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

CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
CLAIMANTS,

v.

THE REPUBLIC OF ECUADOR,
RESPONDENT.

CLAIMANTS' SUPPLEMENTAL MEMORIAL ON TRACK 2

May 9, 2014

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CLAIMANTS' SUPPLEMENTAL MEMORIAL ON TRACK 2

Pursuant to Procedural Order No. 23, Claimants Chevron Corporation ("Chevron") and Texaco Petroleum Company ("TexPet") (collectively "Claimants") hereby submit their Supplemental Memorial regarding issues relevant to Track 2 of the arbitration proceedings. Claimants incorporate their previous submissions into this Supplemental Memorial on Track 2.[1]

I. INTRODUCTION AND SUMMARY

1. Claimants' Track 2 Reply Memorial of June 5, 2013, and prior submissions, detail Claimants' claims for the Republic of Ecuador's breaches of its obligations under the Bilateral Investment Treaty and a denial of justice under customary international law.[2]

2. As previously detailed, Ecuador failed to provide Claimants with effective means of asserting claims and enforcing rights, failed to treat Claimants' investment fairly and equitably, failed to provide that investment with full protection and security, and treated the investment in an arbitrary and discriminatory manner.[3] As addressed in the Track 1 phase of this arbitration, Ecuador further violated the umbrella clause by breaching its contractual obligations to Claimants under the 1995 Settlement Agreement and related releases and agreements.[4]

3. Claimants' prior submissions also detail Ecuador's conduct resulting in a fundamental denial of justice under customary international law. Ecuador violated, and continues to violate, fundamental due process. Through its various organs, it engaged in fraud

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[1] Unless otherwise evident from the context, the terms and abbreviations used in this Supplemental Memorial on Track 2 have the same meanings as in Claimants' Supplemental Memorial on the Merits (Mar. 20, 2012) and Claimants' Track 2 Reply Memorial (June 5, 2013).

[2] *See* Claimants' Memorial on the Merits (Sept. 6, 2010) ("Memorial"); Claimants' Supplemental Memorial on the Merits (Mar. 20, 2012) ("Supp. Memorial"); Claimants' Reply Memorial on the Merits – Track 1 (Aug. 29, 2012) ("Track 1 Reply"); Claimants' Reply Memorial – Track 2 (June 5, 2013) ("Track 2 Reply"); Claimants' Supplemental Memorial on Track 1 (Jan. 31, 2014) ("Track 1 Supp. Memorial").

[3] *See* Claimants' Memorial ¶¶ 459-524; Claimants' Track 2 Reply ¶¶ 321-326.

[4] *See* Claimants' Memorial ¶¶ 373-455; Claimants' Supp. Memorial ¶¶ 211-217; Claimants' Track 2 Reply ¶¶ 337-357.

and corruption, supported and enabled serious judicial misconduct, and continues to actively support the fraudulent Lago Agrio Judgment and the appellate decisions affirming that Judgment.[5] Claimants complain, *inter alia*, of the following acts and omissions of Ecuador:

- The Lago Agrio Litigation involved the judiciary's numerous failures of due process, including, among other things, (i) ending independent inspections of well sites when the results were not favorable to the Lago Agrio Plaintiffs, and instead appointing an "independent global damage expert" who was on the Plaintiffs' payroll and whose reports were drafted by the Plaintiffs and their experts;[6] (ii) taking bribes from the Lago Agrio Plaintiffs to rule favorably for them, and secretly using a ghostwriter to prepare orders favorable to the Plaintiffs;[7] and (iii) allowing the Plaintiffs to draft the Judgment in exchange for the promise of a substantial bribe;[8]
- Ecuador's judiciary lacks independence, and the political branches exercised undue influence over the judiciary in support of the Lago Agrio Plaintiffs and against Claimants;
- Ecuador pursued baseless criminal charges against Claimants' representatives and others in an effort to undermine valid settlement agreements and coerce and intimidate those who might cooperate with Claimants;
- Ecuador's political leaders engaged in a sustained campaign to support and promote the Plaintiffs, their claims and the Judgment, and to vilify Claimants;

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5 *See* Claimants' Memorial ¶¶ 246-283; Claimants' Supp. Memorial ¶¶ 88-153; Claimants' Track 2 Reply ¶¶ 36-219.

6 *See* Claimants' Memorial ¶¶ 201-235; Claimants' Track 2 Reply ¶¶ 72-88.

7 *See* Claimants' Memorial ¶¶ 285-294; Claimants' Supp. Memorial ¶ 113; Claimants' Track 2 Reply ¶¶ 59-71.

8 *See* Claimants' Supp. Memorial ¶¶ 4-17; Claimants' Track 2 Reply ¶¶ 37-56.

- Despite the ample evidence of bribery, corruption, fraud, and failure of due process, Ecuador's courts affirmed the Lago Agrio Judgment and refused to address those issues.

4. Due to the unique circumstances of the case, Claimants seek a combination of remedies including declarative, injunctive, and monetary relief to address Ecuador's violations of its international law obligations. These remedies include, *inter alia*, a declaration that, due to the fundamental denial of justice and BIT violations, the Lago Agrio Judgment is a nullity, without legal effect.

5. With Claimants' recent submissions,[9] the Tribunal now has further evidence before it establishing the facts underlying these claims, leaving no doubt that Claimants have been the victims of Ecuador's breaches of its Treaty obligations and of a fundamental denial of justice. Most of this additional evidence was generated as a result of significant events occurring since Claimants submitted their Track 2 Reply Memorial.

6. Among these events, in October and November 2013, the United States District Court in New York held a trial on Chevron's Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against Lago Agrio Plaintiffs' counsel Steven Donziger and certain of the Lago Agrio Plaintiffs.[10] On March 4, 2014, the Court issued its Opinion and Judgment in the RICO case, finding that the Lago Agrio Plaintiffs obtained the Judgment through a pattern of fraud and corruption, including bribing the judge in the Lago Agrio Litigation so he would rule

[9] *See* Claimants' letter to the Tribunal (Dec. 23, 2013), with accompanying exhibits; Claimants' letter to the Tribunal (Mar. 4, 2014), with accompanying exhibits.

[10] *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), United States District Court for the Southern District of New York ("the RICO case").

in their favor and allowing them to draft the Judgment, which the judge then signed and fraudulently released as his own.[11]

7. From the important new evidence generated from the RICO trial, particularly significant is the testimony of the defrocked judge who issued the Lago Agrio Judgment, Nicolás Zambrano.[12] Zambrano's testimony confirms the previously submitted evidence of fraud, misconduct, and corruption permeating the Lago Agrio Litigation and the Judgment.

8. Although Zambrano falsely insists that he "wrote every word" of the Lago Agrio Judgment,[13] his assertions are not credible. In fact, Zambrano's testimony demonstrated that he wrote virtually *none* of the US$ 19 billion Judgment. For example: (i) he has little if any recollection of its most important content, much less its sources;[14] (ii) he says his 18-year-old typist performed complex legal research in two foreign languages, French and English, but does not know if she speaks or reads either of those languages;[15] (iii) he says he dictated the entire 188-page Judgment to his typist, and yet somehow the final written product had the same formatting and mistakes found in the Plaintiffs' unfiled work product;[16] (iv) he kept no drafts, notes, copies of authorities, or any other documents related to preparing the Judgment – in fact, he admitted under oath that he destroyed those materials despite the existence of an appeal

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[11] *See* **Exhibit C-2134**, Judgment, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), United States District Court for the Southern District of New York (Mar. 4, 2014) ("RICO Judgment"); **Exhibit C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), United States District Court for the Southern District of New York (Mar. 4, 2014) ("RICO Opinion"); and **Exhibit C-2136**, Appendices to the Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), United States District Court for the Southern District of New York (Mar. 4, 2014) ("RICO Opinion Appendices").

[12] **Exhibit C-1979**, Transcript of Deposition of Nicolás Augusto Zambrano Lozada (Nov. 1-2, 2013); **Exhibit C-1980**, RICO Trial Transcript (Nov. 5, 2013) at 1601:13 *et seq.*, Testimony of Nicolás Augusto Zambrano Lozada; **Exhibit C-1981**, Declaration of Nicolás Augusto Zambrano Lozada (Mar. 28, 2013).

[13] **Exhibit C-1980**, RICO Trial Tr. 1604:2-10 (Zambrano).

[14] *Id.* at 1611:15-18, 1613:1-6, 1614:7-12, 1698:1-1699:11, 1712:12-1713:11.

[15] *Id.* at 1617:15-1620:6.

[16] *Id.* at 1711:3-6.

challenging the authorship of the Judgment;[17] and (v) he admits he used former Judge Guerra as his ghostwriter to draft opinions and orders in civil cases.[18] Ecuador ignores this evidence entirely, and does not even mention Zambrano's testimony in its Rejoinder.

9. Contrary to Respondent's characterization, Claimants' submission of this evidence from the RICO case does not change Claimants' claims, theories, or substantive requests for relief. Claimants have not in any way "reset" their case. They submitted newly-generated evidence that corroborates the existing record concerning Ecuador's breaches of the Treaty and the denial of justice.

10. In that regard, Claimants' denial of justice claim is ripe for adjudication. The Cassation Court upheld the Lago Agrio Judgment in all but one respect, leaving the wrongs represented by the Judgment in place and the failure of due process intact. The Cassation Decision in itself constitutes additional proof that Claimants are not required to pursue any further remedies in Ecuador and that all outstanding remedies would be futile.

11. The Cassation Court could and should have corrected the violations of due process represented in the Judgment, but did not do so. Instead, it ignored the ample evidence of fraud and corruption surrounding the Lago Agrio Judgment and left in place the Judgment's fraudulent and unsupported findings based on reasoning that was objectively absurd. Even if Ecuador were correct that the Cassation Court lacked authority to correct those due process violations, that lack of authority itself is a further violation of international law.

12. Contrary to Ecuador's assertion, Claimants are not required to, and could not legally, pursue a claim under Ecuador's Collusion Prosecution Act ("CPA"). As a matter of international law, Claimants do not need to pursue ancillary actions for relief before additional

[17] *Id.* at 1626:1-2, 1628:5-1629:4.

[18] *Id.* at 1630:22-1631:6.

judges who stand outside the path of direct appellate review for the purpose of demonstrating "exhaustion" of local remedies. Moreover, a CPA action regarding Chevron's corruption claims is not legally viable under Ecuadorian law, and in any event it would not be an effective remedy regarding Chevron's corruption claims.

13. Ecuador continues to press its claims of widespread contamination and its efforts to retry environmental claims it long-since settled and released. To correct the misinformation in Respondent's Track 2 Rejoinder, on December 23, 2013, Claimants filed a number of additional exhibits regarding the environmental issues, the import of which is discussed in Annex A. At this juncture, however, the environmental issues are not relevant to the claims before the Tribunal, and Ecuador's so-called "defense" is not a defense under international law. The Lago Agrio Litigation concerned diffuse rights, and any potential environmental claims were finally resolved by the 1995 Settlement Agreement and Releases. Further, the evidence establishes that the damages included in the Lago Agrio Judgment are exorbitant and have no basis other than fraud and corruption.

14. The Lago Agrio Plaintiffs were unable to prove their claims at trial, which is why they resorted to manufacturing evidence and bribery to win.[19] Ecuador is now engaged in a *post-hoc* effort to establish that environmental contamination attributable to TexPet exists, ignoring that the issue is not contamination, but that the Judgment is a denial of justice – a fact not changed by the contamination allegations. In any event, Ecuador's environmental expert witnesses do not prove the existence of widespread contamination or risks to human health, much less that any impacts are TexPet's responsibility, completely ignoring that Petroecuador has been operating at the sites for more than 20 years since TexPet's departure in 1990.

[19] *See* Claimants' Memorial ¶¶ 201-235; Claimants' Supp. Memorial ¶¶ 88-103, 113; Claimants' Track 2 Reply ¶¶ 59-88.

Ecuador's *post-hoc* efforts in no way cure the lack of substance and unreasonableness of the Lago Agrio Judgment.

15. The overwhelming weight of the evidence, old and new, establishes the corrupt and illegal bargain whereby the Lago Agrio Plaintiffs secretly wrote the Judgment, and Judge Zambrano, in exchange for a promised bribe, signed and issued it as the Judgment of the Court. Despite the ample evidence of corruption and lack of due process throughout the Lago Agrio Litigation, the Cassation Court failed to seriously consider the fact that the Judgment is the product of bribery and corruption. Altogether, the evidence and law leave no doubt that Ecuador is liable for violating the BIT and for denial of justice.

II. THE EVIDENCE CONCLUSIVELY PROVES FRAUD, CORRUPTION, AND LACK OF DUE PROCESS UNDERLYING THE LAGO AGRIO LITIGATION AND JUDGMENT

A. Recent Events Generated Material New Evidence, Adding to the Already Substantial Evidence Supporting Claimants' Existing Claims

1. The RICO Trial

16. Significant events have occurred since Claimants filed their Track 2 Reply Memorial. Chief among these, in October and November 2013, Chevron's RICO claims against Lago Agrio Plaintiffs' counsel Steven Donziger and others went to trial in the United States District Court for the Southern District of New York. On December 23, 2013, Claimants submitted key evidence generated in connection with that trial, primarily consisting of transcripts of witness testimony.[20]

[20] Note that while Claimants submitted 120 new exhibits on December 23, 2013, only nine of these were new exhibits related to the RICO trial: **Exhibit C-1978**, RICO Trial Transcript (Oct. 23-25, 2013), Testimony of Alberto Guerra Bastidas; **Exhibit C-1979**, Deposition of Nicolás Augusto Zambrano Lozada (Nov. 1-2, 2013); **Exhibit C-1980**, RICO Trial Transcript (Nov. 5, 2013), Testimony of Nicolás Augusto Zambrano Lozada; **Exhibit C-1981**, Declaration of Nicolás Augusto Zambrano Lozada (Mar. 28, 2013); **Exhibit C-1982**, RICO Witness Statement of Alejandro Ponce Villacis; **Exhibit C-1983**, RICO Trial Transcript (Nov. 23, 2013), Testimony of Alejandro Ponce Villacis; and **Exhibit C-1984**, RICO Witness Statement of Milton Efrain Jacque Tarco (Oct. 21, 2013). Claimants also submitted **Exhibit C-1986**, Banco Pichincha records of the Selva Viva account, which completed the

17. The RICO trial produced significant evidence, perhaps most importantly the testimony of some of the key players in the Lago Agrio conspiracy. Witnesses whom the parties have discussed in depth in prior submissions to the Tribunal, and who are responsible for substantial documentary evidence previously submitted in this arbitration, testified live at the RICO trial. These included former Judge Alberto Guerra,[21] Lago Agrio Plaintiffs' lead U.S. counsel Steven Donziger,[22] and their Ecuadorian counsel Alejandro Ponce Villacis.[23] Most importantly, Nicolás Zambrano, the judge who issued the Lago Agrio Judgment, appeared at trial as a witness for the RICO defendants.[24]

18. Alberto Guerra previously detailed his participation in and facilitation of the bribery, fraud, and other corruption in the Lago Agrio Litigation and Judgment. His three RICO declarations and attached documents, and his first deposition, have been in the arbitration record for some time, and the parties discussed that evidence in detail in their prior submissions.[25] Since Claimants submitted their Track 2 Reply Memorial, Guerra provided a new RICO declaration (summarizing his three previous declarations) to serve as his direct testimony,

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previously filed Exhibit C-1661. **Exhibit C-1985** is a letter from D. Bishop to E. Bloom requesting a copy of the Tarco report on the inspection of Zambrano's computers, and **Exhibit C-2020** is former Judge Guerra's CV. The remainder of the exhibits submitted related to judicial inspections of well sites and environmental issues in rebuttal to assertions made in Ecuador's Track 2 Rejoinder, as discussed below at Section IV.

[21] **Exhibit C-1978**, RICO Trial Tr. 903:6-1235:6 (Oct. 23-25, 2013) (Guerra).

[22] **Exhibit C-2114**, RICO Trial Tr. 2460:16-2657:4 (Nov. 18 and 19, 2013) (Donziger) (submitted with Claimants' Jan. 15, 2014 letter brief on Respondent's request to strike the Guerra evidence).

[23] **Exhibit C-1983**, RICO Trial Tr. 2219:19-2323:8 (Nov. 13, 2013), Testimony of Alejandro Ponce Villacis; **Exhibit C-1982**, RICO Witness Statement of Alejandro Ponce Villacis ("Ponce RICO Witness Stmt.").

[24] Zambrano's appearance was unexpected because, while he provided a written declaration for the RICO defendants in March 2013, he later failed to appear for a scheduled deposition. When the RICO defendants announced he would testify at the trial, the Court ordered that he appear for a deposition prior to his trial testimony. That deposition took place on November 1-2, 2013, and he testified at trial on November 5, 2013. *See* **Exhibit C-1979**, Zambrano Depo. Tr. (Nov. 1 and 2, 2013); **Exhibit C-1980**, RICO Trial Tr. 1603:11-1964:14 (Nov. 5-7, 2013) (Zambrano); **Exhibit C-1981**, Zambrano RICO Declaration (Mar. 28, 2013).

[25] *See* Claimants' Track 2 Reply ¶¶ 22 *et seq*.; Track 2 Rejoinder on the Merits of the Republic of Ecuador ¶¶ 235-273 (Dec. 16, 2013) ("Respondent's Track 2 Rejoinder").

testified live at the RICO trial, and Ecuador deposed him in this arbitration.[26] That additional testimony is consistent with Guerra's prior declarations and testimony.[27] The other new evidence also confirms that existing evidence.

19. The Tribunal did not previously have the benefit of any testimony directly from former Judge Nicolás Zambrano. His RICO testimony – replete with contradictions, inconsistencies with his written declaration, and unsupported by any objective evidence – made clear that he did not author the Lago Agrio Judgment, and that the Judgment was the product of the judicial corruption endemic to the entire Lago Agrio Litigation.

20. Newly-identified witnesses provided written testimony for the RICO defendants. Evelyn Calva, Zambrano's 18-year old typist and the person he said was responsible for researching foreign law legal concepts discussed in the Judgment, submitted a statement regarding her work for Judge Zambrano.[28] Unfortunately, she did not testify at the trial or by deposition. But even without the benefit of cross-examination, it is abundantly clear that an 18-year-old Ecuadorian with no university or legal training and no known foreign-language capabilities could not conduct research on the complex concepts of legal causation under foreign law discussed in the Lago Agrio Judgment.[29]

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[26] **Exhibit C-2386**, Witness Statement of Alberto Guerra Bastidas (Oct. 9, 2013) ("Guerra Witness Stmt."); **Exhibit C-1978**, RICO Trial Tr. at 830 *et seq*. (Guerra); **Exhibit R-907**, Deposition of Alberto Guerra Bastidas (Nov. 5, 2013).

[27] *See* **Exhibit C-1978**, RICO Trial Tr. at 903:6-1235:6 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. (Nov. 5, 2013).

[28] **Exhibit C-2387**, RICO Direct Testimony of Evelyn Yuleisy Calva Erazo (Nov. 6, 2013). The RICO Court did not admit Ms. Calva's statement because she did not appear and submit herself to cross-examination.

[29] **Exhibit C-1980**, RICO Trial Tr. 1616:10-1620:6 (Zambrano).

21. Jacque Tarco, an Ecuadorian police officer, also submitted a statement in the RICO trial on behalf of the RICO defendants, but did not testify live.[30] Tarco apparently performed an examination of Zambrano's court computers as part of the criminal investigation of former Judge Guerra, which was initiated after Guerra submitted his first witness statement in the RICO case detailing the corruption in the Lago Agrio Litigation and Judgment. The actual report of Mr. Tarco's inspection is not available to Claimants.[31] (Notably, and in stark contrast to the alacrity with which Ecuador has pursued criminal proceedings against Guerra, Ecuador has not conducted any investigation of Zambrano's wrongdoing in the Lago Agrio Litigation despite the ample evidence of his misdeeds). The Tribunal has ordered that it will allow Claimants to conduct their own expert review of the Zambrano computer hard drives, but the protocol for that review has only recently been finalized and the inspection has not yet taken place.

22. The RICO trial occurred in October and early November 2013, before Respondent filed its Rejoinder. Ecuador's Rejoinder, however, is devoid of any mention of the RICO trial or the sworn testimony of any of the trial witnesses. The reason for this calculated omission is obvious, as the trial testimony did not support Ecuador's version of how the Lago Agrio Judgment was drafted. Former Judge Zambrano's testimony is particularly devastating to Ecuador's case, not just in its substance but in its effect: any objective person viewing or reading Zambrano's deposition and trial testimony must conclude that he cannot be believed.

[30] **Exhibit C-1984**, Witness Statement of Milton Efrain Jacque Tarco. While the RICO defendants submitted Mr. Tarco's witness statement as his direct testimony, the Court did not admit that testimony because the RICO defendants did not provide Chevron with access to Tarco's full report or to Zambrano's computer, and Mr. Tarco did not appear to testify live at the trial or in deposition.

[31] *See* Proc. Hrg. Tr. at 157:11-161:25 (Jan. 20, 2014).

2. The RICO Judgment and Opinion

23. On March 4, 2014, the Federal Court for the Southern District of New York issued its opinion and judgment in the RICO case in favor of Chevron.[32] Assessing much the same evidence as has been submitted to this Tribunal, and having the opportunity to see and hear the live testimony of all of the witnesses at the RICO trial, the RICO Court held that the Lago Agrio Plaintiffs procured the Lago Agrio Judgment through a pattern of illegal activity, fraud, and bribery of the Ecuadorian judiciary.[33] The RICO Court concluded that the RICO defendants engaged in acts of extortion, mail and wire fraud, money laundering, obstruction of justice, and witness tampering to carry out their scheme. The RICO Court further found violations of the Foreign Corrupt Practices Act and the Travel Act. In short, the findings in the RICO Judgment and Opinion are entirely consistent with Claimants' assertions and with the evidence in this arbitration.

24. The RICO Court found former Judge Guerra's testimony regarding the bribery and ghostwriting scheme credible and supported by objective evidence, while former Judge Zambrano's testimony was inconsistent, contradictory, and not credible.[34] The RICO Court unequivocally found that Zambrano was not the author of the Lago Agrio Judgment.[35] Instead, the Lago Agrio Plaintiffs' representatives, having bribed Judge Zambrano to rule in their favor, wrote the Lago Agrio Judgment that Zambrano fraudulently issued as the opinion and judgment of the Lago Agrio Court.[36]

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[32] **Exhibit C-2134**, RICO Judgment; **Exhibit C-2135**, RICO Opinion; **Exhibit C-2136**, RICO Opinion Appendices.

[33] *See e.g*. **Exhibit C-2135**, RICO Opinion at 2, 219, 240, 266-67, 281, 315, 323.

[34] *Id.* at 182, 185-86, 188-90, 199-200, 219-20, 228, 232, 237, 240, 265-66, 281, 323.

[35] *Id.* at 200, 214, 219.

[36] *Id.* at 219, 240, 281, 323.

25. The RICO Court also expressly found that Ecuador did not at any relevant time provide "impartial tribunals or procedures compatible with due process of law," and therefore "the decisions of its courts in the Lago Agrio Case are not entitled to recognition in courts in the United States."[37] Further, the RICO Court found that the decisions of the Ecuadorian intermediate court of appeals and of the Cassation Court affirming the Lago Agrio Judgment did not break the chain of causation in the harm to Chevron from the fraudulently obtained Judgment.[38] The intermediate appellate court and the Cassation Court both declined to examine the evidence of fraud and corruption in the underlying litigation. Although the intermediate court of appeals claimed to have conducted a *de novo* review so it could "rule on the merit of the record," it did not do so.[39] "[I]t would have been impossible for any court to have conducted a *de novo* review of the 188-page Judgment and the trial record in the time the appellate court rendered its decision."[40] Thus, these appellate decisions "did not cleanse the Lago Agrio Judgment of its impropriety . . . ."[41]

3. Other Recent Events

26. Also since Claimants filed their Track 2 Reply Memorial, Ecuador has not only continued but escalated its long-standing public relations campaign against Chevron, supporting

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[37] *Id.* at 433. In proceedings against funders to the Lago Agrio Plaintiffs, James Russell DeLeon and Torvia Limited, the Supreme Court of Gibraltar has similarly found that "the [Ecuadorian] Court appears specifically to have declined to make any detailed findings" regarding Chevron's allegations of fraud. **Exhibit C-2388**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2112-C-232, Supreme Court of Gibraltar, Ruling of 14 March 2014 ¶ 48(vi). The Gibraltar court further stated that "[i]f the Appeal court in Ecuador had before it anything like the evidence which has been put before me, it is indeed surprising on the face of it that at the least a rehearing was not ordered." *Id.*

[38] **Exhibit C-2135**, RICO Opinion at 288-92, 413-17.

[39] *Id.* at 414-15.

[40] *Id.* at 415.

[41] *Id.* at 413.

the Lago Agrio Judgment.[42] As discussed in Claimants' January 15, 2014 letter brief addressing Respondent's request to strike all of the Guerra evidence, the Correa government and its agents continue to denounce Chevron through the "Dirty Hand of Chevron" ("*La Mano Sucia de Chevron"*) campaign.[43] President Correa and government officials call the Lago Agrio Plaintiffs and their supporters "heroes" and call those who support Chevron "traitors."[44] Ignoring the Tribunal's Interim Awards and the evidence of fraud and corruption, Ecuador continues to promote enforcement of the Lago Agrio Judgment. Both Ecuador's judiciary and the

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[42] *See* **Exhibit C-1890**, Paid Advertisement "A Message from the People of Ecuador, Washington Post (Aug. 5, 2013); **Exhibit C-1899**, Ecuadorian Ministry of Foreign Affairs and Human Mobilization Pamphlet; **Exhibit C-1910**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 20, 2013); **Exhibit C-1911**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 21, 2013); **Exhibit C-1912**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 22, 2013); **Exhibit C-1913**, Letter from the Ecuadorian Embassy in Sweden (Aug. 7, 2013); **Exhibit C-1915**, Huffington Post Article (Aug. 12, 2013); **Exhibit C-1935**, Enlace Presidencial (Aug. 31, 2013); **Exhibit C-1940**, Cadena Presidencial, Ecuador TV (Sept. 17, 2013); **Exhibit C-1964**, Losvendepatria Website; **Exhibit C-2110**, Resolution by the National Assembly of Ecuador in Support of Mano Sucia Campaign (Oct. 15, 2013); **Exhibit C-2111**, El Telegrafo Press Article (Nov. 19, 2013); **Exhibit C-2112**, El Telegrafo Press Article (Feb. 5, 2014); **Exhibit C-2142**, European Pressphoto Agency Press Article (Oct. 17, 2013); **Exhibit C-2143**, Ecuadorinmediato Press Article (Oct. 22, 2013); **Exhibit C-2144**, Press Conference video and transcript (Oct. 22, 2013); **Exhibit C-2145**, Press Article (Nov. 1, 2013); **Exhibit C-2146**, Periodico 26 Press Article (Nov. 2, 2013); **Exhibit C-2147**, Korea Times Press Article (Nov. 11, 2013); **Exhibit C-2148**, El Comercio Press Article (Nov. 25, 2013); **Exhibit C-2149**, Press Article (Dec. 5, 2013); **Exhibit C-2151**, Cadena Presidencial (Dec. 28, 2013); **Exhibit C-2152**, Ecuador TV video and transcript (January 2, 2014).

[43] *See* Claimants' Letter Brief (Jan. 14, 2014) at 10 *et seq*, attaching additional statements from Correa and the Government of Ecuador regarding support for the Lago Agrio Plaintiffs and threats against those cooperating with Chevron: **Exhibit C-1616**, Transcript of a radio interview with Enlaces Sabatino (update) (Feb. 23, 2013); **Exhibit C-2104**, *Enlace Ciudadano*: Presidential Broadcast (Oct. 26, 2013); **Exhibit C-2109**, *Enlace Ciudadano*: Presidential Broadcast (Nov. 2, 2013); **Exhibit C-2110**, National Assembly of Ecuador: Resolution issued in support of the "*Mano Sucia de Chevron*" campaign (Oct. 15, 2013); **Exhibit C-2111**, "*Registro delata a abogados ecuaotorianos de Chevron*," EL TELEGRAFO (Nov. 19, 2013); **Exhibit C-2112**, "*Tres agentes de Kroll trabajan en Quito al servicio de Chevron*," EL TELEGRAFO (Feb. 5, 2013). *See also* Claimants' Letter to the Tribunal (Feb. 7, 2014), regarding the site visit protocol, attaching additional exhibits regarding the Government campaign against Chevron.

