EXHIBIT 5

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VIA E-MAIL

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Re: PCA Case No. 2009-23; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*

Dear Members of the Tribunal:

We write to inform the Tribunal that the appellate court in Ecuador affirmed the Lago Agrio Judgment on January 3, 2012.[1] Within a matter of days, the Secretariat of the appellate court is likely to issue, upon the Plaintiffs' request, a certification rendering the Judgment enforceable under Ecuadorian law, despite the Tribunal's interim measures order that the

[1] The appellate court denied Chevron's appeal in full, with one exception regarding the Judgment's erroneous finding of mercury contamination, which the panel found to have no impact on damages. Claimants have attached the 16-page decision in Spanish, as issued by the appellate court, and will provide the Tribunal with a copy of the English version as soon as it is received. **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m ("Lago Agrio First-Instance Appellate Decision").

Republic of Ecuador take all measures at its disposal to suspend enforcement of the Judgment.[2] Many additional mechanisms remain available to Ecuador to suspend enforcement of the Judgment, including refraining from issuing the above-noted certification.[3] Time is now of the essence to ensure that the Republic takes measures to prevent enforcement of the fraudulent Judgment. Claimants therefore request the Tribunal immediately to: (i) convert the order dated February 9, 2011 (the "Interim Measures Order") into the form of an Interim Award, as the Tribunal contemplated in the Order; and (ii) request that the Republic of Ecuador inform the Tribunal, by this Friday, January 6, 2012, of the steps that it intends to take to comply with the Interim Measures Order and prevent the Lago Agrio Judgment from becoming enforceable.

The Interim Measures Order requires the Republic of Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio Case . . . pending further order or

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[2] Under Ecuadorian law, in order to enforce a judgment after the first-instance appellate decision, the Plaintiffs must request from the Secretariat of the Chamber a certificate stating that the appeal has rendered the judgment enforceable. To obtain enforcement once the judgment is in cassation, the Plaintiffs must ask the Secretariat of the National Court of Justice for a certificate indicating that the respondent did not post a bond. *See* **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Arts. 58, 287, 295. Even if Chevron were to file a cassation appeal with the National Court of Justice, this would not suspend the judgment's enforceability within Ecuador unless Chevron posts a bond that the Court orders, in its discretion. **Exhibit C-316**, Ecuadorian Law on Cassation Appeal, Art. 10. The appeal in cassation is governed by the Ecuadorian Law on Cassation Appeal, as codified and published in the Official Gazette (Supplement) No. 299, Mar. 24, 2004. Cassation is limited to legal issues and cannot be brought on the basis of matters of fact on which either the trial court or the appellate court may have erred. *Id.*, Art. 3. Pursuant to the Ecuadorian Law on Cassation Appeal, the bond should be "sufficient … for the estimated damages that a delay in enforcing the judgment … may inflict on the other party." *Id.*, Art. 11. If the appellate court establishes the bond based on a simple calculation of the interest that a multi-billion-dollar judgment may accrue during the cassation period, the resulting amount could be astronomic. Chevron would be required to deposit the bond within five days to delay enforcement during the cassation appeal period. *Id*. If Chevron were to fail to post a bond at the cassation appeal level, the Plaintiffs could ask the Secretariat of the National Court of Justice to provide a certificate indicating that the defendant did not post a bond and that the judgment is thereby enforceable.

[3] In addition to withholding the first-instance appellate certification, some measures available to the Republic of Ecuador and its constituent organs include the following, many of which Claimants have identified in prior submissions to the Tribunal: (i) issuing or decreeing, through its judges or otherwise, an order that the Lago Agrio Judgment is not enforceable against Chevron, pending the outcome of this BIT proceeding or further award of the Tribunal; (ii) issuing, through its judges or otherwise, an order that Chevron is not required to post a bond to pursue further appeals in Ecuador, and that enforcement of the Judgment is suspended pending the outcome of this BIT proceeding or further award of the Tribunal; (iii) ordering its President, its Solicitor General, or other responsible officials to undertake to post a bond or alternative form of security sufficient to relieve Chevron of any bond that might be required by Respondent's judicial branch in order for Chevron to pursue further appeals in Ecuador in a manner that suspends enforcement of the Judgment, pending the outcome of this BIT proceeding or further award of the Tribunal; and/or (iv) directing, through its responsible officials, including without limitation its courts, the Superintendent of Companies (which has supervision over trusts in Ecuador), the administrator or directors of any trust established pursuant to the Lago Agrio judgment, the Frente, the Lago Agrio Plaintiffs, their representatives, their counsel, or any other person who may be deemed the real party in interest in the corpus of the trusts, to refrain from seeking enforcement or recognition of the Lago Agrio Judgment pending the outcome of this BIT proceeding or further award of the Tribunal. *See* Claimants' Interim Measures Request, Apr. 1, 2010; Claimants' Interim Measures Request, Jan. 14, 2011; Claimants' Letter to the Tribunal, Mar. 4, 2011.

