IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

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

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TABLE OF CONTENTS

I. Introduction

1. Claimants are now in their third decade of litigation in which they seek to avoid responsibility for the degradation of the Ecuadorian Amazon. The thousands of sample results, the scores of judicial site inspections, the dozens of expert reports, and the vast evidentiary record — both in Lago Agrio and now before this Tribunal — convincingly demonstrate their culpability. Claimants' legacy in Ecuador continues to this day. Through this collateral proceeding, however, Claimants seek yet again to avoid liability to parties not present here.

2. In response to successive rounds of new allegations, the Republic has time and again investigated and addressed Claimants' accusations — repeatedly showing that the facts do not support Claimants' claims. Each time Claimants responded *not* with answers, but instead with different allegations or permutations of their former allegations based on "newly uncovered" evidence.

3. This time is no different. Again the very evidence Claimants tout belies their allegations. REDACTED Alberto Guerra's story that he edited a draft Judgment written by Pablo Fajardo, which Fajardo then delivered to Zambrano immediately before Zambrano issued it, has now been shown to be false. In this regard, we ask this Tribunal to expand the mandate of Ms. Kathryn Owen, REDACTED so that she may directly answer questions the Tribunal may have regarding the forensic evidence.

4. This is not to say that the parties' actions before the Lago Agrio Court were always exemplary. Like this Tribunal, the Republic learned about the Plaintiffs' relationship with Mr. Cabrera through Claimants' submissions, largely derived from their U.S. discovery efforts against the Plaintiffs' counsel and their experts. But neither Mr. Cabrera nor the Plaintiffs — nor the Plaintiffs' counsel — are respondents here. Claimants' allegations regarding Mr. Cabrera cannot give rise to a claim against the Republic. Even Judge Kaplan found that the Plaintiffs' relationship with Mr. Cabrera had been *hidden* from the Lago Agrio Court, thereby making the Lago Agrio Court a victim of the alleged wrongdoing.[1]

5. To be sure, the Plaintiffs' counsel's role in preparing Mr. Cabrera's reports, once revealed, generated suspicion from Judge Kaplan (and perhaps this Tribunal) regarding the Plaintiffs' counsel and the sanctity of the Lago Agrio Court processes. But the Lago Agrio Court *declined* to rely on Mr. Cabrera's reports, just as Chevron asked it to do. Claimants nonetheless seek to build a treaty claim based on conduct that did not involve the Republic, parlaying *Plaintiffs' counsel's* conduct with respect to Mr. Cabrera into a presumption that the *Ecuadorian court* acted corruptly and permitted the Plaintiffs' counsel to ghostwrite the Lago Agrio Judgment. But as with their prior accusations, Claimants once again chose not to address the vast body of evidence inconsistent with their allegations, including in this instance much of the now-available forensic evidence.

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[1] C-2135, RICO Opinion at 330 (representations that Cabrera was independent and impartial constituted a "*[d]eception of the Lago Agrio Court*"); *id*. (referring to Plaintiffs' counsel's "*false pretenses and representations to the Lago Agrio* court"); *id*. at 333 ("Neither the Lago Agrio court nor Chevron knew anything approaching the whole story of the overall Cabrera fraud"); *see also id*. at 63 (agreement was "to keep their relationship with the LAPs secret *from the judge*") (all emphasis added).

This Counter-Memorial is accompanied by a Glossary of Terms at Appendix A. Relevant documents, case law, and secondary legal authorities are set out in full therein in alphabetical order by their respective abbreviations. For ease of reference, the abbreviations are used throughout the text and footnotes of this Counter-Memorial.

6. Claimants' storyline has become an extravagantly well-provisioned train hurtling along the tracks towards the goal of avoiding all liability for the environmental damages Claimants caused in the Ecuadorian Amazon. We ask the Tribunal to step back and reassess where we are at this juncture in the arbitration. It is time to reexamine the presumptions on which Claimants' storyline is based and test them against the record evidence on which the parties rely. We also ask the Tribunal to evaluate the extraordinary tactics Claimants have employed in their effort to undermine and discredit the Ecuadorian legal proceedings — tactics that have shaped perceptions and exacerbated relationships — and to reflect on Claimants' credibility both in these proceedings and beyond.

7. From the beginning Claimants have treated Ecuador's indigenous residents with disdain. Rather than defend the allegations of environmental damage on the merits, Claimants attacked the residents for bringing their claims to court, first in the United States and then in Ecuador. Claimants continue to consider the indigenous plaintiffs just as they did in the 1970s — unworthy of the cost and commitment required to protect their environment and lives.

8. The Tribunal knows well of Texaco's ten-year, ultimately successful effort to dismiss the *Aguinda* case from Texaco's home courts in New York by repeatedly promoting the fairness and impartiality of Ecuador's courts.[2] While Claimants try now to make President

[2] *See* 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), *filed in Aguinda* at 13; 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), *filed in Aguinda* at 2-3; R-3, Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of its Renewed Motions to Dismiss (Jan. 11, 1999), *filed in Aguinda* at A4991 ¶ 2; R-1, Texaco Inc.'s Objections and Response to Plaintiffs' Interrogatories Regarding Proposed Alternative Fora (Dec. 28, 1998), *filed in Aguinda* at 5. *See also* R-24, Ponce Martínez Aff. (Dec. 13, 1995) ¶¶ 4-5; R-107, Pérez Pallares Aff. (Dec. 1, 1995), *filed in Aguinda* ¶¶ 6-7; R-31, Ponce and Carbo Aff. (Feb. 4, 2000), *filed in Aguinda* ¶¶ 15, 17; R-32, Ponce Martínez Aff. (Feb. 9, 2000), *filed in Aguinda* ¶¶ 5-7; R-33, Pérez-Arteta Aff. (Feb. 7, 2000) ¶¶ 4, 7; R-34, Pérez Pallares Aff. (Feb. 4, 2000), *filed in Aguinda* ¶¶ 3-4, 6; R-35, Ponce Martínez Supp. Aff., *filed in Aguinda* (Apr. 4, 2000) ¶¶ 1-2; R-36, Espinoza Ramírez Aff. (Feb. 28, 2000), *filed in Aguinda* ¶ 4; R-37, Vaca Andrade Aff. (Mar. 30, 2000), *filed in Aguinda* ¶¶ 4-7; R-38, Jimenez Carbo Decl. (Apr. 5, 2000), *filed in Aguinda* ¶ 1; R-39, Pérez-Arteta Aff. (Apr. 7, 2000), *filed in Aguinda* ¶ 2.

Correa their foil, it was Chevron that worked directly with the Ecuadorian Government in the 1990s to have the case moved to Ecuador.[3] As soon as the case was re-filed in Lago Agrio, Chevron launched a multi-pronged campaign to stop it, including lobbying Ecuador's then-Attorney General in *2004*, several years *before* President Correa was even on the political scene. When President Correa was elected, Chevron continued its ultimately unsuccessful attempts to shut down the litigation.[4] Since then, Chevron's tactics have been designed to obscure, intimidate, and avoid a proper adjudication of its liability.

9. Paul M. Barrett, an author and a Bloomberg and *Business Week* reporter, describes TexPet's oil extraction process in Ecuador in his new book. Mr. Barrett has been a frequent critic of Steven Donziger and has recently begun to coordinate with Chevron to help spread Chevron's message.[5] This makes Mr. Barrett's account of TexPet's history in Ecuador all the more revealing for its harsh criticism of the company. As Mr. Barrett explains, the digging and creation of the company's wells brought oil to the surface, along with "formation water" that generally contained "naturally occurring trace amounts of arsenic, cadmium, cyanide, lead, and mercury."[6] Barrett elaborates:

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3 R-26, Fax from M. Kostiw to D. LeCorgne (Dec. 6, 1993), *filed in Aguinda*; R-27, Diplomatic Note from Ambassador E. Terán to U.S. Dept. of State (Dec. 3, 1993), *filed in Aguinda*; C-289, Ambassador E. Teran Aff., *filed in Aguinda* (Jan. 3, 1996); C-20, Letter from Ambassador E. Terán to Judge Rakoff (June 10, 1996), *filed in Aguinda*.

4 R-45, Reis Veiga Aff. (Jan. 16, 2007), *filed in Republic of Ecuador vs. ChevronTexaco Corp.*, No. 04 Civ. 8378 (S.D.N.Y.) ¶ 66; R-71, Reis Veiga Dep. Tr. (Nov. 8, 2006), *taken in Republic of Ecuador v. ChevronTexaco Corp.*, Case No. 04 CV 8378 at 219-222; R-159, E-mail from W. Irwin to R. Veiga, *et al*. (Sept. 26, 2003); R-156, Letter from Ambassador L. Gallegos to the Editor, THE WALL STREET JOURNAL (Apr. 26, 2008) ("Chevron . . . has lobbied various Ecuadorian presidents, including Mr. Correa, to use their authority to halt litigation.").

5 Plaintiffs have noted "multiple reports that Chevron is quietly helping to promote" Barrett's book on the case and that Chevron arranged for Barrett to offer congressional testimony while "appear[ing] at the side of a lawyer from" Gibson Dunn. Plaintiffs have also accused Barrett of harboring "personal animus toward[ ] Donziger," and having made "explicit threats to those working for the Ecuadorians that he planned to use his book to 'take down' Donziger." *See* R-1201, *Conflict of Interest: Businessweek's Paul Barrett Now An Advocate For Chevron In Ecuador Dispute*, The Chevron Pit, July 31, 2014.

6 R-1202, Barrett at 27.

> *In the oil itself were yet more ingredients that if ingested could cause serious illness to humans and animals.* Among these were benzene, toluene, and xylene. During the drilling and early testing process, Texaco poured a mixture of drilling muds, formation water, and oil into earthen pits dug near each platform. *While it would have been possible to line the pits with concrete or metal to prevent leaching, Texaco left the holes unlined.* The company created hundreds of pits – exactly how many is a matter of dispute – each the size of a large swimming pool. Many were outfitted with "gooseneck" piping systems that siphoned tainted rainwater runoff into adjacent streams.[7]

10. Texaco not only chose *not* to line the pits and not to clean failing pits,[8] it discharged "*billions of gallons* of petroleum-exposed water into [the interconnected web of] streams, rivers, and lagoons" in the Amazon.[9]

11. Texaco's internal documents show that the company considered, but rejected, lining its waste pits for no reason other than it considered the total price tag — approximately US$ 4.2 million — too expensive.[10] The cost "was more than Texaco was willing to pay to protect the rain forest and its inhabitants."[11] Handwritten notes from a Texaco executive similarly concede that "[u]nder normal circumstances I would recommend that the pits be drained and covered to avoid recurring breaks and similar problems in the future," but he concluded instead that stop gap measures "[are] best because [they are] less costly at this moment."[12]

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7 R-1202, Barrett at 27 (emphases added).

8 *See supra* § VII.

9 R-1202, Barrett at 29 (emphasis added). As recounted in one recent press account, Texaco "built and managed more than 350 drill sites on land populated by five local tribes and a smattering of migrant farmers. Along with a lot of oil, these wells produced an estimated *16 billion gallons of toxic runoff*, including so-called 'formation waters' rich in heavy metals and carcinogens like arsenic, chromium and benzene." R-1200, ROLLING STONE at 8-9 (emphasis added).

10 R-202, Texaco's internal letter OTE-276-80 from D. W. Archer to Eng. René Bucaram, Drilling, Workover & Production Pits (June 25, 1980).

11 R-1202, Barrett at 29.

12 R-1199, Memo from M.A. Martinez to R.C. Shields and E.L. Johnson (Mar. 19, 1976) at CA 1070245.

12. At the same time that Texaco adopted policies designed to carry the contamination to the rivers and streams that pervade the Amazon, it simultaneously sought to cover up evidence of its contamination. As Barrett explains, "[a] full record of Texaco's 'contamination problems' in the jungle will never be assembled, because, at least for some time, it was company policy to conceal evidence of pollution."[13] In support of this conclusion, Barrett notes the same "Personal and Confidential" Texaco memo that the Republic has repeatedly pointed to,[14] in which senior executive R.C. Shields directed Texaco employees in Ecuador to report "[o]nly major events as per Oil Spill Response Plan instructions."[15] The memo then defined a "major event" as "one which attracts the attention of the press and/or regulatory authorities or in your judgment merits reporting."[16]

13. As Barrett concludes: "Since there were no regulatory authorities to speak of, and journalists rarely ventured to the lowland oil fields, this instruction reasonably could have been interpreted as an order to cover up contamination. It's difficult to see how else it would have been read."[17] Moreover, according to Barrett:

> Chevron's retrospective attempts to minimize the Shields directive were not very convincing, especially in light of the memo's emphatic tone. Without a hint of ambiguity, it concluded: "No reports are to be kept on a routine basis and all previous reports are to be removed from Field and Division Offices and destroyed." *Texaco wanted no record of the impact of its drilling on the environment*.[18]

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13 R-1202, Barrett at 29.

14 *See* Respondents' Track 2 Counter-Memorial ¶ 55

15 R-201, Memo from R.C. Sheilds and R.M. Bischoff to M.E. Crawford re Reporting of Environmental Incidents New Instructions (July 17, 1972).

16 *Id.*

17 R-1202, Barrett at 29.

18 *Id.* at 30 (emphasis added).

14. As Texaco put profit before people, Chevron has put profit before truth. From the inception of the Lago Agrio Litigation, Chevron has sought to cover up the existence of any contamination attributable to TexPet. **First**, as we have previously explained, Chevron "shielded 'dirty samples' from the court by sending them to friendly labs."[19] What is worse, Chevron's own contractor admitted to swapping "clean" samples for "dirty" samples.[20]

15. **Second**, Chevron conducted extensive pre-testing one to two months before each judicial inspection ("JI") so that it could choose those specific locations within each site to obtain the cleanest samples, including testing far from the source of the contamination. While Claimants now represent that the purpose of its systematic testing was merely to determine a "clean perimeter,"[21] such an exercise would be appropriate only if the intent were to remediate everything within that perimeter. But that is not what was done. Instead, Chevron found its "clean perimeter" and then had its experts repeatedly conclude that these anything-but-random samples were "representative" of the *entire* site, even though Chevron knew they were not.

16. **Third**, Chevron methodically chose to take samples at different depths after detecting contamination at the same location but at shallower or greater depth.[22] Chevron then created "composite" samples in known contaminated areas to diminish the measured toxicity of the sample.[23] In another arbitration between an oil company and the Republic, *Burlington*

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[19] R-1200, ROLLING STONE at 11. *See also* Respondent's Track 2 Counter-Memorial, Annex C: Response to Claimants' Bribery Allegations ¶¶ 6-8; R-184, Tr. of Borja/Escobar Conversation on Oct. 1, 2009 (13:03:33) at 6-7.

[20] R-1200, ROLLING STONE at 11-12. *See also* R-184, Tr. of Borja/Escobar Conversation on Oct. 1, 2009 (13:03:33) at 6-7; R-199, Tr. of Borja/Escobar Conversation on Oct. 1, 2009 (14:04:23) at 11-12.

[21] Connor Expert Rpt. (June 3, 2013) at 14.

[22] RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 3.2.4. *See infra* § VII.F.4.

[23] *See infra* § VII.F.4.

Resources v. Ecuador, the tribunal recently questioned this approach in its examination of Burlington's lead environmental expert, who also serves as Chevron's expert here.[24]

17. **Fourth**, Chevron went to great lengths to shut down a JI of one contaminated site when it determined that the results of the inspection would hurt its case.[25] The Republic's environmental experts, including the Louis Berger Group ("LBG"), have since confirmed that the site is significantly contaminated.[26]

18. Not only has Chevron employed elaborate means to cover up evidence of contamination, it also has implemented a wide-ranging strategy designed to delay and disrupt the court proceedings. As previously described, Chevron inundated the court with repetitive motions, in one instance as many as thirty-nine motions within one hour, to drain the Plaintiffs' resources — and likely the Court's — and to prompt the recusal of any judge who could not keep up.[27] Indeed, Chevron sought to recuse half of the judges who have presided over the Lago Agrio Litigation.[28]

19. Chevron also sought to entrap Judge Juan Núñez in a bribery scheme to further delay any Judgment. The judge neither solicited nor accepted any bribe. Barrett provides the context:

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[24] *See* R-1205, Hr'g Tr. in *Burlington Resources Inc. v. The Republic of Ecuador*, Case No. ARB/08/5 (June 4-5, 2014) at 1135:18-1143-21, 1651:2-1660:6, 1668:2-1676:13.

[25] R-1202, BARRETT at 94-96. *See also* R-475, Lago Agrio Record at 81426 (Chevron's letter to the Court (Oct. 18, 2005) requesting the suspension of the Guanta 6 JI); R-477, Lago Agrio Record at 81410 (Intelligence Report signed by Major Arturo Velasco (Oct. 18, 2005)).

[26] RE-11, LBG Expert Rpt. (Dec. 16, 2013) at 19-20.

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

[28] *See* C-230, Order Denying Chevron Motion to Recuse (Oct. 21, 2009); C-1289, Chevron's Motion to Recuse Judge Ordóñez (Aug. 26, 2010); C-1302, Chevron's Motion for Recusal against Judge Orellana (Sept. 27, 2011); C-130, Chevron's Motion for Recusal against Judge Orellana (Apr. 13, 2011); C-1290, Decision Regarding Judge Núñez's Recusal (Sept. 28, 2009).

The company said it had uncovered a "bribery scheme" implicating Judge Nuñez. . . . The story defied belief: Two businessmen, an American and an Ecuadorian, met several times with Judge Nuñez to discuss lucrative pollution-cleanup contracts. Using tiny cameras embedded in a spy pen and watch, the businessmen recorded their clandestine conversations. Chevron said it received the videos from one of the James Bond wannabes, Diego Borja, who formerly worked as a logistics contractor for the company and whose wife and uncle also had been on Chevron's payroll. Neither Borja nor his partner, an American named Wayne Hansen, had been paid for their private-eye work, Chevron said. But, because of safety concerns, the company had moved Borja and his family from Ecuador to the United States and was paying their expenses. . . . At Chevron's behest, the U.S. government granted Borja political asylum.

* * * *

Chevron's explosive revelation made headlines and then, within weeks, began to deteriorate into confusion. It turned out that Borja's partner, Hansen, was a convicted drug dealer who in the 1980s had been sentenced to nearly three years in American prison for conspiring to import 275,000 pounds of marijuana into the United States from Colombia. Then it emerged that, after three get-togethers with Judge Nuñez, Borja, the former Chevron contractor, met in San Francisco with lawyers for the company. Next, Borja returned to Ecuador and held a fourth meeting with the judge. That sequence, the plaintiffs asserted, suggested that Chevron may have been a more active participant in the sting than the company acknowledged. Chevron insisted that its lawyers told Borja not to meet again with the judge.