[44] *See* **Exhibit C-168**, Press Release, "*The Government Backs Actions of Assembly of Persons Affected by Texaco Oil Company*," Government of Ecuador Secretary General of Communications (Mar. 20, 2007); **Exhibit C-1972**, Lioman Lima, "*Bolivia y Ecuador crearan observatorio para supervisar petroleras*," PRENSA LATINA (Oct. 4, 2013); **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana (Apr. 28, 2007); **Exhibit C-242**, Press Release, Office of President Rafael Correa (Apr. 26, 2007); **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007; **Exhibit C-1006**, "*Ecuador court upholds $18 bln ruling against Chevron*," REUTERS NEWS (Jan. 3, 2012); **Exhibit C-1311**, "*Court in Ecuador upholds multi-million dollar judgment against Chevron for environmental damage*," EL UNIVERSO (Jan. 4, 2012); **Exhibit C-2104**, *Enlace Presidencial*: Presidential Broadcast (Oct. 26, 2013); **Exhibit C-1967**, "*President Correa reveals names of 'Ecuadorian collaborators' working for Chevron*," ECUADOR INMEDIATO (Sept. 28, 2013).

government have chosen to support the Judgment regardless of the due process violations involved in its issuance.

27. Finally, the Ecuadorian Cassation Court issued its decision affirming the Judgment. This decision resulted in additional submissions to the Tribunal by both Claimants and Respondent, which were addressed in the supplemental Track 1 submissions and hearing, and are discussed below regarding the legal effect of the Cassation Court decision.

28. These events generated new evidence that did not exist when Claimants filed their Track 2 Reply Memorial. That additional evidence supplements, corroborates, and enhances the already substantial fact evidence in the record. The old and new evidence, as a whole, paints a clear, consistent, and documented picture of the corruption of the Lago Agrio Court and the fraud and failure of due process in the Judgment. It leaves no doubt that Ecuador not only violated its Treaty obligations, but is liable for denial of justice.

B. The Existing Evidence Established Fraud, Corruption, and Other Circumstances Underlying the Treaty Violations and Denial of Justice

1. The Long History of Repeated Illegality Resulting in the Lago Agrio Judgment

29. The previously submitted evidence, discussed in detail in Claimants' Memorials, established the fraud and corruption pervading the Lago Agrio Litigation and Judgment, proving Ecuador's violations of its Treaty obligations and its denial of justice.[45]

30. To summarize a few of the more remarkable of these corrupt acts, the Calmbacher fraud and the now-admitted Cabrera fraud establish the Lago Agrio Plaintiffs' pattern of secretly ghostwriting documents to suit their purposes, and the Cabrera fraud and "cleansing experts"

[45] *See* Claimants' Memorial ¶¶ 246-99, 455-537; Claimants' Supp. Memorial ¶¶ 1-255; Claimants' Track 2 Reply ¶¶ 36-357.

scheme highlight the Lago Agrio Court's pattern of knowingly accepting those fraudulent materials.

31. The evidence concerning the Calmbacher fraud established that the Lago Agrio Plaintiffs' lawyers substituted their own conclusions for those of Dr. Calmbacher, and then, unknown to him, attached his signature page to that fraudulently revised report.[46] Finding it more convenient to have an expert they could control, the Lago Agrio Plaintiffs later orchestrated the Cabrera fraud.

32. In the Cabrera fraud, the Lago Agrio Plaintiffs coerced the Ecuadorian trial court into appointing an "independent" global damage expert, chosen and controlled by the Plaintiffs. It is undisputed that Cabrera certified his supposed independence, while at the same time the Plaintiffs' experts secretly drafted the majority of his reports and their appendices.[47]

33. In addition to the mounds of previously submitted proof of the Cabrera fraud,[48] a new document further confirms the Plaintiffs' penchant for bribery of court officials. Bank records for the Amazon Defense Front account in Lago Agrio – an account they described as a "secret account" – show an August 17, 2007 transfer of US$ 33,000 from that Selva Viva account directly to Cabrera.[49] This was yet another in a series of payments by the Plaintiffs to Cabrera outside the court process.[50]

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[46] *See* Claimants' Supp. Memorial ¶¶ 89; Claimants' Track 2 Reply ¶¶ 89-91.

[47] *See* Claimants' Supp. Memorial ¶¶ 38-40, 75; Claimants' Track 2 Reply ¶¶ 89-91.

[48] *See* Claimants' Memorial § II.G (3)-(4); Claimants' Letter to the Tribunal at 5-6 (Mar. 4, 2011); Claimants' Supp. Memorial ¶¶ 38-40; Claimants' Track 2 Reply ¶¶ 73-88.

[49] **Exhibit C-1986**, Banco Pichincha, Account No. 3932429800, Frente de Defensa MDE la Amazonia, at p. 6; **Exhibit C-1045**, Email string between S. Donziger and L. Yanza (toxico@ecuanex net.ec) (June 13, 2007) (discussing funds for "the secret account"); **Exhibit C-1053**, Email from L. Yanza to S. Donziger (Sept. 12, 2007) ("he sends us money to our secret account, to give to Wuao, to not stop the work").

[50] *See* Claimants' Supp. Memorial ¶ 92; Claimants' Track 2 Reply ¶ 79; **Exhibit C-1053**, Email from L. Yanza to S. Donziger (Sept. 12, 2007); **Exhibit C-1041**, Donziger Depo. Tr. at 4211:11-4416:7 (Mar. 23, 2011), (testifying that over US$ 50,000 was transferred to this "secret account," and Donziger was aware of no other purpose for the account except to pay Cabrera).

34. At the RICO trial, Lago Agrio Plaintiffs' counsel Alejandro Ponce Villacis tied himself into knots trying to justify the Plaintiffs' conspiracy with Cabrera and the fact that their experts secretly ghostwrote his reports. His answers to questioning regarding whether Cabrera was required to be independent or impartial were practically incoherent.[51] He first said that Cabrera was not required to be independent, but then admitted that it would not be "technical" (*i.e.*, technically correct under the law) for Cabrera to let someone else secretly ghostwrite his report to the Court.[52] He concluded by insisting that Cabrera was required to be independent but not impartial – a ridiculous contortion.[53]

35. When the Cabrera fraud was first exposed with the production of the *Crude* outtakes, the Plaintiffs' representatives developed, and with the aid of the Lago Agrio Court implemented, the "cleansing experts" scheme to try to salvage their claims and their unsupported damage numbers. The Plaintiffs retained new experts who never visited Ecuador and relied on the discredited Cabrera data to produce new damage reports, which the Lago Agrio Court accepted, all designed to provide a veneer of legitimacy for the findings and damages the Plaintiffs had predetermined would be included in the Judgment.[54]

36. At this point, even Ecuador does not try to deny the Cabrera fraud and the "cleansing experts" scheme. Rather, Ecuador argues that the admitted gross misconduct by both the Lago Agrio Plaintiffs and Cabrera does not establish any wrongdoing by the Lago Agrio Court itself.[55] It was, however, the Court that, yielding to the Plaintiffs' intimidation and

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[51] **Exhibit C-1982**, Ponce RICO Witness Stmt.; **Exhibit C-1983**, RICO Trial Tr. at 2226:7-2236:11 (Ponce).

[52] **Exhibit C-1983**, RICO Trial Tr. 2228:7-2229:9 (Ponce).

[53] *Id.* at 2235:1-2236:11.

[54] *See* Claimants' Memorial ¶¶ 242-45; Claimants' Supp. Memorial ¶¶ 100-103; Claimants' Track 2 Reply ¶¶ 89-91.

[55] *See* Respondent's Track 2 Rejoinder ¶¶ 341-365.

blackmail, appointed Cabrera as the "independent" global damage expert on behalf of the Court.[56] Cabrera was acting as a court auxiliary, a representative and agent of the Court, in all of his actions.[57]

37. Further, 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.[58] 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.[59] This failure to take legal action against those involved in the Cabrera fraud constitutes ratification of those actions by the State.

38. After Chevron uncovered the Plaintiffs' corrupt arrangement with Cabrera, the Lago Agrio Court accepted and abetted the Plaintiffs' scheme for using "cleansing experts," giving the parties 45 days to file new expert reports even though the time period for filing evidence had long expired. The day after those reports were filed, the Court issued *autos para*

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[56] *See* Claimants' Supp. Memorial ¶¶ 90-92; Claimants' Track 2 Reply ¶¶ 72-88. This was Judge GermánYánez, who at the time was involved in a sex-for-jobs scandal. He was the "cook" in the Plaintiffs' coded email exchanges about the Court serving as the "restaurant" and Cabrera serving as the "waiter." *See* Claimants' Supp. Memorial ¶¶ 111-112.

[57] *See* Claimants' Track 2 Reply ¶¶ 79-80; **Exhibit C-363**, Certificate of R. Cabrera, Superior Court of Nueva Loja, June 13, 2007; **Exhibit C-366**, Filing by R. Cabrera before the Lago Agrio Court, Jul. 23, 2007; **Exhibit C-364**, Lago Agrio Court Order, Oct. 3, 2007, at 11:00 a.m.; **Exhibit C-367**, Filing by R. Cabrera before the Lago Agrio Court, Oct. 11, 2007, at 2:20 p m., at 4 (Eng.); **Exhibit C-365**, Filing by R. Cabrera before the Lago Agrio Court, Mar. 4, 2009 at 9:50 a.m.

[58] **Exhibit C-2302**, Chevron Motion of Sept. 3, 2013 in Preliminary Investigation No. 235-2010; **Exhibit C-2303**, Administrative Act of Oct. 2, 2013 in Preliminary Investigation No. 235-2010; **Exhibit C-2304**, Letter from Thomas Cullen to Galo Chiriboga, Prosecutor General of Ecuador (Sept. 4, 2013); **Exhibit C-2305**, Letter from Galo Chiriboga, Prosecutor General of Ecuador, to Thomas Cullen.

[59] *See* Claimants' Supp. Memorial ¶¶ 75, 88 *et seq*.; Claimants' Track 2 Reply ¶ 202 *et seq*.

sentencia to close the evidence period and prevent Chevron from making any effective response to the Plaintiffs' highly objectionable "cleansing expert" reports, which relied upon the bogus Cabrera data.[60]

39. Contrary to Ecuador's assertion, the evidence is clear that the Judgment issued by the Lago Agrio Court relied upon the false Cabrera Reports and data in defining and setting the damages assessed against Chevron.[61] In the Judgment, the Lago Agrio Court falsely disclaimed reliance on the Cabrera Reports and the "cleansing expert" reports; however, eight categories of damages in the Judgment match those in the Cabrera Report, and that Report is the only record source for the Judgment's conclusion that 880 pits required remediation.[62] The Cabrera Report provides the only possible record basis for damage items in the Judgment constituting US$ 6 billion of the Judgment's US$ 8 billion in "actual" damages.[63]

40. The evidence further establishes that the Lago Agrio Court allowed the Plaintiffs to ghostwrite the Judgment. The Judgment uses *verbatim* language and incorporates data sequences – including typographical errors, idiosyncratic references and out-of-order numerical sequences – from multiple unfiled Lago Agrio Plaintiffs' documents not found in the court

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[60] *See* Claimants' Supp. Memorial ¶¶ 88 n.258, 100-102; Claimants' Track 2 Reply ¶¶ 20-21, 83-84, 198; **Exhibit C-1564**, Plaintiffs' Motion filed in Lago Agrio Litigation (Sept. 16, 2010 at 5:15 p.m.), regarding filing of the "cleansing expert" reports; **Exhibit C-642,** Order by the Provincial Court of Sucumbíos (Sept. 17, 2010, at 8:05 a.m.). This time it was Judge Leonardo Ordóñez, who was also later dismissed as a judge because of suspicions of bribery.

[61] *See* Claimants' Supp. Memorial ¶¶ 38-66; Claimants' Track 2 Reply ¶¶ 20-22, 72-88.

[62] *See* Claimants' Supp. Memorial ¶¶ 40, 52 (discussing findings in Expert Report of Michael A. Younger ¶ 18); Claimants' Track 2 Reply ¶ 85.

[63] *See* Claimants' Supp. Memorial ¶ 40; Claimants' Track 2 Reply ¶¶ 73-88, 139-72. *Compare* **Exhibit C-201**, Expert Report of Richard Cabrera Vega at 6 (Apr. 1, 2008) and **Exhibit C-212**, Supplemental Cabrera Report at 12-14, 53, *with* **Exhibit C-931**, Lago Agrio Judgment at 179-186. *See* Claimants' Track 2 Reply ¶ 85; Claimants' Letter to the Tribunal at 5 (Jan. 4, 2012); First Younger Expert Report, at 18-19. *See also* **Exhibit C-2136**, RICO Opinion Appendices, Appendix III at App. 42-43 (finding that the Cabrera Report was material to the Lago Agrio Judgment).

record.[64] Parts of each of these unfiled Plaintiffs' work product documents – *e.g.*, the Fusion Memo, the draft Alegato, the Index Summaries, the Clapp Report, the Fajardo Trust email, the Moodie Memo, and the Selva Viva Database – are essentially "cut and pasted" into the Judgment.[65] As the RICO Opinion characterized it, "[t]he LAPs' 'fingerprints' are all over the Judgment."[66]

41. As discussed in Section II.E below, Ecuador's response is to speculate about what *might* have happened to explain how those unfiled documents *might* have been given to the court and *might* have come to be included in the Judgment, mistakes and all.[67] Speculation is not evidence.[68] Further, if the overlap between the unfiled Plaintiffs' work product and the Judgment, along with the other evidence, were somehow not enough to prove the fraud in the authorship and issuance of the Judgment, Judge Zambrano's RICO testimony left no doubt that Ecuador's speculations and contentions are wrong. Simply put, as discussed below, Zambrano's story about what he says happened does not match Ecuador's story about what *might* have happened.[69]

2. The Evidence of the Lack of Independence of Ecuador's Judiciary and the Government's Influence in Favor of the Lago Agrio Plaintiffs and Against Chevron

42. Substantial evidence also established the lack of independence of the Ecuadorian judiciary, as well as the Correa government's active support of the Lago Agrio Plaintiffs and its

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64 *See* Claimants' Supp. Memorial ¶¶ 5-17; Claimants' Track 2 Reply ¶¶ 37-52.

65 *See* Claimants' Supp. Memorial ¶¶ 5-17; Claimants' Track 2 Reply ¶¶ 37-52.

66 **Exhibit C-2135**, RICO Opinion at 200, 215-16. The RICO Court found the evidence indicated the Lago Agrio Plaintiffs' representatives began preparing the Lago Agrio Judgment as early as 2009. *Id.* at 214.

67 Respondent's Track 2 Rejoinder ¶¶ 284-307.

68 The RICO defendants' defense suffered from the same lack of substance. **Exhibit C-2135**, RICO Opinion at 212-13 (finding the RICO defendants failed to provide any explanation for the overlap between the Lago Agrio Plaintiffs' unfiled materials and the contents of the Judgment.).

69 *See infra* § II.E.

campaign against Chevron.[70] The RICO Opinion recognized the effect of this lack of judicial independence and integrity, holding that the Lago Agrio Judgment and the appellate decisions affirming it did not foreclose the RICO defendants' liability, and in any event those decisions are not entitled to comity or other recognition "because they were rendered in a judicial system that does not provide impartial tribunals or procedures compatible with due process in cases of this nature."[71]

43. President Correa has launched numerous direct and indirect attacks designed to intimidate the judiciary, through lawsuits, sanctions, and disciplinary actions, and adopted so-called "reforms" designed to afford even more direct influence, along with systematic purges of the judiciary.[72]

44. The evidence also establishes the Ecuadorian government's continuing strong, public support for the Lago Agrio Plaintiffs and condemnation of Chevron, even those who cooperate with Chevron. President Correa and his government call the Lago Agrio Plaintiffs'

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[70] *See* Claimants' Memorial ¶¶ 246-98, 456-546; Claimants' Supp. Memorial ¶¶ 120-27; Claimants' Track 2 Reply ¶¶ 220-265; **Exhibit C-1890**, Paid Advertisement "A Message from the People of Ecuador, Washington Post (Aug. 5, 2013); **Exhibit C-1899**, Ecuadorian Ministry of Foreign Affairs and Human Mobilization Pamphlet; **Exhibit C-1910**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 20, 2013); **Exhibit C-1911**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 21, 2013); **Exhibit C-1912**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 22, 2013); **Exhibit C-1913**, Letter from the Ecuadorian Embassy in Sweden (Aug. 7, 2013); **Exhibit C-1915**, Huffington Post Article (Aug. 12, 2013); **Exhibit C-1935**, Enlace Presidencial (Aug. 31, 2013); **Exhibit C-1940**, Cadena Presidencial, Ecuador TV (Sept. 17, 2013); **Exhibit C-1964**, Losvendepatria Website; **Exhibit C-2110**, Resolution by the National Assembly of Ecuador in Support of Mano Sucia Campaign (Oct. 15, 2013); **Exhibit C-2111**, El Telegrafo Press Article (Nov. 19, 2013); **Exhibit C-2112**, El Telegrafo Press Article (Feb. 5, 2014); **Exhibit C-2142**, European Pressphoto Agency Press Article (Oct. 17, 2013); **Exhibit C-2143**, Ecuadorinmediato Press Article (Oct. 22, 2013); **Exhibit C-2144**, Press Conference video and transcript (Oct. 22, 2013); **Exhibit C-2145**, Press Article (Nov. 1, 2013); **Exhibit C-2146**, Periodico 26 Press Article (Nov. 2, 2013); **Exhibit C-2147**, Korea Times Press Article (Nov. 11, 2013); **Exhibit C-2148**, El Comercio Press Article (Nov. 25, 2013); **Exhibit C-2149**, Press Article (Dec. 5, 2013); **Exhibit C-2151**, Cadena Presidencial (Dec. 28, 2013); **Exhibit C-2152**, Ecuador TV video and transcript (January 2, 2014).

[71] **Exhibit C-2135**, RICO Opinion at 417. Supporting that determination, the RICO Court cited the 2004-05 judicial purges, President Correa's election, the 2011 judicial 'reorganization,' and President Correa's influence over the Ecuadorian judiciary and the Lago Agrio Litigation.

[72] *See* Claimants' Memorial § II.I, ¶¶ 297-98; Claimants' Supp. Memorial § II.E ¶¶ 154-79; Claimants' Track 2 Reply § III.B.1, ¶¶ 234-252. *See also* Expert Report of Vladimiro Álvarez Grau (Sept. 6, 2012); Expert Report of Vladimiro Álvarez Grau (Mar. 10, 2012).

lawyers "heroes" and offered them "the full support of the national government,"[73] while calling Chevron's lawyers and witnesses "traitors" to the nation.[74] While the Lago Agrio Litigation was ongoing, the government declared that Chevron should be held liable, with President Correa personally offering to "call the judge" on behalf of the Plaintiffs.[75] The government then praised the Judgment and the appellate decisions upholding it, ignoring the fraud, corruption, and violations of due process underlying that Judgment.[76] While the RICO trial was ongoing, President Correa again declared Chevron's lawyers and witnesses "traitors" and publicly disclosed their names and identifying information.[77]

45. The testimony of witnesses at the RICO trial confirmed this government influence and lack of judicial independence. Lago Agrio Plaintiffs' lawyer Alejandro Ponce, for example, confirmed the interest and influence of the Correa government in the Lago Agrio Litigation, and the symbiotic relationship between the Plaintiffs and the Ecuadorian government. Ponce

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[73] *See* **Exhibit C-168**, Press Release, "*The Government Backs Actions of Assembly of Parties Affected by Texaco Oil Company*," Government of Ecuador Secretary General of Communications (Mar. 20, 2007).

[74] *See* **Exhibit C-1972**, Lioman Lima, "*Bolivia y Ecuador crearan observatorio para supervisar petroleras*," PRENSA LATINA (Oct. 4, 2013); **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana (Apr. 28, 2007); **Exhibit C-242**, Press Release, Office of President Rafael Correa (Apr. 26, 2007); **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007; **Exhibit C-1006**, "*Ecuador court upholds $18 bln ruling against Chevron*," REUTERS NEWS (Jan. 3, 2012); **Exhibit C-1311**, "*Court in Ecuador upholds multi-million dollar judgment against Chevron for environmental damage*," EL UNIVERSO (Jan. 4, 2012).

[75] **Exhibit C-1005**, Email from M. Yépez (Plaintiffs' media consultant) to S. Donziger (Mar. 21, 2007) ("THE PREZ 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 GAVE US FABULOUS SUPPORT. HE EVEN SAID THAT HE WOULD CALL THE JUDGE."). *See also* **Exhibit C-2135**, RICO Opinion at 431-32.

[76] *See* **Exhibit C-1972**, Lioman Lima, "*Bolivia y Ecuador crearan observatorio para supervisar petroleras*," PRENSA LATINA (Oct. 4, 2013); **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana (Apr. 28, 2007); **Exhibit C-242**, Press Release, Office of President Rafael Correa (Apr. 26, 2007); **Exhibit C-243**, Transcript of Statements by Rafael Correa, Teleamazonas Broadcast, Apr. 26, 2007; **Exhibit C-1006**, "*Ecuador court upholds $18 bln ruling against Chevron*," REUTERS NEWS (Jan. 3, 2012); **Exhibit C-1311**, "*Court in Ecuador upholds multi-million dollar judgment against Chevron for environmental damage*," EL UNIVERSO (Jan. 4, 2012).

[77] *See* **Exhibit C-2104**, Enlace Presidencial: Presidential Broadcast (Oct. 26, 2013); **Exhibit C-1967**, "*President Correa reveals names of 'Ecuadorian collaborators' working for Chevron*," ECUADOR INMEDIATO (Sept. 28, 2013).

affirmed that in 2007, he arranged a private meeting with President Correa in which they discussed the Lago Agrio Litigation and encouraged Ecuador to take action against those involved in the 1995 Settlement Agreement and Releases.[78] The government did as requested, and the Plaintiffs' lawyers succeeded in getting even more active, public support from the Correa government.[79]

46. Ponce admitted in his RICO testimony that, during the time that the Lago Agrio Litigation was active in the Ecuadorian court, he wrote and published articles admitting that the Ecuadorian judiciary lacks independence and impartiality.[80] Ponce's opinions regarding Ecuador's judicial system were hardly surprising, given the discussions between Donziger and Ponce captured on film in the *Crude* outtakes, in which they celebrate the politicization and lack of integrity of the Ecuadorian judiciary.[81]

47. Ecuador continues to vilify Chevron and to promote the enforcement of the Judgment, ignoring this Tribunal's Interim Awards.[82] President Correa's "Dirty Hand of

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[78] **Exhibit C-1983**, RICO Trial Tr. 2300 (Ponce). *See* Claimants' Supp. Memorial ¶ 209. At the same time as that meeting, Ponce himself was representing President Correa as a party to a civil suit. **Exhibit C-1983**, RICO Trial Tr. 2301 (Ponce).

[79] **Exhibit C-1983**, RICO Trial Tr. 2300 *et seq*. (Ponce). The RICO Opinion described the meeting and its aftermath: "The 'political battle' in Ecuador was made possible by President Correa who consistently has expressed strong feelings about, and demonstrated great interest in, the LAPs' suit against Chevron. President Correa pledged his full support to the LAPs in a 2007 meeting with Yanza, Ponce, and others. The LAPs' media agent reported to Donziger the following day that President Correa 'GAVE US FABULOUS SUPPORT. HE EVEN SAID THAT HE WOULD CALL THE JUDGE'." . . . A month later, after meeting again with members of the LAP team, President Correa broadcast a call for the criminal prosecution of 'the Chevron-Texaco . . . homeland selling lawyers.' . . ." **Exhibit C-2135**, RICO Opinion at 431-32, citing, *inter alia*, **Exhibit C-729**, Republic of Ecuador Press Release (Apr. 28, 2007); **Exhibit C-1005**, Email from M. Yépez to S. Donziger (Mar. 21, 2007).

[80] **Exhibit C-2135**, RICO Trial Tr. 2307 (Ponce).

[81] **Exhibit C-360**, *Crude* Clip CRS-053-02-CLIP-04 (Mar. 30, 2006); **Exhibit C-2308**, *Crude* Clip (Mar. 30, 2006); **Exhibit C-2309**, *Crude* Clip (Mar. 30, 2006). *See also* Claimants' Supp. Memorial ¶¶ 91 n.274, 111-12, 120; Claimants' Track 2 Reply ¶¶ 6, 10; **Exhibit C-2135**, RICO Opinion at 419, 430.

[82] *See*, *e.g.,* Fourth Interim Award on Interim Measures; **Exhibit C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron* (Feb. 14, 2011); **Exhibit C-1975**, Cassation Decision (Ecuadorian National Court Judgment) (Nov. 12, 2013); **Exhibit C-1598**, "*Correa Says He Will Ask Cristina to "Comply With the Judgment" against Chevron*," LA NACIÓN (Dec. 4, 2012); **Exhibit C-1917**, "*Office of the Prosecutor General of Ecuador - Prosecutor's Office Requested Dismissal of Chevron Complaint*," Fiscalía General del Estado Ecuador Press

Chevron" (*La Mano Sucia de Chevron*) campaign has intensified in recent months. He continues to attack the company in nearly every presidential broadcast.

48. Alexis Mera (the President's top legal adviser) and Attorney General Diego García Carrión also appeared on national media to support the Lago Agrio Plaintiffs and give a point-by-point refutation of the RICO decision.[83] The Ministry of Foreign Relations has continued its worldwide support of the Dirty Hand campaign, announcing the creation of a new website, "*Apoya al Ecuador*" ("Support Ecuador"), which purports to tell "the real story" about the Chevron case and seeks to rally supporters for the Lago Agrio Plaintiffs.[84] The Ministry has also attacked Chevron through a series of recent public events in countries including Austria,

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Release (Aug. 19, 2013); **Exhibit C-1918,** "*Prosecutor's Office will investigate complaint by Chevron's attorney*," EL TELÉGRAFO (Aug. 20, 2013); **Exhibit C-1890**, Paid Advertisement "A Message from the People of Ecuador, Washington Post (Aug. 5, 2013); **Exhibit C-1899**, Ecuadorian Ministry of Foreign Affairs and Human Mobilization Pamphlet; **Exhibit C-1910**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 20, 2013); **Exhibit C-1911**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 21, 2013); **Exhibit C-1912**, Ecuadorian Ministry of Foreign Affairs and Human Mobility Press Release (Aug. 22, 2013); **Exhibit C-1913**, Letter from the Ecuadorian Embassy in Sweden (Aug. 7, 2013); **Exhibit C-1915**, Huffington Post Article (Aug. 12, 2013); **Exhibit C-1935**, Enlace Presidencial (Aug. 31, 2013); **Exhibit C-1940**, Cadena Presidencial, Ecuador TV (Sept. 17, 2013); **Exhibit C-1964**, Losvendepatria Website; **Exhibit C-2110**, Resolution by the National Assembly of Ecuador in Support of Mano Sucia Campaign (Oct. 15, 2013); **Exhibit C-2111**, El Telegrafo Press Article (Nov. 19, 2013); **Exhibit C-2112**, El Telegrafo Press Article (Feb. 5, 2014); **Exhibit C-2142**, European Pressphoto Agency Press Article (Oct. 17, 2013); **Exhibit C-2143**, Ecuadorinmediato Press Article (Oct. 22, 2013); **Exhibit C-2144**, Press Conference video and transcript (Oct. 22, 2013); **Exhibit C-2145**, Press Article (Nov. 1, 2013); **Exhibit C-2146**, Periodico 26 Press Article (Nov. 2, 2013); **Exhibit C-2147**, Korea Times Press Article (Nov. 11, 2013); **Exhibit C-2148**, El Comercio Press Article (Nov. 25, 2013); **Exhibit C-2149**, Press Article (Dec. 5, 2013); **Exhibit C-2151**, Cadena Presidencial (Dec. 28, 2013); **Exhibit C-2152**, Ecuador TV video and transcript (January 2, 2014). *See, e.g.,* **Exhibit C-2389,** Enlace Presidencial (LEX1000047331) (Apr. 5, 2014); **Exhibit C-2390,** Enlace Presidencial (LEX1000047332) (Apr. 5, 2014); **Exhibit C-2391,** Enlace Presidencial (Mar. 29, 2014); **Exhibit C-2392,** Enlace Presidencial (Mar. 22, 2014); **Exhibit C-2393,** Enlace Presidencial (Mar. 15, 2014); **Exhibit C-2394,** Enlace Presidencial, Mar. 22, 2014; **Exhibit C-2395,** *La campaña la "Mano Sucia de Chevron" ingresa con fuerza a Europa*, EL CIUDADANO, Mar. 22, 2014; **Exhibit C-2396**, CNN, "Face to Face" Interview with Rafael Correa (May 4, 2014).

