

Response to Doug Cassel's Apology for Chevron's Human Rights Violations In Ecuador*

Notre Dame law professor Doug Cassel has sold his credibility as a human rights advocate to Chevron, a company that in Ecuador and elsewhere has proven itself to have committed significant human rights abuses against vulnerable peoples.¹ In an argument based heavily on Chevron's own misrepresentations, Cassel asserts in an "Open Letter" to the human rights community that a court finding in Ecuador that Chevron's toxic dumping decimated indigenous groups and wrecked the delicate Amazon ecosystem is illegitimate. We believe that Cassel's facts are inaccurate or stripped from context, his scholarship is rife with shortcomings, and his conclusions are deeply flawed. What is indisputable is that Cassel remained silent for the entire 18 years of this landmark battle for human rights justice until Chevron recently retained him.² This is a sad spectacle indeed for a man who has dedicated much of his career to the field of human rights law.

Cassel cites supposed "defects" in the Ecuador trial process—defects which take place regularly in trials the world over—to condemn not only the entire eight-year proceeding that resulted in the judgment against Chevron, but also the entire judicial system of a U.S. ally with an independent judiciary where Chevron itself has won multiple cases in recent years.³ Cassel also engages in false and defamatory

* *This document was prepared by members of the legal team that represents the Lago Agrio plaintiffs. Chevron operated under the "Texaco" brand in Ecuador from 1964-1992.*

¹ See, e.g., *The True Cost of Chevron: An Alternative Annual Report* (May 2011), at <http://truecostofchevron.com/report.html> (detailing allegations of Chevron's corrupt conduct and destructive environmental and human rights policies in Angola, Australia, Burma, Canada, China, Colombia, Ecuador, Indonesia, Iraq, Kazakhstan, Nigeria, Philippines, Thailand, Turkmenistan, the U.K., and the U.S. states of Alaska, California, Mississippi, Texas, Utah, and in the Gulf of Mexico, with contributions by Greenpeace, Global Exchange, Public Citizen, EarthRights International, Rainforest Action Network, Friends of the Earth, and other organizations); "Chevron to Pay \$30 Million to Settle Charges For Improper Payments to Iraq Under U.N. Oil For Food Program," Press Release, U.S. Securities & Exchange Commission, Nov. 14, 2001, at <http://www.sec.gov/news/press/2007/2007-230.htm>; *Curse Or Cure? How Oil Can Boost Or Break Liberia's Post-War Recovery*, pp. 24-25, Global Witness (2011), at http://www.globalwitness.org/curse_or_cure/ (Chevron ratified illegal bribery payments by Liberian subsidiary); Dina Cappiello, "Interior Department Probe Reveals Oil-Related Corruption, 'Culture Of Substance Abuse And Promiscuity,'" Huffington Post, Sept. 10, 2008, at http://www.huffingtonpost.com/2008/09/10/interior-department-probe_n_125437.html (discussing Chevron's involvement in funneling "gifts and gratuities" to government oversight officials and Chevron's refusal to allow official investigator to interview any of its employees).

² This spectacle is made worse by the fact Cassel trades on the good name of Notre Dame. It bears noting that Notre Dame is a university that expressly states that its mission is to help combat poverty, oppression, and injustice – the very life conditions forced on thousands of indigenous persons and farmers in Ecuador by the irresponsible practices of Cassel's new client. See University of Notre Dame Mission Statement, <http://nd.edu/aboutnd/mission-statement/>.

³ Cassel opens his letter with an artless attempt to smear the environmental lawsuit (the *Aguinda* case) by associating it with the *El Universo* libel case brought by Ecuador President Rafael Correa. This is like trying to impugn the U.S. handling of the BP Deepwater Horizon disaster by pointing to deficiencies in the Casey Anthony trial: the two cases have nothing to do with one another. Cassel attacks Correa for making comments in support of the indigenous groups that have been devastated by Chevron's contamination as if there is something wrong

attacks against American lawyer Steven Donziger and the other human rights defenders who have braved threats and intimidation from Chevron to advance a new paradigm of human rights litigation that could benefit victims of environmental contamination worldwide. It is obvious that Cassel, who never visited the affected area of Ecuador and who never talked to the plaintiffs before agreeing to accept money from Chevron, could not have read the 188-page trial court judgment or the 220,000-page evidentiary record on which it was based. It is indisputable that the evidentiary record extensively contradicts his allegations by demonstrating that Chevron's *own undisputed evidence* (along with ample corroborating evidence) proved the claims of the rainforest communities.⁴

Cassel does a disservice to the cause of human rights and undermines his own credibility by apologizing for a major human rights abuser whose sub-standard practices have resulted in the deaths of numerous people.⁵ Even though Cassel belatedly asserts the supposedly “flawed” case should settle—which makes

with a President openly sympathizing with the citizens of his own country. Correa's comments in this regard are certainly bland compared to President Obama's announcement that he was out to “kick” BP's “ass” after the Gulf spill—comments that didn't spur Cassel to run to BP's defense. This sort of rank double standard surfaces throughout Cassel's letter.