* * * *

Borja repaid Chevron's largesse by getting snared in yet another video sting. (A Hollywood screenwriter wouldn't dare make this up.) In Skype conversations with a childhood friend, Borja boasted that by getting Nuñez dismissed, he had accomplished in a matter of days what Chevron had been unable to do in a year. "There was never a bribe," he acknowledged to his friend. If Chevron ever turned on him, Borja said, he could reveal incriminating information about the company. "I have correspondence that talks about things you can't even imagine," he told his friend. "I can't talk about it here, dude, because I'm afraid, but they're things that can make the Amazons win this, just like *that*," he added, snapping his fingers. The Skype exchanges

ended up in the possession of the plaintiffs, who made them public.[29]

20. Another press account provides still further context:

> Borja was already part of the Chevron extended family when the company hired him to transport coolers containing the company's field samples to supposedly independent labs. His uncle, a 30-year Chevron employee, owned the building housing Chevron's Ecuadorean legal staff. As he carried out his work, Borja collected more than one kind of dirt. In recorded calls to Escobar in 2009, Borja explained how Chevron's Miami office helped him set up front companies posing as independent laboratories. (Among his Miami bosses was Reis Veiga, one of the lawyers indicted for corruption in the 1997 Texaco remediation settlement with the Ecuadorean government.)
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> Borja contacted Escobar because he thought his information might be valuable to the other side. "Crime does pay," he told Escobar. In the calls, Borja suggests Chevron feared exposure and prosecution under the Foreign Corrupt Practices Act. "If [a U.S.] judge finds out that the company did [crooked] things, he'll say, 'Tomorrow we better close them down,' you get it?" . . . In awe of Chevron's power, Borja said the company has "all the tools in the world to go after everyone. Because these guys, once the trial is over, they'll go after everyone who was saying things about it." Still, the benefits of working with them were great. "Once you're a partner of the guys," he told Escobar, "you've got it made. It's a brass ring this big, brother."
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> Borja's brass ring was ultimately worth over $2 million. Sometime around 2010, he was naturalized at Chevron's expense and moved

[29] R-1202, BARRETT at 168-171. *See also* R-197, Tr. of Proceedings (Nov. 10, 2010), *In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 38:24-39:3 (The only U.S. judge who reviewed the transcripts and commented on them noted that he saw no evidence of a bribe: "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*.") (emphasis added); R-526, *Revelation Undermines Chevron Case in Ecuador*, NEW YORK TIMES (Oct. 30, 2009) at 1 (revealing that Hansen is "a convicted drug trafficker" who "was convicted of conspiring to traffic 275,000 pounds of marijuana from Colombia to the United States in 1986."); R-185, Tr. of Borja/Escobar Conversation (Oct. 1, 2009) at 8-9 (emphasis added); R-322, Borja Dep. Tr. (Mar. 15, 2011), *taken in In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 19:17-20:2, 24:14-26:19, 77:20-78:3; R-582, Tr. of Borja/Escobar Conversation (Oct. 1, 2009) at 11. *See also* Respondent's Track 2 Counter-Memorial ¶¶ 13-15, 157-160, Annex C: Response to Claimants' Bribery Allegations ¶¶ 9, 23.

> into a $6,000-a-month gated community near Chevron's headquarters in San Ramon, California.[30]

21. Nor are these the only instances where Chevron has been less than candid. To the contrary, Chevron had a New York private investigative firm, Kroll Associates, solicit a journalist "to gather information on the . . . plaintiffs under the guise of reporting an article."[31]

> Kroll invited [the journalist, Ms. Cuddehe] for an expenses-paid weekend at a luxury hotel on Bogotá, Colombia, where she would learn more about the mission. Sam Anson, a Kroll managing director, took Cuddehe out to lavish meals and even a night of dancing. A former journalist, Anson said his client Chevron was being unfairly pilloried. Cuddehe found him convincing.
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> * * * *
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> Chevron later claimed that it didn't approve of Anson's attempt to recruit Cuddehe. "He was off the reservation," a company spokesman told me. Then again, part of the reason large corporations and their lawyers retain firms like Kroll is so that, if an espionage mission goes bad, it can be disowned as off the reservation.[32]

22. While Chevron was mired in subterfuge, Claimants' public relations consultant, Sam Singer, pushed the company in a 2008 memorandum to create a new narrative "to avoid discussing the environmental and legal complexities of the case" and instead to "paint Ecuador and its newly elected leftist government red, and describe the country as 'the next Cuban missile crisis in the making.'"[33] No longer would Claimants be beholden to the evidence. Rather, Chevron would find new evidence to fit its new storyline.

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30 R-1200, ROLLING STONE at 11-12. *See also* R-184, Tr. of Borja/Escobar Conversation on Oct. 1, 2009 (13:03:33) at 6-7, 10-11; R-187, Tr. of Borja/Escobar Conversation on Oct. 1, 2009 (12:06:19) at 6. *See also* Respondent's Track 2 Counter-Memorial, Annex C: Response to Claimants' Bribery Allegations ¶¶ 6-8.

31 R-1202, Barrett at 167.

32 *Id*. at 167-168. *See also* R-1203, Mary Cuddehe, *A Spy in the Jungle*. THE ATLANTIC (Aug. 2, 2010); R-1204, *Journalist Exposes How Private Investigation Firm Hired by Chevron Tried to Recruit Her as a Spy to Undermine $27B Suit in Ecuadorian Amazon*, DEMOCRACY NOW! (Aug. 12, 2010).

33 R-1200, ROLLING STONE at 14; R-1206, Memo from S. Singer to K. Robertson re Ecuador Communications Strategy (Oct. 14, 2008).

23. That has never been more true than in the case of Alberto Guerra. By most accounts, Chevron has bestowed upon Mr. Guerra an even more generous financial package than the US$ 2 million-plus financial package it gifted to Mr. Borja. Mr. Guerra's testimony in the New York RICO case may parrot Chevron's latest claims, but that testimony, time and again, like Borja's, contradicts his prior, recorded and/or sworn statements.[34] Chevron nonetheless got what it paid for: "The oil company's sole witness to its central charge of bribery [in the RICO trial] was a corrupt Ecuadorean ex-judge named Alberto Guerra, whose entire family has been naturalized and relocated on Chevron's dime. The entire case turned on the testimony of a witness living under a corporate protection plan."[35] Nor, apparently, did Mr. Guerra's testimony come easily. According to Mr. Guerra, he met with Chevron's lawyers an unheard-of fifty-three times, for four to six hours a day, prior to trial.[36]

24. Claimants' allegations have been lurid but often demonstrably false.[37] Claimants still suggest that there were no real plaintiffs in the Lago Agrio Litigation and that the lawyers

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34 *See infra* § II.B.7.

35 R-1200, ROLLING STONE at 2-3; R-1202, BARRETT at 232-233. *See* R-853, *Chevron Offered Suitcase Full of Cash to Former Ecuador Judge Guerra in Exchange for Testimony* (May 1, 2013); R-854, *Dumb Chevron Lawyer Tapes Himself Offering A Bribe In Ecuador* (May 1, 2013).

36 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 13:12-22.

37 Paul Barrett describes Chevron's lawyers at Gibson Dunn this way:

> Someone with a more jaundiced view of corporate conduct might compare Gibson Dunn to the character Winston Wolf in the 1994 Quentin Tarantino movie *Pulp Fiction*. Played by Harvey Keitel, Wolf was a "cleaner," an underworld specialist in the art of tidying up bloody crime scenes. If, after other law firms had taken a few whacks at a problem, the client still had a mess on its hands, Gibson Dunn arrived with the legal equivalent of sponges, mop, and a bucket of Clorox.

R-1202, BARRETT at 175.

there in effect had no clients and were instead acting only for themselves.[38] But the Plaintiffs are real; they in fact expressly and publicly *re-authorized* their lawyers to act on their behalf.[39]

25. Whatever the Tribunal ultimately concludes about Chevron's conduct, or the Plaintiffs' conduct, cannot diminish the evidence of TexPet's contamination. No objective observer can find that TexPet operated in Ecuador with regard for either the residents or the environment. It instead put both at risk to maximize profits. TexPet had the necessary expertise in oil field operations, and the Republic reasonably expected it to employ sound infrastructure to minimize contamination in the first instance and to remediate in the second. It chose not to.

26. In explaining Texaco's business decision not to line the pits, Barrett explained that "[t]he term 'corporate responsibility' was not yet part of the business lexicon."[40] But that term has now been part of the business lexicon for more than two decades, and yet Chevron's "take no prisoners" approach in the Lago Agrio Litigation, and its expenditure of tens of millions of dollars on environmental experts both in Lago Agrio and in this arbitration, comes without apology. In a broadcast of the internationally-acclaimed news show *60 Minutes*, Chevron's spokesperson, Sylvia Garrigo, Corporate Manager of Global Issues and Policy, made the extraordinary claim that hydrocarbons harm no one: "I have makeup on, and there is naturally occurring oil on my face. Doesn't mean I'm going to get sick from it."[41] Claimants have taken the art of advocacy and denial to a new level.

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38 Claimants' Supp. Merits Memorial ¶¶ 85-87.

39 Respondent's Track 2 Counter-Memorial ¶¶ 264-266 (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); R-524, Kate Sheppard, *Amazon Plaintiffs to Chevron*: *We're Real!*, MOTHER JONES (Jan. 28, 2011) (same).

40 R-1202, Barrett at 29.

41 *Id.* at 161. *See also* R-356, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012) at 10.

27. The Republic does not see this dispute through the prism that all of the Amazon's ills lie at the feet of Texaco and Chevron. We have in the past noted the Government's own criticisms of PetroEcuador.[42] The Government has insisted that PetroEcuador fulfill its own responsibilities to the people of the region. And it largely has.[43] We instead share this history so that the Tribunal may better understand the skepticism, and at times even the hostility, Claimants have engendered in Ecuador in recent years. Members of the political class have criticized Claimants, but Claimants have not behaved honorably. They have polluted, and they have covered up that pollution. They have made representations that may be expedient in litigation but which belie the history of the Oriente. Their decision to retain lobbyists and lawyers and public relations firms — in the process intimidating witnesses into silence — rather than to acknowledge, even in part, their responsibility has earned them no friends.

28. In their most recent submission, Claimants effectively ask this Tribunal to rubberstamp certain of Judge Kaplan's findings in the RICO case. Even putting to one side that his decision is now on appeal, deference to the first-instance court's decision is inappropriate.

29. As this Tribunal knows, Chevron has decimated its enemies, often through its overwhelming resources. Judge Kaplan, who has considered several of the overlapping factual issues implicated in this proceeding and the RICO case, has been — by all accounts —

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42 *See, e.g.*, R-154, President Correa Press Conference Tr. (Apr. 26, 2007) at 8-9.

43 PetroEcuador, shortly after becoming Operator in 1990, began reinjecting production water. It also began lining waste pits used when new wells were drilled and during workovers of existing wells. In addition, PetroEcuador built gas powered plants to harness the natural gas instead of just flaring it, and it substantially increased the heights of its natural gas flares so as to reduce the pollutants released at ground level. The state-owned oil company also has implemented a system of mandatory spill reporting for all spills regardless of size or notoriety. For its part, PetroEcuador carried out its own self-funded remediation ("PEPDA") of portions of the Concession area to mitigate immediate harm to the affected human population. *See* Respondent's Track 2 Counter-Memorial ¶¶ 170, 172.

consumed by his own contempt for Steven Donziger.[44] The attorneys who had represented Donziger and the other defendants against Chevron for much of the proceedings withdrew because their clients were in arrears for more than US$ 1 million each.[45] Then, the attorneys who defended Donziger against Chevron at the RICO trial parachuted in just weeks before trial and were unfamiliar with the evidence.[46]

30. More fundamentally, the RICO defendants (Donziger and others) did not have the resources or otherwise chose not to cull the many millions of emails and other documents necessary to defend the case. REDACTED. As a consequence, Judge Kaplan did not have anywhere near the record, or the arguments, that have been presented in this forum. Claimants cannot, as they seem to assume, prove their case merely by invoking the decision of the first-instance court in New York. They must instead address the body of evidence the Republic has put forward in this proceeding. There is no collateral estoppel. There is no *res judicata*. But Claimants have chosen, repeatedly, not to address the record evidence, relying instead on their sweeping conclusions and many references to Judge Kaplan's decision.

31. The Republic previously has expressed its concern to this Tribunal that Claimants routinely cite to evidence in support of grand propositions; but under close scrutiny that evidence often fails to confirm the proposition for which it has been offered. Claimants' lawyers similarly and frequently make arguments extending well beyond what their own experts say, as if they are

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44 R-1202, Barrett at 184, 202, 227, 262; R-850, Keker & Van Nest LLP's Motion By Order To Show Cause For An Order Permitting It To Withdraw As Counsel For Defendants Steven Donziger, The Law Offices Of Steven R. Donziger And Donziger & Associates, PLLC, *filed in* RICO (May 3, 2013) at 1-4.

45 R-850, Keker & Van Nest LLP's Motion By Order To Show Cause For An Order Permitting It To Withdraw As Counsel For Defendants Steven Donziger, The Law Offices Of Steven R. Donziger And Donziger & Associates, PLLC, *filed in* RICO (May 3, 2013) at 8.

46 R-1202, Barrett at 202-204, 241-242, 262.

daring the Tribunal to read the fine print in their experts' reports. We understand that this case requires the review of a substantial body of evidence, but we ask the Tribunal not merely to rely on counsel *argument* from either side. Instead, fairness requires that the Tribunal review and evaluate the substantial underlying evidence with care.

Scope of This Supplemental Counter-Memorial

32. In light of the unusual procedural posture, this Supplemental Counter-Memorial responds to not one, but *three*, of Claimants' submissions.

- Claimants' May 9, 2014 Track 2 Supplemental Memorial on the Merits;
- Claimants' August 15, 2014 Post-Submission Insert to Claimants' Supplemental Memorial on Track 2 – REDACTED ; and
- Claimants' June 5, 2013 Track 2 Reply Memorial, in part.

33. Respondent initially was given until November 26, 2013 to respond to Claimants' Track 2 Reply. However, because the National Court issued its decision just two weeks before the deadline, this Tribunal, in its Procedural Order of 5 December 2013, directed the Republic to submit only those parts of its rejoinder "responding to the said factual basis alleged by the Claimants for their Claim for Denial of Justice." The Republic includes in this submission the remainder of its response to Claimants' June 5, 2013 Track 2 Reply, as supplemented by Claimants in their May 9 and August 15, 2014 submissions.

34. This Memorial is organized as follows: **Part II** addresses Claimants' factual allegations of misconduct in the Lago Agrio Litigation. **Part III** addresses Claimants' presumption that the alleged misconduct is imputed to the State. **Part IV** addresses Claimants' contention that the Republic is responsible for a denial of justice. **Part V** addresses Claimants' contention that the Republic is responsible for a breach of the Treaty. **Part VI** addresses the issue of available remedies in the event the Tribunal finds against the Republic on the issue of

state responsibility. **Part VII** addresses Chevron's environmental liability in respect to TexPet's oil extraction activities in the Oriente from 1965-1992. Below, we provide summaries of each part.

35. ***Part II: The alleged State misconduct.*** Claimants have scoured the Lago Agrio record for evidence to support their allegation that the first-instance Court acted corruptly. Finding none, they have purchased testimony to connect non-existent dots. As a threshold matter, however, Claimants focus on the wrong court decision. The first-instance Lago Agrio Judgment is not the operative ruling.[47] Because the intermediate appellate court, in accordance with the law of Ecuador and all civil code countries, conducted a *de novo* review of the relevant portions of the record, its decision is what matters here. And despite insinuations of irregularity, Claimants do not allege that the appellate judges committed fraud, nor have Claimants made any serious effort to impugn the appellate court's decision.

36. That said, Claimants' case fails even if the lower court decision were the correct target. Claimants convinced this Tribunal — over the Republic's vociferous objection — to permit the REDACTED

[47] *See infra* § II.B.1.

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37. The forensic evidence is unsurprising. After all, Claimants' near-limitless access to the Plaintiffs' attorneys' files uncovered no draft of the Judgment, nor any suggestion that Plaintiffs' attorneys' ever prepared one. Nor have Claimants provided any documentary or forensic evidence of any agreement between the Plaintiffs and Judge Zambrano. The contemporaneous emails instead reflect the Plaintiffs' counsel's intention to submit to the Lago Agrio Court, openly and transparently, the very documents Claimants point to as "unfiled" and thus "evidence" of ghostwriting.[51] Beyond those documents, the record contains ample source material for the other aspects of the Judgment Claimants question, including foreign law citations.[52]

38. Claimants enthusiastically wave Judge Zambrano's RICO testimony before the Tribunal, hoping it will distract the Tribunal from the evidence. But they make too much out of too little. Claimants note, for example, that Judge Zambrano was unable to define "TPH" (total petroleum hydrocarbons),[53] but fail to note that in Spanish the acronym is HTP, not TPH, thereby

48 *See infra* § II.B.2.

49 *See id.*

50 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 9-10, 54.

51 *See infra* § II.B.4.

52 *See id.*

53 Claimants' Track 2 Supp. Merits Memorial ¶ 77.

explaining his confusion.[54] Claimants also contend that Judge Zambrano lied during his RICO testimony when he testified that he used the New Computer to draft the Judgment. But even Claimants' expert concedes that REDACTED

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Judge Zambrano's testimony shows only that he was unprepared to testify and at times confused.[58] This stands in stark contrast to Guerra's testimony — both in the RICO proceedings and this arbitration — which is heavily rehearsed, ever evolving, and malleable to Claimants' needs.[59]

39. Claimants' allegations concerning Richard Cabrera and the Plaintiffs' counsel similarly are unavailing because the State is not responsible for Mr. Cabrera's conduct, even if Claimants' allegations are true. Even Judge Kaplan found, expressly and repeatedly, that the Court lacked any knowledge of the Plaintiffs' allegedly improper relationship with Mr. Cabrera.[60]

40. What, then, are Claimants left with in support of their ghostwriting charge? Perhaps the better question is, with whom are Claimants left? Alberto Guerra, and only Alberto

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54 *See infra* § II.B.5.

55 Lynch Expert Rpt. (Aug. 15, 2014) at 35.

56 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 39.

57 *Id.*

58 *See infra* § II.B.5.

59 *See infra* § II.B.7.

60 *See infra* § II.C.3.

Guerra. Claimants' entire ghostwriting case rests on the testimony of a heavily coached and handsomely paid *de facto* Chevron employee who has surfed the wave of this case from a disappointing life in Ecuador to relative luxury in the United States.

41. Along the way, Guerra professed to Chevron to have evidence supporting his various claims. But time has revealed that assertion, like the rest of his testimony, to be false. He produced no documentary evidence that the Plaintiffs drafted the Judgment, or that he ever edited it. And nothing on Guerra's computer hard drives or in the TAME shipping records supports his claim that he drafted and edited orders for Judge Zambrano in the Lago Agrio Litigation. After scores of meetings with Chevron's counsel, and multiple iterations of his story, Guerra, who has admitted to lying in the past, shows himself incapable of changing his ways.[61]

42. Claimants continue to peddle their story, but the evidence on which they rely fails to prove their factual allegations in respect to the Court, or, more generally, to the State.

43. ***Part III: Imputation of personal misconduct to the State.*** Claimants not only fail to establish their factual predicate for a finding of State responsibility, but they also construct an erroneous legal presumption. Claimants presume, without any support, that *any* misconduct by a *State actor* is necessarily imputed to the *State*. Not so.

44. Even if the Tribunal were to presume the truth of Claimants' factual case in its entirety, Claimants' attempt to impute the alleged bribery solicitations by one private actor, Mr. Guerra, allegedly on behalf of Judge Zambrano, fails as a matter of law. Claimants contend that Judge Zambrano sought bribes not only from the Plaintiffs but also *twice* from *Chevron*. On this basis alone, there is every reason to conclude that Mr. Guerra — and, if Mr. Guerra is to be believed, Judge Zambrano — acted not on behalf of the State, but rather, for their own personal,

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61 *See infra* § II.B.7.

pecuniary gain. A State official who solicits and accepts a bribe "*in a purely private capacity, even if [he] has used the means placed at its disposal by the State for the exercise of its function*," has not engaged in a wrong "attributable to the State."[62] If such conduct is not attributable to the State, then there can be no State responsibility under international law.[63]

45. This principle of *non-attribution* is especially pronounced in cases such as this where Chevron, by its own account, knew of the alleged bribery attempts in real time but chose to take no action and to remain silent instead. Any other rule would encourage litigants to lie in wait as an insurance policy against an adverse verdict.[64] Under these circumstances, the alleged misconduct cannot be imputed to the Republic.