award in these arbitration proceedings, including the Tribunal's award on jurisdiction or (assuming jurisdiction) on the merits."[4] Rather than taking all measures at its disposal to suspend enforcement of the Judgment, Ecuador instead has taken affirmative steps towards securing its enforcement. For example, Ecuador affirmatively stated, in a recent § 1782 filing before a federal court in Florida, that it seeks discovery from TestAmerica (formerly Severn Trent Laboratories, which provided technical assistance to Chevron in the Lago Agrio Litigation) "to aid the Republic in defending the validity of the *Lago Agrio* judgment."[5] Given Ecuador's failure to comply with the Interim Measures Order, Chevron's rights at issue in this arbitration are urgently at risk of being eviscerated through foreign enforcement proceedings that the Interim Measures Order was designed to prevent.

The appellate court in Lago Agrio has now affirmed the February 14, 2011 Lago Agrio Judgment, ignoring the overwhelming evidence of fraud in the case, including compelling proof that the Judgment was ghostwritten by the Plaintiffs' representatives and issued by Judge Zambrano in name only. As with its submissions before the trial judge, Chevron submitted evidence of the fraud in the Judgment before the appellate panel. New evidence, in the form of Plaintiffs' own admissions and forensic evidence, proves that the Plaintiffs' representatives drafted the Lago Agrio Judgment:

- Internal communications from August 2008 and onward show the Plaintiffs' representatives discussing their intent to "start the work with the new judges."[6] The Plaintiffs' representatives discussed "developing a judgment that will be enforceable in the US and elsewhere" by becoming "involved in the preparation of the final submission and proposed judgment."[7]

- When the Plaintiffs' representatives hired a law student as an intern in June 2009, Plaintiffs' counsel Pablo Fajardo stated: "I'm going to give him the complaint and the answer to read so he can get to know the case well. After that a research assignment for our legal alegato and the judgment, but without him knowing what he is doing …"[8]

- Also in June 2009, Fajardo circulated in an internal email an Ecuadorian case entitled *Andrade v. CONELEC*, saying, "Colleagues, take a look at this decision.

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[4] The Interim Measures Order directed to the Republic of Ecuador, which includes all of its branches, comprises the judiciary, contains an obligation of result that requires Ecuador to suspend the enforcement of the judgment, both within and without Ecuador. **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, Art. 14, ¶ 3 (2001) ("The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.").

[5] **Exhibit C-992**, *In re Application of Republic of Ecuador et al.*, Case No. 4:11-mc-00088-RH-WCS, Ecuador's Application for an Order under 28 U.S.C. § 1782, Oct. 20, 2011 (N.D. Fla.).

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

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

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

I think it works very well for us."[9] He then copied into the body of the email a memo from a not-yet identified third party and a "transcri[ption]" of a published Ecuadorian court opinion.[10] That transcription contains numerous mistakes not found in any published version of the court opinion itself.[11] The Judgment repeats all of those mistakes, exactly, as well as a citation error that Fajardo made.[12]

- By December 2009, Fajardo was reassuring Donziger that he was "99.99 percent sure" that "the plan for the judgment will be fulfilled," acknowledging that he could not share any details by email.[13]

- The Lago Agrio Judgment repeats verbatim material from the Plaintiffs' internal documents that were never submitted into the court record or made public. For example, Dr. Robert Leonard, Professor of Linguistics and a qualified expert in the field, concluded that the Lago Agrio Judgment contains direct plagiarisms from the Plaintiffs' internal work product that was never filed in the record.[14] Dr. Leonard identified several instances of plagiarism from the Plaintiffs' unfiled documents in the Judgment, including: (i) numerous identical strings of more than 90 words each in the final Judgment and the Plaintiffs' confidential memo regarding their theory about the Chevron-Texaco "merger" (the "Fusión Memo"); (ii) the idiosyncratic use of similar citation errors and reference shorthand in the Fusión Memo; (iii) the verbatim copying of out-of-place numerical ordering from the Fusión Memo; (iv) several identical, lengthy word bundles from the Plaintiffs' unfiled draft *alegato* that do not appear in the Plaintiffs' filed *alegato*; and (v) repeated errors and identical word bundles from the Plaintiffs' unfiled index summary, which they used to track filings made during the Lago Agrio Litigation.[15]

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

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

11 *Compare id. with* **Exhibit C-998**, Highlighted Copy of *Andrade v. CONELEC*, Ecuadorian Supreme Court of Justice, No. 168-07, Apr. 11, 2007.

