IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

ANNEXES A-H

TRACK 2 COUNTER-MEMORIAL ON THE MERITS OF THE REPUBLIC OF ECUADOR

ANNEX A: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING JUDICIAL INDEPENDENCE

1. Using misleading and false allegations, Claimants attempt to establish that the Republic's Executive in fact controls the judiciary. This Annex addresses the fallacy of Claimants' contention. Section I provides a discussion of the substantive reforms that the Republic has undertaken to improve the judicial system that Claimants endorsed for thirteen consecutive years. Section II refutes every material allegation made by Claimants against the independence of the Republic's judicial system, which it bases almost exclusively on press articles.

I. Judicial Reforms Have Strengthened The Independence And Competence Of The Ecuadorian Courts That Claimants Endorsed From 1993-2006

2. Like judicial systems around the globe, the judicial system in Ecuador is not perfect. To address such imperfections, over the last two decades Ecuador has enacted reforms that have enhanced the quality, independence and efficiency of its judicial system as a whole. Most, if not all, of such reforms were undertaken under the scrutiny of, and with support from, the international community including the U.S., the U.N., and various NGOs. While Ecuador's judicial system will continue to make positive strides in the years to come, the system that has been in place during all material times here is certainly competent, independent, and able to provide Claimants with an adequate forum to resolve the Lago Agrio Litigation.

3. Indeed, it was Claimants who argued strenuously before the U.S. district and appellate courts that the courts of Ecuador — not the U.S. — provided the better forum to adjudicate the indigenous claims against the Claimants. Claimants affirmed, in other words, that the Ecuadorian court system constituted not only the more appropriate forum to adjudicate a

complex environmental case but an "adequate" forum since adequacy is the *sine qua non* of a *forum non conveniens* dismissal.[1]

4. Such a massive, complex and high profile case would pose challenges for any court system. Even the U.S. Court system took ten years solely to decide which forum was appropriate. Despite the challenges of trying such a case in a lesser developed judicial system, with fewer resources and modern technologies, from 1993 to 2002, in the *Aguinda* litigation, Claimants proffered no fewer than ten expert affidavits in support of their *forum non conveniens* pleadings, affirming under penalty of perjury that Ecuador's justice system is neither corrupt, nor unfair, and represented an adequate forum for resolution of the *Aguinda* dispute.[2]

5. Chevron made similar representations as late as 2006. In July 2006, Chevron asked a US federal court in California to stay the environmental claims brought by Ecuadorian plaintiffs as they were similar to those being adjudicated in the Lago Agrio Litigation. Chevron urged the U.S. court to defer to the prospective ruling of the Ecuadorian court, and in support of its stay motion, Chevron specifically cited the *Aguinda forum non conveniens* ruling with

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[1] *See, e.g.,* RLA-363, *USHA (India), Ltd. v. Honeywell Intern., Inc*., 421 F.3d 129, 134 (2d Cir. 2005); RLA-364, *Carijano v. Occidental Petroleum Corp*., 643 F.3d 1216,1225 (9th Cir. 2011); RLA-365, *Duha v. Agrium, Inc*., 448 F.3d 867, 873 (6th Cir. 2006); RLA-366, *Yavuz v. 61 MM, Ltd*., 576 F.3d 1166,1171 (10th Cir. 2009).

[2] R-31, Aff. of Enrique Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17 ("I have reviewed the 1998 Report on Ecuador of the United States Department of State. Despite isolated problems that may have occurred in individual criminal proceedings, Ecuador's judicial system is neither corrupt nor unfair. Such isolated problems are not characteristic of Ecuador's judicial system, as a whole."); R-32, Aff. of Dr. Alejandro Ponce Martínez (Feb. 9, 2000) ¶¶ 5, 7; R-33, Aff. of Dr. Sebastian Pérez-Arteta (Feb. 7, 2000) ¶¶ 4, 7; R-34, Aff. of Rodrigo Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; R-715, Aff. of Dr. Adolfo Callejas Ribadeneira (Feb. 4, 2000) ¶¶ 2-4, 6 ("I also have reviewed the 1998 Report on Ecuador of the United States Department of State. While Ecuador's judicial system is not perfect, it is neither corrupt nor unfair. The specific instances cited in that report are not characteristic of Ecuador's judicial system, as a whole."); R-35, Supp. Aff. of Dr. Alejandro Ponce Martínez (Apr. 4, 2000) ¶¶ 1-2; R-36, Aff. of Jaime Espinoza Ramirez (Feb. 28, 2000) ¶¶ 2-6; R-37, Aff. of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7; R-38, Aff. of Ramon Jimenez Carbo (Apr. 5, 2000) ¶ 1; R-39, Aff. of Dr. José María Pérez-Arteta (Apr. 7, 2000) ¶ 2.

approval, reconfirming that Ecuador continued to constitute the preferable forum to decide such environmental damage claims.[3]

6. During the *Aguinda* litigation, Claimants also endorsed the competence and independence of the Ecuadorian courts to adjudicate cases involving U.S. and other foreign oil companies[4] as well as cases filed *against* the Ecuadorian Government and PetroEcuador.[5]

7. Thus, Claimants endorsed the adequacy of the Ecuadorian Judiciary whole-heartedly and without reservation, from 1993 to at least 2006, notwithstanding its imperfections and the fact that there have always been detractors of the Ecuadorian judicial system, particularly amongst the media and political parties that have fallen out of favor. The true motivation for Claimants' sudden transformation from ardent supporter to fervent critic of the Ecuadorian judicial system is not an actual sea-change in the quality or independence of the Ecuadorian judiciary, but Claimants' desire to avoid any judicial accountability for the billions of gallons of

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[3] *See* R-771, Reply in Support of Mot. To Dismiss Complaint Or, In The Alternative, To Stay, *Jane Doe I, et. al v. Texaco, Inc., et al.*, Case No. 3:06-cv-02820-WHA, (N.D. Cal July 6, 2006) at 7; R-7, Defendants' Amended Motion to Dismiss Complaint Or, In The Alternative, To Stay, *Jane Doe I, et. Al v. Texaco, Inc., et al.*, Case No. 3:06-cv-02820-WHA, (N.D. Cal. May 26, 2006) at 1-2, 5, 9-10.

Claimants first did so in the U.S. District Court for the Southern District of New York and in the U.S. Court of Appeals for the Second Circuit in *Aguinda* (from 1993-2002). *See* C-402, Respondent's First Post-Hearing Brief in *Commercial Cases* ¶¶ 119-29.

[4] "Multinational and oil companies are generally treated by the Ecuadorean Court [sic] in equal conditions to national companies or individuals." R-35, Supp. Aff. of Dr. Alejandro Ponce Martínez (Apr, 4, 2000) ¶ 1. And "Ecuador's courts have adjudicated, and continue to adjudicate, many cases involving oil companies in an impartial and fair manner." R-39, Aff. of Dr. José María Pérez-Arteta (Apr. 7, 2000) ¶ 2.

[5] "Many citizens have obtained judgments against the Government and PetroEcuador in connection with injuries from environmental contamination due to oil exploration. . . . Ecuadorian judges . . . have a deep-rooted obligation . . . to apply those laws faithfully." R-122, Aff. of Dr. Vicente Bermeo Lañas (Dec. 11, 1995) ¶ 10. Even Claimants' own long-time Lago Agrio Litigation counsel, Dr. Alejandro Ponce Martínez raved about the independence of the judiciary in cases in which Claimants sued the Government and PetroEcuador: "I have cases for multi-national corporations currently pending in Ecuador's courts. The judicial system in Ecuador has resolved fairly and without corruption those cases that have been concluded, and I expect the judicial system similarly to resolve fairly and without corruption the still pending cases." R-32, Aff. of Dr. Alejandro Ponce Martínez (Feb. 9, 2000) ¶ 6.

toxic waste that TexPet allegedly discharged into the Ecuadorian Amazon during TexPet's twenty-seven year history of oil operations in Ecuador.[6]

8. Consistent with their post-*Aguinda* litigation strategy, Claimants today allege "it is impossible for Claimants to seek effective relief through the Ecuadorian judicial system."[7] To support this strategy, Claimants have spared no effort nor expense in attempting to derail the Lago Agrio Litigation through any means – be it hiring convicted felons (such as Wayne Hansen) and former employees (such as Diego Borja) to entrap judges, hiring lobbyists in the U.S. to attempt to derail the Andean Trade Preferences Act and pressure the Government to interfere in the private-party litigation, and relying on a bevy of misleading articles in the press.

9. Indeed, the vast majority of "evidence" that Claimants use for their attacks on the Ecuadorian judicial system consists of hearsay found in one- or two-page media reports.[8] Claimants have submitted nearly 300 media reports from the lay press in this arbitration, about 250 of which are under two pages in length, and no doubt many of which were generated by Claimants' media relations firms. Aside from a precious few official documents, Claimants' remaining evidence consists of purported statistics and "independent analysis" from sources of questionable integrity and scholarly respect.[9] The testimony of Claimants' judicial independence expert, Vladimiro Alvarez Grau, best encapsulates Claimants' approach: "It would be an enormous *waste of time* in my profession and a waste of money to look for all of the original

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6 R-356, Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER, Jan. 9, 2012 at 5.

7 Claimants' Supplemental Mertis Memorial ¶ 154.

8 *See, e.g.,* C-1309, *President wants his Court*, EL HOY(Jan. 19, 2011); C-1320, *540 Judicial officers removed*, EL DIARIO (Sept. 5, 2010); C-1324, Casino workers accuse Alexis Mera of pressuring the judge to reject action for protection in their favor, ECUADOR INMEDIATO (Mar. 25, 2011); C-1328, *Araujo Case: Complaint Against Judges*, EL HOY (Apr. 7, 2011); C-1339, *The Prosecutor General accused two judges of bribery*, EXPRESO (May 14, 2011).

9 *See infra* Section II.C-H.

sources of all of the press releases that I read in the different media or the different presses of Ecuador."[10]

10. The Republic of Ecuador is a multi-party electoral democracy whose political system has always been characterized by open and cantankerous debate in the media.[11] That opposition party members and media editorialists have the opportunity to lobby against and criticize the judiciary, the President, and other political figures, reflects both their own freedoms of speech and the limits of Executive power in Ecuador to curb such speech. Claimants exploit this public debate, however, by adopting every news media snippet critical of the Government and the judiciary as "truth," even when they are no more than hearsay opinions made without analysis or factual support. None of the cited media reports or ostensibly independent reports and statistics would be admissible as valid evidence in Ecuador or in Claimants' home courts.

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10 R-772, Vladimiro Alvarez Grau Dep. Tr., (Sept. 7, 2011) at 76:2-7 (emphasis added).

11 Open and noisy debate in the media is a common characteristic in most electoral democracies, like England and the United States. In fact, President Barack Obama has faced his own share of criticism in the media. *See, e.g.*, R-773, Jane M. Orient, *Fighting back against Obamacare: Health law based on bad economics*, WASHINGTON TIMES (Jan. 4, 2013) ("[O]bamacare seeks to impose its dubious ethics on everyone, but that's not all. It is riddled with coercion and corruption — and based on bad economics."); R-774, Karen Harned, *Top 5 freedoms at stake if ObamaCare is upheld*, FOX NEWS (Mar. 23, 2012) ("Our nation was founded on individual liberty—liberty which is under assault by the [Obama] health care law. The individual mandate is unprecedented and unconstitutional. It will strip Americans of the freedoms they hold dear and chisel away their ability to exercise individual liberties and freedoms."); R-775, Andrew B. Wilson, *Ten Ways That Obamacare Is Bad Law*, THE AMERICAN SPECTATOR (Apr. 3, 2012) ("[Obamacare] discriminates against young people, forcing them to purchase health insurance at inflated prices in order to subsidize older beneficiaries. [. . .] The law is fiscally irresponsible. It includes a raft of new taxes. But these appear to be wholly inadequate to the task of paying the bill[.]"); R-776, Betsy McCaughey, *ObamaCare's cuts to hospitals will cost seniors their lives*, FOX NEWS (Sept. 12, 2012) ("Don't be bamboozled. It's illogical to think that reducing what a hospital is paid to treat seniors won't harm their care. A mountain of scientific evidence proves the [Obamacare] cuts will worsen the chance that an elderly patient survives a hospital stay and goes home. It's reasonable to conclude that tens of thousands of seniors will die needlessly each year."); R-777, Cal Thomas, *Barack Obama -- our imperial emperor in chie*f, FOX NEWS (Jan. 17, 2013) ("At his news conference Monday, a petulant, threatening and confrontational President Obama spoke like an emperor or supreme ruler. All that was missing was a scepter, a crown and a robe trimmed in ermine. [. . .] President Obama will not negotiate about raising the debt ceiling? Not surprising. Imperial leaders don't negotiate."). *See also*, R-778, *President Obama's Abuse of Power*, WALL STREET JOURNAL (Jan. 25, 2013) ("President Obama has shown increasing contempt for the constitutional limits on his power, and the courts are finally awakening to the news."); R-779, Lloyd Green, *Yes, President Obama, the Constitution Applies To You, Too*, FOX NEWS (Jan. 25, 2013) ("Sometimes, Barack Obama acts like the Constitution does not apply to him and the Congress is an imaginary being."); R-780, Robert Barnes and Steven Mufson, *Court Says Obama Exceeded Authority in Making Appointments*, WASHINGTON POST (Jan. 25, 2013).

Claimants' "tabloid"-based attacks against the entire Ecuadorian judicial system should be given the same weight that such hearsay receives in similar proceedings — none.

A. The International Community Uniformly Praised The Reforms That Led To The Nomination Of A New Supreme Court In November 2005

11. Claimants assert that shortly after they obtained the *forum non conveniens* dismissal in *Aguinda* beginning in late 2004, the Ecuadorian judiciary began to deteriorate to the point where it is now purportedly under the "stranglehold" of the Executive.[12] Claimants' narrative begins with a misleading and incomplete account of the 2004 dismissal of the Supreme Court, which omits any mention of the swift and corrective action that restored the Supreme Court a few months later, in November 2005.[13] Those reforms and the reconstituted Supreme Court earned universal and lavish praise, including from, among others, the UN and the U.S. Government.

12. On December 8, 2004, Ecuador's Congress, which had been called into a special session by then-President Lucío Gutiérrez, removed the sitting Supreme Court and replaced it with a new Supreme Court (known as the "Pichi Court").[14] The people of Ecuador, however, responded to the dismissal of the Supreme Court judges with a demand for swift corrective action. By April 2005, public outrage caused President Gutiérrez to be ousted from office, and the Pichi Court was forced to step down.[15] Thus, the Executive was severally castigated for interfering with the judiciary. Vice President Alfredo Palacio assumed the presidency and immediately undertook, with the support of the other branches of the State, to reform the Organic Code of the Judiciary and to restore the country's Supreme Court by employing a merits-based

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12 Claimants' Interim Measures Request ¶ 48; Claimants' Supplemental Merits Memorial ¶ 155.

13 Claimants' Interim Measures Request ¶ 48 at 22-24.

14 *See* C-81, Leandro Despouy, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, Follow-up mission to Ecuador (Jan. 31, 2006) ¶ 2.

15 *Id*. ¶ 4.

selection system designed to place the most qualified Justices on the nation's highest court.[16] This represented a fundamental departure, and improvement, upon the past method of selecting judicial officers, which had been normally the subject of appointment by political parties in Congress.[17]

13. By May 2005, Ecuador's Congress had enacted a sweeping reform of the Organic Law of the Judiciary aimed at strengthening the Judiciary and ensuring its independence.[18] The reform of this Law was the result of a robust democratic dialogue in which Ecuador's civil society, including international and domestic NGOs, played a significant role.[19]

14. Central to the reform was the implementation of a transparent, merit-based selection procedure, insulated from political or economic influence, in which the Justices of the Supreme Court were assessed and selected based upon educational and professional merit.[20] A Selection Committee, responsible for selecting new members of the Supreme Court, approved regulations outlining the selection procedure, which in turn was based on the experience of judicial selection processes established in other Latin American countries, as well as the recommendations of the UN Special Rapporteur.[21]

15. The selection process was closely monitored and supported by the international community, NGOs, and numerous foreign governments. Upon invitation, the UN, the OAS, and

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16 *Id*. ¶¶ 4-9.

17 R-791, Leandro Despouy, Preliminary of the Special Rapporteur on the independence of judges and lawyers (Mar. 29, 2005) ¶ 3.

18 C-88, Organic Law Amending the Organic Law of the Judicial Branch, Official Registry No. 26, Law No. 2005-001 (May 26, 2005).

19 C-81, Leandro Despouy, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, Follow-up mission to Ecuador (Jan. 31, 2006) ¶¶ 11-16.

20 *Id*. ¶¶ 6-9.

21 *Id*. ¶ 4.

the Andean Community of Nations appointed special and independent representatives,[22] which monitored the three-stage selection process in which more than 300 candidates took part.[23] First, candidates submitted to two separate qualification stages. During this stage, citizens had the opportunity to lodge challenges to any of the candidates in public hearings.[24] In the final professional capacity qualification stage, candidates were evaluated based on various exams, including a written professional skills exam, and on their professional and academic backgrounds.[25] Local media provided round-the-clock coverage of the entire process.[26]

16. At the conclusion of the process, fifty-two candidates were qualified to assume the position of Justice or Subrogate Justice of the Supreme Court.[27] On November 30, 2005, they were sworn into office at a ceremony presided over by the President of the Republic and the President of the National Congress, thus concluding an unprecedented and transparent process of citizen participation in the formation of the Republic's Judiciary.[28]

17. The UN Special Rapporteur rated the selection process an overwhelming success that should be held out as an example for other countries to emulate. In a section of his final

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22 R-793, *Successful Conclusions of CAN Supervision in Ecuador*, Comunidad Andina Press Release (Dec. 1, 2005) at 1.

23 C-81, Leandro Despouy, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, Follow-up mission to Ecuador (Jan. 31, 2006) ¶¶ 6-9.

24 *See Id*. ¶ 7.

25 *Id*. ¶ 8.

26 R-764, *The Selection Process to Appoint a New Supreme Court Begins Tomorrow*, EL UNIVERSO (July 10, 2005).

On August 26, 2005, the United Nations, the OAS, and the Andean Community extolled the progress made to that point in a joint statement: "We celebrate the successful completion of a significant stage in the process of the designation of the new members of the Supreme Court of Justice, thanks to the participation and commitment of all players involved." R-781, Joint Press Release, Organization of American States, United Nations & Andean Community (Aug. 26, 2005).

27 C-81, Leandro Despouy, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, Follow-up mission to Ecuador(Jan. 31, 2006) ¶ 17.

28 *Id*. ¶ 17; R-782, *A Supreme Court of Justice with external support*, EL COMERCIO (Dec. 1, 2005).

report entitled "First **Success**: Establishment Of The New Supreme Court," the UN Special Rapporteur stated:

> This process of selecting members of the Supreme Court has some singular and original aspects which could be applied in similar circumstances. The originality of this experience lies in the characteristics of the process: transparency, public monitoring, supervision by national and international observers and the participation of judges from other countries in the region and of international judicial bodies, such as the International Association of Judges.[29]

18. Other members of the international community likewise praised the swift and profound reforms. The Representative of the UN General Secretary, Angela Kane, confirmed: "The judges [of the Supreme Court] were chosen for their professional standing as opposed to their political leanings or social connections. . . . The selection of the Supreme Court in such a democratic fashion constitutes a major advance in restoring the rule of law and reinforcing checks and balances in Ecuador."[30]

19. The Secretary General of the OAS, Jose Miguel Insulza, stated: "By re-establishing the highest instance of the judicial branch, the Ecuadorian people once more are asserting [their] evident democratic will to the inter-American community and to the world."[31]

20. Finally, the representative of the U.S. declared: "The United States welcomes Ecuador's re-establishment of its Supreme Court of Justice. This is the culmination of a difficult but rigorous selection process managed by Ecuadorians of goodwill who are committed to

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[29] C-81, Leandro Despouy, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, Follow-up mission to Ecuador (Jan. 31, 2006) ¶ 18; *see also id*. ¶ 26 ("The Special Rapporteur draws attention to the significance and originality of the process for selecting the members of the new Supreme Court, a process which combines the particular characteristics of transparency, public oversight, monitoring by international and national bodies and participation of judges from other countries in the region.").

[30] R-794, Angela Kane, *Judicial Independence as Conflict Resolution and Prevention: The Recent Case of Ecuador's High Court*, UNITED NATIONS CHRONICLE, Issue I (2006).

[31] R-783, Speech of the OAS Secretary General in the Ceremony to Install the New Supreme Court of Justice in Ecuador, Organization of American States (Nov. 30, 2005).

strengthening their country's democratic institutions. The people of Ecuador are the beneficiaries of this transparent and objective selection of new justices for a re-established Court. ***We salute the principles that guided this process***, because we firmly believe that an impartial and independent judiciary is essential for effective democratic governance and economic competitiveness."[32]

21. The identical merits-based process employed for the selection of Supreme Court Justices was incorporated into the Ecuadorian Constitution and was later used for the selection of *all* of Ecuador's judges, as discussed further below.

22. Significantly, the dismissal of the 2004 Supreme Court and the selection of the new Supreme Court Justices in 2005 did not affect the business of Ecuador's lower courts. To the contrary, they carried on without interruption or changes in their duties.[33] Thus, the brief absence of the Supreme Court in Ecuador, which took place nearly five years before Claimants even filed the instant arbitration, could not have affected, and did not affect, the proceedings pending before the Provincial Court for Sucumbios where the Lago Agrio Litigation was pending.[34]

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[32] R-784, *Ecuador's Supreme Court of Justice*, United States State Department Press Release (Nov. 30, 2005) (emphasis added).

[33] *See* C-88, Organic Law Amending the Organic Law of the Judicial Branch, Official Registry No. 26, Law No. 2005-001 (May 26, 2005). (implementing the judicial reform and only affecting the Supreme Court).

[34] *See* Claimants' Interim Measures Request ¶ 48 at 24 ("All new judges were appointed to the Supreme Court almost eight months after it had been dismissed and left vacant.").

B. In 2008 The People Of Ecuador Approved A New Constitution, Which Strengthened The Judiciary And The Separation Of Powers

1. The Constituent Assembly Debated and Drafted a New Constitution Through the Most Participatory and Democratic Exercise in the Republic's History

23. In late 2006, then candidate-for-President, Rafael Correa, campaigned on a promise to address corruption and to seek a new Constitution to modernize Ecuador's institutional framework. President Correa assumed office in January 2007, and shortly thereafter, consistent with his campaign promise, called for a Constitutional referendum.[35] On April 15, 2007, 82 percent of the Ecuadorian citizenry resoundingly approved the creation of a Constituent Assembly, which was tasked with drafting the new constitution.[36] Thereafter, on September 30, 2007, Ecuador held open and democratic elections that were monitored by the Carter Center, the OAS, and other U.S. and European organizations, to elect the members of the Constituent Assembly, or *Asambleístas*.[37]

24. Like the 2005 reform that ushered in a new era of transparency and citizen participation in the judicial selection process, the 2007-2008 Constituent Assembly marked another historic exercise in government transparency and meaningful citizen participation in the democratic process. Indeed, the entire Constituent Assembly process was the focus of intense international monitoring and support.[38]

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35 R-766, Presidential Decree No. 2 (Jan.15, 2007).

36 R-795, The Carter Center*, Final Report on Ecuador's September 30, 2007 Constituent Assembly Elections*, 4 (Nov. 30, 2007).

37 *See* R-790, *The Carter Center to Observe Ecuador's Constitutional Referendum,* The Carter Center Press Release (Sept. 8, 2008); R-792, The Carter Center, *Ecuador: International Peacemaking and Human Rights Programs*.

38 *See* R-790, *The Carter Center to Observe Ecuador's Constitutional Referendum*, The Carter Center Press Release (Sept. 8, 2008).

25. The Constituent Assembly completed a draft of the new Constitution in the fall of 2008, and on September 29, 2008, the Ecuadorian people overwhelmingly approved the new Constitution, with 63.93 percent voting in favor.[39] The new Constitution went into effect in October 2008.[40] The Carter Center, which had observed and reported on the Constituent Assembly since its inception, monitored the referendum and "congratulate[d] the Ecuadorian people for their democratic participation in the . . . constitutional referendum, which expressed their civic and peaceful will in a transparent manner."[41] The European Union observed the referendum and praised both the referendum process and the new Constitution, and vowed to support Ecuador's constitutional transition.[42] Shortly after completing its mission, as designed, the Constituent Assembly was dissolved, and in April 2009, a new National Assembly was elected.[43] During this election, women were elected to 40 of the 124 National Assembly seats, evidence of Ecuador's outreach to previously marginalized sectors of its citizenry.[44]

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39 R-785, The Carter Center, *Final Report on Ecuador's Approbatory Constitutional Referendum of September 28, 2008*, 3 (Oct. 25, 2008).

40 R-785, *Id.* at 9.

41 R-785, *Ecuador Constitutional Referendum: Preliminary Statement by The Carter Center*, Carter Center Press Release (Sept. 28, 2008) contained in The Carter Center, *Final Report on Ecuador's Approbatory Constitutional Referendum of September 28, 2008* 14 (Oct. 25, 2008); *see also id*. at 7-8 (referring to the process as peaceful, transparent and well-organized).

42 R-786, *Commissioner Ferrero-Waldner on the constitutional referendum in Ecuador*, European Union Press Release, (September 29, 2008); *see also* R-787, European Union, *Election Observation Mission Report and Final Assessment: Ecuador Constitutional Referendum* (Oct. 17, 2008) (providing a detailed report on the EU's Observation Mission of the constitutional referendum, which "conclude[d] a long participatory constitutional process marked by a peaceful polling day and a clear outcome").

43 *See* R-788, Listado General de Asambleistas (General List of Assembly Members) 2009 – 2011.

As a consequence, Claimants' intimations about the purported intentions of the Constituent Assembly — and indirectly President Correa — to interfere with the judiciary and rule by dictatorial fiat are not only unfounded as a matter of historical fact, but have not even been a theoretical possibility since the Constituent Assembly ceased to exist four years ago.

44 *See* R-788, Listado General de Asambleistas (General List of Assembly Members) 2009 - 2011.

2. The 2008 Constitution Strengthens the Independence of the Judicial and Legislative Branches

26. The 2008 Constitution has reinforced the separation of powers through a system of checks and balances, and contrary to Claimants' allegations, actually weakens the Executive vis-à-vis the other branches. For example, the new Constitutional Court is designed to be significantly more independent than the former Constitutional Tribunal. Under the present Constitution neither the President nor any political party has any role in electing or designating the Judges of the Constitutional Court.[45] Nor are the Judges of the Constitutional Court subject to removal or impeachment by the political parties who designate them, but are instead subject to the same controls as other public officials who must answer for their actions or omissions committed in the exercise of their duties.[46] Also, for the first time, the Constitutional Court's jurisdiction over constitutional issues now allows the court to declare any act by the President or the National Assembly invalid if such act violates the Constitution.[47]

27. Under the new Constitution, the National Court of Justice (formerly the Supreme Court) has jurisdiction to hear all cases initiated against public servants, including those against the President.[48] And the President has *no* authority to appoint or remove any judge — including the Judges of the National Court of Justice.[49]

28. The new Constitution also broadened the circumstances under which the National Assembly, formerly the Congress, can remove or censure the President. While the previous Constitution allowed for removal of the President only upon a two-thirds vote, and then only

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45 RLA-164, art. 183, Constitution of Ecuador (2008).

46 *Id*. at art. 431.

47 *Id*. at art. 436.

48 *Id*. at art. 129.

49 *Id*. at arts. 178 and 147.

after impeachment proceedings that could be initiated solely for mental incapacity or graft, the new Constitution grants the National Assembly the authority to:

- Remove the President if the National Assembly declares the President to be mentally or physically unfit for Office under Article 120.2;
- Initiate impeachment proceedings against the President under Article 129 upon a one-third vote and approval of the Constitutional Court for (i) offenses committed against the security of the State; (ii) offenses of graft, bribery, embezzlement, or other illegal enrichment; and (iii) offenses of genocide, torture, disappearance of persons, kidnapping, or homicide for political reasons;
- Censure or remove the President, if as a result of Article 129 impeachment proceedings, two-thirds of the National Assembly so votes; and, if evidence of criminal conduct is uncovered during these proceedings, the National Assembly can refer the matter to the competent judicial authority;
- Remove the President under Article 130.1 upon two-thirds vote, for arrogating powers not granted to the President under the Constitution, with prior approval of the Constitutional Court;
- Remove the President under Article 130.2 upon two-thirds vote due to either grave political crisis or internal commotion.

29. While the President is empowered to dissolve the National Assembly, that exercise requires the same grounds as those that authorize the National Assembly to remove the President, and subject to the same restrictions.

30. In addition to providing checks and balances amongst the different branches of the State, the 2008 Constitution adopted measures specifically designed to enhance the independence of the judiciary. For example, the 2008 Constitution expressly guarantees the independence of the judiciary from both internal and external pressures, and anyone who violates this principle is subject to administrative, civil and criminal sanctions.[50] The 2008 Constitution also endorses the merits-based selection process that was used in the Organic Code of the

[50] *Id*. at art. 168.1.

Judiciary to elect the Supreme Court in 2005.[51] The principles that were embodied by that Code were thus elevated and transformed into *constitutional* principles. Furthermore, the 2008 Constitution broadens the application of the merits-based selection procedures by ensuring that they apply not only to select the Supreme Court (now known as the National Court of Justice) but to all of Ecuador's courts.[52] Thus, under the 2008 Constitution, no member of a political party from any branch of government may appoint a judge.[53] In addition to enhancing the independence of the judicial branch, as referenced above, the new Constitution actually broadened the powers of the judicial branch, giving all civil judges the power to rule on constitutional matters, which had previously been reserved for only the Constitutional Tribunal (now known as the Constitutional Court).[54]

31. The 2008 Constitution established a State with five independent branches, instead of three. Beyond the traditional branches (i.e., the judiciary, the legislature and the executive) the 2008 Constitution created the Transparency & Social Control Branch and the Electoral Branch.[55] The principal purpose of the Transparency and Social Control Branch is to enhance citizen participation in government and promote the fulfillment of duties by public officials without corruption.[56] The 2008 Constitution also created rights for diverse groups, such as women,[57] the indigenous,[58] and the disabled.[59]

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51 *Id.* at arts. 170, 176, 183.

52 RLA-164, arts. 170, 176, 183, Constitution of Ecuador (2008).

53 *See id*. at arts. 170, 176, 183.

54 *Id*. at art. 428.

55 *Id*. at arts. 204-225.

56 *Id*. at art. 204.

57 *See*, *e.g.*, *id*. at arts. 65, 176, 179.

58 *See*, *e.g.*, *id* at arts. 57, 171, 257, 379.

59 *See*, *e.g.*, *id*. at arts. 16, 35, 61, 62, 66, 330, 333, 341.

C. The May 2011 Referendum Paved the Way for Advancements in the Judiciary

32. With the 2008 Constitution in place, the Judicial Council, which had existed prior to the 2008 Constitution (hereinafter the "Temporary Judicial Council"), was allowed to continue in place until the new Judicial Council could be chosen pursuant to the norms of the Constitution.[60] The Judicial Council acts as the administrative and disciplinary authority over members of the judicial system.[61] The Temporary Judicial Council came under heavy public criticism for, among other things, raising their own salaries and for failing to sanction judges who permitted pre-trial detention periods to lapse, thereby allowing potential criminals to be released early.[62]

33. As expressly envisaged by the Constitution,[63] the Office of the President attempted to address these concerns by calling for a referendum,[64] which, among other proposals, asked Ecuador's citizens whether to dissolve the Temporary Judicial Council and replace it with a new Transitional Judicial Council. Under the proposal, the Transitional Judicial Council would act for a period of only eighteen months, while the Citizens Control Branch administered the merits selection process to elect the permanent Judicial Council.[65]

34. The Constitutional Court performed a thorough review of the constitutionality of the referendum as required by the Organic Law of Jurisdictional Guarantees and Constitutional

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60 R-380, art. 27, Transitional Regime of the Ecuadorian Constitution (2008).

61 RLA-164, art. 178, Constitution of Ecuador (2008).

62 *See* R-817, *They Admit Impeachment Request Against the Vocals of the Judicial Council*, VISTAZO (Mar. 2009); R-818, *Campesino Movement "Removed" Cevallos,* PP EL VERDADERO (Jun. 7, 2011); R-819, *Judge Removes President of the Judicial Council*, EL TELEGRAFO (July 5, 2011).

63 RLA-164, art. 147.14, Constitution of Ecuador (2008).

64 *See* R-767, Referendum Decree No. 669 (Feb. 21, 2011).

65 R-815, Referendum Notice to Constitutional Tribunal, Case No. 0001-11-RC (Feb. 2, 2011) at 15-16.

Review[66] and ratified the referendum in a 145-page decision in February 2011.[67] The decision followed a public hearing during which citizens and a variety of civil-society organizations had an opportunity to be heard on all of the issues raised by the ten-question referendum.[68]

35. As the May 7 vote on the referendum approached, campaigns both for and against the referendum were very active and sought to persuade voters.[69] In the end, voters approved the proposal (among others), providing yet another example of dynamic democratic exercise in the Republic.[70]

D. The Transitional Judicial Council Took Several Steps To Strengthen The Independence and Stature of the Judiciary

36. As decided by the Ecuadorian citizens by way of the May 2011 referendum, the Temporary Judicial Council was dissolved and the Transitional Judicial Council ("TJC") was created in its place to serve for a period of eighteen months.[71] The TJC was comprised of three delegates, one appointed by the President of the Republic, one by the National Assembly, and one by the Transparency and Social Control Branch body.[72] Contrary to Claimants' allegations, the Executive office nominated only one of three of the delegates.[73] The TJC quickly got to work on its reform agenda, including implementation of a merit-based selection process for the judges (and substitute judges) of the National Court of Justice similar to the internationally

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66 RLA-768, Organic Law of Jurisdictional Guarantees and Constitutional Review, art. 127 (Oct. 22, 2009).

67 R-814, Decision of the Constitutional Court, Judgment No. 001-DCP-CC-2011, Case No. 0001-11-CP, Official Gazette No. 391 (Feb. 23, 2011).

68 R-814, Decision of the Constitutional Court, Judgment No. 001-DCP-CC-2011, Case No. 0001-11-CP, Official Gazette No. 391 (Feb. 23, 2011) at 6-10.

69 R-796, Marc Becker, *Ecuador's Referendum Reveals a Fragmented Country*, UPSIDEDOWNWORLD.ORG. (May 17, 2011) at 3-5.

70 R-828, Referendum Results, National Electoral Council, Official Registry No. 490, July 13, 2011 at 2, 3, and 7.

71 *See* R-380, art. 20, Transitional Regime of the Ecuadorian Constitution (2008) as amended by the Referendum.

72 *Id*.

73 *Id*..

acclaimed merit-based process for the Supreme Court under the previous constitution.[74] Fulfilling a strictly administrative role, the TJC has successfully carried out the following goals:

- To enhance the quality of the Judicial System to support the enforceability of citizens' rights
- To enhance the capacity and integrity of judicial services through the implementation of new policies and strategies
- To apply disciplinary mechanisms to promote institutional transparency
- To promote the use of human talent to add value to the judicial system.[75]

37. Consistent with its limited function, the TJC did not appoint a single judge. All judges have instead been selected through a merits-based system called for by the 2008 Constitution.[76] The TJC as part of its role as administrator of the judicial system called upon the President to call for a State of Emergency, the purpose of which was to allow the President to release millions of dollars of funds sorely needed by the judicial system to improve its infrastructure across the country and to incorporate modern technology.[77]

38. On January 24, 2013, the TJC completed its eighteen-month term and relinquished its responsibilities to the Judicial Council elected pursuant to a merits-based selection process.[78] The new Judicial Council, in turn, was formed by the Citizen Participation and Social Control Council — a body under the Transparency and Social Control Branch — which selected individuals from a pool of nominees selected by the National Court of Justice, the State Attorney General, the Public Defender, a delegate of the Executive, and a delegate of the

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74 *See* RLA-164, arts. 183.3, 228, Constitution of Ecuador (2008).

75 *See* R-763, Programa de Reestructuración de la Justicia.

76 RLA-164, art. 176, Constitution of Ecuador (2008); *see also* RLA-303, arts. 61-66, Organic Code of the Judiciary (2009).

77 C-1356, Decree No. 872 (Sept. 5, 2011) at 1 and art. 5.

78 R-765, Resolution of the Citizen Participation and Social Control Council No. 004-221-CPCCS-2013.

National Assembly.[79] The process also involved public examinations, public oversight, and challenges by the public.[80]

E. Claimants' Own Success in Ecuadorian Courts Undermines Their Claim That The Judiciary Lack Independence

39. The current judges of the National Court of Justice were all selected by a merits-based selection process as called for by the 2008 Constitution. Not a shred of reliable evidence has been proffered that suggests that the National Court of Justice will be unable to administer justice in an independent and impartial manner.

40. On the contrary, Chevron's own record of success against the Government in the Ecuadorian courts constitutes dispositive evidence of an independent judiciary. In 2000, a Texaco subsidiary (and other foreign oil companies) won major income tax cases against the Government.[81] In 2002, Texaco prevailed against Government motions to dismiss three civil cases pending in the Superior Court of Quito.[82] More recently, in 2007, Texaco received a US$1.5 million court judgment against the Government.[83] In 2008, an Ecuadorian appellate court reversed the dismissal of another multi-million-dollar Texaco case against the Government.[84] Finally in 2011, the Ecuadorian courts dismissed the criminal proceedings initiated by the Prosecutor General against, *inter alia*, two of Chevron's attorneys.

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79 *Id.*; *see* RLA-164, art. 179 as amended by the Referendum, Constitution of Ecuador (2008).

80 R-769, Resolution of the Citizen Participation and Social Control Council, No. 003-206-CPCCS-2012, Regulations for the Selection of Delegates of the Judicial Council (Jan. 17, 2011); R-797, *New Ecuadorian Judicial Council*, ECUADORTIMES.NET (Jan. 9, 2013).

81 R-812, *TexPet v. Ministry of Energy and Mines*, S. Ct./Tax Div., No. 12-93 (Oct. 17, 2000).

82 R-809, Order of Superior Ct., No. 152-93 (May 22, 2002); R-811, Order of Superior Ct., No. 153-93 (May 22, 2002); R-810, Order of Superior Ct., No. 154- 93 (May 21, 2002).

83 R-816, Court Order in *Texaco Petroleum Co. v. Republic of Ecuador and PetroEcuador*, Case No. 983-03, First Civil Court of Pichincha (Feb. 26, 2007) at 7.

84 R-808, Court Order in *Texaco Petroleum Co. v. Ministry of Energy and Mines*, Case No. 46-2007, Supreme Court of Justice, Second Division in Civil and Commercial Matters (Jan. 22, 2008) at 4.

F. The Republic's Judicial Reform Movement Has Supporters In All Corners Of The World

41. The Republic's path of judicial reform has not gone unnoticed by the international community. Several organizations and international bodies have recognized and praised the Republic's advancements, and have even provided financial support and training.[85] For example, the American Bar Association's Rule of Law Initiative has had a presence in Ecuador for nearly a decade, providing ethics workshops aimed at further developing the judiciary.[86] The United States Agency for International Development (USAID) has also devoted considerable resources to the Ecuadorian Judiciary. Since 2010 and in partnership with the East-West Management Institute, USAID has established the Strengthening Ecuadorian Justice Project (SEJP) "to support Ecuadorian efforts toward improvement, fairness, and transparency in the administration of justice."[87] Additionally, the National Endowment for Democracy funds programs in Ecuador, including a grant for the promotion of "citizen oversight" of the restructuring of the judicial branch.[88] Reputable organizations work with the support and cooperation of the Executive Branch. The Republic's devotion of resources and commitment to these projects confirm that it is dedicated to maintaining a strong and independent Judiciary. In turn, these organizations' investment in Ecuador demonstrates confidence in the current and future independence of the Judiciary.

42. While for tactical reasons Claimants now desperately seek to paint Ecuador as a rogue state that has no respect for the rule of law, the fact is that Ecuador has paid every single

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85 *See* C-1254, Expert Witness Report of Efrain Novillo Guzman, *Chevron v. Aguinda*, Case No. 11-CV 03718 (LAK) (S.D.N.Y) ¶ 48.

86 R-807, American Bar Association Rule of Law Initiative, *Ecuador Programs*.

87 R-813, Fortalecimiento De La Justicia, *Who Are We?*, FORTALECIMIENTOJUSTICIA.ORG.

88 R-789, *Ecuador Programs*, National Endowment for Democracy, NED.ORG.

international arbitration damages award entered against it to date upon satisfaction of its appellate rights.

43. As explained above, Claimants have offered an appallingly superficial — and demonstrably false — basis upon which it argues that "President Correa has consolidated all government power in himself,"[89] "that there is no legitimate rule of law in Ecuador today,"[90] and that the Republic maintains "iron-fisted control over the judiciary."[91] Below Respondent addresses each of Claimants' allegations regarding judicial independence in Ecuador that have not yet been addressed in the Counter-Memorial. The most salient feature of Claimants' allegations is that none proffers a single shred of evidence that the Executive interfered in the Lago Agrio Litigation.

II. Claimants' Litany of Judicial Independence Allegations Are Misleading and Meritless

A. Claimants' Allegations Regarding The National Court Of Justice And The Constitutional Court Are Patently False

44. Claimants allege that the Supreme Court of 2005 was "purged" with the advent of the 2008 Constitution.[92] Claimants' allegations are patently false and misleading.

45. The 2008 Constitution was the result of a democratic process, monitored and endorsed by the international community.[93] To implement the 2008 Constitution, an entirely new group of public officials had to be elected at the federal level, including a new President, a new congress (or National Assembly) and a new National Court of Justice.[94] Thus, President

89 Claimants' Interim Measures Request ¶ 48 at 22.

90 *Id*.

91 Claimants' Supplemental Merits Memorial ¶ 154.

92 *See* Claimants' Interim Measures Request ¶ 48 at page 28 ("[F]or the third time in less than five years the Supreme Court of Ecuador was completely purged.").

93 *Supra* Section I.B.1.

94 R-380, art. 3, Transitional Regime of the Ecuadorian Constitution (2008).

Correa had to run for re-election, and the members of congress had to run for re-election to serve on the new National Assembly.

46. However, because the National Court of Justice was to be determined by virtue of a merits-based selection process, the Constitution established a transitional regime until the merits process could be organized and implemented. As part of this process, under the 2008 Constitution, the judges of the Supreme Court of 2005 were to remain in place until the new merits-based selection process could be conducted, except that the 2008 Constitution called for a reduction in the number of Supreme Court judges from thirty-one to twenty-one.[95] To avoid any criticism of favoritism, the new Constitution called for a lottery process to choose which of the Supreme Court judges would make up the twenty-one transitional judges.[96] Many of the then Supreme Court judges resigned in protest over the decision to call for a lottery, but they did so voluntarily.[97] In their place, the surrogate Supreme Court Judges of the 2005 process, all of whom were also selected via the merits based process, decided to stay on as the transitional judges of the National Court of Justice.[98] Thus the transitional National Court of Justice consisted solely of judges who had been selected via the 2005 merits-selection process.

47. Moreover, each of the members of the Supreme Court of 2005 was free to take the merits-based exams that would be conducted to select the National Court of Justice, and many of

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95 *See id*. at art. 21

96 *See id*. at art. 21.

97 *See* C-118, *The Country Without a Supreme Court and Without National Court*, LA HORA (Oct. 27, 2008); C-119, *Ecuador, without Court for Several Days*, EL UNIVERSO (Oct. 27, 2008).

98 R-820, *The National Council of Ecuador selected 21 judges for the Supreme Court of Justice by lottery*, SOITU.ES ACTUALIDAD (Oct. 30, 2008).

them did.[99] The new Justices of the National Court of Justice were finally selected in January 2012 pursuant to the merits-based selection process called for in the 2008 Constitution.[100]

B. Claimants' Own Allegations Show A System That Swiftly Addresses Instances of Judicial Misconduct With Sanctions

48. Claimants attempt to discredit the Republic's Judiciary by citing to isolated allegations of corruption and bribery.[101] Rather than evincing a broken system, these isolated events, and the swift action taken to remedy them, demonstrate the effectiveness of the Republic's anti-corruption efforts and the investigative and disciplinary mechanisms in place to deal with allegations of misconduct.

- Claimants point to an incident in September 2006 involving members of the new Supreme Court in which "videos surfaced showing a Supreme Court judge's son negotiating a US$500,000 bribe on behalf of three Supreme Court judges to overturn a legislator's criminal conviction."[102] As Claimants' exhibits explain, the Supreme Court immediately and formally investigated the allegations[103] and suspended the implicated

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99 *See, e.g.,* R-821, *New Era for the National Court of Justice, for 9 years,* PP EL AUTENTICO (Jan. 29, 2012).

100 R-822, Resolution 004-2012 of the Transitional Judicial Council (Jan. 25, 2011).

Claimants also note that the Constitutional Court's 2009 decision that only precedents decided under the 2008 Constitution are binding on the Court. *See* C-136, Official Registry No. 644, Constitutional Tribunal Judgment 003-09-SIN-CC (July 29, 2009) at 26; Claimants' Interim Measures Request ¶ 48 at 30. Claimants do not even attempt to explain how this contention is relevant to judicial independence. If it is Claimants' assertion that there was some sinister motivation for this decision, they are mistaken. First, as the decision explains, precedents of the former Constitutional Tribunal under the 1998 Constitution were never binding. C-136, Official Registry No. 644, Constitutional Tribunal Judgment 003-09-SIN-CC, July 29, 2009 at 25 ("the decisions of the former Constitutional Tribunal . . . were not jurisprudential decisions and were not binding and obligatory in nature"). Additionally, the changes to the "legal structure" and "philosophical principles" make the decisions of the two courts "irreconcilable." *Id*. Therefore, the Court logically decided to adhere to its own precedents, based on the current Constitutional philosophies. *Id*. at 25-26.

Claimants proffer a variety of allegations regarding the Constitutional and Electoral Tribunal under the 1998 Constitution and the Constituent Assembly that drafted the 2008 Constitution. Their allegations are conclusory, patently false, and wholly irrelevant to their claims in this Arbitration. *See generally infra* Section I.A.

101 *See* Claimants' Interim Measures Request ¶ 48; Claimants' Supplemental Merits Memorial ¶¶161, 167-168.

102 Claimants' Interim Measures Request ¶ 48 at 24-25 (citing C-91, Kate Joynes, *Supreme Court Suspends Ecuadorian Judge for Corruption*, GLOBAL INSIGHT DAILY ANALYSIS (Sept. 8, 2006); C-92, *Ecuadorian high court judge resigns under fire,* EFE NEWS SVC. (Sept. 8, 2006); C-93, *Ecuador's Supreme Court shaken by corruption allegations*, BBC MONITORING AMERICAS (Sept. 9, 2006)).

103 C-91, Kate Joynes, *Supreme Court Suspends Ecuadorian Judge for Corruption*, GLOBAL INSIGHT DAILY ANALYSIS (Sept. 8, 2006); C-92, *Ecuadorian high court judge resigns under fire,* EFE NEWS SVC. (Sept. 8, 2006); C-93, *Ecuador's Supreme Court shaken by corruption allegations*, BBC MONITORING AMERICAS (Sept. 9, 2006).

Justices pending completion of the investigation.[104] The judge whose son allegedly negotiated the bribe stepped down a day after he was suspended[105] and the three judges were ultimately *removed* following the investigation.[106] Indeed, the BBC report cited by Claimants states: "*The atmosphere in the Supreme Court of Justice yesterday was one of . . . strong opposition to any possible outbreak of corruption*."[107] It further states that one group of Justices "was demanding immediate penalties in order to salvage the image of the Supreme Court as an institution."[108] In addition, "[t]he urgency of the matter compelled the justices to decide . . . to set up a commission to investigate" other allegations of judges improperly postponing a case.[109]

- Claimants also refer to a bribery scheme involving two judges and six judicial officers.[110] As Claimants' exhibits demonstrate, the Ministry of Justice not only refused the US$500,000 bribe, but notified the Judicial Police who investigated the individuals for weeks, and together they orchestrated a sting operation at a local café where the suspects were arrested.[111]

49. Claimants also specifically attack the Temporary Judicial Council, the body responsible for investigating and resolving issues of judicial misconduct after passage of the 2008 Constitution and prior to the creation of the Transitional Judicial Council. Although the Temporary Council eventually experienced internal strife and challenges with other branches of government, its work preceding those difficulties demonstrates that the Temporary Council indeed addressed formal allegations of misconduct in the Judiciary.

- In July 2009, three judges of the second division of the administrative court of Quito were removed from office after an investigation of the Temporary Judicial Council

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104 C-91, Kate Joynes, *Supreme Court Suspends Ecuadorian Judge for Corruption*, GLOBAL INSIGHT DAILY ANALYSIS (Sept. 8, 2006); C-92, *Ecuadorian high court judge resigns under fire,* EFE NEWS SVC. (Sept. 8, 2006).

105 C-92, *Ecuadorian high court judge resigns under fire,* EFE NEWS SVC. (Sept. 8, 2006).

106 C-91, Kate Joynes, *Supreme Court Suspends Ecuadorian Judge for Corruption*, GLOBAL INSIGHT DAILY ANALYSIS (Sept. 8, 2006).

107 C-93, *Ecuador's Supreme Court shaken by corruption allegations*, BBC MONITORING AMERICAS (Sept. 9, 2006) (emphasis added).

108 C-93, *Ecuador's Supreme Court shaken by corruption allegations*, BBC MONITORING AMERICAS (Sept. 9, 2006).

109 C-93, *Ecuador's Supreme Court shaken by corruption allegations*, BBC MONITORING AMERICAS (Sept. 9, 2006).

110 Claimants' Supplemental Merits Memorial ¶ 161.

111 C-1337, *The Prosecutor General's Office catches two judges in the act*, EXPRESO (May 12, 2011); C-1338, *Judges arrested for bribery had already been under investigation for weeks*, EL UNIVERSO (May 14, 2011); C-1339, *The Prosecutor General accused two judges of bribery*, EXPRESO (May 14, 2011).

determined that they lacked jurisdiction to issue a ruling.[112] Following the judges' appeal, the Judicial Council issued an en banc decision affirming the sanctions.[113] After this decision, all three judges filed separate judicial actions at the First and Second Division Administrative Courts where their cases are currently pending.[114]

- Claimants allege that the Judicial Council succumbed to political pressure in suspending judges from the *Filibanco* case — a case involving alleged embezzlement.[115] The Judicial Council removed three Associate Judges of the First Criminal Division of the National Court of Justice following an investigation, which determined they had violated due process by decreasing charges of bank embezzlement to a charge of alteration of financial balances and for overturning a decision of the Supreme Court without having the jurisdiction to do so.[116] As the only proof that the Judicial Council allegedly "admit[ed] that political pressure influenced their ruling," Claimants cite to a press article, which provides — in its own lay assessment — that the Council "left a hint of political pressure in its ruling."[117] In that same article, however, it provides that the President of the National Court of Justice "ruled out any type of political influence."[118] Indeed, Claimants are unable to point to any evidence of political pressure.

- Claimants allege that the "Judicial Council removed more than 540 judicial officers from office, many on the basis of complaints filed on President Correa's behalf."[119] But Claimants conveniently fail to mention that many of those judges were dismissed for causing procedural delays, which led to a record number of lapsed pre-trial detention periods and released prisoners – 4,436 in three years.[120] In fact, the Temporary Council was criticized for not sanctioning enough judges who allowed potential criminals to be released early.[121] Moreover, while Claimants' cited press article mentions that "many"

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112 R-706, Decision of the Council of the Judiciary re the Second Division of the Contentious Administrative Tribunal No. 1 of Pichincha (July 17, 2009) at 18.

