IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

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

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I. Introduction

1. Claimants' theory of the case has plainly evolved since they first filed their Notice of Arbitration. With each new submission, they have offered entirely new factual allegations to go along with entirely new legal theories, all of which are allegedly supported by entirely new bands of exhibits. In response to Claimants' barrage of successive interim measures requests, this Tribunal has required the Republic to respond to these perpetually evolving allegations in a matter of weeks, making an investigation into such allegations impossible.

2. At the risk of restating the obvious: the Republic is not and has never been a party to the underlying Lago Agrio Litigation. As a consequence, the Republic's lawyers are not and will never be as familiar with the underlying Lago Agrio — or *Aguinda* — record as Claimants. Many of Claimants' attorneys have been involved in the underlying litigation since its inception. The Republic's lawyers did not retain any expert or offer expert testimony in or during the Lago Agrio proceeding or otherwise follow the scientific and testimonial evidence during the course of the judicial inspections. Nor did the Republic hire investigators to monitor and follow counsel for the Plaintiffs, or counsel for Chevron, during the course of the Lago Agrio proceedings. It is now clear that Claimants did.

3. Nor does the Republic have access to the internal files of Claimants' counsel. On the other hand, U.S. courts have granted Claimants virtually unrestricted access to almost every email or other scrap of correspondence exchanged internally among Plaintiffs' counsel or between Plaintiffs' counsel and their experts or third parties.

4. In this submission, the Republic addresses, methodically, the many factual allegations, wide-ranging exhibits, and concomitant arguments offered by Claimants in their two

memorials on the merits.[1] As we show in this Counter-Memorial, Claimants employ a variety of tools that have the effect of presenting a distorted reality. To correct this misleading presentation, the Republic directs the Tribunal's attention to certain passages of the cited documents ignored by Claimants, other documents not even referenced or acknowledged by Claimants, and *Crude* outtakes that often immediately precede or follow the out-of-context excerpts cited by Claimants.

5. In its assessment of the evidence at this stage, this Tribunal should be cognizant of at least four stratagems employed by Claimants to distort the truth in their favor, namely:

- **The logical fallacy of *post hoc ergo propter hoc***: Claimants frequently suggest a "cause and effect" nexus through mere chronological proximity where none logically exists. By omitting reference to the causative or triggering events, Claimants misleadingly suggest alternative causative or triggering events. In the Track 1 hearing, for example, Claimants concluded that the Lago Agrio Plaintiffs' petition to the Inter-American Commission on Human Rights failed to raise any meritorious human rights claims. As proof Claimants' counsel noted: "the Inter-American Commission of Human Rights asked the plaintiffs to submit within ten days evidence of the irreparable harm which they claimed in their petition. What did they do [when] asked to come up with proof? They withdrew their request." The intended implication to be drawn is that Plaintiffs' withdrawal of their petition was caused by the Commission's request for evidence — a request that Claimants would like the Tribunal to believe that Plaintiffs knew they could not satisfy. What Claimants misleadingly omitted from their narrative is that Plaintiffs withdrew their petition *because they found that they had already received the relief they sought*. The Ecuadorian court issued its decision on March 1, 2012, affirmatively finding that under Ecuador's hierarchy of laws, the court must give preference to Plaintiffs' rights under human rights conventions to which the Republic is a party. Plaintiffs withdrew their request to the Commission the day after this court decision, since the petition had just been rendered moot. Simply adding this one crucial fact to Claimants' chronology destroys the logic of their false implication.[2]

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[1] Respondent has seen press releases recently issued by both the Lago Agrio Plaintiffs and Chevron, each accusing the other of unlawful contact with, and even bribery of, members of the Ecuadorian judiciary. Whatever may eventually come of these charges and counter-charges, Respondent can at the present time deal only with Claimants' position as reflected in their various merits memorials and related submissions to date.

[2] Similarly, Claimants noted that Plaintiffs lobbied the Prosecutor General for a criminal investigation of Chevron and its lawyers, and that such an investigation was later opened. From this juxtaposition they imply that the Prosecutor General acquiesced in Plaintiffs' tactic to put pressure on Chevron. However, Claimants fail to note that the Prosecutor General had been investigating Claimants' conduct since *before* Plaintiffs even commenced the Lago Agrio Litigation, that there had been a lengthy chronology of events wholly independent of the civil case, and that the Prosecutor General had followed correct legal procedures and relied upon probative evidence. Nor do they

- **Selective quoting**: Claimants often selectively quote parts of documents — and even parts of sentences — out of context with misleading results. For example, Claimants proclaim: "President Correa directly pressured the Lago Agrio Court. The President 'asked the attorney general to do everything necessary to win the trial.'"[3] In fact, this excerpt comes from an email of Plaintiffs' public relations advisor, who actually said 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.*" Given the timing and full quote, this is an obvious reference to the AAA Arbitration and the AAA Stay Action, both of which were then pending in the United States.[4]

- **Guilt by allusion**: Claimants have cited to an email from Plaintiffs' Ecuadorian counsel, Pablo Fajardo, to Donziger, dated June 5, 2009, in which Fajardo makes the statement that "okay, I'm going to give [Brian] the complaint and the answer to read so he can get to know the case well. After that a research assignment for our legal alegato and the judgment, but without him knowing what he is doing . . .." Claimants rely on the phrase "without him knowing what he is doing" to suggest that "Brian" was to be an unwitting ghostwriter in an illicit plot to undermine the rule of law. What Claimants fail to disclose is that, from reading the context of these excerpts, Fajardo most definitely meant that the young Mr. Parker quite literally "would not know what he was doing" and would have to be hand held, since (1) he was a summer intern for the Plaintiffs, (2) he had just completed his first year of U.S. law school, and (3) he knew nothing about the case or Ecuadorian law. Mr. Parker himself testified during his deposition that his summer work dealt mainly with collateral issues and nothing to do with the content of any Judgment ultimately issued by Judge Zambrano.[5]

- **Selective editing**: Claimants also have submitted highly excerpted portions from the *Crude* outtakes. In one instance, Claimants note that President Correa's juridical secretary, Alexis Mera, welcomed counsel for the Plaintiffs and the opportunity to discuss "how we can help one another." But Claimants ignore the context, including the fact that Dr. Mera insisted that he was there as "an attorney" because "[t]he thing is that

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acknowledge, as the Third Circuit did, that the Plaintiffs were legally entitled to provide accusations of wrongdoing to governmental authorities for investigation, and that governmental authorities are entitled to rely on complaints of citizens in making follow-up investigative decisions. In any event, an Ecuadorian judge heard the parties and terminated the investigation on the basis of insufficient legal grounds.

[3] Claimants' Supplemental Merits Memorial ¶ 2.

[4] *See* Annex F, Section III. Separately, in support of Claimants' ghost-writing allegations, Claimants rely on a September 2010 email from an Argentinean lawyer, Ms. Fach, who advised Plaintiffs' counsel as follows: "As I commented in Ecuador, I believe it is very important that you 'do the work' for the judge." But the context of the sentence makes clear that Ms. Fach is suggesting only that Plaintiffs, in their written submissions, provide as much legal support as possible for the conclusions of law they seek: "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 (Sept. 11, 2010) at 2. Claimants conveniently leave out the explicit reference to the Plaintiffs' *alegato*, which was eventually submitted to the Court and served on Chevron.

[5] *See* Annex G.

it's a legal matter."[6] In the end, Plaintiffs received nothing other than good wishes from the meeting. Dr. Mera rejected the suggestion that the Office of the President should approach the Prosecutor General's office regarding the reopening of a criminal investigation.

6. Claimants also routinely argue in generalities when they cannot prove the specifics. A prime example is that Claimants criticize the entire Ecuadorian judiciary, painting with a broad brush and focusing on reported instances of judicial misconduct as if that were the norm in Ecuador and unheard of elsewhere. **First**, it is *not* the Ecuadorian judiciary that is on trial here; the question before this Tribunal is instead whether the legal proceedings in the Lago Agrio Litigation satisfied the minimum standards of fairness required under customary international law. **Second**, for ten years, when it suited their purposes, Claimants lavished praise on the Ecuadorian courts, extolling their impartiality and independence as part of Claimants' effort to persuade the New York courts to transfer the environmental case to Ecuador.[7] **Third**, over the last twenty years Ecuador has implemented a series of judicial reforms — praised by international observers and organizations — that have only strengthened and enhanced the judiciary beginning even before the Ecuadorian courts assumed jurisdiction over the environmental dispute. **Fourth**, Claimants' citation of isolated examples of judicial misconduct in Ecuador does not indict the Ecuadorian judiciary as a whole — any more than reliance on similar examples in the United States or United Kingdom speaks to their court systems as a whole.[8] While not directly relevant here, the Republic provides in Annex A a description of its

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6 C-360, Crude Outtakes at CRS221-02-01 at 14.

7 Consistency of position has never been a hallmark of Chevron litigation. Just last week the U.S. Court of Appeals for the Fifth Circuit criticized Chevron for "deliberately tak[ing] inconsistent positions" in its U.S. litigations against Ecuador, leading the Fifth Circuit to ask: "Why shouldn't sauce for Chevron's goose be sauce for the Ecuador gander as well?" R-684, *Republic of Ecuador v. Connor*, Nos. 12-20122, 12-20123, 2013 WL 539011, at *2 (5th Cir. Feb. 13, 2013).

8 In fact, there were more than 1,600 complaints made against members of the judiciary and magistracy in England and Wales during the 2011-2012 time period. R-634, Martin Beckford, *More Than 75 Judges Disciplined For Misconduct*, THE TELEGRAPH (Jul. 14, 2012). In the United States, from January 1990 to December 2001, no

judicial reform efforts, and responds in detail to Claimants' repeated mischaracterizations of events affecting the Ecuadorian judiciary.

7. This Tribunal must resist finding a Treaty violation or denial of justice based on the volume of Claimants' allegations or the intensity of their rhetoric. No litigant should be rewarded simply because it has the resources and legal teams on hand to issue many dozens of subpoenas, amass a stockpile of data and documents, lodge allegations, and support them with out-of-context quotes. The deconstruction of Claimants' story has taken considerable time, and any effort to arrive at the truth requires an equally painstaking and considered effort to sift through the evidence. It is not enough, Respondent submits, for Claimants to hurl spectacular accusations, one after another.

The Factual Allegations

8. The central thrust of Claimants' denial of justice claim is their allegation that the Lago Agrio Plaintiffs "ghostwrote" the trial court decision. In support, Claimants principally rely on (1) certain passages in the 188-page decision relating to the Chevron merger with Texaco that parallels a legal memorandum found in the Plaintiffs' internal files, (2) references to the Plaintiffs' "Selva Viva" database, and (3) a number of documents that they say suggest a plan to write the judgment for the Court.

9. Claimants' evidence does not support their claims, especially in light of the heavy burden of proof they bear. As the *Putnam* tribunal observed: "Only a *clear and notorious injustice, visible . . . at a mere glance*, could furnish ground for an international arbitral tribunal

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fewer than 110 State judges were removed as a result of judicial disciplinary misconduct. And many hundreds more resigned, retired, were defeated, did not run for reelection, or died while complaints about them were pending. Scores more were suspended without pay or otherwise incurred lesser sanctions by the appropriate disciplinary boards. R-603, A Study of State Judicial Discipline Sanctions by Cynthia Gray at 7. The point is not that the United States or the United Kingdom's judicial system is corrupt or otherwise unreliable, only that anecdotal examples do not define an entire system of justice.

. . . to put aside a national decision presented before it and to scrutinize its grounds of fact and law."[9] And where a party attempts to prove its case by circumstantial evidence — as Claimants attempt to here — the tribunal must "assess whether or not the evidence produced by the Claimant is sufficient *to exclude any reasonable doubt*."[10]

10. Far from excluding any reasonable doubt, and notwithstanding Claimants' historic document and deposition discovery in this case, Claimants' case is heavy on rhetoric but light on actual proof. Simply put, there are *no* draft judgments, *no* emails transmitting or discussing a draft judgment, and *no* evidence of an intent to draft the judgment. That Claimants lack any such proof is evident from reviewing the documents on which they *do* rely. In each instance Claimants' interpretation of the half dozen documents (of the millions produced) is so tortured and belied by the content of the documents themselves that Claimants' very reliance on these documents reflects an unseemly propensity to force-fit a series of narrative excerpts into a predetermined mold by separating them from all surrounding context.

11. Claimants focus instead on the Court's reliance on documents allegedly outside the official record — the "Fusion Memo" discussing Chevron's acquisition of Texaco Inc. and the Selva Viva Database — and urge the Tribunal to conclude that such reliance establishes that the Plaintiffs drafted the decision. In fact all it establishes is that the Court received certain documents that appear not to have been receipted as part of the official record of some 200,000 pages (assuming that they are in fact not in the official record). Given the sheer volume of documents in the matter, and understanding the types of cases ordinarily heard by the court, that should not be a surprise. In fact, we now know that the Fusion Memo was almost certainly provided to the Court, openly and transparently, at the 2008 Aquarico judicial inspection and that

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9 RLA-152, *Putnam* Award at 225.

10 CLA-81, *Bayindir* Award ¶ 143.

all exhibits to the Fusion Memo were receipted in the record.[11] This also explains why a much outdated version of the Fusion Memo (from 2008) was relied upon in the Judgment (in 2011). And a review of the Record shows repeated instances of *both* parties supplying massive amounts of documents to an overwhelmed Court, without all the submitted documents being docketed.[12]

12. While it is not clear how or why the Court cited to the Selva Viva database — though all of this data appear to have been presented otherwise — there is no factual basis to believe that the data were provided to the Court surreptitiously, nor would there have been any logical reason for the Plaintiffs to do so. It would have been far more logical for the Plaintiffs to have shared their data with the Court, openly, when discussing the data during the judicial inspections. As it is, there are a number of court docket entries showing the receipt of CDs and DVDs without identifying their content — again reflecting transparency though perhaps lacking the desired precision.[13] While no one disputes that best practice would be to docket every page of every document as part of the record, this small courthouse in the Amazonian rainforest had never before played host to a case that produced the volume of evidence that the Lago Agrio Litigation generated. That the Court may have made clerical errors or omitted some documents from the numbered record that was officially filed with the court is neither a denial of justice nor a Treaty breach.

13. The fanfare that accompanied Claimants' allegations of "ghostwriting" is reminiscent of Chevron's public relations campaign in 2009 announcing the existence of secret video evidence allegedly proving that the Judge then presiding over the Lago Agrio Litigation actively participated in a bribery scheme that pre-ordained a decision in the litigation against the

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

12 *See* Annex G.

13 *Id.*

company. After a little bit of U.S. court-ordered discovery and some investigation, however, it became clear that the facts never matched Chevron's rhetoric. A review of the transcripts of the meetings in which he was present show that Judge Nuñez never asked for and was never even offered a bribe of any sort.[14] The transcripts also show that Judge Nuñez repeatedly declined invitations to say which way he intended to rule. It was only at the end of the meeting, when he was impatient and trying to leave, that the judge finally offered a series of "yes, sirs" in what appears to have been an attempt to escape from the meeting. The only U.S. judge who reviewed the transcripts and commented on them noted that he saw no evidence of a bribe;[15] respected American media commentators likewise mocked Chevron's claims.[16]

14. At the time the tapes were released, Chevron publicly distanced itself from Diego Borja, its long-time contractor and the person who met and recorded these meetings with Judge Nuñez. Chevron went so far as to represent, falsely, to the Lago Agrio court that Borja's "[w]ork [for Chevron] had already concluded" and that his "functions had *nothing to do with the sampling process*."[17] In fact, Borja had been a Chevron contractor for years, assisting as Chevron's "Sample Manager" for the "Lago Laboratory" right up to, and after, the time he engaged in the surreptitious recording of Judge Nuñez.[18] His income and livelihood had been mostly dependent on Chevron since 2004. And after he illicitly videotaped these meetings, at

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14 *See* Annex C.

15 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.

16 R-315, *Under Pressure Ecuadorean Judge Steps Aside in Suit Against Chevron,* NEW YORK TIMES (Sept. 5, 2009) at 1 ("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."); R-316, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) at 2; R-317, *Chevron Judge Says Tapes Don't Reveal Verdict*, SAN FRANCISCO CHRONICLE (Sept. 2, 2009) at 1; R-470, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES at 2 (Sept. 1, 2009).

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

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

Chevron's request, he then traveled to California to meet with Chevron and its counsel before returning to Ecuador to record illicitly yet an additional meeting.[19]

15. Chevron not only arranged for his departure from Ecuador, but also paid him $10,000, and later $5,000, a month, which they euphemistically referred to as a "stipend," for doing nothing.[20] Chevron also employed his wife; it paid his family to stay in a house adjacent to a golf course in California and later a rental home in Houston; it paid for his furnishings, car, and cell phone; and it even paid all of his U.S. taxes.[21] In the twenty-nine months after Chevron moved Borja to California, Chevron provided Borja more than $2.2 million in benefits.[22] As for Borja's accomplice, Wayne Hansen, he was a convicted felon in the United States. After a U.S. court granted Respondent's application to take discovery from Hansen, he fled the country.

16. After a period of study and examination, Claimants' allegations are never as they first appear. This is true for all of Claimants' remaining allegations. For example, while Claimants have alleged that a substantial portion of the expert report of a court-appointed expert, Richard Cabrera, was written by Plaintiffs' paid experts, there is absolutely no evidence suggesting that *the Republic* had any role in the conduct in question.[23] In fact, the Lago Agrio Court expressly declined to accept Mr. Cabrera's conclusions. Claimants' effort to tarnish the Republic based on the alleged conduct of the Lago Agrio Plaintiffs should be rejected.

17. Claimants' allegations of improper "collusion" between the Government and Plaintiffs fare no better. In even pressing their argument, Claimants apply a double standard. On

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

20 R-322, Borja Dep. Tr. (Mar. 15, 2011) at 24:22-25:9, 29:8-11, 77:20-78:3.

21 *See* Annex C.

22 R-471, *Chevron Paid $2.2 Million To Man Who Threatened To Expose Company's Corruption in Ecuador*, BCLC.

23 *See* Annex E.

the one hand, they flagrantly lobby public officials in the U.S. and Ecuador for support in their dispute against the Lago Agrio Plaintiffs. Yet on the other, they label as "collusive" any communications between the Government and the Lago Agrio Plaintiffs. And while Claimants applaud public officials who voice their support for Chevron, they complain bitterly when public officials offer words of support on behalf of their litigation adversary. Publicly-elected officials are free — and are expected — to comment on matters of public interest, even ongoing legal matters, and their decision to do so has never been found to constitute a violation of law. In any event, Claimants have not and cannot point to any act by any Government official that has actually affected the Lago Agrio proceedings in any way.

18. In this proceeding, Claimants repeat their carefully-selected nomenclature time and again — "ghostwriting," "bribery," "collusion" — apparently based on the myth that repeating something enough times will make it come true. In fact, the evidence does not match Claimants' salacious terminology.

The Legal Claims

19. Not only have Claimants failed to prove their *factual* conclusions, but each and every claim must fail for the additional and independent reason that Claimants have not satisfied the *legal* elements of their respective claims. **First**, this Tribunal does not have jurisdiction over Claimants' denial of justice claim. The logic and basis of the Tribunal's Third Interim Award cannot be extended to the denial of justice claim because if Claimants fail to establish their alleged rights under the Settlement and Release Agreements, then the object of the Lago Agrio proceedings cannot have been the Claimants' investment rights under the Settlement and Release Agreements.

20. **Second**, even if this Tribunal accepts jurisdiction over Claimants' denial of justice claim, Claimants have not met their obligation to exhaust local remedies. Both parties have agreed that "international law requires a claimant to exhaust its local remedies before claiming a denial of justice."[24] Claimants have failed to justify an exemption from this obligation here; certainly, re-fashioning their denial of justice claim as a violation of the Ecuador-U.S. BIT cannot provide Claimants with a viable alternative. The gravamen of Claimants' claims, however labeled, concerns the maladministration of justice. Accordingly, the exhaustion condition applies without regard to whether the claims are based directly on customary international law or on independent BIT obligations. **Third**, if this Tribunal finds that the release contained in the 1995 Settlement Agreement did not extend to third parties, all of Claimants' Treaty claims must fail because, as this Tribunal has already found, each claim derives from alleged rights contained in that Agreement. Claimants cannot rely upon the standards of protection set out in the Treaty to introduce rights they did not bargain for in the 1995 Settlement Agreement. **Fourth**, the Treaty standards invoked by Claimants do not afford them protection beyond that which they would receive under customary international law. Thus, if Claimants' cannot prove denial of justice, their so-called Treaty claims must fail as well.

Calculation of Damages

21. Even in the event of a finding of a Treaty breach or a breach of customary international law, Claimants are not entitled to the relief they seek. There is no basis in law or reason to grant an award that would have the effect of compensating a party beyond the injury it actually sustained. Rather, to determine damages actually sustained as a result of the alleged violation here, this Tribunal must determine the (1) amounts Chevron actually has paid to

[24] Claimants' Supplemental Merits Memorial ¶ 243.

Plaintiffs, and (2) then subtract from that amount Chevron's actual liability for its pollution, if any. Claimants cannot use this forum to cast aside its actual liability altogether. To do so would unjustly enrich Claimants, leaving them in a far better position as a result of the Republic's alleged violation(s) of international law than Claimants would be otherwise.

Organization of Counter-Memorial

22. This Counter-Memorial consists of more than 400 pages, inclusive of eight annexes. For ease of reference, the Counter-Memorial is divided as follows: Section II sets forth for the first time a chronology of Texaco's and Chevron's involvement in Ecuador since 1964. Among other things, we describe the condition of the land, air, and waters in the Oriente (Eastern) region of Ecuador before the 1964 Concession Agreement, and then describe the oil exploration and extraction practices employed by TexPet that forever changed the face of the region. We explain that in the years during which TexPet served as the Operator of the Consortium it adopted practices banned elsewhere in the world, including in Texaco's own State, and that these practices predictably and necessarily lead to devastating contamination of the soil and waters that just as predictably migrated from the original sources of pollution to populated areas. The Republic's experts, reviewing the evidence proffered to the Lago Agrio Court and substantial other evidence obtained through discovery actions in the United States, affirm the presence of contamination that has harmed and persists in harming the region's residents. Also in Section II, we demonstrate that Chevron itself engaged in a series of aggressive and deceptive tactics designed to delay the Lago Agrio Court proceedings, to set the stage to attack any adverse decision, and to skew the scientific data on which the Court would rely. For Chevron the trial posed a serious dilemma since any adverse result would encourage human rights groups across the globe to bring similar actions for relief against it. To address this challenge, Chevron

deployed substantial resources to manipulate the proceedings and, if necessary, set it up to be challenged outside of Ecuador.

23. Sections III, IV and V address Claimants' arbitral claims. Section III addresses Claimants' denial of justice, and Sections IV and V address Claimants' Treaty claims. Because Claimants rely on a laundry list of factual allegations in support of their arbitral claims, Respondent has grouped these allegations based on content, addressing them in full in lengthy annexes, while summarizing them briefly in Section III. Accordingly,

- Annex A addresses Claimants' allegations related to the Republic's judicial independence;
- Annex B addresses Claimants' allegations regarding the now dismissed criminal proceedings;
- Annex C addresses Claimants' allegations that Judge Nuñez was the subject of a bribery plot;
- Annex D addresses Claimants' allegation that the Plaintiffs "ghostwrote" the Lago Agrio Judgment;
- Annex E addresses Claimants' allegation that the expert reports of Dr. Calmbacher and Mr. Cabrera are tainted;
- Annex F addresses Claimants' allegations of "collusion"; and
- Annex G addresses Claimants' allegations of legal error.

These annexes are intended to serve as a ready resource for the Tribunal in analyzing the substantial body of evidence before it.

24. Sections VI and VII address Claimants' requests for relief.

25. As this Tribunal well understands, this arbitration raises serious issues of national sovereignty, constitutional separation of powers and international law, including among others the limits of a tribunal's arbitral competence under the BIT in question. The Republic respectfully requests that this Tribunal not only consider the parties' respective submissions, but

also carefully assess all of the evidence the parties have put forward. We remain concerned that Claimants' characterizations of this evidence and of its import are misleading and flawed, and that the casual acceptance of these characterizations in lieu of actual careful review of the underlying evidence itself — and that which surrounds it — will lead to profound injustice.

II. Factual Background

A. TexPet's Exploitation Of The Ecuadorian Amazon Left Behind Massive Environmental Devastation

1. Life In The Ecuadorian Amazon Prior To TexPet's Oil Activities

26. Before TexPet began its oil activity in the Oriente (East) region of the Ecuadorian Amazon, at least eight groups of indigenous peoples[25] lived there in harmony with the rainforest.[26]

27. Ecuador's Amazonian rainforest is a humid tropical region characterized by high temperatures (a minimum average of eighteen Celsius), heavy rainfall (at least 1.5 meters per year), and no dry season (most years soil is dry for fewer than three consecutive months).[27] This huge volume of water drains west to east[28] through countless streams and rivers to the major river in the area, the Rio Napo, and ultimately ends in the Rio Amazonas.[29] In this hot, wet environment vegetation was dense and diverse,[30] varying in type depending on how close it was

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25 R-472, Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849, 853 (1991) ("Ecuador's *Oriente* has a rich heritage of indigenous cultures, and is home to eight groups of indigenous people.").

26 *Id*. ("Indigenous peoples have lived in Amazonia for thousands of years in harmony with their rain forest environment.")

27 C-13, HBT Agra at 2-1.

28 *Id*. at 7-2.

29 *Id*. at 2-6; C-12, Fugro-McClelland Final Audit § 2-2.

30 R-473, JUDITH KIMERLING, AMAZON CRUDE 33 (1991) ("The rain forests of the Oriente are known and revered for their high levels of biological diversity and endemism … [and] 'is surely the richest biotic zone on Earth'").

to the river and the flood zone.[31] Further from the rivers, the jungle remained dense with tall trees and a closed canopy.[32] And in this thick jungle a huge and diverse population of fauna once lived. The environmental consulting firm of Fugro McClelland, retained by TexPet at the time of Texaco's departure from Ecuador, counted 100-300 species per hectare, depending on the area studied.[33] This was a higher species density than found in Asian rainforests, which at the time had been considered the most diverse forests in the world.[34] Indeed, "[u]pper Amazonia rainforests have the highest diversity of butterflies, amphibians, reptiles, birds, and mammals in the world," Fugro McClelland said at the time.[35]

28. Ecuador's indigenous peoples relied on the rainforest for their subsistence through hunting, gathering, and practicing sustainable agriculture.[36] The streams, rivers, and lakes of the rainforest also were inextricably linked with their daily lives because they relied on its waters, groundwater,[37] flora, and fauna for fishing, bathing, cooking, drinking,[38] washing clothes, and transportation.[39] In addition to nutritional and domestic purposes, indigenous peoples used the rainforest's elements in the preparation of traditional medicine.[40] Sustainable agriculture, called

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31 *See* C-12, Fugro-McClelland Final Audit §§ 2-2 – 2-3; *see also* C-13, HBT Agra at 2-4.*see also*

32 *See id.*

33 *Id*.

34 *Id*.

35 *Id*.

36 R-472, Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849, 854 (1991).

37 C-11, HBT Agra Draft at 8-2. *See* also *id*. at 5-11 ("The water table is encountered at approximately one to two meters depth in most areas of the fields.")

38 *Id*. at 5-11. ("Numerous shallow domestic water wells are used within the town and by rural residents." And while the depth to potable water varies, it is not deep; "most residential wells are hand dug.").

39 R-473, JUDITH KIMERLING, AMAZON CRUDE 37 (1991) ("Fish and wildlife are important sources of protein and calories, and communities depend on streams, rives, and lakes for fishing, gathering, drinking, cooking, bathing and transportation.").

40 *Id*. ("Recent studies have identified over 700 plant species that indigenous communities use for nutritional, medicinal, domestic, and religious purposes.").

"chacra" or "swidden agriculture,"[41] also contributed to indigenous groups' ability to survive in low density populations in the rainforest. According to various studies, the indigenous peoples of the Oriente used "slash and mulch" agriculture, which consisted of removing some underbrush from the forest — while preserving valuable trees — and planting crops in the resulting areas and then using the remaining woody species as a source for regeneration of the forests.[42] Experts praise the indigenous peoples' eco-friendly system as a "truly sustainable agriculture that is environmentally sound."[43]

2. History Of TexPet's Oil Operations In Ecuador

a. TexPet's Participation In The Consortium

29. Because the Republic did not have sufficient equipment, expertise, or "know how" to locate, drill for, produce, or transport crude oil to market, much less refine it into marketable products, the Republic granted concessions to the world's major Western oil companies to exploit the Concession acreage efficiently and cleanly. On March 5, 1964, the Republic granted an oil exploration and production concession (the "1964 Concession Agreement") to a consortium composed of wholly-owned Ecuadorian subsidiaries of Texaco,

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41 C-12, Fugro-McClelland Final Audit at 2-5.

42 *See* C-12, Fugro-McClelland Final Audit at 2-5. ("[It] is the traditional system used by the indigenous . . . and has sustained low-density settlement since before western contact. It is referred to as a 'slash and mulch' system in which valuable trees and palms are preserved when the forest is first cleared. After the short-cycle crops have been harvested, the perennial species continue to produce. The remaining woody species are sources of regeneration through residual saplings, sprouts from cut trees, germination of buried and/or wind borne seeds, and direct seeding or transplantation.")

43 *See* R-474, H. David Thurston, *Slash/Mulch Systems: Neglected Sustainable Tropical Agroecosystems* ("The principles guiding traditional slash/mulch systems around the world incorporate valuable lessons for those interested in a truly sustainable agriculture that is environmentally sound. . . . A study of the principles used in traditional and indigenous slash/mulch systems may provide important lessons for improving the sustainability and productivity of agriculture in developing countries.").

Inc. ("TexPet")[44] and Gulf Oil Corp. ("Gulf") (collectively, the "Consortium"), covering a large tract in the Oriente.[45]

30. These wholly-owned Ecuadorian subsidiaries were created exclusively to carry out their parents' business in Ecuador. Through the 1964 Concession Agreement TexPet and Gulf acquired exploration and production rights under the 1964 Concession, effective January 1, 1965. TexPet was formally designated as the Consortium "Operator,"[46] a position that it exercised until 1990. As Operator, "TexPet conducted the physical exploration and production activities."[47] Until TexPet withdrew as Operator in 1990, the Republic relied on its expertise to employ the appropriate technology and production methods as it was required to do both by contract (the 1964 Concession Agreement) and by Ecuadorian law.

31. In 1967, TexPet drilled the first of its more than 300 wells as Operator of the Consortium.[48] That well, along with all of the others, was drilled according to a Work Plan drafted by and endorsed by TexPet for approval by the Republic's Ministry of Energy and Mining. Due to Texaco's expertise, long time success in the industry, and reputation for compliance with environmental law in the United States, the Ministry generally relied on TexPet to recommend and conduct crude oil drilling and production pursuant to sound worldwide

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44 Strictly for convenience, except where the context otherwise requires, "TexPet" will ordinarily be used throughout to refer to the particular subsidiary of Texaco, Inc. that operated in Ecuador. Such usage is intended to be without prejudice to either Claimants' or Respondent's contentions as to the precise legal relationship among (i) Texaco, Inc., (ii) its Ecuadorian subsidiary, (iii) Chevron Corporation, and (iv) any or all of their respective related entities.

45 C-6, Concession Contract between the Government of Ecuador and Texas Petroleum Co. (Feb. 5, 1964).

46 R-6, Pérez Pallares Aff. (Feb. 25, 2005) ¶¶ 10, 14.

47 R-7, Defendants' Amended Motion to Dismiss Complaint or, in the Alternative, to Stay (May 25, 2006) at 3, filed in *Doe v. Texaco Inc.*, C 06-02820 (N.D. Cal.).

48 C-12, Fugro-McClelland Final Audit § 1-1.

oilfield practices.[49] In addition to its embodiment in Ecuadorian law, the requirement to protect the flora, fauna, and surrounding environment was set forth in general terms in the 1964 Concession Agreement.[50]

32. Limited commercial crude oil production from the Oriente region began in June 1972.[51] On August 6, 1973, the Republic signed a replacement concession agreement (the "1973 Concession Agreement") with TexPet and Gulf for a revised and geographically reduced concession area.[52] The 1973 Concession Agreement was mandated by the Hydrocarbons Law of 1973 because the original concessions granted to the foreign oil companies were too large and included non-productive land.[53] The 1973 Concession Agreement defined the geographic area for which Chevron was eventually held liable in the Lago Agrio Judgment.

33. Pursuant to the 1973 Concession Agreement, the State owned oil company, Corporación Estatal Petrolea Ecuatoriana ("CEPE"), later replaced by its successor, PetroEcuador (collectively, "PetroEcuador"), purchased a 25 percent equity share in the

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49 R-8, Sworn Statement of Luis Arturo Araujo (Jan. 26, 1996) ¶ 5 ("Texaco's duties included the complete control of the seismic exploration, exploitation, production, design, the excavation of the wells, the extraction of the petroleum, and all the other tasks necessary to exploit the petroleum which this company found in the Ecuadorian Amazon."); *id*. ¶¶ 11-12 (Since no one in the Ecuadorian Government "had sufficient knowledge to oppose or to judge the Texaco Company in reference to any issues pertaining to the petroleum industry," TexPet was "permitted . . . to introduce whatever technology it deemed adequate as environmental policy."); *id.* ¶ 14 (TexPet "never suggested to anybody in the government that the practices which they employed, and which resulted in the dumping of petroleum and other contaminants into the Amazon were practices which were not carried out in any other country."); *see also* R-9, Excerpts from Dep. of Edmundo Brown (Dec. 19, 2006) at 50:1-5, 50:17-51:7, taken in *Republic of Ecuador v. ChevronTexaco Corp*., Case No. 04 CV 8378 (LBS) (S.D.N.Y.) (CEPE had limited input into the work program and budget and "[t]he management of the operations was basically in the hands of Texaco"); *id*. at 53:8-13 ("Texaco as operator was responsible and had the technology, had the staff, had the entire control in its hands. . . . We in CEPE were spectators outside the operation.").

50 C-6, Concession Contract between the Government of Ecuador and TexPet (Feb. 21, 1964) at Tenth.

51 R-6, Pérez Pallares Aff. (Feb. 25, 2005) ¶ 35.

52 C-7, Agreement between the Government of Ecuador and Ecuadorian Gulf Oil Company and Texaco Petroleum Company (Aug. 6, 1973).

53 *See, e.g.*, Claimants' Merits Memorial ¶ 27.

Consortium in 1974.[54] The 1973 Concession Agreement also set the termination of the exploitation period as June 6, 1992.[55] TexPet's privileges and responsibilities as Operator continued uninterrupted.

34. When it could not convince TexPet to allow it to become the next Operator, Gulf decided to sell its remaining interest in the Consortium to PetroEcuador. On May 27, 1977, the Republic, PetroEcuador, and Gulf entered into a tripartite agreement whereby, effective December 31, 1976, Gulf sold its remaining interest in the Consortium to PetroEcuador for a negotiated fair market price.[56] After this sale, PetroEcuador held a 62.5 percent interest in the Consortium while TexPet retained the 37.5 percent balance.[57] TexPet, however, continued to serve as Operator because, as the parties both understood at the time, PetroEcuador did not yet possess the oilfield expertise needed by the Operator to design and carry out day-to-day oilfield operations; TexPet instead was required to teach PetroEcuador's management how to conduct oilfield operations so that it could eventually learn enough to succeed TexPet as Operator.[58] TexPet continued to serve as Operator until 1990.

35. In July 1990, TexPet withdrew as Operator and PetroEcuador assumed that duty.[59] On June 6, 1992, the 1973 Concession expired, the Consortium terminated, and "TexPet

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54 R-6, Pérez Pallares Aff. (Feb. 25, 2005) ¶ 35.

55 *Id.* ¶ 33; C-7, Agreement between the Government of Ecuador and TexPet and Gulf (Aug. 6, 1973) §§ 4.1, 52.1.

56 R-6, Pérez Pallares Aff. (Feb. 25, 2005) ¶ 39; C-8, Agreement among the Government of Ecuador, PetroEcuador and Gulf (May 27, 1977).

57 R-6, Pérez Pallares Aff. (Feb. 25, 2005). ¶¶ 36, 39; C-8, Agreement among the Government of Ecuador, PetroEcuador and Gulf (May 27, 1977).

58 R-428, Telex from Sawyer to Coral Gables (Nov. 12, 1984); R-429, Memorandum from Yates to De Crane (Dec. 13, 1984).

59 R-476, Letter from J. Donald Annett, President of Health and Safety Division of Texaco Inc. to S. Jacob Scherr, Director, International Program, of NRDC (Dec. 27, 1990) at 3.

ceased altogether to hold any rights or interests in the Napo Concession" and "has had no ownership interests in oilfield operations in Ecuador since 1992."[60]

b. TexPet As Operator

36. From the beginning of the 1964 Concession through 1990, TexPet served as oilfield Operator. Throughout almost the entire life of both Concessions, despite Gulf's efforts in 1977 and PetroEcuador's growing insistence in the late 1980s, TexPet held steadfastly to that Operator role.[61] In that capacity, TexPet served as the primary field operations decision-maker for the Concession and was primarily responsible for determining the method and manner of conducting drilling and exploitation operations, including: the disposition of drilling muds and other wastes, production water, site wastes such as sewage, crude spills, and crude that could not be produced and saved for sale or refining.[62]

37. As Chevron explained in 2006, as Operator, "Texpet conducted the physical exploration and production activities" from 1965 until 1990.[63] Throughout that time the Republic, whose economy was largely agrarian and technology deficient, depended entirely on TexPet's expertise to determine and implement sound drilling, oil extraction, oilfield management and transport methods.[64] While the Republic's Ministry of Mining and Energy was charged with certain accounting and auditing responsibilities and had to approve the Operator's

60 R-6, Pérez Pallares Aff. (Feb. 25, 2005) ¶¶ 49, 50.

61 R-428, Telex from Sawyer to Coral Gables (Nov. 12, 1984); R-429, Memorandum from E. Yates to A. De Crane, Jr. (Dec. 13, 1984).

62 R-8, Sworn Statement of Luis Arturo Araujo (Jan. 26, 1996) ¶¶ 5, 11-12, 14.

63 R-7, Defendants' Amended Motion to Dismiss Complaint or, in the Alternative, to Stay (May 25, 2006) at 3, filed in *Doe v. Texaco Inc.*, C 06-02820 (N.D. Cal.).

64 R-9, Excerpts from Deposition of Edmundo Brown (Dec. 19, 2006) at 50:1-5, 50:17-51:7; 53:8-13.

proposed annual drilling budgets and Work Plans, in practice the Republic's regulatory authorities left to the Operator all day-to-day oilfield decisions.[65]

38. Throughout the 1980s, TexPet made clear that it wished to remain in its role as Operator.[66] Only in 1990 did a subsidiary of PetroEcuador finally assume the role of Operator. After relinquishing Operator status, TexPet continued to serve as PetroEcuador's equity partner in the Consortium for the remaining two years of the 1973 Concession.

c. TexPet's Drilling Practices In Ecuador

39. To minimize production costs, the equipment and methodologies TexPet employed in the Oriente were rudimentary and inferior to those which its parents and other Texaco affiliates used in the United States and elsewhere around the world. To understand the cost-saving decisions TexPet implemented, at the expense of the Oriente's environment and inhabitants, it is important to understand the oil exploration and production process and TexPet's methodologies in particular.

40. Much of the description of TexPet's historical oil production techniques comes from the various audit reports prepared prior to the 1995 Settlement Agreement and the reports

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65 Owen Anderson, a consultant retained by Chevron, confirmed on February 23, 2005, that the "operator's duties include the management of day-to-day operations." R-421, Owen L. Anderson Aff. (Feb. 23, 2005) ¶ 26. Chevron cites to the deposition of Robert M. Bischoff as proof to the contrary, that the Republic controlled the Consortium's operational decisions despite the fact that TexPet was designated as the Operator. Claimants' Merits Memorial ¶ 31 n. 67. But while Mr. Bischoff stated that the "Ecuadorian government had inspectors on all sites," those inspectors were empowered to provide only advice, "not instructions or not directions." C-419, Dep. of Robert M. Bischoff at 59:22-23. Moreover, he could remember no instances where those inspectors actually advised TexPet to do anything or where TexPet incurred any additional costs responding to the inspectors' advice. *Id*. at 57, 62-63.

66 R-432, Letter to Bates (Feb. 22, 1983) (wherein Texaco's representatives in Ecuador reported to U.S. management that they were proceeding with the strategy required to prevent CEPE [PetroEcuador] from becoming operator of the Consortium.). Indeed, Texaco "very strongly opposed" PetroEcuador's attempts to assume the role of Operator because it felt that it was necessary to remain as Operator in order to achieve its goals of "maximiz[ing] earnings and cash flow." *Id.* at CA2059326, CA2059327; R-433, May 27, 1988 letter from Sawyer to Black at CA2059385. *See also* R-435, O. Anderson Dep. Tr. at 65:7-10 ("it wouldn't be unreasonable for a company . . . to want to remain an operator in almost any circumstance"); *id*. at 66:16-18 ("you would probably find that all the companies would prefer to be the operator"); R-436, Sawyer Dep. Tr. at 51-54, 131-35-166-68, 216-218 (Texaco wanted to remain operator in the 1980s to protect its investment in the region).

of various experts submitted in the Lago Agrio Litigation. In addition, Respondent has obtained documentary and some deposition discovery from Chevron and certain of its environmental experts via litigation in the United States, including the AAA Stay Action and actions under 28 U.S.C §1782. This documentation includes the results of some pre-judicial inspection or pre-inspection ("PI") studies conducted by TexPet's experts and consultants. Together, the accumulation of these documents paint a rather detailed picture of TexPet's oilfield practices in the Oriente, which will be discussed below.

i. Exploration

41. After oil had been discovered in the Oriente but before commercial exploitation could begin, TexPet first had to identify the boundaries of the various oil fields. To begin, TexPet identified general locations in which it believed oil would be found and chose sites based on local geography and aerial photography.[67] Once TexPet identified a likely site, it ordinarily thereafter conducted seismic analyses, which included dropping explosives into shallow holes (less than thirty meters) drilled in the ground.[68] Detonation of the explosives produced shock waves, which were recorded and allowed the engineers to develop a seismic map of the underground formations.[69] Once TexPet developed a general map of the rock formations and identified promising formations, it then drilled "exploratory well[s]" to confirm the presence of a reservoir of extractable oil in sufficient quantities for commercial use.[70] Drilling an exploratory well took one to two months and required crews of approximately 80-120 people and large

67 C-12, Fugro-McClelland Final Audit at 2-1.

68 RE-10, LBG Expert Rpt. § 2.1; R-847, Bischoff Resp re Latin American Exploration (1980).

69 C-12, Fugro-McClelland Final Audit at 2-1.

70 *Id.*

numbers of vehicles and heavy equipment.[71] For example, the mobile rigs used for drilling the exploratory wells — and later the production wells — weighed upwards of two million pounds.[72]

42. To drill the exploratory wells and later the production wells, TexPet generally cut roads through the rainforest on which it could transport its heavy equipment. Although it used helicopters to transport some equipment, use of air transport continued only until the roads had been cut.[73] At each drilling site, TexPet clear cut at least three hectares of rainforest in which it would drill, dig pits, and build the other infrastructure it deemed necessary.[74] In addition to the area cleared for the drill site, TexPet routinely cleared two to ten hectares to accommodate landing strips for its aircraft.[75] Thus, even Texaco admits that TexPet's Oriente oilfield operations resulted in its clearing approximately 5,000 hectares of rainforest to make room for, among other things, its wells, roads, camps, lateral pipelines, flow lines, and production stations.[76]

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71 *Id.*; R-483, Center for Health and the Global Environment, Harvard Medical School, *Oil: A Life Cycle Analysis of its Health and Environmental Impacts* (eds. Paul R. Epstein and Jesse Selber March 2002) at 9.

72 R-483, Center for Health and the Global Environment, Harvard Medical School, *Oil: A Life Cycle Analysis of its Health and Environmental Impacts* (eds. Paul R. Epstein and Jesse Selber March 2002) at 9.

73 C-12, Fugro-McClelland Final Audit at 3-2.

74 R-484, Carlos A. Quiroz, Responses to Specific Charges (Nov. 20, 1990) at CA1108537 (according to Chevron, "Total deforested area for each well, including pits and approaches, should be around 3 hectares and not 5 as stated above [by the National Resource Defense Council]."). Based on documentary evidence, the Republic understands that Texaco conducted an internal investigation of its practices in Ecuador and prepared numerous documents to respond to allegations of extensive environmental contamination put forth by the U.S.-based environmental organization National Resources Defense Counsel (NRDC). In responding to the NRDC's allegations, Texaco included information that confirms certain aspects of its impact on the Oriente ecosystem and its residents. *See* R-500, NRDC's Environmental Allegations.

75 C-12, Fugro-McClelland Final Audit § 5-3.

76 R-485, Texaco Petroleum Company, Environmental Protection – Ecuador's Operations (May 11, 1990) at CA1108129.

43. Because oil exploration and extraction require large amounts of water, these well sites were almost always sited directly next to rivers and streams.[77] TexPet would then set up its drilling rig and dig its first disposal pits at the site.

ii. Production

44. At all of its well sites in Ecuador, TexPet used unlined earthen waste pits, which varied in depth. Due to the high water table and the high annual rainfall, many of these pits were likely partly filled with groundwater before any production wastes were dumped in them.

45. TexPet then dumped all of the waste products generated from drilling, production, and separation of crude oil — in the range of 60,000-300,000 gallons of waste per day[78] — into those unlined pits.[79] At first this material would have largely consisted of rock, dirt, and water as the drill passed through regional aquifers. To extract all of this material out of the borehole, engineers would pump a heavy drilling mud (containing heavier metal compounds to give it weight) down into the hole. The weight of the drilling mud forced all of the other material — rock, dirt, and water — up and out of the bore hole. In Ecuador, TexPet primarily used a drilling mud made from barium sulfate, chromium, lead, petroleum compounds, acids, and various other chemical additives.[80] Of particular note, though, this drilling mud also contained large quantities of Chromium VI,[81] an element that does not occur naturally in the region. TexPet dumped all of

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77 R-483, Center for Health and the Global Environment, Harvard Medical School, *Oil: A Life Cycle Analysis of its Health and Environmental Impacts* (eds. Paul R. Epstein and Jesse Selber March 2002) at 10.

78 *Id.* at 9.

79 Claimants' Merits Memorial ¶ 40.

80 RE-10, LBG Expert Report Annex 1 3.1.2.; R-487, "Characterization of Oil and Gas Waste Disposal Practices and Assessment of Treatment Costs," Final Report (Jan. 16, 1995), prepared for the U.S. Department of Energy under Contract DE-AC22-92-MT92007 by P.B. Bedient, Rice University at 14.

81 Chromium VI "is a well-established carcinogen associated with lung, nasal, and sinus cancer." R-488, CDC - Hexavalent Chromium.

the material that came out of the borehole, including the drilling mud, in the earthen pit next to the well.

46. Below the aquifers, at between 2,900 and 3,100 meters, the average depth of oil in the Oriente,[82] the drill would encounter an oil zone. Once the drill hit oil, TexPet would ready the well for production, a process that involved pumping oil and production water out of the well to "prime the pump." TexPet dumped all of this oil and production water into the waste pit on top of everything else.

47. Chevron has admitted that TexPet dumped three million gallons of formation water daily into these waste pits.[83] Because none of those pits was lined, the toxic chemicals freely leached into the ground around and below each pit. In fact, Texaco's own investigators concluded in 1990 that "the use of pits to remove oil from produced water cannot be considered 'good practice'" for the following reasons:

> The first is that they do not permit clean and efficient recovery of the separated oil. The second is that by covering the pits with a layer of oil, in most cases no more than one inch thick, cooling of the water is retarded, and in fact may actually be causing solar heating of the water. Oxygen exchange is also retarded, causing the water to go anerobic and generate hydrogen sulfide which in turn reacts with soil iron and dissolved iron to produce the black hydrogen sulfide deposits in the discharge. Thirdly, the pits have a negative visual impact and require more land clearing than modern tank separators. In the fourth place, the saline produced water may percolate through the pit beds into the groundwater.[84]

48. According to Texaco's own internal investigation, it would be possible to determine any impact by increased salinity only "by drilling sampling wells upgradient and

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82 C-13, HBT Agra at 2-2.

83 R-484, Carlos A. Quiroz, Responses to Specific Charges (Nov. 20, 1990) at CA1108533.

84 R-489, Memo from U.V. Henderson, et al. to W.C. Benton re "Environmental Assessment-Consortium Operations in Ecuador" (Nov. 14, 1990) at CA1108510-11.

downgradient from the pits."[85] However, the Republic is not aware of any evidence that Texaco actually conducted such testing. Nonetheless, Texaco's investigators recommended that the pits be replaced by steel skin tanks and that "[i]f the salinity or hydrocarbon content of the discharged produced water substantially impacts the quality of the receiving water, produced water should be injected into underground formations . . . [that] should not impact potential drinking water sources."[86]

49. To deal with the groundwater and rainfall infiltrating its waste pits, TexPet installed drains in the sides of its pits — essentially horizontally installed "gooseneck" pipes designed to drain excess liquid accumulations through the sides of the pits into the surrounding rainforest or directly into the nearest surface water (generally a stream).[87] During drilling and extraction, TexPet released millions of gallons of production water — extremely saltine and toxic water contained in the oil formations — directly into the surrounding forest and streams.[88]

50. It was commonplace that during the rainy season liquids from these pits would overwhelm the drains, directly overflow the pit walls, and spill the oil floating on top directly into the nearby rainforest and streams.[89]

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85 *Id*. at CA1108511.

86 *Id*. at CA1108514.

87 C-13, HBT Agra at 6-15, 6-25; RE-10, LBG Expert Report Annex 1 § 3.1.2.

88 *See* R-89, Martha M. Hamilton, *How 60 Minutes Missed on Chevron*, COLUMBIA JOURNALISM REVIEW (Apr. 14, 2010) at 4 (noting that Chevron claimed that "production water was only released or discharged 'when it is safe to do so.'").

89 C-13, HBT Agra at 5-14; [redacted] Because oil floats on water, the first wastes to flow out when pits overflowed was the oil collected in the pits. [redacted]

51. During the time TexPet dug and used unlined pits in the rainforest of Ecuador, the use of unlined, earthen pits had been banned at similar locations throughout the U.S. For example, by 1939 Louisiana had already explicitly outlawed unlined earthen pits in high rainfall regions where the water table was near the surface. As a result, in Louisiana, Texaco was required to, and did, line its waste pits. Texaco dug thousands of pits in Louisiana; each was lined.

52. After the well was in normal production mode, TexPet would pack up its drilling equipment and move on to the next well. In its effort to exploit the Oriente's oil, from 1967 onwards, TexPet drilled more than 300 wells, the majority completed between 1970 and 1979.[90] Records show that all of these wells were developed using the same basic methodology as outlined above.

iii. Transport

53. To transport the drilled oil to the coast, where it could be refined and used within Ecuador or shipped abroad, TexPet contracted with construction company "Williams Brothers" to build the trans-Ecuadorian pipeline.[91] The pipeline is 503 kilometers long and reaches 4,060 meters at its highest point.[92] TexPet also built a road alongside the pipeline, running approximately 200 kilometers.[93] According to Texaco, construction began in August 1970[94] and both the pipeline and the road were built "in a record time of 20 months."[95] The first barrel of

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90 C-13, HBT Agra at 3-2, 6-6; *id*. at Table 3-1.

91 R-485, Texaco Petroleum Company, Environmental Protection – Ecuador's Operations (May 11, 1990) at CA1108128.

92 *Id*.

93 *Id*.

94 R-492, D.R. King and C.A. Quiroz, The Trans-Ecuadorean Pipeline (1986) at CA1108140.

95 R-485, Texaco Petroleum Company, Environmental Protection – Ecuador's Operations (May 11, 1990) at CA1108128.

crude was pumped into the pipeline on May 15, 1972 and arrived at the coast terminal on June 25, 1972.[96]

54. The pipeline was operated by TexPet from June 1, 1972 until September 30, 1989.[97] TexPet thus bears responsibility for the more than 300,000 barrels of oil it admits spilled or leaked from the pipeline during that period of time.[98]

55. TexPet was responsible for numerous crude oil spills. It used its status as Operator and its control over day-to-day operations to limit its reporting, and thus the Republic's knowledge, of oil spills. In an internal memo from R.C. Shields, the Chairman of the Board of Texaco, to Mr. M. E. Crawford, the Acting Manager in Ecuador, the Chairman specifically ordered its field and division offices to report only "major" oil spill events, which he defined as "one which attracts the attention of press and/or regulatory authorities or in your judgment merits reporting."[99] The memo also instructed TexPet's local offices to destroy existing documentation of oil spills and to stop any further record keeping related to oil spills.[100]

56. Despite this explicit evidence that Texaco covered up oil spills, Texaco still maintains that it "documented fully all oil spills which occurred during the period in which it operated the trans-Ecuadorian pipeline (1972 to September 30, 1989) and the Producing Operations (1972 to June 30, 1990)."[101] But even Texaco's own investigators concluded that

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96 R-492, D.R. King and C.A. Quiroz, The Trans-Ecuadorean Pipeline (1986) at CA1108141.

97 *Id*. at CA1108145.

98 *See, e.g.*, *id*. at CA1108149.

99 R-201, Texaco's internal letter CGE-398/72 from R. M. Bischoff to M. E. Crawford, Reporting of Environmental Incidents New Instructions (July 17, 1972).

100 *Id*.

