitutional Court expressly found, like the Cassation (National) Court, that consideration of Chevron’s extrinsic evidence of alleged fraud is precluded under Ecuadorian law.<sup>192</sup> Rejecting Chevron’s claim that the Cassation Court should have analysed “the whole of evidence produced in order to prove the commission of the fraudulent acts”, the Constitutional Court repeatedly noted the limited scope of review of the Cassation Court, adding that Chevron had available to it alternative avenues of relief, including “a specific regulation in the Ecuadorian law” to redress “collusive actions”, i.e., the Collusion Prosecution Act (CPA).<sup>193</sup> The Respondent submits that Chevron cannot successfully prosecute its claims in this arbitration based upon the Ecuadorian Courts’ alleged wrongdoings, whilst simultaneously ignoring the recourse afforded to litigants to redress such alleged wrongdoing in Ecuador.

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<sup>192</sup> C-2551, pp. 71, 75-81.

<sup>193</sup> C-2551, pp. 75-77.

(3) Third, the Constitutional Court determined that Chevron’s right to legal certainty was not infringed by the Ecuadorian Courts’ failure to accept its *res judicata* defence (by which it claimed that the 1995 Settlement Agreement released it from liability for violations to the Lago Agrio Plaintiffs’ constitutional right to live in a clean environment). The Constitutional Court found *res judicata* inapplicable because, whether the Lago Agrio Plaintiffs’ claims are collective or otherwise, there exists no identity of parties or object.<sup>194</sup> The Constitutional Court instead quoted from and reaffirmed the admonition in Article 2362 of the Ecuadorian Civil Code that: “[a] settlement only affects the parties to it.”<sup>195</sup> Further, the Constitutional Court found that the “substantive law” under which Chevron was tried was ‘tort law under the Civil Code’.<sup>196</sup> Because the Civil Code long pre-dated the Environmental Management Act (and the alleged introduction of collective rights in Ecuador), such Code provisions are individual in nature, rendering *res judicata* inapplicable.<sup>197</sup>

(4) Fourth, Chevron has long sought to use this Tribunal as an appellate court by challenging various judicial rulings regarding the application of Ecuadorian law. To the extent the Constitutional Court examined some or all of these legal questions, the Constitutional Court’s findings are dispositive. Its findings are reasonable and correct as a matter of Ecuadorian law and well within the ambit of the “juridically possible”, using the Claimants’ own terminology.<sup>198</sup>

(5) Lastly, so the Respondent concludes, the Lago Agrio Litigation has always been about far more than Mr Donziger. It is also about “the conduct of an oil company that put profit over the environment, leaving indigenous residents with substantive claims for real injuries.” The rule of law requires redress for these indigenous plaintiffs, not overbroad protection for a multi-national giant well equipped to protect itself.

5.213. The Tribunal here addresses several particular features arising from the Judgment of the Constitutional Court.

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<sup>194</sup> C-2551, pp. 95-96.

<sup>195</sup> C-2551, p. 97.

<sup>196</sup> C-2551, pp. 102.103.

<sup>197</sup> References to the Respondent’s earlier written pleadings in Track II.

<sup>198</sup> Citing Professor Paulsson’s Opinion dated 21 November 2008 in the Commercial Cases Arbitration, para. 70 [R-172].



- 5.214. It is clear from the Constitutional Court’s Judgment, that the Constitutional Court was fully appraised of Chevron’s allegations of procedural fraud in the Lago Agrio Litigation and the ‘ghostwriting’ of the Lago Agrio Judgment. It is equally clear that the Constitutional Court decided to leave these factual allegations unanswered, save to refer to its own lack of jurisdiction both to address these allegations and, if proven, to redress them (in addition to the same lack of jurisdiction in the Cassation Court).
- 5.215. The Constitutional Court decided that any alleged defects in the Lago Agrio Judgment, including the procedural fraud alleged by Chevron, could not be reviewed or decided by the Cassation Court or the Constitutional Court; the procedural laws governing their respective functions do not vest these Courts with any authority either to investigate or to redress such alleged defects; and, instead, Chevron’s allegations should be the subject of criminal proceedings or proceedings under the Collusion Prosecution Act (CPA). Therefore, so the Constitutional Court concluded, there was no basis under Ecuadorian constitutional law for the Constitutional Court to decide that due process was violated by the decision of the Cassation Court not to take action in regard to such allegations.
- 5.216. With the Constitutional Court’s Judgment, Chevron has no further appellate remedy within the Ecuadorian judicial system. Its action for protection before the Constitutional Court was its last possible opportunity to obtain judicial relief from the Ecuadorian Courts within the Lago Agrio Litigation. Save for a possible claim under the Collusion Prosecution Act (subject to a time-bar), Chevron has no judicial remedy under the Ecuadorian legal system against the enforcement and execution of the Lago Agrio Judgment under Ecuadorian law.
- 5.217. In several passages, the Constitutional Court emphasised the remedy available to Chevron under the Collusion Prosecution Act. The first passage cites the submission made by the Attorney General’s Office, representing the Respondent:

*“Ecuador has made it clear that the courts that heard the Lago Agrio case declined to hear those allegations because these courts do not have jurisdiction. There is an appropriate and exclusive mechanism - the proceeding established by the Collusion Prosecution Act—that Chevron should use, and it would allow the company to submit its evidence and rebut the arguments of the accused.”<sup>199</sup>*

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<sup>199</sup> C-2551, p.40.

5.218. The second passage accepts the submission made by the Attorney General's Office:

*“It is necessary to insist that the National Court of Justice has pronounced decisions about the procedural fraud alleged by Chevron, thereby establishing its lack of jurisdictional competence to determine the accuracy of the allegations posed by the appellant on lodging its cassation appeal, as this is neither the corresponding judicial stage nor the appropriate means to substantiate the criminal reports made by the appellant; thus, the judges pointed out that if the appellant considers that they were collusive actions or a commission of crimes, there exists the civil and criminal procedure, respectively, in order to try any behaviors so deemed as fraudulent. In this respect, this Court notices that the analysis conducted in the decision subject to appeal [the Cassation Court's Judgment] does not at all cause the appellant to be deprived of its right of judicial defense, since the Cassation Tribunal is not denying justice to the company lodging the cassation appeal, but rather, it is resolving the case in accordance with the rules governing the cassation appeal, thus leaving open the appellant's possibility to pursue any relevant actions intended for the facts being reported by means of the cassation appeal to be punished by more appropriate means.”<sup>200</sup>*

5.219. The third longer passage expands upon the Constitutional Court's reasons regarding the Collusion Prosecution Act. It has already been cited in full above under Chapter 2 of the Constitutional Court's Judgment.

5.220. It is clear from several passages in the Constitutional Court's Judgment that the Constitutional Court equated, as regards jurisdiction and liability, Chevron with TexPet and Texaco notwithstanding their respective different legal personalities. This determination approved the like decisions of the Cassation Court, the Lago Agrio Appellate Court and the Lago Agrio Court based upon Chevron's "merger" with Texaco in 2001, as regards both jurisdiction and liability. It also accords with the last of the submissions made by the Respondent in its letter of 25 July 2018, namely that the Lago Agrio Litigation was about "the conduct of an oil company that put profit over the environment" (cited above). That "oil company" is Chevron, even though Chevron was not involved in any activity in Ecuador under TexPet's concession.

5.221. Lastly, the Tribunal regrets its inability to follow the Constitutional Court's interpretation and application of the 1995 Settlement Agreement in regard to Chevron's liability under the Lago Agrio Judgment, as affirmed by the Lago Agrio Appellate Court and (save as to punitive damages) the Cassation Court and the Constitutional Court.

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<sup>200</sup> C-2551, pp. 79-80.

5.222. In its Judgment, the Constitutional Court accepts the validity and effectiveness of the 1995 Settlement Agreement, as between (inter alios) TexPet, Texaco, Chevron and the Respondent.<sup>201</sup> The Constitutional Court also sets out the terms of Article 19.2 of the 1978 Constitution, being part of the release from liability expressly granted to Chevron by the Respondent under Article 5 of the 1995 Settlement Agreement (as also expressly set out).<sup>202</sup> In describing the environmental rights for which Chevron was adjudged liable in the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate and Cassation Courts), the Constitutional Court uses synonymously the terms “diffuse right” and “collective rights”; in the original Spanish text, respectively, “un derecho difuso” and “los derechos colectivos.”<sup>203</sup> It is clear that the Constitutional Court treats the rights of the Lago Agrio Plaintiffs, as also decided by the Cassation, Lago Agrio Appellate and Lago Agrio Courts, as constituting a diffuse right, in the words of the Constitutional Court “a constitutional and collective right”.<sup>204</sup>

5.223. The Tribunal re-states the distinction, as set out in its First Partial Award dated 17 September 2013, between an individual claim for personal harm by a Lago Agrio Plaintiff (not being a diffuse claim) and a diffuse (or collective) claim. The former is not affected by the 1995 Settlement Agreement; but the 1995 Settlement Agreement precludes the latter, expressly so in regard to Article 19.2 of the 1978 Constitution. Accordingly, the Tribunal concludes that the Constitutional Court’s interpretation of Article 5 of the 1995 Settlement Agreement deprives that settlement of any practical meaning, making it a one-sided and open-ended commitment undertaken unilaterally by TexPet and Texaco, which (as decided by all four Ecuadorian Courts) Chevron inherited based upon its “merger” between Chevron and Texaco. The Tribunal re-states its reasons for its conclusion as also set out in its First Partial Award.

5.224. In the circumstances, on the basis of the submissions and expert evidence on Ecuadorian law adduced before the Tribunal in this arbitration, the Tribunal is driven to conclude, as regards the interpretation and application of the 1995 Settlement Agreement to the Lago Agrio Judgment, that the decision of the Constitutional Court is inconsistent with the effect that the Treaty requires to be given to the 1995 Settlement Agreement.

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<sup>201</sup> C-2551, p. 95.

<sup>202</sup> C-2551, pp. 92, 95 and 120.

<sup>203</sup> C-2551, pp 101, 109, 112 and 94.

<sup>204</sup> C-2551, p. 91.

***P: The Tribunal's Conclusions***

- 5.225. The Tribunal finds proven, on the evidence adduced in this arbitration, the following facts based on the factual and non-forensic expert evidence set out above, in Parts IV and V of this Award. (For ease of reference, these factual and non-forensic expert issues are referred to as “factual issues”).
- 5.226. *The Ghostwriting’ of the Lago Agrio Judgment*: The Claimants’ factual allegation that the Judgment of the Lago Agrio Court was corruptly ‘ghostwritten’ lies at the heart of their present dispute with the Respondent. It is by far their gravest allegation in this case; and, if attributable to the Respondent, it is the origin of the injuries of which the Claimants now complain under the Treaty.
- 5.227. There is no direct factual evidence available in this arbitration proving definitively how and when the Lago Agrio Judgment was in fact written. There is, however, much circumstantial evidence, both factual and non-forensic expert evidence. Subject to the forensic issues considered in the next Part VI of this Award, that circumstantial evidence, in the Tribunal’s view, proves by whom it was *not* written and why and by whom it *was* written, at least in substantial and material part.
- 5.228. As already indicated, the Tribunal declines to draw any adverse inference against the Respondent from the absence of Dr Zambrano as a witness in this arbitration. First, the Tribunal does not accept that Dr Zambrano’s absence was improperly induced or otherwise influenced by the Respondent. Second, the Tribunal has benefited from the written testimony of Dr Zambrano in the RICO Litigation, which the Respondent (with the Claimants) agreed could be received by the Tribunal as if it were testimony adduced in this arbitration. On the other hand, whilst drawing no such adverse inference, the Tribunal confers no special advantage upon the Respondent arising from Dr Zambrano’s absence as a witness in this arbitration. Whilst it thus rejects the Claimants’ criticism of the Respondent for the missing piece of the jigsaw, it must nevertheless assess the Respondent’s case (as also the Claimants’ case) without that missing piece, mitigated by Dr Zambrano’s testimony in the RICO Litigation.
- 5.229. This assessment starts with certain of the Lago Agrio Plaintiffs’ representatives, especially Mr Donziger and Mr Fajardo. The evidence before this Tribunal points clearly to the conclusion that they engaged in prolonged, malign conduct towards the

Respondent's legal system generally and, particularly, the Lago Agrio Court in a manner that almost beggars belief in its arrogant contempt for elemental principles of truth and justice. It is pointless here to characterise such conduct any further, because these individuals are not the object of the exercise required for this Award under the Treaty applying international law. Such conduct, as related above, also speaks for itself. Moreover, others unknown were also involved in the 'ghostwriting' exercise. Whilst not attributable to the Respondent under international law, their collective misconduct nevertheless remains relevant because it was a necessary condition for what happened; but it was not the immediate cause of the Claimants' injuries.

- 5.230. That cause came from Judge Zambrano. The Tribunal considers that Judge Zambrano actively solicited a bribe from whichever side in the Lago Agrio Litigation would be willing to pay him for issuing a favourable judgment in the Lago Agrio Litigation. Chevron refused his approaches; but certain of the Lago Agrio Plaintiffs' representatives did not. It is not proven that Judge Zambrano did receive a monetary consideration actually paid to him before the issuance of the Lago Agrio Judgment. On a balance of probabilities, however, it is proven that the consideration was a promise to reward him financially at a later date from proceeds to be recovered from the enforcement against Chevron of the Lago Agrio Judgment. It is likely to be a reward that he will never see.
- 5.231. Based on the circumstantial evidence, the Tribunal finds that Judge Zambrano did not draft the entirety of the Lago Agrio Judgment by himself, as he falsely testified on oath in the RICO Litigation. The Tribunal finds that Judge Zambrano, in return for his promised reward, allowed certain of the Lago Agrio Plaintiffs' representatives, corruptly, to 'ghostwrite' at least material parts of the Lago Agrio Judgment (with its Clarification). These representatives included Mr Fajardo and Mr Donziger.
- 5.232. Exactly how that was done remains uncertain on the available factual evidence. It is clear that the 'ghostwriting' exercise was begun by these Lago Agrio Plaintiffs' representatives in about mid-2009; and it was well underway by the time of Judge Zambrano's return to the Lago Agrio Litigation in October 2010. For obvious reasons, Judge Zambrano was cautious; and these representatives were still more careful (albeit not careful enough). By that time, Chevron had formed strong suspicions as to what might be happening, even if Chevron could not prove it. That situation began to change when Dr Guerra disclosed what he knew to Chevron, later. However, Dr Guerra was

largely excluded from this ‘ghostwriting’ exercise at the time; and his knowledge is limited.

- 5.233. *Other Allegations:* The Tribunal turns to the Claimants’ other factual allegations under seven headings: (i) the misconduct of Judge Yáñez; (ii) the misconduct of Mr Cabrera, as an auxiliary officer of the Lago Agrio Court; (iii) Judge Zambrano’s improper connivance at Dr Guerra’s ghostwriting of his court orders in the Lago Agrio Litigation (between October 2009 and March 2010); (iv) the Veiga-Pérez Criminal Prosecutions; (v) the conduct of the Respondent’s Government during the Lago Agrio Litigation; (vi) criminal investigations of ‘fraud’ in the Lago Agrio Litigation and the Lago Agrio Court’s Judgment (comprising of the misconduct of Judge Yáñez and Mr Cabrera and the ‘ghostwriting’ of the Lago Agrio Judgment); and (vii) the Judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts in regard to ‘fraud’. It is convenient to address these seven headings in reverse order.
- 5.234. *The Appellate, Cassation and Constitutional Courts:* As to (vii), as a factual matter, the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court did not address in any significant manner the allegations made by Chevron of ‘fraud’ in the Lago Agrio Litigation and the Lago Agrio Court Judgment, in their respective Judgments of 3 January 2012 (with its Clarification Order of 13 January 2012), 12 November 2013 and 27 June 2018.
- 5.235. *Criminal Investigations:* As to (vi), as a factual matter, notwithstanding the existence of at least prima facie evidence of ‘fraud’ in the Lago Agrio Litigation and the Lago Agrio Court’s Judgment available to them, the Respondent’s prosecutorial authorities were unwilling or unable to act in regard to such evidence in any significant and timely manner, before the Judgment of the Lago Agrio Court was declared enforceable by the Lago Agrio Appellate Court on 1 March 2012.
- 5.236. *The Government’s Conduct:* As to (v), the Tribunal does not consider proven the Claimants’ factual allegation that the Respondent’s Government played any material part in the Lago Agrio Judgment’s ‘ghostwriting’ exercise.
- 5.237. Moreover, at the Track II Hearing, Dr Guerra testified to his knowledge that the Government never sought to intervene or influence the judicial process in the Lago Agrio Litigation; and that “the administration never butted in” as regards the Lago Agrio

Litigation.<sup>205</sup> The Tribunal accepts the truth of his testimony. It is also consistent with the tactics adopted by the Lago Agrio Plaintiffs' representatives themselves: see Mr Prieto's cautionary advice by his email message of 14 January 2009, recited in Part IV above. Moreover, with the covert 'ghostwriting' exercise in place, these representatives did not need any intervention from the Government. It is also consistent with the evidence that Judge Zambrano solicited a bribe from Chevron in return for issuing a judgment adverse to the Lago Agrio Plaintiffs (which Chevron rejected). That solicitation was not the result of any intervention by the Government.

5.238. As regards other conduct by the Government, subject to (iv) below, it was inevitable that the Lago Agrio Litigation should arouse strong political, if not populist, passions at the highest level in Ecuador. Oil pollution and international oil companies often do. Hostile statements by politicians, practising domestic politics, do not necessarily amount to international wrongs. In this case, the Tribunal also bears in mind that the Aguinda and Lago Agrio Plaintiffs were all nationals of the Respondent; and, further, that the Aguinda and Lago Agrio Litigation gave rise to legal proceedings in the USA in which the Respondent was a party or putative intervener sharing, at times, an overlapping interest with its nationals. As such, a level of co-operation between them cannot be interpreted as improper collusion. Nor can it all be laid at the door of President Correa: such co-operation began before he first assumed office as President in January 2007.

5.239. *The Veiga-Pérez Criminal Prosecutions:* As to (iv), the Respondent's prosecutorial authorities actively co-operated with certain of the Lago Agrio Plaintiffs' representatives in conducting criminal investigations and initiating criminal prosecutions against (inter alios) Mr Veiga and Dr Pérez as representatives of TexPet, for the purpose of disadvantaging Chevron's defence in the Lago Agrio Litigation based on the 1995 Settlement Agreement. These intermittent investigations and prosecutions from 2003 to 2011 were accompanied by vicious and unwarranted statements directed against each of them personally by senior members of the Government, including (from 2007) President Correa.

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<sup>205</sup> Track II Hearing D3.623.

- 5.240. As already noted in Part IV, on 1 June 2011, these prosecutions were eventually discontinued by the Respondent's National Court, ostensibly without interference by the Respondent's Government. By that date, the Lago Agrio Judgment had been issued in favour of the Lago Agrio Plaintiffs notwithstanding the 1995 Settlement Agreement.
- 5.241. The Tribunal does not consider proven that these criminal investigations or prosecutions had any causative link with the conduct of the Lago Agrio Litigation or the 'ghostwriting' of the Lago Agrio Judgment by certain of the Lago Agrio Plaintiffs' representatives. Indeed, after bribing Judge Zambrano, these representatives no longer needed to impugn the 1995 Settlement Agreement (with its related agreements) by means of these collusive criminal prosecutions.
- 5.242. *Dr Guerra's Ghostwriting of Judge Zambrano's Court Orders:* As to (iii), during Judge Zambrano's first period as the judge presiding over the Lago Agrio Litigation (October 2009 to March 2010), certain of the Lago Agrio Plaintiffs' representatives corruptly paid Dr Guerra to 'ghostwrite' seven procedural orders for Judge Zambrano in the Lago Agrio Litigation, pursuant to which Judge Zambrano, knowing of such 'ghostwriting' by Dr Guerra, improperly issued such orders in the Lago Agrio Litigation.
- 5.243. That misconduct is primarily to be attributed to these representatives and to Dr Guerra (who was then no longer a judge) and not thereby to the Respondent. There is no cogent evidence that any part of the bribes paid by the Lago Agrio Plaintiffs' representatives for such orders was transmitted by Dr Guerra to Judge Zambrano. At the time, Judge Zambrano most probably knew of the payments to Dr Guerra. He could not have expected Dr Guerra to work for him *pro bono*. Judge Zambrano also knew that his delegating the drafting of procedural orders to Dr Guerra was illegal under Ecuadorian law.
- 5.244. However, such misconduct by Dr Guerra took place at an earlier time than the 'ghostwriting' of the Lago Agrio Judgment during Judge Zambrano's return to the Lago Agrio Litigation (October 2010 - March 2011). This later 'ghostwriting' exercise was of a different and much greater order of misconduct by Judge Zambrano, and as the action of a judge within the scope of his professional duties it was plainly conduct attributable to the Respondent. It subsumed any earlier, lesser misconduct by Judge Zambrano. Whilst it is possible, or even likely, that the earlier misconduct by both Dr



Guerra and Judge Zambrano formed a necessary condition for the subsequent ‘ghostwriting’ exercise by Judge Zambrano, it was not its cause.

- 5.245. *Mr Cabrera:* As to (ii), Mr Cabrera, as an auxiliary officer of the Lago Agrio Court, (a) improperly favoured the case of the Lago Agrio Plaintiffs in the Lago Agrio Litigation and (b) improperly colluded with and permitted certain of the Lago Agrio Plaintiffs’ representatives and experts to write, covertly, the Cabrera Report, ostensibly in his name. Mr Cabrera, mendaciously, failed to act as an independent expert to the Lago Agrio Court, in violation of his oath to do so. His misconduct resulted from the bribes corruptly paid to him by certain of the Lago Agrio Plaintiffs’ representatives between mid-2007 to mid-2008.
- 5.246. As a factual matter, Mr Cabrera’s improper conduct severely prejudiced the presentation of Chevron’s case in the Lago Agrio Litigation.
- 5.247. Again, whilst it is possible, or even likely, that this earlier misconduct formed a necessary condition for the subsequent ‘ghostwriting’ of the Lago Agrio Judgment, it was not its cause. To the extent (as the Tribunal finds) that the Cabrera Report influenced in part the result of the Lago Agrio Judgment, the Tribunal considers that this factor forms part of the ‘ghostwriting’ exercise as a whole.
- 5.248. *Judge Yáñez:* As to (i), Judge Yáñez (a) improperly terminated the procedure for the Judicial Inspections in the Lago Agrio Litigation, by order of the Lago Agrio Court dated 22 August 2006; and (b) improperly appointed Mr Cabrera as the Court’s sole global assessment expert, by order of the Lago Agrio Court dated 19 March 2007. His misconduct resulted from the blackmail practised against him by certain of the Lago Agrio Plaintiffs’ representatives from July 2006 onwards.
- 5.249. As a factual matter, the misconduct of Judge Yáñez severely prejudiced the presentation of Chevron’s case in the Lago Agrio Litigation. Although it was a necessary condition for what happened subsequently in the Lago Agrio Litigation, his misconduct was not the cause of the ‘ghostwriting’ of the Lago Agrio Judgment.
- 5.250. These conclusions are limited to the principal facts at issue between the Parties relevant to this Award. They remain subject to the Tribunal’s consideration of the forensic issues

considered in the next Part VI of this Award, as also to the other factual and legal issues considered in Parts VII and VIII of this Award.

**PART V – ANNEX 7**

**THE LAGO AGRIO JUDGMENT ON “MERGER”  
(pp. 6-26, with line numbers here added)**

1        *The complaint states that Chevron is the successor of Texaco, while the defendant*  
2        *denies this assertion, therefore, since I must rule in this respect, according to the*  
3        *record, one can see that the strict legal sense, that is, understanding succession as a*  
4        *method to acquire control by which the rights and obligations are transferred from the*  
5        *originator to its successors (according to the Roman tradition), the assertion that*  
6        *Chevron is not the successor of Texaco Inc. is correct, in so far as the record shows*  
7        *duly certified documentary evidence that demonstrates that Texaco Inc. maintains legal*  
8        *status and consequently legal life (at pages 222 and 223 the original document in*  
9        *English can be found, translated on pages 224 and 225), in such a way that it becomes*  
10       *evident that there cannot be succession mortis causa without an originator. This*  
11       *Presidency begins the analysis considering the explanation of the defendant in the*  
12       *conciliation hearing, referring to there not being a merger between Texaco and*  
13       *Chevron, but rather, as they proved with the certificate that lies at pages 230 and 231*  
14       *(translation at page 225), the merger actually occurred between Texaco Inc. and*  
15       *Keepep Inc. However, this reality, evidenced by documents, must be analyzed in light*  
16       *of the entire body of evidence, therefore various aspects are considered, among which*  
17       *it convenient first to refer to page 4103 where a certification is found, from October*  
18       *29, 2003, at 11:18 a.m., issued by the Clerk of the Presidency, which states that the*  
19       *defendant did not appear for the presentation of various documents related precisely*  
20       *to this topic, which was timely requested by the plaintiffs in a motion filed October 23,*  
21       *2003 at 3:25 a.m., and ordered in the ruling of October 23, 2003 at 3:30 p.m. The*  
22       *documents that to the defendant should have presented included: 1) A complete and*  
23       *certified copy of the ‘Agreement and Plan of Merger,’ which is said to be related to the*  
24       *‘Certificate of Merger between Keepep Inc. and Texaco Inc.,’ a document with the*  
25       *issuance date of October 9, 2001; 2) A complete and certified copy of the document*  
26       *containing the authorization of Chevron Corporation, in order for its subsidiary*  
27       *Keepep Inc. to participate in the Merger; 3) A complete and certified copy of the*  
28       *authorization from the competent corporate body to proceed with the change in name*  
29       *of Chevron Corporation to Chevron Texaco Corporation; 4) A complete and certified*  
30       *copy of the authorization issued by the competent corporate body, for Chevron to be*  
31       *able to include the word Texaco in its new name. These documents, which the defendant*  
32       *did not present, despite having been timely requested to do so by the plaintiff and*  
33       *ordered by the Presidency of this Court, were not filed by the defendant. As the record*  
34       *shows the defendant explained the reasons that support a supposed inability to produce*  
35       *said documents, via a brief on October 27, 2003, at 4:50 p.m., which was addressed*  
36       *through a ruling on October 27, 2003 at 5:20 p.m., ordering compliance with what was*  
37       *ordered or that the excuse be given on the indicated date. As was noted, the explanation*  
38       *recorded by the Office of the Clerk clearly indicates that the defendant did not appear*  
39       *on the indicated date and time, therefore did not offer a valid excuse for this failure to*

40 *comply. Considering Art. 826 of the Code of Civil Procedure with respect to the merit*  
41 *of the presentation of documents requested as evidence, and given that this Presidency*  
42 *should only consider the elements that form part of the proceeding, I consider that the*  
43 *refusal to comply with the ordered presentation of documents cannot favor the party in*  
44 *contempt, but rather to the contrary, the Code of Civil Procedure has established a*  
45 *sanction for these cases, in Art. 827, which says, ‘If once ordered the presentation of*  
46 *evidence is not fulfilled within the term indicated, a fine will be imposed on the*  
47 *reluctant party of ten to forty United States dollars for each day of delay, depending*  
48 *upon the amount in dispute. This fine may not exceed the value equivalent to ninety*  
49 *days,’ therefore in this case, due to the time elapsed, the maximum fine must be applied,*  
50 *equivalent to 40 dollars per day multiplied by the 90 days, for each document that has*  
51 *not been produced as was ordered. The same thing happened with the documents whose*  
52 *production was requested in the motion filed on October 24, 2003 at 4:59 p.m., that*  
53 *refers to ‘Chevron Texaco Notice of the 2002 Annual Meeting and the 2002 Proxy*  
54 *Statement,’ and to ‘Chevron Texaco Notice of the 2003 Annual Meeting and the 2003*  
55 *Proxy Statement,’ and also by motion filed on October 24, 2003 at 5:00 p.m., in which*  
56 *it is requested that a date and time be scheduled for the defendant company to produce*  
57 *the following documents: ‘a.- Complete and certified copy of the ‘Agreement and Plan*  
58 *of Merger’ between Chevron Corporation and Texaco Inc., b.- Complete and certified*  
59 *copy of the records of the competent body , among which appear the authorization for*  
60 *the institution called ‘merger,’ in the legislation of the state of Delaware, of the United*  
61 *States of North America, to proceed between the companies Chevron Corporation and*  
62 *Texaco Inc.; c.- Certificate of Merger between Texaco Inc. and Chevron Corporation;*  
63 *d.- Authorization of the competent body that permits Chevron Texaco Corporation to*  
64 *establish, in the legal documents ‘Chevron Texaco Notice of the 2002 Annual Meeting*  
65 *and the 2002 Proxy Statement and Chevron Texaco Notice of the 2003 Annual Meeting*  
66 *and the 2003 Proxy Statement,’ that the legal concept called ‘Merger’ has occurred*  
67 *between the companies Texaco Inc. and Chevron Corporation,’ which motions were*  
68 *addressed in the ruling of October 27, 2003 at 8:40 a.m., in which the requested*  
69 *production was scheduled for November 4, 2003, without there being a record in the*  
70 *proceedings of the compliance with this order. Moreover, this situation has been*  
71 *considered together with the other record evidence, which indicates to us that both the*  
72 *representatives of Chevron and those of Texaco each made public statements, in*  
73 *different media and by different spokespersons, announcing a financial operation that*  
74 *would combine the strengths of two companies to form a new one that would benefit*  
75 *from this union. The case file contains important documentary evidence as of page*  
76 *140700, in the notarial record made on June 6, 2008 of the true copy of the following*  
77 *documents: 1. Chevron Document: Power – Point slides ‘Analysis of Meeting Notice;’*  
78 *Transcription of meeting of Chevron and Texaco analysts, October, 16, 2000; 3.*  
79 *Chevron and Texaco Agree to a \$100 Billion Merger in an Integrated Co. of energy*  
80 *(Top-Tier); 4. Chevron and Texaco announce leadership team and organization*  
81 *structure for proposed Post-merger Co.; 5. Proposed Chevron-Texaco merger clears*  
82 *regulatory hurdle in Europe; 6. Texaco shareholders approve Chevron-Texaco*  
83 *merger; 7. The United States Federal Trade Commission approves Chevron-Texaco*  
84 *merger; 9. Chevron Texaco to begin first full day of global operations; 10.*  
85 *ChevronTexaco announces its plans to promote retail gasoline brand in the U.S.; 11.*

86 *Federal Trade Commission consent agreement allows the merger of Chevron S.A. and*  
87 *Texaco Corp., preserves market competition; 12. Analysis of the proposed merger*  
88 *order to aid public comment; and 13. Agreement containing consent orders, with its*  
89 *respective translation, and additional documents. Considering that these documents*  
90 *were publicly available, specifically the official page of Chevron, the defendant*  
91 *corporation (www.chevron.com), it follows that their content be analyzed in the*  
92 *following manner. In general, all of these documents refer to or announce a financial*  
93 *transaction called ‘merger’ in the English language, which is the language in which*  
94 *these documents appear. Taking into account the translation from the Spanish and*  
95 *English Legal Dictionary Diccionario Jurídico Inglés-Español by Henry Saint Dahl,*  
96 *McGraw-Hill’s publishing company, and additionally the translations in the record,*  
97 *the unmistakable conviction is reached that the English language term ‘merger’*  
98 *translates to Spanish as ‘fusión.’ Likewise, the translation submitted to the Presidency*  
99 *of the Court inside the same notarial record, done by Mr Mauricio Javier Rodríguez*  
100 *Sandoval, as of page 140746, invariably translates the English term ‘merger’ with the*  
101 *Spanish word ‘fusión.’ With respect to what a merger is, the Law of Companies (Ley*  
102 *de Compañías) dedicates a complete section, in which it explains the concept of*  
103 *merger, indicating that this occurs: a) when two or more companies unite to form a*  
104 *new one that succeeds them in their rights and obligations; and, b) when one or more*  
105 *companies are absorbed by another that continues existing (art. 337), for which reason*  
106 *it is appropriate to analyze the underlying legal transaction that occurred between*  
107 *Chevron and Texaco Inc., to determine if art. 337 of the Law of Companies is*  
108 *applicable to it. Under this legal approach all of the documentation has been analyzed*  
109 *related to the transcript of the presentation made at the Chevron–Texaco merger*  
110 *Analysts meeting held on October 16, 2000, at which Chevron’s General Manager,*  
111 *David O’Reilly, makes the following statements: ‘First of all we’ll talk about the*  
112 *strategic rationale for combining Chevron and Texaco to form this new company,*  
113 *ChevronTexaco Corporation’ (page 140747), then goes on to say ‘The capabilities of*  
114 *the new company will be made stronger by the combination of the skills and talents of*  
115 *both organizations,’ and that ‘We’ll have a larger and stronger portfolio which will*  
116 *enable Chevron and Texaco to better manage and absorb risk’ (page 140748). The*  
117 *Presidency carefully observes the fact that Chevron’s General Manager emphasizes*  
118 *the idea of ‘combining’ Chevron and Texaco so that the new company can benefit from*  
119 *this combination of the skills and talents of both, which makes it evident that the new*  
120 *company acquired benefits of the combined companies. It is noteworthy that, although*  
121 *there is no express mention of obligations, the advantage of ‘better manage and absorb*  
122 *risk’ is analyzed. The Presidency cannot disregard the fact that in slide 13 of the*  
123 *presentation (page 140750) the benefits of the merger with respect to Latin America*  
124 *are discussed, describing how the new company will benefit from the rights that the*  
125 *combined companies have in South American countries; nevertheless, despite the fact*  
126 *that no mention is made of the obligations of these companies in those countries, due*  
127 *to an elemental principle of law we understand that the net assets are united as a whole,*  
128 *made up of assets and liabilities, and therefore in terms of the law, it is understood that*  
129 *be the underlying financial legal transaction what it may, or however the companies*  
130 *want to call it or conceal it, what causes legal effects is the true transaction. This*  
131 *Presidency is convinced that the net assets must be combined as a whole and not just*

132 *the rights alone, that is to say, the obligations are also combined. We understand that*  
133 *the Managers of both companies publicly announced a merger, and that the legal*  
134 *effects of such operation necessarily entail that the new 'combined' company succeeds*  
135 *its creators in rights and obligations, in accordance with what art. 337 of the Law of*  
136 *Companies has provided in this regard, and art. 338 which provides that the respective*  
137 *corporate assets shall be transferred 'in a block,' that is to say, that the full net assets*  
138 *are transferred, assets and liabilities, rights and obligations, without benefit of*  
139 *inventory or any other limit, as is explained with total clarity in the second paragraph*  
140 *of art. 341, which provides that 'the absorbing company shall take care of paying the*  
141 *liability of the absorbed and shall assume, by virtue thereof, the responsibilities*  
142 *inherent to a liquidator with respect to the creditors of the latter;'* therefore, the  
143 *defendant's statement that 'the claimed automatic transfer To Chevron Texaco*  
144 *Corporation of any obligations TEXACO INC. may have had lacks legal basis' (page*  
145 *244) has no legal merit at all, since the transfer is not 'automatic,' but rather it finds*  
146 *its cause in the legal transaction that has been called merger in English, and that*  
147 *combined the net assets of both companies. In addition, the various press releases*  
148 *issued by Chevron Corporation have been analyzed, which were published on the*  
149 *official web page of the same Corporation and are certified in the case file with their*  
150 *respective translation in the Notarial Record that we are now examining, in which there*  
151 *appear several statements by Chevron's General Manager, expressly affirming that '*  
152 *this merger positions ChevronTexaco as a much stronger global energy producer,' and*  
153 *that it 'will create greater value for the shareholders of both companies' (page 140759,*  
154 *reverse). The General Manager of ChevronTexaco, on October 10, 2001, also*  
155 *announced that with the new company 'we have a broader mix of high-quality assets,*  
156 *businesses, skills and technology, thanks to the merger' (page 140768), which*  
157 *corroborates that the new company, ChevronTexaco Corporation, now called only*  
158 *Chevron Corporation acquired benefits (assets, businesses, skills and technology) from*  
159 *the combination of the two combined companies Texaco and Chevron. This coincides*  
160 *with that said by the President and General Manager of Texaco, Glenn F. Tilton, who*  
161 *said that 'the new ChevronTexaco will bring together two great companies,' as well as*  
162 *that, he looks forward 'to completing the merger and creating a great new energy*  
163 *company' (page 140766). Per the principle of good faith, any citizen, Ecuadorian or*  
164 *North American, who heard the public statements made by the companies Chevron and*  
165 *Texaco would have come inevitably to the conviction of a merger between them. This*  
166 *same conviction appears to be the one that motivated such that the plaintiffs initiated*  
167 *their action against the new company resulting from the combination of the other two,*  
168 *since this conclusion is the result of having trusted the information that both companies*  
169 *issued publicly through their representatives and official channels. On the official page*  
170 *of the Company Chevron, www.chevron.com, on October 9, 2001, the defendant*  
171 *company made the following public announcement: 'Chevron Texaco Corporation*  
172 *announces completion of merger' (page 140767, reverse). This clear and express Said*  
173 *announcement, clear and express, leaves no room for confusion, and in any case is*  
174 *presumed truthful for the principle of good faith, but if it turned out that the public*  
175 *statements by the Presidents and General Managers of both companies are made with*  
176 *the intention of creating a false impression of reality, then we could qualify these*  
177 *statements as malicious, and under basic principle of law the author or authors cannot*

178 benefit from such malice, in accordance with the provisions of subsection 2 or art. 17  
179 of the Law of Companies, which provides that ‘For acts of fraud, abuse or other  
180 improper conduct committed on behalf of companies and other individuals or legal  
181 entities, the following shall be held solidarily liable: 1. Those who order or carry them  
182 out, without prejudice to the responsibility that may affect such persons. 2. Those who  
183 obtained benefit to the extent of its value. 3. The holders of the properties for the  
184 purpose of their restitution,’ such that in this case, in which the actions and  
185 announcements of the spokespersons and representatives of both companies created a  
186 false impression of reality, the companies that participated in this financial operation  
187 and that seek to benefit from the false information they disseminated are solidarily  
188 liable. In addition, to issue this ruling, I consider the statements of Dr Ricardo Reis  
189 Veiga, who gave his version of the facts (page 103.460) during the judicial inspection  
190 of well Guanta 7, in which he states: ‘I am Vice President of Texaco Petroleum  
191 Company, professionally I am an attorney, I am responsible for all corporate legal  
192 matters in Latin America,’ and also adds, ‘Yes, I do have a relationship with Chevron,  
193 of course I have a relationship with Chevron, but I did not have a relationship with  
194 Chevron at that time because the truth is that it had not merged (...),’ making clear the  
195 position he holds within the company Texaco, and also clarifying that he maintains  
196 ‘relations’ with Chevron, but that these relations are subsequent to the merger, which  
197 is inferred when he states ‘because the truth is that it had not merged,’ revealing the  
198 certain fact that the author of this testimony has the internal conviction of the existence  
199 of the merger as a consummated, past and objective fact. Also considered is the  
200 existence in the case file of various checks (pages 103221, 104241, 101884, 69483,  
201 among others) that have been signed by Dr Rodrigo Pérez Pallarez, legal  
202 representative of the company Texaco in Ecuador, to satisfy the obligations that the  
203 defendant party, Chevron Corporation, has had to pay as part of the expenses  
204 generated by this lawsuit. This subrogation of Texaco, who is not a party in this lawsuit,  
205 to satisfy the obligations contracted by Chevron Corporation, necessarily denotes at  
206 least a proprietary/patrimonial relationship between the two companies, since between  
207 distinct, independent companies there would be no legal cause for one company to  
208 assume the legal expenses of the other. All these public statements and procedural acts  
209 carried out by spokespersons and representatives of both companies (Chevron Corp.  
210 and Texaco Inc.) lead to the unequivocal conclusion that the combination of their net  
211 assets and personalities is a legal reality, as well as a public and well-known fact. As  
212 provided by the principle of procedural truth established in art. 27 of the OCJB, this  
213 Presidency, as the competent Judge, does not require further proof of the merger  
214 between Chevron and Texaco, given that it has been shown to be common knowledge  
215 based on the evidence added to the procedural index. One cannot fail to observe the  
216 manifest reality, that neither Chevron Corp. nor Texaco Inc., nor their spokespersons  
217 or representatives, in any of their frequent press releases, has ever denied publicly the  
218 existence of the merger (while they did deny, debate and denounce publicly other facts,  
219 through paid announcements in the press media), but rather all the contrary, this  
220 litigation being the only known scenario in which Chevron Corp. debates the existence  
221 of the merger with Texaco Inc., for which it is appropriate to recall that in our legal  
222 system the principle prevails that no one can benefit from his bad faith, which would  
223 be the case of making several false public announcements to transmit a distorted idea

224 *of the reality and to profit from the error induced, such as, for example, if said*  
225 *manoeuvre is undertaken for the purpose of evading legal obligations with third parties*  
226 *The fact that the shareholders of the predecessor companies are the same ones who*  
227 *control the new company, leaving as the result of said merger that the shareholders of*  
228 *Chevron are owners of ‘approximately 61% of the new merged company, while the*  
229 *Texaco shareholders would own approximately 39% of it’ (page 140770); and*  
230 *moreover that the executives in charge of the new company are the same ones who*  
231 *managed the combined companies, (140759, 140761, 140768), as occurs in this case,*  
232 *leads one to think that there is not sufficient separation between the ownership and*  
233 *control of the new company and its predecessors. One considers that if the shareholder*  
234 *of Texaco Inc., became the shareholders of Chevron, and consequently benefited from*  
235 *the new company (same as its executives), the obligations that the latter maintained as*  
236 *shareholders of Texaco Inc. transferred as well to the new company, Chevron Corp.*  
237 *The law serves justice, and cannot allow legal institutions to be manipulated for*  
238 *illegitimate purposes, such as to favor a fraud or to promote injustice, which would be*  
239 *the case of transferring the assets to one Corporation ‘free of responsibility,’ while the*  
240 *responsibilities are kept in a company ‘free of assets,’ the way the defendant tries to*  
241 *have us understand the transaction that took place between Chevron and Texaco, in*  
242 *which the new company benefits from the combined companies, but fails to mention the*  
243 *obligations. As the First Civil and Commercial Chamber of the Former Supreme Court*  
244 *of Justice tells us, ‘in foreign legal treatises and case law, the need is increasingly*  
245 *gaining ground to lift the veil of legal entities, particularly of corporations [sociedades*  
246 *anónimas]. The unveiling consists in disregarding the external form of the legal entity*  
247 *and, giving birth from there, penetrating in the interior of the same and examining the*  
248 *real interests that live inside it,’ (Gaceta Judicial, Year CV, Series XVIII, No. 1, Page*  
249 *79, Quito, July 23, 2004, Published in file 172, Registro Oficial 553, March 29, 2005).*  
250 *In cases like this one, that fit the case where the new corporate structure could provoke*  
251 *a fraud on third parties or a similar injustice, North American jurisprudence teaches*  
252 *us that the doctrine of lifting the corporate veil must especially be asserted. The same*  
253 *thing happens in Ecuadorian jurisprudence, where developments have been such, that*  
254 *it has been possible to synthesize a series of basic postulates that contain, at the same*  
255 *time, both a definition and an identification of the scope of action of the institution of*  
256 *veil lifting in Ecuador. In the first place, it is vitally important to highlight that the*  
257 *institution of veil lifting is strictly exceptional in nature, since the important social role*  
258 *that is played by a clear separation of the equity of legal entities and their owners is*  
259 *undeniable (as set forth in the Ruling of the First Civil and Commercial Chamber of*  
260 *the Supreme Court of Justice, File No. 393, issued on July 8, 1999 at 9:00 a.m.,*  
261 *Registro Oficial No. 273 of September 9, 1999). In the second place, there is the*  
262 *obvious reality that the existence of the corporate entity has lent itself in the past to a*  
263 *series of abuses, being used not for the purposes provided for in the Law, but rather to*  
264 *affect rights of third parties through, becoming in practice like a tool of fraud. It is in*  
265 *this event that the Judges must pull open the corporate curtain of legal entities, in order*  
266 *to observe and analyze the reality of things beyond the appearances (see ruling of the*  
267 *First Civil and Commercial Chamber of the Supreme Court of Justice, File No. 120,*  
268 *handed down on March 21, 2001 at 11:15 a.m., Registro Oficial No. 350 of June 19,*  
269 *2001). In the third place, at the time of analyzing abuses of the corporate entity, it is*



270 not relevant if it was organized with the clear intention of causing a fraud or a harm.  
271 It is sufficient that said fraud or harm exists in order to justify a lifting of the veil (see  
272 Ruling of the First Civil and Commercial Chamber of the Supreme Court of Justice,  
273 File No. 393, handed down on July 8, 1999 at 9:00 a.m., Registro Oficial No. 273 of  
274 September 9, 1999). Finally, it is essential to highlight that lifting the corporate veil of  
275 a company is not simply a power of the court when faced with abuses of the corporate  
276 form. On the contrary, the application of this institution constitutes a true obligation  
277 of the judge, since that is the only, or at least the most effective, remedy for unmasking  
278 these abuses of the legal entity (see Judgment of the First Civil and Commercial  
279 Chamber of the Supreme Court of Justice, File No. 20, issued on January 28, 2003 at  
280 11:00 a.m., Registro Oficial No. 58 of April 9, 2003). For these reasons, the fact that  
281 the procedural index demonstrate the legal existence of Texaco and the merger of the  
282 latter with Keepep, does not contradict the demonstrated, public and well-known fact  
283 that the new company, Chevron Corporation, benefited from all the assets and rights  
284 of Texaco and of Chevron, in the same way that the reverse triangular merger, cannot  
285 serve as a legal mechanism to claim that Chevron benefited only from rights and assets,  
286 leaving in the company Texaco the lawsuits and other pending obligations. It is  
287 estimated that if the financial transaction between Chevron And Texaco meant that as  
288 a result, the Texaco shareholders receive 0.77 ordinary shares of Chevron, and the  
289 shareholders that Chevron became owners of 61% of the combined entity, valued at  
290 100 billion, (page 140759) it is because this transaction involved the transfer of assets  
291 and/or rights from which the new company and the shareholders of the combined  
292 companies would directly benefit; however we must insist that it is contrary to the  
293 principles of law and to good faith to expect that only the assets and rights have  
294 transferred, while not the obligations. If we consider the mandate of the Law of  
295 Companies and the principal of procedural truth, along with the evidence provided and  
296 referred to in this judgment that demonstrate that Chevron (and its shareholders)  
297 benefited from the merger with Texaco, plus the universal principles of law, we have  
298 more than enough legal foundation for the transmission of the obligations of Texaco to  
299 the defendant company, Chevron Corp.. In this way the obligation to submit to  
300 Ecuadorian justice pending on Texaco Inc. was also transmitted to the new company  
301 Chevron Texaco Corporation, so that consequently Chevron Corp. cannot allege that  
302 it never operated in Ecuador to give grounds for lack of a legitimate opposing party.  
303 The record shows that Texaco – who did operate it – was obligated to submit to this  
304 jurisdiction, as can be seen in the judgment of the New York Court, at page 152883,  
305 which states: ‘following remand, Texaco provided the missing commitment; in other  
306 words, to submit to the jurisdiction of the courts of Ecuador (and Peru as well),’ leaving  
307 then the initiation of the complaint, by reason of territory under the competence of the  
308 Presidency of this Court. In addition to the well-known, justified facts and the law  
309 invoked, this Presidency has studied and considered the precedents of US legislation,  
310 inasmuch as it recognizes that in cases where the merger is carried out in bad faith or  
311 in order to defraud third parties, it must be assumed that it is a de facto merger. The  
312 precedents in Delaware establish that ‘the corporations shall not be able to avoid their  
313 responsibilities through a merger.’ In a manner consistent with that provided by the  
314 principle of procedural truth, the Courts of the US pay more attention to the substance  
315 than to the form of this type of transactions. It has been made clear that the simple fact

316 of calling a transaction a merger does not turn it into such, and that the Courts must  
317 observe the substance of the transaction in place of what is alleged by the parties.  
318 Considered of vital importance is the general principle according to which in mergers,  
319 'the party that benefits also assumes the obligations,' which has been established in  
320 various Codes. From the standpoint of legal scholars, imposing responsibilities on the  
321 new company is appropriate in those cases where it knew previously of the  
322 responsibility of its predecessors therefore, there being no argument whatsoever in the  
323 record that indicates lack of knowledge on the part of Chevron Corp. regarding the  
324 obligations of Texaco Inc., It is presumed that the existence of the New York Court's  
325 order was not concealed by Texaco Inc. from Chevron Corp. It is appropriate for the  
326 purposes of justice, to impose on Chevron Corp., which benefited from the 'merger,'  
327 the obligations of Texaco Inc. On the other hand, to allow the right of the victims to  
328 redress to disappear for mere formalities within the merger, would be considered by  
329 the Courts of the US as 'manifest Injustice,' always considering that in certain  
330 circumstances, allowing responsibilities to be avoided or eluded through corporate  
331 formalities can be unfair for the victims, who would end up defenseless. Everything  
332 stated leads us to raise serious doubts as to the good faith with which the defendant  
333 acted in this lawsuit in particular, since this is the only known scenario in which  
334 CHEVRON CORP. Appears disputing the merger with Texaco. Responsibility of  
335 Texaco Inc, for Texpet. The complaint states that 'The employ a subsidiary company,  
336 in this case TEXPET, created to develop operations in Ecuador as a different  
337 corporation, with little equity and patrimony, very much inferior to the real volume of  
338 its operations, corresponds to a scheme designed for the clear purpose of limiting the  
339 impact of any complaint derived from its activities in the country. In reality, TEXPET  
340 was nothing more than a screen behind which TEXACO INC acted, being proprietary  
341 by itself or through its subsidiaries of the total capital.' It also affirms that TEXACO  
342 INC directed, supervised and controlled the operations in Ecuador of its subsidiary  
343 company TEXPET and established the operating procedures and techniques to be used  
344 in the hydrocarbon exploration and production activities, however, as noted by the  
345 defendant during the conciliation hearing, the Federal Court in New York declared  
346 that neither Texaco Inc, nor Chevron Texaco Corp. 'conceived or approved of' the  
347 'decisions related to the methods, procedures, etc., used by Texpet in Ecuador' (F.S.  
348 253), so that it is appropriate, in the first place, to conduct an analysis of said legal  
349 decision, which in the event it constitutes material res judicata would prevent this Court  
350 from analyzing this topic again. Thus, the first thing noted is the fact that in the event  
351 that this foreign judgment constitutes res judicata, it should have been so alleged, as a  
352 defense, during the conciliation hearing, which was the appropriate procedural  
353 moment according to Ecuadorian procedural Law. This defense has not been put forth,  
354 demonstrating that the defendant did not have either the conviction or the intention  
355 that said foreign legal judgment be considered as a material decision of final instance;  
356 in the second place, it is noted that although the foreign legal judgment of the United  
357 States District Court, of the Southern District of New York, of May 30, 2001,  
358 (translation by expert Zambrano of November 14, 2008 at 2:30 p.m., from page  
359 152840, in volume 1430) is in the record, which holds that 'the plaintiffs, after taking  
360 numerous deposition and obtaining responses to no fewer than 81 document requests  
361 and 14 interrogatories, were unable to adduce material competent evidence of

