

## MEMORANDUM

November 21, 2018

For:

Victoria Lucia Tauli-Corpuz  
Special Rapporteur on the Rights of Indigenous Peoples  
indigenous@ohchr.org  
registry@ohchr.org  
[Urgent-action@ohchr.org](mailto:Urgent-action@ohchr.org)

Cc: [REDACTED]

Re: Joint Communication from Special Procedures, dated June 21, 2017; Reference: AL OTH 10/2017; Press Release, November 15, 2018, *Ecuador: UN expert on indigenous peoples to visit Nov. 19-29*

As referenced in our letter of today's date to the Special Rapporteur on the Rights of Indigenous Peoples, this Memorandum summarizes key findings of the Second Partial Award ("the Award") issued on August 30, 2018, by the international arbitral tribunal hearing claims by Chevron Corporation ("Chevron") and its indirect subsidiary Texaco Petroleum Company ("TexPet") against the Republic of Ecuador pursuant to the U.S.-Ecuador Bilateral Investment Treaty ("BIT") and administered by the Permanent Court of Arbitration in The Hague.<sup>1</sup> The Tribunal's Award was unanimous.

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<sup>1</sup> A full copy of the Award is accessible at <https://www.italaw.com/cases/documents/6825>.

The BIT Tribunal resoundingly concluded, as did US courts previously, that the Ecuadorian judgment was the product of fraud and corruption, including judicial bribery enabling Donziger and his cohorts to secretly ghostwrite the judgment in exchange for a promise of future payment from judgment proceeds. Award, ¶¶ 8.54–8.56. The Tribunal further held that Ecuador breached its obligations under its contracts releasing TexPet and its affiliates from public environmental claims—the same claims on which Ecuadorian judgment is exclusively based. *Id.* ¶ 10.8.

Over more than 500 pages, the Tribunal detailed the “overwhelming” evidence of fraud and corruption of Donziger and the Lago Agrio Plaintiffs’ (“LAPs”) legal team. The Tribunal concluded that “[s]hort of a signed confession by the miscreants . . . , the evidence establishing ‘ghostwriting’ in this arbitration ‘must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal.’” *Id.* ¶ 8.54. All three arbitrators—including the arbitrator appointed by the Republic of Ecuador—joined the decision.

The Award against Ecuador by the BIT Tribunal is consistent with the 2014 judgment of the US federal court in New York declaring the Ecuadorian judgment unenforceable. As detailed in our prior submissions,<sup>2</sup> the US court, after a seven-week trial that included testimony from the Sucumbíos judge who issued the Ecuadorian judgment, found lead U.S. lawyer for the LAPs, Steven Donziger, civilly liable for committing fraud, bribery, coercion, extortion, wire fraud, witness tampering, falsification of evidence, and obstruction of justice.<sup>3</sup>

## **I. Background on the BIT Arbitration Proceedings**

Chevron commenced the BIT arbitration in 2009 to seek redress for Ecuador’s international wrongs in connection with the action filed by the LAPs against the company in Ecuador (“Ecuadorian litigation”), including Ecuador’s failure to honor its 1995 Settlement and 1998 Release with TexPet, the Texaco subsidiary that had operated in Ecuador as a minority participant in a joint venture with Ecuador’s national oil company, Petroecuador. The wrongful conduct of Ecuador included its failure to indemnify or otherwise hold Chevron harmless from the claims brought by the LAPs in the Ecuadorian litigation.<sup>4</sup> Chevron amended its claim in 2012 to include the denial of justice that occurred through the Ecuadorian court’s fraud and corruption during the Ecuadorian litigation and the resulting fraudulent \$9.5 billion judgment.

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<sup>2</sup> July 6, 2017, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33565>; August 4, 2017, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33620>).

<sup>3</sup> *Chevron Corp. v. Donziger*, 974 F Supp 2d 362, 386 (S.D.N.Y. 2014), *affirmed on appeal*, 833 F.3d 74, 126 (2d Cir. 2016), *petition for certiorari denied*, 137 S Ct 2268 (2017). Some claimants participated in the trial and were similarly found liable.

