IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

TRACK 2 REJOINDER ON THE MERITS OF THE REPUBLIC OF ECUADOR (PART I: RESPONSE TO FACTUAL PREDICATE TO CLAIMANTS' CLAIMS)

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I. Introduction

1. From the beginning of this Arbitration, Claimants have leveled an ever-changing series of charges against the Ecuadorian Government, its officials, and its courts. Indeed, Claimants' allegations had to have changed because they chose to initiate this Arbitration many years prematurely, while the underlying pollution case was still pending in the first-instance court. In quick succession they have changed both their underlying factual allegations and remedial theories, while continually asserting the need for immediate intervention by this Tribunal. As a result of their manufactured hysteria, Claimants have repeatedly forced the Republic to respond to wholly new or drastically revised claims without adequate time to investigate, often before the Republic could even obtain the contextual documents. This bait-and-switch tactic has unfairly prejudiced the Republic. Making allegations is simple; responding to them in a meaningful way requires access to information and time to review and present the relevant evidence.

2. According to Claimants, "Ecuador's conduct encompasses the full panoply of acts and omissions that can constitute a denial of justice — bribery, corruption, fraud, fundamental due process violations, governmental interference, and many others."[1] Claimants contend that they "pieced together the conspiracy among the Plaintiffs' lawyers, the Ecuadorian courts and Ecuador's Executive Branch that culminated in the Judgment."[2] Not so. Claimants have instead pieced together a mosaic of disparate excerpts from carefully culled emails and other documents,

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[1] Claimants' Amended Track 2 Reply on the Merits ¶ 2. This Rejoinder is accompanied by a Glossary of Terms at Appendix A. Relevant documents, case law, and secondary legal authorities are set out in full therein in alphabetical order by their respective abbreviations. For ease of reference, the abbreviations are used throughout the text and footnotes of this Rejoinder.

[2] *Id.* ¶ 5.

while for the most part deliberately and systematically ignoring the context in which they appear.[3]

3. This Introduction focuses **first** on the impact of the November 12, 2013 decision of Ecuador's National Court on Chevron's appeal of the Lago Agrio decision. **Second**, it examines the allegations that Claimants have dropped following the Republic's Track 2 Counter-Memorial on the Merits. **Third**, it addresses Claimants' conspiracy theories directly by identifying a host of critical facts and evidence they ignore. **Fourth**, it examines evidence of Claimants' misconduct in both the environmental case and in this Arbitration, including their use of highly questionable "pressure tactics," improper payments, and offers of settlement against non-parties to secure favorable witness testimony, thereby rendering the testimony of these witnesses inherently unreliable.

A. The Appellate And National Court Decisions Have Cured Any Procedural Irregularity That Allegedly Occurred In The First-Instance Court

4. It is axiomatic that a State can be internationally responsible only for the final product of its system for the administration of justice. Claimants' attacks on the decision of a single judge almost three years ago are therefore misplaced and obviously so. The February 14, 2011 decision has now been affirmed by a three-judge appellate panel, and most recently, affirmed in part and reversed in part by the National Court's November 12, 2013 decision. To date Claimants have failed to allege, much less offer any proof, that the appellate court panel

[3] Claimants have had, as a reasonable estimate, over 1.5 million documents produced to them over the course of twenty-five Section 1782 subpoenas and their ongoing RICO action. These documents have been produced to them by the Plaintiffs, their law firms, their testifying experts, and virtually any organization that sympathized with the Plaintiffs. They have gathered and pieced together many stones to create their mosaic.

based its decision on anything other than Ecuadorian law. Nor have Claimants challenged the intentions of the National Court — and they have now committed not do so.[4]

5. In rendering its decision, the National Court granted Chevron relief in respect of its challenge to the lower court's award of punitive damages. Finding such an award unsupported by Ecuadorian law, the National Court reversed in relevant part, and reduced the judgment by more than ***US$ 9.5 billion***. Like Messrs. Perez and Veiga, the two Chevron attorneys who were under investigation along with former PetroEcuador and government officials in relation to representations made regarding TexPet's "remediation" of the region, Chevron has been the beneficiary of many Ecuadorian judgments.[5] Here, the National Court judgment provided Chevron substantial, albeit not complete, relief.

6. While finding against the Plaintiffs in relation to the punitive damages award, the National Court dismissed Chevron's claims of procedural fraud. In so doing, the National Court

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[4] *See* Procedural H'rg Tr. (Dec. 3, 2013) at 25-26 ("ARBITRATOR LOWE: If I could just ask a follow-up question, is it the Claimants' position, then, that that pleading on the denial of justice is completely unchanged by the Cassation Decision? MR. BISHOP: Yes. Our view is that we have pleaded certainly denial of justice--excuse me, certainly violations of the Bilateral Investment Treaty which are a separate category of international violations, as the Tribunal well knows, and separately denials of justice that are completed denials of justice. They were completed, as Professor Paulsson has set forth in his opinion, when the Judgment went through the First Instance Appellate Decision and it was made enforceable by the courts of Ecuador sometime in 2012. So, yes, it's our position that we have pleaded a complete, ripe denial of justice under international law. But as I said, I would also point out that that is separate from the BIT violations. ARBITRATOR LOWE: Of course, my question was very slightly different from that. It's not whether you have already pleaded a case which is self-contained and sufficient. It's whether that case stems as the exhaustive statement of Claimants' case on this point. And you're saying that you have nothing to add to that case, to that pleading, in the light of the Cassation Decision? MR. BISHOP: I believe that is a correct statement, yes. ARBITRATOR LOWE: Thank you.").

[5] Over the years Ecuador's courts have repeatedly found in TexPet's and Chevron's favor in a number of litigations. *See, e.g.*, R-808, Court Order in *Texaco Petroleum Co. v. Ministry of Energy and Mines*, Case No. 46-2007, Supreme Court of Justice, Second Division in Civil and Commercial Matters (Jan. 22, 2008) at 4; R-816, Court Order in *Texaco Petroleum Co. v. Republic of Ecuador and PetroEcuador*, Case No. 983-03, First Civil Court of Pichincha (Feb. 26, 2007) at 6-7; R-812, *TexPet v. Ministry of Energy and Mines*, S. Ct./Tax Div., No. 12-93 (Oct. 17, 2000); R-975, *Hector Washington Reinoso Magno v. Texaco Petroleum Company*, Case No. 0055, Judgment of May 5, 1994, *published in* the Official Gazette No 0480 (July 11, 1991); R-976, *Segundo Valentín Pueyo Cerón v. Texaco Petroleum Company*, Case No. 0014, Judgment of November 4, 1999, *published in* the Official Gazette No. 036 (Jan. 14, 2000); R-977, *Texaco Petroleum Company v. Municipality of Orellana*, Case No. 0002, Judgment of August 24, 1999, *published in* the Official Gazette No. 0285 (Sept. 27, 1999); R-978, *Municipality of Lago Agrio v. Texaco Petroleum Company*, Case No. 0227, Judgment of May 15, 1997, *published in* the Official Gazette No. 0124 (Aug. 6, 1997).

noted — *correctly* — that (1) the appellate courts do not have original jurisdiction over such claims, but (2) Chevron nonetheless has a clear remedy under the Collusion Prosecution Act, which it may still exercise until February 14, 2016, but which it has thus far chosen to ignore.

7. That the National Court lacked jurisdiction to consider Chevron's claim of a "great collusive demonstration"[6] should not be surprising. Every jurisdiction has a right to determine the scope of an appellate court's — or any court's — jurisdiction. In the United States, a party may seek to re-open a judgment for up to one year based on intrinsic or extrinsic fraud, but the court lacks jurisdiction to consider such a motion, even based on newly discovered evidence of fraud, after one year.[7] Nor is it surprising that Ecuador's appellate courts, like appellate courts throughout most of the world, are limited to review of the trial court record.

8. Although Chevron previously dismissed with a wave of the hand the Appellate Court's similar finding, and instead mocked the court for failing to afford any relief or even to address the merits of its fraud allegations,[8] Chevron has studiously avoided addressing the Appellate Court's (and now the National Court's) references to the remedy Chevron should have but thus far has failed to pursue. In its wisdom, Ecuador's legislative body created an exclusive remedy to address allegations that a proceeding has been tainted by fraud. Under the Collusion Prosecution Act, referenced by the National Court,[9] an action may be brought by an aggrieved party alleging that a proceeding has been tainted by fraud, and "if the grounds for the claim are confirmed, measures ***to void the collusive proceeding will be issued, invalidating the act or acts,***

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6 C-1975, National Court Decision at 95.

7 *See* RLA-457, U.S. Federal Rule of Civil Procedure 60(b)(3).

8 Claimants' Letter to the Tribunal (Dec. 2, 2013) at 4: "It is particularly noteworthy that the Cassation Court did not substantively address or analyze any of Chevron's claims of fraud or corruption in the issuance of the Judgment, even suggesting this was not within its jurisdiction, just as the lower appellate court decision had also done. According to Ecuador's judiciary, apparently no appellate court has direct jurisdiction to nullify a judgment for fraud or corruption in its issuance. Thus, it leaves the denial of justice pleaded by Claimants uncorrected."

9 C-1975, National Court Decision at 95.

. . . ***and redressing the harm caused, . . . and, as a general matter, restoring the things to the state prior to the collusion***."[10]

9. Claimants cannot blindly heap thousands of new documents into the Ecuadorian appellate record, assert with this new evidence that the appellate courts should find that the lower court's judgment is tainted by fraud, and then credibly assert that an unfavorable decision, even in part, is the result of a conspiracy. As shown below, Claimants knew and understood fully at all times that their appeal to the National Court on alleged "conspiracy" and "collusion" theories would be rejected as outside of the court's competence. And their attorneys not only are presumed under Ecuadorian law to know of their available remedies, but they in fact ***did know both the forum and means by which it could obtain a remedy for tainted or "collusive" proceedings because Chevron's attorney for their National Court appeal was a former Ecuadorian Supreme Court judge who himself has issued rulings under the Collusion Prosecution Act nullifying such "collusive" proceedings.*** That Claimants nonetheless chose *not* to pursue the remedy or otherwise exhaust their domestic court rights reflects a failed stratagem but speaks not at all to the adequacy of Ecuador's system of justice.

10. The National Court Judgment is the final product of the Ecuadorian system for the administration of justice.[11] It is deserving of respect unless it can be shown convincingly that it is the product of a fraud. There is no such showing, or even an effort to make such a showing.

11. For far too long Claimants have made claims that are patently untrue. (1) Claimants alleged that Judge Núñez was bribed; he was not. (2) Claimants have alleged that

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[10] RLA-493, Collusion Prosecution Act, art. 6 (emphasis added).

[11] This is, of course, subject only to the possibility that Chevron might file a complaint to the Constitutional Court of Ecuador or otherwise file a claim under the Collusion Prosecution Act. The statute of limitations for claims under the latter is five years, and therefore it does not expire until 2016. RLA-493, Collusion Prosecution Act, art. 10.

Judge Zambrano's February 14, 2011 Judgment relied upon documents outside the record that allegedly could be found only in Plaintiffs' counsel's internal files. We know now that all of these documents were in fact in the trial record or were openly provided to the court and to Chevron at judicial inspections. (3) Claimants have alleged that a former Judge, Alberto Guerra, acted on Judge Zambrano's behalf to elicit a bribe. We know now that Claimants have paid Guerra hundreds of thousands of dollars to say what they need him to say, that he has now met with Claimants' counsel more than fifty-three times to prepare him for deposition and trial testimony, and that Mr. Guerra himself has been forced to admit to lying about his claims.

12. So too we know now that Claimants' assertion that they have exhausted their remedies is untrue and that Claimants knew how to do so but *chose* not to. In Claimants' letter to the Tribunal on December 2, 2013 they declared, "If this Tribunal concludes that Claimants failed to exhaust local remedies, then it can rule accordingly."[12] This Tribunal should call Chevron's bluff.

B. Claimants Have Abandoned Allegations Previously Contended To Be "Critical"

13. Since commencing this Arbitration in 2009, Claimants have advanced, only to later discard, numerous claims that they initially touted as dispositive, each of which they contended, taken by itself, rendered the Republic liable to Claimants under international law. Many were introduced with a saturating media campaign or rhetoric-laced letters to this Tribunal. Once the claims were properly investigated and the lack of evidence supporting them became manifest, Claimants quietly dropped them in favor of new accusations.

14. For example, Claimants earlier accused the Lago Agrio Plaintiffs' counsel of violating Ecuadorian legal procedures and forging at least twenty of the forty-eight signatures

[12] Claimants' Letter to the Tribunal (Dec. 2, 2013) at 4.

ratifying the Lago Agrio Complaint.[13] The Republic replied by demonstrating that: (a) Claimants' forgery "expert" based his opinion on evidence he could not authenticate, relying on a technique discredited in Claimants' own U.S. courts; (b) the expert opinion was based on an assumption that people, over time, develop a "highly personalized handwriting and signature" — an invalid assumption here because the indigenous Plaintiffs are not called upon to sign their names more than a handful of times in their lives, and even then often apply only their "mark" as attested by a witness; and (c) the indigenous Plaintiffs assembled in person and re-executed (and thus ratified) their Complaint for the avoidance of any doubt.[14]

15. Claimants have not challenged these points and instead have apparently dropped their "due process" claim that the Court wrongfully accepted forged signatures.

16. In a similar vein, this Tribunal will recall Claimants' media blitz and spate of accusations that in 2009 the then-presiding judge in Lago Agrio, Judge Juan Núñez, had been "caught" by independent third parties in a bribery scheme to enter judgment against Claimants and secretly award lucrative remediation contracts to the bribing parties. Claimants (a) put on their web site, (b) submitted to the Ecuadorian State Prosecutor for criminal charges, and (c) submitted to this Tribunal several secretly recorded videotapes by these supposedly non-affiliated parties and claimed that they established the Judge's guilt beyond all reasonable doubt.[15] This was the most significant allegation made in Claimants' Notice of Arbitration filed in this case and it was accompanied by a coordinated public relations campaign that included banner internet advertisements, multiple press releases and interviews, and professionally produced video complete with English subtitles.

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13 *See* Interim Measures H'rg Tr. (Feb. 11, 2012) at 87:24-88:4; Merits Track 1 H'rg Tr. (Nov. 26, 2012) at 50:12-23.

14 Respondent's Track 2 Counter-Memorial on the Merits ¶¶ 264-272.

15 Claimants' Merits Memorial ¶¶ 285-286.

17. The evidence, however, never supported their claims. The Núñez videos contain no discussion of bribes, and instead repeatedly show Judge Núñez refusing to advise Claimants' *agents provacateurs* how the Court might ultimately rule.[16] After having personally reviewed the relevant video transcripts, a U.S. District Court found "no hint in [the transcripts] about [the Judge] taking a bribe or payoff."[17] Numerous publications have also disputed Claimants' evidence of a bribe (including the *New York Times*, *Los Angeles Times*, *San Francisco Chronicle* and *Financial Times*).[18] Claimants have no answer to any of these points.

18. Even Diego Borja, the Chevron environmental contractor who masterminded the unlawful and surreptitious recording of these meetings and took them to his employer for hoped-for compensation, conceded that there "*was no bribe*."[19]

19. Chevron's public relations machine initially characterized their two agents who conducted the illegal recordings as merely good Samaritans who had innocently sought "business opportunities" in Ecuador.[20] The evidence has established just the opposite. **First**, Borja has been a Chevron contractor and a member of Claimants' Ecuadorian environmental defense team since 2004 and was financially dependent on Chevron that entire time.[21] **Second**, despite

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16 "What you want to find out is whether it's going to be guilty or not, I'm telling you that I can't tell you that, I'm a judge, and I have to tell you in the ruling, not right now." C-267, Recording Tr. 3 at 10; "So in the ruling, sir, I'll say it. I haven't come here to tell you that . . . no, no, no, there's a, there will be a ruling, sir." *Id*. at 11; "There will be a ruling, as I tell you, that is the amount they're claiming. I will say in the ruling whether it is more or it is less . . . it's more or it's less, I can't tell you." *Id*. at 12.

17 R-197, H'rg Tr. (Nov. 10, 2010), *In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 38:19-39:5.

18 *See* R-315, *Under Pressure Ecuadorean Judge Steps Aside in Suit Against Chevron*, NEW YORK TIMES (Sept. 5, 2009) at 1; R-316, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) at 2; R-317, *Chevron Judge Says Tapes Don't Reveal Verdict*, SAN FRANCISCO CHRONICLE (Sept. 2, 2009) at 1; R-470, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009) at 2.

19 R-582, Borja/Escobar Conversation Tr. (Oct. 1, 2009) (23.59.31) at 11 (emphasis added).

20 R-314, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 2.

21 Respondent's Track 2 Counter-Memorial on the Merits, Annex C, § A.1.

Claimants' denials, Chevron's own documents show that it had designated Borja as Chevron's "sample manager" in the underlying environmental proceeding.[22] **Third**, while Chevron claimed that it had ended its relationship with Borja by the time of the surreptitious recordings, Borja's invoices to Chevron were still being approved *after* the recorded meetings with Núñez occurred.[23] **Fourth**, it later surfaced that all along Borja had been sharing office space with Chevron's attorneys and even using a Chevron email address.[24] **Fifth**, Borja's uncle had long been a Chevron employee.[25] **Sixth**, Borja met with Chevron's attorneys in San Francisco and then, just days later, returned to Ecuador to surreptitiously record yet another of his meetings.[26]

20. Immediately after taking these videos, Chevron escorted Borja and his wife out of Ecuador and provided them with country club lodging in the U.S., together with more than US$ 2 million in monetary benefits.[27]

21. Chevron's other good Samaritan, Wayne Hansen, is a convicted drug dealer.[28] After a U.S. federal district court judge issued the Republic a subpoena to obtain discovery from him,[29] Hansen fled the United States.

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22 R-319, Chevron "Ecuador Litigation Team" Organization Chart.

23 R-320, Email chain copying D. Borja and A. Verstuft regarding August 2009 Interintelg invoices (Sept. 7, 2010).

24 [redacted]

25 [redacted]

26 R-324, Letter from T. Cullen to Dr. D. García Carrión (Oct. 26, 2009) at 8.

27 R-579, *Chevron Paid $2.2 Million To Man Who Threatened To Expose Company's Corruption in Ecuador*, BCLC; R-325, Summary of Chevron Payments to or on Behalf of Diego Borja.

28 R-526, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES, (Oct. 30, 2009) at 1 (revealing that Hansen is "a convicted drug trafficker" who was "was convicted of conspiring to traffic 275,000 pounds of marijuana from Colombia to the United States in 1986").

29 R-586, Order granting the Republic of Ecuador's Ex Parte Application for the Issuance of a Subpoena (Wayne Hansen), Case No. 10-mc-40 (E.D. Cal. Oct. 14, 2010).

22. Claimants' Reply Memorial does not address, much less dispute, any of these points. Instead, Claimants simply litter the pleading with references to "the bribery solicitation scandal"[30] and "the Núñez scandal"[31] — as if the events in question achieved notoriety independently of Chevron's public relations campaign, and as if there was any truth to them.

23. Nor does Claimants' Reply Memorial address the Republic's handling of the criminal investigation of Messrs. Ricardo Reis Veiga and Rodrigo Perez for alleged corporate and government fraud in connection with the adequacy of Claimants' remediation work in carrying out the 1995 Settlement Agreement. Claimants in fact devoted forty pages of their Track 1 Memorial on the Merits to this single issue and used it as one of their principal grounds for requesting interim measures.

24. As explained in Annex B to the Republic's Counter-Memorial, Messrs. Veiga and Perez — along with ten Ecuadorian officials — were the subject of a preliminary criminal investigation to determine whether they had made material misrepresentations to the Government in certifying the sufficiency of TexPet's performance of its remedial obligations to the Government. Annex B outlined the safeguards in place for criminal investigatory proceedings, and demonstrated the regularity of the proceedings and the court's adherence to the law and its respect for due process.

25. The Republic also noted that the court overseeing the investigation, over the protest of the prosecuting authority, ultimately *dismissed* all charges for legal insufficiency in June 2011, thereby demonstrating both the court's impartiality and independence — and the judicial system's capacity to self-correct when necessary.

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30 Claimants' Amended Track 2 Reply on the Merits ¶ 60.

31 *Id.* ¶ 61.

26. Claimants have not joined issue with any of these points. All that remains are references in Claimants' Annex C to the chronology of the criminal proceeding with no reference to its dismissal or the obvious effect that dismissal has had on any claim.

27. Finally, having previously asserted that the Republic secretly funded the Lago Agrio Plaintiffs through various government grants,[32] Claimants now offer no response to the Republic's explanation that those grants were procedurally proper and issued for specific purposes unrelated to funding the litigation.[33]

28. The allegations that putatively justified the institution of these Arbitration proceedings in the first place — the "Núñez scandal" and the criminal prosecution — have now been quietly dropped by Claimants. And Claimants have rushed to replace their defunct claims with new ones before the dust settles — which the Republic is once again compelled to expend considerable time and resources investigating. The case Claimants now plead bears little resemblance to the case they pled originally in their Notice of Arbitration and even in their initial Memorial on the Merits. No doubt Claimants will seek yet again to change the premise of their claims, either based on allegedly new evidence or to address the National Court's decision (or perhaps a future Constitutional Court decision) notwithstanding their commitment not to.

C. Claimants' Remaining Accusations Are Refuted By The Contemporaneous Evidence

29. Having abandoned many of their previous accusations, Claimants push forward with two principal assertions, neither of which is in their initial Memorial on the Merits (filed September 6, 2010). **First**, they contend that the Lago Agrio Plaintiffs covertly "ghostwrote" the judgment of the first-instance court, notwithstanding Claimants' failure to seek redress under

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32 Claimants' Supplemental Merits Memorial ¶ 12 n.30.

33 Republic's Track 2 Counter-Memorial on the Merits, Annex F, § VII.

Ecuador's Collusion Prosecution Act. **Second**, they try to impute to the Republic the Lago Agrio Plaintiffs' alleged misconduct in having their own environmental experts draft substantial portions of the expert report and appendices of the court-appointed independent global damages expert, Richard Cabrera. Claimants make this latter assertion notwithstanding that: (1) Mr. Cabrera was not a government employee acting for the Republic; (2) the Court expressly disclaimed reliance upon Mr. Cabrera's reports; and (3) Claimants do not contend that the Court knew that Mr. Cabrera had allegedly violated his sworn duty of independence.

30. *Alleged Ghostwriting of the Lago Agrio Judgment.*[34] After four years of arbitration, Claimants now allege — as their primary ground for a finding that Ecuador breached the BIT and is liable for a denial of justice — that the Lago Agrio Plaintiffs' counsel ghostwrote Judge Zambrano's 188-page decision issued on February 14, 2011. As this Rejoinder demonstrates, Claimants not only have failed to satisfy their heavy burden of proving corruption, but the evidence conclusively establishes the opposite — that the Plaintiffs did *not* write the judgment and that Claimants' assertions are *false*.

31. While Claimants have relied on the Plaintiffs' email traffic in their effort to show their involvement in preparing parts of Mr. Cabrera's report, Claimants can point to no comparable evidence in the Plaintiffs' emails or hard drives even hinting at the existence of a ghostwritten judgment. The contemporaneous emails instead show that the Plaintiffs had no involvement in the drafting of the Lago Agrio Judgment.

32. The Republic has recently discovered emails — long in Claimants' possession but which they deliberately did not share with this Tribunal — that affirmatively disprove Claimants' ghostwriting theory. These candid emails show that just weeks before the Lago

[34] For Respondent's full response to these allegations, *see infra* § IV.

Agrio Judgment was issued, Plaintiffs' counsel was seriously concerned about who would prevail in the litigation and was also in the dark about when — even in what year — the Judgment would issue. On December 31, 2010, a mere six weeks before the Lago Agrio Court issued its Judgment, the Plaintiffs' lead Ecuadorian attorney, Pablo Fajardo, emailed Mr. Donziger expressing his concern that the Plaintiffs had not yet submitted their *alegato* (final written memorandum of law) to the Court:

> [N]o one knows when the Judge may issue his judgment; he could do so within two weeks, or within many months or even years. If he does so many months from now, the judge may possibly consider the legal reports [informes en derecho]; but if the judge issues his judgment soon, the document will remain in our hands and will be useless. We will not run this risk.[35]

Mr. Fajardo concluded his email by noting: "I'm sorry my friend, but we are behind schedule with this memorandum of law, which could have serious consequences for the case."[36]

33. One week later Chevron submitted its own *alegato*, prompting even more panic in the Plaintiffs' camp. Pablo Fajardo wrote to the other members of the Plaintiffs' Ecuadorian legal team:

> As you can see, my concerns are well founded. Chevron has gotten ahead of us by filing their alegato, while we are still writing ours. All the more reason to speed up our work, otherwise the Judge could be convinced by Chevron's theory.[37]

34. Another of the legal team, Julio Prieto, emailed his colleagues: "I can't believe they beat us! What is their hurry?" Pablo Fajardo responded:

> The one who strikes first has greater success or causes greater impact . . . . They want to influence the judge with their theory. It

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35 R-896, Email from P. Fajardo to S. Donziger, et al. (Dec. 31, 2010).

36 *Id.*

37 R-897, Email from P. Fajardo to S. Donziger (Jan. 8, 2011).

> is a mistake on our part to have fallen asleep for so long on the *alegato*.[38]

35. Thus, as of January 8, 2011, a mere five weeks before the Judgment was rendered, Plaintiffs' counsel not only had no idea when the court might issue its Judgment, but expressed concern that the Court, having been persuaded by Chevron's earlier defense *alegato* in combination with the Plaintiffs' tardiness in submitting their own, might rule adversely. The contemporaneous concern shown by the Plaintiffs' counsel in their candid inter-attorney emails is fundamentally irreconcilable with Claimants' allegation here that the Plaintiffs had already struck a deal with Judge Zambrano that allowed them to draft the Court's Judgment. Quite the opposite, the Plaintiffs' counsel's contemporaneous internal emails, clearly drafted and sent without the slightest thought that Claimants would one day obtain them under a U.S. court subpoena, establish that the Plaintiffs' legal team knew neither the timing nor the substance of the forthcoming Judgment.

36. Chevron earlier referred to these very emails in a "Fraud Timeline" submitted to the Southern District of New York hearing Chevron's case against the Plaintiffs, but opted to *delete* these same references in their comparable "Fraud Timeline" submitted with their Reply to this Tribunal.[39] It was thus evident to Claimants that these emails contradicted their claim of "ghostwriting."

37. In the absence of any direct evidence corroborating their claim of "ghostwriting," Claimants are forced to rely upon facially misconstrued emails obtained from the Plaintiffs' U.S. lawyers. They suggest that Joseph Kohn, a Philadelphia attorney who had originally been part of Plaintiffs' legal team, had intended to draft the Judgment. The foundation for this suggestion is

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[38] *Id*.

[39] *Compare* R-990, "Judgment Fraud Timeline," *filed in* RICO (Jan. 28, 2013) at 23 of 30 *with* "Judgment Fraud Timeline," Claimants' Track 2 Reply on the Merits, Annex D at 17-18.

the acknowledged fact that in 2009 — two years earlier — Mr. Kohn, a highly regarded attorney, politician, and mediator, had considered whether, if allowed by local court procedure, the Plaintiffs might submit a "proposed judgment" with the Court. But Mr. Kohn, who was never named in Chevron's RICO action, recently gave deposition testimony that he was unable to determine whether the submission of a proposed judgment, commonly filed in bench trials in other legal systems, would be procedurally appropriate in Ecuador.[40] As a result, such considerations never went beyond the exploratory stage and no proposed judgment was ever drafted.

38. Claimants offer no answer for their failure to obtain or produce a single draft or outline of any "ghostwritten" judgment allegedly authored by the Plaintiffs' counsel for Judge Zambrano's signature. Nor have Claimants produced any email exchanges or documents even hinting at a ghostwritten Judgment. As previously noted, Claimants have long been in possession of all of Mr. Donziger's hard drives and all the confidential and privileged documents of his U.S. co-counsel and associates, including all inter-attorney email correspondence with their Ecuadorian co-counsel. Claimants have obtained rulings of waiver of privilege and subjected Mr. Donziger's hard drives to the type of expert forensic analysis which surely would have located such a draft judgment — or at the very least provided confirmation that someone on the Plaintiffs' legal team had drafted the Judgment — if there were any truth to Chevron's new "ghostwriting" theory.

39. There is a simple reason why Claimants have failed to produce a draft or an outline of the Lago Agrio Judgment in the Plaintiffs' counsel's files: There was none to find because the Plaintiffs' counsel did not draft the Judgment.

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[40] R-900, Kohn Dep. Tr. (June 6, 2013), *taken in* RICO at 366:8-367:8.

40. Claimants instead point to the Judgment's unattributed verbatim quotations supposedly excerpted from certain legal memoranda drafted by the Plaintiffs' counsel. These memoranda were produced by the Plaintiffs to Chevron as part of U.S. discovery procedures, but Claimants contend they were never part of the official Lago Agrio court record. From that, Claimants extrapolate the conclusion that the Plaintiffs' counsel must have authored the Judgment.

41. Claimants have once again made very serious allegations while in possession of documents that irrefutably disprove them. The Republic only recently obtained from the Plaintiffs' counsel a significant portion of internal documents they were ordered to produce to Claimants, who, for their part, rely on only a handful of these documents in support of their "ghostwriting" allegations. The Republic has discovered numerous internal contemporaneous emails showing that the Plaintiffs generally prepared these legal memoranda for the express purpose of filing them, transparently and openly, with the Lago Agrio Court during designated judicial inspections, either in hard copy or on disk. Under this procedure, the absence of the Court's clerical receipt stamp on these documents would not have been surprising. Video evidence taken during the judicial inspections confirms the widespread submission of documents in just such a manner during various judicial inspections.

42. For example, as evidence of the Plaintiffs' alleged "ghostwriting" of the Judgment, Claimants have relied upon the Judgment's excerpts from certain documents in the Plaintiffs' subpoenaed production, which Claimants contend were never properly filed with the Lago Agrio Court. This includes the so-called "Fusion Memo" (a memorandum prepared by the Plaintiffs describing the Texaco-Chevron merger)[41] and the "Clapp Report" (a report drafted in

[41] *See, e.g.*, Claimants' Supplemental Merits Memorial ¶¶ 5-11; Claimants' Amended Track 2 Reply on the Merits ¶¶ 39-44.

2006 by Richard Clapp regarding the link between the release of oil contaminants and adverse health effects).[42] According to Claimants, the fact that these documents allegedly cannot be found in the official trial record, but instead were found in the Plaintiffs' counsel's files, conclusively establishes that the Plaintiffs' counsel drafted the Judgment. In so arguing, Claimants deliberately ignore the Plaintiffs' contemporaneous internal emails that show, for example, that the Plaintiffs prepared the Fusion Memo for the express purpose of openly submitting it to the Court at the 2008 Aquarico Judicial Inspection.[43] Indeed, the Plaintiffs conducted a presentation on Chevron's merger with Texaco at that judicial inspection and submitted accompanying documents to the Court that day.[44] Similarly, the Plaintiffs' internal emails from 2006 and 2007 show that Plaintiffs also always intended to and did submit the Clapp Report at a judicial inspection and did so at the 2007 Shushufindi Refinery Judicial Inspection.[45]

43. In the absence of documentary evidence, Claimants have recently sought to salvage their ghostwriting case by retaining Alberto Guerra, a former Judge who had earlier been removed "for cause" from the Ecuadorian bench. Claimants offered Mr. Guerra substantial sums of money in return for his testimony[46] and Mr. Guerra obliged. Mr. Guerra, like Chevron's contractor, Diego Borja, was content to sell his testimony to Claimants in exchange for the promise of an annuity and a new life in the United States for him and his family.

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42 Claimants' Amended Track 2 Reply on the Merits ¶¶ 47-48.

43 C-1641, Email from J. Sáenz to S. Donziger, "RE: Memo Merger" (Nov. 15, 2007); C-1638, Email from J. Sáenz to S. Donziger (June 9, 2008).

44 C-1638, Email from J. Sáenz to S. Donziger (June 9, 2008); R-660, Lago Agrio Record, Cuerpo 1309 at 140787-814 (Acta from JI of Aguarico 2); C-1642, Email from G. Erion to S. Donziger (June 13 2008); R-530, Lago Agrio Record, Cuerpo 1308 at 140701 ("Protocolizacion" noting submission by Pablo Fajardo at the inspection site and attaching the Fusion Memo exhibits).

45 R-901, Email from R. Kamp to R. Clapp (Mar. 13, 2006); R-902, Email from S. Donziger to D. Fischer (July 10, 2006). *See infra* § IV.F.3.

46 R-853, Chevron Offered Suitcase Full of Cash to Former Ecuador Judge Guerra in Exchange for Testimony (May 1, 2013)*; see also* R-854, Dumb Chevron Lawyer Tapes Himself Offering A Bribe In Ecuador (May 1, 2013).

44. By his own account Mr. Guerra promised Claimants that he had a pre-issuance copy of the Judgment on a thumb drive on his computer, which he would provide to them as part of the bargain. In fact, after being paid, Mr. Guerra conceded that he did not actually have a thumb drive copy of the Judgment, claiming instead that he mistakenly remembered having had a copy. In the story's latest iteration, Mr. Guerra explains that he never had such a thumb drive because he now remembers only having seen the Judgment on someone else's computer — a computer to which he only had access over two days in January 2011. There is, of course, no corroborating evidence.

45. Claimants contend that forensic evidence supports Mr. Guerra's claim that he was involved in ghostwriting draft orders for Judge Zambrano. In fact, all of the "draft orders" found on Mr. Guerra's hard drive were created there on July 23, 2010, *after* Judge Zambrano had issued the orders. Further, according to the Republic's forensic expert, "[n]othing in the provided forensic analysis indicates that the issued orders were created from the drafts found on Guerra's computer or that Guerra himself was the author of any of these orders."[47] The remaining circumstantial evidence provided by Claimants to bolster Mr. Guerra's testimony is equally devoid of any probative value. This includes Mr. Guerra's daily planner, which confirms only that at some point Mr. Guerra wrote a note about meeting with Judge Zambrano, more than nine months after the issuance of the Judgment, and Mr. Guerra's unauthenticated shipping records, which have no connection to Judge Zambrano's tenure as presiding judge in the Lago Agrio Litigation.[48]

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47 RE-18, Racich Expert Report ¶ 24.

48 *See infra* §§ IV.E.3.c, IV.E.3.d.

46. The forensics evidence lacks all probity without Mr. Guerra's testimony, but the testimony of a purchased witness who has lied (and been forced to admit his lies) similarly lacks all probity.

47. Claimants' "ghostwriting" claim is built on a house of cards. There is no draft Judgment on the Plaintiffs' hard drives; the Plaintiffs' internal emails instead reflect an utter lack of knowledge regarding the date or substance of the soon-to-be-issued Judgment; and the documents relied upon by Judge Zambrano — according to the Plaintiffs' internal, contemporaneous emails and video evidence — were drafted with the intention of circulating the same during the judicial inspections. Nor is there any forensic evidence showing that the Plaintiffs prepared the Judgment, that former Judge Guerra prepared or even edited the Judgment, or that a draft judgment was sent by *any* outside party to Judge Zambrano.

48. *Use of the Cabrera Reports*.[49] Claimants have by now spent many millions of dollars on multiple investigative firms and well over US$ 36 million commencing dozens of Section 1782 discovery actions across the United States.[50] Notwithstanding this massive investment, the only evidence that Claimants can adduce that the Plaintiffs participated in drafting the Judgment is the Plaintiffs' own admission that their experts prepared parts of Mr. Cabrera's reports.

49. While *the Plaintiffs* and *Mr. Cabrera* may be called to answer for their conduct, the Respondent in this Arbitration is the Republic of Ecuador. There is no legal basis to impute Mr. Cabrera's or the Plaintiffs' conduct to the State.[51]

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[49] For Respondent's full response to these allegations, *see infra* § V.

[50] R-903, Jones Decl. (Mar. 5, 2012), *filed in* RICO; R-904, Heckert Decl. (Mar. 5, 2012), *filed in* RICO.

[51] Even if the State were responsible, the Court's decision to discard the Cabrera Reports would have constituted a judicial self-corrective measure, thus eliminating any alleged actionable conduct by the State.

50. Judge Zambrano, for his part, chose to *disregard* Mr. Cabrera's opinions in reaching his decision. And notwithstanding Claimants' intimations to the contrary, the expert opinions expressed in Mr. Cabrera's report were but a small part of the evidentiary record in this case, and the Court — which lacked any knowledge of the alleged cooperation between the Plaintiffs and Mr. Cabrera — acted well within its discretion to consider the remaining expert reports, the vast volume of data, the testimonial evidence, and the site-specific facts that the Court witnessed first-hand and which were entered into the record during dozens of judicial inspections.[52]

51. No doubt recognizing this, Claimants' Reply Memorial relies on Mr. Cabrera's reports as "propensity" evidence, i.e., arguing that because the Plaintiffs ghostwrote parts of Mr. Cabrera's report, they must have ghostwritten the Lago Agrio Judgment. But the evidence only demonstrates the opposite. While Plaintiffs' counsel's internal emails constitute the underlying evidence of the Plaintiffs' effort to draft parts of the Cabrera Reports, those same internal emails show that they had *no* relationship with Judge Zambrano, that there were *no* draft judgments provided to Judge Zambrano, that they had *no* knowledge of Judge Zambrano's intentions, and in fact, that they were very concerned that Judge Zambrano might rule in Chevron's favor.

52. The challenges facing a little courthouse in the equatorial rainforest in hearing one of the largest environmental disputes in history were immense. No doubt some filed documents were not stamped or logged in as protocol warrants in a court record that exceeded 250,000 pages. But the evidence is plain that the Plaintiffs' counsel did not draft the Judgment.[53]

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[52] C-931, Lago Agrio Judgment at 104-117, 179-184.

[53] Claimants also assert that the Lago Agrio Court misapplied Ecuadorian law. The legal points of law have been raised on appeal, have been decided in the ordinary course, and to the extent applicable, may be subject to a further action in the Constitutional Court. In any event, a court's error of law cannot be the basis of a denial of justice or treaty breach unless the error is outside the "juridically possible." *See* R-172, Excerpt from Opinion of Jan

53. *Chevron's responsibility for environmental contamination.*[54] Claimants' assertion in this Arbitration that there is no pollution in the Oriente today caused by TexPet is plainly wrong. The Republic has retained its own independent experts from the Louis Berger Group ("LBG") to make their own assessment of the pollution and its causes. They conclude that 25- and 30-year old crude oil components, which can only have been dumped into the Oriente by TexPet, continue to wreak havoc in the Amazon, seeping through the ground and into the streams, contaminating drinking water and causing harm to humans, animals, and plants. The Lago Agrio Court clearly witnessed this in over forty judicial inspections, and we reiterate and reaffirm our invitation to the Tribunal to witness the same through a site visit.

54. This summer and fall, the Republic's experts from LBG traveled to Ecuador and performed extensive analysis on five well sites and visual inspection of an additional thirteen sites. LBG's analysis confirmed the persistence of contamination caused by TexPet and the fact that that contamination continues to migrate away from where TexPet left it and affect the people living in the Oriente. LBG found pure crude oil floating on the water in monitoring wells they installed, almost completely unweathered crude oil buried in stream and swamp sediments that rose in the water just by walking in the stream, and clear migration pathways that crude oil is actively following from TexPet's pits to the people living in areas surrounding the well sites.

55. Although it is in Claimants' interest to downplay their role in the contamination of the Oriente, it is incumbent upon this Tribunal to appreciate the scope of the environmental tragedy that took place there, to master the facts underlying the legal proceedings in the Lago

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Paulsson submitted on behalf of Claimants in *Chevron Corporation and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. AA277 ¶ 70 (emphasis added).

[54] For additional discussion of Chevron's environmental contamination, *see infra* § II.

Agrio Litigation, and to consider the volume and quality of evidence introduced to the Lago Agrio Court, including the evidence introduced at the dozens of judicial inspections.

D. Claimants' Pressure Tactics Have Tainted The Evidence On Which They Rely

56. Rather than address the environmental tragedy in their home courts, Claimants spent nearly a decade (from 1993-2002) seeking to persuade, ultimately successfully, the United States District Court for the Southern District of New York to dismiss the *Aguinda* case so that the Ecuadorian courts could adjudicate the dispute. Once moved to Ecuador, Claimants immediately sought to use their overwhelming economic muscle to manipulate the Ecuadorian legal processes that they had once touted as fair and adequate to the task. As shown below, the pattern continues to this day.

57. For illustrative purposes, we have identified thirteen events taking place in Ecuador and/or in the United States that reflect a pattern of Claimants' conduct that not only evidences their "win at all costs" attitude, but simultaneously undermines the credibility of the testimonial evidence they have offered.

58. **First**, Chevron orchestrated at least a portion of the surreptitious recording of its environmental testing contractor's meetings with Judge Núñez, and then launched its massive public relations campaign wrongfully accusing Judge Núñez of soliciting bribes and issuing a preordained Judgment. This had the result of compelling Judge Núñez to recuse himself and further delaying adjudication of the underlying environmental dispute. The last recorded meeting with Judge Núñez occurred just days ***after*** Chevron had flown Diego Borja to California for a meeting with a multitude of its attorneys and investigators. He then returned to Quito and made another recording.[55]

[55] R-324, Letter from T. Cullen to Dr. D. García Carrión (Oct. 26, 2009) at 8.

59. **Second**, Claimants have declined to comment on their contractor's admissions that certain of Chevron's testing laboratories were not independent. Nor do Claimants respond to Mr. Borja's admission that he, as Chevron's "sample manager," had personally swapped "dirty" Chevron judicial inspection samples for "clean" samples before they were sent for outside laboratory analysis.[56] Claimants have not said a word about these admissions in their Reply Memorial. Instead, Claimants rewarded Mr. Borja with more than US$ 2.2 million in financial benefits.[57] Claimants' experts, in turn, have testified under oath at deposition that their only verification that samples were not swapped is that the results of analysis were as they expected.[58]

60. **Third**, just as Claimants financially rewarded Mr. Borja for his efforts on their behalf, former Ecuadorian Judge Alberto Guerra has now testified under oath that in the summer of 2012 Chevron's retained investigator and attorney solicited his cooperation by showing — and offering — him a backpack filled with cash to demonstrate to him that Chevron would pay any price for his cooperation.[59] In exchange for his "cooperation," Chevron initially paid Mr. Guerra US$ 18,000 for his evidence; then another US$ 20,000 and a new laptop; then another US$ 10,000; and has since agreed to pay him an additional stipend of US$ 10,000 a month for 24 months (US$ 240,000 in total); a "housing allowance" of US$ 2,000 a month for 24 months (totaling another US$ 48,000); relocation costs for Mr. Guerra, his wife, his son, and his son's family; health insurance for Mr. Guerra, his wife, his son, and his son's family (no estimate

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56 R-189, Amazon Defense Coalition, *Key Witness Testifies that Chevron Paid Bribes, Switched Soil Samples in $27b Ecuador Lawsuit*, PETROLEUMWORLD.COM (June 11, 2010) at 2.

