ANNEX G: RESPONSE TO CLAIMANTS' ALLEGATIONS OF LEGAL ERROR

1. Claimants allege that the Lago Agrio Court committed numerous judicial errors during the trial, that these errors affected the Judgment, and that they were not corrected (a) by the trial court in its "clarification decision" or by the Court of Appeals in either (b) its order affirming the Judgment or in (c) its order clarifying its own opinion. In the accompanying Foreign Law Declaration of Fabián Andrade Narváez, each of the Lago Agrio Court's rulings argued by Chevron to be erroneous is demonstrated to have been, under controlling Ecuadorian legal principles, well within the Court's discretion and sound judgment. For ease of reference, in Section I below we summarize Dr. Andrade's findings and supplement some of the points with additional applicable authority. In Section II we also address and refute Claimants' assertion that the Lago Agrio Court erred in imputing TexPet's commitments and conduct to Chevron. Finally, in Section III we address and refute Claimants' contention that the appellate court judges who heard Chevron's appeal of the Lago Agrio Judgment were "handpicked" contrary to applicable law and procedure.

I. Alleged Judicial Errors By The Lago Agrio Court

2. ***Delay in ruling on Chevron's* res judicata *and jurisdiction exceptions.*** Claimants claim that the Lago Agrio Court should have, as a preliminary matter, applied the defenses (sometimes referred to as "exceptions") of *res judicata* and lack of jurisdiction (sometimes confused with "lack of competence") to bar Plaintiffs' action. The substantive applicability of this doctrine is currently before the Tribunal as a Track 1 merits issue, and need not be re-addressed here. However, Claimants have a separate "untimeliness" assignment of error, based on the Court's supposedly wrongful failure to address Chevron's "exceptions" immediately as a matter of law. But it was Chevron that sought to have the dispute decided

under Ecuadorian law and procedures, and Ecuadorian law considers the defense of *res judicata* a "peremptory exception"[1] and the defense of lack of jurisdiction a "dilatory exception"[2] — both of which exceptions are required to be adjudicated at the end of the trial as part of the judgment. An Ecuadorian court may decide a motion or exception pleading *res judicata* or absence of jurisdiction prior to judgment only where the court's lack of jurisdiction or competence is immediately apparent. Otherwise, the general rule described above applies and the defense must be decided at the time of the judgment.[3]

3. ***Allegedly Improper Joinder of Claims.*** Claimants claim essential error because the entire Lago Agrio Litigation was tried as an "oral summary proceeding." Claimants contend that the Lago Agrio Court wrongfully joined two types of claims in the same proceeding: (1) ordinary tort claims, which should have been tried in an "ordinary proceeding," and (2) environmental claims, which should have been tried separately under the 1999 Environmental Management Act ("EMA") as an oral summary proceeding (*i.e.*, without joinder of Civil Code tort claims).

4. However, all of Plaintiffs' claims were predicated on the existence of environmental contamination — past, current, and persistent — and therefore, under EMA Article 43, had to be heard as an oral summary proceeding. There could have been no improper joinder of claims in this case, insofar as all claims were environmental in origin and were neither (i) mutually contradictory, nor (ii) required by some other procedural rule to be heard through different proceedings.[4]

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1 RE-9, Andrade Expert Rpt. ¶¶ 8 *et seq*, citing to RLA-198, Code of Civil Procedure, arts. 99-101.

2 *Id.*

3 Where the court ultimately denies these exceptions in its judgment, as it did here, Chevron cannot logically complain of any genuine harm suffered by not having received this ruling earlier.

4 RE-9, Andrade Expert Rpt. ¶¶ 21 *et seq*, citing to RLA-198, Code of Civil Procedure, arts. 63, 75.

5. ***Retroactive application of the EMA.*** Claimants assert that substantive provisions of the EMA were retroactively, and thus wrongfully, applied to hold Chevron responsible for remediating the Concession Area. But as this Tribunal well knows, and as Ecuador's Appellate Court has confirmed, Plaintiffs relied on the **substantive** content of Ecuador's Constitution and various Civil Code provisions for their operative causes of action, and on the EMA only for its **procedural** content.[5]

6. The legal bases for the Lago Agrio Court's Judgment all derived from Ecuador's Constitution and its Civil Code, which has been in effect since the 1800s, including: (i) Article 22, item 2 of the Constitution of Ecuador (right to live in a healthy environment),[6] and (ii) those Civil Code provisions regarding tort liability, including Articles 2241 [currently 2214] (liability for one's tortious acts), 2243, 2244, 2247 [currently 2216, 2217 and 2220, respectively], 2256 [currently 2229] (liability arising from hazardous activities), and 2260 [currently 2236] (liability for impending harm arising from negligence or recklessness).[7] In sum, Chevron's contention that the Court applied the EMA retroactively is wholly unsupported and incorrect as a matter of law.

7. ***Practice of Judicial inspections and appointment of experts under Ecuadorian law.*** Claimants complain of essential error in various procedural rulings made by the Court during the JIs and the appointment of experts to assist the Lago Agrio Court in connection with those JIs. These complaints are unfounded.

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5 RE-9, Andrade Expert Rpt. ¶¶ 41 *et seq*.

6 The Codification of the 1978 Constitution, approved on May 29, 1996, was in effect at the time. The language of the provision in question is identical to that of article 19, item 2 of the 1978 Constitution, introduced through the 1983 reform and subsequently present in later codifications.

7 RE-9, Andrade Expert Rpt. ¶¶ 48, 49.

8. Claimants contend that the Court had no right to amend the Protocol it had originally adopted to regulate conduct of the JIs. To the contrary, an Ecuadorian court always has discretion to issue orders regulating case discovery, including discovery by means of JIs, as well as the power to amend its prior orders from time to time as deemed just.[8] Discovery orders are not *res judicata* and remain amendable up until the time of judgment.[9]

9. Claimants next claim that the Lago Agrio Court did not have the power to grant Plaintiffs' application to reduce the number of JI sites, since it had earlier approved Plaintiffs' longer list of JI sites. Once again, Claimants cannot cite to any law proscribing or limiting an Ecuadorian court's discretion to regulate discovery. Here, Plaintiffs had the burden of proof on the issue of pollution and pollution damages, and were free to reduce their proposed JI sites, at the risk of failing to meet their burden of proof.[10] In fact, while the Court agreed to curtail Plaintiffs' list of JIs, it made clear that Chevron was still entitled to have its own proposed JIs conducted, and even set dates and times for some of the additional JI sites that Chevron wanted.[11]

10. Finally, Claimants contend that the Lago Agrio Court appointed experts who were not on the list of experts requested by the parties or registered with the Court. However, as Dr. Andrade explained, this provision had not been implemented by the time of the appointment of expert Cabrera and no roster of experts was ever assembled or adopted by the country's Superior

8 RE-9, Andrade Expert Rpt. ¶ 31.

9 *Id*. ¶ 32.

10 *Id*. ¶¶ 34 *et seq*.