<sup>4</sup> *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 490 n.813 (S.D.N.Y. 2014); *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 248 (S.D.N.Y. 2012).

## **II. Chevron Wins the BIT Arbitration**

In its Award, the Tribunal held that Ecuador breached its obligations under the 1995 Settlement Agreement, finding that “TexPet spent approximately \$40 million on environmental remediation and community development in Ecuador under the 1995 Settlement Agreement,” which was carried out by a “well-known engineering firm specialising in environmental remediation.” Award ¶¶ 4.67, 4.68. The Tribunal found “no cogent evidence” supporting Ecuador’s claim that TexPet failed to comply with the terms of the remediation plan approved by Ecuador. *Id.* ¶ 4.179. To the contrary, the Award recites the statements of Ecuadorian officials that TexPet’s “technical work and environmental work was done well,” while Petroecuador, “during more than three decades, had done absolutely nothing” to address its own environmental remediation obligations in the area, even though Ecuador and its national oil company received 97.3% of the oil production revenues from the project. *Id.* ¶¶ 4.64, 4.180, 4.181.

In deciding the issues before it, the BIT Tribunal was required to make many determinations regarding the conduct of the Ecuadorian litigation on issues that the US federal court addressed in its earlier decision in the action brought by Chevron against Donziger and others under US anti-racketeering laws, known as RICO. The BIT Tribunal agreed with the factual findings of the US court in the RICO case (the “RICO Court”) in all material respects, on a factual record that was overlapping but not entirely coextensive with what was before the RICO Court. For example, certain additional forensic evidence relating to Judge Zambrano’s computers was adduced during the BIT arbitration but not during the RICO trial. The BIT Tribunal concluded that the Ecuadorian judgment “violates international public policy,” and that “[a]s a matter of international comity, it must follow that the [Ecuadorian judgment] should not be recognised or enforced by the courts of other States.” *Id.* ¶ 9.16.

Finally, the BIT Tribunal held that under international law, the Ecuadorian judgment was unenforceable, and ordered Ecuador to “[t]ake immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment” *id.* ¶ 10.13(i), and to preclude the LAPs, their representatives, “any ‘trust’ purporting to represent their interests,” including the FDA, “and any non-party funder from enforcing any part of the” Ecuadorian judgment, “directly or indirectly.” *Id.* ¶ 10.13(ii). It further ordered Ecuador to “take corrective measures” to “wipe out” the consequences of Ecuador’s “internationally wrongful acts in regard to the Lago Agrio Judgment.” *Id.* ¶ 10.13(vi). The Tribunal was unequivocal that, “as a matter of international law, [Chevron] [is] not obliged to comply with the [Ecuadorian] Judgment.” *Id.* ¶ 9.34.

## **III. The BIT Tribunal’s Independent Factual Findings Correspond to Those Made by the US Court**

The BIT Tribunal’s factual findings align with those of the RICO Court in all material respects. For example, the Tribunal, like the RICO Court, found that

Donziger corrupted the Ecuadorian proceedings from early on, by agreeing to pay Fernando Reyes and Gustavo Pinto to act as “independent experts,” when they were in fact working for the LAPs. The Tribunal found this arrangement “was manifestly wrong by any standard for the administration of justice; and [Donziger] knew it. Wrong as this was, much worse was to follow.” *Id.* ¶ 4.225; *cf. Donziger*, 974 F. Supp. 2d at 417 (“[T]he agreement was for Reyes and Pinto to work covertly for the LAP team and to keep their relationship with the LAPs secret from the judge. And Donziger well understood that the arrangement was improper.”).