46. ***Part IV: Chevron's allegation of a denial of justice.*** Claimants' storyline morphed belatedly into what it was intended to be since the inception of these proceedings: a premature denial of justice claim against the Republic. Claimants' denial of justice claim fails as a matter of international law. As a threshold matter, Claimants' case falls outside the jurisdictional reach of the Treaty. As Claimants themselves admit, there is no link between Claimants' denial of justice claim and the 1995 Settlement Agreement[65] — the only basis on which the Tribunal upheld jurisdiction *ratione temporis* in these proceedings. The only remaining operative agreement, the 1973 Concession, expired five years before the entry into force of the Treaty and does not qualify as a protected investment under the express terms of the

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62 RLA-547, *Yeager* Award ¶ 65 (emphasis added); *accord* RLA-548, *World Duty Free* Award ¶ 169.

63 RLA-549, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 91 (Cambridge Univ. Press 2002) ("The general rule [under customary international law] is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.").

64 *Id.* at 107-108 (attribution requires that the State actor has actual or apparent authority from the State for his conduct).

65 Claimants' Track 2 Reply ¶ 267.

Treaty. Because Claimants' denial of justice claim does not meet the elements of an "investment dispute" — a term defined in the Treaty — this Tribunal lacks jurisdiction over that claim.

47. Even if the Tribunal were to accept jurisdiction over the claim, Claimants have failed to establish the legal predicate for a denial of justice claim. Claimants have asserted two distinct bases for their claim: (1) the Lago Agrio Judgment is the product of judicial fraud; and (2) the Lago Agrio Judgment's factual findings, legal holdings, and assessment of damages are so unjust that they themselves constitute evidence of a denial of justice.[66]

48. Claimants' fraud claims are barred because Chevron chose not to pursue an action under Ecuador's Collusion Prosecution Act ("CPA") — an available remedy under Ecuadorian law designed specifically to address fraud claims based on evidence extrinsic to the trial record. Because exhaustion of remedies is a necessary predicate and an essential element of a denial of justice claim under customary international law,[67] Claimants do not have a viable claim against the Republic. Further, if one were to accept Guerra's paid-for testimony at face value, then Chevron could have taken additional measures available to it to in real time and had Judge Zambrano dismissed from the bench. It elected instead not to avail itself of these remedies, and thereby forfeited its right to pursue a denial of justice claim in this forum.[68]

49. Claimants' reliance on "legal error" by the Lago Agrio Court is misplaced for at least three independent reasons. **First**, Chevron's action before the Constitutional Court is currently pending. As a result, alleged legal errors of any other court are not attributable to the

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66 Claimants' Track 2 Supp. Merits Memorial ¶ 3, 56.

67 RLA-61, Paulsson, DENIAL OF JUSTICE at 111 ("[T]he very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion.").

68 *See infra* § IV.

judicial system as a whole.[69] Claimants' assertion that they are not required to exhaust local remedies because the Lago Agrio Judgment is enforceable remains unsupported by international law and is inconsistent with the fundamental requirement of a denial of justice claim that the system as a whole has been tested before the State can be held liable. Claimants' further assertion that any additional appeals are "futile" is unsupported and belied by Claimants' multiple successes in the Ecuadorian courts.[70] Accordingly, Claimants' failure to exhaust available remedies in respect of their (premature) legal error claims is fatal to this aspect of their denial of justice claim.

50. **Second**, legal error is not a sufficient basis for a finding of denial of justice under customary international law.[71]

51. **Third**, as shown throughout this submission, Claimants have failed to prove, no matter the applicable standard, the factual allegations concerning alleged infirmities in the Judgment's factual findings, legal holdings, and assessment of damages.[72] Denial of justice is an especially grave charge, and the proponent of the accusation must overcome the presumption in favor of the judicial process by means of clear and convincing evidence of highly egregious conduct.[73] Notwithstanding Claimants' hyperbolic rhetoric, a careful examination of the record establishes that the Lago Agrio Court never acted in any conspiracy with the Plaintiffs to effect a fraud, it has instead acted appropriately at all times, and its findings are appropriately grounded

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69 RLA-61, Paulsson, DENIAL OF JUSTICE at 109 ("The obligation is to establish and maintain a *system* which does not deny justice.") (emphasis in original).

70 Respondent's Track 2 Counter-Memorial, Annex A: Response to Claimants' Allegations Regarding Judicial Independence ¶¶ 39-40.

71 *See infra* § IV.

72 The one exception is the National Court's 2013 decision to halve the LAPs' award of damages. C-1975, Lago Agrio National Court Decision at 130-136, 145, 208, 221-22.

73 CLA-232, *EDF* Award ¶ 221 (the party alleging bribery must do so by "clear and convincing evidence").

on the record evidence and Ecuadorian law and practice. **Annex A** to this submission addresses and refutes Claimants' allegations of legal error in the Lago Agrio Litigation.

52. ***Part V: Chevron's allegation of a Treaty breach.*** Claimants' Treaty claims are derivative of their failed claim for breach of the 1995 Settlement Agreement.[74] As previously explained, Claimants cannot point to an obligation that the Government has breached within the four corners of the 1995 Settlement Agreement, and the Treaty cannot be used to procure new rights or impose obligations upon the Government that were never bargained for under the contract itself.[75] But even if Claimants' Treaty claims were independent of their contract claim, they would still fail because they depend upon the false premise that investment treaties create standards that are divorced from and more lenient than the minimum standard of treatment under customary international law. Because Claimants cannot establish a denial of justice under customary international law,[76] Claimants cannot prevail on their allegations concerning the courts' failure to administer justice in the Lago Agrio Litigation merely by repackaging their flawed denial of justice claims as treaty claims.

53. Most treaties, and certainly the present one, reflect obligations and minimum standards of treatment that are found under customary international law.[77] This is particularly true of the two provisions on which Claimants base their Treaty claims,[78] namely, the effective

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74 Respondent's Track 1 Supp. Counter-Memorial ¶ 50 (explaining that 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 Agreement).

75 *See generally* Respondent's Track 1 Supp. Counter-Memorial, §§ I, II & III; Respondent's Track 2 Counter-Memorial, § IV.

76 *See infra* § IV.

77 *See infra* § V.A.

78 *See infra* § V.A (discussing the U.S. BIT negotiating history and arbitral jurisprudence).

means and fair and equitable treatment ("FET") provisions.[79] U.S. negotiators have long confirmed that the United States in its bilateral investment treaties seeks "to re-affirm, not derogate from, relevant customary [international] law."[80] There is no language in the Ecuador-U.S. BIT demonstrating an intention by the United States and Ecuador to eliminate the exhaustion of local remedies (or any other) requirement to state a claim under customary international law. On the contrary, here the Contracting Parties endorsed the application under the Treaty of customary international law principles. Chevron's failure to exhaust local remedies is therefore fatal to Claimants' Treaty claims.

54. Claimants have likewise failed to substantiate their claims of Treaty breach for additional reasons. For example, Claimants have been provided with a fair and impartial forum in Ecuador in which to assert their claims and enforce their rights as an investor. A breach of the "effective means" clause of the Treaty requires proof of *systemic* failures, and cannot be based on the final outcome of a particular case.[81] Additionally, Claimants have been treated fairly and equitably. Nothing that Claimants allege suggests that their legitimate expectations at the time they made their investment were frustrated (assuming that this is in fact even an appropriate test). Claimants have never identified what specific assurances the Ecuadorian State allegedly provided them at the time of their respective investments, nor have they demonstrated that any particular assurances have been breached.[82] Claimants cannot establish a claim for breach of the Treaty's FET provision absent proof of (1) their "legitimate expectations" at the time of their

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79 The FET clause subsumes full protection and security and the prohibition against arbitrary and discriminatory behavior. But even if the two provisions are viewed independently, they should not be understood to reflect standards or obligations different from customary international law. Thus, like Claimants' two other Treaty claims, i.e., FET and effective means, these too must fail.

80 RLA-410, José Alvarez, *A BIT on Custom*, 42 N.Y.U.J. INT'L L. & POL'Y 17, 33 (2009).

81 *See infra* § V.B.

82 *See infra* § V.B.2; *see also* Respondent's Track 2 Counter-Memorial ¶¶ 419-425.

respective investments (i.e., both TexPet's and Chevron's), (2) the source of those expectations, (3) the nature and degree of the State's failure to satisfy those expectations, and (4) the causal nexus to the claimed resulting damage.[83] That Claimants failed even to identify (much less offer proof of) their respective "legitimate expectations" at the time of their initial investments is grounds enough to reject the claim.

55. Nor can Claimants wield the Treaty to hamper the Republic's right to inform the public of — and even to condemn — the activities of investors whose bad acts violate domestic law and cause harm to its citizens. Where (as here) Claimants have not shown that the Executive's actions have actually influenced the Judiciary, the pronouncements of government officials do not and cannot provide grounds for a finding of an international delict.

56. ***Part VI: Available remedies, even assuming State responsibility.*** Claimants seek a remedy — nullification of the Lago Agrio Judgment and an award of damages to Chevron — that is neither available nor appropriate. Nullification rests on an untenable presumption, namely that but for a denial of justice, Chevron would have prevailed completely on its defenses in Ecuador's courts and would have defeated the Plaintiffs' claims in their entirety. As Professor Paulsson explains in *Denial of Justice*, that presumption cannot be squared with the reality of denial of justice claims, in which "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."[84] Professor Paulsson tries to support Claimants' nullification request in his second expert report but his scholarly writings say otherwise.

57. Indeed, Professor Paulsson and other relevant authorities agree that the proper remedy is to put the claimant back in the position it would have occupied but for the denial of

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83 *See infra* § V.B.2.

84 RLA-61, Paulsson, DENIAL OF JUSTICE at 225 (emphasis in original).

justice.[85] To do so here, the Tribunal must determine how the Plaintiffs' claims against Chevron should fairly have been decided — and then craft a remedy to effect that result. The amount of any actual harm *caused* by Chevron must be determined during Track 3 when, as the Tribunal has ruled, the amount of any actual harm allegedly *suffered* by Chevron should be determined. The offset of those amounts against one another will inform the Tribunal's remedy should it find a denial of justice under customary international law, or a Treaty breach, in this arbitration.

58. No principle of international law confers on this Tribunal the power to usurp the national judiciary of a sovereign State by nullifying a domestic court judgment rendered in favor of non-parties to the arbitration. And it is beyond question that nullifying the Lago Agrio Judgment would unjustly enrich Claimants, in violation of international law. "If a denial of justice claim resulted in compensation equal to the claim, then the investor would in effect swap a risky litigation claim for certain, risk-free income."[86] To declare that Claimants bear no liability whatsoever for the environmental damage caused by Texaco in the Oriente would unjustly enrich Claimants to the extent Chevron would have been ordered to pay damages in the Lago Agrio Litigation had it proceeded without a denial of justice. This Tribunal must ascertain those damages to appropriately discount any award Claimants might otherwise receive.

59. ***Part VII: Chevron's environmental liability.*** Claimants no longer seriously contest that contamination exists in the Oriente or that TexPet is at least one source of that pollution. Claimants now argue that: (1) Judge Kaplan declared the Plaintiffs' environmental investigation a fraud;[87] (2) investigations by the Republic's environmental experts, LBG, fail to

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85 *See infra* § VI.

86 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1088.

87 Claimants' Track 2 Supp. Merits Memorial, § IV.B.

validate the Lago Agrio Judgment;[88] (3) TexPet-caused oil contamination does not cause risks of adverse health effects;[89] and (4) Respondent's showing that the Judgment was reasonable is mere "attorney argument."[90] All four arguments fail.

60. **First**, Judge Kaplan resolved *different* claims of *different* parties based on a *different* record. His findings concerning the Plaintiffs' conduct are not entitled to deference here. The Plaintiffs are not parties to this Arbitration, and their conduct is not attributable to the Republic. Even if the Cabrera and Calmbacher reports suffered from infirmities, the Lago Agrio Court excluded both from consideration. And Mr. Russell's public relations damages estimate — used against the Plaintiffs in the RICO trial — was never even presented to the Lago Agrio Court.

61. **Second**, contrary to Claimants' assertions, LBG's 2013 site investigations were never necessary to validate the Judgment; the data submitted in the Lago Agrio proceedings are more than adequate for that task. But LBG's 2013 investigations and now its 2014 investigations have more than confirmed its earlier conclusions based on the data alone: TexPet's contamination has spread far beyond the former well sites; the people of the Oriente are exposed to toxic and carcinogenic contaminants; and TexPet's past practices are a source of those remaining contaminants.[91] In its most recent investigations, LBG found, among other things, toxic and carcinogenic contaminants in the water and soil ten to literally hundreds of times above health-based standards at AG-6;[92] toxic and carcinogenic contaminants in sediments fifty to 800

88 *Id.* § IV.C.

89 *Id.* § IV.D.

90 *Id.* § IV.E.

91 RE-11, LBG Expert Rpt. (Dec. 16, 2013), Executive Summary and Summary of Expert Opinions.

92 RE-23, LBG 2014 SI Rpt. § 5.2.

times higher than applicable standards at SSF-55 and LA-35;[93] and toxic and carcinogenic contaminants in the water and soil around the pits 1,000 to 6,000 times higher than applicable standards at SSF-34 and AG-4.[94] TexPet used the *same* infrastructure, the *same* operating protocol, and the *same* substandard practices at every one of the sites it drilled and managed in the Oriente. Claimants have offered no evidence or argument to counter the resulting presumption that a more comprehensive study would confirm still more contamination attributable to them.

62. **Third**, Claimants make the preposterous assertion that exposure to crude oil and its carcinogenic constituents does not cause risk of adverse health effects. That position is as bankrupt as those taken by tobacco companies and asbestos companies when they made similar arguments about their products. As Dr. Grandjean, Dr. Strauss, and now Dr. Laffon make clear, there is more than ample evidence to support a finding that the residents of the Oriente, who have been exposed to crude oil on a daily basis for decades, face a significantly higher risk of adverse health impacts than those not exposed.[95] Regrettably that exposure is repeated each time a resident of the Oriente bathes or washes clothes in a contaminated stream, walks barefoot on contaminated surfaces, drinks and cooks with contaminated water, eats contaminated meat and poultry, and more.

63. **Fourth**, Claimants suggest that slapping the label "attorney argument" on the Republic's showing that the Judgment's damages are reasonable obviates their need to respond. But Claimants are wrong, and their silence implies they have no convincing answers.

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93 *Id.* § 5.9 (SSF-55); *id.* § 5.7 (LA-35).

94 *Id.* § 5.5 (SSF-34); *id.* § 5.6 (AG-04).

95 *See infra* § VII.E.

64. Both the Lago Agrio and the arbitral Records establish that the former TexPet sites remain contaminated, the contamination has migrated and continues to migrate, it is in the region's groundwater and in the interconnected streams of the rainforest, and the contamination has harmed, and continues to harm, the region's inhabitants and environment. Under these circumstances, a decision exonerating Chevron would have required the Court to ignore all that it saw, smelled and heard during scores of judicial site inspections. Chevron seeks but should not be permitted to use this proceeding — contrary to its express representations before the U.S. courts[96] — to escape from its own, repeated judicial promises or to run away from the overwhelming evidence of its liability to indigenous Ecuadorian citizens who have no right to be heard in this forum.

II. The Republic Has *Not* Participated In Any Fraud Against Claimants

A. Claimants Have Ignored Both Critical, Contemporaneous Documentary Evidence And Their Evidentiary Burden

65. As shown in the pages that follow, Claimants continue to ignore the substantial body of evidence cited by the Republic in its Rejoinder, including voluminous, contemporaneous documents that directly contradict their allegations. REDACTED But Claimants ignore, again, the REDACTED Claimants cannot will this evidence away. This Tribunal has the duty to assess all of it.

66. Of course, there can be no finding of a violation of customary international law absent clear and convincing proof of highly egregious conduct that can be imputed to the

96 *See* Annex A ¶¶ 6-14.

national judicial system as a whole.[97] Because Claimants rely entirely on circumstantial evidence, the Tribunal must "assess whether or not the evidence produced by the Claimant[s] is sufficient to exclude *any* reasonable doubt."[98] The evidentiary record, taken as a whole, in fact proves that the Lago Agrio Judgment (1) was written by Judge Zambrano, (2) who relied on and quoted only evidence submitted openly by the parties. Claimants' ethically challenged payments to fact witnesses cannot change the facts as established by the contemporaneous evidence.

B. The Republic Did *Not* Participate In Any Alleged "Ghostwriting" Of The First Instance Court's Judgment

1. The Appellate Court Decision Is The Operative Decision

67. Claimants' effort to impugn the Ecuadorian courts is focused on the Judgment rendered by Judge Zambrano. But as Dr. Andrade explains, this decision is not the operative judgment because the intermediate appeals court reviewed and affirmed it *de novo*.[99]

68. Specifically, as required under Ecuadorian law, the intermediate court conducted a *de novo* review of the relevant portions of the trial record cataloguing the scope of the environmental damage, finding that none of the allegations of misbehavior at the trial court level tainted the finding of liability in light of the overwhelming evidence of environmental contamination in the underlying record.[100] The intermediate appellate court also found that the first-instance court did not rely on Mr. Cabrera, and thus determined that there was no basis to

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97 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)*, 2006 I.C.J. Rep. 225 (Judgment of 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.").

98 CLA-81, *Bayindir* Final Award ¶ 142.

99 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 85-86.

100 C-991, Lago Agrio Appellate Decision at 9-11, 13.

annul eight years of work assembling the trial record.[101] Although there are insinuations that the appointment of the intermediate appellate court judges was somehow irregular,[102] Claimants have nowhere alleged that the judges engaged in any fraud, nor have Claimants made any serious effort to impugn the appellate court's decision, other than arguing that no Ecuadorian court is capable of applying the rule of law.[103]

69. In any event, as shown below, the record evidence does not support — and instead directly contradicts — Claimants' accusations of impropriety in respect to the first instance Judgment.

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101 C-991, Lago Agrio Appellate Decision at 11-13; *see also* R-1207, Brief for Defendants-Appellants Hugo Camacho Naranjo and Javier Piaguaje Payaguaje, 14-0826-cv, *filed with* the United States Court of Appeals for the Second Circuit, July 1, 2014 at 29-30, 34, 46-48, 52.

102 Claimants' insinuations are misguided. *See* Annex A § G.1.

103 Respondent's Track 2 Counter-Memorial, Annex G ¶¶ 43 *et seq.* (explaining that each of the five substitute judges was properly appointed by the Judicial Council before Judge Zambrano assumed the Presidency of the Court of Sucumbíos and became Acting Provincial Director of the Judicial Council); *See* Annex A § G.

104 As we show below, the lawyer argument contained in Claimants' Supplemental Memorial repeatedly overreaches, well beyond what their own expert has affirmed — or could affirm given the evidence.

105 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 9.

- REDACTED

106 *Id.*; Lynch Expert Rpt. (Aug. 15, 2014) at 27-33.

107 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 10-12.

108 *Id.*¶ 18.

109 *Id.* ¶ 24.