12 *Compare* **Exhibit C-999**, Highlighted Email from Pablo Fajardo to Steven Donziger *et al.*, June 18, 2009 at 2:27 p.m.; *and* **Exhibit C-998**, *Andrade v. CONELEC*; *with* **Exhibit C-1000**, Highlighted Excerpt from Page 186 of the Lago Agrio Judgment (Spanish version) (showing overlap with the Fajardo Email and variation from the published *CONELEC* case).

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

14 **Exhibit C-1004**, Report of Robert A. Leonard, Ph.D., June 27, 2011 (hereinafter "Leonard Report"). *See also* **Exhibit C-1003**, *Chevron Corp. v. Donziger*, No. 1:11-cv-00691 (LAK), Deposition of Steven Donziger, July 19, 2011 (S.D.N.Y.), at 4704:21-4705:4 ("Q: Is it accurate that since the overlap between the judgment and the Fusion memo was disclosed in the Younger declaration, plaintiffs' counsel have not identified any instance in the record where the text from the Fusion memo appears, other than the judgment, correct? A: That's correct.").

15 **Exhibit C-1004**, Leonard Report.

- The Lago Agrio Judgment relies upon the Plaintiffs' unfiled and internal sampling database, rather than the actual, filed laboratory results. Forensic evidence performed by Michael Younger, Senior Director of Digital Forensics at Stroz Friedberg, identified over 100 common errors and common idiosyncracies between the judgment and the database. He thus concluded that the "data points cited in the Lago Agrio Court Decision were copied, cut-and-pasted, or otherwise taken directly from the Selva Viva Data Compilation"[16]—a database controlled internally by the Plaintiffs that is not part of the case record.

- Forensic evidence demonstrates that the author of the Judgment relied on the fraudulent Cabrera Report, despite the Judgment's and Clarification Order's statements to the contrary. As the most obvious example, the determination that Chevron is to be liable for the cost of remediating "880 pits," the majority of which do not exist, comes directly from Annex H-1 of the Cabrera Report.[17]

In the appellate decision of January 3, 2012, the Ecuadorian court refused to consider the issues of fraud and corruption committed by the Plaintiffs' attorneys and representatives throughout the Lago Agrio proceedings (including the ghostwriting of the Judgment), finding that it did not have jurisdiction to consider whether the Judgment had been obtained by fraud, and simply refusing to address the evidence of such fraud.[18] Thus, the appellate court abdicated its fundamental responsibility to determine the legitimacy of the Judgment in light of overwhelming evidence of fraud.

The Lago Agrio Court did not act alone in allowing the Plaintiffs' representatives to ghostwrite the Lago Agrio Judgment. Rather, as Chevron has documented, the Lago Agrio Court took direction from Ecuador's Executive, which continually has interfered in the Lago Agrio Litigation. In a 2007 email, Plaintiffs' representative Maria Eugenia Yépez reported to Donziger that she had spoken with President Correa, and that the President had "asked the attorney general to do everything necessary to win the trial" and had "asked his team to urgently work on the matter."[19] According to this internal email among the Plaintiffs' representatives, President Correa "even said that he would call the [Lago Agrio] judge."[20] Yesterday, President Correa praised the appellate decision as an "achievement" in a press interview, openly declaring his "personal" "satisfaction" with the result multiple times. He stated: "I feel very happy that the Amazonian communities have declared their right and that they have obtained a huge [] judicial victory." Then he unequivocally declared that "justice has been done."[21]

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16 **Exhibit C-966**, Declaration of Michael L. Younger, Mar. 1, 2011 (hereinafter "Younger Decl."), at ¶ 17.

17 **Exhibit C-931**, Lago Agrio Judgment, at 125 (Eng.); **Exhibit C-966**, Younger Decl. at ¶ 16.

18 **Exhibit C-991**, Lago Agrio First-Instance Appellate Decision, at 13-14 (Span.).

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

20 *Id*.

21 **Exhibit C-1006**, *Ecuador court upholds $18 bln ruling against Chevron*, REUTERS NEWS, Jan. 3, 2012.

Ecuador, through its courts, is fully capable of taking measures to suspend enforcement. For example, the Lago Agrio Judgment directs its proceeds to be distributed not to the named Plaintiffs, but rather to an Ecuadorian trust under the supervision of the Lago Agrio Court itself.[22] The Court exercises oversight over the trust to, *inter alia*, "verify the exact performance of the obligation to constitute the trust within the term granted for such purpose; and subsequently, once they have been applied, [to] ascertain the effectiveness of the measures of reparation . . . ."[23] That court, of course, is part of the judiciary, and thus a constituent part of the Republic of Ecuador. Mr. James Tyrrell of the law firm Patton Boggs (which represents some of the nominal Lago Agrio Plaintiffs), confirmed the import of the trust scheme in the recent hearing before the Second Circuit Court of Appeals in New York, when he stated that the named Plaintiffs were no longer the "real party in interest," and that the trust to be established by the Amazon Defense Front (the "Frente") to collect on the Judgment will be under the control of the Ecuadorian courts.[24] Thus, the Frente and the Republic of Ecuador, not the named Plaintiffs, will exercise direct control over the enforcement (and disbursement) of funds collected from the Lago Agrio Judgment.