101 R-493, Questions on Texaco's Environmental and Other Operations (Oct. 24, 1990) at CA1108461.

they "did not perceive that the cleanup of spilled oil had a very high priority with operations personnel."[102]

d. Standard Of Environmental Protection Required Of TexPet During Its Operations

57. At all relevant times during its operations in Ecuador, TexPet was of course required to comply with Ecuador's laws and regulations and international oil industry practice, the latter of which was developed in part by Texaco itself. In fact, Texaco had assured that it complied with each while in Ecuador.[103] When TexPet left the country, Texaco's President of Health and Safety Division assured the National Resources Defense Council ("NRDC") that it had always been "careful to comply with the laws of Ecuador, oil industry standards of 'good practice,' and Texaco's own Guiding Principles and Objectives, which confirm the company's concern for the environment in which it operates."[104]

i. Applicable Ecuadorian Laws And Regulation

58. A blanket prohibition on contaminating the environment existed in Ecuador as far back as 1921, when the Hydrocarbons Deposits Law granted concession holders the "[r]ight of use, for purposes or commercial use, and in the necessary quantity, lands, waters" only if they did not "depriv[e] them of their qualities of potability and purity and without affecting fishing."[105]

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102 R-489, Memo from U.V. Henderson, et al. to W.C. Benton re "Environmental Assessment-Consortium Operations in Ecuador" (Nov. 14, 1990) at CA1108513.

103 R-493, Questions on Texaco's Environmental and Other Operations (Oct. 24, 1990) at CA1108460 ("Texaco has complied with international practices, "Texaco" and Ecuadorean regulations. The latter have not been well specified to this time."); R-476, Letter from J. Donald Annett, President of Health and Safety Division of Texaco Inc. to S. Jacob Scherr, Director, International Program, of NRDC (Dec. 27, 1990) at CA1108568 ("[W]e do not ignore or circumvent either the spirit or the letter of the laws of the countries in which we operate.").

104 R-476, Letter from J. Donald Annett, President of Health and Safety Division of Texaco Inc. to S. Jacob Scherr, Director, International Program, of NRDC (Dec. 27, 1990) at CA1108568.

105 RLA-308, Hydrocarbons Deposits Law, Official Register No. 332, Oct. 21, 1921

59. Additional environmental regulations entered into force in Ecuador in September 1971, well before the vast majority of TexPet's wells were drilled. The Hydrocarbon Law Decree No. 1459 required TexPet "[t]o adopt all necessary measures for the protection of the flora, fauna, and other natural resources" and "to prevent pollution of the water, the atmosphere, and the land."[106] Hydrocarbon Law, Decree 101 of August 1982 required the operator to conduct petroleum activities "in accordance with international practices in these matters." Although specific numerical standards were not promulgated into regulations in Ecuador until later in TexPet's tenure as Operator, TexPet's environmental protection obligations were clear from at least as early as 1976. Indeed, when numerical standards were implemented, they were simply enacted as the practical result of the 1976 law requiring oil concessionaires to protect the environment.[107] Ecuador's environmental laws from 1971 until the present are set forth below.[108]

Date	Decree	Requirements
Oct. 1921	Hydrocarbons Deposits Law	Concession holders had the "[r]ight of use, for purposes or commercial use, and in the necessary quantity, lands, waters, . . . without depriving them of their qualities of potability and purity and without affecting fishing."[109]
Sept. 27, 1971 – Aug. 4, 1973	Decree No. 1459	Operator required to "take all necessary actions for the protection of the flora, fauna, and other natural resources;" and "to prevent water, atmosphere, and land pollution."[110]

106 C-13, HBT Agra at § 4-5, table 4-2.

107 *See, e.g.*, C-12, Fugro-McClelland Final Audit at 3-1 ("These regulations [Discharge requirements and Water quality standards] are supported by the 1976 law which prohibits the discharge of waste and pollutants that were dangerous to the environment and human health."); *id.* at 4-1; *see also* R-484, Carlos A. Quiroz, Responses to Specific Charges (Nov. 20, 1990) at CA1108535 (declaring false the NRDC allegation that "Oriente's oil industry has operated for 20 years with virtually no environmental and public health controls" because "Ecuador is a country with environmental and public health controls deriving from its constitutions.")

108 *See, e.g.* C-13, HBT Agra at table 4-2.

109 RLA-308, Hydrocarbons Deposits Law, Official Register No. 332, Oct. 21, 1921.

110 C-411, Hydrocarbons Law, Decree No. 1459, Sept. 27, 1971, Official Registry No. 322, Oct. 1, 1971§ 29(s)-(t).

Aug. 4, 1973-Apr. 10, 1974	Decree No. 925	Operator required to "adopt appropriate measures for the protection of plant and animal life and other natural resources" and to "avoid contamination of waters, the atmosphere and land."[111]
Apr. 11, 1974 to May 27, 1976	ORD No. 530	Operator required to "prevent the escape and loss of hydrocarbons so as to avoid losses, damages and contamination."[112]
May 22, 1976 to Nov. 6, 1978	Decree No. 374	The following measures related to prevention and control of pollution: "Releasing or discharging contaminants into the atmosphere without following the technical norms and regulations that, in the judgment of the Ministry of Health, may be harmful or constitute a nuisance to human health and life, the flora or fauna and the property or resources of the state or of individuals, is prohibited." [113] "Discharging wastewater that contains contaminants that are harmful to human health, fauna, flora and property into the sewer system, or into streams, irrigation channels, rivers, natural or artificial lakes, or into maritime waters, as well as infiltration into the earth, is prohibited without following the corresponding technical norms and regulations."[114] "Discharging any type of contaminant that might alter the quality of the ground and affect human health, flora, fauna, natural resources and other property without complying with the corresponding technical norms and regulations is prohibited."[115]
Aug. 19, 1982 to Jun. 6, 1983	Decree No. 101	"Conduct oil operations pursuant to the Law and Regulations on Environmental Preservation as well as for the country security, and in relation with the

111 C-416, Supreme Decree No. 925, Aug. 4, 1973, published in Official Registry No. 370, Aug. 16, 1973, cl. 46.1.

112 C-1498, Regulations For the Exploration and Exploitation of Hydrocarbons of 1974, Official Registry No. 530, April 9, 1974, art. 20(b).

113 C-1499, Environmental Contamination Prevention and Control Act, Decree No. 374, Official Registry No. 97, May 31, 1976, chapter V, art. 11.

114 *Id*. at chapter VI, art. 16.

115 *Id*. at chapter VII, art. 20.

		international practices as to preservation of [the environment]"[116]
Jun. 6, 1983 to Jun. 5, 1989	Law of Hydrocarbons No. 1775	"Perform all of the services which are the object of the contract, according to the best international practices and techniques generally accepted in the hydrocarbon industry. These services must be performed preserving in the environment without damaging public or private property. For the pollution caused by the contractor's operations, the latter must perform the corresponding decontamination works notwithstanding his responsibilities to third parties and the corresponding authorities." "Contractor will adopt the measures necessary for protecting the flora, fauna and other natural resources and, at the same time, will avoid polluting air, water and soil as per the respective legal provisions and international agreement."[117]

60. These laws reflect a blanket prohibition on pollution with which TexPet was required — both by the laws themselves and by its concession agreements — to comply.[118] The lack of numerical standards in Ecuadorian law in the early years of the concession period for determining when such pollution exists did not permit TexPet to ignore the law's prohibition on polluting the environment.[119]

ii. International Oil Industry Practice

61. The standard of care employed by the oil industry worldwide — including the best practices of Ecuador — is shown by (1) the guidance and best practices the industry itself put forth at the time and (2) the laws and regulations they were required to meet outside of Ecuador.

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116 C-1546, Law 101, published in Official Gazette No. 306, Aug. 13, 1982, Amendment to the Hydrocarbons Law of 1971 at cl. t.

117 *See* C-13, HBT Agra at 4-7 (citing the Law of Hydrocabrons No. 1775 (Jun. 6, 1983) at cl. 204 and 33, respectively).

118 C-931, Lago Agrio Judgment at 60-74.

119 *Id.*

62. **First**, Texaco, Chevron, and the rest of the international oil industry published numerous documents describing conduct considered "best practices" at the time. These documents covered almost all aspects of oil exploration, exploitation, and transport. Of import here are documents covering production water, use of unlined pits, oil spills, flaring of natural gas, and disposal of drilling muds.

63. In 1962, the American Petroleum Institute ("API") published the second edition of "Principles of Oil and Gas Production," which was at least partially authored by a Texaco engineer.[120] In the chapter titled "Special Problems," the authors note that the management and disposal of produced water requires extreme caution, not only due to the possible damage to the agriculture, but also to the possibility of polluting lakes and rivers that provide water for human consumption as well as for irrigation.[121]

64. In recognition of the dangers of produced water, by 1972 Texaco's engineers had designed a system for reinjecting produced water back into the ground. In their patent application for their improvement on the already existing technology, Texaco stated that disposing of produced water "on or near the surface of the earth might cause considerable pollution problems. In addition, treatment of the stream so that they may be discharged legally and safely into streams or waterways is at times prohibitively expensive."[122] Despite its parent company owning the technology to reinject the produced water, TexPet neither reinjected nor treated produced water before releasing it into the jungle.[123]

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120 R-684, API, Principles of Oil and Gas Production (2d ed) (1962).

121 *Id.*

122 R-529, U.S. Patent Number 3,817,859 (June 18, 1974).

123 C-12, Fugro-McClelland Final Audit at E-2.

65. These concerns drove laws throughout the world; both Ecuador and many U.S. states required companies to protect freshwater during disposal of produced water.[124] For example, Louisiana Order 29-A stated that "[n]o salt water shall be allowed to run into the natural drainage channels of the area."[125] Similarly, in Texas, disposal of produced water in natural drainage was illegal and the recommended disposal method for produced water was reinjection.[126] Even the API — the standard bearer of the oil industry — had recommended reinjection of production water from at least as early as 1962.[127]

66. An understanding of the toxicity of the wastes from oil production also drove laws banning the use of unlined earthen pits except for emergency storage of wastes.[128] As another of Texaco's engineers wrote in 1962, in dry climates — which the rainforest is decidedly not — produced water may be frequently located in huge pits that allow its evaporation. Depending on the surface and subsoil conditions, this method may be harmful due to possible leaking to nearby sources of fresh water, pastures and agricultural lands.[129] Indeed, in 1939 unlined earthen pits like TexPet used in Ecuador were banned in Texas,[130] and by 1969 Texas had virtually eliminated all disposal of produced water in unlined pits.[131] And in Louisiana, where the pits are generally wet as in Ecuador, unlined earthen pits were effectively banned.[132]

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124 *See, e.g.*, RE-10, LBG Expert Rpt. § 2.2.7.

125 R-498, Louisiana Order No. 29-A (May 1942).

126 RE-10, LBG Expert Rpt. § 2.2.7.

127 *Id.* § 2.2.8.

128 *Id.* § 2.2.7.

129 R-684, API, *Principles of Oil and Gas Production* (2d ed) (1962).

130 RE-10, LBG Expert Rpt. § 2.2.7.

131 *Id.*

132 *Id.*

67. **Second**, while Ecuadorian law included blanket prohibitions on environmental contamination but did not yet provide quantitative regulations specifying *exactly how* oil companies were required to comply, countries such as the United States had already moved to specific regulations. Texaco, which of course was based on the United States and operated throughout the country, satisfied these specific requirements in its own country, showing without a doubt that it had the technical capacity to do so when it chose to comply with anti-contamination requirements.

3. Condition Of the Oriente Environment When TexPet Withdrew As Operator

68. Texaco left Ecuador in 1992 amidst growing international pressure for it to clean up the damage it had done to the Oriente.

69. In response to this criticism and as part of its agreement to transfer control of the oil production facilities from TexPet to PetroEcuador, the Government required that TexPet co-fund an environmental audit to determine the state of affairs.[133] In 1992, TexPet and PetroEcuador jointly retained the consulting firm of HBT Agra to perform this joint audit;[134] TexPet also commissioned its own, separate "audit the auditor" report from Fugro McClelland.[135] Both of these audits found that TexPet's operations were based on an oil extraction system with minimal to no environmental safeguards.

70. HBT Agra's joint evaluation found widespread contamination: "Oilfield development and production activities have caused contamination of soil and water at locations

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133 *See* R-176, Contract of Environmental Investigation Services for Oil Fields of the CEPE-Texaco Consortium among PetroEcuador, Texaco Petroleum Company, and HBT-Agra Limited (May 1992); *see also*, R-500, NRDC's Environmental Allegations at CA1108125.

134 R-176, Contract of Environmental Investigation Services for Oil Fields of the CEPE-Texaco Consortium among PetroEcuador, Texaco Petroleum Company, and HBT-Agra Limited (May 1992).

135 C-12, Fugro-McClelland Final Audit at E-1.

throughout the concession. Contamination of soil and water was observed at well sites, production stations along roadways, flowlines and secondary pipelines."[136]

71. Fugro McClelland's report to TexPet came to the same conclusion: "The audit identified hydrocarbon contamination requiring remediation at all production facilities and a majority of the drill sites. . . . Various degrees of crude oil contamination existed on many of the well sites audited."[137]

72. In contrast to Chevron's representations, HBT Agra found numerous compliance issues related to Ecuadorian Law. As summarized in the table below, HBT Agra found that, as a result of oil field development and operations, Texaco had contaminated soil, water, and air in a variety of ways.

Issue Identified from Laws and Regulations	Potential Contaminant Source
Contamination of Soil	- Oil/brine spills from wellheads, flowlines, pipelines - Dams and drains of tank basins - Disposal of tank bottoms - Disposal of chemicals and containers - Seepage from pits
Contamination of Water	- Oil/brine spills from wellheads, flowlines, pipelines - Dams and drains of tank basins - Disposal of tank bottoms - Wastes Disposal - Disposal of chemicals and containers - Overflow and seepage from pits - Disposal of produced water
Contamination of Air	- Disposal of oily wastes - Incineration of miscellaneous wastes - Use/disposal of produced gas

73. During its 1993 investigation, HBT Agra assessed 126 open or closed pits. Of those pits visited, seventy-six, or 60 percent, were found to have oily waste migrating from

136 C-13, HBT Agra at 6-13.

137 C-12, Fugro-McClelland Final Audit at E-1 – E-2.

them.[138] In the open pits the oil was estimated to be between five cm and one meter thick.[139] In addition to the migration of oily waste, sixty-nine pits showed evidence of seepage. To determine seepage HBT Agra looked for "oily soil at covered pits, evidence of lateral migration of contaminants and oily discharge from siphons."[140]

74. At all of the production stations, "produced water is disposed of through a waste stream into the surrounding area."[141] Specifically, produced water was stored in open, unlined pits adjacent to each of the wells.[142] Periodically, TexPet engineers would skim oil off the surface and redirect it for reprocessing. The remaining "produced water is discharged into a local creek or river or in some instances directly into the jungle."[143] As Fugro McClelland observed, "[a]ll produced water from the production facilities [was] eventually discharged to creeks and streams except for one facility which used a percolation pit."[144] And "[n]one of the discharges were [sic] registered with the" Ecuadorian authorities.[145] Because the discharges were kept secret, the Ecuadorian authorities "did not establish sampling points and water quality standards to determine regulatory compliance."[146] Produced water was not generally tested before discharge.[147]

75. Not only did the waste water streams include highly saline production water, but the facilities were designed to divert all forms of liquid waste into nearby streams including

138 C-13, HBT Agra at 6-15.

139 *Id.*

140 *Id.*

141 C-13, HBT Agra at 5-9; *see also* C-11, HBT Agra Draft at 5-9.

142 *Id.* at 5-14.

143 *Id.* at 5-14.

144 C-12, Fugro-McClelland Final Audit at E-2.

145 *Id.*

146 *Id.*

147 C-13, HBT Agra at 5-14.

"sewage, wash water from the laundry and car wash, runoff from the process area, surface drains and floor drains."[148] As HBT noted, these waste streams "were similar prior to 1990."[149] As an example of the changeover that occurred when PetroEcuador took over in 1992, PetroEcuador began to treat sewage generated at the Lago Agrio production facility. In contrast, during the entirety of TexPet's period of control "sewage was released on land or stored in pits that emptied into the local river."[150] Similarly, at the Shushufindi production facility, sewage was held in a septic tank that discharged directly into a river.[151] At Auca, "the sewage stream is designed so that it flows into a cistern and then is released into the jungle. The sewage effluent is not analyzed before release."[152] TexPet simply did not have any waste reduction or pollution prevention plans in place during the entirety of its tenure as Operator.[153]

76. TexPet had never monitored its disposal of wastes for potential environmental impact. As HBT Agra concluded when it assessed the concession in 1993, "[n]o groundwater monitoring program was in place prior to 1990 *at any of the stations.*"[154] When engineers began to monitor water in 1990 at Shushufindi, they found "that surface and subsurface contamination [was] present."[155]

77. Although much focus was placed on the pits TexPet had filled with oil, drilling mud, and production water waste from development and operation of the wells, TexPet also buried untold quantities of other wastes. For instance, "waste oils including lubrication,

148 C-13, HBT Agra at 5-10; C-11, HBT Agra Draft at 5-10.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id* at 5-10 – 11.

153 *See id.* at 5-12.

154 *Id.* at 5-11 (emphasis added).

155 *Id.*

hydraulic, generator and cutting oils [were] placed in drums and buried at Shushufindi."[156] At Shushufinidi, prior to 1990, "all non organic waste was buried with no prior testing."[157]

78. Similarly, all methane (a normal byproduct of decomposing oil wastes) not used for power generation at the station was vented or burned through flares directly into the environment.[158] And as HBT Agra noted, "[n]o monitoring systems are in place or used to test the flare stack emissions or emissions from the incinerator stack."[159]

79. Of particular note, HBT Agra found that in 1990 TexPet had not developed any spill prevention methods,[160] even though it was common practice in other places Texaco operated.[161] Indeed, as mentioned earlier, TexPet management had adopted a policy of purposeful underreporting and hiding of spills.[162]

80. When HBT Agra performed its audit in 1993 it was able to identify numerous spills,[163] including spills at 158 of 163 assessed sites, or 97 percent of the sites assessed.[164]

81. Throughout the oil production system designed and created by TexPet, numerous tanks were used for temporary storage or separation. As oil and other compounds were extracted, the heaviest of the materials precipitated out of the liquid and fell to the bottom of these tanks. That material, including heavy hydrocarbons, solids, sands, and emulsions, was

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156 C-13, HBT Agra at 5-12.

157 *Id*. at 5-12.

158 C-13, HBT Agra at 5-9 – 10; *see id.* at 5-13; *see also* C-11, HBT Agra Draft at 5-9-5-10.

159 C-13, HBT Agra at 5-10; *see also* C-11, HBT Agra Draft at 5-10.

160 C-13, HBT Agra at 5-12.

161 *See, e.g.*, RE-10, LBG Expert Rpt. § 2.2.7.

162 R-201, Texaco's internal letter CGE-398/72 from R. M. Bischoff to M. E. Crawford, Reporting of Environmental Incidents New Instructions (July 17, 1972).

163 C-13, HBT Agra, Appendix F, Table F-2; *id.* at 6-13; C-11, HBT Agra Draft, Appendix F, Table F-2.

164 *Id*. at 6-13.

disposed of on neighboring roads or in pits.[165] Like everything else, this material was not tested, treated, or analyzed before disposal.[166] No one knows what the volume of this waste was, as it was never recorded.[167]

82. Not only did TexPet dump billions of gallons of produced water, oil, and chemicals into the jungle and nearby streams, it also made no efforts to minimize its intentional deforestation of the once pristine rainforest. After PetroEcuador took over the Consortium in 1990, it sought to minimize the size of the well areas and to reforest unneeded areas. Prior to 1990, though, TexPet made "no effort . . . to minimize the lease size."[168]

4. TexPet Conducted A Limited Contractual Remediation Designed To Clean Up Some Of Its Pits, Not To Eliminate Harm To The Oriente Or Its Inhabitants

83. As the Republic explained in its Track 1 briefing, the 1995 Settlement Agreement resolved contractual claims the Government had against TexPet. That agreement required TexPet to conduct a limited remediation, but did not purport to, and did not foreclose the affected population from seeking still further relief.[169] Had it been otherwise, the 1995 Settlement Agreement surely would have specifically addressed the claims then pending in *Aguinda* in New York.[170]

84. As the consulting firm of Louis Berger Group ("LBG") concludes in the accompanying expert report, the documentation surrounding the remediation illustrates its

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165 *Id*. at 5-18; *see also* RE-10, LBG Expert Rpt. Annex 1 § 3.1.5.

166 *Id*. at 5-14.

167 *Id*.

168 *Id*. at 5-15.

169 *See* Respondent's Track 1 Counter-Memorial on the Merits §§ VI, VII; Respondents' Track 1 Rejoinder on the Merits §§ II, III, V.

170 *See* Respondent's Track 1 Counter-Memorial on the Merits § VI.B.1.

limitations. **First**, the contracted-for remediation addressed only pits, not the surrounding areas that had already been impacted by contamination.[171]

85. **Second**, it addressed at most only 20 percent of all of the pits, omitting pits for reasons that included: current use by PetroEcuador and current use by the community. Thus, TexPet avoided remediating the very toxic pits that Oriente residents came into contact with on a daily basis.[172]

86. **Third**, the methodology and standard for whether a pit required remediation or whether remediation was complete may have met the Government's needs at the time but it did not remove the harm to the Lago Agrio Plaintiffs, even at the treated sites.[173]

87. **Fourth**, despite Claimants' protests to the contrary, TexPet failed to use bioremediation or any other method that would properly clean the targeted sites.[174]

88. **Finally**, even though HBT Agra specifically recommended an environmental investigation and risk assessment to determine the full scope of TexPet's liability, TexPet failed to conduct one, thus leaving TexPet with insufficient knowledge to address and resolve fully its liability.[175]

5. Ample Evidence Exists That TexPet's Pollution Persists Today

a. Sources Of Such Evidence

89. Numerous data sources paint a clear picture of the effects of Chevron's sloppy practices in the Oriente. **First**, during the JIs, Chevron took at least 1,445 samples. Chevron also engaged in a series of sampling efforts outside of the court's mandated inspections. Before

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171 RE-10, LBG Expert Rpt. § 5.3.4.

172 *Id.* § 5.3.

173 *Id.* § 5.

174 *Id.* § 5.4.

175 *Id.* § 2.5

taking any of its judicial inspection samples, Chevron also took 1,409 PI samples. And during Cabrera's sampling, Chevron also took 148 "shadow" samples of those taken by Cabrera. In addition to the more than 3,000 samples taken by Chevron, the Lago Agrio Plaintiffs took 473 judicial inspection samples. On top of the samples taken by the parties, Cabrera took a total of 378 samples.[176]

	Soil	Sediment	Surface Water	Groundwater	Drinking Water	Air	Oil	Asphalt	Total
Chevron PI	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Chevron JI	966	83	139	177	22	28	16	14	1445
Chevron Shadow Testing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Plaintiff	350	31	30	47	14			1	473
Cabrerra/Gomez	213	46	7	104	8	-	-	-	378
Total	2057	553	488	581	76	58	24	16	

90. All told at least 3,853 samples were taken during the Lago Agrio Trial, 59 percent of which were available to the Lago Agrio Court. Finally, in addition to the samples taken during the course of the Lago Agrio trial, multiple other parties, including the Harvard Medical School, the Ecuadorian Government, and independent organizations, took multiple samples of many different sites.

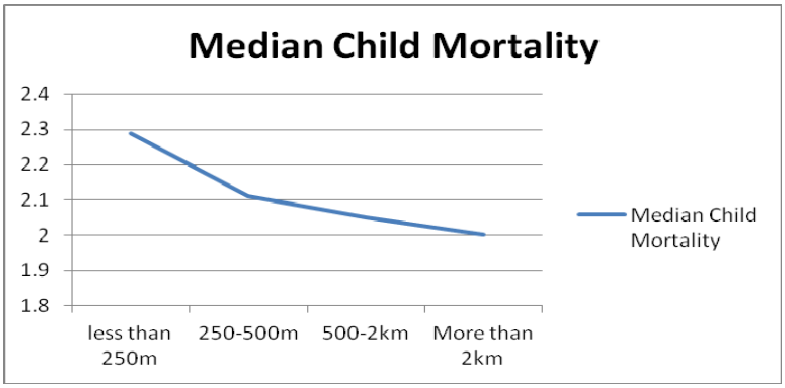
91. **Second**, in addition to the 3,853 analytical results available, the results of TexPet's practices can be seen in various survey results. There are two primary sources of survey results, a survey of over 1,000 residents of the Oriente conducted by Carlos Beristain, a world-renowned social scientist, and [redacted][177] Dr. Beristain's results demonstrated that the closer individuals lived to a TexPet well, the more significant effects they reported.[178] For example, as can be seen in the

176 All sampling numbers are estimates based on LBG's review of Chevron's internal databases and sampling results obtained from Chevron's lab, TestAmerica, Inc. These numbers are minimum values. In particular, Claimants likely took more samples (especially those taken by their "Shadow Team").

177 R-545, CARLOS BERISTAIN, WORDS FROM THE RAINFOREST: PSYCHOSOCIAL STUDY OF THE IMPACT OF TEXACO'S OIL OPERATIONS ON THE AMAZONIAN COMMUNITIES OF ECUADOR 13 (2009).

178 RE-10, LBG Expert Rpt. Annex 1 § 3.3.2.1.

chart below, the number of children who died under the age of five increased the closer they lived to a TexPet well.[179]



92. Of course, Dr. Beristain was not the only one to survey residents of the Oriente.

[redacted]

b. The Lago Agrio Plaintiffs Sampled In Locations Likely To Show Contamination; Chevron Sampled In Locations It Pre-Tested To Avoid Or Minimize Findings Of Pollution

93. After reviewing all of the data points discussed above, and based on their professional expertise, the Republic's environmental experts have concluded that both parties to the Lago Agrio trial conducted environmental sampling with an eye towards achieving their respective goals.[180] Only by reviewing all of the evidence as a whole were the Republic's environmental experts able to understand and evaluate the actual impacts of TexPet's activities.

i. The Lago Agrio Plaintiffs' Testing

94. The Lago Agrio Plaintiffs, for their part, sought to prove that contamination still exists in the Oriente by testing most often inside the waste pits themselves.[181] By doing so, they

179 R-545, CARLOS BERISTAIN, WORDS FROM THE RAINFOREST: PSYCHOSOCIAL STUDY OF THE IMPACT OF TEXACO'S OIL OPERATIONS ON THE AMAZONIAN COMMUNITIES OF ECUADOR 94 (2009).

180 RE-10, LBG Expert Rpt. § 3.2.

181 *Id.* § 3.2.1.

established the contamination they sought to prove but they did not collect samples beyond the source areas to show the breadth of the contamination emanating from those sources. The Plaintiffs, like Chevron, also did not collect extensive information regarding groundwater hydrology or the physical characteristics at each site to support extensive analyses of contaminant fate and transport.[182]

95. Moreover, Chevron has criticized the Plaintiffs' field sampling methodologies, chemical analytical testing methods, and adherence to quality assurance and quality control protocols. LBG notes that although some of this criticism may be warranted, Chevron itself had many of the same quality assurance problems.[183] Nonetheless, to demonstrate that the Lago Agrio Record contains substantial evidence of continuing harm from pollution even without relying on the Plaintiffs' data, LBG conducted its analysis largely by relying on *Chevron's* own data rather than that of the Plaintiffs.[184]

ii. Chevron's Testing

96. Chevron, on the other hand, designed its judicial inspections to focus primarily on an entirely different goal than that of the Lago Agrio Plaintiffs: to demonstrate that the Contract Cleanup had substantially met the technical cleanup specifications set forth in the Remediation Action Plan ("RAP") that formed part of the 1995 Settlement Agreement.[185] Chevron's goal of showing RAP compliance had far-reaching effects. Most significantly, Chevron's much narrower focus caused it to limit its task to (a) inspecting the RAP sites, (b) showing that those sites complied with the RAP cleanup standards and (c) showing that contaminants that remained

182 *Id.*

183 *Id.* § 3.2.7.

184 *Id.* § 3.2.1.

185 *Id.* § 3.2.2.

in the contaminated "hot spots" (generally in the immediate vicinity of the oil wells, pits, and field separators) had been contained without subsequent migration outside those areas.[186]

97. As LBG found in its analysis of Chevron's methods and test results, Chevron biased its samples in a manner designed to support its preferred narrative that any contamination had either been resolved by the RAP or did not travel outside the source "hot spots."[187] The methods employed by Chevron in this regard are discussed below.

1. Chevron's Playbooks And Pre-Inspection Sampling

98. In implementing its inspection goal and in preparation for the upcoming Judicial Inspections ("JIs"), Chevron and its technical experts created "Playbooks" for use in coordinating their preparations for and later conducting the JIs. These Playbooks embodied a game plan for finding mostly "clean" (uncontaminated) samples when testing at those sites selected for JIs. Chevron's strategy was as follows:

99. Chevron first requested permission from the Court, which it received, to have its technical support team enter the oilfield territory to conduct "Pre-Inspections" ("PIs") of various sites in advance of the upcoming scheduled JIs. Upon entering a potential PI site, Chevron drilled core samples, examined surface water and drinking wells, and conducted other tests for the existence of contaminants.[188] The overarching purpose of a PI was to locate specific sampling sites where Chevron, during the JI, could "safely" drill a core and extract a "clean" sample for later laboratory analysis and submission to the *Lago Agrio* court. While the Court was supposed to give credence to Chevron's resulting clean JI sample analysis as if it had been a

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186 *Id.* § 5.3.

187 *Id.* § 2.7.3.

188 TexPet filed some of its PI sampling results with the Court, but not all. The Republic has reason to believe that PIs sampling results showing contamination were not filed, but those with clean results were filed.

customary "random" sample, in fact the sample had been "cherry picked" by Chevron to avoid other site locations that would have shown contamination. When a PI site later became the subject of a JI, Chevron's Playbook strategy was to use its PI results to select JI sampling sites shown to be devoid of contamination.[189]

100. Of course, Chevron did not have time to perform a PI on every potential JI site, and indeed a JI was not performed on every site where Chevron had performed a PI. Where a JI was conducted at a site at which no PI had been conducted, Chevron had to rely on an alternative strategy. In a typical site, there was an obvious "hot spot" source of contamination. This would often be a closed well site or a crude oil separation "pit" formerly used to separate crude oil from production water. Plaintiffs generally tested under the well or pit site itself to establish a past source of historical contamination or a potential source of future contamination.

101. As a most elementary principle, the hydrogeology of a subsurface contaminant migration predicts that such migration will be in the direction in which groundwater flows. Groundwater and any contained contaminants are known to generally flow underground away from areas of high hydraulic "head" pressure and towards areas of lower pressure gradient — almost like surface water running downhill. In most site investigations a groundwater flow model for the area in question is first developed so that subsurface migration of contaminants away from the contaminant source can be measured. Since groundwater flows in the direction of lower hydraulic pressure, it is customary to test for contaminant migration along the expected "lower pressure" pathway indicated by the groundwater flow model.

102. Knowing this, when Chevron sampled a "virgin" JI site (i.e., a site where it had no prior PI results), its environmental experts chose sampling sites that the surface topology

189 RE-10, LBG Expert Rpt. § 2.8.1.

indicated were up gradient from the designated contaminant source, or at least not down gradient. For example, subsurface soil contaminants in groundwater generally flow towards nearby surface waters (ponds, streams, etc.). For this reason, Chevron's technical team would carefully avoid sampling at locations along the line between a pit and the nearest point of a nearby stream.[190]

103. By following its Playbook in this manner, Chevron and its experts transformed the search for truth into a game of avoid evidence of contamination at all costs.[191] One of Chevron's primary "independent" soil and groundwater experts was Douglas Mackay. At his deposition, Dr. Mackay testified that TexPet had not informed him of the Playbooks and the strategy outlined in them.[192] [redacted]

104. [redacted] Chevron's soil and groundwater sampling had mostly been conducted at the periphery of the site, and that during the JIs Chevron had intentionally avoided sampling down gradient of the pit, the original pollution source. He tried to justify this strategy by stating that Chevron's goal was to show that the RAP had been successfully accomplished, and that this

190 *Id.* § 2.7.1.

191 *Id.* § 2.7.3.

192 R-501, Mackay Deposition (May 16, 2012) at 380-88.

193 R-845, Email from R. Hinchee to D. Mackay (June 16, 2006) [MACKAY00064620].

could be — and was — demonstrated by TexPet's showing the absence of contamination migration by testing at the periphery of the site at a distance significantly remote from the pollution source. But despite having been asked numerous times, Dr. Mackay could not rationalize TexPet's complete avoidance of peripheral testing down gradient from the pit, although he conceded that TexPet's strategy was to do just that.

2. Chevron's Other Improper Testing and Sampling Analysis

105. Chevron's selection of JI sampling site locations was both biased and designed to distort the data. In addition to the deceptive practices explained above, Chevron employed still other testing techniques that had as their goal the avoidance of findings of contamination.

106. **First**, Chevron took samples from locations outside of expected contamination pathways. As explained by LBG expert Harlee Strauss, it is beyond doubt that oil contamination travels along standard pathways until it reaches a water source.[194] Indeed, Chevron's expert Connor acknowledged that groundwater — which carries the contamination — "flows slowly toward the section of the river (drainage) that is closest."[195] But, ignoring this, Chevron regularly took samples uphill from the sources of contamination.

107. **Second**, Chevron's groundwater sampling was inadequate because it failed to: (1) install groundwater monitoring wells around the pits to monitor for contaminants; (2) take soil samples deep enough to reach the groundwater, when groundwater would be the expected oil transport mechanism; and (3) take samples from below or down gradient from the pits, where any oil leeching from the pits could be expected to flow into the groundwater. According to LBG expert Kenneth Goldstein, such groundwater testing methods, none of which was employed

194 RE-10, LBG Expert Rpt. Annex 1 § 3.2.

195 R-494, Connor Expert Rpt., Judicial Inspection of Sacha Central Station (Nov. 4, 2005) (unofficial translation) (el agua suberránea "fluye lentamente hacia la sección del rio que se encuentra más cercano").

by Chevron in Ecuador, are standard operating procedure for any company attempting to determine whether contaminants are spreading and to quantify its liability.[196]

108. **Third,** Chevron collected soil samples from waste pits by selecting soil from the superficial layer of topsoil, rather than taking borings deep enough to reach the soil that includes the true contamination. In fact, LBG expert Goldstein concludes that neither Chevron nor the Plaintiffs took samples of sufficient depth to identify the true magnitude of the contamination beneath the surface.[197]

109. **Fourth**, Chevron used a sampling method known as compositing, meaning it vertically aggregated soil core samples, thus reducing the contaminant concentrations by mixing in cleaner topsoil and uncontaminated subsurface zones along with the contaminated zones. In some cases, horizontal aggregation was also used, with much the same predictable effect. As explained by LBG expert Goldstein, this method is sometimes used where pollution is homogeneously distributed, but it is inappropriate here, because it would not identify "hot spots" of concentrated contamination.[198] Chevron composited samples from different depths and from different locations, such that contaminated soil was diluted by clean topsoil and clean samples taken uphill from the contamination sources.[199]

110. **Fifth**, Chevron used a sampling method for soil samples that virtually guaranteed "clean" results, even when high concentrations of contaminants actually existed in the samples. Chevron's preferred test — the Toxic Compound Leachate Protocol ("TCLP") — is inappropriate for testing for crude oil because of its lack of solubility. Indeed, Chevron

196 RE-10, LBG Expert Rpt. §3.2.5.

197 *Id.* § 3.2.4.

198 *Id.* § 3.2.3.

199 *Id.*

conducted PI tests on the same soil samples using both the TCLP and Method 418 — the method recommended by LBG — which shows the dramatic difference in results between the tests. For example, in at least six samples tested both ways, Chevron obtained results 3.7 times higher using Method 418.1 for TPH than it did using the TCLP method.[200] Unsurprisingly, Chevron used the TCLP for its JI tests, despite lacking any scientific foundation for using that test in that situation.

c. Chevron's Testing Nevertheless Evidenced Substantial Past And Present Pollution

111. Chevron's own results demonstrate widespread past and present pollution. In Chevron's soil samples, 91 percent of the sites Chevron had sampled by Spring of 2007 — the last of Chevron's data available to the Republic — resulted in TPH values above the 1000 mg/kg Ecuadorian standard.[201] At 50 percent of the sites inspected by 2007 Chevron's soil data show that the carcinogenic PAHs (benzo(a)pyrene and benzo(a)anthracene) exceed Ecuadorian standards; the PAH pyrene exceeds Ecuadorian standards at 90 percent of the sites; naphthalene exceeds Ecuadorian standards at 82 percent of them.[202]

112. Chevron, like the Lago Agrio Plaintiffs, also tested sediment in nearby streams and swamps because it serves as an indicator of the mobility of contaminants and the availability of those contaminants to benthic[203] and aquatic life.[204] Although Chevron conducted only modest sediment sampling, more than 50 percent of the samples it did take show exceedances of the Ecuadorian TPH standard. These samples also show that 25 percent of the sites exceeded

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200 *Id.* § 3.1.2.

201 *Id.* § 3.3.1.

202 *Id.*

203 Benthic life are animals that live on the bottom of bodies of water, including various types of clams, mussels, snails, worms, and crustaceans.

204 RE-10, LBG Expert Rpt. § 3.3.2.

allowable levels of the carcinogen benzo(a)pyrene and 43 percent exceeded allowable levels of pyrene.[205] That any sites exceeded allowable PAH limits in sediments almost two decades after their release indicates a persistent problem.[206]

113. Similar to the sediment analysis discussed above, Chevron failed to adequately test surface water. Despite Chevron's limited sampling, its PI results detected phenols — a soluble toxic component of crude oil — at seven out of seven locations Chevron tested.[207] The Plaintiffs detected phenols at all three of the sites they tested. When Woodward Clyde performed the same analysis but at more well sites in the 1990s, it found phenols at 77 well sites. The persistence of these chemicals in the aquatic environment twenty years after TexPet left the region demonstrates the long term effects of TexPet's operations.[208]

d. The Pollution Has Harmed And Will Continue To Harm Human Health

114. Although TexPet operated in an area of the world far from large cities, the effects of its pollution still have a dramatic and lasting impact on the lives and health of the residents of the region in question.

115. As Harlee Strauss's portion of the LBG Environmental Expert Report shows, TexPet's oil exploration, extraction, and transport led to the release of numerous toxic contaminants into the air, surface water, groundwater, and land through crude oil and its residues, drilling mud, diesel emissions, and flares.[209] The subsistence living of adults and children in the Oriente means they were exposed to this contamination via multiple pathways —

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205 *Id.*

206 *Id.*

207 *Id.* § 3.3.3.

208 *Id.*

209 RE-10, LBG Expert Report Annex 1 §§ 3.1, 3.2.

including inhalation, ingestion, and dermal exposures — in pattern, duration, and intensity more extensive than those experienced by the workers and residents of most occupational and community exposure studies.[210] Nonetheless, those studies are instructive because they show that exposures to crude oil lead to adverse effects that include skin irritation and other skin problems, sore eyes, sore throats, headaches, psychological problems, and multiple types of cancer.[211]

116. According to Strauss's analysis, the adverse effects reflected in the occupational and community health studies are consistent with the effects reported by adults and children in the Concession area in both Annex L of Mr. Cabrera's and in [redacted].[212] In addition, community studies in the Concession area show higher frequencies than the occupational and community exposure studies of reproductive effects (spontaneous abortions) and childhood cancer in the exposed communities.[213]

117. Based on the evidence in the Lago Agrio Record, Dr. Strauss concludes that TexPet's release of toxic contaminants "resulted in immediate and long lasting adverse health effects in children and adults living in the Concession area" that "are continuing to harm residents of the area."[214]

e. The Pollution Has Harmed And Will Continue To Harm The Ecosystem

118. The analysis conducted by LBG also shows that TexPet's operations left lasting damage to the ecosystem of the Oriente, damage that was not repaired by the RAP. Analysis of

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210 *Id.* § 3.4.

211 *Id.* § 3.3.

212 *Id.* §3.2.

213 *Id.* § 3.3.2.

214 *Id.* § 3.5.

the extent of this impact was conducted by Court Expert investigators Dr. Carlos Eduardo Ceron Martinez and Dr. Gallo and Chevron expert Bjorn Bjorkman, each of whom conducted biological diversity surveys of flora and fauna. According to Dr. Edwin Theriot's section of the LBG Expert Report, although the methodology and conclusions of each of these studies contained some amount of researcher bias, LBG was able to analyze the collective data of the three surveys and compare them to existing published data and standard criteria.[215] This analysis yields the unmistakable conclusion that the Lago Agrio Record includes extensive evidence that TexPet's activities caused substantial residual loss of diversity to flora and fauna that continues to exist today.[216]

119. Dr. Theriot explains that TexPet caused direct impacts to ecological diversity through oil spills, flaring, produced water discharge, and oiling of roads.[217] And TexPet caused secondary impacts through habitat fragmentation, hydrologic impacts at stream crossings, noise disturbances, and soil erosion.[218] These impacts resulted in contamination of surface water, fish tissue, sediment, and soil, all of which have contributed to negative impacts on biological diversity.[219]

120. Yet neither the direct nor secondary impacts were adequately addressed by the limited remediation conducted under the RAP. As explained by Dr. Theriot, TexPet's RAP actions "were limited to a few abandoned well sites and well pits" and no consideration was

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215 RE-10, LBG Expert Rpt. Annex 2 § 2.4.

216 *Id.*

217 *Id.* § 2.1.

218 *Id.*

219 *Id.* § 2.3.

given to the "impacts to flora and fauna outside of the pits (well platforms, roads, spill areas, production/pit discharge areas, flare areas)."[220]

121. As a result, the Lago Agrio Record contains substantial evidence that the ecological effects of TexPet's practices persist today. This conclusion is supported by LBG's analysis of the Martinez, Gallo, and Bjorkman data.

B. The Plaintiffs' Litigation Seeks To Remedy The Harm To Their Lives, Health, And Property Caused By Texaco's Activities

1. The Plaintiffs Brought Suit Against Texaco, First In New York And Then, At Texaco's Insistence, In Ecuador

122. In November 1993, a group of Ecuadorian individuals brought the *Aguinda* case in the United States District Court for the Southern District of New York as a class action on behalf of all citizens and residents of the Oriente region of the Ecuadorian Amazon. The *Aguinda* plaintiffs "alleged that between 1964 and 1992 Texaco's oil operation activities polluted the rain forests and rivers in Ecuador."[221]

123. Although Claimants, in an apparent attempt to distinguish plaintiffs' *Aguinda* action from their subsequent action in Ecuador, assert that in *Aguinda* plaintiffs "sought primarily damages for injury to . . . person[s] and property,"[222] they also sought "extensive equitable relief to redress contamination of the water supplies and environment; . . . creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries; and restitution."[223] Indeed, the *Aguinda* plaintiffs pled nine

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220 *Id*. § 2.2.

221 C-65, *Aguinda v. Texaco, Inc*., 303 F.3d 470, 473 (2d Cir. 2002).

222 Claimants' Interim Measures Request ¶ 19.

223 C-65, *Aguinda v. Texaco, Inc*., 303 F.3d at 473-74; *see also* R-21, Brief for Defendant-Appellee [Texaco] (Jan. 7, 1998) at 2 ("In addition to monetary damages, plaintiffs demand extraordinary equitable relief in Ecuador . . . including remediation of Ecuador's land and environment, modifications of Petroecuador's facilities . . . medical monitoring, and relief for alleged harm to '[plaintiff's] culture, their diet, and other ancient traditions' and 'way of life.'").

counts ranging from negligence to public nuisance and international law claims for destruction caused to the environment under the Alien Tort Statute.[224]

124. Texaco sought to dismiss the *Aguinda* complaint on various theories, including a *forum non conveniens* ground asserting that the courts of the United States were an "inconvenient forum" for adjudicating such claims. In support of this motion, TexPet submitted affidavits from numerous distinguished Ecuadorian legal experts stating that the Ecuadorian courts provided an adequate alternative forum for the claims asserted by the *Aguinda* plaintiffs.[225] For example, Texaco's Ecuadorian outside counsel, Dr. Alejandro Ponce Martinez, averred 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 Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner.[226]

125. Texaco also submitted an affidavit from TexPet's former in-house Ecuadorian counsel, Dr. Rodrigo Pérez, attesting to the fact that dozens of judicial proceedings involving TexPet, the Republic and/or PetroEcuador showed "that the Ecuadorian courts provide an adequate forum for claims such as those asserted by the [*Aguinda*] plaintiffs."[227]

126. At Texaco's urging the Republic opposed the *Aguinda* plaintiffs' position and supported Texaco's dismissal efforts until the change in government in 1996.[228] This generally

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[224] C-14, Complaint, *Aguinda v. Texaco, Inc.*, Case No. 93-Civ-7527 (S.D.N.Y.) ¶¶ 53-90; *see also* Appendix A to Respondent's Interim Measures Response (identifying the specific equitable relief sought by the *Aguinda* plaintiffs in the United States federal district court in New York).

[225] *See, e.g.*, R-22, Affidavit of Dr. Enrique Ponce y Carbo (Dec. 17, 1993) ¶¶ 7-8, 12; Exhibit R-23, Affidávit of Dr. Vicente Bermeo Lañas (Dec. 17, 1993) ¶¶ 10, 12.

[226] R-24, Affidavit of Dr. Alejandro Ponce Martinez (Dec. 13, 1995) ¶¶ 4-5.

[227] R-107, Affidavit of Dr. Rodrigo Pérez Pallares (Dec. 1, 1995) ¶ 7.

[228] *See, e.g.*, R-25, Transcript of Oral Argument before the Second Circuit Court of Appeals (Apr. 29, 1998) at 22 (where counsel for Texaco acknowledged that "[f]or three years, repeated submissions, a diplomatic note to the

took the form of submissions by the then Ecuadorian Ambassador to the United States, Edgar Terán, who allowed Texaco's government relations department to ghost-write a diplomatic note from the Ecuadorian Embassy to the U.S. Department of State.[229] This note urged the U.S. Department of State to intervene in *Aguinda* to advise the court that, among other things, "the actions and omissions of the . . . companies in this case are subject to the jurisdiction of Ecuadorian authorities"; that "only Ecuadorian authorities have the competence to pass judgment in such cases"; and that plaintiffs' claim "that they cannot expect a fair hearing in Ecuadorian courts . . . . is false and defamatory" and "highly offensive."[230]

127. In 1996, the District Court in New York granted Texaco's motion and dismissed *Aguinda* on *forum non conveniens* grounds.[231] However, in 1998 the Second Circuit vacated the dismissal, and remanded the case to the lower court, holding (in part) that the dismissal was inappropriate in the absence of a requirement that Texaco first consent to Ecuadorian jurisdiction and agree to certain other stated conditions, including a retroactive tolling of the applicable statute of limitations.[232]

128. After the Second Circuit's *vacatur* and remand, counsel for Texaco represented that, in order to secure dismissal of *Aguinda* in New York, the company would consent to Ecuadorian jurisdiction.[233] On remand, the *Aguinda* plaintiffs argued to the District Court that their U.S. case should not be dismissed because Texaco would oppose extraterritorial

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state department, amicus briefs, affidavits [submitted by the Republic] have opposed jurisdiction [and] support[ed] our motions.").

229 R-26, Fax from Kostiw to LeCorgne (Dec. 8, 1993).

230 *Id.*; *see also* R-27, Diplomatic Note from Ambassador. E. Terán to U.S. Dept. of State (Dec. 3, 1993) at 2.

231 R-28, *Aguinda v. Texaco, Inc.*, 945 F. Supp 625, 626 (S.D.N.Y. 1996).

232 R-29, *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

233 R-30, Transcript of Status Conference (Nov. 17, 1998) at 7:3-6.

enforcement of any adverse Ecuadorian court judgment on any and all possible grounds.[234] To counter this argument and secure dismissal of the *Aguinda* action, Texaco expressly promised, in a verified interrogatory answer and in additional repeated written representations to the District Court, that it would "satisfy" any final Ecuadorian judgment.[235] Texaco reserved the right to challenge enforcement "only" under New York's Uniform Foreign Country Money Judgments Recognition Act, N.Y. CPLR § 5301, *et seq.*[236] By this representation and sole proviso, Texaco preserved its right to challenge any adverse Ecuadorian money judgment on "due process" grounds, since NY CPLR § 5304(a)(1) provides that enforcement of a foreign money judgment may be challenged if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[237] All other objections to enforcement of an Ecuadorian judgment were waived.

129. Texaco clearly presumed that dismissal of *Aguinda* likely meant the end of the environmental litigation since Plaintiffs, it was believed, would not continue prosecuting the case in Ecuador, especially because there was no class action mechanism and little if any judicial experience with massive environmental litigation. And if Plaintiffs somehow were able to re-file in Ecuador, Texaco still had the comfort that its experience in Ecuador's courts had been

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234 C-16, Plaintiffs' Memorandum in Opposition to Texaco's Motion to Dismiss (Feb. 20, 1996) at 43, filed in *Aguinda*.

235 R-4, Texaco Inc.'s Reply Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity (July 25, 1999) at 21, filed in *Aguinda.*

236 R-2, Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity (Jan. 11, 1999) at 16-17; R-3, Texaco Inc.'s Notice of Agreements in Satisfying *Forum Non Conveniens* and International Comity Conditions (Jan. 11, 1999) ¶ 5; R-1, Texaco Inc.'s Objections and Responses to Plaintiffs' Interrogatories Regarding Proposed Alternative Fora (Dec. 28, 1998) at 3; R-4, Texaco Inc.'s Reply Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity (Jan. 25, 1999) at 21.

237 RLA-8, New York's Uniform Foreign Country Money-Judgments Recognition Act § 5304(a)(1).

singularly favorable, both in private party suits and even in direct litigation with the Government itself.[238]

130. Relying on Texaco's representations, and in the context of a renewed round of briefing in 2000 during which Texaco submitted no fewer than *fourteen* affidavits from Ecuadorian legal experts uniformly attesting to the fairness of Ecuador's courts and the adequacy of Ecuador's judicial system, the District Court thereupon dismissed the case once more on *forum non conveniens* grounds.[239] These affidavits represented, *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 judiciary was fully independent.[240]

131. In August 2002, the Second Circuit affirmed the dismissal.[241] The Second Circuit also concurred with Texaco that Ecuadorian law was sufficiently developed and that Ecuadorian courts were perfectly adequate to hear these types of claims.[242] Chevron, which had acquired Texaco in October 2001 (in a transaction referred to in the two companies' press releases, securities filings, FTC submissions, and brief to the Second Circuit as a "merger" resulting in "ChevronTexaco"), thereupon issued a press release stating that:

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238 TexPet's in-house counsel, Ricardo Reis Veiga, noted in his first witness declaration in this proceeding that all six cases brought by individuals against TexPet with which he was familiar had been summarily dismissed by Ecuadorian courts. *See* Veiga Witness Statement (Aug. 27, 2010) ¶ 22. In 2000, TexPet had also won a very large tax refund case against the Government.

239 C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y 2001).

240 *See, e.g.*, R-31, Affidavit of Dr. Enrique Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; R-32, Affidavit of Dr. Alejandro Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; Exhibit R-33, Affidavit of Dr. Sebastian Perez-Arteta (Feb. 7, 2000) ¶¶ 4, 7; R-34, Affidavit of Rodrigo Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; R-35, Supplemental Affidavit of Dr. Alejandro Ponce Martinez (Apr. 4, 2000) ¶¶ 1-2; R-36, Affidavit of Jaime Espinoza Ramírez (Feb. 28, 2000) ¶¶ 2-6; R-37, Affidavit of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7; R-38, Declaration of Ramon Jimenez Carbo (Apr. 5, 2000) ¶ 1; R-39, Affidavit of Dr. Jose Maria Perez-Arteta (Apr. 7, 2000) ¶ 2.

241 C-65, *Aguinda v. Texaco, Inc.*, 303 F.3d at 480 (2d Cir. 2002).

242 *Id.* at 477-78.

> ChevronTexaco is pleased with the ruling of the U.S. Court of Appeals affirming the lower court's dismissal . . . . This ruling vindicates ChevronTexaco's long-standing position and the arguments we have made to the court that the appropriate forum for this litigation is Ecuador.[243]

132. On May 7, 2003, the Plaintiffs re-filed their environmental case in Lago Agrio, Ecuador.

133. While Chevron has a current litigation-driven motive to portray the *Aguinda* and Lago Agrio cases as fundamentally different, the historical records of the two cases show that the opposite is true — that the Lago Agrio Litigation is nothing more than a continuation of *Aguinda*, although required to be pled as a "popular action" – not a class action – under the laws and judicial procedures of the substantially different civil law legal system that Claimants professed at the time to prefer.

134. All of the plaintiffs in the *Aguinda* action still living also became plaintiffs in the Lago Agrio action.[244] Indeed, in the *Doe* litigation in the U.S. District Court for the Northern District of California, Claimants admitted that "[b]ecause of the *forum non conveniens* dismissals in the United States, in 2003 the *Aguinda* lawyers sued in Lago Agrio, Ecuador, on behalf of the same Oriente residents."[245] Claimants additionally admitted that "[n]ot by coincidence, plaintiffs' core allegations here [in the *Doe* complaint] are nearly identical to those of the

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[243] R-41, *ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation*, ChevronTexaco Press Release (Aug. 19, 2002) (emphasis added). ChevronTexaco changed its name back to Chevron in 2005.

[244] As was their prerogative, some of the original plaintiffs in *Aguinda* chose to cease their participation after that case was dismissed. Of course, these plaintiffs were entitled to drop out of the litigation at any time, even if the case had continued in New York.

[245] R-7, Defendants' Amended Mot. to Dismiss Compl. or, in the Alternative, to Stay (May 25, 2006) at 4, filed in *Doe v. Texaco, Inc.*, Case No. C 06-02820 WHA (N.D. Cal.) ("Because of the *forum non conveniens* dismissals in the United States, in 2003 the *Aguinda* lawyers sued in Lago Agrio, Ecuador, on behalf of the same Oriente residents. The underlying allegations in that case are the same as in the New York [i.e., *Aguinda*] . . . action[].").