⁴ Disturbingly, the lead outside law firm coordinating with Cassel and leading Chevron's attack campaign, Gibson Dunn & Crutcher, markets itself as providing “rescue operations” for companies faced with massive liabilities for human rights abuses and other crimes. Gibson Dunn's template is to create hysteria by attacking the lawyers and others who advocate on behalf of human rights victims with unsubstantiated and distorted allegations of “fraud.” It then tries to drive these lawyers and advocates out of cases by threatening to file or actually filing trumped-up fraud lawsuits against them personally. The goal is to leave human rights victims without representation so that Gibson Dunn can deliver impunity for its clients. Needless to say, this strategy has not been successful in the Ecuador case. There are numerous rulings by courts in the U.S. and elsewhere that Gibson Dunn lawyers have violated ethical rules and engaged in improper conduct in their scorched-earth advocacy on behalf of Chevron. See Paul Paz y Miño, *How Lawyer Arrogance Imperils Chevron Shareholders in Ecuador*; The Huffington Post, Jan. 4, 2012, at http://www.huffingtonpost.com/paul-paz-y-mino/chevron-ecuador-oil_b_1180208.html. Further, since Gibson Dunn entered the Ecuador case, Chevron has suffered a series of devastating legal setbacks in multiple courts in Ecuador and the United States. See *Chevron CEO's Plan to Evade \$18b Ecuador Liability Falters As Courts Slam Oil Giant: Analysis of Litigation Offered to Company Shareholders by Leaders of Indigenous Groups*, Amazon Defense Coalition, Jan. 30, 2012, at <http://chevrontoxico.com/news-and-multimedia/2012/0130-chevron-ceos-plan-to-evade-18b-ecuador-liability-falters-as-courts-slam-oil-giant.html>. Gibson Dunn used its “fraud” template in California on behalf of Dow Chemical and Dole Foods to help those companies delay paying damages related to the use of the banned pesticide DBCP in Nicaragua, which left numerous agricultural workers sterile. It did this by forcing U.S. lawyers to effectively withdraw, leaving the Nicaraguan victims with no meaningful representation during a critical hearing. One Gibson Dunn partner recently described the “fraud” template as “a strategy of action, not reaction”; another bragged that “from day one” on another case, *i.e.* before he had investigated the facts, he “viewed [the] case as the prosecution of massive fraud, not the routine defense of a lawsuit.” See Amy Kolz, *The Complete Game*, The American Lawyer, Jan. 2, 2012, at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202536094810&slreturn=1>.

⁵ See Dr. Daniel Rourke, *Estimate of the Number and Costs of Excess Cancer Deaths Associated with Residence in the Oil-Producing Areas of the Sucumbíos and Orellana Provinces in Ecuador*, Sept. 12, 2010; Addendum Report, Sept. 15, 2010. Dr. Rourke, a statistician former with the RAND Corporation, concluded that more than 9,000 Ecuadorians will contract cancer in connection with the elevated risk linked to oil contamination, a risk described in numerous studies in peer-reviewed epidemiological journals. See, *e.g.*, *Incidence of Childhood Leukemia and Oil Exploitation in the Amazon Basin of Ecuador*, Int'l J. of Occupational and Env'l Health (July/Sept 2004); M. San Sebastián, B. Armstrong, J.A. Córdoba and C. Stephens, *Exposures and cancer incidence near oil fields in the Amazon basin of Ecuador*, Occup. Environ. Med 58:517-522 (2001); A.K. Hurtig and M. San Sebastian, *Geographical differences in cancer incidence in the Amazon basin of Ecuador in relation to residence near oil fields*, Int'l J. of Epidemiology (2002).

no logical sense if he actually believes his own conclusions—he has harmed the cause of the tens of thousands of rainforest inhabitants who have inspired the world with their two-decade legal battle to hold Chevron accountable for environmental crimes and fraud. In the interest of transparency Cassel should fully disclose how much Chevron is paying him.

Cassel's Allegations

Cassel writes that the recent court judgment in Ecuador that found Chevron liable for \$18.2 billion in environmental damages is "indefensible". He said it was "orchestrated by lawyers who purport" to represent Ecuadorians; who tried to stop an environmental clean-up because it might "destroy evidence" in the case; who gave the Ecuador government a "free pass" for its own environmental damage; and who have "thrown professional ethics out the window". He also asserts that the judgment "is an affront to minimum standards of both procedural and substantive justice." Most of these allegations are demonstrably false on their own terms or are wildly taken out of context.

Background—Critical Context Ignored by Cassel

The trial that Chevron chose to have in Ecuador with full knowledge of the Ecuadorian system

Cassel completely discounts the history of the case and the overwhelming scientific evidence relied on by the court to find Chevron liable. Chevron chose Ecuador as its preferred forum after it filed 14 sworn affidavits in U.S. federal court attesting to the fairness and adequacy of the country's courts, and after promising to accept jurisdiction there and to abide by any adverse judgment subject only to narrow enforcement defenses. Of course, Chevron thought it could engineer a political result in Ecuador to get the case improperly dismissed—something its former lead lawyer, Ricardo Reis Veiga, testified under oath that he tried on the first day of the trial in 2003 when he desperately beseeched the country's Attorney General to ask the judge to call off the case. Once the judge rebuffed Reis Veiga and the trial began, the scientific and other evidence quickly pointed to Chevron's culpability.

Knowing it would lose the case based on the evidence, Chevron then launched a multi-faceted political and lobbying campaign to undermine and defame Ecuador's court system. But the court system itself functioned exactly as Chevron had attested when it wanted the trial moved to Ecuador—with integrity, a keen sensitivity to due process concerns, and fairness and balance in considering the evidence presented by the parties. Cassel focuses on minor and legally irrelevant deficiencies that are inevitable in any contested litigation that lasts years, whether it be in the U.S., Ecuador, or any other jurisdiction that observes the rule of law. Even the U.S. State Department, in its annual human rights reports, agrees that Ecuador's courts are independent—a conclusion justified by almost every metric used to measure the independence of a country's judiciary available to academics who genuinely study the issue.⁶

Evidence presented at the Ecuador trial included more than 100 expert reports, testimony from numerous witnesses, two extensive environmental audits conducted by Chevron that documented the company's

⁶ See Expert Report of Professor Joseph L. Staats, Aug. 1, 2011, *Chevron Corp. v. Salazar*, No. 11-cv-3718(LAK) (S.D.N.Y.), available at <http://chevrontoxico.com/assets/docs/2011-staats-report.pdf> (Ecuador's judicial system is one of the best in Latin America).

contamination, independent health evaluations published in peer-reviewed journals, and reams of legal argument that together comprise the 220,000-page trial record. The court supervised dozens of field inspections of a statistically valid sample of the 378 former Chevron well sites and production stations, from which more than 64,000 chemical sampling results of soil and water were presented by the parties to the court. Illegal levels of toxic contamination were found at every single Chevron site inspected. Some sites showed soil contamination *more than 900 times higher* than the maximum tolerances permitted in Ecuador.⁷

