PROCURADURÍA GENERAL DEL ESTADO
ECUADOR

CHEVRON CASE:
ECUADOR'S DEFENSE
ON THE CLAIMANTS ABUSE OF PROCESS IN INTERNATIONAL INVESTMENT ARBITRATION



ADMINISTRATION 2008 • 2015
DIEGO GARCÍA CARRIÓN

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The account of the facts and legal arguments that support the contents of the Book '*Chevron Case: Ecuador's Defense on the claimants abuse of process in international investment arbitration*' was made by the team of attorneys at the National Direction of International Affairs and Arbitration of the State Attorney General's Office, under the direction and supervision of Dr. Diego Garcia Carrion, State Attorney General, based on the written and oral arguments submitted by the State's defense during the international arbitration.

These contents are informational in nature and are not, therefore, an argument in the Chevron III case.

Quito, September 2015"

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PROLOGUE

The first time I heard about the Lago Agrio case was in 2007, while watching a U.S. television network that mentioned Pablo Fajardo, one of the lead attorneys for the Amazon Defense Front. Until then, more than a general interest that this news may have generated, I never imagined the dimensions of the legal conflict in which I would be involved in as Attorney General of the Republic of Ecuador.

Long before my arrival at the Attorney General's Office, and most likely after I have left this institution, Chevron has litigated and will continue to litigate this dispute, in its own words, "until hell freezes over" to avoid its liability for the environmental harm caused in the Ecuadorian Amazon by Texaco's operations – a company that Chevron acquired at the beginning of this century.

Narrating these facts from the Ecuadorian State's perspective—which is not a party to the environmental suit in Lago Agrio, represents describing the story of a senseless dispute in which, forcing international law and the Investor-State Dispute Settlement System—has created an amorphous arbitration proceeding, through which the parties seek to relitigate against the State in an international jurisdiction a civil dispute between private parties, in a forum in which the interested party has no voice, and which involves a nonparty through the forced principle of denial of justice.

The story of a judicial dispute will always be a challenge that attorneys can make even more complex. The description of this dispute, which includes a multitude of proceedings in various jurisdictions, is an unprecedented challenge. Nonetheless, after eight years of speaking and listening to discussions about the Chevron case, I do not harbor any doubt that it is necessary that the Attorney General's Office address the legal matter without losing sight of the dispute on the merits, nor of the underlying human drama behind the legal scenarios.

In adopting this challenge, I am conscious that we cannot include every detail of the legal proceedings, and that even if this were possible, distracting the reader's attention through legal technicalities and procedural tracks would be unhelpful and unnecessary, since although most of the content would be legal, beyond submitting an argument or

giving a lecture on the law, I will attempt to retell the story of a strategy based on the frailty of a dispute resolution system that has lost its way and departed from the application of the law, in a single-minded goal of serving capital interests.

This book seeks to provide the reader, in an easy and didactic manner, with the story of the investment arbitration proceedings brought by Chevron Texaco against the Ecuadorian State. For purposes of identification, we have named this dispute *Chevron III*. By means of this arbitration, this transnational company intends to shift any liability to Ecuador for any amount that it would have to bear in the "Lago Agrio Litigation".

Of course, in order to understand the dispute of the *Chevron III* case, we will briefly address the related disputes, regardless of whether these have developed in parallel or previously. For example, as background, we must be aware of the Aguinda Litigation, or the Chevron I case, as well as the details of the Lago Agrio Litigation, or the RICO Action, among others. I insist that we are faced with a challenge; nonetheless, we have placed all our efforts in presenting a version of this story that enables the audience to finally understand all of the particularities of Chevron's uncommon legal strategy and the great efforts deployed by the Ecuadorian State to confront this transnational company's immense power.

As of April 2008, when I first took office as Attorney General, the dispute over the contamination caused by Texaco in Lago Agrio during its operation in the Ecuadorian Amazon had already been ongoing for over 15 years. During this time, the 'Aguinda Litigation', the precursor to the Lago Agrio Litigation, in the District Court of the Southern District of New York, had developed and ended, where Chevron had argued that the dispute should have been brought in Ecuador and thus it praised and defended the Ecuadorian justice system before the U.S. courts. In 2002, at Chevron's request, the Court of Appeals affirmed the trial court's dismissal of the Aguinda Suit on grounds of *forum non conveniens*. Chevron and Texaco's efforts to have the case not decided in the United States came to an end, and their wish to have the case brought in Ecuador became a reality.

Although it took Chevron almost ten years to bring this environmental dispute from New York to Ecuador, once the Aguinda suit ended in 2002, and the 'Lago Agrio Litigation' began in 2003, Chevron changed both its discourse and legal strategy and commenced the first arbitration proceedings against the Ecuadorian State, before the American Arbitration Association in New York. In response to Chevron's first attempt to link the State to this dispute, Ecuador filed a motion before a United States court and, after several years of litigation, in 2007, it prevailed before the court, closing this arbitration. In 2008, the Court of Appeals affirmed the decision and the U.S. Supreme Court declined to hear Chevron's request to reconsider the lower court's unanimous rejection of its claim. We have identified this dispute as *Chevron I*, which you will be able to read about in the first part of this publication.

In September 2009, in a premature fashion, as we have always stated, Chevron commenced its new litigation strategy by submitting an arbitration claim, this time under the Bilateral Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (BIT), in force since 1997. Chevron thus pursues its intent to link the Ecuadorian State to the dispute, in order to obtain an insurance for the possible results of the environmental suit filed by the Lago Agrio plaintiffs which, at that time, was still pending. Hence, it was premature.

This book seeks to provide the reader, in an easy and didactic manner, with the story of the investment arbitration proceedings brought by Chevron Texaco against the Ecuadorian State. For purposes of identification, we have named this dispute Chevron III. By means of this arbitration, this transnational company intends to shift any liability to Ecuador for any amount that it would have to bear in the "Lago Agrio Litigation".

Chevron's arguments revolve around a violation of the investment protection standards under the BIT, due to the alleged fact that Ecuador was not fulfilling its obligation to indemnify the investor for the Lago Agrio complaint. At the beginning, this was the factual framework that gave rise to the complaint. However, as this is obviously a pending judicial proceeding, it must develop over time, be subject of a judgment and give rise to the processing of its remedies, thereby causing changes to the dispute's factual framework, while the proceedings move forward.

Chevron should never have filed the arbitration proceedings when the case had not concluded, not even its trial phase. The Tribunal should never have allowed the arbitration to go forward; in doing so, it allowed this amorphous case to develop and reach a point at which it was evident that the facts had changed. This was made most clear in November 2013, when the Chamber of the National Court of Justice, which was assigned to hear the cassation appeal against the judgment, issued its decision. From that moment, the Ecuadorian State insisted that the proceedings could not go forward and requested the suspension of the hearing on the merits, which was scheduled for January and February 2014. And although, at the beginning, the Tribunal was reluctant to do so, in the end, it had no choice but to replace the hearing on the merits, with a procedural meeting held on January 20 and 21, 2014.

The breaking point was already apparent. The Tribunal had the opportunity to correct its error and avoid any new mistakes. However, it chose to seek a Solomonic escape and, on a cold and snowy afternoon in January 2014 (which paralyzed Washington D.C.), it was forced to press what it colloquially called the "reset button", to reconstruct the arbitration proceedings, as if that were possible. At that point, what the State's defense had been arguing for over four years became obvious: the claim was premature. The factual framework had changed with each decision. Faced with this reality, the Tribunal reconfigured the case, allowing the submission of new memorials on matters that had already been discussed and staying the hearing on the merits until April and May of 2015.

The preclusion of procedural stages was out of the question, of course. This is an international investment arbitration, where arbitrators have assumed all powers.

However, if the claim was premature and the Tribunal made a mistake by allowing it to proceed, more serious still, is the fact that the Tribunal assumed jurisdiction of the dispute under the BIT, in force since 1997, when Texaco, Chevron's predecessor, had already ceased to invest in the country in 1992. The strained theory that the investment survives because Texaco still had pending obligations (with respect to the environmental remediation) caused during its operation, broadly interprets the concept of investment and investor, in a manner that contravenes legal logic and the reasons for a State to have interest in signing this type of investment agreements, seeking to generate and develop new investments in the country.

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If, in 1992, Texaco had abandoned the country and ceased investing its capital, what could Ecuador's interest have been in enforcing a BIT as a tool for the encouragement of the investment? What did Texaco or Chevron contribute to the country as of 1997? Nothing! Only disputes. Hence, what right did it have –at the time- to benefit from an investment promotion treaty? None, of course.

From there this legal adventure wrongly begins, under the elegant label of international investment arbitration. From that point onward, the collapse of a proceeding begins, which by forcing the system

and international law, has obliged Ecuador to invest significant material and human resources in a legal defense for one of the most complex litigations in the history of international arbitration.

The case is so complex that it has had to be divided into overlapping stages and sub-stages, while the factual framework changes. The proceedings are so perverse that the case has had to be built as it proceeds. Let me explain: Usually, once a claim has been filed and responded, the subject of the dispute has been established. The parties and the judge know the matters to be discussed and the arguments and evidence revolve around the dispute. Not here: The case, and its facts and arguments, have been built and modified while the case moves forward. The disputed facts were ones in September 2009 when the claim was filed (while the Lago Agrio Litigation was being heard by the trial court), but others when a judgment was issued in February 2011; and are different today, after the National Court of Justice issued its cassation decision. They could even be different when the Constitutional Court issues its resolution on the extraordinary action for protection filed by Chevron. This is because each time that a Court decides, it can build an argumentative logic (its justification) that differs from the previous one. We understand that the system can operate without the strict limits of estoppel, which applies in our internal proceedings. However, can an arbitration proceeding in an investment dispute resolution system be so lax and amorphous? Thus, does it provide legal security? Everything points to *no*.

However, I was discussing the different stages of the proceedings. Effectively, the Tribunal initially divided the dispute's proceedings into two stages: one to resolve its jurisdiction and competence, and another to resolve the merits of the dispute. As you will be able to read in more detail in this publication, the jurisdiction stage ends in February 2012 with the unfortunate and erroneous decision that forces us to continue to litigate today. The merits stage, with all of its complexity, was initially divided into two tracks. The first addresses the effects of the release agreements signed by Texaco and the Ecuadorian State, between 1995 and 1998, and the second addresses the denial of justice claim filed by Chevron against Ecuador. Subsequently, the Tribunal deemed necessary to further subdivide Track I, creating Track

I-B, to address the nature of the claims included in the Lago Agrio claim and to determine whether those claims were "settled" by the State, as part of the 1995-1998 Release Agreements referenced above.

Track II of the merits phase also had to be modified because the denial of justice claim filed by Chevron against Ecuador, with respect to the development and decision of the Lago Agrio Litigation, had to include the arguments regarding the existence of environmental damage raised by Ecuador, since even if Chevron were to prevail in the arbitration, principles of international law would prohibit it from benefiting from compensation, unless it took into account its real and proven liability, that is, the environmental harm caused by Texaco, that Chevron never remediated.

Confused? Do not worry; we will attempt to clarify any doubt throughout this publication. The objective is: that this intricate legal proceeding is finally understood.

I will continue: The inclusion of the environmental damage argument in this dispute over denial of justice by Ecuador's defense is not casual or arbitrary. Chevron objected to Ecuador's attempt to introduce evidence of environmental damage in the Amazon, although Chevron itself had asserted in the arbitration that the purported lack of evidence of environmental damage should give

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rise to the conclusion that any judgment against it may only have been procured by fraud. In order to do so, the Attorney General's Office included in its defense team, a specialized technical team consisting of environmental experts from the *Louis Berger Group* (LBG), who filed four expert reports (February and December 2013; November 2014 and March 2015), along with our memorials on the merits, which has taken them over three years of work, as well as multiple visits to the affected area. Their reports have allowed us to conclude that the environmental damage persists, that it was caused intentionally by Texaco during its operation, and, as a result, that the damages judgment within the Lago Agrio Litigation has logic and is supported.

We also included information on the strategies used by Chevron during the Lago Agrio case to distract the attention of judges and experts from the places affected by environmental contamination. The strategy included the practice of performing secret "pre-inspections" at the sites where the judicial inspections would later be carried out, in such a way that, collecting soil samples, Chevron's experts knew where to collect samples during the judicial inspections, avoiding those areas with greater contamination. In this way, Chevron hoped to minimize the evidence of contamination in the record.

The State's defense obtained evidence of Chevron's strategy from the information held by the oil company's own experts who had participated in the "pre-inspections", within the Lago Agrio Litigation. After several years of litigation before American Courts, these experts were ordered to provide us with their working documents, in which this information was obtained, that was later filed as evidence in the international arbitration.

It is obvious that Chevron has played dirty and that it has not acted with the clean hands that would

allow it to build a denial of justice case for purported procedural fraud. Chevron cannot claim fraud under international law if it does not have clean hands. In this publication, we will explain how, within the arbitration proceedings, Ecuador has shown Chevron's two faces.

The story of Chevron's constant media campaign of public aggressions against the Ecuadorian State adds to the story of the legal conflict.

We will address, for example, the theory of the judgment's ghostwriter, which was based on conjectures and assumptions unsupported by the evidence. Chevron groups its theories and conjectures, and on the basis of its forced conclusions, attempts to shift the burden of proof. In other words, the oil company believes that Ecuador must demonstrate that its claims are not true, when the burden of proof requires that it prove its own theory and not that Ecuador, as the defendant, prove that its claims are not true.

At the three-week hearing held in Washington D.C., between April and May of 2015, Chevron presented a series of experts who, from afar, examining scanned documents of the Lago Agrio record, attempted to state whether the trial judgment was issued or not by Judge Nicolás Zambrano. All this, despite the fact that the expert examinations of the hard drives belonging to Judge Zambrano had allowed Ecuador's expert, Christopher Racich, to reach the conclusion that the only place where parts of the draft judgment were found were specifically in Judge Zambrano's computers. Chevron has not been able to submit any evidence that traces of the judgment were found in any place other than the referenced Judge's hard drives. In fact, they were not in Judge Alberto Guerra's computer, which they bought at a high price.

And, in to complete the show and its thesis, Chevron brought its star witness, former Judge Alberto Guerra, the witness who was financed by Chevron, whom Chevron paid tens of thousands of dollars in cash, and most likely, hundreds of thousands of

dollars in financial benefits. In April 2015, during the hearing's first week, the State's defense dedicated two days to former Judge Alberto Guerra's cross-examination. Two days of indignation and shame. Two days asking myself: how is it possible that Chevron and its confessed corrupt witness have the nerve to appear before the Tribunal aspiring to gain credibility. Guerra—who dances to the music that is played for him -- has moved on to better pastures since Chevron decided to buy his story and computer. Since then, Guerra was relocated to the United States, under an alleged *sui generis* "Chevron witness protection program", with a house, salary, and legal costs for immigration, tax and other matters. The Tribunal should never have allowed a witness, under these conditions, to be heard in this case.

The story of the development of this international arbitration, will allow the reader to assess how a Tribunal in the investment arbitration has handled such a complex dispute.

During the first years of this arbitration, the Tribunal seemed not to have ears for Ecuador's requests. The State's concern was so great that in August 2014 we filed a request that the Tribunal recuse itself from continuing to hear the case. The State noted what it believed was a pattern of uneven treatment by the Tribunal, giving prompt attention to Chevron's every request, and including its repeated requests for extraordinary interim relief, yet failing to act over the course of *years* on Ecuador's request to the Tribunal to order Chevron to terminate its smear campaign against the country, or its legislative campaign against U.S. trade preferences for Ecuadorian businesses. The Tribunal did not accept Ecuador's recusal motion, a decision accepted and affirmed by the Secretary of the Permanent Court of Arbitration based in The Hague.

And although the Tribunal did not accept the petition filed by Ecuador, nor did the Secretary of the Permanent Court of Arbitration based in The Hague under the UNCITRAL Rules, it is apparent that Ecuador had sufficient justification to submit a recusal request. On June 18, 2015, the Tribunal issued a procedural order (the Omnibus order, as the Tribunal called it), through which it decided on

14 unresolved points throughout the proceedings, including those underlying Ecuador's recusal request. 'Decisions', to call them in some way, since in fact what the Tribunal did was list the unresolved issues and decide that they no longer required any decision at that time. Of course, the passage of time made that the facts surpass the act of justice, as any decision was already inopportune. And, under this mechanism, the Tribunal is called to decide the denial of justice claim.

In June 2015, after three years of requests, the Tribunal traveled to Ecuador, to the area affected by the environmental damage that gave rise to the Lago Agrio claim. The members of the Tribunal, overcoming all obstacles that Chevron raised throughout the years, understood that these obstacles stemmed from Chevron's strategy to bury them in documents, and keep them far from the consequences of its poor environmental practices. Chevron's attorneys had spoken about an unsafe and dangerous land, even for their own personal safety. Chevron even absurdly proposed that instead of performing a site visit, a virtual tour from a hotel in Guayaquil could be carried out instead. Of course, none of their fears were well founded and both the Tribunal, as well as Chevron's attorneys, were able to stay in the Ecuadorian Amazon for a series of days, without any security incident whatsoever having occurred. During this site visit, the Tribunal's members had their first opportunity ever, after almost 6 years of litigation, of having direct contact with the facts: see and smell the traces of the environmental damage that they had read about in many pleadings and reports, as well as its evident affectation to nature, the sources of water and the surroundings of those who inhabit the area. Without a doubt, this was an important procedural event that must be taken into account at the time that the arbitrators make a decision.

The story of Chevron's constant media campaign of public aggressions against the Ecuadorian State adds to the story of the legal conflict. In this manner, Chevron has not hesitated to use all of the weight of its economic power to smear Ecuador. And although the Ecuadorian government initially chose to avoid interfering in the dispute, it is clear that it could not remain still given the aggression against its judicial system and its government authorities.

However, Ecuador has always understood that the proceedings' scenario is different from that of the public image.

The country's defense – led by the Attorney General's Office – has acted in the legal and procedural arena, while the government has had to confront the global media scenario. We have intervened with the clear understanding that the attorneys' roles at the Attorney General's Office is to defend the Republic of Ecuador, which does not create any distance from the interests of those who are the ultimate reason for its existence: its citizens.

The conduct of the proceedings in its two initial tracks has practically ended as we close this edition. Everything set forth in this publication is part of the case. There are no new arguments or evidence. No attempts to add any new arguments to the case are being made. The arbitrators, surely, will not even read this. Certainly, more than contributing to the procedural strategy of the State's defense, the objective of this publication is to fill a void by publishing a document that records the background of the true dispute, presents the facts and arguments that Ecuador has submitted during the investment arbitration, and reflects its vision.

To think that this is merely another legal proceeding that only trial attorneys must know would be a serious mistake. This is truly the story of a struggle that was initially launched by indigenous communities in Ecuador, and has finally involved the State. It is the story of legal work that is not merely based on professional commitment, but also on the commitment that brings Ecuador's legal institutions closer to its citizens and problems.

Moreover, the story of the Chevron case forms part of the Ecuadorian State's difficult experience with the investment dispute resolution system, which we have criticized throughout the last years. The Ecuadorian State has had to defend itself—although under protest in the majority of cases— within an international investment arbitration system that was founded on Bilateral Treaties for the Encouragement and Reciprocal Protection of Investments, negligently negotiated and executed, that have served as the basis to operate an irrational application of international legal standards, with little respect

for sovereign States, their regulatory power and their systems for administration of justice. In it, the system has used elite international arbitrators who often have attributed absolute powers to themselves, surpassing the limits of their powers, running over domestic law and the sovereignty of States, using the appearance of legality.

This publication, as well as the publication on the Oxy case (2014), fulfills the responsibility of the Attorney General's Office of the Republic of Ecuador to publicize relevant cases for the future of the Investor-State Dispute Resolution System, as its survival will be possible only if it is able to balance its decisions through an application of domestic law and international law, in light of clear rules and fair interpretations.

The Chevron case has not ended, and it may take several more years to reach a final decision. We consider, however, that this is the appropriate time to demonstrate Ecuador's position throughout the proceedings, once the evidentiary record for Tracks 1 and 2 has been closed, and once all of the written submissions have been filed. In order to do so, we used our memorials and legal claims as the basis. The story, under the responsibility of the Department of International Affairs of the Attorney General's Office, of course, represents the work product of an enormous human team of attorneys throughout more than 10 years. Naming each and every one of them is impossible and I would risk not mentioning more than one. I extend my appreciation on behalf of the Ecuadorian State for their commitment, dedication and professionalism.

Dr. Diego García Carrión

Attorney General of the Republic of Ecuador
Quito, September 2015

CHAPTER I

HISTORICAL AND LEGAL BACKGROUND

1. HISTORY OF THE CONCESSION AND TEXACO'S EXIT

Ecuador's first oil well was discovered in 1911 in Ancón, Santa Elena Peninsula, by the English company Anglo; nonetheless, crude exports did not begin until 1928. At that time, oil exports did not exceed 6 percent of the country's total exports.

Due to a natural decline in the production of the first wells, Ecuador ceased to export crude oil between 1960 and 1971, although it continued to produce it for domestic consumption. In 1960, the Texaco-Gulf consortium began exploration in the area designated as Sacha. In 1961, the country granted a concession to Compañía Minas y Petróleos del Ecuador, but, in 1967, without authorization from the government, this company assigned part of its concessions to the Texaco-Gulf consortium, for which reason the contract was subject to *caducidad.*[1]

On September 27, 1971, a new Hydrocarbons Law was issued that, among other things, provided that the State would receive royalties from 6 to 16 percent of the oil exploitation that still persisted in the Gulf of Guayaquil, and also regulated the extractive activity, which marked the beginning of Ecuador's "oil boom" from 1972.

After the creation of Corporación Estatal Petrolera Ecuatoriana (CEPE), on June 23, 1972, the Texaco-Gulf consortium built the Trans-Ecuadorian Pipeline.

1. Milestones for the oil industry. Petroecuador 1829 - 2002. Petroecuador. P. 10.



Ancón well, first oil well that was drilled by Ecuador. Photograph from files: Diario El Universo.

This new infrastructure allowed the Ecuadorian State to carry out the first oil export of 308,283 barrels of oil from the port of Balao on August 17, 1972.

On June 14, 1983, the Ecuadorian government initiated the tender process for oil exploration under a services provision agreement. Thus, eleven blocks were tendered: seven in the Amazon region and four offshore.[2]

From that year, ten new tenders or oil rounds were carried out, which resulted in the execution of contracts with various international companies, such as: Occidental (Oxy), Belco, Texaco-Pecten, British Petroleum, Conoco, ELF, Braspetrol, YPF, Petrobras, Repsol, Mobil, City, Arco, Amoco, Maxus, Tritón, Agip, EDC, Burlington, Sinopec and CNPC, among others. The last of these rounds was held in December 2013 and was named *Ronda Suroriente*.

1.1. Chronology of Texaco's presence in Ecuador

1.1.1. 1964 – 1974 Concession Agreement

On March 5, 1964, the Republic of Ecuador granted a concession to Chevron's predecessor, Texaco Petroleum Company (Texpet), for the exploration and exploitation of hydrocarbons in the Amazon region of Ecuador. Subsequently, the "Napo Concession"— as it came to be known— was assigned to Compañía Texaco de Petróleos del Ecuador, C.A. (CTPE) and Gulf Ecuatoriana de Petróleos, S.A. (GEP), subsidiaries of Texaco, Inc. and Gulf, Inc., respectively. The assignment was recorded before the Ministry of Mines on March 14,

2. Id. p. 38



Shushufindi 34, drilled by Texaco in 1974.

1964. Subsequently, the Napo Concession contract was modified and both subsidiaries signed a new supplementary agreement on June 27, 1969.

In January 1965, Texpet and Ecuadorian Gulf Oil Co. ('Gulf') obtained from CTPE and GEP, respectively, the right to acquire 95 percent of the shares that each company had on oil, gas and other hydrocarbons in the Napo Concession, after subtracting the royalties that the government would acquire in kind, and as a result of the production used in the operations.

On February 3, 1971, the Government created Corporación Estatal Petrolera Ecuatoriana (CEPE), its objective was to explore, produce, process, transport and sell all hydrocarbon resources within the Ecuadorian territory. It also approved the new Hydrocarbons Act of 1971, which, among other provisions, introduced new contracting forms for concessions and granted CEPE the power to explore and exploit hydrocarbon deposits by itself, executing contracts with other companies or creating joint ventures.

On June 14, 1972, by Supreme Decree No. 430, it was established that pursuant to the Hydrocarbons Act of 1971, all concessionaires operating in the country had to execute new concession contracts to replace the preexisting concession contracts.

On August 6, 1973, the Republic of Ecuador held a renegotiation with Texpet and Gulf ('1973 Concession Agreement'), which purpose was the implementation of oil exploration and extraction activities. The 1973 Concession Agreement granted CEPE the option to acquire up to 25 percent of the shares of the Napo Concession in 1977. Furthermore, it reduced the initial 40-year exploitation period for this concession, that is to say, until 2004, establishing that it shall remain in force until June 6, 1992.

On January 10, 1974, by Supreme Decree No. 9, it was established that CEPE's 25 percent stake in the Napo Concession would begin in 1974, and not in 1977, as provided in the 1973 Concession Agreement. This Supreme Decree anticipated an assignment of the shares to CEPE, on the grounds that Ecuador, as a member of the Organization of the Petroleum Exporting Countries (OPEC), was "*required to harmonize the performance of its oil industry with the Resolutions adopted by this International*

Organization," as well as *"immediately proceed to adopt the necessary measures to give effect to a reasonable government ownership interest of the holding companies under any form of contract."*[3] On June 14, 1974, the Ecuadorian government, CEPE, Texpet and Gulf signed a document that established that Texpet and Gulf's shares would each decrease from 50 to 37.5 percent for each. This agreement entered into force on June 6, 1974.

1.1.2. 1977 – 1984: CEPE – Texpet Consortium

On May 27, 1977, Ecuador, CEPE and Gulf signed a tripartite agreement ('1977 Gulf Contract'), whereby, as of December 31, 1977, Gulf would sell CEPE its remaining stake in the CEPE-TEXACO-GULF Consortium. After this sale, CEPE acquired a stake of 62.5 percent in the Consortium, while Texpet continued to hold 37.5 percent. Texpet, nonetheless, continued to act as operator.

On December 16, 1977, the Minister of Natural Resources, the Minister of Finance, CEPE and Texpet, signed an Exploration and Development Contract (1977 Contract) whereby Texpet and CEPE would assume a series of reciprocal commitments and economic parameters that were part of the 1978 annual Work Program, which had a term of one year. The contract signified an investment commitment by Texpet of USD 31 million.

On August 6, 1973, the Republic of Ecuador entered into a new contract with Texpet and Gulf, which would be in force until June 6, 1992.

1.1.3. 1988 – 1992: change of operator and extinguishment of the Concession Contract

On September 21, 1988, CEPE informed Texpet that it would take over as the Consortium Operator on July 1, 1990.

On September 5, 1989, Empresa Estatal de Petróleos de Ecuador (Petroecuador) was created. As a result, CEPE was dissolved and its resources, rights and obligations were assigned to Petroecuador.

3. Supreme Decree No. 09, dated January 2, 1974, published in Official Register No. 469, on January 10, 1974

On June 6, 1992, the concession that the State of Ecuador had granted to Texpet and Gulf in 1973 was terminated. Texpet decided not to continue making investments in the country, and published a "Farewell Letter" in the newspaper with the highest circulation in Ecuador.

From the beginning of the concession, until July 1, 1990, Texpet acted as Consortium operator. During this period, Texpet was responsible for determining the methods and the manner of performing the drilling and exploitation operations, including the disposal of perforation muds and other waste; water supply; production waste, residual waters; crude oil spills, and the disposal of the oil that could not be produced and stored for sale or refining.

On July 1, 1990, Petroecuador assumed the position of Consortium Operator. By abandoning its role as operator during the two remaining years in the 1973 Concession, Texpet continued as part of the Consortium as equity partner.

On March 25, 1991, Petroecuador and Texpet signed a new operations contract ('1991 Operations Contract'), recorded before the Hydrocarbons Registry on July 11, 1991. The terms and conditions of this contract demonstrated that Texpet's investments were finalizing given that the 1973 Concession Agreement concluded in 1992.

On June 6, 1992, the Concession granted by Ecuador to Texpet and Gulf in 1973 ended. Texpet's 37.5 percent stake in the Consortium was assigned to Petroecuador. Texpet decided not to continue with new investments in the country. Precisely on that day, when the Concession ended, Texpet published a "Farewell Editorial" in the newspaper with the greatest circulation in Ecuador, announcing its departure from the country and expressing its gratitude to the Ecuadorian people. In addition, and as part of its departure, Texpet terminated its employment relationship with the employees that remained in Ecuador.

2. THE AGUINDA LITIGATION IN THE UNITED STATES[4]

In November 1993, almost a year after Texpet's investment in Ecuador concluded, a group of Ecuadorians brought a civil suit in the United States District Court for the Southern Judicial District of New York. This action was brought on behalf of all citizens and residents of the eastern region of the Ecuadorian Amazon.[5] The plaintiffs in Aguinda "*claimed that, between 1964 and 1992, Texaco's oil operation activities contaminated the tropical forests and rivers of Ecuador.*"[6]

As a result, they requested the environmental remediation of soils, rivers, streams and watersheds of the Ecuadorian Amazon, as well as compensation for personal damages.[7] Texaco requested dismissal of the claim based on a series of legal theories, in particular, on the common law principle of *forum non conveniens*,[8] since, in its opinion, the United States Courts were an "inappropriate forum" to hear the claims brought by the Amazon's residents.

So that the court would dismiss the claim in the Aguinda Litigation, Texaco repeatedly attacked the jurisdiction, independence and impartiality of the Ecuadorian legal system in the domestic proceedings.

4. The case was referred to in this way because the first of the claimants was named Maria Aguinda

5. The "claimants…individually and…in the name of all other persons in a similar situation, bring this action for reparations of those negligent, reckless, intentional and perverse actions and omissions of the respondent Texaco Inc., in relation to its oil exploration and drilling activities… This is a tort liability action brought in the name of the citizens and residents of the Amazon Region of Ecuador, which is referred to as the "Oriente", against Texaco Inc. ("Texaco"). The claimants and the aforementioned citizens and residents seek indemnification and sanctions for damages, as well as fair compensation, in order to clean up the pollution and contamination in the environment and the personal and property damages caused by the company's aforementioned operations."

6. Aguinda v. Texaco Inc., 303 F.3d 470, 473 (2d. Cir. 2002).

7. Claim (3 November 1993), Aguinda v. Texaco Inc., No 93-CIV-7527 (S.D.N.Y.) ¶ 90 ("The claimants have the right to fair compensation, for the clean-up of the pollution and the remediation of their properties, their sources of water, and the environment") (emphasis added); Claimants' Response to the Second Series of Interrogatories of the Respondent Texaco Inc. (11 July 1994) at 3 - 4 (which describes the types of fair compensation that the claimants are seeking in the Aguinda tort liability action, which included "the performance of (or financing of) an environmental clean-up effort sufficient to restore to those members of the action the quality of life that they enjoyed prior to the damage, including in respect of their rights to potable water and lands that can be used for hunting and fishing; … the creation and maintenance over a period of years … of an environmental monitoring fund in order to study the effects over the long term of Texaco's conduct in the lawsuit; … the development of a series of standards that will regulate any future oil production activity on Texaco's part in areas that are biologically diverse and sensitive, in accordance with the principle of sustainable development")

8. Motion to dismiss due to forum non convenience. A State shall not exercise jurisdiction if doing so would constitute a serious inconvenient forum for the legal proceedings, if a forum more convenient for the respondent is available. Dahl's Law Dictionary. By Henry S. Dahl.

Texaco also declared to the court in the Aguinda case that Ecuadorian law allowed the claimants to seek the same types of reparations in Ecuador that they were seeking in the New York court for environmental clean up efforts.

In these proceedings, Texaco repeatedly invoked the competence, independence and impartiality of the Ecuadorian judicial system. To support this statement, it submitted sworn affidavits by Ecuadorian legal experts who held that the Ecuadorian courts were an adequate forum to hear the claim and that Ecuadorian citizens and public officers trusted the judicial system. Hence, one of these experts stated, under penalty of perjury:

> *"I have reviewed the claims in the Maria Aguinda, et al. case against Texaco Inc.* ***In my opinion, based on my knowledge and experience, the Ecuadorian courts constitute a completely adequate forum for these plaintiffs to fairly resolve their claims.*** *I believe the Ecuadorian judicial system could resolve the plaintiffs' claims in an adequate, efficient and impartial manner… The civil proceedings used in Ecuadorian courts are essentially those that were used in other civil law jurisdictions, such as Spain, France, Germany and Japan. Although they are different from those used in common law jurisdictions such as the United States of America, they do allow for an effective solution of the civil suits."*[9]

Texaco also declared before the Court, in the Aguinda Litigation, that Ecuadorian law allowed the plaintiffs to request the same type of compensation in Ecuador to remedy the environment as requested in New York.

In 1996, the District Court approved Texaco's request and rejected the case on *forum non conveniens* grounds. Nonetheless, in 1998, the Second Judicial District reversed this dismissal and remanded the

9. Sworn Declaration of Dr. Alejandro Ponce Martínez, 13 December 1993. Emphasis is this institution´s opinion.

case to the Lower Court, arguing that the *forum non conveniens* dismissal was inappropriate, given the absence of one requirement: Texaco had not consented to submitting to the Ecuadorian jurisdiction.

After the trial court judgment was annulled and the Second Circuit remanded the case to the lower court, on December 28, 1998, in its Sworn Response to the interrogatories, filed with the Court of the Southern District of New York,[10] **Texaco expressly agreed to fulfill any final judgment issued by Ecuadorian courts, provided that the case arose from the same events and facts as those claimed in the Aguinda Litigation.** Texaco reserved its right to challenge the enforcement of the judgment solely under the New York Uniform Foreign Country Money Judgments Recognition Act, the Civil Practice Law and Rules and the New York Foreign Judgments Recognition Act.[11] With this condition, Texaco protected its right to challenge any adverse monetary judgment issued by Ecuadorian courts in an enforcement proceeding.

Texaco expressly agreed to comply with any final judgment that was reached by the courts in Ecuador, as long as the judgment was rooted in the same events and facts that were argued in the Aguinda case.

In order to ensure the dismissal of the judicial action that it had hoped to obtain in Aguinda on grounds of *forum non conveniens,* Texaco praised the Ecuadorian judicial system and, in 2000, it filed no less than fourteen sworn affidavits by Ecuadorian legal experts. All of these affidavits referenced the impartiality of Ecuador's judicial system "*and stated that the* ***Court should defer the case to Ecuadorian courts,*** *where the parties could be heard and where similar suits were pending against Petroecuador and Texpet.*"[12]

10. Texaco INC´s Objections and responses to Plaintiffs´ interrogatories regarding proposed alternative FORA

11. Ibidem. P. 3. The original text reads: "Texaco, which is the sole defendant in these cases, will satisfy a final judgment (i.e., a judgment with respect to which all appeals have been exhausted), if any, that may be entered against is by a court of competent civil jurisdiction in Ecuador in favor of plaintiffs named in Aguinda v. Texaco Inc., Case No. 93 Civ. 7527 and Jota v. Texaco, Case N0. 94. Civ. 9266, arising out of the events and occurrences alleged in the Complaints filed in the United States in those actions, in the event those actions are dismissed by this Court on grounds of forum non conveniens or international comity and if plaintiffs refile claims in Ecuador. Texaco reserves its right to contest any such judgment under New York´s Recognition of Foreign Country Money Judgments Ac, 78. N.Y. Civ. Prac. L&R §5301 - 09 (McKinney 1978).

12. Renewed motion by Texaco to dismiss the Aguinda case.

Texaco stated explicitly that it would submit to the jurisdiction of the Ecuadorian courts.

Based on Texaco's commitments, in 2001, the District Court granted, once again, Texaco's request to dismiss on grounds of *forum non conveniens*. In 2001 and 2002, during the appeal, Texaco (and later Chevron) continued to argue that Ecuador's courts still provided a completely appropriate and impartial forum. The dismissal of the claim in Aguinda was affirmed by the Second District Court of Appeals for the Second Circuit, in August 2002. Once it received this decision, Chevron issued a press release featuring the following text:

> "*Chevron Texaco is satisfied with the decision of the U.S. Court of Appeals which affirms the dismissal by the lower court… **This decision vindicates Chevron Texaco's long-held position and the claims that we have set forth before the court [with respect to the fact] that Ecuador is [the] appropriate forum for this litigation.***"[13]

3. CONTRACTS SUBSEQUENT TO THE TERMINATION OF THE CONCESSION

After the termination of the Concession in June 1992, on December 14, 1994, the Minister of Energy and Mines, at the time, Petroecuador and Texpet signed a Memorandum of Understanding (MOU) to establish the mechanisms pursuant to which, Texpet would be released from the claims that such institutions may have on the environmental impacts in relation to the Concession. Articles I(d) and VIII of the Memorandum clearly determined both the parties and its scope, that it did not involve any third party rights, as confirmed by the following texts.

> "***Art. I (d):** Establish the mechanisms pursuant to which Texpet must be released from every claim that the Ministry [of Energy and Mines] and PETROECUADOR could have against Texpet with respect to the environmental impact caused as a result of the operations*

13. Chevron Texaco press release. 19 August 2002: "Chevron Texaco has issued a statement in respect of the judgment of the Circuit Court of the United States, which upholds the dismissal of the legal proceedings in Ecuador." P. 36

of the former PETROECUADOR-TEXACO Consortium."

Art. VIII of the Memorandum of Understanding established that:

> *"**The provisions of this Memorandum of Understanding shall apply notwithstanding the rights that third parties could possibly have for adverse effects caused as a result of the operations of the former PETROECUADOR-TEXACO Consortium."***

Although Chevron and Texaco stated that Article VIII was only limited to 'personal injury claims' alleged by third parties, the article's text is clear when it specifies that it is not limited to personal injuries.

On May 4, 1995, the Ministry of Energy and Mines, Petroecuador and Texpet executed an Implementation and Release Contract, which Appendix A contained a general description of the Environmental Remediation Work, that should have been drafted in greater detail in a Remediation Action Plan, which was the responsibility of Texpet.

Paragraph 5.1 of the 1995 Implementation and Release Contract provided that:

> "*On the execution date of this Agreement and in consideration of Texpet's agreement to perform the Environmental Remediation Work according to the Scope of Work specified in Appendix A, (...)* ***through this contract, the Government and Petroecuador shall release,*** *absolve and forever exempt Texpet (...) Texaco, Inc., and all of their agents, servants, employees, officers, directors, legal representatives, (...) successors, predecessors, principals and subsidiaries* ***from all claims of the Government and Petroecuador against the beneficiaries of the releases*** *of liabilities for adverse environmental effects originating in the Consortium's Operations, except those related to their obligations contracted under this agreement to comply with the Scope of Work by Texpet.*"

The 1995 Performance and Release Agreement clearly established that it was only binding on the parties thereto—that is, on the government of Ecuador and Petroecuador.

From the first to the last page, the 1995 Implementation and Release Contract provides that the contract is only applicable to the parties. It not only clearly specifies the Contracting Parties and beneficiaries in detail, but the exemption included in Article 5.1 expressly and unequivocally identifies its scope. The exemption makes clear that the Government and Petroecuador are the only parties that release in respect to their claims.

> "*Through the present document,* ***the Government and Petroecuador*** *shall hereby release, acquit and forever discharge ... the* [Released Parties] *from "****all of the claims of the Government and Petroecuador*** *against the Released Parties for the Adverse Effects on the Environment arising from the Operations of the Consortium."*[14]

On November 17, 1995, Texpet, the Ministry of Energy and Mines and Petroecuador signed the *"Settlement and Release Agreement*", whereby the parties mutually recognized that "*this agreement extinguishes all rights and obligations* ***that each of the parties may have with respect to the other,*** *arising from the contract dated August 6, 1973,*" that is, the 1973 Concession Agreement.

In May 1996, Texpet executed settlement and releases agreements with four municipalities in

The Investment Protection Treaty between the Republic of Ecuador and the United States of America was signed on August 27, 1993, and entered into force on May 11, 1997.

14. 1995 Performance and Release Agreement, Article 5.1. (Emphasis added)

the Amazon Region that had filed claims against it for environmental contamination. As a result of these settlements, the company surrendered approximately USD 3.8 million for infrastructure works, including the installation of water and sewage systems. Each settlement agreement established the corresponding municipality's release from claims against Texpet, Texaco, other subsidiaries or related companies and their agents, employees and directors, among others.

Outside the scope of these agreements, on May 11, 1997, the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, which had been signed on August 27, 1993, entered into force.

On September 30, 1998, the Ministry of Energy and Mines, Petroecuador and Texpet signed a Final Release, pursuant to which "*the parties declare having satisfied and concluded the contract dated May 4, 1995 and all of its complementary documents, scopes, minutes, etc.*"[15]

In 2000, Chevron and Texaco reached a merger agreement. In 2001, Chevron-Texaco filed a brief before the Second Circuit Court of New York that certified the merger and that the resulting entity, "Chevron Texaco Inc.", was based in San Francisco.

4. THE MERGER BETWEEN CHEVRON AND TEXACO

In 2000, Chevron and Texaco reached an agreement to merge both companies and turn them into an integrated global company in the oil industry. The process ended on October 9, 2001. On that date, Chevron and Texaco's shareholders voted to approve the merger and Chevron Texaco Corporation immediately began operating. Since then, Chevron and Texaco held themselves out as a single company.

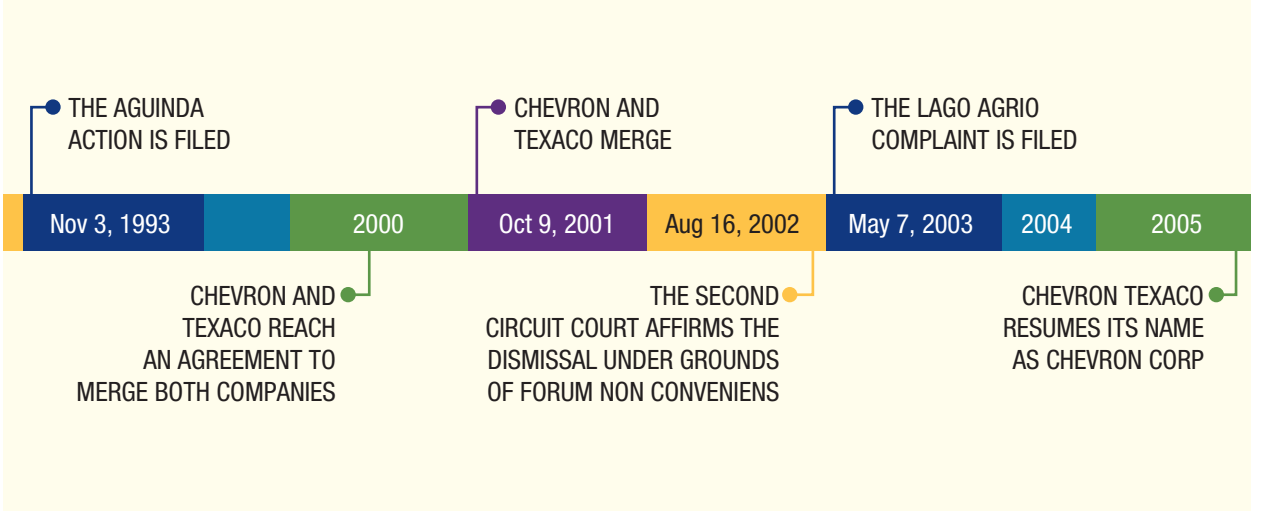
In 2001, Chevron Texaco filed a brief with the Second Circuit in New York, to indicate the following to the Court:

15. Final Release, September 30, 1998.

> "*As is generally known and in this manner, this Court may assume being informed of Texaco's merger with Chevron Inc. on October 9, 2001 and that the resulting company, Chevron Texaco Inc., is headquartered in San Francisco.*"

In its brief, Chevron Texaco also rejected the Lago Agrio plaintiffs' claim that the Aguinda complaint should be processed in New York, since it is Texaco, Inc.'s headquarters, stating that: "*The resulting corporation, Chevron Texaco, Inc., is headquartered in San Francisco. Chevron Texaco is in the process of closing what remains of Texaco's former headquarters in White Plains, New York.*" In fact, its own attorneys appeared as counsel on behalf of Chevron Texaco Corporation, and expressly requested that the Court of Appeals in Aguinda accept judicial notice of what they characterized as a "*merger.*"[16]

FIGURE 1. Chronology of the merger between Chevron and Texaco Inc.



Source: PGE

16. Chevron appellate brief in the Aguinda case: "Texaco merged with Chevron on October 9, 2001, five months after the District Court handed down its decision."

After dismissal of the Aguinda complaint, Chevron Texaco issued a press release stating the following:

> "*ChevronTexaco is pleased with the decision of the U.S. Court of Appeals which affirmed the lower Court's dismissal and* ***this ruling vindicates Chevron Texaco's long-standing position and the arguments that we have filed with the Court, that Ecuador is the appropriate forum for this litigation.***"

Clearly, Chevron and Texaco held themselves out to the world as a single corporation, which adopted both names: Chevron Texaco.

5. THE LAGO AGRIO LITIGATION[17]

5.1. Brief summary of the case

Once the Aguinda complaint was dismissed by the U.S. Courts, the citizens and residents of the Ecuadorian Amazon who had brought their claim

Once the Aguinda complaint had been dismissed, in 2003 the claimants in Aguinda brought a new claim before the courts in Ecuador, in which they presented the same complaints that had been raised in the Aguinda case.

in the United States in 2003, brought a new case before the Ecuadorian courts. In this new action, the plaintiffs named Chevron-Texaco Corporation (instead of Texaco) as the defendant. As in the Aguinda Litigation, the Lago Agrio plaintiffs demanded the following in their complaint:

- Monitoring and medical care for affected residents;
- Elimination of the contaminants from the region; and,
- Remediation in both public and private lands to repair the environmental damage caused by the oil operations performed while Texpet operated the Consortium.[18]

17. Ecuador´s memorial regarding objections to jurisdiction 07 - 26 - 2010

18. Case 002 - 2003. Superior Court of Nueva Loja

The Chevron Texaco Corporation argued that it was not a successor at law to Texaco, and that it had not agreed to submit itself to the jurisdiction and authority of the Ecuadorian courts and legal system. In addition, the company argued that it had been released from all obligations as a result of the ratification of the Settlement Agreements, as well as that there was no harm to the environment.

The Lago Agrio plaintiffs claimed that Texpet's "*willful misconduct*" and "*negligence*" caused serious land and water contamination in the region, which affected not only the drinking water and crops, but also the population's livelihoods, culture, and general health, since there was an increase in cases of cancer, birth defects as well as other diseases.[19]

The principal claims contained in the Lago Agrio complaint were based on Ecuadorian substantive law in force before the Environmental Management Act of 1999. Thus, in Section V of the complaint ("*Legal Foundation*"), the Lago Agrio plaintiffs established as the legal basis of their claim, the class action set out in Article 2236 of the Current Civil Code (formerly 2260). This Article provides that a "*class action*" may be brought in "*all cases of consequential damage, which due to recklessness or negligence, threatens unspecified persons.*"

As this consisted of an oral summary trial, the response to the complaint, and therefore, Chevron's objections were set forth during a Settlement Hearing held on October 21, 2003, in which the company argued, *inter alia*:

1. Lack of jurisdiction and competence of the Superior Court of Justice of Lago Agrio, due to the following:

   a. CHEVRON TEXACO CORPORATION is not the successor Texaco, Inc.'s, thus it has not replaced Texaco Inc. in all of its rights and obligations.

   b. CHEVRON TEXACO CORPORATION has never acted in Ecuador, has not signed

19. Claim in Case 002 - 2003, Superior Court of Nueva Loja (May 7, 2003)

contracts with the government, or sectional or administrative entities, was not an operator in the territory, nor has it submitted to the jurisdiction of aforementioned State.

i. CHEVRON TEXACO CORPORATION has not accepted in any way to be subjected to the jurisdiction of the Ecuadorian courts and tribunals. On August 16, 2002, the Court of Appeals for the Second District of New York ordered that Texaco, Inc. *exclusively* be subjected to the Ecuadorian jurisdiction. Even if the merger had already been perfected, the North-American courts did not order CHEVRON TEXACO CORPORATION's be subjected to the jurisdiction of the State concerned.

ii. The New York courts' ruling ordered the suspension of the statute of limitations in actions against TEXACO, INC. Since the ruling issued by the New York Federal Court (nor the commitments acquired in such Court) are not applicable to CHEVRON TEXACO CORPORATION, any action against the latter shall expire, in accordance with Ecuadorian law, within four years.

iii. CHEVRON TEXACO CORPORATION knows that TEXACO PETROLEUM COMPANY (TEXPET) is not a subsidiary subordinated to Texaco, Inc. in economic, technical and administrative matters. The plaintiffs were not able to prove that this was true, or that Texaco, Inc. made decisions regarding the Consortium. Its only participation in the Consortium, was an indirect investment in a fourth-level subsidiary.

c. The plaintiffs had no right to bring claims for alleged environmental damage.

i. It is CHEVRON TEXACO CORPORATION's understanding that TEXACO PETROLEUM COMPANY and TEXACO INC., as well as its successors, were already released by the government of Ecuador from any liability arising from any environmental impact caused in the Concession area.

ii. The plaintiffs have not stated that they are owners or beneficiaries of the facilities and places where the alleged environmental affectations occurred.

2. Improper accumulation of actions, which should be addressed by different proceedings and heard by different courts.

i. The plaintiffs base their action on the rules of the Civil Code on offenses and civil torts, as well as on provisions of the Environmental Management Act. The president of the Court has no jurisdiction, nor is he or she competent to hear and resolve, by means of a verbal summary proceeding, the liability for allegedly committed acts, since the civil judge of the place where the events occurred is the competent authority to decide these types of actions (civil) through an ordinary trial.

ii. Absence of jurisdiction and competence, and violation of the procedural rules since the trial was processed through verbal summary proceedings.

iii. The plaintiffs also based their action on the Constitution of 1998, the Environmental Management Act of 1999 and ILO Convention No. 169. None of these standards was in force at the time the events occurred. The law is not retroactive in nature.

iv. The Environmental Management Act creates an individual and collective right to enjoy an adequate environment. This right did not exist at the time the events occurred.

3. Alternatively, it denies having caused any damage whatsoever and that it could be attributed malice or negligence that has caused damage to the plaintiffs, neither in the past nor in the present, given that Chevron Texaco Corporation is not a successor of either Texaco, Inc. or Texaco Petroleum Company (TEXPET).

The Lago Agrio Litigation record holds over 200 thousand pages that include testimonies, expert reports and laboratory test results.

5.2. Trial phase[20]

After nine years of litigation, on February 14, 2011, the Trial court of the current Provincial Court of Lago Agrio, issued its decision and concluded that Chevron was liable for the environmental damage listed below, which totaled approximately USD 9.5 billion; this amount doubled as a result of a punitive damages award.