11 C-197, Lago Agrio Court Order (Mar. 19, 2007) at 1-3.

Courts.[12] A list of experts on matters other than criminal law was later compiled and implemented by the Judicial Council.[13]

11. ***Assessment of evidence under Ecuadorian law.*** Claimants assert that the Lago Agrio appellate panel failed to take into consideration any of the "extensive evidence of fraud" that Chevron had submitted regarding Plaintiffs' alleged ghostwriting of the Judgment and the Cabrera report, and the allegedly false Calmbacher report. Claimants' contention not only disregards applicable rules of procedure but also is predicated on a skewed characterization of the relevant facts.

12. Ecuadorian practice and its Code of Civil Procedure place constraints on the type of evidence that an appellate court can properly consider. In particular, there is no evidentiary phase at the appellate level. A court hearing an appeal in a summary oral proceeding may consider only evidence that has been lawfully requested, ordered and produced during the proceedings before the lower court (i.e., the "merits of the proceedings," including allegations and defenses that form the heart of the complaint and evidence produced on a timely basis within the appropriate procedural stage).[14] Under no circumstances does the Court of Appeals have competence to hear and rule on an issue if it does not form a part of the merits of the proceeding.[15]

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12 RE-9, Andrade Expert Rpt. ¶¶39, 40.

13 *Id.* ¶ 39.

14 In defining the "merits of the proceeding," the Supreme Court of Justice has indicated: "The law provides that a judgment must be in accordance with the law and the merits of the proceeding. In his Diccionario Enciclopédico de Derecho Usual [Encyclopedia of Customary Law], Guillermo Cabanellas defines the merits of the proceeding as: 'the set of evidence, background and reasons arising from a proceeding and forming the foundation on which the Judge or Court is to reach decisions and ultimately render judgment, far from personal prejudices or assessments and based on that which has been argued and proven.'" Andrade Ex. 31, The Supreme Court of Justice, Second Division for Civil and Commercial Matters, Ruling [n/n] of Feb. 27, 2012, in case No. 62, *Pérez v. Heirs of José Serrano*, published in Official Gazette 589 of June 4, 2002.

15 *See*, RE-9, Andrade Expert Rpt. ¶¶ 74-77. RLA-198, Code of Civil Procedure 2005, art. 334 ("The judge before whom the referred appeal is lodged may confirm, reverse or amend the ruling under appeal based on the

13. Ecuador's Code of Civil Procedure (CPC) provides that "[t]he judge shall, **within the relevant period**, order that all evidence presented or requested within the same period be examined **after the opposing party has been notified**."[16] Anything filed with the Court outside of the established procedure, or without service on the opposing side, ordinarily will be excluded from the Judge's consideration, unless allowed into evidence by a specific order of the Court.[17]

14. Here, Chevron made untimely submissions of voluminous documentation at the closure of the lower court proceedings and subsequently to the appellate panel. Those submissions were neither requested nor ordered by the lower court as required by CPC 2005 Article 117.[18] Nor were the Plaintiffs given advance notice of Chevron's expected document production, as required under CPC 2005 Article 119.[19] Moreover, much of the documentary evidence submitted by Chevron includes private documents to or from third parties, which (akin to the U.S. "hearsay" rule) are inadmissible and cannot be given probative weight by the judge.[20] The appellate panel was therefore barred from considering as evidence the "fraud" documents that Chevron unilaterally submitted to the lower court, and those submitted post-Judgment in the course of its appeal from the Judgment below.[21]

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merits of the proceedings, including when the lower court judge has omitted a decision on one or several of the disputed points in his ruling. In this case, the higher court judge shall rule on them and shall set a fine between fifty cents of a US dollar to two US dollars and fifty cents, for said omission.").

16 RE-9, Andrade Expert Rpt. ¶ 63.

17 RLA-431, Code of Civil Procedure 1987, art. 278 ("The judgments and the orders shall clearly decide the points that are subject to resolution, based on the law and on the merits of the case, and in the absence of law, on the principles of universal justice."); *see also*, C-260, Code of Civil Procedure 2005, art. 274 ("Judgments and orders must decide with clarity the issues that are the subject thereof, relying on the law and the merits of the case; if there is no law, they must be based on binding precedents of case law and principles of universal justice.")

18 RE-9, Andrade Expert Rpt. ¶ 75.

19 *Id.*

20 *Id.* ¶¶ 72, 75.

21 RE-9, Andrade Expert Rpt. ¶ 7(e).

15. The lower court nonetheless *did* consider Chevron's accusations by refusing to give any weight to the Calmbacher and Cabrera expert opinions. And because the lower court's Judgment did not rely on the excluded evidence, there was no reason for the Appellate Court to address allegedly falsified evidence that did not factor into the Judgment.

16. Similarly, the Appellate Court considered Chevron's allegations that the Judgment relied on extrinsic evidence — as an indication of possible ghostwriting — but dismissed them noting as follows:

> As for the assertion that in the trial court evidence that is not in the case record was considered, the Division has reviewed the pages of Chevron's appeal brief designated with numbers and 56 in which it asserts that the judgment refers to various samples that supposedly are included in the filings to reach the conclusion that the former concession area is contaminated, which, it states, must reflect a reference to information that is not included in the record; having reviewed the detail, it was found that the data that the first instance judge considered is in the record, while in the report of expert Cabrera no specific reference to these samples was found. The Division is not aware of the existence of the data base to which the defendant refers, but it has indeed been able to confirm first hand that the record includes the information to which the judgment refers, in this section, for the Sacha field of the Sacha North 2 Cental Station, which appears on pages 104,909 and 72,335; for the Shushufindi field on page 81, 725, with the necessary clarification that the results show a presence of over 900,000 mg/kg, and not just 900,000 mg/kg; for Shushufindi field the related pages are 100,978 and 119,378, noting that in many cases, the judgment has omitted the decimals, which do not reach half a point, and it states the greater figure when it surpasses it, which is a common and accepted practice not only for large numbers, but also for medium ones and even including low ones. In the case under analysis, for example, the laboratory results show 324,771.1 mg/Kg., and the judgment simply refers to 324,771 without this 0.1 mg/Kg. able to affect the opinion of the judgment. For the Aguarico field, the judgment shows results that appear on page 104,607; meanwhile for the Guanta field, on page 114,575. Regarding the Auca field, the results on page 128,039, and for the Yuca field, page 127,093. It stands out that expert Gino Bianchi, proposed by Chevron and accepted by the Court, found 13 mg/Kg. of benzene in the sample SA-13-JIAMI on page 76,347. This