Aguinda and *Lago Agrio* matters. . . . These are the same allegations that formed the basis of the consolidated *Aguinda* case in New York and that are being litigated in the *Lago Agrio* case."[246]

135. As they had done in *Aguinda*, the Plaintiffs alleged in the Ecuadorian case that the oil exploration and production activities carried out by TexPet, as Operator, had caused contamination in the Oriente and harmed the people residing in the region.[247] They claimed that the methods and technology that TexPet had employed as Consortium Operator had already been prohibited in other countries "due to their lethal effects on the environment and human health."[248] The plaintiffs further alleged that TexPet's "willful misconduct" and "negligence" caused severe contamination of the land and waters in the region, affecting not only the drinking water and crops, but also the livelihood, culture and general health of the population, which saw a rise in cancer, birth defects, and other illnesses.[249] In essence, the Lago Agrio complaint, even though necessarily filed under a civil law system rather divergent from New York's common law system, largely paralleled and even tracked the language of the earlier *Aguinda* complaint.[250]

136. The plaintiffs, as they had done in the *Aguinda* litigation, demanded in their complaint that: (i) medical monitoring and care be established for the affected residents; (ii) the polluting elements still in the region be removed; and (iii) remediation be performed on both

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246 *Id.* at 5; *see also id.* at 1 ("This complaint . . . attacks Texaco's drilling methods in Ecuador from 1971 to 1992, and the environmental impact of those methods. The same methods and impact were the subject of a purported class action in the Southern District of New York which was brought in 1993 and dismissed on grounds of *forum non conveniens* in 2002. . . . These same methods and impact are now the subject of an ongoing, elaborate litigation in Ecuador, which was filed May 7, 2003, and which includes technical oil field inspections and open hearings at numerous purportedly impacted sites in Ecuador.").

247 C-71, Lago Agrio Complaint §§ II-IV.

248 *Id.* at 4.

249 *Id.* §§ I(5), I(7), III(1)-(5), IV(5)-(6), IV(9).

250 R-57, Supplemental Declaration of Dr. Alejandro Ponce-Villacis (Feb. 6, 2007) ¶¶ 13-14, 16.

private and public lands to repair the environmental damage caused by the oil operations conducted while TexPet had been Consortium Operator.[251]

137. The core substantive claims in the complaint were based entirely on Ecuadorian substantive law enacted or judicially established well prior to the 1999 Environmental Management Act.[252] For example, in Section V of the Ecuadorian complaint ("Legal Basis"), the plaintiffs listed as the legal bases for their right of recovery: (1) the environmental pollution recovery rights set forth in the Constitution; and (2) the right to bring a "popular action" under Civil Code Article 2236 (formerly codified as Article 2260) "to compel whoever generated the threat to remove or cease its cause."[253]

2. Chevron Engaged In a Pattern of Procedural Misconduct To Delay Adjudication Of The Environmental Claims Indefinitely

138. On October, 21, 2003, Chevron orally presented its initial answer to the Plaintiffs' complaint in the "Conciliation and Answer to the Complaint Hearing."[254] From that point on Chevron engaged in systematic gamesmanship and deception specifically to delay the proceedings and prevent entry of a judgment. The *Lago Agrio* record shows a consistent pattern of defense tactics designed, *inter alia*, to "prevent the normal progress of the discovery process or prolong it indefinitely,"[255] to disrupt virtually all aspects of the proceedings, and to force the recusal of every judge.

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251 C-71, Lago Agrio Complaint § VI.

252 Claimants have in the past argued that the 1999 Environmental Management Act had been enacted to circumvent the release found in the 1995 Settlement Agreement. The substantive provisions of the 1999 Law, however, are not before the *Lago Agrio* court and are thus not relevant either in the environmental case or in this arbitration. *See* Appendix B to Respondent's Interim Measures Response.

253 C-71, Lago Agrio Complaint § V(b).

254 C-72, Chevron Answer to Lago Agrio Complaint.

255 C-931, Lago Agrio Judgment at 36.

a. Chevron Disrupted And Delayed The Evidence-Gathering Process Through Illegitimate Tactics

139. Chevron's implementation of its scheme to deceive the court during the discovery phase of the Lago Agrio proceedings is best illustrated by its recently-uncovered "Playbooks" reflecting its strategy to conduct secret pre-inspection testing of various sites to pre-determine "safe" sampling locations within contemplated judicial inspection sites. In this way, Chevron could minimize the evidence of contamination on the record.[256] But multiple other examples found throughout the case record reveal how Chevron consistently sabotaged and intentionally delayed the judicial inspections process to try and avoid revealing the extensive contamination in the oilfield area.

140. Chevron, for example, procured and subsequently filed with the Court a false military intelligence report to mislead the Court into granting its request to cancel a critical judicial inspection. Literally on the eve of the Guanta Station judicial inspection, Chevron's lawyers rushed to the court armed with a supposed intelligence report calling for the suspension of the scheduled inspection to avert a threatened riot.[257] Chevron's report described supposed security concerns endangering the safety of Chevron's representatives conducting the judicial inspection site.[258] Taken in by this ploy, the Court granted Chevron's last-minute request and,

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256 *See supra* Section II.A (describing in greater detail how Chevron designed and implemented this plan, only to later direct the court and others during judicial inspections to take samples at locations supposedly "representative" of the entire concession area but which Chevron already knew showed the lowest levels of contamination).

257 C-931, Lago Agrio Judgment at 53-55.

258 R-475, Lago Agrio Record at 81,426 (Chevron's letter to the Court (Oct. 18, 2005) requesting the suspension of the judicial inspection in El Guanta). *See also* R-477, Lago Agrio Record at 81410 (Intelligence Report signed by Major Arturo Velasco (Oct. 18, 2005) recommending that activities in the sector be completely restricted because safety could not be guaranteed). This report indicates that "through information from the personnel of the Sucumbíos Intelligence Agency, we learned that problems and incidents with the settlers and natives in the area of the El Guanta Station are anticipated for October 19, 2005. According to the information obtained by military intelligence, it is known that the intent is to detain the CHEVRON TEXACO executives and all others attending the judicial inspection by blocking both the site's entrance and exit routes in order to force the signing of commitment documents for the delivery and fulfillment of several petitions." *Id.* .

over the objections of Plaintiffs, ordered the suspension of the scheduled judicial inspection.[259] As it later transpired, the so-called intelligence report was knowingly false and had been procured outside of the proper military chain of command by a former military officer then providing security services for Chevron.[260]

141. Further investigations revealed that the author of the so-called intelligence report, an active military intelligence officer, had signed it at the request of Chevron's security officer as an emergency measure unsupported by actual intelligence but granted solely on the basis of the signing officer's longstanding relationship with Chevron's aide.[261] When the matter was subsequently investigated by the Intelligence Agency of Sucumbíos, its resulting official report confirmed that Chevron's intelligence report had been procured by falsehood, explaining further that the Agency had never received or reported any threat in connection with the scheduled judicial inspection.[262]

142. Just one month earlier, Chevron's experts had secretly conducted pre-inspection sampling at the Guanta site.[263] Information recently uncovered through discovery actions in the

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259 R-478, Lago Agrio Record at 81,531 (Court Order (Oct. 18, 2005)).

260 R-479, Lago Agrio Record at 93,031-93,037 (Report signed by Sr. Coronel Miguel Fuertes Ruiz (Feb. 8, 2006) stating that "Major Arturo Velasco had provided that information at the request of Captain (R) Manual Bravo, a former military colleague of Major Velasco's, who worked at the company that provided security services to Texaco . . . It should be noted that no type of written or verbal information was provided by the AISU on problems or incidents that were going to occur with the inhabitants of the "El Guanta" sector during the judicial inspection.").

261 *Id.* (Official Letter from the National Undersecretary of Defense (Feb. 3, 2006) explaining that the author of the report confessed that he submitted the report based on the information provided by, and at the request of, a friend and former military officer. The author explained that: "On . . . October 18 . . . a Texaco executive and a service company worker, accompanied by a former colleague from the institution, Captain (R) Manuel Bravo, told me that they had to attend a court hearing in the El Guanta sector . . . that they had confirmed information that . . . their physical safety was at risk. In response, I told them that I could not provide them with military personnel for their protection . . . They told me that was not what they were requesting, that what they wanted was to have the court hearing suspended . . . and that they were asking for a member of the group's military intelligence to tell it to the Judge, to which I stated that I would do it myself. . . . I agreed to do so because he is my friend and I know that my captain [Bravo] is a serious man.").

262 *Id.* (Report signed by Sr. Coronel Miguel Fuertes Ruiz).

263 R-541, Chevron PI Results from Guanta Production Station (Sept. 28, 2005).

United States reveals that in their pre-inspection sampling, Chevron's experts had found unusually high levels of contamination, including high levels of polycyclic aromatic hydrocarbons ("PAHs," many of which are well-known carcinogens), arsenic, and chromium.[264] This was likely to be particularly troubling to Chevron because the Guanta site was one of the last fields discovered (1986)[265] and developed and would prove to be an indicator that TexPet continued to use substandard methods up until the end of its time as Operator.

143. The Plaintiffs managed to have at least some of the wells at the Guanta Station field inspected but not until more than a year later.[266]

144. Chevron's delay tactics included its systematic refusal to approve expert work plans and/or share in the payment of their fees and costs.[267] As part of what the Lago Agrio Court understatedly described as "signs of procedural bad faith,"[268] Chevron requested and obtained the appointment of an expert to conduct a study of certain farming techniques and the impact of colonization in the Oriente region — the former Texaco concession area.[269] After the expert's appointment, Chevron then filed multiple objections to his proposed work plan, systematically demanding that the expert be required to submit revised plans.[270] For several

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264 *Id.*

265 C-12, Fugro-McClelland Final Audit at 1-4.

266 R-824, Excerpt from Guanta 7 JI (April 5, 2006); R-825, Excerpt from Guanta 6 JI (April 6, 2006).

267 *See, e.g.*, C-931, Lago Agrio Judgment at 184-185.

268 *Id.* at 184.

269 On December 10, 2009, the Court appointed expert José René López Chávez. R-480, Lago Agrio Record at 159,708 (Acta of Appointment of Experts (Dec. 10, 2009)). On December 15, Mr. López provided the Court with a work plan. R-481, Lago Agrio Record at 159,802 (Work Activities and Schedule submitted by Eng. José López (December 15, 2009)).

270 The Court approved López' work plan on January 5, 2010, and granted three days to the parties to raise any observations about the same. R-482, Lago Agrio Record at 164,366 (Court Order, Jan. 5, 2010)). On January 8, Chevron required the Court to return López' work plan and schedule, and requested him to submit a new work plan. R-486, Lago Agrio Record at 164,373 (Chevron's Motion (Jan. 8, 2010)). On January 19, the Court approved the original work plan submitted by López. R-685, Lago Agrio Record at 165,394 (Court Order (Jan. 19, 2010)). Less than a week later, Chevron requested the Court to revoke the Court Order issued on January 19, 2010 and order López to submit a new work plan. R-686, Lago Agrio Record at 165,427 (Chevron's Motion (Jan. 25, 2010)).

months, Chevron refused to advance the funds to cover the expert's fees and costs, demanding that he first submit a "rational and coherent" plan. Chevron did not, however, identify what was "irrational or incoherent" about his current work plan, which had already been submitted and revised once at Chevron's behest.[271] The Court ultimately ordered Chevron to accept the revised work plan,[272] but Chevron refused to pay more than half of the Court-appointed expert's fees, or to pay for any of his costs, including lab testing — thereby causing even further delay in the proceedings.[273]

145. Chevron employed similar tactics of delay and intimidation with respect to other court-appointed experts, such as Dr. Marcelo Muñoz Herrería, whose costs Chevron refused to pay for over six months.[274] In fact, Chevron opened no fewer than twenty-six separate summary proceedings against the Court-appointed experts.[275] In every instance Chevron claimed the existence of "fundamental errors" in the reports filed by each of them. When examined in detail by the Court, however, none of these claims was based on "facts" challenging the integrity of the inspection data or the expert's work, but rather on "legal arguments" over peripheral issues (e.g.,

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[271] On February 2, 2010, the Court returned the work plan to López and asked him to submit a new one, ostensibly in an effort to avoid further controversy. R-687, Lago Agrio Record at 166,936 (Court Order (Feb. 2, 2010)). Notwithstanding the expert's ratification of the work plan, Chevron refused to pay the expert's fees and expenses until a new, "rational and coherent" plan was submitted. R-688, Lago Agrio Record at 167,969 (Chevron's Motion (Feb. 22, 2010)).

[272] R-689, Lago Agrio Record at 168,517 (Court Order (Mar. 23, 2010)).

[273] R-690, Lago Agrio Record at 168,535-168,536 (Chevron's Letter (Mar. 24, 2010)). *See also* R-691, Lago Agrio Record at 168,570-71 (Letter submitted by Eng. José Lopéz (Mar. 30, 2010)); R-692, Lago Agrio Record at 168,618 (Letter submitted by Eng. José Lopéz (Apr. 7, 2010)); R-693, Lago Agrio Record at 168,646 (Chevron Letter (Apr. 9, 2010)); R-694, Lago Agrio Record at 168,678 (Letter submitted by Eng. José Lopéz (Apr. 14, 2010)).

[274] R-695, Lago Agrio Record at 184,161 (Letter submitted by Eng. Marcelo Muñoz (June 03, 2010)). *See also* R-696, Lago Agrio Record at 208,985 (Letter submitted by Eng. Marcelo Muñoz (Oct. 29, 2010)); R-697, Lago Agrio Record at 208,723 (Court Order (Oct. 11, 2010), No. 11); R-698, Lago Agrio Record at 211,685 (Court Order (Dec. 16, 2010)).

[275] *See* C-931, Lago Agrio Judgment at 43, 44.

the expert did not take into consideration the release that TexPet had obtained as part of the 1995 Settlement Agreement).[276]

146. Chevron's delay tactics successfully postponed completion of the judicial inspections process for several years. By 2006 the Plaintiffs had been able to conduct only 35 of the 123 judicial inspections that they had originally requested.[277] On December 4, 2006, the Plaintiffs sought to withdraw their request for the remaining judicial inspections because the judicial inspections process was taking too long and because the Plaintiffs believed they had adequately proven their case.[278] The Court granted the Plaintiffs' request on March 19, 2007 over Chevron's objections.[279] However, the Court ordered that Chevron, who so far had conducted not a single one of its own judicial inspections, could conduct its previously requested judicial inspections if it did so reasonably promptly.

b. Chevron's Litigation Strategy Was Also Designed To Create A False Record Of Unfair Treatment

147. Chevron's gamesmanship extended beyond the systematic disruption and delay of the discovery process. It was also designed to fabricate a synthetic record of supposedly unfair treatment and due process violations. For example, the Lago Agrio record reveals a pattern of vexatious conduct calculated to inject disarray in the proceedings through, among other tactics, its repetitive filing of multiple motions addressing (i) the same issue, (ii) issues already ruled upon,[280] and/or (iii) issues expressly deemed improper to raise by motion under applicable rules of procedure. Chevron's strategy not only delayed the proceedings but also forced successive

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276 *Id.* at 40-43.

277 C-188, Motion from Pablo Fajardo Mendoza to the Superior Court of Nueva Loja (Jan. 27, 2006).

278 C-189, Plaintiffs' Motion to the Lago Agrio Court (Dec. 4, 2006).

279 C-197, Lago Agrio Court Order (Mar. 19, 2007).

280 *See, e.g.*, R-697, Lago Agrio Record at 208,723 (Court Order (Oct. 11, 2010) addressing Chevron's multiple motions on issues already ruled upon).

judges who presided over the case into situations of statutory recusal due to their inability to rule upon every one of Chevron's multiple or redundant motions within the term provided for by applicable rules of procedure.

148. To illustrate, on just one day, August 5, 2010, Chevron filed no fewer than seventeen motions with the Lago Agrio Court.[281] The majority of those motions challenged the same Court resolution.[282] All of them were filed and docketed minutes before the Court closed at 6:00 PM.[283] Under Ecuadorian Civil Procedure, a judge must respond to a motion within 3 days. This practice of filing multiple end-of-day motions in rapid-fire mode made it particularly difficult for the court to address Chevron's submissions within the short term allowed by statute.[284]

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[281] R-699, Lago Agrio Record at 192,680 Chevron's Motion (Aug. 5, 2010, 17H15M); Lago Agrio Record at 192,684 (Chevron's Motion (Aug. 5, 2010, 17h20M)); Lago Agrio Record at 192,685 (Chevron's Motion (Aug. 5, 2010, 17H22M)); Lago Agrio Record at 192,690 (Chevron's Motion (Aug. 5, 2010, 17H25M)); Lago Agrio Record at 192,692 (Chevron's Motion (Aug. 5, 2010, 17H27M)); Lago Agrio Record at 192,694 (Chevron's Motion (Aug. 5, 2010, 17H30M)); Lago Agrio Record at 192,696 (Chevron's Motion (Aug. 5, 2010, 17h32M)); Lago Agrio Record at 192,698 (Chevron's Motion (Aug. 5, 2010, 17H34M)); Lago Agrio Record at 192,700 (Chevron's Motion (Aug. 5, 2010, 17H36M)); Lago Agrio Record at 192,702 (Chevron's Motion (Aug. 5, 2010, 17H38M)); Lago Agrio Record at 192,705 (Chevron's Motion (August 5, 2010, 17H39M)); Lago Agrio Record at 192,707 (Chevron's Motion (Aug. 5, 2010, 17H40M)); Lago Agrio Record at 192,709 (Chevron's Motion (Aug. 5, 2010, 17H41M)); Lago Agrio Record at 192,711 (Chevron's Motion (Aug. 5, 2010, at 17H42M)); Lago Agrio Record at 192,714 (Chevron's Motion (Aug. 5, 2010, 17H243M)); Lago Agrio Record at 192,716 (Chevron's Motion (Aug. 5, 2010, 17H44M)); Lago Agrio Record at 192,719 (Chevron's Motion (Aug. 5, 2010, 17H45M)).

[282] R-700, Lago Agrio Record at 190,491 (Court Order (July 30, 2010)).

[283] *See, e.g.*, R-697, Lago Agrio Record at 208,723 (Court Order (October 11, 2010) addressing Chevron's multiple motions on issues already ruled upon).

[284] RLA-198, Ecuadorian Code of Civil Procedure, art. 288 ("Judgments will be issued within twelve days, court orders within three days; decrees within two days; but if the record has over one hundred pages, the term within which the judgment should be issued will be extended by one day for each one hundred pages."). *See also* C-260, Ecuadorian Code of Civil Procedure, art. 856 ("A judge of an upper or lower court may be recused by any of the parties, and must refrain from hearing a case, if: . . . (10) He does not hear the case within three times the time period provided for by law.").

149. Similarly, on October 14, 2010, Chevron filed thirty-nine motions within a 50-minute window,[285] each and every one of them separately addressing different aspects of a court order issued on October 11, 2010, three days earlier.

150. The Court Record further shows that Chevron's scheme to disrupt and delay was furthered by a pattern of successive filings of patently inadmissible motions. For example, Chevron appealed interim court rulings made expressly non-appealable by applicable rules of procedure.[286] The Court would accordingly deny Chevron's appeal on that ground[287] and, like a dog chasing its tail, Chevron would then appeal that denial, alleging multiple violations of procedure and further moving for annulment of the relevant proceedings.[288] The Court then appropriately denied Chevron's successive motions for annulment,[289] only to have Chevron challenge these denials through yet more inadmissible motions, generally accusing the judge of bias and alleging further violations of due process and irreparable harm. Following proper court procedures, the Court would have to once again issue an order denying Chevron's latest motion

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285 C-644, Lago Agrio Record at 208,830 (Court Order (Oct. 19, 2010) addressing Chevron's thirty nine motions.).

286 *See, e.g.*, R-702, Lago Agrio Record at 129,958 *et seq*. (Chevron's motion appealing a court resolution ordering the appointment of an expert (May 30, 2007)). Court resolutions ordering the appointment of experts cannot be appealed. *See also* C-260, Ecuadorian Code of Civil Procedure, art. 845 ("In summary oral proceedings that are held to liquidate interests, fruits or damages ordered in a final and binding judgment, the judgment shall not be subject to any appeal whatsoever. In other cases of summary oral proceedings, the order denying a summary oral proceeding, or the ruling pursuant to Art. 838, shall only be subject to an appeal and not to any other kind of relief. The court will not accept any filings other than the complaint and filings required by the nature of the proceeding to be held, such as requests for admissions in evidentiary cases and briefs on points of law, and the like. If a filing violates the preceding paragraph and attempts to delay the lawsuit or prejudice the other party, the judge will dismiss it sua sponte, and will fine the lawyer who signed it from US$ 5 to US$ 20.").

287 R-704, Lago Agrio Record at 130,094-95 (Court Order (Jun. 7, 2007) denying Chevron's appeal).

288 *See, e.g.*, R-701, Lago Agrio Record at 159,234 *et seq*. (Chevron's motion (Nov. 13, 2009) appealing the court order denying previous appeal and requesting the annulment of the proceedings).

289 *See*, e.g., R-538, Lago Agrio Record at 159,416-17 (Court order (Nov. 23, 2009) denying Chevron's motion for annulment).

as incompatible with applicable procedure.[290] This endless cycle of motion-denial-appeal was a Chevron routine played out to delay resolution of the issues, to force recusal of those judges unable to keep up with the vexatious practice, to bleed Plaintiffs' resources, and to create a record of purported due process violations by the court.

151. Chevron's counsel appear also to have deliberately created opportunities to file untimely motions, forcing a number of predictable court resolutions denying these motions. To illustrate, in what the Court noted as yet another example of procedural bad faith,[291] Chevron would request the appointment of an expert to review documentary evidence that it sought from third parties. When the Court had granted its motion and requested its nomination of a reviewing expert, Chevron would then decline to follow up by nominating an expert. Chevron would then wait until long after the closure of the relevant evidentiary phase to file a motion to reopen the issue and order the production of the requested documents to its still-not-nominated expert. As Chevron had no doubt planned, the Court quite appropriately rejected Chevron's motion, giving Chevron another excuse to claim judicial bias and lack of due process.[292]

152. Chevron likewise alleged that Plaintiffs' signatures in the power of attorney granted to their counsel to bring suit had been forged.[293] But Chevron raised this allegation, not at the threshold of proceedings, but only shortly prior to the conclusion of the litigation — offering no supporting evidence other than a dubious graphology report which, as the Court noted in its decision, was refuted by the individual Plaintiffs themselves (rather than their

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290 R-702, Lago Agrio Record at 129,958-66 (Chevron's Motion (May 30, 2007)); *see also* R-703, Lago Agrio Record at 129,934 (Court Order (May 23, 2007)). This is but one example illustrative of this aspect of Chevron's litigation strategy.

291 *See* C-931, Lago Agrio Judgment at 35-36.

292 *See id.* at 36.

293 C-1181, Chevron's Motion (Dec. 20, 2010).

counsel).[294] Chevron should have raised this kind of "falsehood" defense, if at all, as a preliminary matter during the initial phase of the proceedings.[295] However, it chose to withhold this charge until such time as it had become procedurally inadmissible, thus garnering another cycle of motion and appeal denials.[296] Despite its tardiness in filing, the Lago Agrio Court nonetheless addressed Chevron's "forgery" motion in its judgment and appropriately found it to be both untimely (i.e., procedurally irregular) and substantially frivolous.[297] We address the substance of the forgery allegation in Section III.C below.

153. Chevron's filings were also regularly accompanied by the submission of thousands of documents and many hours of video clips. Even a sophisticated court with ample technical and personnel support would have difficulty in handling this deluge. The Lago Agrio Court found that Chevron's tactic was improper and that most of its elephantine motion submissions were irrelevant or time-barred. Swamping the court with largely irrelevant paper appears to be a recurring practice by Chevron, even in its own national courts.[298] As the Ecuadorian Court of Appeals noted, "Hundreds of thousands [of] documents submitted by Chevron Corporation bloated the case with everything it considered pertinent to add — so much that at this [appellate] stage alone there were almost two hundred record binders (about twenty

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294 C-931, Lago Agrio Judgment at 56.

295 RE-9, Andrade Expert Rpt. ¶ 7(a).

296 *Id.* *See also* RLA-198, Ecuarorian Code of Civil Procedure, art. 117 ("Only properly produced evidence, i.e., evidence requested, presented and examined according to legal requirements, is admissible in court.").

297 C-931, Lago Agrio Judgment at 56.

298 *See, e.g.*, R-247, Opinion by the U.S. Court of Appeals for the Second Circuit, Case 10-1020-cv(L) (Mar. 17, 2011), n.2 ("Chevron has twice moved to supplement the record with thousands of pages of documents and numerous compact discs containing material irrelevant to the specific issue currently before us. Both motions were denied. After the initial denial, Chevron began submitting similar materials under the guise of Federal Rule of Appellate Procedure 28(j). But, as Chevron's experienced appellate counsel is certainly well aware, that rule only permits parties to submit '*pertinent* and *significant* authorities.' . . . It is not to be used as a vehicle to bombard this Court with distracting and irrelevant documents.").

thousand pages), not counting the more than two hundred thousand papers in the first instance case."[299]

154. The foregoing "paper dump" strategy did in fact lead to Chevron's successful recusal of Judge Ordoñez under Article 856 of the Code of Civil Procedure, since the judge was unable to resolve in a timely manner one of the many inundations of multiple and repetitive filings, accompanied by massive exhibits, regularly made by Chevron's counsel.[300]

155. As Chevron no doubt intended, its counsels' harassing conduct drew constant (and justified) admonishments and fines from the various judges who presided over the proceedings.[301] As early as August 13, 2009, the Lago Agrio Court imposed monetary sanctions on Chevron's counsel for the repetitive filing of motions and requests submitted with no logical purpose other than to disrupt and delay the proceedings.[302] Having accomplished this goal, Chevron's counsel then continued to apply the same tactics over the course of the following months. On October 27, 2010, the Lago Agrio Court once again appropriately rebuked such conduct through the imposition of additional sanctions.[303] Just the week prior the Court had denied more than twenty-five motions that it had designated as repetitive and frivolous.[304]

156. Chevron's counsel clearly adopted a campaign of systematic harassment of the Court, including the filing of motions to recuse any judge who failed to meet the statutory time limitations to rule on the many batteries of multiple and repetitive filings by Chevron's

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299 C-991, Lago Agrio Appellate Decision at 2.

300 C-1289, Chevron's Motion to Recuse Judge Ordoñez (Aug. 26, 2010); R-207, Order of the Provincial Court of Justice Sucumbios (Sept. 30, 2010); C-260, Ecuadorian Code of Civil Procedure, art. 856 ("A judge of an upper or lower court may be recused by any of the parties, and must refrain from hearing a case, if: . . . (10) He does not hear the case within three times the time period provided for by law.").

301 *See, e.g.*, C-219, Sucumbíos Sanctions Decision (Aug. 13, 2009) at 157930; *see also* C-644, Order by the Provincial Court of Sucumbíos (Oct. 19, 2010); C-878, Order by the Provincial Court of Sucumbíos (Oct. 27, 2010).

302 C-219, Sucumbíos Sanctions Decision (Aug. 13, 2009).

303 C-878, Order by the Provincial Court of Sucumbíos (Oct. 27, 2010).

304 *See* C-644, Lago Agrio Record at 208,830 (Court Order (Oct. 19, 2010)).

counsel.[305] Noting the pervasive nature of Chevron's continued disrespect for the judicial process and its numerous public affronts against the Lago Agrio Court, Judge Zambrano observed in his decision that, "These are not isolated incidents . . . [They have] been constant . . . throughout these proceedings which have even been repeated publicly by [Chevron's] spokespersons . . . , [which] have come to [the] Judge's attention."[306]

c. While Chevron Orchestrated An Operation To Remove The Presiding Judge Shortly After He Announced That A Judgment Was Imminent, Its Own Contractor Has Admitted That Chevron's Own Lab Work Was Tainted

157. In an effort to cause the removal of the then-presiding judge (Judge Nuñez) on the proverbial eve of judgment, Chevron, through its long-time contractor, Diego Borja, and convicted felon, Wayne Hansen, sought to entrap the judge in an elaborate "bribery" scheme in which he was surreptitiously video-recorded with a video pen and video microphone. Notwithstanding that the Judge neither solicited nor received any bribes,[307] Chevron launched a public relations campaign accusing the Judge of bribery. While at least one U.S. district court that reviewed the tapes and mainstream media discounted the allegations,[308] Judge Nuñez in fact did recuse himself, thereby delaying final resolution of the case for another eighteen months.

158. Chevron paid Borja handsomely for his services — more than two million dollars in benefits. But while Chevron relies on Borja to provide evidence of Judge Nuñez' alleged wrongdoing, Borja's own, unguarded statements implicate *Chevron* in unlawful activity. In recorded conversations with his long-time acquaintance Santiago Escobar ("Escobar"), Borja

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305 *See*, *e.g.*, C- 1289, Chevron's Motion to Recuse Judge Ordoñez (Aug. 26, 2010). Failure to rule upon a motion within the term provided for by statute constitutes grounds for recusal of the judge. *See* C-260, Ecuadorian Code of Civil Procedure, art. 856.

306 C-931, Lago Agrio Judgment at 60.

307 *See infra* Section III.C.2; Annex C.

308 *Id.*

confided to his friend that he and a Chevron employee, under false pretenses (employing false identities), gained entry to the Plaintiffs' laboratories.[309] According to Borja, they pretended to be independent investigators to learn how the Plaintiffs were conducting their own analysis.[310]

159. As a contractor for Chevron since 2004 with direct responsibility to ensure the safe transport of soil and groundwater samples, Borja has firsthand knowledge of how Chevron managed its labs. Borja advised Escobar that he knew Chevron's labs were not independent.

> **Borja**: Hey, to give you an example, I mean, the plaintiffs have a laboratory where they analyzed their sample, right?
>
> **Escobar**: Yeah. The plaintiffs, yeah, the Indians.
>
> **Borja**: And Chevron always stayed, supposedly, independent, and sent the analysis to have them analyzed here, supposedly, isn't that right? . . . But I know that's not true.
>
> **Escobar**: [Laughs] And where did they have them analyzed?
>
> **Borja**: That's as much as I can tell you, my man! But you do understand me? . . .
>
> **Escobar**: Oh yeah, yeah! In other words, they sent them to laboratories that had . . . that had a connection with them.
>
> **Borja:** I have proof that they were more than connected, ***they belonged to them***.[311]

160. Borja explained to Escobar that he had incriminating evidence to prove that Chevron's own operations were potentially illegal and damaging to Chevron's defense in the Lago Agrio Litigation.

> **Borja:** I have the mails . . . . Did you think I was going to jump into the water without that? . . . **I have** correspondence **that talks about things you can't even imagine, dude** . . . I can't talk about them here, dude, because I'm afraid, **but they're things that can make the Amazons win this just like that [snapping fingers] ....**

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309 R-199, Skype Tr. (Oct. 1, 2009).

310 R-199, Skype Tr. (Oct. 1, 2009).

311 R-184, Skype Tr. (Oct. 1, 2009) at 6-7 (emphasis added).

what I have is conclusive evidence, photos of how they managed things internally.[312]

161. Escobar subsequently testified in proceedings in Ecuador that, according to Mr. Borja, Chevron knowingly substituted clean soil samples for those taken from the judicial inspection sites by lifting soil samples from contaminated well sites and then driving 10 to 30 kilometers away from the sites and replacing the contaminated samples with clean soil taken from areas untouched by oil production.[313]

162. At the time Chevron unveiled its bribery allegations in a manner befitting a political campaign, the Republic did not know the resources and commitment that Chevron had devoted in its effort to bring down the presiding judge to delay or derail the environmental proceedings. But in the three years since these events unfolded it is now apparent that this episode speaks more about the conduct of Chevron than that of the Republic.

d. Chevron's Behavior in the Oriente Mirrors Its Behavior Elsewhere

163. Chevron's poor environmental practices are not unique to the Amazon. All too often Chevron has been found to engage in risky practices that increase profits at the expense of the environment:

- In 2012, a gas explosion at Chevron's off-shore oil rig in Nigeria killed two people. The oil rig's fire burned for over a month, with villagers reporting dead dolphins on the shores and drinking water and fish "that tasted like fuel."[314]
- In 2011, an accident at a Chevron oil rig off the coast of Brazil spilled over 155,000 gallons of crude oil into the Atlantic Ocean.[315] Chevron faces civil lawsuits in Brazil

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312 R-185, Skype Tr. (Oct. 1, 2009) at 8-9 (emphasis added).

313 R-189, Amazon Defense Coalition, *Key Witness Testifies that Chevron Paid Bribes, Switched Soil Samples in $27b Ecuador Lawsuit*, PETROLEUMWORLD.COM (June 11, 2010) at 2.

314 R-502, Drew Hinshaw, *Chevron Faces Fire in Nigeria*, WALL STREET JOURNAL (Mar. 6, 2012).

315 R-503, Jeff Fick, *Chevron Offers to Pay $149 Million to Settle Two Brazil Spill Suits*, WALL STREET JOURNAL (Dec. 17, 2012).

seeking more than ***$20 billion*** in damages.[316] Brazilian authorities lodged criminal charges against Chevron and have already fined the company for its role in the oil spill.[317]

- Chevron has admitted to the U.S. Securities and Exchange Commission that it is liable for remediating 180 locations where it was responsible for the release of hazardous substances causing environmental damage.[318]

- Starting in 2007, Chevron began clean-up of environmental damage it caused near its refinery in Richmond, California. Until 1987, Chevron released toxic "waste water" into local wetlands.[319] California authorities ordered the company to remove the highly contaminated sediments, which is estimated to cost in the tens of millions of dollars.[320]

- In 2010, two consecutive spills from Chevron's pipeline resulted in over 50,000 gallons of oil being spilled near Salt Lake City, Utah. The first incident was in June 2010 and resulted in 33,000 gallons of oil spilling into lakes and rivers, killing all the fish at one location.[321] The same pipeline broke again in December 2010, spilling 21,000 gallons of oil.[322]

- In 2011, Chevron settled a lawsuit brought by the State of California to resolve allegations that Chevron caused environmental harm in California by failing to properly maintain underground storage tanks. As the California Attorney General stated: "There must be accountability and consequences when the environment is compromised and innocent people are potentially exposed to hazardous materials that could endanger their health."[323]

- In 2011, Chevron settled claims brought by the city of San Juan Capistrano, California, alleging that Chevron contaminated the city's groundwater with hazardous substances.[324]

164. Chevron's dismal corporate behavior has not gone unnoticed by the international community. A *Guardian* article summarizes it best: "When it comes to aggressive legal tactics,

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316 *Id*. (emphasis added)

317 R-504, Jeff Fick, *Brazil Agency Fines Chevron $17.3 Million for Oil Spill*, THE WALL STREET JOURNAL (Sept. 17, 2012); R-705, Jeb Blount and Joshua Schneyer, Chevron, *Transocean charged in Brazilian oil spill*, REUTERS (Mar. 21, 2012).

318 R-505, 2011 Chevron 10-K, FS-57 (filed February 2012).

319 R-506, U.S. Department of the Interior, *Case Documents: Castro Cove, Richmond, CA*.

320 *Id*.

321 R-507, Lindsay Whitehurst, *Residents sue Chevron for Red Butte Creek oil spill*, THE SALT LAKE TRIBUNE (Mar. 25, 2012).

322 *Id*.

323 R-508, Office of Attorney General, *Attorney General Kamala D. Harris Announces Proposed $24.5 Million Settlement With Chevron Gas Station And Tank Owners* (Sept. 7, 2011); *see also* R-509, Louis Sahagun, *$24.5-Million Settlement Proposed For Chevron*, LA TIMES (Sept. 8, 2011).

324 R-510, Brittany Levine, *Chevron To Pay $3.1 Million Over Contamination*, ORANGE COUNTY REGISTER (Mar. 23, 2011).

vindictiveness, threats, pollution, intimidation, tax evasion and links with venal and repressive regimes, [Chevron] is in a league of its own as its corporate lawyers bludgeon, bully and try to beat with the law any opposition it meets around the world."[325] The following are just a few examples of Chevron's corporate transgressions:

- In 2007, the U.S. Securities and Exchange Commission charged Chevron with making illegal kickback payments to Iraq during its participation in the U.N. Oil for Food Program.[326] Chevron contractors made approximately US$ 20 million in illicit payments to Iraqi government-controlled bank accounts, bypassing the U.N.-administered Oil for Food escrow accounts that were established to provide humanitarian relief for the Iraqi people.[327] Chevron settled the SEC's Foreign Corrupt Practices Act (FCPA) claims for US$ 30 million, making it one of the top fourteen cases in the history of the FCPA.[328]

- In 2008, Chevron was implicated in the corruption scandal that rocked the U.S. Department of Interior's Minerals Management Service (MMS).[329] A series of investigations by the Department of Interior's Office of Inspector General revealed an extensive ethics scandal that involved financial self-dealing, accepting gifts from energy companies, cocaine use, and sexual misconduct.[330] The investigations revealed that employees of Chevron and other oil and gas companies made numerous illegal gifts to MMS employees.[331] According to the Inspector General, Chevron refused to cooperate with the investigation.[332]

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325 R-511, John Vidal, *Why Chevron's Lawyers Must Be Among The Busiest In The World*, THE GUARDIAN, Feb. 18, 2011.

326 R-512, *Chevron To Pay $30 Million To Settle Charges For Improper Payments To Iraq Under U.N. Oil For Food Program*, SEC Press Release (Nov. 14, 2007); *see also* R-513, *United States Securities and Exchange Commission v. Chevron Corporation*, Civil Complaint, Nov. 14, 2007 (S.D.N.Y.).

327 R-512, *Chevron To Pay $30 Million To Settle Charges For Improper Payments To Iraq Under U.N. Oil For Food Program*, SEC Press Release (Nov. 14, 2007).

328 R-514, *Recent Cases, Foreign Companies Dominate New Top Ten*, The FCPA Blog (Jan. 5, 2011). As part of the settlement Chevron entered into with the SEC, it was ordered to disgorge US$ 25 million in profits, pay a US$ 3 million civil penalty, and pay the Office of Foreign Assets Control of the U.S. Department of the Treasury a penalty of US$ 2 million. R-512, *Chevron To Pay $30 Million To Settle Charges For Improper Payments To Iraq Under U.N. Oil For Food Program*, SEC Press Release (Nov. 14, 2007). Four other companies also agreed to settle similar charges with the SEC, but Chevron's financial penalty is the largest of the five. R-515, *Chevron To Pay $30 Million To Settle Kickback Charges*, NEW YORK TIMES (Nov. 15, 2007).

329 R-516, Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, NEW YORK TIMES (Sept. 11, 2008). The MMS is the agency that collects about $10 billion in oil and gas royalties for exploitation of federal lands, making it one of the government's largest revenue sources aside from taxes. *Id.*

330 *Id.*; R-517, Department of Interior Memorandum from Inspector General Earl E. Devaney to Secretary Kempthorne, OIG Investigations of MMS Employees (Sept. 9, 2008).

331 R-517, Department of Interior Memorandum from Inspector General Earl E. Devaney to Secretary Kempthorne, OIG Investigations of MMS Employees (Sept. 9, 2008); R-518, Department of Interior Investigative Report of Gregory W. Smith (Aug. 7, 2008); Department of Interior Investigative Report of MMS Oil Marketing Group – Lakewood (Aug. 19, 2008).

- In 2010, Earth Rights International released a report documenting how Chevron's pipeline project in Burma (Myanmar) was supporting the authoritarian regime and that Chevron benefited from the forced labor and extrajudicial killings that the regime imposed.[333] The government of Burma (Myanmar) has received hundreds of millions of dollars in revenue from the pipeline, which has helped to keep the military government in power.[334]

3. Summary of Relevant Portions of The February 14, 2011 Judgment and Decision on Clarification

a. The Judgment

165. The single-spaced 188-page Judgment — in the English translation obtained and filed by Claimants as C-931 ("Judgment") — is not easily summarized in a few pages. However, we have abstracted in summary form the Court's crucial findings and the reasoning behind them. *See* Annex H ("Summary"). While the Summary is somewhat more than a table of contents, it is certainly far from exhaustive or even comprehensive; however, it does serve as a ready guide to quickly locate within the body of the full Judgment each of the Court's principal conclusions and its supporting factual and legal reasoning.

166. **First**, the Tribunal must understand that the appropriate format for an Ecuadorian judicial decision follows a quite different model from its common law counterpart. While at a superficial glance it appears to be a stream of consciousness document written in a one single-

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In addition, the investigation revealed that one MMS employee, who had official dealings with Chevron, had a romantic relationship with an oil scheduler for Chevron, and did not believe it was necessary to recuse herself from dealing with Chevron. R-519, Department of Interior Investigative Report of MMS Oil Marketing Group – Lakewood (Aug. 19, 2008) at 20. This same MMS employee had allowed a Chevron employee to amend a bid he had submitted and won to a lower amount than his offer after the Chevron employee realized that he had made a mistake in his calculations which was "a potentially career-ending event with huge financial consequences for Chevron." *Id*. at 11, 14, 21.

[332] R-517, Department of Interior Memorandum from Inspector General Earl E. Devaney to Secretary Kempthorne, OIG Investigations of MMS Employees (Sept. 9, 2008) at 1.

[333] R-520, Earth Rights International, *Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)* (Sept. 2009); *see also*, R-521, Vivienne Walt, *Chevron, Total Accused of Human-Rights Abuses in Burma*, TIME (July 6, 2010).

[334] R-520, Earth Rights International, *Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)* (Sept. 2009) at 43 ("[Earth Rights International] estimates that nearly 75 percent of the [pipeline p]roject income goes directly to the military regime. In 2007, this amount would have been approximately US$795 million.").

spaced 188-page paragraph, on closer inspection it reveals a precise organizational structure – indeed, a structure imposed by custom, the Organic Law of the Judicial Branch and the Code of Civil Procedure as guidance for constructing judicial decisions. While visually they seem buried within the body of the document, there are in fact fifteen logically arranged section headings, entitled FIRST through FIFTEENTH, each leading into a successive discussion of the different elements required to be covered.

167. **Second**, having gotten past these visual dissimilarities, the Tribunal will note that within each of these fifteen sections there is — even in translation — a disciplined and topically organized treatment of every one of Plaintiffs' claims and Chevron's defenses. This treatment analyzes and resolves, as a judgment in an oral summary proceeding is required to do, each of Chevron's defenses. It contains extensive citations to both sides' pleadings, certain expert reports, technical documents, environmental standards, legal documents, testing samples, laboratory analyses, witness interviews, attorney briefs (*alegatos*) and all the various other forms of evidence and argument accumulated over eight years of intensive civil litigation.

168. **Third**, the Judgment treats, and certainly does not ignore, the numerous motions filed by Chevron, virtually up to the day of the decision, claiming that Plaintiffs had engaged in fraud on the Court, that Cabrera's expert reports were written by Plaintiffs' experts, that the signature on Dr. Calmbacher's report had been forged and the report filed after its content had been changed, etc. Indeed, the Court accepted Chevron's motions and ruled that the challenged reports would be disregarded in their entirety but not the underlying evidentiary sources of those reports, such as testing data and laboratory analyses, which had not been implicated.

169. In the NINTH section of the Judgment, the Court engages in a thorough analysis of: (a) the legal bases for Chevron's responsibility (under Ecuadorian tort law) for any harmful

environmental consequences it caused in its capacity as Operator of the 1973 Concession from 1964 through 1990 and (b) the evidentiary basis in the record justifying a finding, among other things, of actual past and the risk of threatened future environmental harm to the Plaintiffs, to the ecology of the Oriente and to the indigenous population through loss of their respective cultural identities.[335] The Court in fact had ample basis in the record for finding Chevron legally responsible for environmental harm, and this finding does not support Chevron's claim that the finding proves the Court's "bias and bad faith."[336]

170. For example, the Court considered, and rejected, Chevron's claim that PetroEcuador's responsibility as Consortium member and successor Operator in the Concession area should mitigate or discharge Chevron's environmental liability caused during the years 1965 through 1990 when Chevron had served as Concession Operator.[337] The Court concludes from an analysis of the Joint Operating Agreement entered into between TexPet and a subsidiary of Gulf Oil Company, from the terms of the 1973 Concession Agreement, and from statements by Chevron's counsel at trial, that Chevron was "'technically responsible and executor of the Consortium's obligations' and as in charge of the 'design, construction, installation and operation of the infrastructure and equipment required for oil exploration and exploitation.'"[338] In fact, quite separately, PetroEcuador had begun its own self-funded remediation ("PEPDA") of other portions of the Concession area.

171. The Judgment includes specific findings based on the cited portions of the trial record, as to the persistence of toxic contaminants resulting from the improper crude oil drilling

335 C-931, Lago Agrio Judgment at 92-154.

336 Claimants' Supplemental Merits Memorial ¶ 18.

337 C-931, Lago Agrio Judgment at 92-93.

338 *Id.* at 93.

and production techniques utilized by TexPet in the Concession area, including high residual levels of TPH, benzene, toluene, polycyclic aromatic hydrocarbon ("PAH") compounds, mercury, lead, cadmium, hexavalent chromium, barium,and excess salinity.[339] The Court found that various of these compounds persisted in the soil, surface water, and ground water.[340]

172. Chevron attacks the Court's failure to use the "actual" per-pit PEPDA remediation costs incurred by PetroEcuador to calculate remediation damages.[341] In doing so, Chevron disputes the accuracy of the Ministry's explanation of PEPDA as only an interim measure, within PetroEcuador's limited budget, to moderate or mitigate immediate harm to the affected human population. However, other than suggesting that the Ministry was acting to assist Plaintiffs in their damages claim, Chevron has no objective factual basis for disputing that the PEPDA efforts were not intended to replicate the comprehensive remedies that Plaintiffs were seeking in the Lago Agrio action.

173. Chevron also attacks the Court's failure to calculate and deduct from its damages award PetroEcuador's proportion of the overall pollution cleanup liability.[342] Judge Zambrano squarely discusses and dismisses this defense on the basis of Ecuadorian law and procedure. In the first place, PetroEcuador was not a defendant and "ha[s] not been able to present any defense."[343] Secondly, TexPet never entered any such defense in its answer.[344] Thirdly, a defendant's liability for damages is not extinguished by the fact of additional harm caused by a

339 *Id.* at 102-14.

340 *Id.* at 102-19.

341 Claimants' Supplemental Merits Memorial ¶ 25.

342 *Id.* ¶ 26.

343 C-931, Lago Agrio Judgment at 123.

344 *Id.*

third party.[345] Furthermore, Chevron could have brought, but chose not to bring, a separate indemnification action against PetroEcuador in the Ecuadorian courts.

174. Since Chevron had the right to seek indemnification in the Ecuadorian courts, but chose not to exercise that right, it cannot now be heard to claim that Judge Zambrano should have reduced overall damages awarded by some percentage that Chevron alleged was the responsibility of an unjoined and absent third party — which had no right to defend itself in the proceedings before him.

175. Thereafter, in the TENTH section of the Judgment, the Court traces the chain of required legal causation between its findings of (a) Chevron's responsibility for the harmful environmental consequences of its actions and (b) Chevron's consequent legal responsibility for remediation of environmental damage to affected soil, water, human health and cultural heritage.[346]

176. In the THIRTEENTH section of the Judgment, the Court assesses compensatory damages in the following amounts:[347]

Groundwater cleanup:	$600 Million
Soils:	$5.396 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

177. In the FOURTEENTH section of the Judgment, the Court awarded a civil penalty against Chevron for a litany of procedural abuses, equal to the amount of compensatory

345 *Id.*

346 *See id*. at 154-74.

347 *Id*. at 176-86.

damages, unless Chevron should issue a timely apology.[348] Justification for this penalty was the Court's finding that Chevron had exhibited "procedural bad faith" during the course of the trial. The Court listed numerous examples, including Chevron's repeated filing of vexatious, duplicative, extra-legal and unjustified motions and appeals; its attempts to entrap the successive assigned judges and to force their recusal by making it difficult or impossible for them to timely respond to Chevron's barrage of filings; unfounded claims of judicial partiality and its use of delay tactics to frustrate the progress of the case, etc.

b. Clarification Order

178. On March 4, 2011 Judge Zambrano issued a 24-page order (summarized in Annex H) in response to a laundry list of requests by Chevron for both factual and legal clarifications of his Judgment. While the Tribunal is directed to the full order itself (C-1367) as well as to the aforementioned summary, the most pertinent portions are briefly noted below.

- The Order explained the Judgment's proper use of both Ecuadorian and U.S. law on "piercing the corporate veil," particularly in the context of the Texaco-Chevron transaction and its representation to the public as a "merger."[349]

- It confirmed how the Judgment isolated TexPet's damages to the environment in the 1965-1990 time period from PetroEcuador's environmental damages after it had become successor Operator in 1990, thus not attributing to TexPet any damages caused by other parties. He explained how evidence in the record, including military aerial photographs taken during 1990, allowed him to isolate those damages properly attributable to TexPet.[350]

- It confirmed the Judgment's consideration of, but non-reliance on, the conflicting or adversarial opinions or conclusions of the parties' experts, or Court-appointed expert Cabrera, and reiterated that the Court had formed its own opinions based on applying "logic" and "sound judgment" to the "technical content" of voluminous scientific data in the record, generally the laboratory analyses attached to the filed experts' reports.[351]

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348 *Id.* at 184-86.

349 C-1367, Lago Agrio Clarification of the Judgment at 2-5, 16-17.

350 *Id.* at 7-8, 14-15.

351 *Id.* at 8, 14, 15, 18, 21.

- It confirmed that the calculation of damages in the Judgment used the "economic criteria" in the various expert reports, but not the experts' own conclusions on remediation costs.[352]

- It contrasted the parties' experts' conflicting second hand document-based testimony with the highly correlated, credible and consistent first-hand testimony of local witnesses interviewed during the judicial inspections.[353]

- It confirmed why and how all damages awarded (with the exception of punitive damages) derived from the complaint, and that none was *extra petita*.[354]

179. While already covered extensively in the Judgment, the Order responded to numerous technical challenges by Chevron to the Court's competence, to its *in personam* jurisdiction over Chevron, to the claimed expiration of the limitations period before the suit was filed, and to the evidentiary use of witness statements.[355]

4. Summary of Relevant Portions of Appellate Court's January 3, 2012 Decision and Clarification

a. Appellate Court Decision

180. On January 3, 2012, the Provincial Court of Justice of Sucumbios addressed and rejected each of the Lago Agrio Plaintiffs' grounds for appeal. The Plaintiffs had sought on appeal additional damages "associated with the ancestral territory of the indigenous nationalities" in the affected lands.[356] The court of appeals concluded, however, that "the rights to these territories that have been recognized for these people were not in effect at the time of the event that provoked this case, so they are not remediable by means of this lawsuit, and neither are they subject to compensation by the defendants in this case."[357] "[T]he loss of territory," the

352 *Id*. at 18-22.

353 *Id*. at 13, 20, 22.

354 *Id*. at 19-22, 24.

355 *Id*. at 2-5, 20-23.

356 C-991, Lago Agrio Appellate Decision at 3.

357 *Id.*

court held, "is not recognized as compensable damage, by application of the principle of non-retroactivity of the law."[358]

181. The Appellate Court also rejected Plaintiffs' separate argument that the first instance court erred at failing to award damages for Texaco's contamination of the roadways:

> As for the damages caused by the spraying of crude on the roads by Texaco, as well as damages to other structures and land, the appeal judgment is upheld inasmuch as there is no evidence in the record that estimates the magnitude of the damage, nor are there references to an appropriate amount for the remediation of this kind of damage, as has been pointed out to this Division. These damages, although the record contains documents that prove their existence, have not been duly described nor does there exist an estimate of what the remediation would cost.[359]

182. The Appellate Court concluded that, "[f]or the reasons set forth, the appeal in the form in which it has been filed by the plaintiffs is denied."[360]

183. In the same decision, the Appellate Court accepted and sustained Chevron's appeal:

> in the part that refers to the presence of mercury in the Concession area, since there was an error in the assessment of the evidence with respect to this element in the lower courts, and therefore its significance is left aside in this ruling.[361]

184. The Appellate Court specifically affirmed the first instance court's finding of its competence to hear the case and jurisdiction over Chevron, citing in support Chevron's acquisition of Texaco in 2001;[362] that Chevron "inherited the assets" of Texaco;[363] "the verbatim public statements of the highest representative" of Chevron and Texaco "released by the same to

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358 *Id*.

359 *Id*. at 4.

360 *Id*.

361 *Id*. at 16.

362 *Id*. at 5.

363 *Id*. at 7.

all the shareholders and media" regarding the effect of the merger;[364] "the plaintiffs' good faith in interpreting the public statements of the CEO of Chevron and of the President of Texaco;"[365] that both Chevron and Texaco sought dismissal of the New York *Aguinda* case in favor of an Ecuadorian forum,[366] and the promises of both companies to submit to the jurisdiction in Ecuador in the event *Aguinda* were dismissed.[367] Among other authorities, the Appellate Court cited to a March 17, 2011 case in which Chevron was a party before the U.S. Court of Appeals for the Second Circuit:

> [T]he judgment of March 17, 2011 (Case 10-1020) says that 'Chevron Corporation remains accountable for the promises upon which we and the district court relied in dismissing plaintiffs' action,' making reference to the Texaco Inc.'s promises to submit to Ecuadorian jurisdiction. 'We therefore conclude that the district court adopted Texaco's promise to satisfy any judgment issued by the Ecuadorian courts, subject to its rights under New York's Money Judgments Recognition Act, issued by a foreign country, in awarding Texaco the relief it sought in its motion to dismiss. As a result, that promise, along with Texaco's more general promises to submit to Ecuadorian jurisdiction, is enforceable against Chevron in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings and attempts to confirm arbitral awards.[368]

185. The Appellate Court further found that the trial court had competence to issue awards under Articles 2236 and 2214 of the Civil Code. It rejected Chevron's argument that "environmental damages cannot be considered contingent" because Article 2236 covers only

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364 *Id*.

365 *Id*. at 8.

366 *Id*. at 7-9.