In its decision, the Trial court observed that the Plaintiffs were not party to the 1994 Memorandum of Understanding; the 1995 Release Agreement; or the 1998 Final Release. The ruling stated that even if "*these transactions were effective (...) for the Government of Ecuador to release Texpet and its parent company, Texaco, Inc., from liability for the environmental damage that has arisen from the Concession,*" **there is** "***no legal basis to hold that the existence of this settlement deprives the plaintiffs of their fundamental and [inalienable] right to bring actions and petitions***" under the Ecuadorian Constitution and international instruments, such as the American Convention on Human Rights, the American Declaration of the Rights and Duties of

" […] But it is necessary to keep in mind that in this case, Petroecuador, which previously was CEPE, was involved in a consortium with the Texaco company at one time, which lasted for a number of years, but this consortium was always administered by the Texaco company. The oil company operator was Texaco, and it was that company which managed the entire oil production process in the Amazon Region, and, as a result, was directly responsible for what was done in the Amazon Region in terms of the environment. Due to this, it is necessary to clarify that this is not a proceeding that Ecuador has brought against Chevron or Texaco, but instead, this is a proceeding that has been brought by communities in the Ecuadorian Amazon Region, who are independent from the government of Ecuador and who, for purposes of the State as a party, are third parties in respect of whom the State does not have any decision-making authority or control."

Interview with Dr. Diego Garcia Carrion, State Attorney General, "Economy and Finance" Program, with journalist Alberto Padilla. CNN, Washington D.C., July 17, 2009

20. Ecuador's response memorial on the merits, Ecuador 2012 - 07 - 03

Man, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

According to the Trial Court, the 1995 Release Agreement "*did not release the defendant of its obligations to the plaintiffs*."[21] In this sense, the 1995 Release Agreement does not contain any legal obligations that may be imputed to all Ecuadorians, since they were not its signatories. The 1995 Release Agreement simply served to release certain claims that exclusively belonged to the Government and Petroecuador.

In its operative section, the judgment provides that the results of judicial inspections demonstrated the presence of polluting substances originated from oil exploitation techniques, for which reason the Court divided the various remedial measures that can be applied to the proven damages.

5.2.1. Main Measures

1.1. Chevron-Texaco was ordered to perform the complete removal and adequate treatment and disposal of contaminating waste and materials that continued to exist in the pools or pits drilled by Texaco. Similarly, it was ordered to clean rivers, estuaries, lakes, wetlands, natural and artificial bodies of water and properly dispose of all waste materials. For this cause, the defendant was ordered to pay **SIX HUNDRED MILLION DOLLARS (USD 600,000,000.00)**.

1.2. Chevron-Texaco was ordered to remove completely the existing contaminating waste and materials in the pits and their surrounding areas. The Court considered that the contamination in the concession area reached 7,392,000 cubic meters and that since the plaintiffs requested that the defendants return matters to the condition prior to the concession, the Court found that the sum of **FIVE THOUSAND THREE HUNDRED NINETY SIX MILLION ONE HUNDRED AND SIXTY THOUSAND DOLLARS (USD 5,396,160,000.00)** was necessary to remediate the soils.

5.2.2. Additional Measures

1.3. As it became clear that the area's original land and aquatic flora and fauna would not recover by itself, the additional measure aimed to recover

21. (Lago Agrio court, March 4, 2011) Resolution on Chevron motion for clarification and expansion. P. 12)

them, therefore, considering the differences at least **TWO HUNDRED MILLION DOLLARS (USD 200,000,000.00)** were deemed necessary.

1.4. As for water contamination, the Court held that, despite the remediation that had been previously ordered, the persons who depend on these sources would require an alternative for their most basic needs; thus, as an additional measure, it ordered the implementation of a potable water system or systems. The Court estimated that **ONE HUNDRED AND FIFTY MILLION DOLLARS (USD 150,000,000.00)** would be necessary as compensation.

5.2.3. Mitigation Measures

1.5. Having demonstrated a serious affectation to public health, provoked by the presence of contaminants in the environment, caused by Texpet's hydrocarbon practices, Chevron-Texaco was ordered to bear the costs for the implementation of a health system for at least, **ONE BILLION FOUR HUNDRED THOUSAND DOLLARS (USD 1,400,000,000.00).**

The lower court found that the 1995 Settlement Agreement did not release Chevron from its obligations to the claimants, given that the claimants had not been signatories to that agreement.

1.6. The Court also ordered the implementation of a community reconstruction and ethnic reaffirmation program, which costs must be borne by Chevron-Texaco, in the amount of **ONE HUNDRED MILION DOLLARS (USD 100,000,000.00)**.

1.7. Given the evidence of the existence of a serious public health problem, which the Court found was reasonably attributable to oil exploitation, a measure to mitigate this public health issue caused by Texpet was ordered, and therefore, it was condemned to pay **EIGHT HUNDRED MILLION DOLLARS (USD 800,000,000.00),** to provide funding for a health plan that should

necessarily include treatment for people suffering from cancer, that can be attributed to Texpet's operations in the Concession area.

1.8. Due to the bad faith with which, in the Court's opinion, Chevron litigated this trial, and the lack of public recognition of the victims' dignity and suffering caused by the defendant's conduct, the Court accepted the punitive damages requested by the plaintiffs. The Court, in its sound judgment, ordered punitive damages equivalent to an additional 100% of the aggregate amount of the reparation measures. However, at the option of the defendant, this civil penalty could be replaced by a public apology on behalf of Chevron Corp. offered to those affected by Texpet's operations in Ecuador. This public apology had to be disclosed no later than 15 days from the judgment's issuance.

1.9. The Court ordered Chevron to pay the Amazon Defense Front an additional 10% of the amount awarded in the judgment for its ongoing work.

Finally, to establish an adequate mechanism for the judgment's enforcement, the Court ordered the plaintiffs to create a commercial trust, within sixty days from the judgment's service date, which would serve as a vehicle for the fulfillment of all measures ordered by the Court.

Chevron requested the clarification and expansion of the judgment issued by the trial court.[22] Two weeks later, this court issued its decision regarding Chevron's request, concluding that there were no further matters to be clarified or expanded upon.

5.3. Appeal

Both Chevron and the Lago Agrio plaintiffs appealed the Trial Court's decision.

The Lago Agrio plaintiffs claimed that the evidence filed in the case justified a judgment ordering payment of a greater amount of compensation for damages.

For its part, Chevron based its appeal on two arguments that it requested the Appellate Chamber to consider:

22. Chevron motion for clarification and expansion filed on February 17, 2011

"[...] The annulment of the entire proceedings for lack of jurisdiction, lack of competence, due process violations, procedural fraud and all the various defects of nullity that affect the entire proceedings [...]".[23]

Alternatively, *"the revocation of the appealed judgment and the clarification and expansion writ, affirming one or more of the objections that raised"* by the company when it responded the complaint and *"considering the claims of violations of due process and constitutional guarantees."*

In its decision dated January 3, 2012, the Superior Court of Justice of Sucumbíos affirmed the trial court's judgment and rejected the Lago Agrio plaintiffs' grounds of appeal, which sought compensation for additional damages "*in connection with the ancestral territory of the indigenous peoples*" in the affected lands. The Appellate Court concluded, nonetheless, that:

"*the rights to such territories that have been recognized to these persons were not in force at the time that the events that gave rise to this case occurred, therefore, they have no right to reparation through this lawsuit, nor are they subject of compensation from the defendants in this case." "A loss of territory,"* held the Court, *"is not recognized as a compensable damage, by applying the principle of non-retroactivity of the law."*[24]

The Appellate Court also rejected another of the Lago Agrio Plaintiffs' arguments stating that the Trial Court had made a mistake by failing to assess the damages caused by Texaco when it spilled oil on the roads:

"*As for the damage caused by the oil that Texaco spilled on the roads, as well as the damage to other structures and land, we affirm the challenged judgment as there is no evidence in the record that assesses the extent of the damage, nor are there any references to an adequate amount necessary to repair this type of damage, as noted to the Chamber. Although the record contains documents proving the existence of this damage, it has not been*

23. Chevron appellate brief, filed on March 9, 2011

24. Decision of the appellate court in the case in Lago Agrio

"This is a process that is being litigated by private actors and Claimants—that is, by indigenous communities in Ecuador and a private foreign company. The State is not participating as a party to these proceedings, and as a result we have not intervened at any point during the proceedings, we do not know the exact terms that were handed down in the judgment, and obviously we have not been able to make any statement in respect thereof, other than noting that this is a judgment handed down by the judicial system of Ecuador, which is a completely autonomous branch of government, both from the executive branch and from the Attorney General's Office of Ecuador."

Dr. Diego Garcia Carrion, State Attorney General, Press Conference. Cuenca, February 16, 2011

fully characterized nor is there an estimate of the amount required to repair it. The Court notes that the mere existence of this damage was barely claimed once the complaint was filed; there is no clear definition in this regard, nor can we estimate the reparation amount, and thus, we also reject this portion of the recourse. Given the foregoing, we deny the appeal as requested by the plaintiff and hereby decide, as to considering the reparation of the damage caused that the lower court's judgment allegedly failed to consider."[25]

The Court partially accepted Chevron's appeal:

"only as to the part that references the presence of mercury in the concession area, since there was error in the assessment of evidence regarding this element at the trial level and consequently, we perform an abstraction of its transcendence in the ruling."[26]

The Appellate Court expressly confirmed the Trial Court's decision regarding its jurisdiction to hear

25. Decision of the appellate court in the case in Lago Agrio
26. Ibidem. Resolution section

the case and its jurisdiction over Chevron, quoting Texaco's acquisition by Chevron in 2001 as support. In this respect, the Court extensively analyzed the doctrine of piercing the corporate veil, concluding:

> *"If this Chamber were to rule that Chevron's argument is valid, it would threaten public law and the basic principles of administration of justice, as it would accept an avenue that upheld irresponsible attitudes;* ***hence, a company with pending obligations in Ecuador could carry out a reverse triangular merger abroad so that neither the law nor Ecuadorian jurisdiction would apply to it, nor a foreign jurisdiction under forum non conveniens."***[27]

The Appellate Court further found that the Trial Court had jurisdiction to issue its judgment on the basis of Articles 2236[28] and 2214[29] of the Civil Code.

The court of appeals expressly upheld the reasoning of the lower court in respect of Chevron's liability, under a theory of piercing the corporate veil.

It rejected Chevron's argument that "*environmental damages could not be considered incidental,*" since, in its opinion, Article 2236 only covers "*civil damages*" given that the articles of the Civil Code only refer to situations of "*contingent damage, without limiting the nature or the essence itself of the damages*." The Appellate Court recognized, however, that Ecuador's Civil Code (adopted in 1861) could not "*foresee the situations we now face in the world today*"[30] but also noted that its articles make no distinction between "*civil damage*" and "*environmental damage*".

27. Decision of the appellate court in the case in Lago Agrio

28. "Art. 2236. As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.."

29. "Art. 2214. Whoever commits an offense or tort resulting in harm to another shall indemnify the affected party, without detriment to the penalty provided by law for such offense or tort."

30. Appellate court´s decision

The Superior Court of Sucumbíos affirmed the relevance of the application of Article 2214 of the Civil Code, noting the "*existing link between the antecedent – the oil production activity – and the consequent – environmental damage.*" The Court concluded that "*the rule establishes the obligation to repair any harmful result.*"

The Appellate Court rejected the argument that Chevron's "*procedural fraud and violation of due process*" should serve as grounds to annul the Trial Court's decision, stating that:

> "*it is worth stating that the trial record shows that the defendant has exercised a vigorous and extensive defense at trial – we already spoke of thousands of pages that comprise the case record, submitted by* [the defendant] *in the litigation; insinuation of experts; examining and cross-examining these judicial auxiliaries, and witnesses, performing each and every one of the steps that were carried out at the trial level. Thus, the proceedings were public and from what we can observe, they were also transparent, with a chilling temporal duration that usually, and without a doubt, affects the interest of the party that brings the complaint, since over eight years have transpired from the complaint until today in Ecuador alone; certainly, it processed the evidence and the actions – all of them – that the parties requested at the procedural investigation stage.*"[31]

The Court rejected Chevron's plea that it should act against the plaintiffs based on their attorneys' alleged fraud, holding that the Court lacks "*jurisdiction to rule on the conduct of lawyers, experts or other officers or directors and judicial auxiliaries.*"[32]

Finally, the Appellate Court criticized Chevron's tactics during the litigation, describing them as "*abusive,*" "*openly aggressive and hostile,*" and noting that

> *"hundreds of thousands [of] documents submitted by Chevron Corporation overburdened the case record with all the material that it considered relevant to add; such that, at that level only, the*

31. Appellate court´s decision

32. Appellate court´s decision

> *case record was already comprised of almost two hundred volumes (about twenty thousand pages), without considering the over two hundred thousand pages of the proceedings at the trial level; obviously, the counter-party had also submitted its own documents, although they were far from [Chevron's] quasi-useless burden."* [33]

The court of appeals criticized the tactics that Chevron had used during the proceedings, and in general, the oil company's combative strategy.

The Court regretted "*the existence of inappropriate objections*," "*the labyrinthine complexities [of arguments] that persistently sought procedural errors,*" and, in general, Chevron's "*combative strategy.*"[34]

Subsequently, Chevron requested the Appellate Court's clarification of its decision. The Appellate Court again affirmed the Trial Court's judgment.[35]

The Court confirmed that the "*non-pecuniary*" reparation established in the ruling, that is, the public apology that was necessary to avoid imposition of the conditional punitive damages judgment had no *res judicata* effect. Chevron had the freedom to state that it was only apologizing because the trial court had ordered it to do so, and can add that its apology did not imply, admit or acknowledge any civil or criminal obligation.[36] In second place, the Appellate Court confirmed that it had considered all of Chevron's arguments regarding what it called "*irregularities in the drafting of the trial judgment.*"

The Court concluded that:

> "*This is a civil proceeding in which the Chamber finds no evidence of 'fraud' by the plaintiffs or their representatives, thus, as it has stated, it refrains from reviewing these accusations,* ***without prejudice***

33. Appellate court´s decision

34. Appellate court´s decision

35. Chevron appeal filed before the lead judge in case before the Provincial Court of Sucumbíos (March 9, 2011)

36. Decision of the appellate court regarding the motion to clarify

The court of appeals noted that there were adequate ways to investigate any unlawful or irregular conduct in the judicial system, and to sanction that conduct if it were discovered, but that it was not under the court's jurisdiction to do so.

of the parties' rights to bring a formal accusation before the Ecuadorian criminal authorities." *(Emphasis added)*

Thus, the Appellate Court observed that there were appropriate channels to investigate any alleged participation in fraud or judicial irregularity, and to punish this conduct if it were proven, but that this matter was not within its competence.

5.4. Cassation

On January 20, 2012, Chevron filed an Appeal for Cassation with the National Court of Justice. Given the applicable legislation, Chevron, in its capacity as claimant, at the time of filing its appeal for cassation, could request and provide a bond that would have precluded enforcement of the judgment, pursuant to legal mandate. In this regard, Chevron decided not to request the suspension of the judgment's enforcement or to post this bond. Given this decision, the Ecuadorian judiciary has no discretionary power to correct a party's omission.

For its part, the National Government neither has the power to annul or modify the rights and obligations derived from a ruling delivered by an Ecuadorian court.

By decision of 12 November, 2013, the National Court of Justice partially granted the appeal for cassation of the judgment issued by the Sole Chamber of the Provincial Court of Justice of Sucumbíos, finding that the concept of punitive damages was not contemplated by the Ecuadorian legal framework; therefore, a public apology nor an order to pay are inadmissible. After determining that the judgment was not supported by Ecuadorian law, the National Court reversed the relevant part and reduced the judgment to just over ***USD 9.5 billion***.

The National Court, in referring to Chevron's claims of procedural fraud, noted that it did not have the competence to resolve them, since it was limited to the appeal for cassation. Nonetheless, the National Court noted that Chevron has a clear recourse that could be exercised until February 14, 2016, under the Collusion Prosecution Act.

Furthermore, the Court agreed with the Superior Court of Sucumbíos, by ruling that

> *"it does not have competence to decide on accusations of collusive actions of a verbal summary proceeding, nor procedural fraud, judges' behavior, inappropriate or appropriate meetings, appointment of associate judges, plaintiffs' collusion, among other accusations made by the claimant company."*[37]

On page 91 of its judgment, the National Court states:

> "*In its recourse, the company filing the appeal for cassation claims the existence of procedural fraud, a very serious allegation that involves the administration of justice and casts shadows of doubt on the trial function of Ecuador's jurisdictional bodies; but, nonetheless, [the company] does not argue under any applicable legal standard in this regard, nor does it state how the case's validity has been affected, and therefore, [its claims] turn into ambiguous statements, without any type of legal support and become mere words; above all, they become serious offenses against those who comprise a part of the highest mission of administering justice in Ecuador.*"

According to the Collusion Prosecution Act, referenced by the National Court,[38] an affected party may bring an action claiming that the case has been tainted by fraud, and

> "*if the reason for such claim is confirmed, measures* ***shall be ordered to nullify the collusive proceedings, invalidating the act or acts*** *...* ***and repairing the damage caused*** *...* ***and, as a general matter,***

37. Ibidem. Pág. 95.
38. Ibidem Pág. 95.

In its decision in the cassation case, the National Court partially overturned the decision, finding that the Ecuadorian legal system does not provide for an award of punitive damages, and as a result reducing the award by more than USD 9.5 million.

restoring things to the condition prior to collusion."[39]

Chevron has not made an effort to prove its fraud allegations in the correct venue, having failed to bring, to date, an action under the Collusion Prosecution Act in force in Ecuador.

5.5. Enforcement of the Judgment

On February 17, 2012, the Sole Chamber of the Provincial Court of Sucumbíos declared that the judgment issued in the Lago Agrio proceedings was enforceable in accordance with applicable procedural rules.[40] The Court also rejected Chevron's argument that it was not required to post any bond, since the Arbitration Tribunal, in the Chevron III arbitration proceedings, had granted provisional measures requiring Ecuador to take all necessary measures to maintain the *status quo*.

In this decision, the Court referenced its obligations under the first Provisional Measures decision issued by the Arbitration Tribunal in the Chevron III case, and Ecuador's other international obligations stemming from the human rights treaties that it had signed, and held that the Ecuadorian State's international obligations under human rights conventions prevailed over the Arbitration Tribunal's orders regarding investments. As a result, the Court declined to stay the enforcement of the judgment, noting, further, that there is no legal basis that allows it to do so.

The Court provided that:

- By acting as Chevron requested and adopting measures to prevent enforcement of the judgment, it would be allowing –when it should

39. Collusion Prosecution Act, Art. 6 (emphasis added)

40. Decision of the Unified Chamber of the Provincial Court of Sucumbíos (February 17, 2012)

prevent— Ecuador's violation of its human rights obligations, specifically Articles 1 and 25 of the American Convention on Human Rights, which require Member States to respect the rights and liberties recognized therein and ensure their free and full exercise by any person who is subject to their jurisdiction, without any discrimination whatsoever. The Court added that the right to effective judicial protection includes the guarantee of enforcement of a judgment; otherwise, the judgment would be ineffective.

- Acting as Chevron requested also implied a violation of Articles 1, 24 and 30 of the American Convention on Human Rights; in other words, the violation of the principles of legality and non-discrimination, as this would cause the Lago Agrio Plaintiffs to be defenseless to the Cassation Law. According to the Court, the discriminatory treatment would be palpable if the general application of the Cassation Law were omitted and if it instead accepted that Chevron could indefinitely delay enforcement of a judgment based on a decision within a case to which the Lago Agrio plaintiffs are not even a party.

5.6. Extraordinary Protection Action

On December 23, 2013, Adolfo Callejas Ribadeneira, in his capacity as Chevron's Judicial Representative, filed an Extraordinary Protection Action against the judges of the Specialized Civil and Commercial Chamber of the National Court of Justice. This action was brought because Chevron claims it was a victim of purported constitutional violations during the Lago Agrio case proceedings. According to Chevron, the following rights were violated:

- The constitutional right to be judged by a competent adjudicator;

- The constitutional right to legal security:

  - Through a violation of the *estoppel* effect to the 1995 and 1996 Settlement Agreements and the 1998 Final *Release*[41] executed by Texaco and the government of Ecuador;

41. i) Contract for the performance of environmental remediation and release from obligations, liability and claims, dated May 4, 1995; ii) Final Act of compliance with the contract for the performance of environmental remediation and release from obligations, liability and claims, dated September 30, 1998; iii) Contract with the Municipality of Joya de los Sachas, dated May 2, 1996; iv) Contract with the Municipality of Shushufindi, dated May 2, 1996; v) Contract with the Municipality of Francisco de Orellana, dated May 2, 1996; vi) Contract with the Municipality of Lago Agrio, dated May 2, 1996; vii) Contract with the Prefecture of the Province of Sucumbios, dated May 2, 1996; viii) Contract with the Municipalities of the Consortium of Napo, dated April 26, 1996

" … In any case, any statement that Chevron could make in respect of the possibility of fraud is something that would have to be analyzed under the jurisdiction of each institution within the legal administration—I am referring to the National Judicial Counsel in respect of the administrative responsibilities of the judges, or to the Office of the Public Prosecutor in respect of prosecution for any crimes that may have been committed during the course of the proceedings. But this is something that would obviously have to be proven—a statement from Chevron is not enough. What is necessary is that any claim be made responsibly—that is, there needs to be a signed complaint, and there needs to be some responsibility taken for what is being said, and not just in statements to the media. What needs to happen is that Chevron, if they have any complaints, Chevron needs to present those complaints formally, in the manner required under Ecuadorian law, and they can't do that from California, on their web page or through statements from their representatives. If they have something to complain about, then they need to present a formal complaint."

Dr. Diego Garcia Carrion, State Attorney General, Press Conference. Cuenca, February 16, 2011

- Through a violation of the principle of non-retroactivity of law;

- Violation of Constitutional Judicial Protection because of the Court's failure to dismiss Chevron's claims of fraud;

- Chevron's constitutional right to receive a properly justified judgment, since the judgment's reasoning is incomplete and irrational;

- The constitutional right to due process;

- The constitutional right to a defense;

- The constitutional right to proportionality and equality before the law, claiming that the damages granted were not proportional to and exceed the standards applicable to similar cases.

The Extraordinary Protection Action is pending before the Constitutional Court. On March 20, 2014, the Constitutional Court's Admissions Chamber admitted the Extraordinary Protection Action for processing.

In accordance with the Law of Jurisdictional Guarantees and Constitutional Control, the opining judge ordered a hearing at which Chevron submitted its arguments underlying its Extraordinary Protection Action. The National Court judges, who issued the cassation judgment and who were, to boot, defendants in the action, did not make an appearance. The Lago Agrio plaintiffs and the Attorney General's Office acted as interested third parties, the latter to inform the Constitutional Court of the existence of the Chevron III arbitration, of Chevron's denial of justice arguments in this instance and its claims of purported fraud in the Lago Agrio case, as well as the theory of the Ecuadorian State's defense with respect to its claims.

Chevron has now filed an extraordinary protection action, which is currently awaiting decision.

6. CHEVRON I

6.1. Brief summary of the case

Less than a year after the Lago Agrio plaintiffs' once again brought their claims against Chevron in Lago Agrio, on June 11, 2004, Chevron Texaco Corporation and Texaco Petroleum Company commenced an arbitration proceeding against Petroecuador before the American Arbitration Association ("AAA") based on the Joint Operating Agreement, signed in 1965 between Texaco and Gulf. Chevron and Texaco's argument to support the arbitration consisted in that Petroecuador, as the successor of Gulf's obligations, was obligated to compensate them for all damages and costs resulting from any judgment in the Lago Agrio litigation.

On October 15, 2004, Petroecuador and the Republic of Ecuador brought a case before the District Court for the Southern District of New York to force Chevron Corporation and Texaco Petroleum Company to cease the arbitration since neither Petroecuador nor Ecuador were parties to the Joint Operating Agreement.

> "The Republic of Ecuador assures that every litigant before its courts, including Chevron, shall have due process guarantees, even in cases against the State. In recent years, Chevron and its companies have actually obtained monetary awards against the Government from Ecuadorian courts. The Republic of Ecuador has not intervened, nor will it intervene, in the environmental lawsuit that is being heard by the Lago Agrio court; on the contrary, it will continue to guarantee due process and the fair and impartial continuation of the lawsuit, for all parties involved."
>
> **Dr. Diego García Carrión, Attorney General, PGE Press Release, Quito, March 11, 2010.**

On June 19, 2007, after more than two years had transpired from submission of the evidence, including numerous affidavits and the exchange of over a million pages of documents, extensive briefs filed by the parties and a four-day hearing that focused essentially on applicable Ecuadorian law, the District Court permanently quashed any additional arbitration proceedings before the AAA.

In 2008, the District Court affirmed that Ecuador and Petroecuador were not contractually bound by the 1965 Joint Operating Agreement between Texpet and Gulf.[42] This decision was affirmed in a summary proceeding carried out by the Second District Court of Appeals.[43]

Despite the fact that Chevron and Texaco had requested that the District Court decide its counterclaims under the 1995 Settlement Agreement and the 1998 Final Release Agreement, once the District Court and the Court of Appeals rejected their claims under the 1965 Joint Operating Agreement, Chevron-Texaco informed the District Court that it did not wish to oppose the Republic and Petroecuador's petition to dismiss all of the remaining counterclaims.[44]

42. Republic of Ecuador v Chevron Texaco Corp., 499 F. Supp. 2d 452 (S.D.N.Y. 2007)

43. Republic of Ecuador v Chevron Texaco Corp., 296 F. App'x 124, 2008 WL 4507422 (2d Cir. 7 Oct 2008), cert. rejected, 129 S. Ct. 2862 (2009).

44. Letter sent by Jones Day to Judge Leonard B. Sand, District Court of the United States of America for the Southern District of New York, Case No. 04 CV 8378 (July 13, 2009)

In 2009, the United States Supreme Court rejected Chevron's petition to review the decision of the District Court; therefore, ending the Arbitration before the AAA and the Litigation, in which Chevron had requested a Stay in the Litigation.[45] Thus, this ended Chevron's first effort to transfer its environmental liabilities to the Ecuadorian State.

During the proceedings before the U.S. Courts seeking a stay in the Chevron I arbitration proceedings, oil companies Chevron and Texpet brought a counterclaim against the Republic of Ecuador, requesting that the Courts take judicial notice that the 1995 Enforcement and Release Agreements, the 1995 Settlement and Release Agreement and the 1998 Final *Release* released them from all environmental claims and liabilities—including third-party claims— resulting from Texpet's activities in Ecuador.



Washington D.C., Sunday, April 19, 2015. Winston & Strawn's offices. The Attorney General, Diego García Carrión prepares his Opening Statement for the Hearing from April 21 to May 8, 2015.

45. Order dated 20 July 2009, issued in Republic of Ecuador v Chevron Texaco Corp. Case No. 04 CV 8378 (LBS) (S.D.N.Y.).

> "For a long time, Chevron has had its public relations and its lobbying firms putting the blame on the company's self-inflicted legal problems, due to this alleged lack of independence of the Ecuadorian judiciary. I would just like to note here that, as of today, three federal courts of the United States—the District Court for the Southern District of New York, the Second Circuit Court of Appeals and now the Supreme Court of the United States—have found 100% in favor of Ecuador on the merits, and have roundly and decisively rejected Chevron's argument that Petroecuador or the Republic are in any way responsible for the environmental contamination that Chevron caused as the operator of the oil concession in Ecuador. However, the courts have taken notice of the fact that Chevron has a tendency to blame others, and not the company itself, and I have no doubt that Chevron will come up with some excuse to blame the Ecuadorian judicial system for the rulings of the United States courts."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, June 30, 2009**

Subsequently, all of the United States Courts: the District Court, the Court of Appeals for the Second Circuit and the U.S. Supreme Court rejected the plaintiffs' claims under the 1965 Joint Operating Agreement. Finally, Chevron and Texpet informed the District Court that they would not oppose the petition filed by the Republic of Ecuador and Petroecuador to dismiss all of the remaining counterclaims.[46]

A mere two months later, on September 23, 2009, Chevron Corporation (Chevron) and Texaco Petroleum Company (Texpet) submitted a Notice of Arbitration based on the Bilateral Investment Protection Treaty signed between the Republic of Ecuador and the United States of America (BIT). The notice included the same claims related to the 1995 and 1998 Release Agreements, signed by Texaco and the government of Ecuador, that they had raised before the AAA and that they agreed that the New York District Court would dismiss.

After having lost their suit under the 1965 Joint Operating Agreement, Chevron-Texaco sought a different forum to decide its claims related to Lago Agrio.

46. Letter sent by Jones Day to Judge Leonard B. Sand, District Court of the United States of America for the Southern District of New York, Case No. 04 CV 8378 (July 13, 2009)

7. CHEVRON II

By notice dated December 21, 2006, Chevron Corporation (Chevron) and Texaco Petroleum Company (Texaco) initiated an arbitration proceeding against Ecuador pursuant to Article VI (3) (a) (iii) of the BIT. Article VI (3) (a) (iii) provides that any difference that arises between a signatory State and an investor can be submitted to an arbitration tribunal constituted under the Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules").

This proceeding, administered by the Permanent Court of Arbitration, was based in The Hague, Netherlands. The official languages of the proceedings were English and Spanish.

On January 16, 2007, Chevron and Texaco appointed Charles N. Brower as co-arbitrator. In turn, Ecuador appointed Professor Albert Jan van den Berg. On May 8, 2007, the appointed arbitrators nominated Dr. Karl-Heinz Böckstiegel as president of the Arbitration Tribunal.

The dispute arose as a result of the existence of six commercial cases brought by Texpet against then Ministry of Energy and Mines, and one against Petroecuador before Ecuadorian tribunals, between 1991 and 1994, which had yet to be resolved on the date of the notice of arbitration.

These claims were brought because Texpet argued contractual breach of the concession agreements executed with Ecuador in 1973 and 1977. In this arbitration, Chevron and Texaco claimed that the Ecuadorian tribunals had refused to decide the cases, thereby damaging the companies and benefitting the Ecuadorian State. Chevron and Texaco claimed that this constituted a violation of Ecuador's obligations under the BIT and, specifically, a denial of justice. In this claim, Chevron and Texaco quantified the damage caused in the amount of USD 1,605,220,793.

7.1. Jurisdictional phase

On December 01, 2008, the Arbitration Tribunal issued the First Interim Award on jurisdiction that dismissed the objections to jurisdiction submitted

by Ecuador and wrongly determined that it had jurisdiction to hear the merits of the dispute, even against the parties' will, as expressly and clearly specified in the BIT. They had themselves clearly determined that the effect that should be attributed to said treaty was prospective, thereby waiving any retroactive effect that the provisions of said BIT could have.

Ecuador objected to the Tribunal's jurisdiction in light of the arguments listed below:

Abuse of process. Ecuador showed that Chevron and Texaco's positions were inconsistent and contradictory with respect to the previous declarations made by the companies before United States courts, in which they attested to the equity and capacity of the Ecuadorian Courts, while they fiercely undermined these very Courts in the arbitration process. Ecuador requested that, according to the principles of good faith and legal estoppel in international law, Chevron and Texaco should not be allowed to contradict themselves and thus create jurisdiction over a new "litigation".

Lack of subject matter jurisdiction *(ratione materiae)*. Ecuador argued that the claims based on Texpet's suits were not covered by the definition of an "*investment dispute*" under Article VI (1) of the BIT; thus, the country claimed that the litigation that was filed was outside the scope of Ecuador's consent to arbitrate under the BIT.

Ecuador argued that Texpet's claims did not arise nor were related to an "*investment agreement*" or to a violation of the Treaty "*with respect to the treatment of investment*" for a series of reasons:

a. The judicial claims did not include the features necessary to be qualified as an "*investment.*"

b. The claims filed were not covered by the meaning of Article I (i) (a) (iii) of a "*claim to money*", since the complaints were not "*associated with an investment*" as required by the same article.

c. Texpet's claims were not covered by the category of a "*right conferred by law or*

contract" under article I (i) (a) (v), since the BIT covered only rights "*to perform.*"

Lack of Temporal Jurisdiction (*ratione temporis)*. During the jurisdictional phase, Ecuador claimed that the State was responsible for the breach of treaty obligations, provided that these obligations were in force at the time the alleged violation took place. Any behavior by Ecuador prior to the entry into force of the BIT falls outside its temporal scope according to the principle of non-retroactivity of Treaties under international law, as reflected by Article 28 of the Vienna Convention on the Law of Treaties ("VCLT"). On this point, Ecuador filed the following objections:

a. The litigation pursuant to which the Chevron II arbitration began, and all the facts related thereto, arose prior to the entry into force of the BIT on May 11, 1997. Therefore, the conflicts that are prior to the BIT are excluded from the BIT's temporal scope.

b. The Tribunal could not judge Ecuador's actions and omissions, under the BIT's rules,

> The claims presented by Texaco did not arise from nor were they related to the investment agreement, or to any violation of the Treaty in respect of an investment.

because they did not exist at the time that the alleged breaching conduct occurred. In this sense, the basis of the claims – purported breaches of contractual obligations – was excluded from the Tribunal's jurisdiction.

c. Texpet's claims were related to investments that ceased to exist when Texpet departed from Ecuador. In 1995, date on which certain legal actions were brought, the 1973 Agreement had already expired, Texpet's operations in Ecuador had ended and all of the rights related to previous contracts had ended in accordance with the Settlement Agreements. In other words, in 1977, the date on which the BIT entered into force,

Chevron and Texaco's investments and corresponding rights constituted a "*situation that had ceased to exist,*" according to Article 28 of the VCLT.

In its Decision, the Tribunal dismissed all of Ecuador's objections to jurisdiction and instead decided that it did have jurisdiction to hear the merits of the dispute. The Tribunal's conclusions were:

i. Regarding the abuse of process:

The Tribunal held that:

ii. "*(...) over a long period of time, Plaintiff Texaco had maintained that the Ecuadorian courts were equitable and fair. (...) the Tribunal cannot exclude the possibility that subsequent events or other facts sufficiently explain any potential conflict between the submissions to the United States courts and those before this Tribunal regarding the impartiality of Ecuadorian tribunals.*"

iii. On subject matter jurisdiction, the Tribunal made a broad and open interpretation of the definition of "*investment*" under the BIT, considering that the rights held by Texpet at the time it filed its claims before the Ecuadorian courts of justice should be considered investments, without taking into account, wrongly, that Texaco had years ago ended its investments in Ecuador. The Tribunal ignored the fact that Chevron-Texaco could not prove the existence of any "*investment*" on the date of entry into force of the BIT, since at no time after 1992 was there any contribution whatsoever to the country's economic development. On the contrary, through the suits, Chevron-Texaco sought to take money from Ecuador, not inject it into its economy. A judicial claim cannot be an investment.

iv. Similarly, the Arbitration Tribunal also dismissed Ecuador's objection to the Tribunal's lack of temporal jurisdiction. According to the Arbitration Tribunal, this was not a matter of retroactivity, but rather, on the contrary, article XII of the BIT should apply, as it protects investments existing on the date of entry into force of the treaty. Misguidedly and through an extremely broad interpretation of the BIT, the Tribunal decided that:

> "*Given that the claims and rights that arise from these agreements*— referencing the 1973 and 1977 agreements— *were still pending, the Plaintiffs 'investment' had not closed completely. The rights and claims regarding the Concession Agreements still constituted an existing investment at the time of the entry into force* –of the BIT—. *Therefore, the agreements that are relevant to this covered 'investment' must also be covered by the BIT as 'investment agreements.'*"

According to the Tribunal, the claims submitted with Ecuadorian courts prolonged the existence of the investment and transformed it, despite the fact that the 1973 and 1977 concession contracts had already terminated.

The Tribunal reached this conclusion even though it had previously recognized that Article 28 of the VCLT clearly establishes the non-retroactivity of Treaties and despite having agreed with Ecuador that the BIT could not retroactively apply.

7.2. Merits phase

Chevron's claim was based on seven commercial complaints filed in the 1990's that had to do essentially with disagreements over the amount payable on the sale of crude oil that Texaco was obligated to deliver for domestic consumption.

The merits phase focused on four main themes:

i. Whether Ecuador had incurred in a denial of justice under customary international law due to undue delays or manifestly unfair decisions.

ii. Whether Ecuador had breached specific standards of the BIT, through its conduct or omissions, with respect to Texpet's judicial proceedings.

iii. Whether Ecuador had breached its obligations under the BIT with respect to the "investment agreements" as the term is understood in the BIT.

iv. Whether Chevron and Texaco had to exhaust domestic recourses to give rise to a denial of justice and other violations of the BIT.

> "Chevron (at time time, Texaco) and its defense team in Ecuador never complained of the delay in the judicial proceedings and never pushed the proceedings forward, and during the course of the proceedings, only participated by filing periodic written briefs, in order to avoid abandoning the proceedings. They never motioned for a recusal, which would have allowed the proceedings, which were being delayed, to be taken out of the hands of one judge, and put before another judge who could move faster. They did not take any of the actions that are the responsibility of an attorney in charge of proceedings such as these to take. And why? Probably because the company was not very interested in these proceedings."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, May 5, 2010**

According to Chevron and Texaco, the 15-year delay of Ecuador's tribunals and their refusal to issue a judgment in Texpet's seven cases, would have given rise to Ecuador's clear violation of its own laws and a denial of justice under International Law.

Further, they claimed that six of the seven complaints brought by Texpet had been legally ready to be decided at least since 1998 and that a writ to issue judgment had been ordered in five of said cases, and thus, in their opinion, this gave the Tribunal the power to immediately issue a judgment.

In turn, Ecuador stated that since 1990, due to a series of problems that plagued the Judicial Function, there was a heavy backlog of cases and this situation was not specific to Texpet. The State's defense highlighted for the Tribunal that the Company did not have any interest either in furthering its cases, nor did it file the measures contemplated by Ecuadorian law to prevent their delay, such as, for example, a request for the judges' recusal.

The State's defense highlighted that, over the last 15 years, significant, effective judicial reforms were implemented to correct the deficiencies in the justice system and, among other matters, rectify the backlog problem in its case resolution, and thus, Texpet could not claim any damage that a judgment could not compensate.

On March 30, 2010, the Tribunal issued its Partial Award on the Merits of the Dispute, concluding that:

"*(...) 2. The Defendant* [Ecuador] *breached article II (7) of the BIT due to an undue delay by Ecuador's tribunals to deliver a judgment on seven cases brought by Texpet and it is liable for the resulting damages that affect the Plaintiffs thereby.*

3. The Plaintiffs [Chevron and Texaco] *have not committed an abuse of process and there is no impediment to bringing this claim against the Defendant.*

4. Given the Tribunal's ruling in section 2 above as to the breach of article II (7) of the BIT, and given that the indemnification requested by the Plaintiffs with respect to the additional claims does not go beyond the indemnification under a claim pursuant to article II (7), the Tribunal does not demand issuing a ruling on the Plaintiffs' claims regarding other breaches of the BIT or customary international law.

5. As a result of the Tribunal's decision in section 2 above, as to the Defendant having breached article II (7) of the BIT, the Defendant is liable for the damages caused to the Plaintiffs as a result of this breach. The Tribunal will decide on the entirety of the damages through a proceeding specified separately by the Tribunal's Procedural Order to determine which taxes, if any, would have been owed to the Defendant but for the breach of article II (7) of the BIT. The Defendant is responsible for payment of compound interest prior to the award pursuant to the New York Preferential Rate (annual) on the final amount to be paid by the Defendant in accordance with section 5 above, from December 22, 2006 to the date that this amount is payable by the Defendant.

6. (...)

7. The Defendant shall be liable for payment of compound interest after the ruling pursuant to the New York Preferential Rate (annual) on the amount set by the Tribunal, from the date on which the Defendant is ordered to post payment until the tendering date of this payment.

8. The ruling regarding arbitration costs is delayed to a subsequent phase in these proceedings.

9. The other claims are rejected."[47]

Given its resolution, the Tribunal set the indemnification in favor of Chevron-Texaco at USD 698,621,904.84 in consideration of the values sought by Texpet within the cases in Ecuador, where, in the Tribunal's opinion, Texpet should have prevailed. This amount should be subject to a discount for the values sought by Ecuador as taxes.

7.3. Ecuador's tax argument

During the arbitration proceedings, Ecuador claimed that, *arguendo* that the Tribunal were to determine that Ecuador was liable for a violation of the BIT (as it effectively did on May 30, 2010), in order to establish the amount of damages in favor of Chevron and Texaco, it had to consider the Ecuadorian tax regulations that were applicable to contracts such as the one that the company held in Ecuador; in other words, a tax rate of 87.31%. The Republic's argument provided that if the prices of the foreign sale of oil were considered in the amounts to be compensated, it was logical for the taxes in force at the time to apply to this sale. If the deduction were not included, Chevron and Texaco would benefit from amounts that they would not have obtained if the disputes subject to the seven judicial proceedings had not arisen. In this sense, Ecuador noted that the Tribunal could not issue compensation beyond what Texpet would have received.

In its final award, the Tribunal recognized that failure to abide by this tax could lead to the Tribunal overestimating the damage that Chevron and Texpet experienced, to such an extent that these companies could receive a windfall. Thus, the Tribunal decided that the amounts claimed by Chevron and Texaco should be subject to a deduction of 87.31% from the values that they should receive as compensation.

In its final award dated August 31, 2011, the Tribunal concluded that:

> "*(1) Pursuant to the Unified Tax Rate that the Tribunal deems applies to Texpet's direct damage, the amount must be reduced by 87.31%; and (2) Texpet's interest prior to the*

47. Final Award dated August 13, 2011

judgment should also be reduced by 87.31% in order to deduce the interest on money that, as a result of the reduction contemplated in (1), does not comprise a part of Texpet's damage, and therefore, this amount must be subsequently reduced by 25%, pursuant to the general Income Tax Rate."

Thus, the direct damage reduced by taxes (USD 44,993,428.60) and the interest prior to the judgment (USD 32,746,268.34), together produce a total of USD 77,739,696.94 in Plaintiffs' damage. This result was equal to the Defendant's second scenario.

Pursuant to paragraph 6 of its decision in the Partial Award, the Tribunal must apply the annual compound interest prior to the award to this amount, at the New York Preferential Tax Rate. This leads to a new total as of August 31, 2011 of USD 96,355,369.17."

The Tribunal's calculations are summarized by the following table:"[48]

FIGURE 2. Table depicting the after-tax payable amounts

	Partial Award (Paragraph 549)	Adjustment for 87.31% Unified Tax (of Direct Damages)	Adjustment in proportion to the 87.31% Unified Tax (On Interest Prior to the award)	Adjustment for 25% Income Tax (on Interest Prior to the award)	Total Direct Damages and Interest Prior to the award	Application of Interest Prior to the Award (from Notice of arbitration of December 21, 2006 until August 31, 2011)
Direct Damages	$354'558,145.00	$44'993,428.60	-	-	$44'993,428.60	$55'767,627.01
Interest prior to award 19	$344'063,759.84	-	$43'661,691.12	$32'746,268.34	$32'746,268.34	$40'587,742.16
TOTAL	**$698'621,904.84**	**-**	**-**	**-**	**$77'739,696.94**	**$96'355,369.17**

Source: PGE

48. Final Award dated August 13, 2011

> "The decision that the Arbitral Tribunal made found that Ecuador violated the Bilateral Investment Treaty, or the BIT, signed between Ecuador and the United States, and, as a result, we now have a violation of a new standard created by the Tribunal, which is less strict than that required by international common law, and which has to do with delays in the Ecuadorian judicial system in resolving seven commercial claims that were brought by the Texaco company between 1991 and 1993."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, March 31, 2010**

Further, the Tribunal then decided that:

> "*The Defendant* [Ecuador] *is liable for the damage caused to the Plaintiffs by the breach of the BIT's article II (7) in the amount of USD 77,739.696.94.*
>
> *The Defendant is liable for compound interest prior to the award at the New York Preferential Tax Rate (annual), from December 22, 2006 to the date of this Final Award, as indemnification for the delay in receiving payment of the amount awarded by the Tribunal in accordance with section 3 above, in a total of USD 18,615,672.23 on the date of this Final Award.*
>
> *The Defendant shall be liable for compound interest subsequent to the award at the New York Preferential Tax Rate (annual), on the amounts awarded by the Tribunal in accordance with sections 3 and 4 above, from the date of this Final Award and until the date on which payment is made.*
>
> *Each party shall bear the costs of its own legal representation and assistance, as well as the costs associated with its witnesses and experts and half of the tribunal's costs.*"[49]

49. Final Award dated August 13, 2011

Certainly, from the original amount of USD 1,605,220,793 sought by Chevron and Texaco, Ecuador's defense obtained a substantial reduction, to USD 96,355,369.17; in other words, the amount that was avoided was USD 1,508,865,423.83.

In sum, the Ecuadorian defense was able to reduce the original amount that Chevron and Texaco sought, of USD 1,605,220,793, to USD 96,355,369.17, a substantial reduction of USD 1,508,865,423.83.

7.4. Annulment action

On July 7, 2010, Ecuador brought an annulment action with the courts in The Hague, Netherlands. Through this action, it requested the reversal of the three awards issued within the proceeding; in other words, the interim awards on Jurisdiction, the Partial award on liability and the Final award.

Ecuador filed this recourse on the grounds that:

1. There was no valid arbitration agreement for the following reasons:

    - Misinterpretation of article I (1) (a) (III) of the BIT
    - Absence of precedent to support the Tribunal's reasoning
    - Misinterpretation of article I (1) (a) (v) of the BIT

2. The Arbitration Tribunal overstepped its mandate and violated it by failing to provide valid reasons for the following:

    - A failure to analyze the arguments regarding the Tribunal's jurisdiction
    - A failure to analyze two cases resolved by Ecuadorian courts
    - Misinterpretation of the "*lost opportunity*" argument
    - The arbitrators wrongly attempted to assume the role of the Ecuadorian judicial system

"Regardless of the decision of the Supreme Court of the Netherlands, Ecuador is continuing with its defense before the Court of Appeals for the District of Columbia Circuit, where Chevron is trying to enforce the award from the Chevron II case. The applicable law in the United States requires the court to again consider the question of whether Chevron had an investment that would qualify as such under the Bilateral Investment Protection Treaty between Ecuador and the United States."

Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, September 29, 2014

- The Tribunal ignored the fact that Chevron accepted the delay in the resolution of its cases, thereby invalidating any right to bring a complaint for this reason.
- Misapplication of Customary International Law.

On May 2, 2012, the District Court of Justice of The Hague decided to dismiss Ecuador's claims and affirm the award.

On August 1, 2012, Ecuador appealed the trial court's decision.

On June 18, 2013, the Court of Appeals of The Hague affirmed the District Court's decision and finally, on November 29, 2013, Ecuador submitted its request for a writ of certiorari with the Dutch Supreme Court. On March 28, 2014, the Dutch Prosecutor General issued an opinion, recommending the reversal of the lower court's judgment, *inter alia,* for the following reasons:

- Non-retroactivity of treaties, based on the fact that the investment was liquidated prior to the treaty's entry into force.
- It is not reasonable to move from litigation to arbitration solely on the grounds that the litigation took too long.

Despite this, through a decision dated September 26, 2014, the Supreme Court of the Netherlands denied the recourse brought by Ecuador.

7.5. Enforcement of the Award

On July 27, 2012, Chevron filed an action with the tribunals of the District of Columbia (Washington D.C.), seeking recognition and enforcement of the Award issued within the arbitration. Despite the fact that the Ecuadorian State opposed this request, on June 7, 2013, the District Court of Columbia's judge, James Boasberg, granted Chevron and Texpet's request to affirm the final arbitration award issued in the "Chevron II" case against the Republic of Ecuador. The Republic of Ecuador

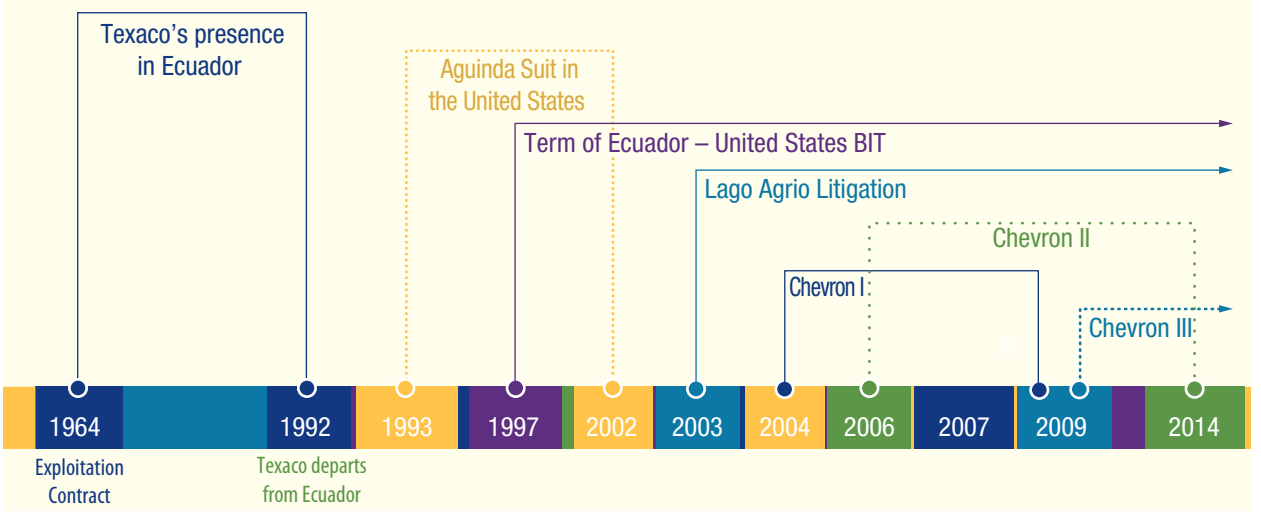


Washington D.C., Sunday, April 19, 2015, Winston & Strawn offices. The State Attorney General, Dr. Diego García Carrión, at the preparatory meeting for the Hearing, from April 21 to May 8, 2015.

appealed this decision, and, on August 4, 2015, the Court of Appeals of the Circuit for the District of Columbia, resolved to dismiss it. On September 4, 2015, the Ecuadorian State requested a hearing from the Court's bench to reconsider, reverse and revise the appeal.

Because the Ecuadorian State's appeal did not suspend the effects of Judge Boasberg's decision, on September 6, 2013, Chevron filed a petition with the District Court for the District of Columbia to record the judgment that confirmed the final award. On October 29, 2013, the District Court accepted the petition and established that the award could be enforced at any place in the United States where the Ecuadorian State is proven to hold assets. On June 11, 2014, Ecuador also appealed the District Court's decision. In January 2015, Ecuador presented its arguments. The Court has yet to deliver its final decision.