The Tribunal’s fact findings regarding the appointment and corruption of the Ecuadorian court’s supposedly neutral global damages expert, Richard Cabrera, also align with those of the RICO Court. Specifically, the Tribunal found that the LAPs’ team blackmailed the presiding judge, Judge Yáñez, into appointing Cabrera in the first instance: “Judge Yanez’ decision to accede to the Lago Agrio Plaintiffs’ applications was the direct result of the blackmail committed by Mr Fajardo, with the knowledge and support of [Mr] Donziger and others representing the Lago Agrio Plaintiffs.” Award ¶ 4.261; *see Donziger*, 974 F. Supp. 2d at 558.

And as did the RICO Court in finding Donziger violated the Travel Act by arranging for Cabrera to receive bribe payments out of what he and the RICO co-conspirators termed a “secret account,” *Donziger*, 974 F. Supp. 2d at 559–60, the Tribunal found that payments to Cabrera from the secret account “were made corruptly as bribes by certain of the Lago Agrio Plaintiffs’ representatives, including Mr Fajardo, Mr Yanza and Mr Donziger.” Award ¶ 4.303.

In addition, the Tribunal also found that the LAP’s legal team ghostwrote the Cabrera Report (*id.* ¶¶ 4.277, 4.378), and that “[t]he Lago Agrio Judgment indirectly relies upon the Cabrera Report,” (*id.* ¶ 4.388), specifically with respect to pit count and the \$5.4 billion award for alleged soil remediation damages. *Id.* ¶¶ 5.119-5.120; *cf. Donziger*, 974 F. Supp. 2d at 559.

With respect to the ghostwriting of the judgment, the BIT Tribunal had available to it certain additional forensic evidence from the Ecuadorian court that was not available to the RICO Court, specifically, forensic images of the hard drives from the computers allegedly used to draft the Judgment. Judge Zambrano did not testify before the Tribunal despite numerous requests from the Tribunal that he do so, but the Tribunal had available to it his testimony from the RICO trial. In contrast, former Ecuadorian judge Alberto Guerra testified in both proceedings.

Ultimately, the Tribunal found that “the circumstantial and other evidence, including testimony by Dr Zambrano in the RICO Litigation, does not support Dr Zambrano’s account of writing the Lago Agrio Judgment,” (*id.* ¶¶ 5.17, 8.54), and rejected his testimony from the RICO trial that he wrote the judgment, finding it to be, “on material issues, incredible.” *Id.* ¶ 5.150. The Tribunal found that “Judge Zambrano did not draft the entirety of the [Ecuador] Judgment by himself,” but instead, “in return for his promised reward, allowed certain of the Lago Agrio Plaintiffs’

representatives, corruptly, to ‘ghostwrite’ at least material parts of the Lago Agrio Judgment (with its Clarification [Order]). These representatives included Mr Fajardo and Mr Donziger.” *Id.* ¶ 5.231; *cf. Donziger*, 974 F. Supp. 2d at 483–92 (“The Court rejects Zambrano’s claim of authorship, let alone sole authorship, as unpersuasive for a host of reasons.”). The Tribunal concluded, moreover, that Donziger had acted with knowledge of the ghostwriting, and was “privy to such ‘ghostwriting’ and ‘collusion,’” “with others.” Award ¶¶ 5.163–5.164.

In addition, the Tribunal, like the RICO Court, found that the LAPs’ representatives pressured the Ecuadorian government to bring criminal prosecutions against attorneys involved in the Settlement and Release Agreements as a way to “nullify the effect of Chevron’s reliance upon the 1995 Settlement Agreement as a defense in the Lago Agrio Litigation.” *Id.* ¶ 4.124; *see also id.* ¶ 4.378 (describing the criminal prosecutions against TexPet’s lawyers in Ecuador as “collusive”); *cf. Donziger*, 974 F. Supp. 2d at 543–44.