113 R-707, Decision of the Judicial Council Sitting En Banc, Case No. 041-09 (156-UCD-09-JC), Oct. 29, 2009 at 8.

114 *See* R-708, Administrative Proceeding of Dr. Ivan Polivio Salcedo Coronel, Case No. 21679-NR (Mar. 25, 2010); R-709, Administrative Proceeding of Dra. Betty Fabiola Guerrero Chaves, Case No. 21.562 (Mar. 26, 2010); R-710, Administrative Proceeding of Dr. Vincente Ivan Izquierdo Pinos, Case No. 21.553 (Mar. 26, 2010).

115 Claimants' Interim Measures Request ¶ 48 at 33-34.

116 *See* R-711, Order of the Council of the Judiciary Removing Judges and Secretary of the First Criminal Division of the National Court of Justice (Mar. 24, 2010) at 6-9.

117 Claimants' Interim Measures Request ¶ 48 at 34 (citing C-161, *Three Years Later, Justice Remains Threatened by Political Groups*, EL COMERCIO (Feb. 17, 2010)).

118 C-161, *Three Years Later, Justice Remains Threatened by Political Groups*, EL COMERCIO (Feb. 17, 2010) at 1.

119 Claimants' Supplemental Merits Memorial ¶ 155 (citing C-1320, *540 Judicial officers removed [from office]*, EL DIARIO (Sept. 5, 2010)).

120 C-1320, *540 Judicial officers removed [from office]*, EL DIARIO (Sept. 5, 2010).

121 *See supra* Section I.C.

were on President Correa's behalf, Claimants do not provide any actual figures nor do they proffer any evidence of impropriety on the Executive's part.[122]

- Claimants point to a resolution of the Temporary Judicial Council in June 2010, which states that "the Judicial Branch is not independent."[123] Claimants fail to provide the context of this assertion. As depicted in the Resolution, the Temporary Council was referring only to itself and *not* to the judicial branch as a whole.[124] Moreover, it was referencing the National Assembly's mounting pressure on the Temporary Council to act more prudently.[125] In issuing the Resolution, the Temporary Council attempted to ward off public scrutiny by faulting external factors, i.e., budgetary restrictions, which according to the Council, limited its ability to carry out its mandate.[126] Regardless of the contentious relationship between the Assembly and Temporary Council during that time, there is no evidence that the judiciary lacked impartiality or independence.

- Claimants aver that judges from the Provincial Court of Justice of Esmeraldas were suspended due to their acceptance of a habeas corpus appeal in a case involving terrorism in the canton of La Concordia.[127] Claimants' contentions are misleading and incorrect. The judges were temporarily suspended[128] for accepting the habeas appeal because they had not properly assessed the validity of the defendants' arrest.[129] Following an investigation conducted by the Temporary Judicial Council, the suspension was revoked and the judges instead received written reprimands.[130]

50. Claimants' recent attacks on the Judicial Council are most surprising considering that Claimants have praised the Council for effectively rooting out corruption to the extent it

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122 *See* Claimants' Supplemental Merits Memorial ¶ 155; C-1320, *540 Judicial officers removed [from office]*, EL DIARIO (Sept. 5, 2010).

123 Claimants' Merits Memorial ¶ 298 at 150 (citing C-641, From the Judiciary Council to the Nation, Resolution No. 043-2010, June 22, 2010.).

124 *See* C-641, From the Judiciary Council to the Nation, Resolution No. 043-2010 (Jun. 22, 2010) at 1-2.

125 The Temporary Council stated: "Certain Assembly Members use the threat of impeachment against the President and Members of the Judiciary Council." C-641, From the Judiciary Council to the Nation, Resolution No. 043-2010 (Jun. 22, 2010) at 1.

126 *See* C-641, From the Judiciary Council to the Nation, Resolution No. 043-2010 (Jun. 22, 2010) at 1-2.

127 Claimants' Merits Memorial ¶ 297 at 149.

128 RLA-303, Article 269.9, Organic Code of the Judiciary (authorizes the President of the Judicial Council to suspend judges in case of serious complaints for no more than 90 days, during which the issue that triggered the suspension must be resolved).

129 R-712, Judicial Council Memorandum, July 26, 2010 at 3-4. The judges also imposed an alternative to imprisonment when they had no authority to do so. *See id.*

130 R-713, Decision by the Plenary of the Judicial Council of October 27, 2010, Disciplinary Proceeding No. 152-UCD-010-JC at 4-7.

exists.[131] Claimants' own legal experts in *Aguinda* stated that the Judiciary cannot be judged by isolated allegations of corruption and misconduct or hearsay:

> [T]he current situation of the Administration of Justice in Ecuador cannot be assessed through the use of specific experiences which lead to conclusions that would imply generalizations. Neither can conclusive judgments be made based on hearsay information, and, much less, based on information received from people who have not developed an explicit and direct contact with the legal and political means, as well as with the media and citizens in general. Neither can it be assessed through value judgments that show lack of consistent information.[132]

51. The Republic is currently in the process of further strengthening its anticorruption efforts. Ecuador's National Secretary of Transparency and Administration is currently rolling out the National Anticorruption Plan to "[e]radicate corruption through an Anticorruption Social

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131 *See* R-37, Aff. of Dr. Ricardo Vaca Andrade (Mar. 30, 2000) submitted in *Aguinda* ("As of this date, I am a Voting member of the National Judicial Council of Ecuador (CNJ) and have the honor of being the Chair of the Human Resources Commission, which is responsible for handling Human Resources in the Judicial Branch of Ecuador, as well as the Disciplinary Control and Imposition of Sanctions on judges, magistrates and employees, in compliance with the Political Constitution, the Organic Law of the National Judicial Council, and the Regulation on Complaints. The function of the Human Resources Commission of the CNJ, among others, is to investigate cases of corruption in the Ecuadorian judicial system. The Board is also responsible for sanctioning members of the judicial system who have participated in illegal acts. . . . From the day we took office, the Human Resources Commission began to work on disciplinary issues. Various judges and employees have been sanctioned, as detailed below: . . . From this information it can be inferred that since December 21, 1998, the National Judicial Council has exercised continuous and efficient control of the Administration of Justice in Ecuador to fight corruption.").

See also R-714, Aff. of Mr. Fabian Corral Burbano (Mar. 30, 2000) ¶ 7, submitted in *Aguinda* ("The National Judicial Council has demonstrated, in recent cases to be a competent organization capable of sanctioning and removing judges whose conduct is irregular or damaging to the public interest and to the reasonable administration of justice. Judges who have demonstrated improper conduct or irregular behavior have been removed. The actions of the Council have the approval of the community, since these have been cases of great importance and national relevance.").

132 *Id*. ¶ 1. "An objective Judgment necessarily involves the understanding, within its context, of the experiences that the attorneys have regarding the Administration of Justice, as a result of their professional activities, as well as an understanding of the measures that have been taken and the changes that have been made to correct the deficiencies that the legal system has, just like any other system in the world. . . . I do not agree with the predominantly negative characterization made regarding the Administration of Justice in Ecuador in the documents filed in support of the Aguinda and Jota case. I consider that the examples given cannot, by themselves, define the predominant legal conduct in Ecuador. In this country, as well as in other countries, specific cases should not be used to generalize and decisively describe the situation of the Department of Justice. *Id*. ¶ 1, 3.

See also, R-31, Affidavit of Enrique Ponce y Carbo (Feb. 4, 2000) ¶ 15; R-715, Aff. of Dr. Adolfo Callejas Ribadeneira, February 4, 2000, ¶ 3 ("I also have reviewed the 1998 Report on Ecuador of the United States Department of State. While Ecuador's judicial system is not perfect, it is neither corrupt nor unfair. The specific instances cited in that report are not characteristic of Ecuador's judicial system, as a whole.").

Pact that guarantees ethical commitment between the institutions of the Public Administration and the citizenry to develop transparency in State administration."[133]

C. Claimants' Allegations Of Executive Interference With The Judiciary Are Unfounded

1. The May 2011 Referendum And The Creation Of The Transitional Judicial Council Have Advanced Judicial Reforms; They Are Not "Power Grabs" Launched By The Executive

52. Claimants decry Ecuador's latest wave of judicial reforms, including the May 2011 referendum, the creation of the TJC, and the sixty-day "state of exception."[134]

53. By intimating that the May 2011 referendum was a political ploy for President Correa to arrogate judicial powers and "politicize[]" the Judicial Council, Claimants do little more than present conjectures and hyperbole. They proffer no evidence or examples of an alleged power grab. Instead, Claimants point to the commentary of critics and political opponents depicted in baseless lay press articles.[135] Claimants also misconstrue President Correa's weekly radio address to demonstrate that the President would "use the new law to retaliate against members of the judiciary who do not serve the State's interests."[136] But there is absolutely no indication that President Correa was addressing — directly or indirectly — judges who have ruled against the State.[137] The President was simply discussing his reform agenda and plans to fight corruption in the judiciary: "When the new Transitional Council is in place, we will put things in order. . . . They will start working on that reform right away, which we continue working on with advice from Chile, Brazil, etc."[138]

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133 R-716, National Anticorruption Plan, National Secretary of Transparency and Administration.

134 Claimants' Supplemental Merits Memorial ¶¶ 163 – 166, 171-75.

135 *Id*. ¶¶ 163, 165.

136 *Id*. ¶¶ 166.

137 *See* C-1351, Presidential Weekly Radio Address, June 25, 2011.

138 C-1351, Presidential Weekly Radio Address, June 25, 2011 at 3.

54. Claimants make the bogus assertion that the sixty-day "state of exception" was a "transparent ploy to control the judiciary."[139] Not only was the declaration of a state of emergency legitimate and constitutional, it was essential in reviving a judicial system that was suffering from grave financial troubles. Indeed, the call for a state of emergency was the brainchild of the TJC, not President Correa, to address the backlog of 1,250,000 cases with emergency funds.[140]

55. Heeding the TJC's plea for assistance, President Correa issued Executive Decree No. 872 pursuant to Article 164 of the Constitution, which permits such measures during times of "public calamity."[141] Claimants present no evidence that the Decree's purpose was other than to address the "deterioration [of the judicial branch] [which was] deepening on account of the economic and financial problems faced in recent times."[142] As Congressman Vethowen Chica explains: "The President of the Republic is not issuing judgments . . . he is not making changes

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139 Claimants' Supplemental Merits Memorial ¶¶ 171, 174. The Republic will address the *El Universo* allegations below.

140 *See* R-718, Correspondence from President of Transitional Judicial Council, P. Rodriguez Molina, to President Correa, Oficio 123-P-CJT-MJ-2011 (Aug. 29, 2011); *See* C-1356, Executive Decree No. 872 (Sept. 5, 2011) at 3 ("the President of the Transitional Judicial Council has requested that a State of Exception in the Judicial Branch be declared, given that: i) it does not have appropriate information technology systems allowing it to generate solid information for strategic institutional planning, ii) modernization processes have not been maintained, and thus the hoped for results have not been achieved, iii) the court system's operational structures do not meet the demands placed by the citizens on the Judicial Branch, iv) judicial procedures have not taken technological development into account and have not improved their stages, phases, and steps; this has led to a lack of timeliness in the administration of justice, v) the incorporation of technology into both judicial and institutional processes is of fundamental importance in order to do away with the backlog of cases and administrative inaction, which have undermined the right of the citizens to an efficient, timely administration of justice; vi) there is inadequate coordination between the various institutions of the Judicial Branch, as well as between the Judicial Branch and the agencies involved in the justice and public security system, vii) the annual increase of cases requiring attention and service from the Judicial Branch in the year 2008 was forty percent (40%) higher than in the year 2002; viii) fewer cases were resolved; at best seventy percent (70%) of the cases projected to be resolved last year actually were, ix) all the conditions indicated above have led to a backlog of approximately one million two hundred and fifteen thousand cases that need to be handled.").

141 RLA-164, art. 164, Constitution of Ecuador (2008).

142 C-1356, Executive Decree No. 872 (Sept. 5, 2011) at 3.

that must be carried out by the Transitional Judicial Council . . . . What [the President] is doing is to speed up economic resources of the Ministry of Finance to the Judiciary."[143]

56. Claimants also suggest that President Correa *could* take advantage of the "enhanced powers"[144] conferred to him during the emergency, but they do not — and cannot — point to any examples of President Correa's purported power grab during the sixty-day period.

2. Allegations Regarding Pressure On Judges To Hand Down Pro-Government Rulings Are Meritless

57. Claimants make several allegations that members of the Executive have exerted political pressure on judges to decide cases in the government's favor. As explained below in detail, each of these assertions is demonstrably incorrect.

- ***Claimants suggest wrongdoing by the Comptroller General and the Council on Citizen Participation and Social Control (CCPSC) regarding the case of former President Jamil Mahuad pending before the Second Criminal Division of the National Court of Justice*.[145]** In reality, the Comptroller General (as directed by the Ministry of Justice) and the CCPSC intervened in the case of Mr. Mahuad because of concerns that Mr. Mahuad was receiving preferential treatment from the President of the Court, Judge Luis Quiroz — a long-time friend and college roommate of Mr. Mahuad.[146] Thus, when Judge Quiroz lifted the precautionary measures, which included pretrial detention and seizure of assets, and eventually exonerated the former President, officials became concerned and ordered the audit of Court's judges.[147] The CCPSC, as mandated by Article 208 of the Constitution, also intervened in the matter.[148]

- ***Claimants contend that Alexis Mera, President Correa's chief legal advisor, intimidated judges to rule in the State's favor in a lawsuit involving casino workers.*[149]** The workers sued to prevent the State from enforcing the prohibition on gambling, enacted after the 2011 referendum, in order to save their jobs.[150] As the sole support for

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143 R-719, *Chica: No interference by the President with Judiciary*, ECUADORENVIVO.COM (Sept 8, 2011).

144 Claimants' Supplemental Merits Memorial ¶ 173.

145 Claimants' Merits Memorial ¶ 297 at 149.

146 R-720, *CNJ Judges Reject Potential Audits*, VISTAZO (Aug. 18, 2010).

147 R-720, *CNJ Judges Reject Potential Audits*, VISTAZO (Aug. 18, 2010).

148 RLA-164, art. 208, Constitution of Ecuador (2008).

149 Claimants' Supplemental Merits Memorial ¶ 158.

150 C-1324, Casino workers accuse Alexis Mera of pressuring the judge to reject action for protection in *their favor*, ECUADOR INMEDIATO (Mar. 25, 2011).

their claim, Claimants point to a double hearsay press article, which presents opposing counsel's rendition of Mr. Mera's conversation with the judge.[151] In fact, an alleged threat by Mr. Mera would have been wholly unnecessary as the law was clearly in the State's favor — the prohibition on gambling was final and binding after the referendum.[152] Therefore, the judge was obligated to find in the State's favor.

- ***Claimants also assert that the Office of the President has sought to intimidate judges for ruling against the State through a memorandum issued in November 2010.***[153] Claimants misconstrue and misrepresent the contents of the memo. It permits a suit for damages against a judge in a very narrow context — when a judge's injunction or other preventative measure is later reversed by an appellate court, the State must sue for damages if it caused the suspension or delay in the public work project.[154] Indeed, the Republic's "Nacional de Patrocinio" Department – the entity that would handle such cases[155] — has reported that no such case has ever been brought by a state entity.[156] Nor was the memo ever distributed to judges.[157]

3. The Judiciary's Track Record Demonstrates The Independence Of The Ecuadorian Courts

58. Empirical data establish that the courts exercise a great deal of independence from the Government. In fact, the State frequently loses in Ecuadorian courts. Since 2008, in just the provinces of Pichincha, Manabí and Guayas, the State has lost 409 times.[158] Last year alone, the State lost thirty-seven cases against private litigants in those provinces.[159]

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151 See C-1324, Casino workers accuse Alexis Mera of pressuring the judge to reject action for protection in *their favor*, ECUADOR INMEDIATO (Mar. 25, 2011).

152 *See* RLA-164, art. 106, Constitution of Ecuador (2008) ("The people's decision shall require mandatory and immediate enforcement.") In response, the National Assembly recently enacted a law that would provide casino workers with unemployment benefits. *See* R-799, Organic Law for Advocacy Work, Oficio No. T.6465-SNJ-12-1121, Sept. 25, 2012.

153 Claimants' Supplemental Merits Memorial ¶ 158 (citing C-1323, Letter from Legal Counsel to the Office of the President of the Republic, Official Circular No. T1.C1-SNJ-10-1689, Nov. 18, 2010).

154 See C-1323, Letter from Legal Counsel to the Office of the President of the Republic, Official Circular No. T1.C1-SNJ-10-1689, Nov. 18, 2010.

155 R-721, art.17, Organic Functional Regulation of the Attorney General Office, Official Register Supplement 228 (Jan. 16, 2012).

156 R-722, Memorandum No. 044-DNPE-02-2013, Office of the Attorney General Feb. 14, 2013).

157 *See* C-1323, , Letter from Legal Counsel to the Office of the President of the Republic, Official Circular No. T1.C1-SNJ-10-1689, Nov. 18, 2010 (memo is addressed to "MINISTERS AND SECRETARIES OF STATE").

158 *See* R-724, List of State Losses in Pichincha, Manabí and Guayas Provinces, Office of the Attorney General (February 2013).

159 *See id*.

59. Instances abound in which the Republic's courts have ruled *against* the Government and *against* positions advocated by the President of Ecuador — often *in favor* of a foreign or multinational entity. In June 2008, the Supreme Court annulled a criminal investigation by Ecuadorian prosecutors against executives of U.S. oil company City Oriente because it violated provisional measures issued by an ICSID Tribunal in favor of City Oriente.[160] In 2010, Ecuador's Internal Revenue Service lost multimillion-dollar cases to two foreign oil companies before Ecuadorian courts, one of which (Repsol) had international arbitral claims pending against the Republic at the time.[161]

60. In other cases, the Ecuadorian courts have ruled directly against President Correa. In 2009, the Provincial Court of Pichincha (Quito) issued a ruling adverse to the President himself in a case involving the Bank of Pichincha. The Court reduced a damages award for the President, leaving him with just 6 percent of the original amount.[162]

4. Claimants Contentions Regarding The *El Universo* Case Are Misleading And False

61. Claimants contend that the 60-day state of emergency was a "cover up" for President Correa's "interference in the El Universo case" and point to the case as an example of the Republic's alleged effort to stifle the press.[163] Conveniently failing to cite the article at issue, Claimants mischaracterize the dispute as revolving merely around *El Universo* columnist Emilio

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160 R-725, Order Regarding Criminal Prosecution of Public Property against James Patrick Ford, et al., Supreme Court of Justice, Second Criminal Division (Jun. 9, 2008).

161 R-726, Official Communication from Ecuador's Internal Revenue Service (May 31, 2011) (listing all national tax cases lost in previous three years, including against Andes Petroleum, a Chinese company, and Reppsol, a Spanish company).

162 R-731, Decision in *Rafael Correa Delgado v. Antonio Acosta Espinosa,* Case No. 2009-0056, Provincial Court of Pichincha, Second Chamber for Civil, Commercial, Rental, and Residual Matters (Jul. 27, 2009).

163 Claimants' Supplemental Merits Memorial ¶¶ 167-71.

Palacio's assertions that President Correa is a "dictator."[164] Palacio in fact accused President Correa of ordering troops to fire "without warning at a hospital full of civilians and innocent people" during a police uprising in September 2011 that resulted in the death of four security officers.[165] In support, Palacio proffered *no* evidence whatsoever. These accusations of fact, if made knowing they are false, would constitute libel in any part of the world. Even public officials have the right to be free from libel.

62. President Correa fervently denied the allegations and understandably sought corrective, legal action. In his capacity as a citizen, President Correa filed a criminal suit, as he was entitled to do, for "slanderous libel" — "false imputation of a crime"[166] — against Palacio, three *El Universo* executives (brothers Carlos, César, and Nicolás Pérez), and El Universo C.A., the corporate owner of the paper.[167]

63. Claimants suggest that President Correa was motivated by a desire to eliminate his critics and shut down the newspaper.[168] In fact, the President "repeatedly said he would drop the case if the newspaper would admit it was wrong."[169] *El Universo* and Palacio refused to retract its statement and instead published another editorial reaffirming its accusation, again with no offer of proof.[170]

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164 *Id*. ¶ 167.

165 R-800, Emilio Palacio, *No more lies*, EL UNIVERSO (Feb. 6, 2011); *see also* R-801, William Neuman, *President of Ecuador to Pardon Four in Libel Case*, THE NEW YORK TIMES (Feb. 27. 2012).

166 RLA-367, art. 489, Ecuador Penal Code, Official Register Supplement 147 (Jan. 22, 1971) ("Slanderous libel consists of the false imputation of a crime, and non-slanderous libel consists of any other statement to discredit, dishonor or disparage another person, or any action carried out with the same purpose.").

167 R-761, *El Universo* Complaint, filed on March 22, 2011, Provincial Court of Justice of Guayas at 1-2.

168 Claimants' Supplemental Merits Memorial ¶ 167.

169 C-1353, *Judge in Ecuador libel case flees country*, MIAMI HERALD (Feb. 23, 2012).

170 R-802, *El Universo Newspaper Publishes its Position on the 30S*, ECUADORTIMES.NET (Jan. 19, 2012).

64. After obtaining an unfavorable ruling,[171] the defendants appealed to the Court of Justice of Guayas; the decision was affirmed in September 2011.[172] President Correa nonetheless "pardoned" the defendants because he "never wanted to put anyone in jail or receive 20 cents. . . . [He] just wanted to prove that they were lying."[173] Using a procedural device available to all claimants in "private" criminal actions — "remisión de penas" — and not any presidential power, President Correa remitted the sentence.[174]

65. The *El Universo* decision has many supporters. In fact, several prominent publications and press organizations have reproached the *El Universo* author and publishers.

- The largest press freedom organization in the world, **Reporters Without Borders**, announced: "This outcome [of the *El Universo* decision] will hopefully also encourage certain media to measure their words before publishing or broadcasting. They were partly to blame and we have said so from the start. Such charged words as 'dictator' and 'crime against humanity' cannot be uttered lightly. Real critical debate should prevail over insults, abuse and intransigence."[175]

- An ***Economist*** article was equally critical, confirming that the *El Universo* "article was irresponsible and probably libellous. Mr. Correa is right that Ecuador's privately owned media have many faults, not least that some have fallen into the trap of acting as a substitute for a weak political opposition."[176]

- A ***New York Times*** article also concluded that "[t]he column offered no evidence to support the accusation."[177]

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171 *See* R-762, El Universo Decision, Criminal Court of Guayas, Case No. 457-2011, July 20, 2011.

172 *See* R-760, El Universo Appellate Decision, Court of Justice of Guayas, September 23, 2011.

173 C-1353, *Judge in Ecuador libel case flees country*, MIAMI HERALD (Feb. 23, 2012).

174 *See* RLA-367, art. 98, Ecuador Penal Code, Official Register Supplement 147 (Jan. 22, 1971) ("The criminal action is extinguished by amnesty*, or by release of the injured party in crimes prosecuted by private action*, or by statute of limitations"); R-798, *'Forgiveness without forgetting' from Rafael to this Journal, Calderon and Zurita*, EL UNIVERSO (Feb. 28. 2012).

175 R-717, Will President Correa's Pardon Erase A Year of Controversy And Polarization, Reporters Without Borders (Feb. 27, 2012).

176 R-723, *The media and the mouth*, THE ECONOMIST (Mar. 3, 2012).

177 R-728, William Neuman, *In Battle With Media, a New Tactic in Ecuador,* THE NEW YORK TIMES (Mar. 12, 2012).

66. Ecuadorians have also recognized the egregious nature of the allegations. Ecuador's Ambassador to Colombia, Raúl Vallejo Corral, stated: "What Emilio Palacio and El Universo wrote was not an opinion but a serious accusation, including crimes against humanity. Having repeatedly refused to correct their error, and due to the gravity of the accusations, this had to go before the legal system."[178]

67. President Correa has often spoken out against the elements of the press, which serve as the mouthpiece for the leading opposition to the President's party, frequently advancing the political views of the right-wing that controls it.[179] But President Correa is not the first politician, and surely will not be the last, to quarrel with the media. A *New York Times* article compared President Correa's sentiments to former New York City mayor's contempt for the media: "At times [President Correa] can sound like a left-wing version of Rudolph W. Giuliani, recalling the former New York mayor's sharp tongue and disdain for the press."[180] Such conflicts with the media, whether in the United States or in Ecuador, demonstrate the strength of the press, whose ample freedoms give it the confidence to challenge high ranking government officials.[181]

68. Claimants also allege that the *El Universo* decision was ghostwritten by the President's attorneys, but they fail to provide any evidence of these allegations. Instead, they

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178 C-1353, *Judge in Ecuador libel case flees country*, MIAMI HERALD (Feb. 23, 2012).

179 R-728, William Neuman, *In Battle With Media, a New Tactic in Ecuador,* THE NEW YORK TIMES (Mar. 12, 2012) ("Many Ecuadoreans agree with Mr. Correa that the media has long reflected the interests of the country's leading families." And "many journalists also acknowledge that the country's press barons long used media properties to further their business and political interests.").

180 *Id*.

181 Claimants allege that "President Correa announced a bill to regulate the media that 'sparked outrage from journalists.'" *See* Claimants' Interim Measures Request ¶ 48 at 32 (citing C-149, *Ecuador's Correa Supports Bill to Regulate Media*, REUTERS (Dec. 1, 2009)). Although the National Assembly is currently considering three bills to amend the Communications Law, none of the pending bills was submitted by President Correa. R-758, National Assembly Website, Status of Pending Bills.

self-servingly rely on *El Universo's* coverage of its own case,[182] completely ignoring all official documents, including the findings of an exhaustive investigation initiated at *El Universo's* request after it filed criminal charges.[183] The inquiry — which was led by the Provincial Prosecutor of Guayas and centered around Judge Paredes, the author of the *El Universo* decision — involved countless interviews, forensic testing of hard drives, printers, and pin drives (by third parties), and an analysis of the written decision.[184] According to the prosecutor's report, 132 out of 156 pages of the decision (85 percent) consisted of complaint allegations, the defendants' answers to the complaint and other pleadings that had been scanned and then cut and pasted by the Judge.[185] As a result, preparing the judgment was far from a "physical impossibility," as Claimants contend.[186] Interviews with the Judge's clerks revealed that both assisted the Judge in chambers until 4 am the night before he issued the decision.[187] Forensic testing proved that the decision was indeed printed from the Judge's printer.[188]

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182 See Claimants' Supplemental Merits Memorial ¶ 167-69 (citing exhibits C-1060, Paredes' "Flash" Judgment Could Not Have Been Written and Read in 1 Day, EL UNIVERSO (Aug. 21, 2011); C-1097, This daily sues Judge Paredes for "misrepresentation", EL UNIVERSO (Aug. 30, 2011); C-1064, Judgment "copied" from external device to Court's system, according toreport**,** EL UNIVERSO (Sept. 7, 2011); C-1352, Testimony given by former judge Monica Encalada to Antonio Gagliardo,provincial prosecuting attorney of Guayas, EL UNIVERSO (Feb. 14, 2012)).

183 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012.

184 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012; R-803, *Judge Paredes did not attend the hearing at Guayas District Attorney*, ECUADORTIMES.COM (Sept 26, 2011); R-804, *Prosecutor Allows Expert's Report on Hard Disk Drive Used by Judge Paredes*, ECUADORTIMES.COM (Oct. 26, 2011).

185 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 28, 31, 49, 73; *see also* R-762, El Universo Decision, Criminal Court of Guayas, Case No.457-2011, July 20, 2011 (The decision contains 132 pages of quoted text).

186 Claimants' Supplemental Merits Memorial ¶ 167.

187 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 16-17, 19.

188 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 63, 73.

69. Claimants' contention that "[f]orensic evidence . . . proved that the judgment was in fact prepared by someone other than the presiding Judge" is patently false.[189] The cited lay press articles make no such assertions; instead the articles discuss the type of program on which the decision was written (an unlicensed one), and not by whom it was written.[190] Nonetheless, the Prosecutor's investigation concluded that the decision was in fact written by Judge Paredes and *El Universo's* criminal charges against Judge Paredes were dismissed.[191] Additionally, Claimants assert that "[t]he judge presiding over the *El Universo* case was supposedly unavailable for the final hearing, therefore a temporary judge, Juan Paredes was appointed the day before the [July 19, 2011 final] hearing."[192] Claimants suggest that Judge Paredes spent only "33 hours" on the case prior to writing his opinion.[193] This is erroneous. Indeed, Judge Paredes was the presiding judge of the case from May 16 to June 16, 2011 – an *entire month*,[194] and was temporarily removed after *El Universo* attempted to recuse him for allegedly not considering an *El Universo* submission.[195] When the grounds for recusal were determined to be meritless, Judge

189 Claimants' Supplemental Merits Memorial ¶ 168.

190 *See* C-1063, Defense of El Universo newspaper presents results of special analysis of judge's computer, ECAUDORINMEDIATO.COM (Sept. 6, 2011); C-1064, Judgment "copied" from external device to Court's system, according to report**,** EL UNIVERSO (Sept. 7, 2011).

191 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 31, 73.

192 Claimants' Supplemental Merits Memorial ¶ 167. Claimants fail to include a cite for this assertion.

193 Claimants' Supplemental Merits Memorial ¶ 167.

194 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 24.

195 *See* R-823, Judge Paredes' Decree of June 16, 2011; *see* also R-825, Docket Report, Paredes Recusal Proceeding, Case No. 09257-2011-0862.

In fact, the *El Universo* defendants attempted to recuse three judges during the proceedings – Judge Juan Paredes, Judge Sucre Garcés, Mónica Encalada. *See* R-825, Docket Report, Paredes Recusal Proceeding, Case No. 09257-2011-0862, R-826, Docket Report, Sucre Garcés Recusal Proceeding, Case No. 09254-2011-0928; R-827, Docket Report, Encalada Recusal Proceeding, Case No. 09262-2011-0947.

Paredes was immediately reinstated as presiding judge in time for the final hearing.[196] Therefore, Judge Paredes was familiar with the case and easily able to draft twenty-four pages of original work (plus 132 pages of copy-pasted materials) within a short period of time.

70. Claimants also allege that President Correa's attorneys attempted to bribe Judge Monica Encalada – the judge that temporarily presided over the case during Judge Paredes's absence — but the investigation found *no* evidence to support this claim.[197] Although Claimants contend that Judge Encalada left the country for her safety, she was present for the trial against Paredes, before its ultimate dismissal.[198] While President Correa has since personally guaranteed Judge Encalada's safety,[199] she still has not presented any evidence of the alleged bribery. Although her whereabouts are unknown, there is no evidence that she is *not* still residing in Ecuador.

D. Rather Than Offer Any Legal Analysis, Claimants Cite To Baseless And Irrelevant Lay Commentary Found In The Press To Attack The Republic's Judiciary

71. An analysis of the 2008 Constitution and its implementation hardly reveals the power grab by President Correa that Claimants seek to portray. Rather than acknowledge the substance of the new Constitution or provide their own legal analysis of it or of any other issue relevant to the Judiciary, Claimants pepper their timeline with intemperate and ultimately baseless opinions uttered in the press. Again, Claimants use the freedoms afforded to the press

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196 *See* R-825, Docket Report, Paredes Recusal Proceeding, Case No. 09257-2011-0862; *see also* R-824, Judge Encalada's Order Reinstating Judge Paredes, July 18, 2011.

197 *See* R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 49.

198 R-759, Resolution by the Provincial Prosecutor of Guayas, Preliminary Investigation Case No. 067-2011-6, July 23, 2012 at 46.

199 R-805, *Correa Reassures Former Judge Monica Encalada to "Tell Everything She Knows",* ECUADORTIMES.NET (Apr. 21, 2012). ("I want to say personally that I give all the guarantees, police protection, if you want to go to the witness protection program, whatever you want, etc., to denounce and present the evidence you have without fear so we can finish this case at once.").

— and to all the President's political adversaries — by elevating their criticisms to alleged fact. Of course, any party can pay for a "clipping service" to gather articles that support or oppose a position, a person or a political party. In the aggregate — and by omitting reference to the scores of contrary opinions — use of the "clipping service" distorts the whole.

72. Here, Claimants' reliance on the unsupported hyperbole is ultimately fatal to their attack, especially considering that Claimants frequently fail to disclose material facts referenced within the cited articles themselves.

- **Claimants' assertion:** "January 8, 2008: The President of the Supreme Court, Roberto Gómez, stated that '[our] country is not living under the rule of law.'"[200]

  Response: The cited press reports contain this statement, but it is taken out of context. The full quotation attributed to the then-President of the Supreme Court was: "Ecuador is not living under the rule of law, but he expects it will recover when the Constituent Assembly approves the new Constitution."[201] Moreover, in the very same press report, Mr. Mera is cited as having "acknowledged the full authority of the Constituent Assembly, by virtue of the fact that they were granted this authority by the voters which, he says, is a legal phenomenon."[202] In a related press report cited by Claimants, Mr. Mera confirmed that the Supreme Court enjoyed absolute independence from the Constituent Assembly. Mr. Mera is quoted as saying that the Constituent Assembly "exists by popular mandate" and notwithstanding its broad mandate, "the Supreme Court is completely independent of the Constituent Assembly: 'nobody from the Assembly has asked us to act in any specific way.'"[203]

- **Claimants' assertion:** "August 2008: Legal scholars noted that President Correa had consolidated power in himself: 'The most important characteristic of the Ecuadorian political process during the presidency of Rafael Correa is the concentration of power in the hands of the executive. This consolidation is the result of both the slow erosion of Ecuador's political institutions and Correa's strong personal popularity.'"[204]

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200 Claimants' Interim Measures Request ¶ 48 at 27 (quoting C-111, *Gómez Mera:"The country is not living under the rule of law*," EL UNIVERSO (Feb. 1, 2008); C-112, *Roberto Gómez Mera: We are not living in a state that is completely under the rule of law*," ECUADOR INMEDIATO (Feb. 11, 2008)).

201 C-111, *Gómez Mera:"The country is not living under the rule of law*," EL UNIVERSO (Feb. 1, 2008).

202 *Id*.

203 C-112, *Roberto Gómez Mera: We are not living in a state that is completely under the rule of law*," ECUADOR INMEDIATO (Feb. 11, 2008).

204 Claimants' Interim Measures Request ¶ 48 at 27 (quoting C-115, Adrian Bonilla & Cesar Montufar, *Inter-American Dialogue, Two Perspectives on Ecuador: Rafael Correa's Political Project* (Aug. 2008) at 1).

Response: This is not the opinion of "[l]egal scholars," but rather the opinion of Adrian Bonilla, a sociologist with no legal background, whose perspective was offered in a working paper for the Inter-American dialogue "on the political origins and outlook of the Rafael Correa government, with a focus on its foreign policy priorities, including relations with the United States."[205] The working paper was published in August 2008 when the new Constitution was in still in draft form. Mr. Bonilla neither identified, cited, nor analyzed a single provision of the draft Constitution, or any other legal provision, to support his statement, so there is no identifiable legal basis for his subjective opinion.

- **Claimants' assertion:** "May 14, 2009: Dr. Hernan Salgado, a former justice of Ecuador's Supreme Court and the former President of the Inter-American Court of Human Rights, stated in an interview that in December 2004 the judicial institutions in Ecuador came 'tumbling down with the "Pichi" Court.' He stated further that repeated changes to the judiciary have destabilized it, and that the latest constitutional changes have politicized the judiciary. When asked directly: 'Do you think politics is again interfering in the judiciary?' He answered: 'Yes.' Dr. Salgado noted that he attributes this interference to a lack of independence and impartiality of the judges, and stated that he does not see any solution to this problem in the short term."[206]

  Response: The "Pichi Court" was removed a few months after it was established, and was replaced by a universally praised Supreme Court. But Dr. Salgado was never asked about the Republic's efforts to rebuild that Court, nor was he asked about the new selection process for Supreme Court Justices.[207] And while he raises concerns about the independence of the courts, the fact is that examples abound in which judges across Ecuador have found against its own Government. Indeed, as mentioned previously, Courts have ruled directly against President Correa and Claimants themselves have enjoyed the fruits of an independent judiciary.[208]

- **Claimants' assertion:** "June 15, 2009: Three former Presidents of Ecuador issued a joint press release stating that President Correa's administration is seeking to replace the rule of law with an authoritarian regime: 'Like many other Ecuadorians, we former Presidents signing this statement are witnesses to the severe deterioration of the democratic institutions that have suffered under the administration of Rafael Correa.' They noted with particular concern the control the State exercises over newspaper and television stations, the intimidation of reporters and the independent media, and the daily manipulation of public opinion."[209]

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205 *See* C-115, Adrian Bonilla & Cesar Montufar, *Inter-American Dialogue, Two Perspectives on Ecuador: Rafael Correa's Political Project* (Aug. 2008) at 2.

206 Claimants' Interim Measures Request ¶ 48 at 29 (quoting C-128, *The Judiciary has been De-Institutionalized*, EL COMERCIO (May 14, 2009)).

207 *See* C-128, *The Judiciary has been De-Institutionalized*, EL COMERCIO (May 14, 2009).

208 *See supra* Section I.E; *infra* Section II.C.3.

209 Claimants' Interim Measures Request ¶ 48 at 29-30 (quoting C-130, *Statement from Former Presidents Sixto Durán Ballén, Osvaldo Hurtado Larrea and Gustavo Noboa Bejarano,* EL HOY (June 16, 2009); C-131, *Three*

Response: The cited press statement of three former Presidents of Ecuador provides only one specific basis for its assertion that "President Correa's administration is seeking to replace the rule of law with an authoritarian regime" — "the case filed by the National Council of Radio and Television Broadcasting" ("CONARTEL") against Teleamazonas.[210] Notably, all three of the former Presidents are political rivals and critics of President Correa. Indeed, former President Hurtado, a Christian-Democrat, has been publicly critical of President Correa since as early as April 2007.[211] Both Messrs. Durán Ballén and Noboa have also been accused of wrongdoing by the Correa Administration related to debt restructuring negotiations during their respective administrations.[212]

- **Claimants' assertion: "**July 10, 2009: Former Supreme Court justice Mauro Terán stated that the Legal Counsel to the President, Alexis Mera, exerted influence over the Supreme Court: when a 'judgment was rendered against [Mera's client], he retaliated against the Supreme Court of Justice by pulling strings, especially at the Constituent Assembly, in order to dismantle the Judiciary and create the Court of his dreams, the one they now have.' He stated further, 'Mr. Mera is now surely exerting pressure on that new Court,' which he affirmed 'is without doubt easily influenced because of the manner in which it was convened, without a merit selection or a review of the qualifications of its members.'"[213]

  Response: The article excerpt reflects only hearsay and speculation — former Supreme Court Magistrate Terán admits that he had never met nor spoken with Mr. Mera, currently counsel to the President, and "was not aware of [Mr. Mera's] true intentions."[214] Mr. Terán's comments are also irrelevant to the issues of judicial independence and freedom from Executive influence. Mr. Mera's alleged contacts with Magistrates of the former Supreme Court occurred when Mr. Terán was on the bench and Mr. Mera was

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former Ecuadorian Presidents Label the Correa Administration a "Dictatorship," ECUADOR INMEDIATO (June 15, 2009)).

210 As Claimants point out, President Correa has been critical of Teleamazonas, a major television network. *See* Claimants' Interim Measures Request ¶ 48 at 33. In December 2009, the network was shut down for three days. This sanction was not a the result of the President's personal vendetta. In fact, the sanction was imposed by the Superintendent of Telecommunications, not President Correa. Nonetheless, Teleamazonas challenged the administrative sanction and prevailed on appeal in the Provincial Court of Justice of Pichincha, which found that the Superintendent of Telecommunications had violated Teleamazonas "constitutional rights to due process, defense, effective representation, liberty of thought, . . . and the presumption of innocence." R-806, Decision of the First Division of the Criminal Provincial Court of Justice of Pichincha in Teleamazonas Appeal (Feb. 3, 2010) at 32-33.

Claimants also point out that the Judicial Council fined the Teleamazonas judges allegedly for ruling in the television network's favor. In reality, and according to Claimants' cited article, the fine was a result of the judges "having acted without jurisdiction," and it was a mere ten percent of one month's salary, or US$340. Alvarez First Expert Rpt., Ex. 125, *Fine for judges who 'harmed the State*,*'* EL UNIVERSO (Feb. 18, 2010).

211 R-754, *Oswaldo Hurtado: Correa Wants to Accumulate Powers*, EL UNIVERSO (Apr. 2, 2007).

212 R-755, *Former Ecuador Leaders Deny Profit from Bond Deals*, AP NEWS (Nov. 21, 2008).

213 Claimants' Interim Measures Request ¶ 48 at 30 (quoting C-133, *Terán: "Mera is Pressing the Court,"* EL HOY (July 10, 2009)).

214 C-133, *Terán: "Mera is Pressing the Court,"* EL HOY (July 10, 2009).

still in private practice, and are not alleged to have been undertaken on behalf of the Executive or any other branch of Government, but rather presumably in furtherance of Mr. Mera's private party cases. Moreover, in the Agrícola Rancho Blanco case, the one concrete example cited by Mr. Terán in which he claims that Mr. Mera allegedly exerted pressure on the Court, Mr. Mera lost the case, and none of Mr. Mera's alleged interventions with the Constituent Assembly thereafter was able to reverse that negative outcome.[215] Additionally, Mr. Mera has publicly and unequivocally denied Mr. Terán's unfounded intimations of impropriety.[216]

- **Claimants' assertion: "**September 4, 2009: Ecuadorian jurist Antonio Rodriguez stated in an interview that 'Ecuador is living under a dictatorship.' He stated that all power of the government is consolidated in the Executive Branch.[217]

  Response: Claimants cite Mr. Rodriguez's opinion as that of an "Ecuadorian jurist," but it is impossible to identify the legal basis or assess the validity of his reported opinions since Mr. Rodriguez, while purporting to pronounce various violations of both the 1998 and 2008 Constitutions, does not cite or analyze a single constitutional provision to support his hyperbole.

- **Claimants' assertion:** "November 2009: One commentator noted that 'unfortunately a kind of reverential fear currently exists for the President of the Republic in all State levels and entities, which prevents the government officials and employees from acting with impartiality and from guaranteeing the citizens' rights.'"[218]

  Response: The cited press report, written by *El Universo* columnist, Orlando Alcivar Santos, adduces no probative examples of lack of impartiality or failure to guarantee citizens' rights. In fact, the article references the Guayaquil Civic Board case — a prime example of government officials acting with objectivity, even in opposition to the President.[219]

- **Claimants' assertion:** "December 2009: Prosecutor General Washington Pesántez 'reiterated his request to restructure the administration of justice' after declaring that certain judicial decisions were indefensible 'because they are damaging to the State.'"[220]

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215 *See* C-133, *Terán: "Mera is Pressing the Court,"* EL HOY (July 10, 2009).

216 *See, e.g.,* R-756, *Alexis Mera Answers Mauro Terán*, EL COMERCIO (July 11, 2009); see also R-757, *Alexis Mera Denies Any Influence on CNJ and Called Mauro Terán a "Liar*," EL HOY (July 10, 2009).

217 Claimants' Interim Measures Request ¶ 48 at 31 (quoting C-138, *We are Living Under a Dictatorship*, Interview of Jurist Antonio Rodríguez, ECUADOR INMEDIATO (Sept. 4, 2009)).

218 Claimants' Interim Measures Request ¶ 48 at 32.

219 *See* R-727, *Nebot Rejects the Crossing of the Bridge by Interprovincial Buses*, EL UNIVERSO (Jun. 8, 2007) (The mayor of Guayaquil and other civic leaders criticized the President for ordering the Ministry of Transportation and Public Works to permit interprovincial transport buses to use the National Unity Bridge and the mayor of Guayaquil rejected the President's decision.).

220 Claimants' Interim Measures Request ¶ 48 at 32.

Response: The cited press article depicts the Prosecutor General's disagreement with several National Court judgments, but does not provide evidence that the "irregular[ities]" — if they even existed — were a result of impropriety by the judges. Moreover, it is unclear how Claimants' mention of the Prosecutor General's ambiguous request to restructure the administration of justice is related to an alleged lack of independence in the judiciary.[221]

- **Claimants' assertion:** "December 2, 2009: The Civic Board of Guayaquil filed a lawsuit against the ROE with the Inter-American Court of Human Rights for the 'unconstitutional situation' under which the country is living as a consequence of the acts performed by the Constituent Assembly since its establishment. The Board's president explained that 'there is no law' in Ecuador, and that 'everything arising from the self-extension of its term, the laws and statutes are illegal; they have no legal support and constitute a flagrant violation of Articles 8, 25, 12 and 13 of the Inter-American Commission on Human Rights.'"[222]

  Response: Although it does appear that the Civic Board did file a complaint with the IACHR over two years ago,[223] it is likely to have been abandoned as there is no record of any proceedings having taken place in the Court or at the Commission. Moreover the Constituent Assembly was elected by the Ecuadorian people in free and transparent elections monitored by the international community.[224]

- **Claimants' assertion:** "December 12, 2009: One commentator noted that 'the separation of the State functions is not respected, to such an extent that the highest authority interferes with justice . . .. The pressure against the judges cannot be more grotesque, particularly because it comes from the highest authority of the nation . . ..'"[225]

  Response: The newspaper editorial reflects the lay opinion of a commentator regarding allegations that Health Minister Caroline Chang embezzled funds. The above quote was in the context of an investigation of these allegations by the Comptroller General.[226] The "grotesque" interference that the editorial points to is the President Correa's defense of the Minister described as "heated" in Claimants' other cited editorial.[227] But President Correa's public proclamation of Ms. Chang's innocence can hardly be considered interference. Politicians often speak out in defense of (or in the alternative, to attack) officials in the face of public scrutiny. And as Claimants' cited press report provides, the

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221 See C-151, General Prosecuting Attorney Demands Changes in Court; Judges Repudiate This, EL UNIVERSO (Dec. 21, 2009).

222 Claimants' Interim Measures Request ¶ 48 at 32 (citing C-150, *Civic Board sues the State in U.S.A. court*, EL UNIVERSO (Dec. 2, 2009)).

223 *See* C-150, *Civic Board sues the State in U.S.A. court*, EL UNIVERSO (Dec. 2, 2009).

224 *See supra* Section I.B.

225 Claimants' Interim Measures Request ¶ 48 at 33.

226 C-152, *Interference with Justice*, EL HOY (Dec. 16, 2009).

227 C-152, *Interference with Justice*, EL HOY (Dec. 16, 2009); C-153, *Undue Interference*, EL EXPRESO (Dec. 16, 2009).

charges against the Health Minister were in fact "heard in . . . judicial proceedings."[228] Therefore, President Correa did not in any way prevent the charges from being brought or otherwise interfere in the investigation or proceedings that followed.

- **Claimants' assertion:** "February 12, 2010: Prominent Ecuadorian lawyer and former Dean of the law school at Pontifical Catholic University in Ecuador, Juan Falconi, announced that '[j]ustice is a public service that has become cynically corrupted, delayed, and tainted by permanent scandals.' Citing various recent cases that were influenced by political interests, Mr. Falconi stated that 'this country is no man's land, where no laws, law schools, or lawyers exist.'"[229]

  Response: Juan Falconi's criticism of the way in which a handful of cases were adjudicated is devoid of any evidence of undue influence. Regardless of his personal opinions on these cases, today Mr. Falconi certainly supports the new judicial reforms as he recently took part in the merit-based selection process to become a judge on the National Court of Justice.[230] Although he was out of the running by December 2011, his participation denotes a basic confidence in the impartiality of the Ecuadorian judicial system.[231]

- **Claimants' assertion:** "February 17, 2010: Carlos Estarellas, chairman of the special committee that selected the justices of the Supreme Court in 2005, declared that '[t]he great disgrace of the court system is that political interests can't resign themselves to not interfere with the courts. That has been a fatal sign. In Ecuador, I don't see the principle of independence enshrined in our Constitution being followed. The current constitution has minimized the power of the Court; that is evident in its rulings. Political influences have turned out to be ruinous.'[232] On the same day, Fernando Casares, former Justice of the Supreme Court, wrote that '[s]ince 2008, the administration of justice has entered an institutional crisis. The reason for this is that there is a marked trend whereby the Executive Branch is taking over all sorts of duties, and the Judiciary has been unable to escape this trend.'"[233]

  Response: The cited opinions are culled from two editorials, neither of which cite or analyze either legal or constitutional provisions to support their conclusions which are erroneous as demonstrated by the analysis of the new Constitution.[234]

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228 C-153, *Undue Interference*, EL EXPRESO (Dec. 16, 2009).

229 Claimants' Interim Measures Request ¶ 48 at 34.

230 R-732, *Falconi, Out of the Contest to be Judge*, EL COMERCIO (Dec. 30, 2011).

231 *Id*.

232 Claimants' Interim Measures Request ¶ 48 at 34 (quoting C-161, Carlos Estarellas, *The Power Still Hasn't Resigned Itself*, EL COMERCIO (Feb. 17, 2010)).

233 Claimants' Interim Measures Request ¶ 48 at 34 (C-161, Fernando Casares, *Justice Is in Crisis*, EL COMERCIO (Feb. 17, 2010)).

234 *See infra* Section II.B.

- **Claimants' assertion:** "February 25, 2010: Detailing a series of Constitutional violations in recent politically-tainted cases, an editorial in *El Comercio* asserted: 'The interests of the State prevail over the people's rights and guarantees. There is no one who will win any case against the government.'"[235]

  Response: This *El Comercio* quote is false — many parties have prevailed against the Ecuadorian Government.[236] Additionally, as the Republic has detailed in its Counter-Memorial, Claimants have had their own fair share of successes against the State.[237]

- **Claimants' assertion**: "March 15, 2010: The vice-president of the Pichincha Bar Association stated that: 'the insults and accusations, oftentimes unfounded, [against judges] lead to two objective and real situations: first that the judge be weaker, more submissive, and true to the political interests of the current administration, and also, to contribute to an ambiance of suspicion in the country surrounding the administration of justice.'"[238]

  Response: The opinion of the vice-president of the Pichincha Bar Association, Alomía José Rodrìguez, found in Claimants' lay press article is entirely devoid of any evidence or legal analysis.[239] Mr. Rodrìguez was ostensibly referring to current challenges *potentially* leading to *future* political influence — "[Mr. Rodrìguez] do[es] not rule out the idea that this is the beginning of the administration of justice being subjected to political interests."[240] Indeed, Mr. Rodrìguez fails to provide even one example of his assertions because none exists.

- **Claimants' assertion:** "July 9, 2010: An editorial in Hoy stated: '[j]ustice in Ecuador is going through one of the worst moments in its history in Ecuador, in contrast with the announcements of revolution and positive changes which this Government promotes so strongly.'"[241]

  Response: This one-page editorial provides no evidence of its assertions whatsoever.[242] It makes generic, sweeping claims without citing to a single example. As lay opinion completely devoid of any legal analysis, it has no probative value at all.

- **Claimants' assertion:** "July 16, 2010: The UN Special Rapporteur on extrajudicial executions stated that Ecuador has 'a prosecution service which seems more concerned

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235 Claimants' Interim Measures Request ¶ 48 at 34.

236 *See infra* Section II.C.3.

237 *See infra* Section I.E.

238 Claimants' Merits Memorial ¶ 298 at 149.

239 *See* Coronel First Expert Rpt., Ex. 238, *There is concern over attacks on justice*, LA HORA (Mar 15, 2010).

240 *See id*.