362 meaningful Texaco [USA] involvement in the misconduct complained of' (page  
363 152882), this decision refers mainly to the competence of the Court, and was based on  
364 various aspects that need to be reconsidered. From a reading of this court order in its  
365 context it stands out that what is being analysed the decision in question is the link  
366 between the evidence and the US or Ecuador as another parameter for establishing the  
367 most suitable forum, concluding that the greatest amount of evidence is found in  
368 Ecuador. The decision states that 'the record establishes overwhelmingly that these  
369 cases have everything to do with Ecuador and nothing to do with the United States'  
370 (page 152880), which is not a decision on the merits that decides that Texaco Inc did  
371 not direct or decide on operations in Ecuador, but rather that the lack of proof in this  
372 aspect is considered as one more basis for demonstrating forum non conveniens. The  
373 reasoning of the New York Court is considered correct insomuch as the majority of the  
374 evidence should be, by logic, in Ecuador, which also implies that the New York Court  
375 recognized that new evidence could be introduced. Then, if we consider the transcribed  
376 text of the judgment we read that it refers to the fact that the record has been analyzed  
377 in terms of 'admissible evidence' in the US, while in Ecuador the same norms do not  
378 necessarily prevail in order to determine what is considered admissible evidence, with  
379 this Presidency having to adhere to that which our laws establish as regards the  
380 evidence, its presentation and its evaluation; and finally, the new evidence that has  
381 been presented and that is part of this record pursuant to the referenced norms, must  
382 be considered, and must necessarily be taken into account to establish the procedural  
383 truth. In this way, the fact that only the evidence admissible and obtained in the U.S.  
384 was analyzed, along with the fact that new evidence has been presented, push for  
385 consideration of the facts at issue discussed in light of the totality of all the evidence.  
386 In addition, it is felt that this decision refers to this issue only as one additional  
387 argument that demonstrates the absence of a link of the case with the United States, in  
388 order to demonstrate precisely that there was no discretion in the lower court decision  
389 in deciding that in this case the evidence was found in Ecuador, but rather that the  
390 balance of public and private interests tilts the scale toward an Ecuadorian forum, such  
391 that what this judgment does is confirm the formal decision of the lower court, that  
392 rejects the complaint based on Forum non Conveniens, but modifies this decision by  
393 conditioning it on the commitment of Texaco to accept the interruption of the  
394 extinguishing prescription of actions, such that it is clear that it is not possible to speak  
395 of material res judicata, since the matters at issue have not been resolved, but rather  
396 on the contrary, the complaint has been rejected taking as a basis the existence of a  
397 more appropriate forum: this one. In this manner competence has settled in this  
398 Presidency of the Provincial Court of Justice of Sucumbíos, where in addition we must  
399 give credit to evidence that has been presented in this lawsuit and that were not  
400 considered either by the Federal Court in New York or by the appeals Court, in handing  
401 down their judgments. Thus we conclude that the judicial decision of the Federal Court  
402 in New York has not been final as to the merits of the matter, nor has it caused state,  
403 so that material res judicata cannot be admitted, nor is it admissible as a decision on  
404 the merits binding on this Presidency which is fully competent to rule on this issue  
405 submitted to be heard by it. Therefore, what is incumbent to analyze are both the  
406 documents obtained and turned over by Texaco Inc through the Discovery process,  
407 whose existence has been accepted by the defendant as a certain fact during the

408 *conciliation hearing like other documents that have been lawfully presented, and the*  
409 *law applicable to the specific circumstances of this case, in order to determine whether*  
410 *it is appropriate to apply the doctrine of lifting the corporate veil, which in our legal*  
411 *system has a jurisprudential and not legislative development. Thus, we begin again*  
412 *remembering that the origin of this institution is due to the need that judges and courts*  
413 *had to remedy the severe crisis in which the concept of legal entity entered due to the*  
414 *fact that many have taken advantage of the benefits that the recognition of the*  
415 *corporate legal entity assumes. That is how our case law recognizes it, in the decision*  
416 *No. 135-2003, handed down in the ordinary lawsuit for payment of sales Commission*  
417 *No. 36-2003 that José Miguel Massuh Buraye brought against Roberto Dumani,*  
418 *published in R.O. No. 128 of July 18, 2003, which notes that '[...] cases are presented*  
419 *in which the legal entity is abused in order to avoid the fulfilment of legal obligations,*  
420 *especially tax-related or to be used as a screen to evade the rights of third parties. For*  
421 *this reason, the doctrine is being consolidated which allows for judges to be able to*  
422 *tear away the veil of legal personality and adopt measures with regard to the men and*  
423 *the relationships covered behind it,' such that the benefits granted by the legal system*  
424 *are limited, thought to promote the general economic development, not only of honest*  
425 *businessmen, but of all society; however, abusing the division or separation of equity*  
426 *and of responsibility, the corporate veil has been used for perverse purposes, that have*  
427 *no relation with its objective. Along that same line, it has been expressed to the*  
428 *Supreme Court of Justice in decision No.120-2001 on a petition for cassation, in verbal*  
429 *summary proceeding 242-99, which points out that 'in the actions of legal entities, in*  
430 *recent years a well-known and prejudicial deviation has been observed, now that it is*  
431 *used as an oblique or detoured path to evade the law or harm third parties.'* (Published  
432 *in R.O. No. 350 of Tuesday, June 19, 2001, Gaceta Judicial, No. 5, Year CII, Series*  
433 *XVII, p. 1262, Quito, March 21, 2001). In view of this possibility, which has been*  
434 *alleged by the plaintiff, it is necessary to start by analyzing it considering that this suit*  
435 *has been brought for the redress of environmental harm supposedly caused by TEXPET*  
436 *while it was operating the Napo Concession, therefore it is appropriate for us to*  
437 *determine if the conditions are met that permit lifting the corporate veil in order to*  
438 *attribute responsibility to Texaco Inc for the conduct or acts of Texpet, to which the*  
439 *defendant has expressly objected, noting they are separate and independent companies,*  
440 *so that in order to resolve this aspect, the various factors will be analyzed that reflect,*  
441 *beyond formal questions, the level of dependence between subsidiary and parent*  
442 *company in order to determine whether it can be considered that the corporate veil has*  
443 *been used to hide the true interested parties and beneficiaries of the subsidiary's*  
444 *affairs, or if it has been legitimate. 1.- With this purpose we first note that the capital*  
445 *of the subsidiary company shall be consistent with the amount of business done and the*  
446 *obligations to be met, because it is understood that business people acting in good faith*  
447 *risk in their affairs a capital rationally adequate to face their potential responsibilities.*  
448 *The capital of the subsidiary can be considered insufficient if it requires constant*  
449 *authorizations and transfers of funds to proceed with the normal course of business,*  
450 *since in that case, those really making the decisions and exercising control over the*  
451 *activities are the people who provide the authorizations and the funds, which frequently*  
452 *are sheltered behind the mask of the legal entity, making necessary that in certain cases*  
453 *the formal structure of the corporate entity be disregarded in order to avoid defrauding*

454 *third parties. In the record at volume 65, pages 6827, 6828,6830, 6831, 6826, 6833,*  
455 *are the translations of various requests for authorization from Shields to Palmar, in*  
456 *which Mr Shields makes requests in the name of the 'Ecuadorian Division' of Texaco*  
457 *Inc. to his superiors at Texaco Inc., requesting their approval for various matters*  
458 *pertaining to the operations in the Ecuadorian Oriente. The record contains*  
459 *authorizations for everyday matters, of routine administration, such as tenders for*  
460 *catering services and the cleaning of the Consortium's operating sites in Quito and the*  
461 *Oriente region (translation of document PET 029369 at page 6827 and PET 028910*  
462 *at page 6830), or the contracting of motion picture entertainment services at the*  
463 *Oriente installations (PET 029086 at page 6831). Likewise we find an authorization*  
464 *for the contracting of equipment and personnel for pipeline maintenance (PET 019212*  
465 *on page 6828) and construction of bridges in Aguarico and Coca (PET 016879 at page*  
466 *6833). Finally, Shields requests Palmer's authorization to begin the exploration of the*  
467 *Sacha-84 well, in October 1976 (PET 012134). Also in the record are various*  
468 *documents from the Texpet archives, containing authorization requests from Bischoff*  
469 *to Palmer, in volume 65, pages 6839, 6840, 6843, 6844, 6848, where it appears that,*  
470 *like Shields, Palmer refers to Texpet's operations in the Oriente as 'the Ecuadorian*  
471 *Division.'* *Among his requests for authorization is the urgent request to approve the*  
472 *tender for two 'workover' towers (support and maintenance) for production in the*  
473 *Oriente (PET 030919 at page 6839), and the tender on a road between the Yuca and*  
474 *Culebra wells (PET 016947 at page 6843), key aspects for the development of Texpet's*  
475 *operations. Authorization also is requested to extend the contract for ferry services in*  
476 *the zone (PET 032775 at page 6844), and more importantly, approval is requested of*  
477 *the approval documents for Vista-1 Well. There is also a memorandum of special*  
478 *importance revealing the existence of a lineal chain of authorization existing between*  
479 *these executives, since Bischoff asks Palmer who, after approving the document, signs*  
480 *and forwards it to McKinley, a higher executive of Texaco Inc (PET 022857 at page*  
481 *6848), denoting the existence of a chain of command, which meant that the decisions*  
482 *regarding every aspect relating to the operation of Texpet in Ecuador were made by*  
483 *executives of Texaco Inc in the U.S. In addition, there are respective authorization*  
484 *requests in the record from Palmer to Granville, in volume 66, pages 6930, 6938, 6943,*  
485 *which show that the chain of authorizations extends higher than Palmer, since in*  
486 *echoing a request from Shields (see PET 019212 at page 6828), Palmer asks Granville*  
487 *for authorization to contract equipment and personnel for pipeline maintenance (PET*  
488 *029976 at page 69309) and per Bischoff's requirement (see PET 030919, at page*  
489 *6839), approves one of the offers for the construction of the 'workover' towers,*  
490 *submitting said approval to Granville for an O.K. (PET 029991, at page 6943). The*  
491 *record also contains letters and memorandums from Shields and Palmer to John*  
492 *McKinley, coming from the Texaco Inc, and Texpet files. In volume 66, pages 6957,*  
493 *6958, 6964, 6959, 6960, 6974. That show that both Shields and Palmer maintained a*  
494 *constant flow of letters and memos with McKinley, asking for his authorization and*  
495 *informing him of events relating to the Napo Concession. Likewise, letters from minor*  
496 *officials addressed to Shields, in volume 65, pages 6855, 6856, 6860, 6861, 6875, 6882,*  
497 *6885, where reference is made to letters addressed to Shields that originated in Quito,*  
498 *in hands of minor officials who requested his authorization, such as William Saville,*  
499 *who was a Texpet executive who operated in Quito, and sent many and daily*

500 *communications to Shields (in New York) requesting authorizations. For example, he*  
501 *sent Shields the estimated costs of drilling the Sacha 36 to 41 wells (unnumbered doc)*  
502 *and asks his approval to start the tender for fuel transport in the Oriente (PET 031387*  
503 *at page 6856). J.E.F. Caston, another executive of the oil firm based in Quito, asks*  
504 *Shields for his authorization to call for bids for various services (PET 020758 at page*  
505 *6860) and to approve the estimated costs of installing submersible pumps in five wells*  
506 *in the Lago Agrio field. Finally, we have Max Crawford, another official based in*  
507 *Quito, who also periodically asked for Shields' approval for various purposes (PET*  
508 *035974 at page 6882, and unnumbered doc at page 6885). On the other hand, it is*  
509 *necessary to consider the proven fact that the decisions of the 'Executive Committee'*  
510 *of Texpet had to be approved by the board of directors of Texaco Inc, as we see that in*  
511 *the Minutes of the Board of Directors No. 478 (Volume 25, page 2427), where it*  
512 *approved Texpet's decision to enter into negotiations with Ecuador to object to an*  
513 *increase in the income tax for the oil company, and additional payments, in the same*  
514 *way that the Texaco Inc board of directors approved the purchase of a plane for US\$*  
515 *850,000, Minutes 456 (Volume 24, page 2351), demonstrating the decision-making*  
516 *power of Texaco Inc. over the purchases made by Texpet. In my opinion, these minutes*  
517 *demonstrate the constant scrutiny that the parent firm Texaco Inc. maintained over all*  
518 *operations and news relative to Texpet in Ecuador. If we analyze this fact*  
519 *independently, perhaps it could be confused with the normal control that a board of*  
520 *directors exercises over its subsidiaries. However we must analyze this control by the*  
521 *parent firm over its subsidiary in its context, taking into account also that the Board of*  
522 *Directors of Texaco Inc. also delivered the 'allocations' of money with which Texpet*  
523 *operated, which implies that Texpet lacked not only administrative autonomy, but also*  
524 *financial, since it was Texaco Inc. that controlled not only the decisions, but that also*  
525 *authorized the funds that Texpet needed for the normal course of activities. Starting*  
526 *with the admitted fact that Texpet is a fourth level subsidiary company belonging one*  
527 *hundred per cent to a single owner, Texaco Inc., and that Texpet operated with funds*  
528 *coming from the coffer of Texaco Inc., it has been shown that there is not a real*  
529 *separation of patrimony. We understand that different legal entities necessarily imply*  
530 *differentiated patrimony, according to the rules of the attributes of the entity, however*  
531 *in this case, the confusion of patrimony is obvious, plus a confusion of entities in the*  
532 *same manner. Among the evidence that lead us to this conviction we cite additionally*  
533 *the minutes of a board of directors meeting of Texaco Inc. No. 380, dated January 22,*  
534 *1965 (Volume 22, page 2166), which established allocations in favor of the Cia. Texaco*  
535 *Petróleos del Ecuador for an amount of US\$ 30,212.00. The minutes of the board of*  
536 *directors meeting of Texaco Inc. No. 387, dated September 17, 1965, (Volume 22, page*  
537 *2176), established allocations in favor of Texaco Petroleum Company (Texpet) for an*  
538 *amount of US\$ 27,625.00. Minutes of the board of directors meeting of Texaco Inc. No.*  
539 *393, dated April 19, 1966 (Volume 22, page 2182), established allocations in favor of*  
540 *Texaco Petroleum Company (Texpet) for an amount of US\$ 331,272.00, and in favor*  
541 *of the Cia. Texaco Petróleos del Ecuador for an amount of US\$ 13,631 establishing in*  
542 *this way the conviction of this Presidency regarding that Texaco Inc., controlled the*  
543 *funds both of the company exercising the concession rights (Texaco Petróleos del*  
544 *Ecuador) and of the one contracted to operate the concession of the fields, which makes*  
545 *it obvious that TEXPET was a company without any capital or sufficient autonomy to*

546 *face the normal course of business, which in turn constitutes more evidence of lack of*  
547 *independence of the subsidiary with respect to the principal, leading us to the*  
548 *conviction that TEXPET was an undercapitalized company, that depended both*  
549 *economically and administratively on its parent company. The amount of the contracts*  
550 *that require authorizations to make likely the unavailability of its own capital, which*  
551 *is an indication of inability to face the possible responsibilities that can be expected*  
552 *after an oil operation. Cabanellas explains to us in his work 'Derecho Societario: Parte*  
553 *General. La personalidad juridical societaria [Corporate Law: General Section. The*  
554 *corporate legal entity] that 'the corporate entity is based on a set of rules that*  
555 *determine what conduct is attributable to the corporation as a legal entity. The general*  
556 *effects of those rules may see themselves modified according to certain norms that alter*  
557 *that attribution, turning to imputing the conduct that normally would be attributable to*  
558 *the corporation as a legal entity, to other physical or legal persons, such as their*  
559 *partners or other people who exercise the control in fact of the corporation.'* (See Vol.  
560 *3. Buenos Aires: Editorial Heliasta, 1993. P. 65.) It has been shown in the record that*  
561 *the authorizations and investments required by TEXPET, made it so the de facto control*  
562 *of its operations was exercised by the parent company, which constitutes an important*  
563 *issue to be considered. López Mesa and José Cesano state it well in their work, El*  
564 *abuso de la personalidad jurídica de las sociedades comerciales: Contribuciones a su*  
565 *estudio desde las ópticas mercantil y penal [The abuse of the legal entity of commercial*  
566 *corporations: Contributions to its study from the commercial and criminal*  
567 *perspectives] (Buenos Aires: Depalma, 2000), when they note that 'The regime of the*  
568 *legal entity cannot be used against the superior interests of the society or the rights of*  
569 *third parties. The techniques manipulated to inhibit the purely instrumental use of the*  
570 *corporate form vary and adopt different names, but they all propose, in substance, the*  
571 *consideration of the economic and social reality and the supremacy of objective law.'*  
572 *Concordantly, the Supreme Court, in Ruling 120.2001, cited above, has said that 'in*  
573 *the face of these abuses, it is necessary to react by rejecting the legal entity, that is,*  
574 *drawing aside the veil that separates third parties with the true final recipients of the*  
575 *results of a legal business to reach them, in order to prevent that the corporate entity*  
576 *be used improperly as a mechanism to harm third parties, be they creditors who would*  
577 *be hindered or impeded from attaining the fulfilment of their loans, be they legitimate*  
578 *holders of a good or a right who would be deprived or dispossessed of them. These are*  
579 *extreme situations, that must be analyzed with extreme care, as legal certainty cannot*  
580 *be affected, but neither can, on the pretext of upholding this value, the abuse of the law*  
581 *or the fraud on the law through the abuse of the corporate institution be allowed.'* 2.-  
582 *Now, if we consider the formal questions, such as the fact that the same people hold*  
583 *the positions of executive directors and other managerial posts in both companies,*  
584 *added to the admitted fact that Texaco Inc was the 100% owner of Texpet, the certainty*  
585 *abounds as to the need to apply the doctrine of corporate lifting. For example, Mr*  
586 *Robert C. Shields held the position of Vice President of Texaco Inc. between 1971 and*  
587 *1977, while at the same time being the Head of Texpet's Board of Directors, according*  
588 *to his sworn statement (volume 63, page 6595). Review of the record shows that Shields*  
589 *signs his letters on behalf of Texpet, when according to his own testimony between*  
590 *1971 and 1977 he held the position of Vice President of Texaco Inc. This fact is*  
591 *consistent with Bischoff's statement that Texpet was the division of Texaco Inc. that*

592 operated in Latin America, and not a mere subsidiary, as the defendant's defense  
593 maintains. In the same way, over the course of his career, M. Robert M. Bischoff held  
594 positions with Texaco Inc. both in the United States and in Latin America. Between  
595 1962 and 1968 he worked as Vice President in the production division for Latin  
596 America, which he himself calls Texaco Petroleum Company (Texpet), according to his  
597 sworn statement in volume 63, page 6621. This shows how even the executives of  
598 Texaco Inc. themselves thought of Texpet as a division of Texaco Inc., and not as a  
599 separate company. Like Shields, the record clearly shows that Bischoff actively  
600 participated in the complex decision-making chains and processes that involved  
601 Texaco Inc. and Texpet. In his sworn statement Bischoff explains how the contracts of  
602 Texpet's headquarters, located in Florida, that exceeded US\$500,000.00 had to be  
603 approved by an attorney of the last name Wissel, head of Texaco Inc.'s attorneys. In  
604 this case, we see how the relationship between Texpet and Texaco Inc. was not limited  
605 to this one owning the shares of the other, but rather that both worked intimately linked,  
606 with Texaco Inc. taking all the decisions while Texpet was limited to carrying them out.  
607 It is true that as a general rule a company can have subsidiaries with completely  
608 distinct legal status. However, when the subsidiaries share the same informal name,  
609 the same personnel, and are directly linked to the parent company in an uninterrupted  
610 chain of operational decision-making, the separation between entities and patrimonies  
611 is significantly clouded, or even comes to disappear. In this case, it has been proven  
612 that in reality Texpet and Texaco Inc. functioned in Ecuador as a single and  
613 inseparable operation. Both the important decisions as well as the trivial ones passed  
614 through various levels of executives and decision-making bodies of Texaco Inc., to the  
615 extent that the subsidiary depended on the parent company to contract a simple  
616 catering service. In this regard it is completely normal that the Board of Directors of  
617 a subsidiary company be made up of some officers from its parent company, and it is  
618 also normal that the parent company receive periodic reports on its condition, and take  
619 certain decisions that for their importance are beyond the reach of the regular  
620 administration. However, in the case of Texaco Inc. and its subsidiary Texaco  
621 Petroleum Company (Texpet), the role of the Directors transcends roles that might be  
622 considered normal, as they received information and made decisions about the great  
623 majority of Texpet's deeds and acts regarding everyday matters of the operation of the  
624 Napo Oil concession, responding to a well-established chain of command, as has been  
625 shown in the record. 3.- Finally, it is considered that the doctrine of lifting the  
626 corporate veil is especially applicable in the face of the abuses that can be committed  
627 in detriment to the public order or the rights of third parties, in order to avoid fraud  
628 and injustice, that is, that the corporate veil must be lifted whenever not doing so favors  
629 a fraud or promotes injustice, as would be the case in which we find schemes  
630 intentionally created to leave the profits in the parent company, while the obligations  
631 remain in a subsidiary, which in general is incapable of satisfying them. As López Mesa  
632 and José Cesano rightly say: 'Even when it is admitted as a hypothesis that two  
633 corporations are subordinate to a decision-making unit or constitute an economic unit  
634 or corporate group, this is not sufficient data to dispense with the legal autonomy of  
635 each one of the corporate subjects implicated in the acts, as long as it is not alleged  
636 and proved that the legal forms have been implemented to prejudice the plaintiff in his  
637 rights, since what is appropriate is to respect the corporation's separation of assets,



638 as long as this is not likely to be the means of violation of other legal rules, since  
639 rejection of the status or attribution of responsibility to persons in distinct  
640 appearances, is exclusively based on proving the abuse of the privilege granted to the  
641 detriment of public order or the rights of third parties' (Pages 145 and 146). Along  
642 these lines it is noted that the plaintiffs have indeed expressly alleged that Texpet was  
643 a company implemented to keep pending responsibilities in a company without  
644 sufficient capital, while keeping the capital of the parent company free of  
645 responsibilities, with the precise objective of avoiding potential liabilities with third  
646 parties, while the record contains abundant evidence, as has been noted above,  
647 demonstrating the subsidiary's deep ties and lack of independence with respect to its  
648 parent company, which was who actually took the decisions and benefited from the acts  
649 of its subsidiary, which is moreover incapable of meeting the extent of the  
650 responsibilities that are demanded of it. Consideration is finally given to what the  
651 Supreme Court of Justice stated in its judgment No. 393, handed down in Ordinary  
652 Proceeding No. 1152-95 for moral damages brought by Rubén Morán Buenaño against  
653 Ricardo Antonio Onofre González and Leopoldo Moran Intriago, published in R.O.  
654 No. 273 of September 9, 1999, that with respect to the lifting of the corporate veil warns  
655 that 'the use of this instrument is not open nor indiscriminate, rather it will be in those  
656 hypotheses in which the interpreter of the Law comes to the assessment that the legal  
657 entity has been constituted with the aim of defrauding either the law or the interests of  
658 third parties, or when the use of the formal cover in the legal entity consists leads to  
659 the same defrauding effects' aspect that coincides with that indicated by the cited  
660 authors in that this principle 'cannot be made without first applying a large dose of  
661 prudence, mindful that its indiscriminate, frivolous, immoderate application could lead  
662 to doing away with the formal structure of companies, or else to disallowing it under  
663 circumstances where it is not warranted, with serious harm to the law, certainty and  
664 security in legal relationships,' such that considering the foregoing analysis, the  
665 exceptional but justified need has been established in this case to lift any corporate veil  
666 that separates Texaco Inc. in its fourth-level subsidiary, Texaco Petroleum Company  
667 (Texpet), given that it has been proven that it was a company with a capital very inferior  
668 to the volume of its operations, that required constant authorizations and investments  
669 from the parent company to carry out the normal course of business of its commercial  
670 activity, that the executives were the same in both companies, and principally the  
671 obvious fact that not lifting the corporate veil would imply a 'manifest injustice'.

*PART V – ANNEX 8*

*DR LEONARD’S AND OTHER EXAMPLES*

(1) *The Clapp Report*: [Leonard ER 2, p. 34]

**Example 11. Identical word strings in the unfiled Clapp Report and the Sentencia, but not in the filed Record**

Clapp Report: page 7	Sentencia: page 109-110	Anexo K of Cabrera Report
<p><b>Las muestras de suelo y agua tomadas durante las inspecciones judiciales han indicado niveles excesivos de plomo que puede plantear riesgos de salud para las poblaciones locales. Los niveles de plomo en el suelo</b> más que duplican el límite legal y prueban <b>que el envenenamiento con plomo es un riesgo real</b> que fue creado por operaciones de producción de PETRÓLEO en la concesión de Texaco en la amazona ecuatoriana.</p>	<p><b>Las muestras de suelo y agua tomadas durante las inspecciones judiciales han indicado niveles excesivos de plomo que puede plantear riesgos de salud para las poblaciones locales. Los niveles de plomo en el suelo</b> son mucho más elevados de lo normal, lo que contribuye a corroborar <b>que el envenenamiento con plomo es un riesgo real.</b></p>	<p>{ While the filed Anexo K of the Cabrera report appears to be based on the unfiled Clapp Report, it does not include this string. }</p>

Note: Bolding in Example 11 is added; bolding indicates exact matches. Curly brackets are used to interject text, spaces, or comments not in the original documents. The translation of this word string in the Sentencia is: “Soil and water samples taken during the judicial inspections have indicated excessive lead levels that could pose health risks for local populations. Lead levels in the ground are much higher than normal, which tends to corroborate that lead poisoning is a real risk.”

(2) *The Draft Alegato*: [Leonard ER 2, p. 21]

**Example 4. Similar text and source citations in unfiled Fusion Memo, unfiled Draft Alegato, and Sentencia, but not in filed Final Alegato**

Fusion Memo: pages 3-4	Draft Alegato: page 61	Sentencia: page 24	Final Alegato: Enero 17, 2011 - 16H55, page 99
<p><b>Al igual que Shields, Bischoff participaba activamente en las complejas cadenas y procesos de toma de decisiones que involucraban a Texaco Inc. y Texpet. En su declaración juramentada Bischoff explica cómo los contratos del cuartel general de Texpet, ubicados en Florida, que se excedieran de USD 500.000,00 debían ser aprobados por un abogado de apellido Wissel, jefe de los abogados de Texaco Inc</b>{footnote 8}. <b>En este caso, vemos como la relación entre Texpet y Texaco Inc. no estaba limitada a que ésta sea propietaria de las acciones de aquella. Ambas trabajaban íntimamente vinculadas, tomando Texaco Inc. todas las decisiones y Texpet limitándose a ejecutarlas.</b></p> <p>{footnote 7} Declaración Juramentada <b>de Robert M. Bischoff</b> [PSV-018/C] Cuerpo 63, foja 6621. {footnote 8} <i>Ibíd.</i></p>	<p><b>Al igual que Shields, Bischoff participaba activamente en las complejas cadenas y procesos de toma de decisiones que involucraban a Texaco Inc. y Texpet. En su declaración juramentada Bischoff explica cómo los contratos de Texpet que excedían ciertos valores debían ser aprobados por el jefe de los abogados de Texaco Inc.,</b> lo cual ayuda a probar la forma en que Texpet dependía de Texaco Inc.</p>	<p><b>Al igual que Shields,</b> ha quedado claro en el expediente <b>que Bischoff participaba activamente en las complejas cadenas y procesos de toma de decisiones que involucraban a Texaco Inc. y Texpet. En su declaración juramentada Bischoff explica cómo los contratos del cuartel general de Texpet, ubicados en Florida, que se excedieran de USD 500.000,00 debían ser aprobados por un abogado de apellido Wissel, jefe de los abogado de Texaco Inc. En este caso, vemos como la relación entre Texpet y Texaco Inc. no estaba limitada a que ésta sea propietaria de las acciones de aquella,</b> sino que ambas trabajaban íntimamente vinculadas, tomando Texaco Inc. todas las decisiones mientras que Texpet se limita a ejecutarlas.</p>	<p>De hecho, las instancias en las <b>que Bischoff</b> tomó la medida de marcar la distinción demuestran la inseparabilidad de las comañías, en lugar de desacreditarla. Por ejemplo, en una <b>declaración</b> bajo <b>juramento Bischoff</b> describió <b>cómo</b> debía asegurarse de que <b>los contratos de Texpet que superaban ciertos valores</b> recibieran la aprobación necesaria de los ejecutivos y de los asesores letrados <b>de Texaco</b>{footnote 362}. Se trata de otro ejemplo de cómo las estructuras de Texpet/Texaco eran, en efecto, indiferenciables.</p> <p>La tradición de ejecutivos que se desempeñan al mismo tiempo en ambas compañías o que pasan de una a otra, una y otra vez, continúa con Chevron y Texpet en la actualidad.</p> <p>{footnote 362: Foja 6639: Transcripción de la <b>declaración de Robert M. Bischoff</b> (17 de agosto de 1995).</p>

Note: Bolding in Example 4 is added and indicates identical or nearly identical matches in two or more documents. Curly brackets are used to interject text or comments not in the original documents.

(3) *The Erion Memorandum*: [C-TII Aug. 2014, p. 18]

#	Erion Memo	Temporary File	Final Judgment
1.	<p>Page 5 of 7: Did the corporate structure cause fraud or similar injustice? FN7: <i>Wallace v. Wood</i>, 752 A.2d 1175, 1184 (Del. Ch. 1999). See also <i>Outokumpu Eng'g Enters., Inc. v. Kvaerner EnviroPower, Inc.</i>, 685 A.2d 724, 729 (Del. Sup. Ct. 1996).</p>	<p>Page 14: En casos como este, que se cumpla el supuesto de que la nueva estructura corporativa podría provocar fraude a terceros o una injusticia similar, la jurisprudencia norteamericana nos enseña que se impone de manera especial la doctrina del levantamiento del velo societario. (<i>Wallace contra Wood</i>, 752 A.2d 1175, 1184 (Del. Ch. 1999); y también <i>Outokumpu Eng'g Enters., Inc. contra K vaerner EnviroPower, Inc.</i>, 685 A.2d 724, 729 (Del. Sup. Ct. 1996).</p>	<p>Original Spanish, page 13: En casos como este, que se cumple el supuesto de que la nueva estructura corporativa podría provocar fraude a terceros o una injusticia similar, la jurisprudencia norteamericana nos enseña que se impone de manera especial la doctrina del levantamiento del velo societario. [Citations in the Temporary File omitted.]</p> <p>Certified Translation, page 13: In cases like this one, that fit the case where the new corporate structure could provoke a fraud on third parties or a similar injustice, North American jurisprudence teaches us that the doctrine of lifting the corporate veil must especially be asserted.</p>

(4) *The Fajardo Trust Email*: [Leonard ER 2, p. 31]

**Example 9. Identical or nearly identical word strings (more than 40 words) in the unfiled Fajardo Trust Email and the Sentencia, but not in the filed Registro Oficial**

Fajardo Trust Email	Sentencia: page 186	Registro Oficial: page 29
<p>La procedencia del fideicomiso como modo de cumplir las obligaciones tiene como fundamento el artículo 24, numeral 17 de la Constitución anterior (debe haber una norma similar en la actual) y <b>ha sido reconocida</b> (la procedencia del modo) <b>en las resoluciones de Corte Suprema números 168-2007 de abril 11 de 2007, juicio No. 62-2005, propuesto por Andrade c. CONELEC; y, 229-2002, R. O. 43 de marzo 19 de 2003;</b></p>	<p>la procedencia del fideicomiso como modo de cumplir las obligaciones <b>ha sido reconocida en las resoluciones de Corte Suprema números 168-2007 de abril 11 de 2007, juicio No. 62-2005, propuesto por Andrade c. CONELEC; y, 229-2002, R.O. 43 de marzo 19 de 2003,</b></p>	<p>{ other than “artículo 24, numeral 17, de la Constitución”, no overlap with the Fajardo Trust Email is found. }</p>

Note: Bolding and underlining in Example 9 are added; bolding indicates exact matches between the unfiled Fajardo Trust Email and the Sentencia. Curly brackets are used to interject text, spaces, or comments not in the original documents.

(5) *The Fusion Memorandum*: [Leonard ER 2, p. 15]

**Example 1. Identical or nearly identical word strings in the unfiled Fusion Memo and the Sentencia (more than 90 words)**

Fusion Memo: page 8	Sentencia: page 24
<p><b>Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Las decisiones importante pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc.,</b></p>	<p><b>Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante, o incluso llega desaparecer. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Tanto las decisiones importantes como las triviales pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc.,</b></p>

Note: Bolding in Example 1 is added and indicates identical or nearly identical matches between the documents.

(6) *The January and June Index Summaries*: [Leonard ER 2, p. 28]

**Example 7. Identical or nearly identical word strings in the unfiled January and June Index Summaries and Sentencia, but not the filed Record.**

<p>January Index Summary: Pruebas pedidas por SV, Row 5, Columns H {"testimonio en fojas 2150. P75.C22"} and I</p>	<p>June Index Summary: Pruebas pedidas por SV, Row 5, Columns H {"testimonio en fojas 2150. P75.C22"} and I</p>	<p>Sentencia: page 138</p>	<p>Record: fojas 2150 vuelta and 2151</p>
<p><b>Me contrató el Frente. Me imagino que hay un convenio interinstitucional entre Pet{no "r"}o y el Frente, y por eso seguramente se imprimió en hojas de Petro. Las muestras {no "s"}e tomaron al azar.</b></p>	<p><b>Me contrató el Frente. Me imagino que hay un convenio interinstitucional entre Petro y el Frente, y por eso seguramente se imprimió en hojas de Petro. Las muestras se tomaron al azar.</b></p>	<p><b>"Me contrató el Frente. Me imagino que hay un convenio interinstitucional entre Petroecuador y el Frente, y por eso seguramente se imprimió en hojas de Petro".</b> Este testigo asegura que <b>las muestras se tomaron al azar</b></p>	<p>2) La metodología fue la recopilación de las muestras de suelo y agua de los diferentes campos, estas <b>muestras</b> las <b>tomaron al azar</b> y los resultados de lapsus fueron comparados con las tablas ambientales que existen en vigencia. 4) No soy asesor del Frente de Defensa de la Amazonía a mi <b>me contrató el Frente</b> de Defensa de la Amazonía para un trabajo técnico a realizarse en el listado de pozos que me presentaron. 11)...de la Amazonía me <b>imagino que</b> las hojas en las cuales se imprimió es por el <b>convenio interinstitucional</b> que hay <b>entre Petr{no "o"}ecuador y el Frente</b> de Defensa de la Amazonía.</p>

Note: Bolding in Example 7 is added; bolding indicates exact matches between the documents. Curly brackets are used to interject text or comments not in the original documents.

(7) *The Moodie Memorandum*: [C-TII Aug. 2014, pp. 27-28]

#	Moodie Memo	Temporary File	Final Judgment
1.	<p>The Moodie Memo discusses the “substantial factor” test for causation under California case law, citing (in six footnotes) <i>Whitley v. Phillip Morris, Inc.</i> five times and <i>Rutherford v. Owens-Illinois, Inc.</i> twice.</p> <p>In discussing the elements of the substantial factor test the Memo states, among other things, that a plaintiff must show that a toxic substance played “more than . . . [a] theoretical” role in bringing about the claimed injury. The Memo further states that a plaintiff has “[n]o need to prove that it was toxic chemical’s [sic] from D[efendant]’s conduct that actually produced the malignant growth.” See Moodie Memo, at WOODS-HDD-0012794.<sup>91</sup></p>	<p>p. 59: El factor substancial, que implica que el elemento dañoso no puede ser mas meramente teórico ni tampoco jugar el papel secundario generando el daño. Según esta teoría estos elementos deben ser considerados sin necesidad de probar cuál de ellos ha sido precisamente el que causó el daño, debido a la irreducible falta de certeza científica respecto a cuál de los elementos utilizados por el demandado provocó el daño (ver <i>Whitley contra Philip Morris. Inc. y Rutherford contra. Owens-Illinois, Inc.</i>).</p>	<p>pp. 89-90: El factor substancial, que implica que el elemento dañoso no puede ser meramente teórico ni tampoco jugar el papel secundario generando el daño. Según esta teoría estos elementos deben ser considerados sin necesidad de probar cuál de ellos ha sido precisamente el que causo el daño, debido a la irreducible falta de certeza científica respecto a cuál de los elementos utilizados por el demandado provocó el daño [Citation in the Temporary File omitted.]</p> <p>pp. 89-90: The substantial factor, which requires that the harmful element cannot be merely theoretical nor can it play a secondary role in the generation of the harm. According to this theory, these elements must be considered without the need to investigate which of them was precisely the cause of the harm, due to the irrefutable lack of scientific certainty about which of the elements used by the defendant caused the harm.</p>



**DR LEONARD'S MARKED-UP TEXT  
(LEONARD ER 2, EXHIBIT 5)**

Juicio No. 2003-0002

**JUEZ PONENTE: AB. NICOLAS ZAMBRANO LOZADA**

**CORTE PROVINCIAL DE JUSTICIA SUCUMBIOS. - SALA UNICA DE LA CORTE PROVINCIAL DE JUSTICIA DE SUCUMBIOS.**

Nueva Loja, lunes 14 de febrero del 2011, las 08h37. **VISTOS.**- En relación a la causa signada con el No. 002-2003 que por daños ambientales sigue María Aguinda y otros, en contra de la compañía Chevron Corporation, atendiendo su estado procesal se dispone.- 1).- Téngase por incorporado al expediente los anexos y escritos presentado a las 16H24 de 03 de febrero del 2.011 por el doctor Adolfo Callejas Ribadeneira, Procurador Judicial de Chevron Corporation, en atención al mismo se dispone negar su solicitud de revocatoria de providencia de fecha 02 de Febrero del 2011 las 17H14, en virtud de que no se le está impidiendo el derecho que le asiste de presentar peticiones que se encuentren amparadas en la ley y el derecho.- 2).- En lo principal, María Aguinda, Ángel Piaguaje, y otros, amparados en el contenido de los artículos 2241 y 2256 de la anterior codificación del Código Civil (en adelante CC), actualmente artículos 2214 y 2229 respectivamente, según la nueva Codificación publicada en Registro Oficial del 24 de junio de 2005, para fundamentar la obligación de reparar el daño; en el artículo 169 de la OIT para fundamentar el derecho a compensación de los pueblos indígenas; y en cuanto al derecho a reclamar las reparaciones derivadas de una afectación ambiental, en el número 6 del artículo 23 y en el artículo 86 de la Constitución de 1998, así como en el artículo 2260 de la anterior codificación del Código Civil, actualmente artículo 2236, que dice "Por regla general se concede acción popular en todos los casos de daño contingente que por imprudencia o negligencia de alguno amenace a personas indeterminadas. Pero si el daño amenazare solamente a personas determinadas, sólo alguna de éstas podrá intentar la acción", y en el 41 de la Ley de Gestión Ambiental - en adelante LGA (fs. 78 y 79), comparecen desde fojas 73 a 80 demandando la eliminación o remoción de elementos contaminantes y la reparación de daños ambientales, en contra de CHEVRON TEXACO CORPORATION, que cambió su nombre a CHEVRON CORPORATION, conforme lo indica y demuestra mediante documento presentado por su Procurador Común, adjunto al escrito presentado el 23 de agosto del 2005, a las 08h05; esta demanda en sus considerandos Primero al Sexto resume los antecedentes (donde alega que el detalle de las obras realizadas por Chevron está comprendido en el anexo A de la demanda), métodos contaminantes empleados por Texaco, los daños y la población afectada, la responsabilidad de Texaco, los fundamentos de derecho descritos anteriormente, y expone las



Corte, que como ha quedado establecido en este caso viene dada por la Constitución, el nuevo COFJ, el CPC, y la LGA. Esta Presidencia considera que el hecho alegado de que Chevron Corporation no es sucesora de TEXACO INC. no obsta la competencia de esta Corte, sino que eventualmente, de ser cierto el hecho alegado se configuraría como falta de legítimo contradictor, excepción que ha sido alegada como primera excepción subsidiaria en la contestación a la demanda, y que será analizada más adelante.- **SEGUNDO.**- La litis ha quedado trabada con las pretensiones de la parte actora y las excepciones propuestas por la demandada en la audiencia de conciliación; como es lógico se analizó primero los aspectos previos tratados en la contestación, los mismos que se refieren a la falta de competencia de esta Corte, que ha sido fundamentada en torno a varios hechos que también son materia de las demás excepciones tratadas posteriormente en la contestación y que se resolverán oportunamente en este fallo. Las excepciones planteadas, en su orden, se resuelven a continuación.- **TERCERO.**- La demandada ha alegado las siguientes excepciones, que serán analizadas en el orden que han sido presentadas porque en la contestación la parte demandada no las diferencia si son excepciones dilatorias o perentorias: 3.1.- Falta de legítimo contradictor. La demanda afirma que Chevron es sucesora de Texaco mientras que la demandada niega esta afirmación, por lo que debiendo pronunciarme al respecto, según consta del expediente, se observa que el estricto sentido jurídico, es decir, entendiendo la sucesión como un modo de adquirir el dominio por el que se transmiten derechos y obligaciones del causante a sus sucesores (según la tradición romanista), es correcta la afirmación de que Chevron no es sucesora de Texaco Inc., por cuanto consta del proceso prueba documental debidamente certificada que evidencia que Texaco Inc. mantiene personería jurídica y por ende vida legal (en fojas 222 y 223 se encuentra el documento original en inglés, traducido en fojas 224 y 225), de manera que resulta evidente que no puede haber sucesión mortis causa sin que exista causante. Esta Presidencia empieza el análisis considerando la exposición de la parte demandada en la audiencia de conciliación, referente a que no existió una fusión entre Texaco y Chevron, sino que como lo prueban con el certificado que reposa en fojas 230 y 231 (traducción en fojas 225), la fusión ocurrió en realidad entre Texaco Inc. y Keepep Inc. Sin embargo esta realidad probada documentalmente debe ser analizada a la luz de todo el acervo probatorio, por lo que se consideran varios aspectos, entre los que conviene referirnos primeramente que a fojas 4103 se encuentran una razón de 29 de octubre del 2003, a las 11h18, sentada por la Secretaría de la Presidencia, en la que consta que la parte



Index Summary: Pruebas pedidas por SV, Rows 6-9, Column H; June Index Summary: Pruebas pedidas por SV, Rows 6-9, Column H

demandada no se presentó a la exhibición de varios documentos relativos precisamente a este tema, la cual fue solicitada oportunamente por los demandantes mediante escrito recibido el 23 de octubre de 2003, a las 15h25, y ordenada en providencia del 23 de octubre de 2003, a las 15h30. Los documentos que a la parte demandada debía exhibir comprendían: 1) Copia íntegra y certificada del "Acuerdo y Plan de Fusión", que dice relación con el "Certificado de Fusión entre Keepep Inc y Texaco Inc.", documento cuya fecha de emisión es el 9 de octubre de 2001; 2) Copia íntegra y certificada del documento en el que conste la autorización de Chevron Corporation, para que su subsidiaria Keepep Inc. intervenga en la Fusión; 3) Copia íntegra y certificada de la autorización del órgano corporativo competente para que se proceda al cambio de denominación de Chevron Corporation a Chevron Texaco Corporation; 4) Copia íntegra y certificada de la autorización del órgano corporativo competente emitida para que Chevron pueda incorporar a su nueva denominación la palabra Texaco. Estos documentos que la parte demandada no exhibió pese a haber sido oportunamente pedidos por la parte actora y ordenados por la Presidencia de esta Corte, no fueron presentados por la parte demandada. Según consta del expediente la demandada expresó los motivos que fundamentan una supuesta imposibilidad de exhibir dichos documentos, mediante escrito del 27 de octubre de 2003, a las 16h50, que fuera atendido mediante providencia del 27 de octubre de 2003, a las 17h20, ordenando que se cumpla con lo ordenado o que se presente la excusa el día señalado. Como se hizo notar, la razón sentada por Secretaría indica claramente que la parte demandada no se presentó en el día y hora señalada, por lo que no presentó excusa válida para este incumplimiento. Considerando el Art. 826 del Código de Procedimiento Civil respecto al mérito de la exhibición pedida como prueba, y debiendo esta Presidencia considerar únicamente los elementos que forman parte del proceso, estimo que la negativa a cumplir con la exhibición ordenada no puede favorecer a la parte en rebeldía, sino por el contrario, el Código de Procedimiento Civil ha establecido una sanción para estos casos, en el Art. 827, que dice: "Si ordenada la exhibición no se la cumple dentro del término señalado, se impondrá al renuente una multa de diez a cuarenta dólares de los Estados Unidos de América por cada día de retardo, según la cuantía del asunto. Esta multa no podrá exceder del valor equivalente a noventa días", por lo que en este caso en razón del tiempo transcurrido debe aplicarse la multa máxima, equivalente a 40 dólares diarios multiplicados por los 90 días, por cada documento que no ha sido exhibido conforme fuera ordenado. Del mismo modo sucede con los documentos cuya exhibición fue

Index Summary: Pruebas pedidas por SV, Rows 6-9, Column D; June Index Summary: Pruebas pedidas por SV, Rows 6-9, Column D



actividades son las personas que proveen las autorizaciones y los fondos, que frecuentemente se encuentran cobijadas tras la máscara de personalidad jurídica, haciendo necesario que en ciertos casos se desestime la estructura formal del ente societario para evitar la defraudación de terceros. En el expediente, en el cuerpo 65, fojas 6827, 6828, 6830, 6831, 6826, 6833, constan las traducciones de varios pedidos de autorización de Shields a Palmar, en los que el señor Shields hace pedidos a nombre de la "División Ecuatoriana" de Texaco Inc. a sus superiores de Texaco Inc., solicitando su aprobación para diversos asuntos propios de las operaciones en el Oriente ecuatoriano. Constan en el expediente autorizaciones para asuntos cotidianos, de administración regular, como la licitación de servicios de catering y limpieza para los sitios de operaciones del consorcio en Quito y el Oriente (traducción de documento PET 029369 en foja 6827 y PET 028910 en foja 6830), o la contratación de servicios de entretenimiento cinematográfico en las instalaciones del Oriente (PET 029086 en foja 6831). Del mismo modo encontramos una autorización para la contratación de equipos y personal para el mantenimiento de oleoductos (PET 019212 en foja 6828) y construcción de puentes en Aguarico y Coca (PET 016879 en foja 6833). Finalmente, Shields solicita la autorización de Palmer para iniciar la exploración del pozo Sacha-84, en octubre de 1976 (PET 012134). También constan del expediente varios documentos de los archivos Texpet, con pedidos de autorización de Bischoff a Palmer, en el cuerpo 65, fojas 6839, 6840, 6843, 6844, 6848, donde consta que del mismo modo que Shields, Palmer se refiere a las operaciones de Texpet en el Oriente como "la División Ecuatoriana". Entre sus pedidos de autorización, consta el urgente pedido para aprobar la licitación de dos torres de "workover" (soporte y mantenimiento) para la explotación en el Oriente (PET 030919 en foja 6839), y la licitación de un camino entre los pozos Yuca y Culebra (PET 016947 en foja 6843), aspectos claves para el desarrollo de las operaciones de Texpet. También se solicita autorización para extender un contrato de servicios de ferri en la zona (PET 032775 en foja 6844), y con mayor importancia, se solicita aprobación de los documentos de aprobación del Pozo Vista-1. Consta además un memorando de especial importancia revelando la existencia de una cadena lineal de autorización existente entre estos ejecutivos, pues Bischoff le solicita a Palmer que, de aprobar el documento, lo firme y reenvíe a McKinley, un ejecutivo superior de Texaco Inc (PET 022857 en foja 6848), denotando la existencia de una cadena de mando, que hacía que las decisiones sobre todo aspecto relacionado con la operación de Texpet en Ecuador sean tomadas por ejecutivos de Texaco Inc, en EEUU. Adicionalmente, constan en el expediente sendos pedidos de autorización de Palmer

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a Granville, en el cuerpo 66, fojas 6930, 6938, 6943, que demuestran que la cadena de autorizaciones se extiende más arriba de Palmer, ya que haciendo eco de un pedido de Shields (ver PET 019212, en foja 6828), Palmer le solicita a Granville la autorización para contratar equipos y personal para el mantenimiento de oleoductos (PET 029976, en foja 69309) y según el requerimiento de Bischoff (ver PET 030919, en foja 6839) aprueba una de las ofertas para la construcción de las torres de "workover", sometiendo dicha aprobación al visto bueno de Granville (PET 029991, en foja 6943). Existen además en el expediente cartas y memorandos de Shields y Palmer a John McKinley, provenientes de los archivos Texaco Inc, y Texpet. En el cuerpo 66, fojas 6957, 6958, 6964, 6959, 6960, 6974. Que demuestran que tanto Shields como Palmer mantenían un flujo constante de cartas y memos con McKinley, solicitando su autorización e informándole acerca de acontecimientos relacionados con la Concesión Napo. Del mismo modo, cartas de funcionarios menores dirigidas a Shields, en el cuerpo 65, fojas 6855, 6856, 6860, 6861, 6875, 6882, 6885, donde se hace referencias a cartas dirigidas a Shields que se originaron en Quito, en manos de funcionarios menores que solicitaban su autorización, como William Saville, que era un ejecutivo de Texpet que operaba en Quito, y envió muchas y cotidianas comunicaciones a Shields (en Nueva York) solicitando autorizaciones. Por ejemplo, le envía a Shields los costos estimados de la perforación de los pozos Sacha 36 al 41 (doc s/n), y solicita su aprobación para iniciar la licitación de transporte de combustibles en el Oriente (PET 031387 en foja 6856). J.E.F. Caston, otro ejecutivo de la petrolera ubicado en Quito solicita la autorización de Shields para licitar varios servicios (PET 020758 en foja 6860) y para aprobar los costos estimados de instalar bombas sumergibles en cinco pozos en el campo Lago Agrio. Finalmente tenemos a Max Crawford, otro funcionario radicado en Quito, quien también solicitaba periódicamente la aprobación de Shields para diversos objetivos (PET 035974 en foja 6882, y doc s/r en foja 6885). Por otro lado, debe ser considerado el hecho probado de que las decisiones del "Comité Ejecutivo" de Texpet debían ser aprobadas por el directorio de Texaco Inc, como vemos que en el Acta de Directorio No. 478 (Cuerpo 25, foja 2427), donde éste aprobó la decisión de Texpet de entrar en negociaciones con el Ecuador para oponerse a una elevación en el impuesto a la renta para la petrolera, y pagos adicionales, del mismo modo que el directorio de Texaco Inc. aprobó la compra de un avión de USD 850.000, Acta 456 (Cuerpo 24, foja 2351), demostrando el poder de decisión de Texaco Inc. sobre las compras realizadas por Texpet. En mi criterio estas actas demuestran el constante escrutinio que la matriz Texaco Inc. mantenía sobre toda operación y noticias

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relativas a Texpet en Ecuador. Si analizamos este hecho independientemente, quizás se pueda confundir como el normal control que ejerce un directorio sobre sus subsidiarias. Sin embargo debemos analizar este control de la matriz sobre su subsidiaria dentro de su contexto, tomando en cuenta también que el Directorio de Texaco Inc. además entregaba las "asignaciones" de dinero con las cuales Texpet operaba, lo cual implica que Texpet carecía no solo de autonomía administrativa, sino financiera, ya que era Texaco Inc. quien controlaba no solo las decisiones, sino que también autorizaba los fondos que Texpet necesitaba para el normal desenvolvimiento de actividades. Partiendo del hecho admitido de que Texpet es una empresa subsidiaria de cuarto nivel perteneciente ciento por ciento a un dueño único, Texaco Inc., y que Texpet operaba con fondos provenientes de las arca de Texaco Inc., ha quedado demostrado que no existe una separación real de patrimonio. Entendemos que personalidades jurídicas distintas necesariamente implican patrimonios diferenciados, según las reglas de los atributos de la personalidad, sin embargo en este caso la confusión de patrimonios se hace evidente, confundiendo del mismo modo las personalidades. Entre las pruebas que nos llevan a este convencimiento citamos adicionalmente el acta de reunión de directorio de Texaco Inc. No. 380, de fecha 22 de enero de 1965 (Cuerpo 22, foja 2166), que estableció asignaciones a favor de la Cía. Texaco Petróleos del Ecuador por un monto de USD 30.312,00. El acta de reunión de directorio de Texaco Inc. No. 387, de fecha 17 de septiembre de 1965 (Cuerpo 22, foja 2176) estableció asignaciones a favor de Texaco Petroleum Company (Texpet), por un monto de USD 27.625,00. El acta de reunión de Directorio de Texaco Inc. No. 393, de fecha 19 de abril de 1966 (Cuerpo 22, foja 2182) estableció asignaciones a favor de Texaco Petroleum Company (Texpet), por un monto de USD 331.272,00, y a favor de la Cía. Texaco Petróleos del Ecuador por USD 13.631. queda de este modo establecida la convicción de esta Presidencia respecto a que Texaco Inc., controlaba los fondos tanto de la empresa que ejercía los derechos de la concesión (Texaco Petróleos del Ecuador) como de la que fuera contratada para operar la concesión de los campos, por lo que resulta evidente que TEXPET fue una empresa sin capital ni autonomía suficiente para afrontar el giro normal del negocio, lo cual a su vez se configura como otra evidencia de falta de independencia de la subsidiaria respecto a la principal, llevándonos a la convicción de que TEXPET era una empresa infracapitalizada, que dependía tanto económica como administrativamente de su matriz. El monto de los contratos que requieren autorizaciones hacer presumible la indisponibilidad de capital propio, lo cual es una indicación de incapacidad para hacer frente a las eventuales