57 *See* Respondent's Track 2 Counter-Memorial on the Merits, Annex C, § A.1.

58 R-905, Douglas Dep. Tr. (Oct. 29, 2013) at 59:11-22.

59 R-906, Guerra Dep. Tr. (May 2, 2013) at 162, *taken in* RICO; *see also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 118:13-122:23 (stating that Chevron's investigator and attorney offered him money they brought to the meeting in a briefcase). For additional discussion of Claimants' payments to Guerra, *see infra* Section IV.

given); a purchased automobile (US$ 22,838) and auto insurance; payment for an immigration attorney for him and his family, including his son who is currently in the United States illegally; payment for a personal attorney and translator in the United States; and for Ecuadorian Counsel to represent Mr. Guerra in any civil or criminal actions in Ecuador.[60] And, as they did for Mr. Borja, it is likely that Chevron will pay for a tax attorney and all of Mr. Guerra's tax obligations resulting from the compensation listed above. For Mr. Borja this benefit alone amounted to hundreds of thousands of dollars. Chevron and Mr. Guerra have yet to negotiate Mr. Guerra's compensation package when the current arrangement expires after two years. As it stands, however, the package of benefits extended to Mr. Guerra is many times his Ecuadorian annual salary of roughly US$ 9,500 when he was a judge.[61] In all, his compensation will likely far exceed that paid to Mr. Borja. With an unlimited war chest, Claimants continue to motivate witnesses on the basis of financial incentives. This purchased testimony is inherently unreliable, but, as Chevron's attorney explained to Guerra, "money talks."[62]

61. The propriety of incentivizing witnesses to testify with promises of significant financial benefits is, to say the least, highly dubious, and is discussed later in this Rejoinder. For now, we ask this Tribunal to consider how Claimants would characterize the identical payments to a witness if the source of the payment had been the Plaintiffs' counsel. The problem for this Tribunal (and for any finder of fact) is that a witness who is paid for his cooperation has a strong, inherent incentive to provide his benefactor with supporting testimony, regardless of its truth or falsity, no matter what the governing agreement says. Just as Mr. Guerra's and Mr. Borja's

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60 *See* Torres Expert Report, ex 82; R-898, Letter from Gibson Dunn to Smysker Kaplan & Veselka (May 1, 2013); R-908, Guerra Supplemental Agreement (July 31, 2013).

61 R-909, Certification of A. Guerra's Judicial Salary (showing Guerra's salary as a judge was US$ 792/month).

62 R-910, Rivero Dep. Tr. (Apr. 24, 2013) at 165-171; Torres Expert Report, Ex. 13 at 68 (Transcripts of Rivero-Guerra July 13, 2012 meeting).

concessions that each looked to sell his services to the highest bidder reflects on their credibility,[63] Claimants' willingness to expend obscene amounts of money to induce witnesses to "cooperate" reflects on *their* credibility.

62. **Fourth**, Claimants have not only paid critical fact witnesses, they also have resorted to pressure tactics to force witnesses to cooperate or otherwise face financial ruin. For example, Claimants deployed an army of public relations firms to mount an aggressive worldwide misinformation campaign devoted to destroying the careers of many people associated with the Plaintiffs' litigation and technical team, including Ann Maest and Douglas Beltman, formerly of Stratus Consulting (together, the "Stratus Parties"). Indeed, in a transparent attempt to compel capitulation, Chevron engaged in a systematic effort to contact and threaten the Stratus Parties' current and prospective clients.[64] Chevron also submitted a letter to the U.S. Environmental Protection Agency seeking Stratus' debarment that would have rendered Stratus ineligible for any and all contracts with the agency.[65] As most all of Stratus' work is on behalf of the national government, debarment would have crippled Stratus, if not destroyed it altogether.[66]

63. Ultimately, Chevron's pressure tactics worked, and the Stratus Parties agreed to enter into a "cooperation agreement" that obliged them to recant portions of their earlier opinions

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63 *See, e.g.,* Torres Expert Report, Ex. 13 at 68 (Transcripts of Rivero-Guerra July 13, 2012 meeting) (After being offered US$ 20,000, Guerra responds: "Couldn't you add a few zeroes?"); R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 125:8-12 ("I told them [Chevron's representatives] that I had been working for a number of months and that if they didn't pay me -- that I considered I needed $20,000 and if they didn't pay me, I wasn't going to continue working for that."); R-199, Transcript of Borja/Escobar Conversation (Oct. 1, 2009) (14:04:23) at 2-3 ("Of course, dude. Yes, I'm telling you; I have . . . I have something for this side and for the other side. I mean, either one of the two, you get it? . . . I'm a whore!").

64 R-911, Proposed Second Amended Answer, Counterclaims and Jury Demand (Dec. 21, 2012), *filed in* RICO at 91-122.

65 R-912, Letter from J. West, Gibson Dunn, to R. Pelletier, Debarring Official, U.S. Environmental Protection Agency (Feb. 8, 2011).

66 R-913, Beltman Dep. Tr. (Oct. 22, 2013) at 59-62.

and to affirmatively assist Claimants in the RICO case (against the Lago Agrio Plaintiffs) and in this Arbitration (against Respondent). As part of the cooperation agreement, Chevron agreed to take down its many websites devoted to discrediting Stratus. Paragraph 2 of that agreement states:

> Chevron agrees to remove the following content from its websites, blogs, and other internet media that Chevron directly controls: (1) the video entitled "Stratus Consulting's Role in Ecuador Litigation Fraud," currently available at http://www.theamazonpost.com/video; (2) "Boulder consulting firm, Stratus, may get no help from its insurance companies," currently available at http://www.theamazonpost.com/in-the-news/boulder-consulting-firm-stratus-mayget- no-help-from-its-insurance-companies; (3) "O Papel da Consultoria Stratus no Caso Fraudulento contra a Chevron," currently available at http://www.theamazonpost.com/portuguesblogs/o-papel-da-consultoria-stratus-no-caso-fraudulento-contra-a-chevron; (4) "O Papel da Consultoria Stratus no Caso Fraudulento contra a Chevron," currently available at http://www.theamazonpost.com/portugues-blogs/o-papel-da-consultoria-stratus-no-casofraudulento- contra-a-chevron-2; (5) "Stratus Consulting's Role in the Fraudulent Case against Chevron," currently available at http://www.theamazonpost.com/news/stratus-consultings-rolein-the-fraudulent-case-against-chevron; (6) "Law Week Colorado: A Bit Of A Jungle," currently available at http://www.theamazonpost.com/news/colorado-law-week-a-bit-of-a-jungle; (7) "In the News – Wizbang – Enviromental Scientist Caught Agreeing To Ignore Her Own Data, Make Up New Claims," currently available at http://www.theamazonpost.com/news/wizbangenviromental-scientist-caught-agreeing-to-ignore-her-own-data-make-up-new-claims; (8) "Center for Individual Freedom – Declining Stratus for Eco-Suits?" currently available at http://www.theamazonpost.com/in-the-news/center-for-individual-freedom-declining-stratus-foreco-suits; (9) "Shopfloor – Accused of Racketeering, Anti-Chevron Consultants Now Work for Feds on Gulf Spill," currently available at http://www.theamazonpost.com/in-thenews/ shopfloor-accused-of-racketeering-anti-chevron-consultants-now-work-for-feds-on-

gulfspill;
(10) "New York Times – Stratus Consulting, Defendant in Chevron Ecuador Lawsuit, Works as U.S. Government Consultant on BP Deepwater Horizon Spill," currently available at http://www.theamazonpost.com/in-the-news/httpbit-lykzahyv;
(11) the document currently located at http://www.chevron.com/documents/pdf/ecuador/Stratus-Consulting-Ruling.pdf;
(12) the document currently located at http://www.theamazonpost.com/wpcontent/uploads/20120618_Chevron-Reprint.pdf?;
(13) the portion of the post under "The Cabrera Fraud: Ghostwriting Supposedly Neutral Damage Reports" consisting of the entire text of the bullet point stating: "When the fraud was exposed in discovery proceedings…" currently located at http://www.theamazonpost.com/the-fraudulent-case-against-chevron-in-ecuador;
(14) the screenshot only used to click on the video called "The fraudulent case against Chevron in Ecuador Part2" and currently located at http://www.theamazonpost.com/video;
(15) a paid search result for "Stratus Consulting" that returns a link to www.theamazonpost.com. Chevron does not agree to remove any material unless it is specifically identified herein.[67]

64. **Fifth**, Claimants have sought, without exception, to discredit any person adverse to them. For example, they have attacked the lawyers at the international law firm of Patton Boggs for its representation of the Plaintiffs in U.S. litigation[68] and one of the Republic's attorneys in this Arbitration in their written submissions.[69]

65. **Sixth**, in addition to intimidating their opponents with financial ruin, Claimants have employed yet other pressure tactics. For example, Claimants have retained investigators to

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67 R-914, Stipulation of Voluntary Dismissal Pursuant to Court Order of April 8, 2013 (April 11, 2013), *filed in Chevron Corp. v. Donziger, et al*., Case No. 11-cv-00691 (S.D.N.Y.), Ex. A at 3-4.

68 *See* R-915, Chevron Corporation's Mem. Of Law in Support of Its Mot. For Leave to File Counterclaims (May 10, 2013), *filed in Patton Boggs LLP v. Chevron Corp.*, Case No. 12-cv-9176 (S.D.N.Y.).

69 Claimants' Letter to the Tribunal (Jan. 12, 2012) at 10-13.

follow the Plaintiffs' attorneys and witnesses,[70] and have repeatedly tried to intimidate them under threats that "cooperation" with Claimants would be far better for the witnesses than the "alternative."[71]

66. **Seventh**, documents publicized just last week show that Chevron has been, since at least 2005, actively "lobb[ying] the [U.S.] State Department with regard to the Lago Agrio dispute," including requests to "tie trade preferences" to the litigation and using the Andean Trade Preference Act as "a blunt instrument."[72] In response, the U.S. Undersecretary for Political Affairs, the State Department's fourth highest official, asked others in the State Department: "How can we best help Chevron in this situation."[73] At one 2007 meeting, as a harbinger of strategies to come, Chevron disclosed its plans to the U.S. Department of State that it intended "to focus on the judge that has [allegedly] committed several of the procedural irregularities, to try and get him to 'do the right thing.'"[74] Thus, while Claimants have repeatedly alleged in this proceeding that any statement made by any Ecuadorian official that expressed any sympathy to the indigenous plaintiffs' cause constitutes unlawful "collusion," Chevron has itself expended many millions of dollars to induce government officials of its own State to use "blunt" instruments in an effort to prompt Ecuador to interfere in the private-party litigation.

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70 R-916, Collins Decl. (June 5, 2013), *filed in* RICO; R-917, Javier Piaguaje Payaguaje's And Hugo Gerardo Camacho Naranjo's Motion To Compel The Production Of Documents Identified On Chevron's Late-Produced Privilege Log Of June 1, 2013 (June 6, 2013), *filed in* RICO.

71 *See* R-918, Dunkelberger Decl. (June 6, 2012), *filed in* RICO.

72 R-1067, Ted Folkman, *Lago Agrio: More Details On Chevron's Lobbying of the State Department, Letters Blogatory* (Dec. 12, 2013) at 1, 3; *see also* R-1061, R-1063, R-1068-R-1110 (documents regarding Chevron lobbying received by T. Folkman via Freedom of Information Act).

73 R-1067, Ted Folkman, *Lago Agrio: More Details On Chevron's Lobbying of the State Department, Letters Blogatory* (Dec. 12, 2013) (quoting R-1088, Email from N. Burns to T. Shannon et al. (Apr. 20, 2007)).

74 *Id.* (quoting R-1091, Email from K. Barr to L. Jewell (July 5, 2007)).

67. **Eighth**, Claimants have been less than candid in the legal fora in which they appear, and have deliberately hidden relevant evidence from both the Lago Agrio Court and this Tribunal when it suits their tactical advantage. For example, Chevron claims to have been approached by Mr. Guerra in 2009 with an offer to directly influence a future judgment, accompanied by the implicit threat to take this offer to the Plaintiffs if Chevron declined.[75] It was incumbent upon Chevron, if this story were true, to report this incident to a public authority such as Ecuador's *Consejo Nacional*, the public body charged with supervising the Ecuadorian courts and imposing judicial discipline. Instead, Chevron evidently calculated that it could profit from Mr. Guerra's overture by concealing that information until after the Judgment had been rendered. Indeed Claimants did not reveal this incident for four years, during which period it has submitted voluminous pleadings and countless letters to this Tribunal.

68. **Ninth**, as noted in the Republic's Counter-Memorial, Chevron conducted "pre-inspections" at numerous sites prior to conducting sampling at the various court-ordered "judicial inspections" sites.[76] While there is nothing *per se* improper about a pre-inspection, Chevron misused this procedure in an effort to pre-determine where "outside-of-the-pits" contamination may have migrated. It did so not to delineate the actual spread of contamination for further refinement and "pin-pointing" during the upcoming judicial inspections, but rather to avoid or at least minimize later sampling within contaminant plumes and thus to obtain mostly "clean" samples during those judicial inspections.

69. Aided by the results of its pre-inspection sampling, during the judicial inspections Chevron would in some instances systematically sample soil at the surface or at shallow depths after having determined from its pre-inspection that deeper soil at a particular site evidenced

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75 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 12.

76 Respondent's Track 2 Counter-Memorial on the Merits ¶¶ 98-104.

contamination. In other instances, during a judicial inspection Chevron would deliberately place sampling locations upstream of pits and on higher ground to avoid pollution that it had found downstream or on lower ground than those pits during its pre-inspections. Internal correspondence among Chevron's various in-house and testifying experts (and, indeed, a comparison of its experts' pre-inspection and judicial inspection data and reports) amply demonstrate that Chevron's "game plan," which was embodied in self-styled "Playbooks," was to manipulate its judicial inspection sampling test results (required to be filed with the Court) by its pre-inspection results (not filed with the Court).

70. The inescapable conclusion is that, while Chevron represented to the Lago Agio Court that its judicial investigation results were statistically "representative" of each site inspected, it knew that its sampling and analytic techniques were heavily and deliberately biased against uncovering pollution.[77]

71. **Tenth**, Claimants routinely make allegations that are not only false, but that they must *know* to be false since Claimants themselves are in possession of the very documents that prove the allegations' falsity. As explained above, Claimants have long been in possession of the Plaintiffs' emails showing that the Plaintiffs had no idea when or how Judge Zambrano would rule just weeks before the issuance of the Judgment. Claimants carefully excised any reference to those emails in its timeline to this Tribunal, although it had previously cited them to the New York court. Claimants likewise have long been in possession of the Plaintiffs' emails showing that the Plaintiffs drafted the "unfiled" Fusion Memo and Clapp Report for the purpose and with the intent of open distribution at the judicial inspections. Claimants nonetheless rest

[77] Until the commencement of this Arbitration, the Republic's outside counsel never had reason to review the science underlying the Lago Agrio case. With the assistance of competent environmental experts, the Republic affirms that substantial evidence establishes that pollution caused by Texaco Petroleum prior to 1990 remains a pervasive problem in the Amazonas and, to this day, continues to threaten the health and welfare of the local inhabitants. We stand ready to prove these claims at a site visit, should the Tribunal so agree.

their ghostwriting allegations on the basis that these documents were not part of the official court record, and they did so without any reference to these exculpatory emails. This pattern of conduct is explored in greater detail in Section IV of this Rejoinder on "Ghostwriting."

72. **Eleventh**, notwithstanding its representations to the *Aguinda* Court in New York that it wanted the case transferred to Ecuador to have the environmental claims adjudicated there, Chevron engaged in a systematic effort to delay adjudication of the environmental claims. In particular, Chevron filed thousands of pages of repetitious and unnecessary documents with the Lago Agrio Court in an effort to overwhelm it.

73. With similar purpose, Chevron repeatedly filed multiple and often identical motions within minutes or hours of one another so as to force the presiding judge to rule on each submission within the limited time allowed him under Ecuadorian procedural law. This would force the presiding judge into statutory recusal when unable to respond to each successive motion within the time required under the procedural rules. Respondent noted in its Counter-Memorial that on October 14, 2010, as one example, Chevron filed 39 motions within a 50-minute window, each of which addressed different aspects of a single court order issued on October 11, 2010.[78]

74. By engaging in a strategy of systematic delay, Chevron has not only sought to avoid a judgment and ultimate responsibility for TexPet's pollution, but it also hoped that time and weather would together minimize the evidence against it in recognition that hydrocarbons tend to degrade over many years. That evidence of pollution still exists in 2013 in significant quantities at sites that PetroEcuador has never operated serves as testament to the extraordinary damage that TexPet inflicted in the region.

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[78] Respondent's Track 2 Counter-Memorial on the Merits ¶ 149.

75. **Twelfth**, during the depositions of the Republic's environmental experts from LBG, Chevron further demonstrated its greater interest in "scoring points" than the truth. For example, while a Gibson Dunn attorney was deposing Kenneth Goldstein, Chevron's counsel asked Mr. Goldstein to identify a spreadsheet that Mr. Goldstein did not recognize. Chevron's counsel specifically and on the record represented that LBG had created this document to calculate the prospective unit cost of treating soil in unremediated pits. Using this document and this representation, Chevron's counsel then repeatedly and aggressively attempted to bully Mr. Goldstein into admitting that he had lied about his having calculated the true cost of pit remediation in Ecuador.[79] Contrary to Chevron's counsel's representation, and as later affirmed under oath by Claimants' expert Robert Hinchee, the spreadsheet in question had ***not*** been created by Mr. Goldstein or anyone at LBG, but rather by Sara McMillen, Chevron's chief scientist, for use by Robert Hinchee, one of Claimants' expert witnesses on remediation costs.[80] In fact, both Ms. McMillen and Mr. Hinchee were in attendance at Mr. Goldstein's deposition. Chevron's counsel was content to accuse Mr. Goldstein of lying when it had full knowledge that the person who had actually prepared the spreadsheet was sitting in the room on Chevron's side of the table.[81] Review of the relevant portion of the videotaped deposition of Mr. Goldstein shows both counsel's misrepresentation and his behavior.[82]

76. **Thirteenth**, Claimants have engaged in a massive effort to enlist third parties to propagate their allegations. Their efforts have included successfully lobbying the U.S. State Department to modify the Ecuador Human Rights Report to include language favorable to

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79 C-1671, Goldstein Dep. Tr. (May, 13, 2013) at 70:3-5.

80 R-919, Hinchee Dep. Tr. (May 17, 2013) at 283-285.

81 C-1671, Goldstein Dep. Tr. (May, 13, 2013) at 4; C-1672, Goldstein Dep. Tr. (May, 14, 2013) at 411 (listing S. McMillen and R. Hinchee as attendees).

82 R-920, Video Excerpt of Goldstein Dep. (May 13, 2013) at 69-79.

Chevron's positions,[83] enlisting "thought leaders" to post favorable comments on listserves and at conferences,[84] and employing scientists to flood scientific literature with Claimants' positions.[85]

77. Notwithstanding the Tribunal's understandable concern about the large volume of evidence in this Arbitration, it must not rely on the selective excerpts proffered by Claimants without considering in every instance the surrounding context. As prefaced here, and detailed below, the contemporaneous documentary evidence makes perfectly clear that the Plaintiffs did ***not*** ghostwrite the Judgment. Equally clear is that, whatever the deficiencies in the preparation of Mr. Cabrera's report, the Lago Agrio Court properly discounted those opinions. And just as the Tribunal should not rely upon selective excerpts in isolation, it should not rely upon *tainted* evidence, including testimony purchased or extracted from witnesses under pressure from Claimants or in reliance on reports and articles that are the result of Claimants' lobbying and public relations efforts. Money cannot purchase truth.

II. Widespread Contamination Still Persists Today In The Ecuadorian Oriente Today As A Direct Result Of TexPet's Practices

78. As set forth below, the Republic's environmental experts have recently confirmed that widespread contamination caused by TexPet continues to exist and to affect the people of the Oriente. Not only does LBG's data confirm contamination, Chevron's own data confirmed it in 2004-2007. Recognizing this, Chevron's longtime spokesman Kent Robertson conceded in December 2008 that Chevron does not deny "the presence of pollution and we don't deny that

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83 R-921, Ted Folkman, *Letters Blogatory, Chevron, Lobbying, and Lago Agrio*, Letters Blogatory (Oct. 4, 2013); R-922, Email from Chevron to Dept. of State (Dec. 8, 2009) at 4-5 (received by Letters Blogatory via FOIA from U.S. Dept. of State); R-923, Letter from Senators R. Wyden, R. Casey, Jr., R. Durbin, and P. Leahy to U.S. Trade Representative (June 25, 2009) (received by Letters Blogatory via FOIA from U.S. Dept. of State); R-924, Chevron Corp. Memoranda, Texaco Petroleum, Ecuador and the Lawsuit against Chevron (received by Letters Blogatory via FOIA from U.S. Dept. of State).

84 *See* R-412, Email to D. Wallace (April 17, 2012); Respondent's Letter to Tribunal (April 23, 2012).

85 *See infra* § II.D.7.

there were impacts."[86] And at the Sacha Norte 2 Judicial Inspection, Chevron's attorney Adolfo Callejas conceded: "Here, we already state in advance that harm exists, that there is contaminating material."[87] And before that, Fugro McClelland and HBT Agra, the auditors responsible for assessing TexPet's impact on the Oriente, confirmed widespread contamination in their respective reports of 1992 and 1993.[88] These concessions are hardly surprising; to the contrary, they merely reaffirm still-earlier conclusions reached by Harvard Medical School doctors, National Resource Defense Council researchers, and many others.[89]

79. Claimants nonetheless argue in this forum that the Republic cannot isolate contamination as having been caused *solely* by TexPet because of the passage of years and PetroEcuador's post June-1990 operations in the Oriente. **First**, the Republic has found numerous instances of contamination from "TexPet only" sites and pits, and thus can establish and has established TexPet's liability on this basis alone. But **second**, even where liability is uncertain between or among multiple tortfeasors, no defendant tortfeasor can escape liability by asserting uncertainty as to individual fault. Ecuador's Civil Code is clear: Claimants are jointly and severally liable for damages caused by contamination in the Oriente, even if PetroEcuador subsequently contributed to that contamination.[90] This legal issue will be addressed more fully in the Republic's later filings.

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86 R-925, *Rainforest lawsuit against Chevron gears up*, LOS ANGELES DAILY NEWS (Dec. 20, 2008).

87 R-926, Sacha Norte 2 JI Acta at 2.

88 *See* Respondent's Track 2 Counter Memorial on the Merits ¶¶ 70-82.

89 R-476, Letter from Texaco to NRDC (Dec. 27, 1990); R-500, NRDC's Environmental Allegations; R-483, *Oil: A Life Cycle Analysis of its Health and Environmental Impacts* (Paul R. Epstein & Jesse Selber, eds., Harvard Medical School March 2002).

90 The law regarding joint and several liability was of course known by Chevron's attorneys at the time. RLA-163, Civil Code of Ecuador, art. 2217; *see also* R-939, Bjorkman Outline of the Judicial Inspection Hearing for Sacha Norte 2 at 2. At the Judicial Inspection for Sacha Norte 2, for example, Chevron's attorney Adolfo Callejas recognized that the parties must "share any liability for purported harm." Iván Racines reiterated later to

80. Regardless of the 20-year delay that Claimants have engineered in the adjudication of their liability, the Lago Agrio Court's Judgment, as affirmed in part by Ecuador's National Court, is correct in substance as it relates to findings of liability for pollution. The judges who sequentially oversaw the Lago Agrio Litigation reviewed massive amounts of evidence, interviewed many residents of the Oriente, and directly observed the contamination from TexPet's operations that continues to affect people in the Oriente. The human health impacts and the damage to the environment affecting the Lago Agrio Plaintiffs are described in detail in the accompanying expert reports from the Republic's experts. The experts' findings are corroborated by the prior testimonies during the Lago Agrio trial and in interviews with Chevron of the residents in the affected areas, as well as the witness statements of three members of the affected communities, which are submitted herewith.[91] The weight of the evidence is overwhelming. TexPet's contamination has caused and continues to cause massive human health and environmental impacts on the Oriente.

A. The Standard Of Review Under International Law Requires Deference To The Lago Agrio Court's Intermediary Rulings And Judgment

81. The BIT of course does not give this Tribunal the powers of a court of appeal. Even Claimants' lead counsel in this Arbitration agrees: "The doctrine of state responsibility does not allow a claimant to seek international review of the national court decisions as though the international jurisdiction were vested with plenary appellate jurisdiction."[92]

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the Court that "as stated by attorney Callejas, there was not one tenant here, but two; two parties to a consortium, and therefore, all liabilities must be shared." R-926, Sacha Norte 2 JI Acta at 2, 4.

91 *See* R-1180, Guamán Witness Statement; R-1178, Jaramillo Witness Statement; R-1179 Curipoma Witness Statement; *see also* R-1177, Pallares Witness Statement (testifying to the effects of TexPet's contamination on the residents and land in the impacted area).

92 R-928, R. Doak Bishop and William W. Russell, *Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement*, 19 J. INT'L ARB. 505, 565 (2002). *See also* RLA-452, Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45(4) VA. J. INT'L L. 809, 847 (2005); CLA-7, *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2

82. Claimants' expert Professor Paulsson observed that "[n]umerous international awards demonstrate that [even] the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law."[93] Professor Paulsson cites to, among others, the *Deham* case, where the arbitral tribunal rejected the claimant's challenge to a decision by the Panamanian Supreme Court to set aside a settlement agreement on the grounds that it was contrary to Panamanian law. Paulsson explains that "[w]hat needs to be stressed is that the Commission refused to substitute its judgment for that of the Panamanian courts" and that this case "illustrates the powerful general rule that the final interpretation of a municipal law should be left to the municipal judiciary."[94]

83. This Tribunal's power of review is limited to whether the Judgment is within the "juridically possible."[95] As we show below, the Judgment, now confirmed by the National Court, is comfortably within the juridically possible based on all the evidence — scientific and testimonial — that the Lago Agrio Court received and considered. This is demonstrated beyond any doubt by (1) LBG's recent confirmation of contamination in the Oriente that could *only* be the result of TexPet's operations, (2) Chevron's awareness of that pollution through its own inspections, and (3) Claimants' attempts to hide that contamination from the Lago Agrio Court and this Tribunal. As the National Court has now held, the Lago Agrio Court was justified in

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(Award of October 11, 2002) (Stephen, Crawford, Schwebel) ¶ 126; CLA-315, *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 114 (Feb. 5, 1970) (Separate Opinion of Judge Tanaka); RLA-453, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39 (Oxford University Press 2008).

93 RLA-61, Paulsson, DENIAL OF JUSTICE at 82.

94 *Id*. at 75.

95 R-172, Excerpt from Opinion of Jan Paulsson submitted on behalf of Claimants in *Chevron Corporation and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. AA277 ¶ 70 (emphasis added).

finding that pollution existed and was caused by TexPet on the basis of the evidence on the record and as cited in the Judgment.

B. LBG Confirmed Continuing Existence Of Oil Contamination Attributable To TexPet

84. Claimants complain that the Republic's environmental experts failed to provide any independent verification of widespread contamination, noting that they had never visited Ecuador.[96] **First**, the Republic's experts know how to read data — and both the data already in the first-instance court record and the data Chevron chose not to introduce into that record plainly established the existence of widespread pollution. That much is clear no matter where the data is reviewed and considered.

85. **Second**, to address Claimants' concerns, the Republic's experts devoted approximately three months in the summer and fall of 2013 to visit sites in the Oriente and to perform extensive sampling of their own. Not surprisingly, given the data they had already reviewed, and as described in detail below (and in LBG's Second Expert Report), LBG verified that: (1) petroleum contamination continues to exist at each of the former Concession Area well sites visited and sampled by LBG; (2) pollution is directly attributable to TexPet's operations; and (3) there is every indication that the same results would be found throughout the Concession Area.

86. As a result, even putting aside the fact that TexPet is jointly and severally liable for all of the contamination to which it contributed,[97] LBG has confirmed that widespread contamination exists and that such contamination could *only* be the result of TexPet's operations:

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[96] Claimants' Amended Track 2 Reply on the Merits ¶ 33; Claimants' Track 2 Reply on the Merits, Annex A ¶ 4.

[97] The Republic will address joint and several liability in its supplemental submission on Ecuadorian law.

> [LBG's] investigations at these five well sites have demonstrated that, contrary to Chevron's assertions, groundwater and surface water resources (including sediment) are not free of chemical impacts, and soil impacts are not confined to localized areas within the oilfield facilities. Rather, they extend onto adjacent properties. Contamination resulting from Texpet's E&P activities was widespread and is persistent in the former Concession Area and presents potential exposures to both neighboring residents and to ecological resources. Moreover, [LBG] ha[s] demonstrated that Chevron's decision to forego detailed investigations of groundwater and surface water resources was biased by their flawed pre-suppositions about the nature and extent of contamination at such sites.[98]

[98] RE-11, LBG Rejoinder Report § 2.2.2.2.

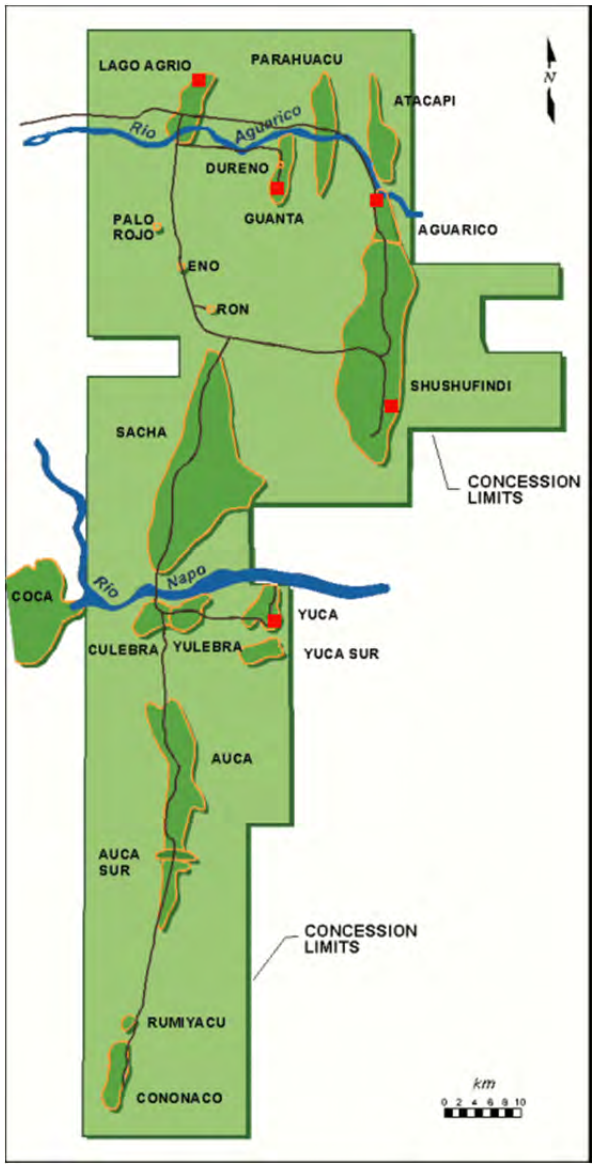

Figure II-1 Map of the Concession Area with red boxes marking approximate locations of well sites visited by LBG

87. As shown by the red boxes in Figure II-1 above, LBG visited five sites that were intended to be roughly representative of the various geographic regions in the Concession Area: (1) Lago Agrio 2; (2) Guanta 6; (3) Sushufindi 25; (4) Aguarico 2; and (5) Yuca 2. Each of these sites provided an opportunity for LBG to evaluate various aspects of TexPet's operations. Sampling and analysis conducted at each site during LBG visits confirmed the persistent and pervasive TexPet-caused contamination.

1. Lago Agrio 2: TexPet's Second Well Continues To Contaminate

88. Lago Agrio 2 ("LA-02") is ostensibly the second well that TexPet drilled in the Concession Area.[99] During its preliminary inspections ("PIs"),[100] Chevron identified four pits — three oil pits and one water pit — surrounding the well, and labeled them 1, 2, 3, and 4. Chevron confirmed during these PIs that [redacted] which was dug by TexPet sometime before 1976 and closed by TexPet in 1990, and that [redacted].[101]

89. By the time PetroEcuador took over LA-02 in 1992, Pits 2 and 3 had been closed for years. As a result, although PetroEcuador has continued to extract oil from the site, the pollution that has affected and continues to affect the residents was unquestionably put there by TexPet via their initial pits.

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99 The Lago Agrio field was the first field developed in the Concession Area. Wells generally are numbered in the order in which they are drilled and put into production.

100 As explained in further detail below, Chevron conducted preliminary investigations of its well sites months prior to the official judicial inspections. While the judicial inspections were attended by the litigants and the Court, the preliminary investigations were solely a Chevron operation. Chevron conducted three PIs at this site. R-929, Chevron's Lago Agrio 02 Judicial Inspection Playbook at GSI_0498199.

101 [redacted] This finding is not surprising. As Dr. Templet notes, studies beginning in the 1920s discovered that earthen pits, even if in clay, resulted in seepage of waste both horizontally out of the pit and vertically down into the ground below. RE-17, Templet Expert Report at 5.

Figure II-2 Chevron's PI map of Lago Agrio-02 showing four pits — three oil pits and one water pit — and preliminary inspection and judicial inspection sample locations.

90. In spite of its PI findings, Chevron's Judicial Inspection ("JI") report portrays a very different picture. Chevron did its best to conceal the origins of this contamination by not disclosing three of the four pits in its official JI report submitted to the Lago Agrio Court. As shown above in Figure II-2, [redacted] Yet Chevron's JI Report, shown below in Figure II-3, identified just one pit for the Court. Based on its PI results (which Chevron did not file or discuss with the Court), Chevron misleadingly elected to avoid identification of those locations it knew would demonstrate the existence of its contamination. For example, during the judicial inspection Chevron chose *not* to take any samples of the sediment in the nearby stream because its PI revealed [redacted]. And Chevron chose to take only shallow surface samples at Pit 3 — which Chevron did not even disclose as being a pit — because during the PIs Chevron found [redacted].[102]

[102] R- 929, Chevron's Lago Agrio 2 Judicial Inspection Playbook at GSI_0498196.

Figure II-3 Chevron's JI map showing only 1 pit.

91. The wide variety of potential future uses to which the land at issue might be put — such as residential homes, laundry, bathing, farming, and drinking — demonstrates the need to ensure that pits were remediated properly. For example, when LBG visited LA-02, it observed a house that had been built between the old oil well platform and the stream to the west. This house was not observed during Chevron's PIs or the JIs; it is within ten meters of contamination detected above the acceptable standard.[103] Based on observations and interviews made during the site visit, it is clear that the family who lives in the house can no longer use the contaminated stream for cooking, cleaning, and other everyday uses because it is contaminated. Yet, during its site investigation LBG witnessed the residents' children in the contaminated stream and pit area.[104] LBG has confirmed that the groundwater at this site has also been

103 RE-11, LBG Rejoinder Report § 2.2.2.1; RE-12, Strauss Rejoinder Report § 2.2.3.1.1.

104 *Id*., Site Investigation Report at RS-8 – RS-9.

contaminated (petroleum from Pit 3 was found floating on top of the groundwater in the monitoring wells installed by LBG). Figure II-4 shows the results of the initial mandatory purges of the water in a monitoring well located between Pit 3 and the nearby stream.

Figure II-4 Oil floating on the top of water purged from a monitoring well adjacent to Pit 3.

Figure II-5 Drainage pipe in side of Pit 3. The contaminated stream is immediately below the pipe.

92. LBG also confirmed that the contamination from Pit 3 has migrated hundreds of meters down the stream and continues to impact the sediments. LBG concluded that the oil found in the stream is identical to the oil found in Pit 3 based on, inter alia, the hopane/sterane fingerprint of the oil.[105] Downstream, where this contamination was found, local residents wade and float in the river to escape the heat in the afternoons.[106]

93. The human health impact from this contamination is significant. The highest cancer risk among all the sites evaluated by Dr. Strauss is at LA-02.[107] The excess risk of getting cancer among people who are exposed to the water and sediments in this location is an astonishing one in one thousand[108]; the World Health Organization benchmark for excess cancer risk is one in one-hundred thousand.[109] As a result of TexPet's contamination, anyone who lived at this site in the past, who lives there currently, or who may live there in the future will face significantly increased risk of cancer. Moreover, the exposure to toxins remaining from crude oil production results in increased risk of non-cancer health issues, including impaired kidney and liver function, debilitating central nervous system effects (such as dizziness, nausea, vomiting, confusion and disorientation),[110] reduced immune function,[111] increased risk of spontaneous abortion and decreased fetal weights.[112] Dr. Strauss notes that there was a greater risk of impacts

105 *Id*., Site Investigation Report at RS-9 – RS-10.

106 RE-12, Strauss Rejoinder Report § 2.2.3.1.1.

107 *Id*. § 2.2.3.6.

108 *Id*.

109 *Id*.

110 *Id*. § 3.3.2.3.

111 *Id*.

112 *Id*. § 3.5.2.

on pregnancies during TexPet's operations when large volumes of oil-containing formation water was intentionally dumped into local water resources.[113]

2. Guanta 6: Pit A Continues To Seep Contamination Into The Adjacent Swamp And Stream, Affecting All People Who Use And Live Next To The Stream

94. The Guanta 6 well is nestled in a flat area between two hills. To the west of the well, the ground drops dramatically to a flat area identified by Chevron's PI experts as "Pit A." According to Chevron's Playbook, Pit A [redacted][114]; the former flare can still be seen sitting on top of the pit.

95. Aerial photography indicates that Pit A was closed sometime before 1990.[115] PetroEcuador therefore never operated or performed operations at Pit A.

113 *Id*.

114 A flare pit is a pit dug in the ground to collect the unburned oil and water and any other wastes from the flare.

115 RE-11, LBG Rejoinder Report, Site Investigation Report at RS-21 – RS-22.

Figure II-6 Guanta 6: Chevron's PI map showing Pit A

96. During its PIs Chevron observed that [redacted].[116] When Chevron investigated that swamp it found [redacted].[117] Chevron's playbook documents that [redacted].[118]

97. But, as shown below in Figure II-7, when Chevron returned for the Judicial Inspection a little more than a month later, it did not identify Pit A for the Court (or even agree with the Plaintiffs that it existed).[119] Not surprisingly, and recognizing that as a general matter

116 R-933, Chevron's Guanta 6 Playbook, Executive Summary at GSI_0455055.

117 *Id.*

118 *Id*.

119 R-934, Chevron Guanta 6 JI Report at foja 117,762; *id*. at 117,770 (noting that the cleared area on the western side of the well in aerial photos does not show evidence of the existence of a pit).

contamination migrates downstream and downgradient, Chevron's experts chose not to take sediment samples *downstream* from or even adjacent to Pit A in an effort to conceal contamination. Chevron's experts instead took sediment samples *upstream* from Pit A (where they knew from Chevron's PI sampling that [redacted]), and surface water samples in a pond *uphill* and on the other side of the valley from the pit.[120]

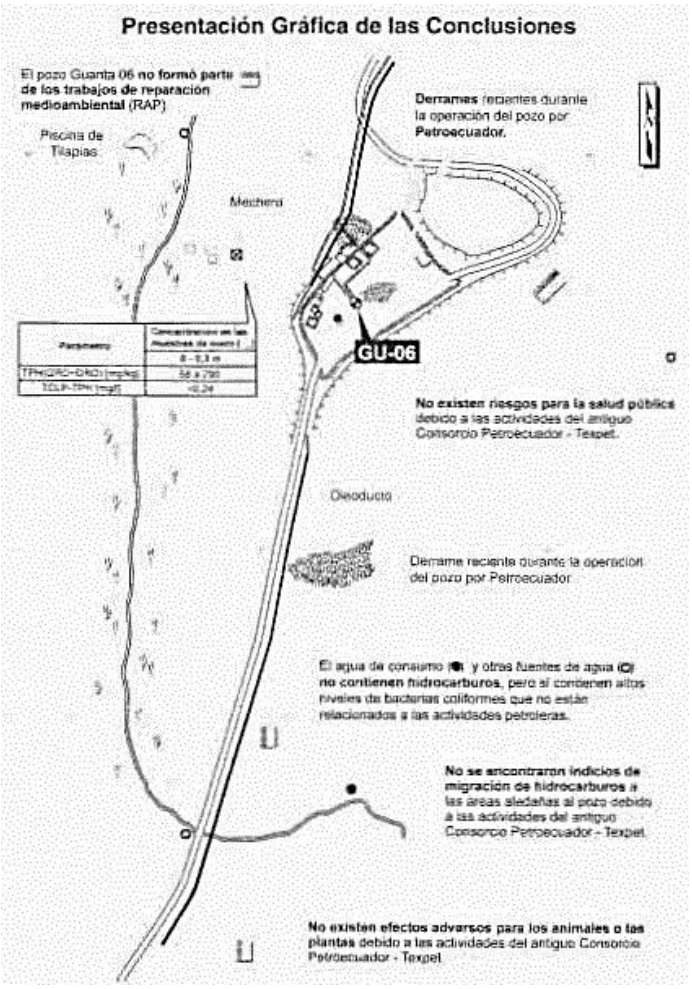

Figure II-7 Chevron's Guanta 6 JI map not showing Pit A

98. In the summer of 2013, LBG confirmed that Pit A still contains elevated levels of total petroleum hydrocarbons ("TPH"),[121] Polycyclic Aromatic Hydrocarbons ("PAHs"),[122] some

120 RE-11, LBG Rejoinder Report, Site Investigation Report at RS-23 – RS-24.

121 Total Petroleum Hydrocarbons ("TPH") is a measurement of the mixture of hydrocarbons found in crude oil.

metals, and phenols, and that those contaminants could still be found in the swamp sediments downgradient from the pit and in the surface water of the nearby stream.[123] LBG's tests confirm that Pit A was (and likely still is) a source of persistent contamination. Dr. Strauss' report found numerous exposure pathways between the people at this site and Texpet's contamination. The platform and surrounding wetlands are freely accessible to livestock and people. The contamination in the groundwater exceeds regulatory benchmarks and consequently puts all individuals exposed to the groundwater at a significant risk of getting cancer.[124] Moreover, as Dr. Strauss noted in her report, TexPet-caused contamination from Guanta 6 continues — more than 23 years after TexPet stopped serving as Operator of the Consortium — to affect individuals living downstream from the site who use the stream for drinking water.[125] Using this contaminated stream for drinking water puts the residents at increased risk for all of the ill-effects of ingesting crude oil and production water including stomach cancer, decreased immune function, impairment of kidney and liver function, decreased fetal weight,[126] and spontaneous abortion.[127]

3. Sushufindi 25: TexPet's Pits Continue To Contaminate The Water Source Local People Use Daily

99. TexPet began operating Sushufindi 25 ("SSF-25") in 1973. Over the course of its Exploration & Production operations, TexPet dug four pits at the site, three of which were oil

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122 PAHs are a family of compounds in crude oil, some of which have been identified as probable human carcinogens.