Chevron's two environmental audits conducted in the early 1990s also found that it used substandard operational practices. The audits concluded the company discharged billions of gallons of toxic "produced water" into creeks and streams relied on by local inhabitants for drinking, fishing, and bathing. The audits also concluded that "no spill prevention methods were in place" and that hundreds of waste pits were never properly lined and overflowed into streams.⁸

To understand the extent of Chevron's malice, one need only to see the pipes it installed to run oil sludge from hundreds of unlined waste pits into streams and rivers relied on by local inhabitants for their drinking water. The existence of these pipes and other similar evidence has been confirmed by numerous independent journalists, such as 60 Minutes⁹ and documented in an online video, *The True Story of Chevron's Ecuador Disaster*, prepared by the plaintiffs and available at www.chevrontoxico.com. This video methodically illustrates how Chevron perverted the normal oil production process at the expense of the environment and public health, evincing a total disregard for the well being of the indigenous groups that had populated the area for millennia. These destructive practices and the resulting damage also were documented extensively while they were still being used by Professor Judith Kimerling in her outstanding book, *Amazon Crude*, published in 1991 by the Natural Resources Defense Counsel.

Intentional pollution, reckless homicide and ethnocide

The horror Chevron visited upon the people of Ecuador's Amazon was made even worse by the fact it was the product of a system of oil extraction deliberately designed to externalize production costs to the delicate ecosystem, at the time home to six indigenous groups. Unlike the BP spill in the Gulf of Mexico or the Exxon Valdez disaster—as awful as they were, these disasters were still *accidents*—Chevron's pump-and-dump system worked exactly as it was intended. Each day, the company discharged through

⁷ Final Judgment at 104-105, *Aguinda v. Chevron Corp.*, Case No. 2003-002, Prov. Ct. Sucumbíos (Feb. 14, 2011), available at <http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html>. See generally "Summary of Overwhelming Evidence Against Chevron in Ecuador Trial," Amazon Defense Coalition (Jan. 2012), at <http://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf> (summarizing the scientific, documentary, and testimonial evidence presented in the trial, with citations to the record).

⁸ Fugro-McClelland West, *Final Environmental Field Audit for Practices 1964-1990, Petroecuador-Texaco Consortium* (Oct. 1992); HBT AGRA, *Environmental Assessment of the Petroecuador-Texaco Consortium Oil Field, Vol. 1: Environmental Audit Report* (Oct. 1993).

⁹ "Amazon Crude," 60 Minutes, CBS News, May 8, 2009, http://www.cbsnews.com/stories/2009/05/01/60minutes/main4983549_page3.shtml.

industrial pipes *four million gallons* per day of "water of formation." These poisonous and scalding hot liquids had ten times the salt content of ocean water and contained heavy metals and carcinogens. As a result, within years the ancestral traditions of indigenous groups were decimated and an outbreak of cancer erupted which has lasted to this day and will worsen with time. To Chevron, it was clearly foreseeable that death and destruction would result from the use of these practices in a rainforest inhabited by people who relied totally on the natural environment for their survival.

Such wanton misconduct likely would have landed Chevron executives jail terms in the U.S. But in Ecuador, these executives have been able to drag out a litigation for eighteen years and counting—itsself a human rights violation on a grand scale, and one that has granted the company temporary impunity for its human rights abuses. Cassel does not mention most of the aforementioned facts in his analysis. Further, Cassel's attempt to deflect blame to Petroecuador, Ecuador's state-owned oil company which continued to operate this defective system after Chevron left in 1992, is disingenuous. Data from all of Chevron's well sites proves that the overwhelming majority of dumping occurred under Chevron's watch. Petroecuador has since made significant investments to install the re-injection system for "water of formation" that Chevron should have installed under industry and legal guidelines when it first began operating in Ecuador.¹⁰ In any event, it was Chevron that exclusively designed, engineered, and operated the pump-and-dump system—and it is Chevron that is therefore the culpable party under established Ecuadorian and international legal standards.

A public health catastrophe

Cassel ignores the public health catastrophe produced by Chevron's discharge of toxic waste. In addition to the expert testimony, the Ecuadorian trial court heard sworn testimony from dozens of local residents about Chevron's operations and the subsequent health impacts and deaths of family members from cancer and other illnesses. For example, Holger García testified that he had lived in the area since 1982 and from the beginning had witnessed the company dumping produced water and other fluids into the local river, Rio Huamayacu, which he and his family used for bathing and fishing. He also recalled the company spreading crude oil on all the roads to keep dust down. Another resident, Hugo Ureña, described his father dying of cancer, then an aunt dying of stomach cancer, and then a niece dying of leukemia at only 17 years of age. He described having to sell most of his family's cattle, their only assets, to meet the costs of seeking health care, such as paying bus fare to reach health clinics, all of which proved futile. Independent health studies—published in leading peer-reviewed journals such as the *International Journal of Epidemiology*—have called the situation "a public health emergency" and found elevated risks of cancer, leukemia, and spontaneous miscarriages in the area where Chevron operated.¹¹ As already noted, Dr. Daniel Rourke, a national authority on statistics, analyzed the health data and concluded that more than 9,000 Ecuadorians in the affected area likely will contract cancer due to

¹⁰ See, e.g., PRINCIPLES OF OIL AND GAS PRODUCTION, AMERICAN PETROLEUM INSTITUTE 48 (1962) ("Chapter 10—Special Problems": "Water Disposal: Extreme care must be exercised in handling and disposition of produced water not only because of possible damage to agriculture, but also because of the possibility of polluting lakes and rivers which provide water for drinking as well as for irrigating purposes.").

¹¹ See *supra* note 5.

exposure to oil contamination, even assuming completion of a court-ordered clean-up by the year 2020.¹²

Chevron's corruption

Chevron has done all it can to fraudulently cover up these facts and in the process has tried to corrupt the evidence-gathering process. During the trial, its lead expert John Conner authored a judicial inspections “playbook” that instructed the company's field team to lift soil and water samples only from “clean” areas far away from waste pits in order to hide evidence of contamination from the court. Chevron used a secret lab to process its “dirty” soil samples while those it thought were “clean” were sent to a regular laboratory to be submitted as evidence. A company contractor, Diego Borja, was caught on tape saying he would switch “dirty” soil samples taken from court-supervised inspections for “clean” dirt lifted from random locations in the rainforest. Evidence was presented the company ordered its employees to deliberately destroy documents related to its many oil spills. Chevron also funded a purposely flawed “study” designed to deliberately undercount the incidence of cancer. The study—conducted by a company owned by a Chevron board member—“measured” mortality by using official death certificates when the vast majority of people who die in the forest never have their deaths recorded. The fact that Chevron corrupted the evidentiary process and used science dishonestly is simply glossed over by Cassel.