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responsabilidades que pueden preverse tras una operación petrolera. Cabanellas nos explica en su obra "Derecho Societario: Parte General. La personalidad jurídica societaria", que "la personalidad societaria se basa en un conjunto de reglas que determinan qué conductas se imputan a las sociedad en cuanto persona jurídica. Los efectos generales de esas reglas pueden verse modificados en función de ciertas normas que alteran tal atribución, pasando a imputarse las conductas que normalmente serían atribuibles a la sociedad como persona jurídica, a otras personas físicas o de existencia ideal, como pueden ser sus socios u otras personas que ejercen de hecho el control de la sociedad." (Ver. Vol.3. Buenos Aires: Editorial Heliasta, 1993. P. 65). Ha quedado demostrado en el expediente que las autorizaciones e inversiones requeridas por TEXPET, hacían que el control de hecho sobre sus operaciones sea ejercido de la matriz, lo que constituye un importante aspecto a ser considerado. Bien lo afirma López Mesa y José Cesano en su obra: El abuso de la personalidad jurídica de las sociedades comerciales: Contribuciones a su estudio desde las ópticas mercantil y penal (Buenos Aires: Depalma, 2000), al decir que "El régimen de la personalidad jurídica no puede ser utilizado en contra de los intereses superiores de la sociedad ni de los derechos de terceros. Las técnicas manipuladas para cohibir el uso meramente instrumental de la forma societaria varían y adoptan diversos nombres, pero todos postulan, en sustancia, la consideración de la realidad económica y social y la supremacía del derecho objetivo". Concordantemente la Corte Suprema, en la Sentencia 120.2001, citada anteriormente, ha dicho que "frente a estos abusos, hay que reaccionar desestimando la personalidad jurídica, es decir, descorriendo el velo que separa a los terceros con los verdaderos destinatarios finales de los resultados de un negocio jurídico llegar hasta éstos, a fin de impedir que la figura societaria se utilice desviadamente como un mecanismo para perjudicar a terceros, sean acreedores a quienes se les obstaculizaría o impediría el que puedan alcanzar el cumplimiento de sus créditos, sean legítimos titulares de un bien o un derecho a quienes se les privaría o despojaría de ellos. Estas son situaciones extremas, que deben analizarse con sumo cuidado, ya que no puede afectarse la seguridad jurídica, pero tampoco puede a pretexto de proteger este valor, permitir el abuso del derecho o el fraude a la ley mediante el abuso de la institución societaria". 2.- Ahora bien, si consideramos las cuestiones formales, como el hecho de que las mismas personas ejercen los cargos de directores ejecutivos y otros cargos directivos en ambas empresas, sumado al hecho admitido de que Texaco Inc era propietario del 100% de Texpet, se abunda en la convicción de la necesidad de aplicar la doctrina del levantamiento societario. **Por**





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ejemplo, el señor Robert C. Shields, desempeñó el cargo de Vicepresidente de Texaco Inc. entre 1971 y 1977, siendo a la vez Jefe de la Junta de Directores de Texpet, según consta en su declaración juramentada (cuerpo 63, foja 6595). Al revisar el expediente consta que Shields suscribe sus cartas a nombre de Texpet, cuando según su mismo testimonio entre 1971 y 1977 ostentaba el cargo de Vicepresidente de Texaco Inc. Este hecho guarda coherencia con lo declarado por Bischoff, acerca de que Texpet era la división de Texaco Inc. que operaba en Latinoamérica, y no una mera subsidiaria, como sostiene la defensa de la parte demandada. Del mismo modo, el señor Robert M. Bischoff durante su carrera ostentó cargos de Texaco Inc. tanto en EEUU como en América Latina. Entre 1962 y 1968 trabajó como Vicepresidente en la división de producción para América Latina, a la cual él mismo llama Texaco Petroleum Company (Texpet), según consta en su declaración juramentada, en cuerpo 63, foja 6621. Esto demuestra cómo inclusive los mismos ejecutivos de Texaco Inc. pensaban en Texpet como una división de Texaco Inc., y no como una empresa separada. Al igual que Shields, ha quedado claro en el expediente que Bischoff participaba activamente en las complejas cadenas y procesos de toma de decisiones que involucraban a Texaco Inc. y Texpet. En su declaración juramentada Bischoff explica cómo los contratos del cuartel general de Texpet, ubicados en Florida, que se excedieran de USD 500.000,00 debían ser aprobados por un abogado de apellido Wissel, jefe de los abogados de Texaco Inc. En este caso, vemos como la relación entre Texpet y Texaco Inc. no estaba limitada a que ésta sea propietaria de las acciones de aquella, sino que ambas trabajaban íntimamente vinculadas, tomando Texaco Inc. todas las decisiones mientras que Texpet se limita a ejecutarlas. Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante, o incluso llega a desaparecer. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Tanto las decisiones importantes como las triviales pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc., a tal punto que la subsidiaria dependía de la matriz para contratar un simple servicio de catering. En este sentido este sentido es completamente normal que el Directorio de una empresa subsidiaria esté conformado por algunos oficiales de su matriz, y que también es normal que la matriz reciba informes periódicos

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sobre su estado, y tomen ciertas decisiones que por su importancia están por sobre la administración regular. Sin embargo, en el caso de Texaco Inc. y su subsidiaria Texaco Petroleum Company (Texpet), el rol de los Directores trascienden los roles que pueden considerarse normales, pues éstos recibían información y tomaban decisiones acerca de la gran mayoría de hechos y actos de Texpet sobre asuntos cotidianos de la operación de la concesión Petrolera Napo, respondiendo a una cadena de mando bien establecida, como ha quedado demostrado en el expediente. 3.-Finalmente se considera que la doctrina del levantamiento del velo societario es especialmente aplicable frente a los abusos que se pueda cometer en detrimento del orden público o de derechos de terceros, para evitar el fraude y la injusticia, es decir, que se debe levantar el velo societario siempre que no hacerlo favorezca una defraudación o promueva la injusticia, como sería el caso en que encontremos esquemas intencionalmente creados para dejar los beneficios en la compañía matriz, mientras que las obligaciones quedan en una subsidiaria, que por lo general es incapaz de satisfacerlas. Como bien lo dicen López Mesa y José Cesano: "Aún cuando se admita por vía de hipótesis que dos sociedades están sometidas a una unidad de decisión o constituyen una unidad económica o grupo de sociedades, estos no son datos suficientes para prescindir de la autonomía jurídica de cada uno de los sujetos societarios implicados en las actuaciones, en tanto no se alegue y pruebe que se haya instrumentado las formas jurídicas para perjudicar al demandante en sus derechos, pues lo adecuado es respetar la separación patrimonial de la sociedad, en tanto ésta no sea probablemente el medio de violación de otras reglas jurídicas, ya que la desestimación de la personalidad o atribución de responsabilidad a personas en apariencias distintas, tiene por exclusivo fundamento la comprobación del abuso del privilegio concedido en detrimento del orden público o de derechos de terceros" (Págs. 145 y 146). En este sentido se nota que la parte actora si ha alegado de manera expresa que Texpet fue una compañía instrumentada para mantener las responsabilidades pendientes sobre una compañía sin capital suficiente, mientras se mantiene el capital de la matriz libre de responsabilidades, con el objeto precisamente de evadir las potenciales responsabilidades con terceros, al tiempo que consta en el expediente abundante evidencia, como ha sido anotado en líneas anteriores, que demuestra el profundo nivel de vinculación y falta de independencia de la subsidiaria con respecto a su matriz, que fue quien realmente tomó las decisiones y se benefició de los actos de su subsidiaria, quien además es incapaz de hacer frente a las potenciales de sus responsabilidades que se le exijan. Se considera finalmente lo dicho





sitios inspeccionados, y los resultados de esas inspecciones, se considera que las muestras válidas del expediente son representativas del estado del área de concesión. De este modo con las consideraciones anotadas, se empieza el análisis de los resultados de las muestras tomadas en campo por los distintos peritos que han actuado en este juicio, haciendo una apreciación general de los resultados presentados para Hidrocarburos Totales de Petróleo (TPHs). Se toma en cuenta que la demandada ha alegado que el TPH no es un buen indicador de riesgo, al decir que “Sobre ese mismo tema Señor Presidente, voy a hacer una cantaleta que ya hice hace unos días y hace unas cuantas inspecciones judiciales, relativo a que el contenido de hidrocarburos TPH no mide la toxicidad ni el riesgo de salud por que los hidrocarburos se encuentran en la naturaleza, por ejemplo en el pasto con 14 mg/kg las hojas secas de roble con 18.00 mg/kg, en la acículas de pino con 16.000 mg/kg; y muchos productos no tóxicos que son derivados del petróleo y utilizados por el hombre; tenemos el aceite para bebés que seguramente muchas personas han utilizado, tiene 865.680 mg/kg de TPH; la vaselina, no la canción sino la que se usa para determinados fines, tiene 749.000 mg/kg” (ver foja 155068). Sin embargo en el expediente también encontrados advertencias en cuanto a los potenciales efectos nocivos de los TPHs para la salud de las personas, como las del perito Bermeo, que en las conclusiones de su dictamen nos indica que “ Los análisis realizados en el tejido de pescado determinaron la presencia de hidrocarburos totales en los peces en valores muy por encima de los máximos permitidos en agua, lo cual al no existir en nuestro país referencia o norma que indique o determine la cantidad máxima en que pueden estar presentes antes de causar problemas a los peces y por ende a la salud de quienes lo consumen, tomamos como referencia los valores permisibles para el agua, y desde este punto podemos manifestar que existe contaminación por hidrocarburos; lo cual podría convertirse en un problema alimenticio de seguirse dando. La agencia para Sustancia Tóxica y el Registro de Enfermedades, ATSDR de los EEUU, indica que estos productos son altamente nocivos para la salud y son el resultado de una mezcla de diferentes productos derivados del petróleo como tal (gasolina, aceites lubricantes, grasas, breas, etc.), por lo que la presencia de hidrocarburos totales en los pescados son el resultado de las actividades petroleras que se dan en la zona” (ver fojas 159373 a 159376). Así también, el perito insinuado por los demandantes, Edison Camino, ha dicho en su informe de Sacha 10 que “Algunos de los compuestos de los TPHs pueden afectar el sistema nervioso”, y en que “un compuesto TPH (benceno) es carcinogénico en seres humanos” (ver informe en fojas 52474 a



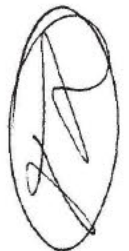
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52780). De este modo, atendiendo a lo dicho por el perito insinuado por la parte demandada, Gino Bianchi, en su defensa de la inspección judicial del pozo Lago Agrio 2, respecto a que "El TPH no se utiliza para evaluar los riesgos potenciales a la salud ya que solo indica la cantidad de petróleo en la muestra, y no sus características de toxicidad" pero también que "las propiedades toxicológicas del petróleo crudo pueden ser caracterizadas sobre la base de los siguientes compuestos tóxicos: Hidrocarburos Aromáticos Volátiles: benceno, tolueno, etilbenceno y xilenos; Hidrocarburos Aromáticos Policíclicos [...]; Metales pesados: bario, cadmio, cobre, cromo, cromo hexavalente, mercurio, níquel, plomo, vanadio y cinc" (ver texto en foja 95701, que es idéntico a lo dicho por el perito Jorge Salcedo en su dictamen de la inspección judicial del pozo Shushufindi 18 y en Shushufindi 25, y reiterado por Gino Bianchi en su dictamen sobre las inspecciones judiciales del pozo Guanta 7), esta Corte ha decidido que lo más adecuado es que los TPHs sean considerados en conjunto con las demás evidencias, pues aunque no fuere un indicador preciso de riesgo para la salud, es un buen indicador del estado del medio ambiente en general en cuanto a impactos por hidrocarburos, aunque debemos reconocer que para identificar posibles amenazas a la salud se debe monitorear la presencia de otros elementos. En este aspecto, de modo concordante con lo dicho por el perito Gino Bianchi respecto a ciertos compuestos tóxicos, se atiende al informe Yanacuri referidos en líneas anteriores, en tanto que éste expresa una particular preocupación que se expresa por la exposición al benceno, tolueno y xileno (BTEX), que por su solubilidad en el agua, mayor permanencia en suelo arcilloso, peligrosidad para la salud deben ser eliminados hasta los niveles cuya presencia sea natural en suelos. Del mismo modo se atiende este estudio, cuando dice "numerosos estudios epidemiológicos realizados en trabajadores de distintas profesiones han demostrado los efectos carcinogénicos de los HAPs" (ver foja 3352 y anverso), conocidos como hidrocarburos aromáticos policíclicos, son contenidos típicamente en el agua de formación, y aunque no son tan solubles en agua, pueden permanecer adosados a sólidos en suspensión y migrar grandes distancias, inclusive sin degradarse; pero también se considera que los lodos de perforación que son utilizados para una variedad de propósitos, incluyendo controlar la presión subterránea y llevar los cortes de perforación a la superficie, aunque pueden variar en composición, generalmente contienen metales pesados, así como el mercurio, plomo, cadmio, cinc, cromo VI, y el bario. En este orden, empezaremos refiriéndonos a la presencia de TPHs en los resultados de las muestras tomadas en suelo por los peritos que participaron en las inspecciones judiciales, notando que el 10% de





y 3142 mg/kg, en las muestras tomadas por peritos insinuados por la parte demandante, ya que los peritos insinuados por la parte demandada no analizaron este compuesto. En cambio el perito Luis Villacreces, en muestras tomadas durante las inspecciones del pozo Auca 1, Cononaco 6, el pozo Sacha 51, y los pozos 18,4 y 7 del campo Shushufindi, ha presentado resultados que sobrepasan cualquier criterio de tolerancia razonable, con resultados como 3142 y 466 en Auca 1 en AU01-PIT1-SD2-SU2-R(220-240 cm)\_sv y AU01-A1-SD1-SU1-R(60-100cm)\_sv; 2450 y 876 en Cononaco 6 en CON6-A2-SE1\_sv y CON6-PIT1-SD1-DU1-R(160-260cm)\_sv; 154.152,73.6325,70.4021 en Shushufindi 18, en SSF18-A1-SU2-R(0.0m)\_sv, SSF18-PIT2-SD1-SU1-R(1.5-2.0m)\_sv; y SSF18-A1-SU1-R (0.0 m)\_sv; el perito José Robalino reportó resultados de hasta 42.47 en Shushufindi 4; mientras que el perito Francisco Viteri reportó 34.13 en Shushufindi 7 en SSF07-A2-SD1-SU1-R(1.3-1.9)\_sv; todo lo cual contribuye a formar el criterio de esta Presidencia. El mercurio ha sido considerado como un posible agente carcinógeno humano por la EPA, y existen múltiples estudios que demuestran los efectos de su exposición, siendo lo más preocupantes daños permanentes al cerebro y riñones, por lo que alerta a esta Corte que se hayan encontrado niveles alarmantes de mercurio en los campos Sacha, Shushufindi, y Lago Agrio, en donde encontramos varias muestras que llegan a los 7 mg/Kg., tomadas por los peritos José Robalino en la inspección judicial de Sacha Central (ver muestras SAC-EST-S1\_sv y SAC-PIT1-S1-1\_sv); y SAC-PIT-1-S1-2\_sv) y Xavier Grades en Shushufindi 8 y en Lago Agrio Norte (ver muestras SSF08-PIT1-S1\_sv, SSF08-PIT1-S2\_sv, SSF08-PIT1-S3\_sv, SSF08-PIT2-S11\_sv, SSF08-PIT2-S3\_SV, SSF08-PIT2-S4-1\_sv, SSF08-PIT2-S5\_sv, SSF08-PIT2-S6\_sv, y también LAN-ESTA-B\_sv, LAN-ESTA-B1\_sv, LAN-ESTA-B2\_sv, LAN-ESTA-C\_sv, LAN- ESTB-ASUE1\_sv, LAN-ESTB-ASUE2\_sv, LAN-ESTB-D1\_sv, LAN- ESTB-D2\_sv, LAN-ESTB-E1\_sv). Ante estos resultados, que demuestran la presencia de mercurio en niveles elevados en muestras de suelo recolectados durante las inspecciones judiciales, se evidencia una preocupante presencia de este elemento en los suelos del ecosistema de la concesión. EL plomo también es encontrado de forma natural en la tierra pero tiene una bien conocida fama como perjudicial en la salud reflejada por ejemplo en las crecientes restricciones para el uso de gasolina con plomo alrededor del mundo, basadas en preocupaciones por la salud, principalmente en disminuciones de la capacidad cognitiva, además de que es considerado como razonablemente presumible como agente carcinogénico humano. Las muestras de suelo y agua tomadas durante las inspecciones judiciales han indicado niveles excesivos de plomo que puede plantear riesgos de salud para las





poblaciones locales. Los niveles de plomo en el suelo son mucho más elevados de lo normal, lo que contribuye a corroborar que el envenenamiento con plomo es un riesgo real. A pesar de esto se observa que resultados que alcanzan los 294 mg/kg, como en la muestra JI-SSF-25-PIT2-SD1-(0.0M) tomada por el perito insinuado por Chevron, Jorge Salcedo, en la inspección del pozo Shushufindi 25, no ha sido suficiente para que estos profesionales encuentren un riesgo en la salud de las personas. También resaltan las muestras JI-CO-06-SB4-0.0M y SSF-13-JI-SB1-1.6M\_tx, tomadas por el perito insinuado por la parte demandada, Ernesto Baca, en las inspecciones judiciales de los pozos Cononaco 6 y Shushufindi 13, que reportan 98.8 y 98.6 mg/kg., respectivamente. De modo concordante el perito insinuado por los demandantes, José Robalino, ha reportado resultados similares en las muestras SA18-SE3\_sv y SA18-NE1-1\_sv, tomadas durante la inspección judicial del pozo Sacha 18, y que alcanzan los 99.89 y 69.93 mg/kg., respectivamente. En cuanto al cadmio, se atiende a que éste puede irritar gravemente el estómago y la vías respiratorias, y que existe un consenso científico acerca de que el cadmio es de hecho, o probablemente, un carcinogénico humano, por lo que sin peligrosos los 151 resultados entre 1.003 y 315.79 mg/kg., de los cuales resaltamos de la muestra JI-SA18-NE1-(SS), recolectada en la inspección del pozo Sacha 18 por el perito Fernando Morales, experto insinuado por Chevron, en la que encontramos 4.1 mg/kg de Cadmio; las muestras JI-SSF-07-SB1 1.2m (DUP), JI-SSF-07-SB2 1.40 m, JI-SSF-07-SB1 1.2m, JI-SSF-07-PIT2-SBC 1.7 m, JI-SSF-07-SB1 0m, JI-SSF-07-SB2 0m tomadas durante la inspección judicial del pozo Shushufindi 07, por el perito insinuado por la parte demandada, Gino Bianchi, que representa resultados que van desde los 2.6 mg/kg a los 3.3 mg/kg; del mismo modo las muestras obtenidas por los peritos John Connor Ernesto Baca en las inspecciones judiciales de Sacha 6 y Sacha 14, respectivamente, en las que encontramos resultados superiores a los 2 mg/kg de Cadmio. Los peritos insinuados por la parte demandante por su parte reportan resultados que alcanzan los 315,79 mg/kg. (Ver muestra SSF45A-A1-SE2\_sv, tomada en Shushufindi 45 A por el perito Amaury Suarez); o los 16 mg/kg. Y 5 mg/kg reportados por el perito Oscar Dávila en las muestras recolectadas SSF-SUR-C1-TW(0.60-0.80m)\_sv y SA14-P3 (0.10-0.80m)\_sv, en las inspecciones judiciales de Shushufindi Sur y Sacha 14, respectivamente; y los 7.9 mg/kg. Encontrados en la muestra LAN-ESTB-H2\_sv, tomada por el perito Xavier Grandes en la inspección judicial de Lago Agrío Norte. Con respecto al cromo VI encontramos 108 resultados entre 0.42 y 87 mg/kg. Mientras que la Organización Mundial de la Salud, la Agencia Internacional para la investigación del Cáncer



Agrio, según estudios publicados que existen, el agua de producción contiene cinco o seis veces menos sal que el agua de mar, eso no quiere decir que no contengan sal, si la contiene, pero también en el agua de producción contiene pequeñas cantidades de petróleo en el tanque ya se separa, por la diferencia de gravedad y por productos químicos esas pequeñas cantidades de petróleo, que generalmente están entre 20 y 40 partes por millón, insignificantes, es por eso que en el caso del Consorcio, luego de que el agua de producción era separada en el tanque de lavado se la enviaba a una o más piscinas construidas en serie para ser tratadas lograr una mayor separación aún de este hidrocarburo, que estaba ahí, también contiene ciertos metales, no estamos negando, son aquellos metales que se encuentran naturalmente en el petróleo, en cantidades también variables, el agua de producción que se produce en la región oriente del Ecuador, como se llamaba a esto, contiene metales en cantidades que no significan un riesgo para la salud humana, eso lo han demostrado los análisis del laboratorio que hemos efectuado en todas las Estaciones que hasta la fecha hemos inspeccionado y que solicito aquí también como ratificaré en su oportunidad, se haga”, sin embargo los resultados de las muestras (ver muestras JI-LA-CENTRAL-PW, tomada por el perito John Connor, perito insinuado por Chevron, con un contenido de 1.31 mg/kg de bario) contradicen lo afirmado en defensa de Chevron, respaldando más bien lo afirmado por los actores, al decir que “Sabemos por ejemplo que el agua de formación contiene un 30% de sal y que obviamente esa sal en exceso, genera los cloruros de sodio, lo que produce otro tipo de cadena contaminante que puede afectar incluso a la vegetación e impide que las raíces de las plantas se desarrollen con normalidad” (ver acta en fojas 102251 a 102308). Recordamos además lo revisado al analizar qué era lo que podía esperarse de una “buena empresa petrolera”, por lo que se considera con mucho cuidado el hecho de que ya se había escrito importantes advertencias acerca de los peligros del agua de formación en 1962, y de hecho se recomendaba que “El cuidado extremo debe ejercerse en el manejo y disposición del agua producida no sólo debido al posible daño a la agricultura, sino también debido a la posibilidad de contaminación de lagos y ríos que mantienen el agua para beber así como para propósitos de irrigación” (foja 158811), de manera que resulta evidente que no nos encontramos ante un elemento inofensivo, como lo aseguran los abogados que ejercen la defensa de la parte demandada. Por el contrario, como lo afirman los expertos insinuados por Chevron, “Aunque el agua de producción no contiene concentraciones significativas de componentes tóxicos, esta puede presentar un daño potencial a los cuerpos receptores y a la vegetación debido a

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provincias de la Amazonía reportan una cantidad determinada de casos de muertes relativas a tumores, que pueden estar relacionadas el cáncer que alegan los demandantes, pero para la provincia de Sucumbíos ni siquiera existe una tipología relacionada con cáncer como causa de muerte, por lo que existe un sesgo importante en estos datos que no permiten comparar ni apreciar la realidad que se presenta. Como se verá más adelante este sesgo se repite en la mayoría de estadísticas oficiales, debido principalmente a la falta de presencia estatal en la zona. Con respecto a las copias certificadas de las páginas 81 y 82, "Cobertura de Saneamiento Ambiental en el país y las provincias amazónicas de los años 1989 y 1990", un capítulo del documento anteriormente citado, se toman en cuenta como indicador estadístico de aquellos rubros que toma en cuenta en relación con el saneamiento ambiental, como que la provincia de Sucumbíos tiene el total más bajo de todas las provincias amazónicas en conexión domiciliaria de agua potable y también en acceso a grifo público, lo cual no significa que los pobladores de estas zonas no consumen agua, sino que necesariamente implica que los habitantes de estas provincias tienen una mayor dependencia de la fuentes de agua naturales. Se considera el documento "Situación de la Salud en el Ecuador, Indicadores Básicas por región y por Provincia" Edición 2000 y 2001. Según alegan los demandados, en este documento se revela que, a diferencia de lo que afirman los actores, el estado de todos los cantones y las provincias del Ecuador es muy similar, sin embargo es un hecho conocido, público y notorio, que no requiere de evidencia, sino que se deje constancia, como en efecto lo hacen los datos presentados en "Cobertura de Saneamiento Ambiental en el país y las provincias amazónicas de los años 1989 y 1990", y en la página 14 del documento "Endemain III" Informe de la Amazonía capítulo "Características de Vivienda por Dominio de Estudio" Cuadro # 3.1, de que las provincias de Orellana y Sucumbíos han sufrido durante décadas de un gran abandono por parte del Estado (el acceso a servicios de salud es inferior, y también es inferior al acceso a agua potable), dando cuenta de una gran brecha en cuanto a presencia estatal y necesidades insatisfechas en el ámbito de la salud humana, lo que se ha reflejado en una ausencia casi total de servicios estatales de salud, impidiendo a los pobladores acceder a prevención, diagnóstico ni tratamiento alguno, de manera que es difícil que pueden llegar siquiera a formar parte de las estadísticas oficiales, lo cual representa un sesgo importante a ser considerado. Se considera como prueba las páginas 61-74 del documento "Informe sobre Desarrollo humano, Ecuador 1999", publicado por UNICEF en el que se consignan datos sobre políticas ambientales y sostenibilidad en el Ecuador en la década de los noventa. Se





considera que la parte demandada alegó que si bien estos datos registran los problemas ambientales del Ecuador, las técnicas de explotación petrolera no constan como uno de los problemas ambientales, sin embargo, al revisar el documento el juzgador ha encontrado bajo el título: "Algunos Hechos y Cifras de los Problemas Ecológico- Ambientales del Ecuador", en el literal e), el siguiente texto: "Desordenada e irracional explotación de los recursos naturales no renovables. Estas actividades se realizan a nivel nacional, siendo los caos más notables y conflictivos los relacionados con petróleo y minería. Tanto la explotación minera como la petrolera se desarrollan sin una planificación que determine el costo-beneficio de tales actividades que son autorizadas ante la sola presencia de yacimientos sin una evaluación de si son o no son comparativamente rentables con los impactos colaterales que pueden ocasionar a la sociedad y al ambiente. En la práctica la mayoría de lugares en donde se desarrollan actividades mineras y petroleras, que en varios casos son en áreas protegidas, han sufrido elevados impactos ecológicos sea por contaminación o destrucción de los diferentes recursos naturales renovables." La parte demandada también ha alegado que en las páginas 63 y 64 de dicho informe se señala la carencia de políticas ambientales en el país en el decenio de 1980, cuando recién se da inicio a una insipiente política de protección ambiental, sin embargo no acoge este análisis legal realizado por UNICEF, y en su lugar fundamentará su decisión en su propio análisis de la normativa de protección ambiental y su desarrollo, como ha sido expuesto líneas arriba. En cuanto a la deforestación, se toma en cuenta lo dicho en la página 66, respecto a que "el proceso de deforestación está estrechamente relacionado con la expansión de la frontera agrícola y la colonización espontánea de las zonas tropicales, con algunas excepciones". Las copias certificadas de la página 160-166 del informe Sobre Desarrollo humano, del capítulo "Indicadores de Salud en el Ecuador según Regiones, Provincias, Cantones y por Área de Residencia" en donde según la parte demandada se demuestra que en todos los cantones del Ecuador se presentan los mismo datos, lo cual tras un análisis de los datos presentados se puede observar que no es del todo correcto. La parte demandada no ha considerado los sesgos referidos en líneas anteriores, causados principalmente por la falta de datos ocasionada por la ausencia estatal en estas provincias, que ha provocado que no influyan en los datos presentados, siendo un reflejo incompleto de la realidad para el juzgador. Se considera la copia certificada de la página 14 del documento " Endemain III " Informe de la Amazonía, capítulo "Característica de Vivienda por Dominio de Estudio" Cuadro #3.1 publicado por CEPAR, en la cual

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se refleja un altísimo porcentaje del 19% de habitantes de la Amazonía que utiliza como fuente de abastecimiento de agua un Río Lago o Acequia, en comparación a un 5.7% en las demás regiones (1.3% para la Región Insular) demostrando mas allá de cualquier sesgo, la dependencia de los demandantes de la Amazonía hacia las fuentes de agua naturales. Con respecto a los cuadros 1, Tasas Generales del estado de salud Región Amazónica Ecuatoriana. Correspondiente a los años 1967, 1970, 1974, 1978, 1982, 1986, 1989; 2, expectativa de vida al nacer en la Región Amazónica. Correspondiente a los años 1962, 1977, 1980, 1985, 1980-1985; 1-85-1990; 3, "Mortalidad Neonatal e Infantil" 1989; 4, Tasa de Mortalidad Infantil 1980-1989, se los tiene en cuenta para emitir este fallo con las consideraciones anotadas. Se tiene en consideración como prueba la publicación realizada por CEPAR "El peso de la enfermedad de las provincias del Ecuador- Años de vida Saludables perdidos por muerte prematura y discapacidad-Avisa"- Publicado en Quito, el 10 de Septiembre del 2000, en donde llama la atención los datos referentes a la cantidad de médicos disponibles por cada 10.000 habitantes, pues se nota una disparidad significativa ente las distintas provincias, como Pichincha, con 20.9 médicos por cada 10.000 habitantes, y 633 Establecimientos de Salud, y Sucumbios, con 6.8 médicos por cada 10.000 habitantes, y apenas 38 Establecimientos de Salud. En segundo lugar, se considera que la publicación señala que "la agrupación de enfermedades fue determinada en el estudio de México por lo tanto para el estudio de las provincias no es necesario hacer ningún ajuste", lo cual llama la atención porque hay la posibilidad de que la realidad de todo el territorio mexicano no sea comparable a la que se vive en las provincias de Orellana y Sucumbios lo cual no es suficientemente discutido en la publicación y podría representar un importante sesgo en los datos presentados. Se considera que de los 3 grupos de enfermedades que agrupan 133 enfermedades, el primer grupo se refiere a las enfermedades transmisibles, de la nutrición y de la reproducción, que no estarían relacionadas con el objeto de esta litis. El segundo grupo incluye a las enfermedades no transmisibles, crónicas, y el tercero se refiere a las muertes por violencia, lesiones accidentales o intencionales, por lo que nos interesa el segundo, que incluye los cánceres, que contribuyen con el 42.2% del peso de la enfermedad en el país (903.561 AVISA), lo que significa una pérdida de 63 años de vida saludable por cada mil habitantes. Según afirma esta publicación, "Las enfermedades agrupadas como no transmisibles son producto de la urbanización y de los nuevos estilos de vida de la población, de las nuevas dietas y el poco ejercicio." Lo cual contribuye a probar que este tipo de enfermedades responden a





estudios realizados en humanos referidos por este informe, en su gran mayoría han demostrado que las poblaciones expuestas enfrentan un elevado riesgo de efectos graves y no reversibles en su salud, lo cual, de ser el caso, tiene el potencial de convertirlo en un importante problema de salud pública. Siendo el objetivo del estudio, "determinar si la contaminación del medio ambiente por las actividades petroleras en el Oriente de Ecuador ha afectado la salud de la población que vive en las cercanías de los pozos y estaciones de petróleo", lo dicho en éste será aplicable a la contaminación originada en actividades petrolera, cualesquiera que sea el actor, consorcio u operador. En términos generales, se comparó la salud de poblaciones en las cercanías de pozos y estaciones con la salud de otras poblaciones que viven lejos de esas instalaciones, y si la contaminación que se origina en estos sitios es un factor contribuyente a esta diferencia encontrada. En este estudio se incluye una "evaluación medio ambiental", que se hizo en base a la recolección de muestras de agua, según consta del informe; ante este particular se aprecia que las muestras recolectadas para este informe no han sido recolectadas dentro del proceso judicial, ni por orden de autoridad competente, por lo que no se las considera como fundamento para emitir este fallo, sino como fundamento del informe. Para efectos de la ejecución de la sentencia se toma en cuenta la definición que hace el informe respecto a lo que se entenderá como "comunidades cotaminadas", entendiéndose que son "aquellas comunidades localizadas dentro de un área de 5 km, alrededor de un pozo o estación petrolero, siguiendo el río a favor de la corriente". Este estudio es tomado en consideración (juntamente con los posibles sesgos) porque los pasos seguidos comportan una metodología que esta Corte considera apropiada en un estudio epidemiológico con el objetivo propuesto, dado que el objetivo de la epidemiología es estimar la frecuencia y distribución de las enfermedades en las poblaciones, e investigar la asociación entre determinadas exposiciones y la ocurrencia de una enfermedad, aún a pesar de que el estudio de campo se realizó entre los meses de noviembre de 1998 y abril de 1999, mucho antes de que este juicio inicie y por ende sin la intervención de la Corte. Entre las conclusiones afirma el autor del informe que es difícil establecer una relación entre la contaminación por petróleo y su impacto porque sus efectos son variados y por la poca información que había de la contaminación en el pasado, sin embargo, puede afirmar que "las mujeres que viven en la cercanía de pozos y estaciones de petróleo presentan un peor estado general de salud que la mujeres que viven lejos de estos pozos y estaciones", anotando que " hay una serie de razones que sugieren que la contaminación proveniente de pozos y estaciones de petróleo es la

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dice en su testimonio que lo financió la fundación Proteus (foja 2147), pero a esta Corte llegó un exhorto tramitado con información de dicha fundación que desmiente este testimonio (ver foja 156033), lo cual resulta inconsistente y le resta valor a dicho informe, pues no ha quedado clara su procedencia. Con esta apreciación se considera que en la encuesta constan recogidos varios testimonios donde se reporta afecciones a la salud desde fojas 272, hasta foja 611, sin embargo, es correcta la apreciación que hace la parte demandada en su impugnación a dicho Informe, en el sentido que para que un testigo pueda ser tomado como tal debe rendir su testimonio ante funcionario administrativo, judicial o consular competente, luego de rendir su juramento de Ley. Sin embargo se advierte que la información recogida en este informe, aunque ha sido inapropiadamente llamada "testimonio", no es tal, pues testimonio es el que ofrecen los testigos ante autoridad competente, por lo que resulta evidente que no se trata de testigos rindiendo una declaración, sino simplemente de encuestas, en las cuales no se aplican las mismas disposiciones que para un testimonio y no se necesita hacer rendir juramento a los encuestados. Dicho esto resulta evidente que dichos testimonios no tienen el valor que tuvieran si fueran rendidos por un testigo que rinde juramento, ante autoridad competente, pero mantienen su valor como fuente estadística de información, siempre y cuando la información haya sido recogido de manera técnica por personas capacitadas. También se considera el estudio de campo titulado "Estudio para conocer el alcance de los efectos de la contaminación en los pozos y estaciones perforados antes de 1990 en los campos de Lago Agrio, Dureño, Atacapi, Guanta, Shushufindi, Sacha, Yuca, Auca y Cononaco.", elaborado por Roberto Bejarano y Monserrat Bejarano, agregado al proceso mediante providencia de 22 de octubre de 2003, a las 15h00, y constante en el expediente desde el cuerpo 7, foja 614, en el que se entrevistaron 1017 familias, de las cuales 957 se consideran gravemente afectadas;-De las familias afectadas, el 42, 42%, es decir, 4006, iniciaron acciones para remediar su situación y solamente el 17, 24%, es decir, 70 obtuvo algún resultado. El informe dice literalmente lo siguiente: "Basado en observaciones de los diferentes campos, pozos, piscinas y las conversaciones directas con familias de las personas involucradas y afectadas por la contaminación hidrocarburífera ecuatoriana", "Los dueños de las fincas o concedores de la zona donde se ubican los pozos y sus respectivas piscinas siempre acompañaron al equipo técnico y fueron fuente principal de información ya que son los únicos que conocen el historial de los sitios". También dice: "La contaminación directa hacia los ríos, fuentes indispensables de agua para la mayoría de familias, es uno de los peores problemas existentes, ya

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que es usada para cocinar, beber, bañarse, lavar ropa y para animales. Por estas causas la presencia de enfermedades provocadas al exponerse y consumir el agua de los ríos, les provoca afecciones dérmicas, infecciones intestinales y vaginales, y en muchos casos cáncer, en mujeres básicamente al útero, ovarios y seno; en general a la garganta, estómago, riñón, piel y cerebro". Uno de los autores de este informe, dice en su testimonio "Me contrató el Frente. Me imagino que hay un convenio interinstitucional entre Petroecuador y el Frente, y por eso seguramente se imprimió en hojas de Petro". Este testigo asegura que las muestras se tomaron al azar, sin embargo la impugnación de la parte demandada contra esta prueba acusa de falta de imparcialidad a sus autores, lo cual parece comprobarse con el mismo testimonio, en el que su autor admite haber sido contratado por el Frente de Defensa de la Amazonía, lo cual pudo haber afectado su objetividad. Por lo expuesto, esta Corte no asume este informe como prueba efectiva de los hechos que contienen, sino que constituyen en indicios a ser considerados en conjunto con los demás. Finalmente, con respecto a daños a la salud de las personas, se advierten que ninguno de estos daños o afectaciones a la salud humana han sido demostrados de manera casuística, es decir, no se han probado puntualmente la existencia de daños identificados sobre la salud de personas particulares, sino que lo que ha quedado demostrado epidemiológicamente es la existencia de daños a la salud pública. Al respecto de la falta de prueba de daños a la salud de algún individuo en particular, esta Presidencia observa que es correcta la apreciación de la parte demandada en el sentido de que no se han presentado certificados médicos que demuestren la existencia de algún daño o lesión o la salud de alguna persona determinada, por lo que para resolver se considera en primer lugar que no se ha demandado la reparación de lesiones particulares, sino que la pretensión de la demanda en el tema de salud es "La contratación a costa de la demandada de personas instituciones especializadas para que diseñen y pongan en marcha un plan de mejoramiento y monitoreo de la salud de los habitantes de la poblaciones afectadas por la contaminación" (foja 80), por lo que la prueba aportada no necesita referirse a daños particulares, sino a afectaciones a la salud pública, de manera que no es relevante el hecho cierto de que no se han probado lesiones o daños en particular; y en segundo lugar, que la pretensión citada guarda coherencia con el objeto de la demanda, que es la reparación de daños ambientales, que como se ha visto, son aquellos causados en el medio ambiente o en alguno de sus componentes, de manera que lo que compete analizar es la existencia de daños a la salud pública y si es que estos tienen relación directa con los impactos ambientales reportados y cuya



señora declara cómo acostumbraba caminar sobre el crudo regado en las carreteras y cómo las aguas a veces se mezclaban con algo que la testigo llama "crudo", que ella "lavaba y continuaba igual como que eso era que ya quedaba normalmente líquida el agua", quien afirmó ante la Corte que hace pocos meses le han detectado cáncer. También en esta inspección judicial, el señor José Holger García Vargas, quien dijo tener a su esposa postrada en cama y culpó a la contaminación del río por el sufrimiento suyo y de su esposa, afirmó además que utilizaba el agua del río "porque en ese tiempo no había de donde tomar agua, del río ocupábamos y nos bañábamos y lavábamos, y es por eso que en el cuerpo le ha pegado a uno hongos que hasta la vez no se ha podido curar con ninguna medicina", declaración que es particularmente ilustradora para esta Corte sobre la dependencia de estas personas a las fuentes naturales de agua que fueron impactadas por los vertimientos de Texaco. Luego, Gerardo Plutarco Gaibor, durante la inspección judicial de la Estación Aguarico (fojas 82595-82642) quien dice estar en la zona desde 1979, afirmó en la misma inspección que : " nosotros llegamos en este tiempo, por este estero corría bastante agua turbia, oscura y era bastante salada, yo tenía una casita, bajando de aquí al margen izquierdo, en la cual ahí me radique con mi esposa y mis dos hijas que tenían en ese entonces. Entonces las niñas bajaban a bañarse a tomar esa agua y se enfermaban, en la cual tenían que les daba fiebre tifoidea, hongos, y también a nosotros porque nosotros no sabíamos que era agua contaminada y nos bañábamos", declaración que contribuye a probar que se trataba de aguas de uso humano y que los vertimientos a cargo de Texpet sometieron a una exposición indebida a las personas que las utilizaban. El señor Gaibor además afirmó y demostró al Presidente de la Corte las huellas de su enfermedad, como se aprecia en el acta que dice " yo tengo enfermedades, como verá señor Presidente en estas fotos, aquí hay hongos en la piel de mi esposa, aquí estoy en la parte posterior del lado de mí, esta es mi barriga, son años, desde tiempo, y hasta la vez eso ha seguido contaminado en la piel, y todavía tengo aquí en la canilla, sigo afectado, no es que me he sanado. Esto es de aproximadamente 20 años atrás. Sigo con esas infecciones en la piel señor Presidente. No es que estoy mintiendo, se comprueba. Entonces esta agua, como la ve ahí, es de donde viene inspeccionando el tubo, y caía abundante agua salada." Concordantemente, en la inspección judicial de Shushufindi 13 (ver acta en fojas 74973-75013), la señora Aura Fanny Melo Melo, sostuvo que "Siempre esa agua ha estado así, cuando llueve sale más, queda manchadita la hierba que va al estero, queda manchada de crudo, incluso mi hija una vez cuando fue a buscar pescado metió el pie en el estero y le empezó a



donde pobladores de la zona han coincidido en narrar estas mismas formas de contacto, como por ejemplo Encontramos la declaración de Amada Francisca Armijos Ajila en Conocaco 6 (ver acta en fojas 123088 a 123123), acerca de “como no sabíamos seguíamos utilizando el agua hasta que llegó el tiempo que mi esposo se enfermo y el murió el año 2002”, de manera similar el señor José Segundo Córdova Encalada, en Sacha Sur (ver acta en fojas 97512 a 97585), declaró que “ Ahora, por qué mi familia de enfermo? Porque caminábamos a pie, ya que no somos ricos más o menos a las doce del día, la naturaleza de aquí y el clima hacía que eso humeara en la carretera, lo que origino que muchos hombres de estas comunidades sufran de medio cuerpo para abajo y las mujeres les dio cáncer por partes que fecundaba el cuerpo cogían aspiraciones y eso era de la pura contaminación yo no soy conocedor en el arte del petróleo pero creo les afectaba ese fluido como de candela que cogían en el cuerpo”; aparte de esto, como lo habíamos anotado , a fojas 97539 consta que “El testigo manifiesta que un tío hermano de su padre vino sano de la provincia del oro y tomaba agua aquí no mas, tío le decía yo ya conozco un poco no tome esa agua pero el seguía tomándola y al año más o menos ya se sintió mal con quemazones en el estómago” Gerardo Plutarco (fojas 82595-82642) también indicó que “por este estero corría bastante agua turbia, oscura y era bastante salda, yo tenía una casita , bajando de aquí al margen izquierdo, en la cual ahí me radique con mi esposa y mis dos hijas que tenía en ese entonces. Entonces las niñas bajaban a bañarse a tomar es agua y se enfermaban, en la cual tenía que les daba fiebre tifoidea, hongos, y también a nosotros porque nosotros no sabíamos que era agua contaminada y nos bañábamos”, de igual modo que el señor José Holger García Vargas, en la estación Aguarico (ver acta en fojas 82595-82642) quien dijo que utilizaba el agua del río “ porque en ese tiempo no había de dónde tomar agua, del río ocupábamos y nos bañábamos y lavábamos”, todo lo cual da cuenta de distintas formas de exposición, a lo cual debemos agregarle lo dicho por el perito Jorge Bermeo, referido en líneas anteriores, en relación al riesgo de que estos elementos entren en la cadena trófica. Dicho esto, en relación a los impactos sufridos en la salud de las personas por la contaminación del agua pasamos a considerar lo dicho por el estudio de campo titulado “Estudio para conocer el alcance de los efectos de la contaminación en los pozos y estaciones perforados antes de 1990 en los campos de Lago Agrio, Dureno, Atacapi, Guanta, Shushufindi, Sacha, Yuca, Auca y Cononaco”, elaborado por Roberto Bejarano y Monserrat Bejarano, agregado al proceso mediante providencia de 22 de octubre de 2003, a las 15h00, y constante en el expediente desde el cuerpo 7, Foja 614, que dice:

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decir que ya estaban contaminados. Eso era con los pequeños bagres y con los bagres grandes también". Durante esta misma inspección, Gerardo Plutarco Gaibor, quien dice estar en la zona desde 1979, afirmó que : " Y lo mismo venimos con unas pocas cabezas de ganado, que bebían esa agua y malparían, se secaban y morían, se murió el ganado, se murió todos los animales porque ingerían esta agua, señor Presidente". También se considera la declaración de Anselmo Abad Vásquez, en foja 79715, brindado durante la inspección judicial de Shushufindi 21, donde señala que " Si, yo tenía ganado, todo esto era puro potreros, todavía se ven residuos de hierba, a mi el ganado se me enfermaba, tenían unas llagas que no es el conocido Tupe y todo eso así, no se curaban por mas que yo les trataba, aquí sufrimos de falta de veterinarios, pero preguntando al uno y al otro no había posibilidad de curarlos, se flaqueaban y morían, luego nos dimos cuenta que era por la contaminación del agua, yo optaba por buscar vertientes y hacer pozos para que el ganado toma ahí el agua no de los ríos, hasta ahora nadie puede tomar el agua de los ríos." Esto es concordante también con lo dicho en la declaración de Maximo Celso, en foja 41659, en la inspección judicial de Lago Agrio Norte, afirmó que " Aquí tenía una chanchera, de donde la cual perdí todos mis chanchos, ciento veinte chanchos, de los cuales había treinta puercas que producían, desde que Texaco comenzó a botar el agua para este sector", y que " En ese entonces yo cultivaba café. En medio del café tenía una bananera que tenía una chanchera, y perdí todos mis animales, porque desde ese momento el agua de formación era continuamente. La parte que cruzaba para botar el agua de formación era por este lugar. Nos decían que era saludable, que era buena hasta para tomar. Y yo confiadamente no saque a mis animales, porque yo estaba seguro de eso. Cuando los animales, cuando las puercas parían, se quedaban con el útero afuera; yo consulté con el médico y me dijo que eso era problema de una contaminación gravísima". También el señor Simón José Rogel Robles, fue examinado durante la inspección judicial de Lago Agrio Norte (foja 41632-41693), y declaró que ": Yo y mi familia me dedicaba a la agricultura y la ganadería porque todo era potrero por donde venimos caminando hasta allá, entonces tomaban esa agua el ganado y para nosotros ya no servía el ganado porque se ponía raquítico, prácticamente nosotros perdíamos, o se caía ahí se bañaban en petróleo, y tocaba en medio, medio, medio bañarlas y venderlas." En la inspección judicial de Shushufindi 13 (foja 74973-75013), la señora Aura Fanny Melo Melo, sostuvo que "Yo aquí tengo ganado pero el ganado se me muere, siempre, siempre, yo le di unas fotos a don Padilla que era el Presidente, por aquí tengo una y la entrego, no puedo encontrar las demás, algunas se mueren así



considerando que ya se ha condenado al demandado a la reparación del daño, y por cuanto sirve a los mismos fines ejemplarizantes y disuasorios, esta penalidad civil podrá ser reemplazada, a lección del demandado, por una disculpa pública a nombre de Chevron Corp., ofrecida a los afectados por las operaciones de Texpet en el Ecuador. Este reconocimiento público del daño causado deberá publicarse a más tardar dentro de 15 días, en los principales medios de comunicación escritos en el Ecuador y en el país del domicilio de la demandada, en tres días distintos, lo cual en caso de cumplirse, será considerado como una medida simbólica de reparación moral y de reconocimiento de los efectos de su conducta, así como garantía de no repetición, que ha sido reconocida por la Corte Interamericana de Derechos humanos con el propósito de “recuperar la memoria de las víctimas, el reconocimiento de su dignidad,[y ...] transmitir un mensaje de reprobación oficial de las violaciones de los derechos humanos de que se trata, así como evitar que hechos similares se repitan” (ver caso Hermanos Gómez Paquiyauri Vs. Perú. Fondo, Reparaciones y Costas. Sentencia de 8 de julio de 2004. Serie C No. 110, Párr. 223).- **DECIMO QUINTO.- Finalmente,** considerando que es necesario establecer un mecanismo adecuado de ejecución de la condena, que permita asegurar que el criterio de Justicia empleado en la presente sentencia se haga realidad, asegurando así la tutela Judicial efectiva, y teniendo en cuenta la procedencia del fideicomiso como modo de cumplir las obligaciones ha sido reconocida en las resoluciones de Corte Suprema números 168-2007 de abril 11 de 2007, juicio No. 62-2005, propuesto por Andrade c. CONELEC; y, 229-2002, R.O. 43 de marzo 19 de 2003, y procurando precautelar los derechos de los demandantes y de los afectados, a través de la aplicación del mismo criterio que ha servido para fijar las indemnizaciones, se impone el siguiente modo de ejecución de la condena a reparación de daños, prevista en el considerando Décimo Tercero: a) En el plazo de sesenta días desde la fecha de notificación con la presente sentencia, los actores deberán constituir un fideicomiso mercantil, ser administrado por alguna de las sociedades administradoras de fondos y fideicomisos radicadas en el Ecuador al tenor de lo dispuesto por la Ley de Mercado de Valores y demás cuerpos aplicables. b) El patrimonio autónomo estará conformado por el valor total de las indemnizaciones a las que ha sido condenada la demandada en el considerando Décimo Tercero. c) El beneficiario del fideicomiso será el Frente de Defensa de la Amazonía o la persona o personas que éste designe, considerando que “los afectados” por los daños ambientales, son personas indeterminadas, pero determinables, unidas por un derecho colectivo, siendo las medidas de reparación

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la forma de beneficiarlos. d) Las instrucciones para la administradora de fondos y fideicomisos, que contenga el contrato de fideicomiso, comprenderán de modo no exclusivo, pero sin poder contradecirse, las siguientes disposiciones: i. Todo el patrimonio tendrá como destino cubrir los costos necesarios para la contratación de las personas encargadas de ejecutar las medidas de reparación previstas en el considerando Décimo Tercero, y los gastos legales y de administración del fideicomiso; ii. Los representantes del Frente de Defensa, o quienes estos designen a nombre de los afectados, constituirán la junta de fideicomiso, que será el organismo de toma de decisiones y de control, y establecerán un plan de reparación dentro de los parámetros establecidos en el considerando Décimo Tercero de esta sentencia. iii. Es facultad de la Junta la selección de los contratistas, que deberán ser personas con dominio en las artes y técnicas aplicables a cada medida de reparación; para lo cual previa a la selección de las personas contratadas por parte del Fideicomiso para ejecutar las medidas de reparación, la Junta deberá asesorarse técnicamente y expresar un voto razonado que deberá ser transcrito y presentado a la fiduciaria; iv. La administradora, aparte de ejercer la representación legal del fideicomiso, supervisará que el plan de reparación se adecue a las medidas de reparación dispuestas en el considerando Décimo Tercero, y de manera previa también verificará que los contratos que vaya a firmar cumplan con el destino del fideicomiso; v. La administradora y la Junta del fideicomiso tienen la facultad de supervisar la correcta ejecución de los trabajos por parte de las compañías contratadas, por si mismo o mediante fiscalizadores y/o auditores externos; El Tribunal de instancia, en la etapa de ejecución, verificará el cumplimiento exacto de la obligación de constituir el fideicomiso, en el plazo otorgado para el efecto; y posteriormente, aplicadas que sean, comprobará también la efectividad de las medidas de reparación, quedando bajo responsabilidad de la fiduciaria el buen manejo de los fondos.- Por las consideraciones expuestas **ADMINISTRANDO JUSTICIA EN NOMBRE DEL PUEBLO SOBERANO DEL ECUADOR Y POR AUTORIDAD DE LA CONSTITUCIÓN Y LA LEYES DE LA REPÚBLICA**, acepta parcialmente la demanda presentada por María Aguinda, Ángel Piaguage y otros en contra de Chevron Corp., y se condena a la demandada al pago de los costos de las medidas de reparación de los daños conforme se dispone en el considerando Décimo Tercero, que deberá aportarse a un fideicomiso conforme se establece en el considerando Décimo Quinto de esta sentencia. Adicionalmente, por mandato legal el demandado deberá satisfacer un 10% adicional al valor sentenciado por concepto de reparación de daños a nombre del Frente de Defensa de la Amazonía. Con

costas.-Por renuncia de la señora Secretaria Relatora titular, actúe como tal la Lcda. Gloria Cabadiana Guanulema.- NOTIFIQUESE, f) Abg. Nicolas Zambrano, Presidente de la Sala Unica de la Corte Provincial de Justicia de Sucumbios, lo que comunico a Usted para los fines legales consiguiente.