123 RE-11, LBG Rejoinder Report, Site Investigation Report at RS-24 – RS-25.

124 RE-12, Strauss Rejoinder Report § 2.2.3.6.

125 *Id*. § 2.2.3.1.2.

126 *Id*. § 3.2.2.2.

127 *Id*. § 3.5.2.

pits and were remediated under the RAP.[128] The other, a water pit, was remediated by PetroEcuador.

100. Despite TexPet's remediation efforts, Chevron's experts found [redacted]. [redacted] — four chemicals Chevron has claimed deteriorate quickly — [redacted]

101. During its PIs, [redacted].[129]

[128] The fourth pit TexPet declared as No Further Action ("NFA") because it was "used for dumping trash." R-956, Chevron's Shushufindi 25 JI Playbook at GSI_0478381.

[129] R-956, Chevron's Shushufindi 25 JI Playbook at GSI_0478381.

Figure II-8 Chevron's PI map for SSF-25

102. During its 2013 site visit, LBG confirmed that the contamination documented by Chevron in 2004 still exists and is continuing to spread. Groundwater continues to transport the petroleum hydrocarbons remaining in the pit into the stream and sediments. This puts the health of the people using the streams and sediments at great risk; the excess cancer risk due to exposure to groundwater at this location exceeds thresholds established by the World Health Organization and used by the Claimants' expert.[130]

103. Interviews of the residents in the area confirm that the people who live near the site use the stream as a primary water source for everyday household uses as well as for their livestock and agriculture. Up until at least through Chevron's PI, the stream was the only source

[130] RE-12, Strauss Rejoinder Report § 2.2.3.6.

of water for residents living at a nearby home.[131] Dr. Strauss' calculation found that due to exposure from this stream, local residents are at increased risk for impacts to health, such as reduction in red blood cell count, impaired liver and kidney function, and serious risks to pregnancy, including decreased fetal weight and spontaneous abortions.[132]

104. Additionally, the residents have planted numerous cocoa trees — trees with tap roots that commonly extend deeper than the clean cover Chevron verified during the PIs — in the area around pits 3 and 4 (the other remediated pits). These trees, which were not present when Chevron conducted its PIs, are another obvious example of the many future uses to which TexPet's sites can be put, but for which their sites are not suitable because they were incompletely (or never) remediated.

105. LBG also found contamination downstream from Pit 1 in the stream's sediment.[133] Contamination in this location is particularly troubling because a wooden structure has been built over the stream and LBG witnessed residents using this structure to gather and use the obviously contaminated water.[134]

4. Aguarico 2: Spillover From TexPet's Pits Continues To Contaminate Nearby Streams

106. Aguarico 2 ("AG-02") was never operated by PetroEcuador and it was one of the last wells closed by TexPet in May 1990, one month before TexPet ceased being Operator. Although all three pits at AG-02 were included in the RAP, the remediation of these pits was far from adequate.

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131 R-956, Chevron Shushufindi 25 JI Playbook at GSI_0478381.

132 RE-12, Strauss Rejoinder Report §§ 2.2.3.6, 3.3.2.3.

133 RE-11, LBG Rejoinder Report, Site Investigation Report at RS-13 – RS-14.

134 RE-12, Strauss Rejoinder Report § 2.2.3.1.3; RE-11, LBG Rejoinder Report, Site Investigation Report at RS-13.

107. During its PI for AG-02, a site that TexPet drilled in 1970, Chevron's experts found [redacted].[135] Chevron's samples revealed [redacted].

108. [redacted]

135 R-935, Chevron Aguarico 02 JI Playbook at GSI_0459415.

136 *Id*. at GSI_0459449.

137 RAOHE limits TPH as 1,000 mg/kg in soils for sensitive ecosystems. [redacted]

138 R-935, Chevron Aguarico 02 JI Playbook at GSI_0459460.

[redacted][139]

109. The video then [redacted] When LBG returned to AG-02 in 2013, six years after the video footage was taken, the contamination caused by TexPet's operations was still evident and at least one pit was still overflowing and contaminating the stream.

Figure II-9 2006 Aerial photograph of AG-02 with Chevron's pit delineations[140]

[139] R-427, Video from Aguarico 2 Pre-Inspection (Dec. 15, 2003). Chevron and its contractors took extensive video at JIs and PIs. *See generally* R-1122 – R-1175 videos produced by GSI, Chevron's environmental expert firm.

[140] R-935, Chevron Aguarico 02 JI Playbook at GSI_0459444.

Figure II-10 2013 Photograph of platform built for laundry downhill from oil seep at AG-02

5. Yuca 02: TexPet's Unremediated Spills Continue To Affect Residents Of The Oriente

110. [redacted] that a spill, which had occurred twenty years prior in the mid-1980s, [redacted][141] This contamination also was found in the JI, with a sample from this location resulting in a TPH (total petroleum hydrocarbons) as DRO (only those hydrocarbon molecules within the molecular weight range of diesel oil) level of 11,000 mg/Kg — a value well above any applicable standard.[142] But at the JI for Yuca 2, Chevron blamed this obvious contamination — [redacted] — on a spill that had occurred at Yuca 8 just the month before the JI and just weeks after the PI.[143] The spill

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141 R-936, Chevron Yuca 02 JI Playbook at GSI_0506970 (confirming that [redacted]). It is likely that the contamination continued much deeper into the marshland, though Chevron's team did not venture there.

142 R-937, Chevron JI Inspection Report for Yuca 02, Cuerpo 1174, Foja 127,285. This result is ***ten times*** the maximum allowed under RAOHE, and even exceeds Chevron's acceptable limit it proposed during the JIs of 10,000 mg/kg.

143 *Id*. at Cuerpo 1174, Foja 127,250.

at Yuca 8, however, was at a distance that made it an impossible source for the contamination at Yuca 2.

Figure II-11 2006 Aerial photograph of Yuca 02 (YU-02) with Chevron's pit and spill demarcations

111. LBG's initial tests in 2013 confirmed that the swamp or marshland was still heavily contaminated from TexPet's spill in the 1980s. On initial investigation just a few steps into the marsh, LBG found sediments saturated with oil just below the surface. LBG found oil seeping from the banks of the stream draining the marsh to the east. Stepping in the stream caused even more oil to rise to the surface and sheen on the water. LBG also found high levels of TPH, PAH, and metals in the soils surrounding one of the pits (Pit 1).[144]

112. Multiple families live near Yuca 2. As Dr. Strauss discusses, the residents at Yuca 2 face the most significant risk of non-cancer health problems of the sites she analyzed.[145] They are at risk of impaired kidney and liver function, weakened immune system, and

144 RE-11, LBG Rejoinder Report, Site Investigation Report at RS-18.

145 RE-12, Strauss Rejoinder Report § 2.2.3.6.

spontaneous abortions.[146] The contamination present at Yuca 2 continues to affect people and unless remediated, will also impact the health of future residents.[147] Due to the exposure to TexPet's contamination, past, present, and future residents have a significant risk of impairment of their liver and thymus.[148]

C. Chevron's Own Investigations Demonstrate That TexPet's Contamination Persists

113. At various times Chevron has variously claimed that: (1) no pollution exists in the Oriente;[149] (2) all pollution that exists is localized;[150] (3) all pollution is so weathered that it is limited, confined, immobile and not dangerous;[151] and (4) all pollution that exists in the Oriente is PetroEcuador's responsibility.[152] But as confirmed by LBG and as Chevron's own data show, Claimants' positions are untenable and divorced from reality.

114. During its PIs, Chevron took over [redacted] different samples in its quixotic quest to find clean locations on which their JI experts might subsequently rely. Those PI samples paint a stark picture that Chevron sought to conceal:

- [redacted].
- [redacted]

146 *Id*. §§ 2.1.1.2, 3.3.2.3, 3.5.2.

147 *Id*. § 2.2.3.6.

148 *Id*. § 3.3.2.3.

149 Claimants' Track 2 Reply on the Merits, Annex A § II.D.

150 *Id*., Annex A § II.D.2.

151 *Id*., Annex A § II.D.1.

152 *Id*., Annex A § II.B.1.

153 R-963, Chevron Access Database 2013. PAHs — Polycyclic Aromatic Hydrocarbons — are a family of compounds in crude oil, some of which have been identified as probable human carcinogens.

154 *Id*.

- [redacted].

These sample results demonstrate that [redacted]

115. In their Reply Memorial, Claimants assert that (a) there is no widespread contamination in the Oriente, and (b) any limited contamination that may have existed did not impact humans, flora, or fauna. These assertions are premised upon numerous false assumptions, obfuscations, logical inconsistencies, and factual errors.

116. Claimants' argument depends on the exceedingly broad premise that "the extensive testing that Chevron, the Plaintiffs, and Ecuadorian agencies have conducted over the years shows that the environmental effects associated with TexPet's historical oilfield operations were confined within the immediate area of oilfield facilities."[156] This premise is false because:

- To actually find "clean boundaries" Chevron would have had to test soil deep into private land neighboring its former facilities;[157]
- Chevron's experts can be seen on Chevron's own videos of its PIs [redacted];
- Chevron's own sediment sampling data show that [redacted][158]
- Chevron's experts videotaped themselves discussing [redacted].[160]

155 *Id*.

156 Claimants' Track 2 Reply on the Merits, Annex A ¶ 64 (quotation marks omitted).

157 C-497, Sacha 6 Chevron JI Report, Executive Summary.

158 R-1129, Chevron video produced by GSI, labeled GSI_0786158_1.

159 R-933, Chevron JI Playbook, Guanta 6, at GSI_0455061.

160 R-427, Video from Aguarico 2 Pre-Inspection (Dec. 15, 2003).

- The Lago Agrio Plaintiffs' data similarly show that contamination migrated away from TexPet's facilities;[161]

- LBG's independent sampling conducted over the summer and fall of 2013 confirms that contamination which could only have been caused by TexPet continues to migrate and affect areas far from the immediate area of oilfield facilities.[162]

117. Claimants' attempt to overcome the evidence establishing that adverse effects from TexPet's operations migrated outside their pits is entirely unconvincing once analyzed. Claimants state that the "Oriente geology . . . prevent[s] surface spills or material in pits from migrating far from the source — vertically or horizontally."[163] As Chevron's own experts must know, and indeed have admitted, this statement is also wrong because:

- Geology throughout the oilfields in the Concession Area is not nearly as monolithic as Claimants allege. [redacted][164] [redacted][5] [redacted];

- Chevron's experts observed [redacted] due to TexPet's substandard pit design;

- Chevron's experts observed perched water — groundwater flowing through permeable soil on top of less permeable soil — that flowed out to springs, wells, or streams;[167]

- Chevron's experts observed [redacted][168]

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161 R-1119, Plaintiffs' Guanta 6 JI Report, Graphical Summary at GSI_0018987.

162 *See supra* § II.B.

163 Claimants' Track 2 Reply on the Merits, Annex A ¶ 65.

164 Loam is a type of soil that is a mixture of sand and silt with some clay.

165 *See, e.g.*, R-931, Chevron JI Playbook, Lago Agrio 06 Boring logs at GSI_0460935, GSI_0460937, GSI_0460939, GSI_0460943.

166 R-491, Video from Aguarico 2 PI.

167 R-927, Sacha Norte 2 JI Summary, (Bjorkman status report to Chevron), BJORKMAN00061701 at BJORKMAN00061704 (Dec. 12, 2005); R-1056, Bjorkman Deposition (Apr. 4, 2013) at 427:7-431:18.

168 R-950, Bjorkman Sacha Norte 1 JI Summary Notes (May 2, 2006), BJORKMAN00061691 at BJORKMAN00061692; R-947, Bjorkman Sacha Sur Summary Notes (May 2, 2006), BJORKMAN00061683 at BJORKMAN00061687.

- Even if earthen pits were placed in clay soil, industry research dating back to the 1930s shows that waste still seeps out from the pits even when they are surrounded by clay;[169]

- TexPet installed gooseneck pipes in the sides of its pits that continue to this day to allow contamination to flow out of pits and away from sites;[170] and

- LBG's sampling demonstrates that contamination flowed vertically down to the water table and then emerged in springs or the sides of streams.[171]

118. Claimants also suggest that the "weathering" of crude cures all ills: "Crude oil exposed to the effects of the environment . . . for a sufficient time will undergo significant changes in its initial composition and physical and chemical characteristics."[172] According to Claimants, this weathering effect "is particularly active in the Oriente due to the high temperatures and moisture."[173] While there is no disagreement that weathering can occur, the evidence shows that the oil has not completely weathered to an immobile state.

119. Claimants' conclusion that any contamination is weathered to a point of impotence is based largely on Dr. Douglas' weathering studies conducted on fresh Ecuadorian crude oil. But Dr. Douglas admitted under oath that these studies and their resulting conclusions were based on assumptions unrelated to any actual conditions in Ecuador.[174] And of the five most important criteria for weathering to occur — temperature, oxygen, surface area, bacteria, and nutrients — only one, bacteria, was known to be similar to that found in Ecuador.

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169 RE-17, Templet Expert Report at 5.

170 *See, e.g.*, *supra* § II.B.1. Figure II-5.

171 *See supra* § II.B.1.

172 Claimants' Track 2 Reply on the Merits, Annex A ¶ 66.

173 *Id.*, Annex A ¶ 66.

174 R-905, Douglas Dep. Tr. at 114:6-123:17.

120. Chevron's experts also rely on an article by O'Reilly and Thorsen — a paper Chevron was involved with drafting, a fact it does not disclose publicly[175] — to show that the samples taken in the Oriente are indeed weathered and therefore less mobile.[176] But of course O'Reilly and Thorsen found all samples to be scientifically weathered: As Dr. Short demonstrates, O'Reilly & Thorsen's samples *start out* 50% weathered, even fresh, unweathered crude oil.[177]

121. Putting theory aside, when LBG visited the Concession Area in 2013 it found as a factual matter that biodegradation had not occurred in some locations and had been arrested in others. As Dr. Short explains, the fact that LBG's analysis of partially weathered hydrocarbons in 2013 is almost identical to Chevron's observations from 2004-2008 indicates that the conditions in which the crude oil has been disposed of in the Oriente have arrested biodegradation.[178] When Dr. Hinchee opines that biodegradation continues today, he is just wrong.[179]

1. Chevron's Own Data From Preliminary Inspections Show Current And Persistent Contamination Caused By TexPet

122. During Chevron's PIs, its field personnel documented the contamination they saw and recorded the interviews they took in thousands of pages of notes. These notes record Chevron's PI teams' candid observations of conditions in the Oriente. The table below provides revealing excerpts from these notes.

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175 *See supra* § II.D.7. *See also, e.g.*, R-1117, Email from S. Mcmillen to R. Hinchee et al. re O'Reilly paper (Dec. 4, 2008).

176 Connor 2013 Expert Report at 22.

177 RE-13, Short Rejoinder Report § 4.1.2.

178 *Id*. § 4.2.

179 Claimants' Track 2 Reply on the Merits, Annex A ¶ 67; Hinchee 2013 Expert Report at 31.

Well	Site	Description	Date
Sacha	51	[redacted]	September 12, 2004
Sacha	85		September 12, 2004
Shushufindi	04		September 13, 2004
Lago Agrio	02		October 6, 2005
Guanta Production Station			September 29, 2005

123. Chevron's experts also wrote field reports that they sent back to their handlers at Chevron. For example, during the Sacha Norte 1 Production Station inspection the day before the Judicial Inspection there, Chevron's appointed expert Bjorn Bjorkman confirmed that [redacted]:

[redacted]

180 R-944, Sacha 51 Chevron Field Interview Form, GSI_0521579 (emphasis added).

181 R-946, Sacha 85 Chevron Pre-inspection Site Visit Summary, GSI_0521605.

182 R-948, Rene Bernier Notes from Pre-inspection Site Visits, GSI_0490721.

183 R-930, Lago Agrio 02 Pre-inspection Site Visit Summary, GSI_0552824.

184 R-949, Guanta Production Station Pre-inspection Site Visit Summary, GSI_0552590.

[redacted].

124. Similarly, Mr. Bjorkman informed Chevron about [redacted]:

[redacted]

125. During the Sacha Norte 1 Production Station pre-JI site assessment the day before the Judicial Inspection, Bjorn Bjorkman found "[redacted]

[redacted]

During the actual Judicial Inspection, when the Judge was present, Mr. Bjorkman was partially successful in concealing the pollution [redacted] but still found that (1) [redacted]

185 R-950, Bjorkman Sacha Norte 1 JI Summary Notes (May 2, 2006), BJORKMAN00061691 at BJORKMAN00061692 (emphasis added).

186 R-947, Bjorkman Sacha Sur Summary Notes (Mar. 12, 2006), BJORKMAN00061683 at BJORKMAN00061689 (emphasis added).

187 R-950, Bjorkman Sacha Norte 1 Summary Notes (May 2, 2006), BJORKMAN00061691 at BJORKMAN00061692 (emphasis added).

[redacted] and (2) [redacted]

[redacted]

[redacted]

D. Chevron Concealed TexPet's Contamination From The Lago Agrio Court

1. Chevron's Preliminary Inspections Were Not Authorized By The Lago Agrio Court

126. Claimants represent in their Reply that the Lago Agrio Court was "very much aware that both parties were conducting pre-inspections."[189] As support, Claimants cite to what they erroneously call a "Chevron Motion to the Court."[190] But this so-called motion does not support Claimants' position. "Chevron's Motion to the Court" is actually a court order directing that a letter be sent to at least two facility owners (of the Shushufindi Refinery and the Palanda Station), asking them to provide access to their facilities for the upcoming Judicial Inspections. Chevron does not request — and the court order does not reference — even the possibility of gaining access before the Judicial Inspection.[191] Claimants' own documents confirm that Chevron knew that neither facility was included in the PI process. This is yet another example of

188 *Id*. at BJORKMAN00061693 (emphasis added).

189 Claimants' Track 2 Reply on the Merits, Annex A ¶ 88.

190 *Id*.

191 C-1789, Providencia, Mar. 19, 2007, at 8:30 (Record at 127,045). Moreover, Claimants' documents confirm that [redacted]

Claimants citing to documentary evidence that fails to support the proposition for which it is cited.

127. Chevron's internal memoranda further belie Claimants' current assertion that the PIs were authorized and not clandestine. On August 28, 2006, Roberto Landázuri led a PI team to Yulebra 01. Once there, [redacted] Instead of showing the authorization Connor claims the team had,[192] Chevron's team [redacted] (DINAPA is a part of the Ecuadorian Ministry of Energy and Mines).[193]

128. On the single occasion when the Lago Agrio Plaintiffs conducted pre-JI site assessments (one week in advance of the very first Judicial Inspection) the stated purpose was only to verify their sampling procedures — not to guarantee or skew any results.[194] And unlike Chevron, the Plaintiffs did not take samples from locations involved in their pre-JI site assessments for purposes of the official Judicial Inspection itself and indeed openly marked the locations at which they sampled.[195]

129. Paradoxically, Chevron vigorously objected to the Plaintiffs' exercise. The day before the Sacha 6 JI, Chevron went so far as to ask that the Sacha 6 JI be cancelled or postponed precisely because the Plaintiffs had conducted sampling outside of the JI process. According to

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192 R-1057, Connor Dep. Tr. Vol. I (Nov. 7, 2013) at 92:2-93:17.

193 R-1066, Memorandum from GSI to Chevron re Pre-Inspection at Yulebra Production Station/Yulebra 01 well site (Sept. 6, 2006) at GSI_0437948.

194 C-186, Calmbacher Dep. Tr. (Mar. 29, 2010) at 47:7-48:5, 52:19-25.

195 R-127, Judicial Inspection *Acta* for Sacha 6 (Aug. 18, 2004) at 8727 ("We do not intend to obtain samples from the holes that have already been drilled, but rather to go to an undisturbed site, drill holes, extract samples, proceed to analyze them at the field laboratory and obtain the other necessary samples to send to the laboratories."); *see also id*. at 8726 ("[W]e have collected soil samples, but not covertly, which is why there are cement markers . . . . If our intent had been to deceive, if our intent had been to conceal, then we would never have left markers or we would have tried to remove them.").

Chevron, any sampling or inspections not in the presence of the Court was illegal. Because of Plaintiffs' sampling days before, Chevron claimed that the "sites have been unlawfully altered, which makes it impossible to comply with any procedural steps therewith evidentiary force."[196] Chevron went so far as to claim that Plaintiffs' actions were "a violation of rights to legal security and the due process of law provided for in Article 23(26) and (27) of Ecuador's Political Constitution." Not only were they illegal, Chevron argued, but "Plaintiffs' 'furtive' actions by themselves constitute a severe environment negative impact whose magnitude is unknown."[197]

130. The day after their Court filing, at the Sacha 6 Judicial Inspection, counsel for Chevron expressly assured the court that "no technical team from ChevronTexaco Corporation has performed any secret tests here."[198] Yet by that time Chevron's experts had conducted PIs at least [redacted] sites and taken over [redacted] samples.[199]

131. The Court in fact permitted both parties to enter the facilities to familiarize themselves with the site a *day and a half before* most JIs.[200] In contrast, and as described elsewhere, Chevron's typical PIs involved sampling taken during multiple visits to a particular site months before the JI.

132. Claimants and their expert John Connor allege that their secret PIs, which occurred months in advance and on the same scale as the JIs, were necessary because otherwise "it would have been impossible to perform all of the analyses that the experts were ordered to

196 R-962, Chevron Escrito 17 de agosto 2006, 17H30, c 79, f. 8455 ¶ 6.

197 *Id.* ¶ 5.

198 R-127, Judicial Inspection *Acta* for Sacha 6 (Aug. 18, 2004) at 8704.

199 R-963, Chevron Access Database.

200 R-947, Sacha Sur JI Summary, (Bjorkman status report to Chevron), BJORKMAN00061683 at BJORKMAN00061687 (Mar. 12, 2006).

perform."[201] This claim is misleading and in fact belied by Chevron's own experts' contemporary observations.

133. **First**, it is misleading because Chevron never submitted any of its PI analyses to the Court; the PIs cannot have been necessary to perform court-ordered analyses if their results were never submitted. And, the experts were not "ordered to perform" any analyses until the JI itself. Thus, what is impossible is that the PIs were necessary to perform analyses the experts were not yet ordered to conduct.

134. **Second**, Mr. Bjorkman's contemporary summary of the Sacha Sur JI proves otherwise:

[redacted].

135. Similarly, during the Sacha Norte 1 inspection Mr. Bjorkman reported back to Chevron that:

[redacted]

201 Claimants' Track 2 Reply on the Merits, Annex A ¶ 83.

202 R-947, Sacha Sur JI Summary, BJORKMAN00061683 at BJORKMAN00061687 (Mar. 12, 2006) (emphasis added).

203 R-950, Bjorkman Sacha Norte 1 Summary Notes (May 2, 2006), BJORKMAN00061691 at BJORKMAN00061693. Additionally, at the Sacha Sur JI Mr. Bjorkman observed that: [redacted] R-947, Sacha Sur JI Summary, BJORKMAN00061683 at BJORKMAN00061688 (Mar. 12, 2006).

136. Both Sacha Sur and Sacha Norte 1 were production stations, which were the largest and most difficult type of site to analyze. The fact that Mr. Bjorkman had more than enough time at these sites shows Mr. Connor's justification for Chevron's extensive program is baseless.

2. Chevron's Preliminary Inspections Located "Clean Spots" So That It Could Avoid Sampling "Dirty Spots" During The Judicial Inspections

137. Knowing TexPet's practices had contaminated the Oriente,[204] Chevron created the PI program to ensure that [redacted][205] Recognizing that some contamination would be found regardless, Chevron's Playbooks instructed [redacted][206] [redacted] Chevron's strategy at the JIs was to blame the Oriente residents for TexPet's contamination.

138. To accomplish its goal, Chevron's experts used their knowledge of the different sampling techniques available, their experience, the PI results, and their on-site observations to avoid taking samples of polluted soil or groundwater during the JIs. [redacted][207] [redacted]

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204 Beginning in the 1930s, the oil industry was on notice that earthen pits were unable to contain contamination. And the oil industry itself — through the API — acknowledged as of 1944 that earthen pits should not be used. *See* RE-17, Templet Expert Report at 6-7. Moreover, as of 1972, Texaco had developed its own re-injection method. In its patent application for this new method, Texaco explained that "to dispose of [effluent streams] on or near the surface of the earth might cause considerable pollution problems." *Id.* Templet Expert Report at 13. *See also* R-1058, *Texas Co. v. Montgomery*, 73 F. Supp 527 (E.D. La. 1947), *aff'd*, R-1059, 68 S. Ct. 209 (U.S. 1947).

205 R-945, Chevron's Sacha 65 JI Playbook at GSI_0447915; *see also* R-957, Chevron's Shushufindi 27 JI Playbook at GSI_0446945; R-942, Chevron's Sacha 21 JI Playbook at GSI_0446556. Chevron's lab practices also put many of their "clean" results in doubt. Many of their samples were compromised because they were not sealed. Chevron's own lab personnel noted that the purpose of sealing the samples is to prevent people from tampering with them. R-1112, Rameriz Dep. Tr. (May 22, 2005) 249:4-7. Moreover, Diego Borja, a Chevron employees who was connected to Chevron's attempt to bribe an Ecuadorian judge, had access to all the samples. *Id*. at 130:18-131:7.

206 R-945, Sacha 65 JI Playbook at GSI_0447915.

207 *See, e.g.*, R-948, Rene Bernier Notes from PI Site Visit at GSI_0490724 ([redacted]).

[redacted].[208] Given the impressive array of resources Chevron marshaled for this task, the fact that Chevron nonetheless found contamination during the JIs confirms just how pervasive the contamination truly was (and still is).

a. Chevron Avoided Sampling *To Depths* At Which It Knew Pollution Existed

139. During the JIs, Chevron's experts sought to avoid finding pollution by sampling only to depths that it knew to be clean. For example, at Shushufindi 24, the soil boring log at pit 2 shows that during its PI, [redacted].[209] Then at the JI, Chevron strategically chose to take surface soil samples only — avoiding the known contamination below.[210]

140. Similarly, at a TexPet pit at Sacha 21, Chevron's experts found [redacted].[211] [redacted], Chevron chose to take samples at this pit only to depths of 1 meter during the JI.[212]

141. Chevron used this same technique at Lago Agrio 06. During its PI, Chevron discovered [redacted]

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208 R-945, Sacha 65 JI Playbook at GSI_0447915. At the Sacha 65 well site the "CVX Response" to the fact that "Rio Jivino Rojo may be obviously contaminated" was simple: "Do not sample if contaminated from upstream source. Will preview the day before the inspection."

209 R-953, Shushufindi 24 Soil Boring Log at GSI_0552700.

210 R-938, Clickable Database 2007, Shushufindi 24, General Description of Sampling Locations at 3.

211 R-942, Chevron's Sacha 21 JI Playbook at GSI_0446563 ("a deeper boring ~2 m deep encountered native soils below the former pit base with residual oil content").

212 R-943, Chevron's Sacha 21 Judicial Inspection Report, John Connor at Table 2.A. Even at 1 meter, there was evident contamination — Chevron found TPH as DRO at 1,700 mg/kg. SA-21-JI-PIT2-SB1-1.0M. During the PI, Chevron took at soil boring at this pit, but went down to 1.4 meters and found TPH as DRO at 4,900 mg/kg — nearly five times over the regulatory maximum. SA-21-PIT 2-S-1 (1.4M). R-942, Sacha 21 JI Playbook at GSI_446668. This PI finding was never submitted to the Lago Agrio court.

[redacted].[213] [redacted]

[redacted]

[redacted].[214] [redacted]

[redacted].[215] [redacted]

[redacted].[216] During the JI for this location, Chevron took only surface samples, thereby insuring that no contamination would be detected.[217]

142. There are numerous other examples in which this pattern is repeated.[218]

b. Chevron Avoided Sampling *At Locations* It Knew Were — And Still Are — Contaminated

143. Chevron also avoided altogether areas it knew from its PIs to be contaminated. For example, in its Playbook for Sacha 65, [redacted]

[redacted], [redacted]

[redacted].„[219]

144. Similarly, at Lago Agrio 02, Chevron [redacted]

[redacted][220] [redacted]

[redacted]

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213 R-931, Chevron's Lago Agrio 06 JI Playbook at GSI_0460859.

214 *Id.* at Table 2.A.

215 This result is close to violating Chevron's proposed JI standard of 10,000 mg/kg, which has no basis in any regulation and is not protective of human health.

216 R-931, Chevron's Lago Agrio 06 JI Playbook Boring logs at GSI_0460916, GSI_0460935, and GSI_0460937; *id.* at GSI_0460934 ([redacted]).

217 R-932, Lago Agrio 06 Chevron JI Report at Tables 2A, 2B. The deepest sample was at 1.9 meters. [redacted]

218 *See, e.g.*, R-938, Clickable Database 2007, Shushufindi 24, General Description of Sampling Locations; R-955, Shushufindi 24 Map of Chevron Rebuttal Sample Locations at GSI_0255107; R-964, Chevron Comparison Chart for TPH Samples at GSI_0539576, sample ID, RB-SSF24-PIT3-SD2-SU1-R.

219 R-945, Chevron's Sacha 65 Judicial Inspection Playbook at GSI_0447915 (emphasis added).

220 R-929, Chevron's Lago Agrio 02 Judicial Inspection Playbook at GSI_0498282.

[redacted][221][redacted][222][redacted][224] Not surprisingly, Chevron neglected to sample these three pits during the JI.[225]

145. Likewise, at Sacha 13 Chevron intentionally omitted from its JI report pits [redacted][226][redacted][227] Chevron's JI report, however, identified only 2 pits and ignored the other two completely.

221 *Id.* at GSI_0498198.

222 *Id.* at GSI_0498196.

223 *Id.* at GSI_0498256.

224 *Id.* at GSI_0498225.

225 [redacted]; *see* R-1061, Clickable Database, Summary of Sampling Locations, Lago Agrio 2.

226 R-940, Chevron's Sacha 13 JI Playbook at GSI_0492622.

227 R-941, Sacha 13 Rene Bernier Field Notes Excerpt at GSI_0490804.

[redacted]

Figure II-12, Image from Chevron's Clickable Database, 2006, Sacha 13, showing [redacted] pits

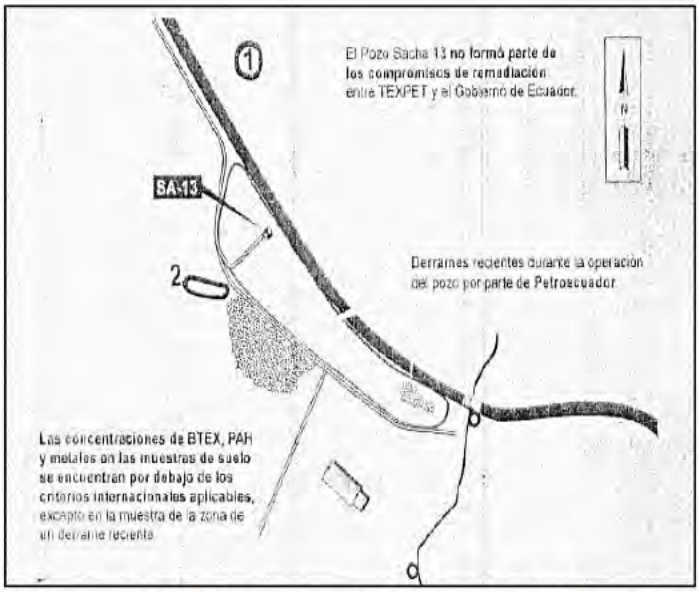


Figure II-13, Image from Chevron's JI Report to the Lago Agrio Court, Sacha 13, showing 2 pits

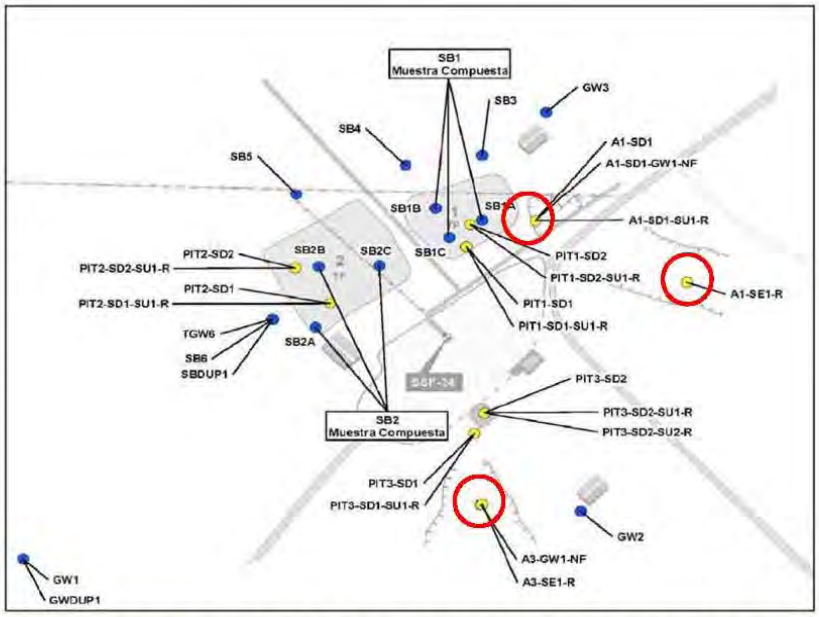
c. Chevron Avoided Sampling *Downgradient* From Known Contamination

146. Chevron repeatedly and deliberately chose during its JIs to sample "uphill" or "upgradient" from contamination [redacted] (fluids in the soil ordinarily flow [redacted]) in a calculated strategy to minimize findings of contamination. For example, at Shushufindi 24, TexPet remediated pit 2 as part of the RAP. [redacted][228] [redacted], when Chevron returned for the JI it chose to sample away from the drainage areas where the contamination would flow.[229]

228 R-952, Chevron's Shushufindi 24 Judicial Inspection Playbook at GSI_0452708.

229 The Plaintiffs found contamination in these drainages areas. *See* R-963, Access Database 2013.

Similarly, at Guanta 6 Chevron elected to sample a pond upstream from the well site and declared the area clean as a result.[230]



Puntos de muestreo en el pozo SSF-24, con los nombres de las muestras abreviados. Más detalles sobre estos lugares de muestreo se pueden encontrar en las Figuras 13, 14, 15, 16, 17 y 18, y en las Tablas 2, 3 y 4.

- Muestras recogidas por el equipo de muestreo del Ing. Baca.
- Muestras recogidas por el equipo de muestreo del Ing. Villacreces.

Figure II-14, Image from Chevron's Shushufindi 24 JI Report to the Lago Agrio Court showing that only Plaintiffs' expert, Ing. Villacreces, sampled in the drainage. Plaintiffs' drainage sample locations are circled in red.[231]

147. Chevron has expended tremendous sums on expensive experts, laboratories and technology. Armed with its deep resources, Chevron systematically and deliberately devoted time and money to detect where contamination exists and where it does not. Chevron then systematically did everything in its power to avoid sampling at the most contaminated locations, thereby seeking to minimize its findings of contamination, all the while contending that its anything-but-random JI samples were "representative" of the whole. They were not.

230 R-938, Chevron Clickable Database, Guanta 06, Summary of Sampling Locations.

231 *See* R-1062, Shushufindi 24 Chevron Judicial Inspection Report at GSI_0707254 (Chevron did take a duplicate sample at one of the three Plaintiffs' sample locations in the drainage areas; however, it was only a surface sample); *see also* R-1063, Clickable Database Map of Shushufindi 24 (marking the "drenaje"/drainage locations).

3. Chevron Obscured The Impact Of Alkyl-PAHs On Its Results And On Human And Animal Health

148. Polycyclic Aromatic Hydrocarbons are a class of chemicals present in crude oil which cause numerous health effects in humans including cancer and reduction in immune system effectiveness. Sixteen of these PAHs are often called the "parent PAHs" because they are the simplest form of a particular PAH. These parent PAHs can also be alkylated, meaning that an alkyl group[232] is added to the parent. In his first expert report, Dr. Jeff Short noted that Chevron excluded alkyl-PAHs from its analysis of contaminants at Oriente sites, and that as a result, Chevron failed to report the most abundant portion of PAHs present in crude oil — over 50%. As Dr. Short explained, the alkyl-PAHs that Chevron omitted from its analysis are:

- Less volatile and less water soluble and therefore more persistent in the environment;
- Often more toxic than other PAHs;
- 4-5 times more abundant in fresh crude oil than the PAHs Chevron discussed with the Court;
- Approximately 10 times or more abundant in weathered crude oil because they are less susceptible to weathering.

149. Claimants do not contest that parent PAHs account for a small proportion of the total PAH content of oil, or that alkyl-PAHs account for the vast majority of the remaining total PAH content of oil.[233] Rather, Chevron claims to have analyzed and presented alkyl-PAH data for all of its samples, and that regardless, alkyl-PAHs are not known to be toxic and that there are no environmental regulations for them.[234]

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232 An alkyl group is an alkane that has lost one hydrogen atom. For example, two common alkyl groups are methyl (CH_3) and ethyl (C_2H_5), which correspond to methane (CH_4) and ethane (C_2H_6).

233 RE-13, Short Rejoinder Report at 5.

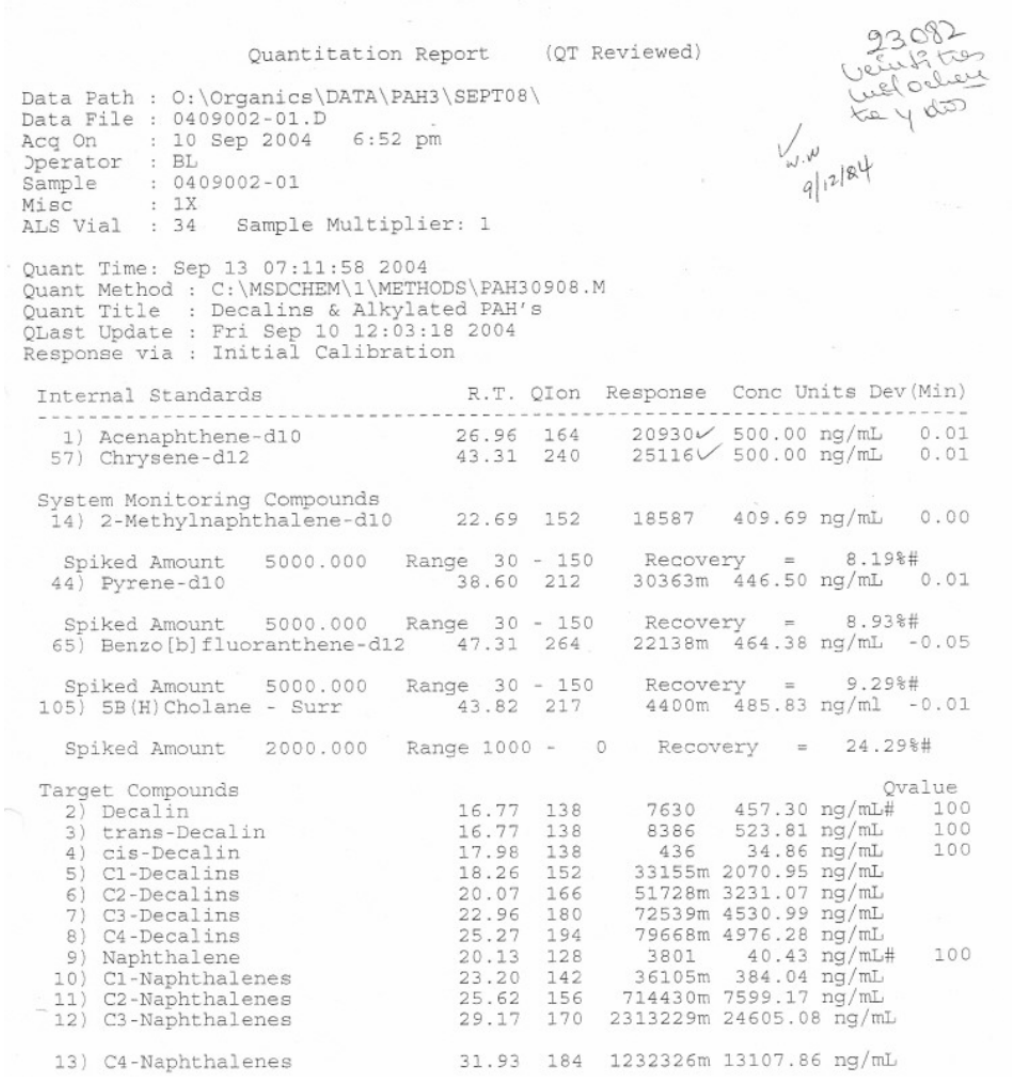
234 Claimants' Track 2 Reply on the Merits, Annex A ¶ 59.

150. Chevron is wrong. **First**, Chevron submitted alkyl-PAH analytical results at only the first eight JIs; it did not submit these results, even though it had them, at any of the remaining 33 JI sites.[235] **Second**, even with respect to these first eight sites, Chevron submitted only the detailed scientific analysis shown below in Figure II-15 buried in hundreds of pages of detailed analytical data.

151. **Third**, Chevron analyzed for alkyl-PAHs only for use in Dr. Douglas' biodegradation work.[236] *But Dr. Douglas did not discuss the alkyl PAHs in his biodegradation work.* Nowhere else do Chevron's JI reports provide any analysis of alkyl-PAHs.

235 Dr. Douglas testified that his laboratory analyzed all samples for alkyl PAHs and submitted the results to John Connor's firm, GSI. R-905, Douglas Dep. Tr. (Oct. 29, 2013) at 257:15-20. According to Dr. Douglas, GSI and its experts then determined what to submit or not submit to the Lago Agrio Court.

236 *Id.* at 256:4-14.