As did the RICO Court, the Tribunal also rejected the adequacy of appellate review of the Ecuadorian judgment to “cure” or otherwise cleanse the judgment of this pervasive fraud. The Tribunal expressed “grave doubts” as to “the thoroughness” of the Appellate Court’s “de novo hearing,” noting the court’s own statement that it had “no competence” to review Chevron’s allegations of corruption and fraud. *Id.* ¶¶ 5.165–5.171; *cf. Donziger*, 974 F. Supp. 2d at 539. Ecuador’s Cassation Court, moreover, “did not review the merits of any of Chevron’s allegations of fraud . . . or the ‘ghostwriting.’” Award ¶ 5.178. And despite having a record of the fraud before it, Ecuador’s Constitutional Court specifically held that neither it nor the Cassation Court had jurisdiction to rule on those claims. *Id.* ¶¶ 5.189, 5.214–5.215.

Finally, in reference to the “go to jail email”—an email from one of the LAPs’ Ecuadorian attorneys to Donziger just as documents were about to emerge demonstrating Stratus’ ghost-writing of the Cabrera Report—which the RICO Court characterized as “one of those blinding rays of candor that can occur even in clouds of lies,” *Donziger*, 974 F. Supp. 2d at 461, the Tribunal noted that “[t]he reference to ‘jail’ is significant. Criminal proceedings could have arisen from unlawful conduct over the bribing of Messrs Reyes and Pinto, the blackmailing of Judge Yáñez, the corrupt collusion with Mr Cabrera, the ‘ghostwriting’ of Mr Cabrera’s Report, the bribes paid to Dr Guerra for drafting Judge Zambrano’s orders, the inappropriate private meetings with several judges of the Lago Agrio Court, the collusive criminal proceedings against Mr Veiga and Dr Pérez and the covert plan for ‘ghostwriting’ the Lago Agrio Judgment.” Award ¶ 4.378.

#### **IV. Donziger’s Claims that the Evidence Before the BIT Exonerated Him Are False**

Donziger has repeatedly represented to the RICO Court, the US federal Court of Appeals for the Second Circuit, and the public at large that “new evidence” adduced in the BIT proceeding exonerated him, and he has criticized the Second Circuit for purportedly refusing to consider it. For example, in filings before both the RICO

Court and the Second Circuit, Donziger falsely has claimed that Alberto Guerra's RICO testimony was undermined by his subsequent BIT testimony. Donziger has claimed that "Guerra admitted under cross-examination in a related international arbitration between Chevron and the Republic of Ecuador that he intentionally and repeatedly lied on the stand and in his sworn statement during the RICO trial." Dkt. 1925 at 2; *see also* Donziger Appellants' Motion for Judicial Notice of Transcripts in Arbitration Proceedings and Filings in Canadian Litigation (Dkt. 461-1) 14-826-cv(L), at 12–13 (2d Cir. Nov. 5, 2015). But the BIT Tribunal rejected these claims. In fact, the Tribunal specifically held that "the Tribunal considers that Dr Guerra was a witness of truth in his testimony at the Track II Hearing. The Tribunal has therefore relied upon his testimony where it can be corroborated by other evidence, at least in part." Award ¶ 4.38.

Donziger has also claimed that certain forensic evidence relating to Judge Zambrano's computers adduced during the BIT arbitration, which was not available to the RICO Court, disproves Chevron's claims that the judgment was ghost written. The BIT Tribunal disagreed, finding that the forensic evidence proves "the account given at the RICO trial by Dr Zambrano as to how he wrote personally the full Lago Agrio Judgment on his New Computer (with his student secretary) is inaccurate, incomplete and unreliable." Award ¶ 6.109. Overall, the evidence led the panel to conclude that "the Lago Agrio Judgment was at least in material part 'ghostwritten' by certain of the Lago Agrio Plaintiffs' representatives, in corrupt collusion with Judge Zambrano." *Id.* ¶ 6.111; *see also* ¶ 10.4.

## **V. The BIT Tribunal Found that Ecuador Violated the 1995 Settlement and 1998 Release Agreements**

The BIT Tribunal also found that the claims adjudicated by the Ecuadorian judgment in the case brought by the LAPs against Chevron were the same "diffuse" claims released by Ecuador in its 1995 settlement agreement and 1998 release with TexPet. Indeed, the Tribunal held that the Constitutional Court's determination that the generalized environmental claims brought by the Plaintiffs in the Ecuadorian litigation were not released "deprives that settlement of any practical meaning, making it a one-sided and open-ended commitment undertaken unilaterally by TexPet and Texaco." *Id.* ¶¶ 5.221–5.224. The Tribunal noted that, due to these significant issues, it "regrets its inability to follow the Constitutional Court's interpretation and application of the 1995 Settlement Agreement." *Id.* ¶ 5.221.