This Tribunal noted that urgent circumstances compelled it to issue the February Interim Measures Order quickly in the form of an order, but reserved its right to "decide (upon its own initiative or any Party's request) to confirm such order at a later date in the form of an interim award under Articles 26 and 32 of the UNCITRAL Rules …"[25] The issuance of the appellate decision urgently threatens Claimants' rights at the heart of this arbitration, and the issuance of an Interim Award is appropriate to help secure those rights and the integrity of this proceeding.

The Tribunal further ordered Ecuador "to inform this Tribunal, by the Respondent's legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this order for interim measures[.]"[26] Claimants therefore request that the Tribunal invite Ecuador to comply with this order and immediately state, by this Friday, January 6, 2012, either in writing or in a telephonic hearing, all measures that it intends to take in the coming days to suspend the Lago Agrio Judgment's enforceability before the issuance of a certification that renders the Judgment enforceable. This is particularly important given the Republic's contention that "[b]y operation of Ecuadorian law, once a final judgment is entered by a first-level court of appeal, such judgment becomes conclusive and enforceable … If the first instance court's decision were ultimately affirmed as a final judgment, … the Republic would have no power or authority to dictate how other sovereigns should apply their own principles of

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22 **Exhibit C-931**, Lago Agrio Judgment, at 186 (Eng.) ("b) The autonomous endowment shall be comprised by the total value of the compensation that the defendant has been ordered to pay per part Thirteenth of the Findings.").

23 *Id*., at 187 (Eng.).

24 **Exhibit C-1002**, *Chevron Corp. v. Naranjo et al.*, U.S. Court of Appeals for the Second Circuit, Hearing Transcript, Sept. 16, 2011, at 34:1-8.

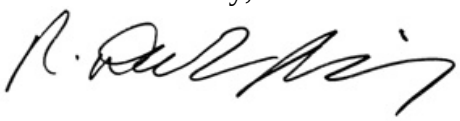
25 Order for Interim Measures, Feb. 9, 2011, at 3, point (C).

26 *Id*., at 4, point (E)(ii).

international comity or to command other sovereigns how they should treat any such judgment."[27]

Through its actions and inactions to date, Ecuador has failed fully to comply with the Tribunal's directive that it use all measures at its disposal to suspend or cause to be suspended the enforcement or recognition of the Lago Agrio Judgment pending further order or award from this Tribunal. On the contrary, Ecuador has admitted that it is seeking to "defend the validity of the *Lago Agrio* judgment" and has taken affirmative steps to promote the Judgment's enforcement.[28] Absent urgent action by this Tribunal to secure Ecuador's compliance with the Interim Measures Order, including through the conversion of the order into an award, Claimants not only may suffer the harm that the Tribunal's Interim Measures Order was designed to prevent, but Claimants also may be denied their Treaty-based right to have this Tribunal determine the outcome of this investment dispute. The Republic of Ecuador should not be permitted to evade its international obligations by actively participating in such a result.

Sincerely,



R. Doak Bishop

cc: Eric W. Bloom
C. MacNeil Mitchell
Francisco Grijalva
Bruno Leurent
Ricardo Ugarte
Tomás Leonard
Zachary Douglas
James Crawford

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[27] Respondent's Letter to the Tribunal, Feb. 24, 2011.

[28] **Exhibit C-992,** *In re Application of Republic of Ecuador et al.*, Case No. 4:11-mc-00088-RH-WCS, Ecuador's Application for an Order under 28 U.S.C. § 1782, Oct. 20, 2011 (N.D. Fla.). In addition to making this representation in seeking discovery before a U.S. court, Ecuador filed an *amicus curiae* brief with the Second Circuit Court of Appeals in support of the Plaintiffs' efforts to vacate the preliminary injunction issued by the federal district court in the Southern District of New York that had enjoined the Plaintiffs from seeking enforcement of the Lago Agrio Judgment anywhere. Ecuador's joint efforts with the Plaintiffs succeeded in removing this one direct legal obstacle to the enforcement efforts. As the Tribunal knows, on September 16, 2011, the Second Circuit Court of Appeals vacated the federal district court's preliminary injunction. **Exhibit R-258**, *Chevron Corp. v. Naranjo et al.*, Order, Sept. 19, 2011 (2d Cir.).