241 Claimants' Merits Memorial ¶ 298 at 150.

242 *See* C-582, *Collapse of the Legal System*, HOY (July 9, 2010).

with public relations than with convicting major criminals, and a judicial system which is almost universally condemned for its inefficiency and mismanagement.'"[243]

Response: The UN report on extrajudicial executions in Ecuador, which Claimants' cited press report refers to, recognizes and praises the Republic's judicial reform: "The Government of Ecuador, under President Rafael Correa, has undertaken major reforms to improve human rights protection, including constitutional renewal, prison reform, an increase in justice sector and witness-protection spending and social and economic initiatives to improve the lives of disadvantaged citizens. Many ministers have a strong commitment to human rights."[244]

- **Claimants' assertion**: "In November 2010, the President of Superior Court of Guayas, Dr. María Leonor Jiménez,…stat[ed] 'I have never seen the independence of the Judiciary reduced to such truly alarming levels as now'…[and] there 'is no judge who is not afraid.'"[245]

  Response: Dr. Maria Leonor Jimenez's personal clashes with the Judiciary Council and her political opposition to the Government significantly diminishes her credibility as a fair critic of the Judiciary Council and the state of the Judiciary. Dr. Jimenez is the mother of one of President Correa's greatest opponents – Cynthia Viteri.[246] Ms. Viteri ran against President Correa in the 2006 election as the Social Christian Party Candidate.[247] Therefore, it comes as no surprise that Dr. Jimenez disapproves of her and her daughter's political opponents and their initiatives. Furthermore, Dr. Jimenez was at the center of a scandal at the Courts of Guayas. While serving as President of the Provincial Court of Guayas, Dr. Jimenez criticized Judge Juan Paredes, the judge presiding over the *El Universo* case, calling him "un juez golondrina," a term for a corrupt judge, and publicly supported the *El Universo* defendants.[248] The TJC investigated the matter and determined that Dr. Jimenez's actions violated Article 108 of the Organic Code of the Judiciary, which prohibits judges from "assaulting orally or in writing…or deed to their hierarchical superior or inferior, colleagues or service users."[249] She was subsequently dismissed.[250]

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243 Claimants' Merits Memorial ¶ 298 at 150.

244 R-733, Philip Alston, *Report of the Special Rapportuer on extrajudicial, summary or arbitrary executions*, U.N. Human Rights Council, (May 9, 2011) at 1.

245 Claimants' Supplemental Merits Memorial ¶ 157 (citing C-1332, *According to Jiménez, the Judiciary Council should disappear*, EXPRESO (Oct. 10, 2010))

246 R-734, *Interview With Ecuadorian Presidential Candidate Cynthia Viteri*, Americas Society/Council of the Americas (Jun. 30, 2006).

247 *Id*.

248 R-735, María Leonor Jiménez de Viteri, *They Are Decisions of the "Golondrinas" Judges*, EL HOY (July 28, 2011).

249 R-770, Decision of the Judicial Council, No. OF-532-UCD-011-PM (0012-2011) (Nov. 22, 2011) at 12-13, 15; RLA-303, art. 108(1), Organic Code of the Judiciary ("art. 108.- SERIOUS INFRACTIONS.- Officers of the Judiciary may be sanctioned with suspension for the following infractions: 1. Outraging verbally or in writing,

73. Claimants surely do not appreciate the irony of alleging the consolidated control by the current President while simultaneously culling, and offering as evidence, articles and quotes reflecting the absolute freedom to criticize this Government.

E. Other Irrelevant And Patently False Events And Allegations

74. Claimants mention additional irrelevant and mischaracterized events, which actually demonstrate that due process protections are alive and well in Ecuador.

1. The *Odebrecht* Case Is Simply Irrelevant

75. Claimants point to the *Odebrecht* case as another example of the Executive's alleged interference with the Judiciary.[251] Odebrecht is a Brazilian construction company that has constructed a number of large infrastructure projects in Ecuador, including the dam around which the dispute centered.[252] Serious structural and mechanical problems arose with respect to the dam, which had been intended to produce 12 percent of Ecuador's energy supply.[253] Due to these problems, the dam was closed, thus cutting off much needed energy supply in the country and resulting in major revenue losses to the Government.[254] Claimants' cited press report notes that the Comptroller General's investigation of the project revealed that the Republic lost

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provided that the terms used constitute serious injury offense, according to the Criminal Code, or for aggression to their superiors or inferiors, colleagues or users of the service.").

250 R-770, Decision of the Judicial Council, No. OF-532-UCD-011-PM (0012-2011) (Nov. 22, 2011) at 15.

251 *See* Claimants' Interim Measures Request ¶ 48 at 28; Claimants' Merits Memorial ¶ 297 at 148.

252 R-736, *Ecuador May Default on $200 Million Brazil Loan*, ASSOCIATED PRESS (Sept. 24, 2008).

253 C-117, San Francisco: Arrest Warrants Issued for 9, EL COMERCIO (Dec. 18, 2008); R-736, Ecuador May Default on $200 Million Brazil Loan, ASSOCIATED PRESS (Sept. 24 2008); see also R-829, Brazilian construction firm sacks 3,700 employees in Ecuador, XINHUANET (Dec. 11, 2008); R-830, Brazil to Return Ambassador to Ecuador: Fight said to be resolved as Ecuador keeps paying on BNDES loan, pending arbitration outcome, LATIN AMERICA HERALD TRIBUNE (Dec. 26, 2008).

254 C-117, *San Francisco: Arrest Warrants Issued for 9*, EL COMERCIO (Dec. 18, 2008); R-829, *Brazilian construction firm sacks 3,700 employees in Ecuador*, XINHUANET (Dec. 11, 2008); R-830, *Brazil to Return Ambassador to Ecuador: Fight said to be resolved as Ecuador keeps paying on BNDES loan, pending arbitration outcome*, LATIN AMERICA HERALD TRIBUNE (Dec. 26, 2008).

US$ 194,132 per day during the repair of the plant.[255] To address the dire domestic consequences occasioned by the dam's closing, President Correa issued an Executive Decree announcing a state of emergency based on the widespread blackouts that would occur.[256]

76. Investigators later charged nine Odebrecht technicians and officers with embezzlement related to contracting, overseeing, and operating the power plant.[257] The defendants appealed a subsequent detention order, resulting in the annulment of the entire proceeding by the Criminal Division of the Court of Tungurahua.[258] As detailed in Claimants' exhibit, Prosecutor Washington Pesántez announced that he will "file suit" against the Tungurahua judges citing that it "was not the procedurally proper time for annulling the proceedings" and that he will "file all possible appeals in order to have the Division's decision vacated."[259] Eventually, prosecutors launched a criminal investigation and brought a case to the criminal court; however, the court dismissed the case as meritless.[260]

2. President Correa's Lunch-Meeting With Members Of The National Court Of Justice Was Routine And Legitimate

77. Claimants rely on third-hand gossip to criticize President Correa's much publicized and utterly transparent lunch meeting with the National Court of Justice on March 2, 2009. They assert that President Correa "requested 'expediency in cases of interest to Ecuador,'" when he invited the newly installed National Court of Justice to lunch at the Presidential

255 C-117, *San Francisco: Arrest Warrants Issued for 9*, EL COMERCIO (Dec. 18, 2008).

256 C-116, Executive Order No. 1383, Oct. 9 2008.

257 C-117, *San Francisco: Arrest Warrants Issued for 9*, EL COMERCIO (Dec. 18, 2008).

258 Alvarez First Expert Rpt, Ex. 76.

259 Alvarez First Expert Rpt, Ex. 76, Coronel First Expert Rpt. Ex. 197, *Court Annuls Odebrecht Case*, EL EXPRESSO (Jan. 23, 2009).

260 *See* R-729, Decision of the National Court of Justice, Criminal Division (Jan. 4, 2011) at 17, 20, 21.

Palace.[261] Indeed, Claimants have adduced no probative evidence that such discussions took place, that expediency resulted, or that President Correa sought to, or did, influence the outcome of any case. Instead Claimants cite third-hand hearsay: (1) a newspaper editorial stating that (2) another newspaper had reported that (3) an unnamed Justice suggested as much.[262]

78. In fact, President Correa made no secret of the meeting, and the justices proclaimed its legitimacy. The very fact that this lunch meeting received so much press dispels Claimants' concern that something untoward was intended or occurred. The Justices themselves proclaimed the legitimacy of the meeting and their own autonomy.[263] Claimants, however, misconstrue President Correa's evident irritation with the media's insinuations about the propriety of the meeting.[264] This likely explains President Correa's rhetorical flourish in his weekly radio address that he is the "Head of the entire Ecuadorian State," which he is, pursuant to the 2008 Constitution (and likewise under the 1998 Constitution).[265] This position does not entitle him to interfere with the Judiciary, as Claimants misleadingly suggest. In any event, official meetings between heads of state and supreme courts are the norm in many states. For

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261 *See* Claimants' Interim Measures Request ¶ 48 at 28 (quoting C-125, Joffre Campaña Mora, *Interference in the Administration of Justice*, EL UNIVERSO (Mar. 5, 2009)).

262 *See* C-125, Joffre Campaña Mora, *Interference in the Administration of Justice*, EL UNIVERSO (Mar. 5, 2009).

263 R-737, *President of the Court of Justice Defends Contacts with the Executive*, ECUADOR INMEDIATO (Mar. 23, 2009) ("The Chief Judge of the National Court of Justice (CNJ), José Vicente Troya . . . [stated] 'The independence of the Judicial Function has not been compromised by having lunched with President Correa, [and] we will continue to be as independent as before.'").

264 *See* Claimants' Interim Measures Request ¶ 48 at 29 (citing C-127, Alberto Acosta, *Court Matters*, ECUADOR INMEDIATO (Mar. 4, 2009)).

265 *See* RLA-259, art. 164, Constitution of Ecuador (1998); RLA-164, arts. 141, 225, Constitution of Ecuador (2008); *see also, e.g.*, R-738, *Countries Represented at Summit of the Americas*, THE TORONTO SUN (Apr. 19, 2001) (noting the common denomination of "Head of State" for the head of government in the vast majority of countries in the Western Hemisphere).

example, in 2009, the Obama Administration's transition team specifically promoted the visit of President Obama and Vice President Biden to the Supreme Court.[266]

F. Claimants Rely On The Same Generalized Criticisms Contained In U.S. Department Of State Reports That They Rejected Out Of Hand In *Aguinda*

79. Claimants' current reliance on the generalized criticisms of the Ecuadorian judiciary contained in reports from the U.S. Department of State is misplaced.[267] None of the reports establishes that the Provincial Court for Sucumbios, where the Lago Agrio Litigation is pending, suffers from corruption, incompetence, undue delays, or is subject to political influence. Moreover, Claimants' reliance on these reports is selective at best. For example, Claimants fail to acknowledge that the 2009 U.S. Department of State Human Rights Report for Ecuador states with respect to "Civil Judicial Procedures and Remedies" that "Civilian courts and the Administrative Conflicts Tribunal [are] generally considered independent and impartial."[268]

80. In relying on the Department of State Reports, Claimants again contradict themselves. In fact, it was the *Aguinda* plaintiffs that relied on these same reports in 1999 and 2000 in their ultimately unsuccessful efforts to persuade a United States court to *retain* the environmental case rather than dismissing it in favor of an Ecuadorian court. And it was *Claimants* that dismissed these reports out of hand. According to Texaco's legal experts, these same reports were irrelevant, uninformed, or otherwise erroneous in the context of civil

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266 R-739, *U.S. President-elect Obama and Vice President-elect Biden Visit the U.S. Supreme Court in Washington*, REUTERS (Jan. 14, 2009).

267 Claimants' Interim Measures Request ¶ 48 at 27 (citing C-114, U.S. Department of State, *2008 Investment Climate Statement: Ecuador*, at 4), 28 (citing C-124, U.S. Department of State, *2009 Investment Climate Statement: Ecuador* (Feb. 2009)), 34-35 (citing C-165, U.S. Department of State, Bureau of Democracy, Human Rights, & Labor, *2009 Human Rights Report: Ecuador* (Mar. 11, 2010)).

268 C-165, U.S. Department of State, Bureau of Democracy, Human Rights, & Labor, *2009 Human Rights Report: Ecuador* (Mar. 11, 2010) at 5.

claims.[269] As the result of Texaco's submissions, the U.S. District Judge in *Aguinda* ruled that the State Department reports were entitled to little weight, agreeing instead with Texaco that Ecuador constitutes an adequate alternative forum:

> While the State Department nonetheless continues to describe Ecuador's legal and judicial systems as "politicized, inefficient, and sometimes corrupt" . . . . this is based, as the Country Reports make clear, on cases largely involving confrontations between police and political protestors. By contrast, *not one* of the cases described by the 1999 and 2000 Country Reports as evidence of such conclusions remotely resembles the kind of controversy here at issue.
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> Accordingly, the Court is satisfied on the basis of the record before it that the courts of Ecuador can exercise with respect to the parties and claims here presented that modicum of independence and impartiality necessary to an adequate alternative forum.[270]

The comments in the Department of State reports now cited by Claimants are no more compelling or relevant today than they were when Claimants convinced the U.S. courts to reject them and, on that basis, to dismiss the *Aguinda* litigation to Ecuador.

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269 *See*, *e.g.*, R-31, Aff. of Dr. Enrique Ponce y Carbo (Feb. 4, 2000) ¶ 15("I have reviewed the 1998 Report on Ecuador of the United States Department of State. Despite isolated problems that may have occurred in individual criminal proceedings, Ecuador's judicial system is neither corrupt nor unfair. Such isolated problems are not characteristic of Ecuador's judicial system as a whole . . . . Ecuador has a democratic government with an independent judiciary."); R-32, Aff. of Dr. Alejandro Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 6, 7 ("I . . . have reviewed the 1998 Report on Ecuador of the United States Department of State . . . . Based on my years of practice and experience, I believe that on the whole, Ecuador's judicial system is neither corrupt nor unfair . . . . I have represented many multi-national corporations, including Texaco Petroleum Company . . . in the courts of Ecuador . . . . The judicial system in Ecuador has resolved fairly and without corruption those cases that have been concluded, and I expect the judicial system similarly to resolve fairly and without corruption the still pending cases . . . . I believe that claims can be and are heard fairly and efficiently by Ecuador's courts."); R-34, Aff. of Dr. Rodrigo Pérez Pallares (Feb. 4, 2000) ¶ 3 ("I . . . have reviewed the 1998 Report on Ecuador of the United States Department of State. Notwithstanding the description of events contained in that report, Ecuador's judicial system as a whole is neither corrupt nor unfair."); R-36, Aff. of Dr. Jaime Espinosa Ramirez (Feb. 28, 2000) ¶¶ 3, 4, 8 ("Before signing this affidavit, I . . . reviewed . . . the Report on Ecuador for 1998 issued by the U.S. Department of State . . . [and] the Report on Ecuador for 1999 issued by same U.S. Department of State on February 25, 2000. Based on my own experience . . . and my knowledge of the Ecuadorian courts, I can affirm . . . that the plaintiffs in both the 'Aguinda' and 'Jota' cases, can obtain from Ecuador civil courts impartial and independent justice, without corruption or interference from military or any other public or private entity. . . . I have read and I agree with the affirmations concerning the convenience and independence of the Ecuadorian courts.").

270 C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 545-46 (S.D.N.Y. 2001) (internal citation omitted).

G. Claimants Rely on Statistical Indicators and Reports of Dubious Reliability and Relevance

81. Claimants also rely on several purportedly objective statistical indicators and reports from so-called independent organizations to support their generalized criticisms of the Ecuadorian government. None of these sources establishes that the civil courts, and particularly the National Court of Justice, where the Lago Agrio Litigation is pending, suffers from corruption, incompetence, undue delays, or is subject to political influence.

1. Transparency International's Corruption Perceptions Index

82. First, Claimants cite Transparency International's 2009 CPI as "rank[ing] Ecuador as one of the 'most corrupt countries in the world.'"[271] Surprisingly, Claimants do not provide the actual CPI data or explain its methodology, but instead cite to discussion of the 2009 CPI in an online news report and in an editorial published by the decidedly conservative *Washington Times*, which has repeatedly run anti-Ecuador editorials without once seeking information from the Republic's representatives.[272] The CPI measures neither proven nor even reported instances of corruption but rather purports to capture "the *perceived* level of public sector corruption" in a country.[273] Transparency International does this not by developing its own data or primary research, nor by indicating which aspects of the "public sector" are being judged or on what criteria. Instead, Transparency International compiles a survey of other surveys — five in Ecuador's case — of "experts and business persons, based both in the country and abroad."[274]

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271 Claimants' Interim Measures Request ¶ 48 at 32 (citing C-147, *Ecuador is Among the Most Corrupt Countries in the World*, PODER360.COM (Nov. 18, 2009)).

272 *See id*. (citing C-147, *Ecuador is Among the Most Corrupt Countries in the World*, PODER360.COM (Nov. 18, 2009); C-148, *Editorial: Inequities in Ecuador*, THE WASHINGTON TIMES (Nov. 19, 2009)).

273 R-743, Transparency International, Corruption Perception Index Methodology (emphasis added).

274 R-743, Transparency International, Corruption Perception Index Methodology; R-744, Transparency International Corruption Perceptions Index 2009, Country Chart.

83. Any arguable relevance of this glorified repackaging of other organization's surveys is rendered more unconvincing by the fact that CPI scores are, according to Transparency International itself, "not intended to measure a country's progress over time" but rather to provide "*a snapshot of perceptions* of corruption, using data published in the past two years."[275] This may explain why Claimants perceive no irony in showcasing Ecuador's 2009 CPI score of 2.2, even though it is *higher* than its 2008 (2.0) and 2007 (2.1) scores, during which time Claimants assert President Correa was not only consolidating all power to form a dictatorship, but that corruption was rampant and increasing. Likewise presumably not troubling to Claimants is the fact that Ecuador's 2009 CPI score is *equal* or comparable to its rankings during the period 1998 through 2002 (2.3, 2.4, 2.6, 2.3 and 2.2, respectively) when Claimants were extolling the fairness and adequacy of the Ecuadorian judiciary in the New York federal courts.[276] In fact, Ecuador's CPI score has steadily increased since 2009 further diminishing its purported probative value.[277]

2. The Freedom House

84. Claimants rely also on a report issued by Freedom House. First, Freedom House is not the "independent non-governmental organization" Claimants portray:[278]

> While touting itself as having a "bipartisan character," Freedom House is often associated with hawkish and neoconservative factions within both major U.S. parties . . . . *Observers have raised serious concerns about the group's fairness and objectivity for decades.*
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> * * * *
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> Freedom House's highly touted "Freedom in the World" reports, which are widely cited by the press but get less credence in the

275 R-743, Transparency International, Corruption Perception Index Methodology, (emphasis added).

276 R-745, Excerpts from Transparency International CPI Surveys, 1998-2008.

277 R-747, Transparency International Corruption Perceptions Index 2010; R-748, Transparency International Corruption Perceptions Index 2011; R-749, Transparency International Corruption Perceptions Index 2012.

278 Claimants' Interim Measures Request ¶ 48 at 27.

> academic world, have also been criticized. . . . *[A]cademics tend to carefully qualify their usage of [the Freedom in the World report], often going so far as to disqualify it because of perceived ingrained biases in research methods.*[279]

85. Freedom House's observation that Ecuador is a "highly corrupt country" is based not upon the "197 videos showing judicial personnel 'receiving money for their services,'" as Claimants' creative quotation suggests, but rather on Transparency International's CPI.[280] With regard to the referenced videos, the report actually states that "the CCCC [Comisión de Control Cívico de la Corrupción — a *governmental agency* that 'promotes . . . transparency in *public administration* in order to prevent and fight corruption'] made public 197 videos showing *administrative personnel* within the judiciary receiving money for their services," and that while the videos were not admissible as evidence of a crime, "those accused could face serious administrative sanctions."[281] In other words, the Government itself has in place a system to ferret out corruption, and it works. Moreover, contrary to the misleading impression that Claimants attempt to create by suggesting that this involved bribery amongst judges, the report makes clear that it concerned "administrative personnel."

3. The Heritage Foundation

86. The Heritage Foundation, like Freedom House, is another distinctly right-leaning organization that describes itself as "a think tank — whose mission is to formulate and promote conservative public policies" and is thus unlikely to be sympathetic to the government of President Correa. The Heritage Foundation's Index of Economic Freedom, which Claimants cite, derives its "Freedom From Corruption" score "primarily from Transparency International's

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279 R-746, Political Research Associates, *Freedom House Profile*, RIGHT WEB (July 7, 2007) at 1, 3-4, 5 (emphasis added).

280 Claimants' Interim Measures Request ¶ 48 at 27 (citing C-110, Freedom House, *Countries at the Crossroads 2007 - Ecuador* at 10, 11).

281 C-110, Freedom House, *Countries at the Crossroads 2007 – Ecuador,* at 11 (emphasis added).

Corruption Perceptions Index (CPI)."[282] Indeed, the Heritage Foundation simply repackages the CPI and adopts its score on *perceived* corruption (unclear by whom it is perceived and what constitutes corruption), not actual or even reported corruption.[283]

87. The "Property Freedom" score, another component of the Index of Economic Freedom purports, *inter alia*, to "analyze[] the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and business to enforce contracts."[284] It does so not through independent, primary research and data-gathering by the Heritage Foundation itself but instead by "rel[ying] on" Economist Intelligence Unit reports, U.S. Department of Commerce reports; U.S. Department of State Human Rights Reports[285]; and "various news and magazine articles."[286] In other words, it is of limited probative value, especially considering Ecuador's 2008 score of thirty is *equal* to its score in 2000 — the year Claimants submitted ten sworn affidavits from their legal experts praising the Ecuadorian judiciary in *Aguinda*.[287]

4. The World Bank's Worldwide Governance Indicators & The Millennium Challenge Corporation's Rule of Law Statistics

88. Claimants' reliance on the World Bank's Worldwide Governance Indicators ("WGI") is similarly unsound as it too is based on third party datasets. Indeed, WGI merely recycles and aggregates data from other reports – "[t]he WGI compile and summarize information from 30 existing data sources that report the views and experiences of citizens,

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282 R-750, The Heritage Foundation, *About Hertiage*. ; R-751, The Heritage Foundation, *Freedom From Corruption*, *Index of Economic Freedom*.

283 *See* R-751, The Heritage Foundation, *Freedom From Corruption*, *Index of Economic Freedom*.

284 R-752, The Heritage Foundation, *Property Rights*.

285 *See infra* at Section II.F for discussion of U.S. State Department reports.

286 R-752, The Heritage Foundation, *Property Rights*.

287 *See supra* ¶ 4.

entrepreneurs, and experts in the public, private and NGO sectors from around the world, on the quality of various aspects of governance."[288] Claimants' reference to the Millennium Challenge Corporation's rule of law statistic[289] also lacks any probative value as it is based exclusively on the dubious WGI measures.[290] While the Republic recognizes that the "governance" indicators may have merit in other contexts, for purposes of assessing the independence of the Ecuadorian judiciary it is entirely ineffective.

5. The World Economic Forum's Global Competitiveness Report

89. Claimants also cite to the Global Competitiveness Report by the World Economic Forum.[291] While this report is indeed premised on primary data, the nature and source of the research is troubling. The three (out of 103) indicators that Claimants cite to — judicial independence, protection of property rights, and favoritism in decision of government officials — are derived from the Executive Opinion Survey:[292] a list of questions sent to "leading business executives" regarding their "national business operating environment."[293] But it is unclear whether the executives surveyed — a mere sixty-two in the case of Ecuador[294] — have any experience or knowledge of the topics on which they are asked to opine. By citing the Report, Claimants inappropriately assume that the sixty-two "executives" working in Ecuador have

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288 R-753, Worldwide Governance Indicators, *WGI Data Sources*.; *see also* C-1332 ("The governance indicators presented here aggregate the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organizations, and international organizations").

289 *See* Claimants' Supplemental Merits Memorial ¶ 160.

290 *See* C-1330, Millennium Challenge Corporation, 2011 Country Scorebook at 83.

291 Claimants' Supplemental Merits Memorial ¶ 160 (citing C-1333, *Global Competitiveness Report, 2010-2011*, World Economic Forum, 2010.)

292 C-1333, *Global Competitiveness Report, 2010-2011*, World Economic Forum, 2010 at 366, 371, 372.

293 C-1333, *Global Competitiveness Report, 2010-2011*, World Economic Forum, 2010 at 58.

294 C-1333, *Global Competitiveness Report, 2010-2011*, World Economic Forum, 2010 at 60.

engaged with the judiciary, been involved with property rights issues, and have attempted to contract with the government and observed favoritism as a result.

90. The Republic is unable to address Claimants' assertion that the "World Bank, United Nations, and the International Bar Association have all denounced Ecuador's court system or overall government as unreliable or corrupt"[295] since it is based not on any statements or reports from these organizations but again on an editorial published by the right-wing *Washington Times*, which itself has been lobbied by Chevron's public relations firm, and which itself does not cite any specific reports by these organizations.[296] Moreover, as discussed above, the United Nations, as well as the broader international community, have found Ecuador's judicial reforms to be particularly praiseworthy.[297]

6. Professor Seligson's Report

91. Claimants proffer the studies of Professor Mitchell Seligson in support of the contention that "the Ecuadorian people do not trust the country's judiciary" and make the non sequitur inference that "the courts of Ecuador do not offer impartial trials."[298] Like Transparency International's CPI indicators and other reports discussed above, the Seligson report assesses neither proven nor reported occurrences of corruption, but rather depicts the *perceived* level of corruption, which offers little in terms of evidence of an impartial judiciary.

92. Claimants also cite a press article announcing that "[t]hree out of four Ecuadorian citizens distrust the judicial system."[299] In the same breath, however, the one-page article

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295 Claimants' Interim Measures Request ¶ 48 at 32.

296 *See id*. (citing C-148, *Editorial: Inequities in Ecuador*, THE WASHINGTON TIMES (Nov. 19, 2009)). Claimants make this same accusation with respect to the U.S. Department of State. *See infra* at Section II.F.

297 *See infra* Section I.A.

298 Claimants' Supplemental Merits Memorial ¶¶ 176-178.

299 C-581, *Three out of Four Ecuadorian Citizens Distrust the Judicial System, According to Opinion Profiles*, ECUADOR INMEDIATO (Jun. 19, 2010).

explains that "[m]ost Ecuadorians are ignorant of the functions of the various judicial entities" and mentions the "insecure situation the country is going through."[300] Even assuming that the study cited in the article is indeed reliable, it is quite sensible that citizens of any country would feel hesitant and confused about a system in the midst of transition and reform. Even States with relatively stable judicial systems have poor images. A 2012 study by a U.S. advocacy group, DRI – The Voice of the Defense Bar, found that 41 percent of Americans lack confidence in the civil justice system and sixteen percent have no confidence in it whatsoever.[301] A similar study conducted in 2011 concluded that 45 percent of French citizens do not have confidence in their judicial system.[302] Negative perception is not probative of actual bias in the system.

93. One decade ago, Texaco explained why the very reports and studies on which Claimants now rely should not form the basis of a finding regarding the credibility and adequacy of the Ecuadorian courts. Those reports, along with a few new ones relied on by Claimants here, are not based on empirical data at all, but rather, on perceptions by those who have their own world view. Texaco was right in 1999 and 2000 in concluding that these reports are not reliable. It is wrong now to urge this Tribunal to accept what Texaco itself (and a United States court) had previously rejected.

H. Claimants' Assertions Regarding The Republic's Arbitration Policy Are Irrelevant and Misleading

94. Claimants make inaccurate and irrelevant observations regarding the Republic's arbitration policy. First, Claimants criticize the Republic for an act fully within the sovereign prerogative of any state — withdrawing from the ICSID Convention and denouncing certain

300 *Id*.

301 R-742, *The DRI National Poll on the Civil Justice System*, DRI-The Voice of the Defense Bar (Aug. 2012).

302 *See* R-741, *The French, Polls, and Justice,* Sondages en France (Feb. 20, 2011).

BITs.[303] Significantly, the withdrawal is of no consequence to the instant UNCITRAL arbitration. Nor is it of any consequence to Claimants — Chevron has never done business in Ecuador and TexPet has not conducted any business in Ecuador since June 1992. Finally, Claimants misconstrue a statement from Telecom Minister Jorge Glas regarding a *domestic* arbitration against State telecom company, Telecsa, in which the Minister expresses reluctance to pay the award.[304] The Republic has not paid the award because it has requested an annulment proceeding.[305] Notwithstanding Claimants' accusations, the Republic has paid *all* international arbitration awards after exhausting appeals.

303 *See* Claimants' Interim Measures Request ¶ 48 at 29, 31.

304 *See* Claimants' Interim Measures Request ¶ 48 at 31 (quoting C-140, *Minister Glas Ratifies His Rejection of Arbitral Award against Alegro*, ECUADOR INMEDIATO (Oct. 27, 2009).

305 *See* R-740, *Vía Advisors Ecuador S.A. v. TELECSA S.A.*, Letter from Arbitral Tribunal to Attorney General of Ecuador regarding TELECSA S.A. Request for Nullity Proceedings (Dec. 14, 2009); R-831, Provincial Court of Justice of Pichincha Accepts Request for Nullification of *Vía Advisors Ecuador S.A. v. TELECSA S.A.* Award (Jan 21 2010).

ANNEX B: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING THE CRIMINAL PROCEEDINGS AGAINST MESSRS. VEIGA AND PÉREZ

I. The Dismissal Of The Criminal Proceedings Demonstrate That The Ecuadorian Judicial System is Robust and Capable of Self-Correction

1. In their haste to condemn the Ecuadorian Judiciary, Claimants devote nearly forty pages of their Memorial to assert that Messrs. Ricardo Reis Veiga and Rodrigo Pérez, attorneys for Claimants,[1] were not afforded due process in a criminal investigation of alleged fraud in the Claimants' remediation work (the "Criminal Proceedings").[2] With the court's dismissal of the Criminal Proceedings in June 2011, however, the merits of Claimants' contentions, if there were any, fell away. The dismissal — based on procedural grounds — in fact establishes that the Republic's judicial system is indeed impartial, independent, and capable of self-correction.

2. Contrary to Claimants' assertions, the criminal case against Messrs. Veiga and Pérez was procedurally sound and carried out fairly and properly. The procedural history of the Criminal Proceedings, detailed in the timeline below, reveals adherence to the law and respect for due process.

- **2001:** The Comptroller General's Office conducts an audit concerning the performance of Ecuadorian officials and TexPet under the Settlement Agreement, covering the period from May 4, 1995 through August 31, 2001.[3] When this audit is initiated, the *Aguinda* litigation is still pending in the U.S. federal courts in New York and the Lago Agrio Litigation has not yet been filed. The audit is based in part upon various technical evaluations and field visits to areas supposedly remediated by TexPet.[4]

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1 Ricardo Reis Veiga is the Vice President and Managing counsel for Chevron's (formerly Texaco's) Latin American Downstream (i.e. refining and retail) Operations, and Rodrigo Pérez, now deceased, was Chevron's (formerly Texaco's) long-time legal representative in Ecuador.

2 Claimants' Merits Memorial ¶¶ 299-372.

3 *See* R-78, M. Teran Andrade, Controller General's Report DA3-25-2002, Special Analysis on the Agreement for Performance of Environmental Remediation Works (Apr. 9, 2003) at 1, 3.

4 *Id*. at 27 *et seq*.

- **April 9, 2003:** Comptroller General's Office issues the results of its audit in Report DA3-25-2002.[5]

- **May 7, 2003:** The Lago Agrio Litigation commences in Ecuador.[6]

- **October 29, 2003:** Based on the findings in DA3-25-2002, the Comptroller General, who under Article 212 of the Ecuadorian Constitution "has the exclusive power . . . to determine administrative and civil liability and evidence of criminal liability,"[7] issues a "*denuncia*" (criminal complaint). The *denuncia* states that potential grounds for criminal liability have been found, including the fact that the nine Partial Receipt *Actas* and the Final *Acta* 052-RAT-98 "indicate as complete[,] work that was not carried out or that remains to be completed" and failed to take into account observations and deficiencies noted in the supporting 52 Work *Actas*. The *denuncia* named as subjects of the investigation those who represented the adequacy of remediation efforts, including *twelve* former government and PetroEcuador officials who had signed one or more of the 9 Partial Receipt *Actas,* the Final *Acta* 52-RAT-98, or the 1998 Final Release, and Messrs. Pérez and Veiga, who had signed both the Final *Acta* 052-RAT-98 and the 1998 Final Release.[8]

- **May 2004:** Following the filing of the Comptroller General's *denuncia* in 2003, two preliminary criminal investigations are opened: the first probing the commission of potential environmental crimes and the second considering possible falsification of public documents.[9] The investigation into environmental crimes is dismissed in the Spring of 2007 on grounds that "during the time that TEXPET was operating in the Ecuadorian Oriente (1970-1990), and even at the time of environmental reparation and remediation (1990-1995), environmental crimes were not contemplated . . . . [E]nvironmental crimes

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5 *See Id*.

6 C-71, Complaint in *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003).

7 *See* C-239, Motion by G. Peña Ugalde acting Comptroller General of Ecuador to Supreme Court (Nov. 1, 2006) at 13.

8 C-231, Peña Ugalde, Acting Comptroller General, *Denuncia,* (Oct. 29, 2003) at 1, 8-10 (naming the following individuals: (1) Former Minister of Energy and Mines, Patricio Rivadeneira; (2) Former Executive President of PetroEcuador, Ramiro Gordillo; (3) Former Manager of PetroProducción, Luis Albán Granizo; (4) – (6) Former Undersecretaries of Environmental Protection of the Ministry of Energy and Mines, Giovanni Rosanía Schiavone, Hugo Jara Román, and Jorge Albán Gómez; (7) Former National Director for Environmental Protection, Engineer Patricio Izurieta; (8) Former Head of the Environmental Protection Office of PetroEcuador, Patricio Maldonado; (9) Former Advisor of the Office of the Assistant Secretary of Environmental Protection of the Ministry of Energy and Mines, Martha Romero de la Cadena; (10) – (11) Former officials of the National Bureau of Hydrocarbons, Engineers Jorge Dután Erráez and Aliz Suárez Luna; (12) Former Integral Protection Technician of PetroProducción, Engineer Marcos Trejo Ordóñez).

9 *See* Claimants' Interim Measures Request ¶ 73.

simply did not exist at the time . . . for which reason no crime could have been committed."[10]

- **August 2006:** The Acting Prosecutor General, Dra. Cecilia Armas, also seeks to dismiss the falsification of documents charges, but her opinion fails to address many of the allegations in the Comptroller General's *denuncia*. Dra. Armas concludes that the Comptroller General's examination report "does not find evidence of any criminal liability for any crime whatsoever," and that the findings did not "indicate any evidence of criminal liability."[11] However, she appears to confine her analysis of "document falsification" to a search for outright signature forgery or post-signing alteration ("in no part of the criminal complaint is there evidence that the document mentioned . . . was altered in any way").[12] Dra. Armas further opines that: "When a settlement agreement is at issue, as in the case at hand, it is improper to speak of 'falsity in documents,'" and that the appropriate remedy for breach would be a civil action for damages.[13] Dra. Armas concludes that since "the matter that gave rise to this preliminary criminal investigation is a civil matter, and specifically a matter involving alleged breach of contract," the criminal charge should be dismissed.[14] Notably, Dra. Armas does not address whether the nine Partial Receipt *Actas* and the Final *Acta* constituted knowing misrepresentations by their signatories or had been procured from them by way of material misrepresentations of fact.[15]

- **October 27, 2006:** Following the Acting Prosecutor General's submission, the President of the Supreme Court, observing proper procedures, sends the dismissal opinion to the Comptroller General for review.[16] The Comptroller General disputes Dra. Armas' "falsification" findings — because she did not consider whether false representations were made regarding the adequacy of the remediation — and therefore requests that the Supreme Court reject the Acting Prosecutor General's dismissal request.

- **November 1, 2006:** The Comptroller General files a motion with the Supreme Court contesting Dra. Armas' decision to recommend dismissal of the case. He cites to the portions of his *denuncia* and underlying examination report that he contends "suggest evidence of criminal liability on the part of those individuals who signed the Acceptance Certificates [*Actas*] for the environmental remediation work and the Final Document, since their actions would be consistent with the conduct described in Articles 338 and 339 of the Criminal Code [Falsification of Documents]."[17] After citing additional

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10 C-236, Motion of M. Vega Carrera, District Prosecutor of Pichincha (Sept. 4, 2006) at 9.

11 C-234, Opinion of Acting Prosecutor General C. Armas (Aug. 9, 2006) at 2, 3.

12 *Id.* at 3.

13 *Id.* at 3.

14 *Id.* at 3-4.

15 *See id.*

16 C-238, Order of Supreme Court (Oct. 27, 2006).

17 C-239, Motion by G. Peña to Supreme Court (Nov. 1, 2006) at 6.

findings by an expert retained by the Prosecutor for Crimes Against the Environment and Cultural Heritage that there was still "environmental contamination in most of the pits from which samples were analyzed and in the soil," the Comptroller General argues that Dra. Armas' request for dismissal of the falsification charges has been erroneous as a matter of law.[18] The Comptroller General concludes by requesting that the Court reject the Acting Prosecutor General's dismissal request, considering "the clear evidence of criminal liability that exists in Report DA3-25-2002 and the additional documents I am attaching hereto."[19]

- **2007:** Exchanges between the President of the Supreme Court, the Comptroller General, and prosecutors continue with the Comptroller General insisting that his allegations be fully investigated, but with no substantive responses from the prosecutors.[20] Chevron also intervenes in the proceedings, seeking dismissal of the investigation.[21]

- **February 28, 2008:** The President of the Supreme Court, Roberto Gómez Mera, orders that the file relating to the falsification of documents investigation be forwarded to the Prosecutor General for review and for an opinion concerning whether the investigation should be re-opened or dismissed.[22]

- **March 5, 2008:** Counsel for Mr. Pérez seeks to have the February 28, 2008 order annulled by submitting a motion to Supreme Court President Gómez Mera asking that the investigation regarding alleged falsification of public documents be finally dismissed.[23]

- **March 13, 2008:** The Court denies Mr. Pérez's motion, citing new evidence that had by that time been submitted by the Comptroller General's Office.[24]

- **March 31, 2008:** The Prosecutor General orders that the criminal investigation of alleged falsification of public documents arising from apparent misrepresentations of fact to the Government in the procurement of the 1995 Settlement Agreement and the 1998 Final

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18 *Id*. at 7, 13.

19 *Id*. at 13.

20 *See* C-240, Order of Supreme Court (Jan. 12, 2007); C-241, Motion by J. German to Supreme Court (Mar.1, 2007).

21 *See* C-945, Email string among P. Fajardo, J. Saenz, S. Donziger, *et al.* (Oct. 2-3, 2007) at 1.

22 R-80, Order of the Supreme Court (Feb. 28, 2008); *see also* R-81, *Complaint Against Texaco Goes Back to the Prosecutor*, LA HORA (Mar. 5, 2008). As Claimants have noted in the past, Supreme Court President Gómez Mera was, and remains to this day, a very public and staunch defender of the independence of the judiciary. Claimants' Request at 27 and n.101; *see also* C-112, *Gómez Mera: We Are Not Living in a State That Is Completely Under the Rule of Law,* ECUADOR INMEDIATO (Feb. 11, 2008).

23 R-82, Motion by Rodrigo Pérez Pallares (Mar. 5, 2008) at 2.

24 R-83, Order of the Supreme Court (Mar. 13, 2008) at 1.

Acta be re-opened, citing, as the Supreme Court had done, the existence of new evidence.[25]

- **August 26, 2008:** The Prosecutor General orders that an *instrucción fiscal* (prosecutorial investigation) of nine people, the seven former Ecuadorian officials and Messrs. Veiga and Pérez (who had signed Final *Acta* 052-RAT-98 and the 1998 Final Release), be undertaken. Three additional former Ecuadorian government officials are later added to the list. As a part of that investigation, the Prosecutor General directs that statements be taken from (i) the subjects of the investigation, (ii) the Comptroller General, (iii) the Comptroller General's staff involved in drafting the original audit report, and (iv) members of the Public Works Oversight Commission of the Comptroller General's Office who had performed site inspections and analysis.[26] The investigation also includes "[a]n expert assessment of the sites and an analysis of the environmental remediation work performed by [TexPet]."[27]

- **September 19, 2008:** Supreme Court President Gómez Mera issues official notice to the defendants, and assumes jurisdiction, since the underlying investigation had been initiated prior to the March 28, 2006 effective date of a new judicial reform law that required such matters to be assigned by lottery to one of the Criminal Chambers of the Supreme Court for pre-hearing investigation proceedings.[28] Following the formation of the new interim National Court of Justice under the Republic's new Constitution, the case is re-assigned to the First Criminal Division of the National Court of Justice, which re-issues the notice to the subjects of the investigation.[29]

- **June - August 2009:** The Surrogate Prosecutor General Alfredo Alvear Enríquez, who had taken over the case following the decision of Prosecutor General Washington Pesántez to recuse himself (due to his earlier involvement in the environmental crimes investigation),[30] adds three additional former Ecuadorian Government officials to the list of those who were the subjects of the investigation — (1) former Undersecretary of Environmental Protection of the Ministry of Energy and Mines, Jorge Albán Gómez, (2) Undersecretary of Environmental Protection, Hugo Jara Román, and (3) Undersecretary of Environmental Protection, Giovanni Rosanía Schiavone.[31]

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25 C-247, Order by Prosecutor General Re-Opening the Investigation (Mar. 31, 2008).

26 C-252, Order from Prosecutor General re Commencement of Prosecutorial Investigation (Aug. 26, 2008) at 6; *see also* C-253, Notification of Prosecutorial Investigation from Secretary General of the Prosecutor General's Office to President of the Supreme Court (Sept. 3, 2008).

27 C-252, Order of Prosecutor General re Commencement of Prosecutorial Investigation (Aug. 26, 2008) at 7.

28 R-84, Order of Supreme Court (Sept. 19, 2008).

29 C-265, Order of First Criminal Division of National Court of Justice (Feb. 3, 2009) at 1-3.

30 C-255, Mercedes Alvaro, *Ecuador: Prosecutor Recuses Himself in Chevron Case*, DOW JONES NEWSWIRES (Dec. 16, 2008).

31 R-85, Notice from Deputy Prosecutor General Alfredo Alvear Enriquez to President of First Criminal Division of the National Court of Justice (June 2009); R-86, Notice from Deputy Prosecutor General Alfredo Alvear

- **April 29, 2010:** The Surrogate Prosecutor General Alfredo Alvear Enríquez issues a *Dictamen Acusatorio* against seven former Government and PetroEcuador officials (as well as Messrs. Veiga and Pérez). The document relies on substantial evidence to support the charges against the named defendants, citing various witness interviews and site inspections and testing results from not only the Lago Agrio judicial site inspections, but also numerous other site evaluations, some dating back to the original Comptroller General's report, and many others made during subsequent years.[32]

- **May 18, 2011:** The court considering the charges hears argument of the Prosecutor General and counsel for the defendants.[33]

- **June 1, 2011:** The court issues its decision, finding that the charges — which focus upon contractual representations — could not be brought unless a civil court first declares that the relevant agreement is vitiated by falsehood or forgery. Because no such declaration by a civil court exists, the court determines that the prosecution was invalid from its inception.[34]

- **June 6, 2011:** The Prosecutor General of Ecuador appeals the court's decision.[35]

- **August 8, 2011:** The First Criminal Chamber of the National Court rejects requests to annul or appeal the dismissal. The Prosecutor General's Office does not pursue any additional avenues for annulment or appeal and, as a result, the dismissal is now final.[36]

3. Today, the Criminal Proceedings against Messrs. Veiga and Pérez are null and void. As such, they can have *no* effect whatsoever on the Settlement Agreements, and can play *no* role in the Republic's alleged breach of the Agreements. In other words, Claimants' arguments relating to the Proceedings are irrelevant to the claims of this Arbitration.

Enriquez to President of First Criminal Division of the National Court of Justice (Jul. 1, 2009); R-87, Notice from Deputy Prosecutor General Alfredo Alvear Enriquez to President of First Criminal Division of the National Court of Justice (Aug. 4, 2009).

32 C-346, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, (Apr. 29, 2010) at 123.

33 *See* R-250, Decision by the First Criminal Chamber of the National Court of Justice, Case No. 150-209WO (Jun. 1, 2011).

34 *Id*. at 31.

35 *See* R-573, Order, Matter No. 150-2009WO, National Court of Justice, First Criminal Chamber (Aug. 9, 2011).

36 *Id.* at 17-18.

4. Claimants' claims for violation of the Ecuador-U.S. BIT in this arbitration are based in part on Ecuador's conduct in connection with these very criminal proceedings. The dismissal of the proceedings serves as a reminder that Claimants' claims are premature. Claimants must actually utilize the means of asserting, defending, and vindicating their rights in Ecuador before asserting BIT claims for deprivation of those means. Any assessment (or condemnation) of the Ecuadorian Judiciary is necessarily premature until and unless the judicial processes are completed. Judicial developments, including the dismissal of the Criminal Proceedings, have already altered substantially the nature of the matters before the Tribunal. And while Claimants continue to disparage the Ecuadorian courts and assert that they and their agents are routinely denied due process, the court here complimented counsel for Messrs. Veiga and Pérez and ultimately adopted his argument in declaring the criminal processes null and void.[37]

5. Whatever the Lago Agrio Plaintiffs' motives in providing information to the Prosecutor General, there is no evidence that the Prosecutor General pursued his investigation against Messrs. Veiga and Pérez (*and twelve former PetroEcuador and Government officials as well*) in bad faith. But even that issue is moot because, regardless of even the Prosecutor General's motivations, the Ecuadorian Judiciary must be afforded the opportunity to self-correct, which it did by dismissing the charges.

[37] R-250, Decision by the First Criminal Chamber of the National Court of Justice declaring null and void the criminal processes against, Ricardo Reis Veiga and Rodrigo Pérez, a former Minister of Energy, Patricio Rivadeneira, and former PetroEcuador officials, Case No. 150-209WO June 1, 2011 at 31.

ANNEX C: RESPONSE TO CLAIMANTS' BRIBERY ALLEGATIONS

1. Claimants rely upon an alleged bribery scheme of a former judge in the Lago Agrio case, Judge Nuñez, in support of its allegation that the Republic breached its Treaty obligations and committed a denial of justice. As shown below, Claimants participated in the underlying conduct, orchestrated (at least some of) the videotaping, transformed the grainy film into a slick, made-for-Hollywood video (complete with subtitles), and unveiled the alleged bribery scheme on August 31, 2009 — just three weeks before it launched this proceeding — in a massive public relations gambit that included banner internet advertisements and multiple press releases and interviews.[1]

2. No objective observer with access to the actual videos could possibly conclude that Judge Nuñez was involved in a bribery scheme. As noted by a U.S. district court judge: "I read the transcript, at least of the two transcripts you provided me . . . there was no hint in there about him taking a bribe or payoff, and I didn't see anything in the two transcripts provided to me on that."[2] It is telling that nowhere in Claimants' 410 pages of merits memorials do Claimants reproduce a transcript of what Judge Nuñez actually said in response to aggressive questioning by Chevron's proxies. The transcript speaks for itself.

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[1] R-314, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009); R-574, *Chevron Offers Evidence Of Bribery Scheme In Ecuador Lawsuit*, NEW YORK TIMES (Sept. 1, 2009); R-575, *Chevron Claims Judicial Corruption In Ecuadorian Environmental Case*, THE ASSOCIATED PRESS (Sept. 1, 2009); R-576, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009).

[2] R-197, Transcript of Proceedings (Nov. 10, 2010), *In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 38:19-39:5.

A. Chevron's Long-Time Contractor, Diego Borja, Together With A Convicted Felon, Wayne Hansen, Engaged In Criminal Conduct In Their Effort To Help Chevron

3. Diego Borja, an Ecuadorian citizen and a long-time contractor on Chevron's Lago Agrio Litigation team,[3] together with Wayne Hansen, a U.S. citizen and convicted felon,[4] surreptitiously recorded four conversations in Ecuador between May 11, 2009 and June 22, 2009. Two of those conversations included Judge Nuñez, who at the time was the judge presiding over the Lago Agrio Litigation. The other two conversations included Ecuadorian citizens with no connection to the Republic or the Lago Agrio Litigation. An analysis of the unlawfully-obtained recordings affirmatively demonstrates Judge Nuñez's unwillingness to engage in any unlawful scheme, notwithstanding Chevron's transparent effort to entrap him in wrongdoing.

1. Borja Has Been Financially Dependent On Chevron Since 2004; Chevron Continues To Support Him And His Family

4. At the time Chevron launched its media blitz with the recordings, Chevron plainly misled Ecuadorian authorities and media outlets by claiming that the recordings were a "gift"[5] — an "act of whistle-blowing by men offended by unethical behavior."[6] Chevron insisted that Borja was acting not on behalf of Chevron but instead merely as a "good Samaritan" who had innocently been "pursuing business opportunities" in Ecuador.[7] Chevron further failed to

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[3] R-319, Chevron "Ecuador Litigation Team" Organization Chart at 6, 11.

[4] R-577, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES, (Oct. 30, 2009) at 1 (revealing that Hansen is "a convicted drug trafficker" who was "was convicted of conspiring to traffic 275,000 pounds of marijuana from Colombia to the United States in 1986.").

[5] R-316, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) at 2 (emphasis added).

[6] R-577, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES (Oct. 30, 2009) at 1.

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

disclose the extent of its relationship with Borja and his direct and ongoing involvement in the Lago Agrio Litigation, noting only that he was a *former* logistics contractor for the company.[8]

5. Nearly a year later, after it had become known that Borja in fact served as a Chevron contractor, Chevron was still lying about its relationship to Borja. In a July 2010 submission to the Lago Agrio Court, Chevron falsely claimed that Borja's "functions had *nothing to do with the sampling process*; and also, his work had *already concluded at the time of the incident*."[9]

6. In fact, Chevron's own Organization Chart identifies Borja — who has served as Chevron's contractor since 2004 — as its "sample manager" for its "Ecuador Litigation Team."[10] And far from having terminated its relationship with Borja at the time of the recordings, Chevron was still authorizing payment of invoices for work performed by Borja's company, Interintelg through ***August 2009***,[11] which of course post-dated the illicit recordings by several months.

7. Far from being a mere "good Samaritan," Borja has relied on Chevron payments for years. [redacted] he worked for two of Chevron's Lago Agrio contractors, [redacted] and Severn Trent Laboratories ("STL"), [redacted]. Borja's wife, Sara Portilla, worked at STL as a Chevron contractor responsible for quality control over the lab process from 2004-2007.[12] Borja then formed his own company, Interintelg, which functioned as a Chevron contractor from 2007 until 2009.[13] Most all of Interintelg's income came from work it performed for Chevron; [redacted]

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8 R-314, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 2; *see also* R-574, *Chevron Offers Evidence Of Bribery Scheme In Ecuador Lawsuit*, NEW YORK TIMES (Sept. 1, 2009) at 2.

9 R-318, Excerpt from Chevron July 13, 2010 Filing at 1 (emphasis added).

10 R-319, Chevron "Ecuador Litigation Team" Organization Chart at 11.

11 R-320, Email chain copying Borja and Verstuft regarding August 2009 Interintelg invoices.

12 [redacted]

13 [redacted]

[redacted]

8. Chevron's laboratories were hardly independent. In fact, all [redacted] of these companies, [redacted] and Interintelg, used the identical office space in Quito.[16] The building, once owned by Borja's uncle, is the same office building in which Chevron's local counsel, Messrs. Pérez, Callejas, and Racines, have their offices.[17] [redacted] Borja himself has claimed that the laboratories were not independent, explaining**:** "I have proof that they were more than connected, ***they belonged to them***."[18]

9. After Chevron released Borja's recordings to the public, Chevron paid for Borja and his wife and son to move from Ecuador to the United States in June 2009.[19] From August 2009 to December 2009, Chevron paid Borja a $10,000 monthly stipend and since January 2009 they have been paying him $5,000 a month (at least through the time of his deposition in March 2011).[20] In addition to the stipend, Chevron pays Borja's rent, his cell phone bills, his car payments, his legal fees, and other miscellaneous expenses.[21] [redacted] Sara Portilla,

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14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 R-184, Transcript of Borja/Escobar Conversation on Oct. 1, 2009 (13:03:33) at 6-7 (emphasis added).