Moreover, the Tribunal found "no cogent evidence" supporting Ecuador's claim that TexPet failed to comply with the terms of the remediation plan approved by Ecuador (*id.* ¶ 4.179), relying on the testimony of Ecuador's former Under-Secretary of Environmental Protection that TexPet's "technical work and environmental work was done well" (*id.* ¶ 4.180)—in contrast to the claims of Donziger and his allies that the remediation was "fraudulent," and their attempt to pressure the Ecuadorian government to bring criminal prosecutions against Texaco lawyers involved in the Settlement and Release agreements. In reaching these findings, the Tribunal relied

upon statements of the Director of DINAPA (Ecuador's Department of National Environmental Protection Management of the Ministry of Energy) that "Texaco completed the remediation of the pits that were their responsibility" while "Petroecuador, during more than three decades, had done absolutely nothing with regard to the pits that were the state-owned company's responsibility to remediate." *Id.* ¶ 4.181. This was so even though Ecuador and its national oil company, Petroecuador, received about \$22.67 billion (97.3%) of the oil production revenues from the project, while TexPet received only \$480 million in revenues (*id.* ¶ 4.64), \$40 million of which it allocated to remediation (*id.* ¶ 4.68).

## **VI. The BIT Tribunal Found that the Ecuadorian Judgment Is Unenforceable Under International Law**

Finally, the BIT Tribunal found that under international law, the Ecuadorian judgment is unenforceable. Indeed, the Tribunal held that "[a]s a matter of international comity, . . . the [Ecuador] Judgment should not be recognized or enforced by the courts of other States," (*id.* ¶ 9.16), and instructed Ecuador that "the reinstatement of [Chevron's] rights under international law requires of [Ecuador] the immediate suspension of the enforceability of the [Ecuador] Judgment and the implementation of such other corrective measures as are necessary to 'wipe out all the consequences' of [Ecuador's] internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by [Ecuador]." *Id.* ¶ 9.17. The Tribunal further held that Chevron, "as a matter of international law, [is] not obligated to comply with the [Ecuador] Judgment" (*id.* ¶ 9.34), and ordered Ecuador to, among other things, "take immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment," (*id.* ¶ 10.13(i)), "preclude any of the Lago Agrio Plaintiffs, any 'trust' purporting to represent their interests (including the 'Frente de Defensa La Amazonia'), any of the Lago Agrio Plaintiffs' representatives, and any non-party funder from enforcing any part of the [Ecuador] Judgment," "directly or indirectly, whether by attachment, arrest, interim injunction, execution or howsoever otherwise," *id.* ¶ 10.13(ii), and to "take corrective measures, of its own choosing, to 'wipe out all the consequences' of all [Ecuador's] internationally wrongful acts in regard to the Lago Agrio Judgment." *Id.* ¶ 10.13(vi).

The BIT Award should put an end to Donziger's unsupported allegations that Guerra's testimony in the BIT arbitration differed materially from his testimony before the RICO Court, that forensic evidence proves that Zambrano wrote the Ecuadorian judgment, and that the evidence presented before the BIT Tribunal somehow exonerates Donziger.


The Tribunal's Award is not subject to further appeal within the arbitration process and is immediately enforceable pursuant to the New York Convention.

Respectfully submitted,

R. Doak Bishop  
King & Spalding LLP  
1100 Louisiana  
Suite 4000  
Houston, Texas 77002

Edward Kehoe  
Douglass Cassel  
King & Spalding LLP  
1185 Avenue of the Americas  
35th Floor  
New York, New York 10036

By:



Douglass Cassel

Attorneys for Chevron Corporation