> gaffe, no doubt involuntary, does not affect the merits of the judgment being examined, since, regardless, it refers to an alarming quantity of benzene in the environment. Moreover, expert Bjorn Bjorkman, also proposed by Chevron, and accepted by the Court, on page 105,181 reports 18 mg/Kg. of benzene. As regards the samples JL-LAC-PITI-SD2-SUI-R (1.30-1.90)M that are attributed to expert John Connor, a correction is made in that the first of these was taken by expert Fernando Morales, who also was proposed by the defendant. We can see the results of expert Morales on page 118,776. A correction also is made in that it is not sample JL-LAC-PIT1-SD2-R(2.0-2.5)M, that shows results of 2.5 mg/Kg. of benzene, but rather sample JI-LAC-PIT1-SD1-SU1-R(1.6-2.4)M, also without affecting the opinion issued in the original judgment. On the other hand, a mistake is found in the assessment of the judgment regarding the PAHs present in samples AU01-PIT1-SD2-SU2-R (220-240 cm.), AU01-A1-SD1-SU1-R (60-100 cm), CON6-A2-SE1, and CON6-PIT1-SD1-DU1-R (160-260 cm) appearing on pages 128,039 and 128,630, respectively, since the unit of measurement are not milligrams but micrograms, therefore the assessment of the quantity of contamination based on these samples should be reduced considerably; however, this Division has reviewed the remaining references to the presence of PAHs and has found that they do not contain any error concerning the unit, and so the assessment of 154, 152, 736, 325, 704, 021 and 34.13 mg/Kg. of PHAs is valid. In samples SSF18-A1-SU2-R (0.0m), SSF18-PIT2-SD1-SU1-R (1.5-2.0m), SSF18-A1-SU1-R (0.0m) and SSF07-A2-SD1-SU1-R (1.3-1.9), respectively. These results are on pages 93,744 and 85,814 of the record so the grounds for the appealed judgment are confirmed. Regarding mercury, another error in the assessment of the evidence is found since the lower court has overlooked the symbol "less than" and instead it has assumed the results are "precise," when they are not. For this reason, emphasis is made that the reference to the presence of "high levels" of mercury reaching "7 mg/kg" does not match the facts, since this refers to levels not detected in that amount. The Division considers that this error in the assessment of the laboratory results regarding a contaminating element does not invalidate the remaining findings or reasoning regarding others which are in fact characterized as contaminating elements.[22]

17. Ecuadorian courts are required to assess all properly submitted evidence before them "as a whole, in accordance with the rules of sound judgment, without detriment to the

[22] C-991, First-Instance Appellate Court Decision at 11.

formalities required under substantive law in order for certain acts to exist or be valid."[23] This means that a judge may dismiss evidence before him as unconvincing or entitled to little weight, or can assign it great weight relative to other items of evidence. However, he cannot assign any weight to that which the law says has no probative value.

18. That Chevron did not obtain this "fraud" relief in the Lago Agrio Court or in the Appellate Court does not mean that Chevron is without a remedy. Ecuadorian law provides for at least two effective remedies to address alleged fraud or comparable violations of due process and other constitutional rights: (i) the cassation appeal to the National Court of Justice (National Court), and (ii) the extraordinary action for protection before the Constitutional Court.

19. Indeed, the National Court can, and presumably will, review Chevron's factual allegations pursuant to its powers under Article 3.[24] The Law on Cassation provides for the review of the application of rules on the standard of proof, and thus the National Court could find, for example, that those rules were not applied properly by the lower court and quash the judgment.[25] Additionally, a cassation appeal can be brought for violation of procedural rules when any such violation has impaired a party's right to a proper defense.[26]

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[23] RLA-431, Code of Civil Procedure 1987, art. 119 ("The evidence must be weighed as a whole, according to the rules of sound judgment, without prejudice to the formalities required in the substantive law for the existence or validity of certain acts."); *see also,* C-260, Code of Civil Procedure 2005, art. 115 ("Evidence must be evaluated as a whole, in accordance with the rules of good judgment [sana crítica], without prejudice to the solemnities prescribed by substantive law for the existence and validity of certain acts.")

[24] *See* RE-9, Andrade Expert Rpt. ¶¶ 7(e), 78 *et seq.* Under U.S. law, Claimants' own jurisdiction, there is no automatic (unbonded) stay of a trial court's monetary judgment, which can be enforced immediately absent the judgment-debtor posting an undertaking in the amount of the judgment. In this respect, Ecuadorian law is more protective of a judgment debtor's rights than U.S. law.

[25] RE-9, Andrade Expert Rpt. ¶ 80.

[26] *Id.*

20. Should the National Court deny Chevron's cassation appeal, Chevron could file an extraordinary action for protection before the Constitutional Court.[27] This action is designed to seek redress or compensation for the damages caused by an order or judgment that violates a fundamental right protected by the Constitution.[28] The extraordinary action for protection allows for the reparation of harm arising from a violation of due process that infringes upon the right to defense of one of the parties to the litigation.

21. ***Alleged Award of* Extra Petita *Damages***. Claimants take the position that certain damages awarded were *extra petita* because they were not requested in Plaintiffs' complaint. In making this argument, Claimants ask for a microscopically narrow reading of the complaint. Ecuadorian law does require "congruence" between the demands in the complaint and the relief awarded. However, this congruence principle is satisfied when there is a functional relationship between (a) the prayer in the complaint and (b) the relief granted in the resulting judgment.[29] The two do not have to be exactly identical. The complaint does not have to specify the exact form of reparation to be granted, so long as the relief actually granted bears a logical connection to the complained of harm.[30]

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27 *See* RE-9, Andrade Expert Rpt. ¶ 85, citing C-288, Constitution of 2008, art. 94 (" A special appeal for protection shall be admissible against final judgments or orders in which rights recognized by the Constitution are violated by act or omission, and shall be filed with the Constitutional Court. The appeal shall be admissible after regular and special remedies have been exhausted within the legal deadline, unless failure to file those remedies is not attributable to negligence by the holder of the constitutional right that was violated.") art. 437 ("Citizens may individually or collectively file suits for protection against judgments, final rulings and decisions with the weight of judgments. For this legal remedy to be admissible, the Court shall verify compliance with the following conditions:

1. That judgments, rulings and decisions be final or executory.

2. That the appellant show that the judgment violates, by commission or omission, due process or other rights recognized by the Constitution.")

28 RE-9, Andrade Expert Rpt. Ex. 23.

29 *See* RE-9, Andrade Expert Rpt. ¶ 88.

30 *Id.*

22. Here, the Lago Agrio Court determined, based on the complaint, that relief was necessary to remedy the two major categories of damages alleged in the complaint:

> (i) "The elimination or removal of the contaminating substances that still threaten the environment and the health of the inhabitants", and (ii) "The remediation of the environmental harm caused, pursuant to Section 43 of the [EMA]."[31]

23. Both of these categories are functionally related to (a) the harm that the complaint explicitly alleges as attributable to the environmental contamination and (b) the resulting harm to the health of those who inhabit that contaminated environment and (c) the resulting parallel harm to the culture of the affected indigenous communities long adapted to their pre-contaminated environment.[32] Each of these categories of harm, for which relief was granted in the Judgment, is wholly encompassed within one or both of the two general categories of damages identified in the complaint's prayer for relief.[33]

24. ***Alleged Refusal To Hold Hearings To Address Purported Errors in Expert Reports.*** Where an expert report is alleged to contain an "essential error," the CPC prescribes that the court must either *sua sponte* or on motion of a party provide for the correction of such error by another expert.[34]

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31 C-071, Lago Agrio Complaint, Sections VI.1 and VI.2 at 14-16.