LCDA. GLORIA CABADIANA  
SECRETARIA RELATORA (E)



**PART VI**  
**THE FORENSIC ISSUES**

***A: Introduction***

- 6.1 On 20 and 21 May 2014, Ms Kathryn Owen, the Tribunal-appointed expert, travelled to Quito, Ecuador together with the Secretary to the Tribunal, Mr Martin Doe, and representatives of both Parties. Ms Owen made forensic images of two computers that had been identified by the Respondent as having been used by Judge Zambrano during the Lago Agrio Litigation (the “Zambrano Computers”). Identical copies of the forensic images of the Zambrano Computers were provided to Mr Lynch (of Stroz Friedberg) and Mr Racich (of Vestigant), the forensic expert witnesses appointed by the Claimants and the Respondent respectively in this arbitration.
- 6.2 These forensic images were collected and held, initially, by the Parties in strict confidence by order of the Tribunal. This order was respected by both the Claimants and the Respondent. Given the timing, these forensic images played no part in the RICO trial held in New York in October-November 2013.
- 6.3 Mr Lynch prepared a second report on the Zambrano Computers dated 15 August 2014 (“Lynch ER 2”). Mr Racich produced his analysis of the Zambrano Computers and his response to Lynch ER 2 in his second report dated 7 November 2014 (“Racich ER 2”).<sup>1</sup> Both expert witnesses filed third reports, on 14 January 2015 (“Lynch ER 3”) and 16 March 2015 (“Racich ER 3”).
- 6.4 At the Track II Hearing during their oral testimony, both experts gave short presentations and were cross-examined by the adverse Party(ies).<sup>2</sup> Ms Owen attended that part of the Track II Hearing (Days 5 and 6); but she did not give oral or written evidence before the Tribunal then or later, apart from her Final Report and Revised Final Report of 5 February 2016 and 3 June 2016.

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<sup>1</sup> Mr Lynch and Mr Racich had previously filed first expert reports that addressed Dr Guerra’s computer and other electronic media.

<sup>2</sup> The transcript of their oral evidence is at D5.935 to D6.1284 of the Track II Hearing.

- 6.5 In accordance with Procedural Order No. 40, Ms Owen considered the expert reports and oral testimony of Mr Lynch and Mr Racich, in order to identify: (i) any material points on which there was common ground between the technical testimony and conclusions of Mr Lynch and Mr Racich; (ii) any material points on which there was a difference between their technical testimony and conclusions; (iii) whether the differences arose from a difference in forensic analysis or whether they were attributable to non-technical facts; and (iv) any material conclusions put forward by Mr Lynch or Mr Racich which she would not characterise as matters of forensic analysis.<sup>3</sup>
- 6.6 Ms Owen subsequently produced a draft report dated 18 December 2015, which was circulated to the Parties, but not to the Tribunal. This draft formed the basis for discussions between Ms Owen, Mr Lynch and Mr Racich in The Hague on 12 January 2016. In accordance with Procedural Order No. 40, Ms Owen's Final Report was circulated to the Parties and to the Tribunal on 5 February 2016.
- 6.7 In accordance with Procedural Orders No. 40<sup>4</sup> and No. 41<sup>5</sup>, the Parties submitted written comments on Ms Owen's Final Report on 4 March 2016.<sup>6</sup> These comments<sup>7</sup> were transmitted to Ms Owen, pursuant to Procedural Order No. 42.<sup>8</sup> Further correspondence from the Parties was sent to Ms Owen in April and May 2016.<sup>9</sup>
- 6.8 Following further consultation between Ms Owen, Mr Lynch and Mr Racich, on 3 June 2016 Ms Owen provided her final written responses on the Parties' comments and a Revised Final Report.
- 6.9 In accordance with paragraph 4 of Procedural Order No. 44, the Parties each filed (i) submissions on the significance of Ms Owen's Revised Final Report on 13 August 2016; and (ii) their reply submissions on 26 August 2016.
- 6.10 The Parties indicated to the Tribunal that they did not seek to examine Ms Owen at an oral hearing, pursuant to Article 27(4) of the UNCITRAL Arbitration Rules.<sup>10</sup> In

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<sup>3</sup> Procedural Order No. 40, para 1(a).

<sup>4</sup> Procedural Order No. 40, para 3.

<sup>5</sup> Procedural Order No. 41, para 2.

<sup>6</sup> The Claimants' letter of 4 March 2016; and the Respondent's letter of 4 March 2016.

<sup>7</sup> With the exception of the last section (at pp. 16-17) of the Respondent's letter.

<sup>8</sup> Procedural Order No. 42, para 2.

<sup>9</sup> The Claimants' letter of 27 April 2016; and the Respondent's letter of 2 May 2016.

<sup>10</sup> The Claimants' letter of 27 June 2016; Procedural Order No. 44, para 3.

Procedural Order No. 46, given the Parties' joint decision, the Tribunal confirmed that it had decided not to question Ms Owen of its own motion also pursuant to Article 27(4) of the UNCITRAL Arbitration Rules.<sup>11</sup>

6.11 In compliance with the UNCITRAL Arbitration Rules, the Tribunal has received no private advice from Ms Owen.

***B: Summary of Forensic Evidence***

6.12 Overall, it appears to the Tribunal from the expert reports and oral testimony of Mr Lynch and Mr Racich, and from the Revised Final Report of Ms Owen, that there are few, if any, material differences between the expert witnesses in relation to the forensic evidence that was retrieved from the Zambrano Computers, as distinct from their respective forensic opinions inferred from such evidence. The various points of disagreement between the expert witnesses arise from significant differences in the way in which Mr Lynch and Mr Racich have approached and interpreted that evidence.

6.13 In particular, there appears to have been a fundamental difference in the overall focus of the two experts, based upon their respective terms of reference. Mr Lynch's analysis (for the Claimants) appears to have been directed primarily at the question whether the available forensic evidence is consistent with Judge Zambrano's testimony at the RICO trial on his drafting of the Lago Agrio Judgment.<sup>12</sup> Conversely, the focus of Mr Racich's analysis of the forensic evidence (for the Respondent) was directed at the possibility, or probability, that a third person or persons did not "ghostwrite" the Lago Agrio Judgment.<sup>13</sup>

***C: Judge Zambrano's Two Computers***

6.14 Judge Zambrano was issued with two Hewlett Packard ("HP") computers. The first (serial number MXJ64005TG) was manufactured and shipped by HP in 2006 ("the Old Computer"). The second (serial number MXL0382C3D) was manufactured in 2010 and

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<sup>11</sup> Procedural Order No. 46, para A.

<sup>12</sup> See Lynch ER 2, p. 7, where Mr Lynch concluded that "*In summary, the totality of the available forensic evidence is inconsistent in all material respects with Mr Zambrano's testimony describing how the drafting of the Ecuadorian Judgment occurred on the New Computer.*"

<sup>13</sup> See Racich ER 2, p. 3, where Mr Racich noted that "*In my professional opinion, the evidence is more consistent with Mr Zambrano and his assistant writing the Judgment than it is with a third party writing the Judgment and giving it to Mr Zambrano for issuance at the beginning of February 2011.*"

purchased by the Judicial Council of Ecuador in November 2010 and available to Judge Zambrano from 26 November 2010 (“the New Computer”).<sup>14</sup>

- 6.15 It will be recalled that the periods here under consideration are (i) from 21 October 2009 to 11 March 2010 and (ii) from 11 October 2010 to 4 March 2011 during which Judge Zambrano presided over the Lago Agrio Litigation. He issued the Lago Agrio Judgment and its Clarification on 9 February and 4 March 2011 respectively.
- 6.16 Windows XP was installed on the Old Computer on 14 July 2010. Mr Lynch (with Stroz Friedberg) found evidence of files and folders that pre-dated 14 July 2010, which indicated that the Old Computer had contained a prior installation of Windows. On 14 July 2010, a significant amount of data was copied to the Old Computer, including 2,428 Microsoft Word documents. This data included files relating to the Lago Agrio Litigation. In Mr Lynch’s view, this instance of bulk copying, combined with the evidence he had found of files and folders from a previous installation of Windows, was consistent with the reinstallation of the operating system, possibly as part of troubleshooting or maintenance.<sup>15</sup>
- 6.17 The registered user name of the Old Computer at all times prior to March 2011 was “CPJS”.<sup>16</sup> Consequently, files saved using the Old Computer had the author or last saved name “CPJS”.<sup>17</sup>
- 6.18 The first user account, named “HP”, was created on the New Computer on 25 November 2010. Files saved by the New Computer had the author or last saved name “HP”.<sup>18</sup> The first apparent use of this account was on 7 December 2010. There was no evidence of any bulk transfer of documents to the New Computer prior to the issuance of the Lago Agrio Judgment on 9 February 2011.<sup>19</sup>

***D: The Development of the Lago Agrio Judgment’s Text***

- 6.19 Mr Lynch (with Stroz Friedberg) carried out searches on the Old and New Computers for words and phrases from the Lago Agrio Judgment. On the Old Computer, Mr Lynch

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<sup>14</sup> Lynch ER 2, pp. 8-9.

<sup>15</sup> Lynch ER 2, p. 11.

<sup>16</sup> Track II Hearing D5.1147 (Racich).

<sup>17</sup> Track II Hearing D5.948 (Lynch).

<sup>18</sup> Track II Hearing D5.948 (Lynch).

<sup>19</sup> Lynch ER 2, p. 12.



identified multiple copies of two files – “Providencias.docx” and “Caso Texaco.doc” – which contained text which was also found in the Lago Agrio Judgment.<sup>20</sup> Subsequent versions of the “Providencias.docx” and “Caso Texaco.doc” files were subsequently saved on the Old Computer.<sup>21</sup> No documents containing text of the Lago Agrio Judgment were recovered from the New Computer.<sup>22</sup>

6.20 The distinction between the date of a document’s first creation, and the date(s) on which it is subsequently saved, is important. The two expert witnesses agree that the earliest recoverable instance of “Providencias.docx” was created on the Old Computer on 11 October 2010.<sup>23</sup> (On that date, 11 October 2010, Judge Zambrano formally resumed his role as the presiding judge hearing the Lago Agrio Litigation). The experts were not able to recover a version of “Providencias.docx” which had been last saved on or around 11 October 2010. Accordingly, they were unable to analyse the content of the document as it stood when it was created.<sup>24</sup>

6.21 However, Mr Lynch noted that early versions of “Providencias.docx” contained a separate section of text, not related to the text of the Lago Agrio Judgment. He searched for this section of text and found it replicated in a document called “Providencias.doc”, which had been transferred to the Old Computer as part of the bulk transfer that had occurred on 14 July 2010.<sup>25</sup> It is not known, however, whether this document “Providencias.doc” contained any Judgment text at the time it was transferred to the Old Computer or at the time that it was used to create “Providencias.docx”. (As at 14 July 2010, Judge Zambrano was not assigned to hear the Lago Agrio Litigation: it remained before Judge Ordóñez since 12 March 2010).

6.22 *The 21/12 Providencias:* The earliest version of “Providencias.docx” that the experts were able to recover was dated 21 December 2010 (“the 21/12 Providencias”). Between 11 October 2010 and 21 December 2010 (a period of 71 days), the 21/12 Providencias was saved 286 times and had been open for approximately 35 hours.<sup>26</sup> The Tribunal

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<sup>20</sup> Lynch ER 2, p. 27.

<sup>21</sup> Lynch ER 2, p. 24.

<sup>22</sup> Lynch ER 2, p. 25-26.

<sup>23</sup> Lynch ER 2, p. 27-28; Racich ER 2, para 10; Track II Hearing D5.1146 (Racich).

<sup>24</sup> Lynch ER 2, p. 28.

<sup>25</sup> Lynch ER 2, p. 29.

<sup>26</sup> Lynch ER 2, p. 24.

notes that the 21/12 Providencias copied text from the Unfiled Moodie Memorandum and the Unfiled Erion Memorandum (both citing foreign, English language materials).

- 6.23 The 21/12 Providencias contained 42% of the final text of the Lago Agrio Judgment (about 80 pages, over pages 1 to 107 of the Judgment);<sup>27</sup> and 94% of its text was unchanged in the Judgment.<sup>28</sup> Mr Racich calculated that this would equate to a work rate of approximately 1 page per day during this period, if the work were evenly spaced. Mr Lynch, however, noted that, during this period, the 21/12 Providencias had been open for approximately 35 hours (the edit time).<sup>29</sup>
- 6.24 Focussing on the edit time, Mr Lynch calculated that the text of the 21/12 Providencias would be typed at a much higher rate of approximately 26 minutes per page.<sup>30</sup> Mr Racich agreed, in cross-examination at the Track II Hearing, that, if it was assumed that someone was typing the document during every minute that it was open during this period, it followed that the text was entered at a rate of less than 30 minutes per page.<sup>31</sup>
- 6.25 Mr Lynch testified in his second report that the 21/12 Providencias contained formatting differences which were consistent with text having been copied and pasted from other documents.<sup>32</sup> Mr Racich does not appear to contest that there were formatting differences in this document (although, as discussed below, Mr Racich does not accept that this evidence is necessarily consistent with text being provided to Judge Zambrano by third persons).<sup>33</sup>
- 6.26 *The 28/12 Providencias:* The next recoverable version of “Providencias.docx” was a version that was last saved on 28 December 2010 (“the 28/12 Providencias”). Again the two experts appear to agree on the metadata of this version of the document; but they interpret it in different ways. Mr Lynch found that between 21 and 28 December 2010, the 28/12 Providencias was saved 29 times and was open for approximately 17.5 hours. He further testified that this version of the document contained 66% of the final text of

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<sup>27</sup> Lynch ER 2, p. 24.

<sup>28</sup> Racich ER 2, para 13 suggests the text at this stage was 78 pages long. Lynch (Track II Hearing D5.950) puts it at 81 pages.

<sup>29</sup> Lynch ER 2, p. 24.

<sup>30</sup> Lynch ER 3, p. 17.

<sup>31</sup> Track II Hearing D6.1257 (Racich).

<sup>32</sup> Lynch ER 2, p. 24.

<sup>33</sup> Racich ER 2, para 10.



the Lago Agrio Judgment (over pages 1 to 154 of the Judgment).<sup>34</sup> 96% of its additional text was unchanged in the Judgment.

6.27 On this basis, Mr Racich calculated that 45 pages had been added to the 28/12 Providencias in this period at a rate of approximately 7 pages per day.<sup>35</sup>

6.28 Again, Mr Lynch pointed out that this calculation did not take account of the edit time: given that the document was only open for 17.5 hours during this period, the additional text would have been added at an average rate of 27.5 minutes per page.<sup>36</sup> That calculation assumes that someone was typing text into the document for every single minute that the document was open during this period.<sup>37</sup>

6.29 Mr Lynch noted that this document, like the 21/12 Providencias, contained formatting differences that were, in his view, consistent with text having been copied and pasted from other sources.<sup>38</sup> Mr Racich suggested that it was likely that part of this additional text “originated in another document on Mr Zambrano’s computer, and that the user copied that text into the Providencias document.” However, Mr Lynch analysed the Microsoft Office Session logs (“the OSession Logs”) to assess how long Microsoft Word had been active.<sup>39</sup> The OSession logs indicate that, in the period between 21 December and 28 December 2010, Microsoft Word was active for 18.3 hours – that is just 52 minutes longer than the time for which the 28/12 Providencias was open.<sup>40</sup> In cross-examination at the Track II Hearing, Mr Racich accepted that the OSession logs indicated that, if someone had been working on any different document on Judge Zambrano’s computers during the period between 21 and 28 December 2010, they had done so for less than an hour.<sup>41</sup>

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<sup>34</sup> Lynch ER 2, p. 24.

<sup>35</sup> Racich ER 2, para 15.

<sup>36</sup> Lynch ER 3, p. 17. Mr Lynch suggested, at Lynch ER 3, p. 20, that 38 pages of Judgment text were added to the 28/12 Providencias.

<sup>37</sup> Track II Hearing D5.951 (Lynch).

<sup>38</sup> Lynch ER 2, p. 24.

<sup>39</sup> The full OSession logs for Microsoft Word for both the Old and New Computer between 14 July 2010 and 26 June 2013 are listed at Lynch ER 2, Exhibit 85.

<sup>40</sup> Lynch ER 3, p. 20.

<sup>41</sup> Track II Hearing D6.1252-1253 (Racich). Mr Racich commented that the OSession logs could be incomplete, although he agreed that they would only be incomplete if something – such as a crash on Microsoft Word – had happened. In his third report, Mr Racich suggested that there were a number of reasons why the OSession logs might not be accurate, for instance if the programme crashed, the power went out or if Word froze (Racich ER 3, para 20).

- 6.30 In his third report, Mr Lynch also explained that he had searched all the instances of “Caso Texaco.doc” for any of the text that was added to the 28/12 Providencias and did not find any of that text.<sup>42</sup>
- 6.31 *The 19/01 Caso Texaco*: The next document containing Judgment text, which Mr Lynch was able to recover, was a document named “Caso Texaco.doc” (“the 19/01 Caso Texaco”). This document had been created on 20 October 2009 and last saved on 19 January 2011.<sup>43</sup> The 19/01 Caso Texaco contained 11% of the text of the Lago Agrio Judgment (over pages 154 to 178). 97% of its additional text was unchanged in the Judgment.
- 6.32 Neither the previous recoverable version of “Caso Texaco.doc” (last saved date 5 January 2011) nor the subsequent recoverable version (last saved date 4 March 2011) contained any text of the Lago Agrio Judgment. The 19/01 Caso Texaco had been saved 16 times and had been open for approximately 11.5 hours since 5 January 2011.<sup>44</sup> This version of “Caso Texaco.doc” was last saved on the Old Computer.<sup>45</sup> However, Mr Racich emphasised that other versions of “Caso Texaco.doc” were opened and edited on both the Old and New Computers.<sup>46</sup>
- 6.33 Mr Racich suggested that the forensic evidence relating to the 19/01 Caso Texaco was consistent with a person copying text from that document and pasting it into the draft of the Lago Agrio Judgment (i.e. “Providencias.docx”) some time before 19 January 2011.<sup>47</sup> Mr Lynch, however, noted that none of the Judgment text found in the 19/01 Caso Texaco was added to the 28/12 Providencias<sup>48</sup> (although for the reason elaborated below, there is no evidence to indicate whether or not the text from the 19/01 Caso Texaco was added to “Providencias.docx” between 28 December 2010 and 19 January 2011).
- 6.34 In cross-examination at the Track II Hearing, Mr Lynch accepted that Judge Zambrano’s computers contained documents in both Bookman Old Style and Times New Roman

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<sup>42</sup> Lynch ER 3, p. 22.

<sup>43</sup> Lynch ER 2, p. 33, Table 16.

<sup>44</sup> Lynch ER 2, p. 25.

<sup>45</sup> Lynch ER 2, p. 33.

<sup>46</sup> Racich ER 2, para 27.

<sup>47</sup> Racich ER 2, para 26.

<sup>48</sup> Lynch ER 3, p. 22.

fonts and that the blocks of text in “Providencias.docx” could have been cut and pasted from another document on Judge Zambrano’s computer.<sup>49</sup> However neither expert was able to shed any light on where the cut-and-pasted text may have come from. Mr Racich emphasised that there was no forensic evidence to suggest that any version of the 21/12 Providencias was provided to Judge Zambrano by a third person.<sup>50</sup>

- 6.35 *21/01 Providencias*: On 21 January 2011, “Providencias.docx” was saved using the “saved as” function, which reset the edit time and revision count (“the 21/01 Providencias”). There was no recoverable temporary file showing the document’s content at that date<sup>51</sup> Accordingly, it was not possible for either expert to determine how many changes were made to the document during the period from 28 December 2010 to 21 January 2011, or for how long it was edited during this period.<sup>52</sup>
- 6.36 *The Lago Agrio Judgment*: As already indicated, the Lago Agrio Judgment was issued by Judge Zambrano on 14 February 2011. No final draft of the Judgment was found on the Zambrano Computers.
- 6.37 *The 04/03 Providencias*: The earliest recovered version of any document containing all of the Judgment text was a version of “Providencias.docx” found on the Old Computer, which had been last saved on 4 March 2011 (“the 04/03 Providencias”).<sup>53</sup> As well as the text of the Lago Agrio Judgment, it contains the Clarification Order issued on 4 March 2011.
- 6.38 Mr Lynch suggests that it is odd that no “final” draft of the Lago Agrio Judgment was recovered before 14 February 2011. He testified that, in the context of a document which has ostensibly taken many months of work, “it is common, based on my experience, for someone to create a backup copy or to save the final copy as a new ‘final’ version of the document, particularly before using the same file to create other documents (as is the case with Providencias).”<sup>54</sup>

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<sup>49</sup> Track II Hearing D5.1074-1075 (Lynch).

<sup>50</sup> Racich ER 2, para 10.

<sup>51</sup> Lynch ER 2, p. 25.

<sup>52</sup> Racich ER 2, para 17.

<sup>53</sup> Lynch ER 2, p. 6.

<sup>54</sup> Lynch ER 3, p. 32.

- 6.39 However, as Mr Racich pointed out, this factor is not conclusive: “The fact that no backup of the Judgment dated 14 February, 2011 can be found on the Zambrano hard drives shows that Mr Zambrano may not have followed best practices to protect his work. In my experience, this is not evidence of ghost-writing.”<sup>55</sup>
- 6.40 Between 21 January and 4 March 2011, the 04/03 Providencias had been saved 124 times and had been open for approximately 58.3 hours. This version of the document contained 99%<sup>56</sup> of the final text of the Lago Agrio Judgment, together with a further 24 pages comprising a version of the Clarification Order.<sup>57</sup>
- 6.41 In the light of this evidence, Mr Lynch concluded that the forensic evidence was inconsistent with Judge Zambrano’s testimony in the RICO Proceedings, namely that the Lago Agrio Judgment was typed by himself and Ms “C”, exclusively on the New Computer.<sup>58</sup>
- 6.42 Mr Racich disagreed with Mr Lynch. He explained that the hard drive of the Old Computer was “mapped” on the New Computer. As a consequence, a user of the Old Computer could access and edit files saved on the New Computer whilst working on the Old Computer, and vice versa.<sup>59</sup> On this basis, so Mr Racich testified, Judge Zambrano’s testimony may have been based on a misunderstanding: if he was sitting at the New Computer, he may have assumed that the files were being saved on to the New Computer. Mr Racich also indicated that the metadata (the Author and Last Saved fields) were not conclusive, since no information is stored about which computer saved the file between its creation and its last save.<sup>60</sup>
- 6.43 Mr Lynch, however, reiterated in his oral testimony at the Track II Hearing that: “... all of the files with Judgment text were saved by CPJS [the user name of the Old Computer], showing that someone was using the Old Computer, not the New Computer.”<sup>61</sup> In his third report, Mr Lynch explained: “... all of the ‘several

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<sup>55</sup> Racich ER 3, p. 10.

<sup>56</sup> In cross-examination, Mr Lynch accepted that the substance of the 04/03 Providencias was identical with the Lago Agrio Judgment: the only difference between the two documents is that former is missing the signature and the heading (Track II Hearing D5.1053).

<sup>57</sup> Lynch ER 2, p. 25.

<sup>58</sup> Lynch ER 2, p. 25.

<sup>59</sup> Racich ER 2, para 39.

<sup>60</sup> Racich ER 2, para 40.

<sup>61</sup> Track II Hearing D5.948 (Lynch).

successive versions' of Ecuadorian Judgment text contained in Providencias and the January 19 Caso Texaco document were saved by the Old Computer and not through any 'mapping' by the New Computer. Had any of those versions been saved using the New Computer the metadata for those versions would reflect that they had been saved using the New Computer.”<sup>62</sup>

- 6.44 In summary, to the Tribunal's understanding, the forensic evidence which the two experts were able to extract from the Zambrano Computers indicates the following:
- 6.45 Between 11 October 2010 and 4 March 2011, the recovered files that contained Judgment text (the 21/12 Providencias; the 28/12 Providencias; the 19/01 Caso Texaco; and the 04/03 Providencias) were open for a combined total of at least 162.3 hours. It is not known how long the 21/01 Providencias had been open.
- 6.46 Between 11 October 2010 and 4 March 2011, "Providencias.docx" was saved at least 439 times on Judge Zambrano's Computers.<sup>63</sup> Again, it is not known how many times the 21/01 Providencias was saved.
- 6.47 Between 11 October 2010 and 14 February 2011, Microsoft Word was open for (at least) 198 hours on the Old Computer and (at least) 36 hours on the New Computer.<sup>64</sup>
- 6.48 The formatting differences in the text are consistent with blocks of text being cut or copied and pasted into the Lago Agrio Judgment from other documents, but there is no way of knowing forensically where those blocks of text came from.

***E: The "Unfiled Materials"***

- 6.49 Mr Lynch, in his first report, testified that the Final Judgment contained text and errors that did not exist in the laboratory results filed with the Lago Agrio Court but which did exist in the "Unfiled" Selva Viva Database (being Material No 8 considered in Part V above).<sup>65</sup> Dr Leonard's expert report had further identified blocks of text in the Lago Agrio Judgment that were identical, or almost identical, to text found in documents which were not found in documents filed with the Lago Agrio Court (referred to by Mr

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<sup>62</sup> Lynch ER 3, p. 30.

<sup>63</sup> Racich ER 2, para 10.

<sup>64</sup> Lynch ER 3, p. 20.

<sup>65</sup> Lynch ER 1, pp. 20-30.

Lynch as “the Plagiarised Documents”, but the Tribunal uses the term “Unfiled Materials”).

- 6.50 For his second report, Mr Lynch was asked to identify whether any of the “Plagiarised Documents” and/or the text and errors from the Selva Viva Database existed on either of Judge Zambrano’s Computers.<sup>66</sup>
- 6.51 Mr Lynch generated search terms from the blocks of text identified in Dr Leonard’s expert report. He then searched the Old Computer and the New Computer using those search terms, to identify whether such text existed in any documents (other than documents containing text of the Lago Agrio Judgment). This search only identified a single Excel file: INDICE DE CUERPOS JUICIO 002-2003.xlsx (“the Zambrano Index Summary”), which appeared to have some connection with the unfiled January and June Index Summaries (being Material No 6 considered in Part V above).
- 6.52 The earliest created copy of the Zambrano Index Summary was found on the Old Computer. It was copied to the Old Computer on 6 January 2011. However, the last saved date for all copies of this document was 12 February 2010 (whereas the last saved date for the January Index Summary and the June Index Summary was January and June 2007 respectively).
- 6.53 Mr Lynch compared the Zambrano Index Summary with the January and June Index Summaries examined in Dr Leonard’s expert report. The latter contained five worksheets, whereas the version found on Judge Zambrano’s computers contained only the first worksheet. Furthermore, there were notable differences between the version of the first worksheet found on Judge Zambrano’s computers and the version contained in the January and June Index Summaries.<sup>67</sup> Mr Lynch also reviewed the Zambrano Index Summary to see whether it contained all three instances of the text identified as plagiarised in Dr Leonard’s Report. It contained only the first two instances.<sup>68</sup> The metadata of the three versions of the Index Summaries (i.e. the June and January Index Summaries analysed by Dr Leonard and the Zambrano Index Summary) indicated that

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<sup>66</sup> Lynch ER 2, pp. 16ff.

<sup>67</sup> Lynch ER 2, pp. 18-19.

<sup>68</sup> Lynch ER 2, p. 20.

all three share the same Created Date and Author; but the metadata for all other fields is different.

6.54 Mr Lynch therefore concluded, to a reasonable degree of scientific certainty, that:

- (a) All the versions of the Index Summaries were generated from the same original document created in January 2007 but were then separately edited (this date long preceded Judge Zambrano's first assignment to the Lago Agrio Litigation, beginning in October 2009);
- (b) The Zambrano Index Summary does not contain all of the plagiarised text which appears in the Final Judgment; and
- (c) None of the other plagiarised documents were on either of Judge Zambrano's computers.<sup>69</sup>

6.55 In his second report, Mr Lynch also searched for data irregularities in the laboratory results collated in the Selva Viva Data Database. He could not identify any references to these on either of Judge Zambrano's Computers, except in documents containing text from the Judgment.<sup>70</sup>

6.56 Both the Index Summaries and the Selva Viva Database are Microsoft Excel (electronic) documents. Mr Lynch therefore analysed the Microsoft "OSession Logs" to determine whether Microsoft Excel had been used on Judge Zambrano's Computers. He found that the OSession Logs record that, between October 2010 to March 2011, Excel was only used on the Old Computer and was only active for a total of four minutes: for two minutes on 18 October 2010; for one minute on 4 November 2010; and for one minute on 31 January 2011.<sup>71</sup>

6.57 Mr Lynch also considered how long it would have taken to calculate the percentages which are contained within the Unfiled Selva Viva Database. He concluded that it would not have been possible, in the four minutes of recorded activity in Microsoft Excel, either to (i) derive the statistics appearing in the Lago Agrio Judgment from the unfiled

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<sup>69</sup> Lynch ER 2, p. 21.

<sup>70</sup> Lynch ER 2, p. 21.

<sup>71</sup> Lynch ER 2, p. 22.

Excel spreadsheets; or (ii) copy the other Excel data from the “Plagiarised Documents” appearing in the Lago Agrio Judgment.<sup>72</sup>

- 6.58 In his second report, Mr Racich did not address in depth Mr Lynch’s analysis of the “Plagiarised Documents”, although he did question Mr Lynch’s analysis of the usage of Microsoft Excel and, in particular, his reliance on the OSession logs. Mr Racich noted that Mr Lynch had not provided any evidence to support the assumption that an OSession log entry is created every time a Microsoft Office product is opened or whether the logs accurately record Microsoft Office usage.<sup>73</sup>
- 6.59 In his third report, Mr Lynch reiterated that “None of the Plagiarized Documents that served as sources of text for the Ecuadorian Judgment were on the Zambrano Computers”; and that “Mr Racich offers no analysis to account for the source of that plagiarized text in the Ecuadorian Judgments.”<sup>74</sup>
- 6.60 Mr Racich responded to this criticism in his third report. He explained that he was informed that documents in the Lago Agrio Litigation were generally not filed electronically. On this basis, he concluded that there are no “authorship conclusions to be drawn from the absence of these documents on the Zambrano hard drives. Instead, the fact that the documents are not present electronically indicates only that Mr Zambrano did not have electronic copies of the documents. I see no reason why Mr Zambrano could not have copied these portions of the Judgment from filed, paper copies of these documents.”<sup>75</sup> Mr Racich explained that he did not address this point, as he did not consider it a matter of computer forensics for the two experts.<sup>76</sup>
- 6.61 Mr Lynch, in his third report, referred to the suggestion (in the Respondent’s Supplemental Counter-Memorial) that “many additional documents were submitted on CDs and DVDs.” Mr Lynch analysed the Old and New Computers and found that the only evidence of a CD or DVD being accessed on either the Old or New Computer between October 2010 and March 2011 was on 25 November 2010, when a user on the New Computer opened a disc called “My Disc”.<sup>77</sup> Mr Racich concluded, in his second

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<sup>72</sup> Lynch ER 2, p. 23.

<sup>73</sup> Racich ER 2, para 72.

<sup>74</sup> Lynch ER 3, p. 6.

<sup>75</sup> Racich ER 3, para 31.

<sup>76</sup> Racich ER 3, para 32.

<sup>77</sup> Lynch ER 3, p. 9.



report, that “My Disc” appeared to be “related to the IT Department’s set up of Microsoft Office on Mr Zambrano’s New Computer”.<sup>78</sup> Mr Lynch testified that: “There is no other forensic evidence of access to a CD or DVD between October 2010 and March 2011 on either of the Zambrano Computers.”<sup>79</sup>

6.62 In relation to the Unfiled Selva Viva Database, Mr Lynch noted in his third report that the evidence shows that text and statistics from this document were added to “Providencias.docx” between 21 December 2010 and 28 December 2010. However, the OSession logs for Microsoft Excel show that Excel was not opened during that period on either of the Zambrano Computers.<sup>80</sup> In this third report, Mr Lynch reiterated his assessment that “it is not reasonably possible for someone to accurately calculate the statistics from the Unfiled Selva Viva Data Compilation without having access to the data in Microsoft Excel or similar spreadsheet or database program.”<sup>81</sup> Mr Lynch found no evidence on the Zambrano Computers of any program (other than Excel) that could have been used to calculate the statistics. He therefore concluded that “the Unfiled Selva Viva Data Compilation spreadsheet document from which the text was plagiarized must have been available to the drafter in electronic form and accessed using Microsoft Excel. Yet there is no evidence that the Unfiled Selva Viva Database was available on the Zambrano Computers or that Microsoft Excel was used during the time period this text was inserted into Providencias.”<sup>82</sup>

6.63 In response to Mr Racich’s criticism about his reliance on the OSession logs, Mr Lynch stated that his second report had described how and when OSession logs are created, the data they track and limitations on the analysis of those logs. Mr Lynch testified that he had performed extensive testing of the log files (with Stroz Friedberg). He appended, as Appendix 1 to his third report, an additional discussion of the testing performed by Stroz Friedberg.<sup>83</sup>

6.64 In his third report, Mr Racich stated that Mr Lynch’s testing document did not support Mr Lynch’s conclusions about the amount of time that Office products were open on Judge Zambrano’s Computers. In particular, Mr Racich observed, it did not explain how

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<sup>78</sup> Racich ER 2, para 61.

<sup>79</sup> Lynch ER 3, p. 9.

<sup>80</sup> Lynch ER 3, p. 10.

<sup>81</sup> Lynch ER 3, p. 10.

<sup>82</sup> Lynch ER 3, p. 10.

<sup>83</sup> Lynch ER 3, p. 11.

the logs function (or fail to function) in many cases and that the analysis performed by Mr Lynch did not preclude other scenarios where Office products could have been in use for a longer period than the logs suggest.<sup>84</sup>

- 6.65 In response to Mr Lynch's conclusions that: (i) Microsoft Excel must have been used to calculate the statistics in the Lago Agrio Judgment and (ii) because there is no evidence of usage of Microsoft Excel in the relevant period, Mr Racich concluded that the allegation that Judge Zambrano could not have authored the Judgment was overstated. Mr Racich testified: "On this evidence, it cannot be said either that the allegedly unfiled Selva Viva Database is the source of statistics in the Judgment or that Mr Zambrano did not simply copy those statistics from a former judge's notes. There may be still other explanations. All we can say is that the computer forensic evidence we have at present cannot answer the question."<sup>85</sup>
- 6.66 In his testimony at the Track II Hearing, Mr Lynch agreed that whether or not the "Plagiarised Documents" were in the court record was not a question of computer forensics; but he emphasised that the question whether or not someone had used Excel was a question for computer forensics. He reiterated his opinions that: (i) someone must have used Excel to calculate the statistics which appeared in the Lago Agrio Judgment; (ii) the naming and data irregularities were copied into "Providencias.docx" between 21 and 28 December 2010; but (iii) Excel (the program which would be used to open the database) was not used on either of Judge Zambrano's Computers during that period.<sup>86</sup>
- 6.67 In cross-examination at the Track II Hearing, it was put to Mr Lynch that another judge at the Lago Agrio Court could have calculated the percentages used in the Lago Agrio Judgment at an earlier date, given that the Judicial Inspections, from which the data was taken, had been suspended or completed by the end of 2006. Mr Lynch answered that he did not know if an earlier judge at the Lago Agrio Court had calculated the percentages, but he confirmed his expert opinion that, if that had been the case, that judge would have had to calculate them using a dataset that exactly double and triple counted the samples in the same way as the Selva Viva Database.<sup>87</sup>

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<sup>84</sup> Racich ER 3, para 20.

<sup>85</sup> Racich ER 3, para 41.

<sup>86</sup> Track II Hearing D5.959- 960 (Lynch).

<sup>87</sup> Lynch, Track II Hearing D5.1111 (Lynch).

- 6.68 In his cross-examination, at the Track II Hearing, Mr Racich was asked about possible explanations for the calculation of the statistics in the Selva Viva Database. In particular, it was suggested that the calculations might just as easily have been made by Mr Fajardo as by a former judge of the Lago Agrio Court. Mr Racich confirmed that he did not know one way or another; and he agreed that it could have been anyone who had access to an electronic copy of the Selva Viva Database or the calculations.<sup>88</sup>
- 6.69 At the Track II Hearing,<sup>89</sup> Mr Lynch testified that the unfiled Selva Viva Database (in Excel format) was over 19 columns wide and over 65,000 rows long. It would extend to thousands of pages if printed in hard copy, and, therefore, unusable in paper form for any practical purpose. He also testified that it contains peculiar information, naming conventions, irregularities and statistical factors that appear in the Lago Agrio Judgment that do not appear in the filed lab results which it purports to compile. Yet, he continued, the Selva Viva Database could not have been used on the Zambrano Computers to draft the Lago Agrio Judgment because, according to the Microsoft Office logs, Excel was only opened for 4 minutes between October 2010 and March 2011. Moreover, it was not opened at all during the period from 21 December to 28 December 2010 when its peculiarities were used or copied into “Providencias.docx”. He concluded that it would not have been possible “for someone to open the Selva Viva Database reference ... and then reference them while drafting Providencias because Excel is the program that you would use to open the Selva Viva Database and it was not used.”<sup>90</sup>
- 6.70 Also at the Track II Hearing, Mr Racich testified as to the Selva Viva Database under cross-examination.<sup>91</sup> From a forensic perspective, the Tribunal did not understand Mr Racich to be disputing Mr Lynch’s expert evidence, as summarised immediately above. In particular, Mr Racich accepted that, whoever drafted the Lago Agrio Judgment, that person must have had access to an electronic copy of the Selva Viva Database or calculations derived from its statistical percentages.<sup>92</sup>
- 6.71 The Tribunal notes that, in his evidence at the RICO trial, Judge Zambrano testified that he was not familiar with Excel: see Part IV above. It is not known whether his temporary

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<sup>88</sup> Track II Hearing D5.1205 (Racich).

<sup>89</sup> Track II Hearing D5.956ff (Lynch).

<sup>90</sup> Track II Hearing D5.959-960 (Lynch).

<sup>91</sup> Track II Hearing D5.1204-1206 (Racich).

<sup>92</sup> Track II Hearing D5.1205 (Racich).

student secretary, Ms “C”, was familiar with Excel. Even assuming that she was, Excel data does not lend itself to oral dictation or mental calculation; and any dictation (if possible at all) could not have been completed within the times found by Mr Lynch regarding the use of Excel on the Zambrano Computers. Thus, the Tribunal discounts, on the forensic evidence, any use by Judge Zambrano of the Selva Viva Database in paper form. Further, the Selva Viva Database did not exist in the Lago Agrio Court’s record as an electronic file (which the Respondent does not dispute); and yet the author of the Lago Agrio Judgment must have made use of the Selva Viva Database in electronic form, as an Excel file, to draft the Lago Agrio Judgment (as both Mr Lynch and Mr Racich testified). It is therefore impossible for the Tribunal to understand how Judge Zambrano could have drafted the Lago Agrio Judgment from the Selva Viva Database, for want of sufficient computer skills and the non-use of Excel on his Computers.

6.72 Ms Owen recorded that it appeared to be common ground between the two experts that:

- (a) There were no documents found on Judge Zambrano Computers that contained text from allegedly unfiled materials, including the Selva Viva Database;<sup>93</sup> and
- (b) The data recorded in the Microsoft OSession log files represented the minimum amount of usage of Microsoft Office applications; and that the data had been accurately presented in evidence.<sup>94</sup>

6.73 As to the difference between the two experts’ approach to the presence of the “Plagiarised Documents” on Judge Zambrano’s Computers, Ms Owen suggested that this was a difference in factual assumptions: Mr Lynch considered that the absence of the documents was of significance when considering how the Lago Agrio Judgment came into being, whereas Mr Racich considered that this merely showed that Judge Zambrano had no electronic copies of the documents.<sup>95</sup>

6.74 In relation to the analysis of the use of Microsoft Excel by reference to the OSession Logs, Ms Owen similarly suggested that the difference of opinion arose out of the two experts’ perceptions of technical facts. Mr Lynch was of the opinion that the author of

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<sup>93</sup> Owen, Revised Report, para 40.

<sup>94</sup> Owen, Revised Report, para 42.

<sup>95</sup> Owen, Revised Report, para 65.

the Lago Agrio Judgment must have used Microsoft Excel to calculate statistics from the Selva Viva Database, thereby adding weight to his view that the Judgment could not have been drafted on Judge Zambrano's Computers in the manner suggested by Dr Zambrano. Conversely, Mr Racich concluded that the available forensic evidence could not answer the source of the statistics and that there were other explanations for the presence of these statistics in the Lago Agrio Judgment.<sup>96</sup>

***F: Internet Usage***

- 6.75 Mr Lynch's second report recorded that he had performed an analysis to recover deleted records and to aggregate all the available Internet History on the Old and New Computers (with Stroz Friedberg). He identified, on both Computers, usage of Facebook and other sites related to Ms "C" (Judge Zambrano's temporary secretary). However, he did not identify any usage of translation or legal research services in the Internet History from either computer.<sup>97</sup>
- 6.76 Mr Racich, in his second report, disputed Mr Lynch's implication, namely that because one can recover Internet History and since Mr Lynch found no Internet History to indicate that legal research or translation websites had been used, then such websites had not been used in the relevant period.<sup>98</sup>
- 6.77 Mr Racich explained that, through normal computer use, Internet History is deleted over time and the space where that History was stored becomes occupied by new data. If this happens, the previous Internet History will no longer be recoverable.<sup>99</sup> Mr Racich also suggested, based on his analysis of the "cookies" which remained on Judge Zambrano's Computers, that there was more Internet History for the relevant time period that had been lost due to normal computer use.<sup>100</sup>
- 6.78 Mr Racich found evidence that the website "fielweb.com" had been used between October 2010 and March 2011; and that this was a website which enabled legal research.<sup>101</sup> Mr Racich also found that, as early as June 2009, a user of the Old Computer

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<sup>96</sup> Owen, Revised Report, para 67.

<sup>97</sup> Lynch ER 2, p. 23.

<sup>98</sup> Racich ER 2, para 42.

<sup>99</sup> Racich ER 2, para 44.

<sup>100</sup> Racich ER 2, para 47.

<sup>101</sup> Racich ER 2, para 48.

had visited the translation website “traducegratis.com”. He explained that the Internet History from this period included only seven entries for this website. However, these seven entries indicated that the site had been visited at least 69 times by September 2009. Mr Racich testified that these numbers illustrated his broader point that much of the Internet History is no longer available.<sup>102</sup> Mr Racich also found evidence that on 4 January 2011 a user of the New Computer accessed “windowslivetranslator.com”.<sup>103</sup> He further noted that there was evidence that Ms “C” had accessed the Internet many times from both Computers during the relevant period, albeit that he only found evidence that she accessed Facebook.<sup>104</sup>

6.79 Mr Racich also analysed the average number of objects downloaded on particular days and identified an apparent gap in the recovered Internet History on the Old Computer between 14 July 2010 and 14 December 2010. He suggested that this could reflect a lack of Internet usage during this period or it could be (which was more likely in his opinion) because the Internet History was subsequently deleted and overwritten through normal computer use.<sup>105</sup>

6.80 Mr Lynch responded to these opinions in his third report, stating that: “Mr Racich’s analysis [of internet usage] does not offer any evidence that is consistent with Mr Zambrano’s testimony, and his conclusion is unsupported by the evidence.”<sup>106</sup>

6.81 In particular, Mr Lynch pointed out that:

(a) Mr Racich identified a single legal research website, “fielweb.com”, that had been accessed via the Zambrano Computers, but the only recoverable Internet History between October 2010 and March 2011 showed that this website was only accessed on the Old Computer on two dates: 2 December 2010 and 3 January 2011. Mr Lynch further noted that Professor Riofrío’s expert report indicated that “fielweb.com” does not contain any information about the case law from the USA which is cited in the Lago Agrio Judgment;<sup>107</sup>

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<sup>102</sup> Racich ER 2, para 50.

<sup>103</sup> Racich ER 2, para 50.

<sup>104</sup> Racich ER 2, para 51.

<sup>105</sup> Racich ER 2, para 52.

<sup>106</sup> Lynch ER 3, p. 13.

<sup>107</sup> Lynch ER 3, p. 13; see Riofrío ER, paras 9 & 25.

- (b) Mr Racich found forensic evidence that a translation website, “windowslivetranslator.com”, was accessed from the New Computer. However, Mr Lynch’s further analysis indicated that this website was visited only once on 4 January 2011. Mr Lynch questioned how a user of the Old Computer could find international case law on the Old Computer using “fielweb.com” if the New Computer was used to access the translation service;<sup>108</sup>
- (c) Mr Lynch acknowledged that Mr Racich had identified “cookies” which suggested that other legal research and translation websites had been accessed from the Zambrano Computers, but emphasised that Mr Racich did not provide any evidence that these websites had been accessed during the relevant period. Mr Lynch disagreed with Mr Racich’s suggestion that the evidence in this regard may have been incomplete because these cookies may have overwritten a previous cookie or been new cookies. Mr Lynch pointed to Mr Racich’s own evidence that “when as part of its normal operations the web browser deletes old Internet History, it often does not delete old cookies even while it deletes entries related to accessing the website’s files.” Mr Lynch highlighted that the cookies which Mr Racich discussed are not from the relevant time period, but are from periods before October 2010 or after March 2011;<sup>109</sup> and
- (d) Whilst Mr Lynch agreed with Mr Racich that recoverable Internet History can be limited, he emphasised that a considerable volume of Internet History – approximately 50,000 records – was recovered from the Zambrano Computers for the relevant period. Fewer than 10 of these records relate to “fielweb.com” or “windowslivetranslator.com”.<sup>110</sup>

6.82 In his third report, Mr Racich dismissed Mr Lynch’s comments on Internet History as irrelevant. In particular, he testified that: “The fact that there is not more evidence of particular sites in the recoverable history is likely a consequence of the inherent limitation of the limited history available years after the fact. And the fact that a particular number of history records (Mr Lynch says 50,000) between October 2010 and March 2011 were recovered does not tell us what percentage of the ... total that number

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<sup>108</sup> Lynch ER 3, p. 13.

<sup>109</sup> Lynch ER 3, p. 14.

<sup>110</sup> Lynch ER 3, p. 15.

represents.”<sup>111</sup> Mr Racich explained that his conclusion that the recovered history is necessarily limited is based on, in particular, gaps in the recorded “hit counts” of particular websites.<sup>112</sup>

6.83 In his direct examination at the Track II Hearing, Mr Lynch gave a general explanation of how Internet History can be recovered. Both experts agree that Internet History degrades over time, but that cookies are often not deleted even when Internet History records are deleted. On this basis, Mr Lynch stated that, “... in order for there to be no evidence of any other legal research Website on Mr Zambrano’s computer, all of the Internet History records would have had to have degraded, disappeared and been overwritten such that they’re no longer recoverable and the cookie would have had to have been deleted and overwritten.”<sup>113</sup>

6.84 In cross-examination, Mr Lynch reiterated that the cookies which Mr Racich had identified for websites such as LexisWeb and LexisNexis all post-dated the relevant period. He rejected the suggestion that Judge Zambrano might have used these websites previously and that the website might have created a new cookie which replaced the record of the earlier visits. Mr Lynch explained that, when a website created a new cookie, generally “the creation date for that cookie would stay from [the first date the website was accessed] because of a property known as file tunnelling, where if you create a file in the same location with the same name where a file was recently deleted, it will adopt the creation date of the file that previously existed.”<sup>114</sup>

6.85 Mr Racich, in his cross-examination, confirmed that the only evidence of a visit to a legal research site which had a date and time stamp within the relevant period was the “fielweb.com” site.<sup>115</sup> He stated that he did not know whether “fielweb.com” could be used to locate the English language cases which were in the 21 December version of “Providencias.docx” as he had not done any analysis of what documents were available on that website.<sup>116</sup> In relation to translation websites, Mr Racich confirmed that the only evidence of visits to “traducegratis.com” was from 2009 and that the visit to

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<sup>111</sup> Racich ER 3, para 17.

<sup>112</sup> Racich ER 3, para 18.

<sup>113</sup> Track II Hearing D5.955 (Lynch).

<sup>114</sup> Track II Hearing D5.1090-1091 (Lynch).

<sup>115</sup> Track II Hearing D6.1231 (Racich).

<sup>116</sup> Track II Hearing D6.1231 (Racich).



“windowslivetranslator.com” occurred on 4 January 2011, which was after English language legal authorities had appeared in the December 21 version of Providencias.<sup>117</sup>

6.86 Mr Racich was also questioned about visits to a website – “live.com”. He agreed that this log-in page could be used to access Hotmail. He also confirmed that the hit count for this website was 14 on 7 January 2011 and had increased to 29 on 13 January 2011. He agreed that during this period in early January 2011 someone on Judge Zambrano’s Computers was logging into Hotmail. Mr Racich confirmed that he had not recovered the contents of any emails that were opened from Hotmail on Judge Zambrano’s Computers.<sup>118</sup>

6.87 Mr Racich agreed that the Internet History recovered from Judge Zambrano’s Old Computer (as set out in Exhibit 21 of Mr Lynch’s second report) indicated that someone on that Computer had opened Hotmail at 17.33 on 12 January 2011 and two minutes later the “Caso Texaco.doc” document was opened on the Old Computer. It was noted that 19 January 2011 was the date of a recovered version of “Caso Texaco.doc” containing Judgment text.<sup>119</sup>

6.88 Ms Owen highlighted the differences in the conclusions reached by Mr Lynch and Mr Racich in relation to the recoverable Internet History. Mr Lynch reported that no evidence of visits to legal research or translation websites was found and concluded that this demonstrated an inconsistency in Dr Zambrano’s testimony at the RICO trial. Mr Racich, however, concluded that websites which could have been used for legal research and language translation were accessed between October 2010 and February 2011. He also concluded that the Internet History was incomplete, probably due to subsequent usage of the Computers. Ms Owen explained that, during the meeting with the two experts at The Hague on 12 January 2016, the two experts had suggested that these differences in opinion arose out of instructions to them from their respective appointing Parties.

6.89 It was noted that:

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<sup>117</sup> Track II Hearing D6.1232-1233 (Racich).

<sup>118</sup> Track II Hearing D6.1239 (Racich).

<sup>119</sup> Track II Hearing D6.1247 (Racich).

- (a) Mr Lynch had been instructed to research the Internet History for evidence of visits to legal research and translation websites consistent with Dr Zambrano’s testimony and the content of the “Providencias.docx” document; whereas
- (b) Mr Racich had been instructed to search for evidence of visits to legal research and translation websites within the time-frame of October 2010 to February 2011 and to provide a general account of Internet History and an explanation of why there might be no evidence.

Ms Owen expressed the view that the difference in these opinions arises out of different expectations of how much evidence of Internet activity might be recovered in a given set of circumstances.

***G: USB Analysis***

- 6.90 Mr Lynch, in his second report, identified 18 USB devices that were known to have been used on the Old or New Computers between October 2010 and March 2011.<sup>120</sup> He then reviewed the records of files accessed on both Computers to determine what files might have existed on the USB devices. He identified 41 files accessed from USB devices, but noted that the computer records reviewed by him (with Stroz Friedberg) were not designed to record every single file that was accessed or existed on USB devices; and that, therefore, many more files could have existed and/or been accessed.<sup>121</sup> Further, Mr Lynch did not have access to the USB devices themselves (nor did Mr Racich); and therefore he could not know the content of the files or whether any of them related to the Lago Agrio Judgment.<sup>122</sup> Nonetheless, so Mr Lynch suggested, the formatting differences in “Providencias.docx” are consistent with having been copied and pasted from another document, including documents accessed from USB devices.<sup>123</sup>
- 6.91 Mr Racich, in his second report, concluded that neither Mr Lynch’s nor his own analysis revealed any evidence that any Lago Agrio related document was transferred to Judge Zambrano’s Computers whilst he was drafting the Lago Agrio Judgment.<sup>124</sup> Mr Racich

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<sup>120</sup> Lynch ER 2, p. 36.

<sup>121</sup> Lynch ER 2, p. 36.

<sup>122</sup> Lynch ER 2, p. 37.

<sup>123</sup> Lynch ER 2, pp. 37-38.