Some of Cassel's Errors, Distortions, and Misrepresentations

After casting aside or minimizing the extensive evidence of Chevron's human rights abuses of the Ecuadorian indigenous and farmer communities and the company's corruption of the judicial process, Cassel makes several blatant misrepresentations—a handful of which we respond to as follows.

Cassel: Lawyers for the Ecuadorians "purport" to represent a group of Ecuadorians.

Chevron has marketed this time-worn lie to courts and journalists for years with no takers, yet Cassel adopts it wholeheartedly. Clearly, this baseless charge is designed to undermine the credibility of the human rights defenders who have worked tirelessly for years to help the rainforest communities by casting them as greedy individuals who put their own interests above those of the communities.¹³

¹² *Id.*

¹³ The plaintiffs' legal team is led by Pablo Fajardo, a life-long resident of the contaminated region of Ecuador, who was “born into extreme poverty and toiled for years as a manual laborer in the forest and oil fields, yet managed by force of intellect to complete his secondary education in night school, and through a correspondence course to earn a degree in law.” See *Jungle Law*, Vanity Fair (May 2007), at <http://www.vanityfair.com/politics/features/2007/05/texaco200705>. Fajardo is a recipient of the Goldman Environmental Prize, the highest honor in the environmental field, along with Luis Yanza, another long-time resident of the region (and a non-lawyer) who for the last two decades has been the intermediary between the legal case and the affected communities, regularly convening town hall-style meetings and facilitating the “executive committee” which represents all different sub-groups of the affected communities and which exercises control over core case strategy. See <http://www.goldmanprize.org/2008/centralsouthamerica>. Steven Donziger, the U.S. lawyer at the center of Chevron's smear campaign, is a Harvard Law graduate who has dedicated most of his career to the case, in addition to his work as a public defender, human rights advocate, and private lawyer. The Ecuador legal team is assisted by a team of litigators from Patton Boggs and Smyser, Kaplan & Veselka, a 14-lawyer firm in Houston. Otherwise, the long-term legal team consists of three young law graduates and a rotating handful of interns. This

Chevron has claimed that the 47 named plaintiffs in the case had their thumbprint signatures "forged" by the lawyers, which is false as attested to by the plaintiffs themselves and the prominent Ecuadorian lawyer Alberto Wray, who personally had them sign the original complaint.¹⁴ Chevron also claims that under Ecuadorian law, only Ecuador's government has the right to press legal claims for a collective environmental clean-up. Again, this is a fiction: a private right of collective action under Ecuadorian law for environmental clean-up exists under civil code provision 2236, which dates to 1861. What's more, Chevron promised the U.S. federal court that it agreed to the jurisdiction of Ecuador's courts for exactly this type of claim.¹⁵

Ultimately, this line of argument is designed by Chevron to dehumanize the thousands of human rights victims even to the point of denying their very existence. Doak Bishop, one of Chevron's lead outside lawyers, who authored the amicus brief that Cassel recently signed, said it plainly at a recent hearing before the illegitimate investor arbitration discussed below: "The Plaintiffs are really irrelevant. They always were irrelevant. There were never any real individual parties in interest in this case. The plaintiffs lawyers have no clients. . . . There will be no prejudice to the plaintiffs or any individual by holding up the enforcement of this judgment."¹⁶

Lawyers for the Ecuadorians tried "to stop" an environmental clean-up by Petroecuador, the state oil company.

This is another Chevron misrepresentation funneled uncritically by Cassel. Representatives of the communities have fought for years for a clean-up—both from Chevron, which exclusively operated the oil fields and caused the vast majority of the pollution, and their own government, which currently runs Chevron's old oil fields. Noticing through independent experts that Petroecuador was mounting a fraudulent remediation that consisted of running dirt over waste pits without cleaning them out—similar to the sham "remediation" Chevron conducted in the mid-1990s—the lawyers asked for a halt to the program until it could be redesigned to be effective. In the meantime, Chevron claims in its misinformation campaign that this wholly inadequate Petroecuador "clean-up" is proof there is no longer a problem.

is contrasted with Chevron's team, which was recently revealed to consist of as many as 500 lawyers from 39 different firms. See "U.S. Law Firms Bill Chevron Exorbitant Fees To Prevent Clean-up of Ecuador Pollution Crisis: Oil Giant Concedes It Has Used Almost 500 Lawyers to Fight Rainforest Indigenous Groups," Amazon Defense Coalition, Jan. 16, 2012, at <http://chevrontoxico.com/news-and-multimedia/2012/0116-us-law-firms-bill-chevron-exorbitant-fees-to-prevent-clean-up-of-ecuador-pollution-crisis.html>.

¹⁴ "Chevron, Trying to Fight Ecuador Lawsuit, Now Claiming Plaintiffs Don't Really Exist," Amazon Coalition, at <http://chevrontoxico.com/news-and-multimedia/2011/0128-chevron-now-claiming-plaintiffs-dont-really-exist.html>

¹⁵ Chevron agreed to submit to the jurisdiction of the Ecuadorian court all claims under Ecuadorian law comparable to those that had been pled in the New York action, which included demands for "injunctive relief" and "equitable relief to remedy the contamination and spoliation of [plaintiffs'] properties, water supplies and environment"—precisely what plaintiffs subsequently demanded under articles 2236 and 2214 of the Ecuadorian Civil Code.

¹⁶ Tr. of Hearing, Feb. 11, 2012, at 88, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23.

Lawyers for the Ecuadorians gave a "free pass" to Ecuador's government.