32 RE-9, Andrade Expert Rpt. ¶¶ 89-92.

33 *See id. See also*, C-071, Lago Agrio Complaint, Section VI.2 at 15, Prayer for Relief. In fact, as part of the second category of damages request, the complaint specifically includes a request for:

> d) "The retention, at the defendant's expense, of qualified personnel or firms to design and implement a plan aimed at improving and monitoring the health of the inhabitants of the towns affected by the pollution."

The construction of a potable water system and the treatment of those who suffer from cancer possibly attributable to the environmental contamination are two forms that the court seems to have considered appropriate to satisfy this specific request and procure the reparation of the harm caused to the health of the inhabitants of the communities affected by the contamination.

34 *See* RE-9, Andrade Expert Rpt. ¶¶ 101 *et seq*. *See also*, RLA-198, Code of Civil Procedure, art. 258 ("If the expert report were vitiated by an essential error, proven summarily, the judge shall, upon request of a party or on its own motion, order it to be corrected by another or other experts, without prejudice to the liability that the [expert]

25. Allegations of "essential error" must be proven "summarily."[35] Chevron filed no fewer than twenty six allegations of essential error,[36] challenging every one of the reports filed by experts appointed by the Lago Agrio Court at the Plaintiffs' request, each time demanding a hearing to provide evidence of the expert's alleged essential error.[37] Chevron did not challenge any of the reports filed by experts appointed by the Court at Chevron's behest.[38]

26. The Lago Agrio Court granted thirteen of Chevron's applications, though nonetheless found that Chevron's systematic barrage of repetitive challenges to Plaintiffs' experts had been filed for the purpose of disrupting and delaying the proceedings. It accordingly declined to grant further requests for collateral summary evidentiary proceedings to examine these experts, and instead deferred adjudication of Chevron's motions until judgment.[39] In its Judgment, the Court refused to rely on the opinions of either side's experts, and concluded that it would form its own conclusions from the data submitted with the experts' opinions, which — unlike the experts' opinions — he found to be reliable. It is clear that, under the circumstances, the Court acted appropriately and in accordance with CPC Articles 292, 293 and 844 and its duties to provide for an expeditious adjudication of the case.[40]

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may have incurred by fraud or bad faith."); *id.* art. 259 ("In case of disagreement in the expert reports, the judge, if deemed necessary to form its opinion, may appoint another expert.")

35 *Id.*

36 *See, e.g.*, Andrade Ex. 39, Lago Agrio Record at 177,499-177,514 (Letter from Chevron dated March 12, 2010, summarizing 26 allegations of essential error submitted to the Court).

37 RE-9, Andrade Expert Rpt. ¶ 102. *See also*, C-931, Lago Agrio Judgment at 39 *et seq*.

38 RE-9, Andrade Expert Rpt. ¶ 101.

39 *See* RE-9, Andrade Expert Rpt. ¶ 103. *See also*, C-931, Lago Agrio Judgment at 43.

40 *See* RLA-303, Organic Code of the Judiciary, art. 20 ("PRINCIPLE OF CELERITY.- The administration of justice shall be expeditious and opportune, both in respect of the processing and adjudication of the case, and in the enforcement of the judgment. Accordingly, in every matter, following commencement of a case judges are obligated to carry out the proceedings within the terms provided for by law, without awaiting for motions of a party except for those cases where the law provides otherwise,") art. 130, section 9 ("JURISDICTIONAL POWERS OF THE JUDGES. - Exercising the jurisdictional guarantees according to the Constitution, international human rights

II. Piercing The Corporate Veil Under Ecuadorian Law

27. Ecuadorian law has long recognized the right of a court to "pierce the corporate veil" in the appropriate circumstances, meaning the prevention of fraud or abuse occasioned by wrongful use of the corporate structure.[41] Ecuadorian courts have in the past "lifted" a corporation's veil to prevent abuses where corporate separateness was used as a vehicle to defraud and negate the rights of third parties.[42] Indeed, the Ecuadorian National Court has asserted that it is not only within a Court's *power*, but is also its *duty* to lift the corporate veil when faced with abuses of the corporate form.[43]

28. Here, Claimants allege that the Lago Agrio Court's failure to respect Chevron's separate corporate status caused the following two pervasive errors in the Judgment, requiring nullification: (a) holding that Chevron was a defendant within the jurisdiction of the Court[44] and

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law and the laws is an essential power of the judges of courts, therefore, they must: 9. Seek to accelerate the proceedings, punishing dilatory maneuvers incurred by litigants or their attorneys"), and art. 139 ("IMPULSE OF THE PROCESS. - The judges are required to continue the processing of the cases within the legal terms, the violation of this rule will be punished according to the law.") *See also,* C-260, Code of Civil Procedure, art. 844 ("No incidental issue raised in this suit, regardless of its nature, can suspend the hearing of the case. All incidental matters shall be resolved when the final judgment is handed down.")

41 RE-9, Andrade Expert Rpt. ¶¶ 94-99.

42 *See* RE-9, Andrade Expert Rpt. ¶ 97. *See also*, Andrade Ex. 35, First Civil and Commercial Chamber of the Supreme Court of Justice, (March 21, 2001 at 11:15 a.m., Official Registry No. 350, June 19, 2001 (*Diners Club del Ecuador vs. Mariscos de Chupadores CHOPAMAR S.A.*), cited in the Lago Agrio Judgment at 14. In this case, the Supreme Court states:

> "Faced with these abuses, we must react dismissing the legal personality, i.e., piercing the veil that separates third parties from the real end users of the results of a legal business and get to them, in order to prevent that the corporate structure of is used incorrectly as a mechanism to harm others, either creditors who are impeded or prevented to achieve compliance with their credits, or legitimate owners of an asset or a right to deprive or take it away from them."

See also RE-9, Andrade Expert Rpt. Ex. 36, First Civil and Commercial Chamber of the Supreme Court of Justice, File No. 20-03, Jan. 28, 2003 (*Angel Puma vs. Importadora Terreros Serrano Cía. Ltda*.).

43 *Id*.

44 Claimants' Supplemental Merits Memorial ¶ 18.

(b) holding that Chevron was legally liable, derivatively or by imputation, for TexPet's activities in Ecuador.[45]

29. ***Piercing the Corporate Veil: Jurisdiction****:* Before the Lago Agrio Court issued its Judgment, the Second Circuit Court of Appeals had already opined that "***Texaco's . . . promises to submit to Ecuadorian jurisdiction,* [*are*] *enforceable against Chevron*** in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards."[46] Because "lawyers from ChevronTexaco [later re-named "Chevron" by a simple Delaware corporate name change filing] appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint . . . ChevronTexaco bound itself to those concessions" and "remains accountable for the promises upon which we and the district court relied in dismissing Plaintiffs' action."[47]

30. The Judgment, in addition to finding jurisdiction over Chevron in a reasoned discussion of Ecuadorian and international law principles, referred to the Second Circuit's parallel ruling which (a) was based on universally accepted concepts of waiver and estoppel and (b) found that Chevron had voluntarily submitted to Ecuadorian jurisdiction. Indeed, while the Lago Agrio Court did not rest on this concept, the Second Circuit's earlier finding would have constituted *res judicata* and justified its jurisdiction over Chevron, even without the further analysis conducted by the Lago Agrio Court.