[83] **Exhibit C-2397,** Adam Klasfeld, *Top Lawyer to Ecuador's President Indignant at Barbs by NY Judge,* Courthouse News Service, Mar. 13, 2014.

[84] **Exhibit C-2398,** *Cancillería de Ecuador lanza la campaña internacional en la Web sobre el Caso Chevron-Texaco*, Ministerio de Relaciones Exteriores y Movilidad Humana Press Release, Feb. 11, 2014.

Qatar, Dominican Republic, South Africa, Hungary, Peru, the United States, Cuba, Switzerland, and Italy.[85]

49. Thus, the Ecuadorian government undeniably actively and vigorously supported, and continues to support, the fraudulent Lago Agrio Litigation and Judgment.

C. The Guerra Evidence is Credible and Corroborated

50. The Tribunal, as the trier of fact, will examine the substance of the evidence and evaluate its materiality, weight, and credibility in the context of all of the evidence presented.[86] The Tribunal expressed its interest in the evidence concerning Guerra and Zambrano, which speaks directly to the fundamental illegitimacy of the Lago Agrio Litigation and Judgment. Rather than addressing the substance of this evidence, however, Respondent attacks Chevron for the method by which it obtained the Guerra evidence and ignores Zambrano's RICO testimony entirely.[87]

51. Certainly, as the Federal Court in New York recognized in the RICO trial, each of the three key fact witnesses – Guerra, Zambrano, and Donziger – is "deeply flawed" and among

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[85] **Exhibit C-2399,** Campaña "La Mano Sucia de Chevron" se difunde en Viena, ECUADOR INMEDIATO, Mar. 20, 2014; **Exhibit C-2400**, Embajador del Ecuador en Catar expone caso Chevron, APOYA AL ECUADOR, Apr. 3, 2014; **Exhibit C-2401,** La mano sucia de Chevron presente en República Dominicana, APOYA AL ECUADOR, Mar. 31, 2014; **Exhibit C-2402,** Embajada en Sudáfrica presenta el caso Chevron en la Universidad de Pretoria, APOYA AL ECUADOR, Mar. 28, 2014; **Exhibit C-2403,** Hungría se une con su comité de apoyo a la causa ecuatoriana, APOYA AL ECUADOR, Mar. 13, 2014; **Exhibit 2404**, "La mano sucia de Chevron" se difunde en Minnesota y Chiclayo, ECUADOR INMEDIATO, Mar. 21, 2014; **Exhibit C-2405,** En evento académico de atracción de inversiones se abordará caso Chevron, APOYA AL ECUADOR, Apr. 4, 2014; **Exhibit C-2406,** Reclama Embajador de Ecuador cese de contaminación petrolera en zona amazónica de su país, SIERRA MAESTRA, Apr. 15, 2014; **Exhibit C-2407,** Ecuador organiza panal sobre derechos humanos y empresas transnacionales en Ginebra, APOYA AL ECUADOR, Mar. 13, 2014; **Exhibit C-2408,** Ecorae aprobó su plan operativo para el 2014, EL UNIVERSO, Mar. 23, 2014.

[86] *E.g.*, **Exhibit R-844**, UNCITRAL Rules of Arbitration (2010) Art. 27(4) (formerly Art. 25(6) in the 1976 Rules); **CLA-512**, IBA Rules on the Taking of Evidence in International Arbitration (May 2010) art. 9.1 ("The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence."); **CLA-507**, Dutch Code of Civil Proceedings ("DCCP"), arts. 1039(5), 1065(1)(e) (arbitrators are not bound by the rules of evidence of a Dutch court and are free to decide the admissibility and the value of the evidence).

[87] *See* Respondent's Track 2 Rejoinder ¶¶ 235-273; Respondent's Letter to the Tribunal (Jan. 3, 2014) (requesting exclusion of all Guerra evidence).

them "there are no saints here."[88] Each of them was driven by personal economic gain, and each is either an admitted (Guerra) or proven (Zambrano and Donziger) co-conspirator in a serious scheme of bribery and corruption of justice resulting in the Lago Agrio Judgment.[89] It is therefore appropriate and necessary for the Tribunal to test the witnesses' veracity and require corroboration of their testimony. Claimants do not ask or expect the Tribunal to accept any witness's testimony as true on its face.[90] But the extensive corroborating evidence for Guerra – as the RICO Court concluded – leaves no doubt as to who is more credible.

52. Respondent devoted much ink to trying to discredit and exclude Mr. Guerra's testimony, as well as the tangible evidence he provided.[91] The Tribunal properly rejected that application.[92] As detailed in Claimants' letter brief replying to Respondent's request to exclude all of the Guerra evidence, Chevron has been transparent regarding its agreements and interactions with Mr. Guerra, and those arrangements are legal and ethical.[93] Nonetheless, Claimants agree that Guerra's testimony should be "scrutinized with great care and viewed with particular caution."[94] But, that scrutiny reveals that Guerra's testimony is consistent with the

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88 **Exhibit C-2135**, RICO Opinion at 222-23.

89 The issues with Zambrano's testimony are discussed below. Lago Agrio Plaintiffs' counsel Steven Donziger's testimony must also be closely and critically examined. He, too, had ample motivation to lie, in hope of collecting a US$ 600 million contingent fee from the multi-billion dollar Lago Agrio Judgment. As a practicing New York lawyer, he is subject to professional discipline for his patently unethical conduct. *See* **Exhibit C-2114**, RICO Trial Tr. 2460-2657 (Nov. 18-19, 2013) (Donziger); *see also* **Exhibit C-2135**, RICO Opinion at 223.

90 Having viewed each of these witnesses in person, the RICO Court assessed their relative credibility and the value of their testimony in light of the evidence as a whole. It found Guerra's testimony, as corroborated by other evidence, credible regarding the ghostwriting and bribery scheme. **Exhibit C-2135**, RICO Opinion at 219, 240, 265-81, 323. In stark contrast, he expressly found that Zambrano's testimony was internally inconsistent, contradicted by other evidence, and not credible. It also found that Donziger lacked credibility. *Id.* at 197, 200, 228.

91 *See* Respondent's Track 2 Rejoinder ¶¶ 235-73; Respondent's letter to the Tribunal (Jan. 3, 2014) (requesting exclusion of the Guerra evidence).

92 January 20-21, 2014 Track 2 Procedural Hearing Transcript 281:11-20 (Jan. 21, 2014).

93 *See* **Exhibit R-892**, Cooperation Agreement art. I; **Exhibit R- 908**, Supplemental Agreement arts. I, II; *see also* Claimants' Jan. 15, 2014 Letter Brief at 4-5.

94 **Exhibit C-2135**, RICO Opinion at 222.

massive volume of objective, tangible evidence in the record establishing that the Lago Agrio Litigation and Judgment were the product of fraud, corruption, and lack of due process.

53. Alberto Guerra is an inside witness with unique knowledge of the fraud and corruption in the Lago Agrio Litigation, and an admitted co-conspirator who acknowledges his wrongdoing.[95] However, as Claimants pointed out in their Track 2 Reply Memorial and other submissions (and as the Federal Court found in the RICO case), the material elements of Guerra's testimony are corroborated by objective documentary evidence, testimony of other witnesses, and expert evaluations.[96] Guerra's testimony supports and is consistent with the other objective evidence of the corruption, malfeasance, and lack of due process infecting the Lago Agrio Litigation and Judgment.[97]

54. The first evidence from Guerra consisted of his three written declarations in the RICO case, with attached documents.[98] He gave a deposition in the RICO case in early May 2013.[99] Claimants discussed this evidence in their Track 2 Reply Memorial of June 5, 2013.[100]

55. In October 2013, Guerra submitted a written statement to serve as his direct testimony in the RICO trial, consolidating his three prior declarations.[101] He then testified live in

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[95] The RICO Court recognized Guerra as essentially an accomplice witness who turned state's evidence. **Exhibit C-2135**, RICO Opinion at 222.

[96] *See* Claimants' Track 2 Reply at ¶¶ 22, 29, 57, 59, 62, 64-71; Claimants' letter to the Tribunal (Apr. 26, 2013) (notifying the Tribunal of the Guerra evidence); Claimants' Letter Brief (Jan. 14, 2014); **Exhibit C-2135**, RICO Opinion at 184, 237-39.

[97] *See* Claimants' Memorial ¶¶ 170-372; Claimants' Supp. Memorial ¶¶ 4-179; Claimants' Track 2 Reply ¶¶ 26-219.

[98] **Exhibit C-1616a**, Declaration of Alberto Guerra Bastidas (Nov. 17, 2012), with Attachments A-X ("First Guerra Declaration"); **Exhibit C-1648**, Declaration of Alberto Guerra Bastidas (Jan. 13, 2013) ("Second Guerra Declaration"); **Exhibit C-1828**, First Supplemental [Third] Declaration of Alberto Guerra Bastidas (Jan. 13, 2013), with Attachment A ("Third Guerra Declaration").

[99] **Exhibit C-1888**, Deposition of Alberto Guerra Bastidas, *Chevron Corp. v. Donziger et al.,* No. 11-CIV-0691 (LAK) (S.D.N.Y.) (May 2, 2103). Respondent also submitted this deposition transcript as **Exhibit R-906**.

[100] Claimants' Track 2 Reply ¶¶ 22-26, 57 n.114.

[101] **Exhibit C-2386**, Guerra Witness Stmt.(RICO direct testimony).

the RICO trial, the transcript of which Claimants submitted with their December 23, 2013 filing.[102] A few days later, Ecuador's counsel deposed Guerra in this arbitration.[103] Respondent discussed Guerra's first and second depositions in its Track 2 Rejoinder, but ignored his trial testimony.[104] That more recent deposition and trial testimony are consistent with Mr. Guerra's RICO declarations and his testimony in his first deposition.

56. In summary, former Judge Guerra described an illegal arrangement by which he served as Judge Zambrano's ghostwriter. Zambrano's experience as a criminal law prosecutor and traffic-court judge left him ill-prepared to address the civil cases before him after his promotion to provincial judge.[105] Zambrano entered into a deal with Guerra, a former provincial judge, for Guerra to ghostwrite orders and opinions in civil cases pending before Zambrano.[106] Guerra testified that this arrangement included the Lago Agrio Litigation, and the documentary evidence – including the presence of nine draft orders from the Lago Agrio Litigation on Guerra's computer – confirms it.[107] Zambrano had Guerra approach both sides in the Lago Agrio Litigation to solicit bribes, approaches which Chevron's representatives rebuffed before he

[102] **Exhibit C-1978**, RICO Trial Tr. (Oct. 23, 2013), Testimony of Alberto Guerra Bastidas, pp. 908:5 *et seq*. At the same time, Claimants also submitted a copy of Guerra's CV **Exhibit C-2020**, Curriculum Vitae of Alberto Guerra Bastidas (undated).

[103] **Exhibit R-907**, Deposition of Alberto Guerra Bastidas (Nov. 5, 2013).

[104] Respondent's Track 2 Rejoinder ¶¶ 235-273. **Exhibit R-906**, Deposition of Alberto Guerra Bastidas (May 2, 2013); **Exhibit R-907**, Deposition of Alberto Guerra Bastidas (Nov. 5, 2013).

[105] **Exhibit C-1616a**, First Guerra Decl. ¶ 7; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 11-12; ; *see also* **Exhibit C-1978**, RICO Trial Tr. 976:12-16 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 77:19-78:14 (Nov. 5, 2013).

[106] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 7-21; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 11-20; *see also* **Exhibit C-1978**, RICO Trial Tr. 910:24-914:5 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 70:2-73:21 (Nov. 5, 2013); **Exhibit C-1979**, Zambrano Depo. Tr. 213:13-222:2; **Exhibit C-1980**, RICO Trial Tr. 1647:2-9 (Zambrano) (admitting Guerra ghostwrote court orders for Zambrano in some civil cases).

[107] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 7-21, 24-29 and Attachments O, P, Q, R, S, T, U, V, and W; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 29-31; *see also* **Exhibit C-1978**, RICO Trial Tr. 913:7-914:5 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 75:25-82:14 (Nov. 5, 2013).

could make any proposition, but which the Lago Agrio Plaintiffs' representatives accepted.[108] The Lago Agrio Plaintiffs paid Guerra to ghostwrite orders favoring them and expediting the Lago Agrio Litigation, which Zambrano signed and issued.[109]

57. In February 2010, another judge, Leonardo Ordóñez, was made chief judge in the Lago Agrio Court and took over from Zambrano as presiding judge on the Lago Agrio Litigation. Guerra continued to act as Zambrano's ghostwriter in other civil cases.[110] In August 2010, in anticipation of resuming the position of presiding judge when Chevron moved to recuse Judge Ordóñez, Zambrano instructed Guerra to again approach the parties to solicit bribes. Again, Chevron rebuffed the approaches before Guerra could make the proposal.[111] The lawyers for the Lago Agrio Plaintiffs, however, met with Guerra and listened to his offer to let them write the Judgment in exchange for at least US$ 500,000.[112] Plaintiffs' counsel Steven Donziger admits this meeting took place and that Guerra solicited the bribe.[113] Donziger told Guerra the Plaintiffs did not have the funds to pay that amount at that time, but Zambrano later told Guerra that he had worked out a deal with the Plaintiffs' lawyers to get the US$ 500,000 bribe from the

[108] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 12-13; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 22-23; *see also* **Exhibit C-1978**, RICO Trial Tr. 914:10-930:3 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 82:15-88:17, 101:18-103:25 (Nov. 5, 2013).

[109] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 14-20; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 23-34; *see also* **Exhibit C-1978**, RICO Trial Tr. 929:19-934:7 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 98:17-109:25 (Nov. 5, 2013).

[110] **Exhibit C-1616a**, First Guerra Decl. ¶ 20; **Exhibit C-2386**, Guerra Witness Stmt. ¶ 35; *see also* **Exhibit R-907**, Guerra Depo. Tr. 88:18-89:5 (Nov. 5, 2013).

[111] **Exhibit C-1616a**, First Guerra Decl. ¶ 22; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 39-41; *see also* **Exhibit C-1978**, RICO Trial Tr. 990:9-19 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 94:5-98:16, 101:18-102:5, 105:4-6 (Nov. 5, 2013).

[112] **Exhibit C-1616a**, First Guerra Decl. ¶ 23; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 41-42; *see also* **Exhibit C-1978**, RICO Trial Tr. 990:9-23, 991:6-999:20 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 102:8-104:4 (Nov. 5, 2013).

[113] **Exhibit C-2382**, RICO Trial Tr. 2597:8-2598:16 (Donziger).

proceeds of the Judgment, and that Zambrano would share part of that money with Guerra.[114] In exchange, Zambrano agreed that the Lago Agrio Plaintiffs could write the Judgment themselves and he would issue it in his name.[115]

58. In October 2010, Judge Ordóñez was recused from the Lago Agrio Litigation and Zambrano again took over as presiding judge. In late January or early February 2011, Zambrano had Guerra travel to Lago Agrio to review the Plaintiffs' draft of the Judgment, and Guerra edited the draft to make it read more like an Ecuadorian court judgment.[116] About two weeks later, Zambrano issued the Judgment in the Lago Agrio Litigation.[117]

59. Guerra's RICO declarations, his depositions, and his trial testimony are accompanied by corroborating, objective evidence, including:

- Word document drafts of nine court orders issued in the Lago Agrio Litigation from the first period when Zambrano was the presiding judge in the case (October 2009-March 2010), which were found on Guerra's computer;[118]
- Word document drafts of a total of 105 court orders in other civil cases pending before Zambrano, found on Guerra's computer;[119]

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[114] **Exhibit C-1616a**, First Guerra Decl. ¶ 23; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 42-43; *see also* **Exhibit C-1978**, RICO Trial Tr. 999:24-1002:7 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 102:8-110:19 (Nov. 5, 2013).

[115] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 23, 29; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 42-43; *see also* **Exhibit C-1978**, RICO Trial Tr. 1001:3-19 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 104:20-105:15 (Nov. 5, 2013).

[116] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 25-27; **Exhibit C-1828**, Third Guerra Decl. ¶ 7; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 47-50; *see also* **Exhibit C-1978**, RICO Trial Tr. 1008:7-1013:12 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 141:6-145:15 (Nov. 5, 2013).

[117] **Exhibit C-1616a**, First Guerra Decl. ¶¶ 28-29; **Exhibit C-2386**, Guerra Witness Stmt. ¶ 47; **Exhibit C-1978**, RICO Trial Tr. 1132:5-8 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 101:11-13.

[118] **Exhibit C-1616a**, First Guerra Decl. Attachments O, P, Q, R. S, T, U, V, W.

[119] *Id.*, Attachments X, Y. Guerra's computer hard drive contained 105 drafts of court orders in a number of cases. Expert Report of Spencer Lynch ¶¶ 1-2, 9, 29-40.

- Banco Pichincha statements and deposit receipts for Guerra's bank account from June-July 2011, showing deposits by Zambrano, payments for ghostwriting services;[120]
- Pages from Guerra's daily diary for February 22-26, 2012, noting cash payments from Zambrano for Guerra's services as a ghostwriter;[121]
- Banco Pichincha statements and deposit receipts for Guerra's account for periods from December 2009 to April 2010, showing multiple deposits of payments from the Lago Agrio Plaintiffs, through Selva Viva, for Guerra's ghostwriting services;[122]
- Certified records from TAME Airlines showing shipment of documents from Guerra to Zambrano/the Lago Agrio courthouse;[123]
- The "Memory Aid" document regarding the background and chronology of the Lago Agrio Litigation provided by Plaintiffs' counsel Pablo Fajardo to Guerra in connection with editing the draft Lago Agrio Judgment.[124]

Ecuador's efforts to discredit Guerra's corroborating documents are insubstantial and based on supposition rather than fact.

60. For example, Ecuador attacks the Memory Aid document that Lago Agrio Plaintiffs' counsel Pablo Fajardo gave to Guerra to help him edit the draft Judgment. Rather than address the substance of the document, Ecuador first incorrectly asserts that the circumstances under which Guerra provided the Memory Aid to Chevron were unethical.[125]

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120 **Exhibit C-1616a**, First Guerra Decl. Attachments G, H.

121 *Id.* Attachment I.

122 *Id.* Attachments K, L, M, N.

123 *Id.* Attachment F.

124 **Exhibit C-1828**, Third Guerra Decl. Attachment A.

125 Respondent's Track 2 Rejoinder ¶¶ 257-263.

Ecuador then questions its authenticity, and suggests that perhaps Guerra obtained the Memory Aid document as a result of his work in getting an LLM in Environmental Law or in some other context or for some other purpose, but those suggestions are mere unsupported guesses.[126] Notably, while the RICO Court recognized there were inconsistencies in Guerra's testimony regarding how he obtained the Memory Aid from Fajardo, it found those inconsistencies immaterial and found the Memory Aid document to be probative evidence of the conspiracy between Zambrano, Guerra, and the Lago Agrio Plaintiffs.[127]

61. Similarly, Ecuador's only response to the Guerra banking records obtained from Banco Pichincha – which clearly show that both Zambrano and Selva Viva were illegally bankrolling Guerra, just as he asserts – is to dispute the authenticity of the records and to complain that those particular transactions do not add up to the total amounts Guerra says he received for his ghostwriting services.[128] Ecuador also discounts the TAME Airlines shipping records that reveal routine shipments of packages between Guerra and Zambrano, suggesting that the records are insufficiently detailed and unauthenticated (even though Zambrano himself admitted that those shipments contained documents and draft orders in Zambrano's civil cases).[129]

62. Ecuador ignores that Guerra's testimony confirmed the source of these records, and it has not provided any evidence to question their authenticity. It further ignores that those

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[126] *Id.* ¶¶ 257-263.

[127] **Exhibit C-2135**, RICO Opinion at 253-55.

[128] Respondent's Track 2 Rejoinder ¶¶ 271-272. Steven Donziger testified that Ximena Centeno, who made the deposits, was employed by Selva Viva when the deposits were made. **Exhibit C-2382**, RICO Trial Tr. 2596:1-4 (Donziger).

[129] Respondent's Track 2 Rejoinder ¶¶ 266-269. *See* **Exhibit C-1979**, Zambrano Depo. Tr. 252:14-254:23; **Exhibit C-1980**, RICO Trial Tr. 1643:18-1644:14 (Zambrano) (regarding the TAME shipments of case materials from Zambrano and drafts from Guerra).

records were deemed reliable and sufficiently authenticated to be admitted into evidence under the strict evidentiary standards of the United States District Court in the RICO trial.[130]

63. Ecuador also has no persuasive answer for the numerous Word document drafts on Guerra's computer of orders later issued in the Lago Agrio Litigation, and from other Zambrano civil cases. It says that its expert concluded that these drafts were "created" after the orders were issued and they all had a file system create date of July 2, 2010.[131] However, Claimants' expert concluded that the documents were created and edited on Guerra's computer, just as Guerra testified. Claimants' expert thoroughly explained that the "file system create" date is due to transferring the files, as part of a larger file transfer, when Guerra upgraded his computer to the Windows XP operating system.[132]

64. Plaintiffs' internal emails also corroborate Guerra's testimony, showing they were aware of the corrupt arrangement by which Guerra was Zambrano's ghostwriter, noting among other things, the need to pay "the puppeteer" to "move his puppet."[133] These emails were followed by deposits from Selva Viva into Guerra's bank account.[134] Most significantly,

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[130] Numerous exhibits were cited by the RICO Court in its March 4, 2014, Opinion or otherwise marked as exhibits for use in the RICO trial, but not previously submitted as exhibits in this arbitration. These additional exhibits are marked as **Exhibits C-2308** through **C-2385**. Although some of these exhibits are not discussed in the instant memorial, they may be relevant and useful to the Tribunal as the case progresses. Therefore, Claimants are submitting these exhibits with this memorial to avoid any further piecemeal submissions of materials from the RICO trial record. Accord, Jan. 21, 2014 Procedural Hearing Tr. at 267:22-268:7.

[131] Respondent's Track 2 Rejoinder ¶¶ 45, 254-256.

[132] Supplemental Expert Report of Michael A. Younger (May 31, 2013), Exhibit A ¶ 2.1.3 and Exhibit 22. *See* Claimants' Track 2 Reply ¶¶ 64-65, 69. Mr. Younger's extensive experience in computer forensics includes many years supervising computer crime investigations for the FBI and the U.S. Department of Defense. The RICO Court agreed with his conclusions regarding the date of the Guerra computer files. **Exhibit C-2135**, RICO Opinion at 232 n.950.

[133] *See* Claimants' Supp. Memorial ¶¶ 5-17; Claimants' Track 2 Reply ¶¶ 57, 61, 67; discussing **Exhibit C-1617a,** Email from P. Fajardo to S. Donziger and L. Yanza re "NEWS" at 2 (Oct. 27, 2009); **Exhibit C-1652**, Email from P. Fajardo to S. Donziger, *et al*, re: "PUPPETEER" (Sept. 15, 2009); **Exhibit C-1654**, Email from P. Fajardo to S. Donziger, *et al*, re: "ONWARD" (Oct. 21, 2009). *See also* **Exhibit C-2135**, RICO Opinion at 334-36 (regarding the Puppet and Puppeteer emails and surrounding events).

[134] *See* Claimants' Track 2 Reply ¶¶ 22, 57-71, discussing **Exhibit C-1616a**, First Guerra Decl. Attachments G, H, I, K, and L Guerra Bank records showing Selva Viva deposits. *See also* **Exhibit C-2135**, RICO Opinion at 233-38,

Ecuador ignores the key fact that in his RICO testimony, Zambrano was forced to admit that Guerra acted as his ghostwriter in civil cases, just as Guerra had said.[135]

65. Ecuador attacks Guerra's credibility in general, but it has not identified any instance in which Guerra's declarations or testimony is contradicted by objective evidence. Instead, in each instance, the objective evidence supports and corroborates Guerra's claims. In contrast, Zambrano's testimony was internally inconsistent and contradicted by the objective evidence, and he could not provide a single document to corroborate his story.[136] Zambrano's RICO testimony confirmed not only the truth of the Guerra evidence, but that Zambrano himself is guilty of the corrupt behavior attributed to him.

D. The Zambrano Testimony

1. Zambrano's Testimony Is Remarkable for Its Lack of Credibility

66. Whatever scrutiny is applied to Guerra's testimony must also be applied to Nicolás Zambrano's testimony. Zambrano is fundamentally self-interested and has strong motivations to say whatever suits his purposes at the moment, regardless of the truth. He remains in Ecuador, practicing as a lawyer since his dismissal from the bench for corruption and/or incompetence.[137] He could be subject to prosecution, disbarment, and other professional discipline if he admitted his participation in the bribery scheme and his other corrupt, illegal

278 (regarding the Puppet and Puppeteer emails and the Selva Viva deposits to Guerra's account, explaining that "all four deposits tie in to defendants' own emails, which remove any doubt as to whether the LAPs in fact made these deposits to Guerra's account.").

[135] **Exhibit C-1979**, Zambrano Depo. Tr. 213:6-214:19, 235:6-12; **Exhibit C-1980**, RICO Trial Tr. 1647:2-9, 1821:8-17, 1964:3-5 (Zambrano).

[136] *See* **Exhibit C-2135**, RICO Opinion at 199-200 (quoted in text); 197-98 ("Yet Zambrano claimed not to recall what had been said at the press conference and to have been entirely unaware, even at trial, 'that President Correa supported the Lago Agrio Plaintiffs' case before [Zambrano] issued the Lago Agrio Chevron judgment.' But that testimony is not at all credible."); 228 ("Zambrano's testimony that he did not pay Guerra and that the arrangement began in 2010 is not credible.").

[137] *See* **Exhibit C-1979**, Zambrano Depo. 109:18-111:13, 112:25-115:10; **Exhibit C-1980**, RICO Trial Tr. 1764:7-9 (Zambrano).

actions while serving as a judge.[138] The Correa government's clear interest in the case and in supporting the Judgment adds to Zambrano's self-interest, since admitting the truth would be very unpopular with those in power in Ecuador and would expose him to criminal prosecution similar to that faced by Guerra.[139]

67. Zambrano also owes his current employment and livelihood to the Ecuadorian government, having been hired as a "legal advisor" for a Petroecuador joint venture shortly after Guerra's cooperation became public and Zambrano signed a declaration denying any irregularities in the Judgment.[140] And he undoubtedly still hopes to capitalize on his illicit arrangement with the Lago Agrio Plaintiffs and obtain the promised US$ 500,000 from the proceeds of the Lago Agrio Judgment if the Plaintiffs are able to collect.[141]

68. Zambrano's RICO testimony was evasive, contradictory, and inconsistent with the documentary evidence, and when confronted with that evidence, Zambrano changed his story. Zambrano's admission that Guerra served as his ghostwriter – which came only after Zambrano first denied the arrangement and when faced with the cumulative documentary evidence for which he had no answer – is one of the few things one can believe from Zambrano's

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138 *See* **Exhibit C-1980**, RICO Trial Tr. 1649:3-6 (Zambrano).

139 *See* **Exhibit C-1980**, RICO Trial Tr. 1740:8-1741:5, 1800:8-1801:7 (Zambrano).

140 **Exhibit C-1979**, Zambrano Depo. 26:16-29:22; **Exhibit C-1980**, RICO Trial Tr. 1935:7-25 (Zambrano); **Exhibit C-1981**, Zambrano RICO Declaration (Mar. 28, 2013). *See also* **Exhibit C-2135**, RICO Opinion at 432-33 ("And a month after Zambrano provided the defendants with a declaration contesting the bribery and ghostwriting allegations, he started a new job as a legal adviser that is majority owned by PetroEcuador, the Ecuadorian national oil company.").