The rainforest communities sued the party that exclusively operated the oil fields and the only party responsible for designing an oil extraction system that purposely dumped toxic waste into the environment: Chevron. They chose not to sue Ecuador's government at the same time, given that Chevron was the sole operator and therefore the most culpable party.¹⁷ Even if the government or the state-owned oil company were guilty of similar crimes, their guilt would not equal Chevron's innocence. There is no rational basis for attacking the plaintiffs simply because they did not sue every possible tortfeasor simultaneously.

Lawyers for the Ecuadorians authored the trial court judgment.

The "troubling evidence" mentioned by Cassel consists of a handful of preconceived conclusions generated by Chevron's so-called "forensic linguists"—conclusions that utterly fall apart upon serious inquiry. Although Cassel asserts that the judgment contains "significant passages" from plaintiffs' internal documents, in fact Chevron's experts identified only a handful of phrases in the judgment which were similar, not verbatim, to phrases in a litigation memo that was used by the plaintiffs throughout the trial. Portions of this memo were likely adapted into countless legal filings by the plaintiffs and the court, as courts do, used and adapted whatever portions it agreed with. Preliminary examinations by rebuttal experts have shown that there is no way that the analysis that Chevron's linguists conducted could have come close to establishing that the overlapping phrases were not part of the 220,000-page record.¹⁸

Lawyers for the Ecuadorians threw "professional ethics out the window".

¹⁷ The fundamental disingenuousness of the Chevron/Cassel distraction technique of focusing on the government and the state-owned oil company is illustrated by the fact they don't use it to argue that Chevron should pay less: they use it to argue that Chevron shouldn't pay anything.

¹⁸ See Expert Report of Richard Fateman at ¶ 29 ("it would be inappropriate to assert that material claimed to be unfiled could not possibly be present in the lower court record"); Expert Report of Dr. Ronald R. Butters at 3 (Chevron's linguists' allegations "cannot be sustained on the basis of their reported research"); Expert Report of Dr. Victoria Guillén-Nieto at 10 ("it is not possible to come to the conclusion that the same or very similar language is not somewhere in the record of filed materials unless the analysis carried out has extended to the full record in the case"). The remainder of Chevron's "conclusions" regarding authorship of the Feb. 14 judgment are simply laughable. For example, one Chevron expert purported to come to the "scientific" conclusion that a former lawyer for the plaintiffs had written the judgment by comparing the writing style between the judgment and an old memo signed by the lawyer. Leaving aside the absurdity of coming to a scientific conclusion on the basis of such a subjective exercise (especially in the legal area where most writing is highly formalized), it has since been revealed that the memo wasn't even authored by the lawyer, but rather by a group of his associates and only signed by him. Again, Cassel obediently accepts and cites these allegations as gospel truth, completely missing the distinction, as one U.S. appeals court stated, that "the circumstances supporting [Chevron's] claim of fraud largely are allegations and allegations are not factual findings." *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011).

That description is more apt for Chevron's lawyers, who have been repeatedly sanctioned by courts in Ecuador and the U.S. for their abusive litigation tactics.¹⁹ Lawyers for the Ecuadorians adhered to the established rules of ethics in the civil law country in which they were litigating. Some of the rules and procedures—like *ex parte* contact with court personnel, including judges—might seem odd to U.S.-trained lawyers, but they are part of the custom and practice in Ecuador and other countries in Latin America, and were engaged in by lawyers for both sides. Cassel fails to acknowledge that different systems have different procedures and that Chevron was well aware of these practices when it sought to move the trial to Ecuador. In particular, lawyers for Chevron had numerous *ex parte* meetings with judges in Ecuador in all sorts of locales in the courthouse and outside of it, including *after* a prohibition on the practice took effect in 2009.²⁰

Chevron also has had repeated meetings over the course of the trial with Ecuador's President, Attorney General and other officials as part of its improper campaign to pressure the government to quash the case. Recently, it was reported that Chevron illegally offered a \$1 billion bribe to the government in exchange for a full release of environmental claims (the government is prohibited by law from releasing the private claims of its citizens).²¹ Cassel should be lauding Ecuador's government for standing up for the rule of law in the face of Chevron's pressure campaign, instead of applauding Chevron's attempts to blackmail and corrupt government officials.

The judgment is an "affront" to minimal standards of justice.

The Ecuador trial court bent over backwards to protect Chevron's due process rights, allowing it to conduct every single site inspection it requested and to file hundreds of frivolous motions that were part of its strategy to delay the proceedings and browbeat judges into ruling in its favor. The court behaved with great patience in the face of Chevron's threats to put judges in jail if they did not rule in its favor, fabricate security threats to delay the trial, manipulate soldiers from Ecuador's military to pressure the court, use a secret lab to hide evidence of contamination, and pay hush money to whistleblowers who

¹⁹ See, e.g., Paul Paz y Miño, *Lawyer Arrogance*, *supra* note 4 (recounting some of the numerous instances where Chevron and its lead counsel have been sanctioned by U.S. federal courts and other institutions for harassment and abusive conduct); Santiago Cueto, *Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions*, International Business Law Advisor, Jan. 18, 2010, at <http://www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions/> (characterizing Chevron's response to its Ecuador liability a "textbook example of abusive litigation").

²⁰ Interestingly, Chevron's lawyer Doak Bishop recently highlighted the problem of how different legal systems adhere to different ethical guidelines. In an address on "Ethics in International Arbitration" delivered in 2010, Bishop concluded that there was a "lack of clarity as to which ethical rules apply" in many transnational disputes. Doak Bishop, "Ethics in International Arbitration," Keynote Address to the 1st International Council for Commercial Arbitration Conference in South America, Rio de Janeiro, May 2010, available at http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf.