8. TIMELINE FOR THE VARIOUS PROCEEDINGS



Source: PGE

9. THE RICO CASE

On February 1, 2011, two weeks before the Lago Agrio Court issued its judgment, Chevron brought a case against two of the Lago Agrio Plaintiffs' attorneys, Steven Donziger and Pablo Fajardo, all of the 48 Lago Agrio plaintiffs and some of their environmental experts, among others, accusing them of criminal activity geared towards obtaining a fraudulent judgment against Chevron.

The case was brought under applicable U.S. legislation in the Racketeer Influenced and Corrupt Organizations Act, known as RICO. United States Congress approved this action as a measure to combat organized crime in its country.

This regulation entered into force in October 1970 and has a criminal and a civil component, meaning that a prosecutor has the power to bring criminal charges against the defendants, and the affected party can request compensation for the damages caused.

The RICO action was filed by Chevron in the U.S. District Court for the Southern District of New York before Judge Lewis Kaplan, seeking, among other matters, a declaration that would preclude the RICO defendants from benefitting from the enforcement of any judgment in the Lago Agrio case. Against the Lago Agrio plaintiffs' objections, the District Court ruled that it had jurisdiction over Ecuador's plaintiffs, including those who had never been outside of Ecuador.

At the time that the action began, Chevron filed a simultaneous petition seeking a preliminary injunction that would preclude the RICO defendants from adopting any action to enforce the Lago Agrio judgment. Acting as a world court with unlimited jurisdiction rather than a domestic court with limited jurisdiction, the District Court granted Chevron's extraordinary petition and prohibited the RICO Defendants from enforcing the Lago Agrio judgment within, or even outside of, the United States. Far from showing any deference to the judgment of a foreign court, Judge Kaplan made a series of serious accusations against the Ecuadorian judicial system. The defendants appealed this decision.

In this appeal, and notwithstanding that the Ecuadorian State was not a party to the legal action, on June 9, 2011,

> "The brief presented clearly establishes the legitimate right that the State has to participate in a process that, despite the fact that it only involves private parties, is reaching inaccurate conclusions about the Ecuadorian judicial system and the Ecuadorian government, above all when Ecuador has not been given an opportunity to defend itself in the proceedings."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, July 10, 2014**

the State Attorney General filed an "*amicus curiae*" to defend the Republic's judicial system from Chevron's attack as well as the District Court's adverse findings.

In submitting this *amicus*, Ecuador highlighted Chevron and Texpet's contradictions and inaccuracies to the Court, which had led to a wrong and unlawful decision. They were as follows:

> **During the *Aguinda* suit, Texaco and Chevron repeatedly affirmed the sufficiency and adequacy of the Ecuadorian judicial system**

In the Aguinda suit, from 1993 to 2002, both Texaco and Chevron praised the Ecuadorian judicial system to the New York Court. They vehemently argued that the case should be dismissed for reasons of *forum non conveniens* because Ecuador's justice system was competent and, in general, independent. Texaco filed its first motion in 1993 and subsequently periodically submitted sworn affidavits from Ecuadorian legal experts praising the country's judicial system.[50] In 1996, the District Court approved Texaco's petition and dismissed the case.[51] Nonetheless, during the appeal, this Court invalidated the judgment that had been issued and remanded the case to the trial court. The appellate court considered that the dismissal carried out at the trial level was inappropriate because of the absence of the defendants' consent to Ecuador's jurisdiction, and given the absence of an agreement on certain other specified conditions.

Once the case was remanded, Texpet accepted jurisdiction in Ecuador and filed *ten* supplementary sworn affidavits issued by experts in Ecuadorian law, enthusiastically praising the justice, sufficiency

50. For example, the sworn declaration of Alejandro Ponce Martínez ¶¶ 3 - 5 ("The courts of Ecuador provide a forum that is totally appropriate in which the claimants … could easily resolve their complaints.") [and] … the Ecuadorian judicial system would resolve the claimants' complaints in an appropriate, efficient and impartial manner … The civil procedure used in the Ecuadorian court system is essentially the one used in other civil law jurisdictions, such as, for example, Spain, France, Germany and Japan. Although there are some differences in procedure from those used in common law jurisdictions, as is the case in the United States, the system allows for an effective solution in matters litigated at civil law.")

51. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626 (S.D.N.Y. 1996).

and adequacy of Ecuador's courts and questioning the U.S. State Department's Human Rights reports characterizing Ecuador's judicial system as "*politicized, inefficient and sometimes corrupt.*" Texpet's experts confirmed that "*the courts in Ecuador… treat all the persons who appear before them with equality and fairly,*" and that the Ecuadorian judicial system was completely independent.[52]

Before Chevron and Texaco began their aggressive attack against the Ecuadorian justice, in July 2006, Chevron argued before a California federal court that it should dismiss or stay another environmental case brought by the Ecuadorian plaintiffs before that Court, in deference to a future ruling in Ecuador. This is consistent with the position adopted by Chevron and Texaco between 1993 and 2002, when they praised Ecuador's judicial system.

Ecuadorian law guarantees due process to every litigant

The Ecuadorian judicial and legal system is founded on fundamental principles of justice and due process, with profound roots in the Ecuadorian Constitution. Ecuadorian Law, similarly to any modern procedural Law, grants litigants both horizontal as well as vertical resources,[53] to ensure the lawfulness of the decisions issued by judges and tribunals and to correct judicial error.

To further safeguard the constitutional rights of all litigants, and, as a last resort, the 2008 Constitution grants the Constitutional Court jurisdiction to entertain "Extraordinary Protection Actions". This action is designed to be the final judicial recourse for an affected party who claims that a judgment or final writ issued by an Ecuadorian court has violated, by action or omission, any right recognized by the Constitution, including the right to due process.

Specifically, the Ecuadorian Constitution and legislation contemplate that the violation of the right to due process causes the judgment to be void and leaves it without effect.

In this same sense, the Organic Code of the Judiciary establishes a strict evaluation and disciplinary system, to which Ecuadorian judges are subject; this

52. Sworn declaration of Enrique Ponce y Carbo ¶¶ 15, 17); Sworn declaration of Alejandro Ponce Martínez ¶¶ 5, 7); Sworn declaration of Sebastián Pérez-Arteta ¶¶ 4, 7.

53. Organic Code of Procedure. Art. 251. Type of actions. The following actions are hereby permitted: clarification, modification, expansion, revocation, appeal, cassation and de-facto appeal.

system, in the last instance, establishes penalties for the breach of duties and obligations imposed by the Constitution and the law.

Two decades of judicial reforms have essentially strengthened the independence and competence of Ecuadorian courts

Over nearly two decades, the Ecuadorian State has dedicated significant recourses to promoting a more qualified and independent judicial system than the one that existed when Texaco and Chevron argued that the Ecuadorian courts were appropriate fora to resolve the environmental case brought before the Lago Agrio Court.

Ecuador has deployed great efforts to move from a strictly inquisitorial system to a more adversarial system, as well as to open its courts to marginalized sectors of society. This led to an avalanche of litigation between 1990 and 1996.

Ecuador's defense emphasized for the Court that, determining that Ecuador's judicial system does not provide due process to its litigants would not only ignore (1) Chevron and Texaco's prior statements to the contrary, (2) the legal protections granted to litigants in fulfillment of Ecuadorian laws, and (3) the extensive resources assigned to the system of justice, but it would also (4) condemn the judgments issued in Ecuador (and perhaps a whole region where approximately 600 million people reside) as pieces of paper lacking in any value and relevance.

In its *amicus* brief, the Ecuadorian State informed the Court of Appeals that the U.S. judges' decision was disrespectful and ignorant of the Ecuadorian judicial system. This not only contradicts the long-held rules of precedents, but also largely contradicts the matters noted by the U.S. Court of Appeals (the Third Circuit), which, rightly held: "Although it is obvious that Ecuador's judicial system is different from the one in the United States, these differences do not provide a basis to undermine or discredit the system".

The U.S. courts, even if they had sufficient reason to be proud of their system, understand that other countries have the authority to organize their judicial system as they deem appropriate."[54]

54. In the matter of the Application of Chevron Corp. [Motion made by Chevron Corp.], No. 10 - 4699, 2011 WL 2023257, at *14 (3d Cir. May 25, 2011).

In September 2011, the Court of Appeals for the Second Circuit invalidated the preliminary injunction ordered by Judge Kaplan, who resumed consideration of the underlying action.

After two and a half years, on March 4, 2014, after deciding on tens of interim petitions and hearing the case on the merits, Judge Kaplan delivered his decision, once again accepting the majority of Chevron's arguments.

In his 485-page decision, Judge Kaplan held that the Lago Agrio plaintiffs' representative, Steven Donziger, seeking to improve the livelihoods of his clients in Lago Agrio, submitted fraudulent evidence. The District Court held that Donziger caused his own environmental experts to draft, in secret, his expert report issued in the name of the Court-appointed expert, and that Donziger and his associates, similarly, drafted the Lago Agrio judgment in exchange for a promise that they would pay the Judge for that judgment. For this last conclusion, Judge Kaplan largely relied on the testimony of former Judge Guerra, a witness who had been hired and protected by Chevron under what it calls its own specific witness protection program,[55] and on circumstantial evidence that could not be disproven by the Ecuadorian State because it was not a party to the RICO action and did not have standing to challenge any evidence filed by Chevron.

Despite the fact that, according to the judge, the Court assumes the presence of contamination in the Ecuadorian Amazon, under this premise, he concludes that it is possible that Chevron-Texaco had some responsibility, but he does not rule on this matter, holding that its existence is no justification for corruption.

Further, Judge Kaplan found that the Lago Agrio decision could not be recognized because the decision was delivered by a judicial system that does not provide impartial tribunals or proceedings compatible with due process in cases of this nature.

The Lago Agrio litigants appealed the decision made by Judge Kaplan in March 2014, before the Second Circuit Court of Appeals.

55. (Decision of Judge Kaplan) Guerra and his family (including his wife, his son and his son's family) were relocated to the United States. The representatives of Chevron paid for the move, and given the fact that his visa did not permit him to work while he was in the country, Chevron paid him USD 10,000 a month for his expenses, paid for health insurance for Guerra and his family, rented him a car, and paid for an attorney to represent him in proceedings before the authorities in federal or state investigations, or in any civil suit, as well as a specialized immigration attorney for the proceedings to facilitate his residence [in the United States].

The State's defense showed that the judge in the decision had insulted a sovereign state, basing the decision on the testimony of an attorney who was openly critical of the Ecuadorian judicial system, without having considered any opinion to the contrary.

At this stage of the appeal, on July 8, 2014, the Ecuadorian State also filed a new "*amicus curiae*" because of District Judge, Lewis Kaplan's attack against the Republic's integrity and that of its courts. Ecuador, he repeated, as all Latin American countries, had carried out nearly two decades of legal reforms to modernize its courts and improve the quality, independence and transparency of its judicial system. Thus, it is obvious that the United States courts should give Ecuadorian courts the same respect that any other sovereign State, including the United States, would expect to receive from another. As the U.S. Supreme Court has long held, every sovereign State is obligated to respect the independence of its counterparts.

Ecuador proved that, although Judge Kaplan allegedly invoked this comity, the reality was that his decision insulted a sovereign State. This decision was based exclusively on the testimony of one attorney, who had been openly critical of the Ecuadorian judicial system, and he did not compare this opinion. It was also delivered despite the knowledge of the existence of an arbitration (Chevron III) that *did indeed* address Chevron-Texaco's challenges to the sufficiency and suitability of the Ecuadorian judicial system and the decisions of its courts.

Ecuador reminded the Court of Appeals that U.S. case law long recognizes that U.S. courts could not determine lightly that another sovereign State's judicial system is corrupt or unreliable, reason enough to strike the misguided comments regarding Ecuador's judicial system.

Within this appeal, during the hearing held last April 20, 2015, one of the judges expressed his concern regarding the course of the RICO action, given the Arbitration Tribunal's possible decision in the Chevron III case, as both proceedings judged the Ecuadorian judicial system:

> "***JUDGE WESLEY:*** *JUDGE WESLEY: I'm okay with all of that,* ***but you've started an arbitration and I'm trying to understand what happens when there's a different result. When you start two lawsuits it seems very curious to me.*** *You start one lawsuit against a group of individuals and you litigate the legitimacy of the Ecuadorian judicial system. You start an arbitration in front of your national arbitration panel. You start it. You start it. And one of the major issues is the fairness of the Ecuadorian judicial system.* ***You opened the door to the inconsistent results. Why should we be a part?"***[56]

A series of hearing excerpts show the Court questioning Chevron's behavior. One of these examples is transcribed below:

> "***JUDGE WESLEY: Texaco comes into the Southern District and says we'll litigate in Ecuador. We'll follow Ecuadorian procedures. How is it that Chevron can come back to the Southern District before it employs one legal proceeding that it could employ to legitimately challenge the judgment in Ecuador through the Collusion Protection Act*** *after Chevron had won three other cases in the Ecuadorian courts, both from a criminal standpoint, it had a judgment that it had vacated in the Ecuadorian courts.* ***Why is it that Chevron shouldn't be held to that promise to follow the Collusion Protection Act?"***[57]

> "***JUDGE WESLEY:*** *It's Ecuador, but curiously the nature of the relief that's sought is a declaration that the Ecuadorian courts are unfair and it presents a curious result to me in a proceeding that your client commences, gets a result from an arbitration panel that you've invoked which Donziger rails against as private. The irony here is quite overwhelming. And suddenly what happens if the panel says it was a fair proceeding? What then?"*[58]

56. Unofficial translation of the Transcript of the Appellate Hearing in the RICO case, on April 20, 2015, p. 49. Emphasis in the original text.
57. Unofficial translation of the Transcript of the Appellate Hearing in the RICO case, on April 20, 2015, p. 49. Emphasis in the original text.
58. Unofficial translation of the Transcript of the Appellate Hearing in the RICO case, on April 20, 2015, p. 52

> *"**JUDGE WESLEY:** And let me say this to you, successor in interest for tort liability is a different matter than a binding matter with regard to representation in federal court of a successor corporation with regard to seeking judicial approval to take yourself into another forum. So I'm not terribly interested in your legalistic argument about successors in interest with regard to tort liability at all.."*[59]

This shows the challenges faced by the Court of Appeals regarding Chevron-Texaco's improper use of the courts and investment arbitration, with the sole objective of evading the results of a judgment that was delivered in Ecuador, requested by the company itself.

Although in theory, the RICO action should not affect the investment arbitration, the reality differs greatly from this scenario. In the arbitration, Chevron- is completely dependent on the decisions and the purported evidence found within the RICO action, demonstrating its inability to support its accusations and showing its weakness with respect to the supporting evidence that it claims to have. This is because, having adequately placed its evidence in context and compared to the evidence submitted by the Ecuadorian State (which, in fact, did not occur in RICO), it ceases to be as convincing as the defendants claim.

In the first place, we must clarify that Judge Kaplan resolved *different* claims, from *different* parties, based on a *different* case record. His determinations regarding the Lago Agrio plaintiffs' behavior should not be considered for the purposes of the evaluation of the Ecuadorian State's conduct in the investment arbitration. The Lago Agrio plaintiffs are not a party to the arbitration, and their behavior is not attributable to the Republic.

This RICO action must be placed in context:

Under the pretext of this action, Chevron has often decimated its enemies, through its overwhelming resources.

Judge Kaplan has been– by all accounts – consumed by prejudice against Steven Donziger.[60]
The parties' inequality in the RICO action has been apparent and largely explains the decisions against the accused parties. The attorneys who have represented

59. Unofficial translation of the Transcript of the Appellate Hearing in the RICO case, on April 20, 2015, p. 49. Emphasis in the original text.

60. Barret en 184, 202, 227, 262; Petición de Keker & Van Nest LLP según la Orden Judicial de aducir argumentos jurídicos suficientes para justificar una Orden que le permita retirarse como Abogado de la Defensa de las Partes Demandadas Steven Donziger, The Law Offices Of Steven R. Donziger And Donziger & Associates, PLLC, presentado en el caso RICO (3 de mayo de 2013) en 1-4.

Donziger and the other defendant parties during much of the case withdrew because their clients owed payment of more than USD 1 million each.[61] The new attorneys were hired just a few weeks prior to trial and were not familiar with the large amounts of evidence.[62]

The defendants in the RICO action did not have the resources to defend themselves in the case, unlike Chevron.

It is expected that the Second Circuit Court of Appeals issues a decision regarding the appeal filed by the Lago Agrio plaintiffs at the end of 2015 or early 2016.

The Plaintiffs seek that, in the investment arbitration, the Tribunal adopts, without more, the evidence that was produced in the RICO case. They claim, for example, that the declarations made by former Judge Alberto Guerra in RICO reliably prove their fraud accusations in the Lago Agrio case, without taking into account, of course, that Guerra held hundreds of hours of meetings with Chevron prior to giving his testimony.

They claim that Judge Nicolás Zambrano's declaration in RICO shows, by itself, the purported lack of the judge's authorship of the Lago Agrio judgment, without considering that their own computer expert reached a different conclusion when he examined the hard drive in Judge Zambrano's computer.

They purport to find support on Judge Kaplan's decision to free themselves of convincing evidence that shows the contamination in the Amazon, accusing it of fraudulent because the Judge *excluded* any evidence on the matter in his opinion. However, the fact that a judge avoids ruling on contamination, and excludes all related evidence, does not make this evidence fraudulent.

61. Petition filed by Keker & Van Nest LLP in response to the judicial order to present sufficient legal arguments to justify an order that would allow the respondents' attorney to withdraw from the proceedings, Keker & Van Nest LLP's Motion Steven Donziger, The Law Offices Of Steven R. Donziger And Donziger & Associates, PLLC, filed in the RICO case (May 3, 2013), at 8.

62. Barret at 202-204, 241-242, 262.

CHAPTER II

THE BEGINNING OF THE CHEVRON III CASE

1. INTRODUCTION

From the beginning of the arbitration proceedings, the Ecuadorian State's defense informed the Arbitration Tribunal that it had serious objections to jurisdiction, which determined that an exclusive phase be opened to decide these matters, pursuant to the principle of *kompetenz-kompetenz*.[63]

Even before exhausting the jurisdiction phase, Chevron-Texaco submitted a request for provisional



Washington D.C., Friday, May 8, 2015, Conference Room at the World Bank. The State Attorney General, Diego García Carrión with part of the State of Ecuador's defense team: Eric Bloom, Eduardo Silva R., Ricardo Ugarte, Pierre Mayer, Tomás Leonard and Carolina Romero, during the Closing Hearing.

63. The Kompetenz principle: Kompetenz provides that it is the tribunal itself that should decide regarding its own jurisdiction.

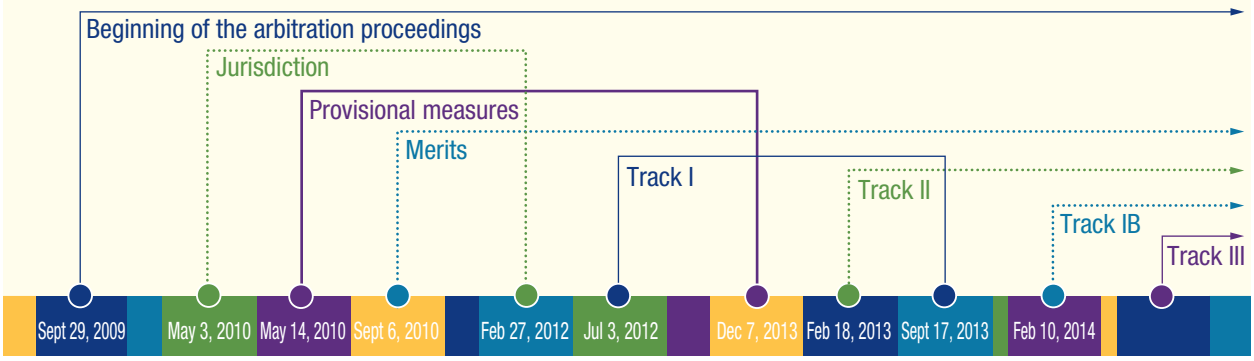
> "This case is related to two legal proceedings, which both arise from the claims that were initiated by indigenous communities in the Ecuadorian Amazon Region, against this company, for damages caused to the environment and to the health of these persons, during the years that it was operating in our territory. One of the cases is being heard in the New York courts, and the other, which the hearing in which I am participating is part of, is going on in this city under the jurisdiction of the Permanent Court of Arbitration of The Hague, under the UNCITRAL Rules."
>
> **Dr. Diego Garcia Carrion, State Attorney General, Press Conference regarding the Chevron Texaco case. Washington D.C., April 22, 2009**

measures, which led to a processing of this request in parallel with the jurisdiction phase, and subsequently with the liability phase.

As we can perceive from the chart below, Chevron III is a long and complex case, with phases that have often overlapped. Similarly, the Claimants, having prematurely filed their claim, have constantly changed their arguments throughout the course of the case.

Under these circumstances, during the arbitration, the parties have exchanged over 30 memorials and hundreds of communications, both amongst themselves and with the Arbitration Tribunal. Also,

FIGURE 3. Chronology of the arbitration proceedings by phases



Source: PGE

the parties have filed thousands of pages with evidence, expert and witness reports, statistical data, among other information that is relevant for the parties to bring their case before the Arbitral Tribunal; therefore, these proceedings continue to date.

2. PREMATURE SUBMISSION OF THE CLAIM

On September 23, 2009, when the Lago Agrio claim was still pending at the trial court level, Chevron Corporation (Chevron) and Texaco Petroleum Company (Texpet) brought a new arbitration proceeding against the Republic of Ecuador (Chevron III), under the Bilateral Investment Treaty ("BIT"), signed by the United States of America and Ecuador. Article VI (3) of the BIT provides that any disputes that arise between the State and an investor, may be submitted before an arbitral tribunal formed pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules").

> "Chevron for some years now has been demonstrating its intention to initiate the present arbitral proceedings. The only difference is that at one time the company planned to exhaust domestic remedies available to it under Ecuadorian law, such as, for example, an appeal. Now, the company is bringing these arbitration proceedings without waiting to exhaust these domestic remedies that are available to it, and in this way is changing its initial strategy. The State will present a round and robust legal defense. The environmental claim should be resolved by courts with proper jurisdiction and among the parties, not in an arbitration in which the individual plaintiffs are not even represented."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, September 24, 2009**

In their notice of arbitration, Chevron Corporation and Texaco Petroleum Company sustained their petition, arguing that:

- Texpet is an investor in Ecuador since i) in 1964 Texpet was a concessionaire, along with Gulf, of

the Napo Concession that ended in 1992; ii) it signed a Memorandum of Understanding with Ecuador to release any environmental claim; and, iii) it was a party to the Enforcement and Release Contract and the 1995 Settlement Agreement, and because it signed the 1998 Final Release.

- Ecuador has used all means available to avoid complying with its obligations under the BIT, and has violated and voided its agreements with Chevron and Texaco.

- Ecuador has refused to inform the Lago Agrio Court that Texpet and its affiliates were completely released from any liability regarding the environmental impact resulting from the former Consortium's activities (therefore, it has allowed Chevron to be sued for an environmental impact that Ecuador indicated by contract that had been dispensed).

- Ecuador has refused to indemnify, protect or defend Chevron and Texaco's rights in the Lago Agrio Litigation.

- Ecuador has actively supported the Lago Agrio plaintiffs in various manners,[64] through open campaigns for a decision against Chevron[65] and by bringing unsupported criminal proceedings against two of Chevron's attorneys.

Along with its notice of arbitration, Chevron-Texaco nominated Professor Horacio A. Grigera Naón, of Argentine nationality. Months later, on December 4, 2009, Ecuador appointed Professor Vaughan Lowe, of English nationality, as arbitrator. As Appointing Authority, on February 25, 2010, the Permanent Court of Arbitration appointed Mr. V. V. Veeder, also of English nationality, as the third arbitrator and President of the Arbitration Tribunal.

Under the procedural calendar ordered by the Tribunal, on September 6, 2010, Chevron and TexPet filed their first memorial, requesting that the Tribunal declare that the Ecuadorian State had violated the BIT, based on the following arguments:

In the Claimants' opinion, Texpet had fulfilled its remediation obligations and received a complete

64. According to the claimants, the proceedings have become a farce, due to the fact that the 122 inspections requested by the parties were not carried out, the appointment of Richard Cabrera as an expert witness, Judge Nuñez's decision to dismiss Chevron's allegations regarding essential error, and the expert witness' having copied the Lago Agrio claimants' reports.

65. In their notice of controversy, the claimants stated that the State's collusive actions were demonstrated by the public statements made the president of the Constituent Assembly and the President of the Republic, stating that Chevron is responsible for the environmental and social destruction in the Amazon Region.

release of any environmental liability from Ecuador, with respect to every environmental liability that arose from the Consortium's operations. Therefore, according to the claimants, Ecuador violated its obligations under the Release Agreements and the Final Release, by allowing the Lago Agrio Litigation to go forward and since its courts granted a judgment in favor of the plaintiffs. According to the Claimants, the breach of the referenced *"investment agreement"* causes a breach of the BIT's "*umbrella clause"*

Chevron and Texpet claim that the violations incurred by are the following:

- It violated its obligation to provide the claimants with effective means to enforce their claims and exercise their rights.

- It has not provided fair and equitable treatment to the Claimants' investments.

- It frustrated the Claimants' legitimate expectations by colluding with the Lago Agrio plaintiffs and politicizing the Lago Agrio Litigation.

In their claim, Chevron and Texaco argued that the Republic of Ecuador violated the Investment Protection Treaty, due to actions and omissions in the Lago Agrio Litigation.

- It acted in bad faith with respect to the Claimants.

The Claimants requested that the Tribunal declare that:

- In accordance with the 1995, 1996 and 1998 Enforcement and Release Agreements, they do not have any legal or general liability for any adverse environmental effects.

- Ecuador has violated the Enforcement and Release Agreements and the BIT signed with the United States of America, including its obligations to provide fair and equitable treatment, full protection and security, effective means of enforcing rights, and non-discriminatory treatment.

Among its petitions, Chevron requested that the Arbitral Tribunal declares that any responsibility adjudicated as a result of the decision in the Lago Agrio case be attributed exclusively to the State or to Petroecuador (or to the State and Petroecuador jointly and severally).

- In accordance with the Treaty and applicable international law, Chevron- Texaco is not legally responsible for any judgment issued in Lago Agrio.

- Ecuador or Petroecuador (or Ecuador and Petroecuador, jointly) are solely liable for any judgment issued in the Lago Agrio Litigation.

- Ecuador be ordered to adopt all necessary measures to preclude that the judgment of the Lago Agrio Litigation be final, may be enforced, and that Ecuador actively prevent any enforcement attempt of the judgment by the Lago Agrio plaintiffs.[66]

- Ecuador be ordered to pay indemnification to Chevron-Texaco in connection with a Lago Agrio judgment, including Ecuador's specific obligation to pay the claimants the amount of compensation granted in the Lago Agrio judgment.

- Ecuador be ordered to pay all the judicial expenses and fees incurred by Chevron-Texaco.

- Chevron-Texaco be granted compensation for the non-pecuniary moral damage that it suffered caused by Ecuador's flagrant and unlawful behavior.

Since Chevron-Texaco's arbitration claim was prematurely filed, as the Lago Agrio Litigation was still in process,[67] the claimants saw the need to "update" the facts as it went forward. Based on this justification, and accepting their request, the Tribunal authorized the submission of a Supplementary Memorial that was filed on March 20, 2012.

With this memorial, two and a half years after its notice of arbitration, Chevron-Texaco added a denial of justice claim under customary international law

66. This petition was addressed in the interim awards on provisional measures.

67. On February 14, 2011, the lower court issued its decision. On January 3, 2012, 11 months after the Unified Chamber of the Provincial Court of Justice of Sucumbíos issued its appellate decision.

and incorporated a series of new claims to justify its late claim.

According to the companies, Ecuador's violations of the BIT and international law were evidenced with greater clarity in light of events that transpired after the Notice of Arbitration. The claimants quote the Republic's behavior in the Lago Agrio Litigation, in the trial level judgment, in the appellate process and in the generalized deterioration of the judicial system, which has deprived them from the ability to obtain a fair trial in Ecuador.

According to Chevron and Texaco, the new evidence confirms that:

- The Plaintiffs' representatives drafted sections of the Judgment issued by the Lago Agrio Court;
- The Judgment was based on fraudulent evidence filed by the Plaintiffs;
- The determination of damages in the judgment is arbitrary, biased and based on the fraudulent reports of the Court-appointed, neutral expert, Richard Cabrera, whom they accused of submitting and claiming that he authored reports that had been secretly drafted by the Lago Agrio plaintiffs;
- The Government and the Amazon Defense Front, not the Plaintiffs in the Lago Agrio Litigation, will exercise control over the proceeds of the Judgment, through a scheme of trusts jointly orchestrated by the Court and the Plaintiffs;
- Ecuador's courts violated its own Constitution, its laws and due process obligations, throughout the entire trial-level proceedings;
- The Government increased its control over the entire judicial system, and exerted pressure on the courts to issue a judgment against Chevron.

In light of the fact that the claim was premature, once the arbitration proceedings had begun, Chevron presented a supplementary brief in which it updated the facts of the case and introduced the claim for denial of justice.

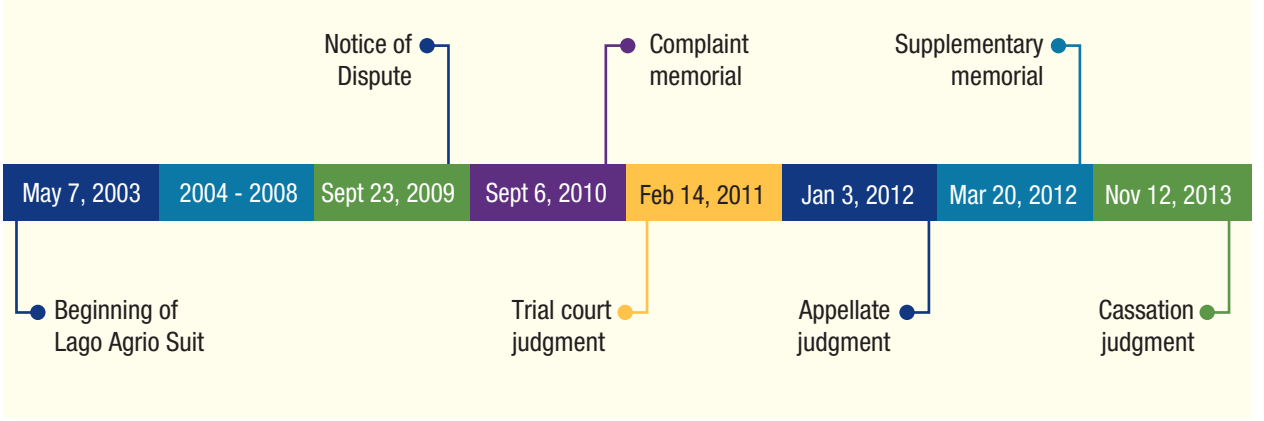
In this new memorial, Chevron and Texaco expanded their reparation request, petitioning the Tribunal to declare that Ecuador committed a denial of justice under customary international law.

The early onset of the proceedings was verified not only by the addition of a new legal claim, as the the addition of the denial of justice claim, but also by the constant mutation of the facts. In too many occasions, the claimants made capricious allegations, only to later drop them after Ecuador investigated and proved that they were false.

For example,

i) Originally, the Claimants accused the Lago Agrio Plaintiffs' attorney of having violated the Ecuadorian legal proceedings and forging at least twenty of the forty-eight signatures that ratified the Lago Agrio Complaint.[68] Ecuador, demonstrated that: (a) the forgery "expert" submitted by the Claimants based his opinion on evidence that he could not authenticate; and (b) the Lago Agrio Plaintiffs met in person and again signed (and ratified) the complaint to avoid

FIGURE 4. Premature submission of the arbitration complaint



Source: PGE

68. Transcript of the Hearing on Provisional Measures (February 11, 2012) at 87:24 - 88:4; Transcript of the Hearing on the Merits in Procedural Track 1 (26 November 2012) at 50:12 - 23.

69. Reply memorial on the Merits presented by Ecuador in Procedural Track 2 ¶¶ 264 - 272.

any doubt.[69] The Claimants have not challenged these points and, instead, they appear to have abandoned their "due process" claim, in relation to the Court having wrongly accepted the forged signatures.

ii) Similarly, they abandoned their scandalous accusations that in 2009, then President of the Lago Agrio Court, Judge Juan Núñez, had been "caught" by independent third parties[70] in a bribery scheme to issue a judgment against the Claimants and secretly award lucrative remediation contracts to the parties who participated in the bribe. In support of their original allegations, they submitted alleged evidence that third parties had purportedly given the company. In fact, one of them was a long-time Chevron contractor and another was a convicted drug felon. Based on this evidence, the claimants launched an aggressive international public relations campaign and lobbied for the judge's criminal prosecution. As part of its campaign, Chevron purchased banner advertisements in large spaces on the internet,

The claimants brought their case with complaints that were rebutted by Ecuador, and then later, Chevron abandoned those arguments, in order to move on to new accusations.

issued multiple press releases, granted a series of widely-circulated interviews and published a modern Hollywood-like video with English subtitles.

Nevertheless, the evidence never supported their claims. The videos of Judge Núñez do not contain any conversation about bribes; on the contrary, they show Judge Núñez repeatedly refusing to inform the Claimants' *agent provocateurs* of how the Court will issue its ruling.[71] Moreover, after reviewing the transcripts of the relevant videos, a U.S. District Court did not find any indication that

70. Ecuador demonstrated that the "independent third parties" were linked to Chevron.

71. "What you are looking to discover is if this party is liable or not, and I am telling you that I cannot tell you that. I am a judge, and I have to determine that in the decision, and not right now." Transcript of Recording 3, at 10; "As a result, in the decision, sir, I will determine that. I did not come here today to tell you … no, no, no, there is, there will be a decision, sir." Id. at 11; "There will be a decision, as I have told you, that is the amount that they are asking. I will state in the decision if it is going to be more or less … it is either more, or it is less. I can't tell you." Id. at 12.

the Judge had received a payment or bribe.[72] The Claimants do not have any answer to any of these points. Even Diego Borja, Chevron's environmental contractor and intellectual author of the unlawful and secret recording of these meetings, who brought them to his employer in exchange for an expected compensation, admitted that "*there was no bribe.*"[73]

Initially, Chevron's public relations machinery characterized its two agents, who made the unlawful recordings, as simple, good samaritans who had ingenuously sought "business opportunities" in Ecuador.[74] The evidence has proved precisely the opposite. **First,** Borja has been Chevron's contractor and a member of the Plaintiff's Ecuadorian environmental defense group since 2004 and during that time, has relied financially on Chevron.[75] **Second**, despite the Claimants' refusal, Chevron's own documents show that it had appointed Borja as Chevron's "samples manager" in the Lago Agrio Litigation.[76] **Third**, although Chevron stated that it had ended its relationship with Borja, at the time of the secret recordings, Borja's invoices for Chevron continued to be approved *after* the recorded meetings with Núñez were held.[77] **Fourth,** it subsequently became known that Borja had been sharing office space with Chevron's attorneys and had even used the oil company's email address. **Fifth,** Borja's uncle had been a long-time Chevron employee. **Sixth,** Borja met with Chevron's attorneys in San Francisco, and subsequently, a mere few days later, returned to Ecuador to secretly record another of his meetings.[78]

Immediately after recording the videos, Chevron protected Borja and his wife during their departure from Ecuador and provided

72. Transcript of the Hearing (10 November 2012), regarding the Republic of Ecuador's motion in the matter of Diego Borja, No. C 10 - 00112 (N.D. Cal.) at 38:19 - 39:5.

73. Transcript of the conversation between Borja and Escobar (1 October 2009) (23.59.31) at 11 (emphasis added)

74. Chevron Press Release, Videos show serious judicial misconduct and political influence in the litigation in Ecuador (31 August 2009) at 2.

75. Response Brief on the Merits presented by Ecuador in Procedural Track 2, Annex C, § A.1

76. Organizational chart of the "State's Litigation Team"

77. Series of messages sent by electronic mail, in which D. Borja and A. Verstuft communicate regarding the Interintelg invoices for August 2009 (7 September 2010)

78. Letter sent by T. Cullen to Dr. Garcia Carrion (26 October 2009) at 8.

them with lodging in a country club in the U.S., along with over USD 2 million in monetary benefits.[79]

iii) Another abandoned accusation has to do with the criminal investigation of its representatives in Ecuador, Ricardo Reis Veiga and Rodrigo Pérez, for alleged corporate and government fraud regarding the sufficiency and adequacy of the remediation performed by the Claimants during the implementation of the 1995 Settlement Agreement. Ecuador demonstrated that the criminal investigation proceedings were subjected to the law and due process, and that ultimately, all accusations were *dismissed* in June 2011, thereby demonstrating both the court's impartiality and independence, as well as the judicial system's ability to correct itself as necessary.

In conclusion, the Claimants abandoned the allegations that purportedly justified submission of this Arbitration proceeding – in the first place, the "Núñez scandal" and the criminal prosecution. The discussion now focuses on two statements, none of which are included in their Claimant's Memorial dated September 6, 2010. First, that the Lago Agrio Plaintiffs secretly "ghost-wrote" the trial judgment, even if they did not request reparation under Ecuador's Law for the Judgment of Collusion. Secondly, they attempt to attribute the Lago Agrio Plaintiffs' supposed misconduct to the Republic, for having forced its own environmental experts to draft substantial portions of the expert report, as well as the appendices prepared by Richard Cabrera—court-appointed damages expert.

> "The claim that the foreign company presented was premature, as the company did not exhaust the domestic recourses available to it in order to appeal the decision. Ecuador reserves its rights in respect of the decisions handed down by the Tribunal, particularly regarding the fact that the Tribunal is acting without jurisdiction, and applying a BIT that entered into force five years after the oil company left the country."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, January 20, 2014**

79. *Chevron paid $2.2 million to a man who threatened to reveal the company's corrupt activities in Ecuador, BCLC; R - 325, Summary of payments made by Chevron to, or in the name of, Diego Borja*

3. PROVISIONAL MEASURES

Shortly after the arbitration was filed, both before and after the issuance of the trial judgment in the Lago Agrio Litigation, Chevron-Texaco submitted a series of requests to issue provisional measures aimed at preventing the judgment's issuance, as well as its subsequent enforcement.

The Tribunal responded to these petitions by a series of orders and interim awards.[80] Through the former, it ordered the parties to "keep the status quo and avoid exacerbating the dispute," as well as not to influence whatsoever on the proceeding pending in Lago Agrio. They were also required to inform the Tribunal of the approximate date on which the trial judgment would be delivered. In the Tribunal's fourth order, dated February 9, 2011, it further ordered Ecuador to adopt all measures at its disposal to suspend the enforcement or recognition of any judgment issued against Chevron in the Lago Agrio Litigation both within and without Ecuador.

Subsequently, the Tribunal issued three interim awards on provisional measures, pursuant to which the parties' obligations were set forth as described below:

3.1. First Interim Award

On January 4, 2012, Chevron and Texpet informed the Arbitration Tribunal of the decision issued by the Provincial Court of Sucumbíos, which confirmed the Lago Agrio Court's judgment. In this letter, Chevron-Texaco argued that Ecuador had failed to fulfill the order dated February 9, 2011, since it had not adopted direct measures to prevent enforcement of the Lago Agrio judgment, and thus, required the Tribunal that this order be included in an interim award, with the consequences of applicability and enforcement thereof under the UNCITRAL Rules.[81]

On January 9, 2012, Ecuador rejected the Claimants' petition, on the grounds that, as the Tribunal ordered: i) it had fulfilled the Tribunal's order as it had adopted the measures at its disposal for such purpose; and, ii) Chevron and Texaco's petition exceeded the State's

80. 1. Procedural Order sent by electronic mail on April 9, 2010; Procedural Order dated April 27, 2010; First Order on Provisional Measures, dated May 14, 2010; Procedural Order No. 4, dated June 14, 2010; New Order on Provisional Measures, dated December 6, 2010; Procedural Order and Second Order on Provisional Measures, dated January 28, 2011; and Fourth Order on Provisional Measures, dated February 9, 2011. 2. First Interim Award on Provisional Measures, dated January 25, 2012; Second Interim Award on Provisional Measures, dated February 16, 2012; and Fourth Interim Award on Provisional Measures, dated February 7, 2013.

81. The consequences include the obligation to perform on both of the parties' parts, the binding force of res judicata and the fact that [an award] can be recognized and enforced under international treaties.

powers and contravened Ecuador's legal framework for the following reasons:

- It violated judicial independence and Ecuadorian law.
- An evasion of judicial proceedings in direct violation of article 168 of the Constitution implied administrative, civil and criminal liability for the entities or persons who interfered with justice.
- To order Ecuador to exempt Chevron from the bond to avoid enforcement of the trial judgment was tantamount to the Ecuadorian State redrafting its laws to fit a specific case.
- No Ecuadorian officer has the power to order the Lago Agrio plaintiffs not to pursue the judgment's enforcement.

After considering the parties' submissions and documents, on January 25, 2012, the Arbitral Tribunal hastily issued its first Interim Award on the following terms:

- It confirmed its order dated February 9, 2011 and reissued it in the form of an Interim Award in accordance with Articles 26 and 32 of the UNCITRAL Rules.[82]

It ordered:

- Ecuador to adopt all measures at its disposal to suspend or cause to be suspended the enforcement and recognition of any judgment issued in the Lago Agrio Litigation against Chevron within or without Ecuador; and,

82. Art. 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Art. 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made public only with the consent of both parties.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

- The government of Ecuador to continue informing the Tribunal, through its representatives in the arbitration proceedings, of all measures which Ecuador has taken for the implementation of the Interim Award.

3.2. Second Interim Award

A mere 23 days after issuance of the First Interim Award on Provisional Measures, on February 16, 2012, and once the parties presented their arguments at the Hearing held on February 11, 2012, in Washington D.C., the Arbitral Tribunal issued a Second Interim Award on Provisional Measures, noting that, "*[...]considering all the relevant circumstances in this arbitration, as of the date of the hearing [...]*"[83] it ordered the following:

To Ecuador:

- Ecuador (through its judicial, legislative and executive branches) must adopt all necessary measures to suspend or cause to be suspended the enforcement and recognition within or without Ecuador of the judgments that were issued by the Sole Chamber of the Provincial Court of Sucumbíos;
- Specifically, it must adopt the necessary measures to prevent any certification that causes the judgments issued in the Lago Agrio Litigation to be enforceable; and,
- The Government of Ecuador must continue to inform the Tribunal of all measures that it has taken to implement its legal obligations under this Second Interim Award.

To Chevron-Texaco:

- It shall be legally responsible, jointly and severally, to Ecuador for any costs or losses, which Ecuador may suffer in performing its legal obligations, under this Second Interim Award;
- As security for such contingent responsibility, Chevron-Texaco shall deposit within thirty days of the date of this Second Interim Award the amount of USD 50,000,000.00.

83. Second Interim Award regarding provisional measures, dated February 16, 2012. Unofficial translation.

The main difference between the two Interim Awards lies in that the former required that the Ecuadorian State "adopt all measures at its disposal" to achieve the Tribunal's objective of preventing enforcement of the Lago Agrio judgment. Given Ecuador's statement that the Government had no such powers, the Tribunal chose, in its Second Interim Award, to impose an obligation of results on Ecuador, thus requiring the Ecuadorian State to adopt "all the necessary measures" to suspend enforcement of the Lago Agrio judgment. By doing so, the Tribunal effectively ordered Ecuador to violate its own domestic law. The Government of Ecuador cannot interfere with other State branches, and, therefore, it cannot suspend or prevent the recognition and enforcement of the judgment in the Lago Agrio litigation.

3.3. Fourth Interim Award

On May 30, 2012, the Lago Agrio Plaintiffs filed a suit before the Canadian courts for the recognition and enforcement of the Lago Agrio Judgment, after which, by means of a letter dated June 1, 2012, Chevron-Texaco requested additional relief from the Tribunal, in relation to these proceedings.

On February 7, 2013, the Tribunal issued a Fourth Interim Award on provisional measures, pursuant to which it:

- Declared that Ecuador had violated the First and Second Interim Awards according to the Treaty, the UNCITRAL Rules and international law with respect to the completion and enforcement of the Lago Agrio Judgment within and without Ecuador, including (but not limited to) Canada, Brazil and Argentina, where the Lago Agrio plaintiffs had brought proceedings to enforce the judgment of the Sucumbíos Court.
- Decided that Ecuador would have to legally explain the reasons why it should not compensate Chevron for any damage caused by Ecuador's violations of the First and Second Interim Awards.
- Declared and confirmed that Ecuador was and continues to be bound under international law to ensure non-enforcement of the Lago Agrio Judgment; and,

- Expressly stated that: (i) so far it had not decided on the substantive legal merits of the Parties' dispute; and (ii) the award was issued without prejudice to the legal arguments, including all of the claims brought by Chevron-Texaco and all of the defense arguments brought by Ecuador.

On July 19, 2013, the Republic requested reconsideration of the Fourth Interim Award. The Tribunal is currently deliberating on this, and has agreed to consider the request in a subsequent arbitration phase. Currently, nonetheless, the Tribunal's orders and interim awards continue to be in force. Interim awards are not common and generally seek to prevent imminent and irreparable harm to the petitioner. Notwithstanding the above, Ecuador has purportedly "breached" the interim awards, despite the fact that the claimants have not suffered the harm expected from the plaintiffs' efforts to enforce the Lago Agrio Judgment.

Ecuador has criticized the awards' issuance on a series grounds, including, among others:

- The interim awards have the ironic effect of interfering with a judicial proceeding, which, if implemented, would violate the long-standing principle of separation of powers that governs in Ecuador (and in much of the world).
- Absence of the essential requirement to issue provisional measures, in other words, "urgency". At the appropriate time, the State's defense had explained to the Tribunal that the analysis of the evidence in the Lago Agrio claim gave rise to the conclusion that the "imminent" issuance of a judgment did not exist. In effect, almost a year transpired between the first Provisional Measures request submitted by the claimants on April 1, 2010 until the date of issuance of the trial judgment on February 14, 2011.
- The claimants have not demonstrated any potentially irreversible harm that they would face in the absence of the interim awards. It may be that the claimants will be forced to face the expenses of enforcement actions and their lawyers' fees, but these may be compensable and do not constitute irreversible harm. Chevron-Texaco had the ability to submit an appeal, as it actually did.
- The defense timely explained that Ecuadorian law contemplated a Cassation recourse after

an appeal, pursuant to which a party could stay enforcement of the judgment through payment of a bond. Indeed, Chevron-Texaco submitted a cassation recourse, but it did not request the establishment of a bond; thus, the judgment became enforceable pursuant to its own decision.

- Further, the defense pointed out to the Tribunal that, even after cassation, the legal framework provided for constitutional review.
- None of this precautionary measures can be complied with, since they impose on the State the obligation to breach its own laws.

Throughout the case, the State's defense also requested provisional measures against Chevron-Texaco, due to its repeated violations of the Tribunal's order to keep the "status quo" and avoid exacerbating the dispute, as well as its repeated and costly attacks on Ecuador, thus:

On March 8, 2012, the State requested that Chevron be ordered to cease the media campaign against the State and the Ecuadorian Justice Administration.

> The Tribunal exceeded its jurisdiction by ordering Ecuador to suspend and avoid acknowledgement and enforcement of the judgment handed down in the Lago Agrio case, in violation of local law and the independence of the sovereign state.

As Chevron's campaign against Ecuador continued, on March 15, March 19, April 23 and May 2, 2012, the country repeated its request to the Tribunal. On June 11, 2012, Chevron requested that the Tribunal allow it to comment against Ecuador and the Lago Agrio plaintiffs, arguing that it was forced to defend itself from their attacks.

On June 20, 2012, the State insisted on its request to the Tribunal to order Chevron to cease its lobbying efforts against Ecuador that sought the non-renewal of trade benefits extended to Ecuador under the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

> "This is something that the State's defense cannot do. Ecuador cannot, as Chevron erroneously hopes, give orders to Ecuadorian judges to halt a legal proceeding between private parties in the ordinary Ecuadorian judicial system. Obviously, neither the executive branch, nor any other branch of government or state authority, can tell the judges in those proceedings to suspend them. That is not within our jurisdiction, nor within our authority."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. May 5, 2010**

On June 3, 2013, the State asked the Tribunal to rule that Chevron had violated the interim awards by promoting a campaign against Ecuador seeking non-renewal of the trade preferences and thereby depriving the country from the benefits contemplated under the ATPA, the ATPDEA and the SGP, and it insisted that the Tribunal resolve its repeated requests regarding Chevron's violations of its provisional measure orders. These are still pending.

On August 9, 2013, because of the campaign that Chevron initiated on web page www.juiciocrudo.com and the public statements that one of Chevron's attorneys made against Ecuador, the State's defense insisted on flagging for the Tribunal Chevron's repeated violation of the interim awards. Given the Tribunal's reluctance to act, Ecuador also reserved its right to respond to Chevron's media campaign.

As opposed to the treatment given to Chevron-Texaco's requests for provisional measures, when Ecuador submitted these same requests, the Tribunal simply deferred ruling on its requests until an uncertain future date, thereby undermining the State's arguments and the urgency and need underlying its requests.

The Tribunal's behavior regarding the provisional measures requests, always resolved in favor of Chevron and ignoring Ecuador's requests, was one of the reasons for the recusal request filed by the country on October 24, 2014 against the Tribunal's members. Shockingly, on June 18, 2015, after the recusal request and three years after Ecuador's first provisional measures request, the Tribunal decided

that, for the time being, it would not comment on the requests and it would instead continue to reserve its decisions to a future date. **The sole fact that the Tribunal was forced to deliver a procedural order regarding all of the requests that had yet to receive an answer ("the omnibus order") demonstrates that the recusal request had sufficient grounds, although it was not accepted by the Tribunal or the Secretary of the Permanent Court of Arbitration, based in The Hague.**

"The Claimants have requested and obtained protective measures which have given rise to two provisional awards, and now they are requesting a declaration stating that the provisional awards have been violated. It has been made evident that neither the motion for the provisional awards, nor the motion for the reparations that are here being requested have the objective of protecting the Claimants from some irreparable harm. Instead, this is going to affect the bilateral relationship of the agreement with the United States, and result in serious economic harm to the Republic and to its citizens.

On a nearly daily basis, the Claimants' lobbying firms have added the provisional awards to their allegations that there has been a breach of the Settlement Agreement, in order to pressure the U.S. Congress and the Department of Commerce to take measures that will affect commerce with Ecuador to the tune of more than a billion dollars, which will have an impact on the jobs of hundreds of thousands of Ecuadorian citizens.

[…] And while powerful economies, such as the United States or Brazil, can impose fines of billions of dollars against companies like British Petroleum or Chevron for environmental liability, declaring that the Republic of Ecuador has violated the provisional awards in these arbitration proceedings, for not having interfered in environmental litigation between private parties, would only confirm that Chevron was not wrong when it declared that, "we can't let these little countries mess with us."