141 As the RICO Court recognized, Zambrano' chances of collecting the promised US$ 500,000 bribe "would be reduced by a finding he was bribed to throw the case" and he has an obvious economic self-interest in denying the corrupt bargain. **Exhibit C-2135**, RICO Opinion at 223.

testimony.[142] Unlike Guerra, whose testimony is corroborated by the objective evidence, Zambrano did not provide a single document to support his story.[143]

69. Having experienced it in person, and in the context of all of the other witnesses' testimony and evidence, the RICO Court summarized Zambrano's testimony:

> His testimony at trial was evasive and internally inconsistent. He repeatedly contradicted himself when attempting to explain how he wrote the Judgment, whether he received any assistance, and what materials he relied upon in doing so. The testimony he gave at trial was markedly different from that which he gave at his deposition just days before. And his responses and explanations at trial varied from one minute to the next. Not only was his version of events internally inconsistent, it was, as we shall see, in large respects thoroughly contradicted by evidence that was unrebutted and unexplained by the defendants.[144]

70. Zambrano's testimony with respect to Guerra's ghostwriting services was typical of his testimony as a whole. In his written declaration, Zambrano failed to mention his arrangement with former Judge Guerra.[145] Under cross-examination in his RICO deposition and trial testimony, Zambrano first denied that he ever used Guerra as a ghostwriter in any of his cases.[146] Zambrano then admitted that he used Guerra to ghostwrite orders for him in some of his civil cases:

> Q. Who typed the other ones that you didn't type into the computer yourself of the many orders you issued between October 10, 2010 and February 14, 2011, besides the Lago Agrio Chevron judgment?
>
> A. Some drafts I was helped by Dr. Alberto Guerra. Once the draft arrived, I would take it, I would polish it, I would match it to what was in the case file in the autos, and, according to my responsibility that I had, I would decide what was to be done based on the laws, on the Constitution, and based on law.

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142 **Exhibit C-1979**, Zambrano Depo. Tr. at 213:6-214:19, 235:6-12.

143 *Id.* at 41:15-42:6, 44:19-46:4.

144 **Exhibit C-2135**, RICO Opinion at 199-200.

145 **Exhibit C-1981**, Zambrano RICO Decl. ¶ 14.

146 **Exhibit C-1980**, RICO Trial Tr. 1631:4-1632:22, 1637:13-19, 1644:15-1645:14, 1648:2-4 (Zambrano).

> Q. Did you pay Mr. Guerra for his work drafting orders for you in your cases while you were a judge in Lago Agrio?
>
> A. As I stated, Dr. Alberto Guerra had been a judge in the court and he was facing a great financial need, and he was thankful toward me because when he first arrived in Lago Agrio as a judge and I was a prosecutor, I would help him in criminal cases.
>
> Q. And he helped you in civil cases, correct, sir?
>
> A. Because he would frequent Lago Agrio, he would provide me with some assistance in cases that I was hearing.[147]

Zambrano denied paying Guerra for his ghostwriting services, but then admitted that he deposited money into Guerra's bank account.[148] He denied that Guerra ghostwrote orders in the Lago Agrio Litigation, but could not explain why Guerra has drafts of orders from that case on his computer.[149]

71. The rest of Zambrano's RICO deposition and trial testimony was similarly unreliable. In particular, his testimony regarding when and how the Judgment was prepared was marked by evasiveness, contradictions, and inconsistencies. His trial testimony differed from his deposition testimony, and he contradicted himself from answer to answer.[150]

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[147] **Exhibit C-1979**, Zambrano Depo. Tr. 213:6-214:19 (objection omitted); *see also* **Exhibit C-1980**, RICO Trial Tr. 1637:13-19 ("[Guerra] never helped me to write court orders. What he prepared were the drafts.").

[148] **Exhibit C-1979**, Zambrano Depo. Tr. 213:6-214:19, 215:11-18; **Exhibit C-1980**, RICO Trial Tr. 1814:4-11 (Zambrano).

[149] **Exhibit C-1979**, Zambrano Depo. Tr. 221:23-223:18; **Exhibit C-1980**, RICO Trial Tr. 1638:7-1641:4 (Zambrano).

[150] **Exhibit C-2135**, RICO Opinion at 199-200. The RICO Court deemed significant portions of Zambrano's testimony regarding preparing the Judgment not credible. *Id.* at 188 ("Zambrano's testimony at trial regarding [Calva's] role was internally inconsistent."; *id.* at 189 ("there was no credible explanation of how Calva, as Zambrano claimed, found French, British, Australian, and American legal authorities on the Internet given that there is no evidence that she had any legal training or spoke French or English."); *id.* at 190 ("It is not credible that Zambrano dictated these sequences [of sampling data] to Calva orally and that Calva then typed them exactly into the draft without looking at any underlying document."; *id.* at 193 (Zambrano's testimony about the computer on which the Judgment was typed "is contradicted by objective evidence.").

2. Zambrano's Testimony Confirmed He Did Not Write the Lago Agrio Judgment

a. Contradictory Testimony about the Timeline

72. The contradictions and inconsistencies in Zambrano's story about the Judgment began with the timeline. As discussed in Claimants' previous submissions, Zambrano could not have reviewed the entire court record, as required by Ecuadorian law and as he insists he did, and drafted the 188-page, single-spaced Judgment in the time frame he claims.[151]

73. Zambrano presided over the Lago Agrio Litigation in two stints, from October 21 2009 to March 11, 2010, and, when Chief Judge Ordóñez was recused from the case, from October 11, 2010 until February 29, 2012.[152] In his written RICO declaration, Zambrano stated that he began drafting the Judgment during his first stint on the case, and that as of December 2010, he "had been working on the preparation of the ruling for some time."[153] In his live testimony, however, Zambrano could not explain why he would do any drafting or other work on the Judgment before mid-October 2010, given that Judge Ordóñez was supposed to serve a two-year term as Chief Judge and it was only due to Ordóñez's unexpected early recusal that Zambrano was reassigned to the case on October 11, 2010.[154]

74. Zambrano went back and forth about when he began working on the Judgment, eventually settling on the version that while he did some advance work, he did not actually begin drafting the Judgment until after he was reassigned to the case in October 2010.[155] Even that

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[151] Claimants' Supp. Memorial ¶¶ 15, 116; Claimants' Track 2 Reply ¶¶ 25-26.

[152] *See* Claimants' Supp. Memorial ¶¶ 88 n.258, 115, 128 n.395.

[153] **Exhibit C-1981**, Zambrano RICO Decl. ¶¶ 4, 11.

[154] **Exhibit C-1979**, Zambrano Depo. Tr. 96:11-99:16; **Exhibit C-1980**, RICO Trial Tr. 1715:24-1719:21 (Zambrano).

[155] **Exhibit C-1981**, Zambrano RICO Decl. ¶ 4 ("During that period [when first assigned to the case], upon reviewing the evidence and arguments of the parties in order to process the record, I realized that the case was about to end. I therefore began to prepare the draft of the structure of the judgment, since, as it was logical, due to being

version is problematic, since Zambrano says he began drafting the judgment before he closed the evidence by issuing *autos para sentencia* on December 17, 2010, although doing so was contrary to Ecuadorian law.[156] At the same time he says he was preparing the Lago Agrio Judgment, Zambrano also issued approximately 200 other orders and opinions in cases pending before him.[157] Zambrano simply could not have drafted the Judgment in the time frame between mid-October 2010 and early February 2011, much less after he issued *autos para sentencia* and asked that the entire record be sent to him for review.[158]

b. Zambrano Says He Discarded All Supporting Documents

75. Tellingly, Zambrano could not provide a single document to support his account of the process of preparing the Lago Agrio Judgment. He testified that he has no documents proving that he wrote the Lago Agrio Judgment other than the Judgment itself with his signature, and whatever is on the newer of the two computers in his office.[159] Zambrano claims, incredibly, that in the year after the Judgment was issued he destroyed all of his notes and other materials on which he relied in preparing it, even though he knew Chevron had challenged the validity of the Judgment and its provenance.[160]

c. Zambrano Did Not Know the Judgment's Contents

76. Zambrano testified that the Lago Agrio Judgment was the most important judgment he ever issued, awarding the most damages of any case of which he was aware in

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the second in seniority according to appointment as Judge, I could be appointed Presiding Judge of the Court in the second period and, therefore, I would have to continue with the trying of the case."); **Exhibit C-1979**, Zambrano Depo. Tr. 62:19-70:7; **Exhibit C-1980**, RICO Trial Tr. 1736:9-1737:2 (Zambrano).

156 **Exhibit C-1979**, Zambrano Depo. Tr. 70:13-83:6, 99:4-108:20; **Exhibit C-1980**, RICO Trial Tr. 1664:22-1665:2, 1837:12-1841:10 (Zambrano).

157 **Exhibit C-1980**, RICO Trial Tr. 1738:13-1739:12 (Zambrano).

158 Claimants' Supp. Memorial ¶¶ 5, 15, 115-116; Claimants' Track 2 Reply ¶ 25.

159 **Exhibit C-1979**, Zambrano Depo. Tr. 30:22-46:4.

160 *Id.* at 41:4-46:4.

Ecuador.[161] He said he studied the record and the applicable law, and wrote every word of the Judgment.[162] Yet, Zambrano knew amazingly little about the contents of the Judgment he insists he crafted over months of intense work. In his deposition, Zambrano refused to answer questions regarding the specific contents of the Lago Agrio Judgment.[163] Required to answer a few of those questions at the RICO trial, Zambrano was unable to recall any details, and even spouted gibberish, recalling a few technical words or phrases but with no idea of their meaning.[164]

77. As noted in the RICO Opinion, Zambrano "was astonishingly unfamiliar with important aspects of [the Lago Agrio Judgment's] contents."[165] For example:

- While the Lago Agrio Judgment describes benzene as "the most powerful carcinogenic agent considered" by the court in that decision,[166] Zambrano was unable in either his deposition or his trial testimony to recall it or provide a coherent answer regarding that important finding.[167]
- The Judgment names a study by San Sebastian of cancer incidence in the Amazon as having established "statistical data of the highest importance to delivering this

[161] **Exhibit C-1980**, RICO Trial Tr. 1605:14-1606:17 (Zambrano).

[162] **Exhibit C-1979**, Zambrano Depo. Tr. 46:13-48:13, 50:16-53:2; **Exhibit C-1980**, RICO Trial Tr. 1736:9-1739:4 (Zambrano).

[163] *See* **Exhibit C-1979**, Zambrano Depo. Tr. 83:7-87:20.

[164] *See* **Exhibit C-1980**, RICO Trial Tr. 1611:15-18 (Zambrano).

[165] **Exhibit C-2135**, RICO Opinion at 199.

[166] **Exhibit C-931**, Lago Agrio Judgment at 107.

[167] **Exhibit C-1980**, RICO Trial Tr. 1611:15-18 (Zambrano). Asked what substance the Lago Agrio Judgment says is "the most powerful carcinogenic agent considered," Zambrano first responded, "The hexavalent is one of the chemicals that if it is exceeded in its limits, it becomes cancer causing, carcinogenic." **Exhibit C-1980**, RICO Trial Tr. 1611:15-18 (Zambrano). "Hexavalent" is not a chemical; it is simply an element or compound "having a valence of six." *See* OXFORD ENGLISH DICTIONARY, "hexavalent," available at http://www.oxforddictionaries.com/us/definition/american_english/hexavalent.

ruling."[168] Zambrano, however, was unable to identify that study during his testimony.[169]

- Zambrano insisted that he alone wrote every word of the Lago Agrio Judgment, but did not know the meaning of the term "workover," which appears in English twice in the Judgment.[170] Zambrano could not explain why that term is used in the Judgment.[171]
- The Judgment cites the importance of "TPH" (total petroleum hydrocarbons") levels in the soil to the need for, and the costs of, soil remediation.[172] Zambrano did not know what TPH means, other than that "it pertains to petroleum."[173]
- The Judgment calculates TPH percentages from certain site inspections,[174] but Zambrano, who admitted he does not know what an Excel spreadsheet is, first said he did not remember how he calculated those percentages, then said he took them from "the reports that were being submitted by the experts."[175]
- The Judgment discusses at length the importance of causation to liability. After mentioning various potentially applicable theories of causation, and citing French law developments, it eventually explains why the Court adopts the "theory of sufficient

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[168] **Exhibit C-931**, Lago Agrio Judgment at 134 (Eng.).

[169] **Exhibit C-1980**, RICO Trial Tr. 1613:1-6 (Zambrano). Zambrano incorrectly said the report in question was by "expert Barros."

[170] **Exhibit C-931**, Lago Agrio Judgment at 20, 21 (Eng.).

[171] **Exhibit C-1980**, RICO Trial Tr. 1712:12 – 1713:11 (Zambrano).

[172] **Exhibit C-931**, Lago Agrio Judgment at 100-02, 104-105, 112-113, 117, 181 (Eng.).

[173] **Exhibit C-1979**, Zambrano Depo. Tr. 30:13-21; **Exhibit C-1980**, RICO Trial Tr. 1614:17-1615:10 (Zambrano).

[174] **Exhibit C-931**, Lago Agrio Judgment at 101-02.

[175] **Exhibit C-1980**, RICO Trial Tr. 1698:23-24 (Zambrano).

causation" as the basis for imposing civil liability.[176] Zambrano, however, could not recall what theory of causation the Judgment applied.[177]

Zambrano's ignorance of the Judgment's contents, together with substantial other evidence, led the RICO Court to conclude that "Zambrano did not write the [Lago Agrio] Judgment, at least in any material part."[178]

3. Zambrano and His Typist

78. Zambrano's description of the physical process of drafting the Judgment was no more believable than his testimony regarding its timing and content. Zambrano testified in his deposition and at the RICO trial that he personally (not the Court or the State) hired Evelyn Calva, the 18-year-old daughter of an acquaintance, to work for him and type the Lago Agrio Judgment.[179] Along with insisting that he dictated the entire Judgment to her, Zambrano used Ms. Calva to try, very poorly, to explain away one of the many serious issues with the Lago Agrio Judgment: the source of its discussion of foreign law theories of causation used to justify holding Chevron civilly liable. Tellingly, as important as Ms. Calva's alleged role in connection with the Judgment eventually became to Zambrano's story, he did not mention her at all in his March 28, 2013 written declaration in the RICO case.[180]

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[176] **Exhibit C-931**, Lago Agrio Judgment at 86-89 (Eng.).

[177] **Exhibit C-1980**, RICO Trial Tr. 1614:7-12 (Zambrano).

[178] **Exhibit C-2135**, RICO Opinion at 182. *See also id.* at 199-200 ("In sum, the Court finds that Zambrano did not write the Judgment issued in his name.").

[179] **Exhibit C-1979**, Zambrano Depo. Tr. 53:19-24; **Exhibit C-1980**, RICO Trial Tr. 1654:24-1655:2 (Zambrano). *See also* **Exhibit C-2387**, Direct Testimony of Evelyn Yuleisy Calva Erazo ¶ 2 (Nov. 6, 2013) ("Calva RICO Direct Testimony") (saying she worked for Zambrano from November 2010 to the end of February 2011, typing his dictation).

[180] **Exhibit C-1981**, Zambrano RICO Declaration. Zambrano said he "composed and prepared the judgment on the computer that the Judiciary Council has assigned to me," but denied getting "any support or assistance" from anyone else and did not mention Ms. Calva. *Id.* ¶¶ 14-15.

79. The RICO defendants submitted a written statement from Evelyn Calva regarding her work for Judge Zambrano, in which she says she typed the Lago Agrio Judgment from Zambrano's dictation.[181] She also said she "did general Internet research of rulings and other reference texts" for Zambrano, though she did not recall the subjects of that research, which she would then "print and hand them over [to Zambrano] for his reading and analysis."[182] She did not, however, show up to testify live and be cross-examined at trial or in deposition, so no one could ask her about her work for Judge Zambrano or her foreign language and legal research capabilities.

80. The Lago Agrio Judgment includes a lengthy discussion of the development of various theories of causation as an element for civil liability, including under French, Australian, English, and U.S. law.[183] The Judgment eventually concludes that the foreign law "theory of sufficient causation" as developed under French and Australian case law, and having no basis in Ecuadorian law, should apply.[184] This supposedly allowed the Lago Agrio Court to use its discretion to hold Chevron liable for having knowingly created an unjustified risk of a hazardous situation from which harm may have occurred.[185] This reliance on foreign-language legal

[181] **Exhibit C-2387**, Calva RICO Direct Testimony ¶¶ 2-4. While the RICO defendants submitted Ms. Calva's written direct testimony, because she did not appear for cross-examination, the RICO Court did not admit that testimony as evidence.

[182] *Id.* ¶ 5.

[183] **Exhibit C-931,** Lago Agrio Judgment at 74-92 (§ 7).

[184] *Id.* at 83 (§ 7.3) (French law), 88-89 (§ 7.3) (French law), 89-90 (§ 7.3) (English, U.S., and Australian law).

[185] *Id.* The Judgment recites, for example, that "Australian case law tells us that causation can be established by a process of inference, which combines concrete facts even if the actual causation cannot be attributed to any one of them by itself, which means that there is no need for the cause of the harm to be any one single contaminating substance, but that it is sufficient if this contaminating substance has been a contributing factor, which means that the defendant's participation must be more than minimal, trivial or an insignificant factor." *Id.* at 89-90 (Eng. Tr.).

sources raised the obvious questions of the justification for relying on foreign law and the sources from which the author of the Judgment obtained those authorities.[186]

81. Zambrano, an Ecuadorian criminal law practitioner with no training in the common law and so little experience in civil disputes that he had to hire a ghostwriter for rulings in those cases, first testified that no one helped him do the research needed to write the Lago Agrio Judgment.[187] Admitting that he neither speaks nor reads English or French, he changed his story and said he did not perform the legal research on which the extensive discussion of foreign legal theories is based, and instead claimed his young typist, Evelyn Calva, did that research for him.[188] Zambrano, however, did not know if Ms. Calva speaks or reads either French or English, or if she has any training or experience in legal research. There is no evidence that she has any such abilities, which would indeed be surprising in an 18-year old with no university or legal education.[189]

82. In her statement Ms. Calva did not indicate that she did, or had any ability to do, anything beyond finding basic Spanish-language sources on the internet, much less that she was capable of performing legal research from foreign-law and foreign-language sources.[190] Even if she had been capable of doing so, Zambrano (by his own admission) could not have read or understood the French and English-language authorities. Neither of them was capable of

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[186] *See* Claimants' Track 2 Reply ¶¶ 39, 49-50.

[187] **Exhibit C-1981**, Zambrano RICO Decl. ¶ 14.

[188] **Exhibit C-1979**, Zambrano Depo. Tr. 243:12-246:8; **Exhibit C-1980**, RICO Trial Tr. 1618:13-1620:6 (Zambrano).

[189] *See* **Exhibit C-2135**, RICO Opinion at 188-89 ("there was no credible explanation of how Calva, as Zambrano claimed, found French, British, Australian, and American legal authorities on the Internet given that there is no evidence that she had any legal training or spoke French or English. Nor was there any reasonable explanation of how Zambrano could 'read … later,' much less deal intelligently with, any such French or English language authorities in light of the fact that he reads neither French nor English, has no legal training in the common law, and even had very little experience with civil matters in Ecuador.").

[190] **Exhibit C-2387**, Calva RICO Direct Testimony.

digesting those authorities and crafting the discussion of foreign law and causation theories in the Lago Agrio Judgment. Zambrano also never explained why he, as presiding judge preparing his most important judgment ever,[191] would accept internet research on issues of foreign law as sufficiently comprehensive and trustworthy to include in the Judgment.

83. Rather than being the product of research by either Judge Zambrano or his typist, the evidence shows that the source of the causation analysis and discussion in the Lago Agrio Judgment was the unfiled work product of the Lago Agrio Plaintiffs' lawyers. As set out in Claimants' Reply Memorial and expert reports, both the Judgment and the "Moodie Memorandum," which was prepared as an internal memorandum for the Lago Agrio Plaintiffs by an Australian legal intern, misapply and misconstrue the law on causation theories in the same way.[192] As with other portions of the Judgment taken from unfiled work product, this analysis of a critical point of law did not come from Judge Zambrano; it was written by the Lago Agrio Plaintiffs' lawyers themselves.

84. Zambrano's story of dictating the Lago Agrio Judgment while Ms. Calva typed is equally unconvincing and cannot withstand even minimal scrutiny. Zambrano insisted that he dictated the entire Judgment, and that Ms. Calva typed it word-for-word from that dictation, without reference to any documents.[193] He could not explain how Ms. Calva was able to type the many alphanumeric sequences and complex environmental, engineering, and legal terms contained in the Judgment.[194] He also had no explanation for why the Judgment repeats identical

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[191] **Exhibit C-1980**, RICO Trial Tr. 1605:14-1606:17 (Zambrano).

[192] *See* Claimants' Reply Memorial ¶¶ 49-50, discussing **Exhibit C-1645**, Moodie Memorandum (Feb. 2, 2009), **Exhibit C-1646**, Expert Declaration of Prof. Michael Green ¶¶ 19-20 (Jan. 28, 2013), and **Exhibit C-1647,** Expert Declaration of James Spigelman ¶¶ 8-21, 25-26 (Jan. 25, 2013).

[193] **Exhibit C-1980**, RICO Trial Tr. 1603:23-1604:10, 1879:24-25 (Zambrano); **Exhibit C-1979**, Zambrano Depo. Tr. 63:13-19, 65:2-24.

[194] **Exhibit C-1980**, RICO Trial Tr. 1663:7-21 (Zambrano); **Exhibit C-1979**, Zambrano Depo. Tr. 62:19-64:6.

word strings, incorrect citations, out-of-order numbering, and includes the same typographical errors and other mistakes as in the Lago Agrio Plaintiffs' unfiled work product documents, including the Index Summaries, the Selva Viva Database, the Fusion Memo, and the Fajardo Trust email.[195] The overlap between these internal Plaintiffs' documents and the Lago Agrio Judgment, right down to the identical typographical errors and incorrect data entries, confirms that the Lago Agrio Plaintiffs themselves prepared the Lago Agrio Judgment.[196]

85. Zambrano frequently tripped himself up over seemingly minor but ultimately important details. He insisted that the only computer he (or Ms. Calva) ever used to type the Lago Agrio Judgment was the newer of the two computers in his judicial office at the Sucumbíos courthouse, which the Judicial Council provided to him soon after he resumed sitting as the presiding judge in the Lago Agrio Litigation in October 2010.[197] In his declaration, however, he said he began drafting the Judgment several months earlier, well before he received that computer.[198]

86. The RICO Opinion summarized the evidence presented at the RICO trial with respect to the preparation and authorship of the Lago Agrio Judgment:

> As we have seen, (1) Zambrano, a new judge inexperienced in civil matters, had his close friend and associate, Guerra, who had been removed from the bench for misconduct, drafting orders for him in civil cases which Zambrano signed and filed as his own; (2) Zambrano had motives to solicit a bribe in the Chevron case; (3) his friend and ghostwriter, Guerra, was a ready means of doing so; (4) Guerra concededly solicited the bribe from Donziger, Fajardo, and Yanza; (5) Donziger, Fajardo, and Yanza had motives and the opportunity to promise the bribe and, at least as long as the money was paid out of judgment proceeds and probably otherwise, the

[195] **Exhibit C-1980**, RICO Trial Tr. 1711:3-15 (Zambrano).

[196] *See* Claimants' Track 2 Reply ¶¶ 39-52.

[197] **Exhibit C-1979**, Zambrano Depo. Tr. 32:12-15; **Exhibit C-1980**, RICO Trial Tr. 1679:5-7, 1680:3-6 (Zambrano); **Exhibit C-1981**, Zambrano RICO Decl. ¶ 15 ("I never prepared one word of the judgment on any other computer").

[198] **Exhibit C-1981**, Zambrano RICO Decl. ¶ 10.

> means to pay it; and (6) the Judgment that Zambrano ultimately signed copied from LAP internal work product that was not in the court record. In short, there is a classic circumstantial case – independent of Guerra's testimony – that the LAPs bribed Zambrano to rule in their favor and sign a judgment they wrote for him. To this must be added (1) the Court's finding that Zambrano could not and did not write the Judgment himself, least of all in the manner in which he claimed he did so, and (2) neither the files of the LAPs' Ecuadorian counsel nor their testimony was made available.[199]

In sum, the federal district court in the RICO case found, by clear and convincing evidence, that (i) Zambrano was corrupt, and in a bribery scheme facilitated by Guerra, agreed with the Lago Agrio Plaintiffs' counsel to fix the case for a promised payment of US$ 500,000 to be derived from the proceeds of the Judgment; and (ii) the Lago Agrio Plaintiffs drafted all or most of the Judgment and Zambrano signed it without significant modification in exchange for the promised bribe.[200] Whether circumstantial or direct, the evidence supporting those findings is ample and conclusive.

4. Zambrano's Testimony About Other Matters is Equally Incredible

87. Zambrano's testimony regarding other matters similarly lacked credibility. He denied that he knew of the Correa government's strong support for the Lago Agrio Plaintiffs and antipathy to Chevron before he issued the Lago Agrio Judgment, and that he was still unaware of that support as of the time he testified in the RICO trial.[201] But the Lago Agrio Litigation was well known in Ecuador for years before the Judgment issued, and President Correa and his government publicly and notoriously supported the Lago Agrio Plaintiffs.[202] He and his

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[199] **Exhibit C-2135**, RICO Opinion at 279.

[200] *Id.* at 214, 219, 240, 245-46, 281, 323.

[201] **Exhibit C-1980**, RICO Trial Tr. 1800:3-10, 1959:18-21 (Zambrano).

[202] *See* Claimants' Memorial ¶¶ 281-296, Claimants' Supp. Memorial ¶¶ 123-127; **Exhibit C-168**, Press Release, *The Government Backs Actions of Assembly of Persons Affected by Texaco Oil Company*, Government of Ecuador Secretary General of Communications, Mar. 20, 2007; **Exhibit C-170**, Press Release, Office of President Rafael Correa, *The whole world should see the barbarity displayed by Texaco*, Apr. 26, 2007; **Exhibit C-171**, Presidential Weekly Radio Address, Radio Caravana, Apr. 28, 2007; **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: US-*

government hailed the Lago Agrio Judgment when it was issued,[203] and Zambrano himself appeared at a news conference the day after the Judgment was issued, being hailed as a "shining star" by the head of the Judicial Council.[204] Since then, President Correa has continued to strongly support the Lago Agrio Plaintiffs and vilify Chevron, lecturing the country on a weekly basis.[205] Shortly before Zambrano testified, the Ecuadorian National Assembly adopted a resolution supporting President Correa's "*la Mano Sucia de Chevron*" campaign, calling on Ecuadorian citizens to remain united against Chevron and those "public institutions, civil servants and authorities who acted against the highest national interests" in support of Chevron.[206] That Zambrano was unaware of this pervasive government interest is not believable.[207]

88. Zambrano's testimony about his new job with Petroecuador subsidiary Refineria del Pacifico and its connection with his support for the supposed legitimacy of the Lago Agrio Judgment is equally unbelievable. On February 29, 2012, Zambrano was removed from his role as a provincial judge in Ecuador, based on findings of corruption/incompetence against him for

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Ecuador Ties Influence Chevron Amazon Dispute, Dow Jones, Aug. 7, 2008; **Exhibit C-580**, Presidential Weekly Radio Address, Apr. 3, 2010.

[203] *See* **Exhibit C-932**, *Ecuador's Correa says Chevron's ruling "important,"* REUTERS, Feb. 15, 2011 (President Correa touts the Judgment as "the most important judgment in the history of the country").

[204] **Exhibit C-1012**, Press conference, Teleamazonas broadcast, Feb. 15, 2011 (President of the Judiciary Council, Benjamín Cevallos, holds a press conference and praises Judge Zambrano as a "shining star").