²¹ See Mitch Anderson, *Crude Politics: Is Chevron Involved in a Billion Dollar Bait-and-Switch in Ecuador?*, The Huffington Post, Dec. 19, 2011, at http://www.huffingtonpost.com/mitch-anderson/chevrons-ecuador-end-run-b_1156876.html.

were prepared to outline the company's extensive efforts to sabotage and corrupt the proceedings.²² Cassel also ignores the report of Joseph Staats, a political science professor at the University of Minnesota, who conducted a careful study consistent with proper methods of scholarship and found that Ecuador's judicial system is one of the best in Latin America.²³

Cassel apparently thinks that when claims brought by indigenous communities get to court against all odds, the trial must be perfect or close to it to count as legitimate. But no trial is perfect, as evidenced by appellate courts the world over that review lower court verdicts for abuse of discretion, prejudicial error or similar standards. What Cassel fails to recognize is that Chevron tried to manufacture and exaggerate deficiencies in the Ecuador trial when it realized its plan to manipulate Ecuador's courts would fail. Cassel's attempt to leverage his academic credentials to enthrone himself as an arbiter for what is right and wrong in a foreign jurisdiction is reminiscent of the mistakes made by Lewis A. Kaplan, a U.S. federal judge who became enthralled with Chevron's manipulated presentation of video outtakes and without any legal basis tried to enjoin (from his New York courtroom) the Ecuadorian plaintiffs from enforcing their judgment anywhere in the world. Kaplan was harshly rebuked by the Second Circuit Court of Appeals, which stayed the injunction the day after it learned of its scope at oral argument, and

²² See generally Declaration of Juan Pablo Saenz, dated Feb. 25, 2011, *Chevron Corp. v. Donziger*, No: 1:11-cv-00691-LAK (S.D.N.Y.), at <http://chevrontoxico.com/assets/docs/2011-02-28-Declaration-of-Juan-Pablo-Saenz.pdf> (42-page declaration recounting Chevron's 18-year history of harassment, intimidation, and abuse in response to the Ecuador lawsuit) ("Saenz Decl."). The plaintiffs have tried to end the impunity Chevron enjoys for its bad acts by documenting them and publicizing them as widely as possible. See, e.g., "Court Affidavit Exposes 18 Years of Chevron's Unethical Conduct in \$9.5 Billion Ecuador Lawsuit: Oil Giant Attempted to 'Buy or Bully' Its Way Out of Environmental Liability for Creating 'Amazon Chernobyl,'" Amazon Coalition, Mar. 7, 2011, at <http://chevrontoxico.com/news-and-multimedia/2011/0307-court-affidavit-exposes-18-years-of-chevrons-unethical-conduct.html> (reviewing Saenz Decl.); "Chevron Used Secret Lab to Hide Dirty Soil Samples from Ecuador Court, Say Company Documents: Oil Giant Also Duped Its Own Paid Experts To Give False Testimony About Deceptive Sampling," Amazon Defense Coalition, Dec. 20, 2011, at <http://chevrontoxico.com/news-and-multimedia/2011/1220-chevron-used-secret-lab-to-hide-dirty-soil-samples-from-ecuador-court.html>; "Chevron Threatened Ecuador Judge With Prison Time If He Failed to Grant Motions, Court Papers Say: On Eve of Judgment, Chevron Resorting to Intimidation Tactics," Amazon Defense Coalition, Feb. 3, 2011, at <http://chevrontoxico.com/news-and-multimedia/2011/0203-chevron-threatened-judge-with-prison-time-if-he-failed-to-grant-motions.html>; "Chevron Paid \$2.2 Million to Man Who Threatened to Expose Company's Corruption in Ecuador," Amazon Defense Coalition, Jan. 23, 2012, at <http://chevrontoxico.com/news-and-multimedia/2012/0123-chevron-paid-2-2-million-to-man-who-threatened-to-expose-corruption.html>; "Chevron 'Cooked' Evidence in Environmental Trial, According to Oil Giant's Own Contractor," Amazon Defense Coalition, at <http://chevrontoxico.com/news-and-multimedia/borja-report/> (providing extensive documentation on Chevron's repeated use of corporate espionage, attempted bribery, and other corruption); "New Evidence Shows Chevron Manipulated Lab Results in Landmark Environmental Trial," Amazon Defense Coalition, Feb. 4, 2009, <http://chevrontoxico.com/news-and-multimedia/2009/0204-new-evidence-shows-chevron-manipulated-lab-results.html>; Saenz Decl. at ¶ 30 (describing Chevron's intimidation of experts); Saenz Decl. at ¶¶ 18-27 (describing how Chevron corruptly roped the Ecuadorian military into helping it cancel the first high-profile judicial inspection in indigenous territory by concocting a false "military intelligence" report falsely alleging security threats); "Indigenous Group Sues Chevron For Defamation Over Bogus Military Report: Alleges Chevron Gave Ecuadorian Army False Information to Halt Environmental Trial," Amazon Defense Coalition, Nov. 14, 2007, at <http://chevrontoxico.com/news-and-multimedia/2007/1114-indigenous-group-sues-chevron-for-defamation.html> (same).

²³ Expert Report of Joseph L. Staats, *supra* note 6.

vacated it entirely shortly thereafter.²⁴

The Video Outtakes

Cassel's uncritical adoption of Chevron's agenda is also on display with his analysis of video outtakes selectively edited by the oil giant's lawyers that show Steven Donziger, an American legal consultant to the Ecuadorians, using colorful language. Donziger was largely expressing his frustration over Chevron's unethical and illegal conduct. For example, the "smoke and mirrors" scene Cassel describes in his letter was carefully snipped out of context by Chevron to hide the lengthy discussion before and after about the overwhelming strength of the evidence against Chevron.

Cassel also relates at length to a story about how Donziger supposedly sought to "scare" the judge in the Lago Agrio case. Cassel is again mistaken. The judge being discussed was not the trial judge in the Lago Agrio case; it was a different judge in Quito that the plaintiffs believed Chevron had likely bribed or pressured to authorize an improper lawsuit aimed at shutting down the only laboratory in the country that was willing to process soil and water samples collected by the plaintiffs during the trial. Mostly due to Chevron's pressure, no other lab in the country would agree to work for the indigenous communities. Even though he used colorful language, Donziger sought to bring public scrutiny to the case so as to stop the corruption.