Quantitation Report (QT Reviewed)

Data Path : O:\Organics\DATA\PAH3\SEPT08\
Data File : 0409002-01.D
Acq On : 10 Sep 2004 6:52 pm
Operator : BL
Sample : 0409002-01
Misc : 1X
ALS Vial : 34 Sample Multiplier: 1

Quant Time: Sep 13 07:11:58 2004
Quant Method : C:\MSDCHEM\1\METHODS\PAH30908.M
Quant Title : Decalins & Alkylated PAH's
QLast Update : Fri Sep 10 12:03:18 2004
Response via : Initial Calibration

Internal Standards	R.T.	QIon	Response	Conc	Units	Dev(Min)
1) Acenaphthene-d10	26.96	164	20930	500.00	ng/mL	0.01
57) Chrysene-d12	43.31	240	25116	500.00	ng/mL	0.01
System Monitoring Compounds						
14) 2-Methylnaphthalene-d10	22.69	152	18587	409.69	ng/mL	0.00
Spiked Amount 5000.000	Range 30 - 150		Recovery =	8.19%#		
44) Pyrene-d10	38.60	212	30363m	446.50	ng/mL	0.01
Spiked Amount 5000.000	Range 30 - 150		Recovery =	8.93%#		
65) Benzo[b]fluoranthene-d12	47.31	264	22138m	464.38	ng/mL	-0.05
Spiked Amount 5000.000	Range 30 - 150		Recovery =	9.29%#		
105) 5B(H)Cholane - Surr	43.82	217	4400m	485.83	ng/ml	-0.01
Spiked Amount 2000.000	Range 1000 - 0		Recovery =	24.29%#		
Target Compounds						Qvalue
2) Decalin	16.77	138	7630	457.30	ng/mL#	100
3) trans-Decalin	16.77	138	8386	523.81	ng/mL	100
4) cis-Decalin	17.98	138	436	34.86	ng/mL	100
5) C1-Decalins	18.26	152	33155m	2070.95	ng/mL	
6) C2-Decalins	20.07	166	51728m	3231.07	ng/mL	
7) C3-Decalins	22.96	180	72539m	4530.99	ng/mL	
8) C4-Decalins	25.27	194	79668m	4976.28	ng/mL	
9) Naphthalene	20.13	128	3801	40.43	ng/mL#	100
10) C1-Naphthalenes	23.20	142	36105m	384.04	ng/mL	
11) C2-Naphthalenes	25.62	156	714430m	7599.17	ng/mL	
12) C3-Naphthalenes	29.17	170	2313229m	24605.08	ng/mL	
13) C4-Naphthalenes	31.93	184	1232326m	13107.86	ng/mL	

Figure II-15 Excerpt of one page of a 211-page Analytical Data Package that is the extent of Chevron's presentation of alkyl-PAHs to the Lago Agrio Court

152. **Fourth**, Chevron questions Dr. Short's conclusion that alkyl-PAHs are the most toxic PAHs based on a single study by Dr. David Page, et al.[237] What Claimants do not disclose is that Dr. Page's article was funded by Exxon Mobil Corporation in its decades-old attempt to avoid liability for the *Exxon Valdez* oil spill. In contrast, Dr. Short's study showing the toxicity of alkyl-PAHs is just one of many independent studies that have demonstrated alkyl-PAH

237 *See* Douglas Reply Report at 10 n.54.

toxicity in various marine biota.[238] Indeed, Claimants' own expert, Dr. Douglas, who now disavows any conclusion that alkyl-PAHs are toxic, said the exact opposite when he was not being paid by Chevron.[239] For work in the United States, Dr. Douglas reported that "Methyl-substituted PAHs tend to be much more mutagenic than the parents compound."[240]

4. Chevron Selected Testing Methods It Knew Would Not Accurately Detect Petroleum Contamination

153. Two of the testing methods most advocated by Chevron — Method 8015 and TCLP — are not appropriate for detecting all of the constituents present in crude oil and underestimate the amount of petroleum-based hydrocarbons in the environment.

154. The **Toxicity Characteristic Leachate Procedure ("TCLP")** test Chevron used to measure TPH in the soil was never intended for that use — it was created to measure water coming out of landfills — and as a result rarely returns positive results, even for samples demonstrated to have significant petroleum contamination. The fundamental problem with the TCLP test is what every child knows: Oil and water do not mix.[241] As Dr. Short explains in a more technical manner, the TCLP test could detect hydrocarbons only if they were literally dripping from the soil.[242] Even the U.S. EPA, the test's developer, cautioned against using the TCLP test to examine oilfield wastes.[243] Chevron's calculated decision to rely upon a test not

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238 RE-13, Short Rejoinder Report § 4.5.

239 R-1113, M. Donlan, G. Douglas, D. MacDonald, An Evaluation of the Composition, and Potential Environmental Fate and Toxicity of Heavy Venezuelan Crude Oil Released into the Delaware River During the *M/T Athos I* Oil Spill (Aquatic Technical Work Group for *Athos I* Spill, Oct. 2005) at 14-15.

240 *Id*.

241 *See also* R-1114, Robert Hinchee, Expert Report on Remedial Cost submitted to the Lago Agrio Court (Sept. 3, 2010) at 4 ("Crude oil, particularly the weathered crude in the Oriente, is viscous and does not easily mix with soil or water.").

242 RE-13, Short Rejoinder Report § 4.4.

243 R-1118, EPA, Report to Congress: Management of Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas, and Geothermal Energy, Vol. 1, Chapter II (1987) at II-42.

designed to measure TPH in the soil is consistent with its strategy to minimize evidence of contamination.

155. Even Claimants' own experts cannot justify the use of TCLP to measure TPH. Dr. Hinchee admitted in his deposition that he has never recommended the use of TCLP in any of his past remediations.[244] Indeed, despite the "vast" experience Claimants attribute to their experts,[245] Dr. Hinchee could not remember a single instance where he has recommended using TCLP to measure TPH.[246] Nor could he identify a single remediation anywhere in the world where TCLP was used to measure TPH.[247]

156. Like the TCLP test, **Method 8015** was never intended to measure crude oil contamination. Method 8015 was created to test for refined gasoline and diesel product. As a result, Method 8015 can detect only (approximately) half of petroleum components, i.e., the GRO and DRO ranges.[248] By relying upon its Method 8015 and counting only 50% of the petroleum product, Chevron deliberately skewed the results it reported to the Lago Agrio Court, both as to the mass of petroleum present and as to the extent the samples had been "weathered."[249]

5. Chevron's Use Of Composite Sampling Masked The Presence Of Contamination By Diluting Soil Pollutant Concentrations

157. Claimants' assertion that composite sampling is a "common oilfield investigation sampling method"[250] misapprehends the purpose of the JIs in the context of the Lago Agrio

244 R-919, Hinchee Dep. Tr. (May 17, 2013) at 185:16-186:1.

245 *See* Connor 2013 Expert Report at 6; Hinchee 2013 Expert Report at 1-2.

246 R-919, Hinchee Dep. Tr. (May 17, 2013) at 185:16-186:1.

247 *Id.* at 188:17-189:3.

248 RE-13, Short Rejoinder Report § 4.1.4.

249 *See supra* § II.C.

250 Claimants' Track 2 Reply on the Merits, Annex A ¶ 90.

Litigation. Composite samples are mixtures of soil taken from various depths to determine the *average* level of contamination. While a properly designed plan for composite sampling is an acceptable form of sampling to confirm whether a polluted area (like inside a remediated, well-mixed pit) has been properly remediated,[251] it is not designed to locate "hot spots" or contaminant migration away from pollution sites.

158. Chevron employed composite sampling for an improper purpose. By mixing contaminated samples with clean samples, it deliberately sought to create an acceptable *average* level of contamination. Chevron's habit of including fresh or clean soil in composite samples again is designed to achieve a preordained result, not to discover how far the pollution has spread.[252]

159. Dr. Hinchee's report uses the illustration of marbles in a sandbox to demonstrate how composite sampling will show a "representative analysis" of the concentration of marbles.[253] This illustration is inapposite because it assumes a homogenous distribution of marbles (or contamination) within the sand. The contamination that seeps or discharges from a particular source, such as a pit, however, generally follows a linear pathway downgradient from the source through sand or other porous layers, and would not be evenly distributed throughout the ground like Dr. Hinchee's marbles example. Rather than revealing evidence of the contamination path that has made its way out of the pit and is spreading through the environment, composite sampling masks the evidence of contamination. Moreover, the clean

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251 RE-10, LBG Report § 3.2.3 (The Republic and its experts acknowledge that there can be some value in composite sampling to "characteriz[e] the average concentration of large volumes of waste materials prior to or following remedial action.").

252 RE-11, LBG Rejoinder Report § 3.3.2.

253 Hinchee 2013 Report § 4.2.3, at 16.

portions of the sample would dilute the concentrations of dirty portions so as to present a false appearance of relatively clean soil throughout.

160. Claimants assert that "Ecuador's experts provide no basis to dispute" the use of composite sampling.[254] LBG's expert report accompanying Respondent's Counter-Memorial explained that "the use of composite sampling outside of pits should be avoided . . . because it dilutes observed concentrations of [contaminants] and blurs the differences in concentration from place to place which are necessary to understanding contaminant movement . . . away from the source."[255] LBG's most recent expert report expounds further on why Chevron's composite sampling was scientifically inappropriate (and thus inadequate).[256]

161. LBG's three-month site investigation found that composite samples in fact concealed the contamination that originated from both TexPet RAP remediated pits and TexPet non-RAP remediated pits, which now serve as continued sources of contamination to the environment.[257] Claimants' Reply fails to rebut the fact that its reliance on composite sampling outside of the pits was misleading and unjustified.

162. That Chevron used composite sampling to hide the severity of contamination cannot seriously be in doubt. At Yuca 02, for example, Chevron took a single bore composite as a "delineation sample"[258] outside of an old TexPet pit. In other words, it composited soil from different layers or levels from within the borehole. This sample, taken ***outside*** of a pit, by its very nature diluted the sample and concealed any evidence that the contamination was spreading.

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254 Claimants' Track 2 Reply on the Merits, Annex A ¶ 91.

255 RE-10, LBG Report § 2.6.1, at 25.

256 RE-11, LBG Rejoinder Report § 3.3.6.3; *Id.* § 3.3.2.

257 *Id.* § 3.3.6.3.

258 R-938, Yuca 02 Sample Location Descriptions, Clickable Database 2007 at 1 (*see* Sample ID: JI-YU-02-SB3-0.3M); R-963, 2013 Access Database results for sample JI-YU-02-SB3-0.3M.

163. It is also evident that Chevron used composite sampling to conceal contamination where it took a composite sample at the same location where the Plaintiffs had taken a grab sample (a layer from a boring that was not composited with other layers from the same borehole). For example, at Lago Agrio Norte Production Station, the Plaintiffs' grab sample revealed that the contamination was escaping from the site. This **grab sample** showed results of TPH as DRO/GRO of over 19,000 mg/kg.[259] On the other hand, Chevron's **composite sample** from the same location yielded a diluted TPH as DRO concentration of 3,100 mg/kg.[260] This is exactly why composite sampling is inappropriate: It conceals the migration of contamination and shows apparent compliance with standards when in fact a discrete sample would show an exceedance.

6. Chevron Blamed Health Problems On Causes Other Than Oil Contamination Despite Knowing Those Causes Were Not Sufficient

164. Chevron's strategy during the Lago Agrio Litigation was to deflect blame for any health impacts by highlighting the poor sanitary conditions in the Oriente. Chevron's JI Playbooks document its objective to [redacted][261] The Claimants continue this tact in their Reply. Dr. Connor asserts "streams in the Concession area ha[ve] shown highly elevated levels of total and fecal coliform" while showing no chemical impacts.[262] As Dr. Strauss demonstrates, however, any exposure to fecal coliforms "is not a good predictor of illness" because fecal coliforms are "not necessarily pathogenic."[263] In fact, the U.S. EPA does not use total and fecal coliforms tests to determine suitability of waters in the

259 R-963, 2013 Chevron Access Database results for Plaintiff Sample ID: LAN-ESTB-H1.

260 *Id.* at Sample ID: JI-LAN-ESTB-I-0.0M(SS).

261 R-942, Chevron's Sacha 21 Judicial Inspection Playbook at GSI_0446556.

262 Connor 2013 Expert Report at 37.

263 RE-12, Strauss Rejoinder Report § 3.2.1.2.

U.S. because it is not accurate.[264] Fecal coliforms are not a good predictive measure for stomach problems, nor is it predictive of skin rashes, headaches, spontaneous abortions, or excess cancer.[265]

165. Dr. Strauss acknowledges that some microbial contamination could exist given the use of streams by domestic and farm animals; she points out, however, that petroleum industry documents make plain that exposure to crude oil has an immunosuppressive effect, causing a reduction in the body's defense against infection.[266]

7. Chevron Actively Sought To Skew The Academic Literature With Authors Paid To Advocate Its Positions

166. Chevron's experts cite to articles by supposedly "independent" academics to support its scientific postulate that there is neither risk to human health nor environmental damage in the Oriente.[267] The independence of these studies, however, is questionable at best — Chevron had a coordinated plan to publish articles supporting its experts' contested scientific views. As one of Chevron's experts in the Lago Agrio Litigation, Dr. Kelsh, acknowledged, there was an effort to get Chevron's data "out in circulation in the scientific community."[268] And Chevron's expert in those proceedings, Mr. Bjorkman, stated that Chevron asked him "to publish the results of the terrestrial biodiversity study in the peer-reviewed literature."[269] Just as Chevron has attempted to get "thought leaders" to spread its message in the arbitral world, Chevron paid for and even wrote articles in the scientific literature.

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264 *Id.*

265 *Id.*

266 *Id.*

267 *See*, *e.g.*, Hinchee 2013 Expert Report at 9, 16; Connor 2013 Expert Report at 3, 22; Douglas 2013 Expert Report at 13.

268 R-965, Kelsh Dep. Tr. Vol. II (Feb. 6, 2013) at 21:9-17.

269 C-1797, Bjorkman Dep. Tr. Vol. I (Apr. 3, 2013) at 69:8-14.

167. In fact, Chevron [redacted].[270]

168. Chevron had a "rough draft prepared" for the topic of surface water risk to aquatic life and fish uptake, despite its recognized "[n]eed to find [an] external author." To date it had the support only of a Chevron employee.[271]

E. Chevron Continues To Conceal TexPet's Legacy Of Pollution From This Tribunal And The World With False Scientific Assertions

1. Naturally Occurring Clay In The Oriente Will Not Prevent The Spread of Contamination

169. Claimants allege that "the Oriente geology consists of thick clay soils, which are low-permeability, poorly draining soils, which prevent significant infiltration of rainwater."[272] According to Claimants' expert John Connor, "it is universally-recognized that these soils act as a natural barrier or liner to prevent surface spills or material in pits from migrating far from the source — vertically or horizontally."[273] Far from being "universally-recognized," Dr. Connor's opinion is in the clear minority.

170. The Bureau of Mines criticized the use of earthen pits as early as 1929, issuing a report finding that seepage from pits always occurs and that clay soils cannot contain the wastes

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270 *See* R-966, Chart of Chevron Sponsored Publications (Bjorkman) at BJORKMAN00061673; R-1115, Chart of Chevron Sponsored Publications (Kelsh).

271 R-966, Chart of Chevron Sponsored Publications (Bjorkman) at BJORKMAN00061673.

272 Claimants' Track 2 Reply on the Merits, Annex A ¶ 65.

273 *Id.*; Connor 2010 Expert Report at 3, 10.

due to the high salt concentrations in the produced water.[274] And a report in 1932 by the American Petroleum Institute (API) — which is hardly a bastion for environmentalists — noted: "We are only kidding ourselves when we think we can dispose of salt water by solar evaporation from earthen ponds."[275] This API report went on to conclude that seepage was occurring and the waste would eventually "find its way to fresh water sources, either surface or subsurface, and in such quantities as to be objectionable."[276] The evidence supporting these conclusions has only grown stronger since these early reports, which is why the API recommended the reinjection of produced water for all oilfield operations.[277]

171. There is no evidence that TexPet ever studied local soils to find clay deposits in which it could dig its pits. In fact, Claimants' other experts have confirmed that sandy soils persist as an active transportation pathway for contamination in the Oriente. At Sacha Norte 2, Mr. Bjorkman noted:

[redacted]

274 RE-17, Templet Expert Report at 5.

275 *Id*.

276 *Id.* at 5-6. *See also* Kaigler Expert Report at 8-9 (noting the risks with unlined pits and describing the standard industry practice not to use them).

277 Respondent's Track 2 Counter Memorial on the Merits ¶ 65 (citing API study from 1962).

278 R-927, Sacha Norte 2 JI Summary ([redacted] BJORKMAN00061701 at BJORKMAN00061704 (Dec. 12, 2005).

2. Scientific Certainty Is Not Necessary Before A Known Problem Should Be Addressed

172. Where (1) little is known about the harmful effects of a particular toxin and (2) the affected population is spread throughout a region that is geographically hard to reach, the traditional scientific paradigm, which requires conclusions based on replication and verification of the effects of a particular toxin, does not work. This does not mean, however, that no conclusions may be drawn or that the conclusions based on the available data are scientifically invalid.[279] To the contrary, studies and testimonials (such as those the Lago Agrio Court relied upon) are important indicators of risk. In fact, contrary to Claimants' assertion, most studies tend to *underestimate* the harm caused by the environmental hazard.[280]

173. Scientific studies tend to underestimate risk because their authors put a premium on certainty. However, this standard is likely to miss real-world occurrences of harm to health.[281] Scientists, like Dr. Moolgavkar, are able to exploit this traditional scientific paradigm by focusing on "null" results.[282] But null results do not mean negative results. Rather, a null result finding means only that under the traditional scientific paradigm there was not enough

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279 After all, the study by Claimants' own expert Dr. Kelsh is significantly flawed. The study selected the Oriente areas in which to sample the population for excess cancer based on visual inspection of the map. RE-15, Grandjean Expert Report at 7 (citing Kelsh et al., *Cancer mortality and oil production in the Amazon Region of Ecaudor 1990-2005*). In contrast, the San Sebastian study selected cantons based on where the oil industry had been most active for the longest time. *Id*. at 6. *See also* R-1121, Email from S. McMillen to M. Kelsh, et al. re SIISE Well Location Map (Dec. 2, 2006).

280 RE-15, Grandjean Expert Report at 10 ("The weaknesses and the incomplete nature of the available information suggest that the risk of adverse human health effects may in fact have most likely been seriously underestimated.").

281 *See* R-967, Philippe Grandjean, Science For Precautionary Decision-Making, Late Lessons From Early Warnings: Science, Precaution, Innovation at 633 (discussing the resistance to studies indicating the dangers of second-hand smoke).

282 Moolgavkar 2013 Expert Report at 17; Claimants' Track 2 Reply on the Merits, Annex A ¶ 96. *See also* Moolgavkar 2013 Expert Report; McHugh 2013 Expert Report, aptly titled "Expert Opinion of Thomas E. McHugh Regarding ***Lack of Evidence of Health Risks*** Associated with Petroleum Operations in the Former PetroEcuador-Texaco Concession Area." (emphasis added).

information to reach a "statistically significant" result.[283] Again, however, adverse effects are not absent just because they were not proven to a scientific certainty.[284] Absence of evidence is not evidence of absence.

174. Although multiple studies have detailed the short-term effects from oil spills on residents and clean-up workers, these studies have not examined the long-term effects.[285] But these studies do show that the short-term effects mirror what the indigenous residents of the Oriente have experienced, such as skin irritation and other skin problems, sore eyes, sore throats, headaches, and psychological problems.[286]

175. It is error, however, to conclude that there are no data. Substantial data demonstrates the ill-effect of many of the toxins contained in hydrocarbons, and additional data shows that the hydrocarbon remnants have caused and are continuing to cause serious health problems in the exposed population in the Oriente.

176. Although reaching a "statistically significant" conclusion for cancer is complicated by the fact that the period between first exposure and diagnosis can be thirty years or more,[287] significant excesses in cancer rates have in fact been shown.[288]

177. As Claimants' expert Dr. Kelsh acknowledged, cancer often takes decades to develop and even longer to diagnose.[289] This is especially so in regions where there is no

283 RE-15, Grandjean Expert Report at 11.

284 R-967, Philippe Grandjean, Science For Precautionary Decision-Making, Late Lessons From Early Warnings: Science, Precaution, Innovation at 631.

285 RE-15, Grandjean Expert Report at 5.

286 RE-12, Strauss Rejoinder Report §§ 1.2, 3.3.2.1.

287 RE-15, Grandjean Expert Report at 7.

288 *Id*. at 8-10.

289 R-965, Kelsh Dep. Tr. Vol. II (Feb. 6, 2013) at 328:19-332:17.

adequate healthcare system in place.[290] In fact, without adequate healthcare, cancer "may not be detected until death."[291] Accordingly, Claimants' early studies concluding that there were no excess cancer deaths are hopelessly flawed because they do not account for the disease's latency period. As Dr. Grandjean explains, studies in the Oriente show that diagnosed cases of cancer have shown up in middle-aged adults with latency times of about two decades after first exposure to oil chemicals.[292] Given the latency period for cancer, however, it is likely that more cases of cancer will develop as the years pass from time of first exposure. And unfortunately, these case numbers will grow in the years to come because, as Dr. Strauss explained, the people living in the Oriente are faced with continued exposure to contamination.[293]

III. The Environmental Evidence Collected In The Lago Agrio Record Supports The Judgment's Findings

178. In support of their denial of justice argument, Claimants assert that "No court could have awarded these damages based on the record in the Lago Agrio case without the influence of bias, corruption, or fraud."[294] But as shown for each category of damages below, the record fully supports the damages awarded. Accordingly, such findings are within the applicable standard of the "juridically possible." Indeed, in respect of each of the six categories of damages other courts, tribunals, or government bodies have found other parties liable for relatively similar amounts of damages.

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290 Dr. Kelsh also pointed out that the time from contact with a carcinogen to the diagnosis of cancer takes even longer in locations where there is not an adequate healthcare system in place. R-965, Kelsh Dep. Tr. Vol. II (Feb. 6, 2013) at 330:6-17.

291 *Id.* at 330:17.

292 RE-15, Grandjean Expert Report at 6.

293 RE-12, Strauss Rejoinder Report § 2.2.3.6.

294 Claimants' Amended Track 2 Reply on the Merits ¶ 139.

179. Chevron has never offered its own estimates of the costs to address the environmental harm in Ecuador caused by TexPet's oil operations. During the Lago Agrio Litigation, the Court in fact requested the parties to address the costs of remediating environmental damages. The Court was clear that doing so would not "imply[] any confession or implicit admission by the parties to the case, nor that the court has jumped to any conclusion as to the existence of any damage."[295] But Chevron chose not to respond as requested, and all of its experts, adhering to the party line, opined that remediation costs for all categories of damages should be zero.[296] In response to the Plaintiffs' experts' cost estimates for remediation of the contaminated area, Chevron's rebuttal reports offered only an estimate for remediating pits to RAP standards.[297] Chevron provided no reasonable estimates to clean up the extensive damage outside the pits, in the pits beyond the RAP standards, or for any of the other damages requested by the Plaintiffs. As the conceptual model in Figure II-16 shows, complete remediation of TexPet's contamination will require much more than the minimal work done during the RAP.

295 C-361, August 2, 2010 Providencia at 1.

296 *See, e.g.*, C-1213, Chevron Initial Alegato, Jan. 6, 2011, at 5:55 p.m. § 7.3 (titled "Plaintiffs Have Not Proven the Allegations of Damages Pled in Their Complaint").

297 R-1114, Robert Hinchee, Expert Report on Remedial Cost submitted to the Lago Agrio Court (Sept. 3, 2010); R-1116, Alvarez, Hinchee, Mackay, Expert Report on Remedial Cost: Rebuttal to Environmental Damages Valuation (Oct. 4, 2010).

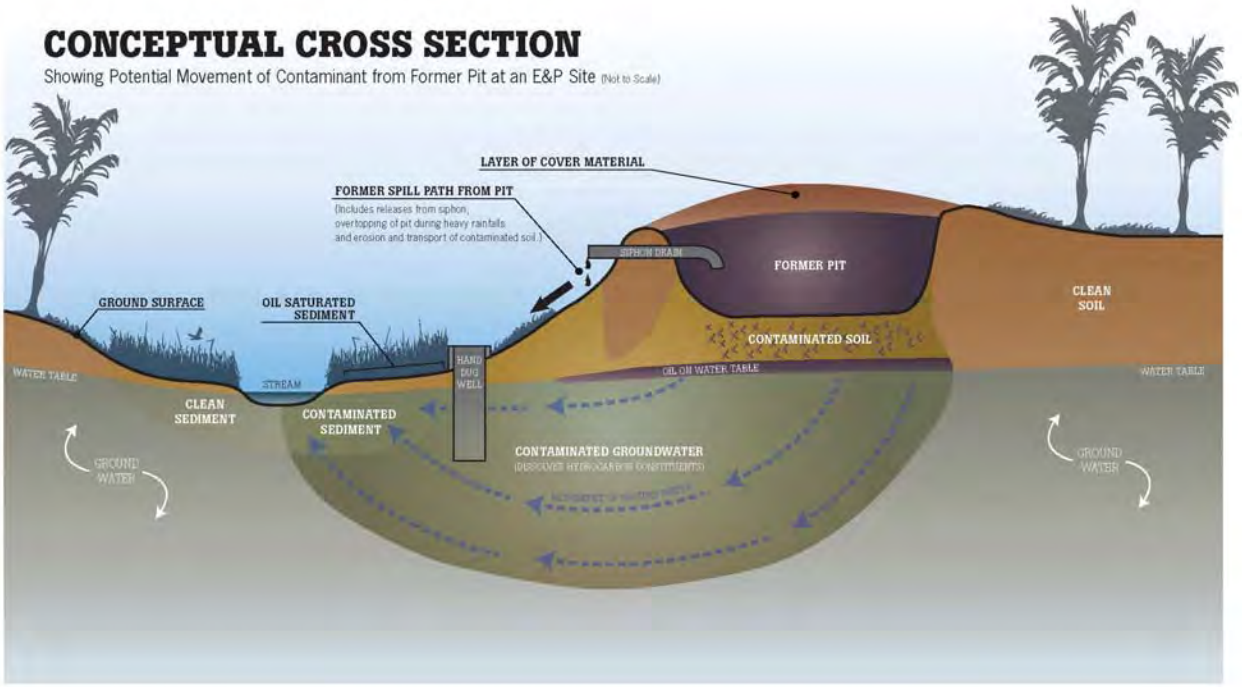

Figure II-16 Conceptual model showing the spread of contamination from an unlined pit

180. Having refused to assist the Court by providing an alternative calculation methodology, Chevron's current disagreement with the Court's final calculations does not prove judicial bias, fraud, or corruption.

A. Soil Remediation

181. Claimants' Reply asserts that the award for soil remediation in the Judgment is based on a misapprehension of the factual record, involving "flagrant errors regarding a) the number of pits at former Consortium sites, b) the size of those pits, c) the proper remediation standard, and d) the cost of remediating each pit."[298] None of these represents errors of fact, much less flagrant errors. What is more, fact-finding is inherently the province of the first-instance court. Not even the highest appellate or cassation courts of most legal systems can

298 Claimants' Amended Track 2 Reply on the Merits ¶ 142.

micromanage by reviewing mere errors of fact.[299] An international tribunal, *a fortiori*, is in a worse position to conduct a review of factual determinations made by a domestic court at first instance and such a mandate has never been assigned to an international tribunal.

182. **First**, as one example, the Court states that it relied on aerial photographs "together with the official documents of Petroecuador submitted by the parties" to determine that 880 pits in the former Concession Area required remediation.[300] In other words, it came up with the 880 figure by reviewing aerial photographs *in addition to* various other sources in the record.[301] Chevron has adduced no valid reason for this Tribunal to contradict or even question the Court's finding on the number of pits, much less a basis for declaring the Court's factual finding so perverse as to support a claim for denial of justice. And, it turns out that this is not only a conservative estimate as to the number of TexPet pits in the Concession Area, it is actually substantially lower than the number of pits *estimated by Chevron's experts using their own data*.

183. According to Chevron's own expert John Connor, Chevron identified 148 pits[302] during 45 total well site inspections[303] during the PIs and JIs. **On average, Chevron thus found 3.29 pits per well site for an estimated total of 1131 pits at 344 well sites**.

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299 *See, e.g.*, C-1975, National Court Decision at 147 ("While the judge has reached his own conclusions according to the discretionary weighing of the evidence, the Cassation Court cannot meddle in the judge's weighing because practically speaking, that would be tantamount to a third proceeding examining the facts if it were to do so. Only exceptionally may it do this when there is an evident breach of the norms for the assessment of evidence."); *see also id.* at 164-165 (discussing the limitations of the Cassation Court in the context of soil remediation). Here, the National Court did not find that there was an evident breach of norms. *Id.* at 160; *see also id.* at 158-159 (referencing the evidence relied on by the lower courts).

300 C-931, Lago Agrio Judgment at 125.

301 In addition to failing to prove that Judge Zambrano relied on Mr. Cabrera, the Judge's reliance on 880 pits does not harm Chevron. If anything, the 880-pit count is a conservative estimate.

302 Connor 2013 Expert Report, Table C.1.A (49 Remediated pits, 15 NFA Pits, 1 COC Pit, and 83 Non-RAP pits).

303 *Id*. at 7.

184. Furthermore, based on data from the Fugro-McClelland and HBT Agra reports, LBG concluded the same: TexPet created between two and five unlined pits per well site and production station. Conservatively assuming three pits per well site and five pits per production station, it is reasonable to estimate that there were about 1,000 TexPet pits — not just 880 — scattered across the Concession Area.[304]

185. **Second**, Claimants complain that the cubic dimensions of the pits as found by Judge Zambrano is beyond any possible reasonable value.[305] But as Chevron's John Connor testified under oath, "it was important, in order for the court to have an accurate estimate of the area of those pits, that samples be collected around that pit to accurately define the area of that pit."[306] Chevron delineated the boundaries of the pit by the exact same method as the Court later adopted (i.e., the first clean soil surrounding each of the pits). Since the Court simply adopted these same delineation points and calculated the area inside these points, Chevron can hardly cry foul — much less cry denial of justice.

186. **Third**, in his Judgment, Judge Zambrano decided that because the Lago Agrio Plaintiffs "have requested the removal of all the elements that can affect their health and their lives, such that the level of cleanup should tend to leave the thing in the state they had before the consortium's operations," the proper remediation standard should be to 100 mg/kg TPH.[307] According to Chevron's expert Dr. Hinchee, this standard is "inconsistent with current Ecuadorian cleanup standards, inconsistent with standards being applied to Petroecaudor's remediation efforts, and . . . unprecedented for comparable crude oil cleanup anywhere in the

304 RE-10, LBG Expert Report at 28.

305 Claimants' Amended Track 2 Reply on the Merits ¶¶ 147-148.

306 R-959, Connor Dep. Tr. (Dec. 6, 2012), *taken in Saldana, et al. v. Shell, et al*. at 331:4-7.

307 C-931, Lago Agrio Judgment at 181.

world." But what Dr. Hinchee does not say is that one of the primary oil cleanups upon which he bases his opinion, the Trecate Blowout in Italy, used a cleanup standard even lower than Judge Zambrano: 50 mg/Kg TPH.[308] Moreover, the standard used in Italy was based on the proposed standard under Dutch law of 50 mg/Kg TPH. Far from unprecedented, the standard set by Judge Zambrano is higher than that used in projects on which Chevron's own experts have advised and that European governments have accepted.

187. **Fourth**, Judge Zambrano concludes that cleaning up the soil around the contaminated pits will cost US$ 730 per cubic meter.[309] According to Chevron this alone is a travesty of justice.[310] But as the chart below shows, the per-cubic-meter cost figure that Judge Zambrano selected is within the realm of reasonableness for clean-ups of this size.

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308 RE-11, LBG Rejoinder Report § 3.3.5; *See also*, R-961, Guido Greco, et al., *Evaluation of remediation techniques*, June 2012 at 9 (noting that 50 mg/kg soil TPH concentrations were the "designated target clean-up level").

309 C-931, Lago Agrio Judgment at 181-184.

310 Claimants' Amended Track 2 Reply on the Merits ¶¶ 151-153.

Major international oil spills

Oil spill, location, year	Magnitude of Spill	Cleanup costs and damages (in US 2008$)	Reference
Prestige oil spill, Coast of Spain, 2002	20 million gallons; cleanup began immediately	$2 to $3 billion in cleanup costs (actual) $1.2 billion in damage claims	IOPCF, 2002 *New York Times*, 2003a, 2003b
Exxon Valdez, Valdez Alaska, 1989	11 million gallons; cleanup began immediately	$2.9 billion in cleanup costs (actual) $4.1 billion in damages claims (settled for $1 billion) $3.6 billion in punitive damages (reduced to $500 million on appeal)	*Exxon Valdez* Oil Spill Trustee Council, 2007 Duffield, 1997
Amoco Cadiz, Brittany France, 1978	186 miles of coastline; cleanup began immediately	$3.4 billion in cleanup costs and damages (actual)	*New York Times*, 1989 Lenntech, 2006
Oil spills in Kuwait from Gulf War, 1991	100 square miles; contaminated for several years before cleanup	$2.2 billion in cleanup costs (claim amount granted by UNCC)	UNCC Governing Council, 2005

188. To put these clean-ups in perspective, in the Oriente, TexPet spilled approximately 12 billion gallons of toxic produced water and 16 million gallons of crude oil — larger than any of the spills on the chart above.

189. **Finally**, Claimants complain that the Judgment "fails to distinguish between any claimed soil impacts caused by TexPet operations and the soil impacts caused by . . . Petroecuador's operations."[311] But, this is both factually incorrect and legally immaterial.[312] Judge Zambrano addressed Claimants' request to apportion costs between PetroEcuador (a non-party) and TexPet, and rejected it. Judge Zambrano found that (1) PetroEcuador was a third-

311 Claimants' Amended Track 2 Reply on the Merits ¶ 143.

312 The implications of and relevant law regarding joint and several liability in Ecuador and elsewhere will be addressed further in Respondent's subsequent proceeding, as ordered by this Tribunal.

party to the action and thus had no opportunity to raise its own defenses; (2) no contribution claim had been brought against PetroEcuador (but that Claimants reserved the right to bring such an action);[313] and (3) "the obligation of reparation imposed on the perpetrator of a harm is not extinguished by the existence of new harm attributable to third parties."[314] In other words, Claimants had the right to seek contribution from PetroEcuador. That they have chosen not to, presumably for strategic reasons, cannot negate the fact that they had the legal right to do so. Simply, it was not up to Judge Zambrano — or the Ecuadorian Court system as a whole — to plead Claimants' case. Indeed, it would have been legal error to do so. And more importantly, even if PetroEcuador further harmed the environment in a divisible (non-joint and several) manner after it had become Operator, that would not have extinguished Claimants' pre-existing separate liability for the harm TexPet caused.

B. Groundwater Contamination

190. Claimants complain that the Judgment awards US$ 600 million for the cleanup of groundwater and that that figure is grossly exaggerated. But the Court did not order US$ 600 million for only groundwater cleanup. Instead, in accordance with the Civil Code, the Court assigned US$ 600 million as the estimated cost for the cleanup of "every trace of the hazardous elements referred to in this ruling . . . from the sediments of the rivers, estuaries and wetlands, that have received the discharges produced by Texpet or the leaks from the pits constructed when it operated the Concession."[315] As LBG's five site investigations show, TexPet's contamination that has migrated out of its pits has extensively impacted the sediments of the rivers, estuaries, and wetlands. And as LBG's analysis demonstrates, the results of these five site summaries

313 C-931, Lago Agrio Judgment at 123.

314 *Id*.

315 *Id.* at 179; *see also* C-1975, National Court Decision at 167 (holding that the lower courts properly weighed the evidence before it and that their decisions with respect to this issue were not arbitrary).

combined with Chevron's PI, JI, rebuttal, and Cabrera Shadow Team sampling results paint a picture of massive contamination spread throughout the Concession Area where sediments near TexPet's historic operations are just as likely to be contaminated as the pits in which TexPet dumped crude oil directly.[316]

C. Potable Water

191. The Judgment awarded US$ 150 million to implement a potable water system in the allegedly affected areas.[317] Claimants contest that the Judgment fails to "provide any rationale for why this system is needed."[318] The Court based its damages amount on information submitted by Mr. Barros, a court-appointed expert nominated by Chevron who stated that Mr. Cabrera's estimated value (US$ 428 million) was too high.[319] As discussed above, the court record amply demonstrates that the rivers and groundwater in the impacted area are contaminated. Consequently, and as the National Court most recently made clear, this "compensatory mechanism is necessary" because "[d]ue to the contamination" "the people there cannot use the rivers that have commonly benefitted the area's natives for washing, bathing or even preparing or cooking food."[320]

D. Healthcare System

192. Chevron claims that the "Judgment does not provide any basis for the US$ 1.4 billion figure" it awarded for implementation of a healthcare system in the Oriente.[321] But as the Republic noted in its Counter-Memorial, the amount awarded in the Judgment is the amount that

316 RE-11, LBG Rejoinder Report § 4.2.3.

317 C-931, Lago Agrio Judgment at 183.

318 Claimants' Amended Track 2 Reply on the Merits ¶ 169.

319 C-931, Lago Agrio Judgment at 182-183.

320 C-1975, National Court Decision at 138.

321 Claimants' Amended Track 2 Reply on the Merits ¶ 168.

Dr. Picone, the Plaintiffs supplemental expert, estimated would be necessary to establish a healthcare system in an area and population the size of the Oriente.[322] As Dr. Picone stated in his report, estimating the cost of setting up a healthcare system in a poor, rural, undeveloped region is a very complex task. Dr. Picone offered analogous healthcare systems for comparison purposes.[323] In contrast, Claimants resorted to their mantra that there were no health impacts at all as a result of TexPet's operations in the Concession Area.[324] Not having proffered any alternative, Chevron should not have been surprised that the Court adopted Dr. Picone's careful analysis.

193. Moreover, a healthcare system is public or quasi universal. One does not create individualized healthcare systems, a hospital for each individual. As is obvious, to meet the healthcare needs of the individuals harmed by the environmental contamination in the Concession Area, entire hospitals and clinics must be built, staffed, and supplied. The Court could not have legitimately ordered that a clinic be built just to service the needs of the individuals harmed. That other people living in the Concession Area will also benefit from the healthcare system is incidental to the Judgment's award.

194. Chevron goes so far as to deliberately misstate the sworn testimony of the Republic's expert, Dr. Harlee Strauss. As she said at her deposition, at the time she was "not offering any — any opinions on what I think you would term specific causation."[325] Not

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322 Respondent's Track 2 Counter-Memorial on the Merits, Annex E ¶ 54; R-1065, Picone Report, Estimated Cost of Delivering Health Care to the Affected Population of the Concession Area of Ecuador, Carlos Picone, 2010 at 6.

323 R-1065, Picone Report, Estimated Cost of Delivering Health Care to the Affected Population of the Concession Area of Ecuador, Carlos Picone, 2010 at 6-8.

324 R-1064, Kelsh Rebuttal to Picone, Supplemental Expert Report at 16-17.

325 C-1669, Strauss Dep. Tr. (Apr. 23, 2013) at 156.

offering an opinion in her initial report or at deposition is a far cry from "recanting" her position under oath.[326]

195. In her supplemental opinion attached to this Rejoinder, Dr. Strauss makes clear "[t]here is substantial clinical, toxicological, and mechanistic evidence that exposure to crude oil causes both immediate and long-term adverse health effects."[327] Dr. Strauss bases her opinion on petroleum industry documents and studies, as well as those by independent investigators and others.[328] Dr. Strauss further notes that "[t]he existence of these data and the conclusion regarding the potential for adverse impacts is never directly disputed in any of Chevron's experts' reports or the Claimants reply memorial."[329]

E. Ecosystem Restoration

196. Judge Zambrano awarded the Plaintiffs US$ 10 million per year to be paid for a 20-year period to restore native flora, fauna and aquatic life to its pristine pre-TexPet operating condition, as required by TULSMA.[330] There is ample evidence to support the first-instance court's award.[331] As explained by Dr. Theriot:

> Claimants' E&P activities from 1964 to 1990 caused widespread direct and indirect harmful ecological impacts within the Concession Area resulting in damage to the native flora and fauna. Direct impacts included (1) the removal of vegetation and loss of habitat resulting from the development of production sites and

326 Claimants' Amended Track 2 Reply on the Merits ¶ 167.

327 RE-12, Strauss Rejoinder Report § 3.3.2.

328 *Id*.

329 *Id*.

330 C-931, Lago Agrio Judgment at 182; RE-14, Theriot Rejoinder Report at 3.

331 The National Court affirmed the lower court's decision based on the fact that the Appeals Court found that there was sufficient evidence for the damages awarded based on the judicial inspections and the interviews conducted. C-1975, National Court Decision at 168-169. It also held that the establishment of a new drinking water system was proper to "compensate for the provisional losses of natural resources" and that "compensatory remediations" should further provide for "added enhancements to the protected species and natural habitats or waters." *Id.* at 139. The Court further concluded that restoration of the ecosystem was important because those "who depend on the ecosystems to survive are doubly affected." *Id.* at 141.

> supporting infrastructure, and (2) the discharge of contaminants into the air, soil, sediment, surface water, and groundwater. Indirect or secondary effects include fragmentation of what was essentially pristine Ecuadorian rainforest and hydrologic alteration due to construction of road and pipeline infrastructure. These activities significantly reduced species diversity of the Concession Area.[332]

197. Dr. Theriot also noted that Claimants' historic activities "altered the ecosystem of the region to the extent that it no longer serves as a rainforest ecosystem. Other than intermittent fragments of vegetation, none of the Concession Area exploited by Texpet retains the abundant species of a typical rainforest, and most of the rainforest fauna endemic to the region have perished or migrated away from the impacted habitat."[333] In short, "[d]amage caused by Texpet to the flora and fauna and other natural resources in the Concession Area goes well beyond the footprint needed to conduct E&P operations."[334]

198. Dr. Theriot's conclusions are based in part on his observations and sampling at five sites he visited in the Oriente region in the summer of 2013 and on samples taken and analyzed by LBG. LBG's samples confirm the presence of residual contamination in surface water, sediment, and soil that exceeds relevant ecological standards and screening criteria at all five sites visited. In other words, the samples confirm that contamination directly resulting from TexPet's activities within the former Concession Area persists today and negatively impacts flora and fauna and, absent remedial action, will continue to do so in the future.

199. Finally, it should be noted that the Court's awarded damages are significantly *less than* the cost estimates proposed by both the Plaintiffs' supplemental expert, Lawrence

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332 RE-14, Theriot Rejoinder Report at 2.

333 *Id.* at 10-11.

334 *Id.* at 11.

Barnthouse (between US$ 874 million and US$ 1.7 billion)[335] and the global damages expert, Mr. Cabrera (US$ 1.69 billion).[336] Thus, the damage awarded in Judgment rendered by Judge Zambrano is comfortably within the realm of the juridically possible.

F. Excess Cancer Deaths

200. In its common retort, Claimants allege that there is no evidence of contamination in the Oriente, and as a result, "there is also no evidence of human health risks" and therefore the US$ 800 million awarded by the Judgment must be baseless. But again, Claimants confuse disagreement by one litigant with a judgment with the requirements for a finding of denial of justice.

201. Chevron's experts Dr. Kelsh and Dr. Moolgavkar both identified perceived limitations and confounding factors in Dr. San Sebastian's report on which the Judgment relies. But as Dr. Grandjean makes clear, perfect data is not required before it is appropriate to attempt to fix a problem.[337] And indeed, if one waited until scientific certainty were obtained, very few damages would every be addressed.