31. Even if the Second Circuit's holding alone did not justify its finding of jurisdiction on *res judicata* grounds, the Lago Agrio Court gave substantial weight to the holding

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45 *Id*. ¶¶ 28, 30.

46 R-247, *Republic of Ecuador v. Chevron Corp*., No. 1-1020-cv (Mar. 17, 2011) at n.4 (emphasis added).

47 *Id*. at n.3.

of Chevron's own domestic appellate court, made on a full record after an extensive adversarial contest. The Lago Agrio Court's own analysis, however, did not blindly accept the U.S. court's holding. Its finding of *in personam* jurisdiction over Chevron was also corroborated by the results of its own searching analysis of both Ecuadorian and U.S. law.

32. ***Piercing Corporate Veil for Purposes of Derivative or Imputed Liability****:* Claimants also contend that, even jurisdiction over it were found proper, Chevron should not be held accountable for Texaco's delicts. However, even Claimants' experts, while objecting to the Court's specific application of this law, accept the general proposition that courts in Ecuador and the U.S. may, under appropriate circumstances, pierce the corporate veil to impose derivative or imputed liability.[48] One of those circumstances is where a court finds that a parent or affiliated company has engaged in conduct that warrants its inheriting derivative or imputed responsibility to third parties for the nominal obligations of its subsidiary or other affiliated company.[49]

33. As the Lago Agrio Court noted, "lifting the corporate veil" is a doctrine commonly relied upon to hold parent corporations accountable for the acts of their controlled corporate subsidiaries or affiliates. In Ecuadorian jurisprudence, as well as in those of other Latin American jurisdictions,[50] lifting the corporate veil is permitted in cases of fraud or abuse affecting third parties — a fact Claimants' expert also recognizes.[51] Likewise, where there is such unity between the parent and the subsidiary that the separateness of the corporate form has ceased, U.S. law will find the corporate veil pierced and the parent held liable.[52]

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48 RE-9, Andrade Expert Rpt. ¶ 94 (citing to Coronel Third Expert Rpt. ¶ 72).

49 Coronel Third Expert Rpt. ¶ 72; RE-9, Andrade Expert Rpt. ¶¶ 94 *et seq*.

50 RE-9, Andrade Expert Rpt. ¶ 96.

51 Coronel Third Expert Rpt. ¶ 72.

52 *See* RLA-387, *Chan v. Society Expeditions, Inc*., 123 F.3d 1287, 1294 (9th Cir. 1997); RLA-388, *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir. 1980); RLA-389, *National Marine Service, Inc. v. C. J. Thibodeaux & Co.*, 501 F.2d 940, 942 (5th Cir. 1974).

34. Evaluating a parent's conduct for vicarious liability is usually an intensely fact-based exercise. Given the content of the record and the discussion of the bases for Chevron's liability in the Judgment, even the harshest critic of the Court's finding would be forced to acknowledge that, at the very least, it falls comfortably within the realm of the "juridically possible."

35. To determine whether a parent is dominating its subsidiary, U.S. courts look to several non-exclusive factors, such as consolidation of leadership, finances, and corporate legal formalities.[53] Recently, a Mississippi state court found Chevron liable for Texaco's pre-merger actions. In reaching this holding, the court relied on the following:

- Chevron acquired *all* of Texaco's capitol stock in a reverse triangular merger in 2001 and is currently the *only* shareholder of Texaco.[54]
- Since 2002, Chevron Corp. and Texaco Inc. have shared at least 15 officers and directors.[55]
- Chevron and Texaco share the same legal counsel on numerous matters, including Chevron attorneys appearing for Texaco on the 2001 appellate brief filed in *Aguinda* New York action.[56]
- Chevron and Texaco share the same treasury department with all w*ire trans*fers and allocations distributed by Chevron.[57]
- Chevron pays the U.S. tax liabilities that Texaco incurs.[58]

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53 Example of such non-exclusive factors: (1) the parent and the subsidiary have common stock ownership; (2) the parent and the subsidiary have common directors or officers; (3) the parent and the subsidiary have common business departments; (4) the parent and the subsidiary file consolidated financial statements and tax returns; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operates with grossly inadequate capital; (8) the parent pays the salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given to it by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; and (12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings. RLA-391, *U.S. v. Jon-T Chemicals, Inc*., 768 F.2d 686, 691-92 (5th Cir. 1985).

54 R-845, Soler Dep. 24:2-22, 28:18-20; R-844, Sciancalepore Dep. 7:1-8:12.

55 R-846, Excerpts from Texaco Corporate Annual Reports and from ChevronTexaco/Chevron Annual Reports (2001, 2003-2006, 2008).

56 In-house counsel for ChevronTexaco appeared as ChevronTexaco's counsel of record, alongside Texaco's outside counsel from King & Spalding, on the brief to the Second Circuit opposing the appeal [by the Aguinda plaintiffs/in the New York action]. R-40, Brief for Defendant-Appellee (Dec. 20, 2001) filed in *Aguinda v. Texaco, Inc.*, Case No. 01-7756 (L), 01-7758 (CON) at 1, 89.

57 R-845, Soler Dep. 79:19-80:6

58 R-844, Sciancalepore Dep. 31:20-32:7

- Texaco receives capital and cash contributions from Chevron to satisfy debts and other obligations.[59]
- Chevron receives all dividends declared by Texaco, including one instance of a single dividend payment of US$18 Billion.[60]
- Texaco has no cash assets of its own because all cash in Texaco's accounts is transferred to an account in Chevron's name each night.[61]
- Chevron designates Texaco as a "non-operating" company which does not have any ongoing commercial enterprises.[62]
- After the merger, Chevron closed down and sold Texaco's former headquarters in New York and moved all operations to the Chevron facility in California.[63]
- Texaco does not conduct a physical shareholder meeting.[64]

36. In light of these and other facts, the Mississippi court found that Texaco, Inc. and Chevron Corp. were jointly and severally liable to plaintiffs and rejected Chevron's arguments of corporate separateness.[65] This is hardly an exceptional or unusual outcome in U.S. Courts.[66]

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59 *Id*. at 28:25-34:2.

60 *Id*. at 36:14-38:24.

61 *Id*. at 28:25-34:2.