[205] *See* **Exhibit C-1935**, Enlace Presidencial, Aug. 31, 2013 (President Correa launches a media campaign called "The Dirty Hand of Chevron," specifically targeted at vilifying Chevron and anyone who has worked with Chevron, including attorneys and experts, and at assisting the Plaintiffs in their enforcement efforts). President Correa himself has called on other countries' leaders personally—specifically in Argentina—to "enforce the judgment"; **Exhibit C-1598**, *Correa Says He Will Ask Cristina to "Comply With the Judgment" against Chevron*, La Nacion, Dec. 4, 2012; *see also* **Exhibit C-1599**, *Ecuador's President Says Chevron Needs to Abide by Court Ruling*, Taos Turner-Dow Jones Newswires, Dec. 4, 2012; **Exhibit C-1600**, *Ecuador's Correa to Lobby Argentina on Chevron case*, Reuters, Dec. 4, 2012.

[206] *See* **Exhibit C-2110**, National Assembly of Ecuador: Resolution issued in support of the "*Mano Sucia de Chevron*" campaign (Oct. 15, 2013).

[207] *See* **Exhibit C-2135**, RICO Opinion at 198 (finding Zambrano's testimony in this regard "not at all credible.").

having inexplicably released the suspects in a high-profile drug trafficking case.[208] The Judicial Council permanently removed him from the bench in May 2012.[209] Despite that history, the evidence shows that Ecuador continues to support the disgraced ex-judge in exchange for Zambrano publicly supporting the supposed legitimacy of the Lago Agrio Judgment against the Guerra evidence.

89. On March 28, 2013, soon after Guerra's first declaration in the RICO case became public, Zambrano signed a declaration in the RICO case denying any improprieties in connection with the Lago Agrio Litigation and insisting he wrote the Judgment.[210] Less than a month later, Petroecuador appointed Zambrano to a lucrative position as legal advisor of one of its subsidiary joint venture entities, Refineria del Pacifico.[211] Zambrano claimed that he applied for that job in response to a job posting over the internet, despite his own admission that his computer skills are virtually nil.[212] He said he got paid for weeks before he ever showed up for work.[213] When he testified, he did not even know his own work email address.[214] Even as of his November 2013 deposition, several months after he was hired, he was unclear on the fact that his employer is majority-owned by Petroecuador.[215] The RICO Court found that these events, and

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[208] **Exhibit C-1829**, Order of the Plenary Judicial Council of Sucumbíos (Feb. 29, 2012). *See also* **Exhibit C-1121**, "*Two Sucumbíos judges appeal CJT decision dismissing them from their posts*," EL UNIVERSO (Mar. 6, 2012); **Exhibit C-1122**, "*Ecuadorean Judge in Chevron Case Dismissed*," ASSOCIATED PRESS (Mar. 7, 2012); **Exhibit C-1281**, "*Judges of Sucumbíos release drug escort,*" HOY (Oct. 21, 2009).

[209] **Exhibit C-2116**, Order of the Judicial Council at 8 (May 22, 2012) (removing Zambrano from bench); **Exhibit C-1721**, Judicial Counsel order denying reconsideration of dismissal (Feb. 15, 2013).

[210] *See* **Exhibit C-1981**, Zambrano RICO Declaration.

[211] *See* **Exhibit C-1979**, Zambrano Depo. Tr. 26:22-29:22.

[212] **Exhibit C-1980**, RICO Trial Tr. 1684:3-11, 1796:12-14, 1935: 13-25 (Zambrano). *See* **Exhibit C-2135**, RICO Opinion at 199 n.822 ("The Court does not … credit Zambrano's claim that he got the job [at Refineria del Pacifico] over the Internet.").

[213] **Exhibit C-1979**, Zambrano Depo. Tr. 28:18-29:22.

[214] **Exhibit C-1980**, RICO Trial Tr. 1796:12-14 (Zambrano).

[215] **Exhibit C-1979**, Zambrano Depo. Tr. 29:15-22.

Zambrano's "clumsy" dissembling about them, "gives rise to a strong inference that Zambrano's employment was – and remains – directly related to his testimony."[216] This conclusion is further supported by the Ecuadorian government's "open and notorious" support for the Lago Agrio Plaintiffs and its campaign against Chevron.[217]

90. Zambrano's evasiveness and willful ignorance extended to his testimony about his own history. His career as a prosecutor and as a judge was marked by repeated accusations of corruption, bribery, and other misconduct.[218] Local attorneys and others begged the government and judicial authorities not to promote him because of his history of soliciting bribes in the cases he prosecuted, but he still somehow managed to be appointed as a provincial judge.[219] Zambrano, however, said he could not recall these complaints and accusations.[220] His corruption and incompetence finally caught up with him, but only after he fraudulently issued the Lago Agrio Judgment.

91. Nothing is more telling about Zambrano's lack of credibility than Ecuador's choice to entirely ignore the existence of Zambrano's testimony in its Rejoinder, and its refusal

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[216] **Exhibit C-2135**, RICO Opinion at 197-98.

[217] *Id.* at 197.

[218] *See* **Exhibit C-1271**, Complaint by C. Montero, Secretary General of the Provincial Union of Drivers of Sucumbíos (Mar. 12, 1997); **Exhibit C-1272**, Affidavit of D. E. Encarnación (Apr. 7, 1997, at 4:30 p m.), **Exhibit C-1273**, Complaint by D. del Rosario Vargas Romero, Superintendent of Health of Sucumbíos (Sept. 4, 1998); **Exhibit C-1274**, Complaint by Dr. P. Rojas Trelles, Napo Bar Association President, et al., (Oct. 1, 2004); **Exhibit C-1275**, Complaint by Dr. E. Mancheno Guerrero (Oct. 28, 2004); **Exhibit C-1276**, Complaint by Dr. R. G. Vera Cardenas (Jul. 12, 1996); **Exhibit C-1277**, Petition to Challenge Judge Zambrano as Napo District Prosecutor (June 28, 2006); **Exhibit C-1278**, "*Accusations hover over judges hearing Texaco case*," EL UNIVERSO (Oct. 18, 2009); **Exhibit C-1279**, Complaint by F. Cox SanMiguel (Apr. 18, 2011); **Exhibit C-1280**, Letter from N. Alcivar to National Judicial Council (Aug. 20, 2011) (all complaining of Zambrano's misconduct and unethical behavior). *See also* Claimants' Supp. Memorial ¶¶ 117-118; Claimants' Track 2 Reply ¶¶ 59, 94.

[219] *See* **Exhibit C-1274**, Complaint by Dr. P. Rojas Trelles, Napo Bar Association President, et al., (Oct. 1, 2004); **Exhibit C-1275**, Complaint by Dr. E. Mancheno Guerrero (Oct. 28, 2004); **Exhibit C-1276**, Complaint by Dr. R. G. Vera Cardenas (Jul. 12, 1996); **Exhibit C-1277**, Petition to Challenge Judge Zambrano as Napo District Prosecutor (June 28, 2006). *See also* Claimants' Supp. Memorial ¶¶ 117-118; Claimants' Track 2 Reply ¶¶ 59, 94.

[220] **Exhibit C-1979**, Zambrano Depo. Tr. 112:25-115:10.

to investigate or prosecute Zambrano. These failures evidence the State's ratification of Zambrano's, and the Lago Agrio Plaintiffs' lawyers' conduct.

E. Ecuador's Story of How the Judgment was Produced Does Not Match Zambrano's Story

1. Ecuador's Story Ignores the RICO Testimony of Zambrano and Others

92. Ecuador insists that Claimants have not proven that the Judgment is the product of illegitimate arrangements between the Lago Agrio Plaintiffs and the judges in the Lago Agrio Litigation. In Ecuador's view, Zambrano did not take any bribes, did not use Guerra as a ghostwriter (despite Zambrano's testimony to the contrary), and drafted the Judgment himself without any ghostwriting from the Lago Agrio Plaintiffs.[221] According to Ecuador's version of events, Zambrano took the Judgment's important discussion of causation theories under foreign law from an *amicus* brief, and relied on and copied from only evidence in the official court record.[222] Ecuador offers complex, speculative explanations for how the Judgment came to copy the Lago Agrio Plaintiffs' unfiled work product word-for-word, and how those Plaintiffs' materials are in the court record, even if no one can find them.[223] Those explanations are for naught, however, given that the judge who allegedly wrote the Judgment tells a different story.

93. One would assume that the sworn testimony of the presiding judge in the case who allegedly prepared that Judgment would be critical to Ecuador's case. Reading Ecuador's Rejoinder, however, one would never know Zambrano ever testified.

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[221] *See* Respondent's Track 2 Rejoinder ¶¶ 207-234.

[222] *See id.* ¶¶ 285-335.

[223] *See id.* ¶¶ 276-307.

2. Zambrano's Testimony Contradicts Ecuador's Assertions About How the Plaintiffs' Unfiled Work Product Was Copied into the Judgment

94. Ecuador's response to the inclusion of the Plaintiffs' unfiled work product into the Judgment is to turn the evidentiary process on its head, complaining that Claimants have not proven a negative (*i.e.*, they have not proven the Lago Agrio Plaintiffs' documents from which the language is copied are *not* in the court's files).[224] Neither Claimants, nor Respondent (which has complete access to the Lago Agrio court files), nor the former judge who says he wrote the Judgment, nor the Lago Agrio Plaintiffs, nor the RICO Defendants, nor any of the experts, nor anyone else, has found any of these unfiled Plaintiffs' documents – the Fusion Memo, the Clapp Report, the Fajardo Trust email, the Moodie Memo, the Selva Viva Database, the Index Summaries – in the Lago Agrio court files.[225] Put differently, contrary to Ecuador's unsupported speculation, the only reasonable conclusion is that these documents were never filed in the judicial record of the Lago Agrio Litigation.

a. The Plaintiffs' Internal Materials Copied Into The Judgment Were Not Filed at Judicial Inspections

95. Even Zambrano's testimony in the RICO case belies Ecuador's arguments about the Judgment and the Plaintiffs' unfiled work product documents. Ecuador says that those materials were handed over at judicial inspections, suggesting that Zambrano simply copied into

[224] *See id.* ¶¶ 275-283.

[225] As discussed in Claimants' Track 2 Reply at ¶¶ 41-46, Dr. Patrick Juola's work confirms that the Selva Viva Database and other Plaintiffs' work product documents are not in the Lago Agrio Court record. Mr. Samuel Hernandez confirmed that expert analysis in his affidavit. **Exhibit C-1636**, Affidavit of Samuel Hernandez, Jr. (Jul. 27, 2012) ¶¶ 14-20. The RICO Court credited Dr. Juola's and Mr. Hernandez's testimony to that effect in the RICO trial. **Exhibit C-2135**, RICO Opinion at 203 n.840 ("The fact that neither [the Selva Viva Database or the Moodie Memo] is in the Lago Agrio record is established by the testimony of Dr. Juola, PX 3800 ¶¶ 3, 27 (Selva Viva Database), and Mr. Hernandez (PX 3900) ¶¶ 3, 17-19, 35-36,39) (Moodie Memo). The Court credits that testimony.").

the Judgment portions of documents properly filed with the Court.[226] Zambrano's final version of the story of the court record and the unfiled Plaintiffs' documents contradicts that speculation.

96. Zambrano said he sometimes found documents regarding the case in front of his office door, which were not incorporated into the case records. He reviewed those documents and if he found them "helpful" he used them in preparing the Judgment, even though he did not know where they came from and could not recall the documents he found.[227] However, he said he always matched those documents up to something that was in the official record – that is, in the *cuerpos* that formed the official record – and if they did not match up to something in that record, he did not use them.[228] Thus, according to Zambrano and contrary to Ecuador's proposition, all of the factual data and information in the Lago Agrio Judgment should be traceable to something in the *cuerpos*. No one, however, has been able to find those references anywhere in the court records.[229]

97. Zambrano further repeatedly insisted that he dictated every word of the Lago Agrio Judgment to his typist, without showing her any source documents.[230] His typist also said

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[226] *See* Respondent's Track 2 Rejoinder ¶¶ 276-307.

[227] **Exhibit C-1979**, Zambrano Depo. Tr. 275:15-276:6; **Exhibit C-1980**, RICO Trial Tr. 1691:3-14 (Zambrano).

[228] **Exhibit C-1979**, Zambrano Depo. Tr. 282:17-20; **Exhibit C-1980**, RICO Trial Tr. 1692:25-1694:25 (Zambrano). *See also* **Exhibit C-2135**, RICO Opinion at 200-01, 212-13 ("More fundamentally, any contention that the eight internal LAP documents that appear *verbatim* or in substance in the Judgment were provided to the judge during the judicial inspections or were left at Zambrano's doorstep cannot be taken seriously. Not only would any such *ex parte* submission have contravened Ecuadorian law, but defendants utterly failed to prove that any such thing actually occurred. Had a member of the LAP team provided a document *ex parte* to Zambrano or any other judge, that person could and should have been brought to court or deposed to explain what the document was and when it was provided to the judge. But no such witness was produced. Defendants' failure to provide any evidence corroborating their explanation makes clear that it is nothing more than a *post-hoc* attempt to explain away the inexplicable.").

[229] *See* Claimants' Reply Memorial at ¶¶ 41-46; **Exhibit C-1636**, Affidavit of Samuel Hernandez, Jr. ¶¶ 21-32 (July 27, 2012).

[230] **Exhibit C-1979**, Zambrano Depo. Tr. 63:13-19, 65:2-24; **Exhibit C-1980**, RICO Trial Tr. 1603:23-1604:10, 1879:24-25 (Zambrano).

in her RICO statement that she typed the Judgment from Zambrano's dictation.[231] Yet the Judgment contains exactly the same formatting of data, mistakes of law and interpretation, typographical errors, idiosyncratic references, and out-of-order numbering as in the Plaintiffs' unfiled work product documents.[232] It is absurd to think that a typist taking dictation would repeat exactly the same mistakes as in the original documents.[233]

98. Two of the lead lawyers for the Lago Agrio Plaintiffs, testifying at the RICO trial, could not provide any better explanation than did Zambrano for the Judgment's incorporation of unfiled Plaintiffs' documents and data. Steven Donziger testified that he had "a variety of explanations" for how the data from the Selva Viva Database and other unfiled work product came to be reproduced in the Judgment, but as the RICO Opinion summarized it, he "failed to provide a single one."[234] While Plaintiffs' counsel Alejandro Ponce followed Ecuador's story that documents were provided to the judge at some judicial inspections but were not recorded in the record, "he failed to identify a single occasion when that actually had happened, much less any given document that was submitted on such an occasion."[235]

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[231] **Exhibit C-**2387, Calva RICO Direct Testimony ¶ 4.

[232] *See* Claimants' Track 2 Reply ¶¶ 39-52.

[233] **Exhibit C-2135**, RICO Opinion at 189-90 ("Zambrano was adamant that Calva typed only what he dictated orally to her. He 'never show[ed] Ms. Calva any document for her to type from.' But the 188-page Judgment contains many complicated words, citations, and numerical sequences. The sampling data cited in the Judgment consists of strings of alphanumeric sequences with dashes, periods, underscores, odd spacing, and parentheses in them. . . . It is not credible that Zambrano dictated these sequences to Calva orally and that Calva then typed them exactly into the draft without looking at any underlying document. Moreover, as will appear, the Judgment contains portions of eight documents from the LAPs' internal files, many of them *in haec verba*. Even assuming that Zambrano actually prepared the Judgment, as he claims, he certainly would not have dictated these pre-existing documents to Ms. Calva rather than giving them to her with markings indicating exactly what he wanted her to copy.").

[234] **Exhibit C-2135**, RICO Opinion at 212, quoting **Exhibit C-2382**, RICO Trial Tr. 2600:6-9 (Donziger).

[235] *Id.*, citing **Exhibit C-1982**, Ponce RICO Witness Stmt. ¶ 11.

b. Zambrano Did Not Rely on an *Amicus* Brief for the French, Australian, English, and U.S. Causation Theories

99. Zambrano's testimony further contradicts Ecuador's story of the source of the important discussion of French, Australian, English, and U.S. law on causation in the Judgment. Ecuador asserts that Zambrano got these authorities and analysis from an *amicus* submission.[236] As discussed above, Zambrano first testified that he did all of that research himself, then changed his story and said he had his young, untrained, typist do the research on the internet.[237] He never suggested, however, that he reviewed, much less relied on, any *amicus* submissions.

100. In sum, Ecuador's version of the creation of the Judgment cannot be reconciled with Zambrano's testimony and the extensive evidence of the Lago Agrio Plaintiffs' scheme.

F. Information from Zambrano's Computer Hard Drives

101. The parties' and Tribunal's experts are scheduled to examine the hard drives of former Judge Zambrano's court computers in the near future. Claimants will supplement this discussion as appropriate after the experts conduct their examination and complete their reports.

III. THE CASSATION DECISION ONLY STRENGTHENS THE EXISTING CLAIMS FOR DENIAL OF JUSTICE AND TREATY VIOLATIONS

102. Because the Cassation Decision has not set aside the Judgment and has only modified it in one respect, there is no basis to credit Ecuador's contention that the "[t]he appellate and national court decisions have cured any procedural irregularity that allegedly occurred in the first-instance court."[238] Ecuador's breaches of the BIT and international law existed before the Cassation Decision, and except to the very limited extent that they were

[236] Respondent's Track 2 Rejoinder ¶¶ 308-320.

[237] **Exhibit C-1981**, Zambrano RICO Decl. ¶ 14; **Exhibit C-1979**, Zambrano Depo. Tr. 243:12-246:8; **Exhibit C-1980**, RICO Trial Tr. 1616:21-1617:4, 1618-1620:6 (Zambrano).

[238] Respondent's Track 2 Rejoinder at 2.

corrected by the Cassation Court with respect to punitive damages, they continue to exist today.[239]

103. The procedural history of the Lago Agrio case, in tandem with that of this arbitration, underscores this conclusion. On February 9, 2011, this Tribunal issued an interim measures order that Ecuador "take all measures at its disposal" to suspend the Lago Agrio Judgment's enforceability. Almost one year later, on January 3, 2012, the Provincial Court of Sucumbíos affirmed Judge Zambrano's decision. In that decision, the court stated that it lacked the authority to address Chevron's claims that the Plaintiffs had drafted Judge Zambrano's judgment and – except for one minor point – affirmed all of the legal and factual findings set forth in that Judgment.[240] Three weeks later, on January 25, 2012, this Tribunal issued its first Interim Award on Interim Measures, ordering Ecuador to "take all measures at its disposal" to suspend or cause to be suspended any enforcement or recognition of the Judgment. Four days after that, Chevron filed its cassation appeal and asked the appellate court to suspend the bond requirement in compliance with this Tribunal's Awards.[241] Two weeks later, on February 16, 2012, this Tribunal issued its Second Interim Award on Interim Measures, this time ordering Ecuador to "take all measures *necessary* to suspend or cause to be suspended" any enforcement or recognition of the Lago Agrio Judgment. The very next day, the appellate court issued an order (i) permitting Chevron's Cassation Appeal but (ii) declaring the Lago Agrio Judgment

[239] The reviewing courts' own decisions confirm this fact. The final paragraph of the appellate court decision of January 3, 2012, states that – apart from one minor finding concerning the presence of mercury – "the rest of the judgment of February 14th, 2011, in all its parts, is ratified." **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court (Jan. 3, 2012 at 4:43 p.m.) at 16 (Eng.) (final para.) ("Lago Agrio First-Instance Appellate Decision"). In turn, the Cassation Decision of November 12, 2013, "partially quashes" that portion of the appellate court decision awarding punitive damages, but otherwise concludes that, "As for the rest, the judgment issued by the Court of Appeals on January 3, 2012, . . . stands." **Exhibit C-1975,** Cassation Decision at 222 (Nov. 12, 2013) (Eng.).

[240] **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision at 16 (Eng.) (final para.).

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

immediately enforceable.[242] Chevron asked the appellate court to reconsider and, on March 1, 2012, the appellate court issued an order refusing to revoke its order of enforceability.[243] That order expressly stated that the Ecuadorian judiciary would not comply with this Tribunal's Interim Awards.[244] Two days later, President Correa stated on television that the Second Interim Award would have "no effect on the Lago Agrio Judgment's enforceability."[245]

104. It was only *after* Ecuador declared the Lago Agrio Judgment enforceable, and *after* both the judiciary and executive expressly declared that Ecuador would not comply with this Tribunal's Interim Awards seeking to forestall enforcement of the Judgment, that Claimants filed their March 20, 2012 Supplemental Memorial on the Merits asserting claims for denial of justice and new breaches of the BIT. Claimants' denial of justice claims fall into two broad categories: (1) the Lago Agrio Judgment is the product of judicial fraud, and corruption and violations of due process; and (2) the Lago Agrio Judgment's factual findings, legal holdings, and assessment of damages are so unjust that they constitute additional evidence of a denial of justice, independent of whether that Judgment is a product of judicial fraud and corruption.[246] In their previous pleadings, Claimants also explained that they were not required to exhaust any further domestic remedies because the judgment had become enforceable outside of Ecuador and because any further theoretical remedies would be futile.[247]

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[242] **Exhibit R-398**, Judgment of the Sole Division of the Provincial Court of Sucumbíos (Feb. 17, 2012).

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

[244] "[M]embers of the [Ecuadorian appellate] Division have no obligation to assume this responsibility under orders from a commercial Arbitration Panel who do [sic] not consider the conflict of international obligations they generate by ordering measures that restrict human rights." *Id.* at 4.

[245] **Exhibit C-1115**, Televised Address by President Correa (Mar. 3, 2012).

[246] Claimants' Supp. Memorial § III.B, C; Claimants' Track 2 Reply §§ IV.C, D.

[247] Claimants' Supp. Memorial § III.D; Claimants' Track 2 Reply § IV.A, B.

105. Nevertheless, in an effort to provide Ecuador with further opportunities to correct its internationally wrongful behavior, Claimants filed a cassation appeal before the National Court of Justice. On November 12, 2013, the National Court of Justice issued its decision upholding the Lago Agrio Judgment in all material respects, save for that Judgment's assessment of punitive damages.[248]

106. Ecuador argues that the Cassation Decision, like the appellate decision before it, "cured any procedural irregularity" allegedly occurring at the trial level.[249] Claimants disagree, and maintain the same claims for denial of justice and BIT violations as asserted in their March 20, 2012 Supplemental Memorial on the Merits. Ecuador breached its obligations under international law and the Treaty when the Lago Agrio Judgment became enforceable as a matter of Ecuadorian law. Ecuador even certified the Judgment as enforceable, allowing the Plaintiffs to present it for international enforcement prior to the exhaustion of domestic review.[250] Any conceivable "remedy" available within Ecuador after that moment of enforceability could not be effective. This would be true not only in the circumstances in which a foreign court might enforce the Judgment, but also in the event that Chevron might obtain a local Ecuadorian remedy before any international enforcement of the Judgment could occur. Even in the latter circumstance, any such remedy obtained would not automatically ameliorate or compensate the damages Chevron will have suffered in combatting international enforcement of the Judgment as a result of Ecuador's disregard of this Tribunal's Interim Awards. Thus, any potential

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248 **Exhibit C-1975**, Cassation Decision at 222 (Nov. 12, 2013) (Eng.).

249 Respondent's Track 2 Rejoinder at 2.

250 **Appendix D,** Second J. Paulsson Report ¶ 9 ("I am not aware of any other case with a factual pattern matching the present one: a domestic judgment said by one party to be defective when measured by international standards, which is subject to further review in the jurisdiction in which it was rendered, but which is certified as enforceable in the meantime, and is on that basis taken by its beneficiaries to multiple foreign jurisdictions for international enforcement.")

"remedies" that Chevron might still pursue can no longer effectively protect Chevron from the harm of Ecuador's wrongful conduct and thus need not be exhausted before Chevron may claim relief for the delict of denial of justice.

107. Under these circumstances, the Cassation Decision is relevant in only a limited sense. Had it nullified the Lago Agrio Judgment in full, the Cassation Court could have put an end to the future consequences of Ecuador's internationally wrongful conduct. Instead, the Court acted in furtherance of Ecuador's ongoing breaches by upholding in all but one respect the lower courts' decisions. Viewed in this light, the Cassation Decision might affect what remedies are now appropriate, in the way that *post-hoc* events often do. It also can furnish additional evidence relevant to whether the Lago Agrio Judgment constituted a denial of justice or breach of the BIT. But the Cassation Decision cannot – and did not – undo a breach of international law that ripened more than a year ago when Ecuador refused to follow this Tribunal's directive that it take all measures necessary to suspend (or cause to be suspended) the enforceability of the unlawful Judgment.

A. The Cassation Decision's Failure to Address Chevron's Corruption Claims Constitutes Further Evidence of an Ongoing International Wrong

108. The Cassation Court declared that neither the Provincial Court of Sucumbíos (which heard the first appeal against Judge Zambrano's Judgment), nor the Cassation Court itself possesses the authority to consider Chevron's claims that the Lago Agrio Plaintiffs bribed Judge Zambrano and wrote their own Judgment:

> … this Cassation Court may not, in the first place, quash a trial court judgment. […]The cassation appeal by the defendant company focuses mainly on the trial court judgment and the manner in which the evidence has been weighed by the trial judge, rendering the appeal inadmissible.[251]

[251] **Exhibit C-1975,** Cassation Decision at 153 (Eng.). The NCJ's insistence that it cannot review a first-instance Judgment is a formalistic statement, considering that it had to review the first-instance Judgment as a part of its

The Cassation Court later asserted:

> When collusion is an independent action governed by our Ecuadorian legislation, … 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 [sic] scope of that court to have jurisdiction to hear collusive action cases within a summary verbal proceeding, or procedural fraud, judges' behaviors, proper and improper meetings.[252]

Ecuador's Track 2 Rejoinder echoes this claim, arguing that because cassation is a purely legal appeal, the allegations of fraud and ghostwriting "could not be adjudicated in the appellate courts."[253] If Ecuador were correct, that would mean that the Cassation Court offers no remedy to address judicial fraud and corruption in a lower court's decision.

109. But Ecuador is incorrect as a matter of law. The Cassation Court's legal reasoning ignores that, under Ecuadorian law, all courts (including the Cassation Court) are obligated to enforce directly certain procedural and due-process rights, violations of which would annul a proceeding.[254] Those procedural violations include the Constitutional guarantees of due process as well as substantial procedural violations.[255] The due-process guarantees enshrined in the Ecuadorian Constitution – which are at the heart of Chevron's complaints about the Lago Agrio trial and appellate proceedings – include the invalidity of evidence obtained in violation of the law, the deprivation of a right to a defense, and the right to be tried by an

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review of the appellate decision. Moreover, Chevron directly appealed to the NCJ the issue that the appellate court failed to perform its duty of reviewing the trial court's misconduct, so the NCJ cannot escape responsibility for failing to address that claim. *See* **Exhibit C-1068**, Chevron's Cassation Appeal at 33 (Jan. 20, 2012) (Eng.) ("The proceeding is null and void . . . for the undeniable procedural fraud that was perpetrated in the proceeding and that was reported with documentary evidence to the lower court judge and the appellate court, both of whom chose to ignore it, failing to fulfil their fundamental duty of ensuring the validity of the proceeding . . ."); *id*. at 35 ("[W]hen the cassation judges review the record they will notice this most serious failure of the appellate court judges to fulfill their duties, for which reason they will have to quash the judgment[.]").

252 **Exhibit C-1975,** Cassation Decision at 95 (Eng.).

253 Respondent's Track 2 Rejoinder ¶ 218.

254 Sixth Coronel Report ¶ 12 *et seq.*

255 *Id.* ¶ 13.

impartial and competent judge.[256] If the Cassation Court finds that any grounds for nullity exist, it must declare the Judgment null and void.[257] The Organic Code of the Judiciary and the Code of Civil Procedure also obligate Ecuadorian judges to investigate the types of serious allegations that Chevron presented.[258]

110. For this reason, the Cassation Court committed two particularly grave errors in its Cassation Decision (among many others). First, the Cassation Court failed to hold that the appellate court erred by disclaiming any authority to address Chevron's fraud, corruption, and due process allegations.[259] Second, the Cassation Court failed itself to examine the same allegations.[260] These two errors constitute further wrongful conduct compounding the ongoing breach of international law.