19 [redacted]

20 [redacted]

21 R-325, Summary of Chevron Payments to or on Behalf of Diego Borja.

Borja's wife, has been working for Chevron in Houston, Texas.[22] From the time that Chevron paid for his relocation to the United States in mid-2009 through September 2011, Chevron plied Borja with more than ***$2.2 million*** of cash and benefits.[23]

2. Chevron's Attorney Met With Borja Before His Fourth Taped Conversation And Borja Claims To Have Been Acting To Give Chevron What It Wanted

10. Borja and Chevron's symbiotic relationship reflects the desire of the former for money and the desire of the latter to win at all costs. In recorded conversations with his long-time acquaintance, Santiago Escobar ("Escobar"), Borja explained that he expected a large reward in return for taping Judge Nuñez. He said he was looking for "something more than big . . . [t]he things you kill yourself your whole life for. I want to have them ready so I don't have to worry."[24] There is no indication Borja has, or ever had, the capacity to provide remediation services.

11. Despite declaring that the meetings had occurred "without Chevron's knowledge"[25] and publicly disavowing any connection to Borja's plan to record Judge Nuñez, Chevron flew their long-time contractor to the United States and met with him at the office of Jones Day, Chevron's outside counsel, before the fourth and final surreptitiously-taped conversation.[26] [redacted] Borja had but one mission after his

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[22] [redacted]

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

[24] R-188, Transcript of Borja/Escobar Conversation on Oct. 7, 2009 (21:30:56) at 12.

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

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

[27] [redacted]

meeting with Chevron: to return to Ecuador and continue his illegal conduct on behalf of Chevron.

12. Just days after his meetings with Chevron, Borja arranged another meeting with Mr. Garciá, an Ecuadorian businessman who had been present during Borja's first recorded meeting; this final, recorded conversation is the *only* meeting in which any "bribery plot" was actually discussed. This meeting, of course, did not include Judge Nuñez, any member of the court, or any government officials.[28] Borja then promptly returned to the United States and provided Chevron with the recording.[29]

13. As Borja admits, he was acting to further Chevron's interests: "It's because, in the end, what they . . . want is for the trial to be annulled."[30] He further bragged that he had "tipped" the balance in Chevron's favor and that he had done in "three days? [t]wo days?" what Chevron had not been unable to do on its own — get Judge Nuñez thrown out.[31]

14. Escobar testified under oath that Borja readily conceded to him that Chevron paid Borja to tape his conversations with Judge Nuñez.

> Q: With respect to the filming, secretly filming these meetings of individuals, including the presiding judge in Lago Agrio, did you learn from Mr. Borja that he has specially been ordered to do that or are you testifying that your general understanding was that the things he did were by the orders of Chevron?
>
> A: Yes, that he had received orders.

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28 As discussed below, Mr. García did not attend either of the recorded meetings with Judge Nuñez.

29 [redacted]

30 R-583, Transcript of Borja/Escobar Conversation on Oct. 1, 2009 (13:30:56) at 9.

31 R-581, Transcript of Borja/Escobar Conversation on Oct. 1, 2009 (12:51:02) at 1. [redacted]

> Q: Did you – did Mr. Borja share any other details about his secret filming of these meetings?
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> A: The first time, only general details, such as these, and that he had been ordered to do this. The second time he was more specific . . . he gave me details regarding the operation they had carried out, that they had filmed the judge; that he had carried out, you know, the deal of his life; that he was going to get a lot of dough, that he was guaranteed to get a lot more dough.[32]
>
> Q: In your [second June] conversation with Mr. Borja at the club, what did he tell you about his filming operation?
>
> A: That he and Wayne Hansen had filmed – well that they had sprung a trap, and that they had filmed quite a lot of people, and that they had filmed the judge accepting or talking about a bribe, and that the judge had also – well, and that that was going to destroy the trial, and that it was going to harm the trial. And they he had received the money, right? There was a person from Chevron in charge of the issue relating to his leaving the country, and that everything was already set and that they has already only packed a small bag, and they would leave because he was in danger because of what he had done.[33]

3. Hansen Fled From the United States Before the Republic Could Depose Him

15. Hansen, who acted in concert with Borja, is a convicted felon[34] with no experience in environmental remediation.[35] When the truth about Mr. Hansen's criminal history was revealed, it was a "blockbuster development" that added "more questions about what motivated Mr. Hansen and [Borja] to record meetings for Chevron's use" and called into question Chevron's allegations and characterization of Hansen and Borja.[36] Chevron has

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[32] *See* R-335, Escobar Deposition at 54:2-16, 57:19-24.

[33] *See Id.* at 58:5-19.

[34] R-332, Grant Fine, Report of Investigation re Wayne Hansen (Oct. 29, 2009) at 4. Hansen pled guilty in 1986 for his role in a conspiracy to smuggle 275,000 pounds of marijuana from Colombia to the United states.

[35] *See* R-584, *Felon Involved In Clandestine Videos*, Associated Press (Oct. 29, 2009); R-332, Grant Fine, Report of Investigation re Wayne Hansen Oct. 29, 2009) at 1.

[36] R-577, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES (Oct. 30, 2009) at 1.

disclaimed any connection to Hansen but nonetheless agreed to pay his reasonable attorney's fees and security costs.[37]

16. The Republic sought discovery from Hansen to further investigate his role in the taping of the conversations with Judge Nuñez.[38] After Section 1782 discovery was granted, Hansen fled the United States.[39] The Republic later learned that Hansen had fled to Peru. He wrote to Chevron's investigators to let them know his status, whereabouts, and monthly costs — with an invitation that they should visit him there.[40]

B. There Is No Evidence To Support Chevron's Claims That Judge Nuñez Was Involved In An Unlawful Scheme

1. Claimants' Own Evidence Establishes That Judge Nuñez Did Not Participate In Any Bribery

17. Almost two months after Chevron received the recordings from Borja, Chevron released the tapes to the public and to public authorities in Ecuador and the U.S., declaring, falsely, that the tapes implicated Judge Nuñez in a bribery scheme.[41] In fact, the recorded conversations with Judge Nuñez neither implicate him in any bribery scheme nor do they suggest that he was even aware of any plans to bribe him.

18. **First**, there is no discussion of bribery in the recorded meetings with Judge Nuñez.

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37 R-324, Letter from T. Cullen to Dr. D. Garcia Carrion (Oct. 26, 2009) at 9.

38 R-585, Application for an Order under 28 U.S.C. § 1782 to issue a subpoena to Wayne Hansen for the taking of a deposition and the production of documents for use in a foreign proceeding (Sept. 14, 2010).

39 R-586, Order granting the Republic of Ecuador's Ex Parte Application for the issuance of a subpoena (Wayne Hansen) (Oct. 14, 2010).

40 R-334, Email from W. Hansen to E. Mason and C. Harris (Dec. 3, 2010).

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

19. **Second**, despite Borja and Hansen's efforts to discuss how he might rule in the Lago Agrio Litigation, Judge Nuñez repeatedly told the men that he could not tell them what his ruling would be:

- "What you want to find out is whether it's going to be guilty or not, I'm telling you that I can't tell you that, I'm a judge, and I have to tell you in the ruling, not right now."[42]
- "So in the ruling, Sir, I'll say it. I haven't come here to tell you that . . . no, no, no, there's a, there will be a ruling."[43]
- "There will be a ruling, as I tell you, that is the amount they're claiming. I will say in the ruling whether it is more or it is less . . . it's more or it's less, I can't tell you."[44]

20. When Borja and Hansen pushed Judge Nuñez to discuss remediation, he similarly refused: "My obligation, sir, is just to issue the ruling . . . that's it. That's my role. . . . In other words, the court has nothing to do with how they're going to remediate and who's going to remediate."[45] When Borja and Hansen asked Judge Nuñez whether their fictitious company could perform remediation work and sought *unsuccessfully* to entrap the Judge in some way, he explained: "The ruling, there will be one. But I repeat, I as a judge, Sir, as to telling you or not telling you whether your company will do the remediation, I can't say." [46]

21. U.S. judges and media outlets who have reviewed the recordings made by Borja and Hansen have found no evidence of a bribery scheme. Judge Chen, a district court judge in California, admonished Chevron, saying:

> [Y]ou quote from the Borja declaration in which he claims that Novoa asked for him for $3 million to be divided: A million dollars for the judge, which is an assertion of the payoff, the bare knuckle kind of payoff to the judge -- a very serious allegation. **And I read the transcript, at least of the two transcripts you**

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42 C-267, Tr. Of Recording 3, at 10.

43 *Id.* at 11.

44 *Id.* at 12.

45 C-267, Tr. Of Recording 2, at 4, 7.

46 C-267, Tr. Of Recording 3, at 15.

> **provided me**, and while I could see why the judicial authorities in Ecuador found Judge Nuñez in violation of his ethical duty by exposing and discussing his opinion, **there was no hint in there about him taking a bribe or payoff, and I didn't see anything in the two transcripts provided to me on that.**[47]

22. Respected media outlets likewise have been uniform in confirming that there is no evidence that Judge Nuñez was involved in a bribery scheme or that he willingly discussed the verdict in the ongoing case.

- **New York Times**: "The recordings, made by a former Ecuadorean contractor for Chevron by using hidden recording devices, **do not make clear whether Judge Núñez was involved in a bribery scheme — or even whether he was aware of an attempt to bribe him**."[48]

- **Los Angeles Times**: "On the tapes, the men . . . press Nuñez to say how he will rule, without success. Then as Núñez appears to leave, one of the men maintains that Chevron is guilty, and Núñez replies, 'Yes, sir.' To Chevron, this clinches the argument. **But on the video, it's unclear to whom the judge is speaking and whether he is responding to the question or just trying to end the meeting."**[49]

- **San Francisco Chronicle**: "[T]he taped conversations with the judge himself **do not ever explicitly discuss bribes**. Núñez repeatedly tells the businessmen that **he can't discuss the verdict in advance**."[50]

- **Financial Times**: "The judge refuses several times on the tape to reveal the verdict, before saying, 'Yes, sir,' when asked if he will find Chevron guilty. However, **the video raises the question as to whether Judge Nuñez understood what he was being asked**."[51]

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[47] R-197, Transcript of Proceedings (Nov. 10, 2010), *In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 38:19-39:5 (emphasis added).

[48] R-315, *Under Pressure Ecuadorean Judge Steps Aside in Suit Against Chevron,* NEW YORK TIMES (Sept. 5, 2009) at 1 (emphasis added).

[49] R-316, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) at 2 (emphasis added).

[50] R-317, *Chevron Judge Says Tapes Don't Reveal Verdict*, SAN FRANCISCO CHRONICLE (Sept. 2, 2009) at 1 (emphasis added).

[51] R-576, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES at 2 (Sept. 1, 2009) (emphasis added).

23. Even Chevron's contractor, Diego Borja, has admitted that there was no bribery scheme. In his conversations with Escobar, Borja conceded: "Because really, there was no bribe. I mean, there[] was never . . . there was never a bribe."[52]

2. Judge Nuñez Recused Himself From The Lago Agrio Litigation And The Prosecutor General Is Conducting An Investigation Into Chevron's Allegations

24. Although Chevron met with Borja in early June 2009 and received three of his four recordings then, it did not notify prosecutors of the tapes until August 31, 2009 when it released the tapes to the public.[53] The Office of the Attorney General responded immediately and assured Chevron that it would "thoroughly, aggressively and fairly investigate Chevron's allegations."[54] The Prosecutor General has led the formal investigation into the videotapes provided by Chevron.[55] The final results of the Prosecutor General's investigation are pending.

25. Shortly after Chevron released the recordings, Judge Nuñez recused himself from the case to avoid any appearance of impropriety and to allow a full and impartial investigation to proceed.[56] Notwithstanding his recusal, Judge Nuñez has denied any role in a bribery scheme and has explained that he met with Borja and Hansen at the request of Dr. Avila, an Ecuadorian citizen and friend Judge Nuñez, to discuss the procedure for environmental lawsuits and the role of environmental experts in such lawsuits.[57]

26. Chevron filed a complaint against Judge Nuñez with the Provincial Court of Sucumbíos to have him sanctioned and to have "each and every one of [his] orders" declared null

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52 R-582, Transcript of Borja/Escobar Conversation on Oct. 1, 2009 (23.59.31) at 11.

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

54 R-587, Letter from Dr. R. Parreño to T. Cullen (Sept. 2, 2009).

55 R-588, Letter from D. Carrión to T. Cullen (Oct. 8, 2009).

56 R-589, *Ecuador Judge Recused in Chevron Case,* CBS NEWS (Sept. 29, 2009).

57 R-590, Sworn Statement of Judge Nuñez (Nov. 18, 2009) at 1.

and void.[58] On October 27, 2010 the Judicial Council, sitting en banc, issued a decision in which it sanctioned Judge Nuñez and removed him from his post of Judge of the Provincial Court of Sucumbíos.[59] The Judiciary Council found that Judge Nuñez had violated Articles 103 and 128 of the Organic Code of Judicial Branch, which prohibit judges from discussing their opinions about ongoing cases and disclosing information that may favor or injure one of the parties.[60]

27. Judge Nuñez later successfully appealed the order removing him from his post. Upon reconsideration, the Judicial Council found that the only evidence against Judge Nuñez were the clandestine recordings, which were made in violation of Articles 155 and 156 of the Code of Criminal Procedure and Article 76 of the Constitution and were therefore inadmissible as evidence.[61] The Judicial Council further noted:

> [T]here is no evidence that the individuals the [Judge] met with are parties to the trial at issue and, therefore, that they were interested in the environmental remediation trial the [Judge] was hearing, or that the [Judge] knew that these individuals had any interest in the trial; further, neither the videos nor their reproduction show the [Judge] soliciting money, and there is no exchange in which he solicited money or they offered him money to decide the case a certain way.[62]

28. The Judicial Council therefore granted Judge Nuñez's request to revoke the resolution to remove him from his post. Chevron's motion to annul all of Judge Nunez's rulings was considered but denied by Judge Zambrano because he found that the Code of Civil Procedure does not provide for such a remedy in this case.[63]

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58 C-229, Chevron Motion to Annul (Sept. 11, 2009) at 1.

59 C-662, Judicial Council Resolution (Oct. 27, 2010) at 8-9.

60 *Id.* at 8.

61 R-591, Judicial Council Resolution (Nov. 19, 2010) at 5.

62 *Id*. at 6.

63 C-230, Order Denying Chevron Motion to Recuse (Oct. 21. 2009) ¶ 13 (noting that Articles 346 and 1014 of the Civil Code of Procedure provide the exhaustive list of acts which could render a lawsuit null and void and finding that the acts at issue here did not fall under either Article).

3. Neither Mr. García Nor Mr. Novoa Represents The Republic In Any Capacity

29. Perhaps understanding that there is no evidence to connect Judge Nuñez to any bribery scheme, Chevron alleges that "two other people with political connections participated in discussions of a bribe relating to the Lago Agrio Judgment: Carlos Patricio García Ortego and Juan Pablo Novoa."[64]

30. Neither of these men has any record of being employed by the Government or of representing the Republic in any way.[65] Mr. García's position at La Adelantada, the offices of a political party, is not a position within the Government and does establish a connection to the Republic. Nor did Mr. García participate in any of the meetings with Judge Nuñez or even know Judge Nuñez.[66]

31. For his part, Mr. Novoa currently serves as a bank liquidator.[67] He is employed in this capacity as a private citizen and his salary is paid by the banks.[68] In any event, Mr. Novoa participated in only one meeting, during which there was no discussion of a bribery scheme at all.[69]

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64 Claimants' Merits Memorial ¶ 287.

65 R-592, Certification from Ecuadorian Institute of Social Security (Aug. 28, 2012) at 3-4; R-593, Certification from National Institute of Public Contracting (Aug. 24, 2012) at 1; R-594, Certification from Ministry of Labor Relations (Sept. 27, 2012) at 2.

66 C-570, *Interview with Patricio García*, La Luna Radio (Sept. 4, 2009) at 8.

67 R-595, Letters appointing Mr. Novoa as bank liquidator (Nov. 30, 2009).

68 *Id*.

69 *See* C-267, Tr. Of Recording 1.

ANNEX D: RESPONSE TO CLAIMANTS' "GHOSTWRITING" ALLEGATIONS

1. In their most serious allegation, Claimants accuse Judge Zambrano of issuing under his own name a 188-page Judgment authored by the Lago Agrio Plaintiffs. In support of this accusation, Claimants ask this Tribunal to (a) impute to emails and other communications connotations that are both speculative and indeed belied by their contexts and (b) fill the multiple voids in their story by importing the most malign inferences. Claimants bear a heavy burden to prove their allegations; they must do so by clear and convincing evidence.[1] Indeed, especially where a party attempts to prove its case by circumstantial evidence — as Claimants attempt to do here — the tribunal must "assess whether or not the evidence produced by the Claimant is sufficient to exclude any reasonable doubt."[2] But short of granting Claimants the benefit of every doubt — a presumption to which they are not entitled — they have not met their burden.[3]

I. Even With Access To All Of The Lago Agrio Plaintiffs' Files, Claimants Cannot Prove The Most Basic And Fundamental Aspects Of Their Ghostwriting Allegations

2. To dispel any serious consideration that the Lago Agrio Plaintiffs may have ghostwritten the Judgment or otherwise participated clandestinely in its drafting, one need only note what Claimants have *not* shown, and cannot show. This omission is particularly glaring in view of the fact that Claimants have had access to the entirety of the Plaintiffs' lead-attorney's case file, including all of his co-counsel and client correspondence, documents, text messages, and his personal diary — even emails and metadata from forensic reconstruction of his computer

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1 CLA-232, *EDF* Award at ¶ 221 (the party alleging bribery must do so by "clear and convincing evidence"); RLA-332, *Case concerning Oil Platforms* Judgment, Separate Opinion of Judge Higgins, ¶ 33 (stating that there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on").

2 CLA-81, *Bayindir* Award at ¶ 143.

3 The Republic continues to review the voluminous record that Chevron and the Lago Agrio Plaintiffs created in Ecuador as well as the astronomical amount of discovery Chevron has received through its efforts in the United States. The Republic's review is not complete.

hard drive and web-based email accounts. Through an unprecedented campaign of U.S. discovery, Claimants forced Steven Donziger, the alleged "mastermind" behind the Plaintiffs' "plot," to turn over all of his documents, all of his computer hard drives, and to give Chevron access to all of his email accounts used during the Lago Agrio Litigation. This included all his outgoing and incoming documents and, unlike in traditional U.S. discovery, the judge refused to exempt from production traditionally privileged inter-attorney, attorney-client, draft expert witness material, lawyer thought processes, investigational work product and even highly personal documents.

3. As a result, not only were Claimants afforded complete access to attorney Donziger's files, but after what undoubtedly was a meticulous and extraordinarily costly review of this remarkable universe of documentary evidence, Chevron deposed Mr. Donziger under oath on those documents for *seventeen* full days (the norm is seven hours). In similar discovery proceedings brought against Plaintiffs' other lawyers, scientific support teams and expert witnesses, Claimants received full access to hundreds of thousands of other legal and scientific documents and internal communications that they had authored, and literally months of their deposition testimony. Thus, extensive discovery was obtained under subpoena from Plaintiffs' legal and technical support team members, including: Stratus Consulting (environmental consultants), Ann Maest (scientific expert), Douglas Beltman (scientific expert), Joseph Berlinger (filmmaker), Michael Bonfiglio (film producer), Andrew Woods (intern), Brian Parker (intern), Aaron Page (junior attorney), Laura Garr (intern), Alberto Wray (attorney), Cristobal Bonifaz (attorney), Daria Page (junior attorney), William Powers (scientific expert), Charles Calmbacher (former scientific expert), Carlos Emilio Picone (scientific expert), Daniel Rourke (scientific expert), Jonathan Shefftz (scientific expert), Richard Kamp (scientific expert), Charles

Champ (scientific expert), Lawrence Barnthouse (scientific expert), Mark Quarles (scientific expert), Douglas Allen (scientific expert), Robert Paolo Scardina (scientific expert), ELAW (environmental consultancy), H5 (environmental consultancy), Vinchent Uhl (environmental consultant), the Burford Group (litigation funders), and the Weinberg Group (expert consultancy).[4] All-in-all Claimants have received over fifty orders requiring members of the Lago Agrio Plaintiffs' attorneys, their experts, their interns, and almost everyone even remotely connected with them, to turn over millions of pages of documents.

4. Despite having received a virtual blank check for discovery, literally unprecedented and unfettered court-ordered access to review nearly every page of the Lago Agrio Plaintiffs' internal communications and documents, Claimants have not produced a single document — no email, text message, excerpt from a deposition, or other document — proving its allegation that Judge Zambrano's decision was written by the Lago Agrio Plaintiffs' legal team. They have not found a single copy of any document, or portion of any document purporting to be a draft judgment. Nor have Claimants found — despite having unfettered access to all emails and other documents written by Mr. Donziger — any references to drafting a judgment for the Lago Agrio Court. Nor can they point to any communication discussing drafting such a judgment in Plaintiffs' possession. Chevron has built its case based on innuendo and inference, not evidence.

[4] The only U.S. counsel from whom Claimants have not received complete discovery is Joseph Kohn. But Kohn has repeatedly denied ghostwriting the Judgment and has offered to disclose his complete file but has been unable to because U.S. Courts have upheld the Lago Plaintiffs' rights to protect those documents as privileged. Kohn's willingness to disclose all of his records though surely indicates that there are no references to drafting the final Judgment or any drafts of that final Judgment in his files. It is again simply not credible to believe that Kohn would be willing to commit career suicide by exposing his own involvement in ghostwriting the Lago Agrio Judgment. Kohn has been unequivocal about his motivations; he considers himself a model attorney in his firm and his city, and has openly sought elected office in Philadelphia. If Kohn's files demonstrated his involvement in fraud on the scale Claimants allege, his career in law or in politics would be over, forever.

5. This otherwise inexplicable inability to find supporting documents has not muted Claimants' allegations. Instead, they point to internal discussions among Plaintiffs' counsel, which according to sworn testimony and the context of the complete communications merely contemplate the drafting and filing of a proposed judgment.[5] Proposed judgments are typical in U.S. litigation and most other common law jurisdictions (as this Tribunal recognized at the Hearing on Provisional Measures),[6] so it is hardly an indictment of the Plaintiffs that they considered filing a proposed judgment but then decided not to. The record shows that they opted instead to make their argument in their closing written submissions, i.e., their *alegatos*, a tactical choice well within the latitude of legal discretion.

6. Nor have Claimants found — having had complete access to all of Stratus Consulting's emails, drafts and other documents — any references in their production to Plaintiffs' drafting a judgment, or any documents purporting to be a draft judgment or a portion thereof. In their submissions to Mr. Cabrera, the Lago Agrio Plaintiffs allegedly relied extensively on Stratus Consulting to draft all of the technical and damages aspects of those submissions — including multiple drafts exchanged with multiple people from consultants to attorneys.[7] In stark contrast to their prior utter reliance on Stratus, Claimants would have this Tribunal accept that the Plaintiffs, when ghostwriting the Judgment, would deem themselves competent without Stratus' handholding. But it is hardly credible that the same lawyers who relied on Stratus Consulting so extensively would suddenly believe that no input was needed from them in crafting a reasoned judgment.

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5 R-273, Donziger Dep. Tr. (July 19, 2011) at 4757; *see also* R-274, Page Dep. Tr. (Sept. 15, 2011) at 170 ("Q. Did Kohn Swift & Graf ever create a draft of a Lago Agrio judgment? A. Not that I'm aware of.").

6 Interim Measures Hearing Tr. (Feb. 11, 2012) at 141 (President Veeder recognizing that submission of "proposed findings of fact and proposed conclusions of law" "happens in many jurisdictions").

7 *See, e.g.*, Claimants' Merits Memorial ¶¶ 226-235; Claimants' Supplemental Merits Memorial ¶ 93.

7. It is a rare occurrence for a prosecutor to bring murder charges, much less to obtain a conviction, absent a dead body. Here, there is no draft judgment in the possession of the Plaintiffs; there is no email transmitting a draft judgment from the Plaintiffs to the Court; there is no email even discussing any of the logistics of drafting a judgment; and there is no email referencing that a draft judgment was ever provided to the Court or would be surreptitiously sent to the Court. Claimants would have this Tribunal instead believe that the attorneys who discussed their communications with Mr. Cabrera in excruciating detail and with many different members of their team suddenly avoided all electronic communications for over a year and a half to discuss and draft a 188-page judgment. Unexplained omissions can sometimes be as probative as actual events. Sherlock Holmes famously solved a fictional case by drawing a shrewd conclusion from the curious circumstance of the dog *not* barking in the night.[8] The curious circumstance here is: so much discovery has failed to corroborate Claimants' "ghostwriting" theory. Isn't this the dog not barking in the night?

II. Claimants' Allegations Concerning The Fusion Memo Fall Apart Upon Examination

8. As noted, Claimants cannot prove the most basic element of their allegations — that the Lago Agrio Plaintiffs' representatives drafted the judgment — and instead can offer only circumstantial evidence grounded in unreliable academic theories.

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[8] Doyle, Arthur Conan, "Silver Blaze" in The Memoirs of Sherlock Holmes (1892). The watch dog made no noise, because no stranger was there.

> Gregory (Scotland Yard detective): "Is there any other point to which you would wish to draw my attention?"
>
> Holmes: "To the curious incident of the dog in the night-time."
>
> Gregory: "The dog did nothing in the night-time."
>
> Holmes: "That was the curious incident."

As explained by Holmes: "I had grasped the significance of the silence of the dog, for one true inference invariably suggests others. . . . Obviously the midnight visitor was someone whom the dog knew well. It was Straker who removed Silver Blaze from his stall and led him out on to the moor."

9. Claimants point to multiple paragraphs from the Judgment that largely mirror portions of the Lago Agrio Plaintiffs' Fusion Memo, idiosyncratic citations and references from the Fusion Memo, and out-of-order numbering similar to that found in the Fusion Memo.[9] Claimants cite to various expert reports they commissioned to support their assertion that "scientific evidence proves that the authors of the Judgment relied on (and copied verbatim) the Plaintiffs' internal legal and technical documents, which were never submitted into the court record or made public."[10] But contrary to Claimants' suggestion, the best available evidence shows that Plaintiffs' "internal documents" relied upon by Judge Zambrano in fact were openly submitted to the court and made public.

A. Claimants Cannot Prove The Fusion Memo Is Not In The Official Trial Record

10. As a threshold matter, Claimants have not even established the predicate fact on which their argument is based, namely, that the Fusion Memo is not in the official trial record. Claimants' sole evidence for their claim that the memo is not in the record is the expert report of Prof. Patrick Joula.[11] Prof. Juola claims that he performed an analysis of the entire Lago Agrio record using Optical Character Recognition (OCR),[12] and that his analysis unearthed neither the Fusion Memo nor portions thereof in that record.[13]

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9 Claimants' Supplemental Merits Memorial ¶ 6.

10 *Id.* ¶ 6. Claimants also cite to the Expert Report of Robert A. Leonard to show that the Fusion Memo was relied upon by the Court. That the Court relied on documents submitted to it is not improper; it is to be expected. Nor is there any aspect of the Fusion Memo that added to Plaintiffs' arguments already in the record. In fact, the Lago Agrio Plaintiffs largely tracked the substance of their Fusion Memo argument in their *alegato*, which was submitted to the Court on December 17, 2010. R-195, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Two at 102-06.

11 Claimants' Supplemental Merits Memorial ¶ 6, n.15.

12 Claimants have not provided the Republic with a copy of the record that Prof. Juola examined so there is no way for the Republic to independently verify that the record he analyzed is coextensive with the actual Lago Agrio Record.

13 *See* C-1007, Declaration of Patrick Juola, Ph.D., Dec. 20, 2011, at 3-4.

11. But this conclusion was countered by Professor Fateman, one of the Lago Agrio Plaintiffs' computer experts, who opined that "it is quite implausible that an effective computer search of the lower court record could be done."[14] As Professor Fateman explained, OCR technology works well with "clean freshly typeset copy," but as even a cursory review of the Lago Agrio Record shows, the record is anything but clean freshly typeset copy.[15] In his declaration, Prof. Fateman listed his results obtained by using Prof. Joula's OCR methodology on the Lago Agrio Record, contrasting them with Prof. Joula's results.

Results of OCR	**Actual Text**
.·'C;O:R□E;,.8,UJlERIOR'.D·E,,..j:US·TIEIA : 'Il·E·'··.:I\IUEVA' :tOJA" .....•....	CORTE SUPERIOR DE JUSTICIA DE NEUV A LOJA.
TEXPET con CH~~ó;0'-?:>,-"'.", CORPORATJON. .(~.,.," '1,:	TEXPET con CHEVRON CORPORATION

12. As Professor Fateman explained, to perform a search using OCR technology one must first feed the documents at issue through OCR recognition software. That software attempts to recognize shapes formed by dark lines (which the human brain recognizes as letters) and to convert those shapes into letters. As can be seen from the examples above, OCR software is far from perfect at this task, even though the same effort is fairly simple for human readers. Based on his expertise and review of the record, Prof. Fateman concluded that "it would be inappropriate to assert that material claimed to be unfiled could not possibly be present in the lower court record."[16]

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14 R-655, Decl. of Richard J. Fateman, Ph.D. (Feb. 22, 2012) ¶ 28.

15 *Id.* ¶ 18.

16 *Id.* ¶ 29.

B. Evidence Shows The Fusion Memo Was Publicly Submitted To The Court

13. But even if the Fusion Memo cannot be found in the official Lago Agrio trial record, it cannot be concluded solely on such basis that its absence either logically or legally necessitates a finding of unlawful conduct, much less a criminal conspiracy. To the contrary, the Lago Agrio Plaintiffs' communications and the trial court record establish a far less suspicious — and far more likely — explanation.

14. On at least six occasions, Plaintiffs' internal communications reveal their affirmative intent to submit (transparently and openly) materials to the Court, including legal arguments regarding the legal effect of Chevron's merger with Texaco. From at least as early as October 2005, Plaintiffs discussed among themselves an intent to submit the Fusion Memo and its accompanying exhibits to the court during one of various judicial inspections. On October 12, 2005, Aaron Page, then a law school student interning with the Lago Agrio Plaintiffs' attorneys, established the Plaintiffs' plan for addressing the legal effect of Chevron's merger with Texaco on the record during one of the judicial inspections. Mr. Page had begun what he called then the "affadavit's [sic] of foreign law" that he proposed Pablo Fajardo submit to the Court in writing or at least read at a judicial inspection.[17] While Mr. Page recognized that they would not be able to complete that project by the October 19, 2005 inspection at Guanta Production Station, Plaintiffs planned to "stir [Chevron] into providing some more information and arguments in response" to Plaintiffs' position on the legal effect of the merger, so that the Plaintiffs would know "what they have up their sleeve before . . . submit[ting] [their] more

[17] R-656, Email from A. Page to S. Donziger, *et al.*, October 13, 2005 [DONZ00085932] Both sides' counsel were present at all judicial inspections and were free to ask questions, cross-examine witnesses, and make statements to the Judge during these occasions, which common law attorneys would analogize to being "in open court." *See* C-1367, Lago Agrio Clarification Order of the Judgment, May 4, 2011 at 22.

detailed legal arguments."[18] Far from acting surreptitiously, the very premise of Plaintiffs' legal strategy was to discuss the issues raised in the Fusion Memo openly, with Chevron's counsel present, so that they could elicit Chevron's responsive arguments.

15. In November 2006 the Plaintiffs planned to "stir the pot" further regarding the "fusion" of Texaco and Chevron in the course of responding to the Judge's request for evidence at the Auca 01 or Cononaco 6 Judicial Inspection.[19]

16. Finally, during the June 2008 Aquarico judicial inspection, Plaintiffs argued the legal effect of the Chevron-Texaco merger directly to the Court, of course in the presence of Chevron's cadre of counsel, who attended every judicial inspection. At the Aquarico inspection, Plaintiffs' counsel accordingly implemented Mr. Page's original plan by submitting their documentary evidence on Fusion, and as their internal communications indicate, simultaneously submitting the Fusion Memo itself. Therefore, on June 9, three days before the Aquarico inspection, Plaintiffs prepared a final version of the Fusion Memo[20] and a list of accompanying exhibits to be submitted.[21] At the June 12 judicial inspection, both parties discussed with the Judge the Chevron-Texaco merger and its legal implications for the case.[22] The court docket notes submission by Pablo Fajardo at the inspection site of all of the Fusion Memo's accompanying exhibits.[23] In fact, each of these exhibits referenced in the Fusion Memo was docketed in the record, even though the memo itself apparently was not, thereby at the worst

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18 *Id.*

19 R-832, Email from P. Fajardo to S. Donziger, *et al*., Nov. 9, 2006 (discussing plan for Yuca 2, Auca 01, and Cononaco 6 inspections).

20 R-657, Email from G. Erion to S. Donziger, June 9, 2008.

21 R-658, Email between Steven Donziger and Juan Pablo Sáenz, June 9, 2008 (discussing merger documents to be submitted).

22 R-660, Lago Agrio Record, Cuerpo 1309 at 140787-814 (Acta from JI of Aguarico 2).

23 R-530, Lago Agrio Record, Cuerpo 1308 at 140701 ("Protocolizacion" attaching Fusion Memo exhibits).

suggesting some administrative hiccup.[24] The Fusion Memo exhibits submitted at the Aquarico 2 judicial inspection are the very exhibits cited in the Lago Agrio Judgment in the legal discussion of "lifting the corporate veil" — the same discussion that Claimants allege was copied from the unfiled Fusion Memo.[25]

17. Of particular note, Claimants allege that the Lago Agrio Plaintiffs, in 2011, relied on a November 2007 version of the Fusion Memo in their alleged surreptitious writing of the Lago Agrio Judgment.[26] As Claimants know, though, the Lago Agrio Plaintiffs had multiple versions of the Fusion Memo, including the 2008 version submitted at the Aquarico 2 JI, and a 2011 version that was circulated in preparation for the Plaintiffs' *alegato*.[27] What Claimants would have this Tribunal believe is that despite having more up-to-date versions of the Fusion Memo, the Lago Agrio Plaintiffs searched their files to find the 2007 version of the Fusion Memo and then used the outdated version in secretly drafting the ultimate Judgment. As Occam's Razor would hold, it is far more likely that the Lago Agrio Court relied on the 2008 version of the Fusion Memo submitted to the Court at the Aquarico 2 JI, and that a clerical mistake kept it from being lodged as an official part of the record.

18. That at least a handful of documents — out of many tens of thousands of documents — may not have been docketed as part of the official trial record is readily apparent. For example, the *Crude* outtakes show that both parties routinely engaged in substantive *legal* discussions (in addition to the taking of evidence) with the Court during the judicial inspections.

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24 *Id.*

25 C-931, First Instance Judgment by the *Lago Agrio* Court, *Aguinda v. Chevron*, Feb. 14, 2011 at 8 (citing to Fusion exhibits starting at 140700); *id.* at 9 (citing 140747 and 140748); *id.* at 10 (citing 140750); *id.* at 11 (citing 140766, 140767, 140768; *id.* at 13 (citing 140770, 140759, 140761, 140768); *id*. at 15 (citing 140759).

26 Report of Robert A. Leonard, Ph.D., Jan. 5, 2012 at 9, 13 *et seq*.

27 R-566, Fusion Memo Versions Chart, Dec. 12, 2012, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 11-cv-691.

And as part of the legal discourse, counsel for both parties provided the Court, and presumably each other, with documents — a few of which may inadvertently not have made it into the official record.

19. For instance, in the *Crude* outtake from Sacha Sur, Mr. Alejandro Ponce Villacís can plainly be seen openly providing a document to the court.[28] Later, in another outtake from the same judicial inspection, the parties' counsel can be seen debating the legal effect of the Chevron-Texaco merger.[29] Similarly, at the judicial inspection of Cononaco 6, Mr. Pablo Fajardo handed a document to Chevron's counsel, Mr. Adolfo Callejas, (at 5:00) and then Mr. Callejas handed it to the court (at 8:40).[30] In neither case, however, does the trial record note the Court's receipt of the document from a party.

20. The Ecuadorian legal system is not the first legal system to have lost one or more filed documents. The fact that paper filing systems are inefficient and are prone to lose documents is one of the reasons many U.S. Court jurisdictions — but not all — are moving to electronic filing systems.[31] Losing filed documents is a frequent enough occurrence in the United States that many states and the Federal Government have enacted laws to help parties and the courts deal with the missing documents.[32]

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28 R-840, Crude Outtakes at 30:40.

29 R-841, Crude Outtakes at 30:00.

30 R-842, Crude Outtakes at 8:40.

31 *See, e.g.*, R-661, McMilan, Walker, and Webster, A GUIDEBOOK FOR ELECTRONIC COURT FILING 111-12 (West 1998); R-572, Alan Carlson, *Electronic Filing and Service: An Evolution of Practice* (Justice Management Institute 2004) at 3, 46 (noting one of the benefits of electronic filing is reduction in lost documents); R-663, Electronic Case Filing, Southern District of New York ("Benefits of filing electronically using ECF include" avoiding "[s]torage of paper files that may be misplaced or lost").

32 *See, e.g.*, RLA-397, 28 U.S.C. 1734 (titled "Court record lost or destroyed, generally"); RLA-398, 705 Illinois Compiled Statutes 85 (titled "Court Records Restoration Act").

21. The totality of the circumstances strongly suggest that the Fusion Memo was provided to the Court — and may have even been read to the Court — openly and in Chevron's counsel's presence. Its contents were clearly discussed, and its attachments indisputably made it into the record. The document itself was derived from public case law and texts. It had no "surprise value," and Plaintiffs therefore had nothing to gain by concealing the language from Claimants. In any event, these same arguments were later covered *in extenso* by both sides in their respective *alegatos*. Worst case, even if Claimants' expert is correct in finding that the Fusion Memo is not part of the *official* record, that falls far short of establishing that such document (or its relevant contents) was not provided to Chevron; nor does it establish that it was not viewed by both sides and discussed openly at a judicial inspection. Claimants' army of attorneys and experts cannot transform an administrative oversight into a crime by force of rhetoric.[33]

22. There are other examples of discreet clerical errors in this eight-year trial. On a single day, October 14, 2010, Chevron filed thirty-nine separate motions challenging one court order.[34] Only thirty-five of those motions appear in the official record.[35] Can an overwhelmed Court be blamed for not being able to administratively process every one of these repetitive

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[33] As Claimants also know, both parties also had a practice of submitting to the Lago Agrio Court, as part of the judicial inspection process and sometimes as a complement to a motion, CDs and DVDs containing documentary evidence. *See*, *e.g.*, R-664, Lago Agrio Record, Cuerpo 1416 at 151470-71 (Chevron asking the Court to review and incorporate into the record the contents of a CD containing sampling data and quality control data related to those samples); R-665, Lago Agrio Record, Cuerpo 108 at 12008 (noting Chevron's submission of a CD and accompanying video to the court during the Sacha 14 JI); R-666, Lago Agrio Record, Cuerpo 108 at 12047 (Chevron submitting CD of video presented at Sacha 14 JI). While at times the Court added those discs to the Record, *see* R-667, Lago Agrio Record, Cuerpo 1076 at 117078 (incorporating transcript of Chevron's video submitted at the Lago Agrio 2 JI), it did not always do so. *See, e.g.*, R-668, Lago Agrio Record, Cuerpo 1416 at 151454-455 (Providencia noting CD submitted by Chevron but not yet included in record).

[34] *See* C-644, Court Order, Provincial Court of Sucumbíos, Oct. 19, 2010 (addressing Chevron's thirty nine motions).

[35] Cuerpo 1989 ends with Chevron's Motion filed at 5:44pm — the 35th of 39 it filed that evening. Cuerpo 1990 starts with the Court's Order addressing those 39 motions. *See*, *e.g.*, R-182, List of Motions Addressed by Court's Order of Oct. 19, 2010, 17H02M.

submissions? Even in the most efficient and industrious courts clerical glitches happen. In Lago Agrio, clerical mistakes are also reflected in the fact that, although each page is supposed to be sequentially numbered, in sections of the record only every other page is numbered — including the section of the record containing the Fusion Memo's exhibits.[36]

23. That the administrative support staff in a provincial trial court in an outpost of the Amazonian rain forest — where Chevron had insisted that the trial take place in preference to the New York federal court — had trouble with the volume of pleadings and evidence in this case is hardly surprising. This gargantuan proceeding, in contrast, generated about 250,000 pages — likely the largest record of any case in Ecuadorian jurisprudence and clearly 2000 times larger than the average case. Suffice it to say that clerical mistakes of this kind would not constitute reversible error in a domestic appellate court, and certainly not amount to a denial of justice constituting a breach of international law or a bilateral investment treaty.[37]

III. Access To The Selva Viva Database Does Not Show Ghostwriting

24. Claimants also note that the Judgment refers to the Lago Agrio Plaintiffs' "Selva Viva database," which, according to Claimants, was not in the record. Claimants specifically point to a number of references in Judge Zambrano's decision to samples that include "_sv" or "_tx" suffixes as proof that Judge Zambrano had access to the Selva Viva Database, which also uses "_sv" or "_tx" suffixes. According to Claimants, this nomenclature was not used in the

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[36] R-669, Lago Agrio Record, Cuerpo 1309 at 140716-786 (including unnumbered pages). *See also, e.g.*, R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages from roughly 60,000 pages earlier in the record).

[37] Claimants also allege that Judge Zambrano had access to "the Plaintiffs' unfiled index summary" because the Judgment contains "repeated errors and identical word bundles." SMM ¶ 8. But Claimants have not proven these "Index Summaries" are the Lago Agrio Plaintiffs' original work. It is far more likely that the Lago Agrio Plaintiffs received these excel spreadsheets from the Court, which maintained extensive spreadsheet records of the parties' filings. *See* R-833, Crude Outtakes at 29:15-42:00 (video of Mr. Fajardo submitting documents to the Court and showing the Court's index summary on the secretary's computer screen); R-834, Crude Outtakes at 7:00-7:34 (close-up video of the Lago Agrio Court's spreadsheet for tracking site inspections and expert reports).

official trial record and thus its use in the Judgment proves that Judge Zambrano had outside-the-record access to the Selva Viva Database.

25. In fact, the Selva Viva Database was merely a compilation of all the testing results — Plaintiffs' and Chevron's — from the judicial inspections filed with the court and sprinkled throughout the court record. Plaintiffs frequently employed this "sv" and "tx" nomenclature in court filings, and it consequently appears in the record numerous times.[38] It is far from surprising that the Plaintiffs used their own nomenclature. It is also unsurprising that Judge Zambrano used that nomenclature — he surely had no idea that using a party's sample name nomenclature would eventually be used as evidence of ghostwriting.

26. But even leaving this aside, the Court's alleged reliance on compilations not officially identified as part of the official court record — but compiling data that had been separately filed as part of that record — cannot give rise to a Treaty breach or a violation of customary international law unless it reflects such an egregious and overwhelming violation of Claimants' due process rights such that they were deprived of a fundamentally fair trial. As before, Claimants make the leap that because the Selva Viva data, in relevant part, are allegedly not identified in the official record, the Lago Agrio Plaintiffs must have ghostwritten the Judgment. In so concluding, Claimants infer that (1) the Plaintiffs did not share the Selva Viva data with anyone or otherwise sought to keep the data out of the record; and (2) the Plaintiffs drafted the Judgment in reliance on this data and somehow transmitted this proposed judgment to

[38] R-671, Lago Agrio Record, Cuerpo 1292 at 139090 (containing 12 samples with "_sv" suffixes); R-836 Stratus Consulting, History of Contamination at Oil Wel Lago Agrio 11A, Oil Well Sacha 94, and Production Station Aguarico in the Napo Concession, Ecuador (2007), in Lago Agrio Record, Cuerpo.1746 at 184395 *et seq.*; *id*. at 184420 (5 samples); *id*. at 184421 (5 samples); *id*. at 184425 (2 samples); *id*. at 184438 (5 samples); *id*. at 184446 (2 samples); *id*. at 184474 (5 samples); *id*. at 184475 (4 samples). These were duplicated in English. R-837, Lago Agrio Record, Cuerpo 1746 at 184516, 184517, 184521, 184534, 184542, 184565, 184566.

the Court with no trace of the communication. Claimants again fall far short of proving their contentions or satisfying their high burden of proving corruption.

27. While the Republic does not know whether, or how, the Court received the Selva Viva data, logic surely is not on Claimants' side. If a party were to ghostwrite the Lago Agrio Judgment, the most critical requisite would be to identify and cite only the evidence in the trial record. Claimants instead suggest that the alleged co-conspirators were so farsighted that they accomplished their ghostwriting goal while avoiding any email or other communication referencing the plot, yet at the same time were so careless that they had the ghostwritten document cite documents not part of the record — documents that Claimants allege in the RICO action the authors *knew* were not in the record.

28. We have already shown that the parties submitted documents to the Judge "in the field" during the judicial inspection process, and routinely submitted CDs and DVDs to the court, both during the judicial inspection process and as an adjunct to their motions practice, though the documents frequently were not identified as part of the trial record. Chevron never objected to this practice, and instead actively participated in it.

29. Nor would it have been improper for either party to provide facts and data to Mr. Cabrera for his consideration. Both parties had the legal right to communicate with the expert to provide information to the expert for his consideration.[39] While Claimants contend that the Lago Agrio Plaintiffs went too far and effectively drafted Cabrera's report for him, Claimants have never taken the position that the parties were prohibited from communicating with court-appointed experts or from providing him with information for his consideration. And if the

[39] R-599, Aff. of Dr. Farith Ricardo Simon, Feb. 16, 2011, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 1:11-cv-691, at ¶¶ 4-5, 7-8 (attesting to the legality and commonality for parties to communicate and meet with court-appointed experts and to advocate their positions).

Plaintiffs transmitted data to Mr. Cabrera, there would have been nothing wrong with Judge Zambrano requesting — or Mr. Cabrera providing at the conclusion of his work — a copy of all of his raw data compilation.

30. The Court's presumed receipt of the Selva Viva data cannot be a basis to conclude that the Judgment was ghostwritten or that the proceedings were unfair. In his 188-page decision, Judge Zambrano identified many, many dozens of exhibits that he had considered. If among the 200 or more exhibits cited by the Court there in fact exist two (or even more) documents *not* reflected in the docket entries, that would indicate only that the Court may have received and considered documents that the court clerk should have recorded and identified. That may constitute a clerical error, but it surely does not establish fraud or a violation of international law.

31. In this regard it is important to understand what the Selva Viva Database is, and is not. In 2005, when the judicial inspections had begun, the Plaintiffs realized they needed to create a master database of all sampling data collected. To that end the Plaintiffs hired an outside consultant who input all of Chevron's data and the Plaintiffs data into a unified Access database named the "Selva Viva Database."[40] Eventually that database took two forms, the original Access database and later a collection of Microsoft Excel spreadsheets.[41] Both forms of that database contained the same information, i.e., only raw sampling data, no argument or other text.

32. As Claimants have admitted in New York, the validity and integrity of the Selva Viva Database's data collection is not in dispute — it accurately and thoroughly reflects both sides' sampling results. As a result, regardless of how Judge Zambrano received the Selva Viva

40 R-672, Email from S. Donziger to L. Carvajal, *et al.*, July 3, 2007 [DONZ00062506].

41 *Id*.

Database, Claimants were not prejudiced because Judge Zambrano had an easy method to access both sides' sampling data.

IV. Claimants' Stylistic Analysis Of The Judgment Is Pseudo-Science And Is Discredited Around The World

33. Claimants rely on the Expert Report of Prof. Gerald McMenamin to conclude that "Judge Zambrano did not write the Judgment."[42] Prof. McMenamin claims to have analysed "seven patterned and re-occurring markers of writing style" to conclude that "'it is highly probable that Judge Zambrano did not author a significant amount of the [Judgment].'"[43] At the outset, Prof. McMenamin's methods and conclusions are highly suspect. In some U.S. courts for instance, Prof. McMenamin's field of study is not even accepted as reliable and therefore such experts have been barred from submitting their opinions to the trier of fact.[44] And, even when the experts and expertise are accepted, courts frequently do not allow the experts to offer an opinion on authorship.[45]

34. As one poignant example of why Prof. McMenamin's stylistic analysis is often deemed unreliable and excluded from U.S. Courts, in the RICO action in New York, Chevron

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42 Claimants' Supplemental Merits Memorial ¶ 10.

43 *Id*. ¶ 10.

44 *See*, *e.g.*, RLA-328, *United States v. Lewis*, 220 F.Supp.2d 548, 552-53 (S.D.W.Va.2002) (finding that proponent of forensic document expert had failed to establish testimony's reliability); RLA-326, *United States v. Saelee*, 162 F.Supp.2d 1097, 1105-06 (D.Alaska 2001) (excluding handwriting expert testimony in its entirety as inherently unreliable).

45 RLA-399, *Wolf v. Ramsey*, 253 F.Supp.2d 1323, 1347-48 ("while Epstein can properly assist the trier of fact by pointing out marked differences and unusual similarities between Mrs. Ramsey's writing and the Ransom Note, he has not demonstrated a methodology whereby he can draw a conclusion, to an absolute certainty, that a given writer wrote the Note"); RLA-400, *United States v. Van Wyk*, 83 F.Supp.2d 515, 524 (D.N.J.2000) (allowing an expert to testify about "the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, he has seen a particular idiosyncrasy"); RLA-401, *United States v. Rutherford*, 104 F.Supp.2d 1190, 1194 (D.Neb.2000) (limiting a forensic document examiner's testimony to "identifying and explaining the similarities and dissimilarities between the known exemplars and the questioned documents"); RLA-402, *United States v. Hines*, 55 F.Supp.2d 62, 68 (D.Mass.1999) (permitting forensic examiner to testify about unique features common or absent in the writings).

submitted the expert report of Professor M. Teresa Turell, who opined on the authorship of the Judgment. In her expert report Prof. Turell concluded that "[t]he written style of some sections of JUDGMENT exhibit linguistic syntactic markers and parameters similar to those found in the style of two sets of texts (academic and legal) written by lawyer [Alejandro] Ponce [Villacis]."[46] But lawyer Ponce, as Prof. Turell calls him, joined his father's law firm, Quevedo Ponce — one of the primary law firms Chevron has retained — in January 2009.[47] Although Alejandro Ponce Jr. once acted as an attorney for the Lago Agrio Plaintiffs, it hardly seems credible that Chevron would continue to retain a firm employing one of the attorneys that it believed covertly drafted the Judgment as part of an illicit plot to extort billions of dollars from the company. Not only is Ponce Jr. now an attorney with Chevron's Ecuadorian law firm, but at least one of the documents Prof. Turell used to identify Ponce Jr. as an author of the Judgment was actually written by his father, Ponce Sr., while his father was working for Chevron.

35. If Claimants' own expert is to be believed, *Chevron's* current attorney(s) in fact ghostwrote the Judgment. And if Claimants' expert is in error, then her report serves as evidence of the exceedingly subjective nature of this "expertise." Not surprisingly, Claimants have elected not to share Prof. Turell's report with the Tribunal.

36. Even if Prof. McMenamin's analysis were reliable, he reaches his conclusions only by ignoring the more likely explanations. It may be, for example, that Judge Zambrano did not write the entirety of the Judgment personally but that he instead incorporated earlier work of other judges sequentially assigned to the case, perhaps along with the work of their law clerks

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46 R-673, Report of Teresa Turell, Feb. 14, 2011, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 11-CIV-0691 at 44.

47 R-531, Excerpts of Procedural Order 1, *Chevron Corp. v. Ecuador*, PCA Case No. 34877 (May 22, 2007) (listing Alejandro Ponce Martinez and Quevedo & Ponce as representing Chevron Corp.). *See* R-532, Firm Biography of Alejandro Ponce Villacis.

and his own law clerks. Or he may have adopted the styles of the parties' voluminous submissions, at least to the extent he relied on them. In either event, Prof. McMenamin's analysis fails to establish either that Chevron has not received a fundamentally fair trial or that the case is being adjudicated on a basis other than applicable law.