62 R-845, Soler Dep. 20:20-21:2; R-844, Sciancalepore Dep. 14:18-24.

63 R-846, Elisa Brenner, *Morgan Stanley Seal Deal on Texaco Headquarters*, NEW YORK TIMES (Mar. 31, 2002).

64 R-845, Soler Dep. 44: 19-45:9.

65 RLA-337, *Simon v. Texaco*, Final Judgment, Case No. 2007-110, Circuit Court of Jefferson Country, Miss. (Aug. 11, 2010).

66 *See, e.g*., RLA-393, *Hystro Products, Inc. v. MNP Corp*., 18 F.3d 1384, 1390-92 (7th Cir. 1994) (The court pierced the corporate veil between parent and subsidiary where the subsidiary was dominated by the parent and where corporate separateness would promote injustice. The court found parent domination on the basis that it controlled the subsidiary's finances, paid the salaries of subsidiary's officers, and the parent and subsidiary had transfers of cash between the organizations.); RLA-394, *U.S. ex rel. CMC Steel Fabricators, Inc. v. Harrop Const. Co., Inc*., 131 F.Supp.2d 882, 894 (S.D.Tex. 2000) (holding the corporate veil could be pierced where parent and subsidiary filed consolidated financial report; parent and subsidiary view themselves as a vertically integrated company; each night revenues are taken from the subsidiary's bank account and placed under the parent's control; officers of subsidiary were not paid by the subsidiary); RLA-391, *U.S. v. Jon-T Chemicals, Inc*., 768 F.2d 686, 691-92 (5th Cir. 1985) (holding piercing of corporate veil appropriate where the parent corporation had total domination and control over its subsidiary); RLA-395, *UST Corp. v. General Road Trucking Corp*., 783 A.2d 931, 940-41 (R.I. 2001) ("[I]if the totality of circumstances surrounding their parent-subsidiary relationship indicates that one of the corporations is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of some one or more other entities, then a court should pierce the corporate veil and hold these other entities liable." (internal citations omitted)).

37. The Lago Agrio Court arrived at the identical holding, based on highly overlapping evidence.[67] The Court examined the totality of the circumstances, finding that the case "must be analyzed in light of the entire body of evidence" to determine whether to lift the corporate veil.[68] For example, the Lago Agrio Court looked at, *inter alia*,:

- the finances between the companies, noting that the evidence of the direct transfer of money between them established an "alter ego" or "patrimonial" relationship.[69]
- the payment of certain expenses by the other, noting, *inter alia*, that *Texaco's* legal representative signed multiple checks to satisfy *Chevron's* legal expenses.[70]
- the overlap of shareholders and executives between the companies. The court found that "the shareholders of the predecessor companies are the same ones who control the new company," and "moreover that the executives in charge of the new company are the same ones who managed the combined companies, . . . leads one to think that there is not sufficient separation between the ownership and control of the new company and its predecessors."[71]
- the public statements made by Chevron and Texaco's leadership representing the "merger" between the companies that would "combine" the companies to form a new one that would benefit from the union.[72]

38. Thus the Court's holding is not, as Chevron would contend, an aberrant distortion of U.S. law. A U.S. court will pierce the corporate veil where the parent has so dominated and

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67 C-931, Lago Agrio Judgment at 15.

68 *Id.* at 6.

69 *Id.* at 12.

70 *Id.* at 12.

71 *Id.* at 13.

72 *Id.* at 8-9. Chevron's assumption of Texaco's liabilities is a separate basis under U.S. law for holding Chevron liable. *See* RLA-396, *U.S. v. General Battery Corporation*, 423 F.3d 294, 305 (3d Cir. 2005) ("The purchaser may be liable where: (1) **it assumes liability**; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent or intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling corporation.") (emphasis added).

disregarded the subsidiary's corporate form that the subsidiary is in effect an alter ego of the parent, carrying on the parent's business.[73]

39. In treating the two merged entities as one, the court treated Texaco and Chevron as they themselves publicly represented that they wished to be treated. Chevron promoted its merger with Texaco to the Second Circuit in 2001, asking the court there to take judicial notice of the fact that "Texaco **merged** with Chevron Inc. on October 9, 2001, five months after the District Court's [second forum non conveniens] decision."[74] From that time onwards, the surviving entity, ChevronTexaco (later re-named "Chevron" again), unequivocally represented to the world that its two predecessors had "merged," *e.g.*, statements to U.S. officials, to the public in numerous press releases, to investors in conference calls, and to the U.S. Securities and Exchange Commission (SEC) in required filings.

40. In their SEC filings, for example, Chevron stated: "The Boards of Directors of Chevron Corporation and Texaco Inc. have approved a **merger** agreement that provides for the **combination of our two companies**. Texaco will join the Chevron group and Chevron will be renamed ChevronTexaco Corporation."[75] In explaining the reasons for the merger, Chevron boasted: "By **joining Chevron and Texaco** we will create a U.S.-based, global enterprise that we believe will rank with the world's largest and most competitive international energy companies[.] As separate companies, Chevron and Texaco are leading energy companies with positive prospects for the future; however, we believe that **a combined Chevron and Texaco** will create greater value for the stockholders of both companies than we could deliver as separate

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73 *See* RLA-387, *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1294 (9th Cir. 1997); RLA-388, *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir.1980); RLA-389, *National Marine Service, Inc. v. C. J. Thibodeaux & Co.*, 501 F.2d 940, 942 (5th Cir. 1974).

74 R-40, Brief for Defendant-Appellee, *Aguinda v. Texaco, Inc.* (2d Cir. Dec. 20, 2001).

75 R-651, SEC Form S-4 at 2 (emphasis added).

companies."[76] And Chevron has emphasized the importance of achieving integration with Texaco: "The benefits that we expect to realize by combining Chevron and Texaco depend, in part, on our ability to **successfully integrate** the operations of the two companies."[77]

41. In press releases announcing the merger, David O'Reilly, then Chevron's Chairman and CEO stated, "We'll be positioned for stronger financial returns than could be achieved by either company separately[.]"[78] His counterpart, Texaco's then chairman and CEO Peter Bijur, described the merger as a "powerful combination" of two companies.[79] On Chevron's website, the company advised investors that "our primary focus at the time of the merger was to integrate our two companies,"[80] and that it had changed its name back to "Chevron" from "ChevronTexaco" to show that the two are now a "a single, integrated global energy company."[81]

42. While lobbying the U.S. Trade Representative to terminate existing favorable trading partner status to Ecuador, Chevron represented that it had "successor" status to contracts between the Republic, TexPet, Texaco, and their "successors" (*e.g.*, the May 1995 Settlement Agreement), and that Texaco contracts should benefit Chevron by being deemed the same as contracts directly between the Republic and Chevron.[82]

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76 R-651, SEC Form S-4 at 31 (emphasis added).

77 *Id.*

78 R-652, *Chevron and Texaco Agree to $100 Billion Merger Creating Top-tier Integrated Energy Company*, Chevron and Texaco Joint Press Release.