111. In its pleadings, Ecuador emphasizes that the Cassation Court considers only errors of law, not fact.[261] That point is irrelevant to the Cassation Court's first grave error. The appellate court committed a gross error of law when it refused to rule on Chevron's fraud claims. The Cassation Court did not need to make or reconsider a fact finding to address that error. In fact, the Cassation Court addressed that error when it improperly held that the appellate court was correct that it lacked authority to address Chevron's fraud claims. Moreover, while it is true that the Cassation Court does not review fact findings in the judgments of lower courts, that

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[256] *Id*. ¶¶ 12-14. Article 11 of the Ecuadorian Constitution provides that "[t]he rights and guarantees established in the Constitution and the international human rights instruments will be directly and immediately applicable by and before any administrative or judicial public servant, *ex officio* [*i.e. sua sponte*] or at the request of one of the parties." *Id*. ¶ 12.

[257] *Id*. ¶ 14.

[258] *Id.* ¶¶ 14-16.

[259] *Id.* ¶ 18.

[260] *See, e.g.,* Respondent's Track 2 Rejoinder ¶¶ 181, 218.

[261] *Id.* ¶ 19.

point does not apply to facts regarding flaws or irregularities *in the proceeding itself*.[262] Therefore, while the factual findings in the Judgment may not be subject to appeal, the facts surrounding the Judgment's false authorship and corrupt roots certainly are.

112. Even leaving aside Ecuador's incorrect position on domestic law, it is nevertheless internationally responsible for its judicial system's ultimate decision to uphold (in its own words, to let "stand" and to "ratify") a corrupt Judgment. In the *Coles and Croswell* case, the U.K. appointed a Special Commissioner to review a Haitian court's conviction of two British nationals for theft.[263] According to the Commissioner's letters, the jury trial was disorderly and corrupt, leading the trial prosecutor to be charged, alongside at least five jurymen, for jury tampering leading to the conviction. As the Commissioner observed, "[i]t is difficult to understand how a verdict, delivered by such a jury, and under such circumstances, could have been allowed to stand for a moment."[264] Yet the cassation court in Haiti refused to annul the theft convictions that resulted from an admittedly corrupt process. In the words of the Commission, a "more flagrant contradiction can hardly be conceived."[265] Nearly the same circumstances are at play here, although Ecuador's conduct is even *worse* than Haiti's. The appellate court and Cassation Court refused to even *consider* the evidence of fraud and corruption, blindly upholding a decision that never should have been allowed to stand for a moment.[266]

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[262] Sixth Coronel Report ¶ 23.

[263] **CLA-576**, *Great Britain v. Haiti*, May 31, 1886, 78 BRITISH & FOREIGN STATE PAPERS 1305, cited in **RLA-61**, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW at 105 (Cambridge Univ. Press 2005).

[264] *Id*. at 106.

[265] *Id*.

[266] *See, e.g.*, **Exhibit C-1975**, Cassation Decision at 122 (Eng.) (stating that "This Cassation Court finds that there are sufficient grounds with regard to lack of jurisdiction for the court of appeals to decide on an issue of procedural fraud, since it is not established in the law, or as a reason for a nullity. . . Furthermore, the civil court lacks jurisdiction. As stated by the Provincial Court of Justice of Sucumbíos, there is also no inconsistency between the

113. The fact that Ecuador's breaches have taken numerous forms, over the course of several years, in no way reduces or affects Ecuador's liability. Article 14(2) of the ILC Articles on State Responsibility provides:

> The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.[267]

This principle is developed in the Commentary to Article 14, which states:

> Thus conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility.[268]

These statements indicate that far from exonerating Ecuador, its judiciary's ongoing conduct in issuing the "final product" of the Cassation Decision only cements Ecuador's responsibility under international law for the "continuing wrongful act" resulting from the Judgment and its effects.

B. Claimants Need Not Pursue an Extraordinary Constitutional Appeal in Order to Exhaust Remedies

114. Established by Ecuador in the 2008 Constitution, the extraordinary action for protection ("EAP") is a constitutional remedy to review final judgments of national courts where constitutional rights have been infringed. As set forth in Article 94 of the Constitution, "[t]he extraordinary action for protection shall be admissible against those rulings or definitive judgments where there has been a violation, by action or omission, of the rights enshrined in the

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judgment rendered on January 3, 2012 and the order issued on January 13, 2012. Pursuant to the above, the alleged charge is inadmissable.")

[267] **CLA-291**, ILC Articles on State Responsibility art. 14(2).

[268] **CLA-288**, James Crawford, *The International Law Commission Articles on State Responsibility* 138 (Cambridge, 2002), reproducing paragraph 12 of the Commentary to Article 14.

Constitution….").[269] The EAP has a "residual" character, meaning that it can only be presented when all other ordinary and extraordinary recourses have been exhausted.[270] Thus, an EAP may only be presented after a proceeding has achieved an otherwise "final" status under Ecuadorian law.

115. Like an action under the CPA, an extraordinary appeal to the Constitutional Court also fails to provide an "effective" or "available" remedy for Chevron's existing harm. First, it is not a "vertical" remedy of the kind typically required for purposes of international exhaustion; cassation is the final stage of that "vertical" process. Second, an EAP before the Constitutional Court provides no stay of enforceability.[271] Therefore, the EAP is not even a potential remedy for the harm that Chevron currently incurs – which is the enforceability of the Lago Agrio Judgment and Chevron's cost and effort in seeking legally to resist such enforcement in multiple jurisdictions. Third, as Claimants have previously pleaded, the Constitutional Court is just as politicized and biased as the National Court of Justice that recently upheld the Judgment for US$ 9.5 billion, and therefore an extraordinary appeal can be expected to be just as futile as Chevron's previous request for cassation.[272] And finally, Ecuador's suggestion that the Constitutional Court promises an effective remedy for Chevron's corruption claims is especially absurd in light of the fact that at least two levels of appellate review to date – including by Ecuador's highest court – have not only rejected Chevron's corruption claims, but denied that they even possessed the authority to consider them.

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[269] **Exhibit C-288**, 2008 Political Constitution of Ecuador art. 94.

[270] *Id.* ("[A]ll ordinary and extraordinary recourses must have been exhausted within the legal term" in order for an EAP to be admitted).

[271] Sixth Coronel Report ¶¶ 39-40.

[272] Claimants' Track 2 Reply ¶¶ 293-94, n.524.

C. An Action Under the Collusion Prosecution Act Is Not an Adequate Remedy to Address Claimants' Corruption Claims

116. Less than five months ago, Ecuador raised a new argument that Chevron's complaints about the fraud and corruption that perverted the Lago Agrio Judgment could only be judicially considered in a separate action brought under the CPA, and for this reason, Chevron's corruption claims fell outside the jurisdiction of the courts having direct appellate review of the Judgment.[273] In making this assertion, Ecuador appears to have taken its cue from a brief remark in the Cassation Decision.[274] Thus, Ecuador now assails Chevron because it allegedly "chose *not* to … exhaust [its] domestic court rights."[275] But in fact, Claimants are not obligated to pursue an action under the CPA for several reasons.

117. Ecuador's assertion that jurisdiction over Chevron's corruption claim lay exclusively under the CPA is wrong because both the appellate court and the Cassation Court were legally obligated to address Chevron's fraud, corruption, and due process claims.[276] Ecuador never made this argument prior to filing its December 2013 Track 2 memorial, which suggests that before that submission Ecuador itself believed that the appellate court was supposed to address Chevron's fraud, corruption, and due process claims. Similarly, after the appellate court issued its decision, the Lago Agrio Plaintiffs filed a motion for clarification asking the appellate court to "clarify and state that it ha[d] analyzed Chevron's accusations, and that it ha[d] not found any fraud in the activities of the plaintiffs or their attorneys."[277] On this point of Ecuadorian law, both the Lago Agrio Plaintiffs and Chevron were correct. The appellate

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[273] Respondent's Track 2 Rejoinder at 103 *et seq.*

[274] **Exhibit C-1975,** Cassation Decision at 159 (Eng.).

[275] Respondent's Track 2 Rejoinder ¶ 9.

[276] Sixth Coronel Report ¶ 12 *et seq.*

[277] **Exhibit C-1066**, Plaintiffs' Request for Clarification, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings) (Jan. 6, 2012).

court was legally obligated to address Chevron's fraud and corruption claims. But instead of doing so, the Court dodged the issue by improperly claiming it lacked jurisdiction.[278]

118. Regardless, as a matter of international law, Claimants do not need to pursue ancillary actions for relief, such as a CPA action, before additional courts that stand outside the path of direct appellate review for the purpose of demonstrating "exhaustion" of local remedies.[279] More specifically, international courts and tribunals have held that procedural devices such as independent actions against a judge are not necessary to exhaust local remedies, particularly when "higher supervising administrative and judicial authorities had [already] been put on notice of the illegalities committed."[280] As the Inter-American Court of Human Rights has indicated, this is particularly true in situations such as this, in which the circumstances demonstrate that Ecuador's judiciary "does not have the independence necessary to arrive at an impartial decision."[281]

119. For example, in the *Montano* case, the respondent State proposed that, after obtaining a domestic court judgment in his favor that remained unenforced because the marshal tasked with its execution was negligent, the claimant should have lodged a suit against the marshal.[282] The argument proposed that "what Montano gained by the sentence was the right to

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[278] *See, e.g.*, **Exhibit R-299**, Order Clarifying the Lago Agrio Appellate Judgment at 4 (holding that the Lago Agrio case was 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" adding that "it was not [the Appellate Court's] responsibility to hear and resolve proceedings that correspond to another jurisdiction.").

[279] *See* Claimants' Supp. Memorial ¶ 250 (citing several authorities for the proposition that Claimants need not pursue remedies "beyond a point of reasonableness" or to exhaust remedies that "exist[] on paper," but exhaust all "effective and adequate" local remedies).

[280] **RLA-61**, J. Paulsson, DENIAL OF JUSTICE at 112 (quoting *Antoine Fabiani (France v. Venezuela)*, *Moore, Arbitrations* 4878 at 4904).

[281] **CLA**-440, *Las Palmeras v. Colombia*, Merits Judgment, Inter-Am. Ct. HR. (Ser. C) No. 90 ¶ 58 (Dec. 6, 2001).

[282] **CLA-577**, *Peru v. US*, in J.B. Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY Vol. II, pp. 1630-38, 1632.

bring forward another complaint."[283] But because the umpire determined that such a claim would not have directly accelerated the enforcement process, he ruled that the claimant was not required to exhaust the alleged remedy.[284] Similarly, in *Merit v. Ukraine*, an undue-delay case, the ECHR held that instituting civil proceedings to complain about lengthy court proceedings would not remedy the delays.[285]

120. In addition, a CPA action would not be an effective remedy on the facts of this case. A CPA action is subject to the *ultima ratio* condition. This means that a CPA claim may only be filed when there is no other mechanism to resolve the matter.[286]

121. The Ecuadorian National Court of Justice has repeatedly affirmed this rule. For instance, in a July 13, 2013 decision – only a few months before the Cassation Court decision in the Lago Agrio Litigation – the National Court of Justice held:

> The Supreme Court of Justice, now the National Court, has consistently held, through its Criminal Divisions, that the collusion action is *ultima ratio* . . . the collusion action may not be brought in any case in which the law has established another mechanism to obtain legal protection of the harmed, disregarded, or violated rights . . . [287]

In *Bowen, et al v Villacis, et al*, the Ecuadorian National Court of Justice rejected an appeal regarding a CPA action because, among other reasons, appeals were available to the plaintiffs.[288] In *Ńauńay v. Llanga et al*, the Ecuadorian National Court of Justice rejected a CPA action based on facts that were at issue in other ongoing proceedings.[289]

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283 *Id.* at 1637.

284 *Id.*

285 **CLA-578**, *Merit v. Ukraine*, App. No. 66561/01, Eur. Ct. H.R. ¶ 59 (Mar. 30, 2004).

286 Sixth Coronel Report ¶ 29.

287 *Id.* (quoting **Coronel Exhibit 334**, *Romero v. Zambrano* (Official Gazette Supplement 20 (Jul. 10, 2013)).

288 *Id.* ¶ 30 (quoting **Coronel Exhibit 331**, *Bowen v. Villacis* (Official Gazette Supplement 21(Jul. 11, 2013)).

289 *Id.* (quoting **Coronel Exhibit 335**, *Ńauńay v. Llanga et al* (Official Gazette Supplement 360 (Nov. 7, 2012)).

122. The appellate court and Cassation Court were obligated to address Chevron's fraud, corruption, and due process claims, and those same claims are currently before the Constitutional Court. Thus, Chevron may not file a CPA action regarding the same fraud, corruption, and failure of due process. Moreover, the CPA was originally enacted to address fraudulent practices related to real estate transactions, and a 2013 decision of the National Court of Justice held that CPA actions were limited to that subject matter.[290] The fraud, corruption, and lack of due process at issue in the Lago Agrio Judgment does not concern real estate. Thus, even if the *ultima ratio* condition were not a bar, the jurisprudence of the Cassation Court itself suggests that Chevron may not bring a CPA action.

123. Finally, CPA actions are brought in the first instance before a district court judge. The first appeal of that judge's final ruling is heard by a division of the applicable provincial court. In turn, the cassation appeal from the appellate decision would be heard by the National Court of Justice – the court that has already upheld the Lago Agrio Judgment. That Cassation Decision would be subject to an extraordinary appeal before the Constitutional Court of Ecuador.[291] And as Dr. Coronel explains, plaintiffs in CPA actions cannot obtain interim relief while they pursue their claims.[292]

124. Under the circumstances of this case, an action under the CPA would require Chevron to commence a new action that would last years before the very courts that have committed the fraud against Chevron and failed in their most elemental duties. In the meantime, the Lago Agrio Judgment would remain enforceable inside and outside Ecuador during the entire

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[290] *Id.* ¶ 28 (citing **Coronel Exhibit 443**, 1945 Collusion Prosecution Act and **Coronel Exhibit 327**, *Campoverde v. Maita et al.*, Official Registry Supplement 2 (July 22, 2013)).

[291] *Id.* ¶ 32.

[292] *Id.* ¶¶ 33 *et seq.*

pendency of that litigation. This remedy is neither legally "available" nor "effective" to fix Chevron's harm, and therefore creates no bar to Claimants' international claims.

D. The Cassation Court's Legal Reasoning Regarding Chevron's Other Grounds for Appeal Constitutes Further Evidence of Denial of Justice and Breaches of the BIT

125. On its merits, the Cassation Decision failed to correct the underlying wrong of the Lago Agrio Judgment. With the sole exception of the punitive damages assessment – which was not even colorable under Ecuadorian law – the fraudulent Judgment remains intact. The Cassation Decision therefore failed to "wipe out" the consequences of the earlier-committed denial of justice. Instead, and as the Plaintiffs' lawyers predicted and orchestrated, the Cassation Court simply lopped off a portion of the enormous Judgment in order to make it appear reasonable.[293]

126. As Claimants have explained in several submissions, the Lago Agrio Judgment's treatment of the scientific evidence and its assessment of damages are substantively absurd. The Cassation Court provided no additional reasoning that could conceivably justify the lower Ecuadorian courts' assessment of damages. Moreover, while the Cassation Court reviewed certain legal findings of the Lago Agrio Judgment, its reasoning in sustaining those findings was absurd and unlawful. Claimants thus maintain their case that the damages assessed in the Lago Agrio Judgment, pursuant to the legal analysis underpinning them, is so fundamentally unfair as to constitute a denial of justice.

[293] **Exhibit C-360**, *Crude* Outtakes (Mar. 4, 2007) at CRS196-01-CLIP 01 (Donziger: "If we have a legitimate fifty billion dollar damage claim, and they end up-- judge says, well, I can't give them less than five billion. You know what I mean?" He explained that the judge can then say that "[Texaco] had a huge victory; they knocked out ninety percent of the damages claim."; *Id*., CRS159-00-CUP-06 (Donziger: "Do we ask for eight and accept three, so that [unintelligible] says, 'Look, Texaco, I cut down the largest part.'").

1. The Cassation Decision Ratifies the Judiciary's Veil-Piercing among TexPet, Texaco, Inc., Chevron, and Chevron Subsidiaries Worldwide, without any Legitimate Basis

127. The Ecuadorian judiciary pierced three different levels of corporate separateness.[294] First, it pierced the veil between TexPet and Texaco, Inc. The first-instance decision reached this holding based on findings of fact regarding Texaco, Inc.'s control of TexPet.[295] But as Dr. Coronel explained in a prior opinion, Ecuadorian law requires a finding of abuse of corporate form with the intent to commit a fraud in order to pierce the corporate veil – excessive "control" of TexPet would be insufficient to justify this result even if it were true.[296] Chevron raised this point on appeal in its first-instance appeal, and the appellate court ignored it entirely.[297] Chevron raised this point again in its Cassation appeal, and the Cassation Court also ignored it.[298]

128. Second, the Ecuadorian judiciary pierced the corporate veil between Texaco, Inc. and Chevron. The Cassation Court articulated two grounds for this holding. First, it affirmed the finding of the appellate and first-instance courts that Chevron acquired Texaco, Inc. for the fraudulent purpose of hiding "inherited assets" and avoiding obligations for damages caused in Ecuador.[299] In reaching this conclusion, the Cassation Court never even acknowledged, much less provided any reason to disregard, Chevron's arguments and evidence for the contrary conclusion. Those arguments were based on undisputed facts. In particular, the Cassation Court

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[294] There are other corporate entities between TexPet, Texaco, Inc., Chevron, and Chevron's other subsidiaries. The Ecuadorian Courts have ignored those entities and their separateness entirely.

[295] **Exhibit C-931**, Lago Agrio Judgment at 6-15.

[296] Fifth Expert Report of Professor Cesar Coronel Jones ¶¶ 18-21 (June 3, 2013).

[297] **Exhibit C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Jan. 20, 2012) at 7-10 (Lago Agrio appellate proceedings).

[298] **Exhibit C-2410,** Chevron Cassation Alegato regarding due process violations (May 29, 2013) at 6; **Exhibit C-1975**, Cassation Decision (Nov. 12, 2013).

[299] **Exhibit C-1975**, Cassation Decision at 61-62 (Eng.).

ignores the fact that Texaco, Inc. merged with Keepep – a Chevron subsidiary – rather than with Chevron.[300] The merged company retained the name "Texaco," and no assets of Texaco were transferred away. Yet, without citing any evidence, the Cassation Court implied that such assets were transferred.[301] So it is incorrect to assert, as the first-instance court and court of appeal did, and as the Cassation Court appeared to accept, that assets of Texaco, Inc. were somehow shielded from liability due to the merger and to justify piercing the veil between Texaco, Inc. and Chevron on that basis. Such an assertion ignores that all of the information concerning Texaco, Inc.'s merger with Keepep was (and is) set forth in official SEC records that were (and are) publicly available and submitted to the Lago Agrio Court.[302]

129. The assertion also ignores that Texaco, Inc. provided the *Aguinda* Plaintiffs with the address in Ecuador where it could be served with notice of process, and that Chevron informed the Plaintiffs and the Ecuadorian Court at the beginning of the Lago Agrio Litigation in 2003 that the Lago Agrio Plaintiffs had sued the wrong party.[303] The Plaintiffs could have rectified that situation by withdrawing their lawsuit against Chevron and filing a new lawsuit against Texaco, Inc. Given these undisputed facts – which Chevron articulated and the

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[300] *Id.* at 62 ("in this case Chevron, with which Texaco merged . . .").

[301] Witness Statement of Frank Soler ¶¶ 15, 18 (Aug. 27, 2012); Expert Report of William T. Allen § 4 (Aug. 27, 2012); **Exhibit FS-4**, Agreement and Plan of Merger at § 1.1; **Exhibit C-1975**, Cassation Decision at 61 (citing, apparently approvingly, the "decision of the court of appeal [that] clearly sets for the reasons why in this case the Court went on to pierce the corporate veil…"…'The purpose…unmistakable tendency to avoid responsibility through the merger between Chevron Corp. and Texaco, Inc. hiding behind the corporate veil the company that inherited the assets,…").

[302] Soler Witness Statement ¶ 19; **Exhibit FS-9**, Form S-4 Registration Statement under the Securities Act of 1933, Chevron Corporation (Jan. 24, 2001); **Exhibit C-1416**, Form S-4/A, Amendment No. 4 to Form S-4, Chevron Corporation (Aug. 27, 2001); **Exhibit FS-11**, Form 8-K, Current Report filed with the U.S. Securities and Exchange Commission, ChevronTexaco Corporation (Sept. 12, 2001); **Exhibit FS-10**, Form 8-K, Current Report filed with the U.S. Securities and Exchange Commission, Texaco Inc. (Oct. 9, 2001); **Exhibit C-70**, Form 10-Q, Quarterly Report filed with the U.S. Securities and Exchange Commission, Chevron Corporation (Nov. 13, 2001); **Exhibit C-1417**, Schedule 14A, Texaco Inc. (Aug. 28, 2001); **Exhibit C-1418**, Form 8-KA, Chevron Corporation (Oct. 19, 2001).

[303] **Exhibit C-1171**, Letter from King and Spalding to Plaintiffs' Counsel (Oct. 11, 2002), filed Oct. 19, 2004 at 4:05 p m., Record at 10327-28 (the translation in Spanish is included in the Record at 10329); **Exhibit C-1172**, Letter from King and Spalding to Plaintiffs' Counsel (Jan. 2, 2003), filed Oct. 19, 2004 at 4:05 p m., Record at 10330-31; **Exhibit C-401**, Adolfo Callejas's Filing of Chevron's Power of Attorney (illegible date) at 5-6 (Eng.).

Ecuadorian judiciary ignored at every level – there is no tenable justification for holding that the purpose of a merger between Texaco, Inc. and Keepep (a subsidiary of Chevron) was to defraud the Plaintiffs.

130. As an additional rationale for piercing the corporate veil between Chevron and Texaco, Inc., the Cassation Court cited the opinion of the U.S. Court of Appeals for the Second Circuit.[304] The cited dicta is based on representations allegedly made to the Second Circuit. The Second Circuit did not state that Texaco or Chevron had abused the corporate form for the purpose of defrauding third parties and that is what Ecuadorian law requires. Moreover, the RICO Court has more recently held that Chevron and Texaco did not merge.[305]

131. Finally, although the issue was not before the Cassation Court, the Ecuadorian enforcement court has now built upon the prior courts' piercing of the veil between Texaco, Inc. and Chevron to pierce further corporate veils, in the reverse direction, between Chevron and dozens of its subsidiaries, that do business all over the world.[306] The enforcement court issued these orders without providing prior notice to Chevron or these subsidiaries; the enforcement court failed to provide Chevron or those subsidiaries with an opportunity to defend themselves; and that enforcement court issued that order based on indirect ownership and not on any factual findings that Chevron has created these subsidiaries for illegitimate purposes.[307] There was no hearing. There was no evidence taken. There was no effort to allow Chevron to make a showing that Chevron and its subsidiaries are not one and the same.

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[304] **Exhibit C-1975**, Cassation Decision at 61.

[305] **Exhibit C-2135**, RICO Opinion at 16 ("Chevron did not acquire any of Texaco's assets or assume any of its liabilities by operation of the merger,")

[306] **Exhibit C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos (Oct. 15, 2012 at 4:54 p.m.); **Exhibit C-1541**, Amplification of Execution Order Issued by the Provincial Court of Sucumbíos (Oct. 25, 2012).

[307] **Exhibit C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos (Oct. 15, 2012 at 4:54 p.m.); **Exhibit C-1541**, Amplification of Execution Order Issued by the Provincial Court of Sucumbíos (Oct. 25, 2012).

132. At the same time that Ecuador's judiciary has imposed billions of dollars in liability on Chevron and many of its subsidiaries for the alleged acts of TexPet, Ecuador continues to rely on the corporate separateness among TexPet, Texaco, Inc., and Chevron to advance numerous defenses in this proceeding. Most recently, in its Track I(b) submission, Ecuador has relied on the separation between Chevron and Texaco to argue that neither is entitled to any remedies regarding Ecuador's conduct *vis-à-vis* the 1995 Settlement Agreement.[308] As Claimants have explained in their jurisdictional pleadings, Ecuador cannot ignore the corporate separateness of TexPet, Texaco, Inc., and Chevron to impose billions of dollars on Chevron and many of its subsidiaries as if they were TexPet, and then rely on the corporate separateness of those companies to prevent those companies from challenging that wrongful conduct in this proceeding.[309]

133. These multiple veil-piercings have been critical to facilitating the Lago Agrio Plaintiffs' strategy. As set forth in the Invictus memo and evidenced by the international enforcement actions that have occurred to date in Argentina, Brazil, and Canada, the Lago Agrio Plaintiffs seek to force Chevron into an unjust settlement by implementing lawsuits simultaneously in numerous countries.[310] These enforcement actions have been filed despite the fact that the assets that the Lago Agrio Plaintiffs target to execute their Judgment are subsidiaries that had nothing to do with the Lago Agrio Litigation and are separate entities from Chevron,

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[308] Respondent's Track I Supplemental Counter-Memorial on the Merits ¶¶ 121-27 (March 31, 2014).

[309] Claimants' Counter-Memorial on Jurisdiction ¶¶ 80-96 (Sept. 6, 2010); Claimants' Rejoinder on Jurisdiction ¶¶ 182-90 (Nov. 6, 2010).

[310] The author of the Invictus strategy, the Patton Boggs law firm, has settled Chevron's counterclaims against it for its participation in the Lago Agrio Litigation, agreeing: (i) to pay Chevron US$ 15 million, (ii) withdraw from any further representation of the Lago Agrio Plaintiffs, (iii) and issued a public statement expressing its regret for its involvement in the matter. *See* **Exhibit C-2412**, Settlement and Release Agreement by and between Chevron Corporation and Patton Boggs LLP (May 7, 2014); *see also* **Exhibit C-2411**, R. Parloff, *Patton Boggs pays Chevron $15 million to settle fraud charges*, FORTUNE (May 7, 2014), available at CNN Money, http://features.blogs fortune.cnn.com/2014/05/07/patton-boggs-pays-chevron-15-million-to-settle-fraud-charges/ (last visited May 9, 2014).

Texaco, Inc., and TexPet. Thus, to give effect to the Lago Agrio Plaintiffs' multi-national, enforcement strategy, the Ecuadorian judiciary has had to pierce the veils between TexPet and Texaco, Inc., Texaco, Inc. and Chevron, and Chevron and dozens of its subsidiaries throughout the world. The Ecuadorian judiciary has accommodated the Lago Agrio Plaintiffs' objectives based on fact findings that do not justify veil-piercing under Ecuador's own law or that ignore undisputed and dispositive facts.

2. The Cassation Court Ratifies the Lower Courts' Flawed Causation Reasoning

134. TexPet ceased its extractive activities in Ecuador in 1992, and Petroecuador has operated the former Consortium's sites for more than 20 years since. The judicial inspections (conducted in the mid-2000s) analyzed a small percentage of those sites. The Lago Agrio Judgment holds that the evidence regarding those sites shows environmental impacts resulting from oil and gas operations, infers that the conditions of those inspected sites accurately reflects the conditions of all of the former Consortium sites, and assigns 100% of the responsibility for those conditions to TexPet (and by extension Chevron).[311] At the same time, the Lago Agrio Judgment acknowledges that Chevron had "managed to prove with documentation the existence of the environmental damages that are the responsibility of third parties."[312] In its defense at every level of the judicial process, Chevron argued that even if the Court were to conclude that evidence of environmental impacts exists at former Consortium sites, the Court would still need to determine whether TexPet caused those impacts before 1992 or whether Petroecuador caused those impacts during the subsequent 20 years of operations.[313] Without addressing this factual

[311] **Exhibit C-931**, Lago Agrio Judgment at 105-107.

[312] *Id.* at 119.

[313] *See, e.g.,* **Exhibit C-1213**, Chevron's Trial Court Alegato at 248-50 (Jan. 6, 2011, filed at 5:55 p.m.); **Exhibit C-1412**, Chevron's Appellate Judgment Alegato at A9, B-3-4 (Dec. 23, 2013); **Exhibit C-2306**, Chevron Cassation Alegato at 15-19 (May 3, 2013); **Exhibit C-2307**, Chevron Cassation Alegato at 3-4 (Sept. 12, 2013).

question, the Court had no basis to conclude that TexPet caused the alleged environmental impacts.