<sup>124</sup> Racich ER 2, paras 53-64.

emphasised that no forensic evidence showed that USB devices were inserted into either of Judge Zambrano's computers between 1 February 2011 and 20 February 2011.<sup>125</sup>

- 6.92 Mr Racich explained that he had performed (with Vestigant) an independent analysis of all evidence of files opened from USB devices on either the Old or New Computers between October 2010 and March 2011. This analysis indicated that up to 56 documents were opened from USB devices in this time period. Mr Racich suggested that a review of file names and types indicated that the files so opened were predominantly picture and PowerPoint files, with only a small number of Word files.<sup>126</sup> Mr Racich identified two copies of the same document, which appeared to be connected to the Lago Agrio Litigation. Both files had the same name ("PROVIDENCIA CHEVRON TEXACO DE FECHA 15 DE JUNIO DEL 2010.docx") and almost identical metadata. However, Mr Racich noted that this document appeared to be a Word version of an order issued in June 2010 when Judge Zambrano was not the presiding judge in the Lago Agrio Litigation. This document appeared to have been copied to the New Computer on 7 December 2010 via a thumb drive with the volume name "MARIELA".<sup>127</sup>
- 6.93 In Mr Racich's opinion, the vast majority (30 out of 43) of the documents and folders opened from USB devices, as identified by Mr Lynch, appeared to have been opened from a USB device named "EVELYN" and appeared to be Ms "C"'s personal documentation. A further four documents were opened from a USB device named "MARIELA" which indicated that they were from Mariela Salazar, the court secretary. Three of the 43 documents were from a USB named "My Disc" and appeared to be related to the IT Department's set up of Microsoft Office on the New Computer.<sup>128</sup>
- 6.94 Mr Racich noted that the only other instances of documents being opened between November 2010 and February 2011 from other USB devices related to four documents and one folder (which were exhibited to Mr Lynch's second report as Exhibit 7). Mr Racich pointed out that Mr Lynch had provided no evidence that these documents had any bearing on the Lago Agrio Litigation.<sup>129</sup>

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<sup>125</sup> Racich ER 2, para 56.

<sup>126</sup> Racich ER 2, para 59.

<sup>127</sup> Racich ER 2, para 60.

<sup>128</sup> Racich ER 2, para 61.

<sup>129</sup> Racich ER 2, para 62.

- 6.95 The analysis of the USB drives was not taken much further by the two experts in their third written reports. Mr Lynch criticised Mr Racich for speculating about the contents of the files on the USB devices, emphasising that, although Mr Racich claimed to have performed a thorough analysis of all the files on all the USB devices connected to the Zambrano Computers in the relevant time frame, he had not offered any evidence of that review; nor claimed that he had had access to any of the USB devices. Mr Lynch noted that, without examining the actual USB devices, the only evidence Mr Racich had reviewed was the names of the files and the metadata highlighted in Mr Lynch’s second report. Mr Lynch stated that Mr Racich’s conclusions as to the content of the files were therefore mere speculation.<sup>130</sup> Mr Racich did not respond to this criticism in his third report.
- 6.96 In cross-examination, Mr Racich was pressed on the dates on which USB devices were connected to Judge Zambrano’s Computers, as set out in Table 23 in Mr Lynch’s second report. This cross-examination showed that:
- (a) The “Providencias.docx” document was created on 11 October 2010 and on the following day a USB device was connected;<sup>131</sup>
  - (b) Between 12 October 2010 and 21 December 2010, at least seven USB devices were connected;<sup>132</sup>
  - (c) In the period between 21 December and 28 December 2010, two more USB devices were connected;<sup>133</sup>
  - (d) In the period after 28 December 2010 and 19 January 2011 (when Judgment text was recovered from the “Caso Texaco.doc” document) a further three USB connections were made to the Zambrano Computers;<sup>134</sup> and
  - (e) Table 23 of Mr Lynch’s third report indicates that a further five connections were made (three from the same device) between 20 January 2011 and 21 February 2011.

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<sup>130</sup> Lynch ER 3, p. 24.

<sup>131</sup> Lynch ER 2, p. 36, Table 23 indicates that this USB device was connected to the Old Computer.

<sup>132</sup> This USB was connected to the New Computer.

<sup>133</sup> Again, this device was connected to the New Computer.

<sup>134</sup> Track II Hearing D6.1225 (Racich).

- 6.97 Mr Racich confirmed that a person at one of the Zambrano Computers could have opened a document from one of the USB devices, copied text out of that document and pasted it into a document which was already on the Computer, closed the document on the USB device and unplugged the USB device; and that it would then not be possible to know what text had been transferred.<sup>135</sup>
- 6.98 Mr Racich also accepted that, during the period from October 2010 to February 2011, 13 USB devices were attached to the Zambrano Computers, as Mr Lynch had testified earlier.<sup>136</sup> Neither Mr Lynch nor Mr Racich had any access to these 13 USB devices.

### ***H: Bulk Copying***

- 6.99 As described above, Mr Lynch's analysis (with Stroz Friedberg) of the Old Computer found that Windows XP was installed on 14 July 2010. On the same day, a significant amount of data was copied to the Old Computer, including 2,428 Microsoft Word documents. This data included files relating to the Lago Agrio Litigation. Mr Lynch's view was that this bulk copying, combined with the evidence he had found of files and folders from a previous installation of Windows, was consistent with the reinstallation of the operating system, possibly as part of trouble-shooting or maintenance.<sup>137</sup>
- 6.100 Mr Lynch also found evidence of subsequent bulk copying of data onto the Old Computer, in particular in September 2012. This was some five months after Judge Zambrano had relinquished the Old Computer; and long after he had completed his assignment to the Lago Agrio Litigation (4 March 2011). On 26 September 2012, 2,202 files were created in a four minute interval and subsequently deleted. Mr Lynch stated that the bulk copying of files on the Old Computer would have overwritten or destroyed data on the Old Computer; and that this was consistent with an attempt to overwrite previously deleted data.<sup>138</sup>
- 6.101 Mr Racich, in his second report, somewhat overstated Mr Lynch's conclusion, suggesting that Mr Lynch had concluded that "evidence of data copied in bulk to both the Old Computer and New Computer reveals some deliberate attempt to overwrite

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<sup>135</sup> Track II Hearing D6.1228 (Racich).

<sup>136</sup> Track II Hearing D6.1223 (Racich); D5.962 (Lynch).

<sup>137</sup> Lynch ER 2, p. 11.

<sup>138</sup> Lynch ER 2, p. 11.

deleted data on these computers.”<sup>139</sup> In Mr Racich’s expert opinion, the forensic evidence did not point to data destruction as the likely motive. He explained that, because it is not possible to know where previously deleted files were stored or to determine which parts of unallocated space will be overwritten by new data, a person who is trying to destroy data will typically try to fill up as much unallocated space as possible; e.g. by copying large files such as movies.<sup>140</sup> By contrast, the bulk copying on 26 September 2012 involved files that consisted mainly of Microsoft Office documents. These files took up less than 1% of the total space on the drive and less than 4% of the unallocated space.<sup>141</sup>

6.102 In his third report, Mr Lynch pointed out that Mr Racich had omitted to mention that the final action, in relation to the bulk copying carried out on 26 September 2012, was the deletion of the copied files. Mr Lynch concluded that this forensic evidence was inconsistent with Mr Racich’s conclusion this activity was a normal backup.<sup>142</sup>

6.103 Mr Racich responded that, while Mr Lynch had discounted the fact that only 734 MB of data was copied, this was a key point in determining whether the copying and deletion was a deliberate attempt to overwrite data. He reiterated that this data comprised only 4% of the free space on the Computer. This action was therefore unlikely to overwrite any particular data and would not guarantee that any particular data was overwritten.<sup>143</sup> In response to Mr Lynch’s view that the subsequent deletion of the copied files was a strong indicator that the user was attempting to overwrite data, Mr Racich noted that it was not the deletion of the data that overwrote the small amount of unallocated space, but the prior copying. He noted that there are many possible motivations for a person to create, fill and then delete a folder; e.g. this may have been a temporary backup; and the motivation could not be ascertained through forensic investigations.<sup>144</sup>

6.104 Ms Owen records that it was common ground between the two experts that, while bulk copying of data to the Zambrano Computers had the potential to overwrite previously

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<sup>139</sup> Racich ER 2, para 65.

<sup>140</sup> Racich ER 2, para 67.

<sup>141</sup> Racich ER 2, para 68.

<sup>142</sup> Lynch ER 3, p. 34.

<sup>143</sup> Racich ER 3, para 51.

<sup>144</sup> Racich ER 3, para 52.

deleted files, there was no technical evidence which would enable them to determine the actual motive for the bulk copying in this instance.<sup>145</sup>

***I: The Tribunal's Conclusions***

- 6.105 The Tribunal accepts that both Mr Lynch and Mr Racich were honest witnesses, seeking to assist the Tribunal in good faith consistent with their obligations as expert witnesses. The Tribunal also acknowledges that both expert witnesses are experienced and knowledgeable specialists in a specialist and complex field. The Tribunal also owes a special debt to Ms Owen, a much respected and senior specialist in this field.
- 6.106 For a long time during this Track II phase of the arbitration, it seemed that the forensic evidence available from Judge Zambrano's two Computers could provide a definitive answer to the 'ghostwriting' issues, one way or the other. It remains tantalisingly close; but, to the Tribunal's regret, there is no such reliable answer from the forensic evidence. There is no 'smoking gun', but rather a mass of complex questions that cannot be answered on the limited forensic materials made available at the time to Mr Lynch, Mr Racich and Ms Owen, without much more evidence from other electronic devices available to Judge Zambrano, Mr Fajardo and others in Ecuador.
- 6.107 Given that the Claimants bear the legal burden of proof on these forensic issues (as with its other allegations) under Article 24(1) of the UNCITRAL Arbitration Rules, the absence of such a definitive answer means that the Claimants' case does not prevail on the forensic issues by themselves, on a balance of probabilities.
- 6.108 Nonetheless, the Tribunal considers that much useful work was done by the Parties' two experts and Ms Owen. The eventual differences between the two experts are more differences of perspective, also influenced by non-technical factors lying outside their expert functions in this arbitration and influenced their respective terms of reference from the Parties. What this this Tribunal can safely derive for this Award from all the forensic evidence and the forensic expert evidence is therefore less than complete. However, in the aggregate, it justifies two conclusions by the Tribunal.

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<sup>145</sup> Owen, Revised Report, para 29.

- 6.109 First, the account given at the RICO trial by Dr Zambrano as to how he wrote personally the full Lago Agrio Judgment on his New Computer (with his student secretary) is inaccurate, incomplete and unreliable.
- 6.110 Second, whilst the forensic evidence alone does not prove, on the balance of probabilities, that the Lago Agrio Judgment was corruptly ‘ghostwritten’ by one or more the Lago Agrio Plaintiffs’ representatives, it is more likely than not that the Judgment was drafted in material part on a computer or device other than the Zambrano Computers. By itself, in the Tribunal’s view, the likely use of another computer or device is not proof of ‘ghostwriting’; but, equally, it is not proof that there was no ‘ghostwriting’.
- 6.111 These conclusions as to the forensic evidence are consistent with the earlier conclusions reached by the Tribunal in Parts IV and V above that, based on all the evidence available to the Tribunal in this arbitration (other than the forensic evidence), the Lago Agrio Judgment was at least in material part ‘ghostwritten’ by certain of the Lago Agrio Plaintiffs’ representatives, in corrupt collusion with Judge Zambrano.



**PART VII**  
**JURISDICTION AND ADMISSIBILITY**

***A: Introduction***

- 7.1 The Tribunal here addresses the issues arising from the Tribunal's disputed jurisdiction over the Claimants' claims and the admissibility of such claims under Articles VI(1)(a), VI(1)(c), II(3)(a), II(3)(c) and II(7) of the Treaty, as asserted by the Claimants and disputed by the Respondent. For ease of reference, where appropriate, these issues are collectively described as "jurisdictional" issues.
- 7.2 In its Third Interim Award on Jurisdiction and Admissibility of 27 February 2012, the Tribunal decided that it had jurisdiction over TexPet's pleaded claims under both Articles VI(1)(a) and VI(1)(c) of the Treaty, thereby rejecting all objections made by the Respondent as to jurisdiction over TexPet's claims: see Paragraph 5.3 of the Third Interim Award (set out in Annex 1(H) to Part I above), with Paragraphs 4.14ff and 4.31ff. Accordingly, in this Award as explained further below, the Tribunal addresses the merits of TexPet's pleaded claims under Articles II(3)(a), II(3)(c) and II(7) of the Treaty.
- 7.3 In its Third Interim Award, the Tribunal also decided that it had jurisdiction over Chevron's pleaded claims under Article VI(1)(c) of the Treaty, with respect to its 'indirect' investment in TexPet. The Tribunal there left expressly undecided whether the Tribunal had any jurisdiction over Chevron's pleaded claims under Article VI(1)(a) and also, with respect to any 'direct' investment, under Article VI(1)(c) of the Treaty, thereby joining these issues to the merits. The Tribunal otherwise rejected all jurisdictional objections made by the Respondent to Chevron's pleaded claims: see Paragraph 5.4 of the Third Interim Award (set out in Annex 1(H) to Part I above), with Paragraphs 4.22ff and 4.38ff.
- 7.4 As regards the Respondent's extant jurisdictional objections under Article 21 of the UNCITRAL Arbitration Rules, the Tribunal again exercises its powers of

‘Kompetenz-Kompetenz’ under Article 21(1) of the UNCITRAL Arbitration Rules, forming part of the Parties’ Arbitration Agreement.<sup>1</sup>

7.5 It is necessary first, however, to refer to the material texts of the Treaty and subsequently to several special features of this case. Whilst the latter are not exclusively relevant to issues of jurisdiction and admissibility, it is nonetheless convenient to address them in this Part of the Award.

***B: The Treaty***

7.6 (1) *The Treaty*: The Tribunal notes that Articles II(3)(a), II(3)(c) and II(7) of the Treaty, as regards the FET standard, the FPS standard, customary international law and “effective means”, provide four possible bases for the Claimants’ claims, read with Articles VI(1)(a) and (c) of the Treaty. The Tribunal addresses each of these below.

7.7 “*Investment*”: Article I(1) of the Treaty of the Treaty provides (in material part):<sup>2</sup>

*“For the purposes of this Treaty,*

*(a) ‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*

*(i) ...;*

*(ii) ...;*

*(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*

*(iv) ... and*

*(v) any right conferred by law or contract, and any licences and permits pursuant to law; ...”*

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<sup>1</sup> The term “Arbitration Agreement” is explained above, in Part I of this Award.

<sup>2</sup> C-279. The relevant provisions of the Treaty are more fully set out, for ease of reference, in Part III(B) above. The full text of the Treaty (in English and Spanish) is reproduced in Annex 5 to Part I above.

7.8 “*Investment Dispute*”: Article VI(1) of the Treaty provides:<sup>3</sup>

*“For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; ... ; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.”*

7.9 *Investment Protection*: Article II(3)(a) of the Treaty provides:<sup>4</sup>

*“Investments 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.”*

7.10 “*Umbrella Clause*”: Article II(3)(c) of the Treaty provides:<sup>5</sup>

*“Each Party shall observe any obligation it may have entered into with regards to investments.”*

7.11 *Effective Means*”: Article II(7) of the Treaty provides, in material part:<sup>6</sup>

*“Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments ...”*

7.12 (2) *The FET Standard and Customary International Law*: As regards the FET standard and customary international law in Article II(3)(a) of the Treaty, the Tribunal considers that these two bases, whether together or separately, provide similar protections against denial of justice. It was decided in *Azinian v Mexico*, as also in *Mondev v USA*,<sup>7</sup> that the FET standard in NAFTA Article 1105 included protection against a denial of justice. However, the FET standard, not being limited to a protection against a denial of justice, provides a broader protection than denial of justice under customary international law, both in scope and as to the time when a choate claim accrues other than for denial of justice (by reason of the principle of

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<sup>3</sup> C-279.

<sup>4</sup> C-279.

<sup>5</sup> C-279.

<sup>6</sup> C-279.

<sup>7</sup> *Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras 91 & 102-103, CLA-299; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para 127, CLA-7. See also the cases cited in Part VIII below, at para 8.24.

judicial finality applicable to a claim for denial of justice, as considered separately below).<sup>8</sup>

7.13 Hence, the Tribunal does not need to treat the protection against denial of justice under customary international law as a separate standard of protection from denial of justice under the FET standard. It is also unnecessary to do so on the facts of the present case as found in this Award: a denial of justice under customary international law necessarily will entail a breach of the FET standard in Article II(3)(a) of the Treaty. Accordingly, references below to denial of justice under the FET standard should be understood, where appropriate, as referring also to denial of justice under customary international law.

7.14 (3) *The FPS Standard*: As to the third basis for the Claimants' claims for denial of justice, the Tribunal considers that the FPS standard, as provided in the same Article II(3)(a) of the Treaty, adds nothing material in the present case to the protection afforded by the FET standard and customary international law. Hence, the Tribunal does not address further the meaning or effect of this FPS standard.

7.15 (4) *Effective Means*: As to the fourth basis for the Claimants' claims, the Tribunal notes that this provision in Article II(7) of the Treaty, as regards "effective means", has been invoked by the Claimants and disputed by the Respondent in other arbitrations under the Treaty, as also in this arbitration.

7.16 It was the subject of the UNCITRAL tribunal's award dated 30 March 2010 between Chevron and TexPet (as claimants) and the Respondent (as respondent) in the *Commercial Cases Arbitration*.<sup>9</sup> It was also the subject of the Respondent's claim (as claimant) against the USA (as respondent) in the *Ecuador-USA Treaty Arbitration*.<sup>10</sup> That State-State arbitration did not proceed beyond the issue of jurisdiction; and it did

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<sup>8</sup> As to "scope", the Tribunal refers to *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, paras 182-218, CLA-606. As to "accrual", see paras 7.116ff below.

<sup>9</sup> *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Partial Award on the Merits, 30 March 2010, paras 242ff, CLA-47; see Part IV(G)(3) above.

<sup>10</sup> See Part IV(G)(4) above.

not therefore decide the parties' disputed interpretation of "effective means" in the Treaty (by reason of that tribunal's award dated 29 September 2012).<sup>11</sup>

7.17 The award in the *Commercial Cases Arbitration*, applying "effective means" as a protection for Chevron and TexPet under the Treaty, had followed the earlier approach taken by the tribunal in *Duke Energy v Ecuador* by its award of 18 August 2008.<sup>12</sup> The award in *Commercial Cases* was in turn followed, as to "effective means", by the tribunal in *White Industries v India* in its award of 30 November 2011.<sup>13</sup>

7.18 In the present case, the Claimants contend that the Treaty's provision as to "effective means" in Article II(7) operates as a '*lex specialis*', distinct from protection against denial of justice under the FET standard and customary international law in Article II(3)(a) of the Treaty, albeit also partly overlapping with such protections. The Claimants contend that a host State may breach the Treaty's provision as to "effective means" (being a less demanding test), even when the State's conduct does not amount to a wrongful denial of justice under Article II(3)(a) of the Treaty.<sup>14</sup>

7.19 The Respondent disputes these submissions. It contends that, by "effective means" under Article II(7), the two States incorporated into the Treaty pre-existing obligations under customary international law, requiring each State to provide an effective framework or system under which claims may be asserted and rights enforced. However, according to the Respondent, the two States did not thereby undertake an obligation to assure that such framework or system was to be effective in particular cases, beyond the protection against denial of justice.<sup>15</sup> Thus, the Respondent submits that the Claimants cannot here invoke such an obligation (with its lesser demanding

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<sup>11</sup> This award on jurisdiction lies in the public domain. Ecuador's claim (as to the merits) can be gleaned from Professor Reisman's expert opinion of 24 April 2012 (for the USA), which is also publicly available.

<sup>12</sup> *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para 391, RLA-40, cited in *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Partial Award on the Merits, 30 March 2010, para 242, CLA-47. The latter also cited *Petrobart Limited v. Kyrgyz Republic*, SCC Arb. No. 126/2003, Award, 29 March 2005, CLA-219 (see p. 28ss) and *Limited Liability Company AMTO v. Ukraine*, SCC Arb. No. 080/2005, Final Award, 26 March 2008, RLA-343 (see para 88).

<sup>13</sup> *White Industries Australia Limited v. India*, UNCITRAL (Ad hoc), Award, 30 November 2011, paras 10.4 & 11.3ff, RLA-347.

<sup>14</sup> See Caron ER 1, particularly his conclusions (para 170); Caron ER 2, particularly his further conclusions (paras 22 to 24); see also Paulsson ER 1, paras 23-28. See generally J. Gaffney & J. Loftis, "The 'Effective Means Meaning' of BITs and the Jurisdiction of Treaty-based Tribunals to hear Contract Claims" (2007) 8(1) *Journal of World Investment & Trade* 5, CLA-213.

<sup>15</sup> See R-TII Mar. 2015, para 375.

test), separately from protection against denial of justice under Article II(3)(a) of the Treaty.<sup>16</sup>

- 7.20 For the purposes of this Award, the Tribunal does not address further the meaning or effect of “effective means” in Article II(7) of the Treaty. It is unnecessary to do so on the facts of the present case, as found in this Award applying the FET standard under Article II(3)(a) of the Treaty (including protection against denial of justice).
- 7.21 Lest it be misunderstood, the Tribunal’s reticence as regards the Parties’ disputed interpretation of Article II(7) of the Treaty should not be taken as implicitly accepting or rejecting one or other of the Parties’ interpretations.
- 7.22 (5) *The Umbrella Clause*: The Claimants claim (denied by the Respondent) that the Respondent did not observe its obligations under the 1995 Settlement Agreement to release Chevron and TexPet from diffuse liabilities, thereby committing a breach of Article II(3)(c) of the Treaty. These claims are distinct from the Claimants’ claims for denial of justice, albeit also occasioned by the Lago Agrio Judgment with the judgments of the Lago Agrio Appellate Court, Cassation and Constitutional Courts.

***C: Special Features***

- 7.23 There are several special features to the Claimants’ claims against the Respondent for denial of justice under the FET standard in Article II(3)(a) of the Treaty.
- 7.24 (1) *Transnational Enforcement*: Chevron had no significant realisable assets in Ecuador, whether owned directly or indirectly, before and after the “merger” with Texaco in 2001. Before the “merger”, Chevron was a stranger to Texaco and TexPet. Texaco and TexPet had left Ecuador by 1992. Neither Texaco nor TexPet left behind any significant realisable assets in Ecuador. Following the “merger”, therefore, Chevron’s indirect ownership of Texaco and TexPet did not endow Chevron with any significant realisable assets in Ecuador.
- 7.25 Outside Ecuador, however, Chevron, with its large group of associated companies, indirectly owned (and still owns) substantial assets, including ocean-going vessels, bank deposits around the world, and other properties. By their nature, vessels and bank

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<sup>16</sup> See R-TII Mar. 2015, paras 375ff.

deposits were and remain vulnerable to arrest, attachment or seizure by the Lago Agrio Plaintiffs upon the Lago Agrio Judgment's enforcement in multiple jurisdictions, especially *ex parte* without prior notice. Even if Chevron were in a position to discharge promptly such an order freezing a bank deposit or arresting a vessel, the damage to Chevron and its associated companies from such repeated actions could have been very significant (as it may still be).

7.26 Hence, as confirmed by the "Invictus Memorandum" (see Part IV above), the Lago Agrio Plaintiffs' representatives always intended that the Lago Agrio Judgment should be enforced in multiple jurisdictions outside Ecuador, not limited to the USA. This Memorandum listed such other foreign jurisdictions expressly, including the Philippines, Singapore, Australia, Argentina, Brazil, Colombia, Venezuela, Canada, Kuwait, Nigeria, Saudi Arabia, South Africa, South Korea, Belgium, Indonesia, the Netherlands, the United Kingdom, Trinidad and Tobago, New Zealand and Russia. It would be possible to add many more jurisdictions to this list.

7.27 The Lago Agrio Litigation was therefore likely to involve, from its outset, numerous national jurisdictions other than Ecuador. This feature makes the present case unusual. Earlier cases on denial of justice have concerned an alleged wrong and an alleged injury taking place within the same State. Here, the injury to Chevron was always intended to take place, at least in part, in one or more foreign jurisdictions elsewhere than Ecuador, whether by the enforcement of the Lago Agrio Judgment or by an enforced "amicable" settlement. Thus, the Lago Agrio Litigation was transnational in the broadest sense, as confirmed by the multiplicity of foreign lawsuits and arbitrations in the USA, Argentina, Brazil, Canada, the Netherlands and elsewhere following the issuance of the Lago Agrio Judgment.

7.28 (2) *The Individual Plaintiffs*: The parties to the Lago Agrio Litigation are not the same as the parties to this arbitration under the Treaty. TexPet, the Second Claimant in this arbitration, was not a named party to the Lago Agrio Litigation (or the Aguinda Litigation). The Respondent was not a party to the Lago Agrio Litigation (or the Aguinda Litigation). Chevron, the First Claimant in this arbitration, was the sole defendant in the Lago Agrio Litigation.

- 7.29 The Lago Agrio Judgment was made in favour of the Lago Agrio Plaintiffs in the Lago Agrio Litigation. These Lago Agrio Plaintiffs had been plaintiffs in the Aguinda Litigation. The Lago Agrio Plaintiffs are not parties to this arbitration. Moreover, they have not participated, nor could they participate, as parties to this arbitration between the Claimants and the Respondent under the terms of the Parties' Arbitration Agreement derived from the Treaty.
- 7.30 Thus, so the Respondent contends, Chevron's claims against the Respondent impugning the Lago Agrio Judgment under the Treaty could, if successful in this arbitration, gravely prejudice these Lago Agrio Plaintiffs. It could even require the Lago Agrio Plaintiffs to begin new legal proceedings in Ecuador, or elsewhere. The Respondent, therefore, advances in this arbitration a 'cross-claim' for environmental damage against Chevron, by way of an "offset" (or set-off), unjust enrichment, causation and contributory fault under Article 39 of the ILC Articles on State Responsibility.<sup>17</sup> (For ease of reference, although these grounds differ juridically, the Tribunal here refers to them collectively as a 'cross-claim').
- 7.31 In essence, the Respondent submits that any decision by this Tribunal that the Lago Agrio Judgment was a nullity (or any other like relief) would effectively immunise Chevron from justifiable liability to the Lago Agrio Plaintiffs because new legal proceedings by the Lago Agrio Plaintiffs would be time-barred under Ecuadorian law. As pleaded in its Counter-Memorial, the Respondent contends that: "... granting Claimants' proposed relief would have the same effect as granting them special immunity from liability for the environmental harm that [the Lago Agrio] Plaintiffs were found to have suffered from Claimants' misconduct."<sup>18</sup>
- 7.32 As a matter of international law, the Respondent again invokes the judgment of the International Court of Justice in *Monetary Gold* (1954), as it did at the November Hearing leading to the Tribunal's Third Interim Award.<sup>19</sup> In brief, the International Court of Justice decided in *Monetary Gold* that an international tribunal cannot

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<sup>17</sup> R-TII Mar. 2015, paras 439ff.

<sup>18</sup> R-TII Feb. 2013, paras 464ff and 502.

<sup>19</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, ICJ, Judgment (Preliminary Question), 15 June 1954, 1954 ICJ Reports 19, RLA-19. For the Respondent's earlier submissions, see the Tribunal's Third Interim Award, paras 3.59ff, 3.83ff & 4.59ff.



exercise jurisdiction over a dispute between two States when the rights of a third State, not being a party to the legal proceedings, form the subject-matter of the dispute.

- 7.33 It is clear to this Tribunal that parts of the declaratory relief requested by the Claimants in this arbitration (if granted) could be used by Chevron, at least forensically, to defend the enforcement proceedings of the Lago Agrio Judgment by the Lago Agrio Plaintiffs in, for example, Canada.<sup>20</sup> Indeed, the Claimants recognise that the nullity of the Lago Agrio Judgment, if decided by the Tribunal, “may well have an effect on the beneficiaries of that judgment as a matter of fact.”<sup>21</sup>
- 7.34 The Claimants acknowledge, however, that there was no procedural possibility for the Lago Agrio Plaintiffs to become parties to this arbitration; and “[n]or is there any forum that could adjudicate a dispute between Chevron, Ecuador and the [Lago Agrio] plaintiffs with international law as the applicable law.”<sup>22</sup> The Claimants dispute, however, any prejudice to the Lago Agrio Plaintiffs from any applicable time-bar, relying upon the expert testimony of Dr Coronel on Ecuadorian law.<sup>23</sup>
- 7.35 In its Third Interim Award, the Tribunal decided to reject the Respondent’s jurisdictional objection based upon “Third Party Rights” and *Monetary Gold*. The Tribunal there assumed, for the sake of argument, that the principle in *Monetary Gold* applied to mixed (i.e. State/Non-State) arbitrations under bilateral investment treaties (such as this arbitration) and to circumstances in which a mixed tribunal adjudicating upon the liability of a State might have to consider matters that were the subject of litigation with private persons elsewhere.<sup>24</sup> Nonetheless, the Tribunal decided that its decisions on the dispute between the Parties in this arbitration “would not decide the question of the effect of the 1995 Settlement Agreement as between the Lago Agrio Plaintiffs and Chevron”; that “the Lago Agrio Plaintiffs cannot here be regarded as indispensable third parties”; and that “this case can properly proceed to the merits of the Claimants’ claims without them.”<sup>25</sup>

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<sup>20</sup> See Track II Hearing D12.2708-2713.

<sup>21</sup> Paulsson ER 2, para 50.

<sup>22</sup> Paulsson ER 2, para 49.

<sup>23</sup> Coronel ER 5, para 108; Paulsson ER 2, para 44; but see also Paulsson ER 2, para 50.

<sup>24</sup> Third Interim Award, para 4.60.

<sup>25</sup> Third Interim award, para 4.67.

- 7.36 The Tribunal here confirms that decision, for these and other reasons set out in its Third Interim Award. It does not consider that any of its decisions made in this arbitration can be legally binding upon any of the Lago Agrio Plaintiffs. This Tribunal has no jurisdiction to decide upon the individual claims for personal harm (not being diffuse claims) of the Lago Agrio Plaintiffs; and it has not sought to exercise any such jurisdiction in this arbitration.
- 7.37 (3) *Environmental Damage*: The Respondent makes a related submission, relevant to its cross-claim for environmental damage (as defined above). The Respondent contends that there is a risk of unjustly enriching Chevron in this arbitration with a “windfall”. It submits that Chevron’s burden of proving loss caused by the alleged denial of justice requires Chevron to prove that: “... it is more likely than not that they would have prevailed on the merits in the underlying environmental litigation before a fair and impartial Ecuadorian court. Otherwise, Claimants would receive indemnification from the State [the Respondent] for damages that a fair and impartial court justifiably would have awarded the Lago Agrio Plaintiffs anyway.”<sup>26</sup>
- 7.38 The Tribunal’s several awards, orders and decisions to date have left intact any environmental claims in the Lago Agrio Litigation “made by an individual for personal harm in respect of that individual’s rights separate and distinct from the Respondent”: see the First Partial Award.<sup>27</sup> As the Tribunal also decided (by a majority) in its Decision on Track 1B, the Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York: see Paragraph 186(3) of the Decision.<sup>28</sup> It is also common ground between the Parties that claims made by an individual for personal harm (not being a diffuse claim), including one or more of the Aguinda or Lago Agrio Plaintiffs, are not precluded by the Claimants’ case in this arbitration, howsoever decided by the Tribunal.
- 7.39 In the Tribunal’s view, therefore, it remains clear that individual claims for personal harm from environmental damage, made by the Aguinda Plaintiffs in the Aguinda Litigation in New York or similar claims for personal harm (not being diffuse claims) made by the Lago Agrio Plaintiffs in the Lago Agrio Litigation, are not and cannot be

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<sup>26</sup> R-TII Feb. 2013, paras 452 & 471.

<sup>27</sup> First Partial Award, para 112(3). (See Annex 1 to Part I above).

<sup>28</sup> Decision on Track 1B (see Annex 1 to Part I above).

claims asserted by the Respondent in its own right against Chevron (or TexPet) in this arbitration.

- 7.40 For its cross-claim in this arbitration, therefore, the Respondent cannot assert against Chevron (or TexPet) personal rights possessed only by these Aguinda or Lago Agrio Plaintiffs as individuals. Such an assertion would require an exercise lying beyond this Tribunal's jurisdiction under the Parties' Arbitration Agreement, inconsistent with the Tribunal's application of the principle in *Monetary Gold* in its Third Interim Award (see above).
- 7.41 Nor can any claims be made by the Respondent, in its own right, against Chevron (or TexPet), given the effect of the 1995 Settlement Agreement as decided by the Tribunal in its First Partial Award.<sup>29</sup> Under the 1995 Settlement Agreement, the Respondent is precluded from asserting any diffuse claim against Chevron as a "Releasee" (as also TexPet and, likewise, Texaco as "Releasees").
- 7.42 Thus, whatever right is here being asserted by the Respondent for its cross-claim alleging environmental damage, it is a right belonging only to these individual plaintiffs alleging personal harm. It is not a right belonging to the Respondent. If it were otherwise, the Respondent's cross-claim could only be a diffuse claim. However, the Respondent cannot assert a diffuse claim against Chevron (or TexPet) without the Respondent violating the effect of the 1995 Settlement Agreement, as decided by this Tribunal. There is therefore no safe passage for the Respondent's cross-claim between Scylla and Charybdis.
- 7.43 In the circumstances, the Tribunal does not consider that the Respondent's cross-claim impugns its jurisdiction (or, as regards admissibility, the exercise of its jurisdiction) to decide other issues between the Claimants and the Respondent in this arbitration.
- 7.44 Conversely, the Tribunal has jurisdiction over the Respondent's cross-claim; and, in the exercise of such jurisdiction, it decides that the Respondent has no standing or right to bring such a cross-claim. Moreover, in a case (such as this) where the claimant's alleged liability to a cross-claim would result from a court judgment impugned by the claimant, the Tribunal considers that the respondent cannot rely upon

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<sup>29</sup> First Partial Award, para 112(3), (see Annex 1 to Part I above).

that judgment to shift the legal burden of proof to the claimant; and that, in this case, the Respondent has not discharged its legal burden of proving its cross-claim.

7.45 Nonetheless, as the Respondent's Counsel rightly submitted at the Track II Hearing, the individual Aguinda and Lago Agrio Plaintiffs are "real plaintiffs" with "real claims."<sup>30</sup> For the avoidance of any doubt, the Tribunal re-confirms that it has no jurisdiction under the Treaty to decide upon the merits of these individual plaintiffs' claims for personal harm against Chevron (not being diffuse claims).

***D: Issues as to Jurisdiction and Admissibility***

7.46 (1) *Introduction:* As already indicated, TexPet was not a named party to the Lago Agrio Litigation. Its position is therefore different from Chevron as the sole named defendant in the Lago Agrio Litigation. It is necessary to consider their respective positions separately, as partly decided in the Tribunal's Third Interim Award (see this Part VII's "Introduction" above).

7.47 It is also necessary to address separately: (i) the Claimants' claims for denial of justice under the FET standard in Article II(3)(a) of the Treaty; and (ii) the Claimants' claims as "Releasees" in the 1995 Settlement Agreement under the Umbrella Clause in Article II(3)(c) of the Treaty.

7.48 (2) *The Third Interim Award:* As decided in the Tribunal's Third Interim Award,<sup>31</sup> TexPet's "investment" qualifies as to jurisdiction, admissibility and protection under Articles I(1)(a)(iii), I(1)(a)(v), II(3)(a), II(3)(c), VI(1)(a) and VI(1)(c) of the Treaty.<sup>32</sup>

7.49 However, the Tribunal there decided that the 1995 Settlement Agreement (to which TexPet was a party and signatory) was not, by itself, an "investment" made by TexPet under the Treaty.<sup>33</sup> Nevertheless, as regards TexPet, the Tribunal decided that the 1995 Settlement Agreement must be treated as "a continuation" of the earlier 1964 and 1973 Concession Agreements, so that the 1995 Settlement Agreement formed part of

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<sup>30</sup> Track II Hearing D13.3033.

<sup>31</sup> The Tribunal understands that the Respondent's legal proceedings in the Netherlands challenging the Third Interim Award (as with other Awards) remain pending before the Hoge Raad: see the Claimants' letter dated 19 March 2018, p. 2 and the Respondent's letter dated 20 April 2018, p. 2. In addition, the Respondent has requested the Tribunal to re-consider its Third Interim Award, a procedure to be completed in Track III of this arbitration: see R-TI Mar. 2014, paras 134-138 and the Respondent's letter dated 20 April 2018, p. 6, fn 15. For present purposes, the Tribunal takes no account of these pending proceedings and request.

<sup>32</sup> Third Interim Award, paras 4.20 & 4.36.

<sup>33</sup> Third Interim Award, para 4.20.

TexPet’s “overall investment agreement” with Ecuador invoked under Article VI(1)(a) of the Treaty.<sup>34</sup>

7.50 In the First Partial Award, the Tribunal decided that Chevron was a “co-Releasee” under the 1995 Settlement Agreement, although it was not a signatory or named party to the 1995 Settlement Agreement.<sup>35</sup> In the Third Interim Award, the Tribunal also decided that Chevron was not a “direct” investor by reference to TexPet’s Concession Agreements of 1964 and 1973: it was never a member of the Consortium; it was not an “Operator”; and it only appeared in the chronology of this case in 2001 following its “merger” with Texaco, long after the departure from Ecuador of TexPet and Texaco, in 1992.<sup>36</sup> Hence, unlike TexPet, Chevron had no “direct overall investment” in Ecuador continuing from the 1964 Concession Agreement; and the 1995 Settlement Agreement, by itself, could not under the Treaty become in 2001 a “direct” investment by Chevron in Ecuador.<sup>37</sup>

7.51 Therefore, although both Chevron and TexPet were and remain “co-Releasees” under the 1995 Settlement Agreement (with Texaco), Chevron is not in the same position as TexPet as an investor with a “direct” investment in Ecuador under the Treaty.

7.52 For these reasons, as recited below, the Tribunal did not make in the Third Interim Award any final decision upon the Respondent’s jurisdictional objections to Chevron’s claims with respect to any alleged “direct” investment by Chevron under Articles I(1)(a), VI(1)(a) and VI(1)(c) of the Treaty, as distinct from Chevron’s “indirect investment” in TexPet, as TexPet’s ultimate parent company following Chevron’s “merger” with Texaco in 2001, under Articles I(1)(a) and VI(1)(c) of the Treaty.<sup>38</sup>

7.53 Thus, in its Third Interim Award, the Tribunal drew a distinction between Chevron’s “direct” and “indirect” investments. As to Articles I(1)(a) and VI(1)(c) of the Treaty, the Tribunal decided (inter alia) as follows:<sup>39</sup>

*“4.24 In the Tribunal’s view, as TexPet’s parent company, Chevron is a covered investor under Article I(1)(a) of the BIT because it indirectly owns or controls an*

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<sup>34</sup> Third Interim Award, paras 4.32-4.35.

<sup>35</sup> First Partial Award, para 112(1).

<sup>36</sup> Third Interim Award, para 4.22.

<sup>37</sup> Third Interim Award, para 4.23.

<sup>38</sup> Third Interim Award, paras 4.27, 4.96 & 5.4.

<sup>39</sup> Third Interim Award, paras 4.24-4.27.

*‘investment’ in Ecuador. It is not disputed that Chevron is a company ‘of the other Party’ formed in the USA; and Article I(1)(a) does not require its indirect investment (i.e. in TexPet and its investment) to be a company formed in Ecuador. Accordingly, the Tribunal decides, as a matter of jurisdiction, that Chevron can bring its claims before this Tribunal for an alleged breach of any right conferred or created by the BIT with respect to its indirect ‘investment’ in TexPet.*

*4.25 A different issue arises from Chevron’s exposure to the liability to the plaintiffs in the Lago Agrio Litigation. Chevron became TexPet’s parent and thus an investor in 2001 only, long after the events said to give rise to Chevron’s liability and occurring at a time when Texaco (not Chevron) was TexPet’s parent company. Notwithstanding their ostensibly distinct legal personalities and corporate histories, the Lago Agrio Litigation appears completely to amalgamate Chevron with Texaco (for legal reasons which remain unclear to the Tribunal). In that event, Chevron here submits for jurisdictional purposes that it should be treated by this Tribunal as, effectively, standing in the shoes of Texaco, as TexPet’s parent company from 1964 onwards, with the same original investment indirectly made and continued by Texaco. Otherwise, so Chevron submits, the Respondent and the Lago Agrio plaintiffs could succeed unfairly in “having it both ways”, with Chevron liable in the Lago Agrio litigation because of the concession/investment made by Texaco & TexPet but with Chevron not entitled in this arbitration to assert any relief because it had in fact no such investment/concession at the material time, i.e. before 2001.*

*4.26 The Tribunal declines to cut this Gordian knot at this early stage of these arbitration proceedings: it will need a much better understanding of the legal reasons why Chevron is to be treated in the Lago Agrio Litigation as a party succeeding to Texaco’s liabilities which arose before the “merger” in 2001; and it will also need a clearer understanding of what constituted such “merger” as regards the different and successive legal relationships between Texaco, TexPet and Chevron before and after such “merger”, under whatever applicable law or laws, namely the laws of the USA and/or Ecuadorian law.*

*4.27 Accordingly, for the time being, the Tribunal makes no final decision in regard to the Respondent’s jurisdictional objection to Chevron’s own claims as a direct investor under Article VI(1)(c) of the BIT, save to join that particular objection to the merits under Article 21(4) of the UNCITRAL Arbitration Rules. In addition, the Tribunal’s jurisdictional decision to treat Chevron as an indirect investor should not be understood as indicating (one way or the other) that Chevron would be entitled to all the relief claimed by Chevron in paragraph 547 of the Claimants’ Memorial on the Merits (cited in Part I above). That is also a matter for the merits phase of this arbitration.”*

7.54 As to Article VI(1)(a) of the Treaty, the Tribunal also decided in the Third Interim Award to join that jurisdictional issue to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.<sup>40</sup>

7.55 The Operative Part of this Third Interim Award, at Paragraph 5.4, provided as regards Chevron:<sup>41</sup>

*“As regards the claims pleaded by the First Claimant (Chevron Corporation or ‘Chevron’) in the Claimants’ said Notice of Arbitration, [the Tribunal here decides] to reject all objections made by the Respondent as to jurisdiction and admissibility in its said memorials and further submissions, save those relating to the jurisdictional objections raised against the First Claimant as a[n] investor under Article I(1)(a) alleging a “direct” investment under Article VI(1)(c) and an “investment agreement” under Article VI(1)(a) of the Ecuador–USA Treaty of 27 August 1993 which are joined to the merits of the First Claimants’ claims under Article 21(4) of the UNCITRAL Arbitration Rules forming part of the Parties’ arbitration agreement under the Treaty.”*

7.56 Accordingly, in summary, the Tribunal there joined to the merits the Respondent’s jurisdictional objections to Chevron as an investor with a “direct” investment. The Parties subsequently agreed, and the Tribunal so ordered, that the Respondent’s objections should be further addressed by the Parties and decided by the Tribunal in Track II of this arbitration.

7.57 For present purposes, therefore, the issue arises as to whether Chevron has any relevant “investment”, “investment agreement” or “investment dispute” under Articles I(1)(a), VI(1)(a) and VI(1)(c) of the Treaty, permitting this Tribunal to decide Chevron’s claims as a national of the USA under the FET standard in Article II(3)(a) of the Treaty (including protection against denial of justice) or under the Umbrella Clause in Article II(3)(c) of the Treaty.

7.58 (3) *The Respondent’s Case:* In brief,<sup>42</sup> the Respondent maintains several objections to the Tribunal’s jurisdiction (including, as to admissibility, its exercise of jurisdiction) to decide Chevron’s claims under Articles II(3)(a) and (c) of the Treaty.

7.59 These objections concern Chevron’s alleged lack of any “direct” investment in Ecuador under Articles I(1)(a), VI(1)(a) and VI(1)(c) of the Treaty; Chevron’s limited

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<sup>40</sup> Third Interim Award, para 4.53.

<sup>41</sup> Third Interim Award, para 5.4 (see also Annex 1 to Part I above).

<sup>42</sup> R-TII Mar. 2015, Sections II & III; see also the Third Interim Award, Parts 3(C) and 3(E).

interest as a “Releasee” under the 1995 Settlement Agreement; Chevron’s several failures to exhaust its local remedies within the Ecuadorian legal system regarding the Lago Agrio Judgment, as required for denial of justice under Article II(3)(a) of the Treaty; and (as also raised by the Tribunal) Chevron’s amendment to its claims (with TexPet) for denial of justice regarding the Lago Agrio Judgment, pleaded after the commencement of this arbitration.<sup>43</sup>

7.60 (4) *The Claimant’s Case*: In brief,<sup>44</sup> the Claimants contend that the Tribunal has both jurisdiction to decide and (as to admissibility) may exercise such jurisdiction to decide Chevron’s claims under Articles I(1)(a), VI(1)(a), VI(1)(c), II(3)(a) and II(3)(c) of the Treaty, on several grounds.

7.61 Chevron asserts (inter alia) that its indirect investment in TexPet is a sufficient “investment” to confer jurisdiction upon this Tribunal under the Treaty to decide its claims. Further, so Chevron contends, the Respondent should not be permitted to treat it (Chevron) differently from Texaco and TexPet under the Treaty, given the terms of the Lago Agrio Judgment merging their respective identities.<sup>45</sup> As regards the exhaustion of local remedies, Chevron contends that the requirement under international law is not absolute for a claim for denial of justice; and that it reasonably availed itself of such remedies as ostensibly existed within the Ecuadorian legal system; but none offered at the time any reasonable, timely and effective prospect of success against the Lago Agrio Judgment. As for the amendment to its case to plead claims in regard to the Lago Agrio Judgment, Chevron contends that such amendments were permissible under Article 20 of the UNCITRAL Arbitration Rules, forming part of the Parties’ Arbitration Agreement derived from the Treaty.

***E: The Tribunal’s Analysis as to Jurisdiction and Admissibility***

7.62 (1) *Introduction*: It is appropriate to address separately the three parts of the Respondent’s objections to jurisdiction (with admissibility); namely: (i) Chevron’s lack of any relevant “investment” under Articles I(1), II(3)(a), II(3)(c), VI(1)(a) and VI(1)(c) of the Treaty; (ii) Chevron’s alleged failure to exhaust local remedies in the Ecuadorian legal system for its claims regarding denial of justice in the Lago Agrio

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<sup>43</sup> See R-TII Mar. 2015, para 5 (whilst this pleading may not expressly take the point, the Tribunal thinks it right to so interpret it, as also to raise the point upon its own initiative: see below).

<sup>44</sup> C-TII Jan. 2015, Section II; see also the Third Interim Award, Parts 3(D) and 3(F).

<sup>45</sup> See Track II Hearing D1.165.



Litigation under the FET standard in Article II(3)(a) of the Treaty; and (as also raised by the Tribunal) (iii) the status of the Claimants' amended claims regarding the Lago Agrio Judgment under the UNCITRAL Arbitration Rules, the Treaty and Dutch law.

- 7.63 (2) *Chevron*: The Tribunal decides, confirming its Third Interim Award, that Chevron cannot establish jurisdiction for its claims under Articles II(3)(a) or II(3)(c) of the Treaty by reference only to its own status as a "Releasee" under the 1995 Settlement Agreement. The Tribunal there decided that, by itself, the 1995 Settlement Agreement is not a direct "investment" in Ecuador made by Chevron under Article I(1)(a) of the Treaty.
- 7.64 The Tribunal therefore decides that Chevron cannot establish jurisdiction for its claims under Article VI(1)(a) of the Treaty, based only on its own status as a "Releasee" under the 1995 Settlement Agreement. That provision requires the existence of an investment dispute "between a Party [i.e. the Respondent] and a national or company of the other Party [i.e., here, Chevron] arising out of or relating to (a) an investment agreement made between that Party and such national or company" (see the full wording set out in Section B of this Part VI above). Whilst there is, in the Tribunal's view, a dispute between Chevron and the Respondent arising out of or relating to the 1995 Settlement Agreement, the 1995 Settlement Agreement is not an "investment agreement" made by Chevron itself.
- 7.65 The Tribunal therefore turns to the interpretation and application of Article VI(1)(c) of the Treaty, regarding a dispute arising out of or relating to "an alleged breach of any right conferred or created by this Treaty with respect to an investment."
- 7.66 The Tribunal notes that Article 1(1)(a) of the Treaty defines "investment", but not "investor"; and that the protection afforded under Article II(3)(a) and (c) of the Treaty similarly addresses "investments", as does Article VI of the Treaty in regard to an "investment dispute" and "investment". The Preamble to the Treaty also records that it is "a treaty concerning the encouragement and reciprocal protection of investments."
- 7.67 The Tribunal has decided that Chevron had no investment under the Treaty before its "merger" with Texaco in 2001 (whether direct or indirect). However, with this "merger", Chevron acquired an interest in the investments made in Ecuador by TexPet and Texaco since 1964, including (as integral parts of their overall investments) the

1964 Concession, the 1973 Concession and the 1995 Settlement Agreement. In about 2001, as contended by the Respondent, Chevron also became a party (with Texaco) to Texaco's earlier undertaking to the US Courts in favour of Ecuadorian jurisdiction contained in Texaco's Notice of Agreement of 11 January 1999 in the Aguinda Litigation, leading to the Lago Agrio Litigation.<sup>46</sup> In any event, Chevron became the sole named defendant in the Lago Agrio Litigation, leading in turn to the Lago Agrio Judgment.

- 7.68 There is no issue between the Parties that Chevron is a 'company' of the USA as a Party to the Treaty, within the meaning of Articles I(1)(a) and VI(1)(c) of the Treaty.
- 7.69 In the Tribunal's view, the meaning of the term "investment" in Articles I(1)(a) and VI(1)(c) of the Treaty is materially different than the term "investor". An "investment" identifies the subject-matter protected by the Treaty, as distinct from the person making that "investment". As a factual matter, Chevron never was a party making its own "direct" investment as an investor separate and distinct from the investments of Texaco and TexPet. Assessed as at 2001, however, Chevron acquired an "indirect" interest in TexPet's investments in Ecuador, satisfying (as regards Chevron) the definition of "investment" in Article I(1)(a) and Article VI(1)(c) of the Treaty, as applied to "investments" in Articles II(3)(a) and II(3)(c) and also to an "investment dispute" as defined Article VI(1) of the Treaty.
- 7.70 Accordingly, in the Tribunal's view, the dispute between Chevron and the Respondent is an investment dispute "arising out of or related to ... (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment" [namely Articles II(3)(a) and II(3)(c) of the Treaty]. As already decided by the Tribunal, the phrase "relating to" is very broad in scope;<sup>47</sup> and the definition of "investment" in Article 1(a) is equally broad, encompassing "every kind of investment [in Ecuador] .... owned or controlled directly or indirectly" by a claimant company.
- 7.71 The Tribunal decides, therefore, that Chevron acquired a relevant "investment" in Ecuador under the Treaty sufficient to entitle it to invoke this Tribunal's jurisdiction to decide its claims under Articles II(3)(a) and II(3)(c) of the Treaty. Such an investment

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<sup>46</sup> The Respondent relies upon the US Court of Appeals for the Second Circuit in its judgment of 17 March 2011, deciding that Chevron is bound by Texaco's undertaking of 1999: see Part IV(G)(1) above.

<sup>47</sup> Third Interim Award, para 4.15.

is not required by the Treaty to be a “direct” investment, still less an “investment agreement” made by Chevron itself.

7.72 (3) *TexPet*: TexPet can assert in this arbitration its own rights under the Treaty in regard to its direct investments, including TexPet’s own rights as a “Releasee” under the 1995 Settlement Agreement (forming an intrinsic part of TexPet’s overall “investment” from 1964 onwards) under Articles II(3)(a) and II(3)(c) of the Treaty.

7.73 The Third Interim Award decided, as regards TexPet:<sup>48</sup>

*“4.20 As a co-claimant in this arbitration, the Tribunal therefore decides that TexPet has standing (as a matter of jurisdiction) to seek its claimed declaratory, specific performance, moral damages and other relief against the Respondent, even though TexPet is not a defendant in the Lago Agro Litigation (or a defendant in the criminal proceedings). As an investor with a covered investment and as a contractual party to the 1995 Settlement Agreement with the Respondent, TexPet enjoys valuable economic rights for itself; and its claimed relief can thus include relief advanced under Articles I(1)(a)(v), Article II(3)(c), Article I(1)(a)(iii) and Article VI(1)(c) of the BIT.”*

7.74 In the Tribunal’s view, therefore, TexPet made a relevant investment under the Treaty sufficient to invoke this Tribunal’s jurisdiction to decide its claims under the Treaty. Such an investment was a direct investment made by TexPet itself from 1964 onwards, in contrast to Chevron.