202. Moreover, Dr. Strauss has now conducted a human health risk assessment for four sites in the Oriente and has found that at each of the sites, residents faced significantly increased risk of cancer.[338] This increased risk at four sites — an increased risk that more likely than not extends to all sites across the Oriente operated by TexPet — demonstrates the reasonableness of the Judgment's finding and places the damages figure for excess cancer deaths well within the juridically possible.

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335 C-931, Lago Agrio Judgment at 182.

336 C-212, Cabrera Supplemental Report at 53.

337 RE-15, Grandjean Expert Report at 5-6.

338 RE-12, Strauss Rejoinder Report § 2.2.3.6.

203. Having visited numerous sites, talked to many local residents, and reviewed thousands of pages of evidence and expert reports, the Lago Agrio Court believed there was adequate evidence to assess damages for excess cancer deaths. That Claimants and their paid experts disagree with that assessment is unsurprising and also not the basis for a determination of denial of justice.

G. The Judgment Does Not Give The Plaintiffs Many Of The Damages They Requested

204. Nor did the Plaintiffs receive damages in the amount they requested. The Plaintiffs presented several alternatives to the Court for each damage category and in the following cases, the Court awarded less — sometimes substantially less — than the Plaintiffs requested. **First**, for the remediation of groundwater, the Plaintiffs presented the Court with an estimate from Mr. Cabrera in the amount of US$ 3.24 billion and estimates from Douglas Allen, a supplemental Plaintiffs' expert, ranging from US$ 394 million to US$ 910 million.[339] In the Judgment, the Court awarded US$ 600 million for groundwater remediation, hundreds of millions less than the estimates.[340] **Second**, for a potable water system, the Plaintiffs presented estimates of US$ 536 million to US$ 541 million.[341] However, the Court instead awarded US$ 150 million to implement a potable water system, giving the Plaintiffs less than one-third of what they requested.[342] **Third**, the Plaintiffs requested damages for excess cancer deaths between US$ 46.9 billion to US$ 69.7 billion;[343] the Court awarded US$ 800 million.[344] **Fourth**, to restore the ecosystem in the region, the Plaintiffs presented a cost range from US$ 874 million

339 R-213, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Three at 186.

340 C-931, Lago Agrio Judgment at 179.

341 R-213, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Three at 191.

342 C-931, Lago Agrio Judgment at 183.

343 R-213, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Three at 191-93.

344 C-931, Lago Agrio Judgment at 184.

to US$ 1.697 billion.[345] In the Judgment, the Court awarded the Plaintiffs US$ 10 million per year to be paid for a 20-year period — US$ 200 million — to restore native flora, fauna and aquatic life in the Oriente, reducing the amount requested by over seventy-five percent.[346]

205. The Court also specifically *rejected* entire categories of damages sought by the Plaintiffs. For example, the Court declined to grant the Plaintiffs' request for the removal of abandoned infrastructure as it found that such infrastructure had not been shown to cause any harm.[347] Nor did the Judgment grant cleanup generally for "lands, crop fields, crops, streets, roads and buildings" because particularized harm had not been shown.[348] The Court also rejected the Plaintiffs' unjust enrichment claim, which the Plaintiffs believed was worth between US$ 879 million dollars and US$ 37.9 billion dollars.

206. Claimants seek to portray the decision of the first-instance court as a complete victory for the Plaintiffs notwithstanding the lack of any evidence of Claimants' culpability. But as this Tribunal can confirm upon acceptance of the Republic's invitation for a site visit, the evidence of pollution is stark and Claimants' liability is obvious. The award of damages (excluding the punitive damages component recently eliminated by the National Court) falls not only within the juridically possible, but well within the ranges found in other cases, and far lower than that requested by the Plaintiffs.

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345 R-213, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Three at 186-87.

346 C-931, Lago Agrio Judgment at 182.

347 *Id*. at 179-80.

348 *Id.* at 180.

IV. Not Only Are Claimants' "Ghostwriting" Allegations Premature For Failure To Exhaust Local Remedies, The Contextual Evidence — Deliberately Ignored By Claimants — Proves That The Lago Agrio Plaintiffs Did *Not* Ghostwrite The Zambrano Judgment

207. Claimants have amassed unprecedented legal resources in an effort to avoid the judgment of the very court to which they had the underlying dispute transferred.[349] They have resorted to extreme pressure tactics and unethical payment practices, tainting the testimony that they now offer as evidence for their crudely assembled "ghostwriting" narrative. Despite having access to the privileged and non-privileged communications from the Plaintiffs' lawyers over the last years of the Lago Agrio Litigation, Claimants have not produced ***any*** direct evidence of "ghostwriting." In fact, the evidence affirmatively establishes the opposite: The Plaintiffs' internal correspondence reveals that on the eve of the Judgment they were acutely concerned that Chevron had the upper hand in the final stages of the proceedings and that Judge Zambrano might rule in its favor. Plaintiffs also had no hint as to when the Judgment might be handed down — their best estimate was days, months or years.

208. Claimants' "ghostwriting" allegations must be rejected for six reasons. **First**, these allegations are premature, and Chevron's claims of exhaustion misleading, because Chevron has to date chosen *not* to assert a claim under Ecuador's Collusion Prosecution Act, which is the local remedy for addressing allegations of fraud and collusion.

209. **Second**, neither Claimants nor their paid-for witnesses have been able to produce any direct proof — such as a draft Judgment — that the Plaintiffs "ghostwrote" Judge Zambrano's Judgment, nor have Claimants produced any e-mail communications or other

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349 It is perhaps a crowning irony that in 2011 Claimants ran back to the U.S. District Court for the Southern District of New York — the very court from which they fled in 2003 — to obtain a declaration that the Judgment from their Ecuadorian transferee court should be nullified. To further hedge their bet, they filed two arbitrations against the Republic (this being the second, the first having been dismissed in 2008) seeking essentially the same relief.

documents indicating that the Plaintiffs even contemplated such "ghostwriting" at any point in the proceedings.

210. **Third**, contemporaneous documentary evidence demonstrates that the Plaintiffs were not involved in any scheme to "ghostwrite" the Judgment. This contemporaneous correspondence among the Plaintiffs' counsel would normally be covered by privilege but it was provided to Chevron upon Judge Kaplan's order, over the Plaintiffs' vehement opposition. The production of this evidence shows that Plaintiffs (a) were themselves concerned about a possible adverse judgment, and (b) had not the slightest clue when the Judgment would issue nor what it would say. If the Plaintiffs' counsel had in fact bribed Judge Zambrano, and if by agreement they were in fact "ghostwriting" his Judgment, they never would have expressed the doubts that are repeatedly revealed in their contemporaneous and thought-to-be-privileged internal communications.

211. **Fourth**, to support their "ghostwriting" theory Claimants stake implausible and demonstrably false claims such as the participation in this alleged scheme of highly respected U.S. lawyer Joseph Kohn. The fact that even Claimants themselves do not believe these allegations is evidenced by their decision not to include Mr. Kohn as a defendant in the RICO fraud case Chevron brought in the Southern District of New York.

212. **Fifth**, Claimants' reliance on former Judge Guerra for corroboration must be rejected because, not only is his testimony highly suspect for having been so extravagantly purchased, but his circumstantial evidence fails to corroborate his claims and he has admitted that he lied in this case for personal gain. Furthermore, Claimants concede that Mr. Guerra approached them for a bribe as a self-professed — but unverified — emissary of Judge Zambrano. Not only did Mr. Guerra produce to Claimants no evidence of his authority to serve

as a "bag man," but Claimants failed to report this incident to the Consejo Nacional de la Judicatura, Ecuador's authority regulating the conduct of members of the judiciary or indeed to any other authority in Ecuador or the United States. That they claim now to have refused his entreaty does not excuse this failure and the cynical calculation that evidently lay behind it.

213. **Sixth**, Claimants' premise that Judge Zambrano's Judgment includes the Plaintiffs' "unfiled" work product is wrong. Claimants have not disputed and cannot dispute that documents openly submitted to the Court during the judicial inspection process were not always logged into the official court record. And, more importantly, contemporaneous evidence demonstrates that documents at issue were, in fact, either openly submitted to the Court at judicial inspections or were otherwise publicly available.

A. Claimants' "Ghostwriting" Allegations Are Premature, And Their Claims Of Exhaustion Misleading, Because The Proper Local Remedies For Such Charges Have Never Been Attempted

214. Claimants have consistently misled the Tribunal regarding the ripeness of their denial-of-justice claims and the exhaustion of their viable local remedies. Even though Claimants knew that the National Court could not accept new evidence or hear claims of alleged "ghostwriting," they misleadingly cried foul to the Tribunal when the National Court did not adjudicate these allegations on appeal. The impropriety of Claimants' handling of this issue is compounded by the fact that Claimants have not exhausted — nor even attempted — the local remedy available in Ecuador to address their allegations of "ghostwriting." Ecuador's Collusion Prosecution Act, enacted in 1977, provides for proceedings to hear allegations of fraud or collusion in the issuance of judgments — the precise alleged wrong in respect of Judge Zambrano's Judgment.[350]

[350] RLA-493, Collusion Prosecution Act.

215. Claimants' misleading approach to exhaustion of local remedies and the Ecuadorian appellate courts' handling of their allegations of "ghostwriting" is exemplified in the following two excerpts from Claimants' submissions. When initially arguing that they need not exhaust local remedies in their March 20, 2012 Supplemental Merits Memorial, Claimants observed:

> [F]iling an extraordinary appeal or 'cassation' before the National Court of Justice (the Supreme Court of Ecuador), is not a relevant remedy for Chevron's purposes because . . . Cassation is limited to legal issues and cannot be brought on the basis of factual matter on which either the first-instance court or the appellate court may have erred. The National Court of Justice cannot review the facts *de novo*. For all of these reasons, cassation is a remedy that need not be exhausted in advance of filing this denial-of-justice claim.[351]

216. Yet after completion of their Cassation appeal before the National Court, Claimants declared to the Tribunal:

> It is particularly noteworthy that the Cassation Court did not substantively address or analyze any of Chevron's claims of fraud or corruption in the issuance of the Judgment, ***even suggesting this was not within its jurisdiction***, just as the lower appellate court decision had also done. According to Ecuador's judiciary, apparently no appellate court has direct jurisdiction to nullify a judgment for fraud or corruption in its issuance.[352]

217. It is plain that Claimants were fully aware that their allegations of "ghostwriting" *could not have been heard* by the Court of Appeals or the National Court. This knowledge, however, did not stop them from submitting approximately 10,000 pages of documents into the appellate record — "untimely and as if this were a trial and the evidentiary period were open" — on these issues.[353] These submissions were made solely so that Claimants could trumpet the following of proper appellate procedure as somehow evidence of the Ecuadorian judiciary's bias

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351 Claimants' Supplemental Merits Memorial ¶ 249.

352 Claimants' Letter to the Tribunal (Dec. 2, 2013) at 4 (emphasis added).

353 C-1975, Lago Agrio National Court Decision at 221.

against Chevron and further grounds for a denial-of-justice claim when the National Court, like the Appellate Court, declined to rely on this improper evidence.[354]

218. Claimants' allegations of fraud and "ghostwriting" could not be adjudicated in the appellate courts precisely because those appeals were limited to the legal issues raised in and record of the Lago Agrio Judgment. Claimants' new "evidence" of "ghostwriting" was developed *after* the issuance of Judge Zambrano's Judgment and therefore fell squarely *outside* the purview of the Ecuadorian appellate courts on direct appeal.[355]

219. Despite their misleading arguments for exhaustion, Claimants still have a plainly applicable and available local remedy in Ecuador that they have yet to attempt. Claimants' proper form of recourse in Ecuador to address their allegations of fraud and "ghostwriting" is to bring a complaint under the Collusion Prosecution Act.[356] Indeed, this is precisely what the National Court noted and all but encouraged when rejecting Chevron's claims as being improperly raised.[357] Under Article 6 of the Collusion Prosecution Act, an action may be brought by an aggrieved party alleging that a proceeding has been tainted by fraud, and "[i]f the grounds for the claim are confirmed, ***measures to void the collusive proceeding will be issued, invalidating the act or acts***, . . . and redressing the harm caused, . . . and, as a general matter, restoring the things to the state prior to the collusion."[358] Such a local remedy, of course, would

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354 *See*, *e.g.*, Claimants' Letter to the Tribunal (Dec. 2, 2013) at 4.

355 Notably, it is not surprising that appellate courts in Ecuador, like those the world over, are limited to the record originally before the trial court.

356 RLA-493, Collusion Prosecution Act, art. 1.

357 C-1975, Lago Agrio National Court Decision at 95 ("Chevron Corporation alleges that there is a '*great collusive demonstration*'. When collusion is an independent action governed by our Ecuadorian legislation, it is so regulated under the Collusion Prosecution Act; and, as stated by this Division of the Court, it is not possible to seek the cassation of a judgment by making these kinds of allegations . . . . Therefore, the affirmation made by the court of appeals in the correct one, as it is not within its scope of that court to have jurisdiction to hear collusive action cases[.]").

358 RLA-493, Collusion Prosecution Act, art. 6 (emphasis added).

directly address Chevron's "ghostwriting" claims pertaining to Judge Zambrano's Judgment. And under Article 10 of the Collusion Prosecution Act, Claimants have a full a five years from the date of the alleged collusive act — here the February 14, 2011 issuance of Judge Zambrano's Judgment — to bring a complaint.[359] Claimants accordingly have until February 14, 2016 to bring such an action.

220. After bringing a complaint under the Collusion Prosecution Act alleging a "collusive" action by means of fraud and "ghostwriting," Chevron would be afforded full and proper recourse to address any claims of fraud or collusion in respect of Judge Zambrano's Judgment. Among other things, Chevron would be entitled to fully brief the issues, present evidence, and participate in a hearing on its claim.[360] Claimants would thus have the opportunity in such a proceeding to *properly* put forth their alleged evidence of "ghostwriting" and fraud — just as they did in the RICO action in the United States. And, as noted above, the remedies available to Claimants under the Collusion Prosecution Act include full nullification of Judge Zambrano's Judgment, as well as damages, imprisonment, and disciplinary proceedings against those involved (including both the lawyers and judges).[361] Critically, if Claimants were displeased with the trial court's ruling, they would be afforded two separate avenues of appellate review to ensure justice was served.[362] Filing a complaint under the Collusion Prosecution Act could therefore afford Claimants the precise relief they seek and multiple *actual* "opportunities" to correct any defects in Judge Zambrano's Judgment due to fraud or "ghostwriting."

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359 *Id*. art. 10.

360 *Id*. arts. 4, 5.

361 *Id*. art. 6.

362 *Id*. art. 8.

221. Chevron's attorney for their National Court appeal, Santiago Andrade, was a former Ecuadorian Supreme Court judge who himself has issued multiple rulings under the Collusion Prosecution Act nullifying such "collusive" proceedings.[363] Accordingly, while ignorance of the law cannot excuse a failure to exhaust local remedies, here Claimants clearly knew of but deliberately chose to disregard their rights under Ecuadorian law to challenge the first-instance court decision on grounds of fraud and collusion.

B. Claimants Have Never Produced A Single Document Evidencing That Plaintiffs "Ghostwrote" Judge Zambrano's Judgment

222. Claimants have *been granted complete and unrestricted access to millions of pages* of the Plaintiffs' counsel's internal, privileged correspondence and confidential work files and have undertaken forensic examination of the Plaintiffs' counsel's computers, hard drives, thumb drives, and email accounts. And yet Claimants have not uncovered a draft Judgment prepared by the Plaintiffs' counsel or indeed any correspondence even mentioning a draft Judgment. To the contrary, the internal correspondence reveals that on the eve of the Judgment's issuance, the Plaintiffs feared that the Judgment — whenever it might issue — could well be in Chevron's favor.

223. The Plaintiffs' counsel had clearly never envisaged that their internal correspondence could be the object of a U.S. disclosure order; this is manifest from the candor with which they expressed themselves in relation to their experts' authorship of Mr. Cabrera's report. The absence of a draft Judgment in this internal correspondence, or even any reference to a draft Judgment, is therefore highly probative.

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363 *See*, *e.g.*, R-987, Supreme Court of Justice, First Civil and Commercial Chamber, Cassation File No. 162, Official Register 664 (Sept. 17, 2002); R-986, Supreme Court Decision, First Civil and Commercial Chamber, Cassation File No. 83, Official Registry Supplement 323 (May 10, 2001).

C. Contemporaneous Documentary Evidence Confirms That The Plaintiffs Could Not Have Been Involved In Any Scheme To "Ghostwrite" Judge Zambrano's Judgment

224. Not only did Claimants' forensic examinations of all of the Plaintiffs' counsel's computer files fail to yield a draft Judgment or correspondence evidencing the Plaintiffs' knowledge of either the substance or the timing of the Court's impending Judgment, they demonstrated the exact opposite. Claimants' allegation that the Plaintiffs "ghostwrote" Judge Zambrano's Judgment is not only inconsistent with, but indeed flatly contradicted by, the Plaintiffs' counsel's contemporaneous internal emails.

225. Specifically, in the weeks and months leading up to the Court's issuance of its 188-page Judgment, the Plaintiffs were scrambling to finish drafting their *alegato* — essentially their closing post-trial "brief" to the Court — to be used to persuade the Court to rule in their favor. As shown below, their counsel's internal emails demonstrate vividly not only the Plaintiffs' ignorance of the date when a judgment might issue, but also their apprehension that Chevron's recently filed *alegato* might persuade the Court to dismiss the case.

226. If the Plaintiffs' counsel had been allowed to draft the Judgment, as Claimants allege, they would have had no reason for such concern. After all, if a bribery agreement had been in place since November 2010, as Mr. Guerra alleges, then Chevron's *alegato* arguments would have been irrelevant.[364]

227. The Plaintiffs' counsel's contemporaneous correspondence instead portrays a very different reality. For example:

- **Dec. 17, 2010 (56 days before issuance of Judgment)**: The Plaintiffs' Ecuadorian counsel Pablo Fajardo explains to various members of the Plaintiffs' legal team: "From our analysis, we can deduce that the Judge can issue a writ for judgment at any time, any day; this means that we must have our legal argument ready, defined and we must all be

[364] R-906, Guerra Dep. Tr. (May 2, 2013) at 97:9-14.

in agreement with it, in order to submit it to the Court at any time. . . . This judge is very firm and exercises a great deal of authority; he is punishing any attempt to delay the proceeding."[365]

- **Dec. 20, 2010 (53 days before issuance of Judgment)**: In response to new defenses raised by Chevron with the Lago Agrio Court, Pablo Fajardo explains: "[This argument] may be of concern. We do not know how the Judge is going to react to this new argument by Chevron."[366]

- **Dec. 31, 2010 (42 days before issuance of Judgment)**: Pablo Farjardo emails Steven Donziger, expressing concern that the Plaintiffs still had not completed their *alegato*, and noting that their efforts would be in vain should the Court issue a decision before the document is completed: "[N]o one knows when the Judge may issue the judgment; he could do so within two weeks, or within many months, or even years. If he does it in several months, the judge may possibly consider the legal reports; but if the judge issues his judgment soon, the document will have stayed in our hands and will be useless. We will not run this risk."[367]

- **Jan. 8, 2011 (34 days before issuance of Judgment)**: Pablo Fajardo emails various members of the Plaintiffs' legal team noting that two days prior Chevron had submitted its 292-page final *alegato* and expressing urgency that the Plaintiffs submit their own *alegato*: "As you can see, my concerns are well founded. Chevron has gotten ahead of us by filing their alegato, while we are still writing ours. All the more reason to speed up our work, otherwise the Judge could be convinced by Chevron's theory."[368]

- **Jan. 8, 2011 (34 days before issuance of Judgment)**: When asked by another member of the legal team, Julio Prieto, why Chevron was in such a hurry to submit its *alegato*, Pablo Fajardo responded: "The one who strikes first has greater success or causes greater impact . . . . They want to influence the judge with their theory. It is a mistake on our part to have fallen asleep for so long on the alegato."[369]

228. In their chronology of relevant events and correspondence submitted in the New York RICO action on January 28, 2013, Claimants included the emails dated December 31, 2010 and January 8, 2011 as part of their comprehensive chronology.[370] After realizing that these

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365 R-988, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Dec. 17, 2010).

366 R-989, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Dec. 20, 2010).

367 R-896, Email from P. Fajardo to S. Donziger (Dec. 31, 2010).

368 R-897, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Jan. 8, 2011).

369 *Id*.

370 R-990, Judgment Fraud Timeline (Jan. 28, 2013) at 23 of 30, *filed in* RICO.

emails in fact undermine their "ghostwriting" allegations, Claimants chose to delete these emails from their chronology submitted to this Tribunal.[371]

D. Claimants Make Fantastic Claims To Support Their Hypothesis

229. In the absence of any (a) draft Judgment in the hands of the Plaintiffs' counsel, (b) reference to an agreement to draft the Judgment in the millions of pages of privileged and internal documents produced in discovery, or (c) contemporaneous internal email evidencing the Plaintiffs' knowledge of the timing or the content of a future Judgment, Claimants have been compelled to make fantastic claims to construct their narrative of the Plaintiffs' "fraud scheme"[372] dating back to at least October 2009.[373]

230. For instance, Claimants cite an internal email from the law firm of Kohn Swift & Graf ("KSG"), former U.S. counsel to the Plaintiffs, alleging that KSG was leading a nefarious plot to draft the eventual Judgment.[374] Claimants deposed Mr. Joseph Kohn and obtained documents from him through a Section 1782 subpoena and the New York RICO proceedings — but have failed to connect him to any unethical behavior whatsoever. In fact, as Mr. Kohn himself testified, KSG had merely sought information about appropriate Ecuadorian law procedures for possible submission to the Court of a proposed final judgment, and what final judgments typically look like in Ecuadorian courts.[375] Mr. Kohn further explained in a submission to the district court in the New York RICO action that "KSG was involved in researching and potentially drafting a *proposed* final judgment and order for open submission to

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371 *Compare* R-990, Judgment Fraud Timeline (Jan. 28, 2013) at 23 of 30, *filed in* RICO *with* Judgment Fraud Timeline, Claimants' Track 2 Reply on the Merits, Annex D at 17-18.

372 Claimants' Amended Track 2 Reply on the Merits ¶ 68.

373 *Id*. ¶ 67.

374 *Id*.

375 R-900, Kohn Dep. Tr. (June 6, 2013) at 366:8-367:8.

the Lago Agrio Court, as is commonly done in the United States with bench trials and complex motion practice (e.g., class certification Daubert hearings)."[376]

231. As this Tribunal has already recognized, it is not at all unusual in the United States for litigants to submit at the court's request proposed orders and judgments — often in Word format on computer disks, or by email. Mr. Kohn confirmed that he never followed through with the idea to submit a proposed judgment, nor did anyone at KSG ever prepare a draft judgment for the Lago Agrio Case.[377] As Mr. Kohn explained, "not only did KSG not contribute to or know about the purportedly ghostwritten final judgment, but also it did not ultimately even contribute to the proposed final judgment that KSG wanted to research."[378] That a U.S. lawyer — one with an impeccable reputation[379] — considered preparing a draft judgment for open and transparent submission in accordance with applicable procedure, is certainly *not* evidence of a bribery and "ghostwriting" scheme alleged to have been implemented years later with a different judge.

232. Claimants further allege that the Plaintiffs employed coded words — "puppet" and "puppeteer" — to refer to former Judge Guerra and Judge Zambrano, and that these sinister-sounding nicknames support the existence of a "ghostwriting scheme."[380]

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376 R-991, Kohn, Swift & Graf P.C. and Joseph C. Kohn's Supplemental Reply to Chevron Corporation's Response In Support of Its Motion to Compel at 6, *filed in* RICO (Jul. 27, 2012).

377 R-900, Kohn Dep. Tr. (June 6, 2013) at 367:9-20. Contrary to Claimants' suggestion (Claimants' Amended Track 2 Reply on the Merits ¶ 55), Respondent has never suggested that the Plaintiffs submitted a draft judgment. Kohn's firm was interested in researching whether such a submission was possible or recommended in Ecuador, but the Plaintiffs ultimately abandoned the idea. Respondent's Track 2 Counter-Memorial on the Merits ¶ 287.

378 R-991, Kohn, Swift & Graf P.C. and Joseph C. Kohn's Supplemental Reply to Chevron Corporation's Response In Support of Its Motion to Compel at 7, *filed in* RICO (July 27, 2012).

379 Kohn has been unequivocal about his motivations; he considers himself a model attorney in his firm and his city, and has openly sought elected office in Philadelphia.

380 Claimants' Amended Track 2 Reply on the Merits ¶ 61.

233. Claimants' own timeline, however, confirms that former Judge Guerra and Judge Zambrano could not have been the referenced "puppet" and "puppeteer." On September 15, 2009, Pablo Fajardo sent an email referring to the "puppet" and "puppeteer," and to a package that the "puppet" was responsible for returning.[381] ***Judge Zambrano was not even the Judge on the Lago Agrio Case at the time***. Indeed, a week later, on September 21, 2009, Pablo Fajardo wrote "we do not know who the Judge on the case is going to be."[382] Judge Zambrano did not replace Judge Núñez on the bench until October 21, 2009.

234. Furthermore, Steven Donziger, who freely admitted that he had employed thinly veiled terms (the "cook," "chef," and "messenger") with respect to Mr. Cabrera's report, has at all times denied that the terms "puppet" and "puppeteer" referred to Messrs. Guerra and/or Zambrano. In fact, the reference was instead to a "former very bossy lawyer" with whom the Plaintiffs' team had a longstanding fee dispute.[383]

E. Alberto Guerra Is A Tainted And Unreliable Witness Whose Paid-For Declaration Remains Unsupported By Objective Evidence

235. Claimants have sought to buttress their floundering "ghostwriting" allegations through the purchased testimony of disgraced ex-Judge Alberto Guerra and two expert reports based on information Mr. Guerra provided.[384]

236. Claimants now allege that: (1) Mr. Guerra had a financial agreement with Judge Zambrano "pursuant to which Guerra would ghostwrite civil case orders and rulings for Judge Zambrano in exchange for compensation of US$ 1,000 per month";[385] (2) at some later but

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381 C-1652, Email from P. Fajardo to S. Donziger, L. Yanza, J. Prieto, and J. Sáenz (Sept. 15, 2009).

382 C-1651, Email from P. Fajardo to J. Sáenz, J. Prieto, S. Donziger, et al. (Sept. 21, 2009).

383 R-992, Clifford Krauss, *Lawyer Who Beat Chevron in Ecuador Faces Trial Of His Own*, THE NEW YORK TIMES (July 30, 2013) at 4.

384 Claimants' Amended Track 2 Reply on the Merits, § II.B.1.

385 *Id*. ¶ 59.

unidentified time the Plaintiffs agreed to pay Mr. Guerra $1,000 per month "in exchange for making the case move quickly and to rule in the Plaintiffs' favor";[386] and (3) two weeks before the Judgment was issued Judge Zambrano gave Mr. Guerra a draft of the Judgment, which Mr. Guerra says that Judge Zambrano told him the Plaintiffs had drafted, so that Mr. Guerra could "work on the document to fine-tune and polish it so it would have a more legal framework."[387] The only evidence connecting the Plaintiffs with the draft Judgment is Mr. Guerra's purchased, hearsay testimony that Judge Zambrano told him so.

237. The Tribunal should strike Mr. Guerra's evidence or otherwise find it not credible for three reasons. **First**, in violation of international rules regarding the proper use of fact witnesses, Claimants purchased Mr. Guerra's testimony and did so at a time when Mr. Guerra was in a desperate financial situation. Claimants lured Mr. Guerra with promises of cash for evidence and relocation to the United States, which now includes a comfortable life bankrolled by Claimants and an immigration attorney to help Mr. Guerra's family obtain citizenship. **Second**, by Mr. Guerra's own admission, he is a serial liar. His story has changed every time he has told it, including at his deposition ordered by this Tribunal. **Third**, Claimants' circumstantial evidence fails to support Mr. Guerra's story under any evidentiary standard (certainly not under the applicable "clear and convincing" standard needed to prove fraud).

1. Claimants Withheld Relevant Evidence Regarding Mr. Guerra For Four Years And Then Unlawfully Paid For His Declaration In This Case

238. Claimants allege for the first time in their Reply Memorial that Mr. Guerra approached Chevron's lawyers in 2009 to establish a connection between Chevron and Judge

386 *Id*. ¶ 62.

387 Claimants' Track 2 Reply on the Merits, Annex D at 18 (quoting C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 25, *filed in* RICO).

Zambrano.[388] If, as Claimants' now allege, Mr. Guerra had in fact approached Chevron, then Chevron had a clear obligation under Ecuadorian law to report the alleged wrongdoing by Mr. Guerra and Judge Zambrano[389] and by failing to do so have acted in bad faith.

239. Far from exposing the alleged bribery scheme, Chevron chose instead to *facilitate* Judge Zambrano's return to the case by moving to recuse his immediate predecessor, Judge Ordoñez, in August 2010, with full knowledge that, under the court's rules, Judge Ordoñez' recusal would require Judge Zambrano to resume his position as the presiding judge.[390]

240. The evidence does not show that the *Plaintiffs* plied anyone with money; the record instead shows that it is *Chevron* that soon began offering and throwing around its money in obscene amounts to purchase testimony.

241. Indeed, at one of his very first meetings with Chevron's representatives after the Judgment was issued, Mr. Guerra was offered money in exchange for evidence and shown a safe containing US$ 20,000 in cash to be paid to him.[391] According to Mr. Guerra's sworn testimony, however, Chevron's "priority" in meeting with him was to make contact with Judge Zambrano.[392] When Mr. Guerra proved unable to prevail upon Judge Zambrano to meet with Chevron's representatives, those representatives let Mr. Guerra know that senior people at Chevron were getting "impatient" and threatened that if he could not deliver Mr. Zambrano, Mr. Guerra would be "left with nothing."[393]

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388 Expert Report of Adam N. Torres (May 24, 2013) at 15-16, Exs. 22, 23.

389 RLA-495, Ecuadorian Code of Criminal Procedure, art. 42; RLA-164, Constitution of Ecuador (2008), art. 83.8.

390 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 66:24-67:22.

391 *Id*. at 119:13-25; 120:24-121:2.

392 *Id*. at 123:10-12.

393 Expert Report of Adam N. Torres (May 24, 2013), Ex. 12 at 27; Ex. 13 at 46.

242. Unable to meet with Judge Zambrano, much less negotiate a financial arrangement with him, Claimants settled on Mr. Guerra. This turned out to be a lucrative arrangement for Mr. Guerra. To date, Chevron has given or promised Mr. Guerra over US$ 300,000 in financial benefits, including:

- US$ 18,000 and a replacement laptop in exchange for a hard drive, 7 USB drives, two day planners and access to two email accounts;[394]
- US$ 20,000 and a replacement cell phone in exchange for copies of phone records and bank records, access to Mr. Guerra's bank and email accounts, various electronic media, two cell phones, TAME shipping records,[395] and credit card statements;[396]
- US$ 10,000 for a copy of the Memory Aid[397] and various bank deposit slips;[398]
- US$ 240,000 (US$ 10,000 per month, for 24 months) for Mr. Guerra, his wife, his son and his son's family's living expenses;[399]
- US$ 48,000 (US$ 2,000 per month for 24 months) for a housing allowance;[400]
- Car and health insurance for Mr. Guerra and his family; legal fees for any action related to the Lago Agrio Litigation;[401] and
- Travel expenses, legal fees for an immigration attorney for Mr. Guerra and five members of his family, and relocation expenses for Mr. Guerra and his family to move to the United States.[402]

243. Complicating these payments and their ample size is Mr. Guerra's confession that he sought this agreement with Chevron with the express goal of making money for himself.[403]

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394 *Id*. at Ex. 82 ¶ 5.

395 *See infra* § IV.E.3.d.

396 Expert Report of Adam N. Torres (May 24, 2013), Ex. 82 ¶ 6.

397 *See infra* § IV.E.3.b.

398 R-898, Letter from Gibson Dunn to Smysker Kaplan & Veselka (May 1, 2013).

399 Expert Report of Adam N. Torres (May 24, 2013), Ex. 82 at 3.

400 *Id*.

401 *Id*.

402 *Id*. at 4.

403 R-906, Guerra Dep. Tr. (May 2, 2013) at 36:18-37:3; 39:6-10; 170:14-16.

This is unsurprising given that Mr. Guerra was unemployed and in a precarious financial situation when he began his negotiations with Chevron.[404] On June 25, 2012, he told Chevron's investigators he needed US$ 50,000 to finish construction of his house.[405] On July 13, 2012, Chevron's investigators had US$ 50,000 in a backpack ready to give to Mr. Guerra if he could provide them with a draft of the final Judgment.[406]

244. Not only do Chevron's payments eviscerate Mr. Guerra's appearance of independence and credibility, they also violate rules regulating payments to fact witnesses under international, U.S., and Ecuadorian law as well as deontological standards of ethical conduct. For example, the IBA Guidelines on Party Representation in International Arbitration permit only certain payments to fact witnesses for: "(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing; [and] (b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify."[407] The IBA Guidelines do not permit cash payments in exchange for forensic, documentary or testimonial evidence. Similarly, U.S. federal law prohibits payments to witnesses in exchange for their testimony. The Federal Anti-Gratuity Statute explicitly provides that anyone who "directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath" will be subject to fines and/or imprisonment.[408]

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404 *Id*. at 150:21-25.

405 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 120:2-9; Expert Report of Adam N. Torres (May 24, 2013), Ex. 12 at 7.

406 R-910, Rivero Dep. Tr. (Apr. 24, 2013) at 152:10-153:8, *filed in* RICO.

407 RLA-496, IBA Guidelines on Party Representation in International Arbitration, art. 25.

408 RLA-494, 18 U.S.C. § 201(c)(2) ("Anti-Gratuity Statute") ("Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.").

245. The American Bar Association's Model Rules on Professional Conduct, which explicitly prohibit any party from offering "an inducement to a witness that is prohibited by law," forbid compensation to fact witnesses for any evidence or testimony beyond reasonable expenses.[409] Under Ecuadorian law, anyone who is found to have paid a witness for false testimony is guilty of perjury himself.[410]

246. Furthermore, there is no rational connection between the payments Mr. Guerra has received and the evidence he provided to Chevron. Regarding Chevron's original US$ 18,000 payment, Mr. Guerra explained the evidence he provided in exchange was not "worth anything to me from my own viewpoint. So I considered that if they were offering me US$ 18,000, they were gifting me that."[411] Similarly, Chevron's US$ 20,000 payment to Mr. Guerra on November 2, 2012 came in response to Mr. Guerra's demand that they give him US$ 20,000 to help him satisfy a debt and a threat that if Chevron did not pay him, he would stop working for them.[412]

247. When Mr. Guerra was a judge in Ecuador, he had a monthly salary of US$ 792.[413] Even excluding the income of in-kind benefits, including Chevron's payments of hundreds of thousands of dollars for immigration and other attorneys, Mr. Guerra is likely in the top 1 percent of all U.S. wage earners. He now receives US$ 12,000 each month — plus health insurance, a

409 RLA-497, American Bar Association Model Rule of Professional Conduct 3.4(b) and comment to same.

410 RLA-367, Ecuadorian Criminal Code, art. 359.

411 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 122:16-23.

412 *Id*. at 125:3-25.

413 R-909, Certification of A. Guerra's Judicial Salary (Sept. 20, 2013).

car, the services of an immigration attorney for himself and five members of his family,[414] and expenses for doing nothing other than testifying on Claimants' behalf.[415]

2. Mr. Guerra Admitted That He Lied Repeatedly To Gain Advantage In This Case

248. Mr. Guerra's own statements and admissions prove him to be an unreliable witness. During his deposition, Mr. Guerra admitted several times that he deliberately lied to Chevron to improve his negotiating position. Among other statements, he admitted:

- Lying to Chevron about his salary to induce Chevron to pay him more;[416]
- Lying to Chevron about having been offered money by the Plaintiffs;[417] and
- Lying to Chevron about the evidence that he could provide.[418]

249. Mr. Guerra stated: "I told Chevron several things. Some of them were true, others were exaggerations."[419] He confessed to following the same approach when he met with the Plaintiffs' lawyers in 2011 regarding the Ecuadorian legal system: "***I told them what I know they wanted to hear***. I didn't tell them or I didn't confirm anything that would go against those good intentions of theirs . . . I was not open, true. I was not open. I told them what they wanted to hear."[420] In the words of Chevron's lead counsel in Ecuador, Mr. Guerra is "shameless."[421]

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414 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 131:19-133:5.

415 In furtherance of such testimony in this arbitration and the RICO proceedings, Mr. Guerra has met with Claimants' attorneys 53 times since September 2012. *Id*. at 13:11-22.

416 R-906, Guerra Dep. Tr. (May 2, 2013) at 52:9-11; 52:23-53:2 ("In my attempt to improve my situation . . . in negotiations with Chevron . . . . I overstated regarding the income or money that I was receiving at the time.").

417 *Id*. at 150:4-14; 150:19-20 ("Q: [Y]ou represented to the Chevron representatives that you had been offered $300,000 by the plaintiffs in the Lago Agrio litigation, correct? A: My intent was to improve my position, the face of a good future negotiation for Mr. Zambrano and myself, so that to that end I said some things or exaggerated some things . . . . There was an exaggeration made to Chevron's representatives.").

418 *Id*. at 72:5-73:19; 74:17-24.

419 *Id*. at 168:11-13.

420 R-906, Guerra Dep. Tr. (May 2, 2013) at 110:23-111:2; 111:6-8.

421 Expert Report of Adam N. Torres (May 24, 2013), Ex. 22 (Racines Aff.) at 1.

250. Mr. Guerra's lies go to the heart of his testimony in this proceeding. During his initial meetings with Chevron's counsel, Mr. Guerra claimed that he had both (1) a draft of the Judgment on his computer, and (2) an e-mail with a "Memory Aid" attached which Pablo Fajardo had sent to him.[422] Chevron's counsel and investigators had a backpack with US$ 50,000 in cash they were prepared to trade with him on the spot for such evidence.[423] But even for a US$ 50,000 tax-free cash payment, Mr. Guerra could not produce a draft of either the Judgment or the Memory Aid. Chevron's private investigators were unable to find either in Mr. Guerra's possession.[424]

251. Mr. Guerra even lied in his sworn declaration regarding the cause for his dismissal as a judge in the Superior Court in Lago Agrio. Mr. Guerra claims he was dismissed because he "confronted Judges Novillo and Yáñez, who succeeded [him] as judges in this case, regarding several dubious and illegal rulings they had issued in the proceedings."[425] In fact, as his dismissal clearly confirms, he was dismissed for violating Article 10(1) of the Judiciary Act, which prohibits judges from publicly taking a position on a case that they have heard or will hear in the future.[426] Mr. Guerra was repeatedly disciplined by the court prior to his dismissal; he had been sanctioned by the National Judicial Council twice before — once on August 19 and again on August 26, 2004[427] — and was the subject of several administrative disciplinary processes.[428]

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422 R-910, Rivero Dep. Tr. (Apr. 24, 2013) at 173:5-22, *filed in* RICO.

423 *Id*. at 152:10-15.

424 *Id*. at 173:5-12; R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 121:3-18.

425 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 6, *filed in* RICO.

426 C-1665, Guerra Dismissal Order at 11:30 (May 29, 2008) at 5.

427 *Id*. at 6.

428 R-995, Draft Letter from A. Guerra to Court found on A. Guerra's hard drive (20130920-0138).

He has an obvious grievance against the Republic, and that deep grievance is matched only by his cash-laden drive to keep his Claimants happy.

252. Just as Claimants' payments to Diego Borja to manufacture a bribery claim failed upon close examination of the evidence, so too Claimants' purchase of Alberto Guerra to manufacture a bribery claim must fail upon close examination of the *untainted* evidence.

3. Claimants' Evidence Does Not Support Mr. Guerra's Claims Regarding His Relationship With Judge Zambrano, His Role In Drafting Procedural Orders, Or His Role In Drafting Judge Zambrano's Judgment

253. Mr. Guerra claims to have been paid by Judge Zambrano during the Lago Agrio Litigation to draft orders but Claimants offer no evidence probative of this claim. Mr. Guerra also claims to have been paid by the Plaintiffs to draft orders, but again Claimants offer no proof of any such arrangement. Finally, while Mr. Guerra claims to have edited the draft Judgment, Claimants have failed to provide any evidence other than Mr. Guerra's word that he even saw the Judgment before the Court released it publicly. When pressed, Mr. Guerra admits that he never struck a deal with the Plaintiffs regarding the final Judgment,[429] nor did he have a deal with Judge Zambrano regarding payments for helping with the Judgment.[430] Nor do the minor changes Mr. Guerra claims to have made to the Judgment in fact appear in the final Judgment.[431] Given this, without any objective or direct evidence to support their claims and little more to offer than a paid-for witness, Claimants seek to corroborate Mr. Guerra's elaborate hearsay testimony of Judge Zambrano's actions through circumstantial forensic and documentary evidence. In doing so, Claimants resort to drawing patently false conclusions from incomplete facts and proffering irrelevant evidence post-dating the Judgment's issuance.

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429 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 102:8-21; 103:3-11.

430 *Id*. at 105:12-107:11.

431 *Id*. at 143:23-144:6.

a. Forensic Evidence

254. Claimants claim to have forensic evidence from Mr. Guerra's hard drive that proves that he drafted procedural orders on Judge Zambrano's behalf.[432] Claimants' expert, Spencer Lynch, examined two separate sets of documents in an attempt to link Mr. Guerra to Judge Zambrano. The first set consists of 11 documents found on Mr. Guerra's hard drive that are similar in text to nine orders Judge Zambrano issued.[433] While Claimants contend that Mr. Guerra is the author of the nine draft orders later issued by Judge Zambrano, Respondent's expert, Christopher Racich, instead found that "[n]othing in the provided forensic analysis indicates that the issued orders were created from the drafts found on Guerra's computer or that Guerra himself was the author of any of these orders."[434] Indeed, the "draft orders" found on Mr. Guerra's hard drive were created there on July 23, 2010, *after* Judge Zambrano had issued his orders.[435]

255. The computer metadata for these documents confirm that they were created *not* on Mr. Guerra's computer produced in this arbitration but on some unknown computer to which Claimants' forensic expert did not have access.[436] As a result, there is no forensic evidence to establish where or by whom the draft orders were created. As explained by Mr. Racich, given the lack of forensic evidence available "it is just as likely that these documents were copied by

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432 Claimants' Amended Track 2 Reply on the Merits ¶ 64; *see also* Stroz Freidberg Expert Report of Spencer Lynch (Oct. 7, 2013) ¶¶ 14-28.

433 *See* Stroz Freidberg Expert Report of Spencer Lynch (Oct. 7, 2013) ¶¶ 14-21.

434 RE-18, Racich Expert Report ¶ 24.

435 *Id*. ¶ 31; Stroz Freidberg Expert Report of Spencer Lynch (Oct. 7, 2013) ¶ 15.