110 *Id.* ¶¶ 19-22.

111 *Id.* ¶¶ 48-50.

REDACTED

3. REDACTED

112 REDACTED

115 *Id.* ¶¶ 77-78.

REDACTED

116 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 6.

117 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 10, 18-19.

118 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 23.

119 Lynch Expert Rpt. (Aug. 15, 2014) exs. 48 and 49. REDACTED

120 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 23.

REDACTED [121] REDACTED

121 Lynch Expert Rpt. (Aug. 15, 2014) at 35.

122 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 39.

123 *Id.*

124 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶¶ 18-19.

125 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 68.

126 *Id.*

127 *Id.* ¶¶ 67-68.

78. REDACTED

[redacted]

128 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 27.

129 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 15, 26-27.

130 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 11; Lynch Expert Rpt. (Aug. 15, 2014) at 23.

131 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 48-49.

132 REDACTED

[redacted]

REDACTED[133] REDACTED

133 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 44.

134 *Id.*

135 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶¶ 7, 24-25; Lynch Expert Rpt. (Aug. 15, 2014) at 38.

136 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 72-73.

137 Lynch Expert Rpt. (Aug. 15, 2014) at 38.

138 *See* R-1272, Microsoft, *How to Recover a Lost File in Word 2007* (REDACTED

139 C-1980, RICO Trial Tr. at 1621-22.

82. REDACTED

[redacted]

140 C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶¶ 13, 47, *filed in* RICO.

141 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 56-58, 64.

142 *Id*. ¶ 84.

143 *Id*. ¶¶ 62-63, 83.

144 *Id*. ¶¶ 20-21, 23-24.

REDACTED

4. A Substantial Body Of Evidence Ignored By Claimants Shows That The Plaintiffs' Counsel Did *Not* "Ghostwrite" The Final Judgment

85. REDACTED

86. This is *not* the RICO case where Chevron merely had to show up to prevail. The RICO Defendants were grossly outgunned and unable to review the millions of emails and other contemporaneous documents at their disposal because their skeletal trial team had assumed the engagement just days or weeks before the trial. Nor did the RICO Defendants have REDACTED . Claimants seek to do no more than invoke Judge Kaplan's decision, ignoring the fact that that decision is *not* res judicata here, and that much of the evidence that the Republic has marshaled in this arbitration was never presented to Judge Kaplan. Nor, as just explained, can Claimants brush aside compelling evidence, such as REDACT It is hard evidence, not self-serving testimony, that carries the most weight.

87. Claimants continue to rely on two discredited and unpersuasive sources of "evidence" to argue that the Lago Agrio Judgment was ghostwritten. **First,** they point to the paid-for and rehearsed testimony of disgraced former judge and admitted serial liar Alberto Guerra. We address Mr. Guerra in Section B.7 below; for now it suffices to say that his testimony is tied only to the treasure trove of money and benefits Claimants have provided and continue to provide him, not to the truth. **Second,** Claimants point to the presence in the Judgment of allegedly internal work product of the Plaintiffs' counsel that Claimants maintain was never filed with the Lago Agrio Court.[145]

88. But Claimants have failed to establish that the work product in question was not in fact offered as evidence, openly and transparently.[146] Contrary to Claimants' protestations, Respondent's focus on Claimants' failure to establish their case does not "turn the evidentiary process on its head."[147] Rather, it demonstrates that Claimants cannot meet their burden of establishing — by clear and convincing proof of highly egregious conduct that can be imputed to the national judicial system as a whole — a violation of customary international law.[148] Claimants brought this arbitration; they must prove their case to win it. Unfortunately for Claimants, their case fails on the merits and the law.

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145 The allegedly unfiled work-product documents are the: **Fusion Memo**, which addressed the specific factual circumstances of Chevron's merger with Texaco; **Clapp Report**, a report drafted in 2006 by Boston University Professor Richard Clapp and his U.S. research team, which the Plaintiffs commissioned as a "Health Annex" as evidence linking the release of oil contaminants to adverse health effects; **Moodie Memo**, an internal memorandum addressing various causation theories, drafted by Plaintiffs' intern Nicolas Moodie in February 2009; **Fajardo Trust Email**, an internal email among the Plaintiffs' counsel; **January and June Index Summaries**, two versions of one Excel spreadsheet that informally summarizes the Court record as of January 2007; and the **Selva Viva database**, a compilation of testing results from both Chevron's and the Plaintiffs' judicial inspections. *See* Respondent's Track 2 Rejoinder § IV.3–IV.8. In their most recent filing, Claimants also point to a so-called **Erion Memo**, an internal memorandum written in 2008 by then-Plaintiffs' legal intern Graham Erion, titled "Chevron's Liability for Texaco in Fact and Law." *See* Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶¶ 36 *et seq*.

146 Respondent's Track 2 Rejoinder ¶¶ 275-283; Respondent's Track 2 Counter-Memorial, Annex D ¶¶ 10-12.

147 Claimants' Track 2 Supp. Merits Memorial ¶ 94.

148 *See* Respondent's Track 2 Counter-Memorial ¶ 285.

89. Foundationally, it is undisputed that documents submitted to the Lago Agrio Court by *both* parties were not always entered into the record — including for example, at least four motions submitted by Chevron[149] — and that the court's record-keeping was more of a problem for documents submitted at JIs.[150] Further, many additional documents were submitted on CDs and DVDs that are unavailable or have been corrupted and are unrecoverable.[151] Claimants' reliance on Judge Kaplan's finding that the RICO defendants did not prove documents were submitted to the court at JIs is misplaced.[152] The Republic in this arbitration, unlike the defendants in the RICO action, has proven — with video and documentary evidence, no less — that such submissions occurred.[153] The doctrines of *res judicata* and collateral estoppel cannot be applied from the RICO trial in which the Republic played no part. This Tribunal must instead assess the evidence submitted in *this* proceeding. And it is sufficient here to note that Claimants nowhere address or challenge the contemporaneous evidence offered by the Republic demonstrating that the allegedly internal work product of the Plaintiffs was either submitted to the Court at judicial inspections or otherwise publicly available.

90. The **Fusion Memo** was properly submitted to the Court at the AG-02 JI on June 12, 2008. This conclusion is compelled by incontrovertible evidence that Plaintiffs' counsel intended to submit the Fusion Memo and its accompanying exhibits to the Court; targeted June

149 *See* Respondent's Track 2 Rejoinder ¶¶ 284-292.

150 *See, e.g.*, R-965, Kelsh Dep. Tr. Vol. II (Feb. 6, 2013) at 283:8-285:2 (Chevron's expert, Dr. Kelsh, explaining that he had to re-record his video testimony because the Court lost the first version after it was submitted by Chevron at a Judicial Inspection).

151 *See* Respondent's Track 2 Rejoinder ¶¶ 276-281, 291-292.

152 *See, e.g.*, Claimants' Track 2 Supp. Merits Memorial ¶ 98 n.228. Claimants also assert that Judge Zambrano's RICO trial testimony is at odds with documents having been submitted to the Lago Agrio Court at judicial inspections. *Id*. ¶¶ 95-96. Not so. Whether Judge Zambrano "sometimes found documents regarding the case in front of his office door, which were not incorporated into the case records" is an entirely separate issue from whether documents were submitted to the Court at judicial inspections and later incorporated into the record.

153 Respondent's Track 2 Rejoinder § IV.F.

12, 2008 as the submission date; made a presentation to the Court on that date regarding the Chevron/Texaco merger; circulated the Fusion Memo and its attachments in the days leading up to the AG-02 JI, in preparation for submitting them to the Court; and all of the Fusion Memo's cited exhibits are in the Court's record from June 12, 2008.[154] Nor is it disputed that the Plaintiffs' attorneys did not further correspond about the Fusion Memo after June 12, 2008, presumably because it was then already before the Court.[155]

91. The **Clapp Report** was properly submitted to the Court at a JI — either Palanda, on April 11, 2007, or Shushufindi, on April 25, 2007. This conclusion is compelled by incontrovertible evidence that the Plaintiffs' counsel commissioned the Clapp Report for the express purpose of submitting it to the Court as a "Health Annex"; memorialized their plan to file the Clapp Report at the first JI following its finalization; and finalized the Clapp Report in the Spring of 2007.[156] As with the Fusion Memo, the Plaintiffs' attorneys no longer engaged in email discussions about the Clapp Report after the targeted submission date, presumably because it was then already before the Court.

92. Claimants continue to ignore the contemporaneous evidence showing the Plaintiffs' counsel's intent to submit these documents to the Court during the site inspection process while simultaneously offering absolutely no comparable evidence, e.g.,

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154 *Id*. ¶¶ 293-296.

155 Similarly, context suggests that the **Erion Memo** was provided to the Court at a JI. The memo was intended originally to serve as background for a corporate law expert. Presumably, the purpose of commissioning such a report would have been to file it with the Court. After deciding not to hire an expert (or being unable to do so for financial or other reasons), the Plaintiffs submitted the memo itself to the Court as part of the numerous debates between the parties over successor liability. The Republic continues to investigate Claimants' allegations regarding the Erion Memo — raised for the first time in their most recent pleading — and reserves the right to respond further in its March 2014 Rejoinder.

156 Respondent's Track 2 Rejoinder ¶¶ 301-307. Since filing its Rejoinder, Respondent has learned that the next JI following the finalization of the Clapp Report was Palanda, on April 11, 2007. Respondent previously believed Shushufindi, on April 25, was the next judicial inspection. *Id*. ¶ 305. In any event, the Clapp Report was presumably submitted at one of these two JIs.

contemporaneous, internal emails of the Plaintiffs' counsel (despite Claimants' practically unfettered access to those communications) suggesting that they ever changed or abandoned their documented plans to submit both the Fusion Memo and Clapp Report to the Lago Agrio Court.

93. Claimants' contention that the **Moodie Memo** served as an unfiled "source document" for the Lago Agrio Court's discussion of certain causal theories is belied by two facts, neither of which is addressed by Claimants. **First,** the Court was permitted to look to foreign jurisprudence. Quite properly, the Lago Agrio Judgment segues into its review of foreign jurisprudence with a detailed discussion of an Ecuadorian Supreme Court of Justice decision, *Delfina Torres*, which itself undertakes — and expressly approves of — reliance on foreign law by Ecuadorian judges.[157]

94. **Second,** the very legal theories at issue were properly put before the Court in an *amicus* brief drafted by ELAW and based in part on the Moodie Memo.[158] Claimants make no effort to explain why the Court did not rely, or could not have relied, on the ELAW *amicus* brief as a basis for the Court's causation discussion found in the Judgment.[159] Nor do Claimants respond to three of the more glaring flaws in their contention that the Moodie Memo is part of a ghostwriting narrative: (1) two of the four theories of causation examined in the Lago Agrio Judgment are not even mentioned in the Moodie Memo; (2) the Moodie Memo does not refer to English law — yet the Judgment does;[160] and (3) Claimants falsely stated that both the Moodie Memo and Judgment cite to the *Seltsam v. McGuiness* case — yet the Judgment does not.[161]

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157 C-931, Lago Agrio Judgment at 86-88; C-1586, *Delfina Torres* (Oct. 29, 2002) at 25-26.

158 Respondent's Track 2 Rejoinder ¶¶ 308-320.

159 *Id.*

160 *Id.* ¶ 312.

161 *Id.* ¶ 320.

95. Claimants' argument that the Judgment copied whole sentences from the **Fajardo Trust Email** is pure fiction. No full sentence from the Fajardo Trust Email appears in the Judgment. And the overlap in content between the Fajardo Trust Email and the Judgment is readily explained by the Court's entirely proper reliance on, and quotations from, the Ecuadorian Supreme Court case of *Andrade v. Conelec*.[162] Indeed, in its Rejoinder, the Republic demonstrated — using textual examples highlighted by Claimants' own expert, Professor Leonard — that the *Conelec* decision served as the basis, independently, for both the Fajardo Trust Email and the Lago Agrio Judgment.[163]

96. It is not our purpose here to repeat all of the detailed evidence previously submitted by the Republic showing the demonstrable falsity of Claimants' assertions.[164] It is instead enough to note that Claimants have chosen *not* to address this evidence, and have waived their right to do so going forward. We have complained many times that Claimants continue to present moving targets; they offer new allegations while pronouncing their earlier theories "established" and "proven" without engaging in any meaningful analysis of the competing evidence. Put most simply, it strains credulity to think that the Plaintiffs' counsel ghostwrote the Judgment while meticulously avoiding any forensic or paper trail whatsoever yet simultaneously

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162 *Id*. ¶¶ 321-326.

163 *Id*. ¶¶ 323-326; *see* Respondent's Track 2 Counter-Memorial, Annex D ¶¶ 50-51.

164 *See* Respondent's Track 2 Rejoinder ¶¶ 327-334. As for the **January Index Summaries**, Claimants have made no effort to show that the Plaintiffs created or maintained those summaries, or that the summaries were not provided to the Court either formally or informally. Regardless, any "overlap" between the January Index Summaries and the Judgment — and Claimants' putative examples of overlap are shaky, at best — is to be expected, considering the January Index Summaries and the Judgment summarize or excerpt the *very same docket entries* in the Lago Agrio Litigation. *See also id*. ¶¶ 335-337; Respondent's Track 2 Counter-Memorial, Annex D ¶¶ 24-32 (regarding the Selva Viva Database).

were so careless that they cited numerous documents Plaintiffs' attorneys allegedly knew were not in the record.[165]

97. Also unaddressed by Claimants is a series of correspondence between the Plaintiffs' counsel in the days and weeks before the Judgment that demonstrate that they had no knowledge when the Judgment might issue, or in whose favor the Court would rule.[166] Between December 17, 2010 and January 8, 2011 (56 and 34 days before the Judgment issued), Plaintiffs' counsel traded at least five e-mails among themselves reaffirming their need to file their *alegato* soon, because "the Judge can issue a writ for judgment at any time, any day"; expressing concern over a new argument raised by Chevron, to which Plaintiffs "[did] not know how the Judge is going to react"; conveying a sense of urgency once Chevron submitted its alegato, on the basis that "Chevron has gotten ahead of us . . . . All the more reason to speed up our work, otherwise the Judge could be convinced by Chevron's theory"; and explaining that Chevron might have rushed to file its *alegato* because "[t]he one who strikes first has greater success or causes greater impact . . . . They want to influence the judge with their theory."[167]

98. These contemporaneous e-mails, individually and collectively, are completely consistent with the lack of any evidence whatsoever of a draft of the Judgment on the Plaintiffs' or Guerra's computers. And they are flatly *inconsistent* — indeed, mutually exclusive — with Claimants' ghostwriting theory; had Plaintiffs' attorneys drafted the Judgment, they would have had no cause to be concerned about the timing or content of their *alegato*.[168]

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165 Respondent's Track 2 Counter-Memorial, Annex D ¶¶ 27.

166 Respondent's Track 2 Rejoinder ¶¶ 222-228.

167 *Id.* ¶ 227.

168 Claimants presumably recognize as much, which explains why they initially included these e-mails in their chronology submitted in the RICO action — but deleted reference to them from the chronology they submitted to this Tribunal. *Id.* ¶ 228.

99. Despite unprecedented and near-limitless access to the files of the Plaintiffs' attorneys, Claimants have found not even one draft of the Judgment among the Plaintiffs' computer and paper files. Nor have Claimants found even a shred of evidence that the Plaintiffs' attorneys prepared one, let alone that they prepared the Judgment itself.[169] REDACTED

100. Claimants have likewise produced no documentary or forensic evidence of any agreement whatsoever between the Plaintiffs' counsel and Judge Zambrano. They have not provided any evidence that Judge Zambrano solicited, or that the Plaintiffs agreed to pay, a bribe. Of course, Mr. Guerra says there was a bribe — but he has no evidence to support that claim.

5. Judge Zambrano's RICO Testimony Does Not Prove Claimants' Case, Nor Does It Trump The Evidence

101. In light of the contemporaneous forensic and email evidence, all of which clearly contradicts their claim that the Plaintiffs ghostwrote the Judgment, Claimants are now trying to win their case *not* by proving their own allegations, but instead REDACTED

But contemporaneous documentary and forensic evidence carry substantially more weight than testimony.

169 *See* Respondent's Track 2 Counter-Memorial, Annex D ¶¶ 2-7.

170 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 13-18; *see supra* §§ II.B.2 & B.3.

102. Judge Zambrano's testimony in the RICO action does not support the immense weight Claimants now place on it. Far from revealing Judge Zambrano to be the criminal and technological mastermind Claimants portray him to be, the testimony instead lays bare that Judge Zambrano went to New York unprepared to testify (because he had nothing to hide) and understanding far too little about computers to have facilitated Claimants' ghostwriting narrative.

103. Claimants trumpet Judge Zambrano's evident lack of preparation, failing completely to recognize that it represents a basic flaw in their case. They insist that Judge Zambrano has much riding on his successful defense of the legitimacy of the Lago Agrio Judgment, including his current job and future financial security (by virtue of the bribe Claimants allege Judge Zambrano is to be paid once the Plaintiffs collect on the Judgment).[171] At the time Judge Zambrano testified in New York, it had been nearly three years since he issued the Judgment. It should come as no surprise that he could not remember all of its details. If Judge Zambrano truly did not write the Judgment issued over his name — yet his livelihood depended on defending it — then he undoubtedly would have reviewed it forward and backward immediately before testifying to its contents.[172] He obviously did not do so.

104. Ironically, Claimants *do* recognize that perhaps the best way to immediately call Judge Zambrano's credibility into question is to liken him to their own star witness, Alberto Guerra. Claimants magnanimously offer that, "[w]hatever scrutiny is applied to Guerra's testimony must also be applied to Nicolás Zambrano's testimony."[173] The two men, however, are not similarly situated. Unlike Mr. Guerra's story, which remains contradicted or unsupported

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171 Claimants' Track 2 Supp. Merits Memorial ¶ 67.

172 Had he done so, Claimants presumably would point to Judge Zambrano's *total* recall as not credible and evidence of ghostwriting. It's "heads, Claimants win; tails, Respondent loses." In any event, Judge Zambrano's earlier resistance to attending a deposition in Peru, and to testifying in the RICO action, further belies Claimants' position that he is beholden to the Ecuadorian Government that he must defend the Judgment.

173 Claimants' Track 2 Supp. Merits Memorial ¶ 66.

by the forensic and documentary evidence, the forensic evidence strongly supports the fundamental point of Judge Zambrano's testimony: He wrote the Judgment.

105. Claimants speculate, with no corroborating evidence, that Judge Zambrano stands to recover US$ 500,000 *if* the Plaintiffs ever collect on the Lago Agrio Judgment. Mr. Guerra, on the other hand, has *already* been paid, and continues to be paid, exorbitant sums of money and other benefits by Claimants for his testimony. Even by the terms of Mr. Guerra's current tale, Judge Zambrano emphatically rejected Claimants' significant efforts to buy his testimony and loyalty.[174] That refusal speaks volumes.

106. To be sure, certain specific details of Judge Zambrano's trial testimony were internally inconsistent. Several reasons exist for this — all of which are exponentially more likely to be true than a bribery scheme of which Claimants have found no evidence, and none of which amounts to a denial of justice or other violation of international law.