7.75 For two reasons, in the Tribunal’s view, it would be no answer that TexPet has itself suffered no “damage” from the Lago Agrio Judgment, not being a named party to the Lago Agrio Litigation. First, damage is not required for an international wrong under Articles II(3)(a) and II(3)(c) of the Treaty: see Article 31 of the ILC Articles on State Responsibility.<sup>49</sup> It suffices that TexPet with its “investment” has suffered an “injury”. Such an injury was allegedly caused (inter alia) by the Respondent’s international wrong committed by the Lago Agrio Court (as part of the Respondent’s judicial branch) with the Lago Agrio Judgment, in violation of TexPet’s release by the Respondent from any diffuse claims under the 1995 Settlement Agreement. That wrong was allegedly repeated and maintained by the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts in upholding the Lago Agrio Judgment

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<sup>48</sup> Third Interim Award, para 4.20.

<sup>49</sup> Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), for the commentary on Article 31, at para 6 (p. 203), CLA-288.

and by the Lago Agrio Appellate Court in rendering enforceable and maintaining the enforceability of the Lago Agrio Judgment.

- 7.76 Second, as alleged by the Claimants, TexPet has in any event suffered damage from the Lago Agrio Litigation and Lago Agrio Judgment. TexPet, albeit not a named defendant, was held publicly responsible in the Lago Agrio Judgment, with Chevron, for extensive environmental damage from 1964 onwards in the area of the concession. Consequentially, the Lago Agrio Judgment was successfully enforced against TexPet's assets in Ecuador, by the Lago Agrio Court's execution order of 15 October 2012.<sup>50</sup>
- 7.77 Under that order, the Court ordered, under paragraph (c), the attachment of "all the funds deposited and existing in Banco Pichincha Checking Account No 30452125-04, as well as any other bank account, investment or fund owned by ... Texaco Petroleum Company, Texpet ..." and, under paragraph (f), "... the total amount of (US\$ 96,355,369) of the award against the Government of Ecuador in the arbitration proceedings brought by Chevron and Texaco [i.e. TexPet] with the Republic of Ecuador, publicly known as the 'Chevron Case II' [i.e. the Commercial Cases Arbitration]". The Lago Agrio Court ordered this attachment of the award debt payable to TexPet (with Chevron) to be notified to the Respondent (as the award debtor), by order of 12 July 2016.<sup>51</sup>
- 7.78 Subject to other issues addressed later below, the Tribunal decides, therefore, that Chevron acquired a relevant "investment" under the Treaty sufficient to invoke this Tribunal's jurisdiction to decide its claims under the FET standard in Article II(3)(a) of the Treaty (including its protection against denial of justice) and under the Umbrella Clause in Article II(3)(c) of the Treaty. Such an investment comprised Chevron's indirect interest, as from the date of the "merger" in 2001, in TexPet's "overall" investments from 1964 onwards (including the 1995 Settlement Agreement).
- 7.79 (4) *Good Faith*: There is a third approach invoked by Chevron, somewhat more teleological, to address the Respondent's jurisdictional objections to Chevron's claims

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<sup>50</sup> C-1532. This asset comprised the modest sum of US\$ 358.00: see the Claimants' letter dated 19 March 2018, p. 7 and the Respondent's letter dated 20 April 2018, p. 4.

<sup>51</sup> The award debt was not recovered by the Lago Agrio Plaintiffs, owing (*inter alia*) to the settlement of the award debt made by the Respondent directly to Chevron and TexPet on 22 July 2016: see the Claimants' letter dated 19 March 2018, p. 8.

for lack of any relevant “investment” under Articles I(1), VI(1)(a), VI(1)(c), II(3)(a) and III(3)(c) of the Treaty.

- 7.80 As the Claimants contend, the Respondent cannot, in good faith, ‘have it both ways’ as regards Chevron’s “investment” in Ecuador. If the Respondent, through its judicial branch, took the position that Chevron had assets in Ecuador, standing in the shoes of TexPet and Texaco as the Lago Agrio Judgment states, the Respondent cannot now adopt the position that Chevron never had any assets in Ecuador, i.e. that it never had any investments in Ecuador. The Lago Agrio Judgment amalgamates completely Chevron with TexPet and Texaco as result of the “merger”, so as to hold Chevron liable for all wrongs committed by TexPet’s and Texaco’s activities in Ecuador from 1964 onwards. Yet the Respondent in this arbitration now seeks, improperly according to the Claimants, to disassociate Chevron in full from any of TexPet’s and Texaco’s activities in Ecuador (including investments), for tactical jurisdictional purposes.
- 7.81 The Claimants therefore conclude that the Tribunal has jurisdiction over Chevron’s claims under Article VI(1)(a) and (c) of the Treaty “because Chevron is entitled to all procedural and substantive legal rights and defences of TexPet, as a result of having been sued for TexPet’s conduct as well as by reason of the [Lago Agrio] Court’s improper amalgamation of Chevron with Texaco and TexPet.”<sup>52</sup>
- 7.82 It is necessary to examine more closely the legal principles underlying the Claimants’ submissions based upon on these apparent inconsistencies between the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and the Respondent’s jurisdictional objections in this arbitration. These inconsistencies and their legal effects are not accepted by the Respondent.
- 7.83 The Parties’ obligations to resolve their dispute by consensual arbitration before an international tribunal derive from Article VI of the Treaty, subject to international law (as its applicable law). Under international law, as codified in Article 26 the Vienna Treaty on the Law of Treaties (the “VCLT”), parties are required to act in good faith in the performance of their obligations.

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<sup>52</sup> C-TII Jan. 2015, para 31; see also *id.*, paras 275ff.

- 7.84 Article 26 of the VCLT provides:<sup>53</sup> “Every treaty in force is binding upon the parties to it and must be performed in good faith”. The International Law Commission stated in its commentary to the VCLT that: “In the case of treaties, ... there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith.”<sup>54</sup> In *Nuclear Tests* (1974), the International Court of Justice decided: “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith”.<sup>55</sup> That was decided in regard to unilateral declarations made by a State. In the ILC’s subsequent “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” (2006), the first guiding principle declared that the binding character of such unilateral declarations “is based on good faith.”<sup>56</sup>
- 7.85 The Parties’ mutual consent to arbitration derived from Article VI of the Treaty is not, course, a treaty between two States. The Parties’ consent is contained in the separate Arbitration Agreement subject to international law between the Claimants and the Respondent, that was formed upon the Claimants’ written acceptance (by their Notice of Arbitration) of the Respondent’s standing, general offer to arbitrate contained in Article VI of the Treaty.<sup>57</sup> Under international law, the Parties’ Arbitration Agreement, made pursuant to Article VI(2) of the Treaty, is legally autonomous, or “separable”, from other provisions of the Treaty.<sup>58</sup> This is not a State-State arbitration under the Treaty (as to which the Treaty contains a separate provision in Article VII). This investor-State arbitration was therefore commenced by the Claimants in their own right, not deriving from the USA’s espousal of their claims. Moreover, the Parties’ Arbitration Agreement incorporates Article 21(2) of the UNCITRAL

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<sup>53</sup> United Nations Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc. A/CONF.39/11/Add.2; 1155 UNTS 331, 8 ILM 679 (1969), CLA-10.

<sup>54</sup> International Law Commission, *Draft Articles on the Law of Treaties, with commentaries* (1966) II (Part Two) Yearbook of the ILC 187, p. 262.

<sup>55</sup> *Nuclear Tests (Australia v. France)*, ICJ, Judgment, 20 December 1974, 1974 ICJ Reports 253, para 46.

<sup>56</sup> International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) II (Part Two) Yearbook of the ILC 161, p. 370.

<sup>57</sup> Z. Douglas, “The Hybrid Nature of Investment Treaty Arbitration” (2003) 74 *British Yearbook of International Law* 152, CLA-177. See also *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, pp. 467-468, CLA-176.

<sup>58</sup> S. Schwebel, *International Arbitration: Three Salient Problems* (1987), “Part 1: The Severability of the Arbitration Agreement”, p. 60ss. See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 212, CLA-67, RLA-350; *Concurring and Dissenting Opinions of Howard M. Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases Containing Various Forum Selection Clauses (Cases Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466)*, 5 November 1982, 1 *Iran-US Claims Tribunal Reports* 284, p. 292.

Arbitration Rules, which recognises the legal autonomy of an arbitration provision physically, but not legally, contained in a substantive agreement. The Tribunal refers to the legal analysis of Article VI of the Treaty made by the US Court of Appeals for the Second Circuit in its judgment of 17 March 2011 in the New York Stay Legal Proceedings, to the effect that the Parties “have created a separate binding agreement to arbitrate” (see Part IV(G)(6) above).

- 7.86 In the Tribunal’s view, the Parties’ offer and acceptance imported into the Arbitration Agreement an obligation derived from the Treaty requiring all Parties to exercise their rights and to perform their obligations in good faith in the conduct of this arbitration. This obligation of good faith applies both to substantive provisions, such as Articles II(3)(a) and II(3)(c), but also to Article VI of the Treaty. Conversely, the Arbitration Agreement precludes conduct by any Party in bad faith, calculated to defeat the object and purpose of arbitration under Article VI of the Treaty: see, particularly, the Treaty’s Preamble as to “fair and equitable treatment of investment” (set out in Part III(B) above), as interpreted under Article 31(1) of the VCLT. Moreover, where the *lex arbitri* is international law, the obligation of good faith as a general principle of international law (with the meaning of Article 38(1)(c) of the ICJ Statute) applies to the Arbitration Agreement directly.
- 7.87 The general principle of good faith has a long history in regard to the conduct of dispute resolution, including arbitrations under international law, albeit under different nomenclatures. It has recently been confirmed by the ICSID award in *Orascom v Algeria* (2017),<sup>59</sup> where the arbitration tribunal stated that it was “undeniable” that the doctrine of abuse of rights, or “abus de procédure”, has a role to play in the conduct of an arbitration under a bilateral investment treaty, prohibiting the exercise of a “right” for purposes other than those for which that right was established; and that this doctrine was a general principle applicable in international law as well as in municipal law. In the Tribunal’s view, such an abuse of rights includes an abusive want of good faith in the exercise of a procedural right, such as an objection to the jurisdiction of a tribunal under Article 21 of the UNCITRAL Arbitration Rules derived from Article VI of the Treaty.

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<sup>59</sup> *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, paras 540, 541 & 547.

7.88 For present purposes, it is necessary to examine a specific want of good faith. Long before the VCLT, Lord McNair wrote, in his commentary on the *Fur Seal Arbitration*.<sup>60</sup> “... international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*.”<sup>61</sup> Dr Bin Cheng later wrote in his well-known work, *General Principles of Law as Applied by International Courts and Tribunals*, under the similar heading “*Allegans Contraria Non Est Audiendum*”.<sup>62</sup> “It is a principle of good faith that “a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another ... Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel’ or by any other name, it is one which courts of law in modern times most usefully deployed.”

7.89 As these scholarly authors considered, an important feature of good faith under international law is the principle expressed in the Latin maxim *allegans contraria non est audiendum*, or sometimes, loosely adopting Anglo-Saxon legal terminology, “estoppel”. Professor Hersch Lauterpacht considered that estoppel under international law was based upon a general principle of good faith: “It is of little consequence whether the rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably no more than one of the aspects of the latter.”<sup>63</sup> Professor Bowett also wrote: “The rule of estoppel, whether treated as a rule of evidence or as a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit. The basis of the rule is the general principle of good faith and as such finds a place in many systems of law.”<sup>64</sup>

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<sup>60</sup> *Award between the United States and the United Kingdom relating to the rights of jurisdiction of the United States in the Bering's sea and the preservation of fur seals*, Ad hoc, Award, 15 August 1893, XXVIII RIAA 263 reprinted from J.B. Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, (1898), p. 935.

<sup>61</sup> A. McNair, “The Legality of the Occupation of the Ruhr” (1924) 5 *British Yearbook of International Law* 17, p. 35.

<sup>62</sup> B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals* (1953, reprinted 1987), pp. 141-149, CLA-108.

<sup>63</sup> International Law Commission, *Law of Treaties, Report by Mr H. Lauterpacht, Special Rapporteur*, UN Doc A/CN.4/63, (1953) II *Yearbook of the ILC* 90, p. 166, cited by I. MacGibbon, “Estoppel in International Law” (1958) 7 *International and Comparative Law Quarterly* 468, p. 471, CLA-107.

<sup>64</sup> D. Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence” (1957) 33 *British Yearbook of International Law* 176, p. 176, CLA-179.



7.90 In his work (*supra*), Dr Bin Cheng also wrote (with footnotes here omitted):<sup>65</sup>

*“The principle [of good faith] applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel. Thus it has been held that a State cannot be heard to repudiate liability for a collision after its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances. Again, if a State, having been fully informed of the circumstances, has accepted a person’s claim to the ownership of certain property and entered into negotiation with him for its purchase, it becomes ‘very difficult, if not impossible’ for that State subsequently to allege that he had no title at the time. If a State, which is the lessee of a property owned by two joint owners, has, after the death of one of them, paid the entire rent to the other, who claims to have become the sole owner, ‘this act can not be interpreted otherwise than as a recognition by the authorities of the fact that the right of ownership of Hassar [the deceased] has passed to Raini [the claimant].’ Where a party negotiates for the sublease of a concession granted by a State, it thereby recognises the validity of the concession and the right of the State to grant it ...”*

7.91 Dr MacGibbon, in “Estoppel in International Law” (1958),<sup>66</sup> wrote that, underlying most formulations of the doctrine of estoppel in international law, is “the requirement that a State ought to be consistent in its attitude to a given factual or legal situation;” and that it “may be, and often is, grounded on considerations of good faith”. He concluded his historical survey of legal materials, as follows:

*“What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*. ...”*

7.92 In its Memorial on Jurisdiction Objections of 26 July 2010,<sup>67</sup> the Respondent cited the Decision of the German-Poland mixed arbitration tribunal (“T.A.M.”) in *Kunkel v*

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<sup>65</sup> B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals* (1953, reprinted 1987), pp. 144-145, CLA-108.

<sup>66</sup> I. MacGibbon, “Estoppel in International Law” (1958) 7 *International and Comparative Law Quarterly* 468, p. 45, CLA-107.

<sup>67</sup> R-Jur. July 2010, para 167, fn 250. The *Kunkel* case was also cited by the Respondent in the *Commercial Cases Arbitration: see Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Interim Award, 1 December 2008, paras 125-131, CLA-1. The tribunal there joined the issue of good faith to the merits where, so it appears, it did not prevail on the facts found by the tribunal. (The *Kunkel* case had been cited earlier in the Iran-USA Claims Tribunal’s award of 29 June 1989 in *Phillips Petroleum Co. Iran v. Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 39, Award No. 425-39-2, 29 June 1989, p. 108, fn 39, RLA-71, as barring “a party’s contradictory and self-serving jurisdictional statements”. Professor Bowett QC had there acted as Counsel for the respondents).

*Poland* (1926) regarding the inconsistent conduct of the respondent State (Poland) in that mixed arbitration.<sup>68</sup> Professor Bowett relied upon this Decision in his 1957 article, “Estoppel before International Tribunals and Its Relation to Acquiescence”.<sup>69</sup> As explained below, the Decision is not a case on “estoppel”.<sup>70</sup>

7.93 As reported, the relevant facts were as follows: Under the Treaty of Versailles, Poland had the right to liquidate the property of German nationals situated within its territory. However, the Treaty also provided that former nationals of Germany, who by virtue of the Treaty had acquired Polish nationality, were not to be regarded as German nationals.<sup>71</sup> Poland proceeded to liquidate the property of the claimants as German nationals. These claimants contended that they had acquired Polish nationality and that their property was, therefore, not liable to such liquidation. The tribunal decided that it had no jurisdiction to decide claims put forward against Poland by Polish nationals. Hence, the tribunal rejected the claimants’ claims pleaded as Polish nationals. However, the tribunal also decided that it was open to the claimants to amend their claims on the basis that they were German nationals (within the same arbitration proceedings). Having liquidated their estates on the ground that they were German nationals, Poland could not deny their German nationality in the arbitration, it being required by the Versailles Treaty that a person who had suffered damage as a German national should not be deprived of legal remedies afforded by the Treaty to German nationals.

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<sup>68</sup> *Kunkel et. al. v. Polish State*, German-Polish Mixed Arbitration Tribunal, Award, 2 December 1925, (1927) VI Recueil des Décisions des Tribunaux Arbitraux Mixtes 979, (1929) Annual Digest of Public International Law Cases 1925-1926 418, RLA-44. The Respondent cited this case on an issue different from the jurisdictional issue here under consideration.

<sup>69</sup> D. Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence” (1957) 33 British Yearbook of International Law 176, p. 187, CLA-179.

<sup>70</sup> The edited summary of the *Kunkel* decision in the *Annual Digest* prepared in English by Hersch Lauterpacht uses the word “estopped”; but that word is not used as an English legal term of art, as appears from the original French text below, taken from the full report in the *Recueil*.

<sup>71</sup> *Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany)*, 28 June 1919, UKTS 4 (1919), CMD 153, Chapter V, Property Rights and Interests, Section IV provides (with square brackets here added): Article 297: “The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto. ... (b) [1] Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates including territories ceded to them by the present Treaty. [2] The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owners shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State. [3] German nationals who acquire ipso facto the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.”

7.94 The Decision was issued in the French language only. The words “estoppel” and “estopped”, albeit an Anglo-Saxon legal concept expressed in Norman-French, are not French words, still less French legal terms of art. The relevant passage in the Decision’s authentic text in French, provides as follows:

*“8. En résumé, le Tribunal doit se déclarer incompétent pour statuer sur les conclusions des requérants telles qu’elles ont été formulées et motivées. Il y a lieu toutefois de faire l’importante réserve suivante:*

*Si les requérants renoncent à fonder leurs réclamations contre l’Etat polonais sur leur prétendue qualité de ressortissants polonais, s’ils se bornent à invoquer les droits assurés par le Traité aux ressortissants allemands liquidés, c’est-à-dire s’ils réclament l’indemnité supplémentaire prévue par l’art. 297. litt. h, et par l’art, 92, ch. 2, ou, éventuellement, s’ils contestent l’admissibilité de la liquidation pour un motif autre que leur ressortissance polonaise, les considérations développées ci-dessus cesseront d’être applicables. Le Tribunal n’aura pas à rechercher d’office si les requérants sont Allemands ou Polonais; il devra au point de, vue de sa compétence, les tenir pour Allemands puisque c’est en raison de cette qualité qu’ils ont été liquidés et que, d’autre part, la prétendue ressortissance polonaise ne constituera plus la base juridique de la réclamation. Et l’Etat polonais ne pourra naturellement pas exciper de la ressortissance polonaise des requérants pour décliner la compétence du Tribunal, puisqu’il les a traités comme Allemands et qu’ils ne revendiqueront pas autre chose que les droits garantis aux ressortissants allemands. La condition de nationalité allemande essentielle pour la compétence du T.A.M. sera donc, dans cette hypothèse, censée réalisée. Cette solution est conforme à la jurisprudence des T.A.M. (Cf. Recueil, t. III, p. 1017-1018 et p. 606) et elle se justifie par des raisons d’équité évidentes: celui qui a subi un dommage en sa qualité d’Allemand doit pouvoir bénéficier des droits attachés à cette qualité, notamment de celui de saisir le T.A.M. .*

*Strictement, les nouvelles conclusions ainsi réservées devraient faire l’objet de nouvelles requêtes, puisque leur fondement juridique différera de celui des conclusions actuelles. Cependant, dans un but de simplification, on peut autoriser les requérants à procéder, dans les deux mois, par le dépôt de mémoires qui seront joints aux dossiers déjà constitués et auxquels l’Etat défendeur aura un délai de deux mois pour répondre, l’échange d’écritures étant ensuite terminé. Ce n’est que si les conclusions en question ne peuvent être prises utilement dans le délai indiqué (par exemple parce que la liquidation ne serait pas encore achevée) que les requérants devront déposer de nouvelles requêtes.”*

7.95 Whilst the tribunal invoked “*des raisons d’équité évidentes*” and did not refer expressly to bad faith or ‘blowing hot and cold’, this Decision can only be understood as resting upon Poland’s lack of good faith in taking, unequivocally, starkly

inconsistent positions towards the same claimants at different times, to their detriment and to Poland's benefit.

7.96 In his 1957 article, Professor Bowett concluded that “[m]any of the cases on estoppel by conduct illustrate the simple principle that the law will demand consistency in conduct where the result of inconsistency would be to prejudice another party”.<sup>72</sup> In support of this conclusion, Professor Bowett cited not only *Kunkel* (1925)<sup>73</sup> but also a lengthy study on related forms of estoppel under the laws of the USA published in the *Harvard Law Review* (1951-1952).<sup>74</sup>

7.97 This study addressed (inter alia) “preclusion” by a party taking inconsistent positions in successive legal proceedings, as follows (with footnotes here omitted, save one):<sup>75</sup>

*“The rule that a person is precluded from making allegations of fact inconsistent with a position he took in a previous case is not based on the policies against relitigation, but on a desire to preserve the dignity of judicial proceedings by preventing the successive assertion of factually contradictory statements as the truth. This is a form of estoppel based on the conduct of the party rather than the court, in which respect it is similar to election of remedies. The preclusion, like election of remedies, preferably should not be applied where the first position taken did not harm or cause reliance by the other party. Unlike res judicata, it operates regardless of finality of the original proceedings or identity of the parties, and it applies only to positions taken on the facts, not inconsistent points of law. Some courts apply the rule only where the position was successfully maintained, while others do not require success if the second action has some connection with the first. The preclusion seems an undesirable restriction against decision on the merits in the second action where it is applied to facts that were not major issues in the first action, or to facts that were conjectural at the time. [Footnote 30]”*

(Footnote 30 states: “It has been suggested that the doctrine might generally be mitigated by using the prior position as an admission, not a preclusion, so that the trier of fact in the second case could decide on the merits between the two positions asserted. See Note, 59 *Harv. L. Rev.* 1132, 1136 (1946)”).

7.98 This principle of preclusion from a party's inconsistent positions was confirmed by the US Supreme Court in *New Hampshire v Maine* (2001).<sup>76</sup> In that case, the US Supreme

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<sup>72</sup> D. Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence” (1957) 33 *British Yearbook of International Law* 176, p, 186, CLA-179.

<sup>73</sup> D. Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence” (1957) 33 *British Yearbook of International Law* 176, p, 187, CLA-179.

<sup>74</sup> D. Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence” (1957) 33 *British Yearbook of International Law* 176, p, 187, fn 3, CLA-179.

<sup>75</sup> *Harvard Law Review*, “Developments in the Law of Res Judicata” (1951-1952) 65 *Harvard Law Review* 818, pp. 823-824.

Court decided, applying “judicial estoppel”, that New Hampshire was “equitably barred from asserting – contrary to its position in the 1970’s litigation – that the inland Piscataqua River boundary runs along the Maine shore”.

- 7.99 While they are relevant to the establishment of ‘judicial estoppel’ as a general principle of international law (applicable here under Article 38(1)(c) of the ICJ Statute), in other circumstances, the Tribunal would not be minded to cite such municipal legal materials in such detail in support of its approach under international law. In this case, however, there is good reason to do so in the light of the Parties’ own joint experiences of these materials directly related to this arbitration, particularly the Respondent’s successful invocation of preclusion, or “judicial estoppel”, from contradictory statements made by Chevron to different US courts.
- 7.100 In disputes between the Claimants and the Respondent in US legal proceedings directly related to this arbitration, this principle of preclusion, or “judicial estoppel”, based on a party’s inconsistent statements, was applied by the US Court of Appeals for the Second Circuit and the US Court of Appeals for the Fifth Circuit.
- 7.101 The first of these judgments was issued by the US Court of Appeals for the Second Circuit on 17 March 2011 in *Republic of Ecuador v Chevron Corporation and TexPet* in the US Stay Proceedings.<sup>77</sup> It related to the application by the Respondent to the US Courts for an order staying this arbitration under the Treaty: see Part IV(G)(6) above. The Tribunal has already addressed the Second Circuit’s judgment; and it is unnecessary to do so here again, save to note that the Court applied “judicial estoppel”.<sup>78</sup> The Court described the purpose of “judicial estoppel”, citing the US Supreme Court, as protecting “the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment”.<sup>79</sup>

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<sup>76</sup> *New Hampshire v. Maine*, 532 U.S. 742 (29 May 2001).

<sup>77</sup> *Republic of Ecuador v. Chevron Corporation & Texaco Petroleum Company*, 638 F.3d 384 (2d Cir. 17 March 2011), CLA-435, R-247. (The Respondent was the Petitioner Appellant, with the Lago Agrio Plaintiffs (formerly the Aguinda Plaintiffs) as Plaintiffs-Appellants).

<sup>78</sup> This first issue was decided in the Second Circuit’s Judgment, at p. 7, fn 3: *Republic of Ecuador v. Chevron Corporation & Texaco Petroleum Company*, 638 F.3d 384 (2d Cir. 17 March 2011), CLA-435, R-247.

<sup>79</sup> *Republic of Ecuador v. Chevron Corporation & Texaco Petroleum Company*, 638 F.3d 384 (2d Cir. 17 March 2011), p. 15, CLA-435, R-247.

- 7.102 The second of these judgments was issued by the US Court of Appeals for the Fifth Circuit on 13 February 2013 in *Republic of Ecuador v Connor*, where Chevron was an intervening party.<sup>80</sup> It related to an application made by the Respondent for discovery under Section 1782 against Mr Connor, for use as evidence in this arbitration under the Treaty. That application was resisted by Mr Connor (with GSI), supported by Chevron.
- 7.103 In its judgment granting the Respondent’s application, the Court (per Jones J) applied the principle of “judicial estoppel”:<sup>81</sup>

*“Judicial estoppel is an equitable doctrine designed to protect the integrity of judicial proceedings by preventing litigants from asserting contradictory positions for tactical gain. The precise rationale for and consequences of the doctrine vary. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (2d ed. 2002 & Supp. 2012) (hereinafter ‘Wright & Miller’). Recognizing this, the Supreme Court examined the doctrine extensively in New Hampshire v. Maine, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), but in the end refused to establish an ‘inflexible formula.’ Relying instead on several factors that often indicate the propriety of the sanction, the Court held that a party may be estopped from asserting a position in a judicial proceeding where it has previously persuaded a court to adopt a clearly contradictory position to the disadvantage of an opponent. See also Reed v. City of Arlington, 650 F.3d 571 (5<sup>th</sup> Cir.2001) (en banc). Reed also notes, ‘Because judicial estoppel is an equitable doctrine, courts may apply it flexibly to achieve substantial justice.’ Id. at 576.”*

- 7.104 The Court decided that there was an inconsistency in Chevron’s statements regarding the status of this arbitration under the Treaty as a ‘foreign or international tribunal’ within the meaning of Section 1782. In other legal proceedings under Section 1782, Chevron (as the applicant) had successfully asserted that this arbitration fell within the legislative definition, whereas in these particular proceedings Chevron (resisting the Respondent’s application) was asserting the contrary. As the judgment states: “Why shouldn’t sauce for Chevron’s goose be sauce for the Ecuador gander as well?”<sup>82</sup> The answer to this question, in addition to other matters decided by the Court, was that it should.

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<sup>80</sup> *Republic of Ecuador v. John A. Connor et. al.*, 2013 W1 539011 (C.A.5 (Tex.)) (5<sup>th</sup> Cir. 13 February 2013), RLA-432.

<sup>81</sup> *Republic of Ecuador v. John A. Connor et. al.*, 2013 W1 539011 (C.A.5 (Tex.)) (5<sup>th</sup> Cir. 13 February 2013), pp. 3-4, RLA-432.

<sup>82</sup> *Republic of Ecuador v. John A. Connor et. al.*, 2013 W1 539011 (C.A.5 (Tex.)) (5<sup>th</sup> Cir. 13 February 2013), p. 4, RLA-432.

- 7.105 The Tribunal does not seek here to apply the doctrine of “judicial estoppel” as recognised by the laws of the USA. International law, not the laws of the USA, is the applicable law in this arbitration. However, it is clear that the mischief which this US doctrine seeks to remedy, by its own nomenclature, is the same as the mischief to be remedied under international law; namely: a deliberate want of good faith by a party’s inconsistent statements calculated to thwart the integrity of the judicial process for its own benefit and to the other party’s prejudice. As Dr Bin Cheng stated (quoted above), the remedy “has its basis in common sense and common justice”; or, more colloquially in the words of the Fifth Circuit, sauce for the goose should also be sauce for the gander.
- 7.106 Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement derived from Article VI of the Treaty. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party’s material advantage or to the other’s material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can ‘have it both ways’ or ‘blow hot and cold’, to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.
- 7.107 The Tribunal here bases its decision on the general principle of good faith under international law applied to the Parties’ obligations under their Arbitration Agreement, rather than upon any specific doctrine derived from the Anglo-Saxon concept of equitable estoppel by conduct or representation. Dr Bin Cheng recognised that, although estoppel is consistent with the general principle of good faith, it is a different doctrine under international law. As Lord McNair wrote in regard to *The Fur Seal Arbitration* (above), that decision did not involve “*estoppel eo nomine*”, but a broader principle precluding a State, in his words, from ‘blowing hot and cold’; i.e. the principle of good faith.
- 7.108 The Lago Agrio Court, by the Lago Agrio Judgment, treated Chevron following the “merger” with Texaco in 2001, as legally indistinct from Texaco and TexPet (as described in Part V above). In particular, it was there decided (inter alia): “ ... the obligation to submit to Ecuadorian justice pending on Texaco Inc. was also

transmitted to new company Chevron Texaco Corporation, *so that consequently Chevron Corp. cannot allege that it never operated in Ecuador to give grounds for lack of a legitimate opposing party*” (see Lines 299 to 302 of Annex 7 to Part V, emphasis here supplied). In other words, the Lago Agrio Judgment treated Chevron as if, like TexPet, it had operated in Ecuador from 1964 onwards as a party to the Concession Agreements of 1964 and 1973, with significant assets in Ecuador. Thus, according to the Lago Agrio Judgment (as upheld by the Lago Agrio Appellate and Cassation Courts), Chevron had assets equating to investments in Ecuador from 1964 onwards.

- 7.109 These statements were unequivocally made in the Lago Agrio Judgment and left intact by the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, forming part of the judicial branch of the Respondent. The acts of its judicial branch are attributable to the Respondent under international law: Article 4(1) of the ILC Articles on State Responsibility. The position of the Respondent by its judicial branch contrasts starkly with the position of the Respondent in this arbitration.
- 7.110 Here, for its jurisdictional objections, the Respondent seeks to distinguish between the respective legal personalities of Chevron and TexPet (as also Texaco). The Respondent then seeks to draw, under Articles 1(1), II(3)(a), II(3)(c), VI(1)(a) and VI(1)(c) of the Treaty as regards relevant “investments”, a material difference between Chevron on the one hand and TexPet (with Texaco) on the other. The Respondent contends unequivocally that, unlike TexPet, Chevron never had any presence in Ecuador, with no assets and no relevant investment in Ecuador. As described above, that difference is contradicted in the Lago Agrio Judgment.
- 7.111 It is impossible for the Tribunal to reconcile the statements in the Lago Agrio Judgment as to the “merger” between Chevron, TexPet and Texaco with the submissions made by the Respondent in this arbitration. The Respondent’s jurisdictional objections to Chevron’s claims are manifestly inconsistent with the unequivocal statements made by the Respondent’s own judicial branch in treating Chevron with TexPet and Texaco for all their activities in Ecuador from 1964 onwards.



- 7.112 Applying the principle of good faith under international law to the exercise of rights and the performance of obligations under the Arbitration Agreement, the Tribunal decides that it is impermissible for the Respondent to ‘blow hot and cold’ or to ‘have it both ways’, to Chevron’s detriment and to the Respondent’s benefit. In other words, the Respondent cannot now defeat, under the principle of good faith, the object and purpose of the Arbitration Agreement derived from Article VI of the Treaty with a jurisdictional objection under Article 21 of the UNCITRAL Arbitration Rules treating Chevron so differently from TexPet and Texaco as regards assets and, therefore, “investments” in Ecuador from 1964 onwards. The Tribunal concludes that the Respondent is required in this arbitration, as a matter of good faith, to treat Chevron as ‘standing in the shoes’ of TexPet (with Texaco), consistently with the statements made and acted upon by the Respondent’s judicial branch in the Lago Agrio Litigation.
- 7.113 The Tribunal has taken fully into account that the principle of good faith may be more cautiously applied to justify a tribunal’s jurisdiction, as compared to other non-jurisdictional issues. Nevertheless, there is no reason why the same principle of good faith should not apply to jurisdiction (or admissibility), as well as to the merits. It did so in the *Kunkel* arbitration decided almost a century ago (1926).
- 7.114 Accordingly, subject to other issues addressed later below, the Tribunal decides that it has jurisdiction over Chevron’s claims under of the Treaty, as it does for TexPet’s claims, under Articles VI(1)(a) and VI(1)(c) of the Treaty.
- 7.115 (5) *The Tribunal’s Conclusion as to “Investment”*: For these several reasons, subject to the following issues, the Tribunal concludes that the Claimants’ cases as regards a relevant investment suffice to meet the Respondent’s jurisdictional objections to the Claimants’ claims under the FET standard in Article II(3)(a) of the Treaty (including protection against denial of justice) and the Umbrella Clause in Article II(3)(c) of the Treaty.
- 7.116 (6) *Judicial Finality (Local Remedies)*: As to the second part of the Respondent’s jurisdictional objections, there is no suggestion in this case that any requirement as to judicial finality has been waived by the Respondent, whether in the Treaty or otherwise. It therefore applies to the Claimants’ claims for denial of justice made under the FET standard in Article II(3)(a) of the Treaty.

7.117 In the Tribunal’s view, it is well settled that a claimant asserting a claim for denial of justice committed by a State’s judicial system must satisfy, whether as a matter of jurisdiction or admissibility, a requirement as to the exhaustion of local remedies or, as now better expressed, a substantive rule of judicial finality.<sup>83</sup> Even the grossest misconduct by a lower court or manifest unfairness in its procedures is not by itself sufficient to amount to a denial of justice by a State, unless the judicial remedies that exist in that State either do not correct the deficiencies in the lower court’s judgment (once exhausted by the foreign national) or are such that none affords to the foreign national any reasonable prospect of correcting those deficiencies in a timely, fair and effective manner.

7.118 In brief,<sup>84</sup> as already summarised above, Chevron contends that it has met the requirement of judicial finality, by its successive but unsuccessful appeals before the Lago Agrio Appellate Court, Cassation Court and (most recently) the Constitutional Court. The Claimants’ counsel, Professor Paulsson, acknowledged that an international wrong for denial of justice does not occur until reasonable attempts have been made by the wronged claimant to secure the local remedies available within the State’s own local legal system. However, Professor Paulson also submitted that a claimant is not required to exhaust any local remedy that offers no reasonable prospect of success. The requirement is limited to “reasonable attempts” to right the wrong within the State’s own legal system.<sup>85</sup>

7.119 In brief,<sup>86</sup> as also summarised above, the Respondent contends that Chevron has not met the requirement of judicial finality, thereby precluding its claims for denial of justice *in limine* (whether as a matter of jurisdiction or admissibility).

7.120 At the Track II Hearing, the Respondent’s Counsel, Professor Mayer, accepted that a judicial remedy would not need to be pursued “in the absence of a reasonable

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<sup>83</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), explains that a claim is inadmissible if any available and effective local remedy has not been exhausted “when the claim is one to which the rule of exhaustion of local remedies applies” (Article 44). The rule does not, of course, apply where an initial defect in a lower is corrected by an appellate court because there can then be no claim for denial of justice. The Tribunal also acknowledges the scholarly debate between the two concepts underlying this rule: the procedural concept and the substantive concept. In the absence of waiver, that debate is not relevant to the present case; and the Tribunal does not therefore need to address it here.

<sup>84</sup> C-TI Jan. 2014, Section III.D; and C-TII Jan. 2015, Sections VIII, IX and X.

<sup>85</sup> Track II Hearing D1.144ff; see also J. Paulsson, *Denial of Justice* (2005), p. 130, RLA-61.

<sup>86</sup> R-TII Feb. 2013, paras 220ff.

possibility of effective redress.”<sup>87</sup> The Respondent contends that Chevron failed reasonably to pursue its effective legal remedies within the Ecuadorian legal system, particularly (as regards the alleged denial of justice) under the Ecuadorian Collusion Prosecution Act (the “CPA”). The Respondent also contends that Chevron’s failure to request the Lago Agrio Appellate Court to fix the amount of a bond and to pay such bond, so as to suspend the enforceability of the Lago Agrio Judgment, led to the alleged injury of which the Claimants complain. It was, according to the Respondent, “an intervening direct and immediate cause of the enforceability of the Judgment, breaking the ‘causal nexus’ required for a showing of denial of justice”.<sup>88</sup> At the Track II Hearing, the Respondent also invoked Chevron’s incomplete proceedings before the Constitutional Court, a submission no longer relevant with the Constitutional Court’s Judgment of 27 June 2018.

7.121 The Tribunal refers to the classic statement as to judicial finality in the final award of the NAFTA tribunal in *Loewen v USA* (2003), where the claimants were held to have failed to comply with the substantive rule of judicial finality by not appealing to the US Supreme Court:<sup>89</sup>

*“154. No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State’s legal system.”*

*“156. The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision ...”*

*“215. Here we encounter the central difficulty in Loewen’s case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the [US] Supreme Court option ...”*

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<sup>87</sup> Track II Hearing D1.211.

<sup>88</sup> R-TII Feb. 2013, para 225; R-TII Nov. 2014, para 239.

<sup>89</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, paras 154, 156, 215 & 217, CLA-44; see also Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, CLA-425; Decision on Respondent’s Request for a Supplementary Decision, 6 September 2004, CLA-643; *Loewen v. United States*, No. 04-2151, Mem. Op. (D.C. 31 October 2005), CLA-644.

“217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.”

This decision was made unanimously by three eminent and experienced jurists, of great renown. It remains the lodestar relevant to the specific issue here under consideration.<sup>90</sup> The Tribunal does not understand from the Parties’ submissions that there exists any material difference between them as to the applicable legal principle, as expressed in *Loewen*. Their differences arise from its application to the facts of the present case.

7.122 For the present case, the Tribunal considers that the crucial part of the statements in *Loewen*, is that the availability of a local remedy “is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in light of its situation...”<sup>91</sup> As also stated above, the local remedy must be available as “an effective and adequate appeal within the State’s legal system.” It clearly does not include any ineffective or inadequate or, equally, any untimely remedy. The test is similarly expressed in the later awards in *Jan de Nul* (2008) and *Pantechniki* (2009).

7.123 In the Tribunal’s view, the overall test for such availability is that of reasonableness applied to the complainant, assessed at the relevant time. Applied to the present case, it would be wrong in principle to require Chevron to have pursued at the time any local remedy in Ecuador that lacked any reasonable prospect of a timely, effective and adequate protection against the enforcement of the Lago Agrio Judgment within and, especially, without Ecuador. As with all its allegations, the legal burden of proving such ineffective protection, once a potential procedure has been identified by the Respondent, rests upon Chevron under Article 24(1) of the UNCITRAL Arbitration Rules.

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<sup>90</sup> The same approach was taken in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras 256-258, CLA-230 (The ICSID tribunal included Professor Mayer, who preaches what he practises); as also in *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para 96, RLA-17 (The ICSID tribunal comprised a sole arbitrator, Professor Paulsson, who also preaches what he practises).

<sup>91</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, para 169, CLA-44.

- 7.124 In the light of the statements in *Loewen*, the Tribunal addresses the application of this requirement of judicial finality to: (i) the Bond, (ii) the CPA and (iii) the Constitutional Court, as invoked by the Respondent.
- 7.125 (i) *The Bond*: The enforcement of the Lago Agrio Judgment was suspended pending Chevron's appeal to the Lago Agrio Appellate Court. The Appellate Court issued its judgment, dismissing Chevron's appeal from the Lago Agrio Judgment, on 3 January 2012.<sup>92</sup> It issued its Clarification Order on 13 January 2012.<sup>93</sup> On 20 January 2012, Chevron filed a cassation appeal with the Appellate Court (of some 176 pages). Chevron there requested the Appellate Court (inter alia) to suspend the enforcement of its judgment (thereby continuing the suspension of the Lago Agrio Judgment's enforcement) and to declare that there was no requirement for Chevron to post a bond to suspend the Appellate Court's Judgment.<sup>94</sup>
- 7.126 On 17 February 2012, the Appellate Court refused Chevron's request to suspend the enforcement of its judgment pending Chevron's cassation appeal. The Appellate Court decided also that its judgment would have been suspended pending the cassation appeal (thereby suspending the enforcement of the Lago Agrio Judgment) if Chevron had requested the posting of a bond and had posted a bond, which it had not done.<sup>95</sup> On 24 February 2012, Chevron requested the Appellate Court to revoke its order of 17 February 2012.<sup>96</sup> By order of 1 March 2012, the Appellate Court rejected Chevron's request, confirming the non-suspension of its judgment. It thereby declared the enforceability of the Lago Agrio Judgment.<sup>97</sup>
- 7.127 By the time of the Lago Agrio Appellate Court's order of 1 March 2012, this Tribunal, in order to preserve the rights of the Parties pending its decision on the merits, had already issued interim measures requiring the Respondent (including its judicial branch) not to permit the enforceability of the Lago Agrio Judgment: see its Orders and Interim Awards on Interim Measures of 28 January 2011, 9 February 2011, 16 March 2011, 25 January 2012 and 16 February 2012.<sup>98</sup> As already indicated above, the

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<sup>92</sup> C-991.

<sup>93</sup> C-2314; R-299.

<sup>94</sup> C-1068, Section C: "Suspension of Enforcement of Judgment pending Resolution of the International Arbitration pursued by Chevron against the Republic of Ecuador" (pp. 160ff).

<sup>95</sup> See C-1114, p. 5.

<sup>96</sup> C-1114.

<sup>97</sup> C-1114 (updated).

<sup>98</sup> These are listed in Annex 1 to Part I of this Award.

Tribunal had secured Chevron's cross-undertaking in damages for these interim measures with an order that the Claimants pay US\$ 50 million to the PCA, which was duly paid by the Claimants and is held to the order of the Tribunal in this arbitration.

7.128 One of the grounds invoked by Chevron in support of its application of 20 January 2012 to the Lago Agrio Appellate Court was that the effect of this Tribunal's orders and awards, particularly its Order of 9 February 2011, was that the enforcement of the Lago Agrio Judgment was "currently suspended" by the Tribunal. At page 160 of its cassation appeal, Chevron pleaded:

*“(a) That the appellate judgment shall not be enforced because its enforcement is currently suspended by order of the Arbitral Tribunal at The Hague;*

*(b) That, as a consequence of the foregoing, the [Appellate Court] declare that there is no requirement to post a bond to suspend enforcement of the judgment; ...*

*(d) That the [Appellate Court] Clerk refrain from certifying that the judgment is enforceable;*

*(e) That in the court order by which the Appellate Court declares that enforcement of the judgment is currently suspended, it orders the enforcement judge to refrain from issuing any order that initiates a proceeding for enforcement of the same; ...”*

7.129 On 30 May 2012, consistent with the order of the Lago Agrio Appellate Court of 1 March 2012, the Lago Agrio Plaintiffs began enforcement proceedings in Canada, followed by enforcement proceedings in Brazil on 27 June 2012. On 3 August 2012, the Lago Agrio Court (i.e. the enforcement judge) ordered the enforcement of the Lago Agrio Judgment in the total amount of US\$ 19,041,414,529.00, payable by Chevron within 24 hours.<sup>99</sup>

7.130 The Respondent (by its judicial branch), in declaring the Lago Agrio Judgment to be enforceable with the Lago Agrio Appellate Court's order of 1 March 2012 and the Lago Agrio Court's enforcement order of 3 August 2012, did not comply with this Tribunal's Orders and Interim Awards.<sup>100</sup>

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<sup>99</sup> C-1404.

<sup>100</sup> In its Fourth Interim Award, the Tribunal decided that the Lago Agrio Judgment was made "final, enforceable and subject to execution within Ecuador by the Respondent no later than 3 August 2012". The Tribunal relied (inter alia) upon the Respondent's submissions at the hearing on 11 February 2012 (see February Hearing

- 7.131 The Tribunal recognised at the time of its orders and awards (as it does still) that national courts have legal responsibilities to discharge under their State's laws and constitution; that the exercise of such responsibilities may impinge upon the rights of third parties; and that in this new world of interaction between international tribunals and national courts, there is a need to proceed with mutual respect and sensitivity to each other's functions. Nonetheless, when the State has chosen to establish procedures in parallel to its national court system (as it has here under the Treaty), it is incumbent on the State to ensure that the commitments that it has agreed are not defeated or subverted by actions of its national agencies, including its judicial branch.
- 7.132 Before 1 March 2012, as already indicated, this Tribunal had ordered the Respondent, under its several orders and awards on interim measures, not to declare the Lago Agrio Judgment enforceable. Chevron was entitled to rely upon those orders and awards, which were legally binding upon the Respondent under the Arbitration Agreement to which the Respondent had decided to commit itself. Moreover, given that the Respondent (by its judicial branch) knowingly did not comply with these orders and awards, it would be inappropriate for the Respondent now to profit from its own wrong under the general principle of international law known by its Latin maxim: *nullus commodum capere de sua injuria propria*.<sup>101</sup>
- 7.133 The Tribunal also relies upon two further factors. First, at the time (after the Lago Agrio Appellate Court's judgment), there were insufficient prospects of favourable relief on Chevron's appeal to the Cassation Court. Such a cassation appeal could not be a full appeal addressing Chevron's multiple complaints regarding the Lago Agrio Litigation and Lago Agrio Judgment. Apart from relief against punitive damages ordered by the Lago Agrio Judgment, this was later to prove to be the case.
- 7.134 Second, the amount of the bond would, on the case advanced by both the Claimants and the Respondent, have been so high as to amount to a practical denial of access to the Cassation Court by Chevron. Dr Coronel testified that the amount of the bond would have been between US\$ 1.9 billion and US\$ 14.6 billion.<sup>102</sup> At the Track II Hearing, the Respondent's Counsel stated that the amount of the bond would have

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D1.167ff). For present purposes, the difference of some four months between 1 March and 3 August 2012 is not material.

<sup>101</sup> B. Cheng, *General Principles of Law, as Applied by International Courts and Tribunals* (1953, reprinted 1987), p. 149, CLA-108.

<sup>102</sup> Coronel ER 5, paras 16 & 113.

been fixed in an amount between 1% and 5% of the amounts at stake.<sup>103</sup> Applied to the Lago Agrio Judgment, as affirmed by the Appellate Court in the total sum of US\$ 18 billion, the amount of the bond would have been between US\$ 180 million and US\$ 14.6 billion. These are not trifling amounts.

7.135 In the circumstances prevailing at the time, the Tribunal does not consider it reasonable to require Chevron to have posted a bond of this size so as to suspend the enforcement of the Lago Agrio Judgment, as affirmed by the Lago Agrio Appellate Judgment. Moreover, upon the exhaustion of Chevron's appellate remedies with the Constitutional Court's Judgment of 27 June 2018, the failure to post a bond has now no legal significance: such a bond could only have suspended the enforcement of the Lago Agrio Judgment pending the completion of the appellate process; and the failure to exhaust a local remedy does not extinguish the underlying international wrong.

7.136 (ii) *The Collusion Prosecution Act (CPA)*: Under Article 6 of the Collusion Prosecution Act (CPA), a party claiming to be the victim of collusive legal proceedings before an Ecuadorian Court may impugn the resulting judgment. It provides: "If the grounds for the claim are confirmed, measures to void the collusive proceeding will be issued, invalidating the act or acts ... and redressing the harm caused... and, as a general matter, restoring the things to the state prior to the collusion". Articles 4 and 5 of the CPA permit the complaining party to present evidence and participate in a hearing under the CPA; and Articles 6 and 7 specify the CPA's remedies, including the judgment's nullification, damages against and imprisonment of the miscreants.<sup>104</sup>

7.137 In its judgment of 12 November 2013, the Cassation Court referred to the CPA, as follows (with footnotes here omitted):<sup>105</sup>

*"... When collusion is an independent action governed by our Ecuadorian legislation, it is so regulated under the Collusion Prosecution Act; and, as stated by this Division of the Court, it is not possible to seek the cassation of a judgment by making these kinds of allegations ... Therefore, the affirmation made by the court of appeals is the correct one, as it is not within its scope of that court to have jurisdiction to hear collusive action cases within a summary verbal*

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<sup>103</sup> Track II Hearing D1.221.

<sup>104</sup> Ley para el Juzgamiento de la Colusion (Collusion Prosecution Act), as amended on 9 March 2009, Registro Oficial 269 de 3 de febrero de 1977 (Ecuador), RLA-493. The CPA's relevant provisions are set out in full above in Part III of this Award, with both the English translation and the Spanish original text.

<sup>105</sup> C-1975, p. 95. (The CPA had not been cited in the Lago Agrio Appellate Court's Judgment).



*proceeding, or procedural fraud, judges' behaviors, proper and improper meetings, the appointment of substitute judges, plaintiffs' connivance, among other allegations made by the appellant company ..."*

- 7.138 The Tribunal found this passage, at first, difficult to follow. To the Tribunal's understanding, the Cassation Court was here deciding that cases of collusion under the CPA are reserved to the exclusive jurisdiction of judges vested with jurisdiction under the CPA in respect of the matters described in this passage. Accordingly, in respect of such matters, these CPA judges have exclusive jurisdiction as a first instance court, although eventually their decisions may be subject to successive appeals within the Ecuadorian judicial system.
- 7.139 This difficulty was resolved by the Judgment of the Constitutional Court. The Court there unequivocally confirmed that the Cassation Court was correct in deciding that it lacked any jurisdiction to address or redress "the arguments expounded by Chevron" (as also the Constitutional Court), with Chevron's only remedy available before CPA judges under the CPA: see the extracts from Chapter 2 of its Judgment in Part V above.
- 7.140 In his sixth expert report of 7 May 2014 (with footnotes here omitted), Dr Coronel testified as to 'how an action under the CPA operates':<sup>106</sup>

*"32. The action for collusion must be filed before a civil judge. That judgment issued by the trial court judge may be appealed before the respective Provincial Court, and the appellate court judgment may be appealed by cassation before the National Court of Justice. Finally, even after the decision of the National Court of Justice is rendered, it could be possible to file an extraordinary action for protection before the Constitutional Court.*

*33. Chevron has asked me to explain whether or not interim measures may be granted within a collusion action. Specifically, Chevron has asked me to explain if a plaintiff in an action for collusion, brought [regarding] a trial in which there has allegedly been procedural fraud, whose judgment is in the process of being enforced within and without Ecuador, could obtain any interim measure suspending the enforcement of this judgment. In my opinion, the answer is no.*

*34. First, none of the applicable rules on preventive measures grants a judge the power to order the suspension of a judgment that has been declared to be enforceable by another court. There are no specific norms regarding interim measures in the Collusion Act, but the same law states that the Code of Civil*

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<sup>106</sup> Coronel ER 6, paras 32-37.

*Procedure applies in a subsidiary manner where there are no other express provisions in the law.*

*35. According to the Code of Civil Procedure, there are only four types of preventive measures that a party can seek in any state of a lawsuit: (i) the sequestration of a thing, (ii) the withholding of funds, credits, or assets, (iii) the prohibition to sell real property, and the (iv) prohibition from leaving the country. The types of interim measures are thus circumscribed by law; indeed, recognizing the limited nature of the powers of Ecuadorian judges regarding interim measures, several bills have suggested that such powers be broadened, but they have not passed. None of these four possible preventive measures are a mechanism to suspend the enforcement of a decision.*

*36. Second, under the hypothetical presented, there would not be any interim measures available because none of the requisites established by law would be in place for them to be ordered. Three of these measures (the attachment, seizure, and prohibition from leaving the country) require the existence of a credit in favor of the petitioner to be granted. A credit is a personal right which may be demanded by creditor to debtor, who must give something or do or refrain from doing something. A debt or a judgment are credits, but a right of action or a pending lawsuit are not credits. In this hypothetical case, there would be no credit in favor of petitioner. In the case of the restraining order against selling, to obtain it, the existence of a credit must be evidenced or it must be proven that a lawsuit concerning specific property is taking place and that the restraining order against selling concerns that property. In the hypothetical case presented to me, those conditions or requirements were not present.*

*37. Finally, [judicial] practice confirms what I have stated. I am unaware of any case or precedent in which the Ecuadorian courts have issued an order of this nature.”*

7.141 In brief, Chevron contends that collateral (or parallel) proceedings under the CPA would have been “a wild goose chase”.<sup>107</sup> Such proceedings would have involved a personal claim against Judge Zambrano and like claims against other alleged miscreants, in separate independent proceedings.<sup>108</sup> Such proceedings would not have suspended the enforcement of the Lago Agrio Judgment, within or, particularly, without Ecuador in an effective and timely manner.