367 *Id*. at 6 (quoting the decision of the U.S. Court of Appeals for the Second Circuit ("Chevron Corporation claims, without citation to relevant case law, that it is not bound by the promises made by its predecessors in interest Texaco and Chevron, Texaco, Inc. However in seeking affirmance of the district court's forum non convenience dismissal, lawyers from Chevron Texaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of plaintiffs' complaint. In so doing, Chevron Texaco bound itself to those concessions.")).

368 *Id*. at 8-9.

"civil damages."[369] While the Appellate Court acknowledged that Ecuador's Civil Code (adopted in 1861) could not possibly "foresee the situations we now face [in] the world today," it also observed that its articles draw no distinction between "civil damage" and "environmental damage."[370] To the contrary, the relevant Civil Code articles refer only to situations involving "contingent damage, without limiting the nature or very essence of the damage."[371]

186. The Appellate Court independently examined and affirmed the appropriateness of the Judgment's award under Article 2214, noting "the nexus between the antecedent — oil production activity — and consequently — environmental damage."[372] Upon establishing this predicate, the court concluded, "[t]he rule establishes the obligation [by the court] to redress any damaging result."[373]

187. The Appellate Court rejected Chevron's contention that "fraud and corruption of plaintiffs, counsel and representatives" should serve as a basis to reverse the decision of the first instance court. While lacking "competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice,"[374] the court instead had an obligation under Article 115 of the Code of Civil Procedure to assess the "[e]vidence . . . as a whole, pursuant to the rules of sound judicial judgment, in addition to the formal requirements prescribed by the substantive law for the existence or validity of certain acts."[375] In "evaluating the evidence

369 *Id*. at 9.

370 *Id*.

371 *Id*.

372 *Id*. at 9-10.

373 *Id*. at 10.

374 *Id*.

375 *Id*. at 12.

collectively,"[376] the court searched the record evidence, finding that it amply supported the decision:

> [This court] . . . 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 of the Sacha North 2 Cental Station, which appears on pages 104,909 and 72,335; for the Shushfindi 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-JI-AM 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 2.5mg/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 acm) appearing on

[376] *Id.*

> 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 [court] 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-SU1R (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 [court] 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. Finally, the abbreviations "sv" and "tx" to which the defendant refers also do not affect at all the content of the information of the samples, but instead in the [court]'s opinion, are understood as a clarifier in the name, to identify the origin of the sample. It is also emphasized that the appealed judgment cured errors that could exist in the assessment of such an overwhelming amount of data, recognizing their possible a priori existence, but also warning that these errors would not be capable of slanting its reasoning, or inducing it to error, which is covered because the judge in his judgment has not assessed each sample and its results separately, as if they described isolated facts, but instead it is the collection of information coming from various sources that undoubtedly has created in the trial judge the conviction of the existence of damage, allowing him at the same time to have a minimal margin of error in applying the interpretation method of sound discretion to assess scientific evidence.[377]

188. This rather extensive quotation illustrates the rather extraordinary willingness and capability of the Appellate Court to go deeply into the trial record to verify, in its opinion, that all the trial court's environmental damages findings were supported by the trial record.

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377 *Id.* at 11-12.

189. Finally, the Appellate Court voiced criticism of the "abusive," "overtly aggressive and hostile attitude" permeating Chevron's litigation tactics, noting that "[h]undreds of thousands [of] documents [sic] submitted by Chevron Corporation bloated the case with everything it considered pertinent to add — so much that at this stage alone there were almost two hundred record binders (about twenty thousand pages), not counting the more than two hundred thousand papers in the first instance case; clearly its counterpart has filed its own, although far from the quasi-inofficious bloating."[378] The Court lamented "the existence of inappropriate challenges," "the labyrinthine profundities seeking with persistent procedural errors," and Chevron's overall "combative strategy."[379]

190. In retrospect, it is obvious — as is reflected in the trial and appellate dockets — that Chevron expected that, once the New York action had been removed to Ecuador, it would be able to overwhelm and attrite both Plaintiffs' counsel and the local judiciary with its aggressive litigation tactics. The Appellate Court noted Chevron's consistently abusive trial strategy when affirming the trial court's grant of punitive damages, concluding that failing to punish Chevron's behavior "would be an example setting a disastrous precedent for other litigants."[380]

b. Appellate Court Clarification

191. The Appellate Court clarified its earlier decision at Chevron's request. While the request and resulting clarification mostly cover technical or procedural matters, two somewhat important points surfaced.

192. **First**, the Court confirmed that the "non-monetary" relief in the Judgment, i.e., the apology needed to avoid imposition of the conditional punitive damages award, is to have no

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378 *Id*. at 2, 15.

379 *Id*. at 2.

380 *Id*. at 15.

res judicata effect. Chevron would be free to state that it is making the apology only because ordered to do so by the trial court, and may add that its apology does not imply or admit recognition of any civil or criminal obligation.[381]

193. Second, the Court confirmed that it has considered all of Chevron's charges of "irregularities in the preparation of the trial court judgment,"[382] and found them to be pure speculation belied by the trial court 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.[383]

194. The Appellate Court noted its awareness of the extensive discovery that took place of Plaintiffs' counsel, including obtaining their internal correspondence, concluding that if counsel had been providing any secret assistance to the trial court judge, that would undoubtedly have come out in that correspondence — but no such correspondence has been brought to the court's attention.[384]

195. **Finally**, the Appellate Court observed that there are proper avenues to investigate any judicial participation in fraud or irregularities and to punish such conduct if proven — but that they are not within the province of this Court.[385]

5. Chevron's Unbonded Appeal To The National Court of Justice

196. On January 20, 2012, Chevron lodged an appeal with the National Court of Justice.[386]

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381 R-299, Appellate Court Decision on Request for Clarification at 2.

382 *Id.* at 3.

383 *Id.*

384 *Id.* at 4.

385 *Id.*

197. Under applicable law, and as Claimants freely admit, Chevron as the appellant had the power at the time of the appeal to request and post a bond that by operation of law would have prevented the enforceability of the judgment pending the appeal.[387] Chevron chose not to request or post such a bond.

198. The Ecuadorian Judiciary has no discretionary powers to relieve a party from the strictures of applicable rules of procedure to the detriment of the opposing litigant.[388] Nor does the Ecuadorian Government have the power to annul or modify the rights and obligations arising from a judgment of the Ecuadorian courts.

199. On February 17, 2012, the Sole Division of the Provincial Court of Sucumbíos declared that the judgment rendered in the Lago Agrio proceedings became enforceable pursuant to the applicable rules of procedure.[389] The court also rejected Chevron's contention that the requirement to post a bond had been waived in light of the Tribunal's First Interim Award on Interim Measures.[390] The court examined its obligations under the First Interim Award and other international obligations of the Republic under human rights treaties, concluding that the Republic's international law obligations under certain human rights conventions prevail. The court accordingly declined to suspend enforceability of the Judgment in the absence of a normative basis allowing the court to do so.[391]

200. The appeal remains pending before the National Court of Justice.

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386 C-1068, Chevron's Cassation Appeal (Jan. 20, 2012).

387 Claimants' Letter to the Tribunal (Sept. 14, 2012).

388 *See* Interim Measures Hr'g Tr. (Feb. 8, 2011) at 102:25-110:3; Respondent's Letters to the Tribunal of Feb. 24, 2011 at 2-4 and Jan. 9, 2012 at 5-7 (citing RLA-164, Constitution of Ecuador (2008), arts. 86.4, 168, 225, 226; R-66, Foreign Law Decl. of G. Eguiguren, E. Albán & A. Bermeo (Feb. 6, 2006) ¶¶ 23-24).

389 R-398 (Decision of the Sole Chamber of the Provincial Court of Sucumbíos (Feb. 17, 2012)).

390 *Id.*

391 *Id.*; *see also* R-399 (Decision of the Sole Chamber of the Provincial Court of Sucumbíos (Mar. 1, 2012)).

III. Claimants' Denial of Justice Claim Must Fail

201. Claimants awaited the Tribunal's Third Interim Award on Jurisdiction and Admissibility[392] before filing what was always going to be their principal claim in this arbitration for denial of justice.[393] Given that Claimants take the view that they are under no obligation to exhaust local remedies, they could have filed their denial of justice claim upon the issuance of the Lago Agrio Court's Judgment on February 14, 2011. Instead, Claimants awaited the Tribunal's ruling on its jurisdiction over contractual and Treaty claims relating to the Settlement and Release Agreements because the jurisdictional basis for the denial of justice claim is far more tenuous. They hope, in other words, to piggyback on the Tribunal's decision to uphold jurisdiction over very different claims. But this stratagem must fail. The logic and basis of the Tribunal's Third Interim Award cannot be extended to the claim for denial of justice because there is a fatal disconnect between the claim and the investment. In short, if Claimants fail to establish their rights under the Settlement and Release Agreements, then the object of the Lago Agrio proceedings cannot have been the Claimants' rights under the Settlement and Release Agreements as a constituent element of Claimants' historical investment in Ecuador. It must follow, from the logic of the Tribunal's Third Interim Award, that a claim for alleged procedural prejudice unconnected with any conceivable investment rights does not satisfy the required link between the dispute and an investment in Article VI(1)(c) of the Treaty.

202. Even if the Tribunal is prepared to affirm jurisdiction over Claimants' denial of justice claim, that claim fails on the merits for the reasons set out in this Section. In summary: Claimants' denial of justice claim must be rejected because they have failed to exhaust local remedies. Furthermore, even if the Tribunal chooses to dispense with the exhaustion

392 February 27, 2012.

393 March 20, 2012.

requirement, Chevron has failed to meet the very high burden of proof required to prove a denial of justice claim.

A. This Tribunal Lacks Jurisdiction Over Claimants' Denial of Justice Claim Because There Is No Connection Between The Denial of Justice Claim and Claimants' Investment

203. Claimants' denial of justice claim does not allege any violation of rights related to Claimants' investment. Accordingly, there is no investment dispute "arising out of or relating to . . . (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."[394]

204. The Tribunal found in its Third Interim Award that:

> The 1995 Settlement Agreement made with the Respondent lies, of course, at the heart of the Claimants' claims against the Respondent, as both an alleged "investment" and an alleged "investment agreement" under the BIT.[395]

205. The Tribunal upheld jurisdiction based on the explicit understanding that "there is a close and inextricable link between TexPet's 1973 Concession Agreement and the 1995 Settlement Agreement."[396] But, as demonstrated during Track 1 of the Merits proceedings, the Republic has not breached the 1995 Settlement Agreement because Claimants do not have the rights they say they have under that agreement. The 1995 Settlement Agreement does not grant Claimants an indemnity or any other conceivable right against the Government of Ecuador in respect of litigation pursued by third party plaintiffs.[397] Absent any link to the 1995 Settlement Agreement, Claimants cannot establish that the Lago Agrio Litigation has any connection to rights arising out of their investment.

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394 C-279, Ecuador-U.S. BIT, art. VI(1)(c).

395 Third Interim Award ¶ 4.2.

396 *Id.* ¶ 4.15.

397 *See infra* Section IV.

206. Indeed, because neither TexPet nor Chevron can establish a breach of any rights arising out of the 1995 Settlement Agreement, the only remaining investment through which to assert jurisdiction is TexPet's original 1973 Concession. But based on the Tribunal's own reasoning in the Third Interim Award, that agreement is too remote to serve as the basis for jurisdiction here. The Tribunal was at pains to emphasize that its jurisdiction over treaty claims was contingent upon a link between the 1973 Concession and the 1995 Settlement and Release Agreement. In the Tribunal's words:

> [F]or the purpose of applying Article VI(1)(c), it is not possible to divorce one from the other. To the contrary, it is necessary to treat the 1995 Settlement Agreement as a continuation of the earlier concession agreements, so that it forms part of the overall investment invoked by TexPet.[398]

207. What was critical to the Tribunal's reasoning was its acceptance of Claimants' submission that "[e]nvironmental remediation is a normal and natural part of an oil concession project."[399] Hence the remediation contemplated by the 1995 Settlement Agreement was said to form "part of the 'overall investment' invoked by TexPet."[400]

208. Without the 1995 Settlement Agreement, the Lago Agrio Litigation is a simple tort action brought by private parties stemming from third-party claims for pollution that has no connection to the rights and obligations under TexPet's 1973 Concession. Indeed, Claimants have not alleged — nor can they allege — that absent the 1995 Settlement Agreement, tort claims for environmental damage are a "normal and natural part of a concession project."[401] The third-party litigation in Ecuador is not part of the lifespan of the investment, and Claimants thus

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398 Third Interim Award ¶ 4.16.

399 *Id.* ¶ 4.33.

400 *Id.* ¶ 4.32

401 *Id.* ¶ 4.33.

cannot establish the requisite link between their denial of justice claim and rights arising out of an investment in Ecuador.

209. In the Third Interim Award, the Tribunal noted that its decision and "approach regarding the overall life-span of an investment materially accords with the reasoning of other tribunals."[402] The reasoning employed by those other tribunals, however, does not assist Claimants in establishing jurisdiction over their denial of justice claim.

210. For example, the lawsuits at issue in the *Commercial Cases* dispute asserted breaches of the 1973 Concession agreement that established the claimants' investment in the hydrocarbons sector in Ecuador. The claimants contended, and the tribunal found, that the seven lawsuits themselves constituted an "investment" or part of an "investment" under the Ecuador-U.S. BIT.[403]

211. The logic of the tribunal's decision was premised on the direct connection between the original concession and the contract claims in Ecuador. The tribunal reasoned: (i) oil extraction and production activities are investment activities conducted pursuant to an investment agreement known as the 1973 Concession; (ii) a dispute concerning remuneration for such activities is an investment dispute; and, (iii) until that dispute had been resolved, claimants' investments have not been "wound up."[404]

212. Similarly, in *Mondev*, the very interest said to constitute the "investment" — option rights that the City of Boston prevented Mondev from exercising — was the direct subject

402 *Id.* ¶ 4.21.

403 CLA-1, *Commercial Cases* Interim Award ¶¶ 40, 158, 161.

404 *Id.* ¶¶ 180, 183.

of the litigation at issue, and until that litigation had been resolved, the tribunal reasoned, the claimant's investment had not been wound up.[405]

213. *Mondev* and the *Commercial Cases* are inapposite because, in both of those cases, the tribunals relied on the lifespan theory where the investors' claims to money were founded upon the investors' rights under their original investments. Here, no such rights are at issue. The Lago Agrio Litigation relates to allegations of pollution of the Oriente beyond acceptable norms, which does not constitute an investment activity. The Lago Agrio Litigation cannot reasonably be considered as the natural "winding up" of TexPet's 1973 Concession.

214. Claimants' denial of justice claim is thus too remote from TexPet's 1973 Concession and must be rejected. There is no investment dispute "arising out of or relating to . . . (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."[406] A conclusion to the contrary would transform this Tribunal into a court of general jurisdiction. It is respectfully submitted that this Tribunal does not have jurisdiction to entertain grievances asserted by *investors* without the requisite connection to their *investments*.

B. Alternatively, Chevron's Denial of Justice Claim Fails on the Merits[407]

1. Chevron's Claim Cannot Be Sustained Given Its Failure To Exhaust Local Remedies

215. The proceedings before the Lago Agrio Court lasted nearly eight years, followed by another two years of appellate proceedings, which are still continuing. Chevron now asks this Tribunal to evaluate dozens of alleged procedural errors that it claims were committed by these

405 CLA-7, *Mondev* Award ¶¶ 80-81.

406 C-279, Ecuador-U.S. BIT, art. VI(1)(c).

407 TexPet has no basis to allege a denial of justice claim as it is not a party to the Lago Agrio Litigation. Even Claimants' own expert on the issue of denial of justice implicitly acknowledges this self-evident point. Jan Paulsson states: "Since the proceedings in Ecuador on the international-law ramifications of which I am asked to opine were against Chevron Corporation only, in the main I refer only to Chevron in this opinion." Paulsson Expert Rpt. ¶ 8. Accordingly, in this section of the Counter-Memorial, Respondent will also refer in the main only to Chevron.

local courts over the course of the last ten years of adversarial proceedings. Until the present memorial, the Tribunal had heard only Chevron's version of events. While a more complete record, as now described herein, will reveal that Chevron did in fact receive fair treatment from these lower courts, the Tribunal need not descend into the minutiae of local Ecuadorian procedural law to evaluate every allegedly inappropriate act or omission of the local courts that Chevron claims occurred during the Lago Agrio proceedings.[408] Chevron's denial of justice claim fails for a much simpler reason: a claim cannot be sustained where, as here, the claimant has failed to exhaust local remedies that would have or have in fact addressed the grievances of which it complains.

216. In *Loewen*, the tribunal upheld the principle that "a court decision which can be challenged through the judicial process does not amount to a denial of justice."[409] The *Loewen* tribunal also endorsed Judge Jiménez de Aréchaga's view that "it was an essential condition of a State being held responsible for a judicial decision in breach of municipal law that *the decision must be a decision of a court of last resort*, all remedies having been exhausted."[410]

217. This is because "the very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion."[411]

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408 Those claims which are little more than an effort by Claimants to appeal procedural decisions of the Lago Agrio Court are addressed in Annex G.

409 CLA-44, *Loewen* Award ¶ 151 (quoting Professor Greenwood).

410 *Id*. ¶ 153 (citing Judge Jimenez de Arechaga,"International Law in the Past Third of a Century" (1978)).

411 RLA-61, Paulsson, DENIAL OF JUSTICE at 111; RLA-309, Edwin M. Borchard, *'Responsibility of States' at the Hague Codification Conference*, 24 AM. J. INT'L L. 517, 532-33 (1930); RLA-310, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE at 311-12, 404 (1970) ("[A] complaint based upon denial of justice . . . will be rejected by the international tribunal seised of the matter where it appears that *the claimant has failed to exhaust his local remedies*.") (emphasis in original); RLA-311, John R. Crook, *Book Review Of Denial of Justice in International Law By Jan Paulsson*, 100 AM. J. INT'L L. 742, 744 (2006) ("Since the whole system of justice is put at issue by a claim of denial of justice — notably its capacity to identify and correct mistakes — the claimants must utilize the system to an appropriate degree in order to establish denial of justice."); RLA-312, Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT'L L. 539, 558-59 (1928) ("[A] denial of justice . . . does not exist until the remedies afforded by the laws of the country have been tried and found wanting."); RLA-313, Fred Kenelm Nielsen, INTERNATIONAL LAW APPLIED TO RECLAMATIONS 28 (1933);

Indeed, the exhaustion of local remedies is necessary to establish that the "denial of justice complained of is the deliberate act of the State, and that it is willing to leave the wrong unrighted."[412]

218. Chevron concedes, as it must, that "international law requires a claimant to exhaust its local remedies before claiming a denial of justice."[413] However, Chevron argues that it need not exhaust local remedies here because:

> (i) the appellate court has stated that the Lago Agrio Judgment is enforceable, constituting a denial of justice *per se*; (ii) no local mechanisms are available to "remedy" the specific harm which Claimants claim; and (iii) the Ecuadorian judiciary is manifestly biased against Claimants and operate as tools of Ecuador's Executive.[414]

219. Chevron's assertions are unsupported by the facts and incorrect as a matter of law.

a. The Fact That A Judgment Is Enforceable Abroad Does Not Excuse The Requirement Of Exhaustion

220. Chevron insists that: "[t]he exhaustion requirement for pleading a denial of justice does not apply in this case, because the Ecuadorian judicial system created a product enforceable within Ecuador with the Lago Agrio judgment."[415] Chevron does not offer one iota of legal support for this novel theory and is wrong for four reasons.[416]

RLA-314, Edwin M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 198 (1919); RLA-150, D.P. O'Connell, INTERNATIONAL LAW 946 (2d ed. 1970) ("Until the injured party has sought redress under municipal law he has not been denied justice, and a State does not incur international responsibility until it has denied justice."); RLA-315, Letter from Marcy, U.S. Sec. of State to Chevalier Bertinatti, Sardinian Minister (Dec. 1, 1858), *reprinted in* 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, 748 (1906) ("A government can not be held responsible for the mistakes of its courts . . . and certainly should not be when the party complaining has not exhausted all the means placed within his reach of correcting the errors that may have been committed.").

412 RLA-316, Clive Parry, *The Exhaustion of Local Remedies: Substance or Procedure?*, 31 BRIT. Y.B. INT'L L. 452, 452 (1954), *citing* Borchard, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, § 381 (1915).

413 Claimants' Supplemental Merits Memorial ¶ 243.

414 *Id.* ¶ 248.

415 *Id.* ¶ 242.

416 Chevron relies on the bare opinion of Jan Paulsson, who states that "Once the Ecuadorean judgment became enforceable under Ecuadorean law, and thus liable to enforcement under the law of other jurisdictions, then

221. **First**, Chevron's argument is inherently illogical. The fact that a private party is seeking to enforce a judgment produced by the Ecuadorian lower courts simply means that Chevron has not one, but two avenues of relief. Chevron is contesting the judgment in the enforcement courts abroad,[417] and is also in the process of seeking relief from the National Court of Justice of Ecuador, as described in more detail below. It defies logic to see how having two avenues of relief renders it unnecessary for Chevron to pursue the local remedies that are available to it under Ecuador's judicial system. Furthermore, the courts of many countries allow for the enforcement of foreign first instance judgments even where that judgment is subject to appeal in the foreign state.[418] It is illogical for Claimants to allege that the exhaustion requirement is rendered nugatory upon the issuance of an enforceable judgment. Simply put, the enforceability of a judgment has no impact on the obligation to exhaust local remedies under customary international law.

222. **Second**, Chevron's argument ignores the fact that the mirror image of a claimant's obligation to exhaust local remedies is the right that customary international law

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no remedy within Ecuador could rectify the situation following enforcement of the judgment outside Ecuador." Paulsson Expert Rpt. ¶ 79. This opinion is not correct since the very overturning of the judgment, which could occur on cassation appeal in Ecuador would render the enforcement proceedings moot.

417 Claimants are actively defending the enforcement proceedings and thus have the opportunity to challenge the validity of the Lago Agrio judgment wherever those proceedings are brought. *See* R-443, Affidavit of George J. Pollack (August 15, 2012) (describing, *inter alia*, the available grounds for challenging recognition of a foreign judgment in Ontario, Canada); R-444, Affidavit of Massami Uyeda Junior and Ruy Janoni Dourado (August 15, 2012) (describing the grounds on which recognition of foreign judgments can be challenged in Brazil); R-468, Declaration by Marcelo Rufino (describing the available grounds for challenging recognition of a foreign judgment in Argentina).

418 *See*, *e.g.*, RLA-8, New York's Uniform Foreign Country Money-Judgments Recognition Act, N.Y. C.P.L.R. § 5302 ("This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."); RLA-317, Australia's Foreign Judgments Act 1991 pt 2 s 5(5) ("[A] judgment is taken to be final and conclusive even though: (a) an appeal may be pending against it; or (b) it may still be subject to appeal; in the courts of the country of the original court."); RLA-318, *Colt Industries Inc. v. Sarlie* (No. 2) [1966] 1 W.L.R. 1287, 1291 (C.A.) (U.K.) ("At the present moment the appellate process . . . is not exhausted . . . But this is not sufficient of itself to show that the judgment is not final and conclusive. It is well established that, even though a judgment is subject to appeal, or under appeal, it is still final and conclusive so as to enable an action to be brought upon it.").

confers upon the respondent State to "correct[]" itself before being held responsible under international law.[419]

223. As explained by the *Ambatielos* tribunal, the exhaustion of local remedies rule:

> means that the State against which an international action is brought for injuries suffered by private individuals has ***the right*** to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has ***the right*** to demand that full advantage shall have been taken of all local remedies.[420]

224. Modern investor-state jurisprudence also supports the Republic's arguments here. The *AFT v. Slovak Republic* tribunal found that "[t]he non-exhaustion of local remedies is *per se* sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary."[421] In *Loewen*, the tribunal explained that "the [s]tate is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort,"[422] "[i]t is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstance in which it is situated."[423] "In the last resort, the failure by [a] nation to provide adequate means of remedy may amount to an intentional wrong but only in the last resort. The line may be hard to draw, but it is real."[424]

225. **Third**, Chevron alone is responsible for the fact that the Lago Agrio Judgment is subject to enforcement abroad today, and Chevron's own conduct cannot be imputed to the Republic. As the Republic previously noted, "the enforceability of the judgment occurred as a matter of law as a direct and immediate result of Chevron's own choice not to request that the

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419 RLA-61, Paulsson, DENIAL OF JUSTICE at 7.

420 CLA-317, *Ambatielos* Award at 334 (emphasis added).

421 RLA-319, *AFT* Award ¶ 251**.**

422 CLA-44, *Loewen* Award ¶ 143.

423 CLA-44, *Loewen* Award ¶ 168.

424 CLA-44, *Loewen* Award ¶ 242.

court set the amount of a bond and to post the appropriate amount to suspend — also as a matter of law — the enforceability of the judgment pending adjudication of the cassation appeal."[425] To state a claim for denial of justice, a claimant must show that the "last, direct act, the immediate cause" of the claimant's alleged damage was the State's conduct, rather than some other event or conduct.[426] Chevron's decision (1) not to request the Lago Agrio Appellate Court to set the bond amount and (2) not to post the bond required to suspend enforceability of the judgment was an intervening, direct and immediate cause of the enforceability of the Judgment, breaking the "causal nexus" required for a showing of denial of justice.

226. Put another way, Claimants cannot escape their responsibility by invoking the previously-issued Interim Awards on Interim Measures or the alleged breach thereof through ministerial steps such as issuance of a certification of enforceability of the Judgment. Not only was Chevron's decision not to exercise its right to suspend the Judgment by way of asking for and posting a bond the "last, direct act, and the immediate cause," but the Judgment was enforceable whether or not the clerk of the court issued the traditional certification of judgment, which does nothing more than confirm in writing what is otherwise operable by law.

227. The *Loewen* case confirms that a claimant may not dispense with the local requirement to post a bond — even where the bond is considered by the claimants to be burdensome.[427] Claimants concede that Chevron had the power to request and post a bond that,

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425 Respondent's Letter to the Tribunal (Aug.15, 2012) at 6.

426 CLA-173, *Lauder* Award ¶ 234 (finding that although respondent did breach treaty obligations, the claimant failed to meet the burden of proof that his own actions did not constitute an intervening cause).

427 In *Loewen*, the claimant argued that it was denied justice during a trial in Mississippi and that, rather than appeal the $500 million jury verdict, it was effectively forced to settle the case because the appeal bond requirement would have required the claimant to post a $625 million bond, an amount which would have quickly bankrupted the claimant. CLA-44, *Loewen* Award ¶¶ 4-7. The tribunal held that the claimant's denial of justice claim must fail because the claimant could not show that it did not have a "reasonably available and adequate remedy under United States municipal law." *Id.* ¶ 2. Claimants' reliance on *Loewen* is misguided and misleading since they fail to note that the tribunal ultimately rejected the claimant's claim due to the claimant's own failure to post a bond and exhaust

by operation of Ecuadorian law, would have prevented the enforceability of a judgment pending the appeal. Unlike in *Loewen,* Chevron has no basis to suggest that the amount of any bond would have been exorbitant because it *never requested to post a bond* or to suggest an appropriate amount. Claimants' failure to request a bond — thus rendering the judgment enforceable — cannot now be used as a tool to avoid the requirement to exhaust local remedies.

228. Furthermore, if Claimants' appeal is successful, the Lago Agrio Judgment may be nullified, thus rendering the enforcement actions moot and eliminating any potential harm that Claimants may have suffered.

b. The National Court Of Justice And The Constitutional Court Provide Effective Remedies To Claimants

229. Alternatively, Claimants argue that exhaustion is not required here because the available remedies in Ecuador are not effective. In particular, Chevron claims: "in order to redress the wrongs of the Lago Agrio Judgment, Claimants would require a different, unbiased finding of fact. Since cassation does not allow a review of the facts, it is no remedy for Chevron to appeal to the National Court of Justice or Constitutional Court."[428]

230. In relation to the exhaustion requirement it is for the respondent State to "prove the existence, in its system of internal law, of remedies which have not been used."[429] Once the respondent State establishes the availability of local remedies, the burden shifts to claimants to show that such remedies are ineffective and obviously futile.[430] Here there is no dispute as to the availability of remedies. Both sides acknowledge that Chevron may appeal to the National Court

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local remedies. Claimants also mistakenly rely on *Pantechniki* to support their denial of justice claim where the sole arbitrator in that case, Jan Paulsson, rejected the claim because the claimants failed to exhaust local remedies. RLA-17, *Pantechniki* Award ¶¶ 96-97.

428 Claimants' Supplemental Merits Memorial ¶ 250.

429 CLA-317, *Ambatielos* Award at 334.

430 CLA-319, International Law Commission (Dugard), Third Report on Diplomatic Protection at 6, ¶ 19; *see also*, RLA-61, Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW at 116.

of Justice and the Constitutional Court of Ecuador. Claimants simply argue that these remedies are not effective because these courts cannot review the facts, just law. [431]

231. To show that these two remedies available to Chevron are ineffective, Chevron bears a significant burden. According to Amerasinghe, "the *Finnish Ships Arbitration* made it clear that the test is . . . *manifest ineffectiveness*, not the absence of a reasonable prospect of success or the improbability of success."[432] Similarly, in the *Norwegian Loans* case, Sir Hersch Lauterpacht insisted the ineffectiveness of the remedy must be "so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts."[433]

232. Chevron has not and cannot meet this burden. There are two effective remedies available to Chevron that it has failed to exhaust. First is Chevron's cassation appeal to the National Court of Justice, which is currently pending. This Court can overturn the Lago Agrio Judgment on numerous grounds, if Chevron substantiates the existence of these grounds.[434] If the National Court of Justice denies Chevron's cassation appeal, Chevron can also pursue an extraordinary action for protection before the Constitutional Court.[435] Chevron's cassation appeal includes alleged violations of several Constitutional provisions, which it is entitled to bring to the Constitutional Court.[436] Like the National Court of Justice, the Constitutional Court can overturn the Lago Agrio Judgment under the proper grounds, including, *inter alia*, lack of due process in the underlying proceeding as alleged by Chevron.

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431 Claimants' Supplemental Merits Memorial ¶ 250.

432 RLA-320, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 206 (2ed. 2004) (emphasis added).

433 RLA-321, *Case of Certain Norwegian Loans* (France v. Norway) I.C.J. July 6, 1957 at 39.

434 RE-9, Andrade Expert Rpt. ¶¶ 80-84.

435 RLA-164, Constitution of Ecuador (2008), arts. 94, 437.

436 *See, e.g.* C-1068, Chevron's Cassation Appeal at 31, 35-36, 89, 107, 115-116, 138.

233. In fact, Chevron's ineffective remedy argument is inconsistent with the relief that it is actually seeking before the National Court of Justice. In particular, Chevron's cassation appeal requests that:

- The Division of Cassation shall declare the proceedings null and final.
- In the event that the Division were to consider the proceeding valid, it shall quash the judgment and dismiss the complaint as having ***no basis in the facts or in law***.
- The plaintiffs shall be ordered to pay court costs, which shall include attorneys' fees.
- The judges and substitute judges who entered the "fraudulent judgments" shall be fined the maximum amount permitted in the Law of Cassation, and an official letter shall be sent to the Judicial Council so that those individuals' conduct be judged.
- The procedural fraud be condemned.[437]

234. Chevron further requests that the National Court of Justice suspend the enforceability of the Lago Agrio Judgment and declare that there is no requirement to post a bond to suspend enforcement.[438] The Court will review factual findings of the first instance judgment pursuant to Article 3 of the Law on Cassation, which permits review of the application of the standard of proof as well as any allegations relating to violations of due process.[439] Article 3 therefore provides Chevron opportunity to argue that the court made fundamental errors in its review of the factual record, which must now be overturned. Chevron's appeal, if successful, would clearly provide it with an effective remedy against the Lago Agrio Judgment.

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437 *Id.* at 159-60.

438 *Id.* at 160.

439 RE-9, Andrade Expert Rpt. ¶¶ 81-82.

c. Claimants Have Failed To Establish That Any Appeal Would Be Futile

235. Finally, Chevron alleges that it need not exhaust local remedies because the judiciary has been so politicized that "any attempted remedies obviously would be futile."[440]

236. Claimants' burden for showing that the suggested procedural mechanisms are so obviously futile that they did not even need to attempt them is high. According to Amerasinghe:

> The *Finnish Ships Arbitration* made it clear that the test is *obvious futility* . . . not the absence of a reasonable prospect of success or the improbability of success. . . . The test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure. The test may be said to require evidence from which it could reasonably be concluded that the remedy would be ineffective.[441]

Claimants have failed to meet their burden of proof regarding futility.

237. Claimants rely on the *Robert E. Brown* case to support their position that futility may be demonstrated by a lack of judicial independence.[442] However, the *Robert E. Brown* case shows that a lack of judicial independence must be extreme to render local remedies futile. According to Professor Paulsson: "In *Robert E. Brown*, *there was massive interference in a pending case*, with the executive removal of the chief judge who had been instrumental in acknowledging Brown's rights and with the legislative reversal of a substantive ruling which had already become *res judicata* in Brown's specific case."[443] Indeed, the independence of the courts in South Africa had been completely destroyed by the Executive, which had become the "sole authority in the land."[444] The situation was so extreme in South Africa during that time that it

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440 Claimants' Supplemental Merits Memorial ¶ 242.

441 RLA-320, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 206 (emphasis added).

442 Claimants' Supplemental Merits Memorial ¶ 247.

443 RLA-61, Paulsson, DENIAL OF JUSTICE at 52-53 (emphasis added).

444 CLA-308, *Brown* Award at 126.

ultimately led to a war in which the independence of the South African State, itself, was suppressed.[445]

238. Further, *Robert E. Brown* also involved a concerted effort by the government to deny justice to a specific party. "All three branches of the Government conspired to ruin [Brown's] enterprise."[446] Specifically, in *Brown*, the legislature enacted a law specifically targeting Brown's case.[447] The President of South Africa had *ex parte* communications with the Chief Justice deciding Brown's case and threatened to suspend him from office if he did not rule as the President desired.[448] The Chief Justice was eventually dismissed from office because of his ultimate ruling in the *Brown* case.[449]

239. Unlike the *Brown* case, here the judiciary has actually ruled on several occasions in favor of Claimants and against the Respondent. Among other examples, in 2007, TexPet received a US$ 1.5 million court judgment against the Government;[450] in 2008, an Ecuadorian appellate court reversed the dismissal of another multi-million-dollar TexPet case against the Government.[451]

240. As recently as June 2011, the First Ciminal Division of the National Court of Justice declared the criminal case against Chevron executives, Messrs. Veiga and Pérez "null and void" because of noncompliance with certain procedural requirements that govern prosecutions of

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445 *Id*. at 129.

446 *Id*.

447 *Id*. at 125. ("An obedient legislature immediately enacted, at the demand of the Executive, the so-called testing law, targeting the decision and judge in the Brown case.").

448 *Id*. at 124.

449 *Id*. at 126.

450 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.

451 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).

this kind.[452] The case advanced through the criminal system culminating in a hearing in May 2011.[453] The National Court of Justice issued its decision, finding that the charges — which focus upon alleged contractual misrepresentations — could not be brought unless a civil court first declares that the relevant agreement is vitiated by falsehood or forgery.[454] Because no such declaration by a civil court existed, the court determined that the prosecution was invalid from its inception.

241. Whatever procedural insufficiencies existed, the judicial system identified and rectified them. The dismissal of the proceedings serves as a reminder that Claimants' claims are premature. Contrary to Claimants' allegations, the commencement, progression and resolution of the criminal proceedings have always been appropriate and regular. In Annex B, the Republic responds in detail to Claimants' allegations, and establishes the regularity of those proceedings.

242. Furthermore, throughout the Lago Agrio Litigation, the court has also ruled in favor of Chevron on various questions of fact and law. Among others, Chevron successfully cancelled the critical judicial inspection at the Guanta field[455] and recused Judge Ordoñez.[456] Chevron also successfully petitioned the Court to open thirteen separate summary proceedings to address Chevron's allegations of essential errors in various expert reports.[457] The Appellate Court upheld the rejection of several of the Lago Agrio Plaintiffs' claims for damages[458] and the

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452 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).

453 *See id.*

454 *See id.*

455 *See supra* Section II.2.a.

456 *See* R-207, *Order of Provincial Court of Justice Sucumbíos* (Sept. 30, 2010).

457 R-522, Lago Agrio Record at 177,499-177,514 (Letter from Chevron dated March 12, 2010, summarizing allegations of essential error submitted to the Court).

458 C-991, Lago Agrio Appellate Decision at 3-4.

Appellate Court accepted and sustained Chevron's appeal regarding the presence of mercury in the Concession area.[459]

243. In sum, Chevron has failed to show any facts resembling those in the *Brown* case and there is no evidence to support allegations that the judiciary is "manifestly biased against Claimants"[460] or that the National Court of Justice cannot or will not provide adequate review of Chevron's appeal. As explained in Annex A, the true state of Ecuador's judiciary is much different from the misleading picture Claimants have painted.

2. Denial Of Justice Is A Serious Charge, And The Presumption In Favor Of The Judicial Process May Be Overcome Only By Means Of Clear And Convincing Evidence Of Highly Egregious Conduct

244. In the event that the Tribunal elects to dispense with the requirement of exhaustion, and to proceed to examine the allegations of misconduct committed in the Lago Agrio proceedings, Chevron bears a very high burden of proof. Under international law, denial of justice is a serious and exceptional charge that can be upheld in only the most extreme circumstances. The charge must, by force of law, be directed to the entire judicial system as a whole, and to its ability to correct error and accord justice. Thus, the implications of a finding of denial of justice are far broader, and cut far deeper, than any other breach of the law of State responsibility that may be alleged. Indeed, judging a judicial system requires extraordinary caution and care.

245. Judge Tanaka of the International Court of Justice ("ICJ") made this point forcefully in the *Barcelona Traction Case*:

> It is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned

459 C-991, Lago Agrio Appellate Decision at 16.

460 Claimants' Supplemental Merits Memorial ¶ 248.

> but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be *a grave charge* which States *are not inclined to make if some other formulation is possible*.[461]

246. The enormity of an accusation of denial of justice and the repercussions of its validation by an international tribunal are reflected in the special principles that international law imposes on the method of adjudicating a denial of justice: (1) the presumption of judicial regularity, (2) the duty to demonstrate highly egregious conduct, and (3) the requirement of clear and convincing evidence.

a. National Judiciaries Are Entitled To A Presumption Of Regularity

247. Chevron assumes a particularly elevated burden in electing to advance claims of denial of justice because international law bestows a presumption of regularity upon the decisions and acts of national judiciaries. This is, in part, an acknowledgment that judicial systems have built-in mechanisms for correction and an internal ethos of reviewability. It is also a reflection of the fact that a judicial system as a whole is accountable to a nation, whose members all have an interest in fair and upstanding courts for their own benefit as citizens. While these considerations certainly do not entirely immunize judicial conduct from international scrutiny, they affect the question and impose a level of deference not warranted in the review of other State actions.

248. As O'Connell succinctly put it, "There is a presumption in favour of the judicial process."[462] The conduct of a national judiciary must always carry a strong presumption of correctness, and review of that conduct should always proceed from a posture of great deference:

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461 RLA-304, *Barcelona Traction* Award at *160, separate opinion of Judge Tanaka (concurring with the judgment dismissing the claim and concluding that Belgium's denial of justice claim was unfounded) (emphasis added).

462 RLA-150, Daniel P. O'Connell, INTERNATIONAL LAW 948 (2d ed. 1970).

> [W]ith but few exceptions judgments of the[] courts of last resort are considered to be and are accepted as just and proper. There is, therefore, a *strong presumption in favor of their correctness*, and a complainant who bases his grievance upon an alleged denial of justice by the courts assumes the obligation of establishing by clear evidence that the presumption does not apply to his case.[463]

249. As stated by the *Putnam* tribunal, foreign court decisions "must be presumed to have been fairly determined."[464] One commentator has observed:

> [D]efinitions [of denial of justice] and the holdings of many arbitral tribunals insist that: whatever the precise definition of denial of justice, there must be a presumption of deference to the foreign court whose performance is being judged; such courts have a certain sovereign 'majesty'; and contrariwise the reviewing international tribunal must not sit as a 'court of appeal' over the foreign court[.][465]

250. This presumption of deference sets a higher hurdle for anyone who would impugn a nation's judicial system.

b. The Threshold Of Qualifying Conduct Is High

251. In light of the rare and exceptional nature of denial of justice claims, coupled with the strong presumption of regularity attached to the acts of national courts, it is hardly surprising that international law imposes a highly elevated standard as to the type of conduct that is sufficiently egregious to constitute a denial of justice. "The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice."[466] The essential conclusion is that an international tribunal may

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463 RLA-151, 5 HACKSWORTH DIGEST OF INTERNATIONAL LAW 526-27 § 522 (1943) (emphasis added).

464 RLA-152, *Putnam* Award at 225 ¶ 5.

465 RLA-153, Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice:* Loewen v. US *and* Chattin v. Mexico, *in International Investment Law and Arbitration*: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary Law at 7 (Todd Weiler ed., 2005) (emphasis added).

466 RLA-61, Paulsson, DENIAL OF JUSTICE at 60.

substitute its judgment for that of a municipal court only in the most extreme and unusual circumstances.

252. Though there exists no universally-applicable expression of the denial of justice standard, authors and tribunals have set out different linguistic formulae to characterize the type of judicial misconduct which, depending on the surrounding circumstances, might fairly be characterized as a denial of justice. The qualifiers invoked to describe conduct amounting to a denial of justice include:

- *bad faith*: "Bad faith and not judicial error seems to be the heart of the matter[.]"[467]
- *bad faith and discrimination*: "The requirement of a subjective element of bad faith and discrimination is based on a concordant series of arbitral awards, on the replies of governments at the 1930 Codification Conference and on doctrinal opinion."[468]
- *malicious*: The judgment must be "*arbitrary or malicious*" and must involve a "*clear and malicious* misapplication of the law" to trigger State responsibility for denial of justice.[469]
- *shock[ing]*: A "wilful disregard of due process of law, . . . which shocks, or at least surprises, a sense of judicial propriety," which gives rise to international responsibility, so long as "the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the propriety of the outcome[.]"[470]
- *outrage[ous]*: The injustice committed by the judiciary must rise to the level of "an outrage, bad faith, wilful neglect of duty, or insufficiency of governmental action apparent to any unbiased man" before liability can be declared.[471]

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467 RLA-150, O'CONNELL at 948; *see also* CLA-301, Gerald. G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y.B. INT'L L. 93, 104 (1932).

468 RLA-322, Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 267, 282 (1978); *see also* CLA-301, Fitzmaurice at 110 ("To involve responsibility of the state the element of bad faith must be present . . . .").

469 CLA-299, *Azinian v. United Mexican States*, (1999) 39 I.L.M. 537 ¶¶ 105, 103 (Civiletti, von Wobeser, Paulsson) (emphasis added).

470 CLA-7, *Mondev Award* ¶ 127, *citing Case Concerning Elettronica Sicula SpA. (United Stated v. Italy)*, 1989 I.C.J. Rep. 15 (hereinafter *ELSI*); *see also*, CLA-315, *Barcelona Traction*, separate opinion of Judge Tanaka, at 156 (citing same).

471 CLA-39, *Chattin (United States v. Mexico)*, Opinion of Commissioners of July 23, 1927, U.S.-Mex. Cl. Comm'n, IV R. INT'L ARB. AWARDS 422, 427.

- *outrage[ous], bad faith, wilful neglect*: For there to be a breach of international law, "the treatment of an alien . . . should amount to an *outrage*, to *bad faith*, to *wilful neglect* of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[472]

253. Though customary international law can of course evolve, as recently as April, 2012, the tribunal in *Oostergetel v. Slovak Republic* confirmed that the standard of proof for a denial of justice is exceedingly high:

> The Tribunal notes that a claim for denial of justice under international law is a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.[473]

254. The *Mondev* tribunal confirmed that the standard remains high, when it specified that a denial of justice occurs when conduct is so egregious that it "*shocks, or at least surprises, a sense of judicial propriety*" and that "the shock or surprise occasioned to an impartial tribunal leads, on reflection, to *justified concerns as to the judicial propriety of the outcome*."[474] The threshold question is whether "a tribunal can conclude in the light of all the available facts that the impugned decision was *clearly improper and discreditable.*"[475]

255. Claimants' further allegation that the Lago Agrio Judgment itself constitutes a denial of justice also must fail. A judicial decision must have "no reasonable objective

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472 RLA-323, *Neer and Pauline Neer (United States v. Mexico)*, Opinion of Commissioners of October 15, 1926, IV R. INT'L ARB. AWARDS 60, 61-62 (emphasis added).

473 RLA-307, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award of Apr. 23, 2012) ¶ 273. *See also*, CLA-223, *Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL Arbitration Rules, (Award of Jan. 26, 2006) (Ariosa, Wälde, van den Berg) ¶ 194, citing, *Genin* Award ¶ 367 (Fortier, Heth, van den Berg) (stating that acts which would violate an "international minimum standard" that is distinct from domestic law "include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.").

474 CLA-7, *Mondev* Award ¶ 127 (emphasis added).

475 *Id*. (emphasis added).

foundation" and must be beyond the "juridically possible" to constitute a denial of justice. This standard has been confirmed by Claimants' expert, Jan Paulsson:

> [W]hat international law requires for a finding of denial of justice based on gross incompetence is a conclusion of law or fact ***outside of the spectrum of the juridical possible***, in light of the procedural and substantive law applied by the relevant national court at the relevant time.[476]

256. Determining whether the conduct at issue is egregious enough to warrant the condemnation of a state's judicial system inevitably requires careful case-by-case examination of the particular facts present.[477] And only if those facts reveal conduct far below the scruples of modern society may they serve as the basis for a finding of denial of justice.

c. Claimant Must Meet A High Degree Of Proof To Establish A Denial Of Justice

257. It is, of course, axiomatic that, as with any claim, a claimant bears the burden of proof with regard to a denial of justice: "Any party contending that a state's administration of justice is not 'satisfactory in the light of international requirements' must prove it: *actori incumbit probatio*."[478]

258. Claimants do not provide any legal support for the assertion that while the substantive standard for denial of justice claims is very high, "the evidentiary standard applicable to Claimants' denial of justice claim is the ordinary balance of the probabilities test."[479] In fact, given the gravity of an allegation of denial of justice, the applicable evidentiary burden is

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476 R-172, Excerpt from Opinion of Jan Paulsson submitted on behalf of Claimants in *Chevron Corporation and Texaco Petroleum Co. v. Republic of Ecuador*, PCACase No. AA277 ¶ 70 (emphasis added).

477 CLA-298, A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, 14 CANADIAN Y.B. INT'L L. 72, 73-74 (1976) (noting that observers have long struggled to provide a definition of denial of justice and have instead concentrated upon providing examples of conduct generally regarded as amounting to a denial of justice); RLA-61, Paulsson, DENIAL OF JUSTICE at 98-99.

478 RLA-61, Paulsson, DENIAL OF JUSTICE at 14.

479 Claimants' Supplemental Merits Memorial ¶ 185.

elevated: International law requires Claimants to prove their denial of justice claim by clear, convincing and conclusive evidence. Commentators and international tribunals agree that such evidence is required to condemn a state for committing a denial of justice.

259. For example, Professor Greenwood has explained that clear evidence is necessary to establish a denial of justice:

> So far as the content of the primary norm is concerned, international tribunals are understandably cautious in concluding that the judicial system of a State has fallen so far short of international standards that it has perpetrated a denial of justice. Only if there is *clear evidence* of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law.[480]

260. In *Chattin*, the tribunal observed that "*convincing evidence* is necessary to fasten liability" for denial of justice.[481] Similarly, in *El Oro Mining*, the tribunal stated, "It is obvious that such a grave reproach can only be directed against a judicial authority upon *evidence of the most convincing nature.*"[482] Likewise, in *Putnam*, the tribunal established, "Only a *clear and notorious injustice*, *visible . . . at a mere glance*, could furnish ground for an international arbitral tribunal . . . to put aside a national decision presented before it and to scrutinize its grounds of fact and law."[483]

261. Thus, only clear and convincing evidence will suffice to show that a national judiciary has conducted itself in so egregious a manner as to warrant international condemnation.

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480 RLA-305, Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 58 (M. Fitzmaurice & D. Sarooshi, eds., 2004) (emphasis added).

481 CLA-39, *Chattin* Award at 429; *see also id*. at 439, 440 (emphasis added).

482 RLA-324, *El Oro Mining* Award at 198 (emphasis added).

483 RLA-152, *Putnam* Award at 225.

C. Claimants Cannot Demonstrate That Ecuador Is Responsible For A Denial Of Justice As A Result Of The Lago Agrio Litigation

262. Claimants make grave charges against the Ecuadorian judicial system. But when Claimants' relied-upon evidence is examined closely, it becomes clear that Claimants have failed to meet their burden of proof. In fact, much of Claimants' case is based on half-truths and facts deliberately manipulated or taken out of context. As we noted at the outset, the Tribunal should resist the temptation to reach a conclusion based on the volume of Claimants' allegations. It is much too easy to reach a finding based on the "totality of the circumstances" without in fact addressing the evidence of *any* of the allegations.

263. Claimants allege "at least six types of conduct constituting a denial of justice claim"[484] and further allege that the Lago Agrio Judgment itself constitutes a denial of justice.[485] But across each "type of conduct" is the same underlying set of facts. Respondent sets forth below a summary of its responses to the respective factual categories of Claimants' allegations. We also provide a more detailed, point-by-point refutation in the corresponding annexes.

1. Claimants' Allegations Concerning Forged Signatures Are Patently False

264. In the Lago Agrio Litigation, and again in this arbitration, Chevron has asserted that there are no real plaintiffs[486] and that the environmental litigation was instead brought to make the plaintiffs' lawyers rich.[487] Claimants have repeatedly called into question whether the

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484 Claimants' Supplemental Merits Memorial ¶ 186 (the types of conduct include: 1) fraud and corruption, 2) fundamental breaches of due process, 3) governmental interference, 4) arbitrary conduct, 5) discrimination or prejudice, 6) illegitimate assertion of jurisdiction).

485 Claimants' Supplemental Merits Memorial ¶¶ 236-238.

486 Interim Measures Hrg. Tr. (Feb. 11, 2012) at 87:24-88:4; Merits Track 1 Hrg. Tr. (November 26, 2012) at 50: 12-23.

487 Claimants' Merits Memorial ¶ 1.

forty-eight named plaintiffs in fact even consented to have the litigation brought in their names.[488]

265. On December 20, 2010, Chevron announced that Gus Lesnevich, a forensic document examiner, had determined that twenty of the forty-eight signatures on the document submitted to ratify the Lago Agrio complaint had been forged.[489] Shortly thereafter, the indigenous plaintiffs themselves responded to refute Chevron's allegations and to confirm that the signatures were, in fact, theirs.[490]

266. The plaintiffs convened in person to re-sign the documents to prove to Chevron that they had signed the original documents and have legitimate claims against the company.[491] As one of the plaintiffs whose signatures had been challenged by Chevron explained, "I find it humiliating that Chevron has said that the signatures are not genuine, and so I am here in person to sign with my own handwriting, yet again, and thus affirm the contamination that they have caused."[492] That there are real plaintiffs — in this case, plaintiffs indigenous to the Ecuadorian Amazon — has been established beyond doubt.

267. Before the plaintiffs even had the opportunity to respond to Chevron's allegations and confirm that they had signed the original complaint, Chevron had submitted a motion with the Lago Agrio Court to have the whole case declared "null and void." The Court considered Chevron's allegations but declined to nullify the case because (1) the indigenous plaintiffs had

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488 Claimants Supplemental Merits Memorial ¶¶ 76, 85; R-235, *Forensic Expert Discovers Elaborate Forgery of Plaintiffs' Signatures Authorizing 2003 Complaint Against Chevron in Ecuador*, Chevron Corp. Press Release (Dec. 20, 2010).

489 R-235, *Forensic Expert Discovers Elaborate Forgery of Plaintiffs' Signatures Authorizing 2003 Complaint Against Chevron in Ecuador*, Chevron Corp. Press Release (Dec. 20, 2010).

490 R-524, Kate Sheppard, *Amazon Plaintiffs to Chevron: We're Real!*, MOTHER JONES (Jan. 28, 2011).

491 *Id.*

492 R-525, *Event in Amazon Jungle Puts Lie To Oil Giant's Latest Desperate Tactic*, NEWSWIRE (Jan. 28, 2011).

themselves denied the forgery allegations and instead ratified their participation in the case, and (2) Mr. Lesnevich was not available to the Court or to the plaintiffs for assessment of his allegations.[493]

268. The evidence relied on by Claimants to support their allegations consists of nothing more than Mr. Lesnevich's report.

269. The report is seven pages long, fails to provide any specific analysis of any individual signature, let alone all twenty challenged signatures, and has been submitted without any supporting documents. As a result, Respondent cannot even assess the documents and signatures Mr. Lesnevich relied on to support his allegations of fraud. Mr. Lesnevich instead represented that several of the documents he used to compare signatures were "computer generated, scanned images, of what *appears* to be an original document."[494] It seems that Mr. Lesnevich himself could not verify the authenticity of his own evidence.

270. Based on what Respondent can glean from Mr. Lesnevich's report, it bears the question whether his methodology is even applicable in this case. Mr. Lesnevich explains that his approach is based on comparing signatures, which is reliable because, over time, through learning to write, people develop a "highly personalized handwriting and signature."[495] But Mr. Lesnevich fails to mention how this approach applies in cases like this where the "indigenous plaintiffs rarely sign their names to documents and thus any two signatures from the same person usually look slightly different."[496]

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493 C-931, Lago Agrio Judgment at 56.