Chevron's clever editing of the outtakes crosses the line from "spinning" to presenting outright falsehoods. On one occasion, Chevron edited the words "I'm exaggerating" to make what was a joke sound serious. What Chevron has refused to show are literally hundreds of hours of outtakes where lawyers for the plaintiffs discuss how strong the evidence is, backed up by footage of sludge-filled waste pits and interviews with sick and dying local residents. Although the Chevron snippets pulled one over on Cassel, in the long-run they are a gold mine of proof about just how rigorous and fair the trial Chevron received really was.²⁵

²⁴ See, e.g., Larry Neumeister, "US Appeals Court: Judge Overstepped Authority in Banning Collection of \$18B Ecuador Judgment," Associated Press, Jan. 26, 2012, at <http://chevrontoxico.com/news-and-multimedia/2012/0126-us-appeals-court-judge-overstepped-authority.html>. The manner in which Kaplan conducted the proceedings exposed a shameless lack of due process for Ecuadorian plaintiffs and their representatives: Kaplan openly mocked and denigrated them in open court, repeatedly referred to the Ecuadorian case as a "game" or worse, ordered massive disclosure of unquestionably privileged attorney-client communications, and repeatedly gave the plaintiffs only two or three days to respond to multi-thousand-page filings by Chevron. See, e.g., Lago Agrio Plaintiffs' Petition for Writ of Mandamus, available at <http://chevrontoxico.com/assets/docs/2011-petition-writ-mandamus.pdf>.

²⁵ See, e.g., The Ecuadorian Plaintiffs' Consolidated Reply Memorandum of Law in Support of Their Motion to Quash, Dkt. No. 47, Case No. 10-mc-0002 (S.D.N.Y. Sept. 7, 2010) (listing statements from the transcript of just one segment of one outtake, CRS-188-1: at 3-4 (summarizing hundreds of contaminated samples, as found by both plaintiffs and Chevron); at 5 ("Here is all of the summary chart for the sites inspected. As we can see, the majority of them are sites that supposedly underwent remediation by Texaco. All of them currently show contamination."); *id.* ("if they take out all of our evidence, I think that we'll win this case. In other words, Texaco is proving our case. With all of their manipulation of the sampling, as can be seen in the inspections, they are still drawing soil and water samples that violate the laws of Ecuador."); at 8-10 (discussing Chevron's manipulation of sampling techniques to minimize findings of contamination); at 13 (describing how Chevron takes water samples upstream to avoid findings of contamination); at 13 ("For barium, we've found 8,030 in soil. The permissible

The "Secret" Damages Expert

Cassel asserts inaccurately that a court-appointed damages expert (who produced one of 106 expert reports) was "secretly named" by lawyers for the communities. In Ecuador, both parties regularly sought out qualified experts, presented their names to the court, and lobbied for their appointment. This is a standard process in many legal systems where only judges (rather than the parties) are permitted to name experts. Experts presented by Chevron to judges were regularly appointed as court experts; Chevron lawyers regularly met *ex parte* with court-appointed experts and judges; and regularly tried to shape the reports and testimony of court-appointed experts.²⁶ Yet Cassel criticizes the indigenous communities for having their lawyers meet with judges in Ecuador consistent with court rules, while he remains silent about Chevron doing the same.

The \$18.2B Damages Number

Picking up on a key Chevron talking point, Cassel suggests there is insufficient evidence to support an award for \$18.2 billion in damages. This is actually a modest amount compared to the actual damage, according to several experts hired by the plaintiffs. It is also much lower than the liability facing BP for its comparatively smaller spill in the Gulf of Mexico, which has lasted for two years and took place offshore. This compares to the nearly five decades of harm endured by the Ecuadorian communities, who have had their water supply poisoned and the ecosystem on which they depend wrecked.

The last round of expert reports submitted by the plaintiffs found that appropriate damages could run as high as \$65 billion, even without including unjust enrichment (which would have added \$38 billion more). The Court essentially rejected expert findings from the plaintiffs on costs for groundwater clean-up and ecological restoration. The award for damages relied heavily on Chevron's own expert reports and data. Cassel sneers that the damages award "would not pass the straight face test." But does he similarly mock the \$20 billion which BP *voluntarily* put up shortly after the Deepwater Horizon disaster or the numerous estimates showing BP's overall liability at over \$60 billion? At heart, what Cassel and Chevron are mocking with their "straight face test" is the very notion that an Ecuadorian would dare claim an equal measure of damages as a similarly situated American. Battling this kind of invidious and

standard in Ecuador is 750 PPM. And in one sample we found 8,030. For cadmium, 27. The permissible limit is one. Nickel, 199.37. The permissible limit is 40. Zinc, 617.91. . . . The permissible limit is 200. Chromium, 232.8. The permissible limit is 63.")).

²⁶ See, e.g., Saenz Decl. at ¶¶ 57-59 (recounting Chevron's practice of meeting *ex parte* and collaborating with neutral court-appointed experts); *id.* at ¶ 56 ("there is no legal provision in the judicial system which prohibits parties to a legal suit from making contact with Court-appointed experts prior to the issuance of the expert report") (citing Declaration of Dr. Juan Pablo Albán A., dated February 17, 2011, ("There is no provision in the Ecuadorian legal system which forbids the parties in a civil trial from contacting the experts appointed by the Court in charge of the trial before they submit their review.") and Declaration of Dr. Farith Ricardo Simon Affidavit, dated February 16, 2011, at ¶ 7 ("In Ecuador there are no regulations that prohibit or prevent the parties from meeting with an expert appointed in a civil trial, to plan the work that will be carried out," and "no provisions that prevent or prohibit the expert from coordinating the execution of their work with any of the parties"))).

discriminatory double-standard is exactly what the *Aguinda* case—and human rights litigation generally—is about.

Punitive Damages

Cassel seems to reserve a special fury for an award of punitive damages to the affected communities. Again, Cassel is outraged by Ecuadorians receiving something that U.S. citizens take for granted. He acts shocked that the punitive award was 100% of the actual damages award, but U.S. punitive damages awards have sometimes been 25 times higher than actual damages. Even the U.S. Supreme Court has suggested that 100% of actual damages is a perfectly defensible figure. This was true in the Exxon Valdez case, the result of an accident that did not involve malicious intent like Chevron's misconduct in Ecuador. The Ecuador court based its punitive award on substantial evidence that Chevron's conduct was in "sever[e]" bad faith and fully intentional. Finally, while Cassel tries to portray the "apology" component of the award as somehow reflective of the court's capriciousness, in fact it underscores the court's reasonableness. Offering this avenue of relief to Chevron to avoid paying punitive damages would never be available to a losing party in a U.S. litigation. And while it may be unfamiliar to U.S. observers, it has a long history in other legal systems—including in international human rights law.