7.142 In brief, the Respondent contends that proceedings under the CPA were an available local remedy (until time-barred) that would have permitted Chevron to address and, if supported by persuasive evidence, obtain effective redress for its claims for ‘fraud’ in

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<sup>107</sup> Track II Hearing D1.144.

<sup>108</sup> Track II Hearing D1.155-156.

the Lago Agrio Litigation and the ‘ghostwriting’ of the Lago Agrio Judgment.<sup>109</sup> The Respondent also submits that Chevron’s chances of success under the CPA were not “tiny”.<sup>110</sup>

7.143 In its Track II Rejoinder, the Respondent acknowledged that a judgment from the CPA would take about 18 months, followed by successive appeals within the Ecuadorian legal system.<sup>111</sup> At the Track II Hearing, the Respondent acknowledged that, on average, CPA proceedings take 17 months, with the CPA judgment only becoming enforceable later by order of the first instance Appellate Court.<sup>112</sup>

7.144 The Tribunal accepts Dr Coronel’s expert testimony that there was no possibility of interim measures under the CPA protecting Chevron’s position during the pendency of any CPA proceedings and any subsequent appeals.

7.145 The Tribunal does not consider that any proceedings under the CPA, at the material time, could reasonably have been expected to result in any sufficient remedy for Chevron. It would have necessarily comprised one or more separate, collateral proceedings; but, above all, the timing of any CPA proceedings made them ineffective as a remedy for Chevron against the enforceability of the Lago Agrio Judgment. Moreover, collusive action cases may be appropriate where it is alleged that there is collusion between parties, witnesses or legal representatives; but where the complaint raises procedural fraud, judicial misconduct and corruption within the Court itself, the State cannot leave remedial action to the efforts of private litigants – the State has its own responsibility to act by its several investigatory, prosecutorial and judicial agencies.

7.146 As regards timing, it was essential that the risk of enforcement of the Lago Agrio Judgment, which could have been disastrous for Chevron (as envisaged in the Invictus Memorandum), be removed whilst the serious allegations of gross procedural and judicial improprieties in the Lago Agrio Court were addressed within the Ecuadorian legal system. That was not possible, given the fact that the Lago Agrio Judgment became enforceable under Ecuadorian law and, thus, enforceable outwith Ecuador on

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<sup>109</sup> Track II Hearing D1.200-201.

<sup>110</sup> Track II Hearing D1.212.

<sup>111</sup> R-TII Mar. 2015, para 80.

<sup>112</sup> Track II Hearing D13.2981.

1 March 2012 (see above).<sup>113</sup> There was, therefore, insufficient time to complete any CPA proceedings (including one or more appeals) before the Lago Agrio Judgment became enforceable, with enforcement proceedings beginning shortly thereafter on 30 May 2012.

7.147 There is therefore no reason to assume, assessed objectively at the time, that any collateral (or parallel) relief under the CPA could have protected Chevron from the enforcement of the Lago Agrio Judgment in a sufficiently timely, effective and adequate manner. The Tribunal also notes the statement, in *Pantechniki*, that it may not be necessary for a claimant to resort to “oblique or indirect applications to parallel jurisdictions”.<sup>114</sup>

7.148 In the circumstances prevailing at the time, the Tribunal does not consider it reasonable to require Chevron to have begun collateral proceedings under the CPA in an attempt to suspend the enforcement of the Lago Agrio Judgment, as affirmed by the Lago Agrio Appellate Judgment.

7.149 (iii) *The Constitutional Court*: On 23 December 2013, Chevron submitted to the Constitutional Court its “extraordinary action for protection” impugning, on constitutional grounds, the Lago Agrio Judgment. As at the Track II Hearing, Chevron’s application remained pending before the Constitutional Court.<sup>115</sup> At that time, there was no information available to the Claimants as to when the Constitutional Court was likely to arrive at any decision.

7.150 Subsequently, there was a procedural hearing on 16 July 2015 before the Constitutional Court; on 2 October 2015, the Constitutional Court’s Secretary-General advised the Parties that the Court had received the Presiding Judge’s draft ruling; on 25 July 2017, the Court advised the Parties that it would require a further hearing, at a date to be fixed; but no hearing date had been fixed as at April 2018.<sup>116</sup> According to the Respondent’s letter dated 20 April 2018, the Constitutional Court’s judgment “ought to be forthcoming in the coming months or year”.

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<sup>113</sup> Track II Hearing D13.2963.

<sup>114</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para 96, RLA-17.

<sup>115</sup> Track II Hearing D1.198, D12.2771.

<sup>116</sup> The Tribunal refers to the Claimants’ letter dated 19 March 2018, p. 2.

- 7.151 As already indicated in Part V above, the Constitutional Court held a public hearing on 22 May 2018; and it issued its Judgment on 27 June 2018.<sup>117</sup>
- 7.152 The Tribunal considers that Chevron’s action before the Constitutional Court did not offer to Chevron any timely and effective remedy for the Lago Agrio Judgment within the Ecuadorian legal system. As already indicated, the Lago Agrio Judgment became enforceable on 1 March 2012; foreign enforcement proceedings were commenced on 30 May 2012; and the Lago Agrio Judgment’s execution was ordered against Chevron and TexPet in Ecuador on 3 August and 15 October 2012. The Constitutional Court’s Judgment was issued more than 4½ years after Chevron commenced its action before the Court; and its action was dismissed by the Court. The Tribunal also notes the statement in *Jan de Nul v Egypt* (supra) that “it would make no sense to insist upon the exhaustion of remedies that are unavailable precisely because the issuance of an appealable decision is delayed”.<sup>118</sup>
- 7.153 Accordingly, the Tribunal does not consider it reasonable to require Chevron to have awaited the result of its action before the Constitutional Court before pursuing its claims in this arbitration under Article II(3)(a) of the Treaty (including its protection against denial of justice. In any event, given its action’s dismissal, Chevron has exhausted its remedies within the Ecuadorian judicial system comprising the Lago Agrio Appellate, Cassation and Constitutional Courts.
- 7.154 (7) *The Tribunal’s Conclusion as to Judicial Finality*: The Tribunal rejects the Respondent’s objections, both as to jurisdiction and admissibility, based on Chevron’s failure to exhaust local remedies or to satisfy the requirement of judicial finality for its claims for denial of justice under the FET standard in Article II(3)(a) of the Treaty.
- 7.155 (8) *Amendment of the Claims*: The Tribunal turns to the third part of the jurisdictional objection to the Claimants’ claims for denial of justice under Article II(3)(a) of the Treaty, as here also raised by the Tribunal upon its own initiative. Further, although not expressly pleaded by the Respondent as a jurisdictional objection, possibly because the Respondent also amended its defence during the course of these proceedings (albeit with no objection by the Claimants), the Tribunal considers it

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<sup>117</sup> C-2551.

<sup>118</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para 256, CLA-230.

appropriate to treat the Respondent's jurisdictional objections as implicitly including this third part.

7.156 The Claimants' claims for denial of justice under the FET standard in Article II(3)(a) of the Treaty, based on the alleged 'ghostwriting' of the Lago Agrio Judgment, were not pleaded in their original Notice of Arbitration submitted under Article 2 of the UNCITRAL Arbitration Rules. Nor could they be. The Claimant's Notice was submitted on 23 September 2009. The Lago Agrio Judgment was subsequently issued on 14 February 2011 and declared to be enforceable on 1 March 2012 by the Lago Agrio Appellate Court. Within five weeks, on 20 March 2012, the Claimants introduced Chevron's claims for denial of justice in this arbitration by their Supplemental Memorial on the Merits, as thereafter supplemented in writing and orally up to and including the Track II Hearing.<sup>119</sup>

7.157 A similar timing analysis applies, *mutatis mutandis*, to the Claimants' claims under the Umbrella Clause in Article II(3)(c) of the Treaty regarding the 1995 Settlement Agreement. That alleged breach of the Treaty took place not before the Lago Agrio Judgment of 14 February 2011 and crystallised on 1 March 2012 with the order of the Lago Agrio Appellate Court declaring the Lago Agrio Judgment enforceable.

7.158 The question arises whether these new claims can be maintained by the Claimants as an amendment to their pleadings under (i) Article 20 of the UNCITRAL Arbitration Rules; (ii) the Treaty; and (iii) Dutch law as *the lex loci arbitri*. The Claimants submit they can. As already explained above, even without the Respondent's express jurisdictional objection, the Tribunal has a duty to check its jurisdiction upon its own initiative, as it sought to do with the Parties at the Track II Hearing.<sup>120</sup>

7.159 (i) *The UNCITRAL Arbitration Rules*: Article 20 of the UNCITRAL Arbitration Rules provides:

*“During the course of the arbitral proceedings, either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may*

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<sup>119</sup> C-Mer. Mar. 2012, para 257(4), re-pleaded in C-TII June 2013, and C-TII May 2014, at paras 424(5) and 199(A)(1) respectively.

<sup>120</sup> See Track II Hearing D1.170-171, D9.2124 and D12.2640.

*not be amended in such a manner that it falls outside the scope of the arbitration clause or separate arbitration agreement.”*

7.160 Article 20 entitles a claimant to amend its claim without the prior permission of the arbitral tribunal. The word “claim” in Article 20 signifies the claimant’s statement of claim, as does “defence” the respondent’s statement of defence (or counterclaim), whether in their original form or as supplemented under Article 22 of the UNCITRAL Arbitration Rules. The amendment is not limited to a specific claim or specific defence already pleaded by a party.<sup>121</sup> In principle, therefore, a claimant has the right to amend its pleaded case at any time (subject to the tribunal’s procedural orders otherwise), including matters occurring after the notice of arbitration. Having done so, the tribunal has a discretionary power to disallow such an amendment by virtue of any of the three factors listed in Article 20; namely (i) delay; (ii) prejudice; and (iii) other circumstances.

7.161 As regards the fourth factor (where the tribunal has no discretion), jurisdiction, the Tribunal notes that it requires that the amended claim should “not fall outside the tribunal’s jurisdiction under the arbitration clause or agreement”.<sup>122</sup> Thus, the jurisdictional difficulty that can arise in an ad hoc arbitration, resulting from the difference between the scope of the arbitration clause and the scope of the reference under that clause, does not arise in an UNCITRAL arbitration with Article 20 of the UNCITRAL Arbitration Rules.<sup>123</sup>

7.162 In the Tribunal’s view, there is no difficulty arising from the interpretation of Article 20 of the UNCITRAL Arbitration Rules. Any difficulty arises from its application to the present case.

7.163 The application of Article 20 was considered by the UNCITRAL tribunal in *American Bank v Slovakia* (2014). The respondent had there amended its statement of

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<sup>121</sup> J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (1991), p. 135; S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992), pp. 91-94, CLA-34, RLA-447; D. Caron & L. Kaplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (2013), pp. 467ff; T. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (2010), pp. 322ff.

<sup>122</sup> S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992), p. 93, CLA-34, RLA-447; D. Caron & L. Kaplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (2013), p. 468.

<sup>123</sup> This old common law rule, as regards English law, is addressed in M. Mustill & S. Boyd, *Commercial Arbitration* (1982), pp. 93ff.

defence to add a late jurisdictional objection. The tribunal decided (with footnotes here omitted):<sup>124</sup>

*“115. The Tribunal considers that what is now explicit in Article 23(2) of the 2010 Rules was implicit in [Article 20 of] the 1976 Rules. To preclude a respondent from making a jurisdictional objection after it submitted its statement of defence when that objection concerned facts which arose only after the date on which that statement was filed would involve a grave injustice. That injustice would be particularly grave where, as here, the new facts involve conduct on the part of the Claimant which the Claimant chose not to notify to the Respondent or the Tribunal. The Tribunal notes that the leading commentary on the UNCITRAL Rules [citing D. Caron & L. Kaplan] points out that the Conference which adopted the 1976 Rules considered that the inclusion of a provision in what became Article 21(3) of the 1976 Rules expressly permitting a tribunal to allow a late jurisdictional plea was unnecessary, because the provision on amendment in Article 20 and the broad general power of the tribunal ‘to conduct the arbitration in such manner as it considers appropriate’ were sufficient. The commentary concludes: ‘The last sentence of Article 23(2) [of the 2010 Rules] thus expressly states what was previously only implicit under the 1976 UNCITRAL Rules: that the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence.’*

*116. In consequence, the Tribunal finds that the 1976 UNCITRAL Rules do not bar a party from raising a jurisdictional objection based upon facts which came into existence, or which it could have discovered by reasonable inquiry, only after the filing of a statement of defence.”*

7.164 It would be possible here to cite at length similar decisions on the application of Article 20 of the UNCITRAL Arbitration Rules made by other UNCITRAL tribunals. It is unnecessary to do so: the legal materials on the interpretation and application of Article 20 amount to a liberal or pragmatic ‘jurisprudence constante’ already evident from its own terms.

7.165 As to the first factor of “delay”, the Tribunal does not consider that the Claimants were guilty of any material delay. They amended their case as promptly as they reasonably could on 20 March 2012, following the Lago Agrio Appellate Court’s order declaring the Lago Agrio Judgment enforceable on 1 March 2012.

7.166 Moreover, the Claimants had earlier pleaded in their Notice of Arbitration of 23 September 2009 other claims advanced under the FET standard in Article II(3)(a) of

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<sup>124</sup> *European American Bank v Slovakia*, PCA Case No 2010-17, Second Award on Jurisdiction of 4 June 2014, paras 115-116.



the Treaty.<sup>125</sup> The Notice of Arbitration pleaded a “judicial farce” in the Lago Agrio Litigation.<sup>126</sup> Its allegations related to (inter alia) the Cabrera Report and other misconduct by the Lago Agrio Court, amounting to serious allegations of gross procedural and judicial improprieties.<sup>127</sup> It raised complaints regarding the 1995 Settlement Agreement.<sup>128</sup> The amended claims of 20 March 2012 for denial of justice regarding the Lago Agrio Judgment were made under the same FET standard, materially similar to the Claimants’ claims pleaded in 2009 (as supplemented by their subsequent pleadings prior to March 2012).

7.167 As to the second factor, “prejudice”, the Tribunal does not consider that the Respondent has suffered any material prejudice from the Claimants’ amended claims. In particular, the Respondent has been afforded a full opportunity in Track II to address the Claimants’ amended claims and to present its own case, as required by Article 15(1) of the UNCITRAL Arbitration Rules, including the Track II Hearing.

7.168 As to the third factor, “any other circumstances”, the Tribunal considers that no such circumstance exists for the Tribunal to disallow the Claimants’ amended claims. In particular, this is not a case where a new disputing party has sought to join as a co-claimant, or where an existing party advances an entirely new claim wholly unrelated to the parties’ existing dispute. The Claimants’ amended claims in regard to the Lago Agrio Judgment (as affirmed by the Lago Agrio Appellate Court) were made by existing claimants advancing claims under the same FET standard in Article II(3)(a) and the same Umbrella Clause in Article II(3)(c) of the Treaty. These amended claims arose from the same evolving dispute between the same disputing parties that had led directly to the issuance and enforcement of the Lago Agrio Judgment in the same Lago Agrio Litigation.

7.169 Moreover, from the time when this Tribunal was appointed in 2010, it was evident that the Lago Agrio Judgment was a likely imminent event, with the potential to inflict grave harm not only to the Claimants (particularly Chevron) but also, paradoxically, to the Respondent also. That is why, so as to maintain the *status quo* and to avoid the aggravation of the Parties’ dispute, the Tribunal made its several orders and awards for

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<sup>125</sup> C-NoA Sept. 2009, paras 69 & 76(2).

<sup>126</sup> C-NoA Sept. 2009, para 44.

<sup>127</sup> C-NoA Sept. 2009, paras 47-54.

<sup>128</sup> C-NoA Sept. 2009, para 3, 4, 14-21, 32-35 & 68ff.

interim measures intended temporarily to preclude the Lago Agrio Judgment's issuance and enforcement by the Respondent's judicial branch. The Claimants' amended claims following the Lago Agrio Judgment did not therefore fall unexpectedly from a clear blue sky in this arbitration. These amended claims were a foreseeable evolution of the Parties' existing dispute; and they did not transform the Claimants' case against the Respondent in this arbitration into an entirely new and different dispute.

7.170 Further, in all the circumstances, the Tribunal considers that it would be an unreasonable, if not absurd, result for the Claimants to advance their amended claims as new claims in a new arbitration before a new arbitral tribunal, at unnecessarily greater expense and delay, with the risk of inconsistent decisions. It could serve no useful purpose to any of the Parties. If the Claimants had sought to do so, the Respondent would have had every right to object to such an abuse of process. There is an overall balancing exercise to be performed by the Tribunal in the exercise of its discretion as a matter of common sense, under this third factor in Article 20 of the UNCITRAL Arbitration Rules.

7.171 In this regard, the Tribunal notes the award in *Encana v Ecuador* (2006),<sup>129</sup> where the UNCITRAL tribunal decided:

*“... a balance must be struck between, on the one hand, unreasonably requiring that new proceedings be commenced where the substance of a claim of breach of the BIT [the Ecuador-Canada BIT] may arguably have been made out or very nearly made out, and subsequent events put the question of breach beyond doubt, and, on the other, allowing what are in essence new claims or new causes of action which in reality have no real relation to the events initially relied upon, to be added onto existing proceedings on the basis of events subsequent to the commencement of proceedings.”*

In this arbitration, as a matter of reasonableness and common sense, the Tribunal strikes that balance towards the first and not the second of these two alternatives.

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<sup>129</sup> *EnCana Corporation. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, para 164, RLA-41. The tribunal there referred the ICJ's decision in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ, Judgment, 26 June 1992, 1992 ICJ Reports 240, paras 62-70, declaring claims not included in the original application inadmissible insofar as they constituted “both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim” (para 70). See also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL (Ad hoc), Decision on Objections to Jurisdiction, 20 July 2006, para 101, CLA-631.

7.172 As to the fourth factor in Article 20 of the UNCITRAL Arbitration Rules, the Tribunal has decided above in favour of its jurisdiction (with admissibility) to decide the Claimants' claims. Thus, in relation to the Lago Agrio Judgment, Article 20 does not require the Tribunal to disallow the Claimants' amended claims for want of jurisdiction under the Arbitration Agreement.

7.173 (ii) *The Treaty*: As to the Treaty, the Parties' Arbitration Agreement expressly incorporates the UNCITRAL Arbitration Rules. Thus, by consent from the outset of these arbitration proceedings, the right of any Party to amend its pleaded case (whether it be as claimant or respondent) was governed by Article 20 of the UNCITRAL Arbitration Rules, as a self-contained procedural code. Provided the amendment meets the requirements of Article 20 (including jurisdiction and admissibility), the Tribunal considers that nothing in the Treaty precludes such an amendment, even in regard to an event occurring after the arbitration's commencement. Thus, the Tribunal sees no cause under the Treaty barring the Claimants' amended claims under Articles II(3)(a) and II(3)(c) of the Treaty in regard to the Lago Agrio Judgment.

7.174 The Tribunal has also considered the position under international law generally, in the absence of Article 20 of the UNCITRAL Arbitration Rules.

7.175 In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice observed:<sup>130</sup>

*“When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court’s jurisdiction and whether consideration of those later facts or events would transform the ‘nature of the dispute’ ....”*

7.176 The International Court of Justice has considered claims based on facts that occurred after the filing of the Application on multiple occasions. For example, in *Fisheries Jurisdiction (Germany v. Iceland)*, Germany raised claims based on acts that post-

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<sup>130</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ, Judgment, 4 June 2008, 2008 ICJ Reports 177, para 87.

dated its Application. The Court had no difficulty in deciding that it had jurisdiction over these claims, explaining:<sup>131</sup>

*“The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland’s extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court’s jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961.”*

7.177 Similarly, in *LaGrand (Germany v. United States)*, Germany made a submission based entirely on facts that occurred after the filing of its Application. The Court held that it had jurisdiction over this submission:<sup>132</sup>

*“The third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction (see paragraph 42 above), and which are thus covered by Article 1 of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the Fisheries Jurisdiction case, where it declared that in order to consider the dispute in all its aspects it may also deal with a submission that ‘is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court’s jurisdiction ...’ (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72).”*

7.178 Before the International Court of Justice, the appropriate test for determining the existence of jurisdiction over facts occurring after the filing of an Application is whether those facts “aris[e] directly out of the question which is the subject-matter of [the] Application”. In the Tribunal’s view, the Claimants’ amended claims under Articles II(3)(a) and II(3)(c) of the Treaty clearly arise directly from the Parties’ dispute pre-dating the Claimants’ Notice of Arbitration. Accordingly, even without Article 20 of the UNCITRAL Arbitration Rules, the Tribunal sees no cause under international law barring the Claimants’ amended claims under Articles II(3)(a) and II(3)(c) of the Treaty in regard to the Lago Agrio Judgment.

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<sup>131</sup> *Fisheries Jurisdiction (Germany v. Iceland)*, ICJ, Judgment (Merits), 25 July 1974, 1974 ICJ Reports 175, para 72.

<sup>132</sup> *LaGrand (Germany v. United States of America)*, ICJ, Judgment, 27 June 2001, 2001 ICJ Reports 466, para 45, CLA-46.

7.179 (iii) *Dutch Law*: As to Dutch law, the Tribunal has been shown no mandatory or other rule of Dutch law that could preclude the Claimants' amended claims. At the Track II Hearing, the Claimants' Counsel, relaying advice from their Dutch Counsel, stated that there was no such mandatory rule.<sup>133</sup> The Respondent did not then suggest otherwise.

7.180 (9) *The Tribunal's Conclusion as to the Amended Claims*: The Tribunal concludes that it has jurisdiction to decide the Claimants' amended claims under the Parties' Arbitration Agreement.

***F: The Tribunal's Final Conclusions***

7.181 For these several reasons, the Tribunal decides the first of the Respondent's jurisdictional objections, as to a relevant "investment" under to the Treaty, in favour of Chevron and (confirming its earlier decisions) TexPet. As to the requirement of judicial finality the Tribunal decides the second of the Respondent's jurisdictional objections in favour of Chevron and (if and to the extent relevant) TexPet. As regards the third part (also raised by the Tribunal upon its own initiative), the Tribunal decides to leave the Claimants' amended claims regarding the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate and Cassation Courts) as pleaded and not to disallow that pleading under Article 20 of the UNCITRAL Arbitration Rules.

7.182 Accordingly, the Tribunal rejects the Respondent's jurisdictional objections to and confirms its jurisdiction over the claims and amended claims pleaded by Chevron and TexPet under the FET standard (including its protection against denial of justice) and customary international law in Article II(3)(a) of the Treaty and also under the Umbrella Clause in Article II(3)(c) of the Treaty. Further, the Tribunal decides that these claims are all admissible in this arbitration, and it rejects the Respondent's objections to the contrary effect under Articles VI(1)(a) and VI(1)(c) of the Treaty.

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<sup>133</sup> Track II Hearing D12.2652.



**PART VIII**

**THE MERITS OF  
THE CLAIMANTS' CLAIMS  
AND THE RESPONDENT'S DEFENCES**

***A: Introduction***

- 8.1 The Tribunal here addresses the merits of the Claimants' claims and the Respondent's defences under the FET standard and customary international law in Article II(3)(a) of the Treaty and under the Umbrella Clause in Article II(3)(c) of the Treaty.
- 8.2 It is again necessary to address and decide separately the issues under Article II(3)(a) of the Treaty as regards denial of justice, and the issues under Article II(3)(c) of the Treaty as regards the 1995 Settlement Agreement.
- 8.3 For both sets of issues, the Tribunal has again kept in mind that each of the Parties bears the legal burden of proving its positive allegations under Article 24(1) of the UNCITRAL Arbitration Rules.<sup>1</sup>

***B: The Tribunal's Analysis & Conclusion on the 1995 Settlement Agreement***

- 8.4 Given the Tribunal's earlier decisions in Track I and 1B of these arbitration proceedings, which also record the Parties' principal submissions on the 1995 Settlement Agreement, it is possible to address this part of the case succinctly.
- 8.5 In its First Partial Award, the Tribunal decided that Chevron and TexPet were both "Releasees" under Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release. The Tribunal also decided that Chevron and TexPet could invoke their contractual rights as "Releasees" against the Respondent in regard to "diffuse" claims (as there described).<sup>2</sup>

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<sup>1</sup> Article 24(1) of the UNCITRAL Arbitration Rules provides: "Each party shall have the burden of proving the facts relied on to support his claim or defence."

<sup>2</sup> First Partial Award, para 112. (For ease of reference, as already indicated earlier in this Award, the Tribunal has referred to the 1995 Settlement Agreement, the 1996 Release and the 1998 Final Release collectively as "the 1995 Settlement Agreement").

- 8.6 In the Tribunal's view, such contractual rights correspond to an 'obligation' by the Respondent towards each of Chevron and TexPet within the meaning of the Umbrella Clause in Article II(3)(c) of the Treaty.
- 8.7 In Parts IV and V of this Award, the Tribunal has found that the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, rests upon finding Chevron liable for diffuse claims in non-compliance with the Respondent's obligations to release Chevron (with TexPet and Texaco) from such liability under the 1995 Settlement Agreement.
- 8.8 In the Tribunal's view, by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(c) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet.
- 8.9 Chevron's injury from such international wrong here requires no explanation: it was the sole named defendant in the Lago Agrio Litigation and the sole named judgment debtor under the Lago Agrio Judgment. Issues as to reparation for such injury in the form of compensation claimed by Chevron are currently assigned to Track III of these arbitration proceedings.
- 8.10 As already indicated in Part VII above, TexPet is in a different position from Chevron for any injury resulting from the Lago Agrio Litigation and the Lago Agrio Judgment (as affirmed by the Lago Agrio Appellate, Cassation and Constitutional Court Judgments). TexPet was not a named defendant to the Lago Agrio Litigation; nor was it so identified in the Lago Agrio Judgment. However, as described in Parts IV and V of this Award, the Lago Agrio Judgment held TexPet publicly responsible for extensive environmental damage in the former concession area between 1964 and 1992; and, by its order of 15 October 2012, the Lago Agrio Court ordered the execution of the Lago Agrio Judgment against (*inter alios*) TexPet by name and attached TexPet's remaining assets in Ecuador. As with Chevron, issues as to reparation for any injury in the form of compensation claimed by TexPet are currently assigned to Track III of these arbitration proceedings.



8.11 In conclusion, under the Umbrella Clause in Article III(3)(c) of the Treaty, the Tribunal decides that the Respondent is liable to make reparation to each of Chevron and TexPet, as addressed in Parts IX and X below.

*C: The Parties' Cases as to Denial of Justice*

8.12 The Parties' respective factual and expert cases have been addressed at length in Parts IV, V and VI above, on which the Tribunal has made its findings. It would therefore serve no purpose to recite these cases in full here, save for the following summaries for ease of reference.

8.13 (1) *The Claimants' Case*: In brief,<sup>3</sup> as regards denial of justice, the Claimants at the Track II Hearing summarised the defects in the Lago Agrio Litigation as “five types of poison: judicial fraud and corruption, gross violations of due process, executive interference, judgments which are a mockery of legal reasoning, [and] factual findings which are taken out of thin air.”<sup>4</sup>

8.14 The first and second of these complaints refer to the alleged ‘ghostwriting’ of the Lago Agrio Judgment, together with judicial misconduct and procedural fraud. The third refers to alleged interference with the Lago Agrio Litigation by the Respondent’s executive branch. The fourth and fifth relate to the “absurd” reasons and “junk science” in the Lago Agrio Judgment (as affirmed by the subsequent judgments of the Lago Agrio Appellate Court, Cassation and Constitutional Courts). For reasons already indicated in Part VII(C)(2) above, as regards their merits, the Tribunal does not consider these fourth and fifth complaints in this Award any further.

8.15 As to the Claimants’ specific allegations in regard to these first three matters, the Tribunal refers to the description and headings in its Conclusions set out at the end of Part V above. Using these headings, this part of the Claimants’ case can be summarised as follows, as decided by the Tribunal.

8.16 As to the ‘ghostwriting’ of the Lago Agrio Judgment, the Claimants contend that Judge Zambrano agreed to receive a bribe of US\$ 500,000 from the Lago Agrio Judgment’s proceeds in return for allowing the Lago Agrio Plaintiffs’ representatives

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<sup>3</sup> See generally C-Mer. Mar. 2012, Sections III & IV; C-TII Jan. 2015, Sections III-XI.

<sup>4</sup> Track II Hearing D1.20 & 141.

corruptly to ‘ghostwrite’ the Lago Agrio Judgment; that Judge Zambrano did not write the Lago Agrio Judgment (as he otherwise testified in the RICO Litigation, falsely); and that the ‘Cabrera fraud’ taints the Lago Agrio Judgment. These allegations, as to the merits, are considered below.

8.17 As to their other allegations; the Claimants plead:

- (i) the misconduct of Judge Yáñez, as the presiding judge in the Lago Agrio Litigation (from February 2006 to October 2007), in regard to his order terminating the judicial inspections, his appointment of Mr Cabrera and private meetings with the Lago Agrio Plaintiffs’ representatives – as a distinct matter, this alleged denial of justice has not been accepted by the Tribunal: see its Conclusions at the end of Part V;
- (ii) the misconduct of Mr Cabrera, as an auxiliary officer of the Lago Agrio Court (from June 2007 to April 2008) – as a distinct matter, this alleged denial of justice has not been accepted by the Tribunal: see its Conclusions at the end of Part V;
- (iii) Judge Zambrano’s improper connivance at Dr Guerra’s ‘ghostwriting’ of seven of his court orders in the Lago Agrio Litigation (between October 2009 and March 2010) – as a distinct matter, this alleged denial of justice has not been accepted by the Tribunal: see its Conclusions at the end of Part V;
- (iv) the Veiga-Pérez Criminal Prosecutions by the Respondent (intermittently, from 2003 to 2011) – as a distinct matter, this alleged denial of justice has not been accepted by the Tribunal: see its Conclusions at the end of Part V;
- (v) the conduct of the Respondent’s Government towards the Lago Agrio Litigation (from 2003 onwards) – as a distinct matter specifically in regard to the Lago Agrio Judgment itself, this alleged denial of justice has not been accepted by the Tribunal: see its Conclusions at the end of Part V. As a broader matter in regard to the Lago Agrio Litigation more generally, the Tribunal returns to this allegation below;
- (vi) the unwillingness or inability of the Respondent’s prosecutorial authorities to conduct and complete criminal investigations in any significant manner into

the prima facie evidence of procedural fraud, judicial misconduct in the Lago Agrio Litigation and of the ‘ghostwriting’ of the Lago Agrio Court’s Judgment, available to them from Chevron’s allegations at the time of the Lago Agrio Judgment’s enforceability on 1 March 2012: this allegation forms part of the overall denial of justice alleged by the Claimants and, as regards the merits, it is addressed further below; and

- (vii) the Judgments of the Lago Agrio Appellate Court (2012), Cassation Court (2013) and Constitutional Court (2018) in leaving materially unremedied the Lago Agrio Judgment, notwithstanding the evidence of procedural fraud, judicial misconduct and ‘ghostwriting’ available to them from Chevron’s allegations at the time, namely (as regards the Appellate Court) by the date of its order declaring the Lago Agrio Judgment’s enforceability on 1 March 2012 and (as regards the Cassation and Constitutional Courts) by the date of their respective judgments on 12 November 2013 and 27 June 2018: these allegations form part of the overall denial of justice alleged by the Claimants and, as regards the merits, these are further addressed below.

8.18 It follows from this summary that the relevant allegations for the merits of the Claimants’ claims for denial of justice comprise: (a) the ‘ghostwriting’ of the Lago Agrio Judgment; (b) the conduct of the Respondent’s prosecutorial authorities; (c) the judgments of the Lago Agrio Appellate and Cassation Courts in regard to alleged judicial misconduct, procedural fraud and ‘ghostwriting’ and (d) the conduct of the Respondent’s Government in regard to the Lago Agrio Litigation generally.

8.19 (2) *The Respondent’s Case*: In brief,<sup>5</sup> the Respondent denies that there has been any denial of justice or any other violation of Article II(3)(a) of the Treaty; and it refutes the Claimants’ claims, as to both the facts and the applicable law.

8.20 As to the facts, the Respondent submits that the Lago Agrio Judgment was not ‘ghostwritten’; and that there is no cogent evidence to support the Claimants’ allegations otherwise (as to which the Claimants bear the legal burden of proof). In particular, so the Respondent submits, Dr Guerra’s testimony in support of the Claimants’ case is inconsistent, unreliable and worthless; the contemporary evidence

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<sup>5</sup> See generally R-TII Nov. 2014, Sections II-V; R-TII Mar. 2015, Sections IV-VII.

does not support any corrupt ‘ghostwriting’; the forensic expert evidence proves that the Lago Agrio Judgment was not written by the Lago Agrio Plaintiffs’ representatives; the Claimants’ case on the “Unfiled Materials” rests upon demonstrably false assumptions; Dr Zambrano’s testimony in the RICO Litigation does not support the Claimants’ allegations; Mr Cabrera was properly appointed as a court expert by the Lago Agrio Court; the Cabrera Report does not taint the Lago Agrio Judgment; and the conduct of the Respondent’s Government towards the Lago Agrio Plaintiffs was not improper.

8.21 As to international law as the applicable law, the Respondent contends that the Claimants have failed to establish that Judge Zambrano’s alleged misconduct should be attributed to the Respondent; that the Claimants’ case regarding the Lago Agrio Litigation and Lago Agrio Judgment does not meet the requirements for a breach by the Respondent of its obligations under Article II(3)(a) of the Treaty; that the decisions in the Lago Agrio Judgment were made reasonably; that the Respondent’s prosecutorial authorities have been and still are investigating, in confidence, aspects of the Lago Agrio Litigation; and that there is nothing materially amiss in the Lago Agrio Appellate, Cassation or Constitutional Court Judgments.

***D: The Tribunal’s Analysis as to Denial of Justice***

8.22 (1) *Introduction:* As to the relevant factual and expert evidence, as indicated above, the Tribunal has already addressed at length and decided the Parties’ respective cases in Parts IV, V and VI above. For the reasons there set out, the Tribunal has not accepted the Respondent’s submissions on the evidence adduced in this arbitration. It remains unnecessary here to re-state the Tribunal’s conclusions. Nonetheless, as regards the merits, the Tribunal addresses below the Claimants’ four complaints listed under sub-paragraphs 8.18(a) to (d) above.

8.23 (2) *The Legal Test for Denial of Justice under the Treaty:* The Tribunal begins with the legal test for denial of justice under the FET standard and customary international law in Article II(3)(a) of the Treaty.

8.24 There is a consistent line of awards over many years, amounting to a *jurisprudence constante*, deciding that a denial of justice in violation of customary international law will also amount to a breach of an FET standard in a treaty: *Azinian* (1999), *Mondev*

(2002), *Waste Management (No 2)* (2004), *International Thunderbird* (2006), *Jan de Nul* (2008), *Rumeli* (2008), *Pey Casado* (2008), *AMTO* (2008), *Al-Bahloul* (2010), *Liman Caspian* (2010), *Frontier* (2010), *Roussalis* (2011), *Oostergetel* (2012), *Swisslion* (2012), and *Flughafen Zurich* (2014).<sup>6</sup> However, ordinarily, the protection for denial of justice under an FET standard in a treaty (such standard providing the international minimum standard for fair and equitable treatment of an alien) is neither broader nor narrower than protection for denial of justice under customary international law: *Iberdrola* (2012).<sup>7</sup> Conversely, apart from denial of justice, an FET standard in a treaty (even limited to fair and equitable treatment under international customary law) provides a broader protection to a covered investor than does denial of justice under customary international law: *Vivendi* (2007).<sup>8</sup>

8.25 Thus, as decided in Part VII above, the Tribunal considers that denial of justice under the FET standard equates with denial of justice under customary international law, both as provided in Article II(3)(a) of the Treaty. These impose upon the Claimants the same legal requirements to establish on the merits their case alleging a denial of justice. (For ease of reference below, the Tribunal continues to address denial of justice under the FET standard, although its analysis applies equally to denial of justice under customary international law.)

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<sup>6</sup> *Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras 102-103, CLA-299; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para 127, CLA-7; *Waste Management v. United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras 97-98, CLA-42; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL (Ad hoc), Award, 26 January 2006, para 194, CLA-223; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para 188, CLA-230; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras 651ff, CLA-231; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (later partially annulled on other grounds), paras 656-657, CLA-82; *Limited Liability Company AMTO v. Ukraine*, SCC Arb. No. 080/2005, Final Award, 26 March 2008, § 75, RLA-343; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award, 2 September 2009, para 221; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, para 268, RLA-486; *Frontier Petroleum Services Ltd. v. Czech Republic*, PCA Case No. 2008-09, Award, 12 November 2010, para 293; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/01, Award, 7 December 2011, para 315; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Ad hoc), Final Award, 23 April 2012, para 272, RLA-307; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para 262; and *Flughafen Zürich A.G. and Gestión de Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, paras 630-631, CLA-602.

<sup>7</sup> *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, para 427, CLA-608.

<sup>8</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras 7.4.10-11, CLA-288.

- 8.26 In the Tribunal’s view, as to the merits, the legal test is whether any shock or surprise to an impartial tribunal occasioned by the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, leads, on reflection, to justified concerns as to the judicial propriety of the Lago Agrio Judgment, as left materially uncorrected or unremedied within the Respondent’s own legal system.
- 8.27 By the shorthand terms “uncorrected” and “unremedied”, here and elsewhere in this Award, the Tribunal means that the Lago Agrio Judgment (excepting its award of punitive damages) was considered by the Lago Agrio Appellate Court, Cassation and Constitutional Courts, in full knowledge of the complaints of serious procedural impropriety, without appropriate steps being taken to address the allegations of procedural fraud, judicial misconduct and ‘ghostwriting’ raised by Chevron at the time.
- 8.28 In Part V above, the Tribunal has found that the Lago Agrio Court, the Appellate Court, the Cassation Court and the Constitutional Court did not investigate Chevron’s allegations of procedural fraud and judicial misconduct; and the Appellate, Cassation and Constitutional Courts also did not investigate the allegedly corrupt ‘ghostwriting’ of the Lago Agrio Judgment. This was not done in ignorance of Chevron’s specific allegations at the time. In the Tribunal’s view, these Courts had sufficient information available to them so as to amount (at least) to a strong prima facie case of judicial misconduct, procedural fraud in the Lago Agrio Litigation and (as regards the Appellate, Cassation and Constitutional Courts) the ‘ghostwriting’ of the Lago Agrio Judgment.
- 8.29 In Chevron’s Initial Alegato of 6 January 2011 addressed to the Lago Agrio Court, (extending over 263 pages of written submissions), Chevron contended (inter alia) that the Lago Agrio Litigation “should be terminated, with the entire Complaint dismissed, because they have been permeated by fraud”; that “Chevron has been denied due process and its constitutional rights”; and that “systematic constitutional violations and substantial procedural defects render these proceedings a legal nullity.” The alleged fraud included the judicial misconduct of Judge Yáñez; the improper appointment of Mr Cabrera; his corrupt collusion with the Lago Agrio Plaintiffs’ representatives, the

“fraudulent and flawed” Cabrera Report; and the violation of Chevron’s rights including its status as a “Releasee” under the 1995 Settlement Agreement.<sup>9</sup>

- 8.30 In Chevron’s Appeal to the Lago Agrio Appellate Court of 9 March 2011 (extending over 193 pages), Chevron contended (inter alia) that the Lago Agrio Judgment should be declared a nullity “due to procedural fraud and violation of the guarantee of due process”. These allegations, set out at length, included the judicial misconduct of Judge Yáñez; the corrupt collusion with Mr Cabrera; the fraudulent Cabrera Report; the use of information in the Lago Agrio Judgment that was “not in the record as the basis for the decision”; and the violation of Chevron’s rights under the 1995 Settlement Agreement.<sup>10</sup>
- 8.31 In Chevron’s Cassation Appeal of 20 January 2012 (extending over 176 pages), Chevron included amongst the grounds for its appeal: the judicial misconduct of Judge Yáñez; the “illegal appointment and actions” of Mr Cabrera; the “irregularities” in the Cabrera Report; the violation of Chevron’s rights under the 1995 Settlement Agreement; and the Lago Agrio Plaintiffs’ “illicit participation in the drafting of” the Lago Agrio Judgment.<sup>11</sup>
- 8.32 In Chevron’s action before the Constitutional Court, its submissions recorded in the Court’s Judgment mirrored much of its case presented earlier at the RICO trial and in this arbitration.
- 8.33 There is little in this Award (or the RICO Judgment) that would add to the substance of the allegations made by Chevron to the Lago Agrio Appellate, Cassation and Constitutional Courts in 2011, 2012 and 2018. In all material respects, at these times, there was before these three Courts at least strong prima facie evidence of judicial misconduct, procedural fraud and (particularly) ‘ghostwriting’, raising justifiable concerns as to the judicial propriety of the Lago Agrio Litigation and the Lago Agrio Judgment. The same situation prevailed as regards the Respondent’s prosecutorial authorities, beginning at an earlier time.

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<sup>9</sup> C-1213.

<sup>10</sup> C-1178.

<sup>11</sup> C-1068.

- 8.34 Yet, as the Tribunal finds, no appropriate steps were taken by the Lago Agrio Appellate Court, the Cassation Court, the Constitutional Court or these prosecutorial authorities to address the allegations of procedural fraud, judicial misconduct and ‘ghostwriting’ raised by Chevron at the time, sufficient to suspend the enforceability of the Lago Agrio Judgment and to comply with the Tribunal’s several Orders and Awards on Interim Measures.
- 8.35 As to the doctrine of denial justice under international law, the Tribunal has been guided generally by four awards cited by the Parties: *Azinian v Mexico* (1999),<sup>12</sup> *Mondev v USA* (2002),<sup>13</sup> *Loewen v USA* (2003)<sup>14</sup> and *Oostergetel v Slovakia* (2012).<sup>15</sup>
- 8.36 In *Oostergetel*, it was decided that the standard for denial of justice (as part of the FET standard) was “a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.”<sup>16</sup>
- 8.37 The Tribunal has also borne in mind, as these legal materials confirm, that the doctrine of denial of justice essentially addresses procedural unfairness and not (by itself) an error of fact or applicable national law, although both may equally defeat the complainant’s substantive rights. An international tribunal, such as this Tribunal, cannot act as a court of appeal. As a former ICJ judge once wrote: “... if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, the State is not responsible ... the only thing that can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some

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<sup>12</sup> *Robert Azinian, Kenneth Davitian, and Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, especially para 102, CLA-299.

<sup>13</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, especially para 127, CLA-7.

<sup>14</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, especially para 132, CLA-44.

<sup>15</sup> *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Ad hoc), Final Award, 23 April 2012, especially para 273, RLA-307.

<sup>16</sup> *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Ad hoc), Final Award, 23 April 2012, para 273, RLA-307.



such question as ‘Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?’ ... *bona fide* error does not entail responsibility.”<sup>17</sup>

8.38 As to the threshold required for denial of justice, the Tribunal adopts the approach taken by the NAFTA tribunal in *Mondev v USA* (2002), citing the judgment of the International Court of Justice in *ELSI* (1989), that the impugned judgment must be clearly improper and discreditable<sup>18</sup> (with footnotes here omitted):<sup>19</sup>

“127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays ‘a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety’. It is true that the question there was whether certain administrative conduct was ‘arbitrary’, contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word ‘surprises’ does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end 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. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.”

8.39 The approach in this passage has been followed subsequently by other international tribunals, including *GEA v Ukraine* (2011), *Arif* (2013) and *Mamidoil* (2015).<sup>20</sup>

8.40 The Tribunal emphasises that the legal test for denial of justice requires the claimant to prove objectively that the impugned judgment was “clearly improper and discreditable”, with the failure by the “national system as a whole to satisfy minimum

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<sup>17</sup> G.G. Fitzmaurice, “The Meaning of the Term ‘Denial of Justice’” (1932) 13 *British Yearbook of International Law* 93, pp. 112-113, CLA-301.

<sup>18</sup> *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989, 1989 ICJ Reports 15, para 128, CLA-237.

<sup>19</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para 127, CLA-7.

<sup>20</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para 312 (by agreement of the parties), CLA-300, RLA-648; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para 445, RLA-651 and *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras 764-769.

standards”. There have been many shocks and surprises caused by court judgments in legal history, but without much more, amounting to discreditable improprieties and the failure of the whole national system, such judgments do not amount to a denial of justice.

8.41 A claimant’s legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly. This general principle was described by Professor O’Connell as follows, as cited to the NAFTA tribunal in *Loewen* (with footnotes there and here omitted):<sup>21</sup>

*“When one comes to examine failure of the courts themselves ‘palpable deviation’ from the accepted standards of judicial practice are not so readily ascertained. For one thing, there is a presumption in favour of the judicial process. For another, defects in procedure may be of significance only internally, and not work an international injustice. For a third, wide discretion must be allowed a court in the reception and rejection of evidence, in adjournment, and in admission of documents, and it cannot be said that deviations even from the municipal law rules of evidence are deviations from an international standard. The first thing that must be ascertained is whether as a result of court manoeuvrings substantial injustice has been done to the claimant; the second is whether these manoeuvrings really amount to obstruction of the judicial process, and are extrinsic to the merits of his claim. Bad faith and not judicial error seems to be the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure.”*

8.42 This general principle subsumes a second principle, namely that a court is permitted a margin of appreciation before the threshold of a denial of justice can be met.<sup>22</sup> Nonetheless, the balance of probabilities remains the standard of proof, with the claimant bearing the overall legal burden of proof.

8.43 (3) *Attribution under International Law*: The Respondent contends that the conduct of Judge Zambrano in regard to the ‘ghostwriting’ of the Lago Agrio Judgment cannot be attributed to the Respondent because it was motivated by personal gain, with the

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<sup>21</sup> See D.P. O’Connell, *International Law*, 2nd ed. (1970), p. 948, RLA-150, cited in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, First Opinion of Christopher Greenwood QC, 26 March 2001, p. 7, CLA-645.

<sup>22</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Ad hoc), Partial Award, 13 November 2000, paras 261-262, CLA-462; see also *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 and the First Opinion of Sir Robert Jennings QC, 26 October 1998, para 23 (on the “Local Remedies Rule”, CLA-647).

Claimants in a better position than the Respondent to prevent such judicial misconduct.<sup>23</sup>

8.44 As the Tribunal has found in Parts IV and V above, the ‘ghostwriting’ resulted from Judge Zambrano’s initiative and the bribe promised to him by certain of the Lago Agrio representatives. It was not conduct directed by the Respondent; and Judge Zambrano’s misconduct was not authorised under Ecuadorian law.

8.45 The Claimants submit that their claims for denial of justice address not the bribe agreed between Judge Zambrano and certain of the Lago Agrio Plaintiffs, but rather the Lago Agrio Judgment as “the capstone of the judicial process: it bears the State’s *imprimatur* of the proceedings that led to it.”<sup>24</sup> The Claimants cite from A.V. Freeman’s work (1938, with references here omitted): “... fraud and corruption either during the proceedings or in connection with the rendering of judgment may produce a denial of justice ... and the responsibility of the State cannot be evaded by relying upon any misapplied theory of the apparent powers of an agent ...”.<sup>25</sup>

8.46 In the Tribunal’s view, the Lago Agrio Judgment was issued by Judge Zambrano in his capacity as a judge of the Lago Agrio Court, itself part of the Respondent’s judicial branch; the Lago Agrio Judgment was accorded the status of a court judgment under Ecuadorian law; and it was (and remains) subject to enforcement and execution by the Respondent’s judicial branch within the Respondent’s national legal system.

8.47 Article 4 of the ILC Articles on State Responsibility states: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State.”

8.48 Article 7 of the ILC Articles on State Responsibility states: “The conduct of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

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<sup>23</sup> R-TII Mar. 2015, paras 350ff.

<sup>24</sup> C-TII Jan. 2015, para 285.

<sup>25</sup> A.V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 268, fn 5, CLA-297.

The ILC Commentary to Article 7 emphasises the phrase “in that capacity”, so as to distinguish the unauthorised conduct of persons acting in an official capacity from a case “where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.”<sup>26</sup> The latter case is not the present case.

8.49 In *State Responsibility: The General Part* (2013), Professor Crawford addressed the dividing-line as regards attribution and non-attribution under ILC Article 7, by reference to two cases cited by the Parties in this arbitration, to different effect: *Caire* (1929)<sup>27</sup> and *Yeager* (1987)<sup>28</sup> (with footnotes here added):<sup>29</sup>

“... *The difference between the situation in Caire and the actions of the Revolutionary Guards in Yeager on the one hand [where there was attribution], and the Iran Air agent in Yeager on the other [where there was no attribution] is that the latter, although he was able to extract a bribe by virtue of his position, did not hold himself out as acting on behalf of the state. The soldiers in Caire were able to arrest their victim through the exercise of state authority; the Revolutionary Guards invoked their state power as customs officials. As was made clear in another case of the Iran-US Claims Tribunal, Petrolane Inc. v. Iran,*<sup>30</sup> *the Article 7 ‘extension’ of liability for acts done ultra vires is predicated on the actions in question being done by ‘persons cloaked with governmental authority’ ...”*

8.50 In the present case, the conduct of Judge Zambrano in issuing the Lago Agrio Judgment (as with all other judges of the Lago Agrio Court acting in the Lago Agrio Litigation) was manifestly done ‘cloaked with governmental authority’, as members of the Respondent’s judicial branch. Judge Zambrano was held out by the Respondent and also held himself out as a judge acting in the name of the Respondent.

8.51 Moreover, the Lago Agrio Judgment was left unremedied by the Lago Agrio Appellate Court and (subject to the issue of punitive damages) the Cassation and Constitutional Courts, with sufficient knowledge of the Claimants’ allegations regarding gross judicial improprieties in the Lago Agrio Litigation and the corrupt ‘ghostwriting’ of

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<sup>26</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p.108, RLA-549.

<sup>27</sup> *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, French-Mexican Claims Commission, Decision No. 33, 7 June 1929, V RIAA 516, CLA-597.

<sup>28</sup> *Kenneth P. Yeager v. Islamic Republic of Iran*, IUSCT Case No. 10199, Award No. 324-10199-1, 2 November 1987, 17 Iran-US Claims Tribunal Reports 92, RLA-547.

<sup>29</sup> J. Crawford, *State Responsibility: The General Part* (2013), pp. 138-139, RLA-556.

<sup>30</sup> *Petrolane, Inc. v. Islamic Republic of Iran*, IUSCT, Award No 518-131-2, 14 August 1991, 27 Iran-US Claims Tribunal Reports 64, p. 92.

the Lago Agrio Judgment. Their respective judgments are also to be attributed to the Respondent under Article 4 of the ILC Articles on State Responsibility. It is not possible, therefore, to treat the misconduct of Judge Zambrano (as also other judges of the Lago Agrio Court) as private initiatives or personal frolics, unrelated to their judicial functions or otherwise unattributable to the Respondent under international law.

- 8.52 Accordingly, the Tribunal concludes that there can be no question as regards the attribution to the Respondent of an international wrong committed by the Lago Agrio Court (with the Lago Agrio Appellate, Cassation and Constitutional Courts), as the judicial branch of the Respondent acting in such capacity in the Lago Agrio Litigation.
- 8.53 (4) *The ‘Ghostwriting’ of the Lago Agrio Judgment*: The facts established on the factual, expert and forensic evidence speak for themselves, as set out at length in Parts IV, V and VI above.
- 8.54 As there explained, the details as to how exactly all or material parts of the Lago Agrio Judgment came to be written, corruptly by certain of the Lago Agrio Plaintiffs’ representatives for Judge Zambrano, remain incomplete. The missing factual and forensic evidence is likely available only in Ecuador, if it still exists at all. Yet the circumstantial and other evidence adduced in this arbitration is overwhelming. Short of a signed confession by the miscreants, as rightly submitted by the Claimants at the end of the Track II Hearing, the evidence establishing ‘ghostwriting’ in this arbitration “must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal.”<sup>31</sup>
- 8.55 As found by the Tribunal in Parts IV and V above, two of the Lago Agrio Plaintiffs’ representatives who were privy to the ‘ghostwriting’ exercise were Mr Donziger and Mr Fajardo. As the Respondent acknowledged at the Track II Hearing, the participation of Mr Fajardo in ‘ghostwriting’ for Judge Zambrano, if correct (which the Respondent denies), would suffice to support the Claimants’ claims for denial of justice.<sup>32</sup> The Tribunal agrees: the Claimants’ inability to identify by name with sufficient probability others of the Lago Agrio Plaintiffs’ representatives, also involved in ‘ghostwriting’ (in addition to Mr Donziger), cannot by itself exculpate the

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<sup>31</sup> Track II Hearing D12.2756.