494 C-1166, Report of Gus R. Lesnevich, June 27, 2011 at 2.

495 C-1166, Report of Gus R. Lesnevich, June 27, 2011 at 3.

496 R-525, *Event in Amazon Jungle Puts Lie To Oil Giant's Latest Desperate Tactic*, NEWSWIRE (Jan. 28, 2011).

271. Mr. Lesnevich's report is even less reliable in light of the criticism that courts and scholars have directed at so called "handwriting identification expertise." Courts in the United States have consistently warned of the unreliability of handwriting identification because:

> There is little known about the error rates of forensic document examiners. The little testing that has been done raises serious questions about the reliability of methods currently in use. As to some tasks, there is a high rate of error and forensic document examiners may not be any better at analyzing handwriting than laypersons.[497]

272. Even in the best of circumstances, handwriting identification testimony is not universally accepted. The best of circumstances, however, are not present in this instance: The indigenous plaintiffs whose handwriting Mr. Lesnevich is analyzing never had an opportunity through practice and repetition to develop a "highly personalized handwriting and signature." As a consequence, Mr. Lesnevich testimony is predicated on an assumption wholly inapplicable here.

2. Claimants' Allegations That Judge Nuñez Was Offered Or Ever Received A Bribe Are Patently False; The Evidence Instead Shows Chevron's Illicit Attempt To Entrap The Judge And Manufacture Evidence To Delay Or Undermine The Lago Agrio Proceedings

273. Claimants rely upon an alleged bribery scheme of a former judge in the Lago Agrio case, Judge Nuñez, to support its allegation that the Republic committed a denial of

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[497] RLA-326, *United States v. Saelee*, 162 F. Supp. 2d 1097, 1103 (D. Alaska 2001). *See also* RLA-327, *United States v. Hidalgo*, 229 F. Supp. 2d 961, 967 (D. Ariz. 2002) ("Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities."); RLA-328, *United States v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D.W. Va. 2002) (Expert's "bald assertion that the 'basic principle of handwriting identification has been proven time and time again through research in [his] field,' without more specific substance, is inadequate to demonstrate testability and error rate."); RLA-329, *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995) (finding that "forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot . . . be regarded as 'scientific . . . knowledge'"); RLA-330, *United States v. Fujii*, 152 F. Supp. 2d 939, 940 (N.D. Ill. 2000) ("Despite [handwriting analysis'] long history of use and acceptance, validation studies supporting its reliability are few, and the few that exist have been criticized for methodological flaws . . . there has been no peer review by an unbiased and financially disinterested community of practitioners and academics; the acceptance of handwriting identification expertise has largely been driven by handwriting experts. It potential rate of error is almost entirely unknown.").

justice.[498] In fact, no objective observer with access to the actual videotaping could possibly conclude that Judge Nuñez was involved in a bribery scheme. A review of the evidence instead suggests that it was Chevron that helped orchestrate the scheme to derail the Lago Agrio Litigation.

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

274. Diego Borja, an Ecuadorian citizen and a long-time contractor on Chevron's Lago Agrio Litigation team,[499] together with Wayne Hansen, a U.S. citizen and convicted felon,[500] 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 served as 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.[501] 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.

275. At the time Chevron launched its media blitz with the recordings, Chevron plainly misled Ecuadorian authorities and media outlets about its relationship to Borja.[502] In a July 2010 submission to the Lago Agrio Court, Chevron falsely claimed that Borja's "functions had

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498 Claimants' Supplemental Merits Memorial ¶¶ 191, 201.

499 R-319, Chevron "Ecuador Litigation Team" Organization Chart.

500 R-526, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES, (Oct. 30, 2009) (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."); *see also* Annex C.

501 *See* Annex C.

502 R-314, Chevron Press Release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009); R-527, *Chevron Offers Evidence Of Bribery Scheme In Ecuador Lawsuit*, NEW YORK TIMES (Set. 1, 2009); *see also* Annex C.

nothing to do with the sampling process; and also, his work had *already concluded at the time of the incident*."[503]

276. In fact, Borja — who has served as Chevron's contractor since 2004 — was a "sample manager" for Chevron's "Ecuador Litigation Team."[504] And Chevron was still authorizing payment of invoices for work performed by Borja's company, Interintelg, through ***August 2009***,[505] which of course post-dated the illicit recordings by several months.

277. While Chevron claimed that the meetings had occurred "without Chevron's knowledge"[506] and publicly disavowed any connection to Borja's plan to record Judge Nuñez, Santiago Escobar testified under oath that Borja readily conceded to him that Chevron paid Borja to tape his conversations with Judge Nuñez.[507] Indeed, 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.[508] [redacted] Borja had but one mission after his meeting with Chevron: to return to Ecuador and continue his illegal conduct on behalf of Chevron.

278. 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

503 R-318, Excerpt from Chevron July 13, 2010 Filing.

504 R-319, Chevron "Ecuador Litigation Team" Organization Chart.

505 R-320, Email chain between Borja and Verstuft regarding August 2009 Interintelg invoices.

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

507 R-335, Escobar Deposition at 54:2-16, 57:19-24; *id.* at 58:5-19.

508 R-324, Letter from T. Cullen to Dr. D. Garcia Carrion (Oct. 26, 2009) at 8.

509 R-322, Borja Dep. Tr. (Mar. 15, 2011) at 26:15-27:18.

court, or any government officials.[510] Borja then promptly returned to the United States and provided Chevron with the recording.[511]

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

279. 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.

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

281. **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."[512]

282. 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. "[513]

283. U.S. judges[514] and media outlets[515] who have reviewed the recordings made by Borja and Hansen have found no evidence of a bribery scheme. Even Borja has admitted that

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

511 [redacted]

512 C-267, Tr. of Recording 3 at 10; *id.* at 10-12.

513 C-267, Tr. of Recording 2 at 4, 7.

514 Judge Chen, a District Court Judge in California, admonished Chevron, saying:

> **I read the transcript, at least of the two transcripts you 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.**

there was no bribery scheme, confessing: "[T]here was no bribe. I mean, there[] was never . . . there was never a bribe."[516]

284. Attached at Annex C is a more detailed refutation of Claimants' allegations of bribery.

3. Claimants' Allegations That Plaintiffs "Ghostwrote" The Lago Agrio Judgment Rely On Circumstantial Evidence That Does Not Logically Give Rise To An Inference of "Ghostwriting"

285. At the core of their denial of justice claim is Claimants' accusation that the Lago Agrio Plaintiffs ghostwrote the judgment Judge Zambrano eventually issued under his own name. In support of this accusation, Claimants ask this Tribunal (a) to impute to emails and other communications connotations that are both speculative and belied by their contexts and (b) to fill the multiple voids in their story by importing the most malign inferences. Like their other allegations of misconduct, Claimants bear a heavy burden[517] to prove their allegations. As discussed *supra* Section III.B, they cannot establish a violation of customary international law absent clear and convincing proof of highly egregious conduct that can be imputed to the national judicial system as a whole.[518] And where a party attempts to prove its case by

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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).

515 R-315, *Under Pressure Ecuadorean Judge Steps Aside in Suit Against Chevron*, NEW YORK TIMES (Sept. 5, 2009) at 1 ("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."); R-316, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) at 2; R-317, *Chevron Judge Says Tapes Don't Reveal Verdict*, SAN FRANCISCO CHRONICLE (Sept. 2, 2009) at 1; R-470, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009) at 2.

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

517 UNCITRAL Rule 24(1) ("Each party shall have the burden of proving the facts relied on to support its claim or defence."); RLA-331, *EDF* Procedural Order ("The party raising the charge [of corruption] has, indisputably, the burden of proof. The seriousness of a corruption charge also requires that the utmost care and sense of responsibility be taken to ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim.").

518 CLA-232, *EDF* Award ¶ 221 (the party alleging bribery must do so by "clear and convincing evidence"); RLA-332, *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 2006

circumstantial evidence, as Claimants try to do, the Tribunal must "assess whether or not the evidence produced by the Claimant is sufficient to exclude any reasonable doubt."[519] But short of granting Claimants the benefit of every doubt — a presumption to which Claimants are not entitled — they have not met their burden.[520] A claimant cannot just *make* an allegation; it must *prove* its allegation to succeed.

286. Most fundamentally, Claimants cannot point to a single communication concerning the judgment — their only "evidence" is forced inferences in emails two years prior to the Judgment's release. Nor can they identify even a single document purporting to be a draft of the Judgment. Claimants have had unprecedented access to Steven Donziger's entire case file, including all of his documents, computer hard drives, and email accounts. Not only were Claimants afforded complete access to Donziger's files, but an army of attorneys also deposed and received millions of pages of documentary evidence from Plaintiffs' other lawyers, scientific support teams and expert witnesses. In all Claimants received millions of pages of evidence and hundreds of hours of testimony from over twenty-nine of the Lago Agrio Plaintiffs' team members.[521] Despite having received a virtual blank check for discovery, Claimants have not produced a single document proving its allegation. Chevron has built its case upon innuendo and inference, not evidence.

I.C.J. Rep. 225 (Nov. 6, 2003), 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").

519 RLA-333, *Bayindir* Award ¶ 143.

520 The Republic continues to review the voluminous record that Chevron and the Lago 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.

521 The only U.S. counsel from whom Claimants do not have his complete file is Joseph Kohn. But Kohn has repeatedly denied ghostwriting the Judgment and offered to disclose his complete file but has been unable to date because U.S. Courts have upheld the Lago Agrio Plaintiffs' rights to protect those documents as privileged. Kohn's willingness to disclose reflects his desire to be transparent. 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 any fraud on his part, his career in law or in politics would be over, forever.

287. Claimants do 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[522] — as this Tribunal recognized, a typical practice the world over.[523] There is absolutely nothing in the context of any of these communications that suggests that Plaintiffs' counsel planned to deliver the "proposed judgment" to the Court surreptitiously. In any event, no proposed judgment was ever prepared, much less identified by Claimants.

288. Claimants' allegation that the Judgment mirrors the "unfiled" Fusion Memo is belied by the facts that (1) they cannot prove that the Fusion Memo is not in the Record and (2) 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. **First**, Claimants' sole evidence for their claim that the Fusion Memo is not in the record is the expert report of Professor Patrick Joula,[524] who claims that he performed an analysis of the entire Lago Agrio Record using Optical Character Recognition (OCR),[525] and that his analysis unearthed neither the Fusion Memo nor portions thereof in that Record.[526] 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."[527]

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522 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.").

523 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").

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

525 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.

526 *See* C-1007, Decl. of Patrick Juola, Ph.D. (Dec. 20, 2011) at 3-4.

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

289. **Second**, the Lago Agrio Plaintiffs' communications and the trial court Record establish a far more likely explanation for the Court's reliance on the Fusion Memo. According to Plaintiffs' contemporaneous internal communications, Plaintiffs planned on multiple occasions to, and seemingly did, openly submit the Fusion Memo and its supporting evidence to the court during judicial inspections. 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. The Court Record paraphrases Julio Prieto's argument regarding fusion on behalf of the Lago Agrio Plaintiffs, an argument which follows the Fusion Memo's structure almost identically — their email correspondence indicates he was likely reading from it or using it as the basis for his presentation. The Record then notes submission to the court of all of the Fusion Memo's accompanying exhibits.[528] 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 suggesting some administrative error.[529] That Plaintiffs submitted the Fusion Memo at the June 2008 judicial inspections is further corroborated by the facts that (1) Claimants themselves argue that the Court relied on the 2008 version of the Fusion memo (rather than its later iterations, as would be expected if the Plaintiffs had actually ghostwritten the 2011 decision); and (2) Plaintiffs' internal emails suggested just days before the June 2008 Aquarico judicial inspection that they should rely upon the Fusion Memo in its argument.

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528 R-530, Lago Agrio Record at 140701 ("Protocolizacion" attaching fusión exhibits). The Fusion Memo exhibits submitted at the Aquarico 2 judicial inspection are the very exhibits cited in Judge Zambrano's Judgment in the legal discussion of "lifting the corporate veil" — the same discussion that Claimants allege was copied from the unfiled Fusion Memo. C-931, Lago Agrio Judgment 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).

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

290. The remainder of Claimants' "evidence" supporting their ghostwriting claim is equally bankrupt. **First**, 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 — documents that very well might have been openly submitted during judicial inspections or otherwise or lost after submission[530] — that would indicate only that the Court may have received and considered documents that the court clerk should have recorded and identified. Regardless, that may constitute a clerical error, but it surely does not establish fraud or a violation of international law. Of course there is nothing inherently notorioius about the Selva Viva Database, and the data relied upon the Court were already in the trial record.

291. **Second**, Claimants also rely on the Expert Report of Gerald McMenamin to conclude that "Judge Zambrano did not write the Judgment" but McMenamin's stylistic analysis is obviously flawed. Indeed, in a similar stylistic analysis performed by Claimants' expert Professor M. Teresa Turell, she accused Alejandro Ponce Jr., an attorney who now works at one of the primary law firms retained by Chevron in this matter, as the ghostwriter. And Professor Turell did so in part based on work product his father, a long-time Chevron attorney, had drafted.[531] It is no accident that Claimants have opted not to submit Professor Turell's report.

292. Third, Claimants rely on a half dozen or so out-of-context snippets from the millions of the Lago Agrio Plaintiffs' internal documents in their possession. Full analysis of the

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530 *See* Ghostwriting Annex D, Section III.

531 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.

documents and even a moment's review of the context reveal these email communications do not come close to satisfying Claimants' burden. For example Claimants ask the Tribunal:

- To infer Donziger intended to ghostwrite the Judgment because in early 2009 he listed a "reasoned opinion" as one of his goals. But there is no indication that he intended to *draft* that "reasoned opinion."[532]

- To believe Fajardo's email to Donziger about having a first-year legal intern do "a research assignment for our legal alegato and the judgment, but without him knowing what he is doing" is a reference to having that intern ghostwrite the Judgment. It is instead wholly illogical that Plaintiffs' counsel would ask an intern with no experience and who was new to a case to ghostwrite a US$ 27 billion judgment. It is far more plausible that Fajardo meant just what he said, that the new intern knew nothing and did not have to or need to know what he was doing since he would be working on limited research assignments.[533]

- To accept that because both an internal email from Fajardo and the judgment reference one of the leading cases in Ecuadorian jurisprudence Fajardo must have ghostwritten the judgment. Claimants ignore the far more likely explanation for this overlap, namely, that the case has been widely cited in the Lago Agrio Record and has been referenced by the Lago Agrio Plaintiffs and non-parties since at least as early as 2006.[534]

293. Attached at Annex D is a more detailed refutation of Claimants' ghostwriting allegations.

4. Claimants' Allegations Concerning Dr. Calmbacher And Mr. Cabrera Fail To Implicate The Lago Agrio Court

294. To prejudice this Tribunal against Ecuador's judicial system, Claimants concoct a sensationalized narrative extending beyond the actual facts to impute the Plaintiffs' alleged misconduct involving Dr. Calmbacher and Mr. Cabrera to the Lago Agrio Court itself. But Claimants cannot implicate the Lago Agrio Court — let alone Ecuador's entire judicial system — through these experts. Not only is Claimants' story belied by witness testimony and

532 *See* Ghostwriting Annex D, Section VI.B.

533 *See id. Section* VI.C.

534 *See id.* Section VI.D.

documentary evidence, but it is made irrelevant by the fact that the Court, at Chevron's request, chose not to rely on these experts' reports in reaching its damages award.

295. **First**, the Lago Agrio Court explicitly declined to consider Dr. Calmbacher's reports in issuing its verdict:

> [C]onsidering the gravity of the accusation . . . and without this affecting the integrity of the body of evidence, the comments and conclusions appearing as stated by Dr. Calmbacher shall not be taken into consideration for the issuing of this judgment[.][535]

296. **Second**, the Court likewise chose not to take into account Mr. Cabrera's reports:

> [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.[536]

297. 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.[537]

298. The Court's decision to ignore the allegedly tainted evidence rather than to declare a mistrial is by no means remarkable. When evidence is improperly admitted, judges in

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535 C-931, Lago Agrio Judgment at 49.

536 *Id.* at 50-51.

537 C-1367, Lago Agrio Clarification Order at 8; *see also* C-991, Lago Agrio Appellate Decision, Jan. 3, 2012 at 9-10.

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.[538] This Tribunal is not an appellate court, and thus cannot substitute its analysis of the facts and law for that of the Ecuadorian courts.[539]

299. **Finally**, as discussed *supra* at Section II and in the expert reports of LBG et al., the available evidence, even excluding the Cabrera and Calmbacher reports but *including Chevron's own data*, demonstrates substantial contamination.

a. Claimants' Allegations Regarding Dr. Calmbacher Do Not Implicate The Republic, And Are Belied By The Evidence In Any Event

300. Claimants would like the Tribunal to believe that Dr. Calmbacher found no evidence whatsoever of pollution at the sites he inspected and that his expert reports noting the presence of pollution must have been falsified by the Plaintiffs. But 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 Lago Agrio Plaintiffs, much less by the Respondent.

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538 *See, e.g.*, R-533, 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").

539 *See* RLA-151, 5 HACKSWORTH DIGEST OF INTERNATIONAL LAW 526-27 (1943) § 522 ("judgments of the[] courts of last resort are considered to be and are accepted as just and proper. There is, therefore, a *strong presumption in favor of their correctness*, and a complainant who bases his grievance upon an alleged denial of justice by the courts assumes the obligation of establishing by clear evidence that the presumption does not apply to his case.") (emphasis added); R-172, Excerpt from Opinion of Jan Paulsson submitted on behalf of Claimants in *Chevron Corporation and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. AA277 ¶ 70 (noting that for a finding of denial of justice there must be "a conclusion of law or fact ***outside of the spectrum of the juridical possible***, in light of the procedural and substantive law applied by the relevant national court at the relevant time.") (emphasis added).

- Dr. Calmbacher was one of 106 judicial inspection experts.[540] He was hired by the Plaintiffs in July of 2004, and spent roughly a month in Ecuador before he was fired.[541] In other words, the reports he submitted represent a minute fraction of the evidence before the Court. That they were not considered by the Court, therefore, could not have affected the accuracy or propriety of the final award.

- Dr. Calmbacher had motive to lie and threatened that he would. He sued Plaintiffs for nonpayment, expressed animus toward them for firing him, and promised that he would cause harm to Plaintiffs' counsel if they did not accede to his demands.[542]

- Dr. Calmbacher's contemporaneous email correspondence materially contradicts his sworn deposition testimony.[543] 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.[544]

301. Unsupported allegations by a terminated consultant with both an economic interest and a demonstrated animus toward the Plaintiffs cannot establish misconduct by the Plaintiffs. Moreover, those allegations do not implicate the Republic or the Lago Agrio Court; Claimants do not even allege that the Republic was complicit in any falsified testimony, and the Lago Agrio Court excluded Dr. Calmbacher's reports from consideration in any event.[545]

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[540] *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.

[541] *See* C-186, Calmbacher Dep. Tr. (Mar. 29, 2010) at 13:20-14:1; 29:6-10; 48:15-17; 49:2-20.

[542] *Id*. 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 (Jul. 28, 2005); R-204, Email from C. Calmbacher to S. Donziger (Jul. 28, 2005) ("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***.") (emphasis added).

[543] *See* C-186, Calmbacher Dep. Tr. at 137:13-15, 62:19-24; R-149, Email from C. Calmbacher to M. Pareja (Mar. 4, 2004); *see also* R-206, Memorandum from A. Woods to S. Donziger (Apr. 23, 2010), Exhibits 2, 3, 7.

[544] *Compare* C-186, Calmbacher Dep. Tr. at 115:15-24 *with* R-206, Memorandum from A. Woods to S. Donziger (Apr. 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.).

[545] 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 (Jul. 31, 2012) at 89.

b. Claimants' Accusation That The Republic Knew Of Or Colluded In Plaintiffs' Drafting Of The Cabrera Report Is Demonstrably False

302. Claimants have offered no evidence that the Respondent participated in the drafting of the Cabrera report or otherwise had knowledge that the Plaintiffs intended to draft parts of Mr. Cabrera's reports. Indeed, Plaintiffs have failed to show that the Court ever engaged in any activity that was illegal or improper with respect to Mr. Cabrera.

303. To sensationalize their story, Claimants suggest that as far back as 2006, five years before the trial court's decision, Plaintiffs conspired with the Lago Agrio Court to appoint a global expert that they knew would "submit a falsified and fraudulent expert report."[546] In support, 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 terminate the judicial inspections and (b) appointed Richard Cabrera as the global expert.

304. Under Ecuadorian law, and as explained in the *Amicus* brief filed in support of Plaintiffs' motion, Plaintiffs retained the right to withdraw their own requests for judicial inspections.[547] The inspections were "exclusively in [their] procedural interest."[548] 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."[549]

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546 Claimants' Merits Memorial ¶ 223.

547 *See* C-194, Amicus Curiae Brief, filed in the Lago Agrio Litigation on July 21, 2006 at 3-4.

548 *Id.* 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-536, 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).

549 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

305. Having decided that terminating the judicial inspections in favor of continuing the site examinations using a global damages expert was in fact proper, the Lago Agrio Court in 2007 ordered the parties to attempt to agree on the appointment of such an expert.[550] Only because the parties failed to reach an agreement did the Court appoint Mr. Cabrera, who by agreement of the parties, was selected from a pool of seven independent experts that the Court had previously appointed in the trial.[551] The Court's appointment of Mr. Cabrera as the global damages expert was thus lawful in all respects.[552]

306. Absolutely nothing in the *Crude* excerpts, Mr. Donziger's diary or the Plaintiffs' internal files supports a finding that the Court understood that Mr. Cabrera was or would be anything but independent and impartial. 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 manner contrary to the Lago Agrio Plaintiffs' interests.[553]

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strictly personal right). Here, Chevron could not have been affected by the Plaintiffs' waiver because the inspections were used to prove the *Plaintiffs'* case, and Chevron had its own independent right to seek judicial inspections (but chose not to at these sites).

550 *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.

551 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.

552 *See* Annex E for a more detailed description of why Mr. Cabrera's appointment did not violate Articles 252 and 292 of the Ecuadorian Code of Civil Procedure, as alleged by Claimants.

553 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. *See, e.g.*, 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

307. Attached at Annex E is a more detailed refutation of Claimants' allegations regarding experts Calmbacher and Cabrera.

5. No "Collusion" Exists Between The Lago Agrio Plaintiffs And The Government Of Ecuador

308. Claimants base their claims in part on the allegation that the Government of the Republic has "colluded" with the Lago Agrio Plaintiffs or otherwise interfered with the Lago Agrio Court. But Claimants manufacture this argument only by taking evidence out of context and slapping it together in a haphazard attempt to show linkages between events that, in fact, have no direct relationship to each other. Without proving any causation between the supposed acts and the Court's Judgment, Claimants cannot base their claims on collusion.

309. Claimants' collusion allegations fall into seven categories, each of which is addressed briefly below.

310. **First**, Claimants note that representatives of the Lago Agrio Plaintiffs have repeatedly said that the Court is corrupt and subject to manipulation. But the opinions of the private Plaintiffs' representatives are, quite simply, legally irrelevant — just as irrelevant, in fact, as the opinions of Chevron itself, which have changed with the wind during this case. While *Aguinda* was pending, Texaco and then Chevron repeatedly praised the Ecuadorian Judiciary, submitting numerous affidavits attesting to its fairness, independence, and adequacy.[554] But after *Aguinda* was dismissed and re-filed in Ecuador, Chevron just as immediately changed its tune, alleging in a series of arbitrations and litigations that the Republic's judiciary is corrupt.

"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. *See* Section III.B (discussing Chevron's victories throughout the pendency of the Lago Agrio Litigation).

554 *See supra* Section I.B.1.

311. **Second**, Claimants point to political statements by Government officials in support of the Lago Agrio Plaintiffs, but they again fail to show that such statements affected the Judgment. Indeed, Claimants simply ignore the many statements that do not fit within their collusion narrative. For example, they ignore that the Republic's officials once overtly supported Texaco, without any suggestion from Texaco that *those* statements were improper. And they ignore that President Correa has been just as critical of PetroEcuador as he has been of Chevron.[555] Ultimately, that the Republic's political leaders have, on occasion, spoken about the dispute is no more surprising nor objectionable than U.S. President Obama concluding that "BP is responsible for this leak. BP will be paying the bill"[556] — all before any court had judged BP legally responsible for the oil spill in the Gulf of Mexico.

312. **Third**, Claimants point to meetings between Government officials and Lago Agrio Plaintiffs' representatives, but Claimants have admitted that those same officials met with *Chevron* representatives *more than twenty-five times* during the pendency of the environmental litigation.[557] That Government officials have met with constituents, whether individual citizens or representatives of big business, is hardly unusual and does not constitute "collusion."[558]

313. **Fourth**, Claimants point to certain counsel who have represented both the Lago Agrio Plaintiffs and the Republic and to a common interest agreement between the Lago Agrio Plaintiffs and the Republic with regard to Chevron's attacks on the Lago Agrio Litigation outside

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555 *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.").

556 R-537, 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).

557 R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.).

558 Claimants' allegations regarding the specific meetings Government officials held with the Lago Agrio Plaintiffs are addressed in Annex F, Section III.

of Ecuador, but Claimants provide no evidence of actual impropriety by any of the counsel involved — and certainly no evidence of malfeasance by the Republic itself.[559]

314. **Fifth**, Claimants contend that Government officials attempted to affect the Lago Agrio Litigation by "undermining" the 1995 Settlement Agreement.[560] But Claimants forget that it is *they* and not the Republic that put the 1995 Settlement Agreement at issue in several corollary proceedings, beginning with the AAA Stay Litigation and continuing to this Arbitration.[561] That Government officials considered whether that agreement might be invalid, or publicly stated that the Government did not breach it, is hardly surprising or improper. Those officials ultimately concluded that too much time had passed to argue invalidity, and the Republic to this day has never taken steps to nullify the remediation contract on the basis of fraud or misrepresentation.[562] Most importantly, the Lago Agrio Court found that the 1995 Settlement Agreement, whether or not valid, did not apply to claims brought by individual citizens.[563] Again, Claimants fail to prove any causation between their supposed evidence and their Treaty claims.

315. **Sixth**, Claimants present the discredited argument that the Government will improperly benefit from the Lago Agrio Judgment.[564] Claimants have previously acknowledged,

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559 *See* Annex F, Section IV.

560 *See, e.g.*, Claimants' Merits Memorial ¶ 253.

561 *See, e.g.,* Respondent's Track 1 Counter-Memorial on the Merits ¶¶ 57, 61.

562 *See, e.g.*, C-166, Email from M. Escobar to A. Wray, *et al*. (Aug. 10, 2005); R-179, Tr. of CRS 221-02-01 (Mar. 29, 2007) at 7-14, 18. In fact, at the Interim Measures hearing, Claimants agreed that the statute of limitations has long since passed and that the criminal proceedings could not therefore be used to nullify the 1995 Settlement Agreement. Interim Measures Hr'g Tr. (May 11, 2010) at 45:18-46:10, 47:16-48:17.

563 C-931, Lago Agrio Judgment at 34.

564 Claimants' Merits Memorial ¶ 248.

as they must, that the Republic will not benefit financially from the Lago Agrio Judgment[565] and their own exhibits show that the Plaintiffs never intended to share any proceeds with Ecuador.[566]

316. **Seventh**, Claimants point to four grants that the Ministry of Environment ("MAE") and PetroEcuador allegedly gave to the Frente de Defensa de law Amazonia ("ADF") as evidence that the Government provided improper assistance to the Lago Agrio Plaintiffs. But the evidence shows that two of the alleged grants were never actually funded and the other two were for specific, valid purposes that did not involve the Lago Agrio Litigation.

- **US$ 160,000** — According to Claimants, "[i]t seems likely that money [allegedly given by the MAE to the ADF] was intended to be used to finance the Lago Agrio Litigation."[567] But the Ministry of Environment has reviewed the status of this grant and determined that the project — while contemplated — was never actually funded.[568]

- **US$ 30 million** — The MAE allegedly awarded this grandiose amount "to the ADF, pursuant to President Correa's relocation plan, to move selected families to new housing and evaluate environmental impacts."[569] In truth, this project involved a total expenditure of approximately US$ 5.1 million to housing contractors.[570] Just US$ 33,000 was paid to the ADF to obtain information necessary to the relocation effort.[571]

- **US$ 185,000** — The MAE allegedly paid US$ 185,000 for "'information' gathered by the [ADF] regarding the Consortium area [that] eventually formed a basis for the Lago

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565 Interim Measures Hr'g Tr. (May 10, 2010) at 46:4-8 (acknowledgment by Mr. Kehoe that the non-governmental Amazon Defense Front has been designed to receive the Judgment money); *see also* C-931, Lago Agrio Judgment at 186-87 (funds to be paid by Chevron will be placed in trust, to be monitored by the Court).

566 *See* C-797, Email from S. Donziger to E. Bloom and N. Mitchell (Oct. 24, 2007) at 1 (Mr. Donziger explaining 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."). 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. *See also* R-193, Wray Dep. Tr. (Nov. 2, 2010) at 138:6-139:2 ("[T]he 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 money . . . will be used in -- in the remediation, but not -- but cannot be claimed by . . . the government.").

567 Claimants' Merits Memorial ¶ 266.

568 R-539, Official letter No. MAE-PRAS-2013-0041 (Feb. 15, 2013) at 1.

569 Claimants' Merits Memorial ¶ 267.

570 R-539, Official letter No. MAE-PRAS-2013-0041 (Feb. 15, 2013) at 3-4.

571 *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 Protect for Homes affected by State Hydrocarbon Activity.")

Agrio Judgment" and it may have been used to create the Selva Viva database.[572] But Claimants' own documents show that the project had specific valid parameters, including general and specific objectives and reporting requirements.[573] And documents also show 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.[574]

- **US$ 100,000** — PetroEcuador allegedly spent this money "to fund studies to support the Plaintiffs' position in the Lago Agrio Litigation."[575] Claimants' own exhibits show that the funds were paid by PetroEcuador 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.[576]

317. In each instance, Claimants present no evidence that the funds were appropriated to support Plaintiffs' litigation efforts, much less that ADF in fact used the funds in such manner. That evidence does not exist.

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318. When all of this supposed evidence of collusion is considered, it becomes clear that Claimants' reliance on *Idler* to prove denial of justice is misplaced.[577] *Idler* establishes that governmental interference with the judicial branch must be severe and deep to support a denial of justice finding. In *Idler*, the denial of justice was based on the government's overt manipulation of the judiciary, *ex parte* communication with the Supreme Court, illicit composition of the Supreme Court deciding the case, and egregious and "extraordinary"

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572 Claimants' Supplemental Merits Memorial n.236.

573 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, 5.01.

574 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 Mr. Donziger stating "let me know if you've spoken to Joe and if I can give him a call about getting paid"; response from Mr. Donziger stating "I am trying to get an answer out of philadelphia").

575 Claimants' Letter to the Tribunal (Dec. 12, 2010) at 6 (incorporated by reference in Claimants' Supplemental Merits Memorial).

576 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 n.29 (ADF and PetroEcuador entered into an agreement in 2002 to update PetroEcuador inventory data for the sum of US$ 98,500.)

577 *See* Claimants' Supplemental Merits Memorial ¶ 206.

misapplication of the law.[578] The tribunal explained: "[I]n effect, the government proposed to decide the Idler case itself."[579] As Respondent has shown, Claimants here fail to establish any illicit "collusion" nor do they make any effort to show that any act of the Government in fact caused any particular judicial result.

319. Attached at Annex F is a more detailed refutation of Claimants' allegations of "collusion."

6. Claimants' Allegations That The Trial Court and Appellate Courts Have Committed Legal Error Are False; And Cannot In Any Event Give Rise To A Denial of Justice

320. In addition to challenging the fairness of the judicial process, Claimants allege that the trial and appellate courts committed legal errors during the course of the proceedings, thereby giving rise to a denial of justice.[580] Claimants now seek to re-litigate the courts' resolution of these legal issues in this arbitration.[581] While the National Court will pronounce final judgment on the legal issues, it is sufficient to note here that the Lago Agrio Court and the first-level appellate court had ample basis to reach the conclusions they did, and that their rulings in each instance fall comfortably within the "juridically possible."

321. It is not the role or right of this Tribunal to examine each and every issue already decided upon by Judge Zambrano and confirmed by the Appellate Court. As Judge Tanaka has explained: "If an international tribunal were to take up these issues and examine the regularity of

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578 CLA-304, *Idler* Award at 3516-3517.

579 *Id.*

580 Claimants' Supplemental Merits Memorial ¶¶ 236-238.

581 Once Claimants appreciated that the Lago Agrio Plaintiffs intended to pursue their pollution claims in Ecuador after the New York courts dismissed *Aguinda*, Claimants settled upon a strategy of (1) launching its public relations machine to criticize the courts they once lauded and create instead a paper trail of harsh editorials; (2) while simultaneously launching a blitzkrieg of legal motions before the Ecuadorian courts in an effort both to slow down the process and to create a trial record that it could later attack. This Tribunal is not, however, an appellate court, and these allegations of legal error — whether considered individually or in the aggregate — do not and cannot serve as a predicate to a denial of justice or Treaty claim.

the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system."[582] Similarly, Jan Paulsson has observed that "[n]umerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law."[583] And, according to Ian Brownlie, "[i]nterpretation of their own laws by national courts is binding on an international tribunal. This principle rests in part on the concept of the reserved domain of domestic jurisdiction and in part on the practical need of avoiding contradictory versions of the law of a state from different sources."[584] Consequently, arbitral tribunals must defer to the decisions of national courts as authoritative expressions of national law.[585]

322. In any event, Claimants cannot establish that the Lago Agrio Judgment is "manifestly unjust" in any way or that there has been a "clear and malicious application of the law."[586] We address each of Claimants' allegations of "legal error" — though this discussion would be more appropriate in an appellate brief — in a detailed expert report of Fabián Andrade

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582 RLA-304, *Barcelona Traction* Award at *158.

583 RLA-61, Paulsson, DENIAL OF JUSTICE at 82. For example, Paulsson cites the *Deham* case, where the arbitral tribunal rejected the claimant's challenge to a decision by the Panamanian Supreme Court to set aside a settlement agreement on the grounds that it was contrary to Panamanian law. Paulsson explains that "[w]hat needs to be stressed is that the Commission refused to substitute its judgment for that of the Panamanian courts" and that this case "illustrates the powerful general rule that the final interpretation of a municipal law should be left to the municipal judiciary." *Id.* at 75.

584 RLA-159, Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39.

585 CLA-302, *Helnan* Award ¶¶ 105-106; RLA-306, *GAMI* Award ¶ 41. For example, in the Owners of the Argonaut and the Colonel Jonas H. French case, domestic proceedings in the Dominion of Canada condemned certain United States ships to be forfeited for having fished in Canadian waters. The arbitral tribunal dismissed the United States' claim against the United Kingdom for the alleged wrongful seizure and confiscation of the vessels, holding that "the boats and seines of the two vessels being inside the territorial waters, were, from the international law point of view, undoubtedly subject to the municipal law and jurisdiction of Canada[,] and the question whether or not, under the circumstances of the case… a proper interpretation and application of Canadian law was made by the Canadian court is a question of municipal law and not a question of international law to be decided by this Tribunal, so far as these cases stand." RLA-336, *Owners of the Argonaut and the Colonel Jonas H. French*, United States v. Great Britain, RIAA, Vol. VI (1921).

586 Claimants' Supplemental Mertis Memorial ¶ 236.

Narváez,[587] and in Annex G. We summarize below, albeit most briefly, some of Claimants' principal complaints and Dr. Andrade's responses:

- ***Delay in ruling on Chevron's* res judicata *and jurisdictional defenses.*** Claimants assert that the Court should have resolved Chevron's *res judicata* and jurisdictional defenses immediately to dismiss the case. Not only did Chevron's defenses lack merit, but also Ecuadorian legal procedure expressly mandates that they be decided at the conclusion of an "oral summary proceeding."

- ***Allegedly improper joinder of claims.*** Claimants' allege that tort claims and claims under Article 43 of the EMA each must be heard through different judicial proceedings and were thus improperly joined by the Court. There could have been no improper joinder of claims in this case, insofar as all claims were predicated on environmental damage and therefore legally required to be heard through "oral summary proceedings."

- ***Retroactive application of the EMA.*** Chevron asserts that substantive provisions of the EMA were retroactively, and thus wrongfully, applied to hold Chevron responsible for remediating the Concession Area. In fact, the EMA contains only procedural rules, mandating that all claims for damages arising from environmental damage be heard through "oral summary proceedings." The Lago Agrio Court relied on the Civil Code provisions that have been operative for more than 150 years as the substantive basis of its decision.

- ***Practice of judicial inspections.*** Chevron complains that the Court had no right to amend the Protocol it had originally adopted to regulate conduct of the Judicial Inspections. To the contrary, an Ecuadorian court always has discretion to issue orders regulating case discovery, including the power to amend its prior orders as deemed just.[588] Discovery orders are not *res judicata* and remain amendable up until the time of judgment. Chevron also claims that the Court did not have the power to grant Plaintiffs' application to reduce the number of judicial inspection sites, since it had earlier approved Plaintiffs' longer list of judicial inspection sites. But the Plaintiffs had the right under Ecuadorian law to waive their earlier request for judicial inspections at the risk of failing to meet their burden of proof. In fact, while the Court agreed to curtail Plaintiffs' list of judicial inspections, it made clear that Chevron was still entitled to have judicial inspections conducted at those sites previously requested by Chevron and even set dates and times for some of the pending JIs.[589]

- ***Imputation of TexPet's and Texaco's Conduct To Chevron.*** Before the Lago Agrio Court issued its Judgment, the Second Circuit Court of Appeals had already found

587 RE-9, Andrade Expert Rpt. ¶¶ 8-40.

588 RE-9, Andrade Expert Rpt. ¶ 32.

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

> 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."[590] The Lago Agrio Court's own analysis substantiated this conclusion. In the event of a "merger," by operation of law the surviving entity inherits responsibility for the merged entity's obligations. Even without a merger, piercing or "lifting the corporate veil" is a doctrine commonly relied upon to hold parent corporations accountable for the acts of their controlled corporate subsidiaries *and* where affiliated entities have failed to adhere to corporate formalities or induced creditors to rely on the combined assets of both entities. Recently, a Mississippi state court found Chevron liable for Texaco's pre-merger actions.[591] The Lago Agrio Court reached the same result based on similar findings, including: (1) the financial relationship between the companies;[592] (2) Texaco's payment of Chevron expenses;[593] (3) the overlap of shareholders and executives between the companies;[594] (4) the public statements made by Chevron and Texaco's leadership representing the "merger" between the companies that would "combine" the companies.[595]

IV. If Claimants Do Not Have A Contractual Release In Respect Of The Lago Agrio Litigation Under The 1995 Settlement Agreement The Treaty Claims They Assert Must Also Fail

323. In its Notice of Arbitration — and during the Track 1 proceedings — Claimants offered the argument that the carefully circumscribed release contained in the 1995 Settlement Agreement had *res judicata erga omnes* effect, and thereby barred the Lago Agrio Plaintiffs from bringing claims for environmental damages against Chevron.

324. With this as their premise, Claimants assert, for purposes of Track 2, that the Republic's failure to: (1) "notify the Lago Agrio court that TexPet and its affiliated companies have been fully released from any liability for environmental impact resulting from the former Consortium's operations"; and (2) "indemnify, protect and defend the rights of Claimants in

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

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

592 C-931, Lago Agrio Judgment at 12.

593 C-931, Lago Agrio Judgment at 12.

594 C-931, Lago Agrio Judgment at 13.

595 C-931, Lago Agrio Judgment at 9-9.

connection with the Lago Agrio Litigation"[596] not only breached the 1995 Settlement Agreement but simultaneously violated Claimants' rights under the Ecuador-U.S. BIT.

325. While it is self-evident that Claimants' Umbrella Clause claim is inextricably dependent upon the alleged breach of the 1995 Settlement Agreement, Claimants' other Treaty claims are equally dependent upon a finding by this Tribunal that the Republic breached the 1995 Settlement Agreement. In Claimants' own words, "TexPet's rights under [the 1995 Settlement Agreement] are directly at issue in the Lago Agrio Litigation, and the Government's conduct in relation to that Litigation gives rise to an investment dispute with TexPet pertaining to both the [Settlement Agreement] and the BIT."[597] Claimants, for example, support their claims for Fair and Equitable Treatment and Full Protection and Security by alleging that Claimants "are legitimately entitled [under the Treaty] to expect Ecuador to honor and respect the legal rights" set forth in the settlement agreements, and "not to undermine or frustrate the enjoyment of those rights" by, i.e., letting the Lago Agrio Litigation proceed.[598]

326. Likewise, this Tribunal based its jurisdictional decision on the fact that each of Claimants' breach of Treaty claims is derivative of alleged rights found in the 1995 Settlement

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596 Claimants' Notice of Arbitration ¶ 67.

597 Claimants' Counter-Memorial on Jurisdiction ¶ 32. *See also id.* ¶ 34 ("Ecuador has eviscerated or impaired Claimants' rights and violated the Settlement and Release Agreements by (1) refusing to dismiss or indemnify Chevron for the claims in the Lago Agrio Litigation, and (2) acting in bad faith by failing fully to defend and support its releases of TexPet and its related companies (and instead attempting to undermine, nullify, or impair those releases though judicial due-process violations, collusion with the Lago Agrio Plaintiffs, and procedurally and substantively bogus Criminal Proceedings)."); Claimants' Notice of Arbitration ¶ 73 ("[T]his dispute arose shortly after the Lago Agrio Litigation was commenced in 2003, when Ecuador refused to honor its obligations under the 1995 and 1998 investment agreements."); Claimants' Merits Memorial ¶ 539 ("Through this arbitration, Claimants seek to protect and enforce their rights under binding agreements by which Ecuador, Petroecuador and several local governments settled all public environmental claims against TexPet and its affiliates, and released them from all liability for public environmental impacts in Ecuador.").

598 Claimants' Rejoinder on Jurisdiction ¶ 102; *see also* Claimants' Merits Memorial ¶ 516 ("Ecuador has all-but rescinded the 1995, 1996 and 1998 Settlement and Release Agreements; failed to enforce Claimants' resulting right to finality and res judicata; denied Claimants any 'effective means' of asserting and defending those same rights; and deprived them of any measure of due process with respect to its right to a fair and open hearing on claims that should have been barred by those contracts from the outset. Under any measure, this is not the 'fair and equitable treatment' that the Treaty requires.").

Agreement.[599] In its Jurisdictional Award, this Tribunal found: "The 1995 Settlement Agreement made with the Respondent lies, of course, at the heart of the Claimants' claims against the Respondent, as both an alleged 'investment' and an alleged 'investment agreement' under the BIT; ***and the Tribunal has therefore concentrated its analysis on that particular settlement agreement***."[600]

327. Respondent has already demonstrated in Track 1 that the 1995 Settlement Agreement (1) was entered into and affects rights only as between the parties to that agreement, namely, the Government of Ecuador, PetroEcuador and Texaco, (2) did not contain any "hold harmless" or indemnification provision, and (3) did not settle, purport to settle, and could not have settled under applicable Ecuadorian law, environmental claims of Ecuadorian citizens. Accordingly, Claimants cannot show that the Republic breached the 1995 Settlement Agreement or interfered with Claimants' investment by allowing the Lago Agrio Litigation to proceed and/or by failing to indemnify, protect or defend the rights of Chevron. Claimants' Treaty claims, as derivatives of these failed contract claims, must therefore fail as well.

328. Moreover, a BIT does not operate to improve the contractual bargain secured by the investor. Claimants cannot rely upon the standards of protection set out in the Treaty to

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599 This Tribunal would not have — nor does it indeed claim to have — jurisdiction over the Lago Agrio dispute under Article VI(1)(c) of the U.S.-Ecuador Treaty to the extent it does not implicate contract or legal rights under the 1995 Settlement Agreement. Indeed, no investment rights could be implicated in the Lago Agrio action without the 1995 Settlement Agreement because the link between the dispute (the Lago Agrio proceeding) and the investment (the 1973 Concession Agreement) would be too remote. To be sure, Claimants do not attempt to sustain any Treaty breaches on the basis of violation of rights under the 1973 Concession Agreement. Claimants instead rely on the 1973 Agreement only to the extent the 1995 Settlement Agreement relates to the Concession Agreement, and hence as a basis for this Tribunal's jurisdiction. Accordingly, as the rights under the 1995 Settlement Agreement that the Claimants purport to have do not exist, this Tribunal does not have jurisdiction over the due process violations asserted by Claimants having to do with the Lago Agrio proceeding.

600 Third Interim Award ¶ 4.2 (emphasis added); *see also id.* ¶ 4.70 ("The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has, through its organs, acted in relation to the settlement agreements.").

introduce rights they did not bargain for in their contract. As Professor Crawford explains, a "BIT should not be used as a vehicle to rewrite the investment arrangement."[601]

V. Even If The Tribunal Finds That The 1995 Settlement Agreement Has Been Breached, Claimants' Treaty Claims Fail

329. Even if this Tribunal were to find that the 1995 Settlement Agreement covers third party claims and somehow did in fact act as a *res judicata* bar precluding the Lago Agrio Plaintiffs from bringing their action against Chevron, Claimants' Treaty claims still fail for independent reasons, as discussed herein.

A. A Breach Of The 1995 Settlement Agreement Does Not Give Rise To A Breach Of The Treaty's Umbrella Clause

330. Article II(3)(c) of the Treaty, otherwise known as the "umbrella clause," provides: "Each Party shall observe any obligation it may have entered into with regard to investments."[602] Claimants seek to impose on the Republic an excessively broad interpretation of this obligation. According to Claimants, any violation of a state contract relating to foreign investment is *a fortiori* actionable, even as to parties who are not in direct privity of that contract. Claimants' expansive view of the umbrella clause is incorrect.

1. The Umbrella Clause Requires Privity Of Contract, Which Chevron Lacks

331. Claimants cannot bring a claim for violation of Article II(3)(c) of the Treaty based on breach of the 1995 Settlement Agreement because "the umbrella clause only becomes operative to the extent that a State party to the BIT has entered into an [actual] '***obligation***'" with respect to an investment.[603] Claimants have failed to show that the Republic "entered into" any

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601 RLA-403, James Crawford, "Treaty and Contract in Investment Arbitration," 24 ARB. INT'L 351, 373 (2008).

602 C-279, Ecuador-U.S. BIT, art. II(3)(c).

603 RLA-338, *Burlington Resources* Decision on Liability ¶ 202 (emphasis added).

applicable "obligation" with Chevron with respect to an investment. The 1995 Settlement Agreement was entered into by and among the Government of Ecuador, PetroEcuador, and TexPet. Thus, even assuming *arguendo* that contracts can be the source of the obligations referred to in the umbrella clause,[604] the 1995 Settlement Agreement creates no State obligations towards, and may not be enforced by, Chevron, a non-party to the contract. Only parties in direct privity of contract may assert a violation of the BIT's umbrella clause based on an alleged breach of the 1995 Settlement Agreement.

a. Chevron Cannot Assert An Umbrella Clause Claim Because Only Signatories To An Agreement Can Assert Breach Of Contract Claims Under *Ecuadorian Law*

332. Tribunals must rely on the law governing the contract when assessing claims under a Treaty's umbrella clause. As noted by the committee in the *CMS* annulment decision, "[t]he effect of the umbrella clause is not to transform the obligation which is relied on into

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604 The Republic rejects the notion that ordinary commercial contracts, such as the 1995 Settlement Agreement — which was not found by the Tribunal to constitute an investment agreement in isolation from the 1973 Concession Agreement — can generally give rise to the kind of obligations referred to in the umbrella clause. Numerous arbitral tribunals have opposed the expansive view endorsed by Claimants here that any breach of a contractual obligation weighing upon a State in an investment contract is *ipso facto* converted into an investment treaty claim by operation of an umbrella clause. *See, e.g.*, CLA-66, *SGS v. Pakistan* Decision on Jurisdiction; RLA-32, *Joy Mining Mach. Ltd. v. Arab Republic of Egypt*, ICSID Case NO. ARB/03/11 (Award on Jurisdiction of Aug. 6, 2004) (Orrego Vicuña, Craig, Weeramantry); CLA-88, *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8 (Award of May 12, 2005) (Orrego Vicuña, Lalonde, Rezek); CLA-14, *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15 (Decision on Jurisdiction of April 27, 2006) (Caflisch, Stern, Bernardini); RLA-49, *Pan American Energy LLC et al. v. The Argentine Republic*, ICSID Case Nos. ARB/03/13 and ARB/04/8 (Decision on Preliminary Objections of July 27, 2006) (Caflisch, Stern, van den Berg).

In *SGS v. Pakistan*, for example, the tribunal rejected the claimant's argument that the umbrella clause "'elevate[d]' its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT." CLA-66, *SGS v. Pakistan* Decision on Jurisdiction ¶ 165; *see also id*. ¶ 163. The tribunal instead reaffirmed "the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law." *Id.* ¶ 167. Clear and convincing evidence of contrary intent of the Contracting Parties to the BIT must be adduced to overcome this principle and to conclude that the umbrella clause elevates simple contract claims to treaty claims. *Id.* The tribunal did not find any evidence of such common intent in the text of the umbrella clause. *Id.* The tribunal stated that such an overbroad interpretation of the umbrella clause would impermissibly allow a private investor to assert unlimited, trivial contractual claims in international fora; evade and nullify freely-negotiated dispute settlement clauses in State contracts; and render other substantive provisions of the BIT superfluous. *Id.* ¶¶ 167-168.

something else; the content of the obligation is unaffected, as is its proper law."[605] Therefore, in determining whether the Republic has breached the Treaty's umbrella clause, this Tribunal must rely on Ecuadorian law. Since Chevron was neither a signatory to, nor a covered Releasee under, the operative contract as defined by Ecuadorian law, Claimants' assertion must be rejected.[606]

333. In the recent award in *Burlington v. Ecuador*, the tribunal addressed the question of "whether the umbrella clause protection applies to obligations entered into not between the State and the investor and Claimants, but between the State and an affiliate of the investor."[607] To reach its decision the tribunal relied on Ecuadorian law because it "is that law that defines the content of the obligation including the scope of and the parties to the undertaking, *i.e.*, the obligor and the obligee."[608]

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605 CLA-104, *CMS* Annulment Award ¶ 95(c); *see also* R-404, Jean-Christophe Honlet & Guillaume Borg, *The Decision of the ICSID* Ad Hoc *Committee in* CMS v. Argentina *Regarding the Conditions of Application of an Umbrella Clause:* SGS v. Philippines *Revisited*, *in* 7 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 1 (2008) (noting that "an umbrella clause does not change the content, proper law of, and the parties to, the obligations of the State, the breach of which may trigger the umbrella clause").

606 The Republic incorporates by reference its previous pleadings explaining why Chevron has no standing under Ecuadorian law to assert claims under the 1995 Settlement Agreement. *See* Respondent's Track 1 Counter-Memorial on the Merits and Rejoinder on the Merits at Parts III and VIII, respectively.

Moreover, Respondent notes that Claimants err when they argue that Chevron steps into the shoes of TexPet and may exercise TexPet's rights as a Releasee under the 1995 Settlement Agreement because the Lago Agrio Court found Chevron liable for TexPet's tortious acts. *See* Claimants' Track 1 Reply on the Merits ¶ 208 (citing Article 338 of the Ecuadorian Law of Companies). In support, Claimants cite to the expert reports of Messrs. Coronel and Barros for the proposition that "under Ecuadorian law, a company that is held accountable for obligations to its subsidiary must also be able to benefit from the rights and defenses that inure to that subsidiary involving the same transaction of facts." *Id.* ¶ 209. But Claimants' theory has no support under Ecuadorian law.

As an initial matter, neither Dr. Coronel nor Dr. Barros cites *any* Ecuadorian legal authority declaring that imputation of liability necessary results in the imputation of contract rights. In fact, Ecuadorian law provides just the opposite. According to Dr. Andrade, piercing a company's corporate veil is applied in Ecuador only as a sanction, and as such cannot be used to benefit the company responsible for the underlying harm. *See* RE-9, Andrade Expert Rpt. ¶ 99 (explaining that under the Law on Companies, art. 17, the sole purpose of piercing the corporate veil is to impose liability). Thus, judicial imputation of TexPet's conduct to Chevron does not, under Ecuadorian law, allow for the transfer of TexPet's contract rights and benefits to Chevron.

607 RLA-338, *Burlington Resources* Decision on Liability ¶ 212.

608 *Id.* ¶ 214.

334. The *Burlington* tribunal held that Burlington did not establish under Ecuadorian law that "the non-signatory parent of a contract party may directly enforce its subsidiary's rights."[609] In other words, under Ecuadorian law, the Republic could owe no obligation under the treaty to a non-signatory claimant — even if the claimant had established that it had an investment in Ecuador — because "[b]road as the definition of investment in the Treaty may be, it cannot compensate for the absence of an 'obligation."[610] The same logic applied by the tribunal in *Burlington* applies here.

b. Nor Can Chevron Assert An Umbrella Clause Claim Under The Terms Of This Treaty

335. Even if Ecuadorian law were to permit non-signatories to assert a breach of contract claim (which is not the case), Chevron fares no better because the Ecuador-U.S. BIT itself requires privity as a pre-condition to the assertion of an umbrella clause claim. In interpreting the very same Treaty at issue here, the *Burlington* tribunal observed, "the protection granted under the umbrella clause requires privity [of contract] between the investor and the host State."[611] Other examples interpreting similar umbrella clauses abound.

336. In *Azurix*, the tribunal dismissed the contract claims asserted under the umbrella clause because the claimant there was not a party to the contract. Instead, the contract was between Azurix's domestic subsidiary, ABA, and an Argentinean province. Dismissing the umbrella clause claims, the tribunal held:

> [N]one of the contractual claims as such refer[s] to a contract between the parties to these proceedings; neither the Province nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina, there is no undertaking to be honored by Argentina to Azurix other than the obligations under

609 *Id.* ¶ 215.

610 *Id.* ¶ 217.

611 *Id.* ¶ 233.