Dr. Diego Garcia Carrion, State Attorney General, Hearing on Opening Arguments. London, November 26, 2012

CHAPTER III

THE DISCUSSION OF THE TRIBUNAL'S JURISDICTION

1. INTRODUCTION

Shortly after Chevron Corporation and Texaco Petroleum Company brought the arbitration, the Ecuadorian State submitted substantial objections to the Arbitration Tribunal's jurisdiction.

On May 3, 2010, Ecuador submitted its preliminary objections to jurisdiction and for this reason, on July 7, 2010, the Tribunal decided to open a special phase to address these objections as preliminary matters to be addressed separately from the merits of the dispute. On July 26, 2010, the country filed its memorial on jurisdiction and admissibility, in which it documented, insisted and argued the reasons why the Tribunal did not have jurisdiction

> "In this Hearing on Jurisdiction that is beginning today, I ask you, the members of the Tribunal, to see this arbitration for what it really is—the Claimants' attempt to artificially transform a local lawsuit into an international controversy between a State and an investor, removing the rights of the courts of Ecuador and the local population in Lago Agrio, and objecting to or arguing elements of an investment treaty [that went into effect] five years after Texaco left our country, taking with it enormous benefits that had accrued, thanks to our oil, over the course of many years."
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> **Dr. Diego Garcia Carrion, State Attorney General, Opening Arguments in the Hearing on Jurisdiction. London, November 22, 2012**

and should abstain from processing Chevron and Texaco's arbitration claim. The procedural calendar established by the Tribunal contemplated a term for Chevron and Texaco to answer these objections and a term for both parties to reply, as well as a Hearing held in London between November 22 and 23, 2010.

2. ECUADOR'S ARGUMENTS

From the beginning of the arbitration, it was clear to Ecuador that Chevron-Texaco's sole purpose was to obtain a ruling from the Tribunal – stemming from the investor-State arbitration, and seeking that the Tribunal act almost as an appellate instance—determining that it was not legally liable in any way to the *Lago Agrio* plaintiffs and decide on the merits of litigation among private parties that did not involve the Ecuadorian State.

> "It is clear that the controversy does not fall within the scope of an investment arbitration, and the Tribunal has exceeded the limits of its authority under international law by assuming jurisdiction that it does not have, which will affect the validity of any decision that it may adopt in the future."
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> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, January 8, 2014**

In Ecuador's view, the Claimants' behavior is unprecedented, especially given that the Claimants themselves had pledged to comply with any judgment issued by Ecuadorian courts with respect to the environmental claims brought by the Ecuadorian Amazon's communities.

In bringing the investor-State arbitration, the Claimants deliberately violated their judicial commitments. After having persuaded the U.S. courts to dismiss the Aguinda case in favor of the Ecuadorian judicial system, they now seek that the Tribunal assigned to the Chevron III case take the Lago Agrio litigation away from Ecuadorian courts and demand that the Republic's executive power ignore its own judicial system by voiding, without more, ten years of judicial proceedings. Chevron and Texaco do not hide this reality; in fact, they

have explicitly acknowledged it; for example, at the hearing on Provisional Measures and in their Counter-Memorial on Jurisdiction, they argue that "*[t]he mere existence of the Lago Agrio case is a violation of our* [Chevron's] right" under the Treaty.[84] Further, they have argued that they have the right under the Treaty to make [the Tribunal] and not the Lago Agrio court, decide on the pending claims."[85]

Ecuador's objections focus on showing the Claimants' useless attempt to transform what is essentially a private environmental dispute into an "investment dispute," and reveal that the Claimants forcefully attempt to adapt a set of conflicting facts to a claim that is consistent with the Arbitration Tribunal's limited jurisdiction under a BIT.



Washington D.C., Friday, May 8 2015, Conference Room at the World Bank. The State Attorney General, Diego García Carrión with part of the State of Ecuador's defense team: Eric Bloom, Eduardo Silva R., Ricardo Ugarte, Pierre Mayer, Tomás Leonard, Carolina Romero, Marck Bravin, Blanca Gómez de la Torre, Gregory Ewing, Eric Goldstein, Nassim Hooshmandria and Nicole Silver, during the Closing Hearing.

84. Transcript of the Hearing on Provisional Measures 91:13 - 14 (emphasis added)

85. Id. at 99:25 - 100:2

The arguments brought by Ecuador have focused on this and more, providing the Tribunal with sufficient legal grounds to declare its lack of jurisdiction.

2.1. The alleged dispute does not arise nor is it related to an investment in Ecuador, pursuant to the BIT

To justify invoking the BIT's protection, Chevron-Texaco characterized its investment as: (i) an "original" investment, in other words, "Texpet's oil operations in Ecuador," that, it states, would continue to exist today based on its theory on the "duration of the life of an investment"; and, (ii) its rights under the Release Agreements.

According to Ecuador, the original investment does not exist because it ended in 1992, many years prior to the BIT's entry into force, when Texpet abandoned all economic activities in Ecuador. Since then, neither Chevron Corporation nor Texaco Petroleum Company have established any business, or held any asset in Ecuador's hydrocarbons sector or any other sector for that matter. *A fortiori*, because it was simply not in force, the BIT was never a factor and could not have been a factor in any of the Claimants' decisions to pledge capital or other resources to Ecuador's hydrocarbon sector.

Neither Chevron, nor Texaco can extend the "life expectancy" of an investment that has expired, by claiming the existence of the Settlement and Release Agreements.

With respect to the Settlement and Release Agreements, these do not constitute, by themselves, an investment under Article I of the BIT, because they do not meet the three necessary economic elements established by judicial precedent to be considered as such.

According to Ecuador, as to certain Arbitration Tribunals, **an investment *"must show the economic features inherent to an investment,"*[86] including *"the contribution of resources by the plaintiff to the economy of the State receiving the investment [and] the acceptance of risks in exchange for an expectation of a commercial benefit."*[87]**

86. Award in Pantechniki S.A. Contractor & Engineers v. Republic of Albania, ICSID Case N° ARB/07/21.

87. Award in Pantechniki S.A. Contractor & Engineers v. Republic of Albania, ICSID Case N° ARB/07/21.

The U.S. Model BIT (2004) similarly identifies these factors in the clarification provided for the definition of an investment.[88]

The Settlement and Release Agreements sought "compensation" and "remediation" for "adverse effects" and other environmental harm that occurred in the Ecuadorian Amazon, in exchange for certain releases from liability. Neither the expenses that Texpet incurred in its efforts to enforce the compensation and remediation measures required by the contracts, nor the limited releases from liability that Texpet received in exchange, can be interpreted as "investments."

Furthermore, Chevron had no stake whatsoever in the referenced Release Agreements because it is not a beneficiary thereof, as it was not featured in the list of the clause designated 1 "Beneficiaries of Releases" under the 1995 Release Agreement. Article 5.1 of this agreement states:

> *TexPet, Texaco Petroleum Company, Compañía Texaco de Petróleos del Ecuador, S.A., Texaco Inc., and all of their respective agents, employees, officers, directors, legal representatives, insurance companies, attorneys, parties responsible for payment of indemnification, guarantors, heirs, managers, estate executors, beneficiaries, successors, predecessors, parent companies and subsidiaries."*

There is no investment, as it was terminated in 1992 when Texpet abandoned the country, and the investment's "life span" cannot be extended through the Settlement Agreements.

Holding that the existence of the release agreements covers an extinct investment would contravene all investment protection logic.

2.2. The tribunal lacks competence under application of the BIT's irreversible election clause

In accordance with article VI (3) of the BIT, the Tribunal lacks jurisdiction because the Claimants chose another dispute resolution avenue. **Even if the**

88. 2004 United States Model BIT.

The claim brought in the arbitration proceedings involves and affects a third party who is not a party of the arbitration proceedings.

Tribunal were to determine that an investment dispute exists, it would not have jurisdiction because the Claimants triggered the BIT's "irreversible election" clause when they persuaded U.S. courts to grant their request to (1) adjudicate the environmental dispute in an Ecuadorian court — including the Claimants' claims set forth in this arbitration under the 1995 Settlement Agreement; and, (2) adjudicate all possible due process challenges to the judgment of an Ecuadorian court in binding extraterritorial enforcement litigation.

To obtain dismissal of the *Aguinda* litigation in U.S. courts, Texaco (along with Texpet and Chevron) expressly pledged to submit to the jurisdiction of Ecuadorian courts, with respect to all claims arising from the same events and facts that were claimed in the *Aguinda* litigation, and to only challenge any judgment of Ecuadorian Courts in the enforcement phase, specifically under the *New York Foreign Judgments Recognition Act*. Thus, the Lago Agrio litigation, as brought before Ecuadorian courts, is a continuation of the *Aguinda* litigation. Texaco made certain judicial promises to U.S. courts – promises that Chevron subsequently joined and expressly approved –to induce these courts to grant its motion to dismiss *Aguinda* on grounds of *forum non conveniens.*

In 1996, the District Court for the Southern Judicial District of New York had delivered an order that granted Texaco an unconditional dismissal on the grounds of *forum non conveniens* and international comity with respect to the laws. Nonetheless, the Court of Appeals *reversed* the ruling, concluding that the dismissal was inappropriate absent Texaco's commitment to submit to Ecuador's jurisdiction, waiving any applicable statute of limitations law.[89]

Texaco and Chevron fulfilled the Court of Appeals' requirement and, arguing that Ecuador was a superior forum to hear the claims,[90] they pledged to waive the

89. Award in Pantechniki S.A. Contractor & Engineers v. Republic of Albania, ICSID Case N° ARB/07/21.

90. En respuesta a los esfuerzos de los demandantes en Aguinda para mantener su caso en una corte de los EE.UU., Texaco y, posteriormente, Chevron, presentaron un sinnúmero de declaraciones juramentadas de peritos legales ecuatorianos que afirmaban que las cortes ecuatorianas ofrecían un foro alternativo adecuado para los reclamos planteados por los demandantes en Aguinda, y que tanto los ciudadanos como los funcionarios locales ecuatorianos tenían fe en el sistema judicial de Ecuador. Véase, v.g., Declaración juramentada del Dr. Enrique Ponce y Carbo (17 de diciembre de 1993) ¶7-8, 12; Declaración juramentada del Dr. Vicente Bermeo Lañas (17 de diciembre de 1993) ¶10, 12.

statute of limitations claims and completely submit to Ecuador's jurisdiction, including committing to fulfilling any final judgment, with the ability to question the extraterritorial enforcement of said judgment, solely and exclusively under the *New York Foreign Judgments Recognition Act*.

The judgment's enforcement proceeding under the *New York Foreign Judgments Recognition Act* is, therefore, the "dispute resolution proceeding" that the parties agreed to, and was referenced by article VI (2) (b) of the BIT.

In having made this irreversible choice, Chevron cannot now request the Arbitration Tribunal to review the exact same claims that it previously accepted to be resolved within a judgment enforcement process.

In this arbitration, Chevron and Texaco's claims under the BIT are based on contractual rights acquired pursuant to the Release Agreements, despite the fact that they have been pled as treaty-based claims. Thus, Chevron and Texaco's BIT-based claims have the same "fundamental basis" as those discussed in the Lago Agrio litigation. Therefore, when Chevron and Texaco agreed to submit to the jurisdiction of Ecuadorian courts and chose not to challenge any judgment until the enforcement phase, they selected the Ecuadorian judicial avenue and this decision now precludes them from choosing this arbitration avenue.

2.3. The Tribunal lacks the competence to resolve a claim that requires a determination of third-party legal rights who are not parties to the arbitration

In its Notice of Arbitration and the complaint, Chevron-Texaco clarifies that this case involves a claim brought by "*a group of Ecuadorian plaintiffs and attorneys with contingent fees who sued Chevron in 2003 in Ecuador's courts, and requested compensation for harm and other reparations for the adverse effects that they claimed were caused by the Consortium's operations.*"[91]

The Claimants' central claim in this arbitration is founded on its argument that Chevron is not liable for any of the adverse effects on the environment that are discussed in the *Lago Agrio* litigation, where, additionally, there is no legal basis whatsoever for the plaintiffs to continue their claims against Chevron.

91. Claimants' request for arbitration ¶ 3.

If the Arbitration Tribunal were to rule in favor of the reparation requested by the Claimants, the third-party rights to redress in the *Lago Agrio* litigation would be resolved and terminated without ever affording the opportunity to hear their claims and submit evidence in their defense.

The Arbitration Tribunal should, therefore, abstain from exercising jurisdiction over this dispute based on the principles adopted by the International Court of Justice ("ICJ") in the *Monetary Gold* case, which established the precedent that a case cannot be ruled upon if it affects a third party who has not submitted to the judge's jurisdiction.[92]

Based on the foregoing, the Arbitration Tribunal had but one choice: it should have timely declared that it lacked jurisdiction to hear Chevron and Texaco's claims.

3. THIRD INTERIM AWARD ON JURISDICTION AND ADMISSIBILITY

On February 27, 2012, the Arbitration Tribunal issued its Third Interim Award on Jurisdiction and Admissibility, deciding, among other matters:

- It elected a broad interpretation of the term "investment" in the BIT. It decided that, for purposes of the BIT, the 1995 Settlement Agreement is a continuation of Texpet's concession contract in such a way that it comprises a part of the original investment made through the 1965 Concession contract. According to the Tribunal, if the first had not existed, the latter would not have existed either. The Tribunal rejected Ecuador's arguments and any chronologic distinction among the remediation agreements, the concession and their expiration date.

- It wrongly concluded that the BIT does not impose any temporal limitation on an investment and does not limit the duration of a covered investment unless it is a complete and final disappearance, including when the investor or other persons end all means of enforcing claims and demanding their rights under said investment.

- The Tribunal, therefore, determined that, for the purposes of the BIT, one cannot be

92. The Monetary Gold case, which was initiated before the International Court of Justice by the Republic of Italy against the Republic of France, the Kingdom of Great Britain and Northern Ireland and the United States of America, makes reference to a legal determination regarding the delivery to Italy or the United Kingdom of a quantity of gold taken by the Germans from in 1943, recovered in Germany, and which was found to belong to Albania.

separated from the other. On the contrary, the 1995 Settlement Agreement must be treated as a continuation of the previous concession agreements, in such a way as to comprise a part of Texpet's global investment.

- On this point, in addition to its more traditional form, and taking into account the existence of the Lago Agrio case, Texpet's investment adopts the forms that are established in the BIT, such as: *"a claim to performance having economic value, and associated with an investment"* and "*a right conferred by ... contract."* According to the Tribunal, Texpet's investment began in 1964, which includes the 1995 Settlement Agreement and with the *Lago Agrio* litigation, said investment has not yet reached its complete and final disappearance.

- The Tribunal wrongly concluded that Texpet's parent company, Chevron, is an investor under Article I (1) (a) of the BIT because it indirectly owns or indirectly controls an "investment" in Ecuador. Thus, the Tribunal decided, as a jurisdictional matter, that Chevron could bring its claims for a purported violation of a right granted or created by the BIT, with respect to Texpet's indirect "investment".

- The Tribunal did not decide on Chevron's liability to the Plaintiffs in the Lago Agrio litigation or on the matters of *res judicata,* preclusion of other claims and evidence, or the principle of *estoppel*. The Tribunal decided that these matters would be resolved in the merits phase.

- According to the Tribunal, if there were any contradiction between Ecuador's BIT obligations and the rights that the Lago Agrio plaintiffs could have, according to the decision issued by the Courts of Ecuador, the country would have to decide how to resolve this contradiction.

- According to the Tribunal, "*[i]n previous investment cases, the tribunals have used the 'triple identity' evidence, which requires that the dispute before domestic courts and the arbitration tribunal possess an identity of the parties, of object and of cause of action. In the*



Washington D.C., Sunday, April 19, 2015, Winston & Strawn's offices, work meeting of the State of Ecuador's defense team in preparation of the arguments to be presented at the Hearing held at the World Bank.

present case, there is no identity of the parties, of object or cause of action between the Lago Agrio litigation or, for that matter, the Aguinda litigation in New York Courts."

- Given that this triple identity does not exist, the Tribunal inappropriately concluded that the Claimants' petitions in this arbitration had not been filed with Ecuadorian courts, despite the existence of pending litigation before said courts, and considering that the claimants pledged to the U.S. courts to respect any decision issued by the Ecuadorian courts. In other words, any choice made by Plaintiffs to resolve the environmental dispute in Ecuador, was a choice made with respect to a different opposing party (the Lago Agrio plaintiffs and *not* Ecuador), and thus the Plaintiffs' commitment to resolve the environmental dispute in Ecuador, and challenges to any adverse decision in enforcement courts, do not abrogate their right to assert arbitral claims against the State.

In this manner, the Tribunal allowed an investment to artificially preserve its validity despite it having expired prior to the entry into force of the BIT. Further, as if it were a new investment attracted by the signature and validity of the Treaty, it allowed its protection under said Treaty, thereby distorting the Treaty's *raison d'être* as a mechanism to attract new investments in the country, not to resolve disputes associated with past investments that have long ceased to contribute to the State's economic development.

The wrong conclusions that the Tribunal reached through this award were submitted as a basis for the annulment recourse brought before Dutch courts on January 7, 2014.

> *"The motion to invalidate before the District Court of The Hague raises serious and substantive questions on Ecuador's part regarding the jurisdiction of the Arbitral Tribunal, which were discussed at the proper time, and which the Tribunal ignored in its subsequent awards."*
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> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, January 8, 2014**

CHAPTER IV

TRACK 1: SCOPE OF THE SETTLEMENT AGREEMENTS

1. INTRODUCTION

By procedural order of April 9, 2012, the Arbitral Tribunal hearing the case established that the liability phase would be divided into two tracks: the first (Track 1) to deal with preliminary legal questions related to the settlement agreements, and the second (Track 2) to deal with the substantive legal questions in dispute.

Track 1, thus, focused on the legal effect and the interpretation of the parties of the Settlement and Release Agreements. According to the Claimants, these Agreements not only released Texpet from the Ecuadorian State and Petroecuador's claims, but also from third-party claims, including the Lago Agrio plaintiffs, who were not party to the agreement. The Claimants also argued that the agreements acted to release Chevron from all environmental liability, a party that did not sign the agreements, and whose merger with Texpet took place years later.

During Track 1, Ecuador filed two memorials, on July 3 and October 26, 2012, setting forth its arguments regarding the matters set by the Tribunal.



Washington D.C., Sunday, April 19, 2015, Winston & Strawn offices, work meeting of the State of Ecuador's defense team to prepare the arguments to be presented at the Hearing held at the World Bank, from April 21 to May 8, 2015.

2. THE INTERPRETATION AND LEGAL EFFECT OF THE SETTLEMENT AND RELEASE AGREEMENTS, AND OF THE CONTRACT FOR THE PERFORMANCE OF ENVIRONMENTAL REMEDIATION AND RELEASE FROM OBLIGATIONS, LIABLITY AND CLAIMS

As regards the legal effects of the Release Agreement, Ecuador's argument centered on the fact that the 1995 Settlement Agreement explicitly defines the scope of the Release of Liability, in such a manner that this release includes only those obligations or liabilities of the Government or Petroecuador, derived from the Environmental Impact caused by the Activities of the Consortium, including any claim that the government or Petroecuador had brought or could bring against Texpet, arising from the Consortium Contracts.

Concerning whether Chevron is or is not "Released" from the 1995 Settlement Agreement, Ecuador argued in its defense in its memorial that Chevron is neither explicitly nor implicitly "Released". On the contrary, the Agreement only identifies the Government, Petroecuador and Texpet as parties thereto, and the latter, in turn, clarified in Article 9.4 that "***It shall not be inferred that this Contract confers any benefit to third parties not party to this Contract****, nor (sic) that it confers any rights to third parties in order to comply with its provisions*", within the meaning and scope of Article 5.1 of the Agreement. Given that Chevron was never a "party" nor had any rights to "perform under the contract", Chevron is not a party to the Agreement, and as a result had no right to invoke it to bring a claim.

2.1. The legal effects of the release agreements

The State's defense is supported by arguments found both in the 1995 Settlement Agreement as well as under Ecuadorian law. These arguments are as follows:

2.1.1. In accordance with Ecuadorian law, Chevron-Texaco had no existing claim for violation of the 1995 Settlement Agreement, and the statute of limitations for bringing claims under that agreement has expired.

The Government received the Claimants' Notice of Arbitration on September 23, 2009. By this time, the third party claims against the company had been going on for 14 years since the execution of the 1995 Settlement Agreement. For this reason, **Chevron-**



Washington D.C., Sunday, April 19, 2015, Winston & Strawn offices, preparation of opening arguments for the hearing to be held on April 21 at the World Bank.

Texaco's breach of contract claim was barred, even according to the longest statute of limitations period available under Ecuadorian law—that is, 10 years—pursuant to the Ecuadorian Civil Code.

Indeed, even if the claimants had a right to bring a claim against the Republic for breach of contract, this right is not indefinite. In this regard, the Ecuadorian Supreme Court has decided:

> *"The statute of limitations and the period of cessation of procedural activities reflect society's recognition that predictability and finality are convenient, and, in reality, indispensable, for an orderly administration of justice, which must be balanced against in respect of each citizen's right to receive reparation for any legally recognized offense."*[93]

If we are to accept Chevron's theory of breach in respect of Ecuador's obligations under the Settlement Agreement in relation to third party claims, the Republic would have been in breach of this agreement from the moment of its entry into force in 1995, given the existence of the Aguinda litigation, which, at the time, was still ongoing.

However, the strange thing is that, despite the fact that according to Chevron Texaco, since the signing of the 1995 Settlement Agreement, the company has been released from any third-party claims, it never invoked this obligation of the State, whether directly, or within the Aguinda litigation.

In order to overcome this obvious contradiction, Chevron Texaco:

- Has argued that the release did not have anything to do with the claims in the Aguinda litigation, since those claims, supposedly, referred only to damages for personal injury.
- Has proposed alternative theories, attempting to determine at what moment the Ecuadorian government violated its obligations under the 1995 Settlement Agreement, which would have had to occur on different dates, either during or after 2003.

But, once more, this argument is weak, given that Chevron's argument does not find any support in the record.

The Claimants argue that the Contracting Parties released Texpet from *all* damages caused by "*any*...

93. Decision issued by the First Civil and Mercantile Chamber of the Supreme Court of Ecuador, Appellate Case at Cassation No. 260 - 2007, Official Register 568, 8 May 2009.

substance present in the environment or discarded there… [that] has the potential to cause harm to human health or the environment."[94] It is impossible to understand why the Claimants' petitions in the Aguinda litigation for the remediation and spoliation of properties, water sources and the environment would not be covered by the broad exemption that the Claimants describe.

During the arbitration proceedings, the Claimants' positions have been inconsistent. For example, in their Reply to the Provisional Measures, the Claimants alleged that the very existence of the Lago Agrio Litigation was a violation of the 1995 Settlement Agreement, which would denote that, from that year, Ecuador would have been in breach.[95] In their Memorial on the Merits, the Claimants argued that the fact that the Lago Agrio court did not dismiss the claim in 2003 gave rise to a presumed breach of the Agreement, which would imply that the date of the breach was in the year 2003.[96] As an alternative, the Claimants recently have alleged that the enactment of the Environmental Management Act of 1999 gave rise to a breach,[97] placing 1999 as the date of the alleged breach.

On the other hand, the Claimants' delay in bringing their contractual claim has impaired the Republic's ability to gather evidence. From the date of the first alleged "breach", some 20 years ago, Ecuador, like the majority of States, has witnessed the election of various administrations, and dozens of government officials have carried out and completed their public duties. It is neither practical nor fair to expect that, so many years later, the State would be able to locate witnesses, whose account would be necessary to support its version of the events.

In summary, the statute of limitations of the Claimants' claim for breach of contract has expired, and there is no basis whatsoever for any type of compensation; as a result, the claim should be dismissed.

2.1.2. The 1995 Settlement Agreement did not release Chevron-Texaco from third-party claims, nor prevent third parties from bringing claims

A. The plain language of the 1995 Settlement Agreement did not cover third-party claims, nor compel the State to take action in respect of such claims.

94. Claimant´s Memorial on the Merits ¶ 395 (emphasis added)
95. Claimant´s Reply Memorial on Provisional Measures, at 5.
96. Claimant´s Memorial on the Merits ¶ 20
97. Id. ¶ 376.

From the first to the last page, **the 1995 Settlement Agreement is applicable only to the parties thereto**. The plain language of the agreement confirms that neither the Government nor Petroecuador had the intention or attempted to act in the name of any third party.

In its first paragraph, the 1995 Settlement Agreement clearly identifies three, and only three, parties: the Government of Ecuador (represented by the Minister of Energy and Mines), Petroecuador (represented by its Executive President), and Texaco Petroleum Company (represented by its Vice-president, Mr. Ricardo Reis Vega and by Dr. Rodrigo Perez Pallares). The agreement was signed and ratified in its entirety with the signature of the representatives of each of the three parties who were present.

The agreement not only specified, clearly and in detail, the Contracting Parties and their beneficiaries, but also that the Exemption included in Article 5.1 expressly and unequivocally defines its scope. The exemption makes clear that the only parties that release in respect of their claims are the Government and Petroecuador.

The language of the 1995 Performance and Release Agreement does not speak to claims of third parties. It also does not oblige the State to take any action in respect of such claims, nor does it require the State to adopt measures to prevent or impede third parties (over whom the Republic has no control) from bringing private claims.

> *Under the present document,* ***the Government and Petroecuador*** *hereby release, absolve and exempt …* the "Released Parties" from "*all* ***claims of the Government and Petroecuador*** against the Released Parties due to Adverse Environmental Effects originating from the Operations of the Consortium.[98]

In accordance with the plain language of this Article, the only "entities that have provided Releases" are "the Government and Petroecuador". And these

98. 1995 Performance and Release Agreement, Art. 5.1 (emphasis added)

entities, as per the express terms set forth in the aforementioned paragraph, gave their release solely in respect of their own claims, and not in respect of any other claim.

The term "Release" was carefully defined specifically not to extend it to any other legal obligation "with respect to" any other individual who may bring a claim for damages or the imminent threat of damages.

In addition, the Work Plan attached as Annex A specifically required that Texpet resolve the pending Litigation against it from certain Municipalities. If the 1995 Settlement Agreement were as broad as Chevron asserts, the claims of the Municipalities would not have been necessary, much less a negotiation, nor a definitive settlement.

The Court of Appeals of Lago Agrio agreed with and adopted[99] the lower court's interpretation of the 1995 Settlement Agreement, and rejected Chevron's characterization of this agreement as having an *erga omnes* effect.[100] The Court of Appeals held that the [1995] settlements were only binding on the contracting parties and "did not extend to third parties", and, as a result, ratified the limited scope of the release to only the Contracting Parties.

The result of the Claimants' argument is that, immediately after the signature of the 1995 Settlement Agreement, the government would have had to adopt measures to deny or prevent third parties (over whom the government has no control) from continuing their trial between private parties, which at that time was pending in the United States, or otherwise, the government would have had to compensate or release Chevron-Texaco from liability for any judgment issued against it. The problem is that the Agreement did not even imply such an obligation, and neither the Tribunal, nor any other court have the jurisdiction to go back and rewrite the agreements in order to impose obligations that were not contemplated nor negotiated, and much less agreed upon.

99. Decision of the appellate court on the lower court's decision in the Lago Agrio case, citing to the Lago Agrio decision, which found that "it is evident that this contract cannot be thought of as an act of the government, and much less that the government entered into this contract on behalf of all Ecuadorian citizens."

100. Id. "The decision issued on February 14, 2011, also addresses the effect of the settlements with the municipalities and the government, and clearly establishes that the settlements cannot be considered as "acts of the government" because they do not comply with the requirements to be classified as such. As a result, given that the settlements do not constitute "acts of the government", such settlements cannot have erga omnes effects."

The 1995 Settlement Agreement in no way imposed upon the Republic the obligation to (1) release Texpet from third-party claims, (2) defend Texpet from the claims in *Aguinda* or any other lawsuit arising therefrom, (3) compensate Texpet for all losses that may result from third-party claims, (4) notify any court about the existence of the 1995 Settlement Agreement (much less interpret the contract in a way that Ecuador disagrees with), or (5) on the contrary, to take any other measure in any other lawsuit brought by third parties to which the Ecuadorian government was not a party. **In simple terms: The 1995 Settlement Agreement did not impose any contractual obligation on the State to intervene in Texpet's favor in any claim, nor under any jurisdiction. The Government of Ecuador and Petroecuador agreed not to bring any claims against the Released Parties. Nothing else.**

Chevron-Texaco must recognize that the 1995 Settlement Agreement, in its plain language, does not include any obligation to release from liability, defend, indemnify or notify, under the Republic's supposed "obligation to act in good faith." [101] The general obligation to act in good faith cannot serve to rewrite the parties' agreements. The scope given by the companies would indicate that that the agreement should be rewritten to add such an obligation, since it is not contained therein, as it is written.

There is no basis for alleging any violation of the supposed obligations, which were neither negotiated under the agreement nor agreed upon. The plain language of the 1995 Settlement Agreement leaves no ambiguity whatsoever regarding the intention of the Contracting Parties, and as such, must be applied in the present case.

B. Knowledge and understanding of the intention of the parties.

All applicable evidence for determining the intention of the Contracting Parties shows that they knew and understood that neither the 1995 Settlement Agreement, nor the Settlement and Release Agreement, released them from any claims brought by third parties.

101. Claimant´s Memorial on the Merits ¶ 16 ("the good faith obligation to protect and defend the claimants' in respect of their release from liability"); id. ¶ 374; id. ¶ 431; id. ¶ 432 (the Republic is in breach of its "obligation to comply with those agreements in good faith" by "failing to defend the rights of the claimants"); id. ¶ 437; id. ¶ 539 - 540 (the Republic is "in breach of its good faith obligation to protect and defend the claimants' in respect of their release from liability")

The Ecuadorian Civil Code provides the rules for contract interpretation.

First, the Civil Code resorts to the language of the agreement, since it represents the best source of evidence regarding the intentions of the parties. If this is not sufficient, the Civil Code requires that the facts and circumstances surrounding the execution of the agreement be examined, in order to determine the intention of the parties. It has already been shown that, in accordance with the plain language of the contract, Ecuador and Petroecuador simply waived their rights to and released Texpet from any claims brought by those two entities. There was no intention to neither waive any rights nor release Texpet from any claims brought by third parties.

As explained below, the facts and circumstances surrounding the entry into force of the agreement strengthens the plain language of the terms thereof.

1. The Parties' failure to refer to the Aguinda litigation, which was pending at the time, in the 1995 Settlement Agreement, reflect their understanding that the Agreement would not have any effect on the litigation brought by the plaintiffs in Aguinda.

When the 1995 Settlement Agreement was signed, there were third party claims pending against Texpet, which were not merely theoretical or *future claims*. By 1993, the litigations brought by the, Federation of United Native Communities of the Ecuadorian Amazon (*Federación de Comunas Unión de Nativos de la Amazonía Ecuatoriana* - FCUNAE)[102] and *Aguinda*, in New York, and the *Sequihua* litigation[103] in Texas, had already begun.

By 1995, while *Sequihua* had been dismissed for reasons of *forum non conveniens* in favor of Ecuadorian courts, and FCUNAE had abandoned its suit, *Aguinda* was not only ongoing, but in full swing.

If, as the Claimants argue, the release had affected the rights of third parties, given the intense ongoing activities in the *Aguinda* litigation, it would have been logical for the parties to expressly release Texpet from those claims under the 1995 Settlement

102. La Federación de Comunas Unión de Nativos de la Amazonía Ecuatoriana (FCUNAE, or the Federation of United Native Communities of the Ecuadorian Amazon Region), et al. v Texaco, Inc., No. 7:94-cv-06262 (S.D.N.Y.), claim filed on 31 August 1991

103. Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

Agreement, had this been the intention of the parties, and within the Republic's powers. Nevertheless, both the language and the history of the negotiation of the 1995 Settlement Agreement show that no such release from third-party claims was contemplated, even if such release had been permissible under Ecuadorian law, which it was not.

In fact, since the execution of the 1995 Settlement Agreement, until the final dismissal of the *Aguinda* litigation in 2002, Texaco never requested the court to dismiss the action on the basis of the 1995 Settlement Agreement, arguing that the agreement should have released it from such claims. During that time, Texaco also did not seek any compensation whatsoever from the Ecuadorian State, nor did it suggest that the State had acted in any way inconsistent with its contractual responsibilities.

If the parties had intended that the Settlement and Release Agreements would release the Claimants from third-party claims, the agreement would have, at least, made reference to the Aguinda litigation, which was still ongoing at the time. The agreement makes no such reference, and Texaco, undoubtedly, would have motioned for the Aguinda litigation to be dismissed on the basis of such a release. The Claimants have no explanation that can justify (during a decade within the Aguinda litigation) why they did not submit this argument.

The parties to the 1995 Performance and Release Agreement made no reference to the Aguinda case, which was already ongoing at the time that the agreement was signed. This reflects the parties' intention that the agreement would not have any effect on the actions of the claimants at the time in Aguinda.

The Claimants' current position, that the government and Texpet had the intention that the Settlement and Release Agreement would interfere with the rights of third parties, is undermined by the text of the agreement and by their own conduct.

The decision of the parties to the 1995 Agreement to make no reference to third party claims, which were

pending at the time, reflects the clear intention that the agreement would not affect such claims.

> *2. The 1994 Memorandum of Understanding (MOU) that established the framework for the 1995 Settlement Agreement makes it clear that the Parties knew and understood that the Contract would not affect third-party claims*

According to Ecuadorian law, the 1994 Memorandum of Understanding (MOU), as the central document that provides a record of the history of the negotiations among the Contracting Parties, which gave rise to the 1995 Settlement Agreement, should have an important role in the interpretation of the parties' intentions regarding the scope of the Release. Article 1580 of the Civil Code provides that for purposes of the interpretation of a contract, "clauses from other contracts among the same parties in respect of the same subject matter" should be taken into account, if such other agreements exist.[104] The MOU clarified that the parties knew and understood that the agreement would have no effect on third parties.

During the negotiations of the 1994 MOU, Texpet proposed a draft that included as an "objective" of the 1995 Settlement Agreement, which was going to be negotiated, a general release in respect of all claims of persons living in the Amazon Region, as. Texpet's proposal was as follows:

> "To establish a mechanism through which Texpet will be released from any claim that the Ministry and Petroecuador have against Texpet for adverse environmental effects, *or are intended to obtain rehabilitation or reparation of any ecological damages caused, or as compensation for the socioeconomic effects caused to populations living in the Ecuadorian Amazon Region as a result of the operations of the former Petroecuador-Texaco Consortium*." [105]

Both the Government of Ecuador and Petroecuador rejected this language. The final version of the 1994 MOU not only removed from the italicized text any reference to damages to third parties, but also incorporated a new "separate" language (in the new Article VIII) in order to clarify that:

104. Civil Code of Ecuador, Art. 1580

105. Draft of the Memorandum of Understanding (9 December 1994), art. I (d) (emphasis added)

> ***"The provisions of this Memorandum of Understanding shall apply without prejudice to the rights that third parties may have for any adverse effects caused as a result of the operations of the former PETROECUADOR-TEXACO Consortium."***

This express reservation clause, which protects the rights of third parties, was adopted in the MOU after the Republic circulated Texpet's draft.

Texpet accepted the changes proposed by the Government and Petroecuador since, according to an internal memorandum, "*it simply confirms what is already established under Ecuadorian law*."[106] As such, the Contracting Parties accepted this clarification and eliminated the controversial language.

The 1994 MOU is a useful interpretative instrument for determining the intention of the parties in entering into the 1995 Settlement Agreement. In accordance with Article VI of the 1994 MOU, the parties agreed that the final version of the 1995 Settlement Agreement would reflect "the principles and procedures established in this Memorandum of Understanding, which constitutes a framework for the parties." [107]

As a result, it is clear that Texpet agreed to draft and sign the 1995 Settlement Agreement ***in accordance with the principles agreed upon in the 1994 MOU***, in compliance with the consensus of the parties to separate "*the rights that third parties may possess*". [108]

3. Texaco's counsel knew and acknowledged—as did Chevron's experts on Ecuadorian law—that the 1995 Settlement Agreement did not affect the rights of third parties

Although Texpet's lead legal Ecuadorian counsel questioned the plaintiffs' substantive legal rights under Ecuadorian law, he admitted that neither the 1994 MOU, or the 1995 Settlement Agreement, had the intention of affecting—and did not in fact affect in any way—the rights of third parties. In 2006, **Dr. Perez Pallares testified under oath in an affidavit, that a third party plaintiff "*could bring a lawsuit against [Texpet] in Ecuador*"**

106. Facsimile sent by R. Perez Pallares to A. Bodero (13 December 1994)
107. 1994 Memorandum of Understanding, Art. VI
108. Id. art. VIII.

and could "*obtain reparations to the extent that [Ecuadorian law] permits it*," and that "*the MOU and the Settlement [would not affect] such a claim in any way*."

The testimony of Texpet's counsel is logical, and reflects the testimony of Giovanni Rosania, former Undersecretary of Environmental Affairs of the then Ministry of Energy and Mines, and one of the government's principal negotiators. Mr. Rosania testified that he spoke in various public forums, which Texaco's counsel also attended, and informed audiences, repeatedly, that the 1995 Settlement Agreement would *not* affect claims that third parties may bring against Texaco. As a result, far from disseminating the idea that the Government was supposedly compromising claims on behalf of the communities, the Parties to the 1995 Agreement assured the indigenous groups that the agreement would not affect them in any way.

The testimony of Dr. Perez Pallares is consistent with the opinions of *five* of the experts in Ecuadorian law that Chevron presented before the Federal Court of the United States in the Chevron I case. **According to Chevron's experts:**

"[The 1995 Settlement] is a contract and the parties can agree to such provisions as they see fit, provided that such provisions do not affect the public good or the rights of third parties…"

"As previously mentioned, the agreement reached between the Government of Ecuador and Texpet neither benefits nor harms any third party. This applies for both private actions brought under Articles 2214, as well as class actions brought under Article 2236. As a result, the possibility of bringing such claims is not affected." [109]

2.13. In accordance with Ecuadorian law, the rights of the Lago Agrio Plaintiffs were not extinguished, and could not have been extinguished by the 1995 Settlement Agreement

Despite the plain language of the 1995 Settlement Agreement, the concurrent facts around its drafting and negotiation, and the prior admissions of the Claimants themselves to the contrary, today they allege that the 1995 Settlement Agreement served to extinguish the rights of third parties to bring claims

109. Dr. René Bustamante Muñoz, Dr. Federico Chiriboga Vásconez, Dr. Sebastián Pérez Arteta, Dr. Rodrigo Jijón Letort, and Dr. Diego Pérez Ordóñez, et al., sworn statements at 3 - 4

under Ecuadorian law, even if this had not been the intention of the Contracting Parties.

In order to support its theory, the Claimants argue that the government released Texpet from the so-called "diffuse" rights claims in the settlement, and that the Lago Agrio plaintiffs base their case on those same (exempt) "diffuse" rights in their claim against Chevron.

In fact, the Ecuadorian Civil Code expressly and unequivocally prohibits *any* person from compromising any claim belonging to another. The Code states, in equally unequivocal terms, that settlement agreements bind only those persons who are parties thereto. Indeed—when multiple parties have an interest in a particular settlement, "***a settlement authorized by one such party shall not harm nor benefit any other party***".[110]

These provisions of the Civil Code do not in any way make a distinction based on the type of claim that is brought ("diffuse" versus "individual"), and also do not distinguish between settlement agreements based on the particular nature of the legal parties that enter into such agreements (public versus private).

Chevron has argued that the government of Ecuador, through the settlement agreements, acted as the representative of parties who were not signatories to those agreements, which expressly contravenes Ecuadorian law. The contracting parties who entered into the 1995 Performance and Release Agreement were the Republic of Ecuador, Petroecuador, and Texpet. The Lago Agrio plaintiffs are not, and have never been, party to the 1995 Performance and Release Agreement.

The Ecuadorian Government is not authorized—nor was it authorized in the past—to make concessions regarding the rights of its citizens, whether in respect of rights characterized as "diffuse" or as individual.

The Ecuadorian Government also does not have the legal capacity to take on or resolve the claims of its citizens—whether through litigation or out of

110. Civil Code of Ecuador, Art. 2363

court settlement—in a manner that would deprive its citizens of their own rights to bring claims and demand compensation in their individual capacity. In Ecuador, the government does not have, nor has had, any authority of *parens patriae*, and as a result, could not have entered into the 1995 Settlement Agreement in a representative capacity—even if it had stated that it intended to do so (which, of course, it did not). It is not strange to find that the Claimants do not quote a single law that grants the government such authority of *parens patriae*, that would allow it to contractually dispose of a citizen's right to bring a claim. The Claimants mention no such laws, because no such law exists.

The releases that, in Chevron's opinion, were granted under the 1995 Agreement, exempted it, with *res judicata* effects, from all past, present and future claims originating from the activities of the Consortium.

However, the principle of *res judicata* is not applicable, since the parties and the objective of the 1995 Agreement are distinct from the parties and the objective of the Lago Agrio Litigation.

If indeed the Claimants believed that the application of the principle of *res judicata* prohibited all third party claims as a result of the 1995 Settlement Agreement, they would have without a doubt, invoked this principle as a preliminary defense at some point during the course of the 10 year litigation in *Aguinda*—but they did not. Instead, they spent the final seven years of the case (i.e., the seven years after the 1995 Settlement Agreement entered into force) attempting to persuade, ultimately successfully, the Southern District Court of New York and the Second Circuit Court of Appeals, where they finally succeeded, that Ecuador was the appropriate forum for the resolution of these cases.

As stated, the Contracting Parties that executed the 1995 Settlement Agreement were the Republic of Ecuador, Petroecuador, and Texpet. The Lago Agrio plaintiffs are not and have never been party to the 1995 Settlement Agreement, and as a result, are not bound by it.

The Claimants seek to avoid the most basic principles of law, using two defective premises: (1) that the Government and Petroecuador

represented all Ecuadorian citizens, and acted as their representatives in releasing Texpet from all claims related to "diffuse" rights that belong to Ecuadorian citizens; and, (2) that the Lago Agrio plaintiffs represent those same Ecuadorian citizens, by bringing claims for the same rights in the Lago Agrio Litigation. Ecuador has demonstrated that these two key elements are false. As Dr. Genaro Eguiguren, the government's expert in the arbitration proceedings, has confirmed: "***Neither the Ecuadorian government nor Petroecuador acted in the name of the Ecuadorian citizens when they entered into the 1995 Contract, to dispose of their rights, or to bind them under the contract***". [111]

Specifically, the Government and Petroecuador did not reach any agreement or make any concessions, nor would they have been able to do so, in respect of the rights of citizens to enforce actions under the Civil Code, in particular Article 2236, which provides the right to bring an action to prevent the damage that may threaten such right. In addition, neither the government nor Petroecuador waived any constitutional right of the Ecuadorian citizens, to bring an action to claim their rights to a healthy environment, as per Article 19 (2) of the Ecuadorian Constitution. In fact, as part of the release of their *own* claims, as the grantors of the 1973 Concession against its former Operator-Concessionaire, the Government and Petroecuador waived their *own* rights (i) to bring claims against the Released Parties identified in the Agreement, or (ii) to bring any claim or seek compensation from such parties, if third parties subsequently brought claims against the Releasing Parties.

2.1.4. The Ecuadorian State has not violated the 1995 Settlement Agreement

Neither the Ecuadorian Government nor Petroecuador guaranteed Texpet that no Ecuadorian citizen could, at some point, bring a suit against a "Released Party". Actually, neither party could have made this type of promise, since they did not have the legal authority to prevent third parties from doing so. Such a compromise would also not have made any sense, given the ongoing Aguinda litigation. The only thing that the parties did was to "release" Texaco from the claims that the Ecuadorian and Petroecuador may have had against it or other

111. Second Expert Report of Genaro Eguiguren ¶ 10 (a).

"Released Parties". To date, they have kept their promise, as there is not a single trial in violation of this agreement.[112]

However, the Claimants allege that the Ecuadorian State breached the 1995 Settlement Agreement by *"failing to notify the Lago Agrio Court about the validity and applicability of the release, or to indemnify Chevron for all remediation or remuneration ordered"*. But in the 1995 Agreement, the State never promised any release from third party claims. In fact, the State did not consider that the agreement operated as a release from third party claims, and never committed to inform any court in respect of this incorrect and contrived interpretation.

Chevron-Texaco also argues that the government has breached the 1995 Settlement Agreement by "failing to defend the Claimants' rights as contemplated therein". As previously noted, the Claimants cannot point to any contractual language that imposes on the Government the obligation to "defend the Claimants' rights" contemplated therein.

The Claimants also argue that the Ecuadorian government's enactment of the Environmental Management Act of 1999 constitutes a breach of the 1995 Settlement Agreement. But the Ecuadorian Government, as does any sovereign nation, has the continuing, inherent and irrevocable right to legislate for the public good.

The Claimants argue that the State's criminal investigation into two of the Claimants' internal counsel (investigation which also extended to Government and Petroecuador officials) violated the 1995 Settlement Agreement. However, it would be absurd to think that a contract (or the 1995 Settlement Agreement) could tie the State Prosecutor General's hands in fulfilling its duties.

2.2. Regarding the characterization as a Released Party invoked by Chevron

2.2.1. Chevron cannot be considered a "Released Party" under Article 5.1 of the 1995 Settlement Agreement

Unlike Texpet, Chevron was not a signatory to the 1995 Settlement and Release Agreements, and as such, is not released under Article 5.1 thereof.

112. The provenance or appropriateness of the government's having entered into these release agreements is not under discussion in this arbitration, and as a result, no analysis will be made thereof in the arbitration, nor in this book

The Claimants' claims for breach of contract are based on the 1995 Settlement Agreement, and are governed by Ecuadorian law. Contrary to the Claimants' affirmation that Chevron has been released from liability under Article 5.1 as a *principal*, under Ecuadorian law, the word "*principals*" does not refer to parent companies, and does not cover Chevron. In addition, although the Claimants' allege that the actual *intention* of the Contracting Parties was that the word *principals* should refer to parent companies, the Claimants have not presented any evidence that the Contracting Parties had any intention to deviate from the plain definition of the term.

As a result, Chevron cannot invoke the protection of the BIT to bring claims that arise from or are related to the 1995 Agreement. Even with this forced interpretation, and allowing for Chevron's disagreement with Ecuador on this point, this controversy does not arise from nor is it related to the investment agreement, thus, it is not a "difference related to investments" protected under the BIT.

The meaning of the word principals, under Ecuadorian law

The Claimants argue that Chevron is in a position to invoke the 1995 Settlement Agreement since it is a Released Party, under Article 5.1 thereof. In Spanish, the only official language of the 1995 Settlement Agreement, Article 5.1 defines "Released Parties" covered by the 1995 Settlement Agreement as follows:

> TEXPET, Texas Petroleum Company, Compañía de Petróleos del Ecuador S.A., Texaco Inc. and all their respective agents, servants, employees, directors, administrators, executors, beneficiaries, successors, predecessors, principals and subsidiaries (which are referred to hereinafter as the "Released Parties").

The word *principals* does not refer to parent companies, as argued by Chevron.[113] The term for parent company under Ecuadorian law is "*matriz*". *Principals* refers to the "principal" in the ordinary sense of "principal and agent". [114] Certainly, as Dr. Roberto Salgado explains it, Article 118 of the Ecuadorian Code of Commerce expressly defines a *principal* as the owner or the party that controls a business, which hires an agent to act on behalf of

113. Second Expert Report of Salgado, 2 July 2012, ¶ 13 - 15.

114. First Expert Report of Salgado, 1 October 2010, ¶ 8 - 10; Claimants Reply Memorial regarding the respondents' objections to jurisdiction, 6 October 2010, ¶ 119.

such owner or party's name.[115] Since, as Chevron acknowledges,[116] under Ecuadorian law, all contracts incorporate the law in force at the time of their execution, the definition of *principals* set forth in the Code of Commerce is dispositive in this case. [117]

The Parties' intent

In direct conflict with the legal meaning of the word *principals*, according to Ecuadorian law and the plain meaning of the term, both in English and in Spanish, the Claimants argue that the Parties' intention was to use the term *principals* to exempt all future parent companies of Texaco.

The most reliable indication of the actual intention of the parties at the time of contracting is the plain and legal meaning of the words used in Article 5.1. As the Ecuadorian government's expert witness Dr. Roberto Salgado explained, in accordance with Ecuadorian law, in order to determine the parties' intention, first a tribunal should look to the plain meaning of the terms used in the contract, and, when the plain meaning is clear, such meaning should be applied. In this respect, according to Ecuadorian law, the term *principals* refers to the principal in a relationship between (principal and agent) in an agency agreement. The term *principals* in Article 5.1 includes the "principals" of Texpet, such as Gulf, in whose name Texpet, as Operator, could have acted as an "agent" in connection with the operations of the Consortium.

As noted in Chapter I of this book, in various occasions, before the Lago Agrio Court, Chevron itself attributed a different meaning to the word *principals*, in order to argue that that suit should be dismissed. Chevron's statements in Lago Agrio, at least, show that the Contracting Parties had no clear intention to exempt the parent companies through the use of the word principals in the 1995 Settlement Agreement. Then, the Claimants, in various forums, propose different definitions of the same term. By doing so, they show that they are willing to use whatever interpretation is most convenient for them at a given moment to reach their desired result.

The Claimants attempt to hide the intention of the contracting parties, by referring to the settlement

115. First Expert Report of Salgado, 1 October 2010, ¶ 8 - 10; Second Expert Report of Salgado, 2 July 2012, ¶ 14.
116. Claimants Memorial on the Merits, 6 September 2010, ¶ 399.
117. First Expert Report of Salgado, 1 October 2010, ¶ 7-9

agreements that were entered into with various municipalities in the Amazon Region. The Claimants state that, "*the language used to describe the parties exempt from liability in the municipal settlements also confirms that the parties had the intention that the term 'principals' should include parent companies*."[118] On the contrary, the text of these municipal settlements shows that Texpet's lawyers knew enough at the time to find an adequate translation into Spanish for "parent company" and, further, to negotiate and expressly include the parent companies within the universe of released parties, when it was their intention to do so. In fact, Texpet entered into seven settlement agreements with various municipalities in the Ecuadorian Amazon Region, all of a similar nature to the Settlement and Release Agreement. All seven agreements identified the parties exempt from liability using identical language, which differs from the text of the Settlement and Release Agreement in various aspects, but expressly includes the phrase, "any other affiliate, subsidiary or related company" of Texpet, Texas Petroleum Company, Compañía Texaco de Petróleos del Ecuador S.A., and Texaco, Inc., among those covered by the release.[119] The Claimants propose that both the terms "*affiliate*" and "*related company*" cover a "*parent company*", which *a fortiori* confirms that Texpet's counsel, far from being incapable of "*finding a particularly appropriate word in Spanish for the term 'parent company'*" [120] knew exactly how to draft a clause broad enough to include, *inter alia*, parent companies.