135. The Cassation Court rejected Chevron's argument, reasoning that it could not consider whether Petroecuador had caused environmental impacts at the former Consortium sites because Petroecuador was not a party to the litigation, and doing so would deprive Petroecuador of its right of defense.[314] This reasoning is absurd. At most, this argument might have supported joining Petroecuador as an indispensable party, thus further confirming that the *verbal summario* procedure mandated by the EMA (which bars impleading third parties) was inappropriate for the Lago Agrio Litigation. But no one, including the Court, disputed that Petroecuador alone had operated the former Consortium sites for the past 22 years or that it had caused impacts at those sites. Therefore, the fact that Petroecuador was not a party to the litigation cannot excuse the failure to determine whether TexPet caused the alleged environmental damage that is at issue in the Judgment.

136. In short, the reasoning of the Ecuadorian judiciary in the Lago Agrio Judgment presumed that TexPet is responsible for all of the environmental impacts at the former Consortium sites and refused to address Chevron's defense – based on undisputed facts – that Petroecuador caused those impacts.

3. The Cassation Court Ignores or Flippantly Dismisses Several Other Actions that Violated Chevron's Due-Process Rights

137. In their Track 2 Reply Memorial, Claimants explained numerous other ways in which the Ecuadorian judiciary's administration of the Lago Agrio Litigation breached Chevron's due process rights. Specifically, Claimants explained that the Court:

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[314] **Exhibit C-1975**, Cassation Decision at 116-17.

a) applied the EMA retroactively by extending standing to new persons regarding conduct that occurred before the EMA entered into effect.[315]

b) abandoned the judicial inspection process when it lacked the legal authority to so;

c) refused to rule on Chevron's essential error petitions;

d) refused to address Chevron's mounting evidence of fraud and instead closed the evidence phase shortly after the Lago Agrio Plaintiffs submitted their "cleansing" experts reports;

e) imposed strict liability and a "reversed burden of proof" upon Chevron based on the 2008 Constitution even though the judicial inspections in the Lago Agrio Litigation had been ongoing for three years; and

f) awarded damages, such as US$ 100 million for "community reconstruction and ethnic reaffirmation," that were *extra petita* since the Lago Agrio Plaintiffs did not request them in their complaint.

138. The Cassation Decision failed to address many of these arguments, which Chevron raised in its Cassation appeal.[316] In the few instances in which it did address these arguments, the court rejected them, often with pedantic and overly formalistic arguments that failed to address the fairness and due-process issues raised by Chevron's arguments.[317]

139. In conclusion, the Cassation Decision reinforces Claimants' existing case for breach of the BIT and denial of justice. At every level of judicial review concerning the Lago Agrio Judgment, Ecuador's courts have ignored clear indicia of fraud and reached unsupportable conclusions under Ecuadorian law. Ecuador cannot dispute that its highest court, the National Court of Justice, has now upheld the unlawful Judgment, and Ecuador's excuse that either the CPA or the Constitutional Court are available to Chevron as mechanisms to effectively challenge the Judgment is belied by the facts. Neither of these so-called remedies are either "available" or

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315 Claimants' Track 2 Reply ¶¶ 109-207.

316 *See, e.g.*, **Exhibit C-2409**, Chevron's Extraordinary Action for Protection at 74-78.

317 *See, e.g.*, **Exhibit C-1975**, Cassation Decision at 85-86, 138-39, 212-13.

"effective" to cure the enormous harm already caused by the Judgment, which remains enforceable to this day. For all of these reasons, the Cassation Decision strengthens Claimants' case that Ecuador is liable for breaches of the Treaty and of international law.

IV. THE ENVIRONMENTAL ISSUES AND EVIDENCE

A. The Environmental Issues and Evidence

140. In its Rejoinder, Ecuador has presented new environmental data and submitted seven new expert reports in support of the Lago Agrio Judgment. But the Lago Agrio Litigation concerned only diffuse environmental rights, which Ecuador and TexPet settled. Accordingly, the Tribunal need not consider this new evidence to decide Claimants' treaty and denial of justice claims.[318]

141. Furthermore, the best evidence of whether the Judgment is a product of corruption and fraud is not speculation based on cursory post-Judgment sampling at a handful of Concession sites, but actual remediation costs that Petroecuador has been and continues to incur to fulfill its contractual and regulatory obligations as the current Concession operator. That evidence reveals that Petroecuador's *actual* remediation costs are orders of magnitude less than the Judgment's remediation damages. The US$ 5.4 billion award for soil remediation is 77 times higher than Petroecuador's estimate of US$ 70 million to remediate pits throughout the Oriente.[319] Petroecuador has also estimated that the soil remediation unit cost would be less than US$ 70 per cubic meter, which is 10 times less than the cost per cubic meter in the Lago Agrio Judgment.[320] Further, Petroecuador has already cleaned up or is in the process of cleaning up

[318] Further, the data and theories presented in LBG's December 2013 report were obviously not before the Lago Agrio Court at the time it issued its Judgment in February of 2011. Therefore, they cannot be used to overcome a denial of justice claim.

[319] Expert Report of Robert E. Hinchee, Ph.D., P.E. (May 31, 2013) at 10 ("First Hinchee Expert Report").

[320] *Id.* at 7, 10.

many of the same sites that are the subject of the Lago Agrio Judgment.[321] Based on publicly available information, Ecuador has consistently approved Petroecuador's remediation of those pits as complete and meeting Ecuador standards.[322] Thus, Ecuador has the capability to provide the Tribunal with the *actual* remediation costs for sites that it contends Chevron is responsible for and compare that to the Judgment. But Ecuador has refused to provide this information. Instead, like the Lago Agrio Plaintiffs before it, Ecuador tries to support the Judgment by all but the true facts.

B. Ecuador's Experts Are Attempting to Legitimize an Environmental Investigation that the RICO Court Declared Fraudulent

142. The stated purpose of Ecuador's 2013 sampling was to confirm the environmental "evidence" submitted by the Lago Agrio Plaintiffs, which in turn was relied upon by the Ecuadorian judicial system to underpin the US$ 9.5 billion Judgment.[323] But as disclosed in testimony and documents presented during the RICO trial, the Lago Agrio Plaintiffs' environmental expert work is the result of corruption. Their environmental evidence was controlled and directed by their corrupt lawyers, not by any valid scientific process. Thus, Ecuador's new environmental reports seek to lend support to an adjudicated fraud.

1. David Russell Disavows the Conclusions Attributed to Him

143. Soon after they filed their complaint in 2003, the Lago Agrio Plaintiffs hired an environmental engineer named David Russell to generate remediation cost estimates for the Concession Area. Russell's investigation was limited in scope; he visited only about forty-five of the hundreds of pits in the region, and some of those "visits" were driving past sites at 40 or

[321] *Id.* at 3.

[322] *Id.* at 4-5, 26.

[323] Respondent's Track 2 Rejoinder at ¶¶ 78, 83-85.

50 miles per hour.[324] Likewise, the Lago Agrio Plaintiffs' lawyers told Russell to assume that the contamination was solely TexPet's responsibility and not Petroecuador's.[325] Based on these faulty assumptions, and what Russell admitted was incomplete work lacking scientific data, Russell made a "scientific wild ass guess" that the remediation cost for the Concession might be US$ 6 billion dollars.[326] The Lago Agrio Plaintiffs then embraced this figure, "despite the fact that they knew that it could not withstand serious analysis."[327] Russell was so disturbed by their use of this unreliable $ 6 billion figure that he sent cease and desist correspondence to the Lago Agrio Plaintiffs' lawyers, demanding that they stop using his name in support of their claims.[328]

144. The RICO Court determined that there was no evidence to support Russell's "scientific wild ass guess." Instead, "[t]he only estimates of which there was any evidence were prepared under Donziger's direction by junior lawyers who worked for him. As Donziger acknowledged, their purpose was to 'make media/court/[Chevron] itself start thinking in terms of billions' and potentially to use the figure to pique the SEC's interest in the litigation . . . . [N]o . . . competent study . . . supports Donziger's claim about the $ 6 billion damage figure."[329]

145. The Lago Agrio Plaintiffs' team also specifically instructed Russell to look for evidence that would implicate TexPet, while at the same time ignoring Petroecuador's role in the environment. For example, while conducting inspections in 2004, Russell reported to the Lago Agrio Plaintiffs' team that he was finding certain specific chemical groups known as "BTEX"

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[324] **Exhibit C-2366,** RICO Trial Tr. 304:5-16, 309:4-8 (Russell); **Exhibit R-980**, Russell Declaration at ¶ 5.

[325] **Exhibit R-980**, Russell Declaration at ¶ 6; *see also* **Exhibit C-2385,** Final Direct Testimony of Steven Donziger, Nov. 17, 2013 at ¶ 111; *see also* **Exhibit C-2366,** RICO Trial Tr. 305:4-9 (Russell).

[326] **Exhibit C-2367,** RICO Trial Tr. 338: 21-339:11 (Russell).

[327] **Exhibit C-2135**, RICO Opinion at 44.

[328] **Exhibit C-1051**, Letter from D. Russell to S. Donziger re "Cease and Desist" (Feb. 14, 2006) at 1-2.

[329] **Exhibit C-2135**, RICO Opinion at 49-50 (emphasis added); **Exhibit C-2353,** Email from A. Page to S. Donziger re: "DOJ ltr" (April 20, 2006); *see also* **Exhibit C-2310,** Email from S. Donziger to A. Page and D. Fisher re: "excellent work on remediation/questions" (April 16, 2006) at 1.

and "GRO" in the soil samples. This was problematic for the Lago Agrio Plaintiffs because these are light-end contaminants and therefore "much more indicative of contamination from Petroecuador rather than Texaco because these compounds are volatile and degrade quickly in [a] hot, wet, warm environment such as the jungle."[330] Because TexPet had not operated in the Concession Area for 15 years when Russell found these chemicals, it was highly unlikely that any BTEX and GRO was attributable to TexPet's operations.[331] In response, the Lago Agrio Plaintiffs' team ordered Russell to stop looking for these compounds, which it felt were "counterproductive" to its case against TexPet and Chevron and instead, to test for total petroleum hydrocarbons (TPH). The methods the team used to test for TPH, however, could not distinguish between recent or earlier contamination, and could mistake naturally occurring compounds for petroleum contamination.[332] Thus, the Lago Agrio Plaintiffs' team purposefully built a record that would conflate (or at best obfuscate) the impacts of TexPet and Petroecuador in the Concession Area.

1. The Lago Agrio Plaintiffs Forged the Report of Charles Calmbacher

146. The Lago Agrio Plaintiffs also turned to Dr. Charles Calmbacher, an industrial hygienist, to support their case. Their fraud involving Dr. Calmbacher is shocking. After he wrote his inspection report, the Lago Agrio Plaintiffs' team asked Calmbacher to initial approximately 30 blank pages.[333] They then took those blank pages and filled them with words not authored by Dr. Calmbacher, including conclusions that the Concession Area was highly

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330 **Exhibit C-2367**, RICO Trial Tr. 394:22-395:2 (Russell).

331 **Exhibit C-2367,** RICO Trial Tr. 407:17-19 (Russell) ("We found BTEX and GRO, and that was indicative of recent contamination rather than contamination which would have been ten or perhaps 20 years old from Texaco").

332 **Exhibit C-1049,** Email from D. Russell to E. Camino, et al. (Nov. 4, 2004), at 1; **Exhibit C-2367,** RICO Trial Tr. 407:21-409:2 (Russell).

333 **Exhibit C-186**, Deposition of Charles Calmbacher (Mar. 29, 2010) at 62:18-63:8.

contaminated and that TexPet's remediation efforts had been substandard.[334] But, in truth, Dr. Calmbacher "never concluded that TexPet had failed to remediate any site or that any site posed a health or environmental risk. Thus, someone on the [Lago Agrio Plaintiffs'] team used the blank pages Calmbacher had initialed and his signature pages to submit over his name two reports that contained conclusions he did not reach."[335] They then filed the forged report with the Ecuadorian Court, "with knowledge of the falsity."[336]

2. Richard Cabrera, a Supposed Neutral Expert, Was Actually on the Lago Agrio Plaintiffs' Payroll

147. By 2006, as the judicial inspection process continued, the Lago Agrio Plaintiffs' team became concerned that the Ecuadorian court's own experts – referred to as the "settling experts" – might side with TexPet, which in fact is what happened. "[T]he settling experts' report was published in February 2006. It concluded . . . that Texaco had fully remediated the [site at issue]. Donziger characterized the report as 'disastrous' for the LAPs' team."[337]

148. At this point, "Donziger – in his own words – went over 'to the dark side' by recruiting and paying new experts to pose as 'independent monitors' and to criticize the settling experts' conclusions to the court without disclosing that the Lago Agrio Plaintiffs were paying them."[338] Ultimately, "the Lago Agrio Plaintiffs team moved on to finding a compliant global expert. The idea was that the global expert – just like the 'monitoring' experts . . . in fact would work for the [Lago Agrio Plaintiffs] but would appear to be independent and neutral."[339] They

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[334] **Exhibit C-2135**, RICO Opinion at 56-57; *see also* **Exhibit C-186**, Calmbacher Depo. Tr. at 113:1-25, 114:22-116:18, 117:2-20.

[335] **Exhibit C-2135**, RICO Opinion at 56-57; *see also* **Exhibit C-186**, Calmbacher Depo. Tr. at 113:1-25, 114:22-116:18, 117:2-20.

[336] **Exhibit C-2135**, RICO Opinion at 57.

[337] **Exhibit C-2135**, RICO Opinion at 65; **Exhibit C-716,** Donziger Diary at 67 of 111.

[338] **Exhibit C-2135**, RICO Opinion at 66; **Exhibit C-716**, Donziger Diary at 98 of 111.

[339] **Exhibit C-2135**, RICO Opinion at 72 (quoting Donziger); **Exhibit C-716,** Donziger Diary at 30 of 109.

settled on Richard Cabrera to serve as the global expert, and the Ecuadorian Court approved his selection.[340]

149. But the Lago Agrio Plaintiffs' team never intended for Cabrera to write an independent inspection report; instead, it hired a Colorado-based engineering firm (Stratus Consulting) to prepare the supposedly neutral report as outlined and directed by Donziger. Further, to secure his compliance, the Lago Agrio Plaintiffs' team secretly paid Cabrera money under the table, provided him with an office, a secretary (that happened to be the girlfriend of a LAP attorney), and life insurance, and selected and controlled the sites that he visited.[341] As was planned from the outset, "the Cabrera report was not written by Cabrera. It was written almost totally by Stratus . . . . Indeed, all of the damage amounts in the Cabrera report came verbatim from Stratus' drafts."[342]

150. As determined by the RICO Court: "Cabrera was not even remotely independent. He was recruited by Donziger . . . . And, in accordance with Donziger's plan to ratchet up the pressure on Chevron with a supposedly independent recommendation that Chevron be hit with a multibillion dollar judgment, [Cabrera] repeatedly lied to the [Lago Agrio] court concerning his independence and his supposed authorship of the report."[343]

3. The Lago Agrio Plaintiffs Attempted to "Cleanse" Their Deceit

151. The news of Cabrera's impropriety broke before the Lago Agrio Court issued the Judgment. "[T]he LAP lawyers knew they could no longer ignore the LAP team's involvement

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340 **Exhibit C-363,** Certificate of Swearing in of Richard Cabrera before the Superior Court of Nueva Loja (June 13, 2007).

341 **Exhibit C-1045,** Email string between L. Yanza and S. Donziger (June 12, 2007); **Exhibit C-1053,** Email from L. Yanza to S. Donziger and P. Fajardo (Sept. 12, 2007); **Exhibit C-2319,** Email from S. Donziger to L. Yanza and P. Fajardo (July 17, 2007); **Exhibit C-1747,** Email from P. Fajardo to L.Yanza and S. Donziger (July 1, 2007); **Exhibit C-1748,** Email from J. Prieto to P. Fajardo and S. Donziger (July 11, 2007).

342 **Exhibit C-2135**, RICO Opinion at 109; **Exhibit C-910**, Donziger Depo. Tr. at 2433:8-14; 2507:24-2508:7.

343 **Exhibit C-2135**, RICO Opinion at 115.

in drafting the Cabrera Report, as the truth soon was to be exposed. So they planned to hire new experts to address Cabrera's findings in the hope of providing alternative grounds for the damages evaluation."[344] These new experts were referred to by the Lago Agrio Plaintiffs' lawyers as the "cleansing experts."[345] Ultimately, the cleansing experts submitted additional expert reports, but those reports were desktop exercises that used Cabrera's fraudulent earlier report as the baseline of their findings.[346] Once the cleansing expert reports were in the record, the Lago Agrio Court issued its Judgment against Chevron. While the Lago Agrio Court claimed that it did not rely upon these fraudulent expert reports, it had obviously done so, as determined by the RICO Court.[347] Indeed, as set out in Claimants' earlier briefing, the Judgment assigns damages in eight categories that exactly match the Cabrera report, the only record source for US$ 6 billion of the Judgment's US$ 8 billion in "actual" damages.[348]

152. It is against this background of corruption that the Tribunal must measure Ecuador's new expert reports. Ecuador seeks to prove the legitimacy of the Lago Agrio Plaintiffs' claims and the Lago Agrio Court's Judgment about extensive environmental damage in the Concession Area. But these earlier environmental conclusions that Ecuador's experts seek to prop up are tainted by the corruption and fraud through which they were obtained. Furthermore, as discussed below, Ecuador's current experts – LBG – use many of the flawed tactics employed by the Lago Agrio Plaintiffs' team to blame TexPet for contamination that is not TexPet's responsibility.

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[344] *Id.* at 175; **Exhibit C-2335,** Email from J. Abady to E. Yennock, et al re: "Current Thinking on Ecuadorian Submission" (June 14, 2010).

[345] Claimants' Memorial ¶¶ 242-45; Claimants' Supp. Memorial ¶¶ 100-102.

[346] **Exhibit C-2382**, RICO Trial Tr. 2577:4-11 (Donziger); **Exhibit C-898**, Deposition of Douglas C. Allen (Dec. 16, 2010) at 90:4-10; **Exhibit C-901**, Deposition of Jonathan Shefftz (Dec. 16, 2010) at 68:14-24, 63:18-64:9.

[347] *See* **Exhibit C-2135**, RICO Opinion at 179-180.

[348] Claimants' Track 2 Reply ¶ 85.

C. LBG's Recent Site Investigation Does Not Validate the Lago Agrio Judgment[349]

153. In the summer and fall of 2013, with no notice to Claimants, LBG conducted field investigations of five well sites out of 344 previously operated by the Consortium. LBG gave Chevron no notice of this investigation, nor any opportunity to participate in, observe, or share samples from the investigation. From this carefully selected handful of inspections, LBG vaguely declares that the Judgment is "reasonable," but it refuses to vouch for the monetary award in any respect. However, the overwhelming evidence demonstrates that there is only limited contamination in the Concession Area, which is solely Petroecuador's responsibility. LBG's selective evaluation at five hand-picked sites does not change these core facts.

1. LBG Attempts to Bolster the Lago Agrio Judgment by Ignoring Critical Facts

154. For all of its advocacy, LBG cannot bring itself to stand behind the damage award in the Judgment. The most that LBG will say is "the ***fact*** that the Judgment awarded damages (under local Ecuadorian law) for ongoing contamination resulting from TexPet's activities in the Concession Area was reasonable," but quantifying those damages is, LBG claims, beyond its purview.[350] In its Rejoinder, Ecuador argues that "the record fully supports the damages awarded,"[351] but strikingly, its expert LBG refuses to express an opinion on that key issue, despite its qualifications to do so.[352] LBG's failure to offer any support for the Judgment

[349] As discussed in § IV.A above, a finding by this Tribunal that the LAPs' claims were diffuse rights claims would of course moot the environmental issues that Ecuador now seeks to retry.

[350] Expert Report of Kenneth J. Goldstein and Edward A. Garvey at 11 (Dec. 16, 2013) ("Second LBG Report (Goldstein)").

[351] Respondent's Track 2 Rejoinder at ¶ 178.

[352] Second LBG Report (Goldstein) at 11-12, 74. This is even more noteworthy because LBG is in the business of assessing environmental damage. Its website boasts that it is an expert in this field: "LBG has the capability to perform all the components of a successful cooperative natural resource damage claim on behalf of a natural resource trustee. This includes not only the analysis, determination, and presentation of the economic values associated with lost non-market resources, but it also includes the physical science of natural resources present and

amount, which is based on purported environmental and natural resource damages in which it claims expertise, is itself an indictment of the Judgment.

155. Furthermore, in reaching its opinion that *the fact that* the Judgment awarded damages was reasonable, LBG uses the Lago Agrio Plaintiffs' flawed approach. In particular, LBG:

- ignores the division of remediation tasks in the Settlement Agreement and RAP;
- assumes TexPet is responsible for all contamination;
- ignores all impacts from Petroecuador over the past 24 years[353]; and
- uses inapplicable remediation criteria (current Ecuador standards instead of standards specified in the RAP) to conclude contamination exists.[354]

156. LBG is quite candid that it is not viewing the facts as they really are. It concedes that it pays no heed to "sorting out environmental liability based on temporal distinctions," nor is it concerned with "allocation of possible shared responsibility for the manifestation of contamination in and from pits used by both TexPet and later Petroecuador."[355] In other words, LBG ignores even the most fundamental facts of the case, which is that TexPet operated in the Concession Area for a limited time (and as part of a consortium), that TexPet remediated its share of environmental impacts in the Concession Area pursuant to the RAP, that Ecuador released it from all liability, and that Petroecuador has impacted the Concession Area during its 24 years of operations.

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lost as well as the planning efforts in restoring the resource to its baseline condition (see **Exhibit C-2154**, LBG's Statement of Qualifications at 10).

353 *See, e.g.,* **Exhibit C-2155** (Photo of Petroecuador flare at Sacha-65, dated June 26, 2012); **Exhibit C-2156** (Photo of Petroecuador unlined pit at Shushufindi-40 taken in June 2009); **Exhibit C-2157** (Photo of Petroecuador unlined pit farm at Shushufindi-40 taken in October 2011).

354 Second LBG Report (Goldstein) at 3-4, 11, 24, 58-60, 66-72.

355 *Id.* at 3.

157. Nor does LBG dispute the fraud in the Lago Agrio record; rather, it ignores it as well. "Our duties were to review the Lago Agrio record, and primarily Chevron's investigation data, not to analyze the legal strategy or trial tactics of either side. A discussion of claimed fraud is a legal topic and therefore, outside our expertise and scope of work."[356] This is not good science. No one expects LBG to offer an opinion on *legal fraud*, but LBG certainly claims the qualifications to look for *scientific fraud* on the part of the Lago Agrio Plaintiffs. At the same time, LBG fails to acknowledge, much less investigate, the proven fraud surrounding the environmental opinions offered to support the Judgment.

4. LBG's Selective Look at Five Sites Does Not Substantiate the Judgment Nor Establish "Widespread Contamination" Attributable to TexPet

158. If anything, LBG's December 2013 report confirms the conclusions reached by Chevron's environmental experts regarding contamination in the Concession Area: (1) it is very limited; (2) it is neither migrating nor threatening human health or the environment; and (3) it is Petroecuador's responsibility under the Settlement Agreement, not TexPet's.

a. Indefensible Site Selection Process

159. In selecting the five sites it chose to investigate, LBG continues its pattern of advocacy over science. There were more than 300 consortium-operated sites.[357] LBG's inspection of five of these sites (less than 2% of the total) cannot and does not yield valid evidence of the Concession Area as a whole, especially considering the manner in which LBG selected its five sites.

160. While the sample size is too small to yield useful field-wide information, it would be reasonable to think that LBG would have at least tried to select five sites that serve as proxies

[356] *Id.* at 61.

[357] Expert Report of John A. Connor, P.E., P.G., B.C.E.E. (June 3, 2013) at 31 ("Second Connor Expert Report").

for the conditions found across the Concession Area in its quest to justify the Judgment; but instead, LBG cherry-picked five sites that it believed would most likely generate evidence against TexPet. In particular:

- LBG admits that it focused on sites where it thought there was likely to be easily detected hydrocarbon contamination and readily available human exposure pathways.[358] In essence, LBG set out to confirm its theories at a few carefully selected sites, not to test its theories against all available data.
- LBG tried to avoid sites that Petroecuador operated and altered after TexPet left the Concession.[359] Thus, LBG purposefully attempted to ignore areas where Petroecuador might have been the source of the observed effects. Despite these stated selection criteria, four of the five sites are, in fact, still under active use by Petroecuador, and Petroecuador made operational changes at all the sites since the JIs were conducted.[360]
- LBG did not consider sites where it could not see "obvious contamination."[361] In other words, LBG ignored the numerous sites where *no* contamination was observed and, therefore, support for the Judgment would not exist.
- One of the five sites has a domestic water well, which LBG did not test. At the other sites, people drink municipal water, spring water, or collected rainwater, but LBG did

[358] Second LBG Report (Goldstein) at 14.

[359] *Id.* at 12-13.

[360] Expert Report of John A. Connor, P.E., P.G., B.C.E.E. (May 7, 2014) at 5-7 ("Third Connor Expert Report"). **Exhibit C-2158** (photo of Aguarico-2 wellhead (March 3, 2006)); **Exhibit C-2208** (photo of Aguarico-2 wellhead (April 2, 2014)).

[361] Second LBG Report (Goldstein) at 13.

not analyze or test any of these sources.[362] This is in stark contrast to Chevron's work where its experts tested over 221 drinking water sources during the judicial inspections.[363] Indisputably, testing domestic water wells and other drinking water sources is the best indication as to whether there is an exposure pathway that could create a potential human health risk. Yet, LBG inexplicably side-stepped this critical indicator in choosing sites that it knew did not have available wells for sampling, and by not sampling the one well that was present.

161. Thus, LBG deliberately chose sites that it thought would help support the Judgment, rather than sites that would be representative of conditions throughout the Concession Area. Only looking for evidence that supports one hypothesis (and ignoring evidence that might refute it) is the hallmark of biased science. Nonetheless, as discussed below and in the accompanying expert reports, the data from the five sites that LBG investigated are actually consistent with Chevron's own data, demonstrate that TexPet has complied with its RAP obligations, and confirm that the sites do not pose a health threat caused by TexPet's operations.

b. LBG Ignores Petroecuador's Operations and Responsibilities at All Five Sites

162. LBG ignores the fact that even at the five sites it selected, there were multiple pits and other potential sources of contamination that are non-RAP items and therefore Petroecuador's responsibility pursuant to the Settlement Agreement. For example, at well platform Lago Agrio 02 (LA-02) – one of the five selected sites – LBG makes much about its findings of contamination from "Pit 3." But LBG ignores that Pit 3 is not a RAP pit.[364]

[362] Expert Opinion of Thomas E. McHugh, Ph.D., D.A.B.T., May 7, 2014, ("Second McHugh Expert Report ") at 1; Third Connor Expert Report at 21, 28.

[363] Expert Report of John A. Connor, P.E., P.G., B.C.E.E. (Sept. 3, 2010) at 69 ("First Connor Expert Report").

[364] Third Connor Expert Report at 21.

Therefore, pursuant to the Settlement Agreement, it was Petroecuador's responsibility to remediate this pit; and indeed, Petroecuador closed the pit between July 1990 and October 1991.[365]

163. Additionally, and very importantly, Petroecuador continued to operate most of the sites after TexPet left the Concession Area, including closing pits that LBG now attributes to TexPet, such as LA-02, Pit 3. Furthermore, as analyzed in GSI's May 2014 report, concurrently filed with this memorial, Petroecuador's operations have resulted in environmental impacts by oil spills, pit closures, and gas flaring operations at all five of the hand-picked sites.[366] Indeed, since TexPet left the Concession Area, at least 23 spills, 4 pit remediations, 2 flare installations, and 61 workovers have occurred, *just* at the five sites.[367] This is in addition to incidents that may have occurred during routine day-to-day operations. LBG's report ignores this substantial activity, which could well account for all of the environmental impacts that it claims to have found.

c. The Data Taken at the Five Sites Do Not Support LBG's Assertions

164. LBG also has not demonstrated that the contamination it claims to have identified is an actual environmental concern requiring remediation.