> the BIT. Even if for argument's sake, it would be possible under [the umbrella clause] to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was a party to this Agreement.[612]

337. The tribunal in *Siemens v. Argentina* similarly reasoned that the claimant could not bring a claim for breach of the umbrella clause because it was not a party to the operative contract:

> The Tribunal considers that Article 7(2) has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty. Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that breach or whether it should be considered by the tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings.[613]

338. Most recently, the *ad hoc* committee in *CMS v. Argentina* annulled, for failure to state reasons, the tribunal's implicit determination that a parent company, like Chevron, could resort to the umbrella clause to enforce obligations owed by the State to its subsidiary.[614] The committee criticized the *CMS* tribunal's overly broad interpretation of the umbrella clause, specifically noting that the provision does not change "the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it)."[615] Picking up on this specific point, the *Burlington* tribunal noted:

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612 CLA-43, *Azurix* Award ¶ 384. The wording of the umbrella clause contained in the Argentina-U.S. BIT is identical to the umbrella clause in the Ecuador-U.S. BIT.

613 CLA-227, *Siemens* Award ¶ 204. The umbrella clause in the Argentina-Germany BIT similarly provided that "[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory." *Id.* ¶ 196.

614 CLA-104, *CMS* Annulment Award ¶¶ 97, 100; *see also id.* ¶ 96 ("In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN.").

615 *Id.* ¶ 95(c). Many commentator's agree with the *ad hoc* committee's reasoning. *See e.g.*, R-405, Sophie Lemaire, *Commentary to the September 25, 2007* Ad Hoc *Committee Decision in* CMS v. Argentine Republic, 4 REVUE DE L'ARBITRAGE 905, 908 (2007) ("[U]nlike generally applicable legal guarantees, these obligations [defined in the umbrella clause] are not of an *erga omnes* nature and are instead applicable to specific entities, which are the

> The *CMS ad hoc* Committee expressed the premise which the *Azurix* and the *Siemens* tribunals had left unstated. First, in keeping with this Tribunal's analysis, the *ad hoc* Committee stated that an obligation has an obligor ("the person bound by it") and an obligee ("the person […] entitled to rely on it"). Second, still in conformity with the Tribunal's view, the *ad hoc* Committee stated that the obligation remains governed by its proper law and that ***the parties to the obligation are not changed by reason of the umbrella clause. Thus, the umbrella clause does not expand the universe of obligees who may rely on the underlying obligation***.[616]

339. Given the consistency with which tribunals have determined that "the umbrella clause cannot transform a contract obligation of the State towards an investor's subsidiary into an obligation to the investor itself,"[617] Chevron, a non-signatory to the contract at issue here, cannot rely upon the umbrella clause contained in this Treaty.

c. The Republic Has Not Breached Any Of Its Obligations Under The 1995 Settlement Agreement Towards TexPet

340. While TexPet is a party to the 1995 Settlement Agreement, its umbrella clause claim is also meritless. As established during Track 1, the Republic has honored all contractual obligations that it owed TexPet under the 1995 Settlement Agreement because neither the Government nor PetroEcuador has ever sued TexPet or any Releasee, as defined in Article 5.1.

341. Furthermore, just as Chevron cannot assert an umbrella clause claim on behalf of its subsidiary, TexPet is not a party to the Lago Agrio Litigation, and thus has no claims to assert under the 1995 Settlement Agreement in respect of that proceeding.[618]

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only ones affected by their performance. The Committee's third point . . . is that the umbrella clause does not by itself transform the obligations that it refers to; neither the contents of such obligations nor the law applicable thereto nor even the parties that may make a claim relating to their performance change.").

616 RLA-338, *Burlington Resources* Decision on Liability ¶ 228 (emphasis added).

617 *Id.* ¶ 231.

618 *See* Respondent's Track 1 Counter-Memorial on the Merits Section IV (explaining why under Ecuadorian law TexPet cannot assert a breach of contract claim on behalf of Chevron or any Releasee); *see also* Respondent's Track 1 Rejoinder on the Merits Section VI (explaining why Respondent has not breached the 1995 Settlement Agreement).

2. Claimants Cannot Salvage Their Umbrella Clause Claim By Relying On General Legislation Giving Rise To Obligations Within The Meaning Of The Umbrella Clause

342. Given the lack of privity, Claimants seek to expand the scope of the umbrella clause to cover their non-contractual claims. In support, Claimants principally rely on *LG&E v. Argentina* and *Enron v. Argentina* for the proposition that the umbrella clause covers "obligations assumed through law or regulation," including unilateral obligations running to the investor contained in legislation.[619]

343. As a threshold matter, the cases cited by Claimants in support of their position are inapposite because Claimants have not argued — nor do they have any basis to argue — that the Republic breached any "commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein."[620] Indeed, nowhere in Claimants' umbrella clause argument do they rely on any particular law or decree as the source of an undertaking on the part of the Republic; Claimants point only to obligations allegedly found in the Settlement Agreement itself.

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619 Claimants' Merits Memorial ¶ 447. *LG&E v. Argentina* does not help Claimants because the case does not stand for the proposition that *general* laws and regulations create *specific* obligations enforceable under the umbrella clause. In *LG&E*, the claimant alleged that regulations on the privatization of *Gas del Estado* by an international bidding process, *coupled with* Argentina's specific promises to foreign investors, amounted to obligations actionable under the umbrella clause. With regard to these specific promises, the claimant alleged that "Argentina wooed foreign investors with promises of return on investment that would always be reasonable, protections against currency exchange and inflation, adjustment of rates pursuant to international indexes, no unilateral changes and no price control without indemnification." CLA-208, *LG&E Energy* Decision on Liability ¶ 165. The tribunal's holding was thus premised on these specific assurances, not only the general regulations: "Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce entry of foreign capital to fund the privatization program in its public service sector." *Id.* ¶ 175.

This case is distinguishable based on its facts, since Ecuador has not made any specific promises to Chevron, but has simply enacted general environmental laws (which only compiled pre-existing legislation in any event) and other regulations governing both domestic and foreign investment in the hydrocarbons industry.

620 Claimants' Merits Memorial ¶ 448 (quoting to CLA-209, *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9 (Award of Sept. 5, 2008) (Sacerdoti, Veeder, Nader) ¶ 301).

344. Even if Claimants were to have made such a claim, their argument would still fail. As the *Continental Casualty v. Argentina* tribunal explained, an "umbrella clause does not come into play when the breach complained of concerns *general obligations arising from the law of the host State*."[621]

345. The *ad hoc* committee in *CMS v. Argentina* confirmed that the umbrella clause applies only to "specific obligations concerning the investment" in question and "***do[es] not cover general requirements imposed by the law of the host State***."[622] To the contrary, only specific, consensual obligations that are in existence and that concern the investment may be enforced under the umbrella clause — to the exclusion of general obligations imposed by national law:

> In speaking of "any obligation it may have *entered into* with regard to investments," it seems clear that [the umbrella clause] is concerned with consensual obligations arising independently from the BIT itself (*i.e.*, under the law of the host State or possibly international law).[623]

346. Professor Crawford, a member of the *CMS ad hoc* committee, subsequently explained his view that laws and regulations of a State do not create or constitute "obligations" enforceable under an umbrella clause:

> [I]t is a confusion to equate a State law or regulation with an obligation entered into by the State, or to regard an umbrella clause as implicitly freezing the laws of the State as at the date of admission of an investment. The enactment of a law by the State, whether it is specific or general, is not the entry by the State into an obligation distinct from the law itself. No doubt a State is obliged by its own laws, but only for so long as they are in force. In the absence of express stabilization, investors take the risk that

621 CLA-209, *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9 (Award of Sept. 5, 2008) (Sacerdoti, Veeder, Nader) ¶ 300 (emphasis added).

622 CLA-104, *CMS* Annulment Award ¶ 95(a) (wherein the committee examined the identically-worded umbrella clause in the Argentina-U.S. BIT) (emphasis added).

623 *Id.*

> the obligations of the host State under its own law may change, and the umbrella clause makes no difference to this basic proposition.[624]

347. The tribunal in *Noble Ventures v. Romania* also elaborated on these points, stating that the term "entered into" signals specific contractual commitments, to the exclusion of general legislative commitments.[625] The tribunal stated:

> The employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts.[626]

348. Thus, Claimants may not use the umbrella clause to assert non-contractual claims (in whatever form) under the Treaty.[627]

B. Nor Is A Breach of Contract Tantamount To A Breach Of The Treaty's Other Protective Standards

349. Just as Claimants cannot show that the Republic breached the Treaty's so-called umbrella clause, they cannot demonstrate that breach of contract claims give rise *per se* to violations of the other protective standards in the Ecuador-U.S. BIT.

350. It is a generally accepted principle of international law that "the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant."[628] Professor Crawford explains: "[S]tate

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624 R-403, James Crawford, "Treaty and Contract in Investment Arbitration," 24 Arb. Int'l at 369.

625 CLA-159, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award of Oct. 12, 2005) (Böckstiegel, Lever, Dupuy) ¶ 51.

626 *Id.*

627 *See* Claimants' Merits Memorial ¶ 455 (wherein, for example, they list among their alleged breaches of Article II(3)(c) of the BIT, the Government's alleged collusion with the Lago Agrio Plaintiffs, both for purposes of the civil lawsuit against Chevron and the filing of criminal charges against two of Claimants' lawyers, even though the investigation extended to twelve officials or employees of the Government and PetroEcuador).

628 CLA-291, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary 6 to Article 4. *See also*, RLA-51, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Decision on Jurisdiction of Apr. 22, 2005) (Guillaume, Cremades, Landau) ¶ 267; RLA-48, *Salini Costruttori*

responsibility for breach of international law is distinct from the liability of a state for breach of its contracts."[629] This is in part because a "treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard."[630] Since treaties and contracts are different instruments, the Ecuador-U.S. BIT cannot grant rights to Claimants that the 1995 Settlement Agreement did not.

351. As the tribunal in *Salini* stated: "[N]ot any breach of an investment contract could be regarded as a breach of a BIT."[631] In *Salini*, the claimant asserted that a contract breach violated the Italy-Jordan BIT's fair and equitable treatment provision. The tribunal, however, found that something more than mere breach was required to rise to a violation of the BIT, further finding that a treaty breach "must be the result of behaviour going beyond that which an ordinary contracting party could adopt."[632]

352. Similarly, in *Glamis Gold v. United States*, the tribunal accepted the respondent's argument that State action constituting a breach of the contract did not by itself violate the treaty's fair and equitable treatment provision.[633] The tribunal reaffirmed that "mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of [treaty]."[634]

S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 (Decision on Jurisdiction of Nov. 9, 2004) (Guillaume, Cremades, Sinclair) ¶¶ 155-60; CLA-42, *Waste Management* Award ¶¶ 163-74; RLA-340, *Glamis Gold* Award ¶¶ 620-22.

629 R-403, James Crawford, "Treaty and Contract in Investment Arbitration," 24 Arb. Int'l at 356.

630 RLA-98, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision on Annulment of July 3, 2002) (Fortier, Crawford, Fernandez) ¶ 113.

631 RLA-48, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Decision on Jurisdiction of Nov. 9, 2004) (Guillaume, Cremades, Sinclair) ¶ 154.

632 *Id.* ¶ 155.

633 RLA-340, *Glamis Gold* Award ¶ 620.

634 *Id.*

353. The *Parkerings v. Lithuania* tribunal likewise distinguished breach of the fair and equitable treatment standard from breach of contractual rights. "[N]ot every hope amounts to an expectation under international law . . . [C]ontracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[635]

354. The tribunal in *Hamester v. Ghana* reaffirmed these principles when it held that "it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for violation of the FET standard."[636] Any other approach would put all investor-State contracts under the protection of the fair and equitable treatment standard, and essentially render the obligation nothing more than a broadly interpreted umbrella clause, contrary to the intentions of the sovereigns who negotiated and executed the Treaty.[637]

355. Because the Republic has not denied Claimants justice or otherwise engaged in "arbitrary or tortious conduct," as demonstrated in Sections II and III of this Counter-Memorial, Claimants' breach of contract claims, even if proven under Ecuadorian law, do not translate into the violation of any of the Treaty's protective provisions. To the extent Claimants' Treaty claims are based upon allegations of lack of due process, these claims fare no better, as discussed below.

C. Claimants' Lack Of Due Process Allegations Must Be Assessed According To The Requirements Of A Claim For Denial Of Justice Under Customary International Law

356. Claimants allege that the Republic has violated several Treaty provisions due to the alleged lack of due process that Chevron was afforded by the courts in Ecuador presiding over the Lago Agrio Litigation. Claimants allege for example that Ecuador: (1) "has not

635 RLA-341, *Parkerings-Compagniet AS v. Lithuania*, ICSID Case NO. ARB/05/8 (Award of Sept. 11, 2007) (Lew, Lalonde, Lévy) ¶ 344.

636 RLA-342 *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24 (Award of June 18, 2010) (Stern, Cremades, Landau) ¶ 337.

637 *See id.* ¶ 336 (quoting C. Schreuer, "Fair and Equitable Treatment: Interactions with other Standards," Transnational Dispute Management, Vol. 4, Issue 5 at 18 (September 2007)).

provided 'effective means' for Claimants to receive . . . any measure of due process with respect to [their] right to a fair and open hearing;" (2) has failed to afford Claimants fair and equitable treatment because of its "failure to provide Claimants due process in its courts, [including] its acts taken in bad faith, its deliberate frustration of Claimants' legitimate expectations, [and] its brazen attempts to coerce the judicial process and harass Claimants' and its representatives"; and (3) "has breached its other positive obligations to provide full protection and security to Claimants' investment, and to refrain from treating it arbitrarily and discriminatorily."[638] In support, Claimants allege judicial bribery, collusion between Ecuador's courts and its Government, judicial impropriety with respect to court-appointed experts, failures of judicial process (including ghostwriting), and abusive criminal prosecutions.

357. These claims are, of course, identical to those relied upon by Claimants in support of their denial of justice claim under customary international law. And like their denial of justice claim, a treaty breach based on the alleged misconduct received at the hands of Ecuador's courts is premature unless Claimants satisfy the element of exhaustion. So long as the factual core of the Claimants' due process claims remains focused on "the manner in which the national system has administered justice,"[639] the exhaustion condition applies without regard to whether the claims are based directly on customary international law, or on bilateral treaty obligations. As explained by the tribunal in *Loewen v. United States*, because the "Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. . . [A] claim alleging an appropriation in

638 Claimants' Merits Memorial ¶ 457.

639 RLA-61, Paulsson, DENIAL OF JUSTICE at 112.

violation of Article 1110 can succeed ***only if*** Loewen establishes a denial of justice under Article 1105."[640]

358. The rationale for the requirement for finality or exhaustion stems from the unique nature of a State's obligation to provide *not* an inevitably perfect outcome in every case but rather an overall system of obtaining justice. As pointed out by Jan Paulsson: "Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions."[641] Indeed, "States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct."[642]

359. Professor James Crawford, as a Special Rapporteur to the International Law Commission, confirmed his understanding of this obligation in the following words: "There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act. . . . *Systematic obligations have to be applied to the system as a whole*."[643]

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640 CLA-44, *Loewen* Award ¶ 141 (emphasis added); *see also* CLA-7, *Mondev* Award ¶ 96 (stating that the tribunal is "concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals"). *Loewen* and *Mondev* — wherein the tribunals focused not on the label or treaty clause invoked, but rather on the gravamen of the claim (denial of justice) — demonstrate that Claimants cannot avoid the exhaustion requirement by labeling their claim as one for treaty violations.

641 RLA-61, PAULSSON at 108.

642 *Id.* at 100; *see also* R-407, Delanoy & Portwood at 625, ¶ 29 (wherein the authors note that the particular nature of a State's obligation is "to set up and maintain a court system capable of delivering justice, there being the requirement that this obligation be fulfilled as from the first instance proceedings, at the earliest, or by the time when the last court capable of being called upon to rule in a given matter has issued its decision, at the latest") (emphasis omitted).

643 RLA-369, Second Report on State Responsibility, March 17, 1999, prepared for the International Law Commission, UN Document A/CN.4/498 ¶ 75 (emphasis added).

360. For that reason, international arbitral tribunals have not hesitated to apply the exhaustion requirement to treaty claims that seek to hold the host State responsible for its judicial action, notwithstanding that the treaty in question did not expressly reference an exhaustion requirement. The *Loewen* tribunal, for example, described the exhaustion requirement as "[a]n important principle of international law,"[644] and readily applied it to, *inter alia*, claimed breaches of Article 1105 of NAFTA,[645] notwithstanding the existence of a NAFTA provision which, under a reading urged by the investor, might have been construed as dispensing with any such requirement.[646]

361. The tribunal there found no basis for inferring any dispensation from the requirement of final court action. It instead stated that it would be surprising if NAFTA provisions had the effect of "encourag[ing] resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State."[647] According to the tribunal there: "[I]t is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law."[648] Academic commentaries since the issuance of *Loewen* have

644 CLA-44, *Loewen* Award ¶ 160.

645 This NAFTA article provides for standards of fair and equitable treatment, full protection and security, and non-discriminatory treatment.

646 CLA-44, *Loewen* Award ¶¶ 160, 162. *See also id.* ¶ 156 (holding that a claimant cannot avoid the exhaustion requirement simply by re-labeling its claim as one for treaty violations); RLA-40, *Duke Energy* Award ¶¶ 390-403 (dismissing a claim for breach of Article II(7) of the Ecuador-U.S. BIT because local remedies had not been exhausted); CLA-7, *Mondev* Award ¶¶ 96-97, 126 (applying the denial of justice standard when the claim was based on NAFTA Article 1105(1)).

647 CLA-44, *Loewen* Award ¶ 162.

648 *Id.*

overwhelmingly approved this approach.[649] Because Claimants have failed to exhaust local remedies available to them in the Ecuadorian judicial system, as described in Section III.B.1, Claimants' Treaty claims fail.

D. The Treaty's Stand-Alone Standards Are No More Expansive Than The Minimum Standard Of Treatment Under Customary International Law

362. Even if the exhaustion requirement were dispensed with, Claimants' Treaty claims fail for several reasons. To begin with, Claimants have mistakenly taken the view that each Treaty standard can be interpreted as an independent, stand-alone obligation that affords them protection beyond that which they would receive under customary international law. However, investment treaties, like treaties generally, frequently reflect obligations that are independently found in customary international law.[650] States often intend to express in the text of treaties standards of treatment that exist in customary international law to ensure that treatment accorded to their respective nationals and property under contingent obligations does not fall below the international minimum standard.[651] This practice, moreover, enables the enforcement of the relevant rules of customary law through investor-state arbitration, which ensures their greater effectiveness.[652]

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649 For example, Professor Paulsson opines that "the *Loewen* tribunal was surely right." R-61, Paulsson DENIAL OF JUSTICE at 107. *See also* RLA-407, Delanoy & Portwood at 630, ¶ 32.

650 Since early multilateral efforts, States accepted the notion that substantive standards in an investment treaty can be reflective of customary international law. The formulation "fair and equitable treatment," for example, found in the Organization for Economic Cooperation and Development ("OECD") Draft Convention on the Protection of Foreign Property, which served as an important model for BITs of capital-exporting States, including the United States, "indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. . . . The standard required conforms in effect to the 'minimum standard' which forms part of customary international law." R-542, OECD Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, at 9. The Draft Convention, along with the notes and comments constituting its interpretation, was adopted by the OECD Council Resolution on the Draft Convention on the Protection of Foreign Property at its 150th Meeting on 12 Oct. 1967. *Id.* at Resolution of the Council.

651 RLA-408, J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID R. - FOREIGN INVESTMENT L. J. 21, 26 (2002).

652 *Id.*

363. This is particularly true with regard to investment treaties concluded by the United States. As Professor Kenneth Vandevelde, one of the principal architects in the United States' BIT program, observes: "The primary United States interest in concluding BITs was to protect existing investment while reaffirming the United States understanding of traditional international law on foreign investment."[653] Consequently, "[U.S.] BITs rely on international law to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts."[654]

364. Professor José Alvarez, another former U.S. BIT negotiator, likewise observes that U.S. BITs are intended to affirm the protections accorded to foreign investors under customary international law. He writes: "The modern wave of BITs arrived when countries like the United States" concluded BITs that are "*intended precisely to affirm the traditional rules of state responsibility to aliens.*"[655] As a result, "[s]uch clauses" are properly interpreted as "efforts to *include customary protections as part of a BIT's protections*" rather than to "exclude these ordinarily applicable general legal rules, as does *lex specialis.*"[656]

365. This interpretation, Professor Alvarez emphasizes, accords with the:

> announced intentions of the U.S. BIT program (and presumably the programs of other capital-exporting states that now widely imitate the provisions of U.S. BITs). *U.S. BIT negotiators have affirmed in scholarly commentaries, in testimony before Congress, and most importantly in the course of BIT negotiations that these treaties sought to re-affirm, not derogate from, relevant customary law.*[657]

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653 RLA-409, Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, 212 (1988).

654 *Id.* at 222.

655 RLA-410, José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 40 (2009) (emphasis added).

656 *Id.* at 33-34 (emphasis added).

657 *Id.* at 33-34 (emphasis added). Similarly, Professor Alvarez writes that the "United States' view" is that "the BIT's requirements" impose only "minimal intrusions on a Government's ability to regulate in the public interest" because they

366. Contemporary iterations of the U.S. Model BIT expressly concede and clarify this connection with customary international law.[658] Article 5 of the 2004 and 2012 Models, titled "Minimum Standard of Treatment," provides that each Party shall accord to covered investments "treatment in accordance with customary international law," and further explains that the treatment envisaged does not require a State to accord treatment in addition to or beyond that which is prescribed by the customary international minimum standard of treatment.[659]

367. As discussed further below, international arbitral jurisprudence, the text of the Treaty, and the negotiations giving rise to BITs entered into by the United States — Chevron's home state — conclusively show that both effective means and fair and equitable treatment (the

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are "based on the belief that much of what the US BIT provided was already contained in the traditional principles of international law regarding the treatment of aliens, drawn from principles of State responsibility." RLA-411, José Alvarez, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT at 114 (Hague Academy of International Law 2011).

658 Claimants acknowledge the significance of U.S. Model BITs in interpreting the meaning and purpose of specific treaty provisions. *See* Caron Expert Rpt. at 25. Tellingly, however, Claimants focus on the 1992 U.S. Model BIT, which while serving as a template for the Ecuador-U.S. BIT, prompted a couple of arbitrators to depart from the U.S. Government's long-standing position that the Treaty's protective standards are a reference to and do not go beyond the minimum standard of treatment. *See, e.g.*, RLA-56, CAMPBELL MCLACLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATIONS: SUBSTANTIVE PRINCIPLES ¶ 7.20 (Oxford Univ. Press 2007). With respect to the fair and equitable treatment standard, for example, the 1992 U.S. Model BIT provides:

> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

See CLA-155, U.S. Model BIT (1992), art. 2(2)(a).

To clarify its position and prevent tribunals from continuing to misinterpret this provision, the United States Government changed the text of the model BIT in 2004. The same provision in the 2004 Model provides:

> Each Party shall accord to covered investments treatment ***in accordance with customary international law***, including fair and equitable treatment and full protection and security.

See R-543, U.S. Model BIT (2004), art. 5(1).

Significantly, however, the 2004 U.S. Model BIT does not represent a departure from previous U.S. policy (or specifically from the 1992 U.S. Model BIT); rather, it affirms the Government's long-standing position. As one commentator has noted, the 2004 U.S. Model BIT "***should not be seen as a State backpedaling from previous commitments, but rather, and more properly, as a clarification of a State's original intended meaning***." RLA-412, J. Roman Picherack, "The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?" J. WORLD INV & TRADE 255, 263 (2008).

659 R-543, U.S. Model BIT (2004), art. 5; R-544, U.S. Model BIT (2012), art. 5. As elaborated below, the United States has been clear in stating that substantive treatment provisions in U.S. international investment agreements reflect customary international law.

latter of which subsumes full protection and security and the prohibition against arbitrary and discriminatory behavior)[660] incorporate, and do not require anything in addition to or above, the minimum standard of treatment under international law.[661]

1. Article II(7) Expresses Customary International Law

368. Article II(7) of the BIT requires Ecuador to "provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."[662] Despite Claimants' contention, this Article, like the other substantive protections at issue in this particular BIT, does not constitute a *lex specialis* between the parties that can be interpreted without consideration of principles of customary international law.

369. The Ecuador-U.S. BIT was not drafted in a vacuum. It was drafted in the context of pre-existing principles of customary international law that govern the relations between States. Claimants assert that the Tribunal should interpret Article II(7) without regard to such principles,[663] but this approach runs contrary to the interpretive rules set forth in the Vienna Convention. Article 31.3(c) of the Vienna Convention on the Law of Treaties ("VCLT") mandates that in interpreting any treaty, among other items, "[t]here shall be taken into account,

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660 *See, e.g.*, RLA-413, DOLZER & SCHREUER at 175.

661 To the extent that the other substantive protective provisions do not fall within the parameters of fair and equitable treatment and/or can be regarded as implicating separate issues, there is no evidence to suggest that these provisions should be treated differently. Indeed, the jurisprudence confirms that all of the BIT's protective provisions express only the minimum standard of treatment under customary international law. For example, in *Noble Ventures v. Romania*, the tribunal stated that it was doubtful that the "full protection and security" clause in the treaty there at issue could be deemed broader than the corresponding duty under customary international law. CLA-159, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award of October 12, 2005) (Böckstiegel, Lever, Dupuy), ¶ 164 ("With regard to the Claimant's argument that the Respondent breached Art. II(2)(a) of the BIT which stipulates that the 'Investment shall . . . enjoy full protection and security,' the Tribunal notes that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens."). Treaty clauses protecting investors against arbitrary and discriminatory measures have likewise been deemed not to exceed the requirements of customary international law. R-413, DOLZER & SCHREUER at 176.

662 C-279, Ecuador-U.S. BIT, art. II(7).

663 Claimants' Merits Memorial 467.

together with the context . . . any relevant rules of international law applicable in the relations between the parties."[664] Customary international law principles constitute rules of international law that are relevant and applicable in the relations between the U.S. and Ecuador. Thus, customary international law principles must be considered by this Tribunal when interpreting this BIT, including Article II(7).

370. Nor does Claimants' invocation of principles of *lex specialis* help them convert Article II(7) into a supposedly free-standing obligation that can be interpreted without consideration of customary international law. Claimants fail to explain how Article II(7) derogates from customary international principles of denial of justice.[665] Indeed, there is nothing in Article II(7) that reflects a discernable intent by the Contracting Parties to exclude the application of principles of customary international law. To the contrary, as the *Duke Energy* tribunal found, Article II(7) "seeks to implement and form *part of the more general* guarantee against denial of justice."[666] Accordingly, as discussed further below, this article requires Ecuador to provide an effective *framework* or *system* under which claims may be asserted and rights enforced; it does not obligate Ecuador to guarantee that the system is effective in particular cases, as Claimants contend.[667]

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664 CLA-10, Vienna Convention on the Law of Treaties, art. 31.3.

665 The fact that Article II(7) does not explicitly refer to customary international law principles of denial of justice, as noted by Claimants in paragraph 467 of their Merits Memorial, is self-evident but does not constitute sufficient grounds to exclude such principles. Nor does the fact that Article II(3) refers to "international law" whereas Article II(7) does not, mean that one can exclude consideration of such principles when interpreting the meaning of Article II(7). *See e.g.*, RLA-430, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, Article 55, *Lex Specialis* (4) (stating that "[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.).

666 RLA-40, *Duke Energy* Award ¶ 391 (emphasis added).

667 *See* Claimants' Merits Memorial ¶ 460.

a. The Meaning Of Article II(7) Under Article 31 VCLT

371. Application of the rules of treaty interpretation, as codified in Article 31 of the VCLT, establishes that the Contracting Parties intended Article II(7) to ensure investors of each State that they would enjoy the protections of customary international law in the territory of the other State.

372. Articles 31 provides in pertinent part:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[668]

373. The "ordinary meaning" of the terms of Article II(7) constitutes the point of departure for the application of Article 31 VCLT. As suggested by the title of Article 31, "general rule of interpretation," application of the listed elements must be performed as a single combined operation.[669] The elements are listed in a logical, not hierarchical, order.[670] All are of equal importance.[671] As will be shown below, when applied to the text of Article II(7), they establish that the obligation in Article II(7) to provide an effective system of administering justice is the same as that which is found in customary international law.

374. As used in Article II(7), the word "effective" functions as an adjective that qualifies the noun to which it refers: the word "means." "Means," in turn, is defined as

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668 CLA-10, Vienna Convention on the Law of Treaties, art. 31(1).

669 *See* RLA-414, RICHARD GARDINER, TREATY INTERPRETATION 141 (Oxford University Press 2010) ("the Vienna rules are to be applied together, not in bits").

670 RLA-70, *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/03 (Decision on Jurisdiction of Oct. 21, 2005) (Caron, Alberro-Semerena, Alvarez) ¶ 91.

671 RLA-169, SIR R. JENNINGS & SIR A. WATTS, OPPENHEIM'S INTERNATIONAL LAW (9th edition, 1992), vol. I (Parts 2-4), pp. 1271-1275. Thus, by virtue of the integrated nature of their operation, "ordinary meaning" is not to be taken in isolation from the other elements of Article 31 VCLT. As Gardiner writes, "the first impression as to what is the ordinary meaning of a term [is not] anything other than a very fleeting starting point. For the ordinary meaning of treaty terms is immediately and intimately linked with context, and then to be taken in conjunction with all other relevant elements of the Vienna rules." RLA-414, GARDINER, TREATY INTERPRETATION at 161-162.

"instrumentalit[ies] for the accomplishment of a purpose."[672] Consequently, when coupled with the introductory phrase "shall provide," the phrase "effective means" requires that Ecuador establish or organize a system or instrumentalities that are fit for accomplishing a particular purpose.

375. The next part of Article II(7) identifies the purpose that the system or instrumentalities must effectuate: "asserting claims" and "enforcing rights." In that regard, "assert" is defined, *inter alia,* as "declare," "plead," and "set forth."[673] "Claim[s]" in turn, is defined as, *inter alia,* a "cause of action," "complaint," "plea," "suit."[674] Read together, effective means of "asserting claims" means a system or instrumentalities that are fit for accomplishing the setting forth of a legal action or suit.

376. The next phrase, "enforcing rights," complements the phrase "asserting claims." "Enforce" is defined, *inter alia,* as "bring to pass, carry into effect, carry into execution, carry out," "compel," "effectuate," "obtain by compulsion," "put into effect, put in force."[675] "Right[s]" is defined, *inter alia,* as "legal claim, legal power, legal title."[676] Therefore, in its ordinary meaning, effective means for "enforcing rights" means a system or instrumentalities that are fit for setting forth a legal action to give effect to rights of a legal nature.

377. Taken as a whole, the phrase "shall provide effective means of asserting claims and enforcing rights," means that there is a binding obligation to establish a system or

672 R-546, BALLENTINE'S LAW DICTIONARY. Similarly, in Spanish, "medios" is defined as "step, means , resource." R-547, Varó & Hughes at 899; R-548, de las Cuevas & Hoague at 514.

673 R-549, BURTON'S LEGAL THESAURUS at 43. Similarly, in Spanish, the phrase "hacer valer" means "to assert, claim, defend/vindicate/maintain one's rights." R-547, Varó & Hughes at 836.

674 R-549, BURTON'S LEGAL THESAURUS at 85. The Spanish word "reclamacion" has the same meaning; it means "claim, demand, complaint, appeal, objection, petition, protest." R-547, Varó & Hughes at 979.

675 R-549, BURTON'S LEGAL THESAURUS at 213-14. Similarly, in Spanish, "respetar" means "respect, obey, comply with, honour." R-547, Varó & Hughes at 999.

676 R-549, BURTON'S LEGAL THESAURUS at 526. "Derechos" means "right, interest." R-547, Varó & Hughes at 758.

instrumentalities that are fit for the purpose of allowing the presentation of legal actions to enforce legal rights.[677] The phrase does not require, as Claimants contend, a successful outcome in every instance or case.[678]

378. The final phrase in Article II(7) — "with respect to investment, investment agreements, and investment authorizations" — limits the scope of the general obligation described in the Article. The Contracting Parties' obligation to "provide effective means of asserting claims and enforcing rights" therefore applies only to such claims and rights that concern "investment, investment agreements, and investment authorizations."

379. In short, the ordinary meaning of the words and phrases that the Contracting Parties used in Article II(7) indicates they are obligated to establish a system or instrumentalities that are fit for the purpose of allowing foreign investors to plead legal causes of action to enforce rights relating to investment, investment agreements, and investment authorizations. Accordingly, the exhaustion requirement, based on testing "the system as a whole," is not supplanted by treaty clauses that set forth general standards of investor protection, at least where these standards do not derogate substantively from the customary international law standards applicable in a denial of justice analysis.

b. U.S. Practice Expressly Equates "Effective Means" To The Right Of Recourse To Administrative And Judicial Authorities Under Customary International Law

380. The United States' own interpretation of a clause similar to Article II(7) in the U.S.-Tunisia BIT reaffirms anew the interpretation derived from the ordinary meaning of the

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677 The examination of the terms of these phrases in both of the authoritative languages of the Treaty, English and Spanish, shows that there is no substantial difference between the definitions under the two languages, which strengthens and reinforces their ordinary meaning.

678 *See* Claimants' Merits Memorial ¶ 463; Caron Expert Rpt. at 6 ("'[M]eans' are ineffective by design or practice when on a case-by-case basis they are found to not provide an adequate basis for the investor to assert a claim or enforce a right.").

text, and solidifies the object and purpose of this provision within the Ecuador-U.S. BIT. Article II(7) of the U.S.-Tunisia BIT provides:

> Each Party shall provide to the nationals and companies of the other Party *the right of recourse to administrative and judicial authorities* in order to assert claims and enforce rights in the event of a dispute relating to an investment.[679]

381. The U.S.-Tunisia BIT substitutes the phrase "right of recourse to administrative and judicial authorities" for the phrase "effective means." The United States has made clear, however, that there is no substantive difference between the two formulations.[680] Likewise, during the treaty's ratification proceedings, the U.S. Department of State explained:

> The U.S.-Tunisia text provides for a "right of recourse to administrative and judicial authorities in order to assert claims and enforce rights." *This is not substantively different from the language in the US. model text* in which each Party agrees that it shall "provide effective means for asserting claims and enforcing rights."[681]

c. Other Authorities Recognize That Article II(7) Reflects Customary International Law

382. Finally, the text of Article II(7) has frequently and explicitly been acknowledged as reflecting customary international law. Professor Gann, for example, has written that this Article ensures that legal remedies are available to foreign investors "on a basis that is consistent

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679 R-550, Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, *signed on* May 15, 1990, *entered into force* Feb. 7, 1993, Article II(7) (emphasis added).

680 RLA-21, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at 416, n.68 (2009). *See also* R-550, USA-Tunisia BIT, submittal letter at 3 (stating that Article II(7) obligates the parties to "provide effective means of asserting claims and enforcing rights with respect to investments."). Thus, insofar as the U.S. Department of State is concerned, the phrases "right of recourse to administrative and judicial authorities" on the one hand, and "effective means of asserting claims and enforcing rights with respect to investments" on the other, are interchangeable.

681 R-551, Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland, Hearing before the Committee on Foreign Relations, United States Senate, 182nd Congress, Second Session (Aug. 4, 1992), at 46 (emphasis added).

with U.S. practice and *the principles of international law.*"[682] Professor Alvarez also interprets Article II(7) as reflecting customary international law, observing that "[t]here are many . . . provisions in [US BITs] that explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens."[683] In enumerating these provisions, he lists the obligation to accord investors "effective means of asserting claims' in local fora," i.e., the obligation under Article II(7), as one of the BIT's "*open-ended invitations to deploy relevant customary international law.*"[684]

383. In *Duke Energy v. Ecuador*, the tribunal similarly found that Article II(7) of the Treaty "[g]uarantees" the Contracting Parties "access to the courts and the existence of institutional mechanisms for the protection of investments."[685] In so doing, the tribunal held, Article II(7) "seeks to implement *and form part of the more general guarantee against denial of justice*,"[686] thereby acknowledging that Article II(7) incorporates only a subset of the "more general" concept of denial of justice under customary international law.

384. The *Amto v. Ukraine* tribunal likewise adopted this view:

> The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is *law and the rule of law*. There must be *legislation* for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires *secondary rules of procedure* so that the principles and objectives

682 CLA-90, P. Gann, *The U.S Bilateral Investment Treaty Program*, 21 STANFORD J. INT'L L 373, 396-397 (1985) (emphasis added).

683 RLA-410, José E. ALVAREZ, A BIT ON CUSTOM, 42 N.Y.U. J. INT'L L. POL. 17, 31-32 (2009).

684 *Id.* (emphasis added).

685 RLA-40, *Duke Energy* Award ¶ 391.

686 *Id*. (emphasis added).

> of the legislation can be translated by the investor into effective action in the domestic tribunals.[687]

385. In *Amto*, the tribunal defined the "effective means" standard in terms of legislation conforming with international standards. The *Amto* tribunal indicated that the standard is "systematic" in that individual failures are insufficient to breach the standard (unless they evidence a systematic failure):

> [The standard] is systematic in that the State must provide an effective framework or system for the enforcement of rights, *but does not offer guarantees in individual cases*. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12).[688]

386. Finally, the *Commercial Cases* arbitration relied upon by Claimants represents an aberration that is plainly in conflict with the overwhelming precedent described above. Indeed, the *Commercial Cases* Award distorts the "ordinary meaning" of Article II(7), and represents a radical departure from the way in which international tribunals and the United States Government have traditionally (and correctly) interpreted this standard.[689]

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687 RLA-343, *Amto* Award ¶ 87 (emphasis added).

688 *Id.* ¶ 88 (emphasis added). Professor Caron in fact *agrees with Respondent* regarding the significance of the ECT for purposes of confirming the meaning of Article II(7). Caron Expert Rpt. ¶¶ 102-105. He also appears to agree with the Republic's analysis of the *Amto* Award. *Id.* ¶ 121.

689 The *Commercial Cases* tribunal's primary justification for determining that Article II(7) is *lex specialis* is that this Article "does not make any explicit reference to denial of justice or customary international law." CLA-47, *Commercial Cases* Partial Award ¶ 242. This rationale is inconsistent with the fact that U.S. BIT's were intended to reflect customary international law, as established herein. The *Commercial Cases* tribunal's rationale is not only erroneous, but is inconsistent with its own recognition that Article II(7) "seeks to implement and form part of the more general guarantee against denial of justice." *Id.* More remarkable still is the decision of the *Commercial Cases* tribunal to conclude without any support that Article II (7) not only constitutes *lex specialis* but also provides for a "potentially less demanding test" than the test applicable for a denial of justice under customary international law. *Id.* ¶ 244.

2. Article II(3)(a) Expresses Customary International Law

387. The fair and equitable treatment provision also does not create new, treaty-based standards, but merely incorporates or references the minimum standard of treatment under customary international law.

a. The United States Government Endorses This Position

388. The U.S. Government has routinely confirmed its position that the fair and equitable treatment provision does no more than reference customary international law. It made its view clear, for example, in numerous transmittal statements accompanying BITs. Both before and after NAFTA's entry into force on January 1, 1994, the U.S. State Department transmitted a series of bilateral investments treaties to the Senate for approval, repeatedly describing the fair and equitable treatment provision as incorporating customary international law principles.[690] It

690 The U.S. provided eleven submittal letters to illustrate their contention that fair and equitable is a reference to the international minimum standard of treatment. R-552, Dep't of State, *Letter of Submittal for U.S.-Albania Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-19, at 5 (1995) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord 'fair and equitable treatment' and 'full protection and security' are explicitly cited."); R-553, Dep't of State, *Letter of Submittal for U.S.-Estonia Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-38, at 7 (1994) ("Paragraph 3 guarantees that investment shall be granted 'fair and equitable' treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph sets out a minimum standard of treatment based on customary international law."); R-554, Dep't of State, *Letter of Submittal for U.S.-Armenia Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-11, at 4 (1993) ("Paragraph 2 further guarantees that investment shall be granted 'fair and equitable' treatment in accordance with international law. . . . This paragraph sets out a minimum standard of treatment based on customary international law."); R-555, Dep't of State, *Letter of Submittal for U.S.-Moldova Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-14, at 6-7 (1993) (same); R-556, Dep't of State, *Letter of Submittal for U.S.-Mongolia Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-10, at 6 (1995) (same); R-557, Dep't of State, *Letter of Submittal for U.S.-Jamaica Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-35, at 7 (1994) (same); R-558, Dep't of State, *Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-37, at 8 (1994) (same); R-559, Dep't of State, *Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-15, at 5 (1993) (same); R-560, Dep't of State, *Letter of Submittal for U.S.-Uzbekistan Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-25, at viii (1996) (same); R-561, Dep't of State, *Letter of Submittal for U.S.-Trinidad & Tobago Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-14, at 7 (1995); R-562, Dep't of State, *Letter of*

issued a similar statement when it submitted the Albania-U.S. BIT to the United States Senate for advice and consent, affirming yet again that the relevant paragraph of the treaty "sets out a minimum standard of treatment based on standards found in customary international law."[691] Similarly, when it submitted the Estonia-U.S. BIT (which contains identical language to the Ecuador-U.S. BIT) for Senate advice and consent, it once again made clear that this provision "sets out a minimum standard of treatment based on customary international law."[692]

389. Indeed, the State Department has repeatedly advised

> the Senate over the past decade that the BIT paragraph containing the provisions concerning 'fair and equitable treatment' and 'full protection and security' is intended only to require a minimum standard of treatment based on customary international law. At no time since the NAFTA entered into force has the United States stated that foreign investors under its BITs should be treated better than under the NAFTA with respect to 'fair and equitable treatment.'[693]

In fact, the United States cited to these particular letters, including the State Department's submittal letter for the Ecuador-U.S. BIT, in *ADF Group Inc. v. United States*, to demonstrate that the fair and equitable treatment standard is a reference to the minimum standard of treatment and nothing more.[694]

390. Were there any question as to the position of the United States, *ADF* eliminated all doubt:

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*Submittal for U.S.-Geor***.** *Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-13, at 5 (1995) (same).

691 R-552, Dep't of State, *Letter of Submittal for U.S.-Albania Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 104-19 (1995).

692 R-553, Dep't of State, *Letter of Submittal for U.S.-Estonia Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in* S. TREATY DOC. NO. 103-38 (1994).

693 RLA-344, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Rejoinder of Respondent United States of America on Competence and Liability (March 29, 2002) at 41-42.

694 RLA-348, *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1 (NAFTA) (Award of Jan. 9, 2003) (Feliciano, de Mestral, Lamm) ¶ 95.

> The United States' view that "fair and equitable treatment" and "full protection and security" reference customary international law obligations accords with consistent State practice concerning the content of those terms. From the use of those terms in the 1967 OECD Draft Convention on the Protection of Foreign Property to the present, *State practice has consistently viewed "fair and equitable treatment" as referring to the customary international law minimum standard of treatment of aliens*. Thus, State practice supports the view that "fair and equitable treatment," as used in investment treaties, refers to the customary international law minimum standard of treatment of aliens. ADF offers no evidence of State practice to support a contrary view.[695]

391. Significantly, the U.S. Government's submission in *ADF* did not confine itself to the Treaty provision in question, but instead reaffirms once again that "State practice" is fundamentally inconsistent with Claimants' position that the fair and equitable treatment obligation is divorced from customary international law.[696]

392. The 2004 U.S. Model BIT likewise reaffirms the understanding of the U.S. Government. It provides in pertinent part that parties "shall accord to covered investments treatment in accordance with customary international law, *including* fair and equitable treatment and full protection and security."[697] Further, the provision is headed "Minimum Standard of Treatment," and states that fair and equitable treatment does *not* require a State to accord "treatment in addition to or beyond" the customary international law minimum standard of treatment of aliens.[698]

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695 RLA-344, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Rejoinder of Respondent United States of America on Competence and Liability (March 29, 2002) at 42 (emphasis added).

696 *See also* RLA-345, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America (June 1, 2001).

697 R-543, The U.S. Model BIT (2004), art. 5(1) (emphasis added).

698 *Id.*, art. 5(2). *See also* R-563, S.M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, TRANSNATIONAL DISPUTE MANAGEMENT, vol. 3, issue 2, at 2-3 (April 2006). Viewed logically, the set of standards in fair and equal treatment is either identical to or a subset of the set of standards in customary international law.

393. The U.S. Model BIT is material to this analysis because it "represents the set of norms that the relevant state holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy."[699] As commentators have noted, the current model BIT reflects an attempt by the U.S. Government to affirm and clarify its long-stated position that fair and equitable treatment has always been a reference to, and does not go beyond, the minimum standard of treatment:

> It may be understood as a response to a perception in and by the United States that a definition of "fair and equitable treatment" unbounded by custom had left the door open to adventurist arbitrators to exercise an unfettered discretion as to appropriateness of State policy. . . . [T]he new model form is one of the very few attempts, even if partial, at a codification of the content of the two central concepts. Importantly, the (non-exclusive) definition of "fair and equitable treatment" draws expressly upon a principle of due process, which is described in terms consistent with it being seen as a general principle of law common to civilized nations.[700]

394. Thus, the United States — a party to the operative Treaty — has *always* equated fair and equitable treatment with the minimum standard of treatment under international law. It is, of course, not alone in its approach. When most States included fair and equitable treatment provisions in their international investment agreements, they did so understanding that they were merely restating obligations that already existed under customary international law.[701] For example, the commentaries to Article 1 of the OECD Draft Convention show that the drafters intended to reference customary international law when they included fair and equitable

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699 RLA-56, CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.20 (2007) (quoting CLA-177, Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 159 (2003)).

700 *Id.* ¶ 7.30.

701 The United States, a member of the OECD, agrees with this view. A former U.S. official who negotiated BITs in the 1980s described the provision of the Model BIT requiring fair and equitable treatment to provide "in effect, a 'minimum standard' which forms part of customary international law." CLA-90, Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L. L. 373, 389 (1985).

treatment obligations in the Draft.[702] In its 1968 Commentary to the 1967 Draft Convention on the Protection of Foreign Investment, the OECD states:

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the *standard set by international law* for the treatment due by each State with regard to the property of foreign investors . . . . The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[703]

395. The OECD Draft has been cited in numerous cases, including in particular *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, wherein Judge Asante stated that the commentary on the OECD Draft Convention affirmed that the fair and equitable treatment standard imports the international minimum standard.[704] Additionally, in 1984, the Report of the OECD Committee on International Investment and Multinational Enterprises reported that, "[a]ccording to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated."[705] Chris Thomas QC states: "While the precise wording varied, [the OECD Draft] is eviden[ce] that states propounding the negotiation of investment

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[702] The origins of the fair and equitable treatment obligation are of course found in the Draft OECD Convention that links the fair and equitable treatment standard to customary international law. Indeed, "the Draft OECD Convention was used by most OECD countries as the basis for their IIA negotiations. By referring to the OECD model and using it systematically, they are also referring to this standard as defined by the Draft Convention of 1967." R-564, "Fair And Equitable Treatment – UNCTAD Series On Issues In International Investment Agreements II," 9 TDM 3, at 5 (April 2012).

[703] R-542, Organization for Econ. Co-operation & Dev., Draft Convention on the Protection of Foreign Property, adopted October 12, 1967, 7 I.L.M. 117 (hereinafter the "OECD Draft Convention"), art 1. cmt. 4. (emphasis added). This understanding was further confirmed in 1984 when the OECD Committee on International Investment and Multinational Enterprises reported, "[a]ccording to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated." R-564,, "Fair And Equitable Treatment – UNCTAD Series On Issues In International Investment Agreements II," 9 TDM 3, p. 21 (citing OECD, 1984, p. 12 ¶ 36).

[704] CLA-86, *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Asante, dissenting opinion, 30 I.L.M. 580 (1991) at 305.

[705] RLA-408, J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ISCID REVIEW – FOREIGN INV. L. J. 21, 48 (2002) (citing R-565, OECD, *Committee on International Investment and Multinational Enterprises, Inter-governmental Agreements Relating to Investment in Developing Countries*, Doc. No. 84/14 (May 27, 1984), at 12).

protection treaties saw a clear and intended link between constant (or full) protection and security and fair and equitable treatment and the international minimum standard at general international law. The former were considered to be expressions of the latter."[706]

b. International Jurisprudence Supports Respondent's Position

396. Respondent's position also has ample support in ICSID awards and other international jurisprudence. In *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, a case in which the claimant sought to recover losses related to its investment in an Estonian financial institution, the tribunal dismissed the claim regarding fair and equitable treatment, holding that claimant needed to establish a "wilful neglect of duty, an insufficiency of action falling far *below international standards*, or even subjective bad faith," a statement of the general tests for violation of the customary international law minimum standard.[707]

397. In *American Manufacturing & Trading, Inc. v. Republic of Zaire*, the tribunal found that the widespread looting in Zaire, which had caused a loss to AMT's investment, gave rise to a violation of the fair and equitable treatment and full protection and security provisions of the U.S.-Zaire BIT. In so concluding, however, the tribunal found that Zaire had "manifestly failed to respect the *minimum standard required of it by international law*."[708]

398. In *CME v. The Czech Republic*, the tribunal stated: "The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in

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706 *Id.* at 51.

707 CLA-87, *Genin* Award ¶ 367 (emphasis added).

708 CLA-103, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1 (Award of February 21, 1997) (Sucharitkul, Golsong, Mbaye) at 72 ¶ 43, *reprinted in* 36 I.L.M. 1531 (1997) (emphasis added); *see also* RLA-346, *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6 (Award of Jan. 16, 2013) (Lowe, Brower, Stern) ¶¶ 227, 232 (finding that there was no breach of the fair and equitable treatment or full protection and security provisions because claimants could not demonstrate that Venezuela violated the minimum standard of treatment under customary international law, as defined by tribunals such as the one in *Waste Management*).

accordance with the standard used for its own nationals. *Standards acceptable under international law apply*."[709]

399. The Tribunal in *Jan de Nul*, again in the context of determining breach of fair and equitable treatment, held that when the subject of the claim is a judicial decision, the tribunal must use standards applicable to denial of justice.[710] Specifically it stated that when a "judgment lies at the core" of the allegation of breach "the relevant standards to trigger State responsibility . . . are the standards of denial of justice, including the requirement of exhaustion of local remedies."[711]

400. Finally, the *Loewen* tribunal left no ambiguity whatsoever on this general principle when it held that '"fair and equitable treatment' and 'full protection and security' are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law."[712] The *Loewen* tribunal is hardly alone.[713]

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709 CLA-220, *CME* Partial Award ¶ 611 (emphasis added); *see also* CLA-173, *Lauder* Award ¶ 292 (concluding that the standard "is related to the traditional standard of due diligence" and provides a minimum standard forming part of customary law).

710 CLA-230, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egy*pt, ICSID Case No. ARB/04/13 (Award of Nov. 6, 2008) (Kaufmann-Kohler, Mayer, Stern) ¶¶ 188-191.

711 *Id.* ¶ 191.

712 CLA-44, *Loewen* Award ¶ 128.

713 CLA-225, *Azurix* Award ¶ 361 (same conclusion made regarding the U.S.-Argentina BIT, which contains fair and equitable treatment and full protection and security clauses to the U.S.-Ecuador BIT); CLA-88, *CMS Gas v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (Decision of May 12, 2005) (Orrego Vicuña, Lalonde, Rezek) ¶¶ 282-284 (same conclusion regarding the fair and equitable treatment clause); RLA-40, *Duke Energy* Award ¶¶ 333-337 (agreeing with the *Azurix* and *CMS* tribunals); CLA-231, *Rumeli Telekom v. Kazakhstan*, ICSID Case No. ARB/05/16 (Award of July 29, 2008) (Hanotiau, Boyd, Lalonde) ¶ 611 (sharing the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law); CLA-137, *Biwater Gauff* Award ¶ 592 ("[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."); CLA-224, *Saluka* Partial Award ¶ 291 (stating that "it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real").

401. Thus, Claimants' four specific standards of treatment do not depart in any material fashion from the customary international law framework establishing a State's responsibility for misconduct in the administration of justice. As such, the standards and requirements applicable to proving a denial of justice claim, particularly the substantive requirement of finality of the relevant state judiciary's action, apply to the entirety of the claims asserted herein, whether they are viewed as claims for violation of the customary international law standard subsumed in the requirements for effective means and fair an equitable treatment, or as claims for breach of other specific standards under the BIT. Accordingly, if Claimants' denial of justice claim fails, then so too must all their "independent" Treaty claims.

E. Claimants' Treaty Claims Still Fail Even If This Tribunal Determines That The Treaty's Protection Clauses Incorporate A Different Standard Than The Minimum Standard Of Treatment

402. Even if this Tribunal determines that the Treaty's protective provisions do not express the minimum standard of treatment under customary international law, Claimants' claims would still fail because they cannot show that Ecuador's alleged conduct breached the supposedly more expansive obligations embodied in the BIT's "stand-alone" clauses.

1. Ecuador Has Afforded Claimants Effective Means Of Protecting Their Investment

403. Claimants allege the Republic has violated Article II(7) because Chevron has not been provided with a fair and impartial forum in which to defend itself against criminal charges and claims brought by the Lago Agrio Plaintiffs. Claimants argue that "as a consequence of alleged governmental interference in the judiciary and the alleged failure of the [Lago Agrio Court] to ensure a timely review of preliminary objections [Chevron's *res judicata* and

jurisdictional defenses], . . . they have been deprived of effective means by which to both assert their judicial claims and enforce their rights as investors."[714]

404. Claimants have failed to demonstrate a violation of Article II(7). **First**, Claimants' argument respecting the allegedly abusive criminal proceedings initiated by Ecuador against two of Chevron's lawyers must fail.[715] As this Tribunal is well aware, the criminal charges brought against two of Chevron's employees and several government officials from Ecuador were dismissed on June 1, 2011.[716]

405. That the case against these gentlemen was declared "null and void" belies Claimants' mantra that the judiciary lacks independence and is incapable of self-correcting if afforded the opportunity. The Lago Agrio case is still on appeal before Ecuador's highest court, and any condemnation of Ecuador's judicial system by this Tribunal would thus be premature.[717] If, in fact, Ecuador's lower courts have acted improperly, the National Court must be afforded the opportunity to correct their errors. There is no basis for exempting Claimants from the requirement to exhaust local remedies.