107. It is possible, for example, that Judge Zambrano, motivated by personal pride and a reluctance to concede minor violations of Ecuadorian procedural practice, was not entirely forthright in his RICO testimony. The foremost example concerns when Judge Zambrano began writing the Judgment — a point on which Claimants focus.[175] In Claimants' words, "Zambrano went back and forth about when he began working on the Judgment, eventually settling on the version that while he did some advance work, he did not actually begin drafting the Judgment until after he was reassigned to the case in October 2010."[176] REDACTED

174 C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 60, *filed in* RICO.

175 Claimants' Track 2 Supp. Merits Memorial ¶¶ 72-74. Pride likely also played a role in Judge Zambrano's reluctance to recall allegations of misconduct from his past. *See id*. ¶ 90. That Judge Zambrano may not have appreciated the importance of full disclosure in the RICO action is not evidence of ghostwriting in respect of the Lago Agrio Judgment.

176 Claimants' Track 2 Supp. Merits Memorial ¶ 74.

REDACTED

Although technically a violation of Ecuadorian procedural practice, drafting portions of the Judgment before issuing the *auto para sentencia* — which Judge Zambrano did on December 17, 2010 — would have made sense from a practical standpoint and would not have deprived either party of due process rights.

108. Beyond the timeline, Claimants focus on Judge Zambrano's description of the judgment-writing process.[178] Specifically, Claimants take issue with two of the representations Judge Zambrano made regarding Evelyn Calva, the woman he hired to assist him at the computer while he composed the Lago Agrio Judgment. *First*, Judge Zambrano insisted that he dictated the entire judgment to Ms. Calva, without ever showing her any source documents. *Second*, Claimants contend Judge Zambrano testified that Ms. Calva found through internet research all of the foreign law materials cited in the Judgment. Neither point is the watershed revelation Claimants characterize it to be.

109. To the first point, Judge Zambrano would not be the only professional who prefers dictation, even dictation of source material. But even if Judge Zambrano in fact shared with Ms. Calva source documents as he dictated the Judgment to her, so what? The narrow question whether Judge Zambrano literally dictated the entire Judgment to Ms. Calva, or instead showed her documents along the way, is hardly determinative of ghostwriting by the Plaintiffs.

110. To the second point, REDACTED

177 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 23.

178 Claimants' Track 2 Supp. Merits Memorial ¶¶ 78-86.

REDACTED [179] That is now an established fact. Beyond that, as the Republic has explained previously and elsewhere in this submission, Judge Zambrano had much of the foreign case law cited in the Judgment before him in the court record or submitted at JIs. The Tribunal should decline Claimants' invitation to ignore the contemporaneous, forensic evidence in favor of Judge Zambrano's RICO testimony — given in trying conditions almost three years after the Judgment issued — that the foreign law in the Judgment instead came from Ms. Calva's research.

111. Claimants also make much of the fact that Judge Zambrano initially did not mention any arrangement with Mr. Guerra whereby Guerra would assist Zambrano with orders in civil cases (other than the Lago Agrio case).[180] Any such arrangement is irrelevant to this arbitration. Judge Zambrano has steadfastly maintained, REDACTED [181] that Guerra never assisted with any orders in the Lago Agrio case.

112. The Tribunal also cannot discount the difficulty and confusion Judge Zambrano faced being cross-examined in a hostile, "gotcha" manner in a foreign language in a foreign court.[182] In just one example, Judge Zambrano obviously struggled with the English term "draft," which can mean both the writing process (as a verb) and an early version of a document

179 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 48-50.

180 *See e.g.*, Claimants' Track 2 Supp. Merits Memorial ¶ 70.

181 *See* RE-18, Racich Expert Rpt. (Dec. 16, 2013) ¶ 47; RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 63-64.

182 In truth, it is more than a little absurd to expect Judge Zambrano (or any judge for that matter) to recall with precision every aspect of a lengthy, detailed judgment issued almost three years earlier. *See* Claimants' Track 2 Supp. Merits Memorial ¶ 77 (chastising Judge Zambrano for being unable to recall particular carcinogenic agents or the precise name of a single study). That is especially true, for example, of Claimants' point that Judge Zambrano could not define the English term "workover," despite its appearance twice in the Judgment. *Id.* The word appears not for its substantive definition, but rather as a summary of requests and responses on various issues reflected in correspondence between Texaco and TexPet. *See* C-931, Lago Agrio Judgment at 20-21. Those requests are notable not for their substance but rather for their mere existence, which supported the Court's determination to pierce the corporate veil between the two entities.

(as a noun).[183] Despite two attorneys bringing this translation issue to the RICO court's attention, the questioning style did not change materially.[184] Indeed, confusion — not an attempt to get away with lying — is the only explanation for instances in which Judge Zambrano would answer the same question differently in quick succession. Claimants, for example, crow over Judge Zambrano's inability to define "TPH" (total petroleum hydrocarbons).[185] But in Spanish, the acronym is not TPH; it is HTP. Consequently, it is understandable that Judge Zambrano was not immediately familiar with the English acronym presented to him by Claimants' counsel.

113. Much of Claimants' ghostwriting narrative depends on Judge Zambrano facilitating a technologically complex cover-up, including the REDACTED Judge Zambrano, however, lacks the computer literacy to oversee or participate in such a scheme. The following example (one of many) is illustrative: At the RICO trial, Judge Kaplan asked Judge Zambrano, "What word processing software was used to type the judgment in the Chevron Lago Agrio case?" Judge Zambrano's response? Not "Microsoft Word," but rather, "[t]he system uses Roman 11," i.e., Times New Roman font in size 11. When pressed further, Judge Zambrano testified he "wouldn't be able to remember" whether Microsoft Word was in fact "the software that was on [his] computer that the judgment was written in."[187]

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183 *See e.g.*, C-1980, RICO Trial Tr. at 1637:13-19 ("Q. Sir, am I correct that before your deposition this past weekend, you never before admitted . . . that Judge Guerra helped draft orders for you when you were a sitting judge back in 2010 and 2011? A. He never helped me to write court orders. What he prepared were the drafts.").

184 *See id*. at 1646:2-9 (MR. GOMEZ: "Your Honor, there is a distinction between drafting the orders and helping with drafts, prepare drafts of orders. Sometimes that distinction gets lost in the translation, and I think the witness draws a distinction between the two."); *id*. at 1671:20-25 (MS. SHANER: "Other words that are very kind of difficult, has anyone in [sic] the drafting? In Spanish, 'borrador' is a draft, and anybody is allowed to do a draft. But if they ask you nonspecific questions using like the word draft, it has a legal meaning and it has an English, a composing meaning, but doesn't mean the same thing in Spanish.").

185 Claimants' Track 2 Supp. Merits Memorial ¶ 77.

186 Claimants' Track 2 Supp. Memorial Post-Submission Insert ¶ 19.

187 *See* C-1980, RICO Trial Tr. at 1744:25-1745:16.

114. In the end, the ***evidence*** in ***this*** case — not the ***testimony*** from a ***different*** case with ***different*** parties — is what matters. This Tribunal has the benefit of substantial, contemporaneous evidence not before the RICO court. Claimants choose to ignore this evidence. The Tribunal does not have that prerogative.

6. Claimants Have No Probative Documentary Evidence Connecting Judge Zambrano To Any "Ghostwriting" Scheme

115. While ignoring the contemporaneous documentary evidence that affirmatively refutes their ghostwriting claims, Claimants offer a scattershot of their own documentary evidence supposedly probative of the alleged scheme. It is not, for at least two reasons. **First**, Claimants' allegations are for the most part supported by no evidence other than Guerra's testimony. **Second**, the documentary evidence cited by Claimants, when examined, repeatedly shows itself to be far less than what Claimants assert.

a. Claimants Offer No Evidence At All In Support Of Many Of Guerra's Allegations

116. Judge Zambrano assumed his role as presiding judge over the Lago Agrio Litigation for the second time on October 10, 2010 as a direct result of *Claimants'* efforts to put him there.[188] He issued the Judgment four months later, on February 14, 2011. Claimants have failed to produce a single piece of documentary evidence supporting Mr. Guerra's assertion that Judge Zambrano agreed to allow the Plaintiffs to draft the Judgment. REDACTED

188 Judge Zambrano's first tenure as presiding judge of the Lago Agrio case was from October 2009 to February 2010. R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 82; C-2135, RICO Opinion at 22. In August 2010, Judge Ordonez was the presiding judge. Chevron sought to recuse him, knowing that he would be replaced by Judge Zambrano. *See* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 82; C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 21, *filed in* RICO.

189 *See* RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 22.

117. Nor have Claimants offered any documentary evidence showing that Judge Zambrano ever received one dime from the Plaintiffs' counsel in connection with the Judgment or for any other reason or that he agreed to accept money at some time in the future.

118. While Mr. Guerra professes to have first-hand knowledge that the Plaintiffs' attorneys drafted the Judgment and paid Judge Zambrano for the opportunity to do so, he has offered no corroborating documentary evidence. And while Mr. Guerra maintains that he edited the draft Judgment, he, of course, has no documentary evidence to support *that* claim, either.[190] At every turn, Claimants must rely on only Mr. Guerra's testimony, because they lack any other supporting evidence.

119. There is absolutely no evidence that the Plaintiffs ever paid Judge Zambrano. Claimants have similarly failed to produce *any* evidence of *any* payments from *anyone* to Mr. Guerra during the relevant time frame — from or after the date on which Chevron moved to recuse Judge Ordóñez, which first triggered the *possibility* that Judge Zambrano might be tasked with drafting the decision. Likewise, the TAME shipping records reveal not a single shipment from Mr. Guerra to Judge Zambrano during either of Judge Zambrano's tenures.[191] It is precisely the lack of evidence of wrongdoing that prompted Claimants to pay ungodly sums of money to Mr. Guerra. Respondent has previously highlighted Mr. Guerra's lack of credibility as a witness,[192] and further addresses his testimony below.

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190 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 120-23; R-906, Guerra Dep. Tr. (May 2, 2013) at 165-67, *filed in* RICO.

191 One of the shipments was on February 11, 2011 — three days before Judge Zambrano issued the final Judgment. Mr. Guerra's testimony rules that shipment out as a transmittal of the Judgment itself. Mr. Guerra testified unequivocally that the last time he saw a draft of the final Judgment was *two weeks* before the Judgment was issued, when he allegedly edited it on Pablo Fajardo's computer. C-1616a, Guerra Decl. (Nov. 17, 2012) ¶¶ 25-27, *filed in* RICO. Therefore, Mr. Guerra's spreadsheet of shipments does not contain a single record of a shipment to Judge Zambrano during the latter's time as the Judge presiding over the Lago Agrio Litigation.

192 Respondent's Track 2 Rejoinder ¶¶ 235 *et seq*.

b. The Documentary Evidence Claimants Do Offer Is Consistent With Judge Zambrano's Testimony

120. Judge Zambrano candidly explained in his deposition in the New York RICO action that Mr. Guerra occasionally helped him prepare orders in some of his other cases and that Mr. Guerra would occasionally ship those orders to Judge Zambrano via TAME.[193] None of that is in controversy. Judge Zambrano further testified that Mr. Guerra never drafted orders in the Lago Agrio Litigation.[194] Judge Zambrano's reliance on Mr. Guerra to review his orders in *other* cases before their issuance does not implicate him in any bribery scheme in the Lago Agrio Litigation.[195]

121. The only documentary evidence Claimants have provided to support Mr. Guerra's testimony either postdates the issuance of the Judgment or relates to Judge Zambrano's first term as presiding judge over the Lago Agrio Litigation. And much of that evidence *contradicts* Mr. Guerra's testimony and is, in fact, consistent with Judge Zambrano's testimony.

122. **First**, the TAME shipping records produced by Mr. Guerra as supportive of his testimony that he regularly drafted orders in the Lago Agrio case and shipped them to Judge Zambrano prove no such claim. There is not a single shipment to Judge Zambrano during *either* of his tenures as presiding judge over the Lago Agrio Litigation, thus making it impossible that Mr. Guerra mailed Judge Zambrano draft orders in the Lago Agrio Litigation.[196] If the TAME records have any utility at all, it is that the timing of the shipments supports Judge Zambrano's

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193 C-1980, RICO Trial Tr. at 1630:22-1631:3, 1643:18-21.

194 For example, Chevron filed thirty-nine separate motions on October 14, 2010 challenging one particular order of the Court. *See* C-644, Court Order, Provincial Court of Sucumbíos (Oct. 19, 2010).

195 Zambrano asked Guerra to help him with his other cases precisely so that Zambrano would have more time to address the many motions submitted by the parties in the Lago Agrio Litigation.

196 Of course, the TAME records do not illuminate the contents of any shipment at all, further cementing their uselessness as corroborative evidence.

testimony that Guerra provided assistance in cases *other than* the Lago Agrio case. These records are merely one example of Claimants promoting so-called "corroborative" records that corroborate nothing of any relevance in this proceeding.[197]

123. **Second**, Claimants contend that nine documents on Mr. Guerra's hard drive are draft orders from the Lago Agrio case.[198] But there is absolutely no forensic evidence in respect to either Mr. Guerra's REDACTED hard drives that offers any hint that Mr. Guerra actually drafted or edited even a single sentence of any of these orders. Nothing. The fact that Mr. Guerra's versions are different from the filed versions only shows that someone edited them before filing, not that Mr. Guerra did.[199] Mr. Guerra's hard drive thus cannot be used to determine where the draft orders were originally created, or, more importantly, *by whom*.[200] Nor does it show that the court's final orders "were created from the drafts found on Guerra's computer or that Guerra himself was the author of any of these orders."[201] All Claimants' evidence tells us is that, as of July 23, 2010, several months after the end of Judge Zambrano's first tenure as presiding judge, Mr. Guerra somehow obtained possession of nine draft orders from the Lago Agrio case.[202]

124. There are still further indications that Mr. Guerra is not telling the truth about drafting orders on behalf of the Plaintiffs in the Lago Agrio Litigation. When Mr. Guerra drafted orders in other cases, he had a practice of leaving the date of issuance blank to be filled in by

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197 Respondent's Track 2 Rejoinder ¶¶ 266-269.

198 Lynch Expert Rpt. (Oct. 7, 2013) ¶ 28; Claimants' Track 2 Reply ¶ 65.

199 RE-18, Racich Expert Rpt. (Dec. 16, 2013) ¶ 33.

200 *Id.* ¶¶ 31-32.

201 *Id.* ¶ 24. REDACTED

202 RE-18, Racich Expert Rpt. (Dec. 16, 2013) ¶ 31.

Judge Zambrano: Mr. Guerra would write the date in the draft order as "abril . . . del 2011 or diciembre . . . del 2011" (with ellipses in place of a day). By contrast, Judge Zambrano always included a date in his draft orders, even if he later updated it. The nine draft orders from the Lago Agrio case in Mr. Guerra's possession are all consistent with Judge Zambrano's practice, not Mr. Guerra's. All nine of the draft orders include the full date.

125. REDACTED

126. Finally, a review of the nine Orders actually shows that Judge Zambrano granted more than half of Chevron's motions whereas he denied more than half of the Plaintiffs' motions.[204] There is no evidence of bias.

127. **Third**, while Mr. Guerra asserts that Judge Zambrano paid him US$ 1,000 monthly for three and a half years to help draft orders in many of his cases, Mr. Guerra's evidence contradicts this claim. The only evidence of any money given to Mr. Guerra from Judge Zambrano is a deposit slip from June 24, 2011 (for US$ 300) and a handwritten note written on an unknown date in Mr. Guerra's daily planner on the October 14, 2011 page (for US$ 500) — both in amounts materially at variance with Mr. Guerra's testimony and both made

203 RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 63-64.

204 C-230, Order by the Provincial Court of Sucumbíos (Oct. 21, 2009); R-1208, Order by the Provincial Court of Sucumbíos (Nov. 23, 2009); C-1809, Order by the Provincial Court of Sucumbíos (Nov. 30, 2009); C-1812, Order by the Provincial Court of Sucumbíos (Dec. 07, 2009); C-1810, Order by the Provincial Court of Sucumbíos (Dec. 14, 2009); R-1209, Order by the Provincial Court of Sucumbíos (Jan. 5, 2010); R-1210, Order by the Provincial Court of Sucumbíos (Jan. 19, 2010); R-1211, Order by the Provincial Court of Sucumbíos (Feb. 2, 2010); C-1816, Order by the Provincial Court of Sucumbíos (Feb. 18, 2010).

months after the issuance of the Judgment.[205] Judge Zambrano explained that he lent Mr. Guerra money because Mr. Guerra had asked him for a loan,[206] testimony perfectly consistent with Mr. Guerra's admitted financial hardship before becoming a ward of Claimants.[207] Indeed, Mr. Guerra's bank statement confirms that prior to the loan from Judge Zambrano, he had only US$ 146 in his account.[208] For their part, Claimants have provided no other evidence to corroborate Mr. Guerra's claim that Judge Zambrano paid him any monies at any time.

128. Claimants deride the Republic's efforts to discredit Mr. Guerra's obviously circumstantial documentary evidence as based on "supposition." But it is Claimants' paucity of evidence — and their penchant for purchasing witnesses — that suggest that Claimants have relied on their overwhelming resources to build their case.

129. As the Tribunal will recall, Claimants previously relied on the purchased testimony of Diego Borja in an effort to implicate Judge Núñez in an alleged bribery scandal. As has been confirmed by numerous independent sources,[209] there was never any evidence to suggest that Judge Núñez was aware of or complicit in a bribery scheme. Mr. Borja himself confessed: "[T]here was no bribe. I mean . . . there was never a bribe."[210] Claimants nonetheless

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205 Claimants allege that an additional deposit slip from June 24, 2011 and a handwritten note in Guerra's diary of a deposit on February 24, 2012 indicate payments from Judge Zambrano. But only Guerra's say-so links either deposit to Judge Zambrano. In any event, both payments are irrelevant because they postdate the issuance of the Lago Agrio Judgment. Claimants' Track 2 Reply n.120, ¶ 59; *see* Adam N. Torres Expert Rpt. (May 24, 2013) at 25.

206 C-1980, Zambrano RICO Trial Testimony at 1814:4-11.

207 R-906, Guerra Dep. Tr. (May 2, 2013) at 150-52.

208 R-1212, Guerra's Bank Statement (July 2011).

209 R-1202, Barrett at 168-171; R-1200, ROLLING STONE at 8-9; 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; R-315, *Under Pressure Ecuadorean Judge Steps Aside in Suit Against Chevron*, NEW YORK TIMES (Sept. 5, 2009) at 1; 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-576, Chevron Steps Up Ecuador Legal Fight, FINANCIAL TIMES at 2 (Sept. 1, 2009).

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

relocated Mr. Borja to the United States and paid him handsomely to act as their mouthpiece, making elaborate allegations of corruption that proved to be false. As the facts unfold regarding Judge Zambrano and Mr. Guerra, a similar scenario appears to be playing out. Here, there is no evidence that Judge Zambrano — the allegedly guilty party — was ever paid one dime as part of a bribery scheme, was aware of any such bribery scheme, or ever issued even one order in the Lago Agrio Case contrary to Ecuadorian law or in response to undue influence of a third party. Rather, the only evidence of wrongdoing and the only source of Claimants' elaborate allegations is yet again the testimony of an inherently unreliable witness whom Chevron has carefully cultivated through months of coaching by a team of lawyers and generously supported with financial rewards.

7. Mr. Guerra's Testimony Is Not Believable

130. Far from serving as the panacea that Claimants desire it to be, Mr. Guerra's testimony has proven to be anything but clear and consistent. His story keeps changing; he continues to massage his testimony — blaming his faulty memory at every turn — in a transparent effort to conform his testimony to the evidence.