V. Claimants' Allegations That The Judge Could Not Have Read The Entirety Of The Relevant Record Are Legally Irrelevant

37. Claimants rely on Dr. Rayner's expert report to conclude that there is no possibility that Judge Zambrano could have read all 237,000 pages of the record and then written a 188-page single spaced Judgment in the two-month period in which Claimants contend it took him.[48] This allegation is as easily dismissed as Prof. McMenamin's above, and for similar reasons.

38. First, there is no rule that prohibited Judge Zambrano from reviewing relevant portions of the Record before he issued his *autos para sentencia* order, closing the evidentiary phase of the case. Indeed, he had previously served a rotation as the presiding judge (from Fall 2009 to Spring 2010), so he was not unfamiliar with the case when he re-assumed the role of presiding judge in 2010.[49] Nor is there any prohibition in Ecuadorian law precluding a judge from beginning to draft a judgment covering those individual issues on which he had previously made a tentative decision. Nor is a judge barred from adopting portions of a draft decision, or the resolution of individual issues to be ultimately covered in a decision, drafted by another judge who previously presided over the case. The Court, where rotation of presiding judges is the norm, is considered a unified body under Ecuadorian law.

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48 Claimants' Supplemental Merits Memorial ¶ 15.

49 *Id*. ¶ 105.

39. In no system of jurisprudence is a trier of fact (whether judge or jury) required to read every page of every document in the record before making findings of fact. Courts are entitled to rely on the litigants' briefs or *alegatos* for summation of and citation to relevant portions of the record on which findings may reliably be made. This Tribunal will no doubt appreciate that litigants routinely fill trial court records with irrelevant and/or duplicative material, whether in the form of pages before and after relevant sections of documents, large repetitive submissions, or highly technical documentation supporting conclusions drawn by experts. Courts are also entitled to assess which facts are not seriously contested and separate them from legitimately disputed propositions. The same applies to the parties' exposition of governing law reflected in their respective legal briefs.

40. The Lago Agrio Litigation was no exception, and indeed Claimants here were chastised multiple times for filling the record with duplicate submissions.[50] A review of the record also demonstrates the degree to which Chevron in particular filled the record with duplicative material. For instance, Chevron seems to have duplicated entire *cuerpos* (bound volumes containing approximately 100 pages of the record), e.g., *cuerpo* 1439 seems to be duplicated by Chevron in *cuerpo* 1441 and then again at *cuerpo* 1443.

41. Similarly, Chevron dumped massive amounts of technical data on the Court. For example, in a Section 1782 action to obtain discovery from Claimants' "independent" laboratory, Chevron claimed that all of the Level 4 Reports[51] that Chevron received for each sample and that the Republic requested in the discovery action had been submitted in Lago Agrio.[52] When those

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50 *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.2.b.

51 Level 4 Reports are the scientifically detailed reports created by testing companies that document every step of the testing process for each sample tested. Typically, these reports are hundreds of pages each.

52 R-677, Chevron Corp.'s Anticipated Objections to the Subpoena Proposed by the Republic of Ecuador and Dr. Diego García Carrión, *In Re Application of the Republic*, Case No. 4:11-mc-00088-RH-WCS (Nov. 3, 2011) at 4

reports were eventually produced, they amounted to tens-of-thousands of pages that spanned twenty-two CDs. In any event, the supposed relevance and materiality of these reports was summarized in Chevron's court filings. Similarly, both parties put both English and Spanish translations of many documents originally created in English into the record. At the end of the day it is next to impossible to determine exactly what percentage of the record was superfluous, but no court could reasonably be expected to read line-by-line and digest the contents of twenty-two CDs filled with highly technical data or read both English and Spanish versions of documents.

42. Skimming portions of the record that a judge or panel has deemed irrelevant to its ultimate determination, and relying on the parties' briefs to summarize data, is hardly uncommon. For example, by rough count the *Commercial Cases* BIT tribunal was faced with a record of more than 200,000 pages that was not complete until the Republic's final post-hearing submission on December 10, 2010. Based on Claimants' expert's analysis, each tribunal member then was required to spend more than 425 8-hour days, or more than fourteen months, just reading the record. And, as of the date of the filing of this Counter-Memorial, the record in this Arbitration is approximately 130,000 pages which will, if nothing further is filed, require 270 8-hour days of review according to Claimants' expert. Claimants' analysis is transparently superficial.

VI. Claimants' Misquotations And Unsupported Inferences From The Plaintiffs' Internal Communications Do Not Show Ghostwriting

43. Claimants' failure to find a draft or copy of the allegedly ghostwritten judgment in the files of counsel for the Lago Agrio Plaintiffs, or in the files of any of their experts, or any

(objecting to requests for reports because they "would require the production of documents already on file with the Sucumbíos Provincial Court of Justice in Ecuador").

references to the submission of a draft judgment to the Court *ex parte* is telling. All they can come up with is the fact that the Judge's secretary may have failed to lodge a couple of documents as part of the official record. Having scoured the millions of Plaintiffs' internal documents in their possession, they resort to twisting the meaning of a few in an attempt to support their accusations.

A. Donziger And Fajardo's August 2008 Email Communication Offers No Evidence Of Ghostwriting

44. Claimants first cite to a short portion of an August 2008 internal email exchange between attorneys Donziger and Fajardo. First, the meaning of the abstracted phrase "work[ing] with the new judges" from Mr. Fajardo's email is far from self-indicting. Claimants can only speculate that a negative connotation should be superimposed onto this informal email snippet. Second, the full text of the email reveals that Mr. Fajardo's reference was a direct response to Mr. Donziger's plea to work out a plan to "speed things up."[53] Even then, it took three more years before a decision was issued.

B. Donziger's Strategic Plan Shows That The Plaintiffs Did Not Ghostwrite The Judgment

45. Claimants next cite to Steven Donziger's email entitled "Strategic Plan for 2009/Ecuador," in which he includes the words "reasoned opinion" in a list related to the word "order."[54] But again there is absolutely no indication that Mr. Donziger intended to *draft* that "reasoned opinion." Claimants' speculation is uncorroborated by evidence that Mr. Donziger's intention was for the Plaintiffs' defense team to ghostwrite anything for the Court. Nothing in the transcripts of seventeen days of deposition testimony from Mr. Donziger, and nothing in the

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53 C-993, Email between P. Fajardo and S. Donziger, Aug. 9, 2008 [DONZ00047253].

54 Claimants' Supplemental Merits Memorial ¶ 16 (citing C-1137, Email from S. Donziger to himself, Jan. 5, 2009 [DONZ00049360]).

universe of emails and other evidence, shows that that is what Mr. Donziger had in mind. Indeed, there is a much more likely explanation than the one offered by Claimants. By that time, Chevron already had challenged prospective enforcement through this Arbitration of any judgment that the Court might render. A reasoned opinion was important because it was clear that Chevron would appeal and then challenge enforcement of any adverse decision. It was to be expected that Mr. Donziger would work to get the court to issue a reasoned opinion. Any lawyer in a case such as that would be expected to work diligently to obtain not only a favorable decision, but a defensible decision, once it is clear that his adversary is likely to appeal.

46. Not only is there no evidence that Mr. Donziger sought to draft the Judgment, but the context surrounding the quoted phrase suggests just the opposite. For example, if he were drafting the Judgment, there would have been no reason to "*ask for* bond and interest to run." In that event, Plaintiffs instead would simply have drafted the Judgment to include an award of post-judgment interest and a provision dealing with the bond required for appeal.

C. A First Year Law Student Intern Did Not Ghostwrite The Judgment

47. Claimants cite to an email from Mr. Fajardo to Mr. Donziger which states that Brian Parker, an intern with Plaintiffs' legal team, would work on "a research assignment for our legal alegato *and the judgment*, but without him knowing what he is doing."[55] Claimants' narrative weaves this otherwise innocuous reference to a *research assignment* into their conspiracy theory, contending that the Plaintiffs trusted the drafting of the final judgment — in what was then a $27 billion case — to an unpaid first year law student who had volunteered to work on the case over the summer. Again, Claimants present no evidence from the record to support their interpretation. A more plausible reading is that Mr. Fajardo was referring to the

[55] *Id.* ¶ 16 at 10 (citing C-995, Email from P. Fajardo to S. Donziger, June 5, 2009 [DONZ00051338]).

fact that their summer intern knew very little and had almost no relevant factual background or legal experience. Moreover, as Mr. Parker testified in a deposition taken by Claimants during the summer of 2009, he worked on "a memo regarding the adequacy of Ecuador's judiciary," "a chart regarding the health effects of toxins found in petroleum and chemicals used to extract petroleum," "a memo regarding Chevron's tactics internationally in response to human rights allegations," "a memo regarding the public statements of US politicians regarding pending litigation."[56] Even including his work during 2010, Mr. Parker worked only on documents that were ultimately publicly submitted for filing in the Lago Agrio Court, including a report titled "Cultural Damages Caused to Indigenous Communities in the Ecuadorian Amazonia" and "a portion of the alegato finale."[57] According to his testimony, at no time did he work on drafting the Judgment. Claimants' contrary contention is unsupported and should be rejected.

D. *Delfina Torres Vda. de Concha v. Petroecuador*

48. Claimants rely on an internal email from Mr. Fajardo attaching the Ecuadorian case *Delfina Torres Vda. de Concha v. Petroecuador,* in which an Ecuadorian court entered judgment against PetroEcuador for environmental damage. Claimants suggest that because Mr. Fajardo circulated this email with his assessment of the case and an ellipsis, and because the Judgment ultimately discussed the *Delfina Torres* case, that the ellipsis in the email must refer to ghostwriting.[58] But the Plaintiffs' internal communications reference many dozens of cases and

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56 R-680, Parker Dep. Tr. (Aug. 5, 2011) at 124:10-23.

57 *Id*. at 149:24-150:1, 159:3.

58 Claimants' Supplemental Merits Memorial ¶ 16 at 11 (citing C-1138. Email from P. Fajardo to S. Donziger, *et al*., June 18, 2009 [DONZ00051506]).

authorities and theories.[59] That one case is also mentioned by the Court means only that the Court also recognized its significance.

49. Prior to the Judgment, *Delfina* was the leading example (and probably the only example) of an Ecuadorian court issuing damages for oil-related environmental pollution. As a consequence, the *Delfina* case had been cited repeatedly by Ecuadorian courts and litigants as precedent in this legal area. For example, Martha Escobar referenced *Delfina* in her deposition in the related AAA Litigation in November 2006.[60] Chevron included the case in its *alegato* filed in the Lago Agrio Litigation.[61] Similarly, Dr. Alejandro Ponce-Villacis (Ponce Jr.) noted and discussed the case in his declaration filed on December 18, 2006.[62] Indeed, Pablo Fajardo had been including it in letters to the U.S. House of Representatives since June 2009,[63] and included references to it in filings in the Lago Agrio case at least as early as July 13, 2005.[64] The fact that this case is cited throughout Ecuadorian jurisprudence and in the Record is a far more likely explanation for its inclusion in Mr. Fajardo's email, and in the Judgment, than some elaborate ghostwriting plot.

E. *Andrade v. Conelec*

50. Claimants rely on another email that shows that Mr. Fajardo received — and then forwarded to his team — an excerpt from an Ecuadorian Supreme Court decision called *Andrade*

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59 Ms. Fach, one of the external attorneys advising the Lago Agrio Plaintiffs specifically advised the Plaintiffs to provide as much authority as possible; Plaintiffs internal documents reflect this strategy. "If he is going to rule against the company and wants to substantiate his judgment . . . the judge would be very thankful if you offer him the greatest number of legal doctrine and case law references that support his position. . . . Thus in the text of the final argument [alegato] . . . I would include the greatest numbers of legal doctrine references as possible." R-490, Email from K. Fach to S. Donziger (Sep. 11, 2010) at 2.

60 R-55, Escobar Dep. Tr. (Nov. 21, 2006) at 52:5-8.

61 C-1213, Chevron Initial Alegato, Jan. 6, 2011 at nn. 751, 765, 864.

62 R-105, Decl. of Alejandro Ponce-Villacis (Dec. 18, 2006) at ¶ 5.

63 R-682, P. Fajardo Letter to U.S House of Representatives, June 2009 [DONZ00051382].

64 R-838, Lago Agrio Record at 73587.

v. Conelec.[65] They allege that the excerpt sent to and forwarded by Mr. Fajardo "contains numerous mistakes not found in any published version of the court opinion itself," all of which were repeated "verbatim" in the Judgment.[66]

51. In his brief mention of the case in the "trust" section of his Decision, Judge Zambrano was not purporting to quote from *Conelec* when he used "condena" in his paraphrase rather than the word "sentencia" as appears in the Offical Register version of the opinion. The fact that the Fajardo email also uses the word "condena" is more likely coincidental than conspiratorial — particularly when elsewhere in the Judgment[67] Judge Zambrano does actually quote at length from *Conelec* with respect to whether a finding of negligence was required before Chevron could be held liable — a proposition and discussion nowhere mentioned in the Fajardo email and establishing beyond dispute that Judge Zambrano had reviewed the actual text of the *Conelec* decision.[68] At the end of the day, all that this Fajardo email proves is that he received the *Conelec* case from someone who found it in the same source — the source with minor differences from the official version — that the Lago Agrio Court did.

F. Communications Regarding The Plaintiffs' "Key" Meeting Reflects Plaintiffs' Counsel Lack of Knowledge Of the Court's Intentions

52. Claimants allege that a "key" meeting among the Lago Agrio Plaintiffs' lawyers taking place on June 19, 2009 outlined the details of the Judgment.[69] But that email reveals nothing illicit, only that Plaintiffs' lawyers were planning their next steps once the Court issued

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65 Claimants' Supplemental Merits Memorial ¶ 16 at 10 (citing C-997, Email from P. Fajardo to S. Donziger, *et al*., June 18, 2009 [DONZ00051504]).

66 *Id*.

67 C-931, Lago Agrio Judgment, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, February 14, 2011, at 174-75.

68 *Id*.

69 Claimants' Supplemental Merits Memorial ¶ 16 at 10.

its long-overdue judgment. Plaintiffs' lawyers in their inner deliberations clearly mis-prophesied that a judgment was "imminent," but this fact only illustrates that the Judgment was not in their hands. Indeed, if Plaintiffs lawyers' truly had been drafting the Judgment, they would surely have been able to predict with greater accuracy when the Judgment would issue.

G. The Plaintiffs' Original Strategy To Submit A Proposed Order — Even Though Never Submitted — Does Not Mean They Ghostwrote The Judgment

53. Claimants cite to a series of emails to and from Joseph Kohn — former Editor-in-Chief of the Villanova Law Review (1981-1982), Member of the Third Circuit Task Force on Selection of Class Counsel (2001-2002), Member of the Pennsylvania House of Delegates, and former Nominee for the Democratic Party for Attorney General of Pennsylvania (1992 and 1996) — and lead partner of his Philadelphia law firm, Kohn, Swift & Graf. Like everyone else associated with Mr. Donziger, Claimants contend that Mr. Kohn and his colleagues participated in the drafting of the Judgment.

54. Instead, as Mr. Donziger testified at deposition, the Kohn firm retained him at an early stage to represent the Plaintiffs when their action was first pending in New York. When the suit was dismissed in New York and re-filed in Ecuador, he and the Kohn firm "had discussions about how the process worked [in Ecuador] and whether the Alegato [Plaintiffs' closing brief] might be similar to proposed findings of fact/conclusions of law [as per U.S. practice] that could potentially be adopted."[70] More specifically, Mr. Kohn later wrote, "we need to be involved in the preparation of the final submission and *proposed judgment*, the major task we have all agreed . . . repeatedly our firm would work on."[71] That Mr. Kohn and his firm discussed the possibility of drafting a proposed judgment to be duly filed with the Lago Agrio

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70 R-273, Donziger Dep. Tr. (July 19, 2011) at 4757.

71 R-839, Email from Kohn to Donziger, *et al.* (Aug. 7, 2009) (emphasis added).

Court does not make those discussions illicit.[72] In any event, Plaintiffs ultimately decided not to draft or file a proposed judgment.

H. Donziger's Reference To The "Other Project" Is Not A Reference To Ghostwriting But To One Of The Other Projects He Wanted To Accomplish

55. Claimants allege that Mr. Donziger's reference in an email to the "other project" is actually a clandestine reference to ghostwriting the Judgment.[73] But this fanciful interpretation is belied by Donziger's own contemporaneous and quite divergent use of the phrase "other project." In his diary, Mr. Donziger described these other projects: creating a "legal entity to handle non-case related stuff — from the Fiscalia, to lawyer complaints, to the peripheral stuff that will keep Texaco off guard and consume resources and energy, like they are trying to do with us."[74]

I. Fajardo's Belief In 2009 That Plaintiffs Would Ultimately Prevail Does Not Mean That Their Lawyers Ghostwrote The Judgment

56. In December 2009, Mr. Farjardo stated that he was "99.99 percent sure" that "the plan for the judgment will be fulfilled." To Claimants, this is the ultimate evidence that the Lago Agrio Plaintiffs were drafting the Judgment. But as Mr. Donziger testified, this was a reference to his "plan to get the case finished," to get a timely judgment, not a reference to some secret plan to undertake the task of writing the Court's Judgment.[75] Both Donziger and Fajardo

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72 This is a prime example of Claimants' shifting evidence as Respondents are able to analyze its efficacy. Claimants raised this same allegation before in their letter of Jan. 4, 2012, relying on a different email than they do in this submission. Respondent researched that first email and explained to this Tribunal in its letter of Jan. 9, 2012 why that email from Mr. Kohn did not support Claimants' allegations. Now that their first attempt failed, Claimants now offer another email from Mr. Kohn to Mr. Donziger as supposed proof — this new attempt is equally unconvincing. C-994, Email from J. Kohn to S. Donziger, *et al*., Aug. 7, 2009 [WOODS-HDD-0148433]. Claimants no longer rely on that email.

73 Claimants' Supplemental Merits Memorial ¶ 16 at 11 (citing C-1142, Email from P. Fajardo to S. Donziger, *et al*., Oct. 25, 2009 [DONZ00052960]).

74 C-716, Donziger Diary at 1.

75 R-273, Donziger Dep. Tr. (July 19, 2011) at 4789-91.

obviously believed in the righteousness of Plaintiffs' cause, and foresaw eventual victory — hopefully before their financing ran out. That they had conversations on this subject does not mean they ghostwrote any part of the Judgment. All parties to litigation have internal discussions of their prospects of winning, and it is not uncommon for a lawyer to get carried away with a prediction about the court's pending decision. Claimants have presented here one instance of such a prediction and impose upon it a meaning that is neither natural nor likely. Claimants are left trying to satisfy their heavy burden through speculation; this they cannot do.

ANNEX E: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING MESSRS. CALMBACHER AND CABRERA

I. The Calmbacher Reports Were Not Altered By The Plaintiffs, Constituted Only A Tiny Fraction Of The Evidentiary Record, And In Any Event Were Disregarded By The Lago Agrio Court On Chevron's Motion

1. Claimants concoct a sensationalized narrative surrounding the allegedly unauthorized submission of two expert reports filed in the Lago Agrio Litigation in the name of one of Lago Agrio Plaintiffs' experts, Dr. Charles Calmbacher. Claimants would like the Tribunal to (a) believe that Dr. Calmbacher, who had fee payment issues with Plaintiffs' counsel, had uncovered no evidence whatsoever of pollution at the sites he inspected, and (b) therefore conclude that his expert reports noting the presence of pollution must have been falsified by the Plaintiffs prior to submission. Claimants' story is belied by witness testimony and documentary evidence.

2. As an initial matter, Dr. Calmbacher was one of many judicial inspection experts in the Lago Agrio Litigation.[1] In fact, the Lago Agrio record comprises more than 200,000 pages of evidence, tens of thousands of laboratory tests, more than 100 expert reports, and the results of more than 100 judicial field inspections.[2] Dr. Calmbacher was hired by the Lago Agrio Plaintiffs in July of 2004, and spent about a total of one month in Ecuador before he was fired.[3]

3. When Claimants' allegations are viewed through the prism of the actual evidentiary record, it is clear that they have failed to establish any unlawful conduct by the Plaintiffs, much less by Respondent.

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[1] Dr. Calmbacher was merely one of 106 experts to submit evidence and/or opinions to the Ecuadorian trial court. *See* R-534, Ecuadorian Plaintiffs' Objections to Order and Recommendation, filed in the United States District Court for the Southern District of Florida, June 26, 2012 at 10.

[2] *See* C-313, Aff.of Andrew Woods (Mar. 3, 2010) ¶¶ 8, 11; *see also* C-201, Report of Richard Stalin Cabrera Vega (Apr. 1, 2008) at 17-19, 21, 23 .

[3] *See* C-186, Calmbacher Dep. Tr. (Mar. 29, 2010) at 13:20-14:1; 29:6-10; 48:15-17; 49:2-20.

4. Dr. Calmbacher testified that he believes that the Plaintiffs altered his reports because the submitted reports are, according to him, different than the reports he authored.[4] For his part, Mr. Donzinger, who has not been shy in offering inculpatory testimony on other subjects,[5] unequivocally denied participating in any fraud, attempted fraud or any other misconduct as it relates to Dr. Calmbacher's reports.[6] The record therefore contains the testimony of two witnesses (Dr. Calmacher and Mr. Donzinger) with competing claims. In this respect, Claimants have failed to carry their burden.

5. Dr. Calmbacher had motive to lie. He sued Plaintiffs for nonpayment, expressed animus toward them for firing him, and warned that he would cause Plaintiffs' counsel professional and psychological harm if they did not accede to his demands.[7] In one email he threatened that he would not stop at anything to ensure reimbursement for his work: "I have not been paid for work performed up to the date you fired me . . . . Please simply pay up. Don't start a war. ***Wars have no rules and people can suffer irreparable professional, psychological and physical damage as a result. You don't want that***."[8]

6. Critically, Dr. Calmbacher's contemporaneous email correspondence materially contradicts his sworn deposition testimony: (a) Dr. Calmbacher testified in deposition that he never drafted the extension request that was filed with the Lago Agrio Court on November 11, 2004.[9] However, in a November 4, 2004 email he advised Plaintiffs' counsel that he was

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4 C-186, Calmbacher Dep. Tr. at 116-118.

5 *See, e.g.*, R-577, Donziger Dep. Tr. (Jan. 29, 2011) at 3658:11-18; R-608, Donziger Dep. Tr. (Jan. 18, 2011) at 3125:3-3130:13.

6 R-209, Donziger Dep. Tr. (Jan. 18, 2011) at 3154:3-9.

7 C-186, Calmbacher Dep. Tr. at 11:23-25; 85:17-20 (explaining that he was fired because he failed to submit his reports in a timely manner); *id.* at 64:21-23 (testifying that he had sued the Plaintiffs for payment). R-204, Email from C. Calmbacher to S. Donziger (July 28, 2005).

8 R-204, Email from C. Calmbacher to S. Donziger (July 28, 2005) (emphasis added).

9 C-186, Calmbacher Dep. Tr. at 137:13-15.

"sending [to counsel] two copies of the request for extension," as well as sending the originals of the request to her office and hotel in Quito.[10] (b) Dr. Calmbacher testified in deposition that he had finished working with the Plaintiffs by November 2004.[11] But, his contemporaneous emails establish that he continued to correspond with Plaintiffs' counsel regarding the reports through March 2005.[12] (c) Most importantly, while Dr. Calmbacher testified in deposition that he did not uncover significant levels of pollution at the sites he visited, the test report Dr. Calmbacher *acknowledges* he signed reflects TPH measurements that exceeded the Ecuadorian standard by more than *seventy* times.[13]

7. Unsupported allegations by a terminated consultant with both an economic interest and a demonstrated animus toward the Plaintiffs cannot establish misconduct by the Plaintiffs, especially in light of Dr. Calmbacher's multiple misrepresentations while under oath.

8. Of course, had Dr. Calmbacher's testimony even been accurate, which the weight of the evidence refutes, neither he nor Claimants have ever alleged (much less offered evidence suggesting) that any representative of the Republic was complicit in any way. To the contrary, the Lago Agrio Court — *at Chevron's request* — chose to ignore Dr. Calmbacher's reports in reaching its decision.[14]

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10 R-149, Email from C. Calmbacher to M. Pareja (Mar. 4, 2004); *see also* R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010), Exhibit 7.

11 C-186, Calmbacher Dep. Tr. at 62:19-24.

12 R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010), Exhibits 2 & 3.

13 *Compare* C-186, Calmbacher Dep. Tr. at 115:15-24 *with* R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010) at 3, Exhibit 5 (explaining that the chemical sampling results from August 2004 for Sacha 94, which were signed by Dr. Calmbacher, reflected a TPH value of 73,000 ppm, exceeding the Ecuadorian legal norm of 1,000 ppm by a multiple of 73.).

14 C-931, Lago Agrio Judgment at 48-49. The materiality of Calmbacher's allegation, even if credited, was doubted by Judge Kaplan in the RICO proceedings. R-535, Opinion on Partial Summary Judgment Motion, Case No. 11:1-cv000691, July 31, 2012 at 89.

II. Claimants' Accusation That The Republic Knew Of Or Colluded In Plaintiffs' Drafting Of The Cabrera Report Is Demonstrably False

9. While Claimants make certain allegations of fact which the Republic has not disputed as it relates to Richard Cabrera, they distort and then exaggerate the record in their failed effort to implicate the Lago Agrio Court. Claimants argue that the Ecuadorian Court worked hand-in-glove with the Plaintiffs to appoint a global expert whom everybody knew would rule against Chevron. However, they have adduced no evidence supporting the proposition that (a) the Court either conspired with the Plaintiffs to reach a predetermined verdict or (b) was otherwise complicit in or had knowledge that the Plaintiffs intended to or did actually prepare parts of Mr. Cabrera's reports.[15] Indeed, as will be shown below, Claimants have failed to show that Judge Yanez, much less his successor, Judge Zambrano, ever engaged in any activity that was illegal or improper with respect to Mr. Cabrera or his appointment.

A. The Lago Agrio Court's Appointment Of Mr. Cabrera As Global Damages Expert Was Proper In All Respects

10. To sensationalize their story, Claimants suggest that as far back as 2006 Plaintiffs conspired with the Lago Agrio Court to appoint a global expert that they knew would "submit a falsified and fraudulent expert report."[16] As support for this proposition, Claimants submit only another unsubstantiated contention — that the Court, with the specific intent of furthering the alleged conspiracy, both (a) granted the Plaintiffs' request to withdraw their request for additional judicial inspections and (b) appointed Mr. Cabrera as the global expert. As shown below, the Lago Agrio Court's decisions were entirely regular.

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15 Even Claimants have admitted that the Lago Agrio Court and the Ecuadorian Government were not complicit in but merely *victims* of Plaintiffs' counsels' alleged fraudulent conduct. *See* R-598, *Proceedings Reveal New Evidence of Fraud and Plaintiffs' Undisclosed Links to Ecuadorian Court Expert Richard Cabrera*, Chevron Press Release, May 24, 2010 (wherein Chevron's Vice President and General Counsel, Hewitt Pate, stated that the "misconduct of the plaintiffs' lawyers and Cabrera constitutes a fraud against Chevron, against the Ecuadorian courts system, and against the Government of Ecuador.").

16 Claimants' Merits Memorial ¶ 223.

1. Plaintiffs Had The Right Under Ecuadorian Law To Withdraw Their Earlier Request For Judicial Inspections In Favor Of Examinations Performed By A Global Expert

11. Under Ecuadorian law, and as explained in the *Amicus Curiae* brief filed by Professors Larrea, Sotomayor, Vila, and Melo in support of Plaintiffs' motion, Plaintiffs retained the right under Ecuadorian law to withdraw their inspections request under numerous legal theories.[17]

12. **First**, litigating parties in Ecuador, as is true in most judicial systems, have control over the evidentiary aspects of a lawsuit.[18] In other words, a plaintiff ordinarily carries a certain burden of proof, and it is up to the plaintiff to decide how to prove its case. It is the plaintiff's prerogative of determining on what type of evidence, and what quantum of evidence, it wishes to rely upon in carrying its burden. And if the plaintiff chooses to prove a case with less (rather than more) evidence, it is neither the court's nor the defendant's prerogative to instruct the plaintiff on how the latter should present its case.[19]

13. **Second**, Chevron had no legal right to insist that the inspections be completed. The inspections were requested by the Plaintiffs and were "exclusively in [their] procedural

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[17] *See* C-194, Amicus Curiae Brief, filed in the Lago Agrio Litigation on July 21, 2006 at 3-4. Because one of the twelve authors of the amicus brief, Gustavo Larrea, has served as an attorney for President Correa, the Claimants reflexively suggest that the submission of the brief demonstrates a governmental effort to pressure the judiciary. *See* Claimants' Merits Memorial ¶ 295. Claimants, of course, fail to note that the brief was submitted well before Mr. Correa was elected as President — at a time when no one expected him to prevail — and that there is absolutely no indication that Mr. Larrea's efforts were on behalf of Mr. Correa.

[18] *See* C-194, Amicus Curiae Brief at 4; *see also* RE-9, Andrade Expert Rpt. ¶ 34 (citing RLA-198, Ecuadorian Code of Civil Procedure, arts. 113, 114).

[19] *See* C-194, Amicus Curiae Brief at 5 (stating that there is no procedural rule prohibiting such waiver); *see also* RLA-163, Ecuadorian Civil Code, art. 11 ("Rights conferred by law may be waived, provided that they only regard the individual interest of the waiving party and that their waiver is not prohibited"); C-1081, Email from A. Wray to P. Fajardo, March 4, 2006 ("[T]there are no [legal] impediments for a party to relinquish evidence that it has previously requested…. [I]n practice it is common that a party withdraws evidence in civil matters."). Ironically, Claimants cite this email to show that the court knew that it was legally bound to continue the inspections. Claimants' Supplemental Merits Memorial ¶ 90. This exhibit fails to support Claimants' allegation.

interest."[20] Under Article 11 of the Ecuadorian Civil Code, "anyone may waive his rights, provided that such waiver is not prohibited and that it affects only the personal interest of the parties making such waiver."[21] Here, Chevron could not have been affected by the Plaintiffs' waiver because (a) the inspections were used to prove the *Plaintiffs'* case; (b) Chevron challenged the judicial inspections when Plaintiffs requested them;[22] and (3) Chevron had its own independent right to seek judicial inspections (but chose not to at these sites).[23] The only "real" interest Chevron had in forcing the completion of yet more judicial inspections appears to have been delay; the pace of judicial inspections was so slow that completion of the additional inspections would have extended the litigation by at least several more years. According to the professors who authored the *amicus* brief, at "the average rate that has been maintained over these last few years, it could be assumed that conducting these waived inspections could end up taking about four more years and costing several more hundreds of thousands of dollars."[24]

14. **Third**, the forced continuation of the judicial inspections would have violated the Plaintiffs' Constitutional right to be afforded certain procedural guarantees, namely promptness,

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[20] C-194, Amicus Curiae Brief at 4. All of the sites whose inspection was waived by the Plaintiffs were exclusively requested by them. Every site inspection that Chevron requested for its case-in-chief was performed. *See* R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 129. *See also* RE-9, Andrade Expert Rpt. ¶ 33 (stating that the Protocol governing the procedural aspects of the judicial inspections was a non-binding document, which was understood to be a mere guideline by both Chevron and the Lago Agrio Plaintiffs).

[21] C-194, Amicus Curiae Brief at 3 (citing a Supreme Court case for the proposition that the Lago Agrio Plaintiffs can legally waive their earlier requests for judicial inspections because the waiver implicates exclusively a strictly personal right)); *see also id.* (stating that the Plaintiffs elected to waive the remaining judicial inspections because they believed that their case "ha[d] already been proven, and [that] conducting new proceedings [was] not going to 'prove it more'"); C-716, Mr. Donziger's Diary, Jan. 24, 2006, at 200 [DONZ0002308] ("Since [Texaco] used all the same methods everywhere, and they admit to such, I just don't think we need to keep doing inspections in every [field] . . . . I don't think these inspections advance the case — in many respects, they slow it down and play into [Texaco's] hands . . . . They want to drag it out . . . [Texaco] prefers delay. Run numbers. Make at least 300m per year, pay lawyers 10m a year — with this rate of return they want to keep it going forever.").

[22] C-194, Amicus Curiae Brief at 4; *see also* C-197, Lago Agrio Court Order, Mar. 19, 2007 at 1-2.

[23] *See* C-197, Lago Agrio Court Order, Mar. 19, 2007 at 1, 3.

[24] C-194, Amicus Curiae Brief at 3.

efficiency, and economy.[25] Ecuadorian courts are bound to "ensure that court costs are not increased without any purpose and without any need," and that "all measures aimed at shortening and simplifying the lawsuit, [and] preventing its unreasonable prolongation" must be taken.[26] This is especially so when a plaintiff belongs to a low-income community. According to the professors who submitted the *amicus* brief:

> Allowing the prolongation of a suit with proceedings that have no probative value is paving the way for the immunity of the economically powerful, who can try to prolong a suit so that it becomes a competition of financial possibilities, for which reason, in view of this threat, the procedural guarantees and principles established in the Constitution play a very important role. In fact, for . . . low-income people and communities . . . the principles of procedural economy, promptness and efficiency are much more than empty phrases or simple statements of aspirations to be applied whenever convenient.[27]

15. Claimants of course ignore the practical impact of forcing the Plaintiffs to continue with the judicial inspections. Under the circumstances of this case — where Texaco had left the country fourteen years earlier and the litigation had already taken thirteen years — it would hardly have been unreasonable for the Plaintiffs to have concluded that continuing with the inspections would add nothing more to the evidentiary record, while unnecessarily prolonging the case by years and draining the Plaintiffs of their already-depleted resources.[28]

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25 *See id.* at 1 (citing the Constitution of Ecuador, arts. 23, 192, 193).

26 *Id.* (citing legal scholar Lino Palacio).

27 *Id.* at 2.

28 *See* C-193, FDA Press Release (June 14, 2006), *available at* www.texacotoxico.com ("Plaintiffs affected by Texaco's contamination today marched in Lago Agrio to demand speed in the trial filed against [Chevron] . . . to protest for the slowness of the process . . . . Texaco attempts to confuse the Court in order to conduct 80 more inspections, with only the purpose of prolonging the case."); *see also* C-1196, Email from S. Donziger to A. Wray, Sept. 24, 2004 ("The 'elephant in the room' is how we are going to end the inspections, and when we can start/finish the global peritaje. We have not been talking about this, but to me this overshadows much of what we are doing. If we do not decide on a targeted endpoint for the case soon that we can shoot for, this case risks lasting too long which benefits Texaco."); C-716, Mr. Donziger's Diary, May 13, 2006 at 69 [DONZ00027156] ("Big remaining issue: have inspections or wait and conserve resources. The money issue is killing us. Debts at 114,000, people waiting to get paid, they have families, not a good dynamic . . . Have to force issue with Joe, I think I am failing

The Court acted well within its discretion to afford the Plaintiffs the right to decide for themselves how best to present their case.

2. Mr. Cabrera's Appointment Was Proper Under Ecuadorian Law

16. Having decided that continuing the site examinations using a global damages expert was in fact proper, the Court in 2007 ordered the parties to attempt to agree on the appointment of such an expert.[29] Only because the parties failed to reach an agreement did the Court appoint Mr. Cabrera.[30] The Court's appointment of Mr. Cabrera as the global damages expert was lawful in all respects.

17. Rather than appoint Fernando Reyes as the global expert, as Plaintiffs had expected, the Court concluded that it was constrained by an earlier agreement by the parties to appoint an expert already used by the Court.[31] The Court therefore selected Mr. Cabrera to serve as the global expert from a pool of seven independent experts that the Court had previously

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here."); *id.*, Jan. 18, 2006 at 206 (DONZ00023089] ("I am still going to push this, because this case will never end . . . . I am also going to ask [Luis Yanza] that we only do one inspection per week to save money."); *id.*, Jan. 12, 2006 at 96 [DONZ00027156] (explaining how Luis Yanza had to pay "out of his own pocket the rent at the Frente house after the money ran out," and how the "phone was cut off because the money ran out."); C-1260, Email from J. Mutti to S. Donziger, Aug. 18, 2006 ("You're right about the lack of momentum . . . [it] has a lot to do with money. Even the guards asked me this morning if we're going under.").

29 *See* C-196, Lago Agrio Court Order, Jan. 22, 2007 at 1. During the original proof period in October 2003, the Court granted the Plaintiffs' request to appoint a global expert to determine the damages caused by Texpet's oil extraction operations between 1964 and 1992. *See* C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 2; C-176, Lago Agrio Court Order, Oct. 29, 2003 at 6-7; C-494B, Lago Agrio Plaintiffs' Motion re Procedures for Evidence, Oct. 29, 2003. Chevron declined to request any such expert, denying instead the existence of any contamination.

30 C-197**,** Lago Agrio Court Order, Mar. 19, 2007 at 2; *see also* C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 2-3. Chevron proposed John Connor, and the Plaintiffs proposed Luis Villacreces. *Id*. at 4-5.

31 C-716, Mr. Donziger's Diary, Feb. 7, 2007 at 134 [DONZ00027256] ("[T]he judge feels bound by an agreement [Ecuadorian Plaintiff attorney Alberto] Wray made with [Chevron counsel Adolfo] Callejas in the first inspection to use peritos already appointed by the court. I thought we had worked this out with the judge, and that Fernando Reyes would be appointed the perito. . . . Now, the judge feels he cannot do that. This is a function of T[exaco]'s pressure campaign – Callejas submitted 30-pages of crap yesterday morning.").

appointed in the trial.[32] Mr. Cabrera thereafter served as a court-appointed expert to evaluate the scope and extent of contamination in the Concession area allegedly caused by Texaco as operator of the Consortium and to assess the cost of remediating the same.

18. Claimants attack Mr. Cabrera's appointment on several grounds; namely, that it violated two specific Ecuadorian Code provisions, and that his appointment was the product of "collusion" between the court and the Plaintiffs.

19. Specifically, Claimants contend that Mr. Cabrera's appointment violated Articles 252 and 292 of the Ecuadorian Code of Civil Procedure. At the time in question, Article 252 provided: "The judge will select and appoint a single expert among the registered experts before the respective superior courts. However, the parties may agree to select the expert or ask the court for the appointment of two or more experts to handle the matter. This agreement will be binding on the judge."[33] Article 292 provides: "Petitions that . . . have the purpose of altering the meaning of the judgments, orders or decrees, or delay the progress of the litigation, or maliciously injure the other party, shall be dismissed and sanctioned."[34]

20. Mr. Cabrera's appointment violated neither Article. First, Claimants allege that because Mr. Cabrera was neither nominated by both parties nor on a list of experts registered with the local Superior Court, the Lago Agrio Court could not have appointed him as the global damages expert under Article 252. Claimants' allegation is incorrect. Despite the mandate

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32 C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 5 (stating that Mr. Cabrera was appointed by the Court to serve as an expert for three judicial site inspections in 2006); *see also* R-497, Donziger Dep. Tr. (Dec. 8, 2010) at 985:4-986:18.

33 RLA-431, Ecuadorian Code of Civil Procedure, art. 256. Article 256 was repealed by provision No. 16 of the 2009 Organic Code of the Judiciary. It was replaced by Article 252, which reads: "The judge shall designate just one expert, whom he or she shall choose from among those on the list to be provided by the Judiciary Council. However, the parties may, by mutual agreement, choose the expert or request designation of more than one for the proceeding, which agreement shall be binding on the judge." C-260, Code of Civil Procedure, Art. 252. The only difference between these two articles, therefore, is the replacement of the text "before the respective superior courts" with the text "from among those on the list to be provided by the Judiciary Council."

34 RLA-198, Ecuadorian Code of Civil Procedure, art. 292.

provided for in Article 252 (then Article 256), in practice — for the Lago Agrio Litigation and every other litigation in the country — the only readily identifiable list of experts maintained by the State was in the Prosecutor General's office, *not* in the local Superior Court.[35] Thus, the Court's reliance on this list of experts did not reflect any disparate treatment for Chevron. To the contrary, the process of selecting experts in the Lago Agrio Litigation was no different from the processes used in other litigations across the country.[36]

21. Nor did the Court's appointment of Mr. Cabrera violate Article 292. Article 292 renders unlawful only those orders that "have the *purpose* of altering the meaning of the judgments, orders or decrees, or delay the progress of the litigation, or maliciously injure the other party." And while Claimants contend that Mr. Cabrera's appointment "caused undue prejudice to Chevron by curtailing its ability to defend itself,"[37] Article 292 is not even implicated unless Claimants can demonstrate that that was the Court's "purpose" in selecting Mr. Cabrera.

22. Putting aside the subsequent developments alleged by Claimants, there is no evidence that the Court considered Mr. Cabrera as anything other than a neutral and independent expert. Mr. Cabrera affirmed to the Court his neutrality and independence on several

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35 *See* RE-9, Andrade Expert Rpt. ¶ 39. Moreover, that this list should be used was initially contemplated in the October 29, 2003 Order, which provided "for purposes of designating the Experts, without prejudice to the parties' reaching an agreement in that respect regarding names or the number of experts, an official letter shall be sent to the State Prosecutor . . . asking them to remit to this Judgeship the list and CVs of the Experts qualified in the areas of applied ecology and environmental engineering." C-506, Chevron's Motion Rejecting Plaintiffs' Petition, Jan. 17, 2007 at 1 (citing C-176, Lago Agrio Court Order, Oct. 29, 2003 at 7).

36 RE-9, Andrade Expert Rpt. ¶¶ 39-40 (stating that every practitioner in Ecuador knew that the requirement that experts had to be listed on a roster filed with the local superior court was never implemented and that Claimants' allegation is novel and frivolous).

37 Claimants' Merits Memorial ¶ 223.

occasions.[38] Thus, Claimants' allegations that Mr. Cabrera was subsequently co-opted by the Plaintiffs, and that Mr. Cabrera eventually permitted Plaintiffs' experts to draft parts of his report fail to shed light on the propriety of the Court's *appointment* of Mr. Cabrera as the global damages expert.

3. Both Parties Lawfully Met *Ex Parte* With The Successive Judges Presiding Over The Lago Agrio Litigation

23. Claimants continually portray the Plaintiffs' meetings with the Lago Agrio Court as scandalous and conspiratorial by always describing them as being conducted in "secret." But as Chevron well knew at the time it begged the United States courts to dismiss the *Aguinda* case in favor of an Ecuadorian forum, Ecuadorian law permitted the parties to meet *ex parte* with the presiding judge. Not until March 9, 2009 did Ecuador prohibit such *ex parte* meetings.[39]

24. In the Lago Agrio Litigation, ***both*** parties regularly met *ex parte* with the judge before the practice was disbanded.[40] Donald Rafael Moncayo Jiminez, an Ecuadorian citizen who since 2005 worked for counsel for Chevron providing "logistical support" in the Lago Agrio case, affirmed under oath that he personally witnessed *at least seven times* Chevron's lawyers "meeting alone with the judges who heard the case without the presence of the plaintiffs' lawyers."[41] In his affidavit, Mr. Moncayo provides details concerning one *ex parte* meeting

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38 *See, e.g.*, C-365, Filing by R. Cabrera in the Lago Agrio Litigation, Mar. 4, 2009; C-366, Filing by R. Cabrera in the Lago Agrio Litigation, July 23, 2007; C-509, Filing by R. Cabrera in the Lago Agrio Litigation, Oct. 8, 2008; C-367, Filing by R. Cabrera in the Lago Agrio Litigation, Oct. 11, 2007.

39 *See* R-599, Aff. of Dr. Farith Ricardo Simon, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 16, 2011, ¶ 6.

40 *See* R-600, Page Dep. Tr. (Sept. 15, 2011) at 120:12-24; R-601, Donziger's Amended Answer to Plaintiff's Amended Complaint, Affirmative Defenses and Counterclaims, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Aug. 15, 2012, -, ¶¶ 172-176,.

41 R-601, Donziger's Amended Answer ¶ 173; R-602, Donald Rafael Moncayo Jimenez Decl. in Support of Lago Agrio Plaintiffs' Motion to Quash ¶¶ 2-6, filed in *In re Application of Chevron Corp. (Stratus)*, Case No. 1:10-cv-00047-MSK-MEH, Aug. 27, 2010. Mr. Moncayo testified that as "part of [his] work, [he] present[ed] the papers of the lawsuit and other documents to the Court. On occasions, [he] also [went] to Court to observe and supervise the activity related to the Lago Agrio case." R-602, Moncayo Decl. ¶ 2.

where he witnessed and overheard Chevron attorneys Callejas, Racines, and Novillo meeting in Judge Novillos offices to discuss Mr. Cabrera.[42]

25. Another eyewitness, Robinson Yumbo Salazar, an Ecuadorian citizen who spent every workday from April 2006 to April 2007 in the "corridors of the Provincial Court of Justice of Sucumbíos" "observing and supervising the activities related to . . . the Lago Agrio case," testified that "on multiple occasions" he too personally witnessed Chevron's lawyers, along with their technical personnel and security guards, "meeting alone with the judge in charge of the case, without the presence of the plaintiffs' lawyers."[43] He affirmed:

> I especially remember two cases where I saw Iván Alberto Racines, a lawyer of Chevron in the Lago Agrio case, and other lawyers of Chevron whose names I do not remember, meeting with Doctor Germán Yánez Ruiz, who was the judge of the case at the time. These meetings were without the participation of the Plaintiffs' representatives in the Lago Agrio case.[44]

26. Further, Claimants quote Mr. Donziger as characterizing a colleague's meeting with a judge as "dangerous,"[45] suggesting that Mr. Donziger knew or understood that the meeting was somehow inappropriate. The full transcript makes clear that Mr. Donziger was concerned not because he considered such meetings inappropriate, but because Texaco could distort the meetings and say "look, [Plaintiffs] are manipulating the court" or "the court is under political pressure."[46] In Mr. Donziger's view, and consistent with Ecuadorian law, *ex parte*

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42 R-601, Donziger's Amended Answer ¶¶ 173-74 .

43 *Id.* ¶ 172; R-604, of Robinson Yumbo Salazar Decl. in Support of Lago Agrio Plaintiffs' Motion to Quash, filed in *In re Application of Chevron Corp. (Stratus)*, Case No. 1:10-cv-00047-MSK-MEH, Aug. 27, 2010, ¶¶ 2-4.

44 R-601, Donziger's Amended Answer ¶ 172 (citing Yumbo Salazar Decl. ¶ 5).

45 Claimants' Merits Memorial ¶ 215.

46 C-360, *Crude* Outtakes, March 6, 2007 at CRS211-01-01.

meetings were perfectly lawful and "[p]ressure mobilizations are good" so long as they "respect[] the independence of the judiciary . . . [and] of the judges."[47]

27. That the Plaintiffs met with Judge Yánez before the court appointed Mr. Cabrera (just as Chevron met with the Judge) does not mean the court was conspiring with either party.[48] Nothing in the *Crude* excerpts, Mr. Donziger's diary, or the Plaintiffs' internal files that have been produced to Chevron supports a finding that the court understood that Mr. Cabrera was or would be anything but independent and impartial.

28. To the contrary, contemporaneous documents unequivocally show that instead of working with the Plaintiffs to appoint a biased expert, the Court was acting independently and often in a way that threatened to undermine Plaintiffs' alleged goals.[49] In an email exchange between counsel for Plaintiffs, Mr. Donzinger wrote to a colleague, Aaron Page, that "everything is up in the air" and that "things are so mysterious here . . . the judge is not doing what we thought he would do, but it is unclear what he is doing and it is unclear if what he is doing is going to hurt us or help us. so me being the control freak, i am having a hard time with it. this is like magical realism. i feel like i am living in a novel. but I am suffering."[50]

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47 *Id.*

48 Claimants state that "Judge Yánez appointed Cabrera with the knowledge that he was controlled by the Plaintiffs and this his 'global assessment report' would be far from impartial." Claimants Supplemental Merits Memorial ¶ 191; *see also id.* ¶¶ 198, 202 (articulating the same theory).

49 Claimants quote at length from Mr. Donziger's diary, often to show him boasting about Plaintiffs' purported stronghold on the court. *See, e.g.*, Claimants' Supplemental Merits Memorial ¶¶ 91, 111. But Mr. Donziger's boasts are time and again refuted by his own doubts and admissions that he and his co-counsel have no influence at all.

50 C-1264, email exchange between S. Donziger and A. Page, Feb. 7, 2007; *see also* C-917, Email from P. Fajardo to S. Donziger, L. Yanza, J. Prieto, J.P. Saenz and A. Anchundia, March 26, 2007 ("[T]he cook [judge] has the idea of putting in another waiter [global expert], to be on the other side. This is troublesome."). This email was written twenty-three days after the Plaintiffs met with Mr. Cabrera to discuss in Chevron's words "how they will collectively write the global assessment expert report." Claimants' Merits Memorial ¶ 295. The Lago Agrio Court was therefore clearly not conspiring with the Plaintiffs to secure their victory over Chevron by appointing Mr. Cabrera as the global expert.

29. While Claimants would have this Tribunal believe that the Plaintiffs used their "secret" meetings with the judges to influence the Court, the Plaintiffs themselves worried that they lacked any influence over the proceedings and that their advocacy was ineffective. Mr. Donziger once again turned to his diary to express his profound doubts about the Plaintiffs' ability to win the case:

> When Pablo [Fajardo] walks into the court, he is one of them, no different from the secretaries and clerks – a punk kid from the Amazon, with nothing to back him up, nothing to fear, no strings to pull.[51]

30. Additionally, the *Crude* outtakes on which Claimants so often rely conclusively show that Plaintiffs did not have any confidence in Judge Yánez, let alone some kind of "deal" with him. Mr. Donzinger explained in one outtake that Plaintiffs have "struggled every step of the way to get everything we've earned. Nothing, nothing has been given to us."[52] Mr. Donzinger subsequently notes that he is not worried that "this judge is . . . leaving [at] the end of the year. I've never trusted this judge . . . . [H]e's not a good judge . . . . So, as long as he moves the case forward, then hands the baton to the next guy who hopefully does have the capacity to deal with it, that's all we're asking for. I'd rather this judge not make the decision."[53] Notably, this conversation took place after Mr. Cabrera was appointed in March 2007.

31. Repeating their accusations over and over again does not render Claimants' allegations true. Claimants have failed to present a single piece of evidence that would suggest that the Lago Agrio Court knew that Mr. Cabrera would be anything but completely independent and neutral. While Claimants have in their possession Mr. Donziger's hard drives, his email

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51 C-716, Mr. Donziger's diary, July 25, 2006 at 169 [DONZ00027256]; *see also id.*, Jan. 18, 2006 at 204 [DONZ00023089] ("Sometimes I feel like the sheer weight and workload of this case is eating us alive, like the toxics are eating the jungle … with the final outcome uncertain.").

52 C-360, *Crude* Outtakes, June 13, 2007 at CRS361-11-01.

53 *Id.*

correspondence, draft pleadings, and even his personal papers, Claimants are unable to point to any of the *millions* of pages at their disposal showing that the Court intended Mr. Cabrera to act on Plaintiffs' behalf or otherwise participate in a conspiracy against Chevron.

4. Mr. Cabrera Was Not The Only Court-Appointed "Global" Expert

32. Given the inculpatory evidence gathered from the Plaintiffs it is no surprise that Claimants inflate Mr. Cabrera's role in the litigation. But the Lago Agrio Court also appointed three of *Chevron's* nominees as global experts, namely, Messrs. Muñoz, Bermeo, and Barros.

33. The Court selected Mr. Gerardo Barros as an expert to investigate and provide information on the "current use of the so-called pits in drilling and workover or maintenance work on oil wells in the different oil fields belonging to the Petroecuador-Taxaco [sic] Consortium through the State-owned company PETROPRODUCCIÓN, either directly or through specialized contractors."[54] His work was specific to the period 1992-2009.

34. The court selected Jorge Bermeo in 2009 to prepare a report detailing the fishing practices used in the Eastern Petroleum Region of the Ecuadorian Amazon to help it better assess the potential health effects on the people who used the waterways for drinking and fishing. Finally, the Court also appointed Marcelo Muñoz Herrería in 2009 to take samples at several Texaco stations and wells to assess potential environmental impact. Mr. Muñoz "was the only expert to take samples at [eight TexPet sites]."[55] Together, these experts (who were working concurrently with Mr. Cabrera), submitted at least 10 reports.[56]

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54 C-540, Lago Agrio Court Order, May 28, 2009 at 4.