The contracts with the municipalities show that the intent of the parties *in those particular contracts* was to release a wider range of "*affiliate*" or "*related*" companies than those included under Article 5.1 of the 1995 Settlement Agreement.[121] As a result, Texpet, which knew how to release affiliate companies, opted to do so in the Municipal Contracts, and not to do so in the 1995 Settlement Agreement.

118. Claimant´s Reply memorial on Jurisdiction, September 6, 2010, ¶ 51

119. The text of the release from liability in the provincial and municipal agreements also differs from the text of the Settlement and Termination Agreement of 1995, in that they do not include various categories of excluded parties that are included in the Settlement and Termination Agreement of 1995 (servants, executors, beneficiaries and principals) and do include others which are not mentioned in that agreement (legal representatives, insurers, attorneys, guarantors, heirs, contractors, and subcontractors).

120. Claimants Counter-Memorial on Jurisdiction, 6 September 2010. ¶ 51

121. Settlement and Termination Agreement with Joya de los Sachas; Settlement and Termination Agreement with Shushufindi; Settlement and Termination Agreement with Francisco de Orellana; Settlement and Termination Agreement with Lago Agrio.

If the intention of the Contracting Parties cannot be determined from the broad language of the contract or other evidence that demonstrates their intent, any supposed ambiguity in respect of the word principals should not be resolved in Chevron-Texaco's favor.

The Ecuadorian Civil Code, in Article 1582, provides that any ambiguity regarding a contractual obligation should be resolved in favor of the party that must comply with such obligation.[122] Given that the Government and Petroecuador are the parties that must comply—and that have complied—with Article 5.1 regarding the exclusion from liability, then any supposed ambiguity in respect of the definition of the term *principals* should as a result be resolved in the Government's favor. [123]

Article 1582 also provides that when one of the parties is responsible for drafting the ambiguous language, the contract should not be interpreted in the drafting party's favor, as long as the ambiguity results from a failure to explain the terms. [124] If Texpet had the intention to give the word "*principals*" a different meaning from that provided by the Ecuadorian Code of Commerce or from the plain meaning of the term, then its team of knowledgeable attorneys experienced in these matters could and should have indicated so at the time of drafting the 1995 Settlement Agreement.

2.2.2. Chevron has no right to bring claims under the 1995 Settlement Agreement, as it is not a "Party" to that agreement and since such right has been expressly denied to "Third parties"

In Article 9.4 of the 1995 Settlement Agreement, the Contracting Parties expressly agreed that third parties would have no right to enforce its terms.

The first paragraph of the 1995 Settlement Agreement expressly provides that the Contracting Parties are the Government of Ecuador and Petroecuador, on the one side, and Texpet, on the other. No other entity can be considered as a party to the agreement. In compliance with Ecuadorian law, under a bilateral contract—such as the 1995 Settlement Agreement—only those entities that have come to a mutual agreement and have submitted themselves to the reciprocal

122. Civil Code of Ecuador, art. 1582 ("If none of the preceding rules of interpretation may be applied, ambiguous clauses shall be interpreted in favor of the obligor. But ambiguous clauses issued or dictated by one of the parties, whether an obligee or obligor, shall be construed against such party, provided the ambiguity results from the lack of an explanation that should have been provided by such party.").

123. Second Expert Report of Roberto Salgado, 2 July 2012, ¶ 22 - 23.

124. Civil Code of Ecuador, art. 1582; Second Expert Report of Salgado, 1 October 2010, ¶ 24.

obligations created by the contract can be considered as parties thereto. As a result, the Released Parties are not—*and could not be*—parties to the contract.

Article 5.1 cannot be used as the basis for a claim. There is no precedent pursuant to Ecuadorian law under which it has been determined that an exclusion from liability may give rise to a claim for breach of contract.

If there were any ambiguity regarding Chevron's right to enter into a contract, the signatories shall have eliminated any such ambiguity when they adopted the text of Article 9.4. In such Article, the parties contractually agreed that, *"the Contract shall not be interpreted to confer any benefit whatsoever to a third party not party to this Contract, nor shall it confer such third party any right to enforce its provisions."* Therefore, the contracting parties deliberately limited the universe of entities that may claim performance of the 1995 Settlement Agreement to the parties themselves.

The Claimants' arguments are based on complaints regarding the behavior in the administration of justice in the Lago Agrio Litigaiton.[125] As the State's defense has repeatedly explained, Texpet is not a party to the Lago Agrio Litigation, nor will it be affected by any decision in that case.[126] Consequently, even if the 1995 Settlement Agreement included any obligation to "indemnify, protect and defend" [127]–which it does not—there is no conceivable manner in which the State could have violated any obligation of this kind *with respect to* Texpet, in the absence of a claim from that company. Chevron, meanwhile, is not a party to the 1995 Agreement, and as a result has no right under Article 9.4 to file any claim for breach of the Contract.

3. FIRST PARTIAL AWARD: SCOPE OF RELEASE, INDIVIDUAL RIGHTS AND COLLECTIVE RIGHTS

On September 17, 2013, the Arbitral Tribunal issued a partial award regarding Track 1, with its decision on the alleged breach of the 1995 Settlement

125. Claimant´s request for Arbitration on 23 September 2009. ¶ 3

126. Respondent´s Jurisdictional Objections on 26 July 2010. ¶ 123 - 129; See also the Respondent´s reply memorial on Jurisdictional Objections, 6 October 2010 ¶ 152 - 158.

127. See, v.g., Claimant´s Request for Arbitration on 23 September 2009. ¶ 67

The Tribunal found that the government did not have the right to settle the rights of third parties.

Agreement, since there were third party claims for environmental damages brought against Chevron.

In its award, the Tribunal made two statements regarding the scope of the release:

First, the Tribunal explicitly rejected the Claimants' argument that the Settlement and Release Agreement imposed upon Ecuador an obligation to indemnify Chevron and to maintain such indemnity for any cost incurred in relation to the Lago Agrio litigation, including any adverse judgment that could be issued against Chevron. By doing so, the Tribunal rejected one of the Claimants' principal claims regarding the breach.

Secondly, the Tribunal rejected the State's argument that Chevron was not a party to the agreement, despite the fact that the contract does not mention Chevron, nor does it identify it as a party, nor is it a signatory thereto. In the Tribunal's opinion, the contracting parties' use of the term "*principal*" in the context of "*principals and affiliates*" necessarily implied and incorporated the parent companies. In addition, the Tribunal held that it would have been illogical for the parties to exclude from liability only the immediate parent (Texaco) by name, without also having the intention of excluding all future parent companies from liability. For these reasons, the Tribunal concluded that Chevron is released from liability under the 1995 Agreement.

The Tribunal dedicated most of its discussion and analysis to matters pertinent to the scope of the release from liability.

In its decision, the Tribunal agreed with the Ecuadorian defense, in holding that the aforementioned Settlement Agreement did not prevent the Lago Agrio plaintiffs from bringing claims "in respect of their individual rights." For the Tribunal, this Agreeement refers to claims that the Ecuadorian government could bring in exercise of its own rights, and not to claims brought by third parties acting independently of the State, to exercise their own individual rights.

The Tribunal concluded that the scope of the release under Article 5 of the 1995 Agreement and Article 4 of the 1998 Final Release did not extend to third parties with environmental complaints based on individual damages claims, at the same time, in individual rights distinct from those of the State. Accordingly, there is no res judicata regarding these claims or proceedings, since the State cannot bring claims in respect of rights that it does not possess.

The Tribunal expressly indicated that:

> ***"The government has no capacity to: (i) settle the rights of individuals, or (ii) represent individuals with the purpose of settling on its own name the rights conferred upon individuals under Ecuadorian law, including those rights set forth under Article 19-2 of the Constitution; and for these purposes, the nature of the right is irrelevant (i.e., if the right is diffuse or of any other nature) since a settlement, in accordance with Ecuadorian law, can affect only the parties to such settlement, and cannot affect the rights of third parties."*** [128]

> "The accusations brought by the Claimants companies are based on nonexistent contractual obligations, which has not prevented its public relations team from attacking Ecuador as a country that has refused to comply with its contractual obligations, or from its implacable attacks on our country in political circles in the United States. Defending the country against this aggressive campaign has required an enormous diplomatic effort, as the Claimants seek to seriously harm Ecuadorian interests. For these reasons, I have asked the Tribunal to end this abuse of the law as soon as possible."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, November 28, 2012**

However, it departed from the Ecuadorian defense by considering that the 1995 Settlement Agreement prevented third parties from bringing claims based on "diffuse" or "collective" rights, since, according to the Tribunal, these would have been subject to the release granted by the government at that time. In this regard, the Tribunal performs an analysis where, in its opinion:

128. First Partial Award on liability in Track I issued on September 17th, 2013

> *"in accordance with Ecuadorian law at the time of celebration of the 1995 Settlement Agreement (i.e., that is, prior to the 1999 Law) only the Government of Ecuador could bring a claim based on a diffuse right under Article 19-2 of the Political Constitution of the Republic of Ecuador, in order to protect the rights of citizens to live in an uncontaminated environment. At that time, no other person had standing to bring such a claim."* [129]

Despite having expressly recognized that Article 19-2 of the Political Constitution of the Republic of Ecuador, in force at the time of entry into force of the 1995 Agreement, [130] is not structured in terms that explicitly confer any right to bring an action, and there is no record (as of 1995) of the Ecuadorian government, as a representative of the community, having brought any claim, at any time, in legal proceedings in order to claim environmental damages against any person for violation of Article 19-2, the Tribunal concluded that since the Constitution guarantees the right to a clean environment and the State consented to the drafting of Article 5.2 of the 1995 Settlement Agreement,[131] the Ecuadorian government implicitly acknowledged the possibility that the State could bring an environmental claim on behalf of the community.

In arguing this, the Tribunal ignored a critical provision that would have limited this release; Article 5.2 is a release in respect of claims of a contractual, extra-contractual and regulatory nature that corresponded to the State. In other words, the waiver in the 1995 Agreement did not refer to actions under Article 19.2 in a general manner, but to "*actions of a regulatory nature*", including those actions brought by the corresponding Ministry as applicable under Article 19.2.

129. First Partial Award on liability in Track I issued on September 17th, 2013

130. Art. 19 "Notwithstanding other rights which are necessary for the full moral and material development that is derived from the nature of the person, the State guarantees: … 2. The right to live in an environment free of pollution. It is the duty of the State to ensure that this right is not affected and to promote the preservation of nature. The law shall establish the limitations on the exercising of certain rights and freedoms, to protect the environment; …"

131. Clause 5.2 of the Contract, "The Government and Petroecuador intend claims to mean any and all claims, rights to claims, debts, liens, common or civil law or equitable causes of actions and penalties, whether sounding in contract or tort constitutional, statutory, or regulatory causes of action and penalties (including, but not limited to, causes of action under Article 19-2 of the Political Constitution of the Republic of Ecuador. Decree No. 1459 of 1971. Decree No. 925 of 1973, the Water Act, R.O. 233 of 1973.ORONo. 530 of 1974. Decree No. 374 of 1976, Decree No. 101 of 1982, or Decree No. 2144 of 1989, or any other applicable law or regulation of the Republic of Ecuador), costs, lawsuits. settlements and attorneys' fees (past, present, future, known or unknown), that the Government or Petroecuador have, or ever may have against each Releasee for or in any way related to contamination, that have or ever may arise in the future, directly or indirectly arising out of Operations of the Consortium, including but not limited to consequences of all types of injury that the Government or Petroecuador may allege concerning persons, properties, business, reputations, and all other types of injuries that maybe measured in money, including but not limited to, trespass, nuisance, negligence, strict liability, breach of warranty. or any other theory or potential theory of recovery.

In accordance with this Tribunal's view of the case, at the time of signature of the Agreement in 1995, only the Republic, no one else, could have exercised a diffuse right under Article 19.2 of the Constitution. Therefore, the State, being the only party that could exercise diffuse rights, was also the only party that could settle claims related to them, and so it did. What changed after 1995 was the individual's right to bring a claim under Article 19.2. This new right was confirmed under the Environmental Management Act of 1999. However, the right of an individual to bring a claim for diffuse rights does not revive the rights settled under the 1995 Agreement.

The Tribunal considered that, under the 1995 Settlement Agreement, and the Final Release, any claim or demand of the State or third parties that invoked diffuse rights against the "released parties", precluded. The Tribunal based its theory on the assumption that the State, as guarantor of the right to live in a healthy environment, is the only right holder to bring actions to protect the population from violations of environmental rights. This is absurd. **This interpretation would leave communities with no defense whatsoever, in cases in which it could be the State itself that caused the environmental damage. The Tribunal erred when it interpreted the Constitution in this manner, and in setting aside the ability of communities to bring actions to defend their rights, and moreover given that the Tribunal expressly recognized that Article 19-2 of the Political Constitution of the Republic of Ecuador, in effect at the time of signature of the 1995 Agreement, is not structured in terms that explicitly confer any right of action,** and that there is no record (as of 1995) of the Ecuadorian government, as a representative of the community, having brought any claim, at any time, in legal proceedings in order to claim environmental damages against any person for a violation of Article 19-2.

The Tribunal rejected Chevron and Texaco's argument that the settlement agreements contained a clause providing an indemnity from the State of Ecuador for any cost incurred by the company.



Washington D.C., Sunday, April 19, 2015, Winston & Strawn offices, meeting to prepare the Hearing held at the World Bank, from April 21 to May 8, 2015.

Finally, the Tribunal did not agree with the Ecuadorian defense's arguments in the sense that Chevron, since it was not mentioned in the contract, was not a party thereto, and as a result, could not be considered to have been released from liability. The Tribunal considered that having written "principals and subsidiaries", it was unnecessary to include the word company because the meaning was obvious. It is illogical to determine that the intention was to limit the concept of "parent" or "controlling" company only to Texaco and not to future companies. For these reasons, the Tribunal concluded that Chevron was released under the 1995 Agreement.

> "Contrary to what the company has stated in its press release, the Tribunal also failed to consider—and much less to resolve—the allegations that Chevron raised regarding the judgment handed down by the court in Ecuador, which they called fraudulent. The court also did not find, as the vice president of the company noted, that the claims of fraud should never have been presented."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, September 18, 2013**

Nonetheless, the Tribunal rejected the argument of the oil company that the Contract in question implicitly contained a "release from liability" or indemnity clause, which would hold the Ecuadorian State responsible for any cost incurred by Chevron or for the effects of any judgment issued against it.

In this partial award, the Tribunal did not take on the question of whether the Lago Agrio plaintiffs' claim pursued the enforcement of their individual rights or their diffuse rights, or both; if the claims are similar to those of the New York proceeding; and, regarding the specific effect of the reforms to Ecuadorian law after the entry into force of the 1995 Agreement and the 1998 Final Release, including the interpretation and application of the Environmental Management Act of 1999.

The Tribunal also did not determine the nature and scope of class action suits under the Civil Code. Based on the testimony of the parties, the Tribunal concluded that, apparently, a plaintiff could not initiate an action for environmental damages of a collective nature without alleging any personal damages. However, the Tribunal preferred to leave this issue for a future ruling.

4. ANNULMENT ACTION OF THE AWARDS ISSUED BY THE ARBITRAL TRIBUNAL

On January 17, 2014, the State Attorney General's Office filed before the District Court of The Hague, an application for annulment of the partial award, regarding liability in Track I (a) issued on September 17, 2013.

The application for annulment also included the interim awards of provisional measures issued by the Tribunal on January 25, February 16, 2012, and February 7, 2013, as well as the interim award regarding Jurisdiction and Admissibility, rendered on February 27, 2012. To this date, the Court still has not set a date for hearings.

The application for annulment is based on the following arguments:

There is no valid arbitration clause: The conflict among the parties arose from the 1995 Agreement, and not from the 1973 Concession Agreement, as the Arbitration Tribunal found. Moreover, the 1995 Agreement is not an investment contract and cannot be considered as an investment contract within the definition of "investment" in the BIT.

This argument has various premises:

Lack of an investment. According to Ecuador, the Arbitral Tribunal incorrectly held that had jurisdiction due to an investment that had already concluded at the time that the BIT entered into force.

The Arbitration Tribunal cannot decide that it has jurisdiction based on the 1973 Concession Agreement, since that contract ended in 1992; therefore, the investment is not covered by the terms of the BIT. The BIT is clear in stipulating that Article VI applies only to investments that were in existence at the time of its entry into force, or thereafter. On the date in which the BIT entered into force, May 11, 1997, Texaco's investment did not exist, as it left Ecuador on June 6, 1992, almost five years prior to the entry into force of the BIT.

There is no continuity of investment by means of the 1995 Settlement Agreement. The Arbitral Tribunal erred in declaring that the 1995 Settlement Agreement "revived" the extinct 1973 Concession Agreement. The objective of the 1995 Settlement Agreement was not to revive the 1973 Concession Agreement, but on the contrary, to seek remediation of environmental damages caused as a result of the irresponsible extraction operations of Texaco in the Ecuadorian Amazon Region.

There is no continuity of investment through the Lago Agrio Litigation. The Lago Agrio litigation is a proceeding among the Lago Agrio plaintiffs and Chevron. Consequently, they should not be considered as a continuation of the Concession Agreement.

Chevron is a not a direct investor. Chevron did not fall under the definition of a "released party" under the 1995 Settlement Agreement. As a result, Chevron has no any claim under the 1995 Settlement Agreement.

The awards are contrary to public order and the arbitrators did not respect their mandate. The basis of these arguments is as follows:

Unacceptable review of a proceeding decided by the Ecuadorian courts. The Tribunal did not have any right to intervene in the Lago Agrio litigation. The Arbitral Tribunal reached a point of ordering Ecuador to prevent the enforcement of the judgment in the Lago Agrio litigation within and without Ecuador—that is, the Tribunal requested the Republic of Ecuador to interfere in its judicial power, violating its internal laws and the principle of separation of powers, a key element and a fundamental pillar of democracy.

The Arbitral Tribunal's decision affects the rights of Ecuadorian citizens to live in an uncontaminated environment. The Tribunal violated public order by limiting the rights of Ecuadorian citizens, when it ignored Article 19 of the Ecuador's Constitution in force in 1995.

The Tribunal has exceeded its powers by ruling on the rights of the Lago Agrio plaintiffs. The Lago Agrio plaintiffs are not party to the arbitral proceedings, and as a result, by ordering the State of Ecuador to prevent the enforcement of the judgment of the Lago Agrio litigation within or without the jurisdiction, the Tribunal affected the rights of third parties who are not party to the arbitral proceedings.

The Tribunal violated the UNCITRAL Rules. In the Fourth Interim Award, the Tribunal declared that Ecuador had violated the First and Second Interim Awards, for which it had no authority. Any matter related to the issue of liability and damages that could have been derived from those awards could be resolved solely in the final award, and not through any other interim award.

5. THE "RESETTING" OF THE PROCEEDINGS

On November 12, 2013, the National Court of Justice issued a cassation judgment in the Lago Agrio Lawsuit, partially upholding the appellate court's judgment of January 3, 2012.

The issuance of this ruling substantially changed the issues under discussion within the arbitration proceedings, but, most of all, it revealed that Chevron's claim was premature, since it was made clear that the denial of justice claim had been filed without exhausting the domestic remedies that are available to the public, essential requirement to be liable for a denial of justice claim. This should have resulted in the resolution of the proceedings in favor of Ecuador due to lack of merits of the claim, which the defense raised expressly in its brief of November 14, 2013.

However, the Tribunal did not dismiss Chevron's case. Instead, in an act without precedent in the history of investment arbitration, and in accordance with the terminology used by the President of the Tribunal, the proceedings were "reset".[132] Everything that had been argued up to that point lost its raison d'être, as acknowledged by the Tribunal itself in a procedural order dated December 5, 2013. Indeed, the Tribunal even admitted that the National Court's decision raised "new legal issues potentially relevant to the defendant's case in these proceedings". Despite the opposition of the Ecuadorian State, which motioned for the suspension of the arbitral proceedings, the Tribunal changed the purpose of the hearing that had been scheduled for January 2014, in which issues of liability that the parties had argued to that extent would have been discussed. The hearing instead became procedural meeting intended to reinitiate the proceedings, which became effective through a procedural order issued on

132. Transcript of the audience, January 2014. Day 1. January 20, 2014: "President Veeder (translated from English): … We would like to make the procedure here very clear, and be open to the possibility of hitting the reset button. But after these dates, from the date that we are going to set, it will not be possible to present documents or evidence without a motion to the Tribunal where the presentation is justified, and offering the other party an opportunity to present its arguments…"

February10, 2014, through which the liability stage was once again divided into three tracks: 1b, II and III.

The gravity of the Tribunal's decision to reconfigure the case and its reticence to dismiss it are evident, since there is no legal basis, neither in the *lex arbitri* (Dutch law), nor under the procedural rules (UNCITRAL), nor in the arbitration agreement, that would approve this "reset". No Tribunal within the investor-State conflict resolution system had ever done this before, and this conduct frankly violates Ecuador's right to due process.

According to its mandate, the Tribunal should have proceeded as other panels have in similar cases. The *Alps Finance and Trade AG v. Republic of Slovakia* case deserves particular mention.[133] The claim was brought by a Swiss investor who alleged that the Republic of Slovakia was liable for failure to provide an effective remedy, given a lower court decision that was, in its opinion, unfair.

The Tribunal:
Expressly rejected the plaintiff's "assumption" regarding the Tribunal's power to correct or remediate a presumed error of the lower court, in the same way that a Slovakian appellate court would do so.

> The "resetting" of the arbitration proceedings showed that the claim Chevron had presented was premature, and made it clear that the claim for denial of justice had been presented without exhausting domestic remedies provided by the State of Ecuador.

Rejected the plaintiff's argument that the Slovakian Republic was "strictly liable" under International Law, due to the fact that one of its local courts had come to an allegedly erroneous legal decision.

Concluded that International Law did not prohibit the existence of errors of law, but opposes the existence of a justice system that does not comply with a minimum standard, in such a way as to lead to an inevitable denial of justice.

Held that:

- the plaintiff had available appeals, in order to attempt review of the lower court's decision, to the extent that the plaintiff considered such

133. Alps Finance and Trade AG v. Republic of Slovakia. Award dated 5 March 2011

decision to be prejudicial to its interests; and

- the failure to exhaust domestic remedies was "per se" sufficient to exclude the possibility of international liability for the Republic of Slovakia for the actions or omissions of its judicial system".

With this reasoning, the tribunal ruled that the plaintiff had not complied with the requirement that it present prima facie evidence of a claim based on the treaty.

The Tribunal's "resetting" of the proceedings in this case has done nothing other than allow Chevron-Texaco to exhaust domestic remedies while the arbitral proceedings are ongoing, which—in the words of Professor Lucius Caflish— is virtually impossible:

> *"We should ask ourselves, in the first place, if it is still possible for the plaintiff to completely exhaust domestic remedies after the initiation of arbitral proceedings. The answer will have to be no: it is indisputable that international jurisdiction must exist at the moment that the proceedings begin. In other words, the Tribunal does not have jurisdiction over the plaintiff's argument of lack of an effective remedy, because there has been no claim for protection under international law, or over the BIT case regarding lack of an effective remedy, at the moment that it was stopped, given that the plaintiff had not exhausted the available and effective domestic remedies. In fact, having failed to exhaust domestic remedies, we can conclude that the plaintiff has abandoned its claim."* [134]

The reset of the proceedings brought with it serious implications in respect of Ecuador's defense of the case. First: the discussion regarding the irregularities in the decisions issued by the lower and appellate courts was turned into a discussion about the National Court of Justice's decision, which, in an impartial manner, considered all the evidence and dealt with the innumerable allegations regarding the proceedings before the lower courts. Second: the legal analysis employed by the lower courts was superseded by the legal analysis of the National Court, transforming the reports of the expert witnesses previously submitted

134. Second Expert Report for the State of Ecuador, 16 February 2015. Case of Merck Sharp & Dohme v. Republic of Ecuador.

by both parties, as well as the related arguments in the respective briefs, irrelevant. And that was not the end of it. Chevron itself appealed the National Court of Ecuador's decision before the Constitutional Court. In light of this fact, we should ask ourselves, following the logic that the Tribunal has used in conducting the arbitration proceedings thus far, if, once a decision is reached by the Constitutional Court, the Tribunal will require an update of the facts, or will implement a new "reset" of the case. The mere possibility that this could happen sounds absurd. In fact, what would be the consequences for an arbitral proceeding that has gone on for more than seven years, if the Constitutional Court were to grant Chevron the reparations it seeks?

6. THE OPENING OF A NEW PROCEDURAL SUBTRACK (TRACK 1B)

According to the Tribunal's orders, Track I (b) would deal with the following matters:

Those detailed in paragraph 93 of the Partial Award in Procedural Track I, that is:

> "This procedural calendar has prolonged the proceedings by allowing the parties to raise new arguments within them, which confirms the position that Ecuador has maintained throughout the litigation, that the oil company's presentation of the request to arbitrate was premature, as the company did not exhaust domestic remedies under local law. As such, the cassation decision handed down by the National Court of Justice this past November 12 changed the factual basis of Chevron's case, and has made everything that has happened prior to it in these arbitral proceedings futile and irrelevant. As a result, the Ecuadorian defense noted its concern in respect of how the proceedings have been managed during the hearing, and has not ruled out the possibility of presenting an action to invalidate.
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, February 3, 2014, in respect of the modification of the procedural calendar by the Arbitral Tribunal due to the issuance of the cassation sentence in the Lago Agrio suit de casación en el Juicio de Lago Agrio.**

If the Ecuadorian State did or did not violate Article 5 of the 1995 Settlement Agreement and Article IV of the Final Release; and, if this is the case, precisely what are the remedies that are available to Chevron and/or

Texpet against the defendant, in respect of each of the presumed violations (i.e., indemnification for damages, declaratory reparations or specific performance);

If the Lago Agrio plaintiffs' alleged arguments are or are not based on individual rights distinct from "collective" or "diffuse" rights (in whole or in part), and if those claims are or are not essentially similar to the claims made by the Lago Agrio plaintiffs in the Aguinda litigation heard in New York; and

The specific effect of any of the changes to Ecuadorian law that occurred after the entry into force of the 1995 Settlement Agreement and the 1998 Final Release, including the interpretation and application of the Environmental Management Act of 1999.

Those issues set forth in paragraph 110 of the Partial Award of Procedural Track I, and which refers to the nature and scope of the class action suits brought under Articles 990 and 2236 of the Civil Code.[135]

The effects on the First Partial Award of the cassation judgment issued on November 12, 2013, by the National Court of Justice.

6.1. Arguments presented by Chevron and Texaco

On January 31, 2014, Chevron and Texaco presented a supplementary brief in respect of the points raised in Procedural Track 1 (b), reiterating the arguments they had already presented, which, in essence, are as follows:

The claims of the Lago Agrio plaintiffs are diffuse by nature, and were settled by the Government in the 1995 Settlement Agreement.

Ecuador is in breach of its positive and negative obligations contained in the release agreements. According to the Claimants, Ecuador did not defend the Claimants' rights nor did it take any measures to ensure that the settlement agreements were not breached.

The actions of the Ecuadorian State resulted in a breach of the obligations contained in the Settlement Agreements, and thus, in a breach of the umbrella clause contained in the Investment Protection Treaty.

135. "Lastly, the Tribunal has not here decided the nature and scope of popular actions under Articles 990 and 2236 of the Civil Code. From the Parties' expert witness reports, there appears to be common ground that a claimant could not bring any environmental claim as a popular action without (inter alia) claiming actual or threatened personal harm. The Tribunal has again heard much less about these popular actions (both before and after the 1995 Settlement Agreement); and, whilst it seems at present that these actions are unlikely to be decisive one way or the other in this case, the Tribunal again prefers to defer its decision for the time being. Similarly, the Tribunal will if necessary request further submissions from the Parties on these popular actions.."

6.2. Ecuador's arguments

On March 31, 2014, Ecuador filed its supplementary brief regarding the outstanding issues to be dealt with in Procedural Track I B, which had already been argued during Procedural Track I A.

In particular, Ecuador reiterated its line of argumentation regarding the fact that, despite the multiple opportunities that Chevron-Texaco were given, the companies have not been able to identify what Article, of the 1995 Settlement Agreement had been violated. At the date of filing of the memorial and, since the beginning to the proceedings, five years have passed, during which Chevron and Texaco have not been able to provide support for their claim based on a specific clause of the Agreement.



Washington D.C., Sunday, April 19, 2015, Winston & Strawn offices, preparation of closing arguments for the Closing Hearing to be held on April 21 at the World Bank.

As opposed to Chevron and Texaco's position, Ecuador argued that the claims brought in the Lago Agrio litigation did not deal with diffuse rights, but, on the contrary, the plaintiffs in that case sought to protect their individual rights to live free of threat of contingent damages, which they allege affect their health and property. The legal principles on which the Lago Agrio litigation is based are related to the protection of the plaintiffs' individual rights, as follows: (1) the civil right to reparation for any unlawful act under Articles 2241 and 2256 of the Civil Code (now Articles 2214 and 2229); (2) the constitutional right to live in an environment free of contamination, in accordance with Article 23 (6) of the Constitution of 1998; and (3) the civil right to bring a class action suit under Article 2260 of the Civil Code (now Article 2236), in order to eliminate the threat posed by a contingent damage.

This provision of the Civil Code forms an integral part of Ecuadorian law on damages, and calls for reparation in those cases in which the unlawful conduct of another party has given rise to a threat of damage that could affect a determined or undetermined group of individuals.[136] The class action suit under Article 2236 allows a party to seek to eliminate the act that threatens a contingent damage.

In the National Court's cassation judgment, the court established a clear distinction between "collective and "diffuse" rights or interests.[137] According to the Court, the claims made in the Lago Agrio Litigation were raised in order to protect the individual rights of citizens in the affected areas who allege that they are *personally* threatened by the environmental contamination caused by Chevron, and are trying to protect their own lives, health and property. The National Court concluded that these claims, brought in respect of individual rights, could not have been settled by the Government through the 1995 Settlement Agreement.

More specifically, the Lago Agrio plaintiffs requested reparation, and the National Court affirmed their rights to this remedy in accordance with Article 2236 of the Civil Code, which is part of the Ecuadorian legal framework since 1861. This provision contemplates reparation in cases in which the unlawful act caused

136. Civil Code of Ecuador, Art. 2236: As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.

137. According to the National Court, collective rights belong to a group of persons who are affected by the same injury, while diffuse rights belong to all members of a society, and are related to matters that are of interest for the entire world. See C - 1975, Decision of the National Court at 195 ("These rights [collective rights] are granted to a specific segment of the population, and are not granted to all citizens in general").

by another party has resulted in a threat of damage to a determined or undetermined group of individuals.[138] Article 2236 allows for the accumulation of claims of a group of individuals who are confronting the same risk of personal damage.

Before initiating these arbitral proceedings and prior to Chevron-Texaco having any reason to provide a biased description of the of the Lago Agrio plaintiffs' claims, the company acknowledged, in its own words, that the claims formulated in the Lago Agrio litigation included "personal" claims. In the introduction to a brief filed on June 15, 2004, prepared by Texaco for the government of Ecuador, the defendants stated that the Lago Agrio plaintiffs were bringing a claim for "***personal damages*** *and damages to the environment*".[139] In addition, Ecuador argued that:

Regarding the alleged breach of the 1995 Settlement Agreement. The Ecuadorian judiciary is not a party to the 1995 Agreement. The Government never committed the judiciary to act in a certain manner, or so that it would guarantee any legal result whatsoever. It also cannot be implied that the 1995 Settlement Agreement represents an agreement binding on the entire State, including the judiciary, given that the requirements for the internationalization of a contract were never finalized. Moreover, Ecuadorian law in effect at the time of celebration of the agreement expressly prohibited the government, and other public entities, from entering into contracts with foreign parties that were subject to a foreign jurisdiction and governed by foreign law.

Regarding the alleged violations of the BIT. Ecuador, quoting Professor Crawford (Chevron and Texaco's attorney), argued that the BIT could not be used as a mechanism that would allow an investment agreement to be rewritten, or in order to obtain a better contractual deal that such obtained by the investor.

Ecuador argued that even if there had been a breach of the 1995 Settlement Agreement, such a breach could not be considered a breach of the BIT. As Professor Crawford himself stated, Ecuador's responsibility for violations of International Law is different from the responsibility that the State could have for breach of contract.

138. Civil Code of Ecuador, Art. 2236: As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.

139. Memorandum from Chevron Texaco to the government of Ecuador, dated 15 June 2004, at 1 (emphasis added)

The Lago Agrio lawsuit is a continuation of the Aguinda litigation in New York. The Claimants accepted that the arguments raised in the Aguinda case were based on individual, rather than diffuse, rights. Pursuant to this premise, the Claimants argued that, as a result, the 1995 Settlement Agreement did not resolve their claims. However, the Lago Agrio litigation was simply a continuation of the Aguinda litigation. When the Claimants requested that the Aguinda litigation be dismissed, the parties and the Court acknowledged that the Aguinda claims should be reformulated in terms of principles of Ecuadorian law. The United States Second Circuit Court of Appeals expressly found that the Lago Agrio case was a continuation of the Aguinda litigation. Given that the claims in Aguinda were claims based on individual rights, the Lago Agrio claims should also be recognized as claims based on individual rights. In fact, if the Claimants had not brought the same claims before Ecuadorian courts, the country would not have provided them with an adequate alternative forum, and there would be no basis whatsoever for the dismissal of Aguinda based on an argument of *forum non conveniens*.

The National Court of Justice of Ecuador correctly dismissed Chevron and Texaco's res judicata arguments. The National Court of Justice, as the final instance in the Ecuadorian judicial system, correctly dismissed Chevron Texaco's arguments for the following reasons:

The Lago Agrio litigation was brought in respect of the rights of individuals, which could not have been settled through the 1995 Settlement Agreement.

The Lago Agrio plaintiffs sought to protect their individual rights—that is, to protect their own health and property. The Claimants also indicated that Ecuadorian law specifically prohibited the settlement of the rights of third parties. Article 2354 of the Civil Code provides that: "*Any settlement involving the rights of third parties or rights that do not exist shall be invalid*." Moreover, Article 2350 of the Civil Code provides that: "*Only the person capable of disposing of the objects contemplated by the settlement has the right to settle*." Any agreement contrary to this provision shall be null, since it violates Ecuadorian law.

7. THE STATE'S REQUEST TO RECUSE MEMBERS OF THE TRIBUNAL AND THE "OMNIBUS" ORDER

On October 24, 2014, the Republic of Ecuador filed a motion to recuse three members of the Arbitral Tribunal before the Permanent Court of Arbitration, in accordance with Articles 10 and 12 (1) of the 1976 UNCITRAL Rules. This motion to recuse was the result of a series of events that gave Ecuador reasonable doubt, both in respect of the impartiality of the Tribunal, as well as its capacity to dedicate the necessary time to the arbitration.

The motion was filed five years after the arbitration proceedings had commenced by Chevron Texaco against the Republic of Ecuador, during which time the Arbitral Tribunal opted not to rule on the urgent motions made by the Ecuadorian State (many of them presented several years ago). In its brief, the State's defense argues that the record shows that the Tribunal lacked the time to rule on these urgent motions of the State, or, in other words, its dedication of resources to considering and resolving the petitions of the Claimants in a timely manner, without showing the same respect for Ecuador's motions, gives the appearance of bias. More worryingly, from Ecuador's point of view, was the Tribunal's reluctance to call and schedule an in-situ visit to the Ecuadorian Amazon Region, or to order Chevron to terminate its lobbying efforts to impede the renewal of certain commercial benefits for the Ecuadorian State by the United States government.

In addition, for five years, the Tribunal allowed Chevron-Texaco to engage in inappropriate procedural conducts, with the submission of unauthorized evidence or the introduction of completely new allegations over the course of the proceedings, with each brief or just before the hearings.

Definitively, the Tribunal's conduct prevented the government from presenting an adequate defense to its case, violated its right to a fair and orderly proceeding, and allowed that its economic and international interests be affected, beyond the scope of the arbitration.

This motion to recuse was formulated under the legal mechanism provided for in the UNCITRAL Rules, with the objective of defending the State's

legitimate interests, as it has done in other arbitral proceedings. As such, the motion to recuse in no way creates an exceptional situation.

7.1. The Tribunal's failure to act

When the State filed its motion to recuse, Ecuador was clear that the Tribunal had "*persistently failed to dedicate the necessary time in order to rule on important questions in these arbitral proceedings, and its conduct has clearly not met reasonable standards*."[140] Any reasonable observer would conclude that the Tribunal's conduct could be characterized as a "failure to act" for purposes of the UNCITRAL Rules and the Dutch Rules of Arbitration (the lex arbitri of the proceedings), in the following instances:

Taking nearly three years to decide whether it was convenient to make an in situ visit, which was later canceled due to the "ongoing discrepancies" between the parties, and the lack of availability of members of the Tribunal. [141]

Taking more than two years to rule on Ecuador's motions in respect of provisional measures, when by means of those motions it sought protection from Chevron Texaco's abusive conduct.[142] Ecuador's motion for provisional measures was designed to enforce the internal measures that the Tribunal had previously ordered, which compelled both parties to avoid exacerbating their differences.

Relegating Ecuador's motion for the reconsideration of the Fourth Partial Award (finding that the State had not complied with two previous interim awards), until the end of the arbitral proceedings, and as a result preventing the filing of a motion to invalidate the Awards during the entire proceeding. Despite this, the Claimants used the challenged Fourth Interim Award to damage Ecuador's interests outside the arbitration proceedings. [143]

7.2. The Tribunal's apparent lack of impartiality

For Ecuador, it was also clear from the facts and circumstances of the arbitration proceedings, that a reasonable observer would have justifiable doubts regarding the Tribunal's impartiality, as evidenced by the following events:

140. Motion for recusal presented before the Secretary General of the PCA in accordance with Art. 12 of the UNCITRAL Rules of Arbitration, ¶ 12, 20.
141. Id. ¶ 20, 31-55.
142. Id. ¶20, 59-66.
143. Id. ¶ 20, 69-70.

- In January 2014, the Tribunal, in an extraordinary and unprecedented move, ordered Ecuador to produce the hard drives of a former judge of a domestic court for its records, despite the fact that the hard drives were in the possession of a state prosecutor, as part of an ongoing criminal investigation. In the following months, the Tribunal acted in a timely manner, resolving the parties' differences and, when an agreement could not be reached, adopting a protocol to govern the parties' actions in respect of the hard drives, and ordering that the parties travel to Ecuador in order to implement and execute the protocol. In contrast, and despite the fact that Ecuador had been requesting an in situ visit over a period of several years, the Tribunal failed to act with the same celerity after it had finally issued an order directing the parties to propose a protocol that would govern the requested in situ visit in January 2014. Instead, eight months later, there was no protocol, the Tribunal failed to perform follow up to a call that had been promised, in order to resolve the differences between the parties. The Tribunal, in fact, missed a deadline for the in situ visit, without proposing a new date in its place.

- The Tribunal did not treat the parties equally, by admonishing one of Ecuador's attorneys for his comments in a magazine specializing in arbitration. The Tribunal did not do the same when one of the Chevron Texaco attorneys made a series of public comments and systematically criticized the Republic.

- The Tribunal sided unfairly with Chevron Texaco in March 2014, by accepting a petition to include questions of international law in Procedural Track 1 regarding liability, when the Tribunal had previously issued a procedural order stating that matters of international law would only be dealt with in Track 2. Even more seriously, this change in position came about only several weeks before Ecuador was to file its final brief, and on the eve of a Track 1 hearing.

- The interim awards on provisional measures show a lack of respect for Ecuador's legitimate interests. In fact, in the first two interim awards in 2012, the Tribunal ordered Ecuador to violate its own laws and constitutional principles.[144] With the Fourth Interim Award in February 2013, the Tribunal did nothing more than support the Claimants' lobbying efforts against the State of Ecuador.

- The Tribunal handed down its First Partial Award in September 2013, primarily in order to rule on matters of Ecuadorian law, despite the fact that the highest court in Ecuador, the National Court, had

144. Id. ¶ 75, 93.

The Tribunal found that there was no impediment to the presentation of the Lago Agrio complaint, as there was no res judicata matter, and, in addition, that the Lago Agrio complaint included the individual claims that had been presented by the claimants in the Aguinda Litigation.

considered an internal case that had dealt with many of the same matters. The Tribunal's decision to issue its first partial award before the National Court had the opportunity to issue its ruling, seemed designed to prevent the revision of the Tribunal's conclusions on Ecuadorian law, without any deference to the ruling of the highest court in Ecuador.

On November 21, 2014, the Secretary General of the Permanent Court of Arbitration issued its ruling rejecting the motion to recuse, since in the Tribunal's opinion, the facts and evidence presented did not show that the Tribunal had consciously ignored its duties, nor that its general conduct clearly did not meet acceptable standards, or that it could be considered that the Tribunal had failed to act, and as a result had failed to comply with its duties.

The Secretary General also concluded that it could not accept that there existed justifiable doubt in respect of the Tribunal's impartiality, in terms of the UNCITRAL Rules or the Dutch Rules of Arbitration.

Despite this fact, Ecuador's arguments regarding the Tribunal's repeated lack of attention to the motions filed by the State were validated when, on June 18, 2015, the Tribunal issued Order No. 38, referred to, in the Tribunal's own words, as the "**omnibus order**". This order was designed to deal with all motions that were more than three years old; in the majority of cases, indicating that given the fact that the issues were no longer relevant, they did not merit a discussion.

The issuance of this procedural order is the clearest evidence of the consistency and of the sufficient basis for Ecuador's motion to recuse.

8. THE TRACK 1B DECISION

On March 12, 2015, the Arbitral Tribunal issued its decision on Track 1B in respect of liability regarding

the legal effects of the 1995 Settlement Agreement, and the 1998 Final Release, celebrated between Texaco and the Republic of Ecuador.

In doing so, the Tribunal explained that it had deliberately limited its decision, and, at the same time, noted various matters that it would resolve in one or more rulings or awards, as follows:

1. The Tribunal's determination to conduct a more in-depth investigation in respect of those questions that it deliberately did not address in the First Partial Award; that is, regarding whether the claims of the Lago Agrio plaintiffs, which were originally argued in Ecuador, were or were not based on individual rights, and whether these are or are not distinct from diffuse rights (in whole or in part), and whether or not these claims are significantly similar to those previously brought by the Lago Agrio plaintiffs in the Aguinda litigation in New York. The Tribunal clarified that this decision will be



Quito D.M., offices of the PGE, defense team of the International Affairs and National Arbitration Direction of the Office of the State Attorney General assigned to the Chevron case: Daniela Palacios, Esq., Chrystel Gaibor, Esq., Blanca Gómez de la Torre, Esq. and Felipe Aguilar, Esq.

made during the portion of Track 2 dealing with liability by way of one or more orders, decisions and additional awards.

2. The Tribunal was still unable to fairly or adequately consider the conduct of the Ecuadorian courts in deciding the cases brought by the Lago Agrio plaintiffs. In other words, whether any deference should be given to the rulings issued by the courts in these cases, in light of the claims of the Claimants in respect of whether the local courts were liable for failure to provide an effective remedy.

3. The March 12, 2015, decision should not be considered as an award, and as a result, the Tribunal fully conserves its jurisdiction to review any of the parts thereof during a later track within the arbitral proceedings, by one or more orders, rulings or awards, without having to reach the point of *functus officio* (a Latin term meaning "having completed its duties"), with respect to any question resolved therein.

The Tribunal's ruling covered various issues and it resolved, although not in an award, the following:

1. **The initial brief filed in the Lago Agrio litigation, on May 7, 2003, included individual claims based on individual rights under Ecuadorian law, which were as a result, not included in the scope of the 1995 Agreement, as Chevron Texaco has argued;**
2. **There Lago Agrio Complaint had no impediment to be filed, since there was no res judicata under Ecuadorian law or under the 1995 Agreement; and,**
3. **The Lago Agrio Complaint included individual claims that were in their essence similar to those individual claims filed by the plaintiffs in the Aguinda litigation in New York.**

To reach these conclusions, the Tribunal performed the following analysis:

a. The Tribunal recalled that when it issued its first partial award on liability, it left various matters to be decided at a later date. However, the March 2015 decision referred only to the following:

Whether the arguments presented by the Lago Agrio plaintiffs are or are not based on

> *individual rights, rather than "collective" or "diffuse" rights (in whole or in part), and if these claims are or are not essentially similar to those claims presented by the plaintiffs in the Aguinda litigation in New York.*

In its analysis of this matter, the Tribunal affirmed that in respect of the application of Ecuadorian law, it would have preferred to guide its decision based on the rulings of the Lago Agrio Court, [145] the Lago Agrio Court of Appeals[146] and the Cassation Court, [147] in order to give due deference to the judicial proceedings of the State. In the Tribunal's opinion, as a practical matter, the decisions of any local court applying its own law, especially an appellate court, are—in the absence of special circumstances—the best evidence regarding the content and application of that law to cases that present the same or similar circumstances.

But, in the Tribunal's opinion, the controversy at issue in the arbitration has given rise to very unusual circumstances, if not completely exceptional circumstances, which prevented it from applying the orthodox approach described above. Given that the allegations raised against the Ecuadorian courts are some of the most serious that can be brought under international law, and the Tribunal still did not have the necessary elements in order to issue a decision, it felt that a fair and adequate decision could only be reached in respect of the claims contained in the Defendant's Memorandum filed before the Lago Agrio Court on May 17, 2003.

b. The Tribunal summarized the parties' arguments as follows: Did the Defendant's Brief include only claims based on diffuse rights, rather than claims based on individual rights for personal damage, whether actual or imminent?

In undertaking this discussion, the Tribunal first considered whether it was "*necessary to clarify the special meanings that are given in arbitral proceedings to the words 'diffuse' and 'individual'*." [148]

In discussing this distinction, the Tribunal provided the following reasoning, in paragraphs 155 to 157 of its award:

145. Decision in the Lago Agrio case, 9 February 2011, and Order of Clarification, dated 4 March 2011

146. Decision of the appellate court dated 3 January 2012; and the enforcement order dated 3 August 2012

147. Decision of the National Court of Justice dated 12 November 2013

148. Majority Decision on Track 1 B dated 12 March 2015 ¶ 153.

"*155. The Tribunal's first decision, found in paragraph 112 (3)—regarding the fact that the scope of the exemptions did not extend to those environmental claims raised by an individual for personal harm (or harm to personal property) that violate the rights of that individual, separately and apart from those of the defendant—identifies a category of claims that here are referred to as "individual" claims. Under Ecuadorian law, an individual claim belongs to the individual who raises it, and the reparations are specific to that person, and do not involve a diffuse claim.*

156. On the other hand, the Tribunal's second decision, found in the same Paragraph 112 (3)—regarding the fact that the scope of the exemptions does in fact have a legal effect under Ecuadorian law that would prevent an diffuse claim from being brought against the First and Second Claimants *in accordance with Article 19-2 of the Constitution, whether raised by the Defendant or by any other person who does not allege personal harm or harm to personal property (whether actual or imminent)—identifies a category of claims that are referred to as 'diffuse'. Under Ecuadorian law, a diffuse claim can be brought by an undetermined group of persons for indivisible reparations, and does not involve individual claims.*

157. The Tribunal emphasized that the terms 'individual' claims and 'diffuse' claims would be used in its decision to identify categories of claims that the Tribunal identified as essential to its legal analysis of the parties' respective arguments. These English language terms (which are not legal terms of art), as employed in this case, do not have the purpose of providing any definitive technical meaning in respect of Ecuadorian law, international law, or under any other law."

Therefore, the Tribunal noted that any analysis would be centered on the substantive nature of the rights invoked by the Lago Agrio plaintiffs, rather than focusing on the form in which these claims were presented.

As such, the Tribunal noted that:

"***It is the Tribunal's opinion that the answer to such questions is found not in the formal issue of the Lago Agrio plaintiffs' standing, but in respect of the legal bases and (if this is the case, and to the extent that these are different from each other) the substantive nature of the alleged rights invoked by the plaintiffs, which should be evaluated more as a substantive issue than as a strictly formal one***." [149] (Emphasis added)

For the Tribunal, the decision in *Delfina Torres v. Petroecuador* sheds some light on the subject, although not definitively, in respect of the legal arguments and rights invoked in the allegations of the Lago Agrio plaintiffs.

The *Delfina Torres* case did not deal with a case of diffuse rights. However, the plaintiff did bring a case that did not involve individual damages, but instead monetary compensation in the form of corrective works that would benefit all members of the affected community, of which the plaintiff was a member. In the opinion of the Ecuadorian Supreme Court, the form of compensation did not convert the individual claim into a diffuse claim.

> "The Tribunal expressly found that there was no provision in the 1995 agreement from which we could infer that the intention of the parties was to prevent the Claimants in the Lago Agrio Litigation from bringing claims for environmental harm as third parties, in exercise of their individual rights. "The decision that was reached today is an important step in the right direction, and appropriately vindicates the position adopted by Ecuador's defense, in respect of the fact that the Ecuadorian courts constitute an adequate forum to hear and resolve the complaints raised by the indigenous communities who are the Claimants in the Lago Agrio Litigation regarding Chevron's liability for the generalized contamination that is a result of the company's operations in the Amazon Region."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, March 12, 2015**

In addition, the Environmental Management Act of 1999 did not have any role in the Supreme Court's analysis of this claim. As a result, in the Tribunal's opinion, the Lago Agro plaintiffs' use of Article 43 of the Environmental Management Act of 1999 could not by itself turn an individual claim into a diffuse claim.

149. Majority Decision on Track 1 B dated 12 March 2015 ¶ 153.

For these reasons, the Tribunal rejected the Ecuadorian defense's argument that the Supreme Court's decision in Delfina Torres determined, decisively, the nature of rights invoked in the Lago Agrio litigation. However, the Tribunal did accept that, in accordance with such decision, the form in which compensation is claimed does not by itself affect the characterization of the claim as an individual claim under Ecuadorian law. Instead, the Tribunal acknowledged that in Delfina Torres the Court had accepted that a claim for compensation brought by a legal entity composed of more than 250 families living on 25 hectares of land, could constitute, and in fact was, a claim based on individual rights.

c. From the Tribunal's point of view, certain claims that were raised in the Lago Agrio litigation were no more than a transformation of the individual claims brought under New York law and procedure, into individual claims under Ecuadorian law and procedure. In this partial sense, the Lago Agrio litigation was, in essence, a reformulation of the same causes brought by the Aguinda plaintiffs in New York.

As a result, the Tribunal concluded that the Lago Agrio litigation was comprised of claims that were substantially equivalent to those raised in the Aguinda litigation, and that these were brought in the Lago Agrio litigation as individual claims under Ecuadorian law.