(i) *Pits*

165. LBG feigns surprise by claiming it "discovered" that there is still TPH inside TexPet remediated pits at the five sites. But, of course, the RAP remediation was designed so that hydrocarbons *would remain* inside the pits, in a properly stabilized state.[368] Obviously, this

365 *Id.*

366 *Id.* at 6.

367 *Id.* at 6, 7 (Exhibit A).

368 First Connor Expert Report at 39; First Hinchee Expert Report at 25.

was well-known to Ecuador because it was a feature of the RAP, and in the *Actas* Ecuador approved this closure method.[369] This is also one of the remediation methods that Petroecuador uses today in closing pits. Neither TexPet nor Chevron has ever contended that the remediated pits were free of hydrocarbons – only that these entrained residual hydrocarbons are not migrating and present no threat to human health.

166. LBG also claims that of the five sites it inspected, three of the sites (LA-02, SSF-25, YU-02) contained "TPH concentrations above both RAP and current Ecuadorian standards."[370] This is incorrect. LBG's sampling does not undercut the conclusion that TexPet complied with its RAP obligations.[371] LBG attempts to show an exceedance by arguing that the pits do not meet Ecuadorian standards issued *after* the RAP was concluded and many years *after* TexPet operated in the Concession Area. Of course, these are not the standards that TexPet was contractually required to meet, and are irrelevant to whether TexPet met its RAP obligations.

(ii) *Migration of Oil to Adjacent Soil*

167. LBG also summarily claims evidence of oil migrating outside of various pits at the five sites and contaminating surrounding soils. In fact, the soil data collected by LBG outside the pits closely match Chevron's own pit investigation and demonstrate that TPH-affected soil is confined to the immediate area of pits or other known spill areas, with no indication of migration.[372] If oil contamination were migrating as LBG claims, then subsurface soil samples collected from soil borings located *outside* of pit boundaries would contain petroleum-impacted soils comparable to those observed *inside* the pit boundaries.[373] However,

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369 First Connor Expert Report at 9, 35, 58; First Hinchee Expert Report at 25, 26.

370 Second LBG Report (Goldstein) at 22.

371 Expert Report of Robert E. Hinchee, Ph.D., P.E. (May 9, 2014) at 5 ("Second Hinchee Expert Report").

372 Third Connor Expert Report at 12-15.

373 *Id.* at 12-14.

for the 26 soil borings drilled outside of pits at the five LBG sites, only one boring encountered subsurface soils impacted by TPH; this boring was drilled on a well pad at Lago Agrio-2, a site that Petroecuador has actively operated since TexPet left the Concession Area. Indeed, Petroecuador has conducted at least 14 workovers on the Lago Agrio-2 well and had at least four oil spills, any one of which could account for the hydrocarbons on the well pad.[374]

(iii) *Groundwater*

168. LBG further claims there is groundwater contamination beneath and migrating from the TexPet remediated pits.[375] Here, LBG's findings are tainted by poor collection methods and a misunderstanding of the pit closure facts. To collect the groundwater samples, LBG drilled borings through the closed pits (which obviously contain hydrocarbons), but failed to encase those borings to prevent cross contamination.[376] Thus, as groundwater was drawn up the boring through the pits, the "groundwater" sampled, just as the purge water depicted in the Rejoinder on page 43, was a mixture of groundwater and pit contents, thereby rendering the samples meaningless for measuring alleged groundwater contamination below the pit.[377]

169. As for groundwater outside of the pits, LBG, like Plaintiffs' experts in Lago Agrio before it, could not find ***any*** evidence of groundwater contamination.[378]

(iv) *Stream contamination*

170. LBG argues that some TexPet remediated pits are contaminating nearby surface streams, theorizing that petroleum hydrocarbons are migrating from the pits to the streams via

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374 *Id.* at 6, 7, 14.

375 Second LBG Report (Goldstein) at 22-23.

376 Third Connor Expert Report at 12.

377 *Id.*

378 *Id.* at 12, 13.

groundwater.[379] LBG provides a conceptual model of this theory on page 23 of its report. If the conceptual model were correct, however, then the soil borings and monitoring wells that LBG installed between the pits and the streams would show contamination. But as discussed in the previous two subsections, despite extensive sampling, LBG did not find contamination in the soils and groundwater outside of the pits. Thus, LBG has no evidence that contaminants seep down from pits, move laterally within the groundwater, and then discharge into streams consistent with its conceptual model.[380]

171. And while LBG advances an unproven hypothesis as to how theoretically contaminated groundwater might affect a nearby stream, only Chevron has conducted the most relevant sampling: testing the water in the Concession that people are *actually* consuming. Those results overwhelmingly demonstrate that oilfield operations have not affected the safety of the drinking water in the Concession. In particular, 343 of 349 water samples from household wells met World Health Organization (WHO) and U.S. Environmental Protection Agency (USEPA) drinking water criteria for petroleum-related chemicals (with the few exceedances limited to metals likely naturally occurring).[381] And 100% of the 20 public water systems Chevron sampled in the Concession met the same drinking water standards.[382]

172. LBG also claims that sampling of sediments in streambeds shows migration of hydrocarbons from nearby pits.[383] But this is misleading in several respects. First, the areas of stream sediments discussed by LBG were identified in the pre-inspection/judicial inspection

[379] Second LBG Report (Goldstein) at 25-26.

[380] Third Connor Expert Report at 11-20; *see also* Second LBG Report (Goldstein) at Appendix B, Site Investigation Report.

[381] Third Connor Expert Report at 28, 32; *see also* Second McHugh Expert Report at 1; William D. Bellamy, P.E., Ph.D., BCEE, *Evaluation of Drinking Water Quality Related to TexPet Petroleum Exploration and Production Activities in the Oriente Region of Ecuador* (May 30, 2013) at 3-6.

[382] First Connor Expert Report at 69-71, Figure 30.

[383] Second LBG Report (Goldstein) at 24.

process and Chevron's experts confirmed them to be unrelated to TexPet's obligations under the RAP; instead, they were associated with ongoing Petroecuador production activities.[384] Second, there is no evidence that the limited contamination present in the stream sediment is affecting the quality of the stream water, which is the relevant concern. While LBG collected some samples that appear to show surface waters that do not meet criteria, LBG failed to filter the samples or otherwise prevent inappropriate collection of sediment, so that it actually collected a mixture of water and sediment.[385] Thus, just as it did with the groundwater samples from beneath the pits, LBG has created misleading results.[386] In contrast, Chevron took almost 400 stream samples as part of the pre-inspection/judicial inspection process and more than 97% of those samples met WHO and USEPA standards.[387] The few samples that exceeded criteria were from locations near active Petroecuador sites that had been affected by recent Petroecuador leaks and spills.[388]

173. While it strains to make a different case, LBG's report actually confirms in all the important respects Chevron's conclusions from the JI process. The TexPet-remediated pits meet the RAP criteria and there is no evidence of migration from the RAP areas for which TexPet was responsible to soil, groundwater, or surface water. [389]

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[384] Third Connor Expert Report at 4, 6, 7, 17, 22-26.

[385] *Id.* at 18-20.

[386] *Id.* at 18.

[387] *See* Expert Opinion of Thomas E. McHugh (May 30, 2013) ("First McHugh Expert Report") at 10, 11; *see also* Third Connor Expert Report at 15, 28; Second McHugh Expert Report at 1-2.

[388] First McHugh Expert Report at 9; *see also* First Connor Expert Report at 66-67. *See also* **Exhibit C-2055**, Di Toro, *et al.*, *Efectos Potenciales Ecológicos Y Para La Salud Humana De Los Hydrocarburos De Petróleo Y Metales Hallados En Los Sedimentos En El Oriente Ecuatoriano* (Oct. 1, 2007) (study of 55 sediment samples from the Lago Agrio trial's judicial inspection process for possible presence of petroleum constituents and metals found no concentrations that presented any significant adverse ecological or human health effects).

[389] Second Hinchee Expert Report at 10-11; Third Connor Expert Report at 11-20.

d. "Widespread Contamination": A Meaningless Phrase under LBG's Definition

174. Another ostensible purpose of LBG's 2013 investigation was to support its prior unsubstantiated opinion that there is "widespread contamination in the Concession Area, which could only result from TexPet's operations,"[390] the implication being that if the contamination is sufficiently extensive, then perhaps the US$ 9.5 billion award is reasonable. But LBG will not say that the amount of the award is reasonable; indeed, it cannot quantify or even accurately define what it means by "widespread contamination."

175. Chevron's experts have *quantitatively* demonstrated that any environmental effects associated with the Consortium's historical oilfield operations over the period in which TexPet was a minority participant and operator are generally confined to the oilfield facilities (less than 0.15% of the entire Concession Area).[391] Yet LBG persists in *qualitatively* describing the Concession Area as suffering from "widespread contamination."

176. After Chevron challenged LBG on its mischaracterization, LBG retreated to a more limited definition of the phrase in its December 2013 report, albeit a virtually meaningless one. "[W]e use the term 'widespread contamination' to connote a pattern of contamination at multiple E&P facilities across the former Concession Area, present in one or more environmental media beyond the immediate confines of the E&P facilities."[392] Put another way, if LBG can find a few molecules of one contaminant a few meters outside the footprint of two or more of the facilities, then by its definition it can say there is "widespread contamination" of the *entire* 500,000 hectare Concession Area. This is not serious science; it is hyperbole designed to bolster a flawed position.

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[390] Respondent's Track 2 Rejoinder at ¶ 86.

[391] Second Connor Expert Report at 4.

[392] Second LBG Report (Goldstein) at 5.

D. Ecuador's Experts Also Fail to Demonstrate Adverse Human Health and Ecological Effects from TexPet's Operations

177. Likewise, Ecuador has no valid basis for claiming that TexPet caused adverse health effects and environmental harms in the Concession Area. Ecuador's assertion that pervasive contamination from TexPet's operations "continues to threaten the health and welfare of the local inhabitants" cannot be justified through the work of any of Ecuador's health or ecological experts, Dr. Grandjean, Dr. Strauss, or Dr. Theriot.[393] Dr. Grandjean admits there is no solid scientific evidence of human health effects, and retreats to claims of plausibility. Dr. Strauss's work is seriously flawed, and despite her assertions, fails to prove the existence of potentially significant health risks or actual harm. Dr. Theriot offers no valid evidence of ecological injury. Ecuador attempts to avoid the real meaning of its experts' reports by relying on exaggerations, assumptions, and speculation concerning the significance of the "absence of evidence." As set forth below, the actual data in the record show Ecuador has not made its case on the health-risk and associated environmental issues.

1. Dr. Grandjean Admits there are No Data Proving Adverse Health Effects

178. Dr. Grandjean, a professor of environmental health, makes several admissions that highlight Ecuador's strategy: it has no solid scientific evidence of adverse health effects from the Consortium's activities, so it must rely on conjecture and speculation. Dr. Grandjean acknowledges:

- the lack of data on actual chemical exposures,[394]
- an absence of studies linking an individual's exposure to alleged disease or symptoms,[395]

[393] *See* Respondent's Track 2 Rejoinder ¶ 70, n.77.

[394] Expert Opinion of Philippe Grandjean, M.D. (Nov. 22, 2013) at 2, 3, 5 ("Grandjean Report").

- insufficient evidence to conclude "the presence and magnitude of health risks . . . ," and[396]
- the impossibility "to judge the possible and likely health consequences for the El Oriente population exposed to toxic chemicals from decades of oil production."[397]

179. In the face of these significant data gaps, Dr. Grandjean was forced to speculate about possible exposures and health effects and cite questionable human health studies from San Sebastían, *et al.*, which the authors themselves admit have data quality issues and other limitations, Dr. Grandjean characterizes as less than ideal, and Dr. Moolgavkar has shown to be flawed.[398]

180. Faced with Dr. Grandjean's admissions that scientific evidence of adverse human health effects from TexPet's operations does not exist, Ecuador resorts to asserting: "Absence of evidence is not evidence of absence."[399] This argument fails to acknowledge that "absence of evidence" is certainly not proof of occurrence and it is an inappropriate basis on which to rest a US$ 9.5 billion Judgment or make decisions about causation or liability. This is another "smoke and mirrors" argument reminiscent of Donziger's faked science.

2. Dr. Strauss's Flawed Human Health Risk Assessment Does Not Prove TexPet's Operations Led to Any Significant Risks

181. To address the weakness of her *qualitative* human health risk assessment included in her initial report, Dr. Strauss now presents in her supplemental report a *quantitative* risk

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395 *Id.* at 3.

396 *Id.* at 13.

397 *Id.* at 5.

398 **Exhibit C-2042**, Email from Miguel San Sebastian to Dave Mills (Aug. 25, 2008 at 3:17AM,) "Quality of data: Cancer cases are based on a questionnaire, from an epidemiological point of view this has little validity"); Grandjean Report, at 6-8; Expert Report of Suresh H. Moolgavkar, M.D., Ph.D. (May 31, 2013) at 7-14 ("First Moolgavkar Expert Report").

399 Respondent's Track 2 Rejoinder ¶ 173; *see also* Grandjean Report at 11.

assessment based solely on data generated from four of the five well sites LBG recently investigated.[400] But neither her qualitative nor her quantitative risk assessment proves TexPet's operations caused significant health risks or adverse health effects. Similar to LBG's biased site selection, Dr. Strauss conducted her quantitative risk assessment by selecting inputs that would maximize risk: (i) making exaggerated and unrealistic exposure assumptions contrary to the actual facts and data; (ii) ignoring the true environmental conditions and exposure measurements; (iii) employing inappropriate toxicity data; and (iv) arguing that the limited and questionable data from four well sites represent the environmental conditions and potential health risks throughout the nearly 500,000-hectare Concession Area. Her risk assessment presents more biased "science."

a. Strauss relies on Flawed Assumptions About Drinking Water Exposure

182. Dr. Strauss bases her questionable health risk findings on two unfounded drinking water assumptions. First, with no proof of actual use, she claims that residents currently or in the future *could* drink contaminated surface waters. Second, she assumes that residents consume exaggerated quantities of water with no basis in reality; indeed, the assumed amount is almost four times the amount used by the USEPA and WHO.[401]

183. For her exposure assumption, Dr. Strauss did not evaluate any surface water or groundwater samples from locations where the residents obtain their drinking water.[402] Even though Dr. Strauss observed hand-dug wells, surface water access points, municipal water pipes,

[400] Rejoinder Opinion of Harlee Strauss, Ph.D. Regarding Human Health Risks, Health Impacts, and Drinking Water Contamination Caused by Crude Oil Contamination in the Former Petroecuador-Texaco Concession, Oriente Region, Ecuador (Dec. 16, 2013) at 6, 17-27 ("Strauss December 2013 Rejoinder Opinion").

[401] *See, e.g.,* Strauss December 2013 Rejoinder Opinion, Appendix A Human Health Risk Assessment at 6, 8-9.

[402] Second McHugh Expert Report at 1.

springs, and other drinking water sources at the four LBG sites, she did not arrange for sampling and analyses from these locations.[403]

184. As Dr. McHugh's analysis of hundreds of actual drinking water samples collected during judicial inspections throughout the Concession Area showed, there is no evidence of petroleum contamination in any surface water or groundwater source the residents currently use as a drinking water supply. Dr. Strauss's flawed and limited work offers no serious refutation of this finding.[404] Because the well locations residents had selected and used remained free of any potential petroleum contamination long after TexPet's departure, there is no basis for suggesting a realistic future risk exists from TexPet's operation.[405]

185. Second, Dr. Strauss reaches her "adverse risk" conclusion by almost quadrupling the daily water intake rate in her risk assessment when compared to the accepted guidelines of the USEPA and WHO. By using those highly inflated water-consumption figures, Dr. Strauss has grossly exaggerated the assumed exposure rates and the resulting risk estimates.[406]

b. Extreme Assumptions About Potential Sediment Exposure

186. Dr. Strauss's assumptions about the residents' potential exposures to sediment are equally exaggerated and defy common sense.[407] Available analytical data indicate that contaminated sediment is a relatively rare occurrence and limited in scope. The sediment lies below the water and would be covered by new layers of solid or semi-solid material. Despite these physical barriers to ready or prolonged exposure, Dr. Strauss makes the following extreme and unsupported assumptions: (i) that residents are equally exposed to buried sediments in a

403 *See, e.g.*, Strauss December 2013 Rejoinder Opinion at 32 (noting hand-dug well at Yuca-2).

404 Second McHugh Expert Report at 1, 2, 4-6.

405 *See id.* at 1, 2.

406 *Id.* at 2.

407 *See* Strauss Dec. 2013 Rejoinder Opinion, Appendix A Human Health Risk Assessment at 7, 9-12.

stream as they are to direct contact with surface soil; (ii) that adults will be exposed to the most contaminated buried sediment every day for 40 years; and (iii) that infants will be doused in the most contaminated sediments in a stream during a daily one-hour bath. Not only are these assumptions absurd and unsubstantiated, they are obviously used to inflate the risk calculations.[408] An analysis of a much larger universe of sediment data from the Concession Area than Dr. Strauss considered shows the concentrations of petroleum constituents and metals detected do not present any significant adverse ecological or human health effects.[409]

c. Dr. Strauss's Misuse and Misinterpretation of Toxicity Data

187. Dr. Strauss acknowledges the importance of using acceptable toxicity data when conducting a risk assessment,[410] but she then manipulates the available toxicity data to overstate potential risks.

188. Dr. Strauss evaluates the TPH sampling data in a way designed to exaggerate her estimate of the potential for health risks from TPH exposure.[411]

189. Dr. Strauss also manufactures a non-existent barium risk. While acknowledging that non-toxic barium sulfate is normally associated with oilfield operations, she bases her risk assessment on potentially toxic barium chloride values. Once again she uses baseless, misleading assumptions to inflate her risk calculation, where no risk exists.

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408 *See* Second McHugh Expert Report at 2, 3.

409 *See* **Exhibit C-2055**, Di Toro, *et al., Efectos Potenciales Ecológicos Y Para La Salud Humana De Los Hydrocarburos De Petróleo Y Metales Hallados En Los Sedimentos En El Oriente Ecuatoriano* (Oct. 1, 2007) (study of 55 sediment samples from the Lago Agrio trial's judicial inspection process for possible presence of petroleum constituents and metals found no concentrations that presented any significant adverse ecological or human health effects).

410 *See* Strauss December 2013 Rejoinder Opinion at 7, 29-30 and Appendix A Human Health Risk Assessment at vii, 3.

411 *See* Second McHugh Expert Report at 3,4.

d. The Four Sites on Which Dr. Strauss Bases Her Risk Assessment Do Not Represent Concession Area Conditions

190. LBG's limited and questionable environmental sampling data from just four non-representative locations are not adequate to support Dr. Strauss's sweeping conclusions about health risks throughout the nearly 500,000-hectare Concession Area. LBG selected the sites in a manner designed to exaggerate reports of any environmental problems and failed to sample at actual exposure points.[412]

191. The LBG sampling results Dr. Strauss relies on for her risk assessment cannot be considered representative of anything but LBG's effort to find contamination at a handful of carefully screened sites.

3. There Is No Basis for Dr. Strauss's Conclusion that TexPet's Operations Caused Adverse Health Effects

192. Dr. Strauss's conclusions that TexPet's activities caused adverse health effects are simply speculative statements based on questionable theories and unreliable data. While she blames crude oil for every ailment identified in her report, she fails to support that theory. Furthermore, Dr. Strauss does not mention that Ecuador, in a separate arbitration with Colombia, alleged that Colombia's aerial pesticide spraying activities caused many of the same ailments in Ecuadorians that Dr. Straus attributes to crude oil exposure.[413] As Dr. Moolgavkar has explained, Dr. Strauss's initial report did not include any scientifically defensible health-effects conclusions.[414] Her second effort is equally deficient.[415]

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412 *See*, e.g., Second LBG Report (Goldstein) at 12-14.

413 **Exhibit C-2209,** 2008 Ecuador Application to the International Court of Justice Instituting Arbitration Proceedings Against Colombia at ¶¶ 4, 14.

414 First Moolgavkar Expert Report at 23.

415 Expert Opinion of Suresh H. Moolgavkar, M.D., Ph.D. (May 9, 2014) at 2, 10 ("Second Moolgavkar Expert Report"). In his 2014 Opinion, Dr. Moolgavkar describes in detail that Dr. Strauss: (i) again deviates from accepted scientific principles; (ii) misapplies the Bradford-Hill causation guidelines; (iii) ignores critical data; (iv) misunderstands and misinterprets the available epidemiological studies that show no association between oil

193. Dr. Strauss's quantitative risk assessment cannot and does not prove that any actual exposure of potential concern or adverse health effects have occurred or will occur.[416] A quantitative risk assessment can only evaluate what might happen from assumed high levels of exposure and other highly conservative assumptions; the results are used to estimate high margins of safety.[417] In other words, as the USEPA and the WHO explain, exposure to contaminant concentrations hundreds or thousands times higher than the very conservative "safe" levels normally used in the risk assessment process may not cause any adverse health effects.[418] Even if a risk assessment estimates that some amount of risk exists from these assumed exposures, "it does not imply that an actual risk exists."[419] "By contrast, epidemiologic studies evaluate what actually *did* happen and, therefore, are necessary to reach a conclusion that an exposure resulted in adverse health outcomes."[420] Dr. Strauss's work does not provide any basis for a causation conclusion; she continues to misunderstand and misinterpret the available epidemiological studies that show no association between oil exploration and production activities and excess cancer and other diseases in the Concession Area.[421]

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exploration and production and excess cases of cancer and other disease in the Concession Area; and (v) improperly employs unreliable case reports and anecdotal evidence to reach unsupported and faulty health effects conclusions. *See also* **Exhibit C-2049,** Moolgavkar, *et al.*, *"Cancer Mortality and Quantitative Oil Production in the Amazon Region of Ecuador, 1990-2010," Cancer Causes Control* (published online Nov. 30, 2013) .

416 *See* Second Moolgavkar Expert Report at 3; *see also* First McHugh Expert Report, Exhibit 11, ASTM E-2081-00; Standard Guide for Risk-Based Corrective Action at 57 (2000) ("ASTM 2000").

417 Second Moolgavkar Expert Report at 3.

418 *See, e.g.,* First McHugh Expert Report, Exhibit 8, USEPA Soil Screening Guidance: Technical Background Document, Office of Emergency and Remedial Response, EPA/540/R-96/128 at 2 (May 1996).

419 Second Moolgavkar Expert Report at 3. *See also* Second McHugh Expert Report at 1.

420 Second Moolgavkar Expert Report at 3.

421 *See, e.g.*, **Exhibit C-2049,** Moolgavkar, *et al.*, "*Cancer Mortality and Quantitative Oil Production in the Amazon Region of Ecuador, 1990-2010*," *Cancer Causes Control* (published online Nov. 30, 2013); Second Moolgavkar Expert Report at 3-6.

194. Available epidemiological information shows that "[n]o excess of cancer or other diseases has reliably been documented in the Concession Area population."[422] Furthermore, Dr. Moolgavkar's research "has documented no significant excess of mortality from any cancer (Moolgavkar et al. 2014) or any natural non-cancer cause of death that might plausibly be caused by exposure to petroleum or its components . . . in oil-producing versus non-oil producing areas in the Oriente."[423]

4. Dr. Theriot Has Not Proved TexPet Caused Adverse Ecological Effects

195. Dr. Theriot's new report continues his original approach of ignoring key facts, failing to follow accepted ecological assessment practices, and simply blaming all environmental effects on TexPet. As a very basic matter, Dr. Theriot did not follow the correct methodology when he concluded ecological risks exist from the Consortium's operations.[424] Relevant government documents show that Dr. Theriot has misused ecological screening levels; he wrongly suggests an exceedance proves harm and improperly characterizes naturally occurring materials as problematic.[425] Even Petroecuador publications disprove Dr. Theriot's approach of blaming oil activities for (and ignoring the real causes of) almost all the Oriente's adverse environmental effects (Ecuador's policies and resulting extensive agricultural colonization). For example, Petroecuador's environmental impact assessments in the Concession Area note that biodiversity is low in the area because of colonization, farming, and ranching, not oil operations,

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422 Second Moolgavkar Expert Report at 5.

423 *Id.*

424 *See* **Exhibit C-2011**, USEPA, Guidelines For Ecological Risk Assessment, EPA/630/R-95/002F (April 1998).

425 *See, e.g.,* **Exhibit C-2210,** USEPA, Guidance for Developing Ecological Soil Screening Levels, OSWER Directive 9285.7-55, Nov. 2005, Revised Feb. 2005, at ES-1 ("ECO-SSLs [soil screening levels] are not designed to be used as cleanup levels and EPA emphasizes it is inappropriate to adopt or modify ECO-SSLs as cleanup standards.") and at 1-1, 1-3 (purpose of using ECO-SSLs is to see if further evaluation or ecological site study is warranted; they are intended to be protective and are intentionally conservative).

and they conclude that petroleum operations have not impacted water resources.[426] Dr. Theriot has not offered any reliable evidence to prove that TexPet harmed the environment.[427]

E. Ecuador's "Heads of Damages" Rebuttal is Simply Attorney Argument Relying on Discredited Lago Agrio Plaintiffs' Environmental Reports

196. In its Rejoinder, Ecuador attempts to defend each of the heads (categories) of damages awarded in the Judgment, arguing that the amounts are "fully" supported by the record.[428] But as explained throughout this section and in prior memorials, the damages are untethered to any evidence that remotely supports the imposition of nearly $ 10 billion in damages. Putting aside that it is Petroecuador's ongoing responsibility to remediate any remaining Consortium impacts, comparison of the damages to actual Petroecuador remediation costs and practices highlights the sham that is the Lago Agrio Judgment.

197. Nor is there any basis for the cancer or health care costs set forth in the Judgment. There is no credible science to support the notion that TexPet caused such personal injuries.

198. Furthermore, Ecuador continues to rely on discredited and disavowed Stratus reports in an attempt to present the award as reasonable. In the Rejoinder, Ecuador includes an unattributed "Major International Oil Spills" chart to justify the Judgment's award.[429] This chart comes almost verbatim from the December 1, 2008 Stratus Engineering Report,[430] in which Stratus purported to have independently reviewed and endorsed the Cabrera report. Not only

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[426] *See, e.g.*, **Exhibit C-2211,** El Diagnóstico Ambiental (Linea Base) del Camp Sacha, PLANISOC (para Petroproducción) (Agosto de 2001) at Executive Summary 7 and §§ 3.1.4.1.2 – 3.1.4.1.10.

[427] *See* Dr. Edwin Theriot, A Rejoinder to Chevron's Rebuttal to the Opinion of Edwin Theriot, Ph.D. Addressing Damages to the Flora and Fauna Caused by Texpet in the Concession Area Oriente Region, Ecuador (Dec. 12. 2013).

[428] Respondent's Track 2 Rejoinder ¶ 178.

[429] *Id.* ¶ 187.

[430] **Exhibit C-858,** Comments on the Report of the Court-Appointed Expert Richard Cabrera Vega in the Case of Maria Aguinda y Otros v. Chevron Corp.

can there be no comparison between these sites,[431] but Douglas Beltman and Ann Maest, the authors of this chart, have disavowed the veracity of this comparison, both stating "I withdraw and disavow any endorsement of the Cabrera Report and Cabrera Responses, including the December 1, 2008 Stratus Comments."[432] It remains that the Judgment is a product of fraud and corruption and there is no reasonable basis for the US$ 9.5 billion award.

V. CONCLUSION AND REQUESTS FOR RELIEF

199. For the reasons stated above, and as set out in Claimants' previous memorials and other submissions,[433] 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 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.

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[431] Second Hinchee Expert Report at 3, 13.

[432] **Exhibit C-1611A**, Witness Statement of Douglas Beltman ¶ 60 (March 22, 2013); **Exhibit C-1612A**, Witness Statement of Ann Maest ¶ 44 (March 22, 2013).

[433] Claimants have already submitted their legal argument on the remedies to which Claimants are entitled, including addressing Respondent's arguments on off-set. *See e.g.*, Claimants' Counter-Memorial on Jurisdiction ¶¶ 57-81, 275; Claimants' Track 1 Reply ¶¶ 261-72; Claimants' Track 2 Reply ¶¶ 358-424.

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.

These requests summarize, but do not substantively change, Claimants' requests for relief set out in Claimants' Track 2 Reply Memorial on the Merits and in Claimants' Supplemental Memorial on Track 1.

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