55 R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 52.

56 C-931, Lago Agrio Judgment at 42, 43, 91, 99, 100, 112, 115, 116, 122, 124, 125, 130, 131, 146, 180-82, 184.

35. Chevron paid the fees for, and collaborated and met on an *ex parte* basis with, each of their nominated global experts.[57] That Chevron (and Plaintiffs) met *ex parte* with their nominated global experts is of course not surprising since doing so was both lawful and customary in Ecuador at the time.[58]

B. Judge Zambrano Addressed Chevron's Court Submissions Regarding Mr. Cabrera's Alleged Lack Of Independence In An Appropriate and Adequate Manner Well Within His Discretion

36. While Claimants have insisted on nothing short of dismissal of the environmental case based on their Cabrera allegations, the Lago Agrio Court acted well within its discretion in addressing Claimants' concerns regarding the drafting of Mr. Cabrera's reports while allowing the case to nonetheless move forward to a decision based on the evidence.

37. **First**, in response to Chevron's motions concerning, *inter alia*, the propriety of Mr. Cabrera's reports, the Court ordered the parties to present a legal brief ["escrito en derecho"] regarding potential damages before closing the evidence phase. The Lago Agrio Court's August 2, 2010 order allowing the submission of damages assessments to be submitted in response to allegations of fraud in the record was neither "unprecedented" nor an inappropriate attempt to

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[57] *See, e.g.,* R-605, Donziger's Counter-Claims ¶ 168, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 28, 2012 ("A glimpse of Chevron's behind-the-scenes collaboration with these court-appointed global experts was provided when Chevron refused to pay Dr. Muñoz, which occasioned a letter of complaint from Muñoz to the Lago Agrio Court in which, in passing, he mentions meeting privately with Chevron's technical consultant, Alfredo Guerrero, in Coca for a 'technical planning meeting' at which the engineer 'approved' a work plan.").

[58] *See* R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 117 ("Ecuadorian law at the time did not prohibit parties to a lawsuit from making contact with court-appointed experts prior to the issuance of the expert's report, including prior to the expert's formal appointment by the court. Instead, it was common practice in Ecuador for both sides to communicate and meet with court-appointed experts and advocate their positions.") (citations omitted); *see also* R-607, Saenz Decl, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 27, 2011, ¶¶ 56, 59; R-599, Aff. of Dr. Farith Ricardo Simon, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 16, 2011 ¶¶ 4-5, 7-8 (attesting to the legality and commonality for parties to communicate and meet with court-appointed experts and to advocate their positions).

"conceal the Cabrera fraud," as Claimants suggest.[59] Under the laws of Ecuador (and the United States), the Court's actions were entirely reasonable.

38. As an initial matter, Ecuadorian law clearly grants broad discretion to the judge with respect to the submission of evidence. For example, under Article 118 of the Ecuadorian Code of Civil Procedure, a judge can always order the submission of new evidence *ex officio* before the judgment is issued.[60] Additionally under Article 330(1) of the Judiciary Code, lawyers have the duty to "collaborate with the judges and courts" where doing so would aid the court and promote justice.[61]

39. The Lago Agrio Court's decision mirrors the tradition of U.S. courts in granting broad discretion to trial courts when determining whether to admit additional evidence.[62] As recently as 2011, the United States Court of Appeals for the Federal Circuit noted "[w]here there is new evidence indicating that the original record was tainted by fraud, reopening may be appropriate."[63] And in the words of the Supreme Court of Illinois:

> It must be remembered that courts are instituted for the administration of justice, and that the matter of the order of proof

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59 Claimants' Supplemental Merits Memorial ¶¶ 88, 191.

60 RLA-198, Ecuadorian Code of Civil Procedure, art. 118; *see also* RE-9, Andrade Expert Rpt. ¶¶ 31, 64 (noting a judge's authority under this article (formerly Article 122) to order the production of evidence to "elucidate the case at any stage of the proceeding").

61 RLA-303, Organic Code of the Judiciary, art. 330(1) ("The duties of counsel in representing causes: (1). Act in the service of justice and for this purpose, collaborate with the judges and courts."); *see also* RLA-164, Constitution of Ecuador (2008), art. 169 ("The procedural system is a means for the realization of justice. Procedural rules enshrine the principles of simplification, uniformity, efficiency, immediacy, celerity and judicial economy, and shall make due process guarantees effective. Justice shall not be sacrificed for the mere omission of formalities."). As a matter of fact and "in order for the court to receive further enlightenment and illustration and additional elements for judgment," the Lago Agio Court did permit both parties to submit additional expert reports under Article 330(1) of the Judiciary Code. C-361, Provincial Court of Sucumbíos Order, Aug. 2, 2010 at 1.

62 *See, e.g.*, RLA-370, *Perlman v. Time, Inc.*, 478 N.E. 2d 1132, 1135 (Ill. App. Ct. 1985) ("The reopening of proofs is a matter within the sound discretion of the trial court") (citing *Harper v. Johnson*, 377 N.E. 2d 1288 (Ill. App. Ct. 1978); RLA-371, *Wright v. State*, 349 A.2d 3134 341 (Md. 1998) ("[T]he trial court has discretion to permit the moving party to reopen its case to introduce evidence adducible in chief") (quotations omitted).

63 RLA-372, *Home Products International, Inc. v. United States*, 633 F.3d 1369, 1379 (Fed. Cir. 2011) (ordering remand because lower court failed to consider new evidence pertaining to fraud, and requiring the Department of Commerce to reconsider its initial decision in light of new evidence).

> and allowing a case to be opened up for taking further evidence rests in the sound judicial discretion of the court and should not be interfered with except for clear abuse.[64]

40. Thus, the decision of the Lago Agrio Court to permit *both* sides to submit new damages assessments did not prejudice either side and was fully harmonious with legal tradition in both the United States and Ecuador.

41. Chevron has never alleged that the indigenous Plaintiffs have themselves acted with a fraudulent intent, or that the indigenous Plaintiffs otherwise had knowledge of the alleged drafting of Mr. Cabrera's report by their own experts. There is no basis to find that a court lacks discretion under such circumstances to determine liability on the basis of untainted evidence rather than to dismiss outright an otherwise meritorious lawsuit.

42. **Second**, contrary to Claimants' insinuations, the Court was not required to respond to each of Chevron's motions regarding Mr. Cabrera immediately after they were filed. Instead, the Court properly deferred adjudication of Chevron's motions to the time of the final judgment.[65] Based on the Court's amply-supported conclusion that Chevron had filed the motions to disrupt and delay the proceedings, the Court acted well within its discretion in declining to decide immediately Chevron's multiple, often repetitive, requests for evidentiary proceedings challenging the expert reports.[66] Moreover, the Court's decision not to rely on Mr.

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64 R-373, *People ex rel. Boos v. St. Louis, Iron Mountain and Southern Railway Co.*, 278 Ill. 25, 28 (Ill. 1917).

65 RE-9, Andrade Expert Rpt. ¶¶ 101-103.

66 *Id.* ¶¶ 102-103. Significantly, Chevron filed an essential errors motion for each report that was filed by a court-appointed expert nominated by the Lago Agrio Plaintiffs — twenty-six motions in all. The Court found that Chevron's motions recycled (often verbatim) arguments and allegations that had already been rejected by the Court. *See* RE-9, Andrade Expert Rpt. ¶ 103, nn.125-127 (citing to the Lago Agrio Record and to the Lago Agrio Judgment at 40-42). Accordingly, the Court concluded that Chevron's "allegations lack[ed] objectivity, and that the defendant has used these essential error proceedings as [a] . . . mechanism to challenge the evidence of the adversary, and not as a means to amend the record and correct real fundamental errors that could affect the decision in this case, which is the real purpose of such institution." C-931, Lago Agrio Judgment at 43-44. Ecuadorian law provides that motions intended to disrupt or delay proceedings, or to prejudice the opposing party, shall be denied and subject the

Cabrera's reports clearly was aimed at resolving Chevron's individual complaints and challenges to Mr. Cabrera, eliminating any alleged prejudice to Chevron, and stripping the Plaintiffs of any advantage tied to their alleged drafting of Mr. Cabrera's reports.[67]

43. **Third**, the Court's decision not to consider Mr. Cabrera's reports was both adequate and appropriate. Although the Court did not find that Chevron had established "fraud," the court expressly declined to consider the Cabrera reports in reaching its judgment:

> [D]ue to the seriousness of the charges, and although the circumstantial evidence does not constitute proof, we must address the petition found at the end of this motion which ... asks that this Court not consider expert Cabrera's report.... [T]he Court accepts the petition that said report not be taken into account to issue this verdict.[68]

44. And in its March 4, 2011 order in response to Chevron's motion for clarification, the Court reiterated that it had previously

> decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment. If [Chevron] feels that it has been harmed because the Court refused to void the entire case against it in response to the alleged fraud in Expert Cabrera's expert assessment, which is allegedly demonstrated by [the Crude outtakes], the Court reminds the defendant that its motion was granted, and that the report had NO bearing on the decision. So even if there was fraud, it could not cause any harm to the defendant. The Court has safeguarded the integrity of the proceeding and the administration of justice.[69]

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moving party to sanctions. RE-9, Andrade Expert Rpt. ¶ 102 (citing RLA-198, Ecuadorian Code of Civil Procedure, arts. 292, 293).

67 Claimants' Supplemental Merits Memorial ¶ 202 (third bullet point).

68 C-931, Lago Agrio Judgment at 50-51.

69 C-1367, Lago Agrio Clarification Order at 8; *see also* C-991, Lago Agrio Appellate Decision, Jan. 3, 2012 at 9-10.

45. The Court's decision complies not only with Ecuadorian law, but also with what Chevron itself requested the Court to do.[70]

46. Under the laws of both the United States and Ecuador, courts have broad discretion to strike allegedly tainted evidence from the record rather than declaring a mistrial.[71] When evidence is improperly admitted, judges in both Ecuador and the United States routinely resolve such issues not by declaring a mistrial but by issuing curative instructions to ignore or strike the tainted evidence.[72] The Court's damages award was not, and need not have been, based on Mr. Cabrera's two reports. The trial record includes more than 200,000 pages and contains in excess of 100 expert reports addressing nearly 64,000 soil and water sample results.

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[70] Claimants' Merits Memorial ¶¶ 478, 528 (second and fourth bullet points, respectively); *see also*, *e.g.*, C-503, Chevron's Motion for Terminating Sanction, filed in the Lago Agrio Litigation, Aug. 6, 2010 at 35. The Court could not have done more than it did. While Chevron argues that the Court could have criminally sanctioned counsel for the Plaintiffs, in fact the Court could only refer the matter to the General Prosecutor who could in turn initiate a formal investigation. In this case, however, Chevron had already requested the General Prosecutor to open a case against Plaintiffs' counsel so there was no need for the Court to make such a referral. Nor would a criminal referral have made any difference in the civil case. Finally, while Claimants would have preferred the Court to have suspended the proceedings to investigate the allegations levied against Mr. Cabrera, any such suspension would have been "contrary to public law, which orders that no incidental proceeding can suspend the verbal summary proceeding." *See* C-931, The Lago Agrio Judgment at 50.

[71] *See* RLA-374, *State v. Munroe*, Case No. 06-03000429, 2011 WL 6114 at *8 (N.J. Super. Ct. App. Div. Oct. 21, 2010) ("The decision to grant a mistrial is entrusted to the sound discretion of the trial court, and only to prevent an obvious failure of justice. We defer to the decision of the trial court, which is in the best position to gauge the effect of the allegedly prejudicial evidence.") (citations omitted); RLA-375, *State v. Williams*, Case No. 44899-4-I, 2000 WL 1224796 at *2 (Wash. Ct. App. Aug. 29, 2000) ("Trial courts are given wide discretion 'in dealing with trial irregularities,' 'in determining whether an error can be cured by an instruction,' and 'in determining whether to grant a mistrial.'") (internal citations omitted).

[72] *See, e.g.*, See R-608, Cassation File 197, Official Registry 59-April 10, 2003 (Ecuador) (confirming on other grounds the decision of the first instance court and striking from the record not legally produced prior testimony considered by the lower court); RLA-334, *Wingfield v. State*, Case No. 189.2012, 2012 WL 4878864 at *2 (Del. Oct. 15, 2012) (wherein the Supreme Court of Delaware upheld the trial court's denial of defendant's motion for mistrial because there was sufficient other evidence to convict defendant and the trial court issued a clear and prompt curative instructions. The court did so noting that the improper "references to the ammunition found in Wingfield's home did not taint the entire trial, especially because the trial judge instructed the jury not to consider any evidence from Wingfield's home."); RLA-335, *Bonnell v. Mitchel*, 301 F. Supp. 2d 698, 730 (N. D. Ohio 2004) (finding evidence should not have been introduced but nonetheless was insufficient "to taint the entire guilt phase of trial in light of the other evidence against defendant"); R-376, *State v. Balvin*, 791 N.W. 2d 352, 366 (Neb. Ct. App. 2010) ("If an objection or motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted."); RLA-377, *Henderson v. State*, 82 S.W.3d 750, 754 (Tex. Ct. App. 2002) ("When the testimony tainted by the alleged unlawful arrest is not considered, we find enough evidence still remained for a reasonable trier of fact to find Henderson guilty beyond a reasonable doubt.").

Additionally, the record contains testimony from dozens of fact witnesses and hours upon hours of legal argument.

47. According to the Plaintiffs themselves, the core of the Lago Agrio Litigation was a "series of approximately 45 'judicial site inspections,'" which resulted in the production of "more than a hundred expert reports."[73] The reports from ***each*** of these sites demonstrate the presence of carcinogens and other chemicals associated with adverse impacts on human health, with some sites exceeding the legal limit many times over.[74] Many of these exceedances were identified by ***Chevron's own experts***, who in fact found substantial contamination at ***every*** single site inspected.[75] [redacted] Moreover, the reports submitted by Chevron's nominated global experts were considered by the Court in calculating its ultimate finding of damages.[77] At least two of Chevron's appointed global experts documented contamination and poor corporate practices.[78]

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73 R-601, Donziger's Amended Answer to Plaintiff's Amended Complaint, Affirmative Defenses and Counterclaims, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Aug. 15, 2012, ¶ 125.

74 *Id.* ¶¶ 126-127; *see also id.* ¶¶ 138-139 (discussing Chevron's own reports of contamination found during the inspections). [redacted]

75 R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 26-42. Moreover, as established above, Chevron's reliance on its own unsubstantiated version of what happened with Dr. Calmbacher cannot serve to undermine or taint the entire judicial inspections phase. Indeed, it would be absurd to use the alleged falsification of Dr. Calmbacher's reports as a reason to strike all of the evidence obtained during the judicial inspections phase.

76 [redacted]

77 *See, e.g.*, C-931, Lago Agrio Judgment at 42, 43, 91, 99, 100, 112, 115, 116, 122, 124, 125, 130, 146, 180-82, 184 (considering the reports and testing results submitted by Chevron experts Muñoz, Barros, and Bermeo).

78 C-381, Expert Report of Gerardo Barros (Dec. 21, 2009) at 9, 18; R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 52 ("Muñoz's work reveals exceedances at each site tested.").

In light of the voluminous evidence showing contamination, there is no reason that the court would have been required or compelled to dismiss the case. Even without Mr. Cabrera's reports, the Court had ample evidence to rely upon in reaching its decision.

C. The Court's Damages Assessment Was Predicated On Sources Other Than Mr. Cabrera's Findings

48. Claimants make a series of allegations challenging the assessment of damages. In each case the Court acted well within its discretion.

49. Claimants begin their attack by asserting that the court awarded nearly US$ 1 billion to Plaintiffs based on damages assessed by Mr. Cabrera and the supplemental experts for categories of harm that the Plaintiffs had not pleaded, including a potable water system, excess cancer deaths, and cultural damages.[79] **First**, the Plaintiffs absolutely did include these categories of damages in their Complaint. Part III of the Complaint, for example, specifically addresses increased rates of mortality caused by cancer, the contamination of drinking water in the Concession area, and the cultural decimation of five indigenous groups.[80] **Second**, Judge Zambrano made clear that he was using a "holistic definition of environmental harm" so that he could incorporate into his damages assessment various categories of injury specifically claimed by the Plaintiffs, including elevated rates of cancer and the destruction of cultural identity.[81]

50. Claimants next allege that the Court in fact did rely on Mr. Cabrera's reports despite its representations to the contrary. As proof, Claimants allege that the court assessed damages for soil remediation in excess of US$ 5 billion based in part on the conclusion that Chevron was responsible for remediating 880 pits. Claimants posit that the number (880)

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79 Claimants' Supplemental Merits Memorial ¶ 41.

80 C-71, Lago Agrio Complaint, Part III at 10-12; *see also* RE-9, Andrade Expert Rpt. ¶¶ 89, 92.

81 C-931, Lago Agrio Judgment at 171; *see also id.* at 94-95, 125, 138; Re-9, Andrade Expert Rpt. ¶¶ 90-91 (noting that the court deemed it appropriate to assess the extent of the damages "in their complexity as a whole," and that it had adopted a broad definition of environmental harm based on a document that Chevron had submitted).

derived directly from Annex H to Mr. Cabrera's Report, and that this specific pit count is contained in no other source in the record.[82] Claimants' allegation is without merit.

51. As an initial matter, Appendix H to Mr. Cabrera's report notes the existence of 916 pits, not 880.[83] Claimants attempt to overcome this hurdle by suggesting that if one were to sort Stratus' pit inventory spreadsheet (which they allege is materially similar to Mr. Cabrera's Appendix H-1) "to remove the pits for which the comments mention 'no impact,' 'Petroecuador,' and 'Petroproduccion' (an affiliate of Petroecuador)," it would leave 880 pits — "the same number of pits identified in the Judgment."[84]

52. Of course there is absolutely nothing in the Judgment — nor do Claimants point to any documentary or other evidence outside of the Judgment — that would support Claimants' speculation that Judge Zambrano in fact engaged in such a mathematical exercise. In this case, though, Claimants' underlying math is simply incorrect. If one were to remove from Appendix H-1 of Mr. Cabrera's Report all such references, there would be only eight fewer pits (not the required 36) for a total of 908 pits.[85] And if one were to subtract from the 916 figure any pits that the Remedial Action Plan (a) designated as being built or modified by either "Petroecuador," "Petroproduccion" or after June 30, 1990 (when TexPet ceased being Operator), and (b) listed as having "no apparent contamination," one would have to remove forty two pits (not thirty six), for a total pit count of 874.[86]

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82 Claimants' Supplemental Merits Memorial ¶¶ 51-52 (citing to Expert Reports by W. Di Paolo & M. Younger).

83 R-77, Appendix H to the Cabrera Report at 10.

84 Claimants' Supplemental Merits Memorial ¶ 52.

85 R-77, Appendix H of Cabrera's Report at 39-41.

86 There is no reason that Judge Zambrano would have automatically removed from his calculations pits that that the Remedial Action Plan labeled "No Apparent Contamination." R-610, Remedial Action Plan for the Former Petroecuador-TexPet Consortium, Sept. 8, 1995, Table 3.1. The vast majority of pits supposedly not requiring

53. There are indeed other sources in the court record that Judge Zambrano could have relied on to determine the number of pits at Texpet sites.[87] For example, Attachment A to the Complaint identifies almost 500 TexPet sites that are the subject of the Complaint.[88] The Court noted in addition, in both its initial Judgment and again in its Clarification Order, that it also relied on aerial photographs in assessing the number of pits at issue.[89] There is no dearth of data in this case. While the Court did not identify the calculation it relied upon to conclude that there are 880 pits, there is no basis to conclude that the court relied on Mr. Cabrera's report in any way.

54. Claimants further contend that Mr. Cabrera's reports are the sole source of data relied on by the Court in awarding eight damages categories: (1) remediation of soil; (2) a healthcare system; (3) indigenous population impacts; (4) a potable water system; (5) excessive deaths from cancer; (6) ecosystem losses; (7) unfair profits; (8) remediation of groundwater.[90] The Court did not rely on Mr. Cabrera's narrative or findings with respect to these categories of damages, which are not unique to Mr. Cabrera's report in any event. Instead, the Court looked at

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remediation under the RAP demonstrated excess levels of pollution when sampled during the judicial inspections. *See* RE-10, LBG Expert Rpt. § 5.3.2.

87 It is curious that Chevron, which presumably had the authoritative count of pits that TexPet created at each site, never submitted a pit count, leaving the Plaintiffs and later the Court to review aerial photographs and other records to determine how many pits TexPet had created and then left behind. C-931, Lago Agrio Judgment at 125 (the determination of the number of pits requiring remediation was "aggravated by the fact that [Chevron] has not submitted the historical archives that record the number of pits, the criteria for their construction, use or abandonment."). Nor did Chevron submit any "corrective" records during the first instance appellate process when it had the opportunity to do so.

88 R-350, Annex A to *Aguinda* Complaint, Detail of the Stations, Wells and Pits.

89 C-931, Lago Agrio Judgment at 125; C-1367, Lago Agrio Clarification Order at 15; *see also* R-127, Judicial Inspection Acta for Sacha 6 filed in the Lago Agrio Litigation, Aug. 18, 2004 at 13 (referencing aerial photographs taken at Sacha 6 and contained in Chevron's Judicial Inspection Report); C-497, Expert Report of John A. Connor, Judicial Inspection of Well Sacha-06, Jan. 7, 2005 at 3, 9 (same); R-77, Appendix H of Cabrera's Report at 10 (wherein he states that there were aerial photos for 832 pits). Significantly, LBG notes in its expert reports that "during their operations of the Concession Area, Texaco created about 2 to 5 unlined pits per well site and production stations for the handling of various E&P wastes and water. Based on Texpet drilling 325 wells and 22 production stations, this puts a rough estimate of the number of pits constructed and used by Texpet at over 900 pits." RE-10, LBG Expert Rpt. § 5.3.

90 Claimants' Supplemental Merits Memorial ¶ 40.

the raw data submitted by Mr. Cabrera and Chevron's global experts.[91] As reflected in the Court's decision, it also relied upon testimony provided by citizens living in the impact zone,[92] and Plaintiffs' six supplemental expert reports submitted in September 2010.[93] Lastly, the Court was free to incorporate into its damages calculation the data from the judicial site inspections.

55. Finally, Claimants complain that the Court relied on Plaintiffs' expert reports submitted after Mr. Cabrera submitted his two reports, at least to the extent that these reports relied on Mr. Cabrera's data. As will be discussed below, **first**, there is nothing in the record to suggest that Mr. Cabrera's underlying data was not valid or reliable; **second**, experts routinely rely on data gathered by other scientists when available; and **third**, the supplemental experts specifically found Mr. Cabrera's data reliable and credible or they would not have relied on them. Additionally, as already discussed in Section II.A of the Counter-Memorial, Mr. Cabrera's data revealing the presence of contamination are mirrored by the data gathered by Claimants' own experts.

56. Claimants' allegations aimed at undermining the validity of Mr. Cabrera's data lack merit. For example, Claimants criticize the fact that Mr. Cabrera (a) occasionally let representatives from the Plaintiffs and community members accompany him in the field when he conducted his testing, and (b) had *ex parte* communications with local residents, the Plaintiffs,

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91 *See, e.g.*, C-931, Lago Agrio Judgment at 180-181 (wherein the Court considered studies provided by Chevron's global expert Mr. Barros in calculating soil damages).

92 *See, e.g.*, C-1367, Lago Agrio Clarification Order at 13; C-931, Lago Agrio Judgment at 130, 139-145 (wherein the court considered the testimony of the affected residents in reaching its decision on damages for a healthcare system and excess deaths from cancer). *See also id.* at 147-153 (wherein the court considered the testimony of the affected residents regarding harm to their animals, food and agricultural lands and productivity).

93 The supplemental experts provided reports on the following categories of damages: (1) Douglas Allen provided a report concerning soil remediation and groundwater; (2) Lawrence Barnthouse provided a report covering damages to the ecosystem; (3) Carlos Picone submitted a report on the healthcare system; (4) Jonathan Shefftz provided a report regarding unjust enrichment; (5) Daniel Rourke prepared a report on excess cancer deaths; and (6) Paolo Scardina submitted a report regarding damages for a new potable water system. Impacts to the Indigenous Population and Culture were outlined in Annex G of the Plaintiffs' September 16, 2010 Submission. *See* R-574, Lago Agrio Plaintiffs' Motion, Sept. 16, 2010, Annex G.

and their counsel.[94] But there is nothing illegal about any of these acts, which were consistent with court rules and practice.[95] Chevron in fact was encouraged to provide information to and communicate directly with Mr. Cabrera, and as discussed above, often communicated *ex parte* with its own global experts.

57. Moreover, it is not only lawful but even encouraged that scientists rely on or use data that has previously been collected.[96] Indeed, in the United States this practice happens regularly, and experts are rarely required to travel to the contaminated site(s) or perform their own testing. For example, in *Monsanto v. David*, the Court of Appeals for the Federal Circuit held that under the Federal Rules of Evidence, "an expert need not have obtained the basis for his opinion from personal perception."[97] The Court of Appeals went on to state that "numerous

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94 Claimants' Merits Memorial ¶ 234. Claimants also, by way of example, allege that Mr. Cabrera had a conflict of interest because his remediation company is allegedly registered to do business with Petroecuador. *See id.* at 110. But as Mr. Cabrera explained in a March 22, 2010 letter to the Court, this is a "serious and false accusation." R-576, Letter from R. Cabrera to Judge Ordóñez, Mar. 22, 2010 at 2.

Claimants also attack Mr. Cabrera's reliance on Mr. Beristain's report in assessing the presence of excess cancer among the Lago Agrio population. *See* Claimants' Merits Memorial ¶ 232. Claimants argue that Mr. Beristain was not independent and that Mr. Cabrera was working with Mr. Beristain before he was sworn in. Chevron's accusations lack support. The May 2007 meeting that Claimants criticize between Messrs. Cabrera and Beristain occurred before Mr. Beristain was identified as a member of Cabrera's technical team. At that time, Mr. Beristain was working for an environmental group and was merely assisting the Ecuadorian Plaintiffs' team with "community-based information gathering." *See* R-523, Donziger Dep. Tr. (Jan. 14, 2011) at 2895:13-22, 2896:4-17. The May 2007 meeting was a community meeting among the Cofán people and their attorneys "to talk about what they want as compensation for all the damage." Mr. Beristain's role at the meeting was "in the form of leading a discussion" with the Cofán people. *Id.* at 2919:20-23. The global damages assessment was not discussed or planned during this meeting.

Claimants' other allegations concerning Mr. Cabrera are equally unavailing. *See* Claimants' Merits Memorial at ¶¶ 226-245. In any event, Chevron's own data reveal the presence of contamination on a scale similar to what the Court ultimately found, thereby rendering Claimants' criticisms of the manner in which Mr. Cabrera collected and processed his data moot. *See* RE-10, LBG Expert Rpt. § 3.

95 R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 31-32.

96 Mr. Allen affirmed in his deposition that his report "represent[s] [his] opinions to a degree of scientific certainty" and that the result of his analysis was "something that I considered to be reasonable and appropriate consistent with best practices and standards." C-898, Allen Dep. Tr. (Dec. 16, 2010) at 123-24.

97 RLA-378, *Monsanto v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008) (citing *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982); RLA-429, *Data Line Corp. v. Micro Techs., Inc.*, 813 F.2d 1196, 1200-01 (Fed.Cir.1987).

courts have held that reliance on scientific test results prepared by others may constitute the type of evidence that is reasonably relied upon by experts for purposes of Rule of Evidence 703."[98]

58. The Appeals Court further found that expert testimony was reliable even if the seed report (the report that the expert had relied on in preparing his subsequent report) was not admissible.[99] Like in the *Monsanto* case, the tests conducted by Mr. Cabrera were certainly of the type normally relied upon by experts, and thus, the expert testimony submitted to the Lago Agrio Court in September 2010 was admissible.[100]

59. Moreover, in this instance, Plaintiffs' supplemental experts do not rely exclusively on Mr. Cabrera's data, and at least two of the supplemental experts — Drs. Rourke and Picone — did not rely on Mr. Cabrera's data at all.

60. Douglas Allen "performed an independent valuation of damages in the concession area of the Ecuadorian jungle" "to develop an independent cost estimate for remediating contaminated soils, sediment, and groundwater in the well sites and production stations of the

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98 RLA-378, *Monsanto v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008) (citing *Ratliff v. Schiber Truck Co.*, 150 F.3d 949, 955 (8th Cir. 1998) (holding that expert testimony regarding a report prepared by a third party was properly allowed); *see also* RLA-379, *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) (finding that testimony was properly admitted from an expert who did not conduct his own tests); RLA-380, *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592 (1993) ("[A]n expert is permitted wide latitude to offer opinions, including those that are not based on first hand knowledge.").

99 RLA-378, *Monsanto v. David*, 516 F.3d at 1016 ("Rule 703 expressly authorizes the admission of expert opinion that is based on 'facts or data' that themselves are inadmissible, as long as the evidence relied upon is 'of a type reasonably relied upon by experts in the particular field in forming opinions.'").

100 There is nothing to suggest that the Lago Agrio Court's consideration of the supplemental expert reports perpetuated the alleged Cabrera fraud by "repackaging" some of the findings in the Cabrera report. Chevron raised the crime-fraud exception in five separate Federal judicial districts in the United States, where it sought documents from the supplemental experts. None of the five courts applied the crime-fraud exception, principally because the experts who relied on the data contained in the Cabrera report did so openly and with full disclosure. *See* RLA-381, *In re Application of Chevron Corp.*, No. 10-mc-00091-WKS, Dkt. 38 at 12-13 (D. Vt. Dec. 2, 2010) (12-13); RLA-382, *Chevron Corp. v. Barnthouse*, No. 10-mc-00053-SSB-KKL, Dkt. 36 at 20-21(D. Ohio Nov. 26, 2010); RLA-383, *Chevron Corp. v. Shefftz*, No. 1:10-mc-10352-JLT, Dkt. 45 at 20-21 (D. Mass. Dec. 7, 2010); RLA-384, *Chevron Corp. v. Picone*, No. 10-cv-02990, Dkt. 28 (D. Md. Nov. 24, 2010); RLA-385, *Chevron Corp. v. Rourke*, No. 10-cv-02989, Dkt. 34 (D. Md. Nov. 24, 2010); RLA-386, *Chevron Corp. v. Scardina*, No. 10-cv-00549, Dkt. 33 (W.D. Va. Nov. 24, 2010).

concession area."[101] Testifying under oath, Mr. Allen affirmed: "I used what I felt was relevant and valid out of [Mr.] Cabrera's report, but I didn't rely solely on [it] to do the valuation. I relied on other sources of data and information."[102] He also explained that he was not "looking at [Mr.] Cabrera's report and rebutting the work that he did so much as . . . using his information to the extent that I found it was useful and valid to develop my own valuation."[103]

61. Similarly, Dr. Barnthouse testified during his deposition that he made an "independent evaluation of the quality of the [Cabrera] study and the validity of the conclusions."[104] His conclusions were based primarily on 1990s studies commissioned by Chevron itself, and he was not asked to assume the data cited by Mr. Cabrera was accurate, nor did he make that assumption.[105]

62. During their respective depositions, Drs. Picone and Rourke explained that they did not rely on Mr. Cabrera's data at all. Dr. Picone testified that he relied in part on demographic data provided by another expert in reaching the conclusions in his report.[106] He added that he was never instructed "to support the findings in the Cabrera report;" instead "the request was to generate a report that did not replicate or did not rely on the Cabrera report."[107]

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101 C-898, Allen Dep. Tr. (Dec. 16, 2010) at 90:4-5, 105:8-12.

102 *Id.* at 90:20-23.

103 *Id.* at 141:8-11; C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 27:3-28:1, 42:10-12 (wherein he explained that he made an "independent evaluation of the quality of the [Cabrera] study and validity of the conclusions"). In other words, his conclusions were based only on the portions of the Cabrera report he found reliable; the rest of his conclusions were based on studies commissioned by Chevron itself. *Id.* at 51:11-17. *See also* C-901, Shefftz Dep Tr. (Dec. 16, 2010) at 59:24-60:1; 190:21-24 (wherein he explained that his analysis "follows from [only] ***some*** data and cost figures from the Cabrera report" and further explaining that he did not "accept[] all the statements in the Cabrera report . . . as being true.") (emphasis added). As with Dr. Barnthouse, Dr. Shefftz was not instructed to assume that the data items in the Cabrera reports were correct. *Id.* at 62:23-63:2.

104 C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 42:10-12.

105 *Id.* at 51, 111.

106 C-900, Picone Dep. Tr.(Dec. 16, 2010) at 191.

107 *Id.* at 80:14-81:5.

As a result, according to Dr. Picone, "I did not rely on the Cabrera report to generate my report."[108]

63. When Chevron asked Mr. Rourke how he utilized the Cabrera report in preparing his expert report, Mr. Rourke replied: "I didn't make any use of . . . the Cabrera Report." Chevron then asked whether the expert "ultimately rel[ied] on the Cabrera Report in any way," to which Mr. Rourke replied: "No, I did not."[109]

64. Finally, Claimants are incorrect when they contend that the supplemental experts who relied on some of Mr. Cabrera's underlying data recanted their damages assessments after they learned that a Colorado environmental firm (Stratus) may have drafted parts of Mr. Cabrera's reports. To the contrary, Dr. Barnthouse testified that if "some parts of the Cabrera Report . . . [he] relied on, were drafted by Stratus," that would give him "a little bit of comfort, in the sense that I know that a group that has had a lot of experience in doing these assessments was involved."[110] Likewise, Mr. Shefftz testified that the fact that Stratus may have provided the figures in the Cabrera report would be a bonus since Stratus was "a major well-regarded firm in the field" and "at the end of the day, we have a lot of regard for Stratus' objectivity and integrity. So if they were helping Cabrera out, my initial reaction would be that that helps the accuracy of the Cabrera report."[111]

65. Finally, Claimants' allegation that Mr. Cabrera's data is "scientifically bankrupt" is without merit. At the height of their operations, Claimants discharged an average of *880 million gallons* of production water *per year* directly into the surface waters of the Amazon

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108 *Id.* at 86:9-10.

109 C-1042, Rourke Dep. Tr. (Dec. 20, 2010) at 230:8-14; 231:6-8; *see also* C-900, Picone Dep. Tr. (Dec. 16, 2010) at 58:3-8, 82:4-20 ("[The Weinberg Group] shared with me the [Cabrera] report, and we talked about the report, and . . . I truly felt that I could not rely on any information in the report.").

110 C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 245-246.

111 C-901, Shefftz Dep. Tr. (Dec. 16, 2010) at 250-251.

basin.[112] As discussed in the Counter-Memorial at Section II.A, the levels of contamination documented in Mr. Cabrera's reports are accurate, as Chevron's own data confirms.

[112] *See* R-426, Letter from P. Pallares to X. Alvarado, Mar. 5, 2007.

ANNEX F: RESPONSE TO CLAIMANTS' "COLLUSION" ALLEGATIONS

1. As the Honorable Leonard Sand of the United States District Court for the Southern District of New York observed, Claimants' use of the term "collusion" has been "overworked":

> I know Chevron is enamored with the word "collusion." They [Chevron's opponents] never "talk" and they never "write"; they "collude." And . . . I think maybe . . . that's overworked.[1]

2. That the Republic's political leaders have, on occasion, spoken about the larger dispute — whether expressing sympathy with the plight of those affected by environmental disaster or taking to task those allegedly responsible — is no more surprising nor objectionable than political leaders of the United States, including President Obama, warning of a "massive and potentially unprecedented environmental disaster . . . in the Gulf of Mexico," or concluding that "BP is responsible for this leak. BP will be paying the bill."[2] Indeed, there was a time when the political leadership in Ecuador spoke in support of Texaco, yet neither Chevron nor Texaco has ever proclaimed *those* statements improper. Elected leaders have a right to comment upon issues of concern to their people, and their decision to engage in political speech does not constitute unlawful "collusion," much less a treaty breach.

3. Claimants plainly employ a clipping service that identifies *any* public comment in all of Ecuador that is critical of Chevron, and then adds such comments to its litany of

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1 *See* C-169, Hr'g Tr. (Apr. 19, 2007) in *Republic of Ecuador v. ChevronTexaco Corp.*, No. 04-cv-8378, at 7.

2 R-538, Joel Achenbach and Anne E. Kornblut, *Officials' Forecast Grim About Massive Oil Spill as Obama Tours Part of the Gulf Coast,* WASHINGTON POST (May 3, 2010) at 1; *see also* R-611, *House Dems Introduce 'Big Oil Bailout Prevention Act' to Protect Taxpayers from Paying Oil Spill Damages*, Press Release by U.S. Congressman Rush Holt (May 5, 2010) at 1 ("[C]ompanies like BP should pay for every last cent of the mess they've made, not taxpayers, not the tourism industry, not the fishing industry, not small businesses . . . . [T]he buck stops with oil companies."); R-612, Jason Linkins, *Gulf Oil Spill: Palin Camp Says You Can't Trust Foreign Oil Companies*, HUFFINGTONPOST (May 5, 2010) at 1 (former Vice Presidential candidate Sarah Palin: "[L]earn from Alaska's lesson w[ith] foreign oil co[mpanies]: don't naively trust.").

"evidence" that it cannot get a fair trial in Ecuador. But Claimants, while complaining about adverse public pronouncements, refuse to credit the frequent statements by Ecuador's political leadership, including President Correa, that the Republic is not a party to the environmental case, that it will not interfere with the case, and that the matter will be decided in the ordinary course by the courts.[3] Indeed, President Correa — whom Claimants repeatedly attack — has been critical not only of Chevron, but of the state-owned oil company as well[4] — and then they use those statements as alleged "admissions" in this proceeding![5]

4. For its part, Chevron concedes that it has enjoyed continued access to almost all levels of the Ecuadorian government, not only communicating frequently through the years with the Ministers of Energy and Mines, but also meeting with Ecuadorian presidents, ambassadors and attorneys general.[6] Chevron has defended this practice by noting that "individuals and corporate representatives have the right to meet with representatives of governments — even if

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3 *See, e.g.*, R-613, TeleSUR News Tr. (Feb. 16, 2011) (President Correa stating: "I will not comment further because it was a . . . legal dispute between private parties: Amazon communities against a transnational corporation, in which the government had nothing to do. Our justice system is absolutely independent."). R-154, President Correa Press Conference Tr. (Apr. 26, 2007) at 2 ("the President cannot intervene in a legal matter"); R-155, *President Correa: There Is No Way To Hide The Pollution Caused By Texaco*, EL MERCURIO (May 1, 2007) at 1 (President Correa "confirmed that the National Government would not interfere in the judicial process"); R-156, Letter from Amb. Gallegos, THE WALL STREET JOURNAL (Apr. 26, 2008) ("President Rafael Correa's government has drawn a clear line between where sympathy for contamination victims ends and interference in an ongoing complex legal dispute begins."); R-157, A. Mera Press Conference Tr. (Aug. 31, 2009) at 1 ("The government is not a party to the legal proceedings between the communities and Chevron . . . . [I]t has no interest in the subject . . . . So the government has not involved itself in the proceedings, it is not involving itself in these proceedings, and it will not involve itself in these proceedings either.").

4 *See, e.g.*, R-154, President Correa Press Conference Tr. (Apr. 26, 2007) at 8 ("I know Petroecuador continues polluting . . . . it is not only Texaco. We agree on that.").

5 Claimants' Supplemental Merits Memorial ¶ 84.

6 *See, e.g.*, R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.) (Chevron admitting to more than twenty-five meetings with Government officials); R-45, Aff. of Ricardo Reis Veiga (Jan. 16, 2007) ¶ 66 (Veiga describes his meetings with Ecuadorian Attorney General Borja and President Camacho); R-615, Fax from R. Veiga to Y. LeCorgne (Sept. 6, 1994) (communications with President and Minister of Energy re: remediation and MOU); R-159, Email from W. Irwin to R. Veiga, *et al*. (Sept. 26, 2003) (meetings with President, Minister of Energy, and other officials re: Lago Agrio Litigation); C-166, Email from M. Escobar to A. Wray, *et al*. (Aug. 10, 2005) (meeting of Texaco officials with President, Legal Undersecretary General and Ministry of Energy official to propose intervention by State in *Lago* in exchange for dropping Chevron's U.S. arbitration against Petroecuador).

the parties are engaged in litigation on one issue or another."[7] But it cannot have it both ways. And the fact that government representatives make themselves accessible to parties in a dispute hardly constitutes "collusion"; and if it did, the Republic has "colluded" just as much with Chevron as it has with the Lago Agrio Plaintiffs.[8]

5. As with many of their allegations, Claimants attempt to link events that occurred at around the same time without any evidence that the first event actually triggered the second.[9] In short, Claimants have offered no proof that any statement or act by an official of the Republic triggered any event in the litigation. This lack of linkage renders Claimants' collusion story factually and legally baseless.

I. The Lago Agrio Plaintiffs' Representatives' *Opinions* Regarding The Lago Agrio Court Are Not Evidence Of *Actual* Corruption

6. Claimants rely on statements of the Lago Agrio Plaintiffs' counsel that are critical of the Ecuadorian courts.[10] But Claimants fail to show how the opinions of Plaintiffs' counsel can form a legal basis for any finding of actual corruption within the Ecuadorian courts. Indeed, Claimants cite the statements of Plaintiffs' counsel while wholly omitting that the all-important context of their remarks was counsels' belief that Chevron might have an unfair advantage before the Ecuadorian courts — the original concern that impelled the Plaintiffs to file the case in

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7 R-72, Letter from M. Kolis to T. Collingsworth & C. Bonifaz (Aug. 11, 2005) at 1.

8 As an initial matter, it is of note that in support of certain allegations of collusion, Claimants cite to statements made by U.S. courts hearing Chevron's Section 1782 applications rather than to primary source documents. *See* Claimants' Merits Memorial ¶¶ 247, 259, and 261. But the Republic did not even appear as a party in those cases. And, in fact, other U.S. courts have pointed out that their task in hearing a Section 1782 application is not to opine on the merits of the applicant's allegations but rather merely to determine if discovery is appropriate. *See, e.g.*, R-269, *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011) ("[T]he circumstances supporting [Chevron's] claim of fraud largely are allegations and allegations are not factual findings."); R-448, Order, *Chevron Corp. v. Quarles*, at 2, No. 3:10-cv-00686, Dkt. 108, (M.D. Tenn. Sept. 21, 2010) at 2 ("While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on *this* court.").

9 *See, e.g.*, Claimants' Merits Memorial ¶ 295.

10 *See, e.g.*, *id.* ¶¶ 275-280; Claimants' Supplemental Merits Memorial ¶¶ 120-123.

a U.S. federal court, rather than in Ecuador.[11] In fact, Plaintiffs' counsel's fears of this influence have remained consistent. It is rather the position of ***Claimants***, not that of ***its opponents in the environmental litigation***, that has changed with regard to the fairness, independence, and adequacy of the Ecuadorian Judiciary. When the context of the opinions of both Claimants and the Lago Agrio Plaintiffs is considered, it is clear that neither provides any evidence of actual judicial corruption.

7. From 1993 to 2002 Texaco lavished praise on the Ecuadorian judiciary so that ***it*** might convince the New York federal district court to send the *Aguinda* environmental case to Ecuador.[12] In support, Texaco submitted numerous sworn affidavits attesting to the fairness, independence, and adequacy of Ecuadorian courts. For example, in 1993, Texaco submitted affidavits in support of its *forum non conveniens* motion from Ecuadorian legal experts Dr. Enrique Ponce y Carbo and Dr. Vicente Bermeo Lañas. They stated that (1) the Ecuadorian courts provided a totally adequate and unbiased alternative forum for the claims asserted by the Plaintiffs, and (2) both Ecuadorian citizens and local officials had faith in the judicial system of Ecuador.[13] In 1995, Texaco submitted additional expert affidavits from Ecuadorian attorneys, including an affidavit authored by its long-time Ecuadorian outside counsel, Dr. Alejandro Ponce Martinez, averring that:

> I have reviewed the pleadings in *Maria Aguinda, et al. v. Texaco, Inc*. . . . . In my opinion, based upon my knowledge and expertise, the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims. I believe that the

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[11] Their other acknowledged parallel motivation was the U.S. courts' use of the Rule 23 class action vehicle to award individual reparation to ***all*** class members, not just to those who appeared and participated as plaintiffs.

[12] The U.S. Circuit Court for the Second Circuit has held that Chevron is bound by Texaco's representations in *Aguinda*. R-247, Opinion, *Republic of Ecuador v. Chevron Corp*. (2d Cir. 2011) at 6 n.4.

[13] R-22, Aff. of Dr. Enrique Ponce y Carbo (Dec. 17, 1993) ¶¶ 7-8, 12; R-23, Aff. of Dr. Vicente Bermeo Lañas (Dec. 17, 1993) ¶¶ 10, 12.

> Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner.[14]

Texaco also submitted an affidavit from its in-house Ecuadorian counsel, Dr. Rodrigo Pérez Pallares, stating that an attached list of Ecuadorian judicial proceedings involving TexPet showed "that the Ecuadorian courts provide an adequate forum for claims such as those asserted by the plaintiffs."[15]

8. After the Second Circuit's initial remand, the District Court invited the parties and the Government of the Republic to submit information regarding "whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums."[16] In response, Texaco submitted to the District Court at least nine additional affidavits from Ecuadorian legal experts, all again uniformly attesting to the fairness and impartiality of Ecuador's courts and the demonstrated legal skills of Ecuador's judiciary to hear the *Aguinda* plaintiffs' claims. Texaco's experts opined, *inter alia*, that "Ecuador's judicial system is neither corrupt nor unfair"; that "the courts of Ecuador . . . treat all persons who present themselves before them with equality and in a just manner"; and that the Ecuadorian

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14 R-22, Aff. of Dr. Alejandro Ponce Martinez (Dec. 13, 1995) ¶¶ 3-5.

15 R-107, Aff. of Dr. Rodrigo Pérez Pallares (Dec. 1, 1995) ¶¶ 4, 6-7, 9 and Ex. B at A1523-A1525 (listing "Lawsuits and Administrative Claims Filed By And Against Texaco Petroleum Company in Ecuador from 1974 Through November 30, 1995"); *see also* R-121, Aff. of Dr. Adolfo Callejas (Dec. 1, 1995) ¶ 9 (existence of lawsuits by Ecuadorian municipalities against TexPet and PetroEcuador "demonstrates that Ecuadorian citizens and local officials in Ecuador have faith in the judicial system of Ecuador to provide redress for alleged wrongs concerning oil-related activities in Ecuador"); R-122, Aff. of Dr. Vicente Bermeo Lañas (Dec. 11, 1995) ¶ 10 ("[m]any citizens have obtained judgments against the Government and PetroEcuador in connection with injuries from environmental contamination due to oil exploration . . . . Ecuadorian judges . . . have a deep-rooted obligation . . . to apply those laws faithfully."); *see also* R-123, Excerpts from Hr'g Tr. (June 7, 1996), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 65 (a judgment against PetroEcuador in an Ecuadorian court "demonstrates that courts in Ecuador do grant relief, that there are procedures, there are remedies in Ecuadorian courts and the parties can be joined. That, in fact was a government entity").

16 R-616, Docket for *Aguinda*, Case no. 1:93CV07527, Dkt. Entry 146 (Jan. 31, 2000). Judge Rakoff's request for additional information came just ten days after a military coup in Ecuador disposed of the president, replacing him with the vice president. *See* R-617, Larry Rohter, *Ecuador Coup Shifts Control To No. 2 Man*, N.Y. TIMES (Jan. 23, 2000).

judiciary was fully independent.[17] Relying on Texaco's sworn representations, the District Court ordered a second dismissal of the case on *forum non conveniens* grounds.[18]

9. After the Plaintiffs re-filed their case in the Superior Court in Lago Agrio, Texaco attempted to use its many political connections in Ecuador to persuade the Government to cause that court to dismiss the new environmental case. Attorney General José María Borja was visited by two Texaco attorneys, who demanded that the government step in and peremptorily halt the case in its tracks[19] — which of course was wholly inconsistent with Texaco's (and Chevron's) recent representations to the New York federal courts.[20] When Dr. Borja refused to accede to these demands, instead telling Chevron it should raise its own defenses in Lago Agrio, Chevron filed the AAA arbitration against PetroEcuador.[21]

10. It was not until it became clear that they could neither coerce the Ecuadorian Government to block the environmental litigation nor control its outcome that Claimants publicly recanted their earlier assessment of the Ecuadorian judiciary. Noting Chevron's inconsistent positions, Judge Lynch of the U.S. Court of Appeals for the Second Circuit pointedly commented to Claimants' counsel during oral argument, "you . . . like[d] the Ecuadorian Courts

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17 R-31, Aff. of Dr. Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; R-32, Aff. of Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; R-33, Aff. of Dr. Sebastián Pérez-Arteta (Feb. 7, 2000) ¶¶ 4, 7, filed in *Aguinda*; R-34, Aff. of Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; R-35, Supplemental Aff. of Dr. Alejandro Ponce Martínez (Apr. 4, 2000) ¶¶ 1-2, filed in *Aguinda*; R-36, Aff. of Jaime Espinoza Ramírez (Feb. 28, 2000), filed in *Aguinda*; R-37, Aff. of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7; R-38, Decl. of Ramón Jimenez Carbo (Apr. 5, 2000) ¶ 1, filed in *Aguinda*; R-39, Aff. of Dr. José María Pérez-Arteta (Apr. 7, 2000) ¶ 2, filed in *Aguinda*.

18 C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

19 *See* R-71, Veiga Dep. Tr. (Nov. 8, 2006) at 220; *see also* R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.) (admitting to meeting with Attorney General Borja in August 2003 and at least one subsequent meeting).

20 *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.1.

21 R-69, AAA Statement of Claim (June 11, 2004).

when they were in the pocket of the oil companies and you don't like them now that they're in the pocket of a populist regime that doesn't like oil companies."[22]

11. By contrast, the Plaintiffs originally filed suit in the United States in 1993 in large part to avoid Texaco's demonstrated ability to manipulate the Ecuadorian courts.[23] When Texaco sought *forum non conveniens* dismissal, the Plaintiffs resisted, filing affidavits and other evidence to demonstrate that they would not receive a fair trial in Ecuador. The Plaintiffs contended that "the independence of the Ecuadorian courts in cases involving the oil industry is open to serious question," citing, *inter alia*, an affidavit stating that "there is no real possibility of obtaining a fair and impartial trial here [in Ecuador] in a suit against Texaco."[24]

12. The Lago Agrio Plaintiffs' representatives continued to express concern regarding Chevron's ability to corrupt the judiciary after the environmental case had been re-filed in Ecuador. It is indeed that very concern — that *Chevron* might use its influence to control the outcome of the litigation — that Claimants capture in their quotations from the *Crude* transcripts and Mr. Donziger's diary. They were not — as Claimants allege — opining on their own ability or intent to manipulate the judiciary.

13. For example, Claimants cite a *Crude* outtake in which Mr. Donziger refers to a judge as "corrupt,"[25] but Claimants ignore the fact that Mr. Donziger is referring to the danger of

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22 R-160, Oral Argument Tr. (Aug. 5, 2010), *Republic of Ecuador v. Chevron Corp*., 10-1020-CV (L);11-10-1026-cv (CON) (2d Cir.) at 44:24-45:5.

23 *See* C-16, Plaintiffs' Memorandum of Law in Opposition to Texaco's Motion to Dismiss (Feb. 20, 1996), at 40, filed in *Aguinda* (questioning "independence of Ecuadorian courts in cases involving the oil industry"); *id.* at 38-39 (noting that the Plaintiffs feared "serious bodily harm" if they brought their suit in Ecuador because of Texaco's relationship with the military).