436 RE-18, Racich Expert Report ¶ 31.

Judge Guerra from a computer at the Lago Agrio Court to [his] Western Digital hard drive, and from there to the Guerra computer."[437]

256. The second set of documents consists of 105 draft orders found on Mr. Guerra's hard drive unrelated to the Lago Agrio Litigation. Here again, Mr. Lynch's analysis "does not prove that the documents found on the Guerra media were the original documents that the 105 orders came from, nor does it show if former Judge Guerra authored or modified these documents."[438] The available metadata confirm an entirely inconsistent hypothesis: that someone had accessed all 105 documents on July 13, 2012, the day Mr. Guerra turned over his hard drive to Chevron, and that all 105 documents had originally been created on at least three separate computers — none of which was Mr. Guerra's.[439] Mr. Racich concludes that Mr. Lynch's analysis cannot show "that the documents found on the Guerra media were the original documents that the 105 orders came from, nor does it show if former Judge Guerra authored or modified these documents."[440] In short, the forensic evidence fails to establish that Mr. Guerra drafted even a single order for Judge Zambrano. It is more likely that Mr. Guerra assembled the files on his computer after he had come to a financial arrangement with Chevron in an attempt to justify receiving payments from Chevron.

b. Memory Aid

257. Mr. Guerra claims in his declaration that Pablo Fajardo sent him an email attaching a "Memory Aid" while Mr. Guerra was editing the Judgment to help him with certain

437 *Id.* ¶ 31.

438 *Id.* ¶ 43.

439 *Id.* ¶¶ 37-40.

440 *Id.* ¶ 43.

factual issues.[441] While Mr. Guerra originally told Chevron's investigators that he had a copy of the Memory Aid, they could not find it anywhere at his house or on the electronic media they searched, and neither could Mr. Guerra.[442] Then, nearly a year later when Mr. Guerra fully understood the financial reward he would receive, he was suddenly able to locate a copy of the alleged Memory Aid for Chevron's lawyers.[443] In return, Chevron paid him US$ 10,000[444] — that is, US$ 10,000 for a hard copy of an 8-page memorandum.

258. The Memory Aid is not probative here for at least five independent reasons. **First**, as discussed above, it is improper to pay a fact witness for evidence under the IBA Guidelines, Ecuadorian law, and U.S. law. Mr. Guerra produced the Memory Aid in response to a subpoena in the RICO action.[445] Chevron acted unethically in paying him US$ 10,000 to "find" a "missing" document to comply with a lawfully issued subpoena — especially a document that it needed to produce to bolster Mr. Guerra's testimony.

259. **Second**, there is no way to authenticate the origin of the Memory Aid or its contents. Mr. Guerra claimed in his November 12, 2012 sworn declaration that Pablo Fajardo emailed it to him.[446] Six months later, in May 2013, Mr. Guerra once again testified that Mr. Fajardo emailed him the document.[447] Facing the obvious issue that neither Mr. Guerra nor Chevron ever located the corresponding email — despite the fact that Chevron had complete access to Mr. Guerra's email accounts and hard drive — Mr. Guerra now says that he believes

441 C- 1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in* RICO.

442 R-910, Rivero Dep. Tr. (Apr. 24, 2013) at 173:5-22, *filed in* RICO.

443 C-1649, Clayman Decl. (Apr. 11, 2013) ¶ 4, *filed in* RICO.

444 R-906, Guerra Dep. Tr. (May 2, 2013) at 213:4-214:2; R-898, Letter from Gibson Dunn to Smysker Kaplan & Veselka (May 1, 2013); R-908, Supplemental Agreement Number 1 between A. Guerra and Chevron Corporation (July 31, 2013).

445 C-1649, Clayman Decl. (Apr. 11, 2013) ¶¶ 2-4, *filed in* RICO.

446 C- 1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in* RICO.

447 R-906, Guerra Dep. Tr. (May 2, 2013) at 79:17-24.

Mr. Fajardo instead delivered it to him by hand.[448] This despite his repeated sworn testimony just months prior that the Memory Aid came by email. Given Mr. Guerra's testimonial flip-flops and the lack of any corroborating evidence whatsoever, we cannot know when or how Mr. Guerra obtained this paper document, or whether he himself prepared the document in light of the cash award Chevron offered for the document. For his part, Mr. Guerra claims not to know who authored the Memory Aid.[449]

260. **Third**, the Memory Aid's contents are nearly impossible to explain in the context of Mr. Guerra's declaration. The Memory Aid, a short and generic 8-page document, has little connection to the 188-page Judgment. Mr. Guerra claims he requested information from Pablo Fajardo about the case because he had questions about the essential errors issues and other sections of the draft Judgment when he was editing it.[450] Yet the Memory Aid itself is incomplete regarding the essential errors and has gaps throughout where important details about the case need to be filled in.[451] Further, the Memory Aid is so general that it would have provided no useful information for any person at all familiar with the case.

261. **Fourth**, Mr. Guerra testified that he requested the Memory Aid because he was unfamiliar with the essential errors issues,[452] notwithstanding that he stated in his affidavit that the Plaintiffs specifically paid him to address the essential errors issues through procedural

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448 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 137:13-17.

449 *Id*. at 137:8-12.

450 R-906, Guerra Dep. Tr. (May 2, 2013) at 78:21-79:9.

451 For example, the timeline of the Memory Aid, titled "Chronology of the Action," begins on May 7, 2003 with the filing of the lawsuit, but ends on February 5, 2009 with Mr. Cabrera submitting a clarification to his report. C-1649, Decl. of C. Clayman (Apr. 11, 2013) at 4, *filed in* RICO. Part of the discussion of the 1998 liability release is highlighted an incomplete, stating "(see pages …)." *Id*. at 6. Similarly highlighted and incomplete sections exist in discussions of the "Analysis of Control Test Sample" and "Essential Errors." *Id*. at 9-10.

452 R-906, Guerra Dep. Tr. (May 2, 2013) at 78:213-79:9.

orders[453] and later testified in deposition that he personally drafted those essential errors procedural orders in accordance with Ecuadorian law.[454] If his testimony is to be credited at all, he would surely not have needed a Memory Aid to assist him with the essential errors issues in the Judgment, most especially a generic 8-page Memory Aid that contains virtually no information about those issues.[455]

262. **Fifth**, the document itself contains a timeline of court events in the Lago Agrio Litigation beginning with the filing of the lawsuit on May 7, 2003 but ending abruptly on February 5, 2009 with the submission of a clarification by Mr. Cabrera to his report.[456] No dates or events from 2010 or 2011 appear anywhere in the document. It is very unlikely, and indeed illogical, that the Plaintiffs would have provided a truncated timeline to Mr. Guerra in 2011 to help him edit the Judgment — especially one that omits any discussion whatsoever of the final year of the Litigation.

263. What is more likely is that Mr. Guerra, who received his LL.M in Environmental Law in 2007,[457] may have received the Memory Aid as a result of his work writing about environmental damage in the Oriente region of Ecuador and the Lago Agrio Litigation.[458] We know from the contents of Mr. Guerra's hard drive that in late 2009 and early 2010 — two years after Mr. Guerra was dismissed as a judge — Mr. Guerra had prepared at least one speech[459] and edited an article by Pablo Fajardo about the Lago Agrio Case and the severe environmental

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453 C- 1616a, Guerra Decl. (Nov. 17, 2012) ¶¶ 13, 16, *filed in* RICO.

454 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 76:6-21, 81:10-82:3. At his deposition more than two years after Mr. Guerra allegedly drafted the earlier procedural orders regarding essential errors, Mr. Guerra was able to discuss at length how the essential errors issues were resolved in compliance with Ecuadorian law. *Id*. at 77:1-82:14.

455 C-1649, Clayman Decl. (Apr. 11, 2013) at 10, *filed in* RICO.

456 *Id*. at 4.

457 R-996, Curriculum Vitae of Alberto Guerra Bastidas (Jan. 28, 2013) at 1, *filed in* RICO.

458 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 149:11-150:11.

459 R-997, *Discurso de Presentación*, Speech by A. Guerra found on A. Guerra's hard drive (20130920-0171).

degradation of the Amazon region.[460] Documents on Mr. Guerra's hard drive also reveal that during this same time period he was engaged in several other projects that could explain his alleged need for a summary of the Lago Agrio court proceedings. These engagements included:

- Being hired by petroleum workers to file suit on their behalf related to health effects of petroleum extraction;[461]
- Working on essays "related mostly to environmental damages which occurred as a result of oil and gas production in the Oriente region";[462]
- Working on an article titled "Petroleo Amazonia" from January to June 2010;[463]
- Being retained by an energy company to assist with potential extraction and production issues related to a concession agreement with the Republic of Ecuador similar to that which Texaco entered in to and under which Chevron was being sued in Lago Agrio;[464]
- Likely working on an article in January 2010 dealing with the Texaco case and potential human rights violations;[465] and
- Working on public policy issues, conferences, lectures, and writings for the councilwoman for whom he worked, including proposed modification of the Hydrocarbons Law.[466]

264. When Respondent's counsel sought to ask Mr. Guerra about these documents and their possible connection to the Memory Aid at his November 5, 2013 deposition, Claimants' counsel repeatedly and impermissibly prevented Mr. Guerra from answering.[467]

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460 R-998, *Executive Summary of the Suit Against Chevron in Ecuador*, Article by Pablo Fajardo Mendoza found on A. Guerra's hard drive (20130920-0107).

461 R-999, *Señor (A) Juez (A) De Orellana*, Petroleum Worker lawsuit found on A. Guerra's hard drive (20130920-2591).

462 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 149:11-152:4.

463 R-1000, *Background and Current Situation of Oil Exploration in Ecuador,* Article worked on by A. Guerra found on A. Guerra's hard drive (20130920-0194).

464 R-1001, *Honorable Judge of the First Labor Court of Sucumbios,* Energy Company retainer found on A. Guerra's hard drive (20130920-2676); R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 152:18-153:6.

465 R-1002, *Universidad Central Del Ecuador Instituto Superior De Postgrado En Ciencias Internacionales Maestría En Derecho Ambiental*, January 2010 article found on A. Guerra's hard drive (20130920-1362).

466 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 149:3-10. Ms. Orellana has been heavily involved in environmental issues for her oil-rich district. R-1003, Biography of Ms. Magali Orellana.

467 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 153:18-154:5; 159:2-15; 160:20-163:14.

c. Mr. Guerra's Daily Planner

265. Claimants seek to corroborate Mr. Guerra's claims with entries in Mr. Guerra's daily planner to show that Mr. Guerra occasionally met with Judge Zambrano.[468] The daily planner, of course, offers no proof whatsoever that Mr. Guerra and Judge Zambrano had any sort of illicit arrangement during the Lago Agrio Litigation or that the two even actually met. Among other things, the first identified meeting between Mr. Guerra and Judge Zambrano occurred on November 11, 2011 — nine months *after* the Judgment issued.[469] If Mr. Guerra did in fact meet with Judge Zambrano on a few occasions more than nine months after the Judgment was rendered, it is not evidence of an illicit plan to ghostwrite a Judgment already issued. Nor is it surprising if they did in fact meet occasionally, given that they were once colleagues in a very small legal community and have known each other for many years.

d. Shipping Records

266. Mr. Guerra also provided Chevron with a spreadsheet, allegedly from a Quito-based shipping company called TAME, listing various shipping records for packages, boxes and documents sent to and from Mr. Guerra.[470] Claimants argue that the shipping records, which contain records of shipments from Mr. Guerra to Judge Zambrano, corroborate their ghostwriting allegations.[471] But the spreadsheet fails to substantiate Mr. Guerra's claims of having assisted Judge Zambrano in drafting orders in the Lago Agrio Litigation for three independent reasons.

267. **First**, the dates of the deliveries show that none of their contents could have related to Judge Zambrano's issuance of orders in the Lago Agrio Litigation. There is only one listed delivery during Judge Zambrano's time as presiding Judge for the Lago Agrio Case.

468 Claimants' Amended Track 2 Reply on the Merits ¶ 59.

469 Expert Report of Adam N. Torres (May 24, 2013), Ex. 36.

470 *Id*., Ex. 21.

471 Claimants' Amended Track 2 Reply on the Merits ¶ 59.

Although the February 11, 2011 delivery date was *three days* before the final Judgment was issued, Mr. Guerra's testimony rules that out as a transmittal of the Judgment itself. Mr. Guerra testified unequivocally that the last time he saw a draft of the final Judgment was *two weeks* before the Judgment was issued, when he allegedly edited it on Pablo Fajardo's computer.[472] Ruling out the February 11 shipment for this reason, Mr. Guerra's spreadsheet does not contain a single record of a shipment to Judge Zambrano during the latter's time as the Judge presiding over the Lago Agrio Litigation.

268. **Second**, the spreadsheet is not — and cannot be — authenticated. There is simply no evidence identifying the source of this document, how it was prepared, who prepared it, or why.

269. **Third**, the spreadsheet does not illuminate the contents of any shipment at all. Mr. Guerra's allegations are therefore not corroborated by any physical evidence; they instead turn on the testimonial evidence of an unreliable, paid witness and deserve to be discarded.

e. Judge Zambrano's Alleged Payments to Mr. Guerra

270. Mr. Guerra asserts that Judge Zambrano, whose background had been in criminal law, paid him US$ 1,000 a month to assist him in drafting orders for his civil cases.[473]

271. Claimants cite to only two transfers from Judge Zambrano to Mr. Guerra: one on June 24, 2011 (for US$ 300)[474] and the other on October 14, 2011 (for US$ 500).[475] But both transfers occurred long after Judge Zambrano issued the orders Mr. Guerra claims to have drafted, and the amounts are not what Mr. Guerra claims he received. These two deposits

472 C- 1616a, Guerra Decl. (Nov. 17, 2012) ¶¶ 25-27, *filed in* RICO.

473 *Id*. ¶ 7.

474 Expert Report of Adam N. Torres (May 24, 2013) at 25.

475 *Id*.

totaling US$ 800 are the only semi-credible evidence suggesting that Judge Zambrano ever gave any money to Mr. Guerra for any reason.[476] There is no evidence whatsoever that Judge Zambrano ever made *a single* payment to Mr. Guerra in the amount of US$ 1,000, much less that Judge Zambrano made such payments on a *monthly* basis during Judge Zambrano's tenure as presiding Judge in the Lago Agrio Litigation. There is likewise no evidence to suggest that the US$ 800 had anything to do with the Lago Agrio Judgment that had been issued many months earlier. There is simply no evidence to corroborate Mr. Guerra's specious claim that Judge Zambrano paid him US$ 1,000 every month — for a grand total of US$ 40,000 to US$ 45,000.[477]

272. Claimants similarly offer just two unauthenticated deposit slips of US$ 1,000 apiece to Mr. Guerra's account allegedly signed by Ximena Centeno, a former Selva Viva employee, as evidence that the Plaintiffs paid Mr. Guerra US$ 1,000 each month to ghostwrite procedural orders.[478] Neither Claimants nor Mr. Guerra have offered testimony showing that: (a) these are authentic bank deposit slips; (b) they were actually signed by Ximena Centeno; or (c) the deposits were made with an improper motive. Incomplete evidence of a mere two deposits is once again entirely inconsistent with Mr. Guerra's testimony that he received US$ 1,000 *every month*. Given Mr. Guerra's many extra-judicial engagements including writing and editing articles, giving lectures, and offering expert advice, if these deposit slips are real, there is every reason to believe that they represent legitimate payments for legitimate services.

273. A daily planner allegedly identifying a couple of meetings with Judge Zambrano many months after he issued the Judgment, shipping records showing only that a couple of

476 On July 15, 2011 and February 24, 2012, in Guerra's daily planner, there are references to money received from a "Nicolas" but nothing to suggest that the note refers to Judge Nicolas Zambrano. *Id*.

477 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 73:15:-21.

478 Claimants' Amended Track 2 Reply on the Merits ¶ 70.

packages were shipped to Judge Zambrano without identifying any of their contents other than the packages did *not* include any draft Judgment, and deposit slips purportedly showing payments less than *one-twentieth* of the amounts allegedly promised do not, separately or in the aggregate, establish that the Plaintiffs ghostwrote the Judgment. Claimants' allegations are instead entirely dependent on the testimony of an admitted serial liar bought and paid for by them.

F. Claimants' "Ghostwriting" Allegations Relating To The "Unfiled" Work Product Of The Plaintiffs Are Unsustainable

274. In the absence of any direct evidence to support their "ghostwriting" allegations, Claimants construct a circumstantial case based on a logical fallacy. Claimants posit that any language appearing in both Judge Zambrano's Judgment and the Plaintiffs' counsel's legal files, if not also entered in the Court's docket, must therefore be evidence of "ghostwriting" by the Plaintiffs.[479] Claimants are in error.

275. **First**, as originally noted in Respondent's Counter-Memorial, Claimants *still* have not established that the allegedly overlapping work product of the Plaintiffs is not in fact in the official trial record.[480] **Second**, undisputed contemporaneous evidence exists demonstrating that documents submitted to the Lago Agrio Court by the respective parties were not always entered into the docket — especially those documents submitted on-site at judicial inspections. **Third**, even if Claimants were able to prove that the few fragments in question had not been officially logged into the record, contemporaneous evidence demonstrates that the documents containing them were in fact either submitted to the Court at judicial inspections or were otherwise publicly available.

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479 *Id.* ¶ 39.

480 Respondents' Track 2 Counter-Memorial on the Merits, Annex D ¶¶ 10-12.

1. Claimants Have Still Not Proven That Plaintiffs' Work Product Is Not In The Official Trial Record

276. Critical to Claimants' "ghostwriting" theory is their contention that verbatim extracts from certain of the Plaintiffs' internal documents appear in Judge Zambrano's Judgment, but not in the official trial record.[481] They support this contention by arguing that: (i) the complete Lago Agrio Record is capable of being reliably analyzed by computer review to determine whether or not certain documents were filed with the Lago Agrio Court[482]; (ii) any potential gaps or issues encountered by such a computer review can be cured by a supplemental hand-review of the "primary" candidates for errors[483]; and (iii) their supplemental hand-review review can be buttressed by a second supplemental hand-review, albeit one performed in 2012.[484] Claimants' argument is untenable for the following five reasons.

277. **First**, Claimants' computer-based review of the mostly paper trial record is inherently unreliable due to the process used to create and maintain the Lago Agrio trial record, as well as the current "pawed over" condition of that record. The vast record is not computer-based, but rather was manually maintained in various hand-stitched, consecutively numbered rubber-banded *cuerpos* (folders) and stored across the span of eight years. Claimants mischaracterize Respondent's argument as stating that "there is no ascertainable court record,"[485] and put forth the expert report of Dr. Santiago Velazquez Coello to knock down this straw man. Thus Dr. Velazquez opines, "I can confirm that in my country there is a record for each

481 Claimants' Amended Track 2 Reply on the Merits ¶ 39.

482 *Id.* ¶ 41.

483 C-1635, Second Juola Decl. (Jan. 27, 2013) ¶ 78.

484 Claimants' Amended Track 2 Reply on the Merits ¶ 42.

485 *Id.* ¶ 40.

proceeding or case, as it is normally referred to."[486] Respondent has never disputed this. What is instead in dispute is the ability of a computer-based analysis, Optical Character Recognition ("OCR"), to reliably and exhaustively analyze the entire Lago Agrio Record, as Claimants' expert, Prof. Patrick Juola, claims he has done, to produce evidence probative of Claimants' "ghostwriting" theory.[487]

278. Claimants' new expert report from Dr. Velazquez merely reinforces the difficulties encountered by an OCR analysis of the Lago Agrio Record. Dr. Velazquez explains that filings in Ecuadorean proceedings are combined into separate 100-page folders with handmade notations on each page, with each batch then "fixed with elastic bands to avoid scattering around the documents."[488] Because of this standard court record filing practice, and the high volume of filings during portions of the case, the content of the folders that were created in the Lago Agrio Litigation ended up being at times out-of-order, misnumbered, or unnumbered.[489] With no electronic filing system available to be searched, it is on these various 100-page files, compiled over eight years and held together by rubber bands, that Prof. Juola performed his OCR analysis and concluded that documents such as the Fusion Memo were not in the record.[490]

279. **Second**, an incomplete hand-review of only certain documents is insufficient to redress the inherent inaccuracy of the OCR review given that Claimants have admitted that the

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486 Expert Report of Dr. Santiago Velazquez Coello (Jun. 3, 2013) at 4.

487 Respondents' Track 2 Counter-Memorial on the Merits, Annex D ¶¶ 10-12.

488 Expert Report of Dr. Santiago Velazquez Coello (Jun. 3, 2013) at 4.

489 *See*, *e.g.*, R-669, Lago Agrio Record, Cuerpo 1309 at 140716-786 (including unnumbered pages); R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages that should appeared in the record approximately 60,000 earlier).

490 *See* C-1007, Juola Decl. (Dec. 20, 2011) at 3-4. As previously noted, Claimants have not provided the Republic with a copy of the record that Prof. Juola examined so there is no way for the Republic to independently verify that the record he analyzed is coextensive with the actual Lago Agrio Record.

poor quality of the Lago Agrio Record resulted in OCR errors. Yet such a hand-review is precisely what Claimants propose as a cure.[491] In response to Prof. Fateman, an expert who opined that "it is quite implausible that an effective computer search of the lower court record could be done,"[492] Claimants' expert, Prof. Juola, "accept[ed] this criticism," "acknowledge[d] that the text files received were in many cases quite poor," and admitted that the OCR analysis produced "gobbledygook."[493] Prof. Juola and his team therefore worked to "identify any particularly egregious documents that may require hand-examination" in an effort to address this serious problem.[494]

280. Yet out of eight years of heavy filings, only 139 documents were identified for hand-review, after which Prof. Juola simply confirmed his prior conclusion.[495] In his recent declaration, Prof. Juola described these 139 documents as just the "*primary* candidates for OCR errors."[496] At the very least, *all* candidates for OCR errors should have been hand-reviewed — not just the "primary" ones. Given the unlimited resources available to Claimants, it is, moreover, unclear why they did not perform a hand-review of the entire Lago Agrio Record when faced with acknowledged deficiencies in their OCR analysis.[497]

281. **Third**, Claimants' attempt to buttress Prof. Juola's inadequate review with Morningside Translations' 2012 hand-review of portions of the Lago Agrio Record is not only

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491 Claimants' Amended Track 2 Reply on the Merits ¶ 42.

492 R-655, Fateman Decl. (Feb. 22, 2012) ¶ 28; Respondent's Track 2 Counter-Memorial on the Merits ¶ 288.

493 C-1635, Second Juola Decl. (Jan. 27, 2013) ¶ 46.

494 *Id*. ¶ 48.

495 *Id*. Appendix B.

496 *Id*. ¶ 78 (emphasis added).

497 Claimants still have not provided their copy of the record to Respondent or the Tribunal.

misleading, it is inaccurate for at least four reasons.[498] *First*, Morningside's review was completed well over a year ago and, despite Claimants' misleading portrayal, was in no way performed in response to the admitted defects of the OCR analysis or Prof. Juola's review. *Second*, Morningside's outdated review encompassed only approximately half of the total documents recorded as docketed in the Lago Agrio Case.[499] *Third*, because this partial review of the record was completed so long ago, the Morningside team limited their review to only certain of the relevant documents, such as the Fusion Memo or the Record Index Excerpts. The Morningside team never even searched for documents such as the Clapp Report and the Moodie Memo. Claimants' statement that "Morningside Translations ('Morningside') separately confirms that . . . *none* of the Plaintiffs' internal documents at issue appears in the record"[500] is thus demonstrably false. *Fourth*, in Morningside's partial review of the record, overlapping text from the Fusion Memo, the Record Index Excerpts, and the Selva Viva Database was in fact discovered.[501] A full review, looking for all the documents at issue, is likely to have revealed further overlapping text.

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498 Claimants' Amended Track 2 Reply on the Merits ¶ 42.

499 C-1636, Hernandez Aff. (Jul. 27, 2012) ¶ 7. Morningside reviewed 3,761 of the 6,348 documents recorded as docketed in the Lago Agrio Case. Claimants appear to conclude, erroneously, that the other 2,587 documents in the record did not need to be reviewed by Morningside because an internal — and wholly unexplained — review on Claimants' part predetermined that those documents could not have included the Plaintiffs' work before transmitting them to Morningside. Yet Claimants are fully aware that the many pages in the record, and even entire *cuerpos*, were at times mis-numbered or not numbered at all, and plainly out of order. Given that certain sections of the record were comingled with other, unrelated sections, a hand-review of the entire record — not just "selected" filings — was required. *See*, *e.g.*, R-669, Lago Agrio Record, Cuerpo 1309 at 140716-786 (including unnumbered pages); R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages from approximately 60,000 earlier in the record).

500 Claimants' Amended Track 2 Reply on the Merits ¶ 42.

501 C-1636, Hernandez Aff. (Jul. 27, 2012) ¶¶ 23, 25, and 28.

282. **Fourth**, some materials were submitted to the Court, often at judicial inspections, on disk in electronic format.[502] The *cuerpos*, however, do not always include a record of a disc being submitted or note the disc's contents.[503]

283. **Fifth**, the overworked Court clerical personnel sometimes made mistakes, not having the quality control and supervisory personnel that courts of other, more affluent countries employ. Had Claimants not elected to move the case to Ecuador as the "more convenient" forum, they would have had the full benefit of the clerical apparatus of the U.S. District Court for the Southern District of New York, including an electronic and comprehensive record filing system. Having moved the case to Ecuador, Claimants cannot now complain about the inadequacy of the Court's filing system.

2. The Parties Regularly Submitted Documents — Including Documents Claimants Characterize As "Unfiled" — At Judicial Inspections

284. In addition to their failure to prove that the allegedly "unfiled" documents at issue are not actually in the record, Claimants also fail to address the fact that documents were properly submitted to the Court, often at judicial inspections. Instead, Claimants attempt to justify their "ghostwriting" narrative by refusing to acknowledge this reality.[504] In doing so, Claimants (i) contend that such arguments by Respondents are "merely speculation,"[505] and (ii)

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502 *See*, *e.g.*, R-664, Lago Agrio Record, Cuerpo 1416 at 151470-71 (Chevron asking the Court to review and incorporate into the record the contents of a CD containing sampling data and quality control data related to those samples); R-665, Lago Agrio Record, Cuerpo 108 at 12008 (noting Chevron's submission of a CD and accompanying video to the court during the Sacha 14 JI); R-666, Lago Agrio Record, Cuerpo 108 at 12047 (Chevron submitting CD of video presented at Sacha 14 JI).

503 *See, e.g.*, R-668, Lago Agrio Record, Cuerpo 1416 at 151454 (Court memorandum noting CD submitted by Chevron but not yet included in record).

504 Claimants' Track 2 Amended Reply Memorial on the Merits ¶¶ 43-44.

505 *Id*. ¶ 43.

simply revert back to their summary contention that the documents do not appear in the record.[506] Claimants are wrong to do so for the following five reasons.

285. **First**, Chevron itself cannot dispute that it too submitted documents that were not entered into the official Court record, but were nonetheless addressed and relied upon by the Court. As just one example, Chevron filed thirty-nine separate motions on October 14, 2010 challenging one particular order of the Court.[507] Despite thirty-nine different motions having been submitted, only *thirty-five* of them appear in the official record.[508] Five days later, however, the Court issued an order addressing all *thirty-nine* motions.[509] Can it be said that those other four motions were never submitted to the Court simply because they did not show up in the record? Or can it be said that the Court somehow engaged in a fraud or miscarriage of justice by relying on those four "unfiled" motions when later issuing its ruling? It is simply a fact that certain documents submitted by both sides — out of the tens of thousands submitted to the Court throughout the course of the trial — were not docketed as they should have been.

286. **Second,** the fact that certain documents were properly submitted to the Court but not properly docketed is wholly unsurprising given the length of the Lago Agrio Litigation, the volume of documents given to the Court, and the flood-like manner in which they were sometimes submitted. That the administrative support staff in a judicial outpost in the Amazon rainforest occasionally failed to enter a submission in a case with a record 2,000 times the size of the average Ecuadorian case is not just unsurprising, it was predictable at the time that Claimants

506 *Id*.

507 *See* C-644, Court Order, Provincial Court of Sucumbíos (Oct. 19, 2010) (addressing Chevron's thirty nine motions).

508 Cuerpo 1989 ends with Chevron's Motion filed at 5:44 PM — the 35th of the 39 Chevron filed that evening. Cuerpo 1990 starts with the Court's Order addressing those 39 motions. *See*, *e.g.*, R-182, List of Motions Addressed by Court's Order of Oct. 19, 2010, 17H02M.

509 R-182, List of Motions Addressed by Court's Order of Oct. 19, 2010, 17H02M.

sought to move the case from New York to Lago Agrio. In short, the sheer volume of the submissions and the manner in which they were maintained together account for the fact that documents were properly submitted to the Court but not recorded.

287. **Third**, legal systems throughout the world have long encountered difficulties in properly docketing and storing documents. These difficulties have only recently led to the current movement towards the expensive process of adopting electronic filing systems, seeking the benefit of finally obtaining "greater confidence in the completeness of the court's case . . . as there are no lost or misplaced documents."[510] But not even all jurisdictions in the United States have adopted electronic filing systems, necessitating the enactment of laws to help parties and courts deal with missing or mis-docketed documents.[511] Such commonplace clerical mistakes do not constitute reversible error in U.S. appellate courts; they surely do not amount to a denial of justice constituting a breach of international law.

288. **Fourth**, documents were frequently submitted at judicial inspections. This increased the likelihood that properly submitted documents would arrive in the Court's hands, but not necessarily show up in the official record. It was at these inspections of contaminated oil pits in the rainforest, far removed from the organization of the courtroom, that under Ecuador's civil procedure practices complex legal arguments were routinely made to the judges and documents submitted to the Court.[512] The Plaintiffs often made use of this procedure.[513]

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510 R-572, Alan Carlson, *Electronic Filing and Service: An Evolution of Practice*, Justice Management Institute (2004) at 3.

511 *See, e.g.*, RLA-397, 28 U.S.C. § 1734 (titled "Court record lost or destroyed, generally"); RLA-398, 705 Illinois Compiled Statutes 85 (titled "Court Records Restoration Act").

512 *See*, *e.g.*, C-1642, Email from G. Erion to S. Donziger (Jun. 13 2008) ("Julio presented a powerpoint presentation about the merger to the judge and discussed a lot of the corporate law concepts we had discussed (i.e., substance over form of the transaction, no mention anywhere of the shell company KeepUp Inc. to the public, intentional undercapitalization/avoiding liability, etc.) I[t] was rather incredible to see such arguments being made under the canopy of the Amazon and next to oil pits.").

Needless to say, when documents were submitted to the Court in this fashion the likelihood increased that they might not end up being fully docketed in an official record, although the Court would still be permitted to properly rely on them.

289. Indeed, out-takes from the documentary *Crude* readily confirm that the practice of submitting documents to the Court at judicial inspections at times resulted in not all of the submitted documents making their way into the official record. In the *Crude* outtake from Sacha Sur, Mr. Alejandro Ponce Villacís can plainly be seen openly providing a document to the Court, but the trial record fails to note the Court's receipt of any document there.[514] Similarly, at the judicial inspection of Cononaco 6, Mr. Pablo Fajardo handed a document to Chevron's counsel, Mr. Adolfo Callejas, (at 5:00) and then Mr. Callejas subsequently handed it to the Court (at 8:40).[515] Once again, however, the trial record makes no note of the Court's receipt of this document. These and other instances of document distribution at judicial inspections have never been disputed.

290. **Fifth**, both parties had a practice of submitting CDs and DVDs – in addition to paper documents – containing documentary evidence to the Lago Agrio Court as part of the judicial inspection process and sometimes as a complement to a motion.[516] It is uncontroverted

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513 R-1004, June 2007 Video Transcript, DOCID 0153431 at 31 ("Donziger: Okay, I think what we'll do with that is . . . see, this is the way it works. There's three main things we haven't dealt with in terms of the evidence. See, the evidence you can only put in during the inspections. And since the inspections are over, we're going to have one more inspection to put in our final pieces of evidence." "Sara: How exactly does that work? Like, why can you only bring evidence during inspections? I mean, like, physically, how does that work?" "Donziger: You just give it to the court and the secretary and it becomes part of the record.").

514 R-840, Crude Outtakes at 30:40. Later, in another outtake from the same judicial inspection, the parties' counsel can be seen debating the legal effect of the Chevron-Texaco merger. R-841, Crude Outtakes at 30:00.

515 R-842, Crude Outtakes at 8:40.

516 *See*, *e.g.*, R-664, Lago Agrio Record, Cuerpo 1416 at 151470-71 (Chevron asking the Court to review and incorporate into the record the contents of a CD containing sampling data and quality control data related to those samples); R-665, Lago Agrio Record, Cuerpo 108 at 12008 (noting Chevron's submission of a CD and accompanying video to the court during the Sacha 14 JI); R-666, Lago Agrio Record, Cuerpo 108 at 12047 (Chevron submitting CD of video presented at Sacha 14 JI).

that these electronic submissions contained portions of the documents at issue that did not otherwise appear in the record.[517] And while at times the Court did add these discs to the record,[518] other times it did not, at least not expressly. However, having been submitted openly and properly, the documents were appropriately before the Court and available for the Court to rely upon for any and all purposes.[519]

291. Claimants seek to obscure this issue of CD and DVD submissions by stating that Prof. Juola has confirmed that, pursuant to his review, CDs submitted to the Court could not contain the documents at issue.[520] But Prof. Juola is clear that his review encompassed only the CDs on the Court's record, thus failing to account in any way for the very *undocketed* CD submissions that the Republic has demonstrated took place during the proceedings. And, in addition to those undocketed and therefore unreviewed submissions, there are also obvious shortcomings in Prof. Juola's review of the *docketed* CD and DVD submissions.

292. Prof. Juola asserts that he reviewed the CDs and DVDs identified as part of the official court record but found no "overlap" between certain of the underlying "unfiled" work product – including the Fusion Memo, the Fajardo Trust Email, and the Clapp Report – and the respective electronic data.[521] When making this assertion, however, he fails to attach the official court correspondence or otherwise address the fact that "a high percentage of the electronic media (CDs or DVDs) located are in an advanced state of deterioration."[522] Nor does Prof. Juola

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517 *See*, *e.g.*, Expert Report of P. Juola (Jun. 3, 2013) ¶¶ 23, 26-27.

518 *See* R-667, Lago Agrio Record, Cuerpo 1076 at 117078 (incorporating transcript of Chevron's video submitted at the Lago Agrio 2 JI).

519 *See, e.g.*, R-668, Lago Agrio Record, Cuerpo 1416 at 151454 (Court memorandum noting CD submitted by Chevron but not yet included in record).

520 Claimants' Track 2 Reply Memorial on the Merits ¶ 42.

521 Expert Report of P. Juola (Jun. 3, 2013) ¶¶ 22, 24-25.

522 R-1176, Lago Agrio National Court Record at 230-31, Eng. D. Rosero's Report (April 19, 2013).

address the many entries noting that the "disc cannot be read" or "cannot be reproduced" or "cannot be copied," or had "many signs of dirt and moisture."[523] The fact is that a substantial amount of the underlying data that was provided to the Lago Agrio Court in electronic form is simply no longer accessible to the parties and therefore Prof. Juola's analysis of the record is – and must remain – incomplete.

3. Plaintiffs Submitted The Fusion Memo To The Court At A Judicial Inspection

293. Claimants' Reply argues as follows: if a particular document (here Plaintiffs' Fusion Memo) did not turn up during Claimants' partial review of the record, but some of its text (240 words) appears in Judge Zambrano's Judgment, then the Plaintiffs must have "ghostwritten" the Judgment.[524] This argument is entirely unconvincing given the shortcomings of Claimants' review discussed above. Moreover, Claimants also ignore the much more persuasive evidence that the Fusion Memo in fact was properly submitted to the Court at a judicial inspection on June 12, 2008. Six points compel this conclusion.

294. **First**, uncontroverted evidence shows that the Plaintiffs always intended to submit the Fusion Memo and its accompanying exhibits to the Court.[525]

295. **Second**, uncontroverted evidence shows that the Plaintiffs targeted June 12, 2008 as their submission date, and did in fact conduct a presentation to the Court on that date

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523 *Id.* at 226-29, "Registro de Control" attached to Eng. D. Rosero's Report (April 19, 2013).

524 *Id*. ¶¶ 43-44.

525 C-1641, Email from J. Sáenz to S. Donziger (Nov. 15, 2007). Mr. Sáenz initially writes: "Colleagues, here's the first version of the famous merger memo, for your review and comments." Mr. Donziger then asks: "The idea is that this is the only document we file?" Mr. Sáenz responds: "This document, along with all of the attached documents it mentions."

regarding Chevron's merger with Texaco.[526] The presentation was made at the Aguarico judicial inspection.[527]

296. **Third**, uncontroverted evidence shows that three days prior to the Aguarico judicial inspection, both the Fusion Memo and a list of all of its exhibits were circulated to Mr. Donziger by the Plaintiffs' team in Ecuador in response to Mr. Donziger's request that they provide him with a "cover memo" and a list of the documents to be submitted at the inspection.[528] In the same email, the Plaintiffs' intern Gregory Erion noted that he had "just talked" with Mr. Juan Pablo Sáenz, an attorney for the Plaintiffs, and the two of them would review Mr. Erion's "memo" the following day.[529] Claimants portray this separate memorandum as the Fusion Memo, knowing it is not because Mr. Erion had just sent the Fusion Memo drafted by Mr. Sáenz to Mr. Donziger.[530] The "Corporate/Veiling Piercing memo" that Mr. Erion notes Mr. Sáenz is "keen to get going on" addressed the legal issues of piercing the corporate veil. [531] The Fusion Memo, in contrast, addressed the specific factual circumstances of Chevron's merger with Texaco.

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526 *See*, *e.g.*, C-1638, Email from J. Sáenz to S. Donziger (Jun. 9, 2008).

527 R-660, Lago Agrio Record, Cuerpo 1309 at 140787-814 (Acta from JI of Aguarico 2); C-1642, Email from G. Erion to S. Donziger (Jun. 13 2008).

528 C-1640, Email from S. Donziger to J. Sáenz (Jun. 9, 2008). Mr. Donziger's request for a list of exhibits and a cover memo was made at 9:12 AM. Nearly the whole day passed before a key attorney for the Plaintiffs in Ecuador, Mr. Juan Pablo Sáenz, responded at 5:45 PM with a list of thirteen Fusion Memo exhibits "that'll be submitted to Court during Thursday's inspection." R-658, Email between S. Donziger and J. Sáenz (Jun. 9, 2008). Eleven minutes later the intern assisting Mr. Sáenz, Graham Erion, sent Mr. Donziger "Jumpa's [Mr. Sáenz'] memo on the fusion/merger." R-657, Email from G. Erion to S. Donziger (Jun. 9, 2008).

529 *Id*.

530 *See*, *e.g.*, Claimants' Amended Track 2 Reply on the Merits, n. 85.

531 C-1642, Email from G. Erion to S. Donziger (Jun. 13, 2008); R-1005, Transmittal Email from G. Erion to S. Donziger (Jun. 9, 2008); R-1006, G. Erion Memorandum RE "Application of Legal Doctrine of "Piercing the Corporate Veil' to Agunida [sp] v. Chevron."

297. **Fourth**, uncontroverted evidence shows that all of the exhibits cited in the Fusion Memo are found in the Court's records from that day — June 12, 2008.[532]

298. **Fifth**, uncontroverted evidence shows that the section of the official record for June 12, 2008, which contains the Fusion Memo's exhibits, also contains pagination errors and, contrary to court rules, was not sequentially numbered.[533] Certain blocks of pages from the relevant portions of the record were unnumbered, while other portions of the record were out-of-order and erroneously alternated back-and-forth with pages that should have appeared roughly 60,000 pages earlier in the record.[534] Such evidence gives rise to the irrefutable fact that on the day of the Fusion Memo's submission the Court's docketing process was error-laden, thereby increasing the likelihood that the Memo was submitted on that day, just not docketed.

299. **Sixth**, in the face of internal documents showing that the Plaintiffs intended to file both the Fusion Memo and exhibits at the judicial inspection on June 12, 2008, and the fact that those exhibits were indeed filed and docketed on that date, Claimants have failed to produce any internal correspondence from the Plaintiffs referencing either a last-minute change in plans to file the exhibits without the Fusion Memo, or indicating that the Fusion Memo remained unfiled after June 12, 2008.

300. Claimants' Reply makes no attempt to reconcile their hypothesis — that the Fusion Memo was never publicly filed with the Court — with these undisputed facts. Claimants instead rely on their admittedly incomplete review of an admittedly incomplete court file.

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532 R-530, Lago Agrio Record, Cuerpo 1308 at 140701 ("Protocolización" noting submission by Pablo Fajardo at the inspection site and attaching the Fusion Memo exhibits).

533 *Id.*; R-669, Lago Agrio Record, Cuerpo 1309 at 140716-786 (including unnumbered pages). *See also, e.g.*, R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages from roughly 60,000 pages earlier in the record).

534 *See, e.g.*, R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages from roughly 60,000 pages earlier in the record).

4. Plaintiffs Submitted The Clapp Report To The Court At A Judicial Inspection

301. Claimants point to the Judgment's apparent reliance on a report drafted in 2006 by Richard Clapp, a reputed Boston University Professor, and his team of researchers in the United States (the "Clapp Report") as support for their "ghostwriting" allegations. Claimants make this assertion because the thirty-seven-page Clapp Report allegedly did not appear in their computer review of the Lago Agrio Record but a forensic analysis by Dr. Robert Leonard concluded that a thirty-four-word extract from the Clapp Report relating to "lead poisoning" appears in Judge Zambrano's Judgment.[535] As with the Fusion Memo, however, the relevant contemporaneous evidence, discussed below, shows that the Clapp Report was drafted for the express purpose of submission to the Court at a judicial inspection — in this case the April 25, 2007 judicial inspection of the Shushufindi Refinery — and was most likely submitted at that time. The following five points compel this conclusion.

302. **First**, uncontroverted evidence shows that the Plaintiffs, in 2006, commissioned the Clapp Report as a "Health Annex" to be submitted to the Lago Agrio Court as evidence in the case establishing the link between the release of oil contaminants and adverse health effects.[536]

303. **Second**, uncontroverted evidence shows that the Plaintiffs, in 2007, memorialized their plan to file the Clapp Report at the first judicial inspection following its finalization.[537]

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535 Claimants' Amended Track 2 Reply on the Merits ¶¶ 47-48.

536 *See, e.g.*, R-901, Email from R. Kamp to R. Clapp (Mar. 13, 2006); R-902, Email from S. Donziger to D. Fischer (Jul. 10, 2006). Prof. Clapp and his team provided an initial draft of this "Health Annex" to the Plaintiffs in July of 2006. R-1007, Email from S. Donziger to G. Howe (Jul. 10, 2006).