406. **Second**, Claimants' argument regarding their *res judicata* and jurisdictional defenses — which is viable only if Claimants win on Track 1 — must also fail. As an initial matter, there is nothing inherently problematic about deferring a ruling on *res judicata* or jurisdictional objections until the issuance of a decision on the merits. In fact, international

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714 Caron Expert Rpt. ¶ 12; *see also* Claimants' Merits Memorial ¶¶ 470, 478. Additionally, in their Notice of Arbitration Claimants allege that the Lago Agrio court "improperly exercises *de facto* jurisdiction over Chevron," and "improperly assists and colludes with the Lago Agrio Plaintiffs," and that Ecuador seeks to "improperly influence the courts through public statements," and "abuses the criminal justice system" to advance its "improper goals" with respect to the Lago Agrio Litigation. *See* Claimants' Notice of Arbitration ¶ 68.

715 *See* Claimants' Merits Memorial ¶ 478 (last bullet point).

716 *See* Annex B.

717 *See* Interim Measures Hearing Tr., Feb. 11, 2012, at 104-105, 115-116, 240-242.

arbitral tribunals frequently elect to join together their jurisdictional and merits awards.[718] Similarly, under German and Swiss procedural law, a court's decision on jurisdiction is postponed until a decision on the merits can be reached when the underlying facts and issues necessary to determine jurisdiction are closely linked with those necessary to rule on the merits of the case (theory of double pertinence of facts; *doppel relevante Tatsachen*).[719]

407. Likewise, under Ecuadorian law, all defenses are generally addressed as part of the final judgment — not before.[720] Rulings on legal defenses such as *res judicata* or lack of jurisdiction are generally deferred until the issuance of the judgment because almost always raise questions of fact that need to be proven by the submission of evidence. By comparison, the U.S. court system took ten years to resolve the much more discreet issue of venue in the *Aguinda* case, and Claimants certainly did not complain of a denial of justice there.

408. Article II(7) requires only that the Republic provide a legal *system* consisting of laws, regulations, procedures, and practices, as well as a judiciary that implements and enforces

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[718] It is generally considered in arbitral literature and the law of many countries that an arbitral tribunal is allowed to postpone a decision on jurisdiction until examination of the merits of the case, particularly when both jurisdiction and merits turn on the same issues. RLA-415, Lew, Mistelis & Kröll, Comparative International Commercial Arbitration, Kluwer Law International at 336 (2003) (citing the decision of the French Cour de cassation of 8 March 1988, *SOFIDIF et al v. Organization for Investment, Economic and Technical Assistance of Iran (OIETAI) and Atomic Energy Organization of Iran (AEOI)*, Rev Arb 482 (1989) (wherein the *Cour de Cassation* upheld an award in which the Tribunal had decided to render a final award dealing with both jurisdiction and merit issues, notwithstanding the terms of reference which provided for a preliminary award on jurisdiction)).

Also, and more generally, Article 23(3) of the UNCITRAL Rules, as revised in 2010, provide that an arbitral tribunal may rule on a plea as to its jurisdiction either as a preliminary question or in an award on the merits; the same principle also applies under the old UNCITRAL Rules. *See* UNCITRAL Rules, art. 23(3).

[719] The evidence and arguments on the double pertinence of the facts will be accepted on a *prima facie* basis, only to be examined later on when deciding on the merits. For Germany, *see* R-567, Ekkehard Schumann, *Internationale Zuständigkeit: Besonderheiten, Wahlfestellungen, doppelrelevante Tatsachen, in* Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit, Festschrift für Heinrich Nagel (Aschendorff ed), Münster 1987, p. 415, with reference to relevant jurisprudence. For Switzerland: *see* R-568, Decision of the Swiss Federal Supreme Court in BGE 122 III 249.

[720] RE-9, Andrade Expert Rpt. ¶¶ 9, 12, 18 (citing RLA-198, Ecuadorian Code of Civil Procedure, arts. 106, 273). Dr. Andrade further notes that a court is permitted to decide questions of jurisdiction as a preliminary matter only where the court's lack of competence or jurisdiction is immediately apparent and undisputed. *Id.* ¶¶ 7(a), 17-19.

them.[721] The Treaty provision does not require Ecuador to guarantee day-to-day *operation* of the legal system in individual cases.[722]

409. While an effective judiciary may be ***an*** element of the "effective means" standard, it is not the primary element. Instead, the tribunal in *Amto* found that the phrase "means of asserting claims and enforcing rights" refers *primarily* to laws, regulations, and procedures for seeking redress.

410. It elaborated on "effective means" as follows:

> The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is *law and the rule of law*. There must be *legislation* for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires *secondary rules of procedure* so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals.[723]

411. Applying this standard, the *Amto* tribunal dismissed the claimant's Article 10(12) claim, concluding that Ukraine had enacted a modern bankruptcy law conforming to international standards.[724]

412. Similarly, in this case, Ecuador's laws and procedures do in fact provide for resolution of Claimants' asserted defenses, as discussed above. Although procedural mechanisms in verbal summary proceedings do not allow for resolution of Claimants' defenses at the time of their choosing, Article II(7) guarantees only the "means," not the desired results.

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721 RLA-343, *Amto* Award ¶ 87-88.

722 *Id.* ¶ 88 ("[The standard] is systematic in that the State must provide an effective framework or system for the enforcement of rights, *but does not offer guarantees in individual cases*. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12).").

723 *Id.* ¶ 87 (emphasis added).

724 *Id.* ¶¶ 89, 92, 95.

413. **Third**, Claimants' allegation regarding government interference in the Lago Agrio proceedings similarly lacks merit. Claimants have not produced any evidence of governmental interference in the judicial proceedings to the investor's detriment. In *Petrobart v. Kyrgyz Republic*, the tribunal held that an *ex parte* extra-procedural letter sent by a high level government official to a Bishtek Court judge qualified as such interference.[725] The letter pressured the judge to stay the execution of a final judgment for three months, during which time the judgment debtor shielded its assets and declared bankruptcy. The tribunal concluded that the Bishtek Court gave weight to the government's letter, as evidenced by the decision itself, in which the Bishtek Court explicitly referred to the government's letter in its decision granting a stay of execution.[726]

414. In this case, Claimants have totally failed to prove any improper governmental interference in court affairs, much less an interference even remotely approaching the level seen in *Petrobart*.[727] To the contrary, the Government has affirmatively declined to intervene in the judicial processes in the private-party litigation. Moreover, Claimants have not shown that public statements by government officials — even if specifically relating to the Lago Agrio case — were taken into account by the court or have otherwise resulted in direct harm to Claimants. As noted above, a detailed refutation of Claimants' allegations of "collusion" may be found in Annex F. And as discussed in Section II, Claimants' *could not* have shown that the result reached by the Lago Agrio Court would have been any different in the absence of the alleged government conduct.

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725 CLA-219, *Petrobart v. Kyrgyz Republic*, SCC Arbitration No. 126/2003 (Award of Mar. 29, 2005) (Danelius, Bring, Smets) at 77.

726 *Id*. at 84-85.

727 *See* Annex F.

415. **Fourth**, Claimants' due process claims with respect to the Lago Agrio Litigation must also fail.[728] As has been discussed elsewhere in this Counter-Memorial, while Claimants are quick to accuse not only the Plaintiffs, but the Government of Ecuador, of fraud, there exists a wide chasm between the evidence and the allegations. Respondent refers the Tribunal to Annex G for a complete discussion of Claimants' various due process allegations.

416. **Fifth,** the *Commercial Cases* decision applying Article II(7) has no application here since that case concerned the same "unreasonable" judicial delay affecting *seven* different cases in *three* separate courts.[729] This proceeding, on the other hand, includes no allegations of widespread delay amongst the judicial system.[730]

2. Ecuador Has Afforded Claimants' Investment Fair And Equitable Treatment Under Article II(3)(A) Of The Treaty

417. Even assuming *arguendo* that this standard is measured by the legitimate expectations test endorsed by Claimants, Claimants' stand-alone fair and equitable treatment claim must likewise fail because they have not shown how Ecuador frustrated their "legitimate expectations" regarding their investment. Article II(3)(a) of the Ecuador-U.S. BIT provides:

> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

728 Claimants' Merits Memorial ¶ 478.

729 CLA-47, *Commercial Cases* Partial Award ¶¶ 250, 251, 262.

730 In his expert report, Jan Paulsson opines that because Article II(7) merely imposes a "qualified requirement of exhaustion of local remedies," it "impose[s] a more stringent obligation on states than the rules of customary international law concerning denial of justice." Paulsson Expert Rpt. ¶ 26. In support of this proposition, Professor Paulsson cites to *White Industries Australia v. India*, wherein the tribunal declined to find denial of justice, whilst finding a breach of the effective means provision. RLA-347, *White Industries Australia v. The Republic of India*, (UNCITRAL Final Award of Nov. 30, 2011) (Rowley, Brower, Lau) §§ 10.4.22-10.4.24, 11.3-11.4. But like the *Commercial Cases* on which *White Industries* relies, this case is inapposite because it too deals with breach caused *solely* by delay.

418. Claimants allege that Ecuador upset their legitimate expectations in four specific ways: (1) by "eviscerate[ing] the arrangement on which TexPet relied in choosing to invest in Ecuador"; (2) by "publicly disparag[ing] Claimants and their individual employees"; (3) by "pre-determin[ing] the Lago Agrio Litigation" and through Judge Núñez's acceptance of a US$ 3 million bribe; and (4) by initiating abusive criminal proceedings to achieve political ends.[731] None of Claimants' allegations has merit.

419. **First**, Claimants cannot conflate the expectations of two claimants and treat them as one and the same. For example, Claimants argue that "Claimant**s**'" legitimate expectations were frustrated when the Republic allegedly eviscerated the arrangements "on which ***TexPet*** relied in choosing to invest in Ecuador." But Chevron's and TexPet's expectations must be assessed individually at the time they each made their respective investments, if any, in Ecuador. In particular, Chevron cannot rely upon the expectations that Texpet allegedly had when Texpet chose to invest in Ecuador. When TexPet chose to invest in Ecuador, Chevron and Texpet were not even affiliated companies. Claimants cannot, therefore, impute Texpet's expectations to Chevron. Chevron did not have any affiliation to Texpet until 2001 when it merged with Texaco. Indeed, the Tribunal has ruled as follows in this respect:

> The Tribunal considers that additional considerations arise in regard to Chevron. Chevron made no investment under any of TexPet's concession agreements; it was never a member of the Consortium; it was not a signatory or named party to the 1995 Settlement Agreement; and it first appears in this case's chronology in 2001 following its "merger" with Texaco. . . . Chevron became TexPet's parent and thus an investor in 2001 only, long after the events said to give rise to Chevron's liability and occurring at a time when Texaco (not Chevron) was TexPet's parent company.[732]

731 Claimants' Merits Memorial ¶¶ 495-499.

732 Third Interim Award ¶¶ 4.22, 4.25.

420. Thus, Chevron's own "legitimate" expectations must be measured as of 2001. Yet Chevron has not once articulated what its own "legitimate expectations" were in relation to its supposed investment in Ecuador. What is clear is that Chevron certainly has no basis to derive expectations, legitimate or otherwise, from a release and settlement agreement to which it was not party and which was entered into six years before it became a supposed investor in Ecuador.

421. Similarly, whatever Chevron's expectations were, they could not have been frustrated because by 2001 many of the acts that form the basis of Chevron's complaints today, had already taken place. For example, the EMA had already passed in 1999 in Ecuador, and the U.S. State Department reports, on which Chevron now relies to claim that Ecuador's judiciary lacks independence, had already condemned Ecuador's judiciary as allegedly flawed.

422. For its part, TexPet claims that its legitimate expectations were derived solely from the 1995 Settlement Agreement. No other basis is alleged. In particular, TexPet alleges that it relied upon the supposed assurances given in the 1995 Settlement Agreement when TexPet chose to "invest[] approximately US$ 40 million for environmental remediation and community development projects in Ecuador."[733] However, the Tribunal has made clear that spending US$ 40 million to clean up its own pollution was not an investment in and of itself. Rather, the Tribunal found that the 1995 Settlement Agreement is inextricably intertwined with the 1973 Concession Agreement, and that only because of this can the 1995 Settlement Agreement be considered an investment.[734] Accordingly, the only legitimate expectations that could give rise to a breach of the fair and equitable treatment clause, as confirmed even under the jurisprudence

733 Claimants' Merits Memorial ¶ 495.

734 The Tribunal has held that Claimants' investment cannot properly be regarded as the remediation it performed from 1995-1998. *See* Third Interim Award on Jurisdiction and Admissibility Part IV ¶ 4.36 (holding that the 1995 Settlement Agreement cannot, in isolation, constitute an investment agreement).

relied upon by Claimants, are the expectations that arose when TexPet invested in Ecuador in 1973.[735]

423. The 1973 Concession Agreement does not give rise to any expectations that have been frustrated here. The 1973 Concession Agreement, for example, did not have a stabilization clause to prevent Ecuador from adopting environmental legislation, such as the EMA.[736] TexPet, in fact, has failed to offer any explanation of what its legitimate expectations were at the time it invested in 1973, much less expend any effort to show that they were frustrated to the point of violating international law. Clearly, any reasonable investor would have expected that if it dumped billions of gallons of toxic waste into pristine Amazonian lands, it might be subject to: criminal investigations; scrutiny by the Executive branch; negative press; litigation brought by the inhabitants whose health and life have been destroyed; and even a hefty judgment to remediate the massive harm its pollution has caused.

424. Alternatively, even assuming *arguendo* that TexPet's fair and equitable treatment claim can be based upon the alleged expectations and assurances that TexPet claims to have derived from the 1995 Settlement Agreement, it could not have legitimately expected to receive benefits that were not explicitly set forth in this agreement.[737] No case has found that an

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735 Numerous cases hold that an investor's legitimate expectations are measured as of when the investment was *first* made. *See, e.g.*, CLA-226, *PSEG Global v. Turkey,* ICSID Case No. ARB/02/5 (Award of Jan. 19, 2007) (Orrego Vicuña, Fortier, Kaufmann-Kohler) ¶¶ 241-42; CLA-207, *Enron* Award ¶¶ 265-67; CLA-208, *LG&E Energy* Decision on Liability ¶¶ 33-34; CLA-42, *Waste Management* Award ¶ 98; CLA-31, *Tecmed* Award ¶ 90; CLA-87, *Genin* Award.

736 Nor, for that matter, did the 1995 Settlement Agreement.

737 To establish a breach of the fair and equitable treatment standard, a claimant must show that its "legitimate expectations" were induced by a host State's formal and authorized assurances or undertakings in relation to an investment, and/or by reasonable reliance on the host State's then-prevailing investment climate and legal context. *See, e.g.*, RLA-348, *ADF Group, Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (Award of Jan. 9, 2003) (Feliciano, de Mestral, Lamm) ¶ 189; CLA-31, *Tecmed* Award ¶ 154; CLA-92, *CME* Partial Award ¶ 157; RLA-40, *Duke Energy* Award ¶ 340. The investor must also establish that those assurances were materially incorrect, and that it suffered damages as a result of its reliance on such assurances and context. R-569, Stephen Fietta, *Expropriation and the "Fair and Equitable" Standard: The Developing Role of Investors' "Expectations" in International Investment Arbitration*, 23 J. INT'L ARB. 375, 398 (2008). Claimants have done none of this.

investor's legitimate expectations were frustrated when non-existent contractual terms were not honored by the Respondent State. Thus, for example, TexPet could not have formed a "legitimate" expectation to be indemnified, to be held harmless, to have the Republic intervene, to have the Republic stand on the sidelines, when there is no indemnification, no hold harmless, no court intervention, and no non-cooperation provision in the 1995 Settlement Agreement.[738] No investor could derive "assurances" from terms that do not even appear in the contract. All TexPet received in the 1995 Settlement Agreement was a release from the claims of the Government and PetroEcuador, and neither of those parties sued TexPet. Chevron's and TexPet's fair and equitable treatment claim must therefore fail.

425. Indeed, TexPet has never been the subject of the Lago Agrio action. It was not made party to that lawsuit, nor will it be liable to pay a single penny for the pollution it ultimately caused to the Ecuadorian Amazon.

426. **Second**, Claimants cannot claim that Ecuador upset their legitimate expectations because the Executive made public statements against Chevron's pollution activities. As an initial matter, Claimants have no evidence that the Government's actions influenced the Ecuadorian judiciary. Nor do such statements demonstrate collusion between Ecuador and the

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738 Stephen Fietta has underscored the importance of specific promises and acts of conduct by authorized representatives of the host State to any fair and equitable treatment claim:

> In particular, the question of whether or not there has been a violation of the standard will turn on what legitimate expectations the investor had *in light of the specific assurances given by the relevant state authorities* against the background of the domestic legal framework that was to govern the investment.

See R-569, Fietta at 389 (emphasis added). Of course, Claimants have not presented any evidence about any specific assurances that they were given when they first invested in Ecuador. Claimants obtained their initial Napo Concession from Ecuador in 1964 and renegotiated it in 1973. Nowhere do they contend that they acquired their concession based on assurances by the Republic regarding the country's civil justice system or even on the basis of common knowledge of the prevailing characteristics of the Republic's judiciary. In fact, nowhere in the Claimants' Memorial on the Merits do they even discuss the state of the Republic's judicial system when they first made their investment in Ecuador now several decades ago. Absent some evidence regarding their alleged "legitimate expectations" at the time of the investment, the source of those expectations, the degree and nature of the falsity of those expectations, and the causal nexus to the claimed resulting damages, Claimants cannot make out a claim under the fair and equitable treatment provision of the Treaty.

Lago Agrio Plaintiffs' lawyers.[739] Just as President Obama has criticized BP for its recent spill in the Gulf of Mexico, Governments across the world frequently voice their opinions in high profile cases and yet that has never been found to give rise to a violation of international law. Moreover, Claimants have not shown that the alleged Government action would result in a financial windfall to the Government,[740] or that it was intended to or actually did affect the outcome of the judgment in the Lago Agrio case.

427. Finally, the decision in *Biwater v. Tanzania* is inapposite because that case involved the expropriation of an active investment — the complained of State conduct resulting in the expropriation occurred only two years into a ten year lease for a water and sewage supply contract. Moreover, in that case, the tribunal found that the public statements made by the President of Tanzania "exceeded the bounds of normal public information," and were designed to disrupt (and actually did disrupt) the investment at a time when the lease was still capable of being salvaged.[741]

428. Claimants cannot complain that public comments made by President Correa similarly violated their right to receive fair and equitable treatment. BITs cannot be used to

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739 *See generally* Annex F.

740 Respondent has explained in numerous pleadings that any recovery by the Lago Agrio Plaintiffs would not inure to the State, as Claimants have insisted, but would instead be split between counsel for the Plaintiffs (10%) and the community directly affected to repair the harm and the damage caused (90%). *See, e.g.*, Respondent's Interim Measures Response, May 3, 2010, ¶ 68.

741 CLA-137, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award of July 24, 2008) (Hanotiau, Born, Landau) ¶¶ 519, 626, 696, 698. The tribunal in *Biwater* found that the Minsiter's act of terminating the lease contract was an "*acte de puissance publicque*," which was "motivated by political considerations," and "ultimately contributed to the expropriation" of the investment. *Id.* ¶ 500. Of course, the political remarks in *Biwater* are but merely one example of the government's interference in the investment. In that case, the Tanzanian Government, with aid of the police, forcibly occupied the investment facility and deported the investor's management personnel. *Id.* ¶¶ 503, 511. Thus, the operative facts in *Biwater* are too disparate from the facts here to be apposite; the Ecuadorian Government surely cannot be accused of taking any action as drastic as those which the Tanzanian Government officials took.

hamper a host State's right to publicly inform and take a view on the activities of investors whose bad acts violate domestic law and cause harm to its citizens.

429. **Third**, Claimants' allegation respecting Judge Núñez's involvement in a bribery scheme similarly does not betray their legitimate expectations. As has been previously explained, Claimants' supposed proof does not incriminate Judge Núñez, but instead reveals Chevron's failed and shameless efforts to subvert the Lago Agrio proceedings.[742]

430. **Fourth**, Claimants' allegations regarding the criminal proceedings do not demonstrate breach of their legitimate expectations. To the contrary, the criminal proceedings serve as evidence that the judicial system in Ecuador works, both because of the regularity of the proceedings and because of the independence shown by the courts in dismissing the charges over the objections of the Prosecutor General.[743]

431. **Finally**, as shown in Annexes B-G, the Republic has never acted in bad faith, harassed or coerced Claimants, or otherwise breached its Treaty obligation to promote or protect Claimants' investment in Ecuador.

3. Ecuador Afforded Claimants' Investment Full Protection And Security

432. In addition to requiring that investments receive fair and equitable treatment, Article II(3)(a) provides that investments "shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." Claimants allege that this standard imposes an obligation of "objective vigilance and due diligence" upon states to secure for foreign investors a "reasonably well-organized modern State."[744]

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742 *See* Annex C.

743 *See* Annex B.

744 Claimants' Merits Memorial ¶ 517.

433. Claimants have mischaracterized this Treaty obligation. As is true of the Treaty's fair and equitable treatment standard, its full protection and security standard merely incorporates into the BIT the customary international law standard of full protection and security.[745] The customary international law full protection and security standard in this BIT is limited in nature and protects only against loss due to various forms of civil strife. Indeed, it is invoked primarily in situations of violence, and applies primarily to periods of insurrection, civil unrest, and other public disturbances (none of which is present or applicable here) and provides a remedy for damage or losses sustained by an investor as a result of such violent episodes (either due directly to government acts or to a government's failure to provide adequate protection for an investment).[746] Thus, this standard is restricted to the host State's duty to provide foreign investors with physical protection from violence.[747] Since Claimants have not pled any such allegations here, their claims under this standard must fail.

434. Even if, however, the Tribunal were to adopt Claimants' interpretation of this standard, Claimants' allegations would still fail because Claimants have not identified any "laws and regulations" enacted by Ecuador that caused an infringement of Claimants' BIT rights.[748] Ecuador's Executive did not interfere with the Lago Agrio Litigation, and the press statements

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745 CLA-214, Dolzer and Stevens, BILATERAL INVESTMENT TREATIES at 60.

746 R-570, "Investor-State Disputes Arising From Investment Treaties: A Review," UNCTAD Series on International Investment Policies for Development, United National Conference on Trade and Development, at 40 (2005).

747 CLA-103, *American Manufacturing & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1 (Award of Feb. 21, 1997) (Sucharitkul, Golsong, Mbaye); CLA-86, *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (Award of June 17, 1990) (El-Kosheri, Goldman, Asante); CLA-403, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award of Dec. 8, 2000) (Leigh, Fadlallah, Wallace).

748 Claimants allege, for example, that the full protection and security standard "has been held to extend to the *legal* protection of investments" and that "[t]he contemporary understanding [of full protection and security] extends beyond physical protection to guarantees against infringements of the investor's rights by the operation of laws and regulations of the host State." Claimants' Merits Memorial ¶ 520.

issued in respect of the polluting activities of Claimants do not represent the direct interference in the judicial processes as found in *Petrobart*.[749]

4. Ecuador Has Not Treated Claimants' Investment In An Arbitrary Or Discriminatory Manner

435. Article II(3)(b) of the Ecuador-U.S. BIT provides: "Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures, the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."

436. As an initial matter, Claimants assert that exhaustion is not a precondition to finding that Article II(3)(b) has been violated.[750] Claimants base their argument on the second sentence of Article II(3)(b), which reads: "For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party."

437. However, in the context of the present case (i.e., where the specific-standard claim is premised ultimately upon the conduct of the judiciary), Claimants' proffered interpretation is erroneous and should be rejected. The second sentence of Article II(3)(b) has nothing to do with misconduct by the court system. Rather, it concerns arbitrary or discriminatory measures by an arm of the host State that were reviewed or could have been reviewed "in the courts or administrative tribunals of a Party." As a consequence, an investor challenging an "arbitrary or discriminatory measure" — a law, a regulation, or other official act of the host state — may not be required to seek and exhaust a judicial remedy before resorting to

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749 CLA-219, *Petrobart v. Kyrgyz Republic*, SCC Arbitration No. 126/2003 (Award of Mar. 29, 2005) (Danelius, Bring, Smets) at 75-77 (wherein the tribunal determined that a government action aimed at interfering in a judicial process ultimately undermined the claimant's investment).

750 Claimants' Merits Memorial ¶ 526.

contractual arbitration. But this exemption does not apply where, as here, the judicial system is itself under review.[751] Article II(3)(b)'s second sentence is intended only to provide specific derogation from the generally applicable "fork in the road" clause stipulated in Article VI(2).[752]

a. Allegations Of Arbitrary Conduct

438. Claimants allege that Ecuador has deliberately damaged Claimants' investment by issuing baseless indictments against Chevron's attorneys and by covertly cooperating with the Lago Agrio Plaintiffs. As to the latter, they allege that Ecuador's conduct was arbitrary because the Lago Agrio Court improperly terminated the judicial inspections, appointed Richard Cabrera, relied on his reports despite allegations of fraud, and permitted the submission of additional expert reports prior to the close of the evidentiary period in the fall of 2010.[753]

439. But, contrary to Claimants' allegations, the Republic has not violated Article II(3)(b) because state measures cannot be considered arbitrary where there is a rational explanation for them. In *Enron v. Argentina*, when analyzing Argentina's measures taken in the context of the 2000-2002 financial crisis, the tribunal held:

> The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, ***but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis.*** Irrespective of the question of intention, a ***finding of arbitrariness requires that some important measure of impropriety is manifest*** and this is not found in a process which

751 *See supra* Section V.C-V.D (explaining that the Ecuador-U.S. BIT reflects principles of customary international law).

752 RLA-57, *Occidental* Award ¶ 49 (wherein the tribunal there found that Article II(3)(b)'s second sentence "allows for submission to arbitration of arbitrary and discriminatory measures even if the claimant has resorted to the courts or administrative tribunals of the Respondent seeking a review of such measures"); *see also id.* ¶¶ 38-63.

753 Claimants' Merits Memorial ¶ 528.

> although far from desirable is nonetheless not entirely surprising in the context it took place.[754]

440. As has been explained in Annex E, Claimants' allegations that the Court itself erred — or worse, participated in a fraud — in its appointment of Mr. Cabrera lack any support. The Court's selection of Mr. Cabrera and its treatment of Chevron's allegations impugning Mr. Cabrera's independence has been regular in all respects, culminating in the Court's decision to disregard the report. So, too, have the Prosecutor General's criminal proceedings been regular and proper, as demonstrated in Annex B.

441. Finally, it is well settled that the bar to prove that a State acted in an arbitrary manner is set exceedingly high. Reed, Paulsson and Blackaby have observed: "Arbitrariness is not so much something opposed to *a* rule of law, as something opposed to *the* rule of law. . . . *It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[755]

442. For the *Azurix* tribunal, the term "arbitrary" meant "'derived from mere opinion,' 'capricious,' 'unrestrained,' 'despotic' . . . 'done capriciously or at pleasure,' 'not done or acting according to reason or judgment,' [and] 'depending on will alone.'"[756] The *Azurix* tribunal also found an "element of willful disregard of the law" inherent in "arbitrariness."[757] Finally, in *Genin v. The Republic of Estonia*, the tribunal found that the respondent's actions must "amount

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754 CLA-207, *Enron* Award ¶ 281.

755 RLA-419, LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 50 (Kluwer 2004) (quoting the July 20, 1989 ICJ Judgment in the *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, 1989 ICJ REP. 15, 76, ¶ 128) (emphasis added).

756 CLA-225, *Azurix* Award ¶ 392 (quoting the *Oxford English Dictionary* and *Black's Law Dictionary*).

757 *Id.* The term "arbitrary" has elsewhere been equated with "unjustified" or "unreasonable" action. RLA-413, Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW at 173. A number of tribunals have held that arbitrary action is one which is "founded on prejudice or preference rather than on reason or fact." *Id.* (citing CLA-173, *Lauder* Award ¶ 221; RLA-57, *Occidental* Award ¶ 162; CLA-88, *CMS* Award ¶ 291; CLA-227, *Siemens* Award ¶ 318).

to bad faith, a willful disregard of the process of law or an extreme insufficiency of action" violating the tribunal's "sense of judicial propriety" before it could find a breach of the BIT's protection against arbitrary treatment.[758]

443. For the reasons stated above, Claimants' claims of arbitrary State conduct do not rise to the high level required by these sources.

b. Allegations Of Discriminatory Conduct

444. Finally, Claimants cannot show that Ecuador breached Article II(3)(b)'s prohibition against "discriminatory" measures. Recent investment decisions affirm that BIT clauses prohibiting discriminatory measures protect investors against adverse differential treatment that is unsupported by any rational explanation for the difference.[759] For instance, the award in *RFCC v. Kingdom of Morocco* provides: "The standard of non-discriminatory treatment requires the State to not treat one investment less favorably than another, either on political grounds or in the absence of an objective reason for differential treatment."[760] In *Plama Consortium* the tribunal affirmed: "With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds."[761] Similarly, in *Saluka Investments* the tribunal stated that "[t]he standard of 'reasonableness'

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758 CLA-87, *Genin* Award ¶ 371.

759 Claimants cite *Siemans v. Argentina* for the proposition that it is not the intent behind the State conduct but "the impact of the measure on the investment [that] is the determining factor to ascertain whether it had resulted in non-discriminatory conduct." But this is hardly a settled matter. Indeed, in the paragraph directly proceeding the one quoted by Claimants, the *Siemens* tribunal stated "Whether intent to discriminate is necessary and only the discriminatory effect matters is a matter of dispute." CLA-227, *Siemens* Award ¶ 320. The better authorities suggest that the measure must have a discriminatory impact, and that intent on its own will not matter *if* there has been no practical effect. *Id.*

760 RLA-349, *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6 (Award of Dec. 22, 2003) (Briner, Cremades, Fadlallah) ¶ 51 (unofficial translation).

761 RLA-350, *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award of Aug. 27, 2008) (Salans, van den Berg, Veeder) ¶ 184.

therefore requires, in this context as well, a showing that the state's conduct bears a reasonable relationship to some rational policy, whereas the standard of 'non-discrimination' requires a rational justification of any differential treatment of a foreign investor."[762] The recent *Rumeli Telekom* award repeated this latter formulation.[763]

445. To support their claims, Claimants point to supposedly inflammatory statements made by President Correa and Ecuador's treatment of Chevron as compared to PetroEcuador.[764] But neither amounts to discrimination. As earlier noted, an investment treaty cannot silence public speech; public officials are instead entitled to comment on legal actions and the conduct of both domestic corporate citizens and foreign investors, especially where their acts have a profound effect on the environment and/or the citizens. In any event, Claimants have not shown that President Correa's comments had any effect on the outcome of the Lago Agrio Judgment.

446. Nor has President Correa's treatment of Chevron differed much from his treatment of PetroEcuador. To the contrary, President Correa has not hesitated in criticizing the state-owned oil company.[765] And there has never been a barrier to Chevron bringing its own suit against PetroEcuador if it so chose, for indemnification or otherwise.[766] Texpet has brought its own actions against the Republic, and as previously shown, has prevailed.[767] That a group of

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762 CLA-224, *Saluka* Partial Award ¶ 460.

763 CLA-231, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Award of July 29, 2008) (Boyd, Lalonde, Hanotiau) ¶ 679.

764 Claimants' Merits Memorial ¶¶ 533-536.

765 *See* Annex F.

766 While verbal summary procedures prohibited Chevron from impleading PetroEcuador or any other party, Chevron always remained free to bring its own independent action against PetroEcuador. It chose not to.

767 *See supra* Section III.B.1; *see also* Annex A.

plaintiffs chose to sue Chevron but not PetroEcuador does not implicate the Government in any way. Parties are free to sue whomever they choose.[768]

VI. In The Alternative, And Only In The Event The Tribunal Were To Find That The Republic Violated Its International Law Obligations, Must It Then Decide Upon An Appropriate Award; In that Event, The Tribunal Must Take Into Consideration Chevron's Actual Liability As It Relates To Pollution In the Amazonas

447. The Republic, of course, defends the conduct of its judiciary in this proceeding and makes no admission that its courts have violated any international legal obligations. In this section, however, we demonstrate that the actual relief sought by Claimants is unjustified and excessive even if the Tribunal were to determine that Claimants are entitled to some measure of relief.

448. Claimants seek two forms of remedy: (1) a declaration that the Lago Agrio Judgment is unenforceable and (2) indemnification in the full amount of the Lago Agrio Judgment, which is still pending appeal in Ecuador's National Court of Justice, together with the entire amount Claimants have spent in defense costs. In seeking these remedies, Claimants ask this Tribunal to determine that they are entitled to transfer their liability and defense costs to the Republic *even if the Tribunal were to determine that Claimants caused damages warranting a substantial final judgment in favor of the Plaintiffs.* In other words, Claimants contend that the trial court's judgment was so tainted that, regardless of their actual liability, and regardless of what may happen to the Judgment on appeal to the Ecuadorian Supreme Court, they should be exonerated altogether and pay no damages whatsoever.

449. Even if the Republic were found to be in breach of the Treaty, no principle of international law would permit Claimants to avoid the financial responsibility for damages they

[768] Nor is the Court favoring PetroEcuador over Chevron. The latter happens to be the party before the Court over whom it may exercise jurisdiction. No party has named PetroEcuador as a defendant to this action so the Court is not in a position to exercise jurisdiction over it.

in fact caused. This Tribunal has the authority to award compensation for actual damages caused by a treaty breach, but it has no authority to *over*-compensate an investor by removing or transferring to the State the investor's liability for *just* damages, i.e., damages for which it should be held liable under the applicable national law and in good conscience.

450. As a consequence, if the Tribunal determines that ***any*** relief is warranted in this case for the alleged denial of justice, it cannot fashion an appropriate award unless and until it conducts its own independent analysis to determine Chevron's actual liability. This is the guiding principle laid down many years ago in the landmark *Chorzów Factory* case.[769] Under the Treaty, therefore, this Tribunal's authority is limited to awarding reparations based on the amounts, if any, Chevron pays Plaintiffs that exceed what the Tribunal determines that Claimants would have been condemned to pay in proceedings free from the unfairness Claimants allege to have occurred in their trial.

451. **First**, international law requires that Claimants not be unjustly enriched under their BIT or customary international law claims; they may recover only their actual damages that would make them whole but not put them in a better position than they would be absent the international law violation.[770] Claimants' request for what amounts to exemplary or punitive damages, above and beyond any actual damages they have incurred, is beyond the scope of Ecuador's consent to arbitrate investment disputes under the Treaty and it exceeds any remedy this Tribunal is authorized to grant.

452. **Second**, and flowing from the first, Claimants' request that the Tribunal issue an award simply declaring the entire Judgment to be wholly invalid or unenforceable is contrary to law. Such an award would unjustly enrich Claimants by expunging their liability to the

769 CLA-406, *Chorzów Factory* Award.

770 *Id.*

indigenous Plaintiffs who have sued them. Moreover, as we have indicated, such a declaration would exceed the Tribunal's authority as delimited by the Treaty.

453. **Third**, and flowing from both the first and second principles above, any finding of a breach of Treaty or customary international law should be reduced instead to a monetary award that takes into consideration Chevron's actual pollution liability. Accordingly, the monetary award should not be greater than such amounts Chevron pays out to the Plaintiffs above and beyond Chevron's actual pollution liability under Ecuadorian law. The object of such an award should be to place the Claimants in the same pecuniary position — not better — they would have been in if the Lago Agrio trial had proceeded in the manner the Tribunal determines was required under the standards applicable to the Treaty.[771]

454. In light of the general principles on damages summarized above, and as explained in more detail below, should this Tribunal conclude that there has been a breach of the Treaty, the Republic respectfully requests that the Tribunal order a final phase of this arbitration to determine the damages that would have been awarded had the trial proceeded in a manner comporting with Ecuador's international obligations, however defined by this Tribunal.

A. International Law Prohibits Claimants From Obtaining A Windfall Through The Successful Prosecution Of Their Customary International Law Or BIT Claims

455. Assuming State responsibility for a claimant's loss, a claimant may not be put in a better position than it would have been absent the breach. To the contrary, a BIT claimant is entitled to only those damages actually *caused* by a State's breach of international law and no more.

771 *See* RLA-413, Dolzer & Schreuer at 272.

456. In reliance on this basic proposition, and citing the *Chorzów Factory* case, the *Commercial Cases* tribunal, having found a breach, was careful not to fashion an award that would unjustly enrich the investor (the same Claimants here). In *Commercial Cases*, claimants sought damages under customary international law and the Ecuador-U.S. BIT, based on the alleged failure of Ecuador's courts to adjudicate seven claims for breaches of contract in a timely fashion. The tribunal, after finding "undue delay" by the Ecuadorian courts in violation of Article II(7), concluded that a "fair and impartial Ecuadorian court" would have awarded Claimants damages for lost profits, and interest thereon, of approximately US$ 600 million.[772] In so doing, the tribunal adjudicated each of the underlying domestic law claims, considering the respective factual and legal arguments of both claimants and the Republic, and the evidence adduced by all parties. Even that did not end the tribunal's analysis.

457. Rather, in a second and separate merits phase of the arbitration, the tribunal considered argument and expert reports to determine whether and to what extent the claimants' hypothetical awards from an Ecuadorian court would have been taxed by the Ecuadorian authorities under applicable law. While the claimants argued that tax considerations ought not play any role at all in the award or damages, the tribunal, citing the *Chorzów Factory* damages formula, disagreed: "[T]he Tribunal's task is to make the Claimants whole, *and not more than whole*, under international law, as if the wrong had not occurred."[773]

458. On this basis, the *Commercial Cases* tribunal reduced Chevron's "lost profits" interim award by the amount of the incremental cumulative tax obligation that the claimants

772 CLA-47, *Commercial Cases* Partial Award ¶¶ 375-77, 550.

773 RLA-351, *Commercial Cases* Final Award ¶ 306.

would have incurred had the State not withheld "lost profits" in violation of international law as determined by the tribunal.[774]

459. The tribunal rejected claimants' truncated analysis (i.e., stopping after calculating the incremental lost revenue) and instead insisted on making a comprehensive analysis to avoid unjustly enriching Claimants. It did this by determining the net after tax cost to claimants after removing what would have been proper tax payments from their "lost" income stream. The *Commercial Cases* tribunal explained its damages calculation rationale as follows:

> The damages the Ecuadorian courts would have granted is an *element* of assessing damages caused by the international wrong. However, as already stated, the Tribunal's enquiry does not stop there. The Tribunal, in making the Claimants whole, must take into account the effect of applicable Ecuadorian taxes on the amounts due the Claimants under the 1973 Agreement, and ultimately on the Claimants' total compensation. Had TexPet received the amounts it claimed, such sums would have been subject to the applicable Ecuadorian taxes. Accordingly, TexPet would have ultimately obtained only such after-tax amounts for its own use.
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> The consequent difference between the Ecuadorian courts' mandate and the Tribunal's was addressed at paragraph 552 of the Partial Award, where the Tribunal stated that, '[w]ere the Tribunal not to take [applicable Ecuadorian tax laws] into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. . . . When quantifying and assessing damages, *the Tribunal cannot award more than the amount that Claimants ultimately would have obtained*' (emphasis added).
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> The Tribunal's approach follows from the principles enunciated in the *Chorzów Factory* decision, which both sides agree to be controlling authority: '. . .reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.' *In essence, the Tribunal's 'but for' analysis must undo not only the damages that have arisen for the*

774 *Id*. ¶¶ 327-328.

> *Claimants but for the wrong, but must also restore the liabilities that were avoided but for the wrong.*[775]

460. The tribunal thus concluded that it was only by "restor[ing] the [tax] liabilities" to the claimants, and offsetting those liabilities from the amount that would otherwise have been awarded, that *actual* damages could be determined, thereby escaping the inequity of awarding the claimants an unwarranted windfall.[776] Based on these principles, the *Commercial Cases* tribunal reduced the arbitral award from the $600 million (before calculation of attendant post-judgment, pre-award interest) that it found a fair and impartial Ecuadorian court would have awarded claimants, to approximately $77.7 million in after-tax principal (plus post-judgment, pre-award interest of another $18.6 million).[777] Thus, the tribunal in that case reduced the amount finally awarded by 92 percent to avoid a windfall to claimants.

461. Claimants here seek, as they did in the prior arbitration, a resolution that would permit them to *avoid any* environmental liability, as they attempted before with respect to tax liability. Such a result would violate the principle of *restitutio in integrum* by "restoring" Claimants to a position superior to that to which they should be entitled. The proper approach would be (i) to determine the proper assessment of Claimants' liability and (ii) subtract that amount first to determine the proper residual amount of any indemnification award.

B. A Declaration Of Unenforceability Would Unjustly Enrich Claimants And Punish Innocent Parties By Absolving Claimants Of Any And All Liability Associated With Their Oil Operations In Ecuador

462. One element of what Claimants seek is a blanket declaration that the Lago Agrio Judgment is invalid or unenforceable — full stop. Such a declaration, however, would run afoul of the international law principle prohibiting unjust enrichment. In this case, such a declaration,

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775 *Id.* ¶¶ 306-308.

776 *Id.* ¶ 308.

777 *Id.* ¶¶ 349-351.

should it not provide for some mechanism of exempting Plaintiffs' actual loss from Claimants' activities, would award Claimants just such a windfall.

463. Here, a group of indigent, indigenous Ecuadorian citizens brought suit against Claimants in a court *in the United States*. Those plaintiffs had but one goal — to have their day in court. It was in response to Claimants' overwhelming preference for an Ecuadorian forum that the United States courts, after nearly a decade of litigation (1993-2002), dismissed Plaintiffs' case for re-filing in Ecuador.[778] Most all of the original Plaintiffs re-filed suit in Ecuador, where they have now been litigating their environmental claims for another decade (2003-2013). The current Plaintiffs have thus been litigating against Claimants for twenty years to obtain just compensation for the harm caused them by Claimants' dumping billions of gallons of hazardous waste into Plaintiffs' habitat in Ecuador.

464. A blanket declaration of nullification by this Tribunal would cause manifest injustice in two ways: (i) it would permanently eliminate any consequence for Claimants' pollution liability, no matter what evidence exists of their actual culpability; and (ii) it would permanently terminate the claims of innocent persons who are not parties to the arbitration and who have no right or opportunity to be heard in this forum.

465. By issuing such an award, this Tribunal would be ignoring the *Commercial Cases* admonition that any proper "'but for' [causation] analysis [1] must undo not only the *damages* that have arisen for the Claimants *but for* the wrong, but [2] must also restore the *liabilities that were avoided* ***but for*** the wrong."[779] Unless both are fairly accounted for in this case, the

778 Ironically, there plaintiffs argued that the Ecuadorian judiciary was prone to delay and corruption, to which Claimants' responded with glowing accolades as to its competence and integrity — citing the seven lawsuits later complained of by Claimants to another international forum (in the *Commercial Cases* arbitration) as examples of the fairness of the Ecuadorian courts.

779 RLA-351, *Commercial Cases* Final Award ¶ 308 (emphasis added).

Claimants would be unjustly enriched and thereby receive an unearned benefit to which they would not have otherwise been entitled had there been no violation of international law in the first place. Because the pollution claims would presumably now be time-barred, the Plaintiffs could not institute a new lawsuit. And as a practical matter, there is no basis in fact or reason to believe that the Plaintiffs would have the funds to start over even if they were not time barred. In this case, Claimants would receive a windfall at the expense of the Lago Agrio Plaintiffs, the poorest of the poor, whose only fault was to have sought relief on two continents for two decades.

C. Any Monetary Or Indemnification Award Against Respondent Must Subtract Those Pollution Damages For Which Chevron Should Be Held Accountable

466. As observed above, damages assessed as reparation for an international wrong must be measured by the "detriment actually caused" to the injured claimant by that wrong. This entails putting the claimant back into the same hypothetical position he would otherwise have been in "but for" commission of the wrong. Dolzer and Schreuer make this point succinctly:

> If an illegal act has been committed, the guiding principle is that reparation must, as far as possible, restore the situation that would have existed had the illegal act not been committed. . . . Under this principle, damages for a violation of international law have to reflect *the damage actually suffered by the victim. In other words, the victim's actual situation has to be compared with the one that would have prevailed had the act not been committed.*[780]

467. In denial of justice cases, the "detriment actually caused" to the victim of internationally wrongful judicial acts, as the claims here allege, is the loss of the opportunity to receive a fair and impartial hearing of their case. This was Paulsson's conclusion when deriving a formula for calculating denial of justice damages:

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780 RLA-413, Dolzer & Schreuer at 272.

> If a foreigner's claim before a national court was thwarted by a denial of justice, the prejudice often falls to be analysed as the loss *of a chance* – the possibility, not the certainty, of prevailing at trial and on appeal, and of securing effective enforcement against a potential judgment debtor whose credit-worthiness may be open to doubt.[781]

468. The reason for this, the requirement of "but for" causation in calculation of denial of justice damages, is obvious. If Claimants' underlying defenses were without merit and its adversary's damages claims were well founded, Claimants would not have suffered a loss from any flaw in the Judgment:

> After all, if [the] case had been given a fair hearing, it may have been a poor one in any event. Similarly, the denial of justice may have occurred at the national appellate level, as the complainant sought to overturn an unfavourable first judgment. The appeal may have had little chance of success even in the absence of the denial of justice.[782]

469. As noted above, the *Commercial Cases* tribunal applied this logic to Claimants' Treaty claim for a denial of "effective means" — akin to Claimants' denial of justice claim in this case — declining to grant an award before establishing the actual *net* loss that the claimants would have suffered in the "but for" world. In their own words, "the Tribunal's task is to make the Claimants whole, *and not more than whole*, under international law, as if the wrong had not occurred."[783]

470. Here, the actual damage caused by a denial of justice or a Treaty violation is not necessarily the damages ordered by the original court, but rather, Claimants' "lost chance" to have the case heard, decided, and affirmed on appeal in a fair and impartial manner. As a result, to determine whether Claimants have suffered a compensable loss at all, it is first necessary to

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781 RLA-61, Paulsson, DENIAL OF JUSTICE at 225.

782 *Id.* at 226-27.

783 RLA-351, *Commercial Cases* Final Award ¶ 306.

weigh the probability that, had the denial of due process not occurred, the Lago Agrio Plaintiffs would indeed have prevailed against Claimants in the courts:

> In establishing an amount so that it corresponds to what the international tribunal feels was the true loss, it may be necessary to evaluate probabilities of the outcome if the local system had proceeded in accordance with its laws but without violating international law.[784]

471. Therefore, even if this Tribunal were to find that Claimants were denied due process by the Ecuadorian judiciary, their injury would lie in the fact that they lost the opportunity to have Plaintiffs' case properly decided on its merits. Whether this denial manifests an actual loss to Claimants depends on whether Claimants would nevertheless have prevailed. To meet their "but for" causation burden of proving that they have in fact suffered the alleged loss from a denial of justice, Claimants are required to prove that it is more likely than not that they would have prevailed on the merits in the underlying environmental litigation before a fair and impartial Ecuadorian court. Otherwise, Claimants would receive indemnification from the State for damages that a fair and impartial court justifiably would have awarded the Lago Agrio Plaintiffs anyway.

D. Claimants Cannot Show That Chevron Is Without Liability

472. Even if this Tribunal finds a denial of justice or a Treaty violation, Claimants cannot meet their burden of showing that Chevron is without liability for the claims against it in Lago Agrio. There is in fact overwhelming evidence in the Lago Agrio Record that TexPet's failure to use appropriate oil exploration, production, and transportation practices has harmed and will continue to harm the ecology of the Oriente and the health and livelihood of its

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784 RLA-61, Paulsson, DENIAL OF JUSTICE at 227.

residents. This record of massive contamination exists even despite Chevron's efforts to manipulate the inspection process to hide its true liability.[785]

473. As the Republic showed above[786] and as its environmental experts confirm,[787] Ecuadorian law required TexPet to exercise a high degree of care to prevent pollution of the environment and corresponding harm to Ecuador's citizens. But TexPet chose to use substandard methods in Ecuador by, *inter alia*, using unlined earthen pits, releasing production water directly into streams and other surface water, failing to install monitoring wells, and covering dirt roads with oil.

474. Even with the limitations on the environmental analysis conducted since TexPet left Ecuador, the contamination that resulted from its practices can be seen in the Lago Agrio Record in a number of places:

- The HBT Agra Report, which demonstrates extensive pollution in existence at the time TexPet left Ecuador;[788]
- The Fugro-McClelland reports, which were commissioned solely by TexPet yet still show extensive pollution;[789] and
- Chevron's JI inspection results, which show, e.g., exceedances of Ecuadorian soil standards at 91 percent of the sites sampled.[790]

475. Claimants cannot prove that this pollution has not had and will not continue to have an impact on the ecology of the Oriente and the health of its residents. In fact, extensive evidence exists to the contrary. Dr. Edwin Theriot of LBG has analyzed the available data and information and concluded that TexPet's operations caused significant and lasting damage to the

785 *See supra* Section II.A.5.

786 *See supra* Section II.A.2.

787 *See* RE-10, LBG Expert Rpt. § 2.2.

788 *See supra* Section II.A.3; RE-10, LBG Expert Rpt. § 2.5.

789 *See supra* Section II.A.3; RE-10, LBG Expert Rpt. § 2.5.

790 RE-10, LBG Expert Rpt. § 3.3.1.

ecology of the Oriente through direct and secondary impacts.[791] And, as shown by Dr. Harlee Strauss, the information in the Lago Agrio Record shows that TexPet's actions caused multiple pathways for toxic and hazardous substances to reach Oriente residents, including: inhalation, ingestion, and dermal contact.[792] As a result of their exposure to these toxic and hazardous substances, the Oriente residents' health was almost certainly adversely affected both in terms of increased cancer, but also in other, non-cancer health effects.[793]

476. Claimants cite to TexPet's completion of remedial action as part of the RAP as evidence that no further damage caused by TexPet exists. But each of the Republic's environmental experts concluded that prior to leaving Ecuador TexPet failed to: (1) determine properly the extent of its pollution; (2) analyze the risk it created to the environment and human health; and (3) to complete an adequate remediation of its oil production and transportation facilities.[794]

477. In the face of this overwhelming evidence of TexPet's unremediated pollution, it would be wrong for this Tribunal to discharge Claimants of any and all liability resulting from their oil exploration and extraction activities in the Oriente. To the contrary, in fashioning an award for a Treaty breach or a violation of customary international law, this Tribunal must consider Claimants' actual liability.

478. Even on the current record, this Tribunal can and should find that the Lago Agrio Court's finding of liability is correct, for at least some amount of damages to be used to remedy TexPet's pollution and its effect on the Oriente's residents. Based on such a determination, this

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791 *See supra* Section II.A.5; *see also* RE-10, LBG Expert Rpt. Annex 2.

792 *See supra* Section II.A.5; RE-10, LBG Expert Rpt. Annex 1 § 3.2.

793 *See supra* Section II.A.5; RE-10, LBG Expert Rpt. Annex 1 § 3.3.

794 *See supra* Section II.A.5; RE-10, LBG Expert Rpt. § 1.

Tribunal should then find that either (1) Claimants are not entitled to any damages from the Republic because justice requires that Chevron be held liable for any amount to be recovered by the Lago Agrio Plaintiffs; or (2) Claimants are entitled to only such amount the Plaintiffs recover through enforcement proceedings that exceeds the amount for which Chevron is properly liable. In the second instance, the Tribunal may require more information to determine (i) the amount of Chevron's liability; and (ii) the amount the Plaintiffs have managed to recover through enforcement proceedings.

E. Chevron Is Not Entitled To An Award Of Costs And Attorneys' Fees Related To Its Defense Of The Lago Agrio Litigation; Nor Is It Entitled To Any Award Of Pre-Judgment Interest

479. Claimants seek an award that would compensate Chevron for the defense costs it incurred in the Lago Agrio matter, including all costs and attorneys' fees, along with an award of pre- and post-award interest (compounded quarterly) through the date of payment of any monetary award.[795] Claimants are entitled to neither.

480. In the "but for" world, that is, in the absence of any international wrong by Ecuador, Chevron would still have incurred costs and fees to defend the environmental action, regardless of the ultimate result in that litigation.[796] The Republic submits that the environmental evidence its experts have reviewed and considered almost certainly would lead any fair and impartial court to have found Chevron liable for some amount. But whatever that

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[795] Claimants' Merits Memorial ¶ 547; Claimants' Supplemental Merits Memorial ¶ 257.

[796] Claimants' requests for costs and fees are inadmissible, for the following reasons: **First**, being sued by private parties in Ecuador cannot be attributed to the State; it was in any event Claimants who fought to have the *Aguinda* case heard by the Ecuadorian courts. **Second**, the defense costs incurred in the Lago Agrio Litigation are entirely attributable to the private parties, who decided for themselves the volume, length, challenges, and seriousness of the arguments. **Third**, the Tribunal should also consider Claimants' own contribution to the underlying dispute in as much as (i) their substandard oil exploration and oil extraction practices — at odds with the practices they adopted elsewhere in the world — directly lead to the contamination the subject of which is at issue in the domestic proceeding, (ii) they engaged in inflammatory statements against the judiciary, and (iii) they substantially contributed to the length and complexity of the Lago Agrio litigation (indeed, it was adopted as part of their litigation strategy), as described in Part II.

amount might be — or even in the hypothetical world wherein Chevron were found not liable at all — Chevron still would have incurred the cost to defend the case, and it may not be put in a better position than had no international wrong been committed. Accordingly, even if this Tribunal finds that a fair and impartial court in Ecuador would have found Chevron *not liable* for the existing harm to the environment and inhabitants of the Oriente, this Tribunal still could not award Claimants the costs and fees Chevron incurred in defending the Lago Agrio Litigation.