24 *Id*. at 40 (citing Decl. of Dr. Enesto Lopez Freire, Justice of the Ecuadorian Court of Constitutional Guarantees ¶ 11).

25 Claimants' Merits Memorial ¶ 9 (citing C-360, Crude Tr., CRS052-00-CLIP 06).

Chevron, not the Plaintiffs, buying off the judge, and discussing how the Plaintiffs' efforts might prevent that from happening:

> There's a price that could be paid to the judge that would overcome his fear and he'd still be corrupt. You know, maybe it's a thousand dollars, maybe it's ten thousand dollars but I know there's a price *they* could pay him where *they* could get him to do what *they* want. Even if *we* put fear in him. Probably. We'll see what happens.[26]

Claimants do not point to a single statement, even in the most candid portions of Mr. Donziger's diary, to the effect that the Lago Agrio Plaintiffs would have to resort to these tactics. All that Mr. Donziger expresses are his inner fears that Chevron would be able to improperly control the trial.

14. For example, Mr. Donziger wrote: "[T]hey [Chevron] are more evil and corrupt tha[n] we could admit to ourselves. My biggest fear is that there can be an unholy alliance between the [Ecuadorian] army, Texaco, and P[etro]E[cuador] to make sure we do not win the case."[27] He noted two occasions when journalists specifically asked him how his clients could win when "all [Chevron] need[s] to do is buy the judge."[28] In one of those instances, Mr. Donziger replied that a combination of vigilance, international attention and the changed political context in Ecuador might keep that from happening.[29] The passages Claimants quote suggesting that the Lago Agrio Plaintiffs hoped to place pressure on the judge similarly reflect the Plaintiffs' representatives' belief that such pressure was needed to counter that imposed by

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26 C-360, Crude Outtakes at CRS052-00-CLIP 06 (emphasis added); *see also id.* at CRS-053-02-CLIP01 ("And Texaco has tried to do that, I mean, they got to that judge first, I — I believe they have paid him, and paid the secretary, probably a hundred bucks. It doesn't cost a lot.").

27 C-716, Donziger Diary at DONZ00027156.

28 *Id.*

29 *Id.*

Chevron, but fail to show that any such pressure was successful.[30] Viewed in this context, these documents demonstrate that Mr. Donziger feared that corruption might overcome the facts and keep his clients from a just award, and that they needed to counter by using transparency and public pressure to prevent that from happening.

15. Mr. Donziger repeatedly made clear that the Lago Agrio Plaintiffs' goal was only to make the trial *fair* to his clients — not to make it *unfair* in their favor. For example:

- "The judge became very . . . I — I'd say *neutralized* . . . . So I think that the presence of those cameras has something to do with that, probably."[31]
- "I find that when you represent people who are historically marginalized, like our clients, you have to create conflict to get a *fair* trial. If you just let the system work naturally you're not going to get a fair trial."[32]

16. This quandary came through clearly in Chevron's Section 1782 deposition of one of the Lago Agrio Plaintiffs' original attorneys, Cristobal Bonifaz, when he was asked why it was considered a daunting task for the Lago Agrio Plaintiffs to obtain a fair judgment against Texaco in an Ecuadorian court:

> Q. And why did you think that [the Lago Agrio Plaintiffs] . . . would not be able to collect?
>
> A. Because I look at the history of the country and I look at the history of the Indian population in the country and I looked at the attitude the government had against the Indian population. And I felt, you know, those poor Indians. Forget it; nothing is ever going to happen on their behalf here.
>
> Q. And that is based on the historical treatment of the indigenous Indian population by the government?
>
> A. That's absolutely correct.[33]

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30 *See* Claimants' Supplemental Memorial on the Merits ¶¶ 122-123.

31 C-360, Crude Outtakes at CRS053-00 CLIP 01 (emphasis added).

32 *Id.* at CRS053-01 (emphasis added).

33 C-1220, Bonifaz Dep. Tr. at 20.

> A Ecuador is a country where the Indian population has been oppressed for 500 years. And this Indian population all of a sudden was filing a big lawsuit against Chevron or Texaco.[34]

17. For his part, Mr. Donziger could not have been clearer that he believes the evidence itself supports the Lago Agrio Plaintiffs' case and that his publicity efforts were aimed at ensuring a ruling based on that evidence: "I mean the judge can easily find that we can win this case based on what's in right now, what Texaco's admitted to. So, what we need to do is get the politics in order in a country that doesn't favor people from the rainforest."[35] Whereas Claimants cite comments from Mr. Donziger that "the only way we're going to succeed, in my opinion, is if the country gets excited about getting this kind of money out of Texaco,"[36] they ignore that in the same breath he said he wanted to "give them a feeling like a foreign company can't come in and do what they — do what Texaco *did* and get away with it."[37] He was *not*, as Claimants suggest, attempting to hold Texaco accountable for something he did not believe it did.

18. It is of no moment that the Plaintiffs' representatives used colorful language to express their distrust of the court. Mr. Donziger has noted that many of his own comments "were either exaggerated or inaccurate or the like."[38] In fact, in at least one instance characterized by Claimants as "shocking,"[39] Mr. Donziger has indicated that the Lago Agrio Plaintiffs' representatives were merely joking: "He made a joke. We were engaged in legitimate advocacy. Chevron was claiming this theory that it was all some sort of conspiracy. You know,

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34 *Id.* at 94.

35 C-360, Crude Outtakes at CRS060-00-CLIP 04 at 2:25-3:5.

36 Claimants' Merits Memorial ¶ 8; Claimants' Supplemental Merits Memorial ¶ 123.

37 C-360, Crude Outtakes at CRS060-00-CLIP04 at 3:18-4:3 (emphasis added).

38 C-952, Donziger Dep. Tr. (Dec. 13, 2010) at 1231:21-24.

39 Claimants' Merits Memorial ¶ 2.

we didn't agree with that. We thought it was funny how they were mischaracterizing it. That was the joke."[40] And regarding another quotation relied on by Claimants — that the evidence of groundwater contamination was "all for the Court just a bunch of smoke and mirrors and bullshit"[41] — Mr. Donziger has stated that he made that comment "for dramatic effect."[42] Mr. Donziger has made clear that he absolutely did not believe that "pressure and force" "mattered more than the law and the facts" to the Lago Agrio Court.[43]

19. Claimants have characterized statements by the Plaintiffs' representatives as evidence of "collusion" when they are critical of the Lago Agrio Court and have but disregarded their statements when complimentary of the Court or critical of Chevron. Despite all of their quotes from the Lago Agrio Plaintiffs' representatives, Claimants have provided no evidence that any of Plaintiffs' private thoughts actually influenced anyone in the judiciary to improperly rule in their favor. At the end of the day, the statements on which Claimants rely are merely expressions of fear, perhaps verging on paranoia, by one party to the Lago Agrio Litigation as to what the other might do, particularly when the two sides' litigation resources were so lopsided.

20. Even then, this Tribunal cannot decide whether the Lago Agrio Court afforded Chevron due process or whether Ecuador has violated the BIT based on what Steven Donziger thinks or has said. While the nature of arbitrations would likely change dramatically if all parties to the dispute had total access to each other's diaries, emails, and internal case files so that every recorded thought, every flippant remark, and every exaggerated complaint could be cobbled

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40 C-697, Donziger Dep. Tr. (Dec. 1, 2010) at 599:3-9.

41 Claimants' Merits Memorial ¶ 10 (quoting C-360, Crude Outtakes at CRS195-05-CLIP 01).

42 C-715, Donziger Dep. Tr. (Dec. 8, 2010) at 799:24-25.

43 *Id.* 800:7-14.

together to present a colorful narrative, a party's opinions — whatever they may be — are legally irrelevant.

II. Political Statements Supportive Of The Lago Agrio Plaintiffs Are Not Evidence Of Collusion

21. Neither statements made by certain Government officials sympathetic to the Plaintiffs' plight nor the Plaintiffs' representatives' appreciation of this support manifests "collusion," "assistance," or "interference" in the environmental litigation.

22. The public comments by Ecuadorian officials cited by Claimants are political in nature, designed to communicate with Ecuador's citizens about an issue of critical importance to the country. Indeed, it is common in representative democracies for officials, particularly elected ones, to curry favor with their constituency, often through patriotic or nationalist gestures. This is allowed and even encouraged where the Constitution protects the judicial branch by insulating it from executive or legislative control.

23. Claimants level accusations against the Republic based on political statements, often wrenched out of context, made by President Correa, the Attorney General, the Prosecutor General, the President of the Constituent Assembly, and the Ombudsman.[44] But none of the officials quoted by Claimants has the power to control the Lago Agrio Court or the Judgment it rendered — and there is certainly no evidence that they did so. Under the Ecuadorian Constitution, the judiciary enjoys absolute independence from the other branches of Government.[45] And the powers of government officials of all ranks are strictly limited by Ecuador's Constitution so that any official who acts outside the powers expressly granted by the

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[44] Claimants' Merits Memorial ¶ 283.

[45] RLA-164, 2008 Constitution, art. 168 ("The administration of justice in the performance of its duties and in the exercise of its powers, shall apply the following principles: 1. The organs of the Judiciary shall enjoy internal and external independence. Any violation of this principle will lead to administrative, civil and criminal liability in accordance with the law.").

Constitution or other law risks criminal penalty.[46] Mere expressions of sympathy for the Lago Agrio Plaintiffs cannot overcome this Constitutional separation of powers — a protection copied from the constitutions of virtually all Western democracies.

24. The statements of support by Ecuadorian officials are no different from those heard around the world from political leaders responding to environmental crises. As noted above, in response to the BP oil spill in the Gulf of Mexico, political leaders across the U.S. political spectrum heaped public criticism on BP and oil companies in general. After a Congressional hearing on the matter, President Obama gave press conferences taking the companies involved to task for failing to accept responsibility — even while acknowledging that there "are legal and financial issues involved" and that a "full investigation" had not yet been completed:

> You had executives of BP and Transocean and Halliburton falling over each other to point the finger of blame at somebody else. The American people could not have been impressed with that display, and I certainly wasn't . . . . It is pretty clear that the system failed, and it failed badly. And for that, there's enough responsibility to go around. And all parties should be willing to accept it.[47]

25. Similarly, CNN reported that Attorney General Eric Holder "said in May [2010] that the Justice Department would ensure that BP is held liable"[48] — even though neither civil nor criminal liability had been established.

26. Other political figures made similar comments. According to Member of Congress Rush D. Holt, Jr., "companies like BP should pay for every last cent of the mess

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46 *Id.*, art. 226 ("State institutions, agencies and departments, as well as public servants and persons acting under State authority, shall exercise only the powers and authorities entrusted to them under the Constitution and the law.").

47 R- 618, *Obama: Stop finger-pointing over oil leak*, CNN (May 14, 2010) at 1; *see also* R-619, *Obama says he's furious about oil spill but loves 'best job on Earth,'* CNN (Jun. 3, 2010) at 1 ("Oil giant BP caused the spill and is responsible for paying the costs, Obama said, adding: 'My job is to make sure they're being held accountable.'").

48 R-620, *U.S. begins criminal investigation into oil spill*, CNN (June 1, 2010) at 1.

they've made, not taxpayers, not the tourism industry, not the fishing industry, not small businesses . . . . [T]he buck stops with oil companies."[49]

27. Yet it has not been suggested that President Obama and the other government officials who apparently prejudged BP's liability did so inappropriately or in violation of BP's due process rights. Rather, President Obama was criticized for not showing "*enough* emotion and outrage."[50]

28. Just as statements of support by Correa administration officials demonstrate a free, open political process rather than government's "collusion" with affected citizens, so too the statements by the Plaintiffs' representatives expressing happiness at President Correa's election and verbal support for their suffering reflect only appreciation of a new era of fairness in Ecuador towards formerly marginalized minorities. As shown above, prior to the election of President Correa, the Plaintiffs' representatives held a well-justified, historically accurate fear of a multi-national corporation's ability to influence the judicial process. The Correa administration heralded a new era in Ecuador in which the Government was no longer dominated and controlled by foreign oil companies. It is not surprising that companies like Chevron regretted the transition to an administration that demanded that they be judged by the same standards as indigenous persons.

29. The Plaintiffs' representatives' happiness at President Correa's election was *not* based on any rational expectation that the new Government would interfere in their favor with the legal process — rather, that they might now be protected from governmental intervention *against* them. Plaintiffs' attorney Kohn made this quite clear: "Yeah, I'm not saying [the

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49 R-611, *House Dems Introduce 'Big Oil Bailout Prevention Act' to Protect Taxpayers from Paying Oil Spill Damages*, Press Release by U.S. Congressman Rush Holt (May 2010).

50 R-621, Holly Bailey, *Obama's learning 'whose ass to kick' in oil mess*, YAHOO NEWS (June 8, 2010) (emphasis added).

Government will] interfere, but at least they're not interfering the other way . . . . At least they're not . . . tools of the other guys."[51] Mr. Donziger showed his agreement by interjecting "exactly" on three occasions during Mr. Kohn's statement. Indeed, in celebrating the inauguration of President Correa, Mr. Donziger noted his hope that, under the newly elected President, Chevron would no longer be able to "get away with what it usually does here[,] which is bribes, backdoor meetings and manipulation of . . . governmental power."[52]

30. Even if the Plaintiffs' representatives had believed that officials of the Correa administration might somehow interfere in their favor with the judicial process, this (mistaken) belief is no more factually relevant than their belief that the judiciary is corrupt. Hope, particularly when the clouds of the past are lifted, springs eternal. But if so, in this instance all the evidence shows that any such hope would have been misplaced. For example, while some of the Plaintiffs' representatives expressed hope that the criminal conviction of Chevron's local attorneys might help force Chevron to an early settlement,[53] the Ecuadorian criminal investigative machinery properly considered the allegations and dismissed all charges as barred by Ecuadorian law.[54] At the end of the day, Claimants have not shown that *any* of the Plaintiffs' representatives' hopes regarding executive interference actually materialized.

III. The Government Has Not Interfered With The Lago Agrio Litigation Through Meetings With The Lago Agrio Plaintiffs' Representatives

31. As Claimants know, it was Chevron — not the Plaintiffs — that routinely conferred with Government officials and sought their assistance as needed. By its own admission, Chevron had "for four decades" enjoyed continual access to almost all levels of the

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51 C-360, Crude Outtakes at CRS169-05-CLIP-08 at 2.

52 R-180, Crude Outtakes at of CRS 156-00-01 (Jan. 15, 2007) at 2.

53 *See, e.g.*, Claimants' Merits Memorial ¶ 11.

54 See Annex C.

Ecuadorian government, including its Presidents and Attorneys General.[55] In the RICO action, Claimants have admitted that Chevron representatives met unilaterally with Government officials to urge dismissal of the Plaintiffs' complaint more than twenty-five times during the pendency of the environmental litigation.[56] These meetings included Ecuador's presidents, a vice president, two attorneys general, and a variety of ministers and other officials.[57]

32. Chevron's own description of these meetings makes clear that its representatives specifically intended to persuade the Government to interfere on Chevron's behalf in the pending Lago Agrio Litigation. Chevron describes more than twenty of these meetings as addressing "the ROE's binding legal and contractual obligations reflected in the settlement and release agreements, and urging the ROE's and Petroecuador's responsibility and liability for any further remediation or environmental impact associated with the Concession area, including any and all relief sought in the baseless Lago Agrio Litigation."[58] The *res judicata* effect of the 1995 Settlement Agreement was then pending before the court and no *ex parte* discussions with other

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55 R-72, Letter from M. Kolis to T. Collingsworth and C. Bonifaz (August 11, 2005) at 1 ("[F]or four decades, Texaco's, and now Chevron's, representatives have met regularly with representatives of the Republic to discuss various matters between the company and the Republic. As new administrations have come to power in Ecuador . . . Texaco and Chevron representatives have always made efforts to meet with government officials, including the President if possible . . . . The present time is no exception."). *See also* R-45, Aff. of Reis Veiga (Jan. 16, 2007) ¶ 66 (Reis Veiga describes his meetings with Ecuador Attorney General Borja and President Camacho); R-71, Veiga Dep. Tr. at 219-221 (describing meeting with Attorney General Borja); R-159, E-mail from W. Irwin to R. Veiga, *et al*. (Sept. 26, 2003) (meetings with President, Minister of Energy, and other officials re Lago Agrio litigation); C-166, E-mail from M. Escobar to A. Wray, *et al*. (August 10, 2005) at 1 (meeting of Chevron officials with President, Legal Undersecretary General, and Ministry of Energy official to propose intervention by State in Lago Agrio action in exchange for dropping Chevron's U.S. arbitration against Petroecuador); R-156, Letter from Amb. Gallegos, THE WALL STREET JOURNAL (Apr. 26, 2008) ("Chevron . . . has lobbied various Ecuadorian presidents, including Mr. Correa, to use their authority to halt litigation. It is Chevron, not Ecuador that would like to 'politicize' the case."); R-622, Memorandum of Holwill & Company re: Meeting with the Vice President (Aug. 17, 1993) (describing meeting with Vice President); R-623, Memorandum of Holwill & Company re: Meeting with the Minister of Energy (Aug. 17, 1993) (describing meeting with Minister of Energy); R-624, Memorandum of Holwill & Company, for Ricardo Viega [sic] (Jan. 18, 1994) (describing preparation of memorandum for Vice President and conversations with Minister of Energy).

56 R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.).

57 *Id.*

58 *Id.*; *see also* R-71, Veiga Dep. Tr. (Nov. 8, 2006) at 220 (describing meeting with Attorney General Borja).

branches of the Government could have constitutionally overridden the Court's Judgment on the issue. Yet Chevron persisted in its meetings with Government officials.

33. More recently, Chevron has met with unnamed representatives of the Republic to discuss "potential resolution of the Bilateral Investment Treaty Arbitrations."[59] Any resolution of this proceeding necessarily entails efforts to resolve the underlying Lago Agrio Litigation.

34. Chevron similarly has met repeatedly with representatives of its own Government in an effort to induce them to act in a manner designed to influence the Lago Agrio Litigation. It has lobbied the U.S. Trade Representative and members of Congress in a bid to have Ecuador's eligibility for U.S. Andean Trade Preferences Act benefits withdrawn.[60] Chevron's efforts target billions of dollars of trade benefits to the Republic on which tens of thousands of Ecuadorian jobs depend,[61] all in the hopes of pressuring the Republic to interfere in the litigation between two private parties. Chevron also has repeatedly urged that the U.S. Department of Justice investigate its Lago Agrio Litigation-related allegations.[62] Claimants provide no explanation for their suggestion that it is improper for the Plaintiffs to lobby their own government to investigate

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59 R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.).

60 *See, e.g.*, R-414, Claimants' Letter to USTR (May 18, 2012); R-416, Q1 2012 Lobbying Report by Chevron Corp. at 15; R-417, Q1 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 4; R-625, Q2 2012 Lobbying Report by Chevron Corp. at 15; R-626, Q2 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 4; R-627, Q3 2012 Lobbying Report by Chevron Corp. at 15; R-628, Q3 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 3; R-629, Q4 2012 Lobbying Report by Chevron Corp. at 10; R-630, Q4 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 3. Chevron has also heavily lobbied the U.S. Congress to implement legislation critical of the government of Ecuador using at least three other lobbying firms. *See* R-631, Q2 2011 Lobbying Report by Mayer Brown on behalf of Chevron Corp. at 2; R-632, Q3 2011 Lobbying Report by Mayer Brown on behalf of Chevron Corp. at 2; R-633, Q3 2011 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 8; R-634, Q3 2012 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 10; R-635, Q3 2012 Lobbying Report by TwinLogic Strategies, LLP on behalf of Chevron Corp. at 2; R-636, Q4 2012 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 7; R-637, Q4 2012 Lobbying Report by TwinLogic Strategies, LLP on behalf of Chevron Corp. at 4.

61 R-415, Comments by the Embassy of the Republic of Ecuador to the United States of America before the Office of the United States Trade Representative (May 22, 2012).

62 *See, e.g.*, C-226, Letter from T. Cullen to W. Pesántez (Aug. 31, 2009) at 2-3; R-297, Letter from T. Cullen to W. Pesántez (July 14, 2010) at 4.

whether Texaco and former government officials made false representations regarding Texaco's alleged compliance with its remediation obligations under the 1995 Settlement Agreement while somehow permissible for Chevron to lobby both the U.S. and Ecuadorian governments.

35. That the Republic's Government representatives have made themselves accessible to both parties in a private dispute cannot possibly constitute Government "collusion" with either. Both sides have at various times sought to employ the Government as a mediator, and naturally have sought to convince it of the merits of their respective cases. These meetings — whether initiated by Chevron, Texaco, or the Plaintiffs — are neither inappropriate nor unlawful. We address Claimants' specific allegations immediately below.

36. **First**, Claimants point to meetings that Lago Agrio Plaintiffs' representatives had with Rafael Correa before he became President of the Republic.[63] But the evidence shows that these meetings were purely informational, designed to educate Mr. Correa on an issue facing both the Republic as a sovereign nation and certain of the constituents he hoped to serve. For example, in their December 12, 2010 letter, which Claimants incorporate by reference, Claimants cite testimony from Mr. Donziger that Plaintiffs' representatives, who apparently did not include Mr. Donziger himself, held a meeting with presidential candidate Correa "to explain the case to him, how it implicated Ecuador's government."[64] But what Chevron leaves out of its characterization of this meeting is that *Chevron* — not the Plaintiffs — was responsible for any such implication. By the time of that meeting in 2006, Chevron had dragged the Republic into its decade-long battle with the Plaintiffs by initiating the AAA Arbitration against PetroEcuador, and the Republic and Chevron were embroiled in the resulting AAA Stay Litigation.[65]

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63 Claimants' Merits Memorial ¶ 255-256; Claimants' Letter to Tribunal (Dec. 12, 2010) at 9.

64 C-715, Donziger Dep. Tr. (Dec. 8, 2010) at 747:10-11.

65 Respondents' Track 1 Merits Counter-Memorial at ¶¶ 56-57.

37. **Second**, Claimants' incorrectly suggest that a March 20, 2007 meeting between the Plaintiffs' representatives and President Correa and other Government representatives involved "coordination" of the Lago Agrio Litigation.[66] To the contrary, in the email on which Claimants rely, Eugenia Yepez, who had "PR-related responsibilities on behalf of the plaintiffs' team,"[67] claimed to Mr. Donziger that she had had an "unexpected" meeting with President Correa, and that the President had "asked the [then] Attorney General to do everything necessary to win the trial and the arbitration in the U.S."[68] The "trial and the arbitration in the U.S." was, of course, the AAA Arbitration and the AAA Stay Litigation.[69] No other relevant trial and arbitration existed in the United States. Mr. Pallares' email describing the same meeting, also quoted by Claimants,[70] makes clear that the discussion focused on how best the Republic might defend itself against the AAA Arbitration.[71]

38. As to Ms. Yepez's comment that President Correa said he would call the judge,[72] it is notable that Mr. Pallares' email does not mention this comment at all. It would be truly surprising if the President of Ecuador made a comment to the Plaintiffs' representatives that (a) the Plaintiffs might perceive as assisting their cause and (b) suggested that he might take an action that could violate the Constitution of Ecuador — without Mr. Pallares finding it

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66 Claimants' Supplemental Merits Memorial ¶ 124 (citing C-1005). Claimants have also previously contended that this email is "document[ation that] the Lago Agrio Court took direction from Ecuador's Executive, which has continually interfered in the Lago Agrio litigation." Claimants' Letter to Tribunal (Jan. 4, 2012) at 5. The email states no such thing.

67 R-277, Donziger Dep. Tr. (Dec. 8, 2010) at 774.

68 C-1005, Email from M. Yépez to S. Donziger (Mar. 21, 2007).

69 *Id.*

70 Claimants' Supplemental Merits Memorial ¶ 124.

71 C-1287, Email from M. Pallares to S. Donziger (Mar. 21, 2007) ("The president ordered that the acta the finiquito [the 1998 Final Release] has to be nullified by whatever means full support to the arbitration resources all.").

72 C-1005, Email from M. Yépez to S. Donziger (Mar. 21, 2007) ("He gave us fabulous support. He even said that he would call the judge.").

sufficiently noteworthy to memorialize in his email. Even assuming that Ms. Yepez was being truthful and not simply attempting to curry favor with Mr. Donziger, certainly nothing came of the encounter since the Lago Agrio trial continued on for nearly four more years. If a call was made at all, the judge never did anything in support. In fact, there is no evidence that such a call was ever made in the forty-eight months it took the court to rule after this alleged occurrence.

39. **Third**, contrary to Claimants' December 12, 2010 letter alleging supposed "collusive" meetings, Mr. Donziger did not deny all memory of what took place during his meetings with the Attorney General.[73] Rather, he stated that while he did not have *specific* recollections of the meetings, he did generally recall discussing "what the posture of the case was procedurally" and answering questions from the Attorney General and his staff.[74] This information was relevant and indeed critical to the Attorney General because his office was responsible for defending the Republic against *Chevron's* attempts to force the Republic to arbitrate the implications of the 1995 Settlement Agreement in New York, even though that question was at that very time before the Lago Agrio Court — having been placed there earlier by Chevron. The Republic, like any other litigant, may use whatever means are at its disposal to gather evidence necessary for its defense.

40. Claimants implicitly suggest that Chevron was free to commence legal proceedings and raise claims against the Republic that overlapped with Chevron's claims against the Plaintiffs while simultaneously suggesting that the Republic was somehow denied the opportunity to discuss these overlapping claims with (and seek evidence from) Chevron's *other* litigation adversary in aid of the Republic's defense in the AAA Arbitration and AAA Stay Action. But there is a world of difference between (1) the Republic acting to defend its own

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73 Claimants' Letter to Tribunal (Dec. 12, 2010) at 8.

74 C-682, Donziger Dep. Tr. (Nov. 29, 2010) at 321:15-20.

litigation interests and (2) the Republic interfering with the judicial processes governing Chevron's private party dispute with the Plaintiffs. That the Republic should engage in the former — which is its legal right and duty — offers not a shred of evidence that the Republic engaged in the latter.

41. **Fourth**, Claimants criticize a meeting between the Plaintiffs and then Minister of the Environment Anita Albán by misconstruing both the purpose of the meeting and the content of the conversation. As an initial matter, Ms. Albán made clear at the beginning of the conversation that her English was not perfect and that the Government was not a party to the Lago Agrio Litigation.[75] Nonetheless, Claimants extrapolate from her actual words that the Government intended to "set[] up a corporation" with the Plaintiffs "to manage the remediation work flowing from a future (and apparently pre-determined) Lago Agrio judgment."[76] To the contrary, Ms. Albán did not meet with the Plaintiffs to discuss strategy regarding the pending legal proceedings, but instead to describe *the Republic's efforts* to perform remediation, address adverse health effects, and provide sources of clean drinking water to counter the environmental devastation in the Oriente, as well as other Governmental initiatives (such as seeking an alternative to oil exploration in an as yet undisturbed area of the Yasuni National Park).[77] At no time did she indicate that any Government remediation would be funded by judgments proceeds, much less that a particular judgment was pre-determined. That she sought the cooperation of the Amazon Defense Front and other NGO groups (but not as part of a "corporation" formed with them) made perfect sense because, not surprisingly, they had promoted Government involvement

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75 C-360, Crude Outtakes (July 24, 2007) at CRS421-00-CLIP 03.

76 *Id.*

77 *Id.*

in the cleanup of the Oriente. In fact, as Claimants themselves point out, the Government began its own remediation of the Oriente in 2005.[78]

42. **Fifth**, some of the meetings merely reinforce the point made above: the Lago Agrio Plaintiffs feared that the Government would take sides in the litigation on behalf of Chevron, relent to Chevron's lobbying efforts, and force the court to shut down the litigation. As a result, Government officials met with Plaintiffs' representatives to reassure them that the Correa administration would not do so.[79]

43. **Sixth**, other meetings that Claimants rely on as evidence of "collusion" reflect nothing more than the desire of Government officials to ensure that the pending litigation proceed expeditiously.[80] Claimants are intimately familiar with Ecuador's efforts to reduce case backlogs and expedite litigation in its courts to a timely conclusion. In the *Commercial Cases* dispute, Claimants even obtained an "undue delay" award against the Republic for precisely these types of delays.[81] Now that their preference is to stall resolution of a case for as long as possible, they cite efforts to expedite the judiciary as evidence of interference. This contention is particularly ironic, given Chevron's efforts to overwhelm the court with papers and successive motions to delay resolution of the dispute.[82]

44. **Finally**, even the existence of certain of the meetings Claimants cite is questionable, given their sources. Claimants allege that a meeting took place between Plaintiffs'

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78 Claimants' Merits Memorial ¶¶ 149-151.

79 *See, e.g.,* C-172, Presidential Weekly Radio Address (Jan. 19, 2008) (cited in Claimants' Merits Memorial ¶ 261); C-174, Alonso Soto, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS (Aug. 16, 2008) (cited in Claimants' Merits Memorial ¶ 262).

80 Claimants' Merits Memorial ¶ 255 (citing C-360 Jan. 17, 2007, CRS 161-01-02-CLIP 01; CRS 161-01-02 CLIP 02); *id.* ¶ 295 (citing C-125, Joffre Campaña Mora, *Interference in the Administration of Justice*, EL UNIVERSO (Mar. 5, 2009)). Notably, it is not even clear from [C-125] that President Correa even mentioned the Lago Agrio case in this meeting, much less that he influenced the judgment.

81 *See* CLA-47, *Commercial Cases* Partial Award.

82 *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.2.

representatives and President Correa in September 2009, insinuating that the topic must have been the "explosive proof of corruption in the Lago Agrio trial."[83] But no such "explosive proof" exists.[84] Moreover, Claimants cite only an Oakland, California blogger — located just thirty minutes from Chevron's San Ramon, California headquarters — who had clearly pre-judged Chevron to be a wholly innocent party.[85] And that blogger cites only a single, other blogger, Bob McCarty, who in turn cites only a source he refused to identify.[86] Mr. McCarty is hardly a reputable journalist, as is evident from the headlines of his prior blog posts on this case: "University of Illinois Alums Honor Ecuadoran Crook" (referring to Correa), "Chevron Awarded $96 Million in Arbitration Claim Against Corrupt Government of Ecuador," and "Shakedown in the Rain Forest Nears End in Court."[87] Indeed, Chevron has a history of using pseudo-journalists as shills for dressing up its propaganda in the trappings of hard news.[88]

IV. That Certain Counsel Have Represented Both The Lago Agrio Plaintiffs And The Republic Does Not Demonstrate Collusion

45. Because certain counsel have, over the course of the past two decades, represented both the Lago Agrio Plaintiffs and the Government, Claimants contend that the

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83 Claimants' Merits Memorial ¶ 263.

84 *See* Annex C.

85 The blogger, Zennie Abraham, is based out of Oakland, CA. *See* R-638, *Profile of Zennie Abramham, Jr.*, HUFFINGTONPOST. He was fired from the SFGate (the source cited by the Claimants) for inflammatory statements about a U.S. presidential candidate. *See* R-639, Zennie Abraham, *SFGate.com Traffic Down 11 Percent After Zennie62 Departure*, ZENNIE62BLOG (Dec. 17, 2011). After his departure, he began blogging on his own site and kept up his rants against Ecuador. Some of his inflammatory blog posts about the Republic include: *Ecuador's President Correa Runs Country "Like A Dictator*," and *Chevron Ecuador: How Steve Donziger Is Like James Bond's Goldfinger*.

86 R-640, Bob McCarty, *Source: Attorneys for Plaintiff in Chevron Lawsuit Visit Palace of Ecuadoran President Rafael Correa*, BOBMCCARTY.COM (Jul. 2, 2009).

87 R-641, Bob McCarty, *University of Illinois Alums Honor Ecuadoran Crook*, BOBMCCARTY.COM (Apr. 12, 2010); R-642, Bob McCarty, *Shakedown in the Rain Forest Nears End in Court*, BOBMCCARTY.COM (Sept. 9, 2011).

88 *See, e.g.*, R-643, Brian Stetler, *When Chevron Hires Ex-Reporter to Investigate Pollution, Chevron Looks Good*, NY TIMES (May 11, 2009) (describing faux documentary prepared for Chevron by former CNN reporter); R-644, Mary Cuddehe, *A Spy in the Jungle*, THE ATLANTIC (Aug. 2, 2010) ("With one Google search, anyone could see that I was, in fact, a journalist. If I went to Lago Agrio as myself and pretended to write a story, no one would suspect that the starry-eyed young American poking around was actually shilling for Chevron.").

overlap of counsel constituted some type of "collusion" or governmental assistance to the plaintiffs.

46. Claimants' allegation is patently frivolous. **First**, counsel presumably determined that there was no conflict of interest precisely because Chevron's action against the Republic rendered Chevron an adversary to both the Republic *and* the Lago Agrio Plaintiffs. If Chevron believed that there was a conflict, it should have brought a motion to disqualify against the Republic's counsel at the time.

47. **Second**, the counsel in question have played discrete roles for the Republic and their conduct surely has no fathomable relation to the developments of the Lago Agrio Litigation.[89]

48. **Third**, counsel at the time wore two hats, owing as a matter of law separate and distinct duties to the Republic *and* to the Lago Agrio Plaintiffs. But it was counsel that had two masters, not the Republic.

49. **Fourth**, there is no showing that the Republic — rather than in its counsel acting in its capacity as counsel for the Plaintiffs — ever acted on behalf of the Plaintiffs.

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[89] Claimants point to representations by Cristobal Bonifaz, Terry Collingsworth, Alberto Wray, and Jonathan Abady. Claimants' Merits Memorial ¶ 268. Mr. Bonifaz and Mr. Collingsworth briefly represented the Republic on a pro bono basis in the AAA Arbitration and the AAA Stay Litigation. The Republic's initial reaction to the AAA Arbitration was to decline to participate in it at all. R-645, Notice of Non-Opposition, *In re Chevron Corp.* (Bonifaz), No. 10-30221 (D. Mass Nov. 22, 2010) ¶ 55. Fearing that a default award against the Republic would end the Lago Agrio Litigation, U.S. counsel for the Lago Agrio Plaintiffs offered to represent the Republic on a pro bono basis. *Id.* ¶¶ 56-58. But that representation was limited to those U.S.-based actions; neither Mr. Bonifaz nor Mr. Collingsworth ever represented the Republic in the Lago Agrio Litigation. Similarly, Dr. Wray's representation of the Republic has been limited to various international and domestic arbitrations. R-646, Wray Dep. Tr. (Nov. 2, 2010) at 53:14-54:13. Separately, Dr. Wray has served as an attorney for the Lago Agrio Plaintiffs since 2003, first as their primary advocate before the Lago Agrio Court and, since June 2005, in an advisory capacity. *Id.* at 26:11-28:21. Dr. Wray is a well-respected lawyer who served as a judge on the Republic's Supreme Court and who currently maintains a private practice in Ecuador and serves as "Of Counsel" to the Washington, D.C. office of U.S. law firm Foley Hoag LLP. Finally, Mr. Abady represented the Republic for a short period of time in *Aguinda* beginning in 1996, but Chevron prevailed and he had no role for the Republic after the environmental case was transferred to Ecuador. Indeed, Mr. Abady did not begin representing the Lago Agrio Plaintiffs until 2009.

50. **Fifth**, as explained above, there would have been no violation of any obligation owed to Chevron even if counsel, acting on behalf of the Republic, undertook any action that might have benefitted the Lago Agrio Plaintiffs so long as counsel did not interfere in the judicial process.[90] If Chevron had wished to include a clause prohibiting the Republic or PetroEcuador from communicating with or assisting any plaintiffs in suits against Chevron, surely Chevron's sophisticated legal department could have crafted appropriate language for inclusion in the 1995 Settlement Agreement. Such clauses are by no means uncommon in commercial agreements.[91] But there is no such contractual obligation in the 1995 Settlement Agreement.

51. Claimants also allege "collusion" based on the Republic's entry into a common interest defense agreement with attorneys for the Lago Agrio Plaintiffs to permit the Republic's counsel to represent the Republic properly in litigation brought by Chevron outside of Ecuador. But again, the Republic is entitled to defend its own litigation interests, and there is no basis in

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90 Similarly, there has never been a claim that the United States is somehow prohibited from communicating with Gulf State plaintiffs who have brought suit against BP.

91 *See, e.g.*, RLA-420, *Earnings Performance Group, Inc. v. Quigley*, 124 Fed. App'x 350, 352 (6th Cir. 2005) (settlement provided that defendants "agree not to assist or work with any third party regarding any claim or dispute between said third party and [plaintiff]"); RLA-421, *Zanders v. Nat'l R.R. Passenger Corp.*, 898 F.2d 1127, 1133 (6th Cir. 1990) (settlement provided that former employee "agree[s] not to assist in any litigation or investigation against the corporation, except as required by law"); RLA-422, *Quad/Graphics Inc. v. Fass*, 724 F.2d 1230, 1231 (7th Cir. 1983) (settlement included clause prohibiting settling defendant from voluntarily assisting a non-settling defendant in the course of remaining litigation); RLA-423, *Grand River Enter. Six Nations Ltd. v. Pryor*, No. 02 Civ 5068, 2006 WL 1517603, at *7 (S.D.N.Y. 2006) (agreement provided that party would "not directly or indirectly assist or encourage any challenge" to the agreement by "any other person"); RLA-424, *Raybon v. Cont'l Tire N. Am.*, No. 040274, 2005 WL 1278466, at *1 (S.D. Ala. 2005) (former employee's separation agreement provided that employee "agrees not to assist any third party in pursuing a lawsuit...or any other action against" former employer); RLA-425, *The Kellogg Co. v. Sabhlok*, No. 5:04-CV-598, 2005 WL 2297446, at *3 (W.D. Mich. 2005) (agreement provided that former employee would "not lodge, assist nor participate in any formal or informal charge or complaint in any court . . . arising out of or related to Employee's Claims or Employee's employment"); RLA-426, *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1028 n.4 (E.D. Cal. 2002) (agreement provided that plaintiff "agrees not to aid the prosecution of any pending claim against Defendants by [third party] . . . , whether asserted in [specified actions], or in future claims which may be asserted by...[third party] arising out of the matters which are the subject of this Settlement Agreement"); RLA-427, *Am. Special Risk Ins. Co. v. Greyhound Dial Corp.*, No. 90Civ2066, 1996 WL 551659, at *81 (S.D.N.Y. 1996) (settlement included provision that party would "not cooperate in any manner with any party conducting or proposing to conduct litigation against" specified parties); RLA-428, *In re Gulf Beach Dev. Corp.*, 48 B.R. 40, 42 (M.D. Fla. 1985) (settlement between debtor and bank included provision stating that debtor "agree[s] not to directly or indirectly assist any other Defendant in the above-referenced litigation . . . unless (they) are acting under the direction of the Court").

law or in equity that would permit the Republic to have fewer rights than other litigants. Moreover, the agreement was intended (1) to assist the Republic in the Republic's disputes with Claimants, all of which were occurring outside of Ecuador; and (2) at no time did the Republic's attorneys interfere with or otherwise inject themselves in the Ecuadorian judicial processes.

52. The Republic and the Lago Agrio Plaintiffs, acting under the common interest agreement, have at times shared information and documents.[92] But the very purpose of the agreement was to ensure that the Republic's attorneys have access to the evidence necessary to defend itself against an opponent with seemingly unlimited resources and decades of institutional knowledge, neither of which are possessed by the Republic. That the Republic should ask the Plaintiffs to review and comment on certain documents — none of which was subject to a protective order — is hardly surprising since the Plaintiffs have the institutional knowledge that the Republic's attorneys lack. Nor has there ever been anything furtive or illicit about this sharing of information; counsel for the Republic openly acknowledged it in pleadings filed in the AAA Stay Litigation as far back as 2007.[93]

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92 Claimants' Merits Memorial ¶ 269.

93 As the Republic noted in a pleading before the district court at the time:

> Chevron cites to Mr. Ponce-Villacis' declaration as positive proof of some perverse "collusion" between the Republic and the *Lago Agrio* plaintiffs. Suffice it to say that counsel for [the Republic], consistent with the discharge of their professional obligations, will seek out relevant information from all fact witnesses and interested parties as circumstances so warrant. Here, the Defendants chose to inject into *this* case the legal theories upon which the *Lago Agrio* action has been pursued. Counsel for Defendants have been litigating *Aguinda* and *Lago Agrio* for 15 years and have the institutional knowledge of both. Counsel for [the Republic] have now been litigating this action for one year, and have both the right and duty to fully investigate.

R-151, Excerpt from Pls. Reply Mem. of Law in Support of Their Motion for Summary Judgment (Feb. 6, 2007) at 13 n.21, filed in *Republic of Ecuador v. ChevronTexaco Corp.*, 04 Civ. 8378 (LBS) (S.D.N.Y.).

V. Statements By Government Officials Regarding The Validity Of The 1995 Settlement Agreement Had No Impact On The Lago Agrio Litigation

53. Claimants criticize statements by Government officials regarding the validity of the 1995 Settlement Agreement, but those statements had no effect on the Lago Agrio Litigation and, in fact, the Government has never breached the 1995 Settlement Agreement. Indeed, it was *Claimants* that forced the Government to consider whether the 1995 Settlement Agreement was in fact valid. Claimants first accused the Republic of breaching the 1995 Settlement Agreement in its counterclaims to the AAA Stay Litigation.[94] And Claimants have now brought those same claims against the Republic in this Arbitration.[95] Apparently Claimants believe that, unlike private litigants, elected officials of the Republic had no inherent right to publicly state that their Government did not breach the agreement that it was being accused of having breached. Apparently Claimants believe that public statements about their pending disputes may be freely made by private parties but are off limits to their Government opponents.

54. Claimants point in particular to an August 10, 2005 email from Dra. Martha Escobar, a line attorney in the Office of the Attorney General, in which Dra. Escobar writes: "all of us working on the State's defense were searching for a way to nullify or undermine the value of the remediation contract and the final acta."[96] But it is not surprising — or wrong — for the Office of the Attorney General to consider whether appropriate legal means might be present to "nullify" the "remediation contract," in view of allegations that Chevron or Texaco may have secured that contract through fraud or misrepresentation. By the time of the Escobar email, Chevron had already brought the AAA Arbitration and the U.S. District Court was already seized with the AAA Stay Litigation. In the AAA Stay Litigation between Chevron and the Republic,

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94 Respondent's Track 1 Counter-Memorial on the Merits ¶ 57.

95 *Id.* ¶ 61.

96 Claimants' Merits Memorial ¶ 252.

Chevron argued that the Republic breached the "remediation contract," i.e., the 1995 Settlement Agreement. Just as any private lawyer has, the Office of the Attorney General had every right — and in fact it had the *duty* — to consider whether to defend against Chevron's arguments on the basis of fraud or misrepresentation. Nonetheless, Dra. Escobar specifically noted in her email that "our greatest difficulty lay in the time that has passed."[97] Even more pointedly, neither the Office of the Attorney General nor any other legal representative of the Republic ever took steps to nullify the remediation contract on the basis of fraud or misrepresentation.[98]

55. In testifying on this topic in 2006, Dra. Escobar did *not*, as Claimants allege, attempt to cover up any contacts she had had with Lago Agrio Plaintiffs' representatives. She did not testify that she "had not had *any* contact with Plaintiffs' lawyers."[99] In fact, she testified to a number of contacts.[100] When shown the email at issue in which she emailed Plaintiffs' counsel, she explained that she had probably simply replied to all on an email that included them as original co-recipients.[101] She did not even know who most of the Plaintiffs' counsel were or which email addresses belonged to them.[102] Finally, she did not "admit that she had since destroyed other emails."[103] Rather, she explained that in her regular course of business she deletes emails to maintain enough electronic space for new emails. Claimants' practice of rearranging every innocent act into a conspiracy against them is exemplified by their incessant reliance upon Dra. Escobar's email.

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97 C-166, Email between Dra. Martha Escobar and Alberto Wray et al (Aug. 10, 2005).

98 To the extent that certain individuals were criminally investigated by the Fiscalia for possible fraud or misrepresentation, the Republic's judiciary terminated those investigations as unsupported by Ecuadorian law. *See* Annex C.

99 Claimants' Merits Memorial ¶ 253.

100 *See* C-167, M. Escobar Dep. Tr. (Nov. 21, 2006) at 129-131.

101 *Id.* 159:18-20.

102 *Id.* 149:1-21.

103 Claimants' Merits Memorial ¶ 253.

56. Claimants also repeat claims they have made previously regarding statements made by Alexis Mera, a legal advisor to President Correa, regarding nullification of the 1995 Settlement Agreement.[104] But echoing Dra. Escobar, Dr. Mera in fact advised counsel for the Lago Agrio Plaintiffs that, in his view, any attempt to nullify the agreement would be deemed time-barred by the courts under the applicable statute of limitations, even if the facts would otherwise justify such relief.[105] This view was shared by the delegate of the Office of the Attorney General.[106]

57. It is therefore perfectly obvious from viewing the *Crude* excerpt cited by Claimants that Dr. Mera was not "collaborating" or "colluding" with the Plaintiffs, nor was he conspiring with them to do *anything*, much less something illegal. It is instead apparent that the Plaintiffs were lobbying Dr. Mera — no differently than Chevron, and before it, Texaco, have lobbied other government officials over the years, albeit without the cameras. But in the excerpt provided by Claimants, Dr. Mera went out of his way to note that "here I'm an attorney."[107] In fact no action was forthcoming. Far from undermining the rule of law, Dr. Mera affirmed it.[108]

58. As the Republic made clear during Track 1, the Republic has never breached its promises in the 1995 Settlement Agreement.[109] The Republic has never brought suit against TexPet or Texaco, and the 1995 Settlement Agreement does not require the Republic to

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104 Claimants' Supplemental Merits Memorial ¶ 125.

105 R-179, Tr. of CRS 221-02-01 (Mar. 29, 2007) at 7-14, 18 (five-year statute of limitations for a Public Contract would be applicable; President Correa's legal advisor of the opinion that "I don't see [a nullity suit] as a very . . . sustainable issue").

106 *Id.* at 6-7, 8, 12, 16.

107 C-360, Crude Outtakes at CRS221-02-01 at 14.

108 In fact, at the Hearing on Interim Measures, Claimants agreed with the Republic's assessment that the statute of limitations has long since passed and that the criminal proceedings could not therefore be used to nullify the release in the 1995 Settlement Agreement. Interim Measures Hr'g Tr. (May 11, 2010) at 45:18-46:10, 47:16-48:17.

109 Respondent's Track 1 Counter-Memorial on the Merits ¶¶ 243-262.

indemnify or hold harmless Chevron. Similarly, the Lago Agrio Court saw no reason to opine on the validity of the 1995 Settlement Agreement, finding instead that it did not apply to claims brought by individual citizens.[110] Thus, even if the Republic had sought to invalidate the 1995 Settlement Agreement — which it did not — this would have no bearing on Claimants' Treaty claims.

VI. The Only Interest Of The Republic And Its Officials Is In Seeing Justice Done

59. Claimants allege that the Correa administration has improper or unlawful reasons for hoping that the Plaintiffs will prevail in their suit against Chevron, including the desire for political, financial, or legal benefit to the Republic, its political figures, or PetroEcuador.[111] That President Correa or other politicians might benefit politically is of no moment. In any democracy, elected officials regularly voice opinions that they believe will garner support among their constituents.[112] This cannot be a ground for finding an intent to interfere with the administration of justice. And Claimants' allegation that any Government official acted to benefit the Republic financially or to prevent PetroEcuador from being sued is devoid of any evidential basis.

60. **First**, Claimants have acknowledged, as they must, that the Republic has not and will not benefit financially from the Lago Agrio Judgment.[113] Washington Pesántez, Claimants' sole source for the proposition that the Republic would receive 90 percent of the proceeds from

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110 C-931, Lago Agrio Judgment at 34.

111 Claimants' Merits Memorial ¶ 248.

112 *See supra* Section II.

113 Interim Measures Hr'g Tr. (May 10, 2010) at 46:4-8 (acknowledgment by Mr. Kehoe that "The Amazon Defense Front [a non-governmental organization] . . . has been designated by the [Plaintiffs] to receive the money that will come from an ultimate judgment in the Lago Agrio court to remediate the public land and the like that is at issue.")

any judgment against Chevron,[114] served at one time as the *criminal* Prosecutor General. He was simply incorrect on his interpretation of the *civil* law that dictates how the judgment proceeds will be distributed. As the Judgment states, the funds to be paid by Chevron will be placed in trust, to be monitored by the Court.[115]

61. Claimants' own exhibits show that the Lago Agrio Plaintiffs never intended to share any proceeds with Ecuador. For example, Claimants' Exhibit C-797 shows Mr. Donziger explaining to counsel for the Republic that the Government should "understand [that] the government will not control any recovery of funds, should there be one, but could with the client group and their technical advisors participate in the decision-making about how to use."[116] The Tribunal will no doubt appreciate that every civilized country requires some form of governmental agency oversight and approval of pollution remediation, even where conducted using purely private funds.

62. In deposition testimony elicited by Chevron, Dr. Wray confirmed that the Republic would not receive funds from the Judgment:

> Q. Do you understand that the government of Ecuador intends to receive 90 percent of the proceeds from the –
>
> A. That's not true. That's a misunderstanding. That's not true.
>
> Q. Do you -- do you understand whether or not they -- they are to receive any?
>
> A. In my understanding, the government of Ecuador is not going to receive anything because it depends all on the decision of the judge, but if the judge decides for the plaintiffs, . . . the

114 Claimants' Merits Memorial ¶ 248.

115 C-931, Lago Agrio Judgment at 186-87.

116 *See* C-797, Email from S. Donziger to E. Bloom and N. Mitchell (Oct. 24, 2007) at 1.

> money . . . will be used in -- in the remediation, but not -- but cannot be claimed by . . . the government.[117]

63. Similarly, PetroEcuador does not benefit legally or financially from the Judgment. Claimants contend that the Plaintiffs decided not to sue PetroEcuador to secure the Government's assistance in the Lago Agrio Case. But Cristobal Bonifaz, counsel for the Lago Agrio Plaintiffs at the time that decision was made, has testified that he believed the Lago Agrio Plaintiffs should not sue PetroEcuador because it was Chevron that was to blame for the environmental damage.[118] Mr. Bonifaz went on to testify that, although he and Plaintiffs' attorney Joseph Kohn had at one time promised not to sue the Republic, that agreement did not bind the Plaintiffs or their other attorneys and it did not commit the Republic to do anything in support of the Plaintiffs.[119]

VII. The Republic Has Not Provided Illicit Assistance To The Lago Agrio Plaintiffs

64. Claimants allege that the Republic has provided to the Lago Agrio Plaintiffs financial assistance and confidential documents, and otherwise agreed to coordinate with respect to PetroEcuador's environmental practices. Claimants' allegations are in each instance either factually wrong or legally irrelevant.

65. Claimants' allegations regarding alleged funding provided by the Ministry of Environment and PetroEcuador to the Plaintiffs can be distilled as follows:[120]

- US$ 160,000 — allegedly given by the Ministry of Environment "in exchange for, among other things, information and laboratory samples provided by the [Frente de

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117 R-193, Excerpt from Wray Dep. Tr. (Nov. 2, 2010) at 138:6-139:2.

118 *See* C-1220, Bonifaz Dep. Tr. (Mar. 1, 2011) at 24:14-26:2; C-1221, Bonifaz Dep. Tr. (Dec. 30, 2010) at 33:22-34:7.

119 R-196, Bonifaz Dep. Tr. Day 1 (Dec. 30, 2010) at 263-267.

120 Claimants quote vague communications by the Lago Agrio Plaintiffs regarding possible funding from the Government, but fail to tie these references to any specific grant of money other than those listed here. *See* Claimants Letter to the Tribunal (Dec. 12, 2010) at 5-6 (incorporated by reference in Claimants' Supplemental Merits Memorial n.236).