537 R-1008, Email from S. Donziger to G. Howe and R. Clapp (Jan. 5, 2007) ("For logistical reasons, we still have not turned in the health annex to the court. There were some last-minute changes that changed our certified translated copy, which caused a snafu with the translator. We will turn it in at the next inspection, which might be in a few weeks."). The Plaintiffs' counsel had initially targeted a mid-November 2006 judicial inspection for the report's submission to the Court, but were unable to make this initial target date due to difficulties in securing the

304. **Third**, uncontroverted evidence shows that the Clapp Report was signed and finalized in the Spring of 2007.[538]

305. **Fourth**, uncontroverted evidence shows that the next judicial inspection following completion of the Clapp Report was the judicial inspection of Shushufindi Refinery, the final report of which was submitted to the Court on September 6, 2007.

306. **Fifth,** uncontroverted evidence shows that there is no internal correspondence among the Plaintiffs' counsel — out of the millions of documents produced to Claimants — stating that they had decided to abandon their plan to submit the finalized Clapp Report to the Court. It is not credible for Claimants to suggest that the impecunious Plaintiffs would have paid for a supportive expert report, spent months finalizing it, and agreed to submit it to the Court, only then to bury the report after its completion without any internal email discussion on the subject.

307. From these uncontroverted facts, the only reasonable conclusion is that the Plaintiffs openly submitted the Clapp Report to the Court, as planned, at the judicial inspection of Shushufindi Refinery, and that either Claimants simply did not find the Report in their incomplete review of part of the Court's record, or the Report simply did not show up in the Court's record due to a docketing error.

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signatures of Prof. Clapp and the rest of his U.S.-based team onto a single page for the report prior to its submission. *See*, *e.g.*, R-1009, Email from S. Donziger to R. Kamp (Nov. 10, 2006). Following this missed submission, Lauren Schrero, an intern for the Plaintiffs, and Mr. Donziger coordinated the finalization of the report so it could be submitted to the Court the following year. R-1010, Email from L. Schrero to S. Donziger (Nov. 29, 2006).

538 In May 2008, Richard Clapp sent Stratus' David Mills an email containing the 2006 Clapp Report and stating "Here's our previous report. We signed it and sent it to Steve Donziger over a year ago." R-1011, Email from R. Clapp to D. Mills (May 29, 2008); R-1012, Copy of Clapp Report Sent From R. Clapp To D. Mills (May 29, 2008). After their initial difficulties in late 2006, Mr. Donziger coordinated with one of the Plaintiffs' team members to redo the signature page so that all of the necessary signatures would be on the same page for the upcoming submission. R-1013, Email from L. Schrero to S. Donziger (Jan. 6, 2007). Coordinating these signatures, however, proved to be more difficult than initially anticipated, and as a result several months passed before the Plaintiffs finally received the signed and finalized version of the Health Annex in late Spring 2007.

5. Legal Theories Of Causation Found In The Moodie Memo Were Also Submitted To The Court In An *Amicus Curiae* Brief, Explaining Their Use In Judge Zambrano's Judgment

308. Claimants allege that the "Moodie Memo," an internal memorandum addressing various theories of causation drafted by the Plaintiffs' intern Nicolas Moodie in February 2009, is a "source document" responsible for the Judgment's use of "mysterious causation standards that have no basis in Ecuadorian law" — namely those from the United States and Australia.[539] Unlike their allegations regarding the Clapp Report and Fusion Memo, however, Claimants do not argue that the Judgment contains text lifted from the Moodie Memo. Instead, Claimants simply allege that (i) there was no reason for the Judgment to look to U.S. or Australian causal theories when dealing with the issue of causation; (ii) the Moodie Memo was not submitted to the Lago Agrio Court but contains U.S. and Australian causation theories; and (iii) because the Judgment used causation theories similar to those from the Moodie Memo, the Judgment must have been "clandestinely drafted by the Plaintiffs' lawyers."[540] Contrary to Claimants' allegations, the Judgment properly relied on the causation theories at issue because not only was the Lago Agrio Court permitted to look to foreign jurisprudence when informing its causal analysis, but the very theories at issue were put before the Court by way of an *amicus curiae* brief that was drafted based in part on the Moodie Memo. Six points compel this conclusion.

309. **First**, Claimants do not allege any sort of textual overlap between the Moodie Memo and the Judgment. They merely claim that the use of the same causal theories in both the Moodie Memo and the Judgment is sufficient by itself to establish "ghostwriting" by the Plaintiffs. Such evidence is circumstantial at best, and is easily explained.

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539 Claimants' Amended Track 2 Reply on the Merits ¶ 49; C-1645, Moodie Memorandum (Feb. 2, 2009).

540 Claimants' Amended Track 2 Reply on the Merits ¶ 50.

310. **Second**, Judge Zambrano's Judgment was well-founded in looking to U.S., English, and Australian causation theories because Ecuadorian judges have broad discretion in assessing causation, and reliance on foreign legal theories is readily accepted in Ecuadorian jurisprudence.[541] Indeed, the Judgment begins its section on causation by quoting *Comite Delfina Torres vda. de Concha v. Petroecuador*, an opinion by Ecuador's Supreme Court of Justice that discusses various foreign and domestic approaches to causation analyses.[542] As quoted in the Judgment, the *Delfina Torres* case notes that many difficulties arise in determining the appropriate causation theory to apply in any given case and therefore "trust is placed in the discretionary powers of the judge" in making the determination of which to use.[543] The Supreme Court of Justice found it significant that "the case law of foreign courts" approved of the standard selected for use in *Delfina Torres*.[544] Similarly, the National Court decision looked to foreign jurisdictions, such as Chile, when discussing the causal link.[545] Even Claimants' purchased witness, Mr. Guerra, readily concedes the propriety of Ecuadorian courts looking and citing to foreign jurisprudence when issuing decisions.[546]

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541 *See*, *e.g.*, C-998 *Andrade v. Conelec*, ruling of Apr. 11, 2007 by the Ecuadorian Supreme Court of Justice, at 6 ("The causal relationship between the illegal act and the damage considered must be classified by the courts on the basis of reasonableness, in each specific case; this Court believes that the different theories on the classification of the causal relationship, which have been set forth by doctrine, are an important guide for the judge, but they do no limit his ability to classify the relevant events on the specific circumstances of the matters place for his consideration."); C-1586, *Comite Deflina Torres vda. de Concha v. Petroecuador*, ruling of Oct. 29, 2002 by the Supreme Court of Justice, First Chamber for Civil & Commercial Claims, at 25-26. Furthermore, in upholding the use of strict liability, the National Court decision looked to law in the United States, France, Argentina and Costa Rica — once again reinforcing the normalcy of Ecuadorian courts looking to foreign jurisprudence when informing their analyses. C-1975, Lago Agrio National Court Decision at 114.

542 C-931, Lago Agrio Judgment at 86-88; C-1586, *Comite Deflina Torres vda. de Concha v. Petroecuador*, ruling of Oct. 29, 2002 by the Supreme Court of Justice, First Chamber for Civil & Commercial Claims at 25-26.

543 *Id*.

544 C-1586, *Comite Deflina Torres vda. de Concha v. Petroecuador*, ruling of Oct. 29, 2002 by the Supreme Court of Justice, First Chamber for Civil & Commercial Claims at 25-26.

545 C-1975, Lago Agrio National Court Decision at 210, 216.

546 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 49:18-23.

311. Quoting the *Delfina Torres* case at length, Judge Zambrano notes that "the theoretical development of the question has not come to an end" and in foreign jurisdictions "new explanatory and supporting theories have arisen in accordance with the necessities and requirements of the modern world."[547] Applying this precedent to the facts of the Lago Agrio Litigation, Judge Zambrano found that "we are precisely in the presence of one of these requirements and necessities of the modern world, and that the justice system must find a solution with the available sources of law and cannot skimp in the study and consideration of these theories, inasmuch as the judge has discretionary authority to apply them if he thinks they may be better suited to the circumstances of this case."[548]

312. The Judgment therefore followed express Ecuadorian precedent when proceeding to assess four separate theories of causation: (i) the theory of the culpable creation of the unjustified risk of a hazardous situation; (ii) the theory of the pursuit or deliberate continuation of the harmful behavior; (iii) the theory of the substantial factor; and (iv) the theory of most probable cause.[549] Judge Zambrano refers to the latter two theories, which also appear in the Moodie Memo, as "legal theories of causation developed in the USA, Australia, and England."[550] The Moodie Memo, however, makes no mention of the first two theories, nor of English law. Thus, the Judgment's analysis of four separate causal theories — two of which appear in the Moodie Memo, two of which do not — was in no way "mysterious" or lacking basis in Ecuadorian law as Claimants contend.[551]

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547 C-931, Lago Agrio Judgment at 88; C-1586, *Comite Deflina Torres vda. de Concha v. Petroecuador*, ruling of Oct. 29, 2002 by the Supreme Court of Justice, First Chamber for Civil & Commercial Claims at 25-26.

548 C-931, Lago Agrio Judgment at 88.

549 *Id*. at 88-89.

550 *Id*. at 89.

551 Claimants' Amended Track 2 Reply on the Merits ¶ 49.

313. **Third**, the "mysterious" theories used in the Judgment were in fact *expressly submitted* to the Court in an *amicus* brief filed by the Environmental Law Alliance Worldwide ("ELAW") in the Lago Agrio Litigation on June 21, 2009.[552] ELAW filed the *amicus* brief to provide the Lago Agrio Court with support when ruling on issues of non-extinguishment of legal actions, rights of individuals to obtain remediation of the environment, strict liability, and causation given that "[t]raditional legal theories often cannot resolve modern environmental problems."[553]

314. While Claimants allege that the Judgment's use of the "substantial factor" test is probative of "ghostwriting" by the Plaintiffs, the ELAW *amicus* brief cites two separate U.S. cases that involve the "substantial factor" test: *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124 (2d Cir. 1995), and *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984).[554] The *Allen* case alone involves over twenty separate mentions of "substantial factor" and goes through multiple analyses.[555]

315. The *Allen* court used a "substantial factor" analysis to assess causation between exposure to toxic materials and cancer — a situation quite similar to the one Judge Zambrano faced. The U.S. court in that case, akin to the Lago Agrio Court's ultimate decision, concluded:

> Where it appears from a preponderance of the evidence that the conduct of the defendant significantly increased or augmented the risk of somatic injury to a plaintiff and that the risk has taken effect in the form of a biologically and statistically consistent somatic injury, i.e., cancer or leukemia, the inference may rationally be

552 R-1014, ELAW *amicus* brief (Jun. 21, 2009). ELAW is a network of attorneys and scientists from around the world "working to protect the environment and human rights through the law." *Id.* at 1.

553 *Id*. at 2.

554 *Id*. at 11-12; R-1015, *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124 (2d Cir. 1995); R-1016, *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984).

555 R-1016, *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) ("substantial factor" on pp. 411-412, 415, 426, 428, 430-435, 439-441, and 443).

> drawn that defendant's conduct was a substantial factor contributing to plaintiff's injury.[556]

316. Similarly, the Australian causation standard referenced in the Judgment — namely, the statement that "Australian case law tells us that causation can be established by a process of inference" — is also explained by the ELAW *amicus* brief's submission to the Court.[557] The ELAW *amicus* brief quotes an Australian case, *Seltsam v. McGuiness*, as a causation "approach . . . used in Australia" for "drawing an inference of causation in an individual case."[558]

317. **Fourth**, the ELAW *amicus* brief was drafted *in reliance on* the Moodie Memo, further explaining the similarities between the causation theories used in the Moodie Memo and the Lago Agrio Judgment. Mr. Moodie prepared the Moodie Memo for the Plaintiffs' attorneys Julio Prieto and Juan Pablo Sáenz on February 2, 2009; twelve days later he emailed it ("CausationMEMO.doc") to another attorney for the Plaintiffs, Andrew Woods, noting that the Memo "is the one Julio has been using to supplement his research on the upcoming amicus."[559]

318. As for the Judgment's statement that proving causation by a process of inference comes from Australian case law,[560] Claimants reflexively argue that "[a]n Ecuadorian court would have no reason to cite these [Australian] principles," insisting that the statement therefore must have come from the Moodie Memo.[561] In so arguing, Claimants ignore (1) Mr. Prieto's

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556 R-1016, *Allen v. United States*, 588 F. Supp. 247, 428 (D. Utah 1984) (further noting "[u]nless the facts are proven otherwise by sufficient evidence, the inference provides a rational basis for imposing liability").

557 C-931, Lago Agrio Judgment at 90.

558 R-1014, ELAW *amicus* brief (Jun. 21, 2009) at 12.

559 C-1645, Moodie Memorandum (Feb. 2, 2009) at 1; R-1017, Email from N. Moodie to A. Woods (Feb. 18, 2009); R-1018, Copy of Moodie Memo sent from N. Moodie to A. Woods (Feb. 18, 2009).

560 C-931, Lago Agrio Judgment at 89-90.

561 Claimants' Amended Track 2 Reply on the Merits ¶ 50.

reliance on the Moodie Memo in drafting the ELAW *amicus* brief, and (2) the *amicus* brief's reference to Australian law.[562]

319. **Fifth**, just like it did with the causation theories, the Lago Agrio Court utilized the theory of strict liability as discussed in the ELAW *amicus* brief. The ELAW *amicus* brief argued for the application of strict liability, noting that "[t]raditional principles of civil liability require proof of intent (fault-based liability) in order to hold the defendant liable for damages," but "[t]his focus suffers severe limitations in situations in which environmental harm has occurred."[563] Given these limitations, the ELAW *amicus* brief concluded, "[t]here is no doubt that the oil exploration and production activities for which ChevronTexaco was responsible must be evaluated under the strict liability standard."[564] When adopting the rule of strict liability, the Judgment found that "the need to apply this new type of liability is imperative because 'the production, industry, transport and operation of hydrocarbon substances undoubtedly constitute high risk or hazardous activities'" and therefore the Plaintiffs did not need to prove intent.[565] In so concluding, the Judgment — just like the ELAW *amicus* brief — surveyed and approved of various other legal systems' application of strict liability to similar problems.[566] Similarly, in upholding the use of strict liability, the National Court decision looked to law in the United States, France, Argentina, and Costa Rica, once again reinforcing the normalcy of Ecuadorian courts looking to foreign jurisprudence when informing their analyses.[567]

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562 R-1014, ELAW *amicus* brief (Jun. 21, 2009) at 12.

563 *Id*. at 7. Going further, the brief observed that "many legal systems" have recognized "these limitations" and therefore "have concluded that it is appropriate under certain circumstances to impose liability upon the defendant regardless of intent." *Id*.

564 *Id*. at 10.

565 C-931, Lago Agrio Judgment at 86.

566 *Id*. at 83-86.

567 C-1975, Lago Agrio National Court Decision at 114.

320. **Sixth**, Claimants make false statements in their effort to make the Judgment's use of foreign causal theories appear to be nefarious. Claimants assert that "substantial factor" analysis is "a narrow doctrine found in California state law that applies *only* to asbestos litigation"[568] — yet the cases cited in the ELAW *amicus* brief relating to "substantial factor" come from the District of Utah (assessing whether certain types of cancer were caused by exposure to atomic device testing) and the United States Court of Appeals for the Second Circuit, which sits in New York.[569] Similarly, Claimants assert that "both the Moodie Memo and the Judgment describe a well-established common law principal as particularly Australian, and cite . . . *Seltsam v. McGuiness*, as the source."[570] But the Judgment never cites *Seltsam v. McGuiness*.

6. The *Conelec* Case Explains The Overlap Between The Fajardo Trust Email And Judge Zambrano's Judgment

321. Claimants assert that the Judgment lifted multiple sentences from an internal email among the Plaintiffs' counsel (the so-called "Fajardo Trust Email"), referring to an alleged textual overlap between the Fajardo Trust Email and the Judgment.[571] Claimants' arguments regarding the Farjado Trust Email should be rejected for the following three reasons.

322. **First**, Claimants assert that "the Judgment actually copies whole *sentences* in full from the Fajardo Trust Email," citing Example 10 from Prof. Leonard's Second Report.[572] That

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568 Claimants' Amended Track 2 Reply on the Merits ¶ 49.

569 R-1014, ELAW *amicus* brief (Jun. 21, 2009) at 11-12 (citing R-1016, *Allen v. United States*, 588 F. Supp. 247, 416 (D. Utah 1984); R-1015, *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1128 (2d Cir. 1995)).

570 Claimants' Amended Track 2 Reply on the Merits ¶ 50.

571 *Id.* ¶ 51.

572 *Id.*

assertion is false. Not one sentence — much less multiple sentences — is copied "in full" from the Fajardo Trust Email.[573]

323. **Second**, the fact that the Fajardo Trust Email and Judge Zambrano's Judgment share a few words in common is hardly surprising given that both employed language from an Ecuadorian Supreme Court decision called *Andrade v. Conelec* ("*Conelec*").[574]

324. **Third**, contrary to Claimants' statement of facts there is no consistent overlap between the Judgment and the Fajardo Trust Email. The lack of consistent overlap between the two can be readily seen in Claimants' cited example, which provides two excerpts of a sentence that does contain certain textual overlap, but is by no means a sentence copied *verbatim* as alleged.[575] The source of this overlap is the *Conelec* decision, widely reported in Ecuadorian news sources and a subject of much academic discussion within the Ecuadorian bar. This is clear from the example in Prof. Leonard's report, but worth highlighting here:

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573 *See* Expert Report of Robert A. Leonard, Ph.D (May 24, 2013) at 31-32.

574 Respondents' Track 2 Counter-Memorial on the Merits, Annex D ¶ 51.

575 Expert Report of Robert A. Leonard, Ph.D (May 24, 2013) at 32.

Fajardo Trust Email	***Conelec* Registro Oficial: Page 29**	**Judgment:** Page 186
Finalmente, es necesario establecer un mecanismo adecuado de ejecución de la condena, que permita asegurar que el criterio de Justicia empleado en la presente sentencia se haga realidad, asegurando la tutela judicial efectiva	Finalmente, es necesario establecer un mecanismo adecuado de ejecución de la sentencia, que permita asegurar que el criterio de Justicia empleado en el presente caso se haga realidad, asegurando la tutela Judicial efectiva	Finalmente, considerando que es necesario establecer un mecanismo adecuado de ejecución de la condena, que permita asegurar que el criterio de Justicia empleado en la presente sentencia se haga realidad, asegurando así la tutela Judicial efectiva
y procurando precautelar los intereses de Juan Pablo Andrade Bailón a través de la aplicación del mismo criterio que ha servido para fijar las indemnizaciones por daños materiales	y procurando precautelar los intereses de Juan Pablo Andrade Bailón con la aplicación del mismo criterio que ha servido para fijar las indemnizaciones por daños materiales	y procurando precautelar los derechos de los demandantes y de los afectados, a través de la aplicación del mismo criterio que ha servido para fijar las indemnizaciones por daños materiales,
*NB: Underlined text is text that differs from the Fajardo Trust Email		

325. As is evident from the above text in the *Conelec* case, virtually all the linguistic overlap between the Judgment and the Fajardo Trust Email derives from the fact that the ***very same language*** is used in the Supreme Court's *Conelec* decision. Critically, Claimants fail to note that the Judgment's *Conelec* excerpts contain differences from the same excerpted passages in the Fajardo Trust Email (e.g., the inclusion of additional phrases like "considerando que" and "derechos de los demandantes y de los afectados"). Additionally, the Judgment also shares at least one similarity with the published *Conelec* decision not found in the same passages quoted in the Fajardo Trust Email (the capitalization of the "J" in "Judicial efectiva").[576]

[576] That the term "*condena*" is used in this section of the Judgment instead of *Conelec*'s use of "sentencia" is readily explained by the fact that Judge Zambrano himself repeatedly used the term "*condena*" — not "*sentencia*" — throughout when referring to the sentence in the Judgment. "*Condena*" in fact appears eight times throughout the Judgment in this context, including an additional use of "*condena*" on the same page as the text at issue, as well as another instance on the following page of the Judgment. Given this usage, it would not have made sense for Judge Zambrano to use "*sentencia*" when paraphrasing the *Conelec* quote, explaining his decision to revert to "*condena*" instead. This alteration also explains his use of "*sentencia*" later in that sentence in lieu of "*caso*" since it was no longer already preceded by "*sentencia*." Finally, it is not disputed that Judge Zambrano relied on the *Conelec* case in drafting the Judgment because he quotes it at length elsewhere in the Judgment with respect to whether a finding

326. In short, the Court's reference to *Conelec* was no "cut-and-paste" job. Comparing the three documents shows that Judge Zambrano did nothing more than cite to and analyze a principal case on a subject necessary to the resolution of the Plaintiffs' requested relief.

7. Claimants' Reliance On The Allegedly "Nearly Identical" Overlap Between The January Index Summaries And Judge Zambrano's Judgment Is Misplaced

327. Claimants rely upon an Excel spreadsheet found in the Plaintiffs' legal files that informally summarizes the Court record as of January 2007 (dubbed the "January Index Summaries") as support for their "ghostwriting" claims. Claimants do so because certain citations and words appear in both Judge Zambrano's Judgment and the January Index Summaries, but did not turn up in Claimants' incomplete review of the Court record.[577] This is not evidence of "ghostwriting" for four reasons.

328. **First**, while Claimants focus their arguments on "nearly identical word strings" between the Index Summaries' account of specific docket entries and the Judgment's account of the very same entries,[578] "near identity" of the descriptions should be expected given that the text Claimants highlighted in both the Index Summaries and the Judgment *address the same docket entries* from the record, especially since the Ecuadorian Court system uses a highly normalized naming scheme for filings.

329. **Second**, as Respondents noted previously (and Claimants ignored), Claimants have failed to establish that the Index Summaries were prepared by the Plaintiffs or otherwise constitute the Plaintiffs' work product.[579] Instead, Claimants turn a blind eye to the fact that the

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of negligence was required before Chevron could be held liable — a proposition and discussion nowhere mentioned in the Fajardo Trust Email. *See* C-931, Lago Agrio Judgment at 174-75.

577 Claimants' Amended Track 2 Reply on the Merits ¶ 45.

578 *Id*.

579 Respondents' Track 2 Counter-Memorial on the Merits, Annex D n.37.

Lago Agrio Court indisputably prepared and maintained extensive spreadsheet records of the parties' filings.[580] The Court did so, understandably, to track the voluminous submissions of the case, which had a record 2,000 times the size of the average Ecuadorian case. At his deposition Mr. Guerra described how it was common for the judges or secretaries to keep an electronic record in an effort to keep track of filings.[581]

330. The Court's need to maintain some index of Court filings would be especially acute here in light of Chevron's practice of filing multiple and redundant motions to put pressure on the judge to rule on each within the tight responsive time limits dictated by applicable court rules. Overlap between the Index Summaries and the Judgment does not mean that the Plaintiffs ghostwrote Zambrano's Judgment; it is far more likely that the Court simply relied on its *own* spreadsheets.

331. **Third**, even if the Plaintiffs had created the Index Summaries, Claimants would still need to establish that this 2007 spreadsheet had not been provided to the Court in a formal or informal capacity. All Claimants establish is that the Index Summaries did not appear in Claimants' incomplete review of the official record.

332. **Fourth**, the "overlap" Claimants focus on is substantively without merit. Claimants' expert, Prof. Leonard, attempts to highlight "identical or nearly identical overlap" between certain entries appearing in the Index Summaries and the Judgment.[582] He then contrasts such overlap with slightly differing text found in the Lago Agrio Record for the same

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580 *See, e.g.*, R-833, Crude Outtakes at 29:15-42:00 (video of Mr. Fajardo submitting documents to the Court and showing the Court's index summary on the secretary's computer screen); R-834, Crude Outtakes at 7:00-7:34 (close-up video of the Lago Agrio Court's spreadsheet for tracking site inspections and expert reports). *See generally* R-1122 – R-1175, R-1183 videos produced by GSI, Chevron's environmental expert firm.

581 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 44:2-7.

582 Expert Report of Robert A. Leonard, Ph.D (May 24, 2013) at 23.

docket entries.[583] Yet these three documents — the Index Summaries, the Judgment, and the Record — all describe the *same* docket entries, making overlap with slight differences to be expected. But even more importantly, the examples of overlap that Claimants cite are largely probative of nothing. As an example of "identical overlap" between the Index Summaries and the Judgment demonstrative of "ghostwriting," Prof. Leonard highlights the phrase: "para que su subsidiaria Keepep Inc intervenga."[584] What Prof. Leonard finds significant about the phrase is the *absence of two commas* — one after "subsidiaria" and the other after "Inc" because the Record for this entry includes commas after both.[585] That the absence of the occasional comma is trumpeted by Claimants as "identical overlap" evidence probative of the "ghostwriting" of an entire 188-page single-spaced Judgment is absurd.

333. Prof. Leonard's reliance on "nearly identical" overlap between the Judgment and the Index Summaries is also misplaced. As an example of such "nearly identical" overlap, i.e., *not actually* overlapping text, Prof. Leonard once again overreaches in an attempt to establish hypothetical "ghostwriting" by the Plaintiffs. For instance, in the example discussed below (taken from his recent report) Prof. Leonard finds the following entry demonstrative of "nearly identical" overlap, and therefore "evidence" of the Plaintiffs' "ghostwriting" efforts:[586]

583 *Id*.

584 *Id*. at 26. Notably, even in this example Claimants get it wrong because the Judgment includes a period after "Inc." — but the Index Summaries do not.

585 *Id*.

586 *Id*. at 23.

Index Summary: Pruebas pedidas por CVX, Row 46, Columb B	**Judgment**: Pages 127-128	**Record**: Foja 159.199
Que se agregue a los autos como prueba, el documento Informe sobre Desarrollo Humano Ecuador 1999 publicado por UNICEF en el que se consignan datos sobre políticas ambientales y sostenibilidad en el Ecaudor en 1990, págs. 61-74.	Se considera como prueba las páginas. 61-74 del documento "Informe sobre Desarrollo humano, Ecuador 1999", publicado por UNICEF en el que se consignan datos sobre políticas ambientales y sostenibilidad en el Ecuador en la década de los noventa.	Que se agregue a los autos y se tenga como prueba de mi parte las copias certificadas de las páginas 61 a 74, que en catorce fojas útiles acompaño, del documento denominado "INFORME SOBRE DESARROLLO HUMANO ECUADOR 1999", publicado por la UNICEF, en el que se consignan los datos sobre "políticas ambientales y sostenibilidad en el Ecuador 1990".

334. It is difficult to understand how Claimants could impart significance to this "nearly identical" overlap between the Index Summary and the Judgment. Yes, some of the words are the same. But again, one would *expect* that to be the case when both documents excerpt or summarize *the same docket entry* in the Lago Agrio Litigation. Claimants try to superimpose a conspiracy upon commonplace events by overwhelming the Tribunal with numerous expert reports and highly technical computer analyses to generate a colorable foundation for their "ghostwriting" narrative. But even a cursory review of these reports and their actual substantive content reveals that these inflated "nearly identical word strings" do not match Claimants' rhetoric.[587]

[587] Claimants' Amended Track 2 Reply on the Merits ¶ 45.

8. The Few Samples In Judge Zambrano's Judgment That Contain Suffixes From The Selva Viva Database Derive From The Plaintiffs' Prior Submissions To The Court

335. Finally, Claimants allege that the handful of references allegedly made to the Lago Agrio Plaintiffs' "Selva Viva database" [588] in the Judgment is evidence of "ghostwriting" because, according to Claimants, the database was not in the record.[589] This database, however, is nothing more than a compilation of the testing results from the judicial inspections of both Chevron (denoted as "tx") and the Plaintiffs (denoted as "sv"). While Claimants make much of the fact that the database as a whole did not show up as such in their incomplete review of the record, Claimants fail to account for the fact that both parties submitted CDs to the Court and otherwise made submissions at judicial inspections where the evidence often was not logged as part of the official record.[590] Claimants' reliance on the Judgment's reliance on the Selva Viva database is misplaced for two additional reasons.

336. **First**, Claimants do not and cannot rebut the fact that the Plaintiffs repeatedly used the "tx" and "sv" nomenclature in court filings when referring to samples taken by either Chevron or the Plaintiffs, and that these suffixes therefore appear throughout the record.[591] The fact that not every such citation was located in Claimants' incomplete review of the record is not evidence of "ghostwriting." To the contrary, the very fact that many of the citations do appear in

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588 The Selva Viva Database was created by an outside consultant in the form of an original Access database and a later collection of Microsoft Excel spreadsheets. *See* R-672, Email from S. Donziger to L. Carvajal, *et al.* (Jul. 3, 2007).

589 *Id*. ¶ 46.

590 Although Claimants assert that this database (which contains both Chevron's data as well as the Plaintiffs') is "rife with errors," they point to none. Claimants' Amended Track 2 Reply on the Merits ¶ 46.

591 R-671, Lago Agrio Record, Cuerpo 1292 at 139090 (containing 12 samples with "_sv" suffixes); R-836 Stratus Consulting, History of Contamination at Oil Well Lago Agrio 11A, Oil Well Sacha 94, and Production Station Aguarico in the Napo Concession, Ecuador (2007), in Lago Agrio Record, Cuerpo 1746 at 184491 *et seq.*; *id*. at 184516 (5 samples); *id*. at 184517 (5 samples); *id*. at 184521 (2 samples); *id*. at 184534 (5 samples); *id*. at 184542 (2 samples); *id*. at 184565 (5 samples); *id*. at 184566 (4 samples).

the record indicates that proper filings were most likely the sources from which these references appeared in the Judgment.

337. **Second**, in attempting to prove "ghostwriting" by constructing a connection between the Judgment and the Selva Viva database, Claimants and their expert Prof. Leonard look to tenuous "irregularities" between the filed lab results, the Judgment, and the database.[592] For example, as evidence of Plaintiffs' "ghostwriting" of the entire 188-page Judgment, Claimants point to the use of parenthesis around "cm" [i.e., "(cm)"] in the Judgment and the database, whereas the lab results do not use parentheses.[593] Claimants also note the use of parentheses around "m" [i.e., "(m)"] in the Judgment and database, but not in the lab results.[594] This cannot satisfy Claimants' burden of proof in establishing "ghostwriting."

338. In summary, each of the documents discussed in this section, individually and collectively, point only to Claimants' desired conclusions upon acceptance of a false premise. Claimants incorrectly assume that any documents they could not locate in the official court record (after an incomplete review) could not have been properly submitted to the Court. After making this assumption, Claimants conclude that any reference or reliance on any such document establishes that the Plaintiffs "ghostwrote" the Judgment. Never has so much been made of so little.

339. Claimants did not investigate *whether* the Judgment was "ghostwritten"; Claimants instead started backwards, beginning with the conclusion they now urge on this Tribunal and adopting the evidence to fit their argument. As a result, Claimants have made no effort to account for the Plaintiffs' contemporaneous emails showing their acute concern about

592 Expert Report of Robert A. Leonard, Ph.D (May 24, 2013) at 36.

593 *Id*.

594 *Id*.

the direction of the Court just weeks before the issuance of the decision. Claimants likewise have failed to explain their inability to locate a single draft of the Judgment or a single email referring to such a draft. Not even their extravagant spending spree on Alberto Guerra has fixed Claimants' problem.

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340. Claimants' assertion that the first-instant court decision was ghostwritten is nowhere matched by the evidence that they offer but mischaracterize. **First**, Mr. Guerra is an admitted liar, who concedes that he engaged in his dialogue with Claimants with the express purpose of maximizing his financial return. Claimants in turn have readily obliged by paying this witness, now and in the future, cash and other benefits that probably have already exceeded one million dollars in value. That Claimants' should accede to the purchase of a fact witness is itself evidence that they fully understand that they have failed otherwise to prove their allegations. **Second**, while Claimants also allege that the Lago Agrio Judgment lifted excerpts of documents allegedly in the exclusive possession of Plaintiffs' counsel, it is now clear that all of this information had been available to the Court openly and transparently. In one instance the Court relied upon foreign law cited in an *amicus* brief; in other instances the contemporaneous evidence shows that the respective documents were provided to the Court and to Chevron at judicial inspections. **Third**, Claimants have no answer to the fact that they have found no draft judgment and no contemporaneous evidence of a plan to draft the judgment. To the contrary, the contemporaneous evidence shows that the Plaintiffs did not have a clue as to the substance or timing of the issuance of the decision — or even how the Court would rule.

V. Mr. Cabrera's Conduct Does Not Impugn the Lago Agrio Court

341. In their Reply Memorial, Claimants rely upon Mr. Cabrera's alleged misconduct for four separate purposes. **First**, recognizing that the Court has never been implicated in any

misdeeds involving Mr. Cabrera or his report, Claimants instead argue that Plaintiffs' alleged "ghostwriting" of Mr. Cabrera's report makes it more likely that they similarly "ghostwrote" Judge Zambrano's decision. **Second**, Claimants for the first time now characterize Mr. Cabrera as a State actor whose misconduct may *ipso facto* be imputed to the Republic's court system. **Third**, Claimants argue that the Court's decisions to appoint Mr. Cabrera and to grant Plaintiffs' motion to cancel certain remaining judicial inspections prove that the Lago Agrio Court "conspired" with Plaintiffs to reach a predetermined verdict. **Fourth**, Claimants also suggest that manipulation of Mr. Cabrera was necessary for Plaintiffs to fabricate their pollution claims because, Claimants argue, there is no actual evidence of pollution. (This last point is addressed in detail in Annex A, which responds to Claimants' Annex B discussing environmental fraud.)

A. Mr. Cabrera's Alleged Complicity In Wrongful Conduct Does Not Make It More Likely That Judge Zambrano Acted Unlawfully

342. Claimants seek to use Mr. Cabrera's report as "propensity" or "prior bad acts" evidence, i.e., to establish that because Plaintiffs allegedly drafted parts of Mr. Cabrera's report, they more than likely drafted the Judgment as well.[595] But there is no evidence whatsoever that Judge Zambrano, or any other official whose acts are attributable to the Republic, was involved in drafting Mr. Cabrera's report or otherwise exercised any influence over it. Indeed, Judge Zambrano elected *to totally disregard* Mr. Cabrera's report when issuing his Judgment after Chevron raised allegations concerning Mr. Cabrera's impropriety before him. In short, even if the Plaintiffs and Mr. Cabrera engaged in illicit acts, there has never been any evidence implicating *Judge Zambrano* in any illicit activity.

595 Claimants' Amended Track 2 Reply on the Merits Section II.B.

B. Mr. Cabrera's Actions Cannot Be Imputed To The Court

343. In their Reply, Claimants posit a new theory for finding Ecuador in breach of its treaty obligations for the events surrounding Mr. Cabrera. Based on the *possibility* that Mr. Cabrera accepted bribes from Plaintiffs, Claimants now claim that the Court violated Articles 251 and 256 of the Ecuadorian Code of Civil Procedure, which require that court-appointed experts perform their duties honestly and lawfully.[596] But they fail to explain how Mr. Cabrera's failure to act with integrity or to provide an independent report, even if true, could have impugned the Court or the State.

344. As Claimants acknowledge, Mr. Cabrera repeatedly affirmed his neutrality in official court rulings and sworn statements during the entire course of his service. Indeed, Claimants themselves include five such examples in their Reply.[597] Significantly, however, Claimants fail to provide any evidence that the Court knew or would have any reason to know that Mr. Cabrera was anything but independent and impartial.[598]

345. Moreover, under Ecuadorian law, any fraudulent activity committed on the part of an expert cannot be attributed to the court or the State because court-appointed experts are not public servants or agents of the State.[599] Of course, this does not mean that the expert could not or should not be disciplined for his improper acts, but absent additional affirmative proof of the

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596 *Id.* ¶ 80.

597 *Id.*

598 In his recent deposition, Douglas Beltman testified that Mr. Donziger never told him (nor did he otherwise have any reason to believe) that the Court was: (1) aware that the Plaintiffs' legal team was providing written comments to Cabrera; (2) complicit in any fraud or scheme to defraud Chevron; or (3) working with the Plaintiffs to ensure a verdict against Chevron. R-913, Beltman Dep. Tr. (Oct. 22, 2013) at 19:21-10:16. Mr. Beltman further confirmed that Mr. Donziger never told him that he knew when or how the Judge would rule on the case. *Id.* at 21:2-19.

599 RLA-303, Organic Code of the Judiciary, art. 38 (providing an exhaustive list of those who can be considered servants of the judiciary; court-appointed experts are not included).

court's knowledge and complicity, no disciplinary action lies against the appointing court.[600] The same is true in the United States, where the proper remedy would be to sanction, charge or discipline the court-appointed expert himself.[601]

C. Claimants Have Not Produced Any Evidence That The Court (1) Was Complicit In The Events Surrounding Mr. Cabrera's Appointment Or In The Drafting Of His Report, Or (2) Did Not Properly Respond To Chevron's Allegations Concerning Mr. Cabrera

346. By their silence, Claimants appear to accept that there is no evidence that the Court (meaning *any* successive presiding judge in the Lago Agrio proceedings) actually knew of the Plaintiffs' alleged drafting of Mr. Cabrera's report. Instead, Claimants charge the Court with being implicitly "complicit" in a conspiracy with Plaintiffs, pointing to what they claim were the Court's (again, meaning different presiding judges') supposed errors of law, namely: (i) cancellation of the remaining judicial inspections; (ii) appointment of Mr. Cabrera; (iii) acceptance of Plaintiffs' six supplemental expert reports; and (iv) purported reliance on Mr. Cabrera's report in the Judgment.[602] As previously explained, however, none of these actions — even if true — evidences bias, improper conduct, or "conspiracy" with Plaintiffs.

1. The Cancellation Of The Remaining Judicial Inspections And The Appointment Of Mr. Cabrera As Global Damages Expert Were Lawful And Proper Exercises Of Judicial Authority And Discretion

347. As the Republic has already explained, and as will be discussed in more detail in in our later submission examining Ecuadorian law, the Court's early termination of the judicial

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600 *See* RLA-164, Constitution of Ecuador (2008), art. 11.9; RLA-303, Organic Code of the Judiciary, art. 32 (stating that judicial liability for improper administration of justice arises when the error, delay or any other defect in the administration of justice results from the actions of judicial officers).

601 *See, e.g.*, RLA-475, *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999) (court-appointed witness charged with perjury); RLA-476, *Chein v. Shumsky*, 373 F.3d 978, 980 (9th Cir. 2004) (same); RLA-477, *Davis ex rel. Davis v. Wallace*, 565 S.E.2d 386, 391 (W. Va. 2002) (holding court-appointed expert liable for negligence); RLA-478, *Levine v. Wiss & Co.*, 478 A.2d 397, 402-403 (N.J. 1984) (same); RLA-479, *Budwin v. Am. Psychological Ass'n*, 29 Cal. Rptr. 2d 453, 459 (1994) (professional association may discipline member for making false representations in a judicial proceeding); RLA-480, *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (same).

602 Claimants' Amended Track 2 Reply on the Merits §§ II(B)(2)(iii), II(E)(3)-(5).

inspections and appointment of Mr. Cabrera as global damages expert were lawful in all respects.[603] **First**, Plaintiffs, who had to shoulder the burden of proof, had the right to decide how to present their case and could withdraw their request for the remaining judicial inspections at any time.[604] **Second**, the forced continuation of the judicial inspections would have violated several of the Plaintiffs' constitutional rights.[605] **Third**, Mr. Cabrera's appointment as the global damages expert was not the product of *ex parte* communications between the judge and the Plaintiffs[606] and did not in any event violate any legal provision or prior agreement between the parties.[607] Furthermore, contrary to Claimants' allegation, all of the judicial inspections at *Chevron's proposed sites* were completed during Phase I; it was only the remainder of *Plaintiffs' proposed sites* where the judicial inspections were never done.

348. Claimants nonetheless suggest that (1) the then-presiding judge (Judge Yánez) granted Plaintiffs' motion to cancel certain judicial inspections, not based on the merits of the motion, but rather because he was the target of Plaintiffs' alleged blackmail, and (2) Plaintiffs' "pressure tactics" should have alerted the judge that "Plaintiffs were controlling Cabrera and his reports."[608] Once again, evidence in Claimants' possession belies their claims.

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603 *See* Respondent's Track 2 Counter-Memorial on the Merits, Annex E, Part II(A).

604 *See* Respondent's Track 2 Counter-Memorial on the Merits, Annex E ¶¶ 12-13; *see also* C-1975, National Court Decision at 83 (explaining that Plaintiffs' waiver of 64 of their requested judicial inspections was not grounds for nullification because the "principle of production of common evidence" applies only after the evidence has been produced and not before); *id.* at 84 ("[E]vidence, as long as it has not been already produced, depends on the free and voluntary initiative of the party concerned (Art. 282) who regardless of whether it presents it or not may withdraw any evidence already proposed and admitted, thereby cutting short measures already underway for said evidence to be presented. At any rate, such abandonment must . . . take place before the production of the piece of evidence.").

605 *See* Respondent's Track 2 Counter-Memorial on the Merits, Annex E ¶¶ 14-15.

606 *See id.*, Annex E ¶¶ 16-31.

607 *See* C-194, *Amicus Curiae* Brief, filed in the Lago Agrio Litigation on July 21, 2006 for a full explication of the legal bases for the termination of Plaintiffs' earlier-requested judicial inspections. *See also* Respondent's Track 2 Counter-Memorial on the Merits, Annex E at 5-8.

608 Claimants' Amended Track 2 Reply on the Merits ¶¶ 82, 88, 193.

349. As an initial matter, Judge Yánez did not grant Plaintiffs' motion to withdraw their earlier request for certain judicial inspections as a result of being blackmailed by Plaintiffs.[609] Claimants base their allegation on selective excerpts of an e-mail from Mr. Donziger to Mr. Kohn. They assert on the basis of these excerpts that Plaintiffs threatened to file a complaint against Judge Yánez implicating him in a sex scandal unless he canceled the judicial inspections.[610] Plaintiffs never made such a threat.[611] By the time this email was written on July 26, 2006, the scandal implicating Judge Yánez already had surfaced.[612] Moreover, the draft complaint that Plaintiffs prepared had nothing to do with the alleged sex scandal; rather it concerned Judge Yánez's failure to act on a long-overdue motion that Plaintiffs had filed regarding judicial inspections.[613] The filing of this commonplace type of complaint — which Chevron perfected in their repeated recusal motions — could hardly constitute grounds for blackmail.

350. Judge Yánez did not, moreover, agree to appoint Mr. Cabrera to protect his reputation. In support of this allegation, Claimants rely on a single entry from Mr. Donziger's diary. But what is clear from that diary entry is that, while Mr. Donziger may have *wished* that he had control over the judge's career and reputation, he knew that Plaintiffs had no traction with the Court precisely because they did not inspire fear. In his diary, Mr. Donziger privately

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609 *Id.* ¶¶ 13, 82.

610 Claimants' Supplemental Merits Memorial ¶ 109 (citing C-760, Email from S. Donziger to J. Kohn (July 26, 2006)).

611 C-716, Diary of S. Donziger (July 25, 2006) at 57 of 111 (noting that the Plaintiffs were not behind the complaints against Judge Yánez, even though there was a feeling in the Court that they were).