79 *Id.*

80 R-653, Investor Q&A: Answers to Common Questions About Investing In Chevron.

81 *Id.*

82 R-654, Letter from L. Barry to USTR S. Schwab (Feb. 11, 2008) at 1 of att. ("the Republic of Ecuador and PetroEcuador have failed to meet several contractual obligations **to Chevron** and TexPet") (emphasis added); *id*. at 5 ("The Republic of Ecuador.. . . over the past several years has repeatedly refused to comply with its specific obligations under two separate contracts **with Chevron** and TexPet. . . . It has taken instead a series of affirmative steps to repudiate and nullify the Settlement and Release.") (emphasis added); *see also*, R-843, *Ecuador, ATPDEA and Chevron*, LATIN BUSINESS CHRONICLE (Aug. 4, 2008) at 2 (per Chevron media relations advisor Kent

III. Alleged "Handpicking" Of Appellate Court Judges Hearing Chevron Appeal

43. Claimants have cobbled together a number of independent events — some of them unrelated to the Lago Agrio Litigation — to suggest that both the Ecuadorian trial court and the Judiciary Council clandestinely maneuvered to hand-pick, in a "highly irregular and non-transparent process," the members of the appellate panel that would hear their appeal. But these contentions misrepresent the relevant facts and applicable law.

44. **First**, the Judicial Council appointed each of the *conjueces* (substitute judges) of the Provincial Court of Sucumbíos in accordance with the rules in place at the time of appointment. The Judicial Council is the authority independent from the executive and legislative powers responsible for, *inter alia*, the appointment of judges and *conjueces*.[83] Once appointed as such, *conjueces* form part of a roster from which judicial assignments may be made in a particular case. If a permanent judge becomes temporarily absent, a *conjuez* shall be selected by lot (*sorteo*) from the roster.[84] The Judicial Council duly appointed each of the five *conjueces* in the Provincial Court of Sucumbíos in accordance with applicable rules in force at the time of appointment.[85]

Robertson, "the Republic of Ecuador has taken steps to 'repudiate or nullify' **existing contracts between itself and Chevron**.") (emphasis added).

83 "*Conjueces"* are auxiliary judges who are called upon to assume the role of a judge in the event of the absence (*e.g.*, by recusal) or impairment of a permanent judge to hear a particular case. For example, in November 2010, Judge Legña was appointed as an Interim *Conjuez* of the Provincial Court of Sucumbíos to replace Judge Nuñez following his removal from the court as a Judge. R-302, Acta de Sorteo (Nov. 8, 2010). RLA-303, Articles 200 and 201 of the Organic Code of the Judiciary establish the number of *conjueces* to be appointed and the powers to be granted. Although these provisions govern the appointment of *conjueces* for the National Court of Justice, RLA-303, Article 205 of the Organic Code extends their application to the Provincial Courts.

84 In October 2009, the Judicial Council issued Resolution 50-09, establishing that in the event of the absence or impediment of judges, the President of the Provincial Court shall appoint a *conjuez* by *sorteo*. *See* R-307, Resolution 50-09 of the Judicial Council, arts. 1, 2. Official Gazette 42, October 7, 2009. Later, by Resolution 58-09 enacted in November 2009, these powers were transferred to the Provincial Director of the Judiciary Council. *See* R-384, Resolution 58-09 issued by the Council of the Judiciary (Oct. 27, 2009)

85 **Judge Legña** and **Judge Toral** originally became *conjueces* in early 2009 under the rules of the 1974 Organic Law of the Judiciary. *See* R-310, Organic Law of the Judiciary, arts. 2 and 62. *See also* R-306, Nomination Document for Luis Legña (Jan. 22, 2009); and R-304, Nomination Document for Milton Toral (Mar. 4, 2009).

45. **Second**, Claimants confuse and misrepresent (i) events relating to the appointment of standing members of the appellate chamber of the Provincial Court of Sucumbíos, with (ii) events relating to the necessary appointment of an *ad hoc* panel of *conjueces* to hear Chevron's appeal. In fact, at the time of Chevron's appeal, the Court's appellate chamber was comprised of the following two permanent judges and one Subsititute Judge: (i) Judge Zambrano, (ii) Judge Nuñez, and (iii) Substitute Judge Legña.[86] This panel was entrusted with the appellate review of *all cases* on appeal to that provincial court. However, given their prior involvement as first instance judges in the Lago Agrio case, both Judge Zambrano and Judge Nuñez recused themselves from hearing Chevron's appeal, thus requiring the appointment of two additional *conjueces*.

46. Two *conjueces* — Judge Toral and Judge Orellana — were accordingly chosen by lot from the pool of *conjueces* to complete the three-judge appellate panel for Chevron's

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Similarly, in accordance with Resolution No. 58-09 of the Judicial Council, the Acting Provincial Director of the Judicial Council for the Provinces of Sucumbíos and Orellana appointed **Judge Yaguache** as *conjuez* for the Provincial Court of Sucumbíos on March 1, 2010. *See* C-1294, Nomination Document for Marco Antonio Yaguache Mora. **Judge Encarnación** became a *conjuez* in December 2010, following a nationwide merit-based selection of *conjueces* and upon a showing that he had complied with the new rules of the Organic Code of the Judiciary. *See* R-311, Organic Code, art. 207. *See also* R-305, Nomination Document for Juan Encarnación (Jan. 6, 2011). During the plenary session of December 7-8, 2010, the Judicial Council appointed **Judge Orellana** as *conjuez* for the Provincial Court of Sucumbíos pursuant to art. 264, paragraph 1, of the Organic Code of the Judiciary. *See* C-1291, Nomination Document for Alejandro Kleber Orellana Pineda.

86 **Judge Legña** was appointed to this position on March 3, 2011, to replace Judge Yaguache, who had been serving in that position for over a year in substitution of Judge Ordoñez (who instead had been appointed to act as President of the Provincial Court of Justice of Sucumbíos.) *See* C-1294 Nomination Document for Marco Antonio Yaguache Mora.

Claimants assert, incorrectly, that the Judicial Council removed Judge Yaguache from the "substitute appellate panel." Claimants' Supplemental Merits Memorial ¶ 130. Judge Yaguache had never been appointed to the *ad hoc* panel designated to hear the Lago Agrio appeals. Instead, as explained above, he had been appointed to the appellate panel of the Provincial Court of Sucumbíos to substitute Judge Ordoñez. The Judicial Council considered appropriate to conclude Judge Yaguache's tenure a year after his initial appointment pursuant to the authority conferred under Article 280, section 11 of the Organic Code of the Judiciary. RLA-303, Organic Code of the Judiciary. These events took place *before* the appointment of the *ad hoc* panel charged with hearing the Plaintiffs and Chevron's appeal. Judge Yaguache was neither appointed to nor removed from it. Claimants' reference to the "*substitute appellate panel*" appears intended to mislead the reader into confusing events relating to the day-to-day organization of the Court (specifically, that of the chamber of appeals) with those relating to the appointment of the separate panel specifically to hear the Lago Agrio appeals.

appeal.[87] Chevron subsequently moved to recuse Judge Orellana,[88] who was promptly replaced by Judge Encarnación pending resolution of Chevron's recusal motion.[89] The appellate panel for Chevron's appeal was thus comprised of Judge Legña,[90] Judge Toral[91] and Judge Encarnación,[92] who ultimately issued their appellate judgment on January 3, 2012.