Defensa de law Amazonia or] ADF"; according to Claimants, "[i]t seems likely that money was intended to be used to finance the Lago Agrio Litigation."[121]

- US$ 30 million — allegedly awarded by the Ministry of Environment "to the ADF, pursuant to President Correa's relocation plan, to move selected families to new housing and evaluate environmental impacts."[122]

- US$ 185,000 — allegedly paid by the Ministry of Environment for "'information' gathered by the [ADF] regarding the Consortium area [that] eventually formed a basis for the Lago Agrio Judgment."[123]

- US$ 100,000 — allegedly given by PetroEcuador "to fund studies to support the Plaintiffs' position in the Lago Agrio Litigation."[124]

66. But when the evidence is examined, it is clear that one of these alleged payments did not occur at all and that the others did not occur as described, and in any event constituted lawful governmental appropriations disconnected from the Lago Agrio Litigation.

67. **US$ 160,000.** Claimants admittedly speculate that $160,000 earmarked by the Ministry of the Environment for a project designated "Environmental Liabilities Information System: Acquisition of information in digital and hard copy formats as well as laboratory samples, identified and available at the FDA"[125] was "likely" money that was actually "intended to be used to finance the Lago Agrio Litigation."[126] But the Ministry of Environment has reviewed the status of this earmark and determined that the project — whatever its intended actual use — was never even funded.[127]

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121 Claimants' Merits Memorial ¶ 266.

122 *Id.* ¶ 267.

123 Claimants' Supplemental Merits Memorial n.236.

124 Claimants' Letter to the Tribunal (Dec. 12, 2010) at 6 (incorporated by reference in Claimants' Supplemental Merits Memorial).

125 C-552, Ministry Agreement No. 164, Official Gazette No. 26 (Feb. 22, 2007).

126 Claimants' Merits Memorial ¶ 266.

127 R-539, Official letter No. MAE-PRAS-2013-0041 (Jan. 9, 2013) at 1.

68. **US$ 30 million.** Claimants' most grandiose allegation — the Ministry of Environment granted US$ 30 million over five years to the ADF — did not occur on the scale or in the manner suggested by Claimants. The Environmental And Social Remediation Project ("PRAS") Claimants reference involved the construction of housing "to relocate homes affected by state hydrocarbon activity."[128] The total amount spent on this project was approximately US$ 5.1 million[129] — nowhere close to the US$ 30 million alleged by Claimants. And the vast majority of this went to housing contractors, with only a small fraction of the project money (US$ 33,000) paid to the ADF to obtain information the ADF possessed regarding potential beneficiaries of the relocation effort.[130] This is hardly the "substantial amount of money" characterized by Claimants, and those monies were not appropriated for any purpose related to the Lago Agrio Litigation. While Claimants allege that "there are no assurances that the ADF has not used [funds under this program] to pursue this case,"[131] there in fact is no evidence whatsoever that the funds were used improperly or, even if they were, that the Government sanctioned or otherwise approved of their allegedly improper use.

69. **US$ 185,000.** Claimants' own documents show that the Ministry of Environment allotted US$ 185,000 to the ADF for "Managing Information on the Socio-environmental Problems of the Areas Affected by Petroleum Industry Activity in Sucumbíos and Orellana."[132] In designating the funding for this project, the Government outlined both a general objective and three specific objectives expected from the project, demonstrating that when the Government

128 *Id.* at 3-4.

129 *Id.* at 1.

130 *Id.* at 2 (referencing US$ 33,000 paid to the ADF to "[p]rovide social information regarding the potential beneficiaries of the First Phase of the Relocation Project for Homes affected by State Hydrocarbon Activity.").

131 Claimants' Merits Memorial n.659.

132 C-1135, Cooperation Agreement Between the Management Team Unit of the Environmental and Social Remediation Project ("UEG-PRAS") of the Ministry of the Environment and The Amazon Defense Front (Aug. 15. 2008) § 3.01.

earmarks certain funds for a private organization it sets the parameters for use of that money quite clearly.[133] The ADF was required to submit a report and document of its work to the Ministry of Environment to obtain 40 percent of the payment.[134]

70. Despite this, Claimants speculate, based on no evidence at all, that "this project closely resembles the Selva Viva Database" and that "it seems entirely likely that the 'information' gathered by the Frente regarding the Consortium area eventually formed a basis for the Lago Agrio Judgment."[135] Not only have Claimants failed to show why it is "likely" that the funds were used as alleged, there is absolutely no evidence that the Government knew this to be the case or approved the hypothetical misuse of the funds. In fact, documents indicate that the Plaintiffs obtained funding for the Selva Viva database not through this grant but from the Kohn firm in Philadelphia, which bankrolled much of the litigation.[136]

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133 *Id.* The general objective states:

> To promote a comprehensive vision of socio-environmental problems derived from petroleum industry activity that strengthens the support of proposals for resolving the conflicts generated by this activity. The geographical scope of execution of this agreement will be within the current area of operations of Petroecuador former areas of operation of CEPE and Texaco.

Id. The specific objectives are as follows:

> a) To contribute to the development of a participatory process of integration and systematization of the information contained in existing studies of socio-environmental problems in the provinces of Sucumbíos and Orellana.
>
> b) To drive the preparation of a proposal for a regulatory framework that establishes specific regulations regarding the remediation of environmental and social damage generated by petroleum industry activity.
>
> c) To promote a process of socialization of the results obtained after the integration and systematization of existing information on the socio-environmental problems in the provinces of Sucumbíos and Orellana.

Id.

134 *Id.* § 5.01.

135 Claimants' Supplemental Merits Memorial n.236.

136 R-540, Email from L. Belanger to S. Donziger (2007) at 2-3 (email from employee of company that prepared the selva viva database to Donziger stating "let me know if you've spoken to Joe and if I can give him a call about getting paid"; response from Donziger stating "I am trying to get an answer out of philadelphia").

71. **US$ 100,000.** Claimants take excerpts from an email out of context to assert that "as of February 2004, PetroEcuador had provided at least US$ 100,000 to the Plaintiffs" to fund studies to support Plaintiffs' position in the Lago Agrio Litigation.[137] Claimants' own exhibits show that those funds were paid by PetroEcuador to the ADF in 2002, the year *before* the filing of the Lago Agrio litigation. These funds were earmarked to fund a private study to update PetroEcuador's inventory data regarding abandoned wells and waste pits for the period 1994-2002.[138] The data supplied by ADF provided support for one paragraph in an eighty-nine-page report prepared by PetroEcuador on the "Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002)."[139] PetroEcuador, of course, had no control over how ADF used the funds it received.

72. In addition to their allegations regarding grants to the ADF, Claimants also allege that the Lago Agrio Plaintiffs' representatives were dismayed that PetroEcuador took remediation steps of its own accord, supposedly because they believed it would interfere with the Lago Agrio Litigation.[140] **First**, the Plaintiffs' representatives made clear in the very document cited by Claimants that their concern at PetroEcuador's efforts to remediate stemmed in part from fear that the remediation would not be done correctly.[141] **Second**, Claimants do not and cannot dispute that the Plaintiffs' lawyers' concern that any remediation activity might hamper evidence gathering is in fact well-founded. **Third**, that the Republic is engaged in activity that

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137 Claimants' Letter to the Tribunal (Dec. 12, 2010) at 8 (incorporated by reference in Claimants' Supplemental Merits Memorial).

138 C-184, Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002), FLACSO Project, Report by G. Fontaine (Nov. 2003) at 28 n.29 (ADF and PetroEcuador entered into an agreement in 2002 to update PetroEcuador inventory data for the sum of US$ 98,500.)

139 *Id.* at 28.

140 Claimants' Supplemental Merits Memorial ¶ 83.

141 C-1163, Email from P. Fajardo to S. Donziger, *et al.* (Jun. 21, 2009) at 2 ("The remediation they do isn't good. What's going to happen is that they're going to veneer more or less what Texaco did.").

the Plaintiffs may not favor demonstrates the independence of the Republic, not its alleged complicity with the Plaintiffs. **Fourth**, Claimants have failed to show that any concerns that the Plaintiffs' representatives might have had in fact affected PetroEcuador's remediation efforts.

73. **Finally**, Claimants suggest that Plaintiffs' conclusion that they would likely need to include the Republic in any settlement discussions with Chevron is itself evidence of collusion.[142] But it was *Chevron*, not the Plaintiffs, that brought the Republic into this longstanding dispute. And it is *Chevron*, not the Plaintiffs, that met over and over again with Government officials seeking to convince them that the Republic should have a role in any settlement of the dispute.[143]

142 Claimants' Letter to Tribunal (Dec. 12, 2010) at 6-7.

143 *See supra* Section III.

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.").

ANNEX H: SUMMARY OF LAGO AGRIO'S FIRST INSTANCE AND APPELLATE COURT DECISIONS

I. First Instance Judgment Dated Feb. 14, 2011 (C-931)

1. (1) Chevron's February 3, 2011 motions and documents are added to the record. Refers to Old Civil Code ("CC") 2241 and 2256 (New CC 2214 and 2229); 169 ILO [International Labor Organization]; 23(6) and 86 of 1998 Constitution; Old CC 2260 (New CC 2236) [Popular Action]; 41 EMA.

2. (2)-(3) Summary of remedies sought 43 EMA; CC 2261.

3. (3)-(4) Summary of defenses asserted

4. (4)-(5) Competence The court has competence [jurisdiction] under the Constitution, OCJB [Organic Code of the Judicial Branch], 29 CCP [Code of Civil Procedure], 42 EMA in that the harm was incurred within the court's geographical jurisdiction; Chevron's allegation that it is not the successor to Texaco does not deprive the court of jurisdiction or competence, but would only bear on the defense of lack of a legitimate opposing party.

5. (6)-(16) Jurisdiction over Chevron The court also finds that Chevron is liable for Texaco's liability to plaintiffs for a number of reasons, including 337, 338 and 341 of the Law of Companies ("LC"), Chevron's press releases, statements of Chevron's CEO and President on which plaintiffs reasonably relied. Since Texaco directed, supervised and controlled TexPet's operations in Ecuador, Chevron is also liable for TexPet's acts.

6. (18)-(25) Corporate veil The court also determines that in any event the corporate veil should be pierced in this case; Texaco transferred capital to TexPet to allow it to meet expenses. (23)-(25) The court also discusses interlocking directors and officers. (25)-(26) Not to lift the corporate veil here would be to perpetuate a fraud, since Texaco controlled TexPet and

did not adequately capitalize it for its operations, but had to constantly infuse capital; Texaco was trying to leave the assets in the parent company and put the liabilities in the subsidiary.

7. (26)-(27) Improper joinder Pursuant to specific legal provisions, this action must be heard in a summary verbal proceeding, not an ordinary proceeding; Old CC 2241, 2256 and 2260 (New CC 2214, 2229 and 2236); 59 CCP and 42 and 43(5) EMA.

8. (27)-(28) Non-retroactivity of the EMA 7(20) CC; 42 and 43(5) EMA provides procedural norms, not substantive rights; 163(2) OCJB.

9. (28) Non-retroactivity of 169 ILO: This defense is upheld.

(29) Prescription (statute of limitations) with respect to Chevron 2259 CC; The merger binds Chevron to the order of the U.S. court tolling the limitations period with respect to Texaco.

10. (29) Plaintiffs' lack of connection with Chevron no direct connection is needed, and the merger of Texaco and Chevron supplies a sufficient connection with Chevron.

11. (30)-(33) Release pursuant to the 1995 Settlement Agreement The court finds that Plaintiffs are not bound by the Government's release because they are not signatories; the clear language shows that the Government and PetroEcuador gave a release only on their own behalf; the Constitution and international law prevent the Government from depriving Plaintiffs of their inalienable right to seek redress.

12. (34) Further discussion of the fact that the scope of the release did not include the Plaintiffs, so did not extinguish their claims.

13. (33)-(34) Failure to conform to New 2236 CC (Old 2260 CC): 43 EMA provides for verbal summary proceedings in cases of claimed environmental harm.

14. (35)-(36) FOURTH: Chevron's motions complaining of the Court's tardiness are baseless and evidence of bad faith.

15. (36)-(38) Judicial inspections Chevron has claimed that the terms of reference for over 100 judicial inspections constitute a "procedural contract," which the court denies; the court can accept or reject the experts' reports based on his own sound judgment; the judge is not required to appoint a third expert and must consider principles of procedural economy.

16. (39) Compliance with formalities and due process Chevron has alleged crucial errors everywhere, demonstrating its lack of objectivity; the judge in fact considered all of Chevron's challenges and claims of error in the proper manner.

17. (40) To the extent that Chevron argues that plaintiffs' experts testified to legal conclusions, the judge did not consider those conclusions since they were outside the expert's scope of expertise and were for the judge to decide.

18. (40)-(42) The judge reviews the redundant Chevron complaints about essential error in plaintiffs' expert reports and states that he could not have overlooked Chevron's position because it was repeated with respect to almost every one of plaintiffs' expert reports, such that "it is virtually impossible for an essential error to escape the eyes of the judge."

19. (43)-(45) The expert answered all of Chevron's questions, except concerning the retroactive application of the law; Chevron tried to initiate 26 summary lawsuits to challenge experts, which the judge finds to be a litigation tactic and not an effort to correct essential errors; Chevron's assertions are really just disagreements over interpretation of data and application of law, which the judge could take into consideration in making his decision; the HAVOC Laboratory was ruled unaccredited by the Ecuadorian Accreditation Agency, but so was the Severn Trent Laboratory used by Chevron; the judge will consider both laboratories' results, keeping in mind that they had foreign, but not local Ecuadorian, accreditation.

20. (46)-(47) Chevron claims that the judge's acceptance of plaintiffs' waiver of its remaining inspections assumes that he has accepted plaintiffs' claims as proven; this is untrue and no judge on this case has ever said that; each party must prove its case and is free to withdraw proofs at the risk of not proving its case.

21. (48)-(49) Allegations of Calmbacher fraud and misconduct Chevron has submitted evidence that Dr. Calmbacher's expert reports were forged. Accordingly, although there were labor and payment issues between plaintiffs and Dr. Calmbacher, the judge will not consider Judge Calmbacher's testimony in this ruling.

22. (49)-(51) Allegations of Cabrera fraud and misconduct Chevron's motion that the Court not consider the Cabrera Report will be granted.

23. (51) Allegations of Donziger fraud and misconduct Donziger's statements, some of which are "disrespectful," are rejected and ignored; he is not a "procedure party" although has made statements on behalf of plaintiffs; no pressure has effectively been exerted on this Court, despite what Donziger may have said in front of the cameras.

24. (52)-(53) Allegations of Borja fraud and misconduct Borja was linked to Chevron and Chevron's defense team as a consultant; as a result of Borja's clandestine films Dr. Nuñez excused himself as a judge in this case; Borja's friend Escobar taped him stating that portions of Chevron's tests were manipulated to avoid showing pollution; but the judge will not credit Escobar any more than Borja as stating valid proofs; they will not be held to bind Chevron any more than Donziger's statements will be held to bind plaintiffs.

25. (53-55) Allegations regarding Chevron's wrongful suspension of El Guanta site inspection The evidence submitted shows that the inspection was suspended by the Judge, because he was misled by the request of Chevron's attorney who filed with the court a false

intelligence report procured by Captain Bravo (Ret.), a former military officer who was employed by Chevron as part of its private security team. Nevertheless, while Chevron's conduct delayed and hampered the inspection, it did not impact the final resolution of this case.

26. (55) Resolution of all procedural motions This concludes the Court's analysis of the parties' motions related to the processing of the case.

27. (55) "Dilatory" or "later discovered" defenses to be addressed

28. (56)-(57) Counterfeit plaintiff signatures and invalid powers of attorney Plaintiffs have ratified their signatures and none has complained that his signature was forged or otherwise supported Chevron's charge; thus Chevron's charge is reckless and indicative of bad faith; the same applies to the claim that plaintiffs' attorneys (Wray and Fajardo) did not have legally valid powers of attorney.

29. (56)-(57) Competence of this Court The Court cites the "savings" legislation and resolution of the National Council on the Judiciary extending the competence and powers of the Superior Courts pending the enactment of new laws.

30. (57)-(58) Chevron's claim of "ideological falsification" by Plaintiffs' economic damages experts Plaintiffs submitted their experts' economic assessments applicable to the remediation without the Court's involvement in their selection simply as a reference for the Court, not as damage reports; the Court accordingly has not accepted these assessments as damage reports, as they were expressly submitted only as statements of Plaintiffs' position; even if Plaintiffs had committed fraud by using the work of Dr. Barnthouse, they clearly did not try to deceive the Court with false damage reports because they correctly described them as economic assessments submitted in compliance with the Court's earlier order; indeed, Chevron had done the same with its own economic assessments.

31. (58)-(60) Incivility of both counsel and Chevrons' counsel's affronts to the impartiality of the Court The incivility on behalf of both counsel to each other will cancel itself out; however, Chevron's counsel has made unfounded and untrue accusations against the Court for "judicial lynching" and wrongful appointment of a court expert; the National Judicial Council rejected Chevron's complaint and found no irregularity in the Court's appointment of its expert; there have been constant unfounded claims of the Court's partiality throughout the proceedings.

32. (60) Motions to review prior rulings Rehearing of rulings can only be heard once, so requests for a second or more rehearing must be disallowed under CCP Art. 291.

33. (60) FIFTH: No informalities or due process violation Summary oral procedure was the correct and valid form for this environmental case.

34. (60)-(74) SIXTH: Applicable environmental laws and regulations in effect The Court analyzes the laws in effect at the time that Chevron was Operator. Up until 1971 there was no law or regulation in place which established specific technical environmental obligations for the operator; in 1974 the Hydrocarbons Law Regulations required the Operator "to prevent harm to or danger to persons, property, natural resources …"; the Concession allowed the Operator to use the Concession without depriving the villages of the flow of water they need or depriving the waters of their potable and pure qualities; the Health Code in effect at the time also prevented unsanitary or toxic materials to be deposited in the soil or water without treatment; the Hydrocarbons Law of 1971 also required the Operator to protect flora and fauna and other natural resources; the Water Law also became effective in 1962; the State's control of the Operator does not serve to release the Operator from the consequences of violation of these laws; Chevron was legally bound to avoid any form or mode of contamination; the fact that specific regulations did not exist at the time setting maximum levels of contamination is of no

consequence; the Court agrees that retroactive application of later regulations is improper, and it has not done so; Chevron received numerous administrative fines and punishments for contamination of soil and water, so it was obviously aware that such contamination was proscribed; later numerical parameters for discharges have not been applied retroactively, but merely observed by the Court as reference parameters.

35. (74)-90) SEVENTH: Discussion of competing theories of extra-contractual liability and damages causation where defendant engaged in risky or hazardous activities, but did not intend to cause harm Judge states that Plaintiffs pled liability under Article 2256 [now Article 2229] of the Civil Code for risky or hazardous activities; refers to a 2002 Supreme Court decision. Requirements are (1) some legal harm (certain harm), (2) defendant's negligence or other "fault," and (3) a causal nexus between the two; a risky or hazardous activity presumes a causal nexus, and the burden of proof is on defendant to disprove the nexus; the fact that the State administratively authorized and regulated certain of Chevron's activities does not release Chevron from third-party liability; memoranda in the record of administrative sanctions imposed on Chevron by the State show the express reservation of third-party rights, so Chevron was aware of this at the time; the record also shows that Chevron did not intend to cause harm; however, Chevron clearly had knowledge of the potential harm it was causing, making that harm "foreseeable" and in civil law tantamount to intentional misconduct; there is an objective and a subjective method of determining whether harm is "foreseeable"; Judge relies on 1962 book "*Primer of Oil and Gas Production*" for the objective test of what a "good oil company" should do; the chapter by a Texaco employee also shows that this harm was "foreseeable" by Chevron under the subjective test as well; Judge discusses "risk distribution mechanism" ("no fault") which countries have been adopting to apply to endeavors which are beneficial but have greater

attendant risks; in these situations modern jurisprudence presumes "the fault of whoever uses and takes advantage of the risky thing through which the harm occurred"; Judge goes through the four different legal theories of "causation" and chooses the "theory of sufficient causation" or "the culpable creation of the unjustified risk of a hazardous situation"; the USA, England and Australia have developed the theory of the substantial factor and the theory of the most probable cause; this needs two elements: (1) the reasonable medical probability and (2) the substantial factor; in this complicated case, the separate "harms" must be analyzed separately.

36. (90)-(92) EIGHTH: The allowable relief sought in the complaint The relief sought in the complaint cannot supersede what the law allows or provides; because the State and municipalities have released Chevron, the funds cannot go to them to perform the remediation but under Article 43 of the EMA the Judge must award the funds to a qualified entity – not the Government – to carry out a lawful remediation, not necessarily the remediation (return to pristine conditions) that Plaintiffs have requested.

37. (92)-(154) NINTH: Judge's three major findings of fact (1) Texaco Petroleum Company (TexPet) was the Consortium Operator and legally responsible for Consortium operations (92-94); (2) environmental harm resulted from Texaco's operations (94-125); and (3) other types of harm also resulted from those operations (125-154).

1. Responsibility (92)-(94)

38. It is uncontested and legally proven that the operation of the Concession was the responsibility of TexPet as Operator under the Napo Agreement (JOA) until June 1990 (93); the Court notes that under Article 46.1 of the Concession Agreement the Operator, both as agent and principal, was obliged to protect "the flora and fauna and other natural resources" (93).

2. Environmental Harm (94)-(125)

39. The conflicting expert conclusions will be ignored but their evidentiary source is consistent and reliable, allowing the Court itself to draw reasonable conclusions as to contamination (95); Ecuadorian legislation as to maximum allowable limits of hydrocarbon concentration is used merely as a reference point, not applied retroactively (96); the absence of any regulation setting maximum limits for hexavalent Chromium (Chromium VI) concentrations did not implicitly authorize this hazardous substance to be dumped into the environment (99); discussion of TPH in samples (99); the Court finds that TPH levels should be considered along with rest of evidence since it is not a precise indicator of health risks (101); BTEX and PAH should also be considered, but TPH should not be ignored (101).

a. Contaminants In Soil (102)-(111)

40. TPH the Court discusses the TPH sample and sampling methodology disagreement between the parties ("grab sample" vs. "sample homogenization" ["compositing"]) (102-104); defendants produced four times as many samples as plaintiffs, lowering the overall percent of TPH samples < 1,000 ppm to 80% (102); plaintiffs' samples showed only 38% < 1,000 ppm while defendants' samples showed 88% < 1,000 ppm (102); defendants defended the homogenization technique as correct (103); plaintiffs measured TPH in mg./kg., while defendants split TPH into gas (GRO) and diesel (DRO) (104); every Concession field shows similar TPH concentrations (104); the Court lists TPH samples taken by various experts at various fields to show that TPH ranges are very similar for all samples sites (including RAP sites and non-RAP sites) "which gives us certainty that environmental conditions are similar in all of the sites, even if they have been covered by the [earlier] remediation work mentioned and regardless of whether they have been abandoned since then or are in operation." (105-06); "based on the results obtained from a representative number of all the sites operated by TexPet, it

is possible to deduce predictable results for the rest of the sites not considered in the sample." (106).

Benzine	14 site samples (plaintiffs and defendants) reflect benzene, the most powerful carcinogenic substance found in the site samples (107);
Toluene	10 samples (plaintiffs and defendants) show toluene contamination (108);
PAHs	54 samples between 1.1 and 3,142 mg./kg. (108)-(109);
Mercury	cites to several inspection results (109);
Lead	samples show excessive lead levels (109)-(110);
Cadmium	151 results between 1 and 316 mg./kg. (110);
Chromium VI	108 samples between 0.42 and 87 mg./kg (111);
Barium	widely reported in defendants' sampling; not listed as a carcinogen because not extensively studied, however the court finds it hazardous in the concentrations shown in the sampling (111)-(112).

b. Contaminants In Water (112)-(119)

41. Surface water the Court is "disturbed" by difference in findings of parties' respective experts with respect to effects on water (112); but the findings of Court's appointed expert, Jorge Bermeo, agree with those of plaintiffs' experts (112). However, Pérez Pallarez published in 2007 that TexPet had dumped 15.8 billion gallons of production water (containing BTEX, TPH and PAH) from 1972 – 1990 (113); this allows the Court to presume that the dumping caused a negative impact on surface waters being used for human consumption (113); TexPet 's defenses to this are discussed and dismissed by the Court (113)-(115); the Court discusses Bermeo's findings of mercury and bioaccumulation of hydrocarbons in fish tissue "way above the maximum levels for water" because of dumping (115)-(116).

42. Ground water the Court finds that some of the samples show that hydrocarbons leached through pit bottoms, showing that the soil was not impermeable and that pits are a potential source of groundwater contamination (117); plaintiffs claim that buried oil does not weather or volatilize (118); Michael Martinez, TexPet's Manager, was warned by a TexPet engineer Granja in a 1976 memo that seepages of oil from wells were contaminating nearby streams (119); the Court does not find defendant's expert rebuttal to be credible (119).

43. Third party liability (PetroEcuador) Defendants blame a third party, PetroEcuador, for disposing of produced water in the same manner and for spills from wells it was operating (119)-(122); Gerardo Barros also testified to PetroEcuador's polluting practices (122); the Court excludes harm caused by third parties from this lawsuit for 3 reasons (123): (1) PetroEcuador is not a party and cannot defend itself here; (2) no monetary claim has been made against PetroEcuador in this proceeding and no harm caused by it will be attributed to TexPet or reparable in this judgment; and (3) TexPet's liability for the harm it caused is not extinguished by new harm caused by another person (123)-(124).

44. Court's conclusions on environmental harm (1) TexPet's operating practices were the same at all Concession sites they operated; (2) there are 7.392 million cubic meters of contaminated ground areas; (3) the surface water used for human consumption has received 16 billion gallons of formation water from TexPet dumping, which is a significant impact; and (4) there exist risks of leaks from the pits that could affect the groundwater (125).

3. Other Types Of Harm (125)-(154)

45. There is a negative impact on: (1) human health (125)-(152) and (2) indigenous communities' cultural identity and integrity (152)-(154).

46. Human health studies (125)-(138) the right to health is a universal and fundamental human right (126); this right is especially linked to the right to human dignity, non-discrimination and equality (126); defendant claims infant mortality in the oil region is similar to that in the rest of Ecuador (126); the Court conducts a lengthy discussion of the fact that disease and mortality in the Concession area is underreported (lack of data) because of a "bias" — the virtual absence of the State in this area (127); that these people do not have either comparable health services or tap water, and thus have both undiagnosed illnesses and a greater reliance on natural water sources, making the "official statistics" on which TexPet relies (i.e., no higher disease incidence here) biased (127)-(129); but other comments in the reported statistics do mention elevated ecological impacts of oil drilling with out risk analysis (128); the statistics show that 19% of Amazon people use rivers, lakes or ditches for potable water, compared with 5.7% elsewhere in Ecuador (129). The Court focuses on "non-contagious chronic diseases" as the subject of this lawsuit (129); defendant claims the disease incidence is caused by poverty alone, but the Court finds that there is another common denominator, contamination, that exacerbates the problems of poverty (130); Judge credits Jorge Bermeo's studies on fish tissue, which show TPH values well above permissible values for water, as well as ATSDR publications indicating toxicity of hydrocarbon compounds (130)-(131); the Court discusses the pre-litigation Yana Curí Report which opines on studies showing the impact of oil on animal and human health, including exposure to BTEX and PAH compounds (131)-(133); the Court credits this report because it compares the Amazon population with similar population not exposed to oil, its results are statistically significant, it uses data on both humans and animals, and its results are consistent with the results expected from exposure to oil (134); Court also discusses study "Cancer in Ecuadorian Amazon," which compared oil provinces with other provinces and found

a significantly higher incidence of cancer in former (140% for men and 163% for women), which provided "statistical data of highest importance to … this ruling" and "will be considered to establish causation." The Court agrees with the report's conclusion pointing "to the data as suggesting [but not by itself necessarily proving] a link between the risk of contracting cancer, and living in cantons with a long history of oil-related activities." (134)-(135) Court notes that all the evidence generally lines up to suggest a causality factor, including "the consistency with other investigations that relate chemical compounds in oil to cancer." (135); Court reviews Dr. San Sebastían's peer reviewed publication and agrees that it only provides a "suggestion" of cancer causation, not a proof (136); Court discusses Pallares/Yépez survey, "Texaco's Legacy" containing several reported instances of health problems, which the Court accepts as a valid survey, but not as formal testimony rendered before a competent judge (136)-(137); another field study by Bejarano interviewed 1,017 families in the region, of which 957 claimed to be severely affected and complained of oil contamination of their water sources (137)-(138); the Court will not accept this survey as proof of causation, as one of the authors had been hired by the Front, and the Judge therefore questioned his impartiality, but will consider its contents along with the other evidence (138); the Court notes that the case issues involve epidemiological (public health) disease causation, not individual disease causation, and thus will only evaluate the environmental injury to the public health for purposes of reparation of the environment (138).

47. Human health interviews at judicial inspections (139)-(154): pursuant to article 245 of the Code of Civil Procedure (139); the Court quotes from interviews of residents which took place at the judicial inspections, all of whom testify to oil contamination and its effect on them, their families, their crops and their livestock (139)-(144); Court: "these statements will be considered with the value they deserve and in accordance with the rules of sound judgment, and

together with the other evidence submitted by the parties." (144) The Court notes that these interview statements are both consistent with each other and unrebutted by contrary interview statements, which "leads us to think that the suffering mentioned in these statements is real." (144) The Court cites TexPet's attorney Callejas as to the proper three-point method of determining health risks from environmental contamination, and notes that all three points are present here: (1) source of contamination, (2) exposure pathway(s) to a receiver, and (3) the existence of a receiver (145)-(146); the Court says that reparation for damage to flora and fauna has been alleged, but that loss of livestock has not been claimed as monetary damages (147); Court reviews interviews involving loss of farm animals (148)-(152); Court concludes from this that "the wild, domestic and farm animals exposed to substances derived from the oil industry were adversely affected, to the detriment of the productive capacity and quality of food of the people." (152) Court finds there can be no compensation for loss of lands due to damage to the environment, because no ownership of lands was proven (152); but the destruction of their ecosystem also destroyed their "good life" — the culture and customs of these people, who lived off the land (153); it is only the cultural harm suffered by the indigenous peoples caused by forced displacement that can be considered as resulting from the environmental damage (154).

48. (154)-(174) TENTH: Causation

1. Harm To Soil And Waters

49. Ecuadorian legal standard is "wrongful creation of unjustified risk from a dangerous condition" (154); the Court looks at 4 factors:

50. **First**, TexPet's practice created a known risk of danger in generating hazardous waste into the ecosystem (154)-(158); Court cites the engineering testimony at the Guanta Station (155)-(158) to show that an emulsion of crude, gas and production water came out of the

wells into the production station, which was built as a three-phase separator but mostly operated as a two-phase separator, and the crude had a great deal of gas and water in it.

51. **Second**, TexPet's practices show that the risks of danger were unnecessary and could have been avoided, because the decanting pits in which the production water was deposited (for removal of solids) were unlined and uncovered (158); the supposed impermeability of the ground is not an answer, as migration and seepage from the decanting pits has already been established (158); defendants claim that depositing production water in the unlined decanting pits was universal practice around the world, but plaintiffs dispute that, leaving it to the Judge to decide (159); Court finds an unbiased opinion in the 1962 book "Primer of Oil and Gas Production" by A.P.I. and T.C.Brink (of Texaco Inc.), which warned that: "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." (160)-(161); this article, while not law, is evidence of the state of the technology in 1962 (161); in 1980 a Texaco District Superintendent, D.W. Archer, advised Rene Bucaram, the Consortium's general manager, stated that the current unlined decanting pits were adequate and replacing them with lined pits would be uneconomic (161)-(162); Court finds that lined pits were feasible, but not used by TexPet for purely economic reasons (162); also, Texaco owned a 1972 Patent Application for an improved method of re-injecting production water into the oil reservoir (162)-(163); from all of this the Court finds that at that time effective technological measures were available to avoid having to dump formation waters onto the ground (164); indeed, the Supreme Decree granting the Concession relied on the fact that Texaco "has all the necessary technical and economic resources to carry out an efficient exploration in the hydrocarbon field." (164)

later, article 41 of the 1974 Regulations required the operator to take all appropriate measures to prevent harm or danger to persons, property, natural resources, etc." (165) "[T]he system implemented by Texaco for treatment of its waste did not eliminate or manage the risks in a manner that was adequate or sufficient, but rather economical." (165) TexPet thus created a risk that could have been avoided. (166)

52. **Third**, TexPet's dumping of 15.8 million gallons of formation water directly into the ecosystem after only simple decantation, as acknowledged by Pérez Pallarez, constitutes a definite legal harm for which it was solely responsible.

53. And **fourth**, the interviews confirm the causation of this harm by TexPet (166)-(169); the interviewees described the overflowing storage tanks, the burning of crude oil in ditches, the contamination of rivers and water supplies, spraying of excess oil on the ground (167)-(169); Court refers to statement of William Powers as to problems of excess salinity of formation water and prohibitions of its disposal in the U.S. because of contamination of drinking water. (169) Finally, Court cites Ecuadorian laws and regulations prohibiting this practice. (169)

2. Harm To Health

54. The "substantial factor" theory requires analysis of two elements: Elements: (1) reasonable medical probability and (2) the showing of the substance as a substantial factor in the harm alleged (170); Application: (1) it is more probable than not that exposure to TexPet's effluents would have produced an adverse health impact, and (2) TexPet's discharges have been a substantial factor since the adverse health effects were foreseeable because the substances had a known potential for harm and the ailments found were perfectly consistent with that harm (170); there are scientific bases for reasonably linking the claims concerning health made by

inhabitants of the region with the oil contamination that derives from TexPet's activities as the Consortium operator (171).

3. Cultural Impact

55. The Court has noted that the environmental impacts found above also forced changes in indigenous cultures based on their social system, their culture and their existence in a close bond with nature, thus causing an adverse cultural impact on them (171); the Court finds that changes in indigenous peoples lives were partially caused by defendant's activities, but other causative factors (such as migration and colonization) were also involved (172); the affected people have had to modify their culture and way of life due to the impact on the ecosystem caused by TexPet (174).

56. (174)-(175) ELEVENTH: Fault This is a case based on objective (no fault) liability, so an analysis of liability is unnecessary (174); it is not necessary to prove that actions were taken with wrongful intent or negligence (175); nevertheless, even if fault were not presumed here from TexPet's risky activities, its failure to prevent known avoidable harm to plaintiffs clearly constitutes grossly negligent conduct. (175)

57. (175-176) TWELFTH – The 1995 Remediation Agreement and Release The Court finds the earlier remediation to be irrelevant to this lawsuit, noting that even some of the supposedly remediated areas has been found to be polluted (176); also, plaintiffs were not signatories to that contract.

58. (176)-(184) THIRTEENTH – Calculation of Damages

Groundwater cleanup:	$600 Million
Soils:	$5.4 Billion
Native fauna and flora:	$200 Million

Bringing in potable water:	$150 Million
Healthcare system	$1.4 Billion
Public health plan	$800 Million
Cultural restoration	$100 Million

59. (185)-(186) FOURTEENTH: Punitive Damages The Court imposes a punitive penalty equivalent to additional 100% of the aggregate values of the reparation measures, which is adequate for exemplary and dissuasive purposes; this civil penalty may be replaced, at the defendant's option, by a public apology in name of Chevron Corp., offered to those affected by Texpet's operations in Ecuador.

60. (186)-(188) FIFTEENTH: Trust To be set up in amount of judgment in Ecuador, with Amazon Defense Fund as beneficiary.

II. Clarification of First Instance Judgment Dated May 4, 2011 (C-1367)

A. The Court First Clarifies How It Had Made Certain *Factual* Determinations That Appear In The Judgment

61. (2) Merger The Court clarifies that it did not use defendant's default to find that Chevron was the merger successor to Texaco, but decided the issue on the merits. The Court was entitled to apply Ecuador's Corporations Act to the merger because it is entitled to use analogous law where there is no specific law on point. (3)-(4) The Court also relied on statements of Texaco and Chevron representatives that a "merger" had taken place, as well as the identity of the two companies in respect of "formal issues."

62. (4)-(5) The Court did not say that the entire merger was fraudulent or done with the intent to avoid liability, but only that in the context of this case the plaintiffs were led to believe by the statements of Texaco's and Chevron's representatives that the transaction was a "merger."

63. (4) Signatures on the complaint The Court clarifies that the complaint had been ratified by those whose signatures are claimed to be missing, and that many plaintiffs were illiterate and could not sign their own names; also, since this was a representative filing, Ecuadorian law would in any event have allowed a single person to sign for the entire group of affected individuals.

64. (6)-(7) Objections to certain documents received into evidence The Court clarifies and adheres to its earlier rulings admitting into evidence and ascribing evidentiary weight to certain witness statements, documents and translations objected to by Chevron's attorneys.

65. (7)-(8) Chevron as "Operator" of the Consortium The Court clarifies and confirms the correctness of its finding that the Consortium activity "was operated exclusively by Texpet … from its start until 1990."

66. (8) Petroecuador's operation of the Consortium The Court clarifies that it has used a time divide to allocate the respective responsibility of Texpet, as initial Operator of the Consortium through 1990, from the responsibility of Petroecuador, as later Operator, and has not awarded damages for the latter, only for the former.

67. (8) No reliance on Cabrera's Report The Court clarifies that it has reviewed all the materials submitted by Chevron on the alleged Cabrera fraud, and that it "decided to refrain entirely from relying on Expert Cabrera's Report," which accordingly has "no bearing on the decision." The "complaint requested redress for all damage, and that was what was ordered in the judgment."

68. (8)-(9) Imposition of Sanctions The Court clarifies that its punitive damages award against Chevron, which would be nullified by Chevron's timely apology, was based on "universal principles of law" and took into consideration "the severity of the wrong committed by Chevron and its misconduct during these proceedings, which are both of a severity never before seen in Ecuador."

69. (10)-(11) Post-Judgment reassertion of defenses overruled in the Judgment The Court addresses Chevron's post-Judgment motion to dismiss the complaint on a number of grounds previously asserted by Chevron as defenses and earlier covered in detail by the Court in its Judgment, "so there is no need to elaborate."

70. (11) Failure to designate further settling experts: The Court clarifies that it was able to review the parties' conflicting expert reports and derive a good understanding of the issues, and then to make findings based on its review of the "abundant information" underlying the reports. The Court's appointment of more settling experts was therefore unnecessary.

71. (11)-(12) Failure to discuss the settling experts' reports on the Sacha 53 well: The Court clarifies that it read the settling experts' reports on Sacha 53 but found them unhelpful, as they merely summarized the reports of the parties' experts, which the Court studied. Therefore, the Court found it unnecessary to refer to the settling experts' reports in its Judgment.

72. (12)-(14) Consideration of the testimony of Chevron's witnesses: The Court clarifies that it "did in fact consider the testimony of all the noteworthy individuals" who testified at Chevron's request. The Court discusses in some detail some of its determinations as to the respective credibility of Chevron's expert witnesses, who testified largely on the basis of documents, and "the dozens of testimonies of the residents … which are consistent and relate a similar story." "It is precisely the humility of these individuals, who even though they are not experts or doctors or Ph.D.s, do share a single history and a single condition as victims, which cannot be feigned or fabricated…." However, the Court also notes that "the testimonies of the residents are also backed by the scientific evidence contributed to the record regarding the presence of elements that are hazardous to health, and that arose from the defendant's activities."(13)

73. (13)-(14) Governmental oversight and control: The Court clarifies its earlier finding that, in a high risk activity such as oil production, mere compliance with (a) governmental oversight and (b) government rules and regulations (even where such compliance could be shown) does not absolve a person from civil liability for failing to take "all necessary measures to avoid harm."

74. (14) Health impacts from Texpet operations: The Court clarifies that it has taken into account all the expert reports on health issues and cancer incidence, keeping in mind that many of them merely collected information "from official sources without a presence in the

field." It considered the report of Expert Barros, but not his observations regarding the health of the residents. The Court notes that the cost of remediation of Shushufindi 89, for which Petroecuador is liable, was not covered by the Judgment.

75. (14)-(15) Groundwater contamination The Court clarifies that it found groundwater contamination on the basis of public documents and laboratory analysis of pit soil samples, and that Chevron's experts lacked credibility. It also noted that it considered Dr. Allen's expert report as a cost reference, not as a damages valuation report.

76. (15) "Technical content" of the expert reports The Court clarifies that the "technical content" of the expert reports on which it relied in forming its own conclusions on liability did not include the experts' subjective conclusions, but rather the objective analytic laboratory data and the description of the technical processes in the documents attached to those reports.

77. (15)-(16) Cost of remediation of pits constructed by Texpet The Court expands its discussion in the Judgment of its determination of (a) the size of the Texpet pits and (b) that those pits had been constructed by Texpet and not by PetroEcuador.

B. The Court Next Clarifies How It Had Made Certain *Legal* Determinations That Appear In The Judgment

78. (16): Jurisdiction of the Court; Jurisdiction of the Judge; Reverse triangular Merger; Piercing the corporate veil. (17): Application of Ecuadorian law as well as analogous principles of international law. (17)-(18): Selection of Texpet's pits to be remediated.

79. (18)-(19): Court's use of expert reports The Court clarifies that the expert reports were helpful, even though contradictory in conclusion, and that it weighed the evidence admitted into the record "using the rules of sound judgment," and assessed evidentiary weight and witness credibility "rationally and applying the rules of logic." "What the judge has done is to consider

parts of the various expert reports that were submitted by the experts who acted in the judicial inspections" but omitting "their conclusions concerning the culpability or liability of the defendant or of third persons, while the results of the laboratory analytical examinations have generally been attached to the reports."

80. (19)-(20): Authority for imposition of punitive damages The Court clarifies that plaintiffs were not required to seek punitive damages in their complaint, since the bases for awarding punitive damages all occurred during the trial and therefore after the complaint had been filed. The Court points out that its award of punitive damages was not expressly authorized by Ecuadorian law proper, but rather implicitly authorized by the stark conduct of Chevron and its attorneys, Article 18 of the Civil Code and by "universal principles of law and science."

81. (20): Calculation of amounts of damage The Court clarifies that it calculated the different classifications of damages based on the parties' expert reports and their submissions of economic criteria at the Court's request. "It is clarified and reaffirmed that [with the sole exception of punitive damages] the judgment has not granted more than what was requested in the complaint, since the complaint requested a series of specific aspects in addition to the remediation of all the environmental damage."

82. (21): Inability to cross-examine certain expert witnesses The Court clarifies that both sides, which includes Texpet, submitted expert reports from persons who never appeared before the Court or the other sides' attorneys for interrogation or cross-examination. Since Texpet had no problem submitting this type of expert testimony, it cannot be heard to complain that plaintiffs did the same. In any event, the Court did not fully accept the expert report of plaintiffs' expert, Dr. Barnthouse, and its damages findings were considerably lower than the recommendations of that report.

83. (21)-(22): Use of circumstantial evidence The Court clarifies that it has used both direct and circumstantial evidence where appropriate and necessary. In the area of health, the data are largely circumstantial, but have been given value. There, the Court applied "sound judgment to weigh the evidence contributed to the record, differentiating the particularities of each study, but analyzing them as a whole, until the sum of the evidence ma[de] it possible to form a conviction of the existence of an excess of cancer deaths." In the case of the videotapes of Cabrera, that is also circumstantial evidence; however, since Cabrera's opinions have not been considered, any repercussions of the videotaped evidence must be pursued, not in this case, but elsewhere, and "the rights of the parties to do so have been left intact."

84. (22): Use of witness statements as evidence The Court clarifies that it quite properly took the witness statements and made them part of the file, and that it did not consider the witness statements to be mere speculation. Chevron, whose attorneys were in attendance when the witnesses spoke, had the right to cross-examine them, and by so doing "exercise an effective defense," although it chose not to do so.

85. (22): Extension of prescriptive period to sue Chevron voluntarily agreed to waive the prescriptive period in order to allow the case to be dismissed by a foreign court for refilling in Ecuador. Hence, it cannot dismiss this action for plaintiffs' failure to bring it within what otherwise would have been the prescriptive period under Ecuadorian law.

86. (23): Texpet's RAP expenditures The Court clarifies that Texpet's expenditures under the 1995 Settlement Agreement and the resulting RAP have no bearing on this case and cannot be considered.

87. (23): Removal and remediation The Court clarifies that it ordered both that Texpet "remediate damages' and also "remove and properly treat the contaminated materials." Both

were requested in the complaint and they are not mutually exclusive. A health program to redress the damage to public health is what the Judgment contemplates.

88. (23): Both restoration of the environment and supplementary measures are required The Court clarifies that not all the environment can be restored to its natural state. Where that is impossible or impractical, "supplementary measures and mitigation measures" will be required, and they are not mutually exclusive.

89. (23)-(24): Remedial health plan implementation The Court clarifies that the implementation of the health program shall be accomplished by a specialized health institution, which shall develop a remediation plan within the guidelines and monetary limits of the Judgment.

90. (24): Damage to persons The Court clarifies that "damage to persons" as used in the Judgment means damage to the health and culture of persons in general, which directly results from the environmental damage.

91. (24): Remedy as exceeding what was requested in the complaint The Court clarifies that the various remedies ordered in the Judgment are all in response to the complaint's prayer for remediation of "environmental damage," and are thus within the scope of the complaint.

III. First Instance Appellate Court Decision Dated Jan. 3, 2012 (C-991)

92. (1): The Court first denies Plaintiffs' appeals contesting the trial court's failure to assess damages against Texpet for: (A) certain economic losses, (B) loss of the tribes' ancestral lands and (C) spraying the roads with crude oil. [It returns to this discussion in its FOURTH section.] Then the Court turns to Chevron's claimed errors of the trial court.

93. (1): FIRST The Court first establishes it competence to hear the appeal.

94. (1): SECOND The Court affirms the trial court's competence and assertion of its *in personam* jurisdiction over Chevron on the basis of Chevron's "consent" to trial in Ecuador.

95. (1)-(2): THIRD The Court points out in prefatory fashion that in both courts Chevron "has been the instigator of incidents that have resulted in obstruction of the judicial process," and cites numerous examples.

96. (2)-(3): THIRD [which should have been labeled FOURTH]: The Court reviews the trial court's denial of Chevron's "obstructive" repetitive petitions and finds that they "cannot be considered 'denial' or 'lack of jurisdictional guarantees.'" At both court levels, Chevron "bloated the case" with superfluous filings and made numerous requests for evidence, almost all of which the trial court granted. Chevron has also inappropriately claimed that the 1998 release was an "act of government" releasing it from liability to Plaintiffs, and has filed "insolent" accusations against the Ecuadorian judiciary for supposedly "disparate treatment," rather than adhering to "the natural spaces in which the defendant understood it was appropriate to defend itself and to be heard in the case."

97. (3)-(4): FOURTH The Court affirms the trial court's denial of these additional damages on the ground that, while they were addressed in the trial court proceedings, they were

either without legal merit or never appropriately quantified in the record.("… there is no evidence in the record that estimates the magnitude of the damage….").

98. (4)-(13): FIFTH The Court addresses in detail and rejects Chevron's claim that the trial court lacked competence in this case or *in personam* jurisdiction over Chevron. The Court notes Chevron's legal position in the U.S. Second Circuit court, including its preference for trial in Ecuador as "more convenient" than a trial in New York. (4)-(6) The Court then addresses properly deemed Texaco's "successor" by virtue of the merger and Chevron's public statements explaining the effect of the merger. (7)-(9) Next, the Court analyzes Plaintiffs' New York and Ecuadorian complaints, and agrees with the assessment of the New York Second Circuit that the two sets of plaintiffs and their two complaints are virtually identical. (9) Next, the Court finds that Article 2236 of the Civil Code sections covering contingent damages does not exclude environmental damages. Article 2214 of the Civil Code also provides a damages remedy for environmental injury. Thus, the Civil Code provides for all the damages awarded by the trial court. (9)-(10).

99. (10): The Court discusses and affirms the trial court's denial of Chevron's claim of "nullity" because of alleged "due process" violations and points out that Chevron has mounted a vigorous defense over the eight years that the trial has lasted, and the trial court generally accepted Chevron's numerous submissions into the record. The trial court considered Chevron's argument on the "forged complaint signatures," and then correctly rejected that argument. With respect to Chevron's allegations of fraud or corruption on behalf of Plaintiffs or their counsel, the Court has no competence to consider these claims, which appear to be pending in other fora.

100. (11)-(12): The Court considers Chevron's claim that certain data considered by the trial judge was not in the record, and the Court, "having reviewed the detail, it was found that

the data that the first instance judge considered is in the record." The Court then cites a number of laboratory analyses from the various expert reports and judicial inspections, finding a few immaterial mistakes but substantially supportive of the trial court's findings. The Court addresses the trial court's findings as supported by the evidence as a whole, filtered through the logic and sound judgment of the trial judge. The Court holds that the trial court's finding of mercury contamination was based on a misreading of data, and reverses that finding; however, it concludes that that error is immaterial in terms of the damages awarded.

101. (12): The Court agrees with the trial court's determination that "this is a case of strict civil liability" under Ecuadorian civil law because of the known dangers inherent in crude oil drilling and production, to which dangers Texpet responded by failing to take necessary precautionary measures.

102. (13): As regards the rest of Chevron's petition for nullification of the Judgment, "it is observed in the first place that the petition for partial nullity of the proceeding is based on arguments or incidents that have been thoroughly addressed in the judgment, without there being new elements to consider."

103. (13)-(14): SIXTH The Court notes its displeasure with some of the statements of Judge Kaplan, which it feels are "inappropriate in light of the conditions and requirements of mutual respect due between States."

104. (14)-(15): SEVENTH The Court discusses some examples of what is considers to have been Chevron's "abusive" and "overtly aggressive and hostile attitude" in its violation of established rules of procedure governing the conduct of litigants in civil proceedings. Indeed, the court felt that its overlooking such behavior "would be an example setting a disastrous precedent for other litigants."

105. (15)-(16): EIGHTH The Court rules that punitive damages should be placed in a separate trust managed by the trustees responsible for administering the compensatory damages awarded.

IV. Clarification of First Instance Appellate Decision Dated Jan. 13, 2012 (R-299)

106. Chevron requested clarification and amplification of the Court's January 3, 2012 decision in eight respects, most of which are immaterial to this proceeding; however, the Court's response to two of those requests are summarized below.

107. (1)-(2): The Court's response to Chevron's fourth request The Court clarifies the terms of the non-monetary "symbolic reparation" contained in the contingent punitive damages award. The Court confirms that the public apology requested will not have any *res judicata* effect on other matters outside the present litigation. Chevron "may clarify that it is making the publication by judicial order and that it does not imply recognition of any obligation nor ulterior, civil not criminal responsibility."

108. (3)-(4): Chevron's accusations regarding trial court's preparation of its judgment The Court clarifies that it has considered Chevron's "accusations with respect to irregularities in the preparation of the trial court judgment," and has found it to be speculative and non-probative. Specifically, the Court clarifies that it has determined for itself that the findings made by the trial court are all supported by filed evidence duly accepted into the record. "[A]ll of the samples, documents, reports, testimonies, interviews, transcripts and minutes, referred to in the judgment, are found in the record without the defendant identifying any that is not – the defendant's motions simply show disagreement with the reasoning, the interpretation and the value given to the evidence…." The Court "understands that [defendant] is not alleging that the judgment has been sustained on evidence foreign to the record. Therefore, starting by considering that only the

evidence legally produced is deemed authentic in trial about the facts in dispute, and that which must be in the record, it is concluded that the appealed judgment is based on legally presented evidence, that is, in the record." The Court also points out that Chevron presented "a considerable amount of information" to the trial court judge" which "was not introduced into the record" but which "was known and studied by the lower court judge."

109. (4): U.S. discovery of Plaintiffs' attorney's files The Court notes that Chevron has had access to large amounts of Plaintiffs' attorney's case files and correspondence through U.S. proceedings, and states that any secret assistance given to the trial court judge would undoubtedly have come out in those documents. The Court reiterates that allegations of fraud are subjects for other investigatory or criminal agencies, but not for speculation by a civil court.