The Tribunal also found that the compensation requested in the form of remediation works in the Lago Agrio litigation, and the reference to Article 43 of the Environmental Management Act, did not, by themselves, turn those individual claims into diffuse claims under Ecuadorian law.

9. POINTS AT ISSUE THAT WERE NOT RESOLVED

As previously noted, Track 1 B dealt only with those points that were pending from Track 1 A. However, there were two matters that the Tribunal also did not address in its March 12, 2015, decision, as follows:

> "*(...) The Tribunal does not find it appropriate to take into account those later actions of the Lago Agrio Court, the Lago Agrio Court of Appeals or the Cassation Court in this Track 1 B decision in the present arbitration proceedings, with respect to the specific treatment given to the*

Lago Agrio suit, given that all of these matters are scheduled to be discussed in Track II."[150]

In light of the limited scope and the form of this decision, the Tribunal also does not find it appropriate to address the specific reparations requested by the Parties in Part B in a more in-depth manner, as these include questions regarding costs and certain procedural motions, and the resolution of all such questions must necessarily be postponed for one or more later orders, decisions, or awards, which the Tribunal will issue at a later date." [151]

With respect to the treatment given by the Ecuadorian courts to the claims and defenses raised by the parties in the Lago Agrio litigation, Ecuador has emphatically held that the decisions issued by State courts are in each and every instance under their own jurisdiction, in compliance with Ecuadorian law and, certainly, within a legally reasonable and possible scope. Under Ecuadorian law, and in keeping with the legal decisions issued in Lago Agrio, no person or entity, including the State, can renounce or settle any rights belonging to third parties. The individual rights of persons affected by these events fall outside the scope of the 1995 Settlement and Release Agreements, and the Lago Agrio plaintiffs have always had the right to bring any suit that they wish against any person alleged to have engaged in unlawful acts.

Ecuador has also denied the Claimants' allegations regarding judicial malfeasance. As will be explained in more detail in the next Chapter, the forensic evidence has demonstrated that the President of the Ecuadorian court wrote the decision, and there is no forensic evidence to suggest that any other party contributed to such decision.

Ecuador's defense counsel has also argued in favor of the Ecuadorian judicial system, indicating that, over the years, judicial reforms have strengthened the Ecuadorian legal system, and have made it more cohesive and independent than when the Claimants praised the Ecuadorian courts.

Regarding the second outstanding point, which relates to the requested compensation, Ecuador agrees with the Tribunal regarding the fact that damages and costs cannot be quantified at this time, since it is still to be determined whether a violation of international law has taken place. This determination has been reserved for procedural Track III, if it is found to be necessary.

150. Track 2 Claimant´s Supplemental memorial , dated 14 January 2015, ¶ 240

151. Motion for evidence filed by Chevron (29 October 2003); see also C - 176, Judicial Order in respect of Evidence and the Appointment of Expert Witnesses (29 October 2003)

CHAPTER V

TRACK 2: DENIAL OF JUSTICE AND ENVIRONMENTAL DAMAGE

1. INTRODUCTION

By procedural order dated April 9, 2012, the Tribunal divided the discussion regarding liability into two phases: the second of these was designed to deal with the main issues under controversy—that is, Chevron Texaco's accusations that the State of Ecuador had denied it justice and the alleged violations of the BIT, and particularly, the allegation that the State of Ecuador had failed to provide an effective remedy for violations of Chevron Texaco's rights, by failing to give the Claimants' investments a fair and equitable treatment, and, finally, accusations of discriminatory treatment.

Chevron's allegations in respect of these accusations appear in two briefs filed on September 6, 2010, and March 20, 2012, respectively. In accordance with the procedural calendar established by the Tribunal, Ecuador answered these allegations on February 18, 2013. Chevron filed its reply in a brief dated June 5 of the same year, and Ecuador presented its next reply on the following December 16. This latter brief responded only to those allegations put forth by the Claimants regarding the facts of the case. As a result of the decision of the National Court of Justice, which granted Chevron's request for cassation of the case, through a procedural order dated December 5, 2013, the Tribunal postponed the date for presentation of Ecuador's legal arguments.

In light of the cassation judgment and the subsequent reconfiguration (the reset) of the arbitral proceedings, the Tribunal restructured Track 2 by a procedural



Lago Agrio 2, April 2015, crude extraction pipeline.

order dated February 10, 2014. In addition, the Tribunal requested that the parties file additional briefs in respect of matters related to Track 2 of the proceedings, including the following:

All those claims under the treaty (including any matter under international customary law) related to conduct in the Lago Agrio litigation, the decision, the appeal in Ecuador and any other related case being heard in the Ecuadorian legal system, as well as all non-monetary remedies that could be ordered by the Tribunal, in the case that it were to decide that Ecuador had violated international law.

Any effects of the cassation judgment issued by the Ecuadorian National Court of Justice on November 12, 2013, regarding the issues raised in the arbitral proceedings for violations of the BIT, and the corresponding defenses of the Ecuadorian State.

The existence of any environmental damage that Ecuador alleged to have been caused by the Claimants, and the effects of such damages (if any) on the Claimants' arbitral proceedings, the corresponding defenses of the Ecuadorian State, and any remedy that the Tribunal may order.

"These arbitral proceedings are no more than an attempt by Chevron Texaco to avoid the enforcement of a legal judgment that was reached in the Lago Agrio case, that ordered the company to pay damages for the contamination that its operations caused in the eastern part of Ecuador." This arbitration should never have begun, given the fact that Texaco ended its investment in the country five years before the BIT went into effect, which means that the Tribunal lacks jurisdiction to resolve the controversy under the investment protection treaty. Ecuador has demonstrated that the claim that Chevron-Texaco is bringing is premature, because the company did not exhaust the domestic remedies provided under Ecuadorian law in respect of the decision handed down in the Lago Agrio case. In addition, the bad faith conduct of the oil company during the aforementioned lawsuit has revealed that the company made inspections prior to the official inspections, in order to be able to take samples from the areas that they considered the most convenient to their case. In addition, within the arbitral proceedings, through an environmental auditor, Ecuador has proven that there is contamination in the area as a result of Texaco's operations there, which was the subject of the Lago Agrio case."

Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, April 20, 2015

On May 9, 2014, the Claimants filed a supplementary brief, which Ecuador responded to on November 7 of the same year. The Claimants responded to Ecuador's brief on January 14, 2015. Ecuador filed its final brief on March 17, 2015. Between April 20 and May 8, in the city of Washington D.C., a hearing was held in which the parties submitted evidence. At the end of this hearing, the Tribunal requested that both parties present their post-hearing briefs on July 15, 2015.

2. ARGUMENTS PRESENTED BY ECUADOR

During almost the entire arbitration, Ecuador's appearance in this procedural stage has been affected by the constant changes in Chevron Texaco's theory of the case and its supporting arguments. With each new brief, Chevron Texaco has presented new arguments, new facts, and new legal theories, supposedly supported by new evidence, above all related to the Lago Agrio litigation or the RICO class action, neither of which the Republic of Ecuador is a party to, and to neither of which the government has unrestricted access, as does Chevron Texaco. This fact, together with the volume of the supposed evidence submitted in the arbitral proceedings, has obliged Ecuador's defense to double its efforts in order to demonstrate the weaknesses of the Claimants' arguments, and the circumstantial nature of much of their evidence.

The State's defense has repeatedly noted inconsistencies and distortions that Chevron Texaco has attempted to use in order to avoid the results of the legal proceedings brought against them, by taking advantage of the smallest loophole available to them under the system of investor-State conflict resolution.

Ecuador has based its defense to Chevron Texaco's allegations on the following arguments:

2.1. Regarding Chevron-Texaco's factual allegations

The constant mutation of the facts of the case under discussion, provoked by Chevron Texaco's premature filing of its claim, has made it necessary

for Ecuador's defense to reformulate its own position repeatedly, as Chevron abandons some allegations and raises new issues.

For example: i) Chevron Texaco accused the Lago Agrio plaintiffs' attorney of having violated Ecuadorian legal procedures, and of having coerced at least 20 of the 48 signatures that appeared on the Lago Agrio claim. The Ecuadorian defense discredited this argument, and Chevron Texaco abandoned it; ii) the Claimants' sudden and intense accusations in the media, when it was announced in 2009 that the then-president of the court in Lago Agrio, Judge Juan Nuñez, had been "caught" by independent third parties, in a bribery scheme to rule against the Claimants,



Quito M.D., April 6, 2015, PGE Conference Room, work meeting between the State Attorney General, Dr. Diego García Carrión and the International Affairs and National Arbitration Direction team, to review the status of the case.

Chevron's defense made its allegations of fraud based on accusations that have now been abandoned, and bases its claim on new facts, with new accusers and new accused parties.

and secretly adjudicate lucrative remediation contracts for the parties that participated in the scheme. Ecuador also rebutted this allegation, and the Claimants abandoned it; and iii) the accusation of supposed persecution on the part of the State against Mr. Ricardo Reis Veiga and Mr. Rodrigo Perez, Chevron employees, which was abandoned once the Ecuadorian State demonstrated that the criminal investigation procedures at issue were completely normal, and controlled by the Court and the law, and their respect for due process.

However, Chevron's defense has maintained its accusations in respect of violations of due process, and has persisted in its argument regarding fraud in the 2009 judgment, although this time based on new facts and new wrongdoers: former Judge Guerra and former Judge Zambrano.

2.1.1. The Claimants' accusations regarding due process violations

Chevron Texaco's accusations regarding due process violations in the Lago Agrio litigation are based on the Lago Agrio court's decisions regarding the following matters:

(a) The concession of the Lago Agrio plaintiffs' petition to cancel some of the judicial inspections that had previously been requested; (b) the appointment of Richard Cabrera as general expert witness on damages; and (c) the denial of Chevron's petitions regarding the supposed lack of essential error in several of the expert reports.[152]

In relation with the fact referred to in the preceding paragraph a), the State's defense has shown that Chevron requested at least 30 judicial inspections, all of which were duly ordered and carried out by the court.[153] If Chevron had desired inspections at the sites indicated by the Lago Agrio plaintiffs, it was Chevron's responsibility to also name those sites during the evidentiary stage. As Chevron did not do so, in accordance with Ecuadorian

152. Track 2 Claimant´s Supplemental Memorial, dated 14 January 2015, ¶ 240

153. Motion for evidence filed by Chevron (29 October 2003); see also C - 176, Judicial Order in respect of Evidence and the Appointment of Expert Witnesses (29 October 2003)

law, Chevron could not request that such sites be included later.[154]

In relation to the facts at issue in paragraph b), Ecuador has demonstrated that the decision was not based on Richard Cabrera's report. Richard Cabrera is not an employee of the State, nor has he acted as such since his appointment by the court as an expert witness, and as a result, any violation in which he may have incurred could not be attributed to the State.

Finally, regarding the 26 allegations of essential error presented by Chevron in the case, many of which are repetitive, it was demonstrated that the Court had given the company multiple opportunities to submit evidence that would support its repeated challenges to the legally appointed expert witnesses.

Each of these decisions was correct in every way. But even supposing that this was not the case, none of these objections, taken alone or separately, were sufficient to support a claim for denial of justice.

In conclusion, Chevron and Texaco were not able to support their arguments and allegations of a denial of justice, since it has not been demonstrated that there existed any scandalous violations of the standards of due process, nor could any of these events be considered as an international crime. These ordinary errors, as alleged by the Claimants, are not sufficient to sustain a claim, and much less a finding that any denial of justice occurred, under international customary law.[155] "As a result, a denial of justice only occurs where there is 'manifest unjustness' that 'would shock the conscience' of a reasonable person or when a foreigner is completely denied access to the judicial system."[156] Chevron Texaco could not meet this strict standard, given that the Lago Agrio court conducted itself and decided on each of the issues brought before it, in accordance with Ecuadorian law. The Claimants' attempt to convert the Arbitral Tribunal into a supranational appellate court is contrary to established principles of international law. [157]

154. Transcript of the deposition of Callejas (19 May 2013) at 134:15 – 137:9, taken in the RICO case. See also Transcript of the deposition of Callejas (9 September 2011), taken in Chevron Corp. v. Salazar, Case No. 11 Civ. 3718 (S.D.N.Y.).

155. Supra § IV.A.

156. Andrea Bjorklund, Reconciling State Sovereignty And Investor Protection In Denial Of Justice Claims [Reconciliar la soberanía de los Estados con la protección de los inversionistas en las reclamaciones por denegación de justicia, 45 VA. J. INT'L L. 810, 813 (2005).

157. Supra § IV.A (which cites to the Expert Report of Paulsson (12 March 2012) ¶ 16 ("Obviously, international law does not invest international adjudicators with authority to act as courts of appeal from national courts, but rather to determine whether the actions or inaction of national courts transgress the standards applicable in international law.; see also Andrea Bjorklund, Reconciling State Sovereignty And Investor Protection In Denial Of Justice Claims, 45 VA. J. INT'L L. 810, 847 (2005) ("the international tribunals should not act as 'courts of appeals'"); Alexis Mourre, Alexandre Vagenheim, Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem (2010) at 855 ("when the local courts reach a decision in a case on the merits [,] the guiding principle should be, if justice has been done, there can be no liability under a claim for denial of justice. To allow simple errors committed by the municipal courts in the application of the law to be considered equivalent to a denial of justice would be an unacceptable denial of the sovereignty of the states in respect of their most important power: the administration of justice within their territory. This would turn the international tribunals (established in accordance with investment treaties) into appellate courts, with unacceptable consequences for the entire system of protection of investments").

> "I object to the Tribunal's decision to accept the presentation of new evidence, in particular the testimony of former judge Alberto Guerra, who, in his capacity as a witness for Chevron, cannot be considered as a reliable witness, as he gave his testimony after he was paid large amounts of money."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, January 29, 2014**

2.1.2. The fraud accusations in the lower court's decision in the Lago Agrio litigation

As soon as Nicolás Zambrano issued his decision as the lower court judge in the Lago Agrio litigation, Chevron Texaco attacked its validity. Within hours, the Claimants had refuted the decision's reasoning,[158] and simultaneously accused the Lago Agrio plaintiffs' counsel of having secretly written the decision.[159] Chevron Texaco referred to the few facts that they considered convenient for their sensationalist accusations, and, later, bought off former Judge Alberto Guerra, so that he would help them to tell their version of the events.

The accusations of Chevron Texaco were based on the declarations of former Judge Alberto Guerra.

In the RICO suit, former Judge Guerra declared that he had personally participated in a bribery scheme, along with former Judge Zambrano, through which they offered to rule in favor of Chevron in the first procedural instance, and later, for the Lago Agrio plaintiffs, who, finally, accepted the deal. In his testimony, among others, he stated that he had reviewed and edited the decision that was later issued by Judge Zambrano.

Within the arbitral proceedings, the State of Ecuador's defense has demonstrated that the testimony of former Judge Guerra is inconsistent, contradictory, and linked to his desire and interest in living the "American dream" as promised by Chevron.

As such, Guerra, in the cross-examination conducted during the arbitration proceeding, admitted that when he was contacted by Chevron, after the decision had been handed down, he had financial problems: a construction debt of US$20,000, and he

158. Simón Romero & Clifford Krauss, Ecuador Judge Orders Chevron to Pay $9 Billion [Juez de Ecuador ordena a Chevron pagar USD 9000 millones], N. Y. TIMES, 15 de febrero de 2011, en A4.

159. Chevron´s reply memorial in support of its Motion for Preliminary Preventative Measures, at 6, note 1, presented in the RICO case

needed another US$20,000 or US$30,000 in order to be able to complete a home renovation that he had not been able to complete, he was unable to visit his children, who lived in the United States, and he only had a few hundred dollars in the bank. As such, Chevron became the life preserver that he was looking for—an enormous life preserver, big enough to cover his entire family.

Chevron bought Guerra off and gave him the opportunity to be with his children and grandchildren, whom he had not seen in many years. Chevron's attorneys also promised him that his son, who was living illegally in the United States, would not be deported. In sum, Chevron gave him the opportunity to live in that country with his expenses paid by one of the most powerful companies in the world.

These benefits, which Chevron calls part of a private witness protection program,[160] came as no surprise to Guerra, since he knew that the company provided these types of benefits. When, at the hearing, Ecuador's defense attorney asked if he had reviewed the financial benefits that Diego Borja had received from Chevron, he said, "*It was said that the person who made those videos was taken out of Ecuador and received asylum in the United States, and as in my case, he lives in the United States, and his expenses are covered, in some way, by Chevron*."

Chevron based its accusation of fraud of the testimony of former judge Guerra, who has benefited from a private witness protection program, which has guaranteed him the "American dream".

Throughout the cross-examination, many of his statements were questioned. In order to better understand them, below a transcription is provided of the questions that were put to him by Ecuador's defense attorney, as well as former Judge Guerra's responses:

Regarding his statement that the Lago Agrio decision was not written by former Judge Nicolás Zambrano:

Question: Would you also agree with me that no draft of the decision was found on your computer? Response: Yes. That is correct.

160. RICO opinion at 22 ("[Guerra] has been the recipient of benefits under a private witness protection program created for him by Chevron, which facilitated his relocation from Ecuador to the United States of America, and has been providing for him and helping him since his arrival here").

Question: *You did not provide any hard copy of the decision to Chevron or to the Tribunal. Is that correct?*
Response: *That is correct.*

Question: You have nothing written by Judge Zambrano. There are no emails, no correspondence, no notes in which he indicates to you that anyone other than Judge Zambrano wrote the decision.
Response: There are definitely no specific documents of that nature.
But in context, there is other evidence, in my opinion, other reasons for us to reach this conclusion in respect of who really wrote the decision.

Question: *We are going to talk about these other pieces of evidence that you are referring to, I think, during the course of this cross-examination. But what I am asking you to confirm right now, in the simplest terms, is that you have nothing from Judge Zambrano, whether email or written correspondence, to indicate that he was allowing someone other than himself to write the decision. Am I correct in saying that?*
Response: *Yes. As far as I know, there is nothing like that.*

Question: You also have no written communications from the plaintiffs, Fajardo, Donziger—emails, written notes—that would indicate that the Lago Agrio plaintiffs had written or had the intention of writing any part of the decision.
Response: I know that there is no evidence like that in existence.

Question: *You also do not have any recorded conversations with any person, with Judge Zambrano, with Mr. Donziger, with Mr. Fajardo, nor with any of the other attorneys for the Lago Agrio plaintiffs, that would suggest that the plaintiffs and Zambrano reached an agreement to the effect that the Lago Agrio plaintiffs would write his decision.*
Response: *I have no recordings of that nature, but I have my own memory of what Mr. Zambrano told me.*

Question: *I understand that, and we are going to talk later about what you remember. My question only has to do with recorded conversations, so please listen carefully.*
Response: *Yes, I do not have any such conversations recorded.*

Question: *Do you have any documentary evidence that shows that Judge Zambrano ever received any money, even a dollar, from the Lago Agrio plaintiffs' legal counsel?*
Response: *No, sir. I do not.*

Question: *At any time, in 2009, 2010 or 2011, or afterward, you never at any time had any type of evidence of payments made to Zambrano by on or behalf of the Lago Agrio plaintiffs. Is that correct?*
Response: *I do not have any document.*

Question: *You have said that you edited the draft of the decision. There is no type of electronic evidence that shows that you edited the Lago Agrio decision. Or is there?*
Response: *No, there is not, specifically because there has not been any forensic analysis of the computer on which I worked on the document.*

Question: *You have not presented any type of handwritten versions that you made of the draft of the Lago Agrio decision. Is that right?*
Answer: *That is right, sir."*[161]

Regarding the benefits obtained from Chevron, both for your family and economic.

Question: *Do you understand that your income in the United States would also include economic benefits of over $12,000 per month, for example, payments made in your name for legal advice?*
Response: *Honestly I have to say that I do not have any knowledge regarding those types of details.*

Question: *Were you not aware that for tax purposes in the United States, your income would include payments made by Chevron in your name, even if Chevron was not making the payments directly to you?*
Response: *This is the first I have heard of that, from you right now. I was not aware of that fact.*

Question: *You do not know how much you should pay for the 2013 fiscal year. Is that right?*
Response: *No.*

Question: *Or for fiscal year 2014?*
Response: *No, not for 2014, either.*

161. Transcript. Cross examination of Alberto Guerra. Chevron III Hearing. Washington, 22 April to 8 May 2014.

Question: *You were only aware that Chevron was going to pay all of those taxes for 2013 and 2014.*
Response: In the last supplementary agreement that was signed in March of this year, approximately a month ago, precisely that was agreed, in the sense that Chevron offered to pay the taxes that I owe—since [sic]—for 2013 and 2014 to the United States government.

Question: *Did Chevron offer to pay the taxes for you, or did you ask Chevron to pay the taxes?*
Response: *Frankly, I have to say that I requested that Chevron do it.*

Question: *And Chevron agreed to do it.*
Response: *Yes.*

Question: *And both you and your wife have been worried for some time that your son, who has a wife and children here in the United States, could be deported. Is that right?*
Response: *Yes, sir.*

Question: *And at the time that you made contact with Chevron in 2012, you had not seen your son or your daughter for years, for several years. Is that correct?*
Response: *Yes, sir.*

Question: *You had not seen your daughter since 2009?*
Response: *That may be right, sir.*

Question: *And you had not seen your son since 2008?*
Response: *That may be right, sir.*

Question: *And you were brought here to the United States. When did you arrive here? Was it at the end of 2012? Do you remember precisely?*
Response: *When I came here with the intention to stay in the United States, that was in the month of January in 2013.*

Question: *And in fact, Chevron has been trying to help your son so that he can stay legally in the United States. Is that right?*
Response: *Yes.*

Question: *Do your son or his family have any immigration attorney who is working on their case for them?*
Response: *Yes.*

Question: *And I think that, maybe they are not the ones who are paying that immigration attorney. Is that true?*
Response: *That is true. That is true.*

Question: *Chevron is paying that attorney?*
Response: *Yes, sir.*

Question: *Do you know how much that immigration attorney, the amount that immigration attorney has received from Chevron?*
Response: *No, sir.*

Question: *And is this the same immigration attorney who is also representing you in your immigration proceedings?*
Response: *Yes, sir.*

Question: *And you are not aware of how much Chevron has paid this immigration attorney, for your case?*
Response: *No, sir.*

Question: *And you have your own personal attorney. Is that right?*
Response: *Clayman.*

Question: *Would I be correct in saying that he was present at the 53 meetings, at all of those meetings, when the Gibson Dunn 23 attorneys met, between November 2012 and November 2013, approximately?*

Response: *He, my attorney, Dr. Clayman, has always been present at all of the meetings that I have attended. And he has been there for all of the activities, etc., etc., that have been held at the government offices, etc. But not since November 2012, he was hired after that, in January 2013.*

Question: *Thank you very much for the clarification. Of course I am not aware of the content of the conversations that you have had with your attorney, but I assume that you have met with him a few times without the presence of Chevron's counsel. Could you confirm that for me?*
Response: *Yes, sir.*

Question: *And you do not pay Mr. Clayman's legal fees. Do you?*
Response: *No, sir. No, I do not.*

Question: *Chevron pays his legal fees. Don't they?*
Response: I think that Chevron should pay his fees, or his professional [sic] fees of my attorney.
Question: *Do you also have a tax attorney working for you?*
Response: *Yes, at the moment, one is working for me. I know that he is working on tax issues.*

The Chevron representatives offered former judge Guerra an initial amount of USD 20,000 in cash for the draft of Judge Zambrano's decision. Guerra could not produce the draft, because he never had it.

Question: *And who pays his professional fees?*
Response: *To the best of my understanding, Chevron does.*

Question: *Do you have an accountant, an accountant here in the United States?*
Response: *I do not know if I do, but what I do know is that Chevron hired someone, through my attorney, they have hired some accountant or some person who specializes in tax issues.*

Question: *And you also do not pay the (attorneys) for this person. Is that right?*
Response: *That is right.*

Question: I suppose that you are extremely thankful to Chevron for the help that they have given you, and that they have given to your son and his family. Aren't you?
Response: In some way, I am thankful, I am conscious of it, I am thankful for the supportive attitude that has allowed me to maintain my emotional stability and my security. Yes.

Regarding the sale of his computer to Chevron

Question: *You even made an offer of 50 thousand dollars for the evidence that you had.*
Response: *I thought that the draft of the decision had that, that is how I remember it, and I thought that the draft of the decision would be on the computer.*

Question: *Please give me a chance to ask you the question. I am not sure if you are answering the same question. They [Chevron's representatives] made you an initial offer of 20 thousand, and you made a counteroffer of 50 thousand. Is that right?*
Response: *Exactly. They told me that they had 20 thousand dollars, giving me to understand that they had that amount of money, and that that would be the jumping off point to initiate the negotiations. Yes, at*

some point I said to them that they needed to add a few zeros to their number. And a little later I said to them: "Well, I think it could be 750,000", but I have to be honest: at the moment of truth they said to me, "This is all we can give you. Well, okay. That's okay. I accept."

Question: *So, you did propose or suggest an amount of 50,000 dollars. Is that right?*
Response: *Yes, I did.*

Question: *And you also stated that the investigators who met with them had probably spent at least 50 thousand on hotels, on hotel rooms. Is that right?*
Response: *I do not recall having said that. Maybe I did. If some transcript says I said it, then I said it.*

Question: *So you were trying to negotiate a better price than the 20 thousand in cash that they had brought with them. Is that not right?*
Response: *I might have been trying to do that because I was sure—if you will—that the draft of the decision would be, was on my computer. Later, hours later that day, when a technician they had called reviewed the computer and could not find the draft of the decision, that was when I accepted: "Look, we can only give you 18 thousand dollars." I accepted without hesitation. I thought that maybe they only had 20 thousand, and they needed the other two thousand to get back to their country, for their expenses. And so I thought that: "I can't leave them without a dime, without any money, without anything left over for them to take care of themselves." "It's okay, there is no problem," and I got the 18 thousand.*

Question: *And then they went to your house. Is that right? Home, to your house.*
Response: *Yes, sir.*

Question: *And they brought with them the money in cash. Is that right?*
Response: *I understand. Yes.*

Question: *And at that point they gave you 18 thousand dollars in cash, at your house. Is that right?*
Response: *No, not at that moment. At home, at my residence, we got there maybe at 1 in the afternoon. I invited them to lunch. After that, they, with my permission, reviewed the content of my computer. Later, they called an American who is a computer technician, and I also let him into my house and let*

him go over my computer. ***And finally, at the end, when the technician said that he had not found the draft, that he had not found the draft of the decision, among other things, at that point it was maybe between five and six in the afternoon, and that day they told me, "Look, we have 18 thousand dollars to give you for this. We did not find the main document. If we had found the main document, maybe we could offer you more, etc."*** *Something like that. "We have 18 thousand dollars for you, and we are going to take the computer." I agreed at that time, and at the end of the afternoon, that same day, that night, the 18 thousand dollars, which they gave me, in addition to what I had received a little while earlier, I had accepted a laptop computer from them as a replacement for the one they were going to take with them.*

Question: *You received 18 thousand dollars in cash on the same day that they came to your house, during the time that they were at your house. Is that right?*
Response: *Yes, sir.*

Regarding how his story has changed in various sworn declarations, based on his meetings with the Chevron investigators:

"***Question:*** *We reviewed 20 declarations: some taped conversations with Chevron, some transcripts of statements, other statements or testimony, transcripts of litigation. Can you say that your statements regarding the Lago Agrio case were always consistent, that you have always told the same story, the same way, every time?*
Response: *The concrete answer to your question is yes. But allow me, if the Tribunal will allow me, to explain something.* ***Certainly, in the recorded conversations that I have had, that I initially had with Chevron's representatives, there are some inconsistencies, certain incongruities,*** *but in my sworn statements that I wrote out and put my signature to, I certify, I guarantee with my signature that there have not been at any time any incongruities or inconsistencies.*
...
Question: *Do you acknowledge, and I am quoting here, that "****I told them, that is, Chevron's representatives, some things that were exaggerated because it was my intention—or in order to improve my position"****? [sic] That is what you declared under oath. Is that true?*
Response: *Yes, sir. You are right.*

Question: *Can you confirm for me that when you said, "I told them some things that were exaggerated", are you referring to Chevron? Is that correct?*
Response: *Yes, to the Chevron representatives.*

Question: *You were aware that the statement that you made to them was an exaggeration.*
Response: *Of course. As I said at the time, and as I will repeat right now: I did not know them, and I did not trust them, I was trying to improve my position in case of a future negotiation, etc. etc.* ***I exaggerated in some cases, and I may have lied in other cases, as the circumstances required.***

Question: *You lied to them because you thought it would be beneficial to you to lie to them. Is that correct?*
Response: *I wanted to put myself in a little bit more of an important position, once an agreement had been reached with Mr. Zambrano.*

Question: *Is it true that you have said various things in this case that are not true or that have been exaggerated because you thought that it would be to your benefit, or to make things so that they would be to your benefit?*

Response: *Look, if you will allow me:* ***it seems to be something genetic in humans—or at least in Ecuadorians—this desire to try to present a better image than what we really are to people that we are just getting to know, and even more so if there is a possibility that, at some point, these people could possibly help us or benefit us in some way.***

Question: *Do you recall having tried to improve your negotiating position with the Chevron representatives? For example, maybe this will help you: do you remember anything that you did or said in order to improve your negotiating position?*
Response: *Yes, some things.* ***I have to acknowledge that I did exaggerate.*** *If you will permit me,* ***it is like when you go to look for work and you say that you have experience, and in reality you do not have any experience, but: "Ah, no; yes, of course, I have 10 years' experience."*** *That is the situation.*

Question: *Among the ways that you tried to strengthen your position, was to falsely indicate to the Chevron representatives that the Lago Agrio plaintiffs had offered you 300 thousand dollars. Is that correct?*

Response: I lied. I admit it. I did not tell the truth. There was no such offer from the plaintiffs' representatives.

Question: *But the intention that you had was to improve your negotiating position, and your negotiating strength with the Chevron representatives. Is that right?*
Response: *Yes, sir. In some way, yes.*

Question: *How did you think that lying to the Chevron representatives and falsely stating that the Lago Agrio plaintiffs had offered you 300 thousand dollars—how did you think that this would give you more power with Chevron in your negotiations with them?*
Response: *In those terms, maybe I did not think it; I was not careful. I definitely was flippant about it. They asked questions, if you will, in this abrupt way. I was never prepared to address that type of response. And they asked the questions, and obviously* ***I responded really without thinking carefully about my responses****. I answered immediately and obviously I made mistakes, I know it. Maybe I thought that in the specific case that if, maybe, I said that they were going to give me 300 thousand dollars for something, and you all, the Chevron representatives, maybe you all would double it or, or you could. Maybe it was like that.*

Question: *You wanted Chevron to beat the amount that you said that the plaintiffs had offered to pay to you. Is that right?*
Response: *No, sir. That is not what I wanted. I did not think about that. The only thing that I thought about was how to improve my negotiating position in respect of any potential benefits that I might receive.*

Question: *In sworn declarations, you have stated that you made what you refer to as a series of exaggerations. Is that right?*
Response: *Yes, sir. Yes.*

Question: *You said that some of the facts were exaggerated, that you had not been precise regarding space or time. Do you generally recall having made that statement?*
Response: *Yes, I did say that, and I know that, obviously, it is there in the documents, in the recordings regarding the inconsistencies in the statements I have made.*

Question: *In this same sworn declaration, you said that you hoped that in the future you could obtain bigger benefits or bigger payments. You are not disputing that statement. Or are you?*
Response: *No, I am not disputing that statement."*[162]

162. Ibidem

Once Chevron's star witnesses' lack of credibility had been thus established, the Claimants did nothing to defend it. **Guerra admitted to having received substantial monetary benefits from the Claimants in exchange for his cooperation**. For its part, Chevron and Texaco tacitly admitted that Guerra was not an impartial witness, and for this reason they have tried to find support in other evidence, to cure Guerra's lack of credibility. However, the problem for the Claimants is that their independent evidence has no weight, unless it can be shown that Guerra is a credible witness.

In addition, the forensic analysis of Guerra's computer does not offer any support for the former judge's statement that he sold it to the Claimants. If his story were true -particularly the first versions, which he gave before the intervention of the Chevron attorneys- they hoped that they would find sufficient evidence on his computer and phone, which did not exist.

In fact, **the forensic analysis did not find**:

- **Any draft (or partial draft) of the decision;**
- **Any order (in draft or other form) corresponding to the period during which the decision of the lower court was handed down, over which Judge Nicolás Zambrano presided;**

The forensic analysis of the computer used by Guerra showed that the decision was never written or reviewed on the computer in question, and that the document that became the decision was created on Judge Zambrano's computer on October 11, 2010, and was saved on that computer many times during the following months.

- **Any electronic mail that shows communication between Guerra, Judge Zambrano or the Lago Agrio plaintiffs, and much less any correspondence that shows any unlawful conspiracy; and**
- **Any copy of any document presumably presented by the Lago Agrio plaintiffs.**

The Claimants' expert, Spencer Lynch, found and examined two groups of documents, in an attempt

to implicate Mr. Guerra with Judge Zambrano. The first group is comprised of 11 documents found on Mr. Alberto Guerra's hard drive. These are the only documents related to the Lago Agrio case, and they are similar in text to nine orders handed down by Judge Zambrano.[163] Although Chevron-Texaco argues that Mr. Guerra is the author of the nine drafts of orders later issued by Judge Zambrano, the Ecuador State's expert, Christopher Racich, determined, on the other hand, that, "nothing in the forensic analysis ordered indicates that the orders handed down were written based on the drafts that were found on Guerra's computer, or that Guerra himself was the author of any of these orders."[164] In reality, the "drafts of the orders" found on the former judge's hard drive were created on July 23, 2010, *after* Judge Zambrano had handed down his orders. [165]

The investigation of the hard drive of Zambrano's computer

In August 2014, both parties were able to access and had the opportunity to analyze the hard drives from Judge Zambrano's computer, which was used to write the decision in the Lago Agrio case. From the forensic examinations, the following was shown:

The document for the sentence was created on Judge Zambrano's computer on October 11, 2010, and was saved on the computer many times during the following months, contrary to what the Claimants argue, which is that Judge Zambrano received the decision from Fajardo, one of the attorneys from the Lago Agrio claim, in digital format, immediately before it was handed down. [166]

Judge Zambrano was actively working on the decision on his computer during October, November and December of 2010, contrary to what Guerra stated, which was that the Lago Agrio plaintiffs gave Judge Zambrano an electronic copy of the decision at some point at the end of January 2011. The State's expert, in his second expert report, stated in his conclusions that:

"In my professional opinion, the evidence is more consistent with Judge Zambrano and his assistant

163. See the Expert Report of Stroz Freidberg, from Spencer Lynch (7 October 2013) ¶ 14 – 21

164. Expert Report of Racich ¶ 24

165. Id. ¶ 31; Expert Report of Stroz Freidberg, from Spencer Lynch (7 October 2013) ¶ 15

166. Compare the Expert Report of Racich (7 November 2014) ¶ 18, with, for example, R - 907, the Transcript of the Deposition of Guerra (5 November 2013), at 141 ("I went to Lago Agrio and I saw the draft of the decision on a computer in the possession of Pablo Fajardo"); Declaration of Guerra (17 November 2012), ¶ 28, presented in the RICO case ("The claimants' attorneys made changes in the decision up to the last minute").

having written the decision, than with a third party having written the sentence and giving it to Judge Zambrano to be handed down at the beginning of February 2011."[167]

Part of the decision is found in a version of a file titled "Caso Texaco.doc" on Judge Zambrano's computer, dated January 19, 2011, contrary to what the Claimants' allege, which is that Judge Zambrano received the decision from Pablo Fajardo, legal counsel for the Lago Agrio plaintiffs, directly before it was issued. [168]

There is no evidence that there was any transfer whatsoever of any files to Judge Zambrano's computer, as would have been the case if the Lago Agrio plaintiffs had written the 200-page decision. Over those two weeks during which the decision was written (the period during which the Claimants argue that Pablo Fajardo turned over the completed decision to Judge Zambrano) no USB memory sticks were connected to Judge Zambrano's computer, which also is not consistent with the Claimants' argument that Judge Zambrano received the decision from Pablo Fajardo immediately prior to handing it down.[169]

On Judge Zambrano's computer, no files were opened from electronic mails that contained the decision, particularly during the two weeks prior to the issuance of the decision, which is also not consistent with the Claimants' allegations that Judge Zambrano received the decision from Pablo Fajardo immediately prior to handing it down.[170]

Faced with the mounting evidence, it has become evident that no matter what they do, the Claimants cannot make their arguments fit the objective facts of the case. Moreover, the Claimants' current allegations do not match with Guerra's prior testimony, or with the testimony of its own attorneys.

The Claimants' accusations regarding "unfiled plaintiffs' work product".

167. Compare the Expert Report of Racich (7 November 2014) ¶ 18, with, for example, 7, the Transcript of the Cross Examination of Guerra (5 November 2013), at 141 ("two or three weeks prior to 14 February 2011, when I went to Lago Agrio I saw the draft of the decision on a computer in the possession of Pablo Fajardo").

168. Compare the Expert Report of Racich (7 November 2014) ¶ 25 - 28, with, for example, the Declaration of Guerra (17 November 2012), ¶ 28, presented in the RICO case ("The claimants' attorneys made changes in the decision up to the last minute").

169. Compare the Expert Report of Racich (7 November 2014) ¶ 83, with, for example, the Declaration of Guerra (17 November 2012), ¶ 28, presented in the RICO case ("The claimants' attorneys made changes in the decision up to the last minute").

170. Compare the Expert Report of Racich (7 November 2014) ¶ 77 - 78, with, for example, the Declaration of Guerra (17 November 2012), ¶ 28, presented in the RICO case ("The claimants' attorneys made changes in the decision up to the last minute").

The Claimants center their argument on the fact that the lower court in the Lago Agrio suit based its sentence on documents that, supposedly, were not added to the official record of the proceedings in the Lago Agrio case, such as the "Merger Memorandum", which discusses the acquisition of Texaco Inc. by Chevron, and the Selva Viva database that was authored by the Lago Agrio plaintiffs. Only on the basis of this simple statement, they urge the Tribunal to find that the Lago Agrio plaintiffs wrote the draft of the decision.

The Claimants also assume, in addition, that any reference made to the decision in the documents that still have not been located in the record of the proceedings is a clear indication that the Plaintiffs wrote the decision. But it remains a fact, which has even been accepted by Chevron-Texaco, that there were problems in keeping track of the files in the record of the proceedings in Lago Agrio.[171] The difficulties that the clerk of the court experienced are understandable in light of the circumstances of the case, above all when taking into account the volume of the documents of the case and the multiple locations in which they were filed. The parties provided documents regarding the proceedings in more than 40 judicial inspections that the court carried out. Despite this fact, the document management problems are not evidence of the fact that there was a secret author of the decision, and even less so, that there was a denial of justice in the case.

In addition to this, the Claimants have not been able to find support for their "theory" through the existence of any electronic mail that makes reference to the Lago Agrio Plaintiffs in the Merger Memorandum, the Clapp Report, or any other so called "internal work product" of the Lago Agrio plaintiffs, in a decision written by a ghostwriter. No more are there any electronic mails that would demonstrate that the Plaintiffs backed off of their plan to file these documents along with their final brief before the judge handed down his decision, as can be seen from the electronic correspondence at the time. There is also no electronic mail that includes a draft of the decision, to which the decision is attached—not any part of the decision, not even a paragraph of the decision. Other than Guerra, who is being paid very well for his cooperation, no other person with any

171. Even Chevron's copy of the act is missing, or at least the entire act is not there, in addition to other documents that were filed. See, for example, extract of the record of the proceedings in the Lago Agrio case at pages 11974 – 11976; extract of the record of the proceedings in the Lago Agrio case at pages 206,018 – 206,119; extract of the record of the proceedings in the Lago Agrio case at pages 204318 – 204320

relationship to the court or to the Lago Agrio plaintiffs has come forward to corroborate these accusations.

The electronic mails from the attorneys of the Lago Agrio plaintiffs reflect a clear intention to present the so called "internal work documents that have not been submitted to the record of the proceedings" at a public hearing, or during some of the judicial inspections, or together with a legal brief that would be presented prior to the issuance of the decision. In this respect, the unfounded arguments of Chevron-Texaco cannot overcome the available evidence.[172]

In a few words, there are no drafts of the decision, nor any electronic mails that discuss or mention a ghostwriter who wrote the decision, nor the intention to write the decision.

The abundant evidence that the Claimants have presented does not support their claims. Just as the Putnam tribunal stated: "*Only an evident and notorious injustice, visible…to the naked eye, could form the basis for an international Arbitration Tribunal…to set aside the decision of a national court in order to later examine its reasoning in fact and at law*."[173] **And when a party tries to make a case based on circumstantial evidence—as the Claimants are now attempting to do—the Tribunal must determine if the evidence presented by the Claimants is sufficient "beyond the shadow of a reasonable doubt."**[174]

In sum, the Claimants' case is full of accusations and rhetoric, but it is lacking in real evidence.

The Claimants' allegations regarding the supposed conspiracy against them by the government and the Lago Agrio plaintiffs is even worse. In order to force this argument, the Claimants have applied a double standard: on the one hand, in the most flagrant way, they base their arguments on case law and judges in the United States to support them in their case against the Lago Agrio plaintiffs. And on the other hand, they call any communication between the government and the Lago Agrio plaintiffs a conspiracy, and, even worse, they are still demonizing and twisting any declaration by the government directed at raising awareness of the environmental harm that was caused.

172. Electronic mail from J. Saenz to S. Donziger (15 November 2007) with, for example, Track 2 Claimant´s re-buttle, filed on 14 January 2015, ¶ 47 – 51, 64.

173. Award in the Putnam case. United States of America vs. United Mexican States, demanding from the latter on behalf of Ida Robinson Smith Putman, 8 - anr - 1927 par. 225. ¶ 225.

174. Award in the Byindir case. Bayindir vs Islamic Republic of Pakistan ICSID case No. ARB/03/29, 27 August 2009 ¶ 143.

Chevron-Texaco argues that credible proof of the conspiracy between the government of Ecuador and the Lago Agrio plaintiffs can be found in the political declarations made by government employees who support the Lago Agrio claim. However, the Claimants have not been able to demonstrate that such declarations would affect the basis of the decision or the facts or the case, or the legal arguments on which the case will be judged, nor that such declarations would influence the decision.

In its hurry to make its case, Chevron-Texaco contradicts itself. When there are declarations by government employees that work in its favor, they never characterize those declarations as improper. However, they also ignore the fact that, for example, President Correa has been as critical of Petroecuador as he has been of Chevron.[175]

It is not in and of itself unusual or objectionable for political leaders of the country to make reference to the Lago Agrio case, much like the declarations that President Barak Obama has made, who, when referring to the environmental damage caused by British Petroleum, stated that: "BP is responsible for the spill. BP will pay the bill."[176] And this all occurred before any court had found that BP was legally responsible for the oil spill in the Gulf of Mexico.

A president's statements, in a case such as this, are not executive orders that are binding on the judiciary, but are to be understood as being made in the context of the president acting as a representative of the citizenry. Statements such as these do not have any legal weight.

The Claimants' allegations are in fact downright extreme, but all the same, they have not been able to provide the necessary facts to support these allegations. They have spent enormous sums of money, and have dedicated themselves to using impermissible and outsize inciting and intimidation tactics, in order to try to shore up their claims. This includes guaranteeing witness testimony in exchange for enormous cash payments, inundating the Lago Agrio court—which is small, in comparison with other courts—with a torrent of illegitimate and extemporaneous motions in order to overload its capacity, paying a person who has committed drug offenses and a Chevron contractor so that they would try, surreptitiously, to entrap Juan Nuñez, who was at

175. Press Conference held by President Correa, Transcript (26 April 2007) at 8 ("I know that Petroecuador is still causing contamination … It is not only Texaco. We are in agreement on that.")

176. Joel Achenbach y Anne E. Kornblut, Officials' Forecast Grim About Massive Oil Spill as Obama Tours Part of the Gulf Coast, Washington Post, 3 May 2010

that time the judge in the Lago Agrio case, and forcing witnesses who had appeared in the Lago Agrio case to retract their testimony through intimidation tactics and under the threat of financial ruin.[177] On the basis of this evidence, the Claimants have not been able to establish that there has been any denial of justice.

The burden of proof in this type of claim belongs to the party bringing the claim. article 24 of the UNCITRAL Rules states that each of the parties shall have the burden of proof in respect of the facts that such party wishes to use to support its arguments or claims. This provision makes no distinction between the evidentiary burden and the legal burden. This provision is also not related in any way to the issue of the reversal of the burden of proof. No more does it make a distinction between allegations of offenses of varying degrees of seriousness. It simply says that the burden of proof in respect of a particular fact belongs to the party alleging it.

In international law, there is no reversal of the burden of proof for allegations of corruption, because the accuser is the party who must make all possible efforts in order to back up his or her argument and claim, same as in Ecuadorian law.

The Claimants' argument depends completely on testimony that was bought and paid for, a good dose of conjecture, and a vivid imagination. This is not sufficient to show that the Ecuadorian State is corrupt. The Claimants have done their best to show that the Lago Agrio plaintiffs were the ones who wrote the decision, even before the decision was handed down. Since then, the Claimants have twisted every statement, every document and every piece of evidence, with the intention of forcing their conclusion to make sense. Chevron does not have clean hands in these proceedings, and as a result they cannot claim that there was a denial of justice.

The weight of the available evidence has shown that the Claimants' allegation that Judge Zambrano gave the Lago Agrio plaintiffs the opportunity to write his decision in exchange for a promised payment is false.[178] However, even assuming—on a hypothetical basis—that the Claimants' accusations were true, in any case their claims would be excluded, because

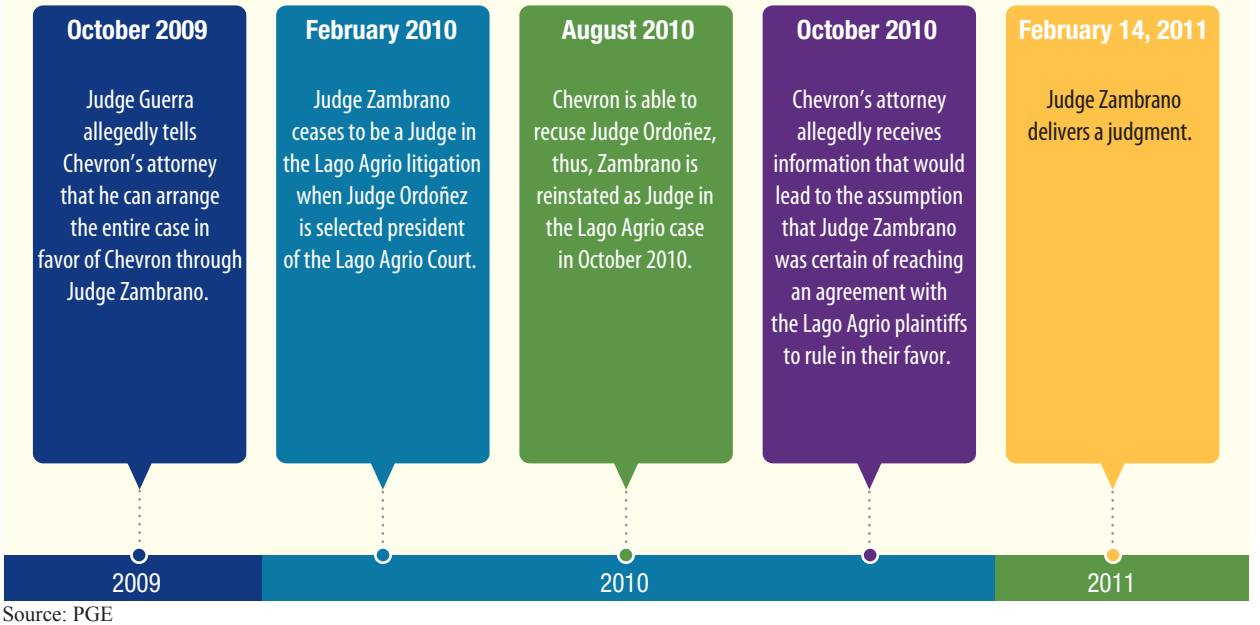
177. As in the case of Mr. Beltman and Ann Maest, formerly of Stratus Consulting.

178. Respondent´s Track 2 Counter-memorial, on 18 February 2013, ¶; Id. Annex D; Supplementary Response Brief presented by the respondents in Procedural Track 2, on 14 January 2015, ¶ 67 – 154.

Chevron's own accusations show that it chose to ignore the local and appropriate recourses which were available to it, and where these claims should have been dealt with from beginning, instead of in an international forum.

Doctrine holds that a party's unlawful or negligent conduct will have an effect on the basis of that party's claim, and on the quantification of damages. This is because a Claimants cannot claim harm caused as a result of its own actions, or its own failure to avert a result known by it. There are two crucial aspects to the Claimants' allegation that there was a "ghostwriter", which support this argument and which are reflected in the Claimants' own allegations (i) Chevron knew, *before* Zambrano

FIGURE 5. Chronology of Chevron's accusations in the Lago Agrio litigation



Source: PGE

handed down his decision, that he was supposedly receiving "secret assistance" from the Lago Agrio plaintiffs; and (ii) instead of making use of the local recourses that would have prevented this alleged fraud, Chevron opted to do nothing. The Tribunal should not (and in truth, international law does not allow it) to ratify Chevron's decision to take no action in Ecuador, by granting it an award for damages in an international claim.[179]

According to the Claimants, at this time they were aware of the bribe that had occurred before the decision was handed down. But they defend their decision not to take any action against Judge Zambrano, including by presenting a motion to recuse him, or denouncing his conduct before the Judicial Counsel of Ecuador because, presumably, these actions would not have provided an effective remedy, and there was no action that Chevron could take in Ecuador that would have been successfully. However, Chevron itself had successfully motioned to recuse the former judge (Judge Ordóñez), for failure to rule in a timely manner and lack of probity. This shows how inconsistent the oil company's arguments have been.

Chevron was obliged, according to the doctrine of exhaustion of domestic remedies, to follow the appropriate procedures, which the Ecuadorian judicial system had made available to Chevron in order to address these issues in the first instance. As Professor Jan Paulsson has stated, exhaustion requires not only that a party pass through the appellate stage of judicial proceedings, but also that while these procedures are ongoing, the Claimants must make use of existing judicial resources. But Chevron, in reality, acted against these basic principles of international law, circumventing all procedural recourses and failing to make any sort of objection regarding this matter. Chevron could have made use of the domestic resources available in Ecuador prior to the handing down of the decision, and did not do so. As a result, under international law, Chevron cannot request that the international Arbitration Tribunal provide it with a remedy, when Chevron failed to seek its own remedy in the first instance. Ecuador is responsible for the final products of its judicial system, but it is not responsible for the deliberate strategy that Chevron has employed to circumvent effective domestic recourse that was made available to it in the first instance.