<sup>32</sup> Track II Hearing D1.243.

Respondent from liability for denial of justice. If it were otherwise, the more successful the ghostwriting exercise, the less culpability would result. In any event, for denial of justice, the relevant actor is Judge Zambrano; and his participation in the ‘ghostwriting’ of the Lago Agrio Judgment is firmly established on the evidence before this Tribunal.

8.56 On such evidence, the Tribunal has found that Judge Zambrano acted corruptly, in return for a bribe promised to him by certain of the Lago Agrio Plaintiffs’ representatives. Judge Zambrano’s collusive conduct in the ‘ghostwriting’ of the Lago Agrio Judgment was not authorised under Ecuadorian law.<sup>33</sup> Nor was it under judicial standards long established under international law. He was far from acting as an independent or impartial judge deciding the Lago Agrio Litigation fairly between the parties, under minimum standards for judicial conduct long recognized under international law.

8.57 Article 10 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charges against him”. Article 14 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 (in force from 23 March 1976), to which the Respondent is a party, provides, in material part: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 2 of the UN Basic Principles on the Independence of the Judiciary, adopted by the UN General Assembly in November-December 1985, provides: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” Article 6 of these Basic Principles provides: “The principle of the independence of the

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<sup>33</sup> Constitución de la República del Ecuador 2008 (2008 Ecuadorian Constitution), as amended on 13 July 2011, Registro Oficial 449 de 20 de octubre de 2008 (Ecuador), Article 76, RLA-164; C-400, Article 9; Velázquez ER, pp. 11-12; Track II Hearing D10.2346 & D11.2360.

judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”<sup>34</sup>

- 8.58 The Tribunal does not understand from the Parties’ respective submissions that these international standards for judicial conduct are materially disputed between them. Moreover, in addition to the Universal Declaration of 1948 and the International Covenant of 1966, the Constitutional Court’s Judgment cites Article 8 of the American Convention on Human Rights of 1969 on the right to a fair trial “by a competent, independent and impartial tribunal.”<sup>35</sup> As to Ecuadorian law, the Constitutional Court’s Judgment also cites the constitutional rights under Articles 75 and 76(7)(k) of the Respondent’s Constitution “to the effective, impartial and speedy protection of his or her rights and interests” and “to be tried by an independent, impartial and competent judge.”<sup>36</sup>
- 8.59 The Tribunal considers that the Claimants’ case on ‘ghostwriting’ satisfies the legal test for denial of justice under the FET standard in Article II(3)(a) of the Treaty, as at 1 March 2012 when the Lago Agrio Judgment became enforceable as a result of the Appellate Court’s judgment and order. The evidence pointing to the corrupt conduct of Judge Zambrano in regard to the ‘ghostwriting’ of the Lago Agrio Judgment in collusion with certain of the Lago Agrio Plaintiffs’ representatives justifies the very gravest concerns as to judicial propriety in regard to the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate Court, Cassation and Constitutional Courts leaving the Lago Agrio Judgment materially unremedied. Judge Zambrano’s conduct was grossly improper by any moral, professional and legal standards; and it directly impacted, adversely, the rights of Chevron (with TexPet).
- 8.60 Accordingly, in the Tribunal’s view, the Lago Agrio Judgment was, in the words of the award in *ELSI*, “clearly improper and discreditable” with the result that the Claimants’ investments have “been subjected to unfair and inequitable treatment”. That judgment was left unremedied by the Respondent’s own legal system, including the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts and the Respondent’s prosecutorial authorities. That conduct amounted to a failure of the

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<sup>34</sup> United Nations, *Basic Principles on the Independence of the Judiciary*, UN Doc. A/CONF.121/22/Rev.1 59 (1985), CLA-293; see the text of the UN Basic Principles set out in Part III(H) above.

<sup>35</sup> C-2551, pp. 57-58.

<sup>36</sup> C-2551, pp. 65 and 57.

Respondent's national system as a whole to satisfy minimum standards required under international law.

- 8.61 (5) *Other Allegations*: The Tribunal does not base its decision, as secondarily alleged by the Claimants, on the institutional corruption of the Ecuadorian legal system as a whole, including the Lago Agrio Appellate, Cassation and Constitutional Courts. In view of the Tribunal's decisions concerning the Lago Agrio Judgment, it is not an allegation material to the Claimants' primary case; and it is not here necessary for the Tribunal to address this secondary case, beyond the factors listed below.
- 8.62 First, it was Texaco's decision to support the stay of the Aguinda Litigation in New York, thereby effectively remitting that litigation to the Ecuadorian legal system under Texaco's undertaking of 1999 to the US District Court for the Southern District of New York in the Aguinda Litigation. According to the Respondent, following its subsequent merger with Texaco, Chevron became a party to Texaco's undertaking, as ostensibly confirmed the US Court of Appeals for the Second Circuit in its judgment of 2011. It therefore lies with difficulty, so the Respondent contends, for Chevron and TexPet now to complain, in good faith, about an alleged state of affairs generally in the legal system of Ecuador, given that recourse to that system was the result of Texaco's and their own choosing. On the other hand, the Claimants deny the binding effect upon either of them of Texaco's undertaking, as also the legal effect of the Second Circuit's judgment under the laws of the USA; and the Claimants contend that the Lago Agrio Court wrongly assumed personal and subject-matter jurisdiction over Chevron.
- 8.63 The Tribunal prefers not to decide the issue whether or not Texaco's undertaking is binding upon Chevron. It is not necessary to do so for the purposes of this Award. Even if the Claimants were correct (which the Tribunal assumes, but does not decide), the Tribunal does not consider that the wrongful assertion of jurisdiction by the Lago Agrio Court over the Lago Agrio Plaintiffs' Complaint against Chevron can amount, by itself, to any breach of Article VI(1)(a) or Article VI(1)(c) of the Treaty by the Respondent (acting by its judicial branch). The Tribunal notes, in particular, the terms of the Second Circuit's judgment (whatever its legal effect under the laws of the USA). Hence, the Tribunal discounts this first factor.



- 8.64 Second, even the general state of the Ecuadorian legal system (as alleged by the Claimants) is not uniformly applicable to all cases. As the Respondent rightly submits, the eventual dismissal of criminal charges against Mr Veiga and Dr Pérez as TexPet's signatories to the 1995 Settlement Agreement, albeit late, is inconsistent with the Ecuadorian judiciary dependent upon instructions from the Respondent's executive branch.
- 8.65 Third, even with knowledge of Chevron's allegations, the New York Courts have continued to stay related litigation in New York, effectively remitting that litigation to the Ecuadorian courts: see the Huaorani Litigation summarised in Part IV(G)(9) above.
- 8.66 Fourth, there is evidence that Judge Zambrano was willing to be bribed by Chevron in return for a favourable result in the Lago Agrio Litigation (Chevron declined this offer). That initiative is also inconsistent with uniform judicial corruption in Ecuador dependent upon instructions from the Respondent's executive branch.
- 8.67 Last but not least, as already indicated, the evidential materials regarding the Lago Agrio Court (including Judge Zambrano) are so overwhelming that the Claimants' broader allegations of corruption against the Ecuadorian legal system can add nothing to their proven primary case.
- 8.68 In Parts IV and V above, the Tribunal discounted, as a distinct matter in regard to the Lago Agrio Judgment, the numerous public condemnatory statements regarding Chevron made by President Correa and members of his administration. As regards the Lago Agrio Litigation more generally, although particularly vicious in regard to Mr Veiga and Dr Pérez, Chevron's other legal representatives in Ecuador and (later) Dr Guerra, these statements were also not the cause of any injury sustained by the Claimants in the Lago Agrio Litigation or under the Lago Agrio Judgment.
- 8.69 Moreover, as the Respondent submitted, Governments sometimes resort to extreme political language as regards alleged damage to the environment caused by foreign oil companies.<sup>37</sup> The Tribunal does not consider such political, even populist, statements

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<sup>37</sup> The Respondent cited the public condemnation in 2010 of "British Petroleum" by the President and Interior Secretary of the USA in regard to the Deepwater Horizon catastrophe in the Gulf of Mexico, which involved fatalities and significant environmental pollution: see R-537 and R-621.

by a State's executive branch, however regrettable, as amounting by themselves to a denial of justice. This applies necessarily to a situation where the sole cause for the denial of justice lies elsewhere within the State's judicial branch – as it does in the present case.

8.70 The Tribunal returns to the Claimants' summary of their case on denial of justice, as formulated at the end of the Track II Hearing, as follows:<sup>38</sup>

*“[There are] at least five separate and independent denials of justice: First, the Cabrera fraud, which the private and Government conspirators never quite managed to cleanse. Second, they paid [for ghostwritten orders] on behalf of the Plaintiffs; third, the Plaintiffs' ghostwriting of the Judgment using their own unfiled materials; fourth, the absurd and discriminatory fraudulent judgment itself imposing enormous liability by ignoring the environmental standards applicable to PetroEcuador and other companies, and then manufacturing environmental costs for remediation exponentially greater than those used anywhere else in the world. Now, the fifth denial of justice is Ecuador's response to the exposure of the first four. This goes directly to the question of when international liability will attach for misconduct that began in a country's courts”.*

8.71 The Tribunal has decided the first three allegations as related parts of Judge Zambrano's misconduct regarding the 'ghostwriting' of the Lago Agrio Judgment. The Tribunal has decided the fifth allegation, to the effect that the Lago Agrio Judgment was left materially unremedied by the Lago Agrio Appellate, Cassation and (now) Constitutional Courts and the Respondent's prosecutorial authorities.

8.72 As regards the merits of the fourth allegation, relating to the Claimants' criticisms of 'junk science' or 'absurd' reasoning in the Lago Agrio Judgment, the Tribunal does not consider it necessary to say more than it has already said in regard to this case's special features, namely the Respondent's cross-claim, in Parts VII(C)(2) and VII(C)(3) above.

8.73 Accordingly, for denial of justice on the merits, the Tribunal does not consider it appropriate to base its decision on the Lago Agrio Judgment's treatment of environmental standards, including its assessment of causation and damages. As indicated above, the Tribunal bears in mind that similar environmental issues may yet be argued anew by the Aguinda or Lago Agrio Plaintiffs in resumed legal proceedings against Chevron, TexPet or Texaco. Albeit not binding upon these Plaintiffs, a

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<sup>38</sup> Track II Hearing D.12.2756-2757.

decision by the Tribunal here as to this fourth allegation could prejudice the determination of these issues.

8.74 It is also unnecessary for this Tribunal to address these issues in this arbitration as regards the dispute between Claimants and the Respondent: the Lago Agrio Judgment as a whole has been successfully impugned by the Claimants on other grounds.

8.75 The Tribunal's reticence in regard to this fourth allegation, i.e. its necessary exercise of arbitral economy in this arbitration, should not be misunderstood. If there were to be individual claims for personal harm by the Aguinda or Lago Agrio Plaintiffs (not being diffuse claims) in further legal proceedings, the Claimants may well be correct that the full costs for remediating all environmental damage by whomsoever caused in the former concession area would be less than US\$ 100 million.<sup>39</sup>

8.76 *(6) The Tribunal's Conclusion as to Denial of Justice:* As recited above, the Tribunal bases its decisions on the merits on the corrupt misconduct of the Lago Agrio Court in regard to the Lago Agrio Judgment in the Lago Agrio Litigation, together with the absence of any appropriate relief within the Respondent's own legal system from the Lago Agrio Appellate, Cassation and Constitutional Courts and the conduct of the Respondent's prosecutorial authorities.

8.77 For these reasons, on the merits of the Claimants' claims for denial of justice, the Tribunal decides that the Respondent violated the FET standard and customary international law in Article II(3)(a) of the Treaty.

### ***E: The Tribunal's Final Conclusions***

8.78 In summary, the Tribunal decides that the Respondent is liable to make reparations to each of Chevron and TexPet for injuries caused by the breaches of the FET standard and customary international law in Article II(3)(a) of the Treaty and for breaches of the Umbrella Clause in Article II(3)(c) of the Treaty, as further addressed in Parts IX and X below.

### ***F: Postscript***

8.79 This postscript does not form part of the reasons in this Award, or its Operative Part.

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<sup>39</sup> February Hearing D1.10 (Mr Pate), referring to PetroEcuador's costs estimate.

8.80 If the Claimants' assessment (above) of the full costs of remediating environmental damage in the concession area were correct (as to which the Tribunal here expresses no conclusion), it is deeply regrettable that individual claims for personal harm caused by such damage were not amicably settled long ago, without the massive costs expended on the multiple lawsuits and arbitrations (including this arbitration) and, also, without the involvement of non-party funders and other third persons. The latter groups ostensibly rank in priority far above the Lago Agrio Plaintiffs for any proceeds from the Lago Agrio Litigation, as to which, again in the words of the Respondent's Counsel, the "real plaintiffs" with "real claims" are likely to receive nothing after 25 years of continuous litigation.

8.81 The Tribunal here bears in mind the remarks made by Mr Pate, Chevron's General Counsel, at the beginning of the Hearing on Interim Measures held on 11 February 2012, more than six years ago:<sup>40</sup>

*"... I will close by repeating what I said the last time I spoke before this Tribunal.<sup>41</sup> Chevron takes no pleasure in a dispute with any sovereign nation. We pride ourselves in working as good partners with nations who take a very broad spectrum of policy views. Chevron would welcome a constructive dialogue with Ecuador about this case and respects Ecuador's people and officials. So long as Ecuador continues to work in league with Mr Donziger, however, the result will be only further harm to the people, the civil society, and the reputation of Ecuador. Chevron invites Ecuador to change that course."*

8.82 However, then as now, the amount of compensation resulting from any such "constructive dialogue", together with PetroEcuador's share with Chevron and TexPet for any liability regarding personal harm and environmental remediation in the concession area, lies beyond the jurisdiction of this Tribunal.

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<sup>40</sup> February Hearing D1.10-11 (Mr Pate).

<sup>41</sup> This was a reference to his opening statement at the Jurisdiction Hearing in November 2010 (D1.111ff). Later, Mr Pate made the same observations during the November Hearing (D1.8ff), and again at the Track 1B Hearing in April 2014 (D1.8ff).

**PART IX**  
**THE PARTIES' CLAIMS FOR RELIEF**

***A: Introduction***

- 9.1 The Tribunal here addresses the Claimants' and the Respondent's material requests for relief in Track II as set out in Part I above, in the light of the decisions taken in this Award, together with the Tribunal's earlier awards, decisions and orders. These requests are taken, respectively, from the Claimant's letter dated 19 March 2018 (Section B with its marked-up Enclosure 1) and the Respondent's letter dated 20 April 2018 (pp. 5-8, with its marked-up Enclosure 1).
- 9.2 The Tribunal has fully considered the Parties' respective written and oral submissions regarding their respective requests for relief. Given the several decisions made by the Tribunal in this Award, it is unnecessary to set out these submissions for the purpose of this Award, beyond the Parties' specific requests for relief.<sup>1</sup>

***B: The Tribunal's General Approach***

- 9.3 As set out in Part VIII above, on the evidence adduced in these proceedings, the Tribunal has found the Respondent in breach of its obligations towards Chevron and TexPet, for denial of justice under the FET standard and customary international law in Article II(3)(a) of the Treaty and under the Umbrella Clause in Article II(3)(c) of the Treaty.
- 9.4 As explained in Parts VII and VIII above, the Tribunal considers that denial of justice under the Treaty's FET standard equates to denial of justice under customary international law, both falling within the scope of Article II(3)(a) of the Treaty. It follows that the Tribunal's finding regarding denial of justice under the FET standard equates with finding the Respondent also in breach of its obligations under customary international law for denial of justice.
- 9.5 Conversely, the Tribunal has not found the Respondent in breach of its obligations under the Treaty from the facts only that: (i) the Lago Agrio Plaintiffs commenced legal

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<sup>1</sup> As regards the Parties' oral submissions on relief at the Track II Hearing, the Tribunal refers in particular to the Claimants' closing submissions at D12.2708ff and to the Respondent's closing submissions at D13.3011ff.

proceedings against Chevron before the Lago Agrio Court on 7 May 1993; (ii) the Lago Agrio Plaintiffs pleaded individual claims for personal harm against Chevron in their original Complaint filed in the Lago Agrio Litigation (not being diffuse claims);<sup>2</sup> (iii) the Lago Agrio Court assumed jurisdiction over the Complaint (as regards non-diffuse claims), by reason of the undertaking in favour of Ecuadorian jurisdiction in the Aguinda Litigation; and (iv) certain of the Lago Agrio Plaintiffs' legal representatives in the Lago Agrio Litigation engaged in corrupt and other nefarious practices during the Lago Agrio Litigation (not attributable to the Respondent under international law).

9.6 In regard to the Claimants' material requests for relief regarding the Respondent's internationally wrongful acts, the Tribunal's starting-point comprises the ILC's Articles on State Responsibility,<sup>3</sup> the judgments of the Permanent Court of International Justice in *Chorzów Factory* (1927 & 1928)<sup>4</sup> and the judgment of the International Court of Justice in *Avena I* (2004).<sup>5</sup>

9.7 In *Avena I* (*Mexico v USA*), applying the general principles enunciated in *Chorzów Factory*, the Court decided upon the form of reparation (inter alia) as follows:<sup>6</sup>

*“119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the Factory at Chorzów case as follows: ‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’ (Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.) What constitutes ‘reparation in an adequate form’ clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the ‘reparation in an adequate form’ that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows: ‘The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had*

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<sup>2</sup> This decision was reached by a majority of the Tribunal: see the Tribunal's Decision on Track IB.

<sup>3</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) II (Part Two) Yearbook of the ILC 31, CLA-291.

<sup>4</sup> *The Factory at Chorzów* (*Germany v. Poland*), PCIJ, Judgment (Jurisdiction), 26 July 1927, 1927 PCIJ Series A No. 9; Judgment (Merits), 13 September 1928, 1928 PCIJ Series A No. 17, CLA-406.

<sup>5</sup> *Avena and Other Mexican Nationals* (*Mexico v. United States of America*) I, ICJ, Judgment, 31 March 2004, 2004 ICJ Reports 12.

<sup>6</sup> *Avena and Other Mexican Nationals* (*Mexico v. United States of America*) I, ICJ, Judgment, 31 March 2004, 2004 ICJ Reports 12, para 119.

*not been committed.’ (Factory at Chorzów, Merits, 1928, PCIJ., Series A, No. 17., p. 47).”*

9.8 In that case, the Court identified the respondent State’s internationally wrongful acts as the “process” of the domestic court proceedings (under the Vienna Convention on Consular Relations), as distinct from “the correctness as such of any conviction or sentencing”. Accordingly, the Court concluded that:<sup>7</sup>

*“[121] ... the internationally wrongful acts committed by the United States [sic; the United States of America] were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States’ courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.*

*[122] The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention [i.e. the Vienna Convention on Consular Relations] and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.”*

9.9 As regards the ILC Articles on State Responsibility, the Tribunal refers, in particular, to Articles 16 and 28 to 38.<sup>8</sup> An internationally wrongful act (which includes the violation of a treaty or of customary international law) entails the consequences set out in Part Two of the ILC Articles on State Responsibility. These consequences include Article 28 (“Legal consequences of an internationally wrongful act”), Article 29 (“Continued duty of performance”), Article 30 (“Cessation and non-repetition”), Article 31 (“Reparation”), Article 32 (“Irrelevance of Internal law”), Article 33 (“Scope of international obligations”) and Articles 34 to 38 on forms of reparation.

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<sup>7</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America) I*, ICJ, Judgment, 31 March 2004, 2004 ICJ Reports 12, paras 121-122.

<sup>8</sup> The relevant text of these ILC Articles on State Responsibility is fully set out in Part III above; see also CLA-291.

- 9.10 In regard to the enforcement of the Lago Agrio Judgment before the courts of a third State (i.e. not Ecuador or the USA), the Claimants referred to Article 16 of Part One of the ILC Articles on State Responsibility (“Aid or assistance in the commission of an internationally wrongful act”).<sup>9</sup> This Article provides that a State which aids or assists another State in the commission of an internationally wrongful act entails the consequences set out in Part Two of the ILC Articles on State Responsibility if: (i) that State does so with knowledge of the circumstances of the internationally wrongful act and (ii) the act would be internationally wrongful if committed by that State. For this purpose, a denial of justice under customary international law would be such internationally wrongful act. As the International Court of Justice decided in the *Bosnia Genocide Case* (2007),<sup>10</sup> Article 16 of the ILC Articles reflects a rule of customary international law.
- 9.11 The Tribunal adopts the general approach suggested by the ICJ in *Avena I*, to the effect that reparation for an internationally wrongful act varies, depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury under international law.
- 9.12 The Tribunal also follows the distinction drawn by the ICJ in *Avena I* between the “process” of the Lago Agrio Litigation leading to the enforceability of the Lago Agrio Judgment and the “correctness” of the Lago Agrio Judgment, as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts.
- 9.13 A similar distinction was drawn by the ICJ in the *Case Concerning the Arrest Warrant* (2002).<sup>11</sup> In that case, the unlawful arrest warrant engaged the respondent State’s international responsibility; but the warrant continued to exist, both as a matter of the local law and also international law. The Court held: “The warrant is still extant and remains unlawful ... The Court accordingly considers that Belgium must by means of its own choosing cancel the warrant in question ...”. Significantly, the Court did not itself cancel the warrant. In the *Case Concerning Jurisdictional Immunities* (2012),<sup>12</sup>

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<sup>9</sup> Track II Hearing D12.2719ff.

<sup>10</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, 2007 ICJ Reports 43, para 420, CLA-640.

<sup>11</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, Judgment, 14 February 2002, 2002 ICJ Reports 3, para 76, CLA-415.

<sup>12</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment, 3 February 2012, 2012 ICJ Reports 99, para 137, CLA-616.



the ICJ ordered the respondent State to take steps, by means of its own choosing, to ensure that decisions of its own courts “become unenforceable”. Again, significantly, the ICJ did not itself annul or declare the nullity of these judicial decisions.

- 9.14 Accordingly, applying international law, the Tribunal does not consider that it has the power to annul the Lago Agrio Judgment as regards its lack of “correctness”. Albeit unlawful under international law as to “process” (as decided by the Tribunal), the Lago Agrio Judgment exists as a concrete fact under Ecuadorian law, hence the Claimants’ successive appeals to the Respondent’s courts. Given such existence, the Lago Agrio Judgment has a legal effect and resulting consequences under international law. However, the remedy of annulment, as such, lies with the Respondent’s internal law. This Tribunal has no power to apply such an internal remedy, as an international tribunal. It does, however, have the power to order the Respondent to take steps to secure that result.
- 9.15 As to international law, the Tribunal has decided that the Respondent breached its obligations, by a denial of justice, in issuing the Lago Agrio Judgment, rendering it enforceable and maintaining its enforceability by the Lago Agrio Plaintiffs.
- 9.16 In Part VIII above, as to the right of a party to receive a fair hearing before an impartial tribunal, the Tribunal has already referred to Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Articles 2 and 6 of the UN Basic Principles on the Independence of the Judiciary. The violation of such a right by judicial corruption is proscribed by the UN Convention against Corruption ratified by the General Assembly on 31 October 2003 (to which the Respondent is a Contracting Party). In *World Duty Free* (2006), in the context of corruption by bribery, the tribunal identified, as a matter of international public policy, an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It concluded: “In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States ...”.<sup>13</sup> In the Tribunal’s view, judicial bribery must rank as one of the more serious cases of corruption, striking

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<sup>13</sup> *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, 46 ILM 339, para 157, RLA-548.

directly at the rule of law, access to justice and public confidence in the legal system; and also, as regards the foreign enforcement of a corrupt judgment, at the law of nations. Accordingly, the Tribunal concludes that the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts) violates international public policy. As a matter of international comity, it must follow that the Lago Agrio Judgment should not be recognised or enforced by the courts of other States.

- 9.17 In the Tribunal’s view, the reinstatement of the Claimants’ rights under international law requires of the Respondent the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to “wipe out all the consequences” of the Respondent’s internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent.
- 9.18 The Tribunal considers that these measures, subject to their elaboration in the form of declarations and orders below, are appropriate in the present circumstances of this case. These circumstances do not require the Tribunal itself to declare the nullity of the Lago Agrio Judgment under international law.
- 9.19 For the time being, contrary to the Claimants’ submissions,<sup>14</sup> the Tribunal is willing to assume that the Respondent will comply in good faith with this Award, in compliance with the Parties’ Arbitration Agreement (as defined in Part I of this Award), the Treaty and the *lex loci arbitri*.

***C: The Claimants’ Requests for Relief***

- 9.20 For this Track II, in the light of its general approach and decisions in this Award, the Tribunal addresses below the material relief sought by the Claimants in the form of the specific declarations and orders highlighted in green and purple in its marked-up Appendix A to their 19 March 2018 letter, recited in Annex 3(1) to Part I above:<sup>15</sup>
- 9.21 A3.3 Declaration 6: “*Declare that Claimants have no liability or responsibility for satisfying the Lago Agrio Judgment because they were fully released for all such claims by the Settlement Agreements*”.

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<sup>14</sup> Track II Hearing D12.2733ff.

<sup>15</sup> As designated by the Claimants, “green” signifies relief requested in Track II and “purple” relief requested in Tracks II and III. This “purple” relief is here marked \*. In Annex 3 to Part I above, “green” is italicised and “purple” italicised and underlined.

- 9.22 The Respondent, whether acting through its judicial branch or otherwise, was and remains bound to ensure, by means of its own choosing, that the Claimants have no liability or responsibility as regards diffuse claims under the 1995 Settlement Agreement. To such extent, this request is granted in principle as set out in this Award's Operative Part X.
- 9.23 A3.3 Declaration 7: *"Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment were based) are barred by res judicata and collateral estoppel"*.
- 9.24 The Respondent was and remains bound to ensure, by means of its own choosing, that in accordance with the 1995 Settlement Agreement the Claimants are not exposed to liability or responsibility for diffuse claims in the courts of Ecuador. To such extent, this request is granted in principle as set out in this Award's Operative Part X.
- 9.25 A3.4: Declaration 1: *"Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements [the 1995 Settlement Agreement], 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, punitive damages or penalties, 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"*.
- 9.26 This request is not granted save in regard to diffuse claims under the 1995 Settlement Agreement, as explained in Paragraphs 9.22 and 9.24 above and set out in this Award's Operative Part X.
- 9.27 A3.4: Declaration 2: *"Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements"*.
- 9.28 The Respondent failed to observe its obligations under the 1995 Settlement Agreement, in breach of the Umbrella Clause in Article II(3)(c) of the Treaty. To such extent, this request is granted in principle as set out in this Award's Operative Part X.
- 9.29 A3.4: Declaration 3: *"Ordering Ecuador to specifically perform the Settlement and Release Agreements."*
- 9.30 The Respondent is required to observe its obligations under the 1995 Settlement Agreement, in accordance with the Umbrella Clause in Article II(3)(c) of the Treaty. To such extent, this request is granted in principle as set out in this Award's Operative Part X.
- 9.31 A3.4: Declaration 4: *"Declaring that Ecuador has breached the U.S.-Ecuador Treaty, including its obligations to afford fair and equitable treatment, full protection and*

*security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, national treatment, and to observe obligations it entered into with regard to investments”.*

- 9.32 This request is granted in principle as regards: (i) denial of justice under the FET standard and customary international law in Article II(3)(a) of the Treaty; and (ii) the non-observation of the 1995 Settlement Agreement under the Umbrella Clause in Article II(3)(c) of the Treaty, as set out in this Award’s Operative Part X.
- 9.33 A3.4: Declaration 6: *“Declaring that under the Treaty and applicable international law, Chevron is not liable for the Judgment”.*
- 9.34 Under Articles II(3)(a), Article II(3)(c) of the Treaty and customary international law, the Respondent (by its judicial branch) was obliged not to hold Chevron (or TexPet) liable under the Lago Agrio Judgment; and consequently the Claimants are, as a matter of international law, not obliged to comply with the Lago Agrio Judgment. To such extent, this request is granted in principle as set out in this Award’s Operative Part X.
- 9.35 A3.4: Declaration 7: *“Declaring that Ecuador is exclusively liable for the Judgment.”*
- 9.36 This request is granted as set out in this Award’s Operative Part X, to the effect that any injury to the First or Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make full reparation under international law.
- 9.37 A3.4: Declaration 8: *“Nullifying the existence, validity, and all effects of the Judgment”.*
- 9.38 This request for nullification is not granted. Under its general approach above in Paragraphs 9.3 to 9.19, the Tribunal has decided that that a declaration of the nullity of the Lago Agrio Judgment is not an appropriate remedy under international law.
- 9.39 A3.4: Declaration 9: *“Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment, including enjoining the nominal Plaintiffs or any Trust from obtaining any related attachments, levies or other enforcement devices”.*
- 9.40 In accordance with the Tribunal’s decisions in Paragraphs 9.22 and 9.24 above, the Respondent is obliged to use measures of its own choosing to prevent the enforcement of the Lago Agrio Judgment. Save to such extent, this request is not granted except as set out in this Award’s Operative Part X.
- 9.41 A3.4: Declaration 10: *“Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly”.*

- 9.42 This request is not granted, save as set out in this Award's Operative Part X.
- 9.43 A3.4: Declaration 11\*: *"Awarding Claimants indemnification against Ecuador in connection with the Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment"*.
- 9.44 This request is not granted in this Award, any such indemnity or payment being issues allocated to Track III as set out in this Award's Operative Part X.
- 9.45 A3.4: Declaration 12\*: *"Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing the Judgment, including the amounts embargoed thus far"*.
- 9.46 This request is not granted in this Award, any such sums being issues allocated to Track III as set out in this Award's Operative Part X.
- 9.47 A3.4: Declaration 14: *"Ordering Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Judgment that: ... (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; ... (v) any enforcement of the Judgment places Ecuador in violation of its international law obligations"*.
- 9.48 This request is not granted as regards sub-paragraph (ii): see Part VIII above (Paragraph 8.63). As regards sub-paragraph (v), it is granted in principle, as set out above in Paragraphs 9.22, 9.24 and 9.40 and in this Award's Operative Part X.
- 9.49 A3.4: Declaration 17: *"Any other and further relief that the Tribunal deems just and proper."*
- 9.50 This general request has been addressed by the Tribunal in its several decisions above, subject to any further relief to be addressed in Track III. The Tribunal does not think it necessary to address here this general request any further.
- 9.51 A3.5B: Order: *"Claimants also request that the Tribunal provide for a subsequent phase in this arbitration to determine all costs and attorneys' fees that should be awarded to Claimants for being forced to (i) pursue this arbitration; (ii) uncover the Judgment fraud; and (iii) defend against enforcement of the Lago Agrio Judgment in any jurisdiction"*.
- 9.52 This request is granted in principle, as set out in this Award's Operative Part X.
- 9.53 A3.8A: Declaration 1: *"By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law and breached provisions of the Treaty."*
- 9.54 This request is granted in principle, as set out this Award's Operative Part X.

- 9.55 A3.8A: Declaration 3: *“The court [1] rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere [2] to try the Lago Agrio case and [3] to pass judgment.”*
- 9.56 This request (as directed at the Lago Agrio Court in the Lago Agrio Litigation) is not granted as regards [1] and [2]: see Part VIII above (Paragraph 8.63).
- 9.57 As regards [3], this request (as directed at the terms of the Lago Agrio Judgment) is granted in principle insofar as the Judgment is inconsistent with the Respondent’s obligations under Articles II(3)(a) and II(3)(c) of the Treaty, as decided above in Paragraphs 9.22, 9.24, 9.40 and 9.48 and as set out in this Award’s Operative Part X.
- 9.58 A3.8A: Declaration 4: *“The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.”*
- 9.59 This request is granted in principle, as set out in this Award’s Operative Part X.
- 9.60 A3.8A: Declaration 5: *“The Judgment is a nullity as a matter of international law”.*
- 9.61 This request is not granted. As decided above in Paragraph 9.38, under its general approach described in Paragraphs 9.3 to 9.19, the Tribunal has decided that a declaration of the nullity of the Lago Agrio Judgment is not an appropriate remedy under international law.
- 9.62 A3.8A: Declaration 6: *“The Judgment is [1] unlawful and [2] consequently devoid of any legal effect {under international law}<sup>16</sup>.”*
- 9.63 As to unlawfulness under the Treaty (including customary international law), the first part of this request is granted in principle, as set out in this Award’s Operative Part X. The second part is not granted. As decided above in Paragraphs 9.38 and 9.61, under its general approach described in Paragraphs 9.3 to 9.19, the Tribunal does not consider that such a declaration for the Lago Agrio Judgment is an appropriate remedy under international law.
- 9.64 A3.8A: Declaration 10\*: *“By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador [1] is in breach of its obligations under the Treaty, and [2] must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment”.*

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<sup>16</sup> The words “under international law” in this Declaration 6 were added by the Claimants at the Track II Hearing: see D12.2514.

- 9.65 As the first part, this request is granted in principle as set out in this Award’s Operative Part X, given the order dated 1 March 2012 of the Lago Agrio Appellate Court declaring the enforceability of the Lago Agrio Judgment and the Respondent’s judicial branch maintaining such enforceability (see Part IV above). As to the second part, this request is not granted in this Award, any such indemnity being allocated to Track III, as set out in this Award’s Operative Part X.
- 9.66 A3.8B: Order 5: *“To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent’s possession”*.
- 9.67 This request is granted in principle, as set out in this Award’s Operative Part X.
- 9.68 A3.9A: Declaration 1: *“The Lago Agrio Litigation is exclusively a diffuse-rights case”*.
- 9.69 This request is not granted: the Tribunal refers to its Decision (by a majority) dated 12 March 2015 in Track IB.
- 9.70 A3.9A: Declaration 2: *“The 1999 EMA has no legal effect on the Settlement and Release Agreements [the 1995 Settlement Agreement]”*.
- 9.71 This request is not granted, in the general form requested. In its Decision on Track 1B, the Tribunal decided (by a majority) that the Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon personal rights under Ecuadorian law, not being diffuse claims falling within the scope of the release under the 1995 Settlement Agreement. The Tribunal also decided that Article 43 of the 1999 Environmental Management Act (the “EMA”) could not by itself convert what was otherwise a personal claim by an individual into a diffuse claim. Conversely, the Lago Agrio Plaintiffs could not succeed in bringing a diffuse claim before the Ecuadorian Courts, not being an individual claim for personal harm, without the Respondent breaching the 1995 Settlement Agreement: see Paragraphs 168 and 186(1) of the Decision on Track IB. In these circumstances, the Tribunal thinks it unnecessary to answer the request any further in this Award.
- 9.72 A3.9A: Declaration 3: *“The Lago Agrio Litigation was barred at its inception by res judicata.”*
- 9.73 This request is not granted. As already indicated, by its Decision on Track IB, the Tribunal decided (by a majority) that the Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon personal rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement, and that

the Lago Agrio Complaint was not wholly barred at its inception by *res judicata*, under Ecuadorian law, by virtue of the 1995 Settlement Agreement: see paragraphs 186(1) and 186(2) of the Decision on Track 1B.

- 9.74 A3.9A: Declaration 4: *“By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the Treaty.”*
- 9.75 This request, albeit in different forms of wording, has already been addressed above in Paragraphs 9.28, 9.32, 9.54, 9.57, 9.63 and 9.65. The Tribunal has decided that the Respondent (by its judicial branch) failed to comply with its obligations under the FET standard and customary international law in Article II(3)(a) of the Treaty and under the Umbrella Clause in Article II(3)(c) of the Treaty, by the issuance and enforceability of the Lago Agrio Judgment resulting from the conduct of the Lago Agrio Court, the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court. The Tribunal does not therefore consider it necessary to grant this further relief, as a matter of surplusage; and it is not granted.
- 9.76 A3.9A: Declaration 5: *“By issuing the Lago Agrio Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996 and 1998 Settlement and Release Agreements, and also violated Chevron’s rights under the Treaty.”*
- 9.77 This Tribunal repeats its decision above in Paragraph 9.75; and this request is therefore not granted.
- 9.78 A3.9A: Declaration 6: *“The Lago Agrio Judgment is a nullity as a matter of international law.”*
- 9.79 This request is not granted. (It repeats the requests addressed above under Paragraphs 9.38, 9.61 and 9.63; and the Tribunal provides the same reason for its decision).
- 9.80 A3.9A: Declaration 7: *“The Lago Agrio Judgment is [1] unlawful and [2] consequently devoid of any legal effect.”*
- 9.81 As to the first part, this request is granted in principle, as already decided above in Paragraph 9.63 and as set out in this Award’s Operative Part X. As to the second part, the Tribunal repeats its decision above in Paragraph 9.38; this request repeats the similar request addressed above under Paragraphs 9.61 and 9.63; the Tribunal does not therefore consider it necessary to grant this further relief, as a matter of surplusage; and it is not granted.
- 9.82 A3.9A: Declaration 8: *“The Lago Agrio Judgment is a violation of Chevron’s rights under the Treaty, and is not entitled to enforcement within or without Ecuador.”*



- 9.83 This request is granted in principle, as already decided above in Paragraphs 9.40 and 9.63 and as set out in this Award's Operative Part X. The Tribunal does not therefore consider it necessary to consider this request separately.
- 9.84 A3.9A: Declaration 9: "*The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognized and enforced*".
- 9.85 This request is granted in principle, as set out in this Award's Operative Part X.
- 9.86 A3.9A: Declaration 10\*: "*By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the Treaty, and must compensate Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment*".
- 9.87 This request repeats the similar request addressed above under Paragraph 9.65. It is therefore unnecessary to address it here separately, save that all issues relating to compensation are allocated to Track III, as also set out in this Award's Operative Part X.
- 9.88 A3.9B: Order 1: "*To take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian law.*"
- 9.89 This request, albeit in different forms of wording, has already been addressed above in Paragraphs 9.38, 9.61, 9.63 and 9.81. It is therefore unnecessary to address it here separately.
- 9.90 A3.9B: Order 2: "*To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment*".
- 9.91 This request, albeit in different form of wording, has already been addressed above in Paragraphs 9.40, 9.63 and 9.83. It is therefore unnecessary to address it here separately.
- 9.92 A3.9B: Order 3: "*To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*"
- 9.93 This request, albeit in different form of wording, has already been addressed above in Paragraph 9.40. It is therefore unnecessary to address it here separately.
- 9.94 A3.9B: Order 4: "*To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the Treaty*".

9.95 This request is not granted, save as otherwise ordered in this Award’s Operative Part X (see also the decisions regarding the similar request in Paragraph 9.48 above).

9.96 Paragraph 47: *“Claimants’ requested relief is without prejudice to all other remedies sought in relation to Track II or any other remedy that may effectively protect Claimants’ rights, including a damage remedy as part of Track III.”*

9.97 To the extent necessary and appropriate, the Tribunal defers to Track III this general request as to any undecided issues outstanding from Track I, IB and II.

***D: The Respondent’s Requests for Relief***

9.98 In the circumstances, it is possible to decide the Respondent’s requests for relief more succinctly. As with the Claimants’ requests for relief, it is appropriate to set out the Respondent’s material requests in the form submitted to the Tribunal.

9.99 In its letter dated 20 April 2018, the Respondent limited its pleaded requests for relief for Track II to “those prayers referring to findings of jurisdiction and State responsibility”, with “prayers that refer to remedy” assigned to Track III, along with (i) the ‘show cause’ issues related to the Tribunal’s Fourth Interim Award; (ii) the Respondent’s application of 1 March 2013 for “Reconsideration of the First, Second and Fourth Interim Awards” and (iii) any quantum issues (page 8 of its letter). Moreover, the Respondent has confirmed its agreement that all issues of costs be assigned to Track III (see below).

9.100 For this Track II, in the light of its general approach and decisions in this Award, the Tribunal addresses below the material relief sought by the Respondent in the form of the specific declarations and orders as marked-up in its Attachment 1, recited in Annex 3(2) to Part I above:<sup>17</sup>

9.101 A3.12(b): *“Dismisses on the merits Chevron’s claims under the 1995 Settlement Agreement and the 1998 Final Release [i.e., collectively, “the 1995 Settlement Agreement”].”*

9.102 This request is not granted, as regards the Claimants’ claims under the Umbrella Clause in Article II(3)(c) of the Treaty.

9.103 A3.12(c): *“Dismisses on the merits TexPet’s claims under the 1995 Settlement Agreement and the 1998 Final Release.”*

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<sup>17</sup> As designated by the Respondent, “red” signifies relief requested in Track II and “blue” relief requested in Track III. See Annex 3 to Part I above.

- 9.104 This request is not granted, as regards the Claimants' claims under the Umbrella Clause in Article II(3)(c) of the Treaty.
- 9.105 A3.12(d): *"Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release"*.
- 9.106 This request is not granted, as regards the Claimants' claims under the Umbrella Clause in Article II(3)(c) of the Treaty.
- 9.107 A3.12(e): *"Dismisses all of Claimants' claims as they relate to the 1996 Local Settlements, reached between TexPet and local government entities"*.
- 9.108 This request is not granted, subject to this Award's Operative Part X.
- 9.109 A3.12(f): *"Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel."*
- 9.110 In its Decision dated 12 March 2015 in Track IB, the Tribunal decided (by a majority) that the Lago Agrio Complaint of 7 May 2003 of the Lago Agrio Plaintiffs was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement. Save as aforesaid, this request is not granted.
- 9.111 A3.16(a): *"Declaring that it [the Tribunal] lacks jurisdiction over Claimants' denial of justice and related treaty claims against the Republic."*
- 9.112 This request is not granted.
- 9.113 A3.16(b): *"Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, dismissing Claimants' denial of justice and related treaty claims against the Republic as not ripe for adjudication under international law in light of Claimants' failure to exhaust available local remedies, and as otherwise meritless."*
- 9.114 This request is not granted.
- 9.115 A3.16(c): *"Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation."*
- 9.116 This request is not granted, subject to this Award's Operative Part X.
- 9.117 A3.16(d): *"Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation."*
- 9.118 This request is not granted.

*E: Miscellaneous*

- 9.119 *Compensation:* The Tribunal decides, confirming its earlier procedural orders, that all issues of quantum shall be addressed in Track III of these arbitration proceedings. These issues shall include issues as to reparation in the form of compensation for injuries sustained by the First Claimant or the Second Claimant, as pleaded by the Claimants, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest. Track III may also address, to the extent still relevant, issues of non-compensatory restitution.
- 9.120 *Costs:* The Parties are agreed and the Tribunal here confirms that all issues relating to legal and arbitration costs under Articles 38-40 of the UNCITRAL Arbitration Rules are deferred to a later stage of these arbitration proceedings. Nevertheless, the Tribunal considers that it would be useful for the Parties to provide breakdowns of the amounts of their respective claims for legal costs to date, as set out in as set out in this Award's Operative Part X.
- 9.121 *Track III Issues:* Subject to any further order of the Tribunal otherwise, the issues for Track III shall include: (i) compensation (as described above); (ii) the Parties' extant requests for relief left undecided in this Award, as identified in their respective letters dated 19 March and 20 April 2018 (including any extant issues as to non-compensatory restitution); (iii) the 'show cause' issues as to compensation claimed by the Claimants for the Respondent's violations of the Tribunal's First and Second Interim Awards on Interim Measures; and (iv) the Respondent's application for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards.

***PART X***  
***THE OPERATIVE PART***

***A: Introduction***

**10.1 For the reasons set out in this Award, based on the evidential materials adduced in these arbitration proceedings together with its earlier awards, orders and decision, the Tribunal makes the following declarations and orders under the Treaty and international law:**

***B: Declarations as to Jurisdiction and Admissibility***

**10.2 The Tribunal declares that it has jurisdiction under Article VI of the Treaty over the claims pleaded in this arbitration by the First Claimant (Chevron) and the Second Claimant (TexPet) under Articles II(3)(a) and II(3)(c) of the Treaty; and the Tribunal rejects all objections as to lack of jurisdiction pleaded by the Respondent;**

**10.3 The Tribunal declares that the claims pleaded in this arbitration by the First Claimant and the Second Claimant under Articles II(3)(a) and II(3)(c) of the treaty are admissible under Article VI of the Treaty; and the Tribunal rejects all objections as to non-admissibility pleaded by the Respondent.**

***C: Declarations as to the Merits***

**10.4 The Tribunal declares that material parts of the Lago Agrio Judgment of 14 February 2011 (as clarified by order of 4 March 2011) were corruptly ‘ghostwritten’ for Judge Nicolás Zambrano Lozada, as a judge of the Lago Agrio Court, by one or more of the Lago Agrio Plaintiffs’ representatives in return for a promise by such representative(s) to pay to Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment’s enforcement by the Lago Agrio Plaintiffs;**

**10.5 The Tribunal declares that the Respondent, by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also**

decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador, wrongfully committed a denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty;

- 10.6** The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant for denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty; and the Tribunal rejects the defences pleaded by the Respondent;
- 10.7** The Tribunal (by a majority) declares, confirming its Decision on Track IB, that the Lago Agrio Complaint of 7 May 1998, as an initial pleading, included individual claims (for personal harm) resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement and that, therefore, the Lago Agrio Complaint was not wholly barred at its inception by res judicata under Ecuadorian law, by virtue of the 1995 Settlement Agreement;
- 10.8** The Tribunal declares that the said Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) decided only diffuse claims as distinct from individual claims for personal harm by the Lago Agrio Plaintiffs, whereby the Respondent violated its obligations towards the First Claimant and the Second Claimant as “Releasees” under the 1995 Settlement Agreement;
- 10.9** The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant under Article II(3)(c) of the Treaty for the non-observation of its obligations towards each of them as a “Releasee” under the 1995 Settlement Agreement; and the Tribunal rejects the defences pleaded by the Respondent;
- 10.10** The Tribunal declares that, given the Respondent’s said denial of justice, the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) grossly violated the fundamental procedural rights of

**the First Claimant (including its rights of defence); the said Lago Agrio Judgment (as thus decided) is contrary to international public policy; and no part of the said Lago Agrio Judgment should be recognised or enforced by any State with knowledge of the Respondent’s said denial of justice;**

**10.11 The Tribunal declares that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law;**

**10.12 For the avoidance of doubt, the Tribunal declares and confirms that neither this Award nor any of its earlier awards, orders and decision precludes a claim by any of the Lago Agrio Plaintiffs against the First or Second Claimants made for personal harm in respect of his or her individual rights, not being a diffuse claim within the meaning of the 1995 Settlement Agreement.**

***D: Orders as to the Merits***

**10.13 The Respondent shall, to the satisfaction of the Tribunal and as unconditional obligations of result (save where otherwise indicated):**

- (i) Take immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts);**
- (ii) take immediate steps, of its own choosing, to preclude any of the Lago Agrio Plaintiffs, any “trust” purporting to represent their interests (including the “Frente de Defensa La Amazonia”), any of the Lago Agrio Plaintiffs’ representatives, and any non-party funder from enforcing any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts), directly or indirectly, whether by attachment, arrest, interim injunction, execution or howsoever otherwise;**

- (iii) on notice from the First or Second Claimants, advise promptly in writing any State (including its judicial branch), where the Lago Agrio Plaintiffs may be seeking directly or indirectly, now or in the future, the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) of this Tribunal’s declarations and orders regarding the Respondent’s internationally wrongful acts comprising a denial of justice resulting from the Lago Agrio Judgment (as thus decided); and, for this purpose (being required by legal duty or to pursue a legal right), any Party shall be entitled, notwithstanding Article 32(5) of the UNCITRAL Arbitration Rules, to disclose to the State’s judicial branch (on whatever terms that its courts may order) a copy of this Award and its earlier awards, orders and decision;**
- (iv) abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) within or without Ecuador;**
- (v) return promptly to the First Claimant any such proceeds that (notwithstanding the foregoing) come into the Respondent’s custody, possession or control;**
- (vi) take corrective measures, of its own choosing, to “wipe out all the consequences” of all the Respondent’s internationally wrongful acts in regard to the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts), within the meaning of Article 31 of the International Law Commission’s Articles on State Responsibility, excepting only reparation in the form of compensation (as to which, see Section E below);**
- (vii) comply with its obligations towards the First Claimant and the Second Claimant as “Releasees” under the 1995 Settlement Agreement, in accordance with Article II(3)(c) of the Treaty; and**



**(viii) subject to further order of this Tribunal in Track III, make full reparation in the form of compensation for any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts).**

*E: Compensation*

**10.14 All issues as to reparation in the form of compensation for any injuries sustained by the First or Second Claimant, as claimed by the Claimants and denied by the Respondent, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest, are currently assigned for further submissions by the Parties to Track III. These issues are not decided in this Award.**

*F: Legal and Arbitration Costs*

**10.15 All issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent, are currently assigned for further submissions by the Parties later in these arbitration proceedings. These issues are not decided in this Award;**

**10.16 Nonetheless, so as to facilitate this later exercise as to assessment, the Claimants and the Respondent shall submit written summaries (not to exceed ten pages) of their respective claimed amounts for costs and expenses to date, to be submitted to the Tribunal not later than 90 days following the date of this Award. These summaries shall contain only a breakdown of the claimed amounts and shall not include any submissions as to the merits of the Parties' respective claims for costs (including issues of allocation).**

*G: Miscellaneous*

**10.17 The Parties' extant requests for relief, as marked-up in the enclosures to their respective letters dated 19 March and 20 April 2018 for Track III, shall be addressed by the Parties in Track III of these arbitration proceedings;**

- 10.18** The Tribunal confirms, as declared in its Fourth Interim Award on Interim Measures dated 7 February 2013, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law;
- 10.19** In accordance with the Tribunal's said Fourth Interim Award, at Paragraph 2 of Part IV (page 31), the 'show cause' issues relating to compensation claimed by the First and Second Claimants for the Respondent's violations of the said First and Second Interim Awards shall be addressed by the Parties in Track III of these arbitration proceedings;
- 10.20** The Respondent's application of 1 March 2013 for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards shall be further addressed by the Parties in Track III of these arbitration proceedings;
- 10.21** In the light of this Award, not later than 90 days following the date of this Award, any Party may apply to the Tribunal for permission to add any further issue or request for relief to be addressed by the Parties in Track III of these arbitration proceedings;
- 10.22** Further, in the light of this Award, not later than 90 days following the date of this Award, the Respondent may (in writing) show cause why the Tribunal should not vary Paragraph 4 of its Second Interim Award on Interim Measures by ordering the release to the Claimants of the amount of US\$ 50 million deposited by the Claimants with the Permanent Court of Arbitration as security for the Claimants' contingent responsibility to the Respondent in regard to such interim measures; and
- 10.23** Save as aforesaid, the requests for relief made by the First and Second Claimants for decision in this Track II are not granted; and the requests for relief made by the Respondent for decision in this Track II are not granted.

**10.24 This Award, although separately signed by the Tribunal's members on three signing pages, constitutes a "partial award" signed by the three arbitrators under Article 32 of the UNCITRAL Arbitration Rules.**

**Made at The Hague, The Netherlands as the place (or seat) of this arbitration, by the Tribunal,**

On **30 August** 2018

*Dr Horacio A. Grigera Naón:*



*Professor Vaughan Lowe QC:*

*V.V. Veeder (President):*

**10.24 This Award, although separately signed by the Tribunal's members on three signing pages, constitutes a "partial award" signed by the three arbitrators under Article 32 of the UNCITRAL Arbitration Rules.**

**Made at The Hague, The Netherlands as the place (or seat) of this arbitration, by the Tribunal,**

**On 30 August 2018**

*Dr Horacio A. Grigera Naón:*

*Professor Vaughan Lowe QC:*



*V.V. Veeder (President):*

**10.24 This Award, although separately signed by the Tribunal's members on three signing pages, constitutes a "partial award" signed by the three arbitrators under Article 32 of the UNCITRAL Arbitration Rules.**

**Made at The Hague, The Netherlands as the place (or seat) of this arbitration, by the Tribunal,**

**On 30 August 2018**

*Dr Horacio A. Grigera Naón:*

*Professor Vaughan Lowe QC:*

*V.V. Veeder (President):*

A handwritten signature in dark ink, appearing to read 'V.V. Veeder', is positioned to the right of the typed name 'V.V. Veeder (President):'.