131. Before Mr. Guerra secured his pecuniary and non-pecuniary riches from Chevron, he met with a Chevron attorney and Chevron investigator in Quito for six days over the course of three months (May to July 2012). At these meetings, Mr. Guerra began to negotiate for himself and his family. For sale were a hodge-podge of documents and, of course, his testimony. In exchange, he sought — and has obtained — a financial windfall.

132. For Mr. Guerra these meetings also served as a test run: He began identifying elements of his narrative that he would maintain, those that he would later bolster, or, in some instances, abandon. During the meetings, Chevron purchased all the documentary evidence that

Mr. Guerra professed to have. And where the evidence fell short, Mr. Guerra swapped in his own testimony.

133. Ostensibly recognizing the deficiencies in Mr. Guerra's story, in November 2012, Chevron began working with Mr. Guerra to solidify his testimony in behind-the-scenes meetings for which, unlike the early investigator meetings, no transcript is available. Over the next several months, Mr. Guerra admits that he had no fewer than ***fifty-three meetings*** with Chevron's attorneys.[211] That is, Mr. Guerra met with Chevron's attorneys "three to four days a week" for "approximately three months" "between four and six hours a day."[212]

134. Claimants maintain that all of this is irrelevant because, per Chevron's agreement with Mr. Guerra, "Chevron has no control over, and places no limits on the content of, Mr. Guerra's testimony."[213] The facts belie this assertion. Mr. Guerra has been for the last two years, and will be for the foreseeable future, entirely dependent on his patron's largesse. But there is no rational connection between the evidence provided and the payments made to Mr. Guerra. Mr. Guerra, who admitted that he deliberately lied to Chevron to improve his negotiating position,[214] conceded that this evidence was not "worth anything to [him] from [his] own viewpoint" so he considered the payments a gift.[215] And where the sums of money and financial benefits are in the millions of dollars and where that largesse is accompanied by fifty-

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211 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 13:21-22.

212 C-1978, Guerra RICO Trial Testimony at 1049-50.

213 R-892, Cooperation Agreement, art. II.B.3; Claimants' Letter to Tribunal (Jan 15, 2014) at 5.

214 R-906, Guerra Dep. Tr. (May 2, 2013) at 52:9-11; 52:23-53:2, *filed in* RICO ("In my intent to improve my situation . . . in negotiations with Chevron . . . . I overstated regarding the income or the money that I was receiving at the time."); *id*. at 150:4-14; 150:19-20 ("Q: [Y]ou represented to the Chevron representatives that you had been offered $300,000 by the plaintiffs in the Lago Agrio litigation, correct? A: My intent was to improve my position, the face of a good future negotiation for Mr. Zambrano and myself, so that to that end I said some things or exaggerated some things . . . . There was an exaggeration made to Chevron's representatives."); *id.* at 72:5-73:19; 74:17-24.

215 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 122:16-23.

three meetings to discuss his testimony, the resulting testimony ceases to have any indicia of reliability.[216]

a. The Plaintiffs' Payments For Orders

135. Today, Mr. Guerra alleges that the Plaintiffs' bribery scheme began as early as 2009 when, during Judge Zambrano's first term on the case, the Plaintiffs paid Mr. Guerra US$ 1,000/month to draft orders in the Plaintiffs' favor on behalf of Judge Zambrano. But when Mr. Guerra first spoke to Chevron's investigators in May to June 2012, he *never* mentioned, much less hinted at, such an arrangement. In fact, much of what Mr. Guerra said at those meetings contradicts his future accounts. Mr. Guerra does not reveal his "pact" with the Plaintiffs until his first declaration in November 2012, after months of preparation by Chevron's legal team.

136. During the initial meetings held in Quito with Chevron's investigators, Mr. Guerra casually mentioned that REDACTED

216 Respondent's Letter to the Tribunal (Jan. 3, 2014); Respondent's Track 2 Rejoinder § IV.E.

217 R-1213, Guerra Recorded Conversation (June 25, 2012) at 47.

218 *Id*. at 47.

219 *Id*. at 48.

REDACTED

137. REDACTED

138. In his very first declaration, signed in November 2012 and filed in the RICO case, Mr. Guerra completely alters his story. REDACTED

May – July 2012	November 2012
REDACTED	Sometime in the second half of 2009, "[Mr. Guerra] arranged a meeting with Mr. Pablo Fajardo at Mr. Zambrano's suggestion."[226]

220 *Id.* at 64.

221 *Id.* ("What's more, they, Fajardo, actually they, would send me like, like, like a request, right? He would call me, tell me: 'Look, damn! You will try not to . . . grant the fundamental errors. Doctor Guerra,' he would say, 'damn! Don't — lend a hand — do not process the fundamental errors.' 'We're already on that path.' 'The issue is that it be done fast'. 'Yes, yes, yes, yes. Don't worry, we will see.' I mean, there were those kinds of conversations, right?").

222 *Id.*

223 *Id.* at 48.

224 *Id.* at 64.

225 *Id.* at 47.

226 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 13, *filed in* RICO.

May – July 2012	November 2012
	"Mr. Fajardo and [Mr. Guerra] met in Quito, at the corner of Río Coca and 6 de Diciembre streets."[227]
	"[Mr. Fajardo and Mr. Guerra] agreed on 3 things: (1) [Mr. Guerra] would make the case move quickly; (2) Chevron's procedural options would be limited by not granting their motions on alleged essential errors in rulings [Mr. Guerra] was to write, so the case would not be delayed; and (3) the Plaintiffs' representatives would pay [Mr. Guerra] approximately USD $1,000 per month for writing the court rulings Mr. Zambrano was supposed to write."[228]
	"[Mr. Guerra's] understanding was that [he] had to follow these guidelines during the remainder of the case."[229]
	"[Mr. Guerra] met with Messrs. Fajardo, Donziger and Yanza in the Honey & Honey Restaurant located on Eloy Alfaro and Portugal streets."[230]
	During this meeting, Mr. Donziger "thanked [Mr. Guerra] for [his] work as ghostwriter in this case and for helping steer the case in favor of the Plaintiffs."[231]
	"The payments from the Plaintiffs' representatives were given to [Mr. Guerra] by Mr. Fajardo in cash, or were deposited into my savings account at Banco Pichincha."[232]

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

May – July 2012	November 2012
	"[W]hile [Mr. Guerra] was writing court rulings for Mr. Zambrano [he] would regularly meet with Mr. Fajardo, perhaps twice per month, to discuss [his] work."[233]
	"The payments [Mr. Guerra] received from the Plaintiffs were in addition to the payments [he] received from Mr. Zambrano for [Mr. Guerra's] work as ghostwriter for his other cases."[234]

139. Mr. Guerra's new story, for the very first time, seeks to implicate Judge Zambrano. Yet in those early meetings with the Chevron investigators, REDACTED

140. According to Mr. Guerra REDACTED

REDACTED

233 *Id.*

234 *Id.* ¶ 14.

235 R-1213, Guerra Recorded Conversation (June 25, 2012) at 68.

236 *Id.* at 70.

237 *Id.* at 68.

238 *Id.* at 70.

REDACTED

142. Even after Mr. Guerra developed his new storyline, he still was not able to tell a consistent story. Among other things, Mr. Guerra could not decide whether he consulted with the Plaintiffs while they were allegedly paying him, and if he did, how often:

June 25, 2012	November 17, 2012	October 23, 2013	October 25, 2013
REDACTED	"While I [Mr. Guerra] was writing court rulings for Mr. Zambrano, I [Mr. Guerra] would ***regularly*** **meet** with Mr. Fajardo, perhaps twice per month, **to discuss** my work."[242]	"[Mr. Fajardo and I] would ***occasionally*** **meet in person to discuss** matters of the case and to discuss matters that were to be included in the court orders in the case."[243]	Mr. Guerra confirms that he "**generally *didn't* consult** with the plaintiffs when [he was] writing orders in the Chevron case."[244]

143. REDACTED

yet after formally teaming up with Chevron, Mr. Guerra modified his claim, alleging now that Judge Zambrano paid Mr. Guerra only US$ 1,000 a month.[246] REDACTED

239 *Id.* at 69.

240 *Id.* at 47 (emphasis added).

241 *Id.* at 60-61.

242 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 13, *filed in* RICO.

243 C-1978, Guerra RICO Trial Testimony at 931:8-10.

244 *Id.* 1196:8-9.

245 R-1213, Guerra Recorded Conversation (June 25, 2012) at 78.

246 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 7, *filed in* RICO.

REDACTED.[247] Guerra subsequently changed his testimony and now contends that the two in fact "very regularly" discussed the parties' motions, key procedural issues, and the court orders — in fact "everything."[248]

b. The Weekend Mr. Guerra Allegedly Edited the Judgment

144. Mr. Guerra has told a number of mutually exclusive stories relating to the weekend during which he allegedly edited the draft judgment that he claims had been written by the Plaintiffs. His initial account can be summarized as follows:

- Mr. Guerra met Judge Zambrano at the Quito airport REDACTED[249]
- The meeting took place on the evening of Friday, January 28, 2011 "at around 6, 6:30 in the evening."[250]
- Judge Zambrano gave Mr. Guerra the draft judgment on a USB flash drive.[251]
- At this meeting, Judge Zambrano explicitly told Mr. Guerra that the Plaintiffs wrote the draft judgment and REDACTED[252]
- Mr. Guerra worked on the draft judgment at his home in Quito.[253]
- Mr. Guerra could not possibly have worked from Judge Zambrano's home in Lago Agrio because of safety concerns.[254]

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247 R-1213, Guerra Recorded Conversation (June 25, 2012) at 60-61 REDACTED)

248 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 78-79.

249 R-1213, Guerra Recorded Conversation (June 25, 2012) at 88-89; R-1214, Guerra Recorded Conversation (May 6, 2012) at 7 ("The way we would always do things."). *See also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 143; C-1978, Guerra RICO Trial Testimony at 1097-1115.

250 R-1214, Guerra Recorded Conversation (May 6, 2012) at 13; *id.* at 6; R-1213, Guerra Recorded Conversation (June 25, 2012) at 88. *See also* C-1978, Guerra RICO Trial Testimony at 1097-1115.

251 R-1213, Guerra Recorded Conversation (June 25, 2012) at 88-90, 99; R-1214, Guerra Recorded Conversation (May 6, 2012) at 5 ("That he gave me, gave it to me in a flash drive."). *See also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 143; R-906, Guerra Dep. Tr. (May 2, 2013) at 72, *filed in* RICO; C-1978, Guerra RICO Trial Testimony at 1097-1115.

252 R-1213, Guerra Recorded Conversation (June 25, 2012) at 98-99. *See also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 143; C-1978, Guerra RICO Trial Testimony at 1008-11.

253 C-1978, Guerra RICO Trial Testimony at 967-68, 1105-15.

- At his home, Mr. Guerra copied the document containing the draft judgment from the USB flash drive to his personal computer.[255]
- Mr. Guerra worked on the draft judgment for three days: Friday, Saturday, and Sunday.[256]
- Judge Zambrano had made "some changes already" to the draft judgment.[257]
- REDACTED
- REDACTED
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- REDACTED
- When Mr. Guerra finished his work on the draft judgment, he copied the document back onto the flash drive.[261]
- Mr. Guerra returned the flash drive to Judge Zambrano "on Sunday around 7 . . . in the evening."[262]
- Mr. Guerra maintained a copy of the draft judgment on his home computer.[263]
- REDACTED .[264]

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254 R-1214, Guerra Recorded Conversation (May 6, 2012) at 15 ("[Zambrano] didn't want me to even be seen there, because it couldn't be explained that I were to be part of his office.").

255 *Id.* at 5 ("So what I did then was put it in my CPU"); *id.* at 14 ("I copied it.").

256 *Id.* at 13. *See also* C-1978, Guerra RICO Trial Testimony at 1133-34.

257 R-1214, Guerra Recorded Conversation (May 6, 2012) at 12.

258 R-1213, Guerra Recorded Conversation (June 25, 2012) at 95.

259 *Id.* at 99 (REDACTED

260 *Id.* at 93-95, 99, 107.

261 R-1214, Guerra Recorded Conversation (May 6, 2012) at 7.

262 *Id.* at 13; *id.* at 7.

263 *Id.* at 14; R-1213, Guerra Recorded Conversation (June 25, 2012) at 101. *See also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 118-23; C-1978, Guerra RICO Trial Testimony at 1120.

264 R-1213, Guerra Recorded Conversation (June 25, 2012) at 101.

145. Mr. Guerra has since recanted in respect to each and every one of these *sixteen* factual representations.

146. After Mr. Guerra "was told by Chevron's representatives that they were not finding the draft judgment," Mr. Guerra contends he "began an effort to remember."[265] Suddenly, Guerra's "memory improved regarding those facts," and he realized that his weekend at home in Quito working on the Judgment had actually been spent in Lago Agrio meeting with Mr. Fajardo and regularly appearing in public with Judge Zambrano.[266]

147. Guerra trips over himself as he backpedals. "In recalling these facts initially, I assumed I had received the document on a flash drive given to me by Mr. Zambrano in the Quito airport, *as he usually did with the projects I helped him with*."[267] At another time, Guerra states that his exchanges of documents and flash drives with Judge Zambrano were REDACTED at the airport.[268]

148. But his explanation is contradicted by his RICO trial testimony wherein he testified that "as far as me issuing the court orders related to the Chevron case during Judge Zambrano's second term, *I would travel to the city of Lago Agrio*."[269] This was because "in his opinion, Chevron's attorneys or Chevron representatives . . . have been very attentive as far as

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265 R-906, Guerra Dep. Tr. (May 2, 2013) at 165, *filed in* RICO.

266 C-1978, Guerra RICO Trial Testimony at 1133.

267 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 25, *filed in* RICO (emphasis added).

268 R-1213, Guerra Recorded Conversation (June 25, 2012) at 89.

269 C-1978, Guerra RICO Trial Testimony at 999-1002. *See also* C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 46, *filed in* RICO ("When I traveled to Lago Agrio to work on the Chevron rulings for Mr. Zambrano, I would work on a laptop, which Mr. Fajardo had previously provided to me."); R-906, Guerra Dep. Tr. (May 2, 2013) at 165, *filed in* RICO ("That's when I began an effort to remember until I determined that actually the draft judgment, the project, I worked on it in Lago Agrio, among other documents that I have generated over there."). R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 102-105 ("Q. Why did Mr. Zambrano set up a deal directly with the plaintiffs after he had asked you to approach the plaintiffs? A. I don't know why he did it, but he told me that he reached that agreement. Q. When did he tell you that he had reached that agreement? A. At the time that he told me that I should go to Lago Agrio to work on the orders. Q. When was that? A. At the beginning of the second term that Judge Zambrano was the judge on the case.").

finding any irregularities."[270] In other words, he allegedly did not meet with Judge Zambrano publicly, at the airport or otherwise, after Zambrano became President of the Court in October 2010. If this had been true, his continued insistence, for months, that he obtained the USB from Judge Zambrano at the airport would not have made sense from the outset.

149. Regardless of the reason for abandoning one story in favor of another, the fact that Mr. Guerra's new version deems *every* element of Mr. Guerra's first account untrue completely undermines the plausibility of either. The chart below demonstrates how each detail was swapped for a new "truth."

Version 1 (May – July 2012)	**Version 2** (November 2012 and later)
~~Mr. Guerra met Judge Zambrano at the Quito airport "as he always did."~~	Mr. Guerra traveled 8 hours by bus from Quito to Lago Agrio to meet with Judge Zambrano at the Judge's home.[271]
~~The meeting took place on the evening of Friday, January 28, 2011 "at around 6, 6:30 in the evening."~~	Mr. Guerra "do[es] not recall the exact date" of the meeting but it took place "two or three weeks prior to February 14th of 2011" when the Lago Agrio Judgment issued.[272]
~~Judge Zambrano gave Mr. Guerra the draft judgment on a USB flash drive.~~	Judge Zambrano presented Mr. Guerra with the draft judgment, which "was already on [Mr. Fajardo's] laptop in Mr. Zambrano's apartment."[273]
~~At this meeting, Judge Zambrano explicitly told Mr. Guerra that the Plaintiffs wrote the draft judgment and "that Fajardo gave it to him."~~	Mr. Fajardo was present in Judge Zambrano's home when Mr. Guerra first received the draft judgment.[274]

270 C-1978, Guerra RICO Trial Testimony at 999-1002.

271 *Id.* at 1002-05; R-1273, Lago Agrio: Getting There and Away, LonelyPlanet.

272 C-1978, Guerra RICO Trial Testimony at 1008. *See also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 101, 141.

273 C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 47, *filed in* RICO.

274 *Id.* ¶ 47, *filed in* RICO; C-1978, Guerra RICO Trial Testimony at 1008-11.

<table>
<tr><th colspan="2">Version 1
(May – July 2012)</th><th colspan="2">Version 2
(November 2012 and later)</th></tr>
<tr><td colspan="2">~~Mr. Guerra worked on the draft judgment at home in Quito.~~</td><td colspan="2" rowspan="2">Mr. Guerra worked on the draft judgment in Mr. Zambrano's home in Lago Agrio where he spent the entirety of the weekend using Mr. Fajardo's laptop.[275]</td></tr>
<tr><td colspan="2">~~At his home, Mr. Guerra copied the document containing the draft judgment from the USB flash drive to his personal computer.~~</td></tr>
<tr><td colspan="2">~~Mr. Guerra worked on the draft judgment for three days: Friday, Saturday, and Sunday.~~</td><td colspan="2">Mr. Guerra worked on the draft judgment for two days: Saturday and Sunday.[276]</td></tr>
<tr><td>~~Mr. Guerra maintained phone contact with Judge Zambrano as he edited the draft judgment that weekend.~~</td><td>~~Mr. Guerra did *not* contact Judge Zambrano that weekend because there was no need to consult with him.~~</td><td colspan="2">Mr. Guerra spent the weekend in Judge Zambrano's apartment, even having "breakfast, lunch, dinner" with him.[277]</td></tr>
<tr><td colspan="2">~~On the second day (Saturday), Mr. Fajardo called Mr. Guerra and Mr. Guerra mentioned that he required help on a particular issue. Mr. Fajardo offered to give him a memory aid.~~</td><td colspan="2">On the first day (Saturday), *Mr. Guerra* called Mr. Fajardo and asked for a memory aid.[278]</td></tr>
<tr><td colspan="2">~~Mr. Fajardo emailed the memory aid to Mr. Guerra as an attachment on Saturday afternoon.~~</td><td>Mr. Fajardo emailed the memory aid to Mr. Guerra as an attachment on Saturday in the late afternoon or evening.[279] Mr. Guerra retrieved it by leaving Judge Zambrano's</td><td>Mr. Fajardo *hand delivered* the memory aid to Mr. Guerra "in the nighttime hours" on Saturday.[281]</td></tr>
</table>

275 C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶¶ 46-48, *filed in* RICO.

276 *Id.* ¶ 48; C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 25, *filed in* RICO.

277 C-1978, Guerra RICO Trial Testimony at 1134-1139.

278 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in* RICO; C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 49, *filed in* RICO.