179. Respondent´s Track 2 Counter-memorial, on 18 February 2013, ¶ 243 – 245

2.2. Regarding the legal arguments

Not only have the Claimants been unable to prove their factual conclusions, but also each of their motions should be denied because, after several years, various memoranda and hearings, an innumerable amount of letters and alleged pieces of evidence, Chevron has not proven the legal elements of its respective allegations.

2.2.1. The Tribunal does not have jurisdiction to rule on Chevron-Texaco's claim of a denial of justice and its other claims under the Treaty

Although the Tribunal concluded in its partial award that Chevron had the ability to claim rights and defend itself as a party exempt from liability under the 1995 Settlement Agreement, this limited ruling does not address the challenge that Ecuador raised to the Tribunal's jurisdiction over Chevron's claim for denial of justice and its related claims under the treaty.[180]

In its analysis of jurisdiction over Chevron's Procedural Stage 1 claims, this Tribunal observed, expressly, that the oil company's claims related to the treaty raised serious jurisdictional questions, given that Chevron did not make any investment in accordance with any of the Texpet concession agreements; it was never a member of the Consortium; it was not a signatory or a named party in the 1995 Settlement Agreement, and it appears for the first time in the chronology of the proceedings in 2001, after the "merger" with Texaco.

Chevron, then, cannot successfully allege that it made an investment under the BIT, in order to create jurisdiction for this Tribunal in respect of its claims in the present arbitration proceedings. If its case were stopped at this point, this Tribunal could refuse jurisdiction in respect of Chevron's claims under Article VI (1) (c), subject only to the residual argument that it could still present its claims as an indirect subsidiary of Texpet.[181]

The Tribunal has not made any definitive determination regarding the Republic's objections, opting, instead, to join them with the argument on the merits in accordance with Article 21 (4) of the UNCITRAL Rules of Arbitration.[182]

180. Texpet has no basis on which to bring a claim for denial of justice as it is not a party to the litigation in Lago Agrio. As the claimants' own expert—who is now working as legal co-counsel for them—implicitly acknowledged, this is self evident. See the Expert Report of Paulsson (12 March 2012) ¶ 8 ("Since the proceedings in Ecuador … were against Chevron Corporation only, in the main I refer only to Chevron in this opinion..") Both in this section as well as in Section III of the present document, the Republic also made reference only to Chevron.

181. Third Interim Award on Jurisdiction and Admissibility, dated 27 February 2012, ¶ 4.22 – 4.23.

182. Id.

Given that Chevron did not make any "investment" in Ecuador, nor did it enter into any "investment agreement" with the Republic, its claim for denial of justice does not and cannot meet the elements of a "controversy in respect of investments" under Articles VI (1) (a) o VI (1) (c) of the BIT, and as such, it is not included in the Republic's agreement to submit such controversies to the jurisdiction of an arbitration.

2.2.2. Chevron and Texaco have not exhausted domestic remedies, which is fatal to their claim of denial of justice, as well as to their other claims under the BIT

Even if the Tribunal were to accept jurisdiction over the alleged denial of justice claimed by the Claimants, the Claimants have not complied with their obligation to exhaust domestic remedies **before bringing a claim for denial of justice, as required under international law**. The Claimants have not been able to provide any reason why they should be exempt from this obligation. The bulk of their claims, whatever they refer to them as, refer to an alleged inadequate administration of justice. As a result, the requirement of exhaustion is applied regardless of whether their claims are based directly on international common law or on independent obligations under the BIT.

As a part of their argument, the Claimants state that Ecuador "cannot deny that the facts of this case are extreme"—the judicial system of Ecuador has incurred in a denial of justice for "having collaborated with the Lago Agro plaintiffs' legal counsel in order to produce and execute the fraudulent Lago Agrio decision, which handed down a judgment of 19 billion dollars."[183] As they have done throughout the course of the arbitration proceedings, the Claimants are confusing the facts with their claims.

The proceedings before the Lago Agrio court went on for almost eight years, with two of them spent on the appeals proceeds, and the claim is still ongoing. Chevron now wants this Tribunal to evaluate dozens of alleged procedural errors that the local courts have incurred in over the last 10 years during the Lago Agrio proceedings. These, however, are not of the scale or weight that Chevron would ascribe to them, as the Ecuadorian courts have given Chevron fair treatment, and this arbitration is nothing more than an effort on the Claimants' part to appeal the decisions

183. Respondent´s reply memorial on Track 2, on 5 June 2013, ¶ 266 (emphasis added)

that the court in Lago Agrio reached in its proceedings. Chevron's claim for denial of justice will fail for the simple fact that the Claimants have not exhausted domestic remedies, which would have resolved, and in fact have resolved, the complaints that Chevron now brings. **In respect of Chevron's principal allegation, this is still pending the resolution of an extraordinary protection action that Chevron itself brought, and in respect of its allegation of fraud, Chevron has not initiated any proceedings under the Law of Actions for Collusion.**

In the second place, while Chevron decided to appeal the decision and to present claims before the corresponding courts, the oil company has not presented any claim under the Law of Actions for Collusion, which is the claim, at Ecuadorian law, under which Chevron's claims regarding judicial fraud should be presented. A claim under this law would permit Chevron to file evidence to support its arguments and to obtain, as the case may be, an overturning of the decision. In light of the fact that Chevron chose (to date) not to present such a claim, Chevron cannot now argue that it has exhausted domestic remedies as required under international law, and, as a result, its claim for denial of justice, as well as its claims under the BIT, have no foundation.

In the award handed down in the *Loewen* case, the tribunal confirmed the principal that "the decision of a court that can be challenged through judicial proceedings does not equate to a denial of justice."[184] The Loewen tribunal also supported Judge Jimenez de Arechaga's point of view, in the sense that "that was an essential condition for a determination that the State was responsible for a legal decision that violated the municipal law, that is, that the decision be issued by a court of final instance, having exhausted all other remedies."[185]

This is due to the fact that "the definition itself of the crime of a denial of justice includes the concept of the exhaustion of domestic remedies. It is axiomatic that the exhaustion of domestic remedies is a substantive element of the claim for a denial of justice."[186] **The Claimants' own attorney has publicly acknowledged**

184. Award in the Loewen case. Loewen Award. Loewen Group Inc. & Loewen v. United States, ICSID Case No. ARB (AF)/98/3 (Award of Jun. 25, 2003) (Mason, Mason, Mikva, Mustill). ¶ 151 (citing to Professor Greenwood). ¶ 151 (citing to Professor Greenwood).

185. Ibidem. ¶ 153 (citing to Judge Jimenez de Arechaga, "International Law in the Past Third of a Century" (1978)).

186. It is universally accepted that the liability of a State for denial of justice can only occur when the system as a whole has been put to the test and justice has not been served. Doctrine overwhelmingly confirms this premise. See, v.g., Paulsson, DENIAL OF JUSTICE en 100, 108, 111 - 12, 125; 310, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 311 - 12, 404 (1970); RLA - 311, John R. Crook, Book Review Of Denial of Justice in International Law By Jan Paulsson, 100 AM. J. INT'L L. 742, 742 (2006); Clyde Eagleton, Denial of Justice in International Law, 22 AM. J. INT'L L. 539, 558 - 59 (1928). The list goes on.

that "the rule on exhaustion of domestic remedies is … an essential element before any international liability can be established, in the same way that it is a critical element of the crime of a denial of justice, at international law."[187] And this is the case because an allegation of a denial of justice, by requirements of law, should include a judicial system as a whole, including the possibility of correcting any errors made and administering justice.[188] The exhaustion of domestic remedies in respect of any other claim that could be brought against a legal proceeding is, as a result, not a question of procedure or admissibility, but an essential, inherent element of the unlawful act. Professor Jan Paulsson energetically and unequivocally stated that, **"There cannot be denial of justice without exhaustion [of domestic remedies]."**[189]

In reality, the exhaustion of domestic remedies is necessary in order to establish that the "denial of justice, which is the subject of the claim, has been a deliberate act of the State, and that the State is willing to leave the unlawful act without correction".[190]

International law requires that a claimant exhausts domestic remedies before bringing a claim for a denial of justice. Chevron has not exhausted domestic remedies.

Chevron admits -as it should- that, "international law requires that the Claimants exhaust domestic remedies before bringing a claim for denial of justice."[191] However, Chevron argues that it did not necessarily have to exhaust domestic remedies in the present case, because:

> *(i) The court of appeals has indicated that the Lago Agrio court's sentence is enforceable, which constitutes a denial of justice per se; (ii) there is no local mechanism available to "remedy" the specific harm that the Claimants complain*

187. Paulsson DENIAL OF JUSTICE IN INTERNATIONAL LAW p. 90, (Cambridge: University Press)

188. ("The obligation to establish and to maintain a system that does not deny justice") (emphasis in the original)

189. See also Zachary Douglas, International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed, 63 Int'l & Comp. L.Q. 867, 900 (October 2014) (A denial of justice cannot "occur unless the substantive rights of a foreign national have been definitively denied in a final judgment"); Award in the Loewen case, ¶ 151 ("The decision of a court that can be challenged through a judicial proceeding does not equate to a denial of justice").

190. Clive Parry, The Exhaustion of Local Remedies: Substance or Procedure?, 31 BRIT. Y.B. INT'L L. 452, 452 (1954), citing to Borchard, diplomatic protection of citizens abroad, § 381 (1915).

191. Claimant´s supplementary memorial on the merits, 20 March 2012, ¶ 243

> *of; and (iii) the Ecuadorian judicial system is manifestly biased against the Claimants and functions as a tool of the executive branch of the State of Ecuador.* [192]

Chevron's arguments are not supported by the facts of the case, and are not correct as a question of law. The fact that a decision can be enforced outside the country does not dispense with the requirement of exhaustion of domestic remedies.

Chevron insists that, "the requirement of exhaustion of domestic remedies in order to claim a denial of justice does not apply in this case, given that, according to the Ecuadorian legal system, the judgment is enforceable."[193] Chevron has not presented any legal support for this new theory, which is wrong for two reasons.[194]

First: The argument that Chevron is raising is intrinsically illogical, given that it allows it two tracks to reparations: before the tribunal hearing the case, and before the National Court of Justice in Ecuador. The enforceability of a judgment has no influence on the obligation to exhaust domestic remedies, in accordance with international common law.

Second: the argument that Chevron is raising ignores the fact that the obligation that a Claimant has to exhaust domestic remedies is the possibility that international common law concedes to a State government to "correct", on its own, any miscarriage of justice, before it can be considered liable in terms of international law.[195]

The most recent decisions on investor-State cases back up this pretension. The tribunal in the AFT v. the Republic of Slovakia case found that, "the failure to exhaust domestic remedies is per se sufficient to bar any liability of the State under international law for actions or omissions by its judicial system."[196] In the *Loewen* case, the tribunal explained that, "the State is

192. Ibidem. ¶ 248.

193. Ibidem. ¶ 242. "The exhaustion requirement for pleading a denial of justice does not apply in this case, because the Ecuadorian judicial system created a product enforceable within Ecuador with the Lago Agrio Judgment as upheld in the first instance"

194. Chevron bases its argument on the insufficient opinion of Jan Paulsson, who stated that "Once the Ecuadorean judgment became enforceable under Ecuadorean law, and thus liable to enforcement under the law of other jurisdictions, then no remedy within Ecuador could rectify the situation following enforcement of the judgment outside Ecuador." Paulsson´s expert report ¶79. This opinion is not correct since the revocation of the decision which could occur in cassations, would render the execution processes moot.

195. Paulsson DENIAL OF JUSTICE IN INTERNATIONAL LAW p. 7, (Cambridge: University Press).

196. Award in AFT ¶ 251

not responsible for the errors of its courts when the decision has not been appealed before a court at the highest judicial instance,"[197] "it is a requirement that all domestic remedies be exhausted, which are effective and appropriate and available under reasonable terms for the Claimant in the circumstances in which the Claimant finds itself."[198] "In the final judicial instance, the omission of [a] State in providing adequate and sufficient measures for reparations could rise to the level of an unintentional unlawful act, but only in the final instance. The dividing line may be difficult to identify, but it is real."[199]

The National Court of Justice, in its turn, and the Constitutional Court, currently, are providing, in accordance with the law, effective remedies for the Claimants to defend their rights.

The Claimants argue that it is not necessary for them to exhaust domestic remedies in this case, because the remedies available in Ecuador are not effective.

In respect of the requirement of exhaustion of domestic remedies, it is the duty of the defendant State to "prove the existence of, in its internal judicial system, those remedies that have not been used".[200] Once the defendant State has established that there are available local remedies, the burden then passes to the Claimants, who are required to demonstrate that these remedies are not effective and that the use thereof would be clearly futile.[201] In the present case, availability of domestic remedies has been made more than evident, both given the fact that Chevron has been able to present its appeal at cassation to the National Court of Justice, as well as an extraordinary protection action before the Constitutional Court of Ecuador, which is still pending resolution. It is obvious at this point that the Claimants cannot argue that they were not able to make use of these remedies. As such, the burden passes to Chevron-Texaco to now demonstrate that these two available remedies have not been effective. To date, the Claimants have not done so.

Chevron-Texaco has not satisfied its burden of proof, and it cannot do so. The National Court has already heard the case at cassation in respect of the decision of the Court of Appeals, and has corrected what it

197. Award in Loewen ¶ 143

198. Award in Loewen ¶ 168

199. Award in Loewen ¶ 242

200. Award in Ambatielos ¶ 334

201. International Law Commission (Dugard), Third Report on Diplomatic Protection en 6, ¶ 19; see also, Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, p. 116

considered to be an error. That is, the National Court corrected the application of the concept of punitive damages, given that such a concept does not exist in the Ecuadorian legal system, and which issued was raised by the Claimants themselves when they brought their cassation appeal. The Claimants have also not been able to show that the Constitutional Court has not been effective, because their claim was admitted by the court, although the court has still not ruled on the claim.

Also regarding this same issue, the allegations that Chevron-Texaco has made do not correspond to the reality of the case. During the proceedings, the Claimants have alleged that it was not necessary for them to exhaust domestic remedies, given the fact that the judicial system in Ecuador is so politicized that "all remedies that could be attempted would obviously be futile." [202] The truth is that the National Court reviewed the decision of the appellate court, and partially agreed with the claim raised by Chevron.

The Claimants focus their arguments unduly on the lower court's decision in the Lago Agrio case.

The Claimants argue that there were errors made in the decision in the Lago Agrio case. But this decision was replaced by the decision that was issued by the court of appeals, whose decision was in turn reviewed by the National Court. As Professor Jan Paulsson, one of Chevron-Texaco's attorneys, has stated, a "*denial of justice is not to be based on the decision of the court in the first instance ... [A] lower court judge who does not properly conduct his or her proceedings is simply not committing an unlawful act under international law that could be considered imputable to the State."* [203]

The Claimants have not brought a single allegation of fraud in respect of the judgments of the court of appeals or the National Court. However, they have challenged the courts' reasoning and their decisions, as they consider them to be, inter alia, "absurd", "pedantic", "excessively formalistic" and additional proof of the denial of justice that they claim. [204]

That is, there are no allegations of a legal error, but simply the complaints of a party that has not received a legal judgment that runs in its favor.

202. Claimant´s supplemental memorial on the merits on 20 March 2012, ¶ 242
203. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, p. 108 – 109
204. Supplementary Brief on the Merits presented by the Claimants in Procedural Track 2 on 20 March 2012, ¶ 135, 138

In addition, from a legal point of view, the allegations that the Claimants have raised are also not adequate or sufficient to bring a claim for denial of justice under international law. The tribunal is not a supranational appellate tribunal, and it is obliged to defer to the decisions of the courts in Ecuador, particularly regarding matters of interpretation of Ecuadorian law.[205]

2.2.3. There has been no denial of justice

The argument that the Claimants have raised in respect of the denial of justice has failed over and over again. The Claimants have made three separate, dissembling attempts to persuade this Tribunal to act as a supranational court of appeals. None of these arguments—whether they are referred to as "legal absurdities", "factual absurdities" or "violations of due process"—can be successful. In the eyes of international law, an act becomes unlawful at international law if there is sufficient evidence to back up the allegation of such act. However, as in the case of the arguments that have been presented by the Claimants, there are also mere procedural errors, which neither can be, nor should be considered as a

> "Despite the Claimants' constant efforts to defame the Ecuadorian judicial system, a 2014 study sponsored by the United States and carried out by the Latin American Public Opinion Project determined that Ecuador is first in South America, and fifth in the Americas overall, in respect of the trust that its citizens have in its government's ability to apply the rule of law. Ecuador is in the same group with the United States and Canada. The study noted that, "A pattern was observed in Ecuador. The country consistently has some of the highest confidence levels in the region." (end citation) Despite this fact, the Claimants describe the Ecuadorian judicial system in a way that is inconsistent with the reality, and the existing studies make use of politicians who oppose the government as if they were impartial legal experts. In this same way, the Claimants seek to establish a false image of Ecuador, as well as presenting the environmental disaster in the eastern part of the country in a way that is not consistent with the facts."
>
> **Dr. Diego Garcia Carrion, State Attorney General, Hearing on Opening Arguments held on from April 21 to May 8, 2015, in Washington D.C.**

205. See Track 2 Respondent´s Memorial on 18 February 2013 ¶ 320 -321 (citing to the award in the Barcelona Traction case at *158 ("If an international tribunal takes charge of these questions and examines the adequacy of the decisions of the municipal courts, the international tribunal would become a 'cour de cassation', the court at the highest level or final instance in the municipal law system".); see also, Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39 (7th ed. 2008) ("The interpretation of its own laws by a national court is binding on an international tribunal")

denial of justice under international law. In addition, the Claimants' statement in respect of the "factual absurdity" is nothing more than a continued failure to accept or to admit any type of responsibility for the devastating environmental conditions that have been wrought upon the Amazon Region.

The accusations of the Claimants regarding the legal error in the Lago Agrio case are unfounded, and are not sufficient to make a claim for denial of justice under international law. There are many precedents that confirm what the State of Ecuador has been saying for years in these proceedings: the international courts are not courts of appeals, and they cannot replace with an award, a judgment issued by local courts in respect of questions of local law.[206] As the tribunal held in the *Mondev* case:

> *"it is one thing to address matters that have not been addressed by the local law, and it is another very different thing to question a posteriori those well founded decisions of the highest courts of a given State. Under NAFTA, the parties have the option to seek recourse from the local courts. If they choose that route and lose on the merits, the NAFTA tribunals do not have the jurisdiction to act as courts of appeals."*[207]

More recently, the tribunal in the *Arif v. Moldavia* case explained, in a similar manner, that the international courts must abstain from acting as courts of final instance. These courts cannot replace the interpretation of national law made by national courts with their own application and interpretation. The necessary distinction that exists between the hierarchy of courts within a national legal system, and the role of the international tribunals, would be blurred if "a simple difference of opinion on the part of the international tribunal were sufficient" in order to make a determination that a national court infringed international law.

206. Respondent´s supplemental memorial on Track 2, ¶ 271; Id. Annex A ¶ Respondent´s reply memorial on Track 2, ¶ 320 -321; see also Zachary Douglas, International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed, 65 INT'L & COMP. L.Q. 867, 877 (2014) ("A valid determination of a claim in respect of a right or an accusation of guilt handed down by an internal judicial body cannot be altered by an international court or tribunal simply because this internal judicial body had available to it a more sensible set of reasons. This would be the equivalent of exploiting the vulnerability of the decision generated through the judicial resolutions process; a vulnerability caused by the very necessity of justifying those decisions through a special argument that appeals to reason. International law gives deference to the specific virtues of a legal resolution that respects the integrity of the process and the results that it produces. This deference is manifest in the principle of finality, and the idea that the denial of justice is centered in the procedural aspects of the judicial resolution before its fundament on the merits.").

207. The Mondev Award, ¶ 126 – 127; see also 452, Andrea K. Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 VA. J. INT'L L. 809, 847 (2005) ("[Recent tribunals] have reiterated the idea that the international tribunals should not act as 'courts of appeals'.").

> *"The opinion of an international tribunal that it understands local law better than a national court, and that the national court erred, is not sufficient. In fact—as the Claimants have argued—the Arbitration Tribunals cannot 'act as international courts of appeals'".*[208]

Both commentators and tribunals agree, in addition, that the threshold to demonstrate that there has been a denial of justice is exceptionally high, and have reached the conclusion that only serious deficiencies in the administration of justice can rise to the level of an evident injustice that is equivalent to a denial of justice.[209] A simple legal error cannot provide the necessary support for a claim, and much less for a claim of a denial of justice.[210]

To allow for simple errors committed by the national courts in the application of the law to rise to the level of a finding of a denial of justice, would be an intolerable denial of the sovereignty of the States in respect to their most important attribute: the administration of justice within their respective territories. This would convert the international tribunals (established through investment treaties) into courts of appeals, with unacceptable consequences for the entire system of protection of investments. As such, only in exceptional circumstances can the decision of a local court rise to the level to be characterized as a denial of justice.[211]

208. Arif Award ¶ 441 (footnotes omitted)

209. Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW: In respect of the result of a claim before a local court, it is clear that an investment tribunal cannot act as a method of appeal, and will not decide if the court acted erroneously or if one perspective on the law would be preferable to another. However, a line must be drawn between ordinary error and a serious error in the administration of justice, which means that a state is no longer operating under the rule of law. This line is crossed particularly when it would be impossible for a third party to see how an impartial judge could have arrived at the result in question. (Emphasis added)

Research in International Law en Harvard Law School, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 AM. J. INT'L L. 134 (1929); see also infra § IV.C.

210. See, for example, Award in the Jan de Nul case, ¶ 206, 209 ("It is not a function of the tribunal constituted under the BIT to act as a court of appeals for the national court system. The Tribunal's duty is to determine if it is clear or not that the decision was improper and unreliable, in the words of the Mondev tribunal."). Andrea K. Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 VA. J. INT'L L. 809, 813, 847 (2005) ("The rhetoric of the arbitral decisions has been to consider that a State 'denies justice' only in extreme cases: it has been held that simple errors in a decision do not imply international liability. As such, there is only a denial of justice when there has been a 'manifest injustice' that 'shocks the conscience' of reasonable people, or when a foreign national has been completely denied access to the judicial system. The tribunals have recently used the standard of 'arbitrariness' or acts that shock the conscience or offend a sense of 'judicial correction'.); Campbell McLachlan, Laurence Shore & Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, 229 (Oxford Univ. Press 2007) ("The international tribunal is not a court of appeals. A challenge to a decision on the merits from a national court can only be successful if it is clear that there was a judicial error, and not just an error at law. It has been convincingly argued that an international tribunal in a cause of action such as Mondev should not in any event return to evaluate the merits of a decision of the national court in made under its own law").

211. Alexis Mourre & Alexandre Vagenheim, Some Comments On Denial of Justice in Public and Private International Law After Saipem and Loewen, in LIBER AMICORUM BERNARDO CREMADES 843, 855 (Wolters Kluwer Spain; The Law 2010).

2.3. Regarding the Claimants' other treaty-based claims

2.3.1. Ecuador has provided the Claimants with effective means to exercise their rights

According to Chevron-Texaco, the standard for an effective remedy, as an independent standard from that of the denial of justice under international common law, imposes on sovereign States the obligation to provide not only a system that allows them to exercise their rights, but also "a system that is effective in respect of the exercise of legal rights in each individual case."[212]

This, however, is not precise, given that the opinion of the majority in terms of doctrine is that, under this provision, a State is obligated to provide institutional mechanisms that will adequately be able to resolve those controversies in which investors may find themselves. The simple fact that a specific case, or even a group of cases, is not decided in accordance with the opinion of the Claimants or the defendant, does not give rise to a violation of the provision of the treaty regarding "effective measures". Even in the extreme case that there were to exist one case or various cases that were resolved without the application of the relevant law, this would not rise to the level of a violation of the standard of effective measures. In addition, the tribunal in the Duke Energy case, when making reference to effective measures in respect to the administration of justice under the Ecuador-United States BIT, which was at issue in that case, held that Article II (7) did not relieve the investor of its responsibility under the rule of exhaustion of domestic remedies, and determined that the Claimants in that case had not exhausted domestic remedies, which prevented the "Ecuadorian legal system" as a whole from "playing its role". And, as a result, the Claimant was not able to prevail in its claim under the Treaty.[213]

2.3.2. Ecuador has provided the Claimants with fair and equitable treatment (FET)

The Claimants argue that the provisions in respect of FET require that a State: (1) act in good faith; (2) guarantee due process; (3) not frustrate the legitimate expectations of an investor; (4) refrain from engaging in coercion or harassment; and (5) promote and protect the investment.[214]

212. Reply of the claimants in Procedural Track 2 on 5 June 2013 ¶ 323

213. Award in Duke Energy v. Ecuador paragraph 398. Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19.

214. Reply of the claimants in Procedural Track 2 on 5 June 2013 ¶ 328

Regarding the concept of legitimate expectations, and even supposing that this were an obligation contemplated in the clause regarding FET, which it is not, Chevron cannot base its claim on the legitimate expectations of Texpet, just as Texpet could not base a claim on the legitimate expectations of Chevron. The legitimate expectations of each investor are to be measured as at the moment that such investor made its investment.[215]

The alleged first investment made by Chevron, in this case, was in the year 2001, when it acquired its interest in Texpet. As a result of this, even if Chevron had the right to invoke any rights in Texpet's name under the 1995 Settlement Agreement, Chevron's expectations must be evaluated as at the moment in which it made its operational investment, in 2001.[216] In any case, the Claimants have not presented any evidence in respect of what Texpet's expectations or Chevron's expectations were at the time that they made their respective investments. As a result of this, their claims based on FET fail for this simple reason. The allegation of the Claimants, in the sense that Ecuador violated the standard of FET because the court did not calculate an indemnity for damages that the Claimants believe were caused by Petroecuador, lacks any legal basis.[217] The Claimants were able to bring an action against Petroecuador, although it seems that they made a strategic decision not to do so.

Regarding the statement that the Claimants have made in regard to the idea that the Republic violated the standard of fair and equitable treatment by exercising undue pressure on the Lago Agrio courts, [218] the State's defense has shown that the government in no way interfered with the Lago Agrio court's proceedings, nor did it make any effort to encourage the court to reach a certain ruling.[219] The Claimants cannot present anything other than alleged examples of abusive conduct on the government's part, which are just recycled public

215. VTécnicas Medioambientales TecMed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, 43 ILM 143 (Award dated 29 May 2003) (Grigera Naón, Roasa, Verea) ¶ 157; PSEG Global Inc. v. Turkey, ICSID Case No. ARB/02/5 (Award of 19 January 2007) (Orrego Vicuña, Fortier, Kauffman Kohler) ¶ 240; Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3 (Decision dated 22 May 2007) (Orrego Vicuña, van den Berg, Tschanz) ¶ 252; Waste Management, Inc. v. México, ICSID Case No. ARB (AF)/00/3 (Sentence dated 30 April 2004) (Crawford, Civiletti, Gómez) ¶¶ 73, 98.

216. RosInvest Co UK Ltd. v. The Russian Federation, SCC. Case No. V079/2005 (Final Judgment dated 12 September 2010) (Böckstiegel, Steyn, Berman) at 192 - 193, 241 - 242.

217. See infra § VII.F.1.

218. Claimant´s supplemental memorial on Track 2, 14 January 2015, ¶ 388 – 392.

219. The reason, in part, that the tribunals in the Petrobart and Teco cases determined that the respective respondent States were responsible, is that the acts of these governments were designed to interfere with and in fact did interfere with the proceedings, in order to impede a final judicial resolution. See the Supplementary Reply Brief presented by the claimants in Procedural Track 2 on 14 January 2015, ¶ 389 – 390. As a result, these cases are not relevant here.

statements by government employees who had no hand in directing the activities of the courts in Lago Agrio.[220] Given that there is no corroboration (and no proof) that these public statements were directed toward the legal proceedings, or that they had any effect on them, the complaint that the Claimants are bringing, which is that the government exercised its right to free expression, in response to Chevron's own exercise of its rights to free expression, does not give rise to a claim under the treaty that would be admissible at law. In fact, far from constituting a "sign" of a corrupt legal system, the public statements, including the critical ones, are in reality a sign of a free society.[221]

2.4. Regarding the motion to invalidate the judgment in the Lago Agrio case

In respect of this motion, the defense of the State has requested that the Tribunal take the following into account:

First, there is no doubt that the invalidation of the judgment in the Lago Agrio case would settle the rights of the Claimants in that case, over which the Tribunal does not have jurisdiction. The rights of the plaintiffs in the Lago Agrio case are not the same as the rights of the government or the rights of Petroecuador, and there is no way that the Republic can act for those Claimants, in their stead or in their defense as their representative. In addition, in arguing that the judgment in the Lago Agrio case should be invalidated, the Claimants are completely ignoring the fact, which has not been disputed, that compliance with such an order would make it necessary for the Republic of Ecuador to breach its own obligations under the American Convention on Human Rights, in addition to the Constitution and its procedural laws, which would constitute a limit of the sovereignty of the Republic that would result in a violation of international law.

Second, the Claimants continue to ignore the fact that an invalidation is not an appropriate remedy when "the Claimant has been frustrated in its attempts to pursue or defend its claim",[222] but is only applicable in those cases in which a denial of justice has occurred

220. The respondent has already addressed the claimants' repeated accusations in respect of collusion and other inappropriate government conduct. See the Respondent´s reply memorial on Track 2, 18 February 2013, Annex F; Respondent´s counter-memorial on Track 2, 16 December 2013 § VI.B. Instead of responding, the claimants simply passed over the Republic's arguments and again presented their unfounded accusations as if they were factual.

221. Respondent´s supplemental memorial on Track 2, 17 March 2015, Annex B; Respondent´s memorial on Track 2 on 18 February 2013, Annex F; ¶ 2, 21 – 30; see also, David G. Savage, Justice Stevens: Obama right to criticize court ruling on campaign spending, LA TIMES (30 May 2012) (analyzing President Obama's criticisms of the United States Supreme Court); Robert Barnes, Reactions split on Obama's remark, Alito's response at State of the Union, WASHINGTON POST (29 January 2010) (same topic).

222. Paulsson DENIAL OF JUSTICE IN INTERNATIONAL LAW p. 226, (Cambridge: University Press) .

due to a lack of jurisdiction of the tribunals. The Claimants cannot point to one single case in which a ruling was ordered invalidated in circumstances that are similar to the circumstances of the present case. In addition, this is not a viable remedy because the State of Ecuador, as is the case in other democratic states, cannot order a judgment invalidated, given that the State is governed by, among others, the principle of separation of powers. More importantly, the courts themselves have an obligation to provide a remedy to those Claimants who have demonstrated that they have suffered adverse effects: this is consistent not only with the Ecuadorian legal system, but also with the principles set forth by the human rights agreements that have been signed and ratified by the State.

Third, an order to invalidate the judgment is not valid in those cases in which it has not been possible to show that there has occurred a denial of justice, and where the tribunal lacks jurisdiction.

Fourth, an order to invalidate the judgment would have the result of unjustly enriching the Claimants. The Claimants would be able to completely evade liability for the environmental damage for which they are responsible as a matter of Ecuadorian law. This result would be a distortion of justice and would be contrary to well established principles of international law.

Fifth, in accordance to what the Claimants themselves have admitted, despite the fact that Chevron knew that the alleged fraud was going to occur, it did nothing to stop it. As a result of this omission, Chevron cannot now point to this fraud in order to obtain an order to invalidate the decision.

The Claimants took action so that Nicolás Zambrano would be appointed as the judge presiding over the case in Lago Agrio. And, knowing that if Leonardo Ordóñez were dismissed as the judge presiding over the proceedings, Zambrano would replace him, they presented a motion to recuse the former, removing him from the proceedings. It is impossible to understand how, if they believed that Nicolás Zambrano was corrupt, as they have assured the Tribunal during the arbitration proceedings, why they would have motioned for the recusal of Leonardo Ordóñez.

As such, ordering that the decision be invalidated in these circumstances would have no legal basis, would be factually incorrect, and would be grossly unfair.

3. THE COURT'S DETERMINATION REGARDING ENVIRONMENTAL DAMAGES WAS WELL FOUNDED AND IS REASONABLE

In the fact of Chevron-Texaco's argument that the environmental case is no more than a creative conspiracy with the intention of bankrupting the company, Ecuador has shown that the evidence presented in the suit in Lago Agrio demonstrates that this is not the case,[223] and for this reason, Chevron-Texaco's arguments are without merit.

From the evidence that Chevron itself presented, it is easy to conclude that the Claimants polluted the former Concession Area, and that the contamination is still causing harm to the residents of the area.

The environmental experts who were hired by the State of Ecuador's defense, Louis Berger Group Inc. (LBG) have analyzed the historical documents, other data collected during the lawsuit in Lago Agrio, and finally, data they themselves compiled, have concluded that the operations of Texpet caused serious and lasting damage to the ecology of the Amazon Region, with direct and secondary effects.

In this respect, for the first time, the Claimants have based their arguments on regulations in force in Ecuador, by attempting to argue that the pollution that Texpet caused is not significant, and does not present any risk to human health.[224] This is a crucial shift, which cannot be explained, from the previous posture of the Claimants, as it leads them to the conclusion that an arbitrary "international" standard, invented by Chevron, of 10 mil mg/kg, should be applied, which is much less strict.[225] In any case, the new posture that the Claimants have adopted is based on an incorrect assumption: The question is not if the environmental contamination that the Claimants caused does or does not exceed the standards applicable in Ecuador. The question is, instead, whether **Texpet did or did not cause any contamination, because it is the company that is obliged, both by the laws that were in force**

223. Even the "crisis management expert" hired by Chevron admitted that he would not bathe in or drink from the water sources in the area of the former Concession, Barrett at 218, 221 ("I would not want to bathe in those streams", Craig admitted. "I would not want to drink from those streams. I would not want to live close to an oil drilling operation with a natural gas plume burning all the time. But this is the deal that Ecuador made in order to move itself into the modern world").

224. See, for example, Respondent´s supplemental memorial on Track 2, 14 January 2015, ¶¶ 210 – 211, 214.

225. See, for example, the Expert Report of John A. Connor, Judicial Inspection of the Sacha – 06 Well (7 January 2005)

during the time of its operations in Ecuador, as well as under the Concession Agreement of 1973, to comply with the general obligation not to cause any contamination.[226] The Claimants' own expert witness, John Connor, stated that the levels of Total Petroleum Hydrocarbons (TPH) that were naturally occurring, or the "base levels", should have been at zero.[227] Under these circumstances, the Lago Agrio judgment used a standard of 100 mg/kg, which can only be considered as reasonable.[228]



Aguarico 6, June 2015, evidence of contamination that persists to date, caused by Texpet's operations.

226. See the Law on Hydrocarbon Deposits, Official Register No. 331, 21 October 1921; Law on Hydrocarbons, Decree No. 1459, 27 September 1971, Official Register No. 322, 1 October 1971, 29 (s) – (t); Supreme Decree No. 925, 4 August 1973, Official Register No. 370, 16 August 1973, cl. 46:1; Regulation of Exploration for and Exploitation of Hydrocarbons of 1974, Official Register No. 530, 9 April 1974, art. 20 (b); Law regarding the Prevention and Control of Environmental Contamination, Decree NO. 374, Official Register No. 97, 31 May 1976, chapter V, art. 11, chapter VI, art. 16, chapter VII, art. 20; Decision in the Lago Agrio case at 60 – 74; see also Response Brief filed by the Respondent in Procedural Track 2, at ¶ 58 60; Decision in the Lago Agrio case at 60 – 74.

227. Transcript of the Hearing regarding Counterclaims in the Burlington case, at 1627 – 1629.

228. Expert Report presented by LBG (16 March 2015) 2.5. See also HYDROCARBON BIOREMEDIATION, 424 (R. Hinchee, et al., eds. 1993) ("The standard for the clean-up that was established was 50 mg/kg of TPH [Total Petroleum Hydrocarbons]").

The Claimants' use of these defective premises with the objective of distracting the Tribunal did not stop there:

First, the Claimants have stated that the Republic has not been able to demonstrate the correct assignation of responsibility for the contamination found in the Concession Area. This is misleading. Both parties have presented different legal theories in respect of the assignation of responsibility. The Claimants have maintained that the Remediation Work Plan (PAS, for its initials in Spanish) released Chevron from any responsibility, including in respect of third parties who were not signatories to the document, as in the case of the Claimants in the case in Lago Agrio. **Ecuador has shown why this is not correct, and, in addition, that Chevron is not only solely liable for all of the contamination that was presumably caused by Texpet, but also jointly liable with Texpet and Petroecuador**, although this is subject to the right that Chevron has to bring a later claim against the latter party for its contribution to the contamination.

Second, the Claimants have stated that the data compiled by LBG has not been entered into the record of the proceedings in the Lago Agrio case, and as a result, the judgment cannot be considered to be reasonable, other than to show that the evidence presented in the proceedings is not sufficient to justify the decision that the court reached. However, the State of Ecuador has not alleged that the court in the Lago Agrio case based its ruling on the data compiled by LBG: what the State has argued is that **the data that was used in the proceedings before the court, confirmed by the data found in the prior secret inspections that Chevron had conducted, as well as by the data compiled by LBG, show that the judgment was reasonable**.

Third, the Claimants continue to argue that the health experts that Ecuador used were not able to show truth harmful health impacts to specific persons. However, as the State's defense did in fact demonstrate, the available evidence confirms that there is a risk to human health that requires remediation efforts as well as efforts to monitor human health.

4. THE 1782 ACTIONS BROUGHT BY THE STATE'S DEFENSE IN THE UNITED STATES OF AMERICA REVEAL THE CONDUCT OF CHEVRON DURING THE INSPECTIONS THAT WERE CARRIED OUT IN THE LAGO AGRIO LITIGATION

> "This is an important achievement for Ecuador in fighting the legal battle that Chevron is engaged in against our country, and it is a new failure on the part of the oil company in the appellate courts of the United States, as a result of the 1782 actions that we have initiated in order to obtain evidence that can be used within the investment arbitration proceedings."
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, November 18, 2013**
>
> The Court of Appeals for the 10th Circuit in Denver (Colorado, United States of America) confirmed that the Republic of Ecuador can make use of thousands of documents that the oil company sought to keep reserved in the international arbitration, which we refer to as "Chevron III."

Despite Chevron's resistance, Ecuador brought actions in the United States of America with the objective of obtaining privileged documents of Chevron and its contractors. These actions, referred to as the "1782 actions" allowed Ecuador to obtain a large quantity of documents, which it has exclusively used within the international arbitration proceedings.[229] Chevron and Texaco wanted to keep these documents, which were in the custody of the Chevron environmental experts, reserved. With these documents, it has been shown that during the evidentiary stage of the proceedings in the case in Lago Agrio, Texaco minimized and hid evidence of contamination caused by its more than 30 years of operations in Ecuador. In addition, the conclusions of at least one of its experts in respect of the contamination caused by the company are debatable and inaccurate.

This evidence has revealed that **in the Lago Agrio case, Chevron hid and manipulated evidence, including the following: i) Chevron used a test that, by its design, was never meant to**

229. Videos of the prior inspections are available on YouTube at: (https://www.youtube.com/watch?v=l618BhvWkz4&feature=youtu.be)

evaluate contamination by oil hydrocarbons, or to determine if there was any contamination in the collected samples. Chevron used the "compound sample" method, a sampling technique that, by design, establishes an average concentration of oil components. In other words, Chevron mixed clean soil and contaminated soil together, in order to obtain more favorable results; ii) Chevron carried inspections that were not authorized prior to the official judicial inspections, in order to determine sites from which to take samples that would yield "clean" results; and iii) Chevron used its knowledge



Aguarico 6, June 2015, catchpit and water monitoring well, used to measure the contamination of underground waters and soil.

of the geography and natural features of the area in order to take samples from places in which it was unlikely that any contamination would be found.

The documents obtained allowed Ecuador to incorporate this information into its legal briefs, and in this way demonstrate to the Tribunal the bad faith practices that Chevron had engaged in during the judicial inspections carried out during the case in Lago Agrio. Specifically, Chevron presented to the Tribunal documents known as the "Pre-Inspection Manual", which it had prepared for each of the judicial



Shushufindi 55, April 2015, detecting device for volatile organic compounds used to measure the pollution levels.

inspections. These documents show that Chevron, in preparation for each inspection, and without disclosing its activities to its counterparty or to the judge, carried out field inspections with the objective of locating clean areas at the inspection sites, from which, during the judicial inspection, it would extract its samples to be sent to the laboratory for analysis.

These documents, which were presented in the briefs filed in November 2014 and March 2015, showed that Chevron had used a team of professionals and information about each site in order make use of the topography of each area, the locations of the pools and other information, in order to determine the sites from which it wished to take its samples. Later, this was verified through an extraction of samples, which confirmed the first evaluation. Despite these efforts, on many occasions, given the degree of contamination at the sites, it was discovered that the areas that Chevron hoped were clean, in reality were not free of contamination. These findings were not shared with the Court, and even when the findings were shared, they were the subject of jokes among the experts, as can be seen from the video recording that Ecuador presented to the Arbitration Tribunal in the final hearing on the merits held in April and May 2015. This document has been made available to the public on YouTube (https://www.youtube.com/watch?v=l618BhvWkz4&feature=youtu.be). Without the 1782 actions and the documents obtained by the Ecuadorian defense, all of this information would have remained hidden.

The aforementioned was not the only information that Ecuador obtained through the 1782 actions. Ecuador also obtained information regarding Chevron's use of a compound sampling method that had been designed to hide the presence of contamination, consisting of diluting, by mixing clean soil with contaminated soil, of the concentration of existing hydrocarbons and toxic material. Using this method, and in a deliberate manner, Chevron sought to reach an acceptable average level of contamination.

The information obtained revealed Chevron's activities as a party to the proceedings in Lago Agrio. For example, this information has brought to light how Chevron used the compound sampling method, which, from a technical point of view, and as LBG pointed out, is not appropriate, because it hides the migration of contamination and gives

misleading results. Without this method, high levels of contamination would have been found at the points where hydrocarbon wastes migrated from the pools, which end in rivers and streams and which, in turn, make contact with human populations, as well as the flora and fauna in the area.

In this way, the **'1782 Actions'** revealed the following:

First: With knowledge that Texpet had contaminated the Amazon Region, **Chevron set up a schedule of preliminary inspections**, knowing, however, that it would find some contamination. The Chevron Strategy Manual showed how to carry out the inspections in order to minimize the impact of the inspections. The strategy of Chevron was to locate and test only those areas free of contamination for sampling during the judicial inspections.

Second: In order to reach its final goal, the experts working for Chevron made use of their knowledge of different sampling techniques, their experience, the results of the preliminary inspections, and their own in situ observations in order **to avoid taking samples of contaminated soil or subterranean water during the Judicial Inspections**. If all of their strategies failed, Chevron was looking for a way to blame the residents of the Amazon Region for the contamination that was attributable to the oil company. Given the impressive array of resources that the oil company dedicated to this task, what was found during the judicial inspections simply serves to corroborate just how widespread the contamination was and is.

> The "1782 actions" reveal the unfair practices that Chevron engaged in, in order to hide the existence of contamination in the Ecuadorian Amazon Region from the judge in the Lago Agrio case.

Third: Chevron avoided taking samples from depths that it knew would be contaminated. During the judicial inspections, the experts for Chevron took samples only at depths at which the company could be certain that they would not find any contamination. The oil company strategically made the decision to take only surface soil samples.

Fourth: Chevron avoided taking samples from areas that it knew to be, and which still are, contaminated. The company also completely avoided those areas that, thanks to the prior inspections, knew to be contaminated.

Fifth: During the inspections, Chevron repeatedly and deliberately made the decision to take samples from an "upward incline" or an "upward gradient", as part of a strategy designed to minimize levels of contamination detected.

Sixth: In its reports, **Chevron hid the degrees of Polycyclic Aromatic Hydrocarbons (PAH) that were found at the sites from which it took samples**. The Polycyclic Aromatic Hydrocarbons are a class of chemical substance present in crude oil which causes a number of effects on human health, including: cancer and a decrease in the immune system's functioning. Sixteen of these PAHs are frequently referred to as "parent PAHs" because they are the simplest form of a particular PAH. These parent PAHs can also be alkylated—that is, an alkylated group can be added to the PAH parent.
In his first expert report, Dr. Jeff Short, an expert for the State of Ecuador, noted that Chevron had excluded alkylated PAHs from its analysis of contaminants at the Amazon Region inspection sites, and, as a result of this, Chevron did not report on the highest PAHs present in crude oil (more than 50%). As Dr. Short explained, the alkylated PAHs that Chevron omitted from its analysis have the following characteristics:

- They are less volatile and less soluble in water, and as a result, are more persistent in the environment;
- They are often more toxic than other PAHs;
- They are four to five times more abundant in fresh crude oil than the PAH that Chevron analyzed in its presentations to the Court;
- They are approximately 10 times more abundant in degraded crude oil due to environmental conditions, given that they are less susceptible to this type of degradation.

Seventh: Chevron selected sampling methods that it knew would not detect contamination by oil with precision. Two of the methods that Chevron has defended the most—the 8015 Method

and the TCL method—are not appropriate for the detection of all components of crude oil, and underestimate the quantity of hydrocarbons present in the environment.

Eighth: With the use of the compound sample, Chevron was able to hide the presence of contaminants, by diluting the concentration of contamination in the soil. Chevron used the compound sample method for an improper purpose. By mixing contaminated soil samples with clean soil samples, Chevron, in a deliberate manner, sought to create an average level of contamination that was acceptable. Chevron's method of including fresh or clean soil in compound samples, again was designed to reach a predetermined result, not in order to actually determine how far the contamination had reached.

Ninth: **The strategy that Chevron used during the case in Lago Agrio was meant to avoid liability for any of the impacts on human health**, by playing up the deficient sanitation conditions in the Amazon Region. The Chevron Strategy Manual for the Judicial Inspections documents the fact that this was the company's objective.

Tenth: **Chevron actively sought to bias the academic literature, by paying off experts to defend its positions.** The Chevron experts cited articles that were supposedly written by "independent" academics in order to bolster their scientific theory that there was no existing risk to human health or environmental harm in the Amazon Region. However, in the best of cases, the independence of these studies is questionable, given that Chevron had a coordinated plan to publish articles that would support the scientific points of view of its own experts.

5. REGARDING CHEVRON TEXACO'S LIABILITY IN RESPECT OF CONTAMINATION IN THE AMAZON REGION

Although the Republic vigorously maintains that the judicial branch's conduct did not infringed any international legal obligation, even if the Tribunal were still to come to the conclusion that there had been a violation of the BIT, there is no principle of

" […] The expert reports that LBG presented to Ecuador in these arbitral proceedings show that there is substantial contamination in the eastern part of the Ecuadorian territory. Despite arguments to the contrary, it has been shown that a large part of the contamination found is directly attributable to Texpet and Chevron. The information obtained by the State's defense by way of the 1782 actions in the United States of America, which includes written and audiovisual records of the prior inspections that were carried out at the sites of the environmental damage, demonstrate both Chevron's conduct as a party to the proceedings, as well as its practices during its exploration and exploitation proceedings. It is sufficient for the moment to note that the Tribunal has at its disposition thousands of pages and numerous hours of video that show how Chevron implemented its plan to cover up the environmental contamination caused by Texpet and Chevron and hide it from the court.

Your Honors of the Tribunal: it is obvious why the Claimants have resisted, for all these years, a visit to the sites of the environmental damage. The Claimants do not want this Tribunal to be exposed to the reality of the contamination caused by Texpet's operations in the eastern part of the Ecuadorian territory. Dr. Diego Garcia Carrion, State Attorney General, Hearing on Opening Arguments held on from April 21 to May 8, 2015, in Washington D.C.

Dr. Diego Garcia Carrion, Attorney General, Hearing on Opening Arguments held on from April 21 to May 8, 2015, in Washington D.C.

international law that would allow the Claimants to avoid their responsibility for those damages that they did in fact cause in the Amazon Region.

In any case, even if the Tribunal had the authority to order an indemnity for the damages caused by a failure to comply with the provisions of the BIT, it would not have any authority to order an excessive indemnity for an investor, by eliminating, or transferring to the State, that investor's liability for damages for which such investor must answer in accordance with the applicable national legislation.

The general principles of international law require that the Claimants not be unjustly enriched as a result of the application of the BIT, or of international law. The Claimants may only recover those damages that they actually suffered and be restored to the economic position in which they found themselves prior to the infraction against them, but they cannot use the BIT to put them in a better position than the one they were in if it had not been for the violation of international law.

As a result, the Claimants' petition that the Tribunal issue an award that simply declares that any judgment that results from the case in Lago Agrio be ordered invalid or not be enforced, is contrary to the law. Such an award would provide an unjust enrichment



Aguarico 6, June 2015, oil bursting forth from the soil.

to the Claimants and would exclude them from being held liable by the Claimants in Lago Agrio. Such a declaration would overstep the Tribunal's authority (if it had such authority to begin with), which is set forth within the limitations of the BIT.

Any resolution regarding a violation of the Treaty or of international common law should reduce the amount that was calculated based on Chevron Texaco's responsibility for the contamination in the Ecuadorian Amazon Region. This would put the Claimants in the same economic position—and not in an improved economic position—in which they would have been in if the Lago Agrio claim had been carried out in the manner in which the Tribunal determined appropriate, in accordance with the applicable provisions of the Treaty.[230]

5.1. Chevron is not excluded from liability for environmental damages

Throughout the course of the arbitration proceedings, Chevron-Texaco has not been able to demonstrate that they are excluded from liability in respect of the claims raised against the company within the suit in Lago Agrio. To the contrary, there is evidence that Texpet did not employ proper methods for the exploration, production and transport of oil, which harmed and continues to harm the ecology of the Amazon Region, human health, and the methods of subsistence of the region's inhabitants.

The evidence shows that contamination exists on a grand scale, despite the efforts that the Claimants have engaged in to cover it up.

The environmental experts that the Republic hired[231] for purposes of the arbitral proceedings have established that, despite the fact that Ecuadorian law requires a high degree of care in order to avoid contamination of the environment and the corresponding harm to the citizens of Ecuador, **Texpet chose to use methods that were below minimum acceptable standards, such as, among others, using pits in the earth without linings, discharging production waters directly into streams and other surface waters, failing to install monitoring wells, and covering dirt paths with oil**. In the same case file of the proceedings in Lago

230. Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, P. 272 (Oxford Univ. Press 2008)

231. The LBG Firm, Louis Berger Group

Agrio, there is evidence of the contamination created by Texpet's activities, as follows:

- The report prepared by HBT Agra, an environmental auditor hired by Texaco and Petroecuador within the proceedings of the transfer of operations after the termination of the Concession Contract, shows that there was extensive contamination in existence at the time that Texpet left Ecuador;
- The Fugro-McClelland reports, which were commissioned exclusively for Texpet (the audit on the HBT Agra report) and which demonstrate extensive contamination; and,
- The results of the judicial inspections that Chevron carried out, show, for example, that 91 percent of the sites that were sampled exceeded the standards established by Ecuadorian law.