47. **Third**, while Claimants contend that this selection process departed from "the usual process for selecting the appellate panel," both Judge Toral and Judge Encarnación were in

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87 R-303, Acta de Sorteo (Mar. 23, 2011).

88 *See* C-1303, Motion for Recusal Against Judge Orellana, April 13, 2011. Chevron alleged that Judge Orellana was precluded from sitting in judgment of Chevron's appeal because he had previously represented a private party in a claim for damages against ChevronTexaco Corporation substantially similar to that of the Plaintiffs. The Court had summarily dismissed this private party's complaint on March 11, 2011 (even before Chevron was served with a copy of the complaint.). Chevron moved to recuse Judge Orellana about four weeks later.

89 *See* C-1292, Minutes of drawing for the appointment of Judge Encarnación to the appellate panel in substitution of Judge Orellana. Judge Orellana resigned to his position as *conjuez* shortly thereafter. *See* C-1305, Resignation of Judge Orellana.

90 Judge Legña was subsequently removed from his position at the appellate panel of the Superior Court of Sucumbíos, albeit provisionally, which also caused his temporary removal from the *ad hoc* panel appointed to hear the Lago Agrio appeals. See C-1306, Provisional Nomination of Judge Erazo. He was replaced, also provisionally, by Judge Erazo. *Id.* Judge Legña was reappointed to serve at the *ad hoc* panel for the *Lago Agrio* appeals on November 29, 2011, following two other provisional rotations at the appellate chamber of the Superior Court of Sucumbíos. C-1307, Resolution of the Plenary of the Judicial Council terminating all provisional appointments, causing the termination of Judge Erazo's provisional appointment to the appellate chamber of the Provincial Court of Sucumbíos; *see also* C-1308, Judicial Council resolution appointing Judge Yaguache to replace Judge Erazo; C-1099, referencing appointment of Judge Toral to the appellate chamber of the Provincial Court of Sucumbíos; and C-1065, Minutes of appointment of Judge Legña and Judge Encarnación to the *ad hoc* panel charged with hearing the Lago Agrio appeals.

Claimants allege that the Judicial Council removed Judge Legña "without stating the reasons and in flagrant violation of Ecuadorian law." Claimants' Supplemental Merits Memorial ¶ 130. But this assertion is incorrect. Judge Legña's provisional appointment to the appellate panel of the Provincial Court of Sucumbíos was concluded by the Judicial Council pursuant to the authority conferred upon its President concerning provisional appointments. *See* RLA-303, Organic Code of the Judiciary, arts. 269(5) and 40(2).

91 Claimants attempt to cast doubt over the impartiality of Judge Toral by alleging falsely that he was "originally nominated by Judge Zambrano, who issued the first-instance Judgment." Claimants Suppl. Memorial ¶ 132. But as Claimants know, the Judicial Council appointed Judge Toral years prior to the issuance of the Lago Agrio Judgment. *See* R-304, Nomination Document for Milton Toral (Mar. 4, 2009.)

92 Claimants also attempt to tarnish Judge Encarnación by wrongly asserting that he had been "appointed to the pool of substitute judges by Judge Zambrano … apparently outside the traditional merit-based selection process." Claimants Supplemental Memorial ¶ 132. But as Claimants also must know, Judge Encarnación was appointed to the pool of substitute judges by the Plenary of the Judicial Council, following a nationwide merit-based selection of *conjueces* and upon a showing that he had complied with the new rules of the Organic Code of the Judiciary. *See*, R-305, Nomination Document for Juan Encarnación (Jan. 6, 2011); *see also*, R-311, Organic Code, art. 207.

fact selected by lot. Judicial Council Resolutions 50-09 and 58-09 required, and governed the process for selecting and appointing *conjueces* in cases of temporary absence or impairment of permanent judges, charging the Provincial Director of the Judicial Council with the task of conducting the lot from the existing roster of *conjueces*.[93] Both the selection by lot of Judge Toral and, subsequently, that of Judge Encarnación, were conducted by (i) the Acting Provincial Director of the Judicial Council and (ii) the Acting Secretary of the Provincial Bureau of the Judicial Council, in compliance with these resolutions.[94]

48. **Fourth**, Claimants allege that the panel selection process was conducted in "secret."[95] However, Claimants do not cite any provision in the Organic Code of the Judiciary for the proposition that the Judicial Council or the Court is obliged to provide notice to the parties prior to conducting the lot for the appointment of a *conjuez* from the panel to fill a vacancy.[96] In Ecuador, the judiciary is governed by, *inter alia*, the principle of publicity, which refers to the duty to publish information relating to its regulations and procedures, and to publish judicial decisions and rulings relating to cases.[97] Here, the requisite element of publicity is met

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93 *See* R-307, Judicial Council Resolution No. 50-09 (Sept. 2, 2009); R-384, Judicial Council Resolution No. 58-09 (Sept. 2, 2009).

94 By resolution of the Plenary of the Judicial Council, the functions of the Provincial Directors of the Judicial Council were provisionally delegated on the President of the Provincial Courts. Accordingly, Judge Zambrano was charged with the duties assigned to the Provincial Director of the Judicial Council for the Province of Sucumbíos and carried out the *sorteos* in such capacity.

95 Claimants' Supplemental Merits Memorial ¶ 130.

96 Similarly, in the Second Circuit's consideration of Ecuador's appeal of the denial of its stay application, the Second Circuit substituted judges *after* argument, advising the parties of the substitution by way of a single docket entry with absolutely no explanation or pre-warning. *Compare* R-160, Oral Argument Tr. (Aug. 5, 2010) at 1 (listing appellate panel for oral argument as Pooler, Raggi, and Lynch) *with* R-247, *Republic of Ecuador v. Chevron Corp.*, 638 F. 3d 384 at 2 n.* (2d Cir. 2011) (noting in final Opinion of court that "Chief Judge Dennis Jacobs was designated as the third member of the panel pursuant to Internal Operating Procedure E(b), replacing Judge Reena Raggi, who recused herself earlier in these proceedings.").

97 RLA-303, Organic Code of the Judiciary, art. 13.

through the issuance of the minutes of lot and appointment, which constitute public documents in accordance with Article 165 of the Ecuadorian Code of Civil Procedure.[98]

[98] RLA-198. Ecuadorian Code of Civil Procedure, art. 165 ("All public documents, i.e. all instruments duly authorized by the persons responsible for the matters related to their office or employment, such as diplomas, decrees, orders, edicts, provisions, requisitions, letter rogatory or other orders issued by competent authority; certifications, copies or testimonies of a governmental or judicial action or proceeding, given by the secretary concerned, are deemed evidence and attest to the truth of the matter asserted.").