481. Nor is pre-judgment interest proper in the circumstances here. To date Claimants have not paid any portion of the Judgment to the Lago Agrio Plaintiffs. Pre-judgment interest cannot be assessed on a principal sum before any portion of that sum has been lost or expended.[797] Even if this Tribunal found the Republic liable to Claimants for any portion of the Lago Agrio Judgment, there currently is no loss of principal on which interest could properly be assessed. In fact, none will exist unless and until the Lago Agrio Plaintiffs succeed in their current efforts to enforce the Lago Agrio Judgment against Chevron (which is unlikely to occur any time before the conclusion of these arbitral proceedings, and in any event will be subject to confirmation by the National Court *and* the Constitutional Court of at least part of the damages awarded to the Lago Agrio Plaintiffs).

482. Similarly, an award for pre-judgment interest on Chevron's costs and legal fees associated with the Lago Agrio Litigation is unwarranted because Chevron's incurrence of those costs and fees are not the proximate result of any alleged breach by Ecuador of international law. Those costs would have been incurred whether or not Ecuador committed an international wrong.

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797 *See*, *e.g.*, RLA-352, *SOABI* Award at ¶ 6.36 (requiring that a party first establish losses before earning pre-judgment interest).

483. Even if these proceedings could result in an award of costs and fees on which interest could be assessed, Claimants would be entitled to *simple* interest, not compound. In fact, in assessing interest, this Tribunal must apply municipal law in a manner that is consistent with how a fair and impartial Ecuadorian court would likely decide the issue. To do otherwise would yet again leave Claimants with a windfall.[798] Under Ecuadorian law only simple interest may be applied because compound interest is prohibited under "legal and Constitutional precepts."[799]

484. Reference to municipal laws in matters dealing with application for and award of interest is endorsed by several international tribunals that have analyzed claims under the Ecuador-U.S. BIT. For example, applying Ecuadorian law and the same BIT at issue in this arbitration, the tribunal in *Duke Energy v. Ecuador* recently awarded simple interest while denying an award that included compound interest.[800] According to the tribunal there, the prohibition of compound interest contained in local law had to be enforced even though resolution of the dispute hinged on application of international law.[801] Similarly, in *Occidental v. Ecuador*, the tribunal there relied on "all of the circumstances of th[e] case" to award only simple interest.[802] And more recently, the *Commercial Case*s tribunal rejected Claimants' application for compound pre-judgment interest and awarded simple interest instead.[803] These

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798 *See supra* Section VI.A (discussing the *Chorzów Factory* Award).

799 R-571, Expert Rpt. of Drs. Genaro Eguiguren and Mónica Ruiz (Sept. 22, 2008), *submitted in* the *Commercial Cases* arbitration, at Part I ¶¶ 9-11 (citing RLA-163, Civil Code of Ecuador, arts. 1575, 2113; RLA-259, Constitution of Ecuador (1998), art. 244; RLA-353, Organic Law of the Monetary System and State Bank, Codification 22, Official Registry Supplement 196 of Jan. 26, 2006, art. 22).

800 RLA-40, *Duke Energy* Award ¶¶ 473 *et seq*. (relying on Ecuadorian law and Article VII of the Ecuador-U.S. BIT to award simple interest as opposed to compound interest).

801 *Id*. ¶ 473 (finding that the tribunal was bound by Ecuadorian law). Significantly, the tribunal stated that its decision was informed by Article VII of the Ecuador-U.S. BIT, which specifies that the Treaty shall not derogate from the laws and regulations of the host State. *Id*.

802 RLA-57, *Occidental* Award ¶ 211.

803 CLA-47, *Commercial Cases* Partial Award ¶ 548 (wherein the tribunal applied simple interest to the pre-judgment amount in accordance with Ecuadorian law).

tribunals are by no means alone;[804] and even courts in the United States, Claimants' own jurisdiction, have followed the same standard.[805]

485. Compound interest is not the recognized standard of compensation in international law.[806] In fact, "there is no uniform standard of practice for applying interest and calculating present day values."[807] Because there is no international norm with respect to what kind of interest must be applied, especially in cases not involving expropriation, Claimants cannot overcome Ecuadorian law.

VII. Claimants' Requests For Equitable And Declaratory Relief Are Deficient, Unjustified, And Contrary to the Treaty, International and Human Rights Law, and Ecuadorian Law

A. Granting Claimants Their Requested Equitable and Declaratory Relief Would Be Inconsistent With Ecuadorian Law And Human Rights Obligations

486. Claimants' requests for relief extend well beyond that which this Tribunal has authority to grant. Among other requests, Claimants seek from the Tribunal, *inter alia*:

- A declaration that, under the Treaty, Chevron is not liable to Plaintiffs under the Judgment;[808]
- a declaration that "any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable";[809]
- an order that Respondent "use all measures necessary" to:

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804 For example, the tribunal in *Autopista Concesionada v. Venezuela* likewise found that because Venezuelan law did not permit compound interest, the tribunal was obligated to award simple interest. RLA-354, *Autopista v. Venezuela* Award; *see also* RLA-355, *Marvin Roy Karpa* Award; CLA-240, *CSOB* Award.

805 *See, e.g.*, RLA-356, *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1083-84 (D.C. Cir. 2012) (applying local Iranian law and awarding simple interest as Iranian law "do[es] not recognize compound interest").

806 *See, e.g.*, RLA-40, *Duke Energy* Award ¶¶ 473, 491(3); RLA-357, *Archer Daniels* Award ¶ 298.

807 R-416, Mark Kantor, VALUATION FOR ARBITRATION 275 (Kluwer 2008).

808 Claimants' Supplemental Merits Memorial ¶ 257.

809 *Id.*

- prevent any judgment against Chevron from becoming final, conclusive or enforceable;[810]

- "*enjoin* enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation including *enjoining* the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices";[811] [emphasis added] and

- order Ecuador to make a written representation to *any court* in which the Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive.[812]

487. Respondent submits that the relief sought would give rise to an inconsistency with Ecuadorian domestic law and with international human rights conventions to which Ecuador is a party. The inconsistency arises because such relief would have the practical effect of depriving Plaintiffs of the benefits of their Judgment in violation of Ecuador's human rights obligations.

488. The right to due process is a fundamental feature of the rule of law. As Lord Bingham suggested, fairness requires:

> that a matter should not be finally decided against any party until he has had an adequate opportunity to be heard; that a person potentially subject to any liability or penalty should be adequately informed of what is said against him; that the accuser should make adequate disclosure of material helpful to the other party or damaging to itself; that where the interests of a party cannot be adequately protected without the benefit of professional help which the party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate opportunity to prepare his answer to what is said against him.[813]

489. These procedural fairness rules applicable to the administration of justice include: (i) the principle of equality of arms; (ii) access to court; (iii) the right to adequate notice; and (iv) the principle of effective remedy.

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810 Claimants' Merits Memorial ¶ 547 at 279; Claimants' Supplemental Merits Memorial ¶ 257.

811 Claimants' Supplemental Merits Memorial ¶ 257.

812 *Id.*

813 RLA-417, Lord Bingham, Sixth Sir David Williams Lecture: *The Rule of Law* (Nov. 16 2006); *see also* RLA-418, Tom Bingham, THE RULE OF LAW 90 (2007).

- The principle of equality of arms requires that there must be a fair balance between the parties, including the right of a party to be afforded the opportunity to present his case under conditions that do not place him at a substantial disadvantage as compared with his opponent.[814]

- The right of access to court means the right to participate in a fair hearing to have a dispute determined.

- The right to adequate notice goes hand in hand with the opportunity to be heard before any order is pronounced against a party so that he is able to prepare his defense and protect his rights.

- The right to an effective remedy means that impediments must not unduly obstruct the exercise of the right of a party.

490. These rights are enshrined in the Ecuadorian Constitution and in several human rights conventions to which Ecuador is a party. Articles 75 and 76 of the Ecuadorian Constitution expressly guarantee a number of rights and principles related to the right to an effective remedy and fair trial, including the principle of equality of arms.[815] Article 24 of the American Convention on Human Rights (ACHR), for example, guarantees the right to equal protection of the law, which in turn requires the state to afford all the parties to a case the same rights and considerations. Article 25 of the ACHR guarantees every individual a right to judicial protection.

491. The right to judicial protection includes the obligation of the state to protect the enforcement of domestic judgments. As noted by the European Court of Human Rights, the right to access a court would be illusory if the domestic legal system allows for a final and binding judgment to remain inoperative to the detriment of the prevailing party.[816] The practice

814 RLA-368, Clayton Tomlinson, FAIR TRIAL RIGHTS 11.159 (2011).

815 RLA-164, Constitution of Ecuador (2008), art. 76 (7).

816 RLA- 359, *Burdov* Judgment ¶ 65.

of human rights courts has consistently emphasized that the execution and enforcement of a judgment afforded by a domestic court is regarded as an integral part of the right to a fair trial.[817]

492. These elements of *fairness* described above are recognized in most legal systems. They not only form part of human rights law and Ecuadorian law but also of general international law.

493. In accordance with the Ecuadorian Constitution, human rights treaties are ranked in order of priority above national law and other international obligations wherever a conflict between them occurs. This means that the Ecuadorian courts have no discretion to prevent the rights and obligations of the people from conforming to international human rights norms enshrined in treaties and conventions to which Ecuador is a party.[818]

494. This hierarchy of laws was recognized by the Ecuadorian courts when they were confronted with the interim awards rendered by the Tribunal. The Lago Agrio Court considered whether it could, as a matter of law, give priority to the Tribunal's interim award, predicated on the application of the investment treaty obligations. It concluded that it could not:

> [T]he American Convention on Human Rights, signed at the Inter-American Specialized Conference on Human Rights, in its Article 29, concerning Rules of Interpretation, provides that no section of this Convention may be construed to allow any person [such as Chevron Corp. or the Arbitral Tribunal] to suppress the enjoyment or exercise of the rights and freedoms recognized under the Convention, or to preclude other rights or guarantees that are inherent to the human personality or derived from a representative democracy form of government [Art. 29] and that no restrictions may be applied except in accordance with laws "enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[819]

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817 *Id.*; *see also* RLA-360, *Voytenko* Judgment ¶ 35; RLA-61, *Immobiliare Saffi* Judgment ¶ 66.

818 *See* RLA-164, Constitution of Ecuador (2008), arts. 172, 424, 425, 426; RLA-303, Organic Code of the Judiciary, art. 123.

819 R-398, Decision issued by the Sole Chamber of the Provincial Court of Sucumbíos (Feb. 17, 2012) at 3.

495. The court concluded that:

> [G]iven that Ecuador is a party to this Convention [ACHR], and that we are facing a binding and mandatory provision, and recognizing that the award is based on international laws created for the purpose of protecting investments, we find no place to enforce the arbitration award over our prevailing obligations on human rights. By this statement, this Chamber ratifies Ecuador's commitment with its international obligations, both at the investment and human rights levels, but according to our analysis it is very clear that under the Vienna Convention and other international obligations, in case of doubt on the application of a law, the latter, i.e. human rights, take precedence. On the other hand, and without presuming to place domestic law above international law, this Court cannot ignore the constitutional mandate under Article 11, paragraph 4 providing that 'No juridical norm may restrict the content of constitutional rights or guarantees', and it is our duty as judicial officials to apply the law that is most favorable to its validity as established in Article 11, paragraph 5. In addition, any act or omission of a regressive nature will be deemed unconstitutional, as established in Art. 11 paragraph 8, as these constitutional principles establishing the respect for the essential content of rights not to be infringed upon and *pro homine* are nothing other than international principles of implementation and interpretation of human rights. These underscore the international obligations of Ecuador at the Human Rights level, and as shown above when referring to the *Pro Homine* principle, in this case of apparent conflict between international obligations, the application of the respective norm leads us to conclude about its necessary and mandatory application.[820]

496. A determination granting Claimants their requested relief would require the Republic to violate its international obligations (under the human rights conventions) in the name of honoring (other) international obligations (to give effect to its obligations under the BIT).

497. **First**, the Republic's Executive branch does not control its Judicial branch, which the Constitution makes independent. In particular, the Executive branch has no authority to order the Judicial branch to prevent a judgment from becoming final, conclusive or

820 *Id.*

enforceable.[821] Nor does it control the Plaintiffs, who after two decades of litigation are understandably anxious to enforce their Judgment.

498. As indicated in Respondent's letter of November 21, 2012, Claimants seek to compel Respondent to perform a Constitutionally impermissible action — to interfere in private party litigation. Professor Lowe previously identified "a certain paradox in the claimants' objecting to interference by the Executive in the judicial process, but . . . now asking the tribunal for an order which would instruct the government to do just that."[822]

499. There is no doubt whatsoever that this paradox is real: Claimants' proposed relief would impose an obligation on the State that is outside the boundaries of what is legally and practically possible.[823] Respondent submits that it cannot be obliged to fulfill a legally impossible task, nor is it appropriate for the Tribunal to sanction the Republic for failing to do so.[824]

500. **Second**, the Republic's implementation of the requested relief would cause it not only to offend its obligations under the Ecuadorian Constitution, but also its obligations under international human rights conventions guaranteeing all parties the right to have a binding and enforceable judicial decision enforced. By preventing the Judgment from becoming final, conclusive or enforceable, the Republic would inevitably be violating the rights of the Plaintiffs enshrined in fundamental constitutional and international convention guarantees.

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821 Of course there are built-in procedural safeguards, which provide a proper mechanism for deferring enforcement of a judgment — such as the posting of an appeal bond — but Claimants deliberately chose *not* to avail themselves of this protection.

822 Interim Measures Hr'g Tr. (May 11, 2010) at 31:5-9.

823 *See* Respondent's Letter to the Tribunal (Feb. 20, 2012); Respondent's Letter to the Tribunal (Nov. 21, 2012).

824 An order against the State to interfere in the Lago Agrio litigation would have little practical effect, as government officials are subject to — and therefore cannot disregard — Constitutional norms or internal governmental regulations to which they are obliged to follow as State officials. (*ad impossibilia nemo tenetur*).

501. As the Lago Agrio Court found:

> In this context, the actual possibility of enforcing a judgment (even if forcibly) is a cornerstone not only of the Administration of Justice, but of the Rule of Law, since to do otherwise would turn its decisions into mere recommendations, a useless thing, which would leave society without an effective system of conflict resolution, to open the way for one in which the strongest can impose their will.[825]

502. In other words, granting Claimants' proposed relief would have the same effect as granting them special immunity from liability for the environmental harm that Plaintiffs were found to have suffered from Claimants' misconduct. This would clearly transgress Plaintiffs' right to due process. The function of the Tribunal is to effect justice between the parties to this arbitration. In so doing, it must take great care to avoid impinging upon the rights of third parties or to compel the State to violate its own Constitution.

503. Granting Claimants this relief would be absurd as well as illegal. Faced with such a demand, this Tribunal must take a cautious approach. As the *Loewen* tribunal observed, also in the context of a denial of justice claim, arbitral tribunals must tread lightly before intervening in the operations of a State's domestic courts, particularly by disturbing the Constitutional principle of separation of powers:

> Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts . . . Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself.[826]

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825 C-1532, Order Issued by the Provincial Court for Sucumbíos (Oct. 15, 2012) at 3.

826 CLA-44, *The Loewen* Award ¶ 242.

504. Claimants seek to use this arbitration between themselves and the Republic to stop Ecuadorian citizens from obtaining relief in the courts of Ecuador, Argentina, Brazil, Canada, and potentially other countries; they ask this Tribunal to look exclusively to Ecuador's obligations under the BIT and to interpret and apply the BIT to override the Republic's obligations under the human rights treaties and the Ecuadorian Constitution that it owes to the Plaintiffs. This is another variant of the same paradox that Professor Lowe noted: the Tribunal has been asked to issue an award *inconsistent* with the rule of law principle to *advance* that very same principle. It should decline to do so.

B. Granting Claimants Their Requested Equitable and Declaratory Relief Would Be Inconsistent With Claimants' Promises To The U.S. Courts

505. Any final award should be fashioned in a manner that compels Claimants' adherence to their prior promises to the U.S. judiciary. As we have previously advised,[827] Claimants have explicitly, clearly and repeatedly committed to the U.S. Court of Appeals for the Second Circuit that they would seek only indemnification against the Republic through this arbitration, and not use it to try and invalidate the Plaintiffs' Judgment. They made that commitment to the Court of Appeals specifically to secure termination of litigation that could have been decided on the merits in U.S. courts many years ago, and choosing instead to defend against Plaintiffs' claims in the courts of Ecuador.

506. Texaco (and later Chevron) made certain judicial promises to U.S. courts — later expressly joined in and adopted by Chevron — to induce those courts to grant a *forum non conveniens* dismissal of *Aguinda*.[828] Among other promises, Texaco committed to "satisfy" any

827 *See* Respondent's Letter to the Tribunal (Jan. 9, 2012); Respondent's Letter to the Tribunal (Jan. 24, 2012).

828 *See supra* Section II.B.

final Ecuadorian judgment, subject only to the right to contest extraterritorial enforcement of that judgment under the New York Foreign Country Money Judgments Recognition Act:

> If this Court dismisses these cases on forum non conveniens or comity grounds, . . . Texaco will satisfy *judgments* that might be entered in plaintiffs' favor, *subject to Texaco's rights under New York's Recognition of Foreign Country Money Judgments Act*.[829]
>
> Texaco . . . will satisfy a final judgment . . . [except that] Texaco reserves its right to contest any such judgment under New York's Recognition of Foreign Country Money Judgments Act.[830]
>
> Texaco will "satisfy a final judgment . . . subject to Texaco Inc.'s reservation of its right to contest any such judgment under New York's Recognition of Foreign Country Money Judgments Act."[831]

507. The Second Circuit found that Texaco's promises to the court are enforceable against Chevron: "[I]n seeking affirmance of the district court's forum non conveniens dismissal, lawyers from ChevronTexaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint. In so doing, ChevronTexaco bound itself to those concessions. In 2005, ChevronTexaco dropped the name Texaco and reverted to its original name, Chevron Corporation. . . . Chevron Corporation therefore remains accountable for the promises upon which we and the district court relied in dismissing Plaintiffs' action."[832]

508. After Claimants initiated the instant arbitration against Respondent, the Republic — and later Plaintiffs as well — brought suit against Claimants in the Southern District of New York for a stay of this arbitration on the basis that Claimants were estopped from challenging the

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829 R-2, Texaco *Aguinda* Renewed MTD at 16-17 (emphasis added).

830 R-1, Texaco Sworn Interrogatory Response at 3 (emphasis added).

831 R-3, Texaco Agreements at 3, ¶ 5 (emphasis added); *see also* R-4, Texaco *Aguinda* Renewed MTD Reply at 21 and n.13.

832 R-247, Opinion by the U.S. Court of Appeals for the Second Circuit, Case 10-1020-cv(L) (Mar. 17, 2011) at n. 3.

Lago Agrio decision other than through an enforcement action. As the Second Circuit noted in its subsequent decision: "New York's Recognition of Foreign Country Money Judgments Act . . . *is the sole reserved route for Chevron to challenge any final judgment resulting from the Lago Agrio litigation*[.]"[833]

509. Given Claimants' earlier promises to the Court of Appeals to induce dismissal of *Aguinda*, it was little surprise that the Second Circuit panel pressed Claimants on their intentions in the arbitration. While Claimants comfortably argued that they were entitled to seek indemnification or money damages from the Republic, they were forced to concede that their earlier judicial commitments barred them from using the arbitration to interfere with the judicial processes in Ecuador.

> JUDGE LYNCH: So are you, are you relying on some notion that this is just an indemnification action or is it *really* much more than that?
>
> CHEVRON'S COUNSEL: Your Honor, the core of that proceeding [the BIT Arbitration] is to *enforce our indemnification rights against the Republic of Ecuador*.[834]

510. In response to questioning by another judge on the Court of Appeals, Chevron's counsel reiterated that his client seeks an arbitral award that would not affect the Plaintiffs, but which instead shifts the ultimate responsibility (indemnification) to the Republic:

> CHEVRON'S COUNSEL: We do, we do want that court, the tribunal, to say that that's ultimately entirely the obligation of the government of Ecuador which has been colluding with these plaintiffs to try and avoid its obligation.[835]
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> * * *

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833 *Id*. at 26.

834 R-160, Oral Argument Tr. (Aug. 5, 2010), *Republic of Ecuador v. Chevron Corp*. (2d Cir.) at 39:4-10 (emphasis added).

835 *Id.* at 41:13-21.

> CHEVRON'S COUNSEL: We brought an international treaty arbitration against the Republic of Ecuador, not the plaintiffs, they can pursue and get their judgment, but we have a right in that international arbitration, that the United States and Ecuador gave us[,] to get an arbitration panel to impose that responsibility on Ecuador and make it stop violating international law.[836]

511. When further pressed, Chevron's counsel added the caveat that Chevron had "no present intention to ask [this Tribunal] to shut down [the Lago Agrio] proceedings."[837] The Court of Appeals again pushed Chevron's counsel to confirm that Chevron would unreservedly permit entry of the Judgment and dispute only "who pays the judgment or whether there's indemnification."[838] Judge Lynch required Chevron's counsel to clarify his representation about the relief it was seeking in the arbitration, repeating his distinction between an award (i) dismissing third parties' claims and (ii) holding Respondent obligated to indemnify those claims, if successful:

> JUDGE LYNCH: I would have thought there's a fairly elementary distinction between the claim we are not liable, and the claim if we are liable, we have a third party action for indemnity against somebody else. So I understand on the one hand when you say this is just about indemnity. We want the Arbitrators to decide that if there is a judgment against us in favor of the plaintiffs, we have now, in this separate forum, won the third-party action that Ecuador's going to indemnify us. That's a very different claim, it seems to me, than the claim we want the Arbitrators to decide that we were never liable to the plaintiffs in the first place, and direct Ecuador to go to the Ecuadorian court and say not just, we have been — we want you, the Court, to know that we've been held liable — to Chevron in indemnity, but to say we want you the court to decide that Chevron was never liable in the first place, and that that seems to me to cut off the plaintiffs' rights to argue, yes,

836 *Id.* at 51:20-53:2.

837 *Id.* at 54:1-3

838 *Id.* at 54:6-13. Judge Lynch recognized the irony inherent in Chevron's ambiguous commitment, since the stay application was predicated on Chevron's 2002 judicial representation: "JUDGE LYNCH: No present intention is different from a promise and a commitment. That's part of the problem we had with the — what happened before. Is there a commitment that nothing that's going on in this arbitration will shut down the Ecuadorian court proceeding to judgment, as opposed to questions of who pays the judgment or whether there's indemnification?" *Id.* at 54:6-13.

> Chevron is liable to us. Yeah, we don't care who's going to pay the judgment in the long run. If Chevron gets — has an indemnity right against Ecuador, let them proceed against Ecuador, we just want to get paid. And they might well think you know, we're not that likely to get paid by Ecuador, we want to get paid by Chevron 'cause they're the party who are directly liable to us, and if there's some indemnity somewhere, let those guys fight it out. You understand the difference?
>
> CHEVRON'S COUNSEL: I do absolutely, Your Honor.[839]

512. When the Second Circuit affirmed the denial of a stay of the BIT Arbitration, Judge Lynch, writing for the Panel, specifically found that the arbitration cannot resolve Chevron's rights vis-à-vis the Plaintiffs:

> Chevron's claims are now pending in the BIT arbitration precisely because they deal with allegations of Ecuador's improper behavior with respect to Texaco's investment in the region. However**, *Plaintiffs are not parties to the BIT, and that treaty has no application to their claims; their dispute with Chevron therefore cannot be settled through BIT arbitration***.[840]

513. And in a not-so-veiled threat to Claimants, the Second Circuit strongly hinted that if Claimants were nonetheless to seek (and obtain) relief from this Tribunal inconsistent with their judicial promises, "Plaintiffs would be free to argue that Chevron is estopped from refusing to pay that judgment," recognizing further that "New York's Recognition of Foreign Country Money Judgments Act, which is the sole reserved route for Chevron to challenge any final judgment resulting from the Lago Agrio litigation, provides only limited ways to attack a judgment based on a prior agreement."[841]

514. This Tribunal should hold Chevron to its promises and deny Claimants' requests for a finding of unenforceability or invalidity.

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839 *Id.* at 62:1-63:7.

840 R-247, Opinion by the U.S. Court of Appeals for the Second Circuit, Case 10-1020-cv(L) (Mar. 17, 2011) at 21.

841 *Id*. at 26.

C. Claimants' Requests For A Finding Of Invalidity Or Unenforceability Violate The *Monetary Gold* Principle

515. As the Republic explained in its jurisdictional briefing,[842] this Tribunal also should abstain from invalidating the Judgment, based on the principles espoused by the International Court of Justice ("ICJ") in *Monetary Gold*. The Tribunal, after considering the Republic's arguments in this regard, determined that portions of Claimants' prayer for relief could trigger a decision by the Tribunal regarding the legal effect of the 1995 Settlement Agreement "that might be said to decide the legal rights of the Lago Agrio plaintiffs."[843] However, the Tribunal determined that this question goes to the "form and content of the decision" and therefore "is a matter to be addressed during the merits phase of this case."[844] That question is now squarely before this Tribunal because Claimants ask this Tribunal to issue a final award ruling that the Judgment is invalid or unenforceable. This Tribunal should now find that it cannot do so.

516. There can be no question that a finding of nullification or unenforceability of the Judgment, as Claimants are now requesting, would terminate Plaintiffs' rights. The Tribunal already has found that it has no jurisdiction over the Plaintiffs.[845] The Republic showed during Track 1 that Plaintiffs' rights are not the same as those that the Government and PetroEcuador released as part of the 1995 Settlement Agreement,[846] negating Claimants' argument that the Republic can somehow stand in for Plaintiffs here as their involuntary surrogate or champion.

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842 *See* Respondent's Jurisdictional Memorial ¶¶ 168-181; Respondent's Reply Memorial on Jurisdiction ¶¶ 221-220.

843 Third Interim Award ¶ 4.66.

844 *Id.*

845 *Id.* ¶ 4.65.

846 Respondent's Track 1 Counter-Memorial on the Merits Sections VI, VII; Respondent's Track 1 Rejoinder on the Merits Sections II, III, V. The fact that (i) the rights that the Republic compromised in the 1995 Settlement

517. Yet Claimants continue to seek requests for relief that directly impact enforceability of the Judgment, and therefore the rights of the non-joined Plaintiffs. Claimants still seek, among other things:

> A declaration that under the 1994, 1995, 1996 and 1998 investment agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador.[847]

518. Claimants also ask that this Tribunal order the Republic to inform the Lago Agrio Court that Claimants "have been released from all environmental impact"[848] and must be "protect[ed] . . . in connection with the Lago Agrio Litigation."[849] These requests are not limited to deciding "questions of the Respondent's liability to the Claimants under the BIT," as the Tribunal held was its role in this arbitration.[850] To the contrary, they are demanding that this Tribunal adjudicate Chevron's liability to the Plaintiffs. The Tribunal could not possibly grant such a requested remedy without disposing of Plaintiffs' claims, contrary to the dictates of *Monetary Gold*.

519. The reasoning of *Monetary Gold* counsels that this Tribunal should deny Claimants' request for a finding of invalidity or unenforceability. In *Monetary Gold*, Italy and Albania both laid claim to gold that was forcibly removed from Rome by Germany in 1943, after

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Agreement were different from (ii) those that Plaintiffs asserted in the Lago Agrio action is just one of the reasons why Plaintiffs were not barred by the release under the doctrine of *res judicata*.

847 Claimants' Notice of Arbitration ¶ 76(1).

848 *Id.* ¶ 76(3).

849 *Id.* ¶ 76(4).

850 Third Interim Award ¶ 4.67.

which an independent arbitrator determined that the gold belonged to Albania.[851] A tripartite commission then mandated that the gold be allocated to the United Kingdom, in partial satisfaction of a judgment it had obtained against Albania in a prior case. Italy brought suit against the United Kingdom (among others) before the ICJ, claiming that it too was owed compensation by Albania, and that its claim should be given priority over the United Kingdom's claim.[852] Albania was notably absent from the ICJ proceedings.

520. To determine which country should rightfully receive the gold, the ICJ not only had to decide the relative priority among the claims, but whether Italy's claim against Albania was valid in the first instance.[853] The ICJ found that it could not examine the latter claim (and hence could not resolve the former claim) in the absence of Albania, which was not a party to the case, and over which the ICJ did not therefore have jurisdiction.[854] The ICJ characterized the relief sought by Italy against Albania as follows:

> Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her.[855]

521. In short, the relief sought by Italy against Albania required the ICJ to determine whether Albania, the absent party, had in fact committed the wrong alleged, and whether Albania had an obligation to Italy. The ICJ declined to exercise jurisdiction under such circumstances, stating:

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851 RLA-19, *Monetary Gold* Preliminary Question Judgment.

852 *Id*. at 25-33.

853 *Id*. at 31-32.

854 *Id.* at 32-33.

855 *Id.* at 32.

> To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.[856]

522. The ICJ concluded that "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[857]

523. As the Republic has shown, the *Monetary Gold* principle is not confined to proceedings before the ICJ; it "applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings."[858] The tribunal in *Larsen v. Hawaiian Kingdom* stated:

> While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.[859]

524. In *Costa Rica v. Nicaragua*, the Central American Court of Justice determined that it could not render a decision respecting the validity of a U.S.-Nicaragua treaty, because the United States (like Plaintiffs here) was neither subject to the court's jurisdiction nor a party to the proceedings.[860] It held:

> To judge . . . the validity or invalidity of the acts of a . . . party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and

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856 *Id.*

857 *Id.*

858 RLA-76, *Larsen v. Hawaiian Kingdom* ¶ 11.17.

859 *Id.*

860 RLA-77, *Costa Rica v. Nicaragua* at 40. The Central American Court of Justice was created "exclusively to pass upon the laws enforceable among the Central American states in cases brought before it for the settlement of their conflicting interests and their controversies." *Id.*

> definitely embrace it — a party that had no share in the litigation, or legal occasion to be heard — is not the mission of the Court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers.[861]

525. The principle set forth in *Monetary Gold* and echoed in *Larsen v. Hawaiian Kingdom* and *Costa Rica v. Nicaragua* applies equally here. Claimants, in their bipartite arbitration with Respondent, seek from the Tribunal a determination that Plaintiffs, who are not a party and over whom this Tribunal has no jurisdiction, and who have been litigating a separate environmental case against Claimants in other fora for two decades, should now be barred from enforcing the Judgment they fought to obtain. According to Claimants, this Tribunal can and should overrule the Lago Agrio Court and issue an award holding that Chevron is not liable to Plaintiffs for adjudicated pollution damages. To the contrary, like the Central American Court of Justice in *Costa Rica v. Nicaragua*, this Tribunal must "confine itself within the scope of its particular powers" and decline to "judge" whether or not Plaintiffs have the right to pursue their environmental claims against Chevron, because they have "no share in [this arbitration] or legal occasion to be heard" in it.[862] To do otherwise would be to exceed the boundaries within which this Tribunal may operate and in so doing violate the due process rights of the non-party Plaintiffs.[863]

D. The Tribunal Lacks Jurisdiction to Award Moral Damages

526. Claimants request relief in the form of "moral damages" to compensate them for the "non-pecuniary harm" they allegedly suffered as a result of "Ecuador's outrageous and

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861 *Id.*; *see also* RLA-72, *East Timor* Case at 102 (wherein the ICJ affirmed that "the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act.").

862 RLA-77, *Costa Rica v. Nicaragua* at 40.

863 *See* Respondent's Reply Memorial on Jurisdiction n. 426.

illegal conduct."[864] However, this claim must be dismissed. Moral damages are not compensable under the Treaty because, first, they refer to the rights of individuals, which are outside the jurisdiction of this Tribunal and, second, Claimants have not established their right to any particular amount of compensation. Under these circumstances, Respondent is in no position to provide a detailed response and reserves its rights to do so at a later stage, if appropriate. Nevertheless, the Respondent can provide the following general response to this claim.

527. First, this Tribunal has no jurisdiction to award moral damages. The Parties to the Treaty consented to arbitration on fixed terms. The Treaty's dispute settlement procedure provides a limited mechanism by which an investor may claim damages in relation only to *its investment*.[865] Claimants can therefore claim damages only with respect to their investment. As Article VI expressly states, the jurisdiction of a treaty tribunal is limited to "investment disputes."[866]

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[864] Claimants' Merits Memorial ¶ 547; Claimants' Supplemental Merits Memorial ¶ 257.

[865] Claimants' alleged Treaty breaches refer to the protections afforded in Article II of the Treaty. For example, Article II(3)(a) provides: "***Investment*** shall at all times be accorded fair and equitable treatment." II(3)(b) declares: "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of *investments.*" II(7) provides: "Each Party shall provide effective means of asserting claims and enforcing rights **with respect to *investment, investment agreements*, and *investment authorizations***." *See* C-279, Ecuador-U.S. BIT (emphasis added). None of Respondent's implicated Treaty obligations can be disassociated from Claimants' alleged investment.

[866] The Tribunal's jurisdiction derives from Article VI of the Treaty, which provides that:

> For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

C-279, Ecuador-U.S. BIT, art. VI.

528. An investor is entitled to claim damages in respect to the property rights comprising the investment. It follows that an investor cannot claim damages to the personal rights of the investor or the rights of the individuals associated with the investment.[867]

529. In this case, the covered investment is the Concession Agreement of 1973.[868] Therefore the jurisdictional question for the Tribunal is whether an investment agreement can suffer moral damages? The mere premise leads us to its logical conclusion; it cannot because any loss, damage or harm would be to the property rights comprising the investment agreement, not to a person.

530. Customary international law makes a clear distinction between "material" and "moral" damage. Professor Crawford has previously explained the concept of moral damages:

> "Moral" damage includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life.[869]

531. This means that material damage to the Concession Agreement cannot transcend its border and be extended to include any harm to the personal rights of the investor or its employees or consultants. Put simply, because there are no obligations owed to individuals or to protect rights other than property rights, the Tribunal has no jurisdiction to award damages for personal injuries.[870]

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867 RLA-33, Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS at 276.

868 *See* Third Interim Award at § 4.31.

869 RLA-358, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries Art. 4,* at 202 (Cambridge Univ. Press 2002).

870 RLA-33, Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS at 276.

532. As noted by the *Biloune v. Ghana* tribunal, "the Tribunal lacked the jurisdictional power to address these claims [the investor's human rights] and had to limit its decision to the investment dispute which the parties had agreed to arbitrate."[871]

533. Even if the Tribunal were nonetheless to find that it has jurisdiction to award moral damages, the Respondent submits that it is not justified in this case. Tribunals have held that the recovery of moral damage is available only in "extreme cases of egregious behavior."[872] Examples of extreme circumstances in which tribunals have awarded moral damage against a State are found only in the three cases on which the Claimants rely. Claimants first cite to the *Lusitania* case (U.S. v Germany) of 1923. In that case, a German submarine sank a British Ocean Liner killing 1,198 unarmed noncombatant civilians. The umpire there awarded "reasonable compensation" to the surviving relatives for their "mental suffering or shock."

534. Claimants cite to the 1977 case, *Benvenuti v. the Republic of Congo*, in which the Congolese military occupied the claimant company's premises. The Congolese government threatened to use force against the company's personnel, commenced criminal proceedings against them, and ultimately forced them to leave Congo after the Italian embassy had warned them of their imminent arrests.[873] The company sought approximately US$ 1.2 million in moral damages for intangible losses including injury to its business reputation. The tribunal awarded US$ 25,000 on that claim. Importantly, in awarding moral damages that tribunal did *not* apply international law, but instead relied on Congolese domestic law.[874]

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871 RLA-362, *Biloune* Award at 185.

872 CLA-40, *Waguih Elie George* Award ¶ 545; CLA-234 *Desert Line* Award ¶ 289.

873 *See* CLA 241, *Benvenuti et Bonfant* Award.

874 *Id*. at ¶ 4.64.

535. Claimants finally rely on *Desert Line v. Yemen*.[875] In that case, heavily armed Yemeni soldiers occupied the claimant's premises and repeatedly discharged automatic weapons, arrested several of claimant's managers, and detained the son of the claimant's chairman.[876] Desert Line claimed that it was entitled to US$ 100 million in moral damages because: (i) its executives suffered stress and anxiety from being intimidated, harassed, threatened, and detained; and (ii) Desert Line's business credit, reputation, and prestige had been damaged.[877] Finding that the physical duress exerted on Desert Line's executives was malicious, and that Desert Line had indeed suffered intangible losses, the tribunal awarded only US$ 1 million for moral damages including loss of reputation.

536. All three cases involved some form of malicious conduct by the State, aimed at the corporate investor's employees, including intentionally instilling fear and causing extreme mental anguish resulting from the threat — or actual use — of injurious force. Claimants' allegations bear no resemblance to the particularly egregious State conduct that ultimately resulted in relatively small awards for moral damages in the few cases in which they were ever awarded to an investor. Those awards provide no support for the award of moral damages to the Claimants in this case.

537. Claimants argue that they have suffered moral damages because of the Respondent's "illegal conduct." But the Claimants fail to specify and explain which acts of the State constitute "egregious" behavior that might entitle them to moral damages. Claimants' allegation made in the first Merits Memorial concerning the criminal proceedings is moot. In fact, Claimants have withdrawn their request for relief related to the criminal proceedings in their

875 CLA-234, *Desert Line* Award.

876 *Id.* ¶ 185.

877 *Id.* ¶ 286.

Supplemental Merits Memorial.[878] Moreover, the evidence shows that the criminal proceedings were handled (and ultimately dismissed) in accordance with due process and proper application of substantive law.[879] There was no allegation, let alone proof, of malicious conduct by the State directed at Claimants' management or employees.

538. With regard to damages from alleged denial of justice or due process, Claimants have failed to explain how and in what circumstances they or their employees have been morally damaged.

539. With regard to damages in general, international law requires that: (i) the harm occurred, (ii) such harm must be the result of a breach to the treaty, (iii) the claimants must also show a causal link between the alleged harm and the breach, (iv) that the damage is attributed to the State. These same requirements apply to moral damages as well. As noted by the *Tecmed* tribunal:

> The Arbitral Tribunal finds no reason to award compensation for moral [damage], as requested by the Claimant, due to the absence of evidence proving that the actions attributable to the Respondent that the Arbitral Tribunal has found to be in violation of the Agreement have also affected the Claimant's reputation and therefore caused the loss of business opportunities for the Claimant.[880]

540. Furthermore, Claimants make no effort to correlate their supposed moral damage to the breach of any particular Article of the Treaty. Claimants wrongly assume that a finding of any breach of the Treaty automatically qualifies as the "egregious" conduct meriting an award of moral damages.

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878 Claimants' Supplemental Merits Memorial ¶ 256.

879 *See* Annex B.

880 CLA-31, *Tecmed* Award ¶ 198.

541. International law is concerned with damages that are specific and demonstrable, not just hazy non-monetary inconvenience, such as perceived reputational harm. Having utterly failed to justify (or even attempt to justify) their requested relief, Claimants' request for moral damages must be dismissed in its entirety.

VIII. Conclusion / Relief Requested

542. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award that grants the following relief:

a. Declaring that the Tribunal lacks jurisdiction over Claimants' denial of justice claims, or that it refuses to exercise such jurisdiction because such claims are too remote to any investment.

b. Alternativey, dismissing Claimants' denial of justice and Treaty claims due to the failure of Chevron to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.

c. Alternativey, dismissing Claimants' Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement do not exist or were not breached.

d. Alternatively, even if the 1995 Settlement Agreement has breached by the Republic, dismissing all of Claimants' Treaty claims, inter alia, because Claimants have separately failed to establish that the Republic has violated the effective means clause; the fair and equitable treatment clause; the full protection and security clause; the arbitrary and discriminatory treatment clause.

e. Alternatively, even if the 1995 Settlement Agreement has been breached by the Republic, dismissing Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.

f. Otherwise dismissing all of Claimants' claims against the Republic in these arbitration proceedings as meritless.

g. Awarding all costs and attorneys' fees incurred by the Republic in this arbitral proceeding.

h. Any other and further relief that the Tribunal deems just and proper.

543. To the extent the Tribunal finds the Republic responsible for a violation of international law, the Republic requests that the Tribunal conduct a further phase (Track 3) of the

arbitration sufficient to determine Chevron's actual liability in fact for the claims asserted against it in Lago Agrio and to fashion a final award that takes into consideration such established liability.

544. The Republic reincorporates by reference its Request for Relief in Track 1 to the extent that such Request remains pending.

545. The Republic reserves its rights to supplement its pleadings and request for relief.

Respectfully submitted,

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Procuraduría General del Estado

Zachary Douglas
Matrix Chambers

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APPENDIX A

GLOSSARY OF TERMS
RESPONDENT'S TRACK 2 COUNTER-MEMORIAL

"1973 Concession Agreement" or **"1973 Contract"** means C-7, Agreement Between the Government of Ecuador and Ecuadorian Gulf Oil Company and TexPet, August 6, 1973.

"1995 Settlement Agreement" means C-23, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995.

"1999 EMA" means C-73, Environmental Management Act of 1999, Official Registry No. 37, July 30, 1999.

"*Aguinda*" or "New York Action" or "New York Litigation" means the class action lawsuit brought by a group of Ecuadorian individuals in the United States District Court for the Southern District of New York, *Aguinda v. Texaco, Inc.*, No. 93 Civ 7527 (S.D.N.Y.).

"*Aguinda* Complaint" means C-14, Complaint, November 3, 1993, filed in *Aguinda v. Texaco, Inc.*, No. 93 Civ 7527 (S.D.N.Y.).

"*AFT* Award" means RLA-319, *Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL Award of Mar. 5, 2011) (Stuber, Klein, Crivellaro).

"*Amto* Award" means RLA-343, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Final Award of Mar. 26, 3008) (Cremades, Runeland, Soderland).

"*Archer Daniels* Award" means RLA-357, *Archer Daniels v. The United Mexican States*, ARB(AF)/04/05 (Nov. 21, 2007) (Cremades, Rovine, Siqueiros).

"*Autopista v. Venezuela* Award" means RLA-354, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5 (Award of Sept. 23, 2003) (Kaufmann-Kohler, Böckstiegel, Cremades).

"*Azurix* Award" means CLA-43, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12 (Award of July 14, 2006) (Sureda, Lauterpacht, Martins).

"*Barcelona Traction* Award" RLA-304, *Barcelona Traction, Light & Power Co. Case (Belgium v. Spain)*, 1970 I.C.J. 3 (Award of Feb. 3, 1970).

"*Bayindir* Final Award" means RLA-333, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29 (Final Award).

"*Benvenuti et Bonfant* Award" means CLA-241, *Benvenuti et Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2 (Award of August 15, 1980).

"*Biloune* Award" means RLA-362, *Biloune and Marine Drive Complex ltd. v Ghana Investments Centre and the Government of Ghana* (Award of Oct. 27 1989).

"BIT," "Ecuador-U.S. BIT," or **"Treaty"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

"*Biwater Gauff* Award" means CLA-137, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award of Jul. 24, 2008) (Hanotiau, Born, Landau).

"***Brown* Award**" means CLA-308, *Robert E. Brown* (U.S. v. Great Britain) (Award of Nov. 23, 1923).

"***Burdov* Judgment**" means RLA-359, *Burdov v Russia*, European Court of Human Rights (Judgment of May 4, 2009).

"*Burlington Resources* Decision on Liability" means RLA-338, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Liability of Dec. 14, 2012) (Kaufmann-Kohler, Stern, Orrego Vicuña).

"Caron Expert Rpt." means Claimants' Expert Opinion of Professor David D. Caron as to Article II(7) of the Treaty of September 3, 2010.

"*Case concerning Oil Platforms* Higgins Opinion" means RLA-332, *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 2006 I.C.J. Rep. 225 (Nov. 6, 2003), Separate Opinion of Judge Higgins.

"CEPE" means **Corporación Estatal Petrolera Ecuatoriana,** the State Oil Company of Ecuador until it was replaced by its successor, PetroEcuador.

"*Chorzów Factory* Award" means CLA-406, *The Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17 (Decision on Indemnity).

"Civil Code of Ecuador" means RLA-163, Civil Code of Ecuador, Codification, Official Registry Supplement No. 46, June 24, 2005.

"Claimants' Jurisdictional Counter-Memorial" means Claimants' Counter-Memorial on Jurisdiction of September 6, 2010.

"Claimants' Merits Memorial" means Claimants' Memorial on the Merits of September 6, 2010.

"Claimants' Track 1 Reply on the Merits" means Claimants' Track 1 Reply on the Merits of August 29, 2012.

"Claimants' Supplemental Merits Memorial" means Claimants' Supplemental Memorial on the Merits of March 20, 2012.

"*CME* Partial Award" means CLA-220, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration (Partial Award of Sept. 13, 2001) (Kühn, Schwebel, Hándl).

"*CMS* Annulment Award" means CLA-104, *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Decision on Annulment of Sept. 25, 2007) (Guillaume, Elaraby, Crawford).

"*Commercial Cases* Partial Award" means CLA-47, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, PCA Case No. AA277, UNCITRAL (Partial Award on the Merits of March 30, 2010).

"*Commercial Cases* Final Award" means RLA-351, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, PCA Case No. AA277, UNCITRAL (Final Award on the Merits of August 31, 2011).

"*Commercial Cases* Interim Award" means CLA-1, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, PCA Case No. AA277, UNCITRAL (Interim Award on the Merits of December 1, 2008).

"Constitution of Ecuador (2008)" means RLA-164, Constitution of Ecuador, Official Gazette No. 449, October 20, 2008.

"Constitution of Ecuador (1998)" means RLA-259, Constitution of Ecuador, Legislative Decree No. 000, August 1, 1998.

"Consortium" means the Consortium of two Ecuadorian subsidiaries of American companies — TexPet and Gulf — that were granted oil exploration and production rights by the Republic in 1964.

"Coronel Third Expert Rpt." means Claimants' Expert Rebuttal Report of Dr. César Coronel Jones of August 28, 2012.

"CSOB Award" means CLA-240, *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4 (Award of Dec. 29, 2004) (van Houtte, Bernadini, Bucher).

"Delanoy & Portwood" means RLA-407, Louis-Christophe Delanoy & Tim Portwood, La Responsabilité de l'État Pour Déni de Justice dans l'Arbitrage d'Investissement, 2005(3) REVUE DE L'ARBITRAGE.

"*Delfina Torres*" means RLA-286, José Luis Guebara Batioja, on its own behalf and in representation of the Committee "Delfina Torres Vda. De Concha" v. PETROECUADOR, PETROCOMERCIAL, PETROINDUSTRIAL, and PETROPRODUCCION, Case 229, Official Registry 43, March 19, 2003.

"*Desert Line* Award" means CLA-234, *Desert Line*, ICSID Case No ARB05/17 (Award of Feb. 6, 2008).

"Dolzer & Schreuer" means RLA-413, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford Univ. Press 2008).

"Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS" means RLA-33, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 276 (Cambridge 2009).

"*Duke Energy* Award" means RLA-40, *Duke Energy Electroquil Partners et al. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (Award of Aug. 18, 2008) (Kaufmann-Kphler, Gómez-Pinzón, van den Berg).

"Ecuador-U.S. BIT," "BIT," or **"Treaty"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

"*EDF* Award" means CLA-232, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/03 (Award of Oct. 2, 2009) (Rovine, Derains, Bernardini).

"*EDF* Procedural Order" mean RLA-331, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13 (Procedural Order No. 3) (Rovine, Derains, Bernardini).

"*Enron* Award" means CLA-207, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3 (Award of May 22, 2007) (Orrego Vicuña, van den Berg, Tschanz).

"Fugro-McClelland Final Audit" means C-12, Fugro-McClelland, Final Environmental Field Audit for Practices 1964-1990 (Oct. 1992).

"*GAMI* Award" means RLA-306, *GAMI Investments Inc. v. The United Mexican States*, UNCITRAL (Final Award of Nov. 15, 2004) (Reisman, Muró, Paulsson).

"*Genin* Award" means CLA-87, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (Award of June 25, 2001) (Fortier, Heth, van den Berg).

"*Glamis Gold* Award" means RLA-340, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (Award of June 8, 2009) (Young, Caron, Hubbard).

"*Helnan International* Award" means CLA-302, *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. 05/19 (Award of Jul. 3, 2008) (Derains, Dolzer, Lee).

"*Immobiliare Saffi* Judgment" means RLA-61, *Immobiliare Saffi v. Italy*, European Court of Human Rights, Judgment of July, 28 1999 at ¶ 66.

"*Oostergetel* Award" means RLA-307, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award of April 23, 2012).

"Lago Agrio Complaint" means C-71, Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos, May 7, 2003, commencing the Lago Agrio Litigation.

"Lago Agrio Judgment" or **"Judgment"** means C-931, First Instance Judgment by the Lago Agrio Court in the Lago Agrio Litigation, February 14, 2011.

"Lago Agrio Litigation" means the lawsuit brought by a group of Ecuadorian individuals filed before the President of the Superior court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos, May 7, 2003.

"Lago Agrio Record" or **"Record"** means case records of Lago Agrio Litigation.

"Lago Agrio First-Instance Appellate Decision" or **"Lago Agrio Appellate Decision"** means C-991, First-Instance Appellate Decision by the Lago Agrio Appeals Court, January 3, 2012.

"*Lauder* Award" means CLA-173, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration (Final Award of Sept. 3, 2001) (Briner, Cutler, Klein).

"LBG Expert Rpt." means RE-10, Expert Report of Kenneth Goldstein and Jeffrey Short (Feb. 18, 2013).

"LBG Expert Rpt. Annex 1" means RE-10, Annex 1 to Expert Report of Kenneth Goldstein and Jeffrey Short, prepared by Harlee Strauss (Feb. 18, 2013).

"LBG Expert Rpt. Annex 2" means RE-10, Annex 2 to Expert Report of Kenneth Goldstein and Jeffrey Short, prepared by Edwin Theriot (Feb. 18, 2013).

"*LG&E Energy* Decision on Liability" means CLA-208, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Liability of Oct. 3, 2006) (Maekelt, Rezek, van den Berg).

"*Loewen* Award" means CLA-44, *Loewen Group Inc. & Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Award of Jun. 25, 2003) (Mason, Mason, Mikva, Mustill).

"*Marvin Roy Karpa* Award" Means RLA-355, *Marvin Roy Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (Award of Dec. 16, 2002) (Kerameus, Bravo, Gantz);

"*Mondev* Award" means CLA-7, *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 (Award of Oct. 11, 2002) (Stephen, Crawford, Schwebel).

"New York Action" or **"New York Litigation"** or **"*Aguinda*"** means the class action lawsuit brought by a group of Ecuadorian individuals in the United States District Court for the Southern District of New York, *Aguinda v. Texaco, Inc.*, No. 93 Civ 7527 (S.D.N.Y.).

"*Occidental* Award" means RLA-57, *Occidental Exploration and Production Co. v. The Republic of Ecuador*, UNCITRAL Case No. UN 3467 (Award of Jul. 1, 2004) (Vicuña, Brower, Sweeney).

"*OCP* Case" means C-1175, *Red Amazónica por la Vida v. Compañía Oleoducto de Crudos Pesados S.A.*, Provincial Court of Justice of Sucumbíos, Opinion, December 14, 2011.

"*El Oro Mining* Award" means RLA-324, *El Oro Mining & Railway Co. Ltd. Case (Great Britain v. Mexico)*, 5 REP. INT'L ARB. AWARDS 191 (1931).

"Paulsson DENIAL OF JUSTICE" means RLA-61 Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005).

"Plaintiffs" mean the plaintiffs who asserted claims first in New York in 1993 in *Aguinda* and subsequently in the Lago Agrio Litigation.

"PetroEcuador" means Empresa Estatal de Petróleos del Ecuador (the State Oil Company) and CEPE (the previous State Oil Company).

"Putnam Award" means RLA-152, Putnam (United States v. United Mexican States), Opinion of Commissioners of Sept. 8, 1923, U.S.-Mex. Cl. Comm'n.

"Reis Veiga Aff." means R-45, Affidavit of Ricardo Reis Veiga (Jan. 16, 2007), filed in *Republic of Ecuador v. ChevronTexaco Corporation*, No. 04 Civ. 8378 (LBS) (S.D.N.Y.).

"Respondent's Track 1 Counter-Memorial on the Merits" means Respondent's Track 1 Counter-Memorial on the Merits of August 29, 2012.

"*Saluka* Partial Award" means CLA-224, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL Partial Award of Mar. 17, 2006) (Watts, Fortier, Behrens).

***"SGS v. Pakistan* Decision on Jurisdiction"** means CLA-66, *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction of Aug. 6, 2003) (Feliciano, Faurès, Thomas).

"*Siemans* Award" means CLA-227, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8 (Award of Feb. 6, 2007) (Sureda, Brower, Bello Janeiro).

"*SOABI* Award" means RLA-114, *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1 (Award of Feb. 25, 1988) (Broches, Mbaye, Schultsz).

"*Tecmed* Award" means CLA-31, *Técnicas Medioambientales TecMed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, 43 ILM 143 (Award of May 29, 2003) (Grigera Naón, Roasa, Verea).

"*Thunderbird* Award" means CLA-223, *Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL (Award of Jan. 26, 2006) (Ariosa, Wälde, van den Berg).

"Texaco" means Texaco, Inc.

"TexPet" means Texaco Petroleum Company.

"Third Interim Award" means Third Interim Award on Jurisdiction and Admissibility of February 27, 2012.

"Treaty," "Ecuador-U.S. BIT," or **"BIT"** means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

"*Voytenko* Judgment" means RLA-360, *Voytenko v Ukraine*, European Court of Human Rights (Judgment of Jun. 29, 2004).

"*Waguih Elie George* Award" means CLA-40, *Waguih Elie George Siag v. The Republic of Egypt*, ICSID Case No. ARB/05/15 (Award of Jun. 1, 2009).

"Wasserstrom Expert Rpt." means Claimants' Expert Report of Dr. Robert Wasserstrom: Agricultural Settlement, Deforestation and Indigenous People in Ecuador of August 31, 2010.

"*Waste Management* Award" means CLA-42, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (Award of Apr. 30, 2004) (Crawford, Civiletti, Gómez).