279 R-906, Guerra Dep. Tr. (May 2, 2013) at 79, *filed in* RICO.

Version 1 (May – July 2012)	**Version 2** (November 2012 and later)
	apartment and going to an internet café.[280]
~~When Mr. Guerra finished his work on the draft judgment, he copied the document back onto the flash drive.~~	Mr. Guerra did not have a copy of the draft judgment on his computer or on any of his flash drives.[282]
~~Mr. Guerra returned the flash drive to Judge Zambrano "on Sunday around 7 . . . in the evening."~~	Mr. Guerra explained that "Mr. Zambrano explicitly asked me not to make copies and not to leave traces of the document or the changes I was making, outside of the file on which I worked on Mr. Fajardo's computer"[283] In fact, Mr. Guerra was not to "ever even let that computer out into the street."[284]
~~Mr. Guerra maintained a copy of the draft judgment on his home computer.~~	
~~Mr. Guerra also had a copy of the judgment on a USB flash drive.~~	Mr. Guerra left Mr. Fajardo's computer in Judge Zambrano's home in Lago Agrio.[285]

150. To presume that Guerra's most recent reiteration of events is accurate would mean that he forgot some remarkable details contained in his earlier iterations: that he took an 8-hour trip to Lago Agrio, that he met with Mr. Fajardo in the only meeting Mr. Guerra has described as including both Judge Zambrano *and* Mr. Fajardo, that Mr. Fajardo had given him

281 C-1978, Guerra RICO Trial Testimony at 1012.

280 *Id.* at 80.

282 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 120-23; R-906, Guerra Dep. Tr. (May 2, 2013) at 165-68, *filed in* RICO.

283 C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 48, *filed in* RICO.

284 C-1978, Guerra RICO Trial Testimony at 1010.

285 *Id.* at 1004-05.

and Judge Zambrano a laptop to use, that Mr. Guerra used that laptop to edit the pinnacle of the bribery scheme — the Judgment — and that Mr. Guerra visited an internet café to retrieve a memory aid that Mr. Fajardo emailed him.

151. Later, Mr. Guerra changed his story regarding the memory aid again. After insisting for nearly a year and a half that Mr. Fajardo emailed the memory aid to him, Mr. Guerra needed an explanation for the fact that neither he nor Chevron ever located the corresponding email. In another about-face, and alleged improvement of his memory, Mr. Guerra now claims that Mr. Fajardo "personally handed" him the memory aid.[286]

152. Setting aside the inconsistencies, Mr. Guerra's story is still rife with hard-to-believe details. Mr. Guerra asserts that by the time Judge Zambrano issued the Judgment, Judge Zambrano was "being careful" ostensibly to keep the bribery scheme under wraps. Zambrano was allegedly so concerned that Mr. Guerra was "forbidden to even show up [in Lago Agrio]" to assist with post-judgment orders. But Mr. Guerra simultaneously contends that on the eve of the Judgment, he spent an entire weekend in Judge Zambrano's Lago Agrio apartment, even being seen in public taking meals with the Judge. More remarkable, these public appearances came after Mr. Guerra allegedly approached Chevron not once but twice for bribes — and even indicated he would approach the Plaintiffs,[287] thereby putting Chevron on notice of the alleged corruption.

153. Mr. Guerra's narrative continues on this rollercoaster when he purports to describe his role, financially and substantively, in the alleged scheme. First, Mr. Guerra claimed that he had a deal directly with the Plaintiffs, who agreed to pay him US$ 300,000. After telling

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286 *Id*. at 1011-13.

287 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 12, *filed in* RICO; R-1218, Callejas Aff. (Dec. 7, 2012) ¶¶ 7-8; R-1219, Racines Aff. (Nov. 29, 2012) ¶ 4; R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 94:25-95:9, 114:24-115:15.

several inconsistent stories regarding the financial arrangement — all under oath — Mr. Guerra settled on claiming that while he himself had no deal, Judge Zambrano had a deal with the Plaintiffs wherein they would pay him US$ 500,000 and Mr. Guerra "assumed" — without ever discussing it with Judge Zambrano — that he would receive 20 percent of that US$ 500,000. Twenty percent for what? It is unclear since Mr. Guerra repeatedly changed the details concerning how exactly he contributed to the effort, offering for the first time in his deposition ordered in this arbitration that none of his proposed changes made it into the final Judgment.

June 25, 2012	**November 12, 2012**	**October 24, 2013**	**November 5, 2013**
REDACTED	Mr. Guerra was supposed to negotiate with the Plaintiffs for a US$ 500,000 payment for Judge Zambrano and "whatever amount [he] could negotiate or agree to for [him]self."[289] In the end, Judge Zambrano reached a deal directly with the Plaintiffs for US$ 500,000 and told Mr. Guerra "he would share with me part of that money once it was paid to him."	Judge Zambrano promised to give Mr. Guerra 20 percent of the US$ 500,000 that the Plaintiffs promised Judge Zambrano, i.e. US$ 100,000.[290]	Judge Zambrano never told Mr. Guerra that he would give him 20 percent of the US$ 500,000. Mr. Guerra "assumed" that Zambrano would give him that amount because Judge Zambrano would want to be generous with him.[291]

288 R-1213, Guerra Recorded Conversation (June 25, 2012) at 23-28 (REDACTED *id.* at 48.

289 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 23, *filed in* RICO

290 C-1978, Guerra RICO Trial Testimony 999-1002, 1198-99.

291 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 105-07.

June 25, 2012	November 12, 2012	October 24, 2013	November 5, 2013
	Mr. Guerra worked on the structure of the Judgment and made changes to terminology relating to environmental law.[292]		For the first time, Mr. Guerra reveals that none of the changes that he proposed appeared in the final Judgment.[293]

154. REDACTED. The contemporaneous *documentary* evidence shows that he did so based on documents properly submitted to the Court. Claimants' decision to spend millions of dollars on their chief witnesses shows that Claimants themselves appreciate their inability to prove their case by any other means.

C. Neither Mr. Cabrera's Nor Plaintiffs' Counsel's Alleged Misconduct Gives Rise To State Responsibility Here

155. Claimants also point to and rely on the Plaintiffs' relationships with Mr. Cabrera and their former experts in an effort to obtain a finding of State responsibility. The State, however, is *not* responsible for either the Plaintiffs' or the experts' alleged conduct.

1. The First Instance Court's Decision To Exclude Mr. Cabrera's Report Was Sufficient And Proper

156. Even if Claimants' focus on the lower court's Judgment were proper, which it is not (*see infra* Section IV), the Plaintiffs' actions with respect to Mr. Cabrera are irrelevant. Judge Zambrano did not consider, nor did he need to consider,[294] Mr. Cabrera's report in

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292 C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in* RICO.

293 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 144.

294 *See infra* § VII.G.2.d.

reaching his verdict and assigning damages.[295] The exclusion of Mr. Cabrera's report from the lower court's consideration is confirmed in the Court's Clarification Order.[296]

157. Judge Zambrano acted well within his discretion to exclude Mr. Cabrera's report.[297] Indeed, Chevron asked him to do so.[298]

158. Having obtained the precise relief they requested, Claimants now assert that Judge Zambrano *surreptitiously* relied on Mr. Cabrera's reports, and, working from that starting point, offer various baseless hypotheses of how Mr. Cabrera's findings might have found their way into the Judgment.[299]

159. Claimants' alleged evidentiary support is shockingly thin. They first argue that the Judgment's eight categories of damages match those in the Cabrera report. Even Judge

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295 C-931, Lago Agrio Judgment at 49-51 ("the Court accepts the petition that said report not be taken into account to issue this verdict.")

296 C-1367, Lago Agrio Clarification Order at 8 ("Nonetheless, even though this was altered evidence, the Court decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment. If the defendant 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 those videos, 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.").

297 Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 43-47 (discussing Ecuadorian law allowing judge's to admit or dismiss evidence). Indeed, it is a well settled presumption of law in the United States that when acting as factfinders, reviewing courts presume that judges disregard inadmissible evidence. *See, e.g.*, RLA-550, *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (*per curiam*) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. . . . surely we must presume that they follow their own instructions when they are acting as factfinders."); RLA-551, *Commw. v. Kearney*, 92 A.3d 51, 61 (Pa. Super. Ct. 2014) (It is "well-settled that even if prejudicial information was considered by the trial court, a judge, as fact finder, is presumed to disregard inadmissible evidence and consider only competent evidence.") (quotation marks and citation omitted); RLA-552, *Commw. v. Sepheus*, 468 Mass. 160, 170 (2014) ("[Courts] presume that the judge correctly instructed himself on the law of evidence.") (quotation marks and citation omitted); RLA-553, *Hinesley v. Indiana*, 999 N.E.2d 975, 987 (Ind. Ct. App. 2013) (same); RLA-554, *Beck v. Commw.*, 484 S.E.2d 898, 906 (1997) ("A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both.") (citation omitted).

298 Respondent's Track 2 Counter-Memorial, Annex E ¶ 45 n.70.

299 *But see* C-931, Lago Agrio Judgment at 50-51; C-1367, Lago Agrio Clarification Order at 8; C-991, Lago Agrio Appellate Decision at 9-10 (disavowing any reliance on Cabrera).

Kaplan, whose decision Claimants constantly rely on, rejected that contention,[300] noting, among other things, that Mr. Cabrera's report identified only seven categories of damages, not eight.[301] Therefore, as Judge Kaplan found, it is more likely that Judge Zambrano relied on the Plaintiffs' final *alegato*, which contained the same eight categories of damages, than on Mr. Cabrera's report.[302] In any event, even if the final *alegato* were not the source for the damages categories, there are other potential sources for these eight generic categories of damages, including the Plaintiffs' complaint.[303]

160. Claimants' alternatively theorize that the Court indirectly relied on Mr. Cabrera by relying in part on several of the Plaintiffs' supplemental experts. As a threshold matter, these experts either did not rely on Mr. Cabrera at all or did so only to the extent that they could independently verify his data.[304] Additionally, Judge Kaplan found only two supplemental experts that the Ecuadorian Court might have relied on: Mr. Allen and Dr. Barnthouse. Judge Kaplan held that Chevron's argument "falters at least with respect to [Dr.] Allen," because there is no evidence that Mr. Allen relied on Mr. Cabrera in coming up with his "damages assessments for soil remediation and groundwater restoration — the two areas for which he is cited in the Judgment."[305] As to Dr. Barnthouse, Judge Kaplan did not find any reliance on him by the Lago

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300 C-2136, RICO Opinion Appendices, Appendix III at App. 52 (noting that there are "several problems with Chevron's arguments on this point").

301 *Id.*

302 *Id.* at 53. Judge Kaplan also criticizes Chevron's theory that the Judgment's punitive damages award is the same as Mr. Cabrera's recommended unjust enrichment award. *Id.* Mr. Cabrera recommended that unlawful profits be taken into account as a damages category. The Court, however, did not award damages for unjust enrichment. Similarly, Mr. Cabrera suggested that damages be awarded to improve the infrastructure in the Concession Area. The Court did not award any such damages. *See* C-212, Cabrera Report, Summary Of Environmental Reparation Costs.

303 Respondent's Track 2 Counter-Memorial, Annex E ¶ 49.

304 *Id.* ¶¶ 60-61.

305 C-2136, RICO Opinion Appendices, Appendix III at App. 50-51. *See also* Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 60-62 (demonstrating that Drs. Picone and Rourke did not rely on Mr. Cabrera, and that Mr.

Agrio Court, and concluded that any hypothetical reliance "would be insufficient to deem the Judgment invalid" in any event.[306]

161. Finally, Claimants theorize that Mr. Cabrera's report is the only record source for the Court's finding that 880 pits required remediation. Claimants are wrong for three reasons.

162. **First**, Mr. Cabrera's Annex H-1 identified a total of 916 pits, not 880 as the Court found.[307] To explain how and why the Court reduced the number of pits from 916 to 880, Claimants and their experts used an Excel spreadsheet that was produced by Stratus,[308] but which was not submitted to the Court,[309] insisting that it was the likely basis for Annex H-1 because the two documents "contain[ ] *almost* the exact same data in the exact same format."[310] But Stratus affirmed that it did *not* prepare Annex H-1,[311] and, in any event, "almost" is not good enough; the Stratus spreadsheet identifies 917 pits, while Annex H-1 identifies only 916 pits.[312] That

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Allen and Dr. Barnthouse principally relied on sources other than Cabrera and/or Mr. Cabrera's data only to the extent they found them valid).

306 C-2136, RICO Opinion Appendices, Appendix III at App. 50-51. The Court explicitly rejected Dr. Barnthouse's report, which contemplates a value between US$ 874 million and US$ 1.7 billion for this category of damages, insofar as the report accounts for the historic loss of rainforest services and the loss of habitat due to infrastructure. C-931, Lago Agrio Judgment at 180, 182. In any event, Dr. Barnthouse primarily based his conclusions on studies commissioned by Chevron, and he relied on Mr. Cabrera's data only to the extent he found them valid or could independently verify the data. Respondent's Track 2 Counter-Memorial, Annex E ¶ 61.

307 R-1216, Annex H-1 to Mr. Cabrera's Report.

308 Lynch Expert Rpt. (Oct. 7, 2013) ¶¶ 52-53; Younger Expert Rpt. (Dec. 21, 2011) at 18; *see also* C-2136, RICO Opinion Appendices, Appendix III at App. 45. Claimants' have not submitted Stratus' compilation in this arbitration.

309 Claimants' experts acknowledge that the Judge did not have the document they used to perform their calculations. Younger Expert Rpt. (Dec 21, 2011) at 3 ("It is . . . my understanding that these three XLS files, while produced in discovery in the United States to Chevron, were never filed with the court in the Lago Agrio litigation.").

310 *See* Lynch Expert Rpt. (Oct. 7, 2013) ¶ 71 (emphasis added); Younger Expert Rpt. (Dec. 21, 2011) at 18 (emphasis added).

311 C-1611a, Witness Statement of Douglas Beltman ¶ 25 (confirming that Stratus did not prepare Annex H-1).

312 *Compare* R-1217, Stratus-Native Spreadsheet *with* R-1216, Annex H-1 to Mr. Cabrera's Report.

small difference would have caused the Court — had it actually employed the methods that Claimants suggest — to reach a total pit count *other than 880*, as shown below.

163. **Second**, Claimants' experts cannot even agree with each other on what pits comprise the Court's 880-pit count, belying any confidence that either one of them accurately retraced the Court's steps. To explain their math, Claimants' experts identified a number of categories of pits, compiled them on a spreadsheet, and created tables for the benefit of the Tribunal, captured immediately below this paragraph. Claimants' experts hypothesize that the Court could have used Annex H-1 as a starting point, and then excluded pits falling within certain categories delineated in the "Comentario Del Rap" column found in H-1.[313] Claimants suggest that Judge Zambrano subtracted from Mr. Cabrera's total count all pits marked as "no impact," or pits that might be attributable to "PetroEcuador" or "Petroproducción."[314] Yet as the Table below demonstrates, Lynch and Younger both use as a starting point the Stratus spreadsheet, rather than Annex H-1. Stratus counted 917 total pits. So did Younger, but Lynch counted only 916 pits to comport with Mr. Cabrera's Annex H-1. The **bolded** items note the differences between the Lynch and Younger counts.[315]

313 Mr. Lynch testified that he has no personal knowledge of how Judge Zambrano might have actually arrived at the figure of 880. He was willing to say only that one could, as he had done, "analyze the Cabrera report and information there, and I guess cut it such that it results in 880." C-1980, RICO Trial Tr. at 613:10-22. He removed particular categories of pits because he "noted" that the Judgment seemed to take into account only "pits that had some sort of environmental impact" that "couldn't be attributed to Petroecuador." *Id*. at 638:25-639:11. Mr. Lynch conceded that there was ample material referred to in the Judgment that he has never reviewed and that his opinion assumed as true Mr. Ebert's testimony that the judge did not rely on aerial photographs in reaching his 880 total pit count. *Id.* at 639:20-640:5.

314 Lynch Expert Rpt. (Oct. 7, 2013) ¶ 71; Younger Expert Rpt. (Dec. 21, 2011) at 19.

315 In the Expert Reports of Messrs. Younger and Lynch, several of the RAP Commentaries (comentario del Rap) appear in Spanish. These commentaries or descriptions have been translated into English in the table below for easy readability. *See* Lynch Expert Rpt. (Oct. 7, 2013) Fig. 18; Younger Expert Rpt. (Dec. 21, 2011) Fig. 22.

Rap Commentaries (number of pits per Stratus)		Younger Count	Lynch Count	Difference
Previously closed*	(21)	21	21	
Constructed after 6/30/90	(3)	0	0	
Constructed after 6/30/98	(2)	0	0	
Landowner denied access	(3)	3	3	
Impact below action levels	**(1)**	**0**	**1**	**1**
Modified after 6/30/90 by Petroecuador	(6)	0	0	
No impact observed	(18)	0	0	
Not determined to be a pit	(1)	0	0	
Petroecuador constructed over pit	(1)	0	0	
Petroproduccion used as a pit	(1)	0	0	
Petroproduccion discarded debris	(1)	0	0	
Closed pit	(1)	1	1	
Pit was graded and revegetated	(1)	1	1	
Corn Crops	(1)	1	1	
Remediation Complete	(156)	156	156	
Petroecuador's Responsibility	(1)	0	0	
Revegetated	(1)	1	1	
Soil TPH below action levels	(1)	1	1	
Used by community for fish pond	(2)	2	2	
Used by the local community	(15)	15	15	
Used by Petroecuador	(1)	0	0	
Used as a municipal landfill	(2)	2	2	
Used by Petroproduccion as a waste pit for burning	(1)	0	0	
(blank)	**(676)**	**676**	**675**	**1**
Total	**(917)**	**880 out of 917 pits**	**880 out of 916 pits**	

* shaded entries are classified as "Change of Condition" or "No Further Action" under the RAP

164. Younger and Lynch arrive at a different total number of pits because they chose different, but equally random (and thus equally unreliable) methods of resolving the 1-pit difference between Stratus's spreadsheet (917) and Annex H-1 (916). Younger recognized that Stratus included a pit (Charapa 4) that Mr. Cabrera did not,[316] and as a result used as his base a total of 917 pits (like Stratus).

316 Younger Expert Rpt. (Dec. 21, 2011) at n.3, 18.

165. Conversely, Lynch simply subtracted from his total count one of the "blank pits,"[317] leaving him with a base of 916 pits (like Cabrera). Unsurprisingly, starting with only 916 pits would lead Lynch to a net total of only 879, rather than 880. To account for *that* discrepancy, Lynch made a second random decision: He simply added one pit (categorized as "Impact below action levels,"[318] a category that Younger discarded entirely[319]) back into his revised total count. If Claimants' own experts cannot agree on how to manipulate the data, and if the only way in which they both could reach 880 was to randomly pick and choose from among the pit categories, Claimants' theory must fail as a matter of course. Claimants cannot rely on guesswork to explain the Judgment's 880-pit finding, let alone to prove that Judge Zambrano relied on Mr. Cabrera.

166. Further, Claimants' methodology lacks logic. The evidence before the Court repeatedly demonstrated that pits then being used by the community were deemed clean under the RAP but during the Lago Agrio trial were shown to be highly contaminated.[320] It makes little sense to assume that the Court would under these circumstances have relied on the RAP categories — part of the 1995 Settlement Agreement found not binding on the Plaintiffs — to guide its decision to reduce the total pit count from 916 to 880.

167. **Third**, Claimants' methodology is flawed because in choosing which pits to subtract from the total pit count to reach the 880 figure, Claimants' experts place heightened

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317 Lynch Expert Rpt. (Oct. 7, 2013) ¶ 71. Mr. Lynch says that he removed one pit from the "blank" category because Charapa 4 was not in the Concession Area. This left Mr. Lynch with 675 blank pits, in contrast to Mr. Younger's 676 blank pits. While his decision to decrease the total number of blank pits by one preserves the grand total of 880, this does not change the fact that Mr. Younger excluded an entire category of pits that Mr. Lynch did not. *Id.*

318 *Id*. (Oct. 7, 2013) ¶ 71.