Defending A Secret Arbitration That Violates Human Rights Law

Cassel's approach to the private investor arbitration Chevron initiated in a desperate attempt to shift its liability to Ecuador's government is another example of his lack of sensitivity to human rights concerns. Cassel tries to legitimate a process that appears to operate well beyond the scope of the U.S.-Ecuador Bilateral Investment Treaty and clearly violates treaty protections that bind Ecuador and other countries to protect the fundamental human rights of their citizens. The investor arbitration proceeding—if one can even call it that, given that it takes place in secret—blatantly denies due process to the rainforest communities by prohibiting them from appearing. It is also tainted with conflicts of interest as the three arbitrators each stand to reap millions of dollars in fees by granting jurisdiction over the case when in fact no basis exists.²⁷

²⁷ See, e.g., Letter to Ban Ki-moon, Secretary General of the United Nations, from the Enrique Bernales Ballesteros, Andean Commission of Jurists, dated Feb. 10, 2012, available at <http://chevrontoxico.com/assets/docs/2012-02-10-caj-letter-to-un.pdf>; Letter from Donald Anton, Naomi Roht-Arriaza, Jorge Avendano V, Timo Koivurova, and Cesare Romano to Renaud Sorieul, Secretary of UNCITRAL, dated Feb. 8, 2012, available at <http://chevrontoxico.com/assets/docs/2012-02-08-letter-to-sorieul.pdf>. See generally S. Donziger, L. Garr, A. Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims*, 17:2 Human Rights Brief (2010), available at <http://www.wcl.american.edu/hrbrief/17/172.pdf?rd=1>; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vanderbilt Journal of Transnational Law 775 (2008); Gus Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007). It has recently been revealed that the arbitrator appointed by Chevron, Horacio Grigera Naon, appears to have a *de facto* business relationship with Chevron's lawyer Doak Bishop, who regularly appoints Grigera to panels (including several other arbitrations against Ecuador). See "Chevron's Arbitrator Suffers from Acute Ethical Problems, Ecuadorians Assert: Grigera Naon's 'Business Relationship' With Chevron Lawyer Raises Questions," Amazon Defense Coalition, Feb. 23, 2012, at <http://chevrontoxico.com/news-and-multimedia/2012/0223-chevrons-arbitrator-suffers-from-acute-ethical-problems.html>. For his part, Grigera always rules in favor of Bishop's client, even if it requires him to write separately in dissent from the other two arbitrators on the panel. *Id.*

Cassel claims the arbitrators have the right to act as a worldwide appellate "Supreme Court" lording over Ecuador's public judicial system (or over that of any other country, including the United States). The arbitration panel has been harshly criticized for issuing a series of interim "awards" ordering the Ecuador government to violate its separation of powers doctrine and shut down the Lago Agrio case. But as the Ecuadorian appeals court noted recently, such "awards" violate the right to life and the right to seek legal redress held by thousands of affected Ecuadorians and therefore cannot be implemented to override the results of private litigation brought to remedy those violations.²⁸ And nobody in their right mind could possibly conceive that the U.S. government would be expected to abide by any decision by an international body that purported to force it to override a decision made by its independent courts. But in Ecuador, this kind of outrageousness seems perfectly acceptable to Cassel.

How Should the Human Rights Community Respond?

Since Cassel poses this question in his Open Letter, we will attempt to answer it. First, all human rights advocates should back the Ecuadorian communities and their defenders in the effort to hold Chevron accountable for its human rights abuses. For the first time, indigenous groups and human rights victims have created a model that has attracted sufficient support so they can litigate effectively for as long as it takes against one of the most powerful and corrupt oil companies on the planet. Second, one should be clear that the Ecuador litigation is about addressing human rights violations and environmental crimes on a vast scale commensurate with the unconscionable magnitude of the problem created by Chevron—a problem that only gets worse every day as Chevron continues to show contempt for its legal obligations. Third, the human rights community should demand that Chevron cease violating the human rights of the Ecuadorians and abide by court decisions that it promised to respect when it fought for years to shift the matter from U.S. federal court to Ecuador. Fourth, the human rights community should condemn an arbitration panel's attempt to interfere in a private litigation. Finally, the human rights community should demand that the lawyers and human rights defenders who are working on behalf of the rainforest communities be protected from defamatory and unfounded attacks from human rights violators and their allies.

March 15, 2012
Lago Agrio Legal Team

²⁸ Indeed, the notion that an investment arbitration panel could even entertain the notion of ordering domestic courts to shut down manifest human rights proceedings is so repugnant that Chevron had to lie to the Second Circuit Court of Appeals to get permission to go forward with the arbitration. In argument in August 2010, members of the Second Circuit panel repeatedly expressed concern that Chevron would use the arbitration not to assert indemnification claims against Ecuador's government, but to enjoin or otherwise frustrate the environmental case. Chevron knew that admitting to this motive would result in the Second Circuit blocking the arbitration, so it lied, again and again, telling the court that it was being "crystal clear" and "super clear" that Chevron would never "ask[] the arbitration panel to shut down the proceeding" or "have the BIT tribunal tell Ecuador to go into the Ecuadorian courts and tell the Ecuadorian courts that it can't enter a judgment." Oral Argument Tr. (Aug. 5, 2010), *Republic of Ecuador v. Chevron Corp.* (2d Cir.) at 53:10-23, 94:17-95:18. Less than six months later, Chevron went ahead and asked the arbitration panel for injunctive relief halting the Lago Agrio case, leading up to the tribunal's issuance of the February 2012 award directly ordering the court to freeze the proceeding in its tracks by unlawfully refusing to certify the judgment.