612 *See* C-760, Email from S. Donziger to J. Kohn (July 26, 2006) (explaining that "the judge, who is on *his heels* from the charges of trading jobs for sex in the court") (emphasis added); *see also* C-716, Diary of S. Donziger (July 25, 2006) at 57 of 111 (noting that the corruption charges against Yánez had come out in *El Comercio* two weeks prior).

613 *See* R-606, Donziger's Response to Chevron's Statement of Material Facts, *filed in* RICO (Nov. 8, 2012) at 9-10; *see also* C-716, Diary of S. Donziger (July 5, 2006) at 57-58 of 111.

laments that they will "lose [this case] no matter how strong the evidence . . . [precisely] because there is so little fear of us."[614]

2. The Court Properly Ordered Both Parties To Submit Supplemental Expert Reports On Damages In The Fall Of 2010

351. The Lago Agrio Court's approval of Plaintiffs' request to submit supplemental expert reports was both lawful and proper.[615] Claimants have not submitted any evidence to support their allegation that the Court approved that request to whitewash an alleged fraud.[616]

352. **First**, Claimants have not submitted any evidence that a presiding judge was complicit in the alleged fraud involving Mr. Cabrera. The issue is one of law, and the Court was well equipped to grant such relief as permitted by Ecuadorian law.

353. **Second**, Claimants have not disputed that a court has wide latitude to ensure justice, and that even if the Lago Agrio Court had doubts regarding the propriety of the Cabrera Report it still retained discretion to ensure that it had all available evidence to decide the dispute.[617]

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614 *See* C-716, Diary of S. Donziger (July 5, 2006) at 57 of 111. Claimants' effort to support their allegations with findings made by Judge Kaplan in the RICO case cannot be considered for at least four reasons. **First**, the Republic is not a party to the RICO case so Judge Kaplan's holdings are not *res judicata* against the Republic. **Second**, the RICO action has yet to be decided. The case was recently heard by Judge Kaplan, and the decision will be subject to appeal. **Third**, Judge Kaplan's definition of "tainted" is not relevant here because the issues before him (whether Plaintiffs' counsel committed fraud and racketeering) are different from those before this Tribunal (whether the Republic committed a denial of justice and/or breached the Ecuador-U.S. BIT). **Finally**, and perhaps most significantly, Judge Kaplan has time and again proven himself to be biased against the Plaintiffs and their counsel, Steven Donziger. *See, e.g.*, R-969, Letter from S. Donziger to Judge Kaplan (Oct. 23, 2013) *filed in* RICO; R-970, *Villagers Accuse U.S. Judge of Bias in $19 Billion Ecuador Lawsuit*, ChevronToxico, Press Release (Jan. 17, 2013); R-971, *U.S. Federal Judge Insults Ecuadorian Indigenous Plaintiffs Who Won $18 Billion Judgment Against Chevron*, ChevronToxico, Press Release (June 7, 2011); R-972, Petition for Writ of Mandamus (June 2, 2011), *filed in In Re Hugo Gerardo Camacho Naranjo And Javier Piaguaje Payaguaje*, Case Nos. 11-cv-069 and 11-cv-3718 (2d Cir.).

615 *See* Respondent's Track 2 Counter-Memorial on the Merits, Appendix E ¶¶ 36-41; *see also* C-1975, National Court Decision at 148-149.

616 *See* Respondent's Track 2 Counter-Memorial on the Merits, Appendix E II(B).

617 *See id*., Annex E at 16-18 (discussing the propriety of the Court's actions under Ecuadorian law, which mirrors U.S. law).

354. **Third**, in stark contrast to Claimants' allegation that the August 2, 2010 order inviting further expert assessments was issued "as a result of 'intervention' by the Plaintiffs' lawyers,"[618] that order instead provides that it was granted in response to *Chevron's* motions concerning the propriety of Mr. Cabrera's report, and that it was intended to ensure that *both* parties would have a chance to "set[] forth and justify[] their positions . . . with respect to the economic and applicable criteria for remediation of environmental damages."[619]

355. **Fourth**, while Claimants suggest that the Court's request for supplemental expert reports on damages was discriminatory against Chevron, because Chevron had only 45 days to prepare such reports,[620] the August 2, 2010 Order granted *both* parties 45 days to submit supplemental damages reports. Further, as the Tribunal surely has noticed, Claimants employ a literal army of lawyers, experts and consultants. The idea that Chevron was disadvantaged because it had only a month and a half to draft damages reports is fanciful. Chevron managed to marshal enough resources to submit to the Lago Agrio Court a 228-page pleading on September 16, 2010, which included ten expert reports and an additional thirty seven annexes, comprising more than 7,000 pages.[621]

356. **Fifth**, the only documents Claimants cite in support of their claim that the Court sought to whitewash the alleged fraud surrounding Mr. Cabrera's report are emails among Plaintiffs' lawyers and potential funders — correspondence to which the Court was not privy.[622]

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618 Claimants' Amended Track 2 Reply on the Merits ¶ 84.

619 C-361, Lago Agrio Court Order (Aug. 2, 2010) at 1.

620 Claimants' Amended Track 2 Reply on the Merits ¶ 84.

621 *See* Lago Agrio Record at 199152 - 206286, Claimants' Sept. 16, 2010 submission to the Lago Agrio Court, Cuerpos 1893-1964. Moreover, on October 29, 2010, Chevron submitted an additional 68-page pleading along with nine rebuttal expert reports. *See* Lago Agrio Record at 208987-210043.

622 Claimants' Amended Track 2 Reply on the Merits ¶ 83. In this paragraph Claimants cite to a single email between S. Donziger and N. Economou (C-1044) and another email between S. Donziger and A. Small (C-1250), both discussing and strategizing how Plaintiffs could best cure the potential problems arising from the Court's

357. **Finally**, as the Republic previously demonstrated, the supplemental experts did not rely on Mr. Cabrera's opinions. In each instance the expert either did not rely on Mr. Cabrera's report at all,[623] or relied only on data the expert independently verified.[624]

3. In Reaching Its Damages Judgment The Court Did Not Take Into Account Mr. Cabrera's Opinions

358. The Judgment was not informed, let alone infected, by Mr. Cabrera's report. **First**, as the Republic has previously demonstrated, Judge Zambrano expressly disavowed any reliance on Mr. Cabrera's report or his data.[625] Mr. Cabrera's report was not essential to the Court's ability to render a decision. His report only quantified the cost of the remediation; the existence of contamination was determined through the judicial inspections, which the successive presiding judges attended firsthand. Accordingly, Judge Zambrano had a considerable record of relevant evidence on which to base his damages award, relying on the other 100 expert reports addressing nearly 64,000 soil and water sample results, testimony from dozens of fact witnesses, and hours of legal argument.

359. **Second**, Claimants present no evidence that the Court relied on Mr. Cabrera's report; they merely assert that his report is the sole source in the record for the Judgment's (1) eight damages categories and (2) stated pit count.[626] But, as the Republic has previously

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potential reliance on Mr. Cabrera's report. But Plaintiffs' counsels' own concerns regarding the issues surrounding the drafting of Mr. Cabrera's report and the Court's possible reliance on it do not reflect or provide any insight into the Court's understanding of (or actions with respect to) the drafting of Mr. Cabrera's report. To be sure, the content of these emails do not implicate the Court at all.

623 *See* Respondent's Track 2 Memorial on the Merits, Annex E ¶¶ 62-63 (demonstrating that neither Rourke nor Picone relied on Cabrera in drafting their supplemental reports).

624 *See id.*, Appendix E ¶¶ 59-64.

625 C-931, Lago Agrio Judgment at 50-51, 99 (explaining that it did not consider the sampling done or the report prepared by Cabrera); C-1367, Lago Agrio Clarification Order at 8; C-991, Lago Agrio Appellate Decision at 9-10; C-1975, National Court Decision at 97-98, 156-157; *see also* Respondent's Track 2 Counter-Memorial on the Merits ¶¶ 43-47.

626 Claimants' Amended Track 2 Reply on the Merits ¶¶ 85-86.

shown, neither of these assertions has merit, and Claimants' Reply presents no new evidence to overcome or rebut the Republic's arguments.[627]

360. That the Judgment calculates damages in the same eight categories that had been included in Mr. Cabrera's report hardly shows that the Court relied on Mr. Cabrera's opinions or data. As previously explained, there were multiple sources of evidence and testimony for these broad categories of damages (remediation of contaminated groundwater and soil, compensation for harm to human health, etc.) that the Court evidently considered.

361. Moreover, there is nothing wrong with the Court relying on the supplemental expert reports submitted by Plaintiffs for certain of these categories of damages. **First**, Claimants have not denied that courts routinely find that expert testimony is reliable even if the seed report (the report that the expert had relied on in preparing his subsequent report) was itself inadmissible.[628] **Second**, to the extent these experts relied on Mr. Cabrera at all, they were able to independently verify the information through other sources.[629] In fact, Claimants do not dispute that the supplemental experts were independent. As previously shown, Messrs. Rourke and Picone did not rely on Mr. Cabrera at all, and Messrs. Allen and Barnthouse relied on Mr. Cabrera's data only to the extent that they concluded it was valid and useful to their independent valuation of damages.[630]

362. Perhaps most important, however, is the incontestable fact that Judge Zambrano did not adopt Mr. Cabrera's recommended quantification of damages — and did not adopt any of the supplemental experts' figures for damages either. He instead rejected them all. For example:

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627 Respondent's Track 2 Counter-Memorial on the Merits ¶¶ 50-54.

628 *Id.* ¶ 58.

629 *Id.* Annex E ¶¶ 60-61.

630 *Id.* ¶¶ 59-63.

- The Court's assigned value for groundwater remediation (US$ 600 million) is *less than* the "the average according to the economic criterion estimated by Douglas Allen,"[631] and is less than 20 percent of Mr. Cabrera's proposed cost (US$ 3.24 billion).[632]

- The Court's awarded damages to restore the ecosystem (US$ 200 million) is significantly *less than* the cost estimates proposed by Lawrence Barnthouse (between US$ 874 million and US$ 1.7 billion)[633] and a fraction of Mr. Cabrera's proposed number (US$ 1.69 billion).[634]

- The Court awarded damages to cover the cost of implementing a potable water system (US$ 150 million).[635] The Court based its damages amount on information submitted by Mr. Barros, a court-appointed expert nominated by Chevron, who stated that Mr. Cabrera's estimated value (US$ 428 million) was too high.[636]

- The Court awarded damages to implement a "plan of health" to fund treatment for persons suffering from cancer caused by toxins in the contaminants (US$ 800 million).[637] This amount is significantly *less than* the costs proposed by Mr. Cabrera (US$ 9.5 billion)[638] and Daniel Rourke (between US$ 12.1 and US$ 69.7 billion).[639]

- The Court awarded damages to mitigate against cultural harm (US$ 100 million) based on projections developed by Mr. Barros (for a more truncated time period).[640] This amount is significantly *less than* the cost proposed by Mr. Cabrera (US$ 430 million).[641]

363. Claimants' contention that the Judgment relied on Mr. Cabrera by utilizing a pit count of 880 to support the remediation costs is plainly incorrect. As previously explained, Mr. Cabrera's Appendix H notes the existence of 916 pits, not 880.[642] Further, Claimants' assertion

631 C-931, Lago Agrio Judgment at 179. Mr. Allen estimated that the potential cost to remediate the groundwater could reach a high of US$ 911 million. R-974, Plaintiffs' Alegato (Sept. 16, 2010) at 8.

632 C-212, Cabrera Supplemental Report at 53.

633 C-931, Lago Agrio Judgment at 182.

634 C-212, Cabrera Supplemental Report at 53.

635 C-931, Lago Agrio Judgment at 183.

636 *Id.* at 182-183.

637 *Id.* at 184.

638 C-212, Cabrera Supplemental Report at 53.

639 R-974, Plaintiffs' Alegato (Sept. 16, 2010) at 12-13.

640 C-931, Lago Agrio Judgment at 183-184.

641 C-212, Cabrera Supplemental Report at 53.

642 Respondent's Track 2 Counter-Memorial on the Merits ¶¶ 51-52.

that it would be impossible to come up with 880 pits by using aerial photographs is irrelevant. To support his decision to rely on 880 pits, Judge Zambrano relied on aerial photographs "together with the official documents of Petroecuador submitted by the parties."[643] In other words, he came up with the 880 figure by reviewing photographs *in addition to* various unidentified other sources in the record.[644]

364. **Third**, Claimants' own documents show that the Judgment did not rely on Mr. Cabrera's report or sampling data.[645] Rather, in reaching his damages award, Judge Zambrano took into account the results of 93 samples taken by both Plaintiffs and Chevron during the judicial inspections phase.[646]

365. In short, Claimants have all but admitted that the Court was not complicit in the alleged "Cabrera fraud." Their effort to impugn the State through the alleged conduct of others should be rejected.

VI. There Has Been No Political Interference In The Lago Agrio Litigation

366. In their Reply, Claimants continue to argue that the Ecuadorian Judiciary is politicized "*in fact, even if not in law*."[647] They contend that the Lago Agrio Court "received directives from the Ecuadorian Executive on how and when to rule,"[648] and that the National Court of Justice and the Constitutional Court are "so politicized that [they] offer[] no possibility for Chevron to enforce its rights."[649] In so doing, Claimants ask this Tribunal to disregard the

643 C-931, Lago Agrio Judgment at 125.

644 In addition to failing to prove that Judge Zambrano relied on Mr. Cabrera, the Judge's reliance on 880 pits does not harm Chevron. If anything, the 880 pit count is a conservative estimate. *See supra* Section II.A.

645 R-963, Chevron Access Database (SamplesInRuling).

646 C-931, Lago Agrio Judgment at 104-117.

647 Claimants' Amended Track 2 Reply on the Merits ¶ 221 (emphasis added).

648 *Id*.

649 *Id*.

fact that the Government loses many cases in its own courts,[650] that TexPet and other U.S. oil companies have frequently prevailed in Ecuador's courts, including in high profile cases against the government,[651] that the Ecuadorian courts dismissed criminal investigations of two of TexPet's attorneys,[652] and that the contemporaneous emails documenting *Plaintiffs'* internal communications revealed they had no idea when the Judgment would issue, nor whether they or

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650 *See, e.g.*, R-1051, *Municipality of Quito v. Julio Serrano Alomia*, Supplemental Official Register No. 220 (June 23 2010) (The Municipality of Quito filed a cassation appeal with the National Court of Justice after the lower court ordered the Municipality to pay over US$ 4.8 million to Mr. Serrano for using his property to build the Eastern highway without an expropriation proceeding. The National Court of Justice dismissed the cassation appeal and confirmed the lower court's decision.); R-1052, *Texaco Petroleum Co. v. Ministry of Energy and Mines,* Supplemental Official Gazette No. 376 (July 8, 2008) (Texaco filed an appeal rejecting the Supreme Court's declaration that the proceedings had been abandoned by Texaco; the Supreme Court granted the appeal and overruled the order issued by the Acting President of the Supreme Court.); R-1053, *Petroecuador v. CONGAS C.A., ECOGAS S.A., and GASGUAYAS S.A.*, Judgment No. 068-13-SEP-CC, Case No. 0447-12-EP (Sept. 10, 2013) (After a lower court found PetroEcuador liable for over US$ 3.5 million and PetroEcuador refused to comply, the court ordered that the judgment be seized from PetroEcuador's account in the Central Bank. PetroEcuador filed a constitutional extraordinary protection action with the Constitutional Court, claiming that its due process rights were curtailed. The Constitutional Court rejected and dismissed PetroEcuador's claim, declaring that no violations of rights had occurred in this case.); R-1054, *Olympus SA Seguros and Reaseguros and Termoriente Cia. v. National Electricity Council* ("Conelec"), Constitutional Tribunal Decision No. 709, Supplemental Official Register No. 51 (May 7, 2008) (The Constitutional Court granted Olympus's and Termoriente's constitutional action, establishing that state company Conelec was permitted to terminate a concession contract for the construction and operation of a thermal power plant, but that Olympus and Termoriente were not liable for non-compliance, and that all penalties and the execution of the guarantees were not applicable.).

651 *See, e.g.*, R-725, Order Regarding Criminal Prosecution of Public Property against James Patrick Ford, et al., Supreme Court of Justice, Second Criminal Division (June 9, 2008); R-726, Official Communication from Ecuador's Internal Revenue Service (May 31, 2011) (listing all national tax cases lost in the previous three years, including against Empresa Andes Petroleum, a Chinese company, and Repsol, a Spanish company); R-808, Court Order in *Texaco Petroleum Co. v. Ministry of Energy and Mines*, Case No. 46-2007, Supreme Court of Justice, Second Division in Civil and Commercial Matters (Jan. 22, 2008) at 4; R-816, Court Order in *Texaco Petroleum Co. v. Republic of Ecuador and PetroEcuador*, Case No. 983-03, First Civil Court of Pichincha (Feb. 26, 2007) at 7; R-812, *TexPet v. Ministry of Energy and Mines*, Supreme Court of Justice, Tax Division, No. 12-93 (Oct. 17, 2000); R-809, Order of Superior Court., No. 152-93 (May 22, 2002); R-811, Order of Superior Court., No. 153-93 (May 22, 2002); R-810, Order of Superior Court, No. 154-93 (May 21, 2002); R-975, *Hector Washington Reinoso Magno v. Texaco Petroleum Company*, Case No. 0055, (May 5, 1994), Official Gazette No. 0480 (July 11, 1994); R-976, *Segundo Valentín Pueyo Cerón v. Texaco Petroleum Company*, Case No. 0014 (Nov. 4, 1999), Official Gazette No. 036 (Jan. 14, 2000); R-977, *Texaco Petroleum Company v. Municipality of Orellana*, Case No. 0002, (Aug. 24, 1999), Official Gazette No. 0285 (Sept. 27, 1999); R-978, *Municipality of Lago Agrio v. Texaco Petroleum Company*, Case No. 0227 (May 15, 1997), Official Gazette No. 0124 (Aug. 6, 1997).

652 R-250, Decision by the First Criminal Chamber of the National Court of Justice declaring null and void the criminal processes against Ricardo Reis Veiga and Rodrigo Pérez, a former Minister of Energy, Patricio Rivadeneira, and former PetroEcuador officials, Case No. 150-209WO (June 1, 2011).

Chevron would prevail in the litigation.[653] In ignoring these facts, Claimants ask the Tribunal to declare instead that Ecuador is a failed State where corruption is rife and extreme.

367. Claimants seek to support their generalized claims by: (1) citing press articles that are unrelated to the Lago Agrio case;[654] (2) providing three expert reports by Professor Álvarez who himself relies on the very press articles that Claimants cite (and oftentimes no doubt lobbies for); and (3) repeating allegations — with no additional support — that the Republic has previously addressed.

368. Nowhere in the more than one hundred pages of judicial independence and collusion allegations have Claimants provided clear and cogent evidence to demonstrate (1) any impropriety in the National and Constitutional Courts of Ecuador that would prove any bias against Chevron, or (2) direct evidence of Executive interference in the Lago Agrio Litigation. For Claimants to prove such interference, they must present evidence that the Executive gave directions or instructions to the courts and that those directions or instructions actually affected the outcome of the trial. Political commentary is not sufficient.

A. Claimants Must Demonstrate Direct, Successful Interference To Meet The High Standard For Establishing Political Interference In The Lago Agrio Case

369. The test applied by international tribunals for proving political interference or corruption in the judiciary in a particular case is a rigorous one.[655] The *Liman Caspian Oil* Tribunal concluded:

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653 *See, e.g.*, Respondent's Track 2 Counter-Memorial, Annex F ¶¶ 12-20.

654 *See, e.g.*, Claimants' Amended Track 2 Reply at nn.529, 559, 562, 566, 572, 576, 579, 580, 582-589, 591-592, 597, 598.

655 *See* CLA-304, *Jacob Idler v. Venezuela (U.S. v. Venezuela)*, *reprinted in* IV JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3491 (1898); RLA-61, Paulsson, DENIAL OF JUSTICE at 157; *see also* RLA-485, *Samantha Orobator v HMP Holloway & Anor* [2010] EWHC 58 (Admin) (Jan. 20, 2010).

> ***[C]orruption is a serious allegation***, especially in the context of the judiciary. The Tribunal notes that both Parties agree that ***the standard of proof in this respect is a high one***. Therefore, generalized allegations of corruption in the Republic of Kazakhstan do not meet Claimants' burden of proof. . . . Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. . . . ***It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to prove corruption.***[656]

370. And according to the *Garrison Case,* "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country, which nevertheless the law of nations universally allows in extreme cases."[657]

371. The same standard is applied by the courts of the United States and the United Kingdom. The United States' Ninth Circuit stated: "A litigant asserting inadequacy . . . [of a state's court] must make a powerful showing."[658] The English courts have equally recognized a high threshold. As stated by the High Court:

> [I]t is very well established law that allegations of political, governmental or judicial impropriety in other jurisdictions should not be made and will be rejected out of hand ***unless there is clear and cogent evidence to support them***. Here there is ***no more than press or political comment***, which is wholly unsubstantiated by independent evidence. Moreover, whatever the evidence about press and Opposition comment concerning the role of politicians and other authorities, there is not a shred of evidence to suggest, let alone clearly demonstrate, that there is any impropriety amongst the judiciary in Mauritius.[659]

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656 RLA-486, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Excerpts of Award June 22, 2010) (Böckstiegel, Hobér, Crawford) ¶¶ 422-24 (emphasis added).

657 RLA-487, *Garrison Case (United States. v. Mexico)*, U.S.-Mex. Cl. Comm'n, 3 MOORE'S INT'L ARB. 3129 (1995).

658 RLA-488, *Tuazon v. R.J. Reynolds Tobacco Co*, 433 F.3d 1163, 1179 (9th Cir 2006).

659 RLA-489, *Dornoch Ltd & Ors v The Mauritius Union Assurance Company Ltd & Anor* [2005] EWHC 1887 (Comm) (emphasis added). The claimants there relied on one witness statement that alleged "*widespread corruption at the highest level in Mauritian institutions*" which "*may extend to the judiciary*." *Id.* ¶ 96 (emphasis

372. Because international tribunals and courts are reluctant, and rightfully so, to damn an entire sovereign's judiciary, direct evidence of interference is required, and reliance on generalized reports and press articles that are akin to citing hearsay, often from questionable sources, is disfavored. As the English court in the *Cherney* case observed:

> [E]vidence [of political corruption or interference] is likely, insofar as it derives from reports and articles, to consist of "broad and conclusory allegations, founded on multiple levels of hearsay" and, if so, to be unacceptable as an indictment of a legal system or part of it. Evidence relied on [in the case] was so characterised by Judge Koeltl in the Base Metal case and regarded by him as "insufficient to condemn the entire Russian judiciary as an inadequate alternative forum."[660]

373. Similarly, the English Court in the *Kishor Ragul* case, considering the risks confronting the appellant upon extradition to Azerbaijan, readily acknowledged the existence of multiple human rights reports, including from the U.S. State Department, critical of the "widespread corruption within the judiciary who are said not to be independent of the executive."[661] The Court, however, concluded that "[t]he question is whether the reports on which the appellants rely provide ***clear and cogent evidence*** which establishes that in their cases there is a ***real risk*** that the very essence of a fair trial will be destroyed."[662] Ultimately, the Court was "unable to conclude that the ***generalised*** reports establish that proposition."[663]

374. Claimants' effort to adjudicate the propriety of judicial decisions other than the Lago Agrio Judgment (such as the *El Universo* case) is misplaced. Even if proven, the propriety of these other cases is irrelevant as they do not involve the same parties, the same court, or the

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added). The claimant submitted press and political commentary to support the claim. *Id.* The Court rejected the contention that this established corruption of the judiciary in a foreign court. *Id.* ¶ 97.

660 RLA-490, *Cherney v. Deripaska* [2008] EWHC Civ. 1530 (Comm) ¶ 238.

661 RLA-491, *Kishor Ragul v. The Government of Azerbaijan*, [2013] EWHC 2000 (Admin) ¶ 39.

662 *Id.* ¶ 43 (emphasis added).

663 *Id.* (emphasis added).

same issues. As the English High Court in the *Pacific International Sports Clubs* case observed: "[it does not] follow that because claimant A cannot obtain a fair trial in a particular country, claimant B will not be able to do so in the same country."[664] The Pacific International appellate court noted that the complaining party needed instead to show that "[the Respondent] or his associates were successful in manipulating the [foreign] legal system by improperly influencing the [foreign] courts in any of the *particular cases* in which the [Appellant Company] has sought to ventilate its claims."[665]

375. As a matter of international law, Claimants' generalized allegations of corruption are legally irrelevant and obviously have been injected into this Arbitration to taint the Tribunal. The Republic addresses them in Annex B.

B. Claimants' Allegations Of "Collusion" By The Government Fail

376. Claimants' allegations of political interference with the Lago Agrio Litigation also fall far short of the required standard. For this Tribunal to find a denial of justice, it must find (1) a manifest injustice to due process rights, which (2) resulted in an outcome that offends a sense of judicial propriety.[666] Claimants have offered no facts that meet this requirement.

377. In fact, Claimants have dropped a number of the arguments they previously made in support of their "collusion" allegation. Claimants offer no response to the following facts and propositions put forth by the Republic in its Counter-Memorial on the Merits:

- Plaintiffs' representatives' opinions regarding the Lago Agrio Court are not evidence of actual corruption (Annex F ¶¶ 6-20).
- The government has not interfered with the Lago Agrio Litigation through meetings with the Plaintiffs' representatives (Annex F ¶¶ 31-44).

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664 RLA-492, *Pacific Int'l Sports Club Ltd v. Soccer Mktg. Int'l Ltd*, [2009] EWHC 1839 (Ch) ¶ 41.

665 RLA-456, *Pacific Int'l Sports Club Ltd v. Soccer Mktg. Int'l Ltd*, [2010] EWCA Civ 753 ¶ 51.

666 Pursuant to the Procedural Order of December 5, 2013, Respondent's arguments respecting denial of justice under customary international law will be addressed in its subsequent submission.

- That certain counsel have represented both the Plaintiffs and the Republic does not demonstrate collusion (Annex F ¶¶ 45-52).
- Statements by government officials regarding the validity of the 1995 Settlement Agreement had no impact on the Lago Agrio Litigation (Annex F ¶¶ 53-58).
- The Republic has not provided illicit assistance to the Plaintiffs (Annex F ¶¶ 64-73).

378. In lieu of any new argument or evidence regarding their "collusion" contentions, Claimants provide a fifty-two-page timeline that supposedly details "Plaintiffs' Pressure Tactics and Collusion With Ecuador and Its Courts." Of course, as shown above in Section I, it is Claimants who have deployed their vast resources and perfected the art of "pressure tactics" — paying enormous amounts of cash to some witnesses while threatening others until and unless they agree to enter into cooperation agreements.

379. In any event, most of the entries on Claimants' timeline do not involve State action in any way. And Claimants do not explain how any of the entries caused the allegedly fraudulent Judgment, perhaps hoping that this Tribunal will infer causation where none exists.[667]

380. On their remaining points, Claimants' rebuttal argument is weak, at best, and also fails to satisfy the causation requirement.

381. **First**, Claimants continue to argue that political statements supportive of Plaintiffs demonstrate collusion.[668] But they implicitly concede that such political statements are not, in and of themselves, improper. Rather, they argue that political statements in Ecuador do not enjoy the same immunity as they do if they had been made by other world leaders in other States because judicial independence is allegedly lacking in Ecuador. But, as explained in

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667 Moreover, Claimants' timeline continues to put forth as "fact" statements that the Republic has already shown to be false. For example, Claimants describe an *amicus* brief submitted by Gustavo Larrea as a "Government of Ecuador *amicus* brief," (Claimants' Track 2 Reply on the Merits, Annex C at 16) but the Republic previously showed that the signatories were not government officials at the time they signed the brief. *See* Respondent's Counter-Memorial on the Merits, Annex E ¶ 11 n.17.

668 *See* Claimants' Amended Track 2 Reply on the Merits ¶¶ 221-225.

Annex B, Claimants' contention that Ecuador lacks judicial independence is counter-factual and contrary to Claimants' own experience in Ecuador. At its heart, it is based on misleading and incorrect "news" articles written by the opposition press. More fundamentally, international law does not apply differently depending on the identity of the respondent State.

382. Nor do Claimants make any showing — they instead rely on rampant speculation — that political statements affected the outcome of the Lago Agrio case, any more than President Obama's statements affected the outcome of any case stemming from the Deepwater Horizon spill.[669] To the contrary, the evidence shows that President Correa's political comments were not, in fact, acted upon. For example, Claimants note that "President Correa himself has called on other countries' leaders personally — specifically in Argentina — to 'enforce the judgment.'"[670] But none of the enforcement proceedings has progressed.[671] Similarly, Claimants allege that the Lago Agrio Court "received directives from the Ecuadorian Executive on how and when to rule,"[672] but Claimants fail to show that the Lago Agrio Court actually acted on any of these so-called "directives." In fact, the evidence on which Claimants rely demonstrates that the Court did not rule for another *two years* after the supposed instruction by President Correa.[673] Claimants have never linked any protected political speech with any actual court act, nor have Claimants established that any such instructions were ever given.

383. **Second**, Claimants challenge the Republic's argument that its only interest is in seeing justice done. They contend that the Republic supported Plaintiffs to ensure that

669 *See* Respondent's Counter-Memorial on the Merits, Annex F ¶¶ 21-30.

670 Claimants' Amended Track 2 Reply on the Merits ¶ 223.

671 *See, e.g.*, Respondent's Letter (June 6, 2013) (discussing (1) decision by the Supreme Court of Argentina overturning the holding of Chevron subsidiary's assets in escrow and (2) order by Superior Court of Justice of Ontario staying enforcement actions pending in Canada).

672 Claimants' Amended Track 2 Reply on the Merits ¶ 221.

673 Claimants' Merits Memorial ¶ 295 (referencing President Correa's request for "expediency in cases of interest to Ecuador" in *March 2009*, whereas the Lago Agrio Court did not enter its judgment until *February 2011*).

PetroEcuador would not have to pay for remediation.[674] But the Court explicitly found that Chevron could itself sue PetroEcuador to seek its contribution to the Judgment.[675] That Chevron has not done so is a strategic choice made by Chevron.

384. Claimants also rely on their ghostwriting argument to contend that Plaintiffs "orchestrated for their own organization to receive the money, with their co-conspirators in the Court to oversee its disbursement."[676] This argument is nonsensical for three reasons. (1) Most importantly, as shown above, Plaintiffs did not ghostwrite the Judgment.[677] Evidence long in Claimants' possession affirmatively disproves their allegations. (2) Even if Claimants had proven an improper relationship between Plaintiffs and Judge Zambrano, which they have not, Judge Zambrano no longer serves as a judge in the Lago Agrio Court and will never serve as a trustee for the judgment fund. (3) None of the Judgment proceeds will be paid *to the Republic*, as Claimants allege, and they have offered no proof to the contrary.[678]

385. **Finally**, Claimants improperly seek to add a new argument in their Reply Memorial — that the Republic has "promot[ed]" the Judgment through official measures.[679]

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674 Claimants' Amended Track 2 Reply on the Merits ¶ 222.

675 *See* C-931, Lago Agrio Judgment at 123; *see also* C-1975, National Court Decision at 116-117, 197.

676 Claimants' Amended Track 2 Reply on the Merits ¶ 230.

677 *See supra* Section IV.

678 Claimants dismiss the Republic's reliance on testimony by former counsel for the Plaintiffs, Alberto Wray, because he no longer represents Plaintiffs. But Dr. Wray represented the Plaintiffs when the case was brought and was intimately involved in its strategy. *See* R-993, Witness Statement of A. Wray (Dec. 10, 2013) ¶ 5 ("As the author of the Complaint, I formulated the legal basis of the claims in accordance with Ecuadorian law."). His perspective on the case is just as relevant as that of Cristóbal Bonifaz, another former Plaintiffs' counsel, whom Claimants continue to quote extensively in their timeline. *See, e.g.*, Claimants' Track 2 Reply on the Merits, Annex C at 1-2.

679 Claimants' Amended Track 2 Reply on the Merits ¶ 225. Claimants also add a quote from Judge Kaplan, who presides over the RICO action against Mr. Donziger, apparently suggesting that this Tribunal should adopt Judge Kaplan's opinion of the Republic. *Id.* ¶ 226. But the Republic is not a party in the RICO action and Judge Kaplan has therefore heard none of the evidence presented by it to this Tribunal. Indeed, Judge Kaplan's conclusions are pure supposition and should hold no weight before this Tribunal. This is especially so because the RICO Defendants (the Lago Agrio Plaintiffs) have apparently lacked the resources to defend adequately the allegations presented there.

However, none of the official measures Claimants rely on lends support to this new allegation, which in turn is predicated on misrepresentations of applicable law.[680] The Republic reserves the right to address the legal issues that pertain to Claimants' new allegation in due course.

386. In recent correspondence, Claimants alleged that the Republic "has initiated a massive diplomatic campaign to assist in enforcing the judgment."[681] Claimants now appear to have backed off that allegation, asserting even more recently that the Republic seeks "to *create an atmosphere* for enforcing the Lago Agrio Judgment around the globe."[682] Through this change in rhetoric, Claimants appear to acknowledge the obvious: The Government of the Republic cannot control the courts around the world that are hearing, or may eventually hear, enforcement actions brought by the Plaintiffs.[683] The Republic's politicians and Government are not pursing a diplomatic effort to enforce the Judgment. Rather, they are merely responding to Chevron's public relations and lobbying campaign.[684] As the Republic has noted previously, the Republic was not involved in the underlying Lago Agrio Litigation and therefore did not have experience with the scientific evidence at issue there. However, the Republic's own environmental experts have now confirmed that: 1) significant contamination caused by Claimants still exists in the former Concession areas that 2) will continue to harm the Republic's

680 For example, Claimants insist upon their long-refuted allegation that the Appellate Court "promoted" the Judgment by issuing a "certificate of enforceability." *Id.* ¶ 225. But, as explained *ad nauseam* throughout the course of these proceedings, a judgment becomes enforceable *as a matter of law* upon its affirmation by the appellate court. *See, e.g.*, Respondent's Letter to the Tribunal (Apr. 15, 2013) at 1-2; *see also* RLA-198, Code of Civil Procedure, art. 296(5). ("A judgment becomes enforceable: (5) Upon adjudication of a matter by the last instance."). Ecuadorian law does not require the issuance of any certificate for a judgment to become enforceable. *Id.* And in fact, the appellate court did not issue any such "certificate of enforceability."

681 Claimants' Letter to the Tribunal (Nov. 17, 2013) at 1.

682 Claimants' Letter to the Tribunal (Dec. 2, 2013) at 2 (emphasis added).

683 As the Republic has noted in its correspondence, the existing enforcement actions have either stalled or been dismissed. Plaintiffs are now embroiled in defending the RICO action. There is no indication that they have the resources to launch any new enforcement actions.

684 *See e.g.*, R-1067, Ted Folkman, *Lago Agrio: More Details On Chevron's Lobbying of the State Department,* Letters Blogatory (Dec. 12, 2013) ("Chevron has been talking about the case with senior officials in the State Department for a long, long time.").

citizens until it is properly remediated.[685] The Republic's Government and politicians are entitled — and in fact have a *duty* — to respond forcefully to Chevron's misinformation campaign against it, and to make the public aware of Claimants' conduct in Ecuador and their efforts to cover up those activities.

VII. Conclusion / Relief Requested

387. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award, in which the Tribunal:

a. Denies all the relief and each remedy requested by Claimants in relation to Track 2, including the relief and remedies requested in Paragraph 424 of Claimants' Amended Track 2 Reply on the Merits.

b. Declares that it lacks jurisdiction over Claimants' denial of justice claims, or refuses to exercise such jurisdiction because such claims are too remote to any investment.

c. Alternatively, dismisses Claimants' denial of justice and Treaty claims due to Chevron's failure to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.

d. Alternatively, dismisses Claimants' Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements do not exist or were not breached.

e. Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements was breached by the Republic, dismisses all of Claimants' Treaty claims because Claimants have separately failed to establish that the Republic has violated any of the Treaty's provisions.

f. Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements has been breached by the Republic, dismisses Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.

g. Alternatively, even if any of Claimants' Treaty or denial of justice claims are upheld, declares that the Lago Agrio Judgment is not null and void because

685 *See supra* Section II.

nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.

h. Alternatively, even if any of Claimants' claims are upheld, orders the arbitration proceedings to continue to Track 3, so that the Tribunal may assess what Chevron's liability should have been for the claims asserted in Lago Agrio so that the Tribunal may fashion a final award that takes into consideration such liability.

i. Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties.

j. Declares that the 1995 Settlement Agreement has no effect on the claims brought in the Lago Agrio Litigation.

k. Otherwise dismisses all of Claimants' claims against the Republic in these arbitration proceedings as meritless.

l. Orders, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon.

m. Awards any other and further relief that the Tribunal deems just and proper.

388. The Republic reincorporates by reference its Request for Relief in Track 1[686] and in its Track 2 Counter-Memorial on the Merits[687] to the extent that such Request remains pending.

389. The Republic reserves its rights to supplement its pleadings and request for relief.

686 *See* Respondent's Track 1 Counter-Memorial on the Merits ¶ 263; Respondent's Track 1 Rejoinder on the Merits ¶ 192.

687 *See* Respondent's Track 2 Counter-Memorial on the Merits ¶ 542.

Respectfully submitted,

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APPENDIX A

GLOSSARY OF TERMS
Respondent's Track 2 Rejoinder
(Part I: Response to Factual Predicate to Claimants' Claims)

"1995 Settlement Agreement" means C-23, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995.

"*Aguinda*" means the class action lawsuit brought by a group of Ecuadorian individuals in the United States District Court for the Southern District of New York, *Aguinda v. Texaco, Inc.*, No. 93 Civ 7527 (S.D.N.Y.).

"BIT," "Ecuador-U.S. BIT," or **"Treaty"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

"Civil Code of Ecuador" means RLA-163, Civil Code of Ecuador, Codification, Official Registry Supplement No. 46, June 24, 2005.

"Claimants' Amended Track 2 Reply on the Merits" means Claimants' Amended Track 2 Reply on the Merits of June 12, 2013.

"Claimants' Merits Memorial" means Claimants' Memorial on the Merits of September 6, 2010.

"Claimants' Track 1 Reply on the Merits" means Claimants' Track 1 Reply on the Merits of August 29, 2012.

"Claimants' Track 2 Reply on the Merits" means Claimants' Track 1 Reply on the Merits of June 5, 2013.

"Claimants' Supplemental Merits Memorial" means Claimants' Supplemental Memorial on the Merits of March 20, 2012.

"Collusion Prosecution Act" means RLA-493, Ecuador's "Ley Para el Juzgamiento de la Colusion," enacted Feb. 3, 1977.

"Constitution of Ecuador (2008)" means RLA-164, Constitution of Ecuador, Official Gazette No. 449, October 20, 2008.

"Consortium" means the Consortium of two Ecuadorian subsidiaries of American companies — TexPet and Gulf — that were granted oil exploration and production rights by the Republic in 1964.

"Ecuador-U.S. BIT," "BIT," or **"Treaty"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

"ELAW *amicus* brief" means R-1014, *Amicus Curiae* – Environmental Law Alliance Worldwide, María AGUINDA et al. v. CHEVRON TEXACO, June 21, 2009.

"Grandjean Expert Report" means RE-15, Expert Report of Philippe Grandjean (Dec. 16, 2013).

"Kaigler Expert Report" means RE-16, Expert Report of Kenneth Kaigler (Dec. 16, 2013).

"Lago Agrio Complaint" means C-71, Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos, May 7, 2003, commencing the Lago Agrio Litigation.

"Lago Agrio Judgment" or **"Judgment"** means C-931, First Instance Judgment by the Lago Agrio Court in the Lago Agrio Litigation, February 14, 2011.

"Lago Agrio Litigation" means the lawsuit brought by a group of Ecuadorian individuals filed before the President of the Superior court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos, May 7, 2003.

"Lago Agrio National Court Decision" means C-1975, Cassation Decision by the National Court in the Lago Agrio Litigation, November 12, 2013.

"Lago Agrio Record" or **"Record"** means case records of Lago Agrio Litigation.

"Lago Agrio First-Instance Appellate Decision" or **"Lago Agrio Appellate Decision"** means C-991, First-Instance Appellate Decision by the Lago Agrio Appeals Court, January 3, 2012.

"LBG Expert Report" means RE-10, Expert Report of Kenneth Goldstein and Jeffrey Short (Feb. 18, 2013).

"LBG Expert Report Annex 1" means RE-10, Annex 1 to Expert Report of Kenneth Goldstein and Jeffrey Short, prepared by Harlee Strauss (Feb. 18, 2013).

"LBG Expert Report Annex 2" means RE-10, Annex 2 to Expert Report of Kenneth Goldstein and Jeffrey Short, prepared by Edwin Theriot (Feb. 18, 2013).

"LBG Rejoinder Report" means RE-11, Expert Report of Kenneth Goldstein and Edward Garvey (Dec. 16, 2013).

"LBG Rejoinder Report, Site Investigation Report" means RE-11, Appendix B to Expert Report of Kenneth Goldstein and Edward Garvey (Dec. 16, 2013).

"Paulsson, DENIAL OF JUSTICE" means RLA-61 Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005).

"Plaintiffs" means the plaintiffs who asserted claims first in New York in 1993 in *Aguinda* and subsequently in the Lago Agrio Litigation.

"PetroEcuador" means Empresa Estatal de Petróleos del Ecuador (the State Oil Company) and CEPE (the previous State Oil Company).

"Racich Expert Report" means RE-18, Expert Rebuttal Report of J. Christopher Racich (Dec. 16, 2013).

"RICO" means *Chevron Corp. v. Steven Donziger, et. al.*, Case No. 1:11-cv-00691 (S.D.N.Y.).

"Respondent's Track 1 Counter-Memorial on the Merits" means Respondent's Track 1 Counter-Memorial on the Merits of August 29, 2012.

"Respondent's Track 2 Counter-Memorial on the Merits" means Respondent's Track 2 Counter-Memorial on the Merits of February 18, 2013.

"Second Juola Decl." means C-1635, Decl. of Patrick Juola, Ph.D., Stylometric Report of Computational Analysis of Lago Agrio Case," (Jan. 27, 2013).

"Short Rejoinder Report" means RE-13, Expert Report of Jeffery Short (Dec. 16, 2013).

"Strauss Rejoinder Report" means RE-12, Expert Report of Harlee Strauss (Dec. 16, 2013).

"Theriot Rejoinder Report" means RE-14, Expert Report of Edwin Theriot (Dec. 16, 2013).

"Templet Expert Report" means RE-17, Expert Report of Paul Templet (Dec. 16, 2013).

"Texaco" means Texaco, Inc.

"TexPet" means Texaco Petroleum Company.

"Treaty," "Ecuador-U.S. BIT," or **"BIT"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.