Gooseneck left by Texpet, which continues to spill crude oil into the environment to date.

LBG's experts analyzed the data and the information available, and dedicated approximately three months—between June and November 2013—for visits to the sites in the Amazon Region and to carry out an expanded sampling exercise. Based on the information that was already available, and the data that it was able to produce, **LBG verified that: (1) there was still contamination from oil present in each of the wells in the former Concession Area that LBG visited and from which it took samples; (2) the contamination is directly attributable to the operations of Texpet; and (3) everything indicates that the same type of results would be found throughout the Concession Area**.



Shushufindi 34, April 2015, drilling of the soil to determine the contamination of the soil.



Aguarico 6, June 2015, State Attorney General, Dr. Diego García Carrión, visits the affected area.

"Chevron is not exempt from liability for environmental harm; the LBG reports have shown that there is contamination, and that it is attributable to Chevron."

The Claimants cited the finalization of the remediation measures that Texpet had taken as evidence of the fact that there were no further damages caused by their operations in the Ecuadorian Amazon Region. However, the Republic's environmental experts concluded that before leaving Ecuador, **Texpet**:

1) **Did not correctly establish the extent of the contamination it had caused;**
2) **Did not calculate the risk that it had caused to human health and the environment; and**
3) **Did not undertake sufficient remediation works in respect of its oil production and transport facilities.**

In the face of this overwhelming evidence, it would be wrong for the Tribunal to release the Claimants from any liability as a result of their oil exploration and extraction activities in the Amazon Region.

5.2. The Claimants' practices and policies resulted in significant damages to the environment, and today represent a risk to human health

The origin of the larger share of the damages that are complained of by the Lago Agrio plaintiffs is a result of the decision that Texaco made to save money instead of to comply with its legal, contractual and moral obligations to protect the environment and the indigenous populations from the harmful effects of Texaco's operations at the oil fields.[232]

In particular, Texaco, in the name of its subsidiary, Texpet, decided not to cover the earthen pits that it was using for waste material, thereby impeding the spread of contamination, because it determined that the price tag of USD 4.2 million that it would cost the company to undertake this task was too high. It is difficult for an oil company that would make a decision like this one to say that it carried out "responsible" remediation works.

In accordance with Texpet's own internal records, when Texpet tested the production capacity of each new well, it dumped hundreds of barrels

232. Internal memorandum of Texaco, dated 25 June 1980 CGE – 398/72, sent by R.M. Bischoff to M.E. Crawford, at 1 – 2.

of crude oil directly into the pools, which were not covered with liners. The expert appointed by Chevron in the Lago Agrio suit, Mr. Gerardo Barros, estimated that, as a result of the production capacity testing, up to 42 thousand gallons of oil were dumped into each well.[233] **If Texpet repeated this process at each well, and all the evidence points to the fact that they did so, then Texpet dumped more than 14,448,000 gallons of oil into pools located around their 344 wells.** Internal documents from the oil company show that the "hide the evidence" strategy that Texpet employed in order to solve the problem with these wells was to cover them up with earth, without engaging in any cleanup



Shushufindi 55, January 2015, topography of the land that demonstrates the continued migration of the contamination.

233. Expert Report of Engineer Barros

Texpet, when it tested the production capacity of each new well, dumped hundreds of barrels of crude oil directly into the pools, without using liners.

efforts whatsoever. Chevron continued on with this "hide the evidence" strategy, making it an integral component of its strategy in the litigation in Lago Agrio, and to this date, continues to be part of the activities the company carries out in order to evade responsibility for the damage it has caused.

In July 1972, the President of the Board of Directors of Texaco, R.C. Shields, sent a "Personal and Confidential" memorandum to Texpet leadership, which was titled "Reports on Environmental Incidents". In this memorandum, the president of Texaco ordered the oil company's employees in Ecuador to avoid keeping records of any spill or accident, unless such spill or accident had already "attracted attention in the press and/or the attention of the regulatory authorities, or if, in your opinion, the incident bears reporting".[234]

A report from one of the Texaco employees shows how contamination was covered up by Texpet. Mr. Warfield Hobbs, a Texaco employee, wrote a memorandum regarding his trip to one of the concession sites in Ecuador, stating that:

> *"many of the sites at which the wells are located have remained in terrible condition after the drilling platforms at the sites are removed"; "many well sites and the natural drainage paths that are adjacent to them are contaminated with crude oil, due to inappropriate burning and retention methods used during the well testing stage"; and "the pools that are being used generally for mud and to hold the material that is coming out of the wells while the wells are being drilled need to be repaired, and are not adequate to hold the oil from the tests, while the tests are being carried out at the well".*[235]

234. Memorandum sent by .C. Sheilds and R.M. Bischoff to M.E. Crawford, with the subject line, New Guidelines for the Presentation of Reports on Environmental Incidents (17 July 1972)

235. Memorandum sent by Hobbs to Texaco (16 May 1972).

5.3. The Arbitration Tribunal should not issue any resolution in respect of the complaint brought by Chevron, if the tribunal has not yet resolved the issue of Chevron-Texaco's liability for environmental damages

Contrary to what the Claimants have argued, the contamination is relevant to these arbitration proceedings.[236] The contamination is the event giving rise to the claim that led to the request for arbitration, and any decision that is made in the arbitration proceedings will have consequences on the environmental claim. It was the Claimants themselves who brought the environmental claims into this process in the first place, by making the argument that the judgment in the litigation in Lago Agrio lacks any scientific justification, and as a result, could only be the result of fraud.[237] Now that it has been shown that the pollution did in fact exist, and that it was attributable to the company, this point cannot simply be dropped from the proceedings. The credible evidence shows that the Lago Agrio decision is relevant, given that it shows that the Ecuadorian court acted in an appropriate manner.

5.4. The contamination is still present to date in the Ecuadorian Amazon region, as a direct result of the practices employed by Texpet

Recently, the Republic's environmental experts confirmed that the contamination caused by Texpet is still present and continues to have effects on people living in the Amazon Region. And not only that, but the experts have concluded that the pollution is not localized.

> ***"Specifically, we have found that the contamination caused by Texpet: a) is not limited to the areas immediately surrounding the E&P installations (the exploration and production infrastructure) and b) it has migrated to areas that are inhabited by humans, where there are domesticated animals, agricultural activity, or subterranean water or surface hydrological resources. These findings even more strongly support our opinion that the contamination is not localized".***[238]

236. Claimant´s supplemental memorial, 20 March 2012, ¶ 140.

237. See Claimant´s supplemental memorial, 20 March 2013 ¶ 38 (confirming that "there is no valid evidence in the record of the proceedings in the case in Lago Agrio that supports the enormous award of damages included in the judgment"); Response Brief filed by the claimants in Procedural Track 2 on 5 June 2013, § II.D.6 ("The judgment in the case in Lago Agrio is not justified by any valid environmental evidence").

238. Unofficial translation. Expert report dated November 2014.

From the beginning of the experts' work on this matter, their conclusions have been consistent, as demonstrated by the following:

> *LBG's Expert Report dated February 2013 mainly evaluated the available environmental data from the Lago Agrio case and previous studies, from which* ***we have arrived at the conclusion that there is generalized contamination currently in the Concession Area, contrary to the Claimants' statements that the residual contamination is limited".***[239]

A summary of our opinions as given in February 2013 indicates the following:[240]

- *As the designated operator of the Concession, Texpet caused generalized contamination in relation to its activities associated with the exploration, drilling, production, and transport of oil. The operations of Texpet have caused environmental harm in the past, and this harm is ongoing, due to the exposure to toxic and dangerous chemical products, and the concordant risk to human health and to the local ecology;*

- *This contamination is due to the presence and persistence of a wide variety of hydrocarbons and other related compounds discharged by the activities of Texpet;*

- *The Texpet Remediation Action Plan (RAP) of September 1995 was limited, and was not able to identify or address a large part of the contamination caused by the past operations of Texpet, and the risks associated therewith to human health and the environment;*

- *Some of the sites that Texpet supposedly remediated in the 1990s continue, to this date: (a) to exceed the performance standards established in the RAP, (b) to exceed the permissible limits established under Ecuadorian laws and regulations, and (c) to represent a risk to human health and the environment. The sampling methods that Chevron used in the Lago Agrio litigation and the evidentiary procedures (for example, the compound sampling method) were not*

239. Claimant´s supplemental memorial on Track 2, 9 May 2014, p. 85

240. Expert Report presented by Kenneth J. Goldstein, M.A., CGWP and Jeffrey W. Short, PhD, with respect to the environmental contamination caused by the oil E&P [exploration and production] activities carried out by Texpet in the former Napo Concession Area, in the Eastern Region of Ecuador (hereinafter referred to as the LBG Expert Report of February 2013)

representative, and, as a result, they do not adequately demonstrate the scope of the contamination. Despite this limitation, however, the sample and the evidence that Chevron (and the plaintiffs in the Lago Agrio suit) took show that there is significant contamination due to toxic compounds; and

- *The analysis in the decision regarding damages was reasonable".*[241]

Not only does LBG's data confirm that there was contamination, but, that between 2004 and 2007, while the case in Lago Agrio was ongoing,



Shushufindi 34, June 2015, Drilling of the soil where petroleum is sprouting.

241. Unofficial translation of the LBG Expert Report, 7 November 2014. Summary of the opinions presented in the report of February 2013

> During the Judicial Inspection at the Sacha North 2 site, Adolfo Callejas, legal counsel for Chevron, admitted that, "In this respect, we have already stated that there is existing harm, that there are contaminant materials."

Chevron's own data also confirmed it. For example, at the Judicial Inspection of the Sacha North 2 Well, Chevron attorney Adolfo Callejas admitted that: "In this respect, we have already taken it as a given that there is damage, that there is contaminating material".[242] And, even before that, Fugro McClelland and HBT Agra, the auditors responsible for evaluating Texpet's impacts on the Amazon Region, confirmed that there was contamination in their reports in 1992 and 1993.[243]

The Claimants argue that the pollution could not be treated as if it had been caused solely by Texpet, given the lapse of years and the operations of Petroecuador after June 1990. But this argument deserves to be broken down:

First: the Republic has found numerous cases of contamination at sites and pools that were "solely operated by Texpet", and, as a result, the contamination therein can only be the responsibility of Texpet.

Second: even when the party that is liable cannot be determined between two or more parties responsible for unlawful conduct, no party who was part of the unlawful conduct can avoid liability by relying on the fact that there is too much uncertainty to assign individual responsibility. The Civil Code of Ecuador is clear on this point: the Claimants are jointly and severally liable for the damage caused by contamination in the eastern part of the country, even if Petroecuador also later contributed to that contamination.[244]

Under the principle of joint and several liability, the Claimants' liability is not extinguished by the intervention of a later actor. However, in order to simply this issue, LBG took samples from those sites at which Petroecuador never carried out operations—

242. Order regarding the Judicial Inspection of the Sacha North 2 Well, at 2

243. Response Brief on the Merits filed by the Respondent in Procedural Track 2 on 18 February 2013 ¶ 70 – 82

244. Civil Code of Ecuador, art. 2217

that is, at sites that were exclusively operated by Texpet.[245] The results from these samples serve to show that the contamination caused by Texpet is still present, has migrated, and has had a negative impact on the environment.

The decision of the court in the Lago Agrio case, which was upheld by the National Court of Ecuador, is correct in substance, as it relates to a determination of liability for contamination. The judges who presided sequentially over the Lago Agrio proceedings reviewed massive amounts of evidence, interviewed many residents of the Amazon Region, and directly observed the pollution that resulted from Texpet's operations, which continues to affect area residents.

LBG has confirmed that this contamination is present, and that such contamination could only be a result of the operations of Texpet.

> ***The investigations [of LBG] at five sites of wells have shown that, contrary to what Chevron claims, the subterranean and superficial hydrological resources (including sediment) are not free from the impacts of chemical substances, and the impacts on the soil are not limited to localized areas within the area of the installations at the oil fields.*** *In fact, the contamination extends to the adjacent properties.* ***The contamination that resulted from the activities of exploration and production that Texpet engaged in can still be found in the Concession Area, and presents a possible risk of exposure for persons residing in neighboring areas, as well as for the local ecology****. LBG has shown that the decision made by Chevron to abandon detailed investigations into the subterranean waters and surface waters was biased by its defective assumptions in respect of the nature and the extension of the contamination at these sites.*[246] (Emphasis added)

In addition, in its report of November 2014,[247] LBG reported the following objective findings:

245. Aguarico 02, Aguarico 06, Shushufindi 34 and Shushufindi 55.

246. Response report prepared by LBG § 2.2.2.2.

247. Unofficial translation. Report of November 2014

- ***"The personnel working in the field have informed us that all you have to do is push your foot down into the soil in some of the wet areas, and the oil filters up through it."***

- ***"…when you find subterranean waters that existed as a resource, the water is contaminated."***

- *"The analysis shows that even using its own data, Chevron was not able to identify the existence of a 'clean perimeter' at nearly all of the sites…"*

- *"Our samples that were taken in 2013 show that the contamination in the sediment in the streambeds that flow next to the installations for exploration and production activities is found at significant distances from the installations at the sites, and is found in places where there are people and animals making use of those water sources."*

- *"Our on site inspections at the wells and the follow up of the investigations document cases in which the natural resources (that is, soil, sediment, and surface and subterranean waters) continue to feel the impacts of the exploration and production activities that Texpet engaged in… Throughout the streams that are adjacent to the sites, crude oil can be seen bubbling up…"*

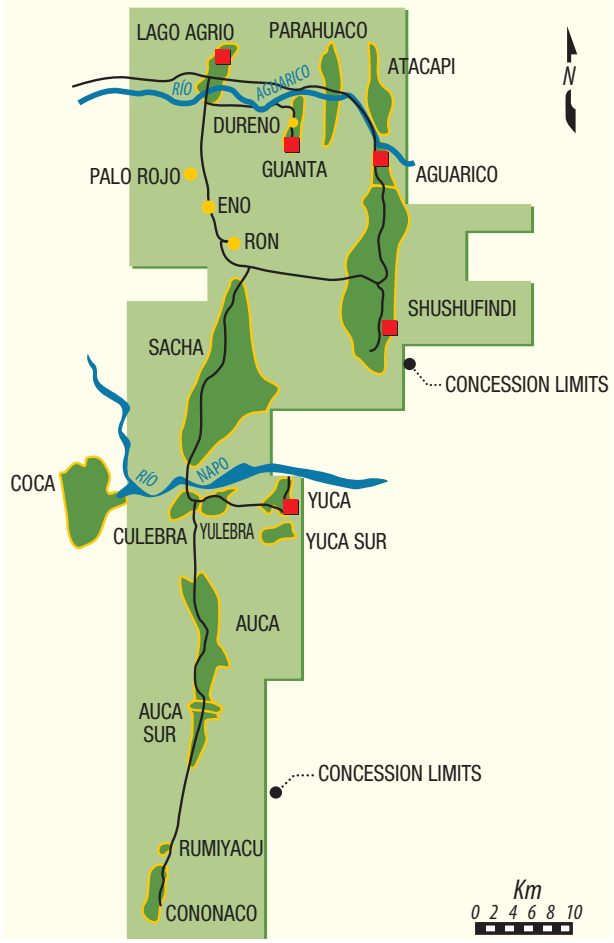
- *"We have also seen water sources that are impacted in the areas where people are making use of those same resources."*

As can be seen in the red boxes in the following illustration, LBG visited five sites that were representative of the various geographic regions in the Concession Area: (1) Lago Agrio 2; (2) Guanta 6; (3) Shushufindi 25; (4) Aguarico 2; and (5) Yuca 2. The sampling and analysis activities that were carried out at each site during LBG's visits confirmed that the presence of contamination caused by Texpet was persistent and generalized.

There are various results from the visits to each of the selected sites. For example:

- At Lago Agrio 2, it cannot be doubted that Texpet, using its first pools, left behind pollution that has affected and continues to affect area residents.

FIGURE 6. Map of the Concession Area with red squares to denote the approximate locations of the sites that were visited by LBG.



Source: PGE

- During the proceedings of the case in Lago Agrio, Chevron did everything it could to hide the origins of this contamination, when in its official report, presented before the court in Lago Agrio, it did not make any mention of three of four pools, but instead referred to only one of the pools, in order to avoid the identification of locations in which it knew that contamination would be found.

- When LBG visited LA-02, they observed a house that had been constructed between the former oil drilling platform and a stream flowing east, which had not been observed during the preliminary inspections or the judicially ordered inspections within the Lago Agrio litigation. Based on observations made and interviews taken during the visit to those sites, it was evident that the area residents could not use the stream water to cook, clean or for other daily uses, because it was contaminated.

- However, during its visit to the site, LBG noted the presence of children of area inhabitants at the pools and streams.[248] LBG has confirmed that at

248. Id., Report on Site Inspections at RS - 8 – RS - 9

the site, the groundwater is also contaminated (oil from Pool 3 was found floating on the surface of the groundwater in the monitoring pools that were installed by LBG).

LBG also confirmed that contamination from Pool 3 had migrated hundreds of meters into the stream, and that it had had a continuous impact on the sediment. LBG concluded that the oil found in the stream is identical to that oil found in Pool 3.

- At the Shushufindi 25 site ("SSF-25"), during its exploration and production activities, Texpet dug four pools, three of which were oil pools, and which were cleaned up in accordance with the RAP.[249] The fourth, a pool that held water, was cleaned up by Petroecuador.

During its visits to the sites in 2013, LBG confirmed that the contamination documented by Chevron in 2004 is still in existence and continues to propagate



Lago Agrio 2, the oil floats in the top portion of the water extracted from a monitoring well that is adjacent to Pit 3.



Drainage pipe beside Pit 3. The contaminated stream is located just below the pipe.

249. Texpet stated that the fourth pool did not require additional actions ("NFA" or No Further Action) because "it was used for spills". Chevron Strategy Manual for Judicial Inspections at the Shushufindi 25 site, at GSI_0478381.

itself. The subterranean water is still transporting the petroleum hydrocarbons that remain in the pools into the streams and the sediment. This puts the health of those persons who use the streams and sediments at risk of harm.

The interviews conducted with area residents confirm that those persons who live close to the site use the stream as a primary water source for domestic use, as well as for their livestock and for agricultural purposes.

LBG also found contamination running below Pool 1, in the sediment of the stream.[250] The contamination at this site is particularly problematic given that a wooden structure has been put up next to the stream. LBG saw how the residents of the area used this structure to collect and make use of the contaminated water.[251]

- At Yuca 02, the initial tests that LBG conducted in 2013 confirmed that the wetland area was still highly contaminated as a result of a spill that Texpet caused during the 1980s. During the initial investigation, only a few steps away from the wetland, LBG found sediment that was saturated with oil just below the surface of the ground. In addition, LBG found oil that had filtered on to the banks of the stream and was draining into the wetland from the east. Taking a few steps away from the stream caused more oil to rise to the surface on the ground, and the surface of the water shone with oil.

5.5. The supplementary investigation that LBG carried out at additional sites in 2014 confirms, in addition, that the contamination that Texpet caused is also present in the concession area

The investigations that LBG carried out in 2014 at additional sites once more tested the Claimants' hypothesis that the contaminants were degrading in a significant way over time due to environmental factors, were immobile, and were confined to the wells where Texpet had left them. These 2014 investigations confirmed the findings of LBG's 2013 investigations, and demonstrated that the hypothesis presented by the Claimants is incorrect.

250. Reply Report prepared by LBG, Report on Site Inspections at RS – 13

251. Reply Report prepared by Strauss at § 2.2.3.1.3, Reply Report prepared by LBG, Report on Site Inspections at RS – 13

The contamination that was caused by Texpet has migrated, contaminating the soil, subterranean water, surface water and sediment, all of which are to this day affected by the oil that is still migrating, is not localized and is not contained.

In this most recent round of sampling, LBG took samples from the following sites: Aguarico 6, Lago Agrio 16, Shushufindi 13, Shushufindi 34, Aguarico 4, Lago Agrio 35, Shushufindi 43, and Shushufindi 55. At each site, LBG found contamination that is attributable to the Claimants and which exceeds the limits established by the decision in the Lago Agrio suit, as well as those limits established by Ecuadorian law in force at the time, and/or international standards.[252] LBG also carried out additional testing at the Lago Agrio 2 and Shushufindi 25 sites, both of which were originally part of the 2013 investigations, and was able to confirm that the subterranean water was contaminated at both sites, due to the migration of oil from Texpet's former pools.

For example:

- The Lago Agrio 16 (LA – 16) site, located to the north of the Concession Area, is surrounded by houses and cultivated fields. Texpet drilled the LA – 16 well in 1970, and abandoned the well in 1981.

- There are at least two families who live in houses that are located close to the LA – 16 well. The soil samples that were taken from the cornfield that the families cultivate next to the pool showed contamination from oil at 75 times above the remediation standard that was established in the Lago Agrio decision.[253] In general, two thirds of the soil samples from the LA – 16 site showed contamination from oil.[254] LBG also took samples from subterranean water,

252. The decision found that Ecuadorian law prohibited Texpet from contaminating the eastern part of the country and required Chevron to return the area to the state of cleanliness in which it had been prior to the company's activities, Decision in the Lago Agrio case at 60 – 66; see also Reply Brief presented by the respondent in Procedural Track II § II.A.2.d ("Standard of Environmental Protection that Texpet was held to in respect of its operations"). In order to determine the remediation costs, the Court used a conservative threshold of 100 mg/kg TPH (Total Petroleum Hydrocarbons) (the "Standard of Environmental Cleanliness used in the Judgment") in order to approximate the original state of cleanliness. In order to provide better context for the results of the tests conducted by LBG, as well as those obtained by both parties during the Lago Agrio case, the Republic makes reference to the Standard of Environmental Cleanliness used in the Judgment and a variety of other standards, among them, the standards used by the Environmental Remediation Plan and in the United States of America. In the arbitration proceedings related to the case of Burlington Resources v. Ecuador, Mr. Connor testified that he would have expected that the natural levels of TPH would be zero. Transcript of the Hearing on Counterclaims in the Burlington Case, at 1627 – 1629.

253. LBG 2014 SI Report § 5.3.

254. Id.

which the families make use of by extracting water from manually dug wells. The monitoring wells for subterranean water that LBG dug showed contamination from oil directly linked to Texpet's[255] activities at levels four times above those established by Ecuadorian law.[256]

- Contamination from the Shushufindi 13 (SF – 13) site, a pool that was supposedly "closed", filters toward the stream. SSF – 13 was drilled by Texpet in 1972, and stopped producing oil in 1998.[257] Texpet dug at least three pools around the area of the well, and left degraded crude oil in a drainage area to the north of pools 1 and 2. Although Texpet dug all three pools, Texpet never cleaned up Pool 3, because this pool had been "closed" in 1976.[258] Pit 3, which is now a grazing lot for cows, is found immediately to the east and downhill from the well. The former wall of the pit has a breach at the northeast corner, from which the contents of the well drain toward the stream.[259] LBG found crude oil at concentrations 200 times higher than the standards established by Ecuadorian law. At the stream that receives the contents of Well 3, Texpet discarded significant quantities of crude oil down river with sediment containing levels of oil contamination almost 400 times higher than those established by Ecuadorian law.

- The Shushufindi 34 (SF -34) well was drilled by Texpet in May of 1973, and was abandoned and sealed in September of 1983, when it dried up.[260] Since then, petroleum operations have not been carried out at the site. During LBG's visit, crude oil was found there in liquid form just below the surface of a well that was hidden by Texpet. The analysis showed that the contamination at this well exceeded all possible thresholds. The contamination by oil had migrated from outside the confines of the pit, as LBG found crude oil in subterranean water.[261]

255. Expert Report of LBG (7 November 2014), Annex 1 § 3.4.3. The levels of barium were seven times higher than Ecuadorian standards, which governed contamination levels relevant to Texpet. Id.; LBG 2014 SI Rpt. § 5.3.

256. LBG 2014 SI Rpt. § 5.3.P. 252

257. Report on Judicial Inspections in Shushufindi prepared by Chevron at 14, at 2.

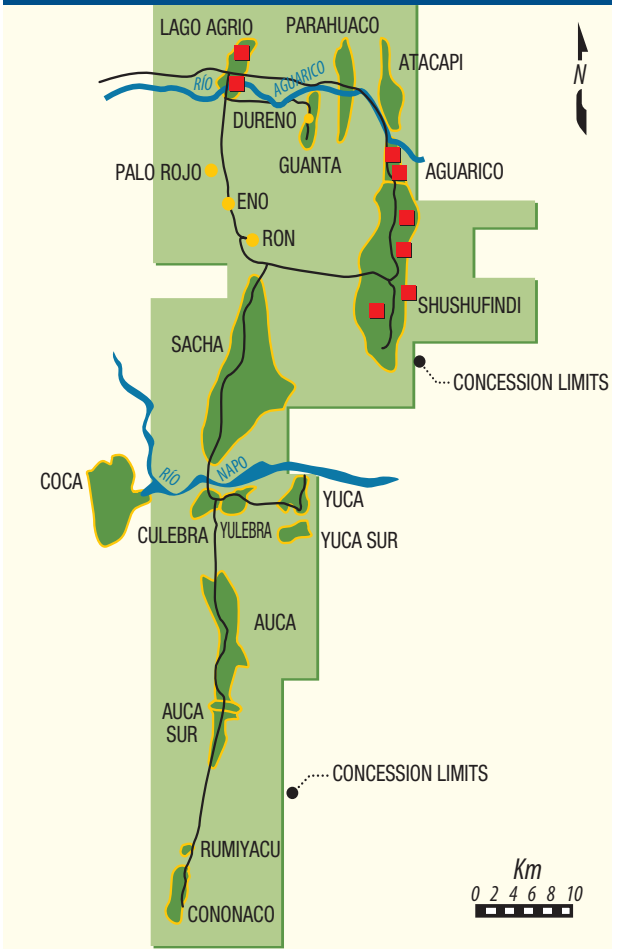
258. Remediation Action Plan for the former Petroecuador – Texpet Consortium at CA1100894; Report on Judicial Inspections in Shushufindi prepared by Chevron at 14, at 2.

259. Chevron Strategy Manual for the Shushufindi 13 Judicial Inspection at GSI_0462747.

260. Summary of the covering and abandoning of the GSI´s well, at GSI_0000820.

261. Id. § 5.5.

FIGURE 7. Map of the Concession Area with red squares to denote the approximate locations of the sites that were visited by LBG.



Source: PGE

- The Aguarico 4 (AG – 04) site was drilled by Texaco in 1974, and abandoned in 1986. LBG centered its sampling activities at one of the pools that was cleaned up, according to the Environmental Remediation Work Plan. The platform of a well is located just to the north of the site. The contamination from crude oil found at the site is at levels 500 times higher than the limits established by Ecuadorian law.

5.6. The residents of the Amazon region have been and continue to be exposed to the contamination caused by Texpet, in multiple ways

Ecuador has demonstrated, beyond the shadow a doubt, that the contamination that Texpet has caused continues to be present in the Amazon Region at levels that are harmful to human health, their animals, and to the environment. **The evidence presented by LBG has shown that there is contamination in the sediment, superficial soil, and subterranean water at locations that are easily accessed by area residents and their livestock.**

Ecuador has demonstrated that area residents, their livestock and the environment are currently exposed to contamination that was caused by Texpet. The Claimants argue that the criteria that should be used to determine whether or not a clean up effort is necessary, is whether or not area residents have found alternative sources, which, in their opinion, relieves them of the need to clean up the area residents' original sources of water. Now, some area residents rely on alternative sources of water, although this does not mean that potential risks to their health have been eliminated, due to the many years that they were exposed to these contaminants in the past, and it also does not relieve Chevron-Texaco from its obligation to make the hydrological resources in the Amazon Region usable again.

The Claimants' perverse position, that the victims should pay the costs necessary to avoid the contamination caused by Texpet, has no basis under Ecuadorian law, and minimizes the harm caused to inhabitants of the area. In some cases, it may be possible for area residents to avoid known contamination sites when planting crops, to keep animals from contamination, to walk long distances to a source of municipal water, to pay for municipal water to be transported on trucks to their properties, or to dig multiple wells in search of potable water—but none of these things is easy to do. The movements of grazing animals cannot be completely controlled, and farmers may accidentally expand their grazing lands into oil extraction zones that have been contaminated by the Claimants.

> The evidence presented by LBG shows the contamination in the sediment, surface soil, and ground water in locations that are easily accessibly by residents and their livestock.

The income of many residents of the Amazon Region is, to put it simply, not sufficient to pay for potable water. It is also not justifiable to ask area residents to buy tanks for water, or for them to be deprived of their access to free sources of water, or to force them to walk on contaminated ground. The victims of the contamination should not be the ones made to pay for the damage caused by the Claimants.

5.7. Ecuadorian law provides that parties who have successively contributed to environmental harm at the same sites are jointly and severally liable

Any damages related to Texpet's drilling activities is attributable to the Plaintiffs. And if there is any intentional or negligent conduct, this is also the case. Liability is attributable to the Claimants whether Texpet is the only party to have engaged in the activities that caused the harm, or whether some other party contributed to such harm. In this latter supposition, Texpet would be jointly liable. In no scenario is Chevron- Texaco free from liability.

In Ecuador, "if two or more persons commit an unlawful act, whether intentional or not, each of them shall be jointly and severally liable for the harm caused by this intentional or unintentional act."[262] As under other civil law and common law system, it is considered that if more than one actor has contributed to the same injury, whether or not the unlawful conduct contributing to the act occurred before, concurrently with or after the other act makes no difference.[263] As Dr. Fabian Andrade, an expert for the State of Ecuador, has pointed out, the existence of a potential second actor who has caused the harm (and who is legally separate from other actors), who may have contributed to the harm (for example, Petroecuador) and who could be considered as jointly and severally liable, does not alter the presumption of responsibility of the first actor (for example, Chevron-Texaco), nor does it reduce or eliminate the first party's liability.[264] This is the case no matter how broad or limited the first actor's responsibility for the harmful act is, relative to the harm caused by the second actor.[265]

In order to mitigate any injustice with respect to actors who may have also contributed to a particular

262. Civil Code of Ecuador, Art. 2217. Neither of the two exceptions is applicable here.

263. See, for example, Doctor Wagner Iván Viñan v. Federación Médica Ecuatoriana (the Ecuadorian Medical Foundation) et al. (defense to the principle of joint and several liability of various parties for damages caused in separate events that took place at different moments), in Official Register 87 on 22 May 2003. See also Delfina Torres Vda. de Concha v. Petroecuador et al. (seeking a ruling of joint and several liability of Petroecuador, Petrocomercial and Petroindustrial) in Official Register No. 43 on 19 March 2003.

264. Expert report presented by Andrade (7 November 2014) ¶ 22; See also, decision of the National Court, at 163.

265. Expert report presented by Andrade (7 November 2014) ¶ 22; Alberto Racines, one of the Chevron attorneys in the Lago Agrio case, has also admitted that, "the responsibility is shared".

harm who are unknown, unavailable or who are party to a legal proceeding, the Civil Code of Ecuador provides that the victim of some harm (here, the Claimants in the Lago Agrio suit) who was presumably injured by the actions of multiple parties (in this case, Chevron-Texaco and allegedly, Petroecuador) has the right to bring a claim against any of them—that is, against one or more of the parties who are presumably jointly liable for having caused some injury—and to recover completely, and not in a prorated manner, the amount of total damages from one of the offenders, according to the party who has been adjudicated and found to be responsible.[266] As a result, the Claimants have the discretion to claim damages from Chevron, Petroecuador or from Chevron and Petroecuador together.

Ecuadorian law also protects those who have been accused in actions for civil liability by allowing

> "The forensic evidence that Ecuador has presented, which includes the expert review of the computers of the judges on which the judgment in the Lago Agrio case were written, demonstrates the inconsistencies in Chevron's arguments regarding the judicial fraud that it claims occurred, and which is based on simple conjecture. In addition, the environmental and documentary evidence obtained through various freedom of information acts filed in the United States has supported the arguments of the State of Ecuador in respect of Chevron's environmental liability and its bad faith conduct, which, as a party to the proceedings, engaged in during the Lago Agrio litigation, in order to hide the environmental damage from the judge and its counterparty. Ecuador has demonstrated that Chevron and Texaco are responsible for the environmental damage, and that this damage is still persisting. It has also made clear that, despite the fact that the Ecuadorian judicial system offers Chevron sufficient legal recourse in order for an allegation of fraud to be heard in Ecuador, this multinational company has made the decision not to make use of them, which shows that its international claim was premature, and undermines the basis of the accusation of the denial of justice that Chevron brought against Ecuador.
>
> **Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, May 12, 2015**

266. Civil Code of Ecuador, Art. 1530 ("The creditor can act against all the joint and several debtors jointly, or against any of them, at his discretion, without the latter being able to oppose the benefit of division.").

any joint debtor, who has complied with its own part of the total shared responsibility, to seek legal recourse from those other parties in the form of subrogation (sometimes referred to as "repetition" or "indemnification" in other legal systems) against some other actor who is potentially responsible for having contributed to causing the harm.[267]

6. THE TRIBUNAL'S VISIT TO THE AFFECTED AREA

More than three years after Ecuador presented its petition for an on site visit, and, after various exchanges between the parties and the Tribunal,[268] between June 6 and June 10, 2015, under the strictest order of confidentiality and with a full deployment of security forces, as had been ordered by the Arbitration Tribunal, the Arbitration Tribunal and the representatives of the parties visited four sites that have been affected by Texpet's extraction operations, and the Tribunal was able to see first hand the pollution that the aforementioned company had left behind and hidden in the Ecuadorian Amazon Region.

This visit came about despite fierce opposition on Chevron's part, which not only expressed its disagreement, but also deliberately and repeatedly slowed down any initiative or action that led to the visits. Chevron argued, among other things, that it was presumably useless to make a visit to the area, the supposed dangers to the lives and physical security of the attorneys and personnel of Chevron and for those of the Tribunal, required excessive security measure and other guarantees in order for the visit to take place, and, finally, when a date for the trip had already been established, proposed to the Tribunal, in a laughable manner, that instead of making a

267. Civil Code of Ecuador, Art. 1538 ("The joint and several debtor who has paid the debt, or has canceled it through any of the means equivalent to payment, remains subrogated in the creditor's legal action with all his privileges and securities, but is limited, vis-a-vis each of the co-debtors, to this co-debtor's part or share of the debt."); see also the Expert Report prepared by Andrade (7 November 2014) ¶ 23

268. 13 March 2012; 14 March 2012; 18 February 2013; 19 March 2013; 28 March 2013; 17 April 2013; 19 April 2013; 26 April 2013; 6 May 2013; 28 June 2013; 16 July 2013; 15 October 2013; 16 December 2013; 2 February 2014; 7 February 2014; 25 February 2014; 8 March 2014; 25 March 2014; 23 June 2014; 1 July 2014; 7 July 2014; 9 July 2014; 1 August 2014; 8 August 2014.



Aguarico 6, June 2015, site visit, confirmation of contamination.

visit to the site in the Amazon Region, that the Tribunal should participate in a virtual tour, in a hotel to be chosen in the city of Guayaquil. Of course, Ecuador objected to this motion, and it was rejected by the Tribunal.

On Saturday, June 6, 2015, the Tribunal and representatives of the parties took a charter flight on the airline TAME, from the Jose Joaquin de Olmedo Airport in the city of Guayaquil, to the city of Francisco de Orellana (known as "El Coca"). On Sunday, June 7, the group visited the first well: Shushufindi 34. On Monday, June 8, the group visited two sites: Aguarico 06 and Shushufindi 55. The final well the group visited was Lago Agrio 02, on Tuesday, June 9. The representatives of the parties and the Tribunal then returned to their homes on June 10 and 11.

Despite the fact that the Tribunal did not visit the majority of the affected sites, the visits to the four sites allowed Ecuador to demonstrate to the Tribunal the following five points:

1. **That there is still contamination present in the sensitive ecosystems of the Amazon Region in Ecuador;**

2. **That the contamination that is present can only be attributed to Texpet. This was demonstrated by the experts working for the Republic, who: (i) showed the source of the contamination; (ii) showed the migration of the contamination; and (iii) showed how such contamination was caused by Texpet, and, as a result, is imputable to Chevron and Texaco;**

3. **That, even today, the oil continues to migrate and to filter from the pools that Texpet dug, reaching water sources and affecting the subterranean water. The State argued that, contrary to the arguments presented by the Claimants, the oil found in the pools is not contained, but in fact, its dispersion is evident;**

4. **That the problems at each of the sites are constant and are common in all of**



Aguarico 6, June 2015, visible oil in the water.

the locations and sites where Texpet had operations;

5. **That the theories of the case that have been advanced by Chevron, including the theory that the oil does not present any risk to those persons who are exposed to it, are simply false, and the evidence does not back them up. Ecuador has demonstrated that the residents of the area continue to be exposed to the oil, and, as a result of the inadequate clean up efforts, will continue to confront serious risks to their health.**

During the visit to the sites, Ecuador reminded the Tribunal that the plaintiffs in the Lago Agrio case, as well as the people who live close to the sites the group was visiting, are not parties to the arbitration proceedings. However, they are the true victims of the bad practices that Texaco and Chevron engaged in, and the bad decisions that the companies made. In addition, the State highlighted the fact that any decision that the Tribunal could make in the case would have a profound impact on the affected residents of the areas. This on site visit is a critical part of the arbitration proceedings, and for Ecuador, a fundamental piece of its case—for this reason, the State insisted that the on site visits take place. Chevron and Texaco have argued that the Lago Agrio case has been fraudulent in its entirety, and that the findings of the decision issued by the Ecuadorian courts can only be explained by arguing the courts acted unlawfully and inappropriately. However, the position of the Claimants, and their reiterated refusal to assume any responsibility for the contamination that they caused and covered up in the Amazon Region, have been debunked by the evidence that the experts working for the State have presented during the arbitration proceedings.[269]

As of the date of publication of this book, the Tribunal has not handed down any decision in respect of the evidence presented, and above all, the evidence that was observed directly by the members of the Tribunal, who could see, smell, and in many cases, touch the results of the contamination left by Texpet.

269. Making reference to the environmental chapter

"The visit was an important milestone for the State's defense, because it allowed the members of the Tribunal to see, smell and touch [the contamination]—and above all, to put the real dimensions of the Lago Agrio litigants' claims regarding the contamination in the Ecuadorian Amazon Region into context. Due to this, the Tribunal can see that the judgment handed down by the Ecuadorian court against Chevron was reasonable, in ordering Chevron to remove the contamination it caused."

"It is not logical that an Arbitral Tribunal hearing a case on the merits of a judgment in a case for environmental damage would decide on that case without having seen the area in which the events giving rise to the claim occurred. The Arbitral Tribunal, by agreeing to Ecuador's persistent petition that it visit the area of the contamination, has incorporated Chevron's environmental liability into the elements of the discussion of the case, which is, without a doubt, a very important development in these arbitral proceedings."

Dr. Diego Garcia Carrion, State Attorney General, SAG Press Release. Quito, June 18, 2015

CHAPTER VI

CONCLUSIONS

For Ecuador, it is clear that bringing these arbitral proceedings is just one more attempt to undermine the decision reached in the case in Lago Agrio before the Ecuadorian courts, which, in every instance, has concluded that Chevron-Texaco is responsible for the damages caused to the environment and the local communities who live in the areas in which it operated in Ecuador.

In light of this fact, and in light of all of the arguments that have been presented by the State's defense, Ecuador has requested that the Tribunal hands down its final award, which should include the following:

a. The Tribunal should find that it does not have jurisdiction in respect of the Claimants' complaint regarding a denial of justice, or over any other claim based on the BIT.

b. Alternatively, and supposing that the Tribunal does determine that it has jurisdiction to hear the Claimants' complaint, the Tribunal should dismiss the complaint based on the fact that the Claimants did not exhaust domestic remedies, and because the complaint is unfounded.

c. The Tribunal should find that the Claimants have no right to bring claims under the 1995 Settlement Agreement, the 1998 Final Release, and / or the Local Settlement Agreements of 1996, in relation to the litigation in Lago Agrio.

d. The Tribunal should also find that Ecuador is not in breach of the 1995 Contract, the 1998 Final Release, or the 1996 Local Settlement Agreements, in relation to the litigation in Lago Agrio.

e. The Tribunal should refuse to order any reparations, as well as each and every remedy requested by the Claimants, in the Claimants' favor, in respect of the alleged violations of the BIT.

As an alternative, if the Tribunal does accept the Claimants' allegations, the Republic motions that the Tribunal hands down a partial award, which should include:

a. The Tribunal should order that Procedural Stage 3 be carried out, in such a way as to allow the Tribunal to evaluate the actual liability of Chevron as a result of the case in Lago Agrio, and should then issue a final award that takes this liability into account.

b. The Tribunal should find that the defendant is not obliged to indemnify, protect, defend or release the Claimants from liability in respect of third-party claims.

c. The Tribunal should find that the Claimants have no right to non-economic damages.

d. The Tribunal should declare that the decision of the court in the Lago Agrio case is not invalid, because an order of invalidity of a local court decision is not a remedy that is available or appropriate under international law, and because such an order of invalidity would result in the unjust enrichment of the Claimants.

During the present stage of the proceedings, if the Tribunal, contrary to the motion of the Ecuadorian defense, should determine that the Republic did violate its obligations under the BIT, or incurred in a denial of justice that should be remedied, the Tribunal should then calculate and order damages in three steps (within Procedural Stage 3): (a) determine the amount of damages that the Claimants should have been ordered to pay to the Claimants in the Lago Agrio case, had it not been for the unlawful international acts; (b) determine the amount of enforceable obligations of the Claimants under the decision in the Lago Agrio case; and (c) determine its award for net damages by comparing the two—that is, by subtracting

(a) from (b). In accordance with the relevant precedents, this is the only way to determine the amount of damages in this case.

The defense of the State of Ecuador reserves all of its rights in respect of the claims for invalidity of the partial awards that the Tribunal has already handed down and that are currently in proceedings before the Dutch courts, as well as any new actions in respect of invalidity in respect of the partial awards or the final award that the State may see fit to bring in the future.

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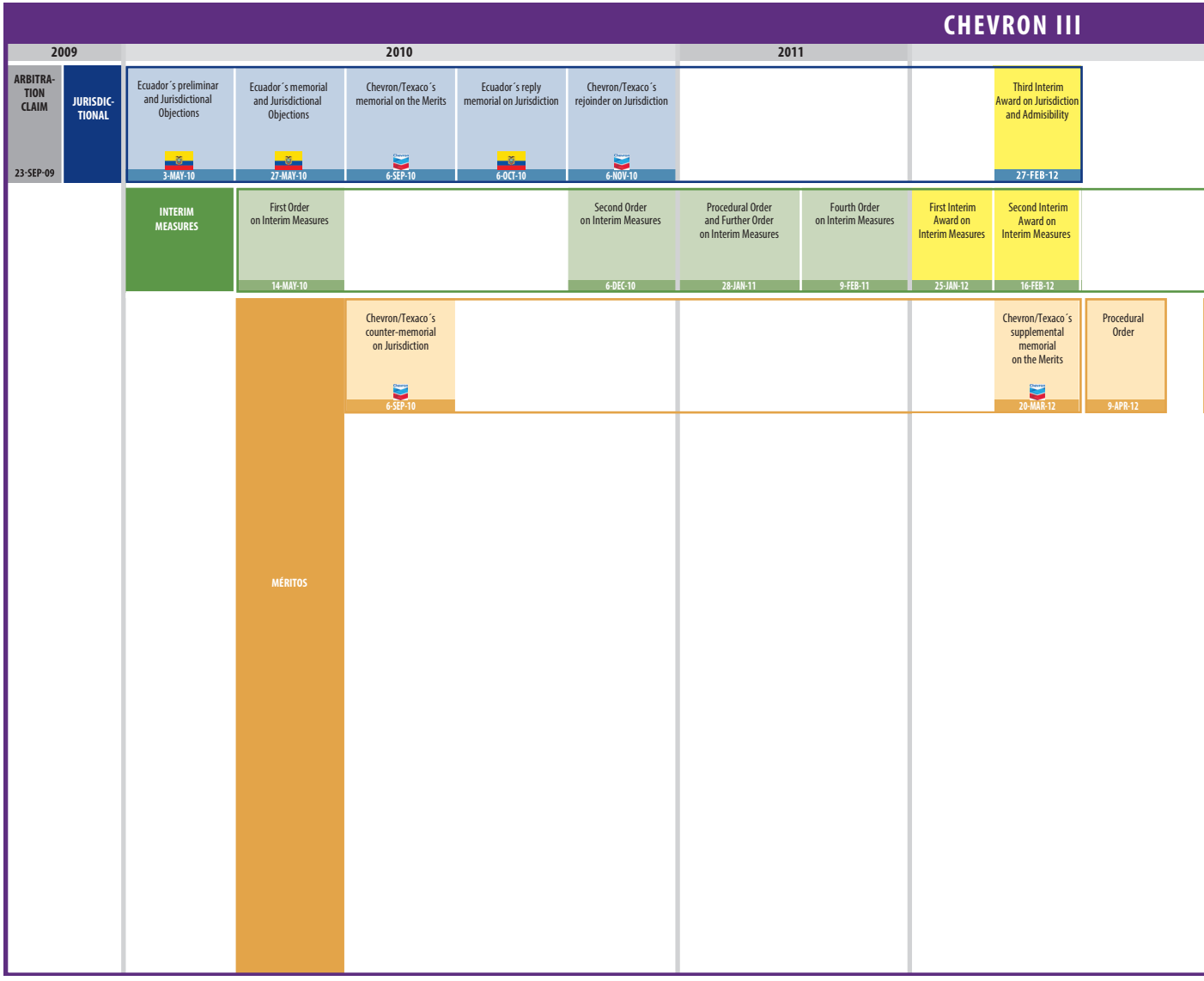

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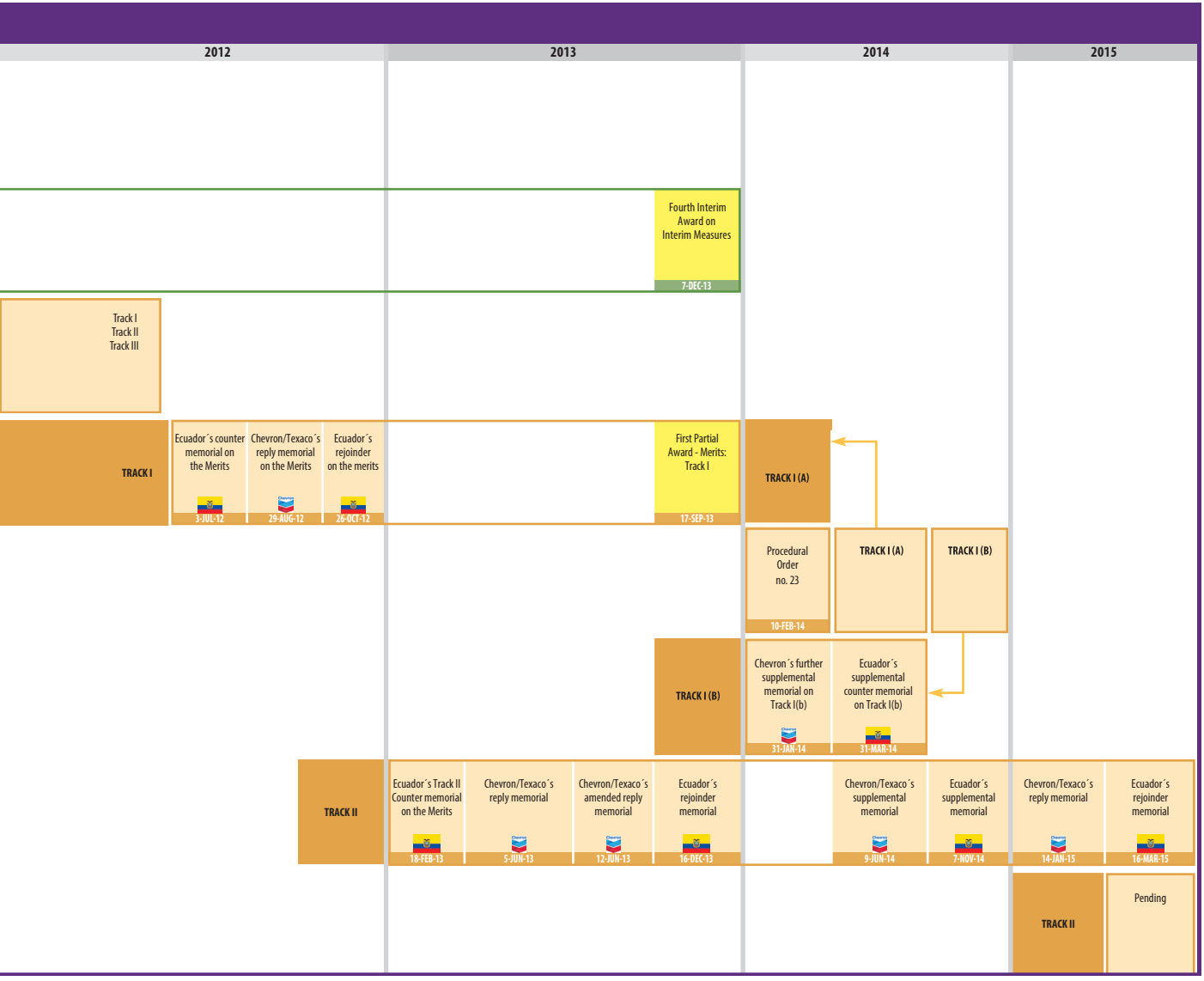

Gabriela González Giráldez

ANNEX

ANNEX I: Chevron's Time Line of Arbitration Process



Fuente: PGE


2012
2013
2014
2015
Fourth Interim Award on Interim Measures
7-DEC-13
Track I
Track II
Track III
TRACK I
Ecuador´s counter memorial on the Merits
3-JUL-12
Chevron/Texaco´s reply memorial on the Merits
29-AUG-12
Ecuador´s rejoinder on the merits
26-OCT-12
First Partial Award - Merits: Track I
17-SEP-13
TRACK I (A)
Procedural Order no. 23
10-FEB-14
TRACK I (A)
TRACK I (B)
TRACK I (B)
Chevron´s further supplemental memorial on Track I(b)
31-JAN-14
Ecuador´s supplemental counter memorial on Track I(b)
31-MAR-14
TRACK II
Ecuador´s Track II Counter memorial on the Merits
18-FEB-13
Chevron/Texaco´s reply memorial
5-JUN-13
Chevron/Texaco´s amended reply memorial
12-JUN-13
Ecuador´s rejoinder memorial
16-DEC-13
Chevron/Texaco´s supplemental memorial
9-JUN-14
Ecuador´s supplemental memorial
7-NOV-14
Chevron/Texaco´s reply memorial
14-JAN-15
Ecuador´s rejoinder memorial
16-MAR-15
TRACK II
Pending



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