319 Younger Expert Rpt. (Dec. 21, 2011), Fig. 22.

320 *See, e.g.*, RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 5.3.2 (describing pollution at SSF-25 pit 2 that was described under the RAP as "used by the local community").

importance on the "RAP commentary," which catalogs the type of pit, while illogically rejecting the RAP's overall classification scheme.[321] As Claimants explain, the RAP specified that certain classifications of pits did not require remediation: Change of Condition (COC) and No Further Action (NFA).[322] The RAP's "NFA" classification included pits the commentaries described as, *inter alia*, "previously closed," "in use by the community," and "no impact detected."[323] Similarly, Claimants explain that the RAP's "COC" classification included pits the commentaries described as, *inter alia*, "[m]odified after remedial investigation by Petroecuador" and "[a]ccess was not granted by owners."[324] Claimants' theory runs afoul of the RAP classifications because it suggests that the Court would have included in its calculation of total pits only some categories of pits but not others within the same classification or group.

168. In the table above, the shaded items delineate pit categories that fall within the "COC" and "NFA" classifications, categories that should be treated the same. But in their quest to reach 880 pits — no matter how random the turns they take along the way — Claimants' experts do not treat these categories equally. For example, both the previously closed ("cerrada previamente") and no impact detected ("no detectó impactos")[325] categories are classified in the RAP as "NFA," but Claimants' methodology aimed at recreating Judge Zambrano's hypothetical

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321 During the RAP process, the pits were assigned one of three classifications — "No Further Action," "Change of Condition," and "Oil and Water Pits" — based on the contemplated action for each. For example, the Change of Condition classification required reporting the pit only to the Government. Within those classifications, pits were assigned categories that emerged from the RAP inspections labeled RAP commentary, e.g., "modified after remedial investigation by Petroecuador." Claimants' Merits Memorial ¶¶ 103, 105, 107.

322 Claimants' Merits Memorial ¶ 103.

323 *Id.* ¶¶ 104, 107.

324 *Id.* ¶ 107.

325 This category was defined in Woodward Clyde's report, not in the RAP, and was relied upon to show that no impact was detected based solely on a ***visual inspection***, which clearly is not an accurate or reliable measurement. R-610, Remedial Action Plan (1995) § 3.1.2 (evaluating closed pits based on visible contamination); R-938, Clickable Database 2007, SA-01, Remediation Table: WCC Remedial Action Project 2000 (no sampling at pits).

calculation includes only one of these categories, while inexplicably excluding the other. Indeed, why would Judge Zambrano choose to include "previously closed pits" but simultaneously exclude "no detected impact pits" since under the RAP both are classified as "NFA" pits? More likely, if the Court were actually trying to remove pits not needing remediation based on the RAP, it would have excluded at least an additional 42 pits (21 previously closed, 3 where the owner did not grant access, 1 where the soil was below TPH action levels, and 17 used by the local community), and would have concluded that only 838 pits required remediation.

169. In sum, Claimants' proposed theory is that: (1) the Court used a document it did not have to exclude pits from Mr. Cabrera's total pit count based on (2) a methodology that Claimants' experts cannot agree on and (3) which relied on the RAP that the Court discounted as irrelevant, and which if actually employed was improperly and illogically used. This rampant speculation as to how Judge Zambrano might have reached the magic number of 880 not only fails to satisfy Claimants' high burden of proof, it defies common sense.[326]

2. The First Instance Court's Decision To Accept Supplemental Expert Reports Was Proper And Lawful In All Respects

170. Claimants contend that the Court's decision to allow *both* parties to submit further expert evidence after Chevron raised concerns regarding Mr. Cabrera's relationship with the Plaintiffs shows that the Court (1) engaged in a "pattern of knowingly accepting those fraudulent

[326] Claimants have studiously avoided identifying what they contend is an accurate pit count, preferring instead to rely on this argument exclusively to show that the Court might have relied on Mr. Cabrera in some small fashion. But just as Claimants cannot use the 880-pit count to advance their argument, they also cannot use it to show that the Court's determination was in anyway prejudicial to them. As Respondent has shown previously, the actual number of pits far *exceeds* the 880-pit count employed by Judge Zambrano. *See* Respondent's Track 2 Rejoinder ¶¶ 182-184 (showing that the actual pit count is likely in excess of 1,000 pits). The Court's reliance on a pit count that *understates* Chevron's liability cannot be a basis to conclude that the Court committed such an egregious error of judgment *against Chevron* as to rise to a violation of international law.

materials"[327] and (2) sought to help the Plaintiffs by providing a "veneer of legitimacy for the findings and damages *the Plaintiffs* had predetermined would be included in the Judgment."[328]

171. Claimants are wrong in all respects. They ignore that the Court had wide discretion in managing the trial and the intake of evidence, much in the same way that this Tribunal has granted Claimants' multiple requests to supplement the record — in one instance by introducing on the eve of the Track 2 hearing on the merits thousands of pages of evidence and testimony from the New York RICO trial after representing that they would not (and further granting their request for the production of the images of Judge Zambrano's hard drives). Even assuming that Mr. Cabrera's report — whether accurate or not — had been tainted by the Plaintiffs' *attorneys'* conduct, the Court had no reason to turn its back on its truth-seeking mission to determine whether and to what extent Chevron might be liable to the indigenous plaintiffs. The Lago Agrio Litigation has always been about much more than Steven Donziger.

172. The Court's exercise of its discretion to allow the parties an opportunity to submit supplemental damages reports was entirely proper and lawful.[329] As a threshold matter, the Court's decision to permit additional expert reports was not granted in response to a petition filed by the Plaintiffs; rather, it was responsive to multiple motions filed by *Chevron*.[330] Ignoring this,

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327 Claimants' Track 2 Supp. Merits Memorial ¶ 30.

328 *Id.* ¶ 35 (emphasis added).

329 *See* Respondent's Track 2 Counter-Memorial, Appendix E ¶¶ 36-41 (discussing the propriety of the Court's actions under Ecuadorian law, which mirrors U.S. law); *see also* C-1975, National Court Decision at 148-49; R-1207, Brief for Defendants-Appellants Hugo Camacho Naranjo and Javier Piaguaje Payaguaje, 14-0826-cv, *filed with* the United States Court of Appeals for the Second Circuit, July 1, 2014, at 29-31 (explaining that the approach followed by Ecuador's appellate court — which addressed only the merits of the claim but left analysis of the alleged wrongdoing to other *fora* — parallels US legal procedure). Claimants also argue that Ecuador appears to concede what they describe as the '"cleansing experts' scheme." Claimants' Supp. Track 2 Memorial ¶ 36. But it has never been inappropriate for a party to introduce multiple sources of evidence, especially when the probity of evidence from one source is under attack. Claimants themselves have employed the same tactic in this forum by introducing, belatedly, new evidence in a vain effort to corroborate Mr. Guerra's allegations, fully appreciating that Mr. Guerra is *not* a credible source.

330 Respondent's Track 2 Rejoinder ¶ 354.

Claimants seek to get into the head of the Court and wish for this Tribunal to infer an ill motive when there is no evidence of one.[331] Claimants allege, for example, that Chevron was prohibited "from making any effective response to the Plaintiffs' . . . [supplemental] expert reports" because the court had issued an *autos para sentencia* the day after the supplemental damages reports were filed.[332] Claimants neglect to note — and it is these types of omissions of which we ask the Tribunal to take notice — that the *autos para sentencia* was later *revoked*, on October 11, 2010,[333] clearing the way for both parties to file rebuttal papers, which in Chevron's case meant a sixty-eight-page pleading accompanied by *nine* expert reports.[334] It was not until December 17, 2010, that the Court finally issued its *autos para sentencia*.[335]

173. Nor do Claimants dispute that the supplemental experts either did not rely on Mr. Cabrera's data or did so only to the extent that they could independently verify them.[336] In any event, the damages awarded in the Judgment were far less than either Mr. Cabrera or the supplemental experts had proposed.[337] For example:

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331 Claimants' only support for their claim of abetment is correspondence to which the Court was not even privy. *Id.* ¶ 356.

332 Claimants Track 2 Supp. Merits Memorial ¶ 38.

333 R-697, Order issued by the Provincial Court of Sucumbíos (Oct 11, 2010) at 1.

334 Respondent's Track 2 Rejoinder ¶ 355 n.621 (noting that Chevron filed its rebuttal papers on October 29, 2010).

335 C-894, Order issued by the Provincial Court of Sucumbíos (Dec. 17, 2010).

336 Respondent's Track 2 Rejoinder ¶¶ 354, 357; Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 59-64. Tellingly, Claimants also have not refuted that courts routinely find expert testimony reliable *even where* the seed or underlying report is found inadmissible. *Id.* at Annex E ¶ 58.

337 Respondent's Track 2 Rejoinder ¶ 362.

Type of Remediation	Damages Proposed by Cabrera (US$)	Damages Proposed By The Supplemental Expert (US$)	Damages Award By Court (US$)
Groundwater	3.24 billion	911 million	600 million
Ecosystem Restoration	1.69 billion	874 million to 1.7 billion	200 million
Excess Cancer	9.5 billion	12.1 to 69.7 billion	800 million

That the Court did not bless, let alone adopt, most of the Plaintiffs' damages requests belies Claimants' current claim of a Court-led conspiracy.

3. The First Instance Court Properly Terminated The Judicial Inspections Phase And Appointed Mr. Cabrera

174. There is no evidence suggesting that the Court conspired with the Plaintiffs to end the JIs or appoint Mr. Cabrera as the global expert to further a specific agenda. **First**, as the Republic has previously explained (and explains yet again in Annex A), the Court's decision to end the JIs and to appoint a global damages expert was entirely consistent with applicable Ecuadorian law.[338] It is a party's choice to seek and introduce whatever evidence it wishes. The Plaintiffs here had every right to withdraw their own request for still more evidence. **Second,** Claimants' assertion that the Court's grant of the Plaintiffs' motion to withdraw its earlier request for further inspections was motivated by blackmail ignores (again) that the Plaintiffs could not have threatened to implicate Judge Yánez in a sex scandal given that the alleged scandal had been made public weeks before.[339]

175. Nor was the Plaintiffs' decision to terminate the JIs motivated by the poor results they were obtaining, as Claimants allege.[340] Rather, the Plaintiffs lawfully elected to forego testing at their remaining inspection sites because the results they had already obtained were

338 Claimants' Track 2 Supp. Counter-Memorial, Annex A § F.3-4.

339 Respondent's Track 2 Rejoinder ¶¶ 347-350; Respondent's Track 2 Counter-Memorial, Annex E, § II(A).

340 Claimants' Track 2 Supp. Merits Memorial ¶ 14.

overwhelmingly in their favor,[341] and they did not want to further delay court proceedings that were then fifteen years old and counting.[342] In other words, the Plaintiffs elected to rest on the proof they had already collected, move on with and expedite the proceedings, and preserve their precious few resources for the next phase of the case.[343] In any event, the Plaintiffs' motives are not relevant to the propriety of the Court's conduct.

176. Most critically, but again not addressed by Claimants, there is not a scintilla of evidence showing that the Court was aware of the Plaintiffs' relationship with Mr. Cabrera when the Court appointed him as the global damages expert, let alone that the Court was acting in concert with the Plaintiffs in drafting Mr. Cabrera's reports.[344] Even Judge Kaplan found, repeatedly, that Mr. Cabrera's relationship with the Plaintiffs' counsel had been hidden from the Court.[345]

4. Mr. Cabrera Is Not A State Actor, And His Actions Therefore Cannot Be Imputed To Ecuador's Judiciary

177. Precisely because the lower court did not act in complicity with Mr. Cabrera — as Judge Kaplan found — Claimants seek to transform Mr. Cabrera into a State actor, contending that his alleged improper acts may *ipso facto* be imputed to the State.[346] Under Ecuadorian law,

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341 *See* Respondent's Track 2 Rejoinder ¶ 347, nn.603-607 (explaining why it was entirely lawful for the Plaintiffs to forego the remainder of their inspections, none of which included any Chevron-nominated sites since they had all been inspected prior to the commencement of the damages phases); *see also* Respondent's Track 2 Counter-Memorial, Annex E, § II(A).

342 Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 13, 15.

343 Respondent's Track 2 Rejoinder ¶ 347; *see also* Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 11-15 (explaining the propriety of the Plaintiffs' decision and Plaintiffs' counsel's legal responsibilities to their indigenous clients).

344 *See e.g.*, Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 27-31.

345 C-2135, RICO Opinion at 87, 94, 115, 118; *see also id.* at 330 (representations that Cabrera was independent and impartial constituted a "[d]eception of the Lago Agrio Court" and referring to the Plaintiffs' counsel's "false pretenses and representations to the Lago Agrio court"); *id.* at 333 ("Neither the Lago Agrio court nor Chevron knew anything approaching the whole story of the overall Cabrera fraud.").

346 Claimants' Track 2 Reply ¶¶ 80-81; Claimants' Track 2 Supp. Memorial ¶ 36; *see also infra* § III.

however, any fraudulent activity on the part of an expert can never be attributed to the court (and hence the State) because court-appointed experts are not public servants or agents of the court.[347] Absent additional, affirmative proof of the court's knowledge and complicity, no disciplinary action can lie against the appointing court.[348]

178. Recognizing this infirmity, Claimants suggest that the failure by various Ecuadorian courts to take legal action in response to Chevron's evidence of Mr. Cabrera's alleged misconduct constitutes "ratification" of his conduct by the Court, and thus the State.[349] Claimants' sweeping proposition fails as a matter of fact, logic, and law.

179. As a threshold matter, no adjudicatory forum can be held civilly liable on the basis of its good faith legal conclusions. If it were otherwise, this Tribunal and tribunals across the globe would be exposed in a manner that would jeopardize the dispute resolution arena.

180. Moreover, there has never been nor can there be any ratification. **First**, the trial court in fact *excluded* Mr. Cabrera's report from consideration.[350] The appellate court affirmed Chevron's liability but based its decision on a *de novo* review of the record evidence, which similarly did *not* include Mr. Cabrera's report.[351] And not even Claimants contend that the National Court relied in any way on Mr. Cabrera's report. In short, the Ecuadorian courts ratified nothing as it relates to Mr. Cabrera.

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347 Respondent's Track 2 Rejoinder ¶ 345 (citing RLA-303, Organic Law of Judiciary, art. 38). RLA-198, Ecuadorian Code of Civil Procedure, art. 250 ("Expert or experts shall be appointed to the issues in dispute that demand some knowledge of science, art or craft."). The requirement for accreditation of experts before the Judicial Council (which enables them to be appointed in the litigations) does not change the fact that they are not judicial servants or court employees. RE-20, Andrade Expert. Rpt. (Nov. 7, 2014) ¶ 77.

348 *See* RLA-164, Constitution of Ecuador (2008), art. 11.9; RLA-303, Organic Law of the Judiciary, art. 32 (stating that judicial liability for improper administration of justice arises when the error, delay or any other defect in the administration of justice results from the actions of judicial officers).

349 Claimants' Supp. Track 2 Memorial ¶ 37.

350 C-931, Lago Agrio Judgment at 49-51.

351 C-991, Lago Agrio Appellate Decision at 9-11, 13.

181. **Second**, Claimants cannot show that the courts ratified Mr. Cabrera's conduct for the independent reason that Chevron has never presented its evidence regarding the alleged fraud to a court of competent jurisdiction.[352] Chevron's attempted submission of such evidence was rejected by the first instance court because Chevron failed to submit the evidence within the lawfully prescribed time.[353] Given that the evidence was never part of the trial record, neither the appellate court nor Ecuador's highest court could properly consider Chevron's allegations regarding Mr. Cabrera.[354] Chevron possesses the right to submit its evidence in a separate, plenary action under the CPA, pursuant to which authority the court may nullify a decision allegedly tainted by fraud or collusion.[355] To date, Claimants have chosen not to do so.

5. Claimants Cannot Rely On Judge Kaplan's Findings Regarding The Plaintiffs' Experts To Impugn The First Instance Court

182. Claimants seek to impugn the Republic on the basis of Judge Kaplan's findings regarding Mr. Russell and Dr. Calmbacher. This reliance is misplaced. Simply, the testimony provided by these gentlemen is legally irrelevant to *this* proceeding, which is focused on the conduct of the State, not the conduct of the Plaintiffs' attorneys. As even Claimants admit, the Lago Agrio Court *never considered this allegedly tainted evidence in reaching its verdict*,[356] and thus there is no allegation that the Court did anything improper. Further, Claimants ignore the

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352 There are two criminal investigations pending under the auspices of the Sucumbíos Prosecutor, which may involve Mr. Cabrera. *See, e.g.*, C-2000, C-2001, C-2002, C-2003, C-2004. Because of the rules of secrecy governing these proceedings, it is not possible to know at this time either the ultimate scope of the investigations or the conclusions that one day will be reached. RLA-367, Ecuadorian Criminal Code, art. 584.

353 RLA-198, Ecuadorian Code of Civil Procedure, art. 838; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 70; RLA-164, Constitution of Ecuador (2008), art. 76.4. *See also* RLA-586, Devis Echandía, Hernando: Teoría General de la Prueba Judicial, Tomo I, Editorial Temis S.A., Bogotá, 2002, at 358-359.

354 Ecuadorian law does not allow parties to submit evidence in cases before the Constitutional Court. RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 70-72.

355 *See infra* § IV.B.1-3.

356 C-931, Lago Agrio Judgment at 48-49.

fact that both gentlemen actually found significant amounts of pollution at the sites that they inspected.[357]

III. Judge Zambrano's Alleged Solicitation Of Bribes From The Parties In The Lago Agrio Case Does Not Violate International Law

183. Claimants allege that Judge Zambrano solicited and "[took] bribes from the Lago Agrio Plaintiffs to rule favorably for them."[358] In support, Claimants previously relied on evidence showing that the Judgment incorporated verbatim language from documents allegedly never filed with the Court. The Republic has already refuted that claim.[359] Now Claimants rely on the paid-for testimony of Mr. Guerra,[360] a demonstrated and admitted liar. But it is not only Claimants' *factual* assertions that are infirm; their *legal* theory to support a finding of State responsibility is similarly based on a false premise, namely, that Judge Zambrano's bribery scheme is *necessarily imputed* to the State as an international wrong. According to the rules of international attribution, this premise is error. Judge Zambrano's alleged solicitation of a bribe to decide in favor of the Lago Agrio Plaintiffs, which the Republic agrees would be a crime under Ecuadorian law,[361] does not impute to the Republic a violation of international law.

184. Liability can attach to the Republic only if Claimants prove, in this arbitration, that (1) the alleged solicitation and receipt of a bribe by Judge Zambrano from the Lago Agrio Plaintiffs or their representatives actually occurred and (2) those acts constitute a breach by the Republic of its international obligations. They fail to meet their burden of proof as to both. If Judge Zambrano had solicited and received a bribe, as Mr. Guerra asserts, he did so in

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357 *See infra* § VII.G.2.

358 Claimants' Track 2 Supp. Merits Memorial ¶ 3.

359 Respondent's Track 2 Counter-Memorial, Annex D; Respondent's Track 2 Rejoinder § IV.

360 Claimants' Track 2 Supp. Merits Memorial ¶¶ 56 n.108, 57 n.114; Claimants' Track 2 Reply ¶ 59 n.120.

361 RLA-303, Ecuadorian Organic Law of the Judiciary, art. 128(10).

furtherance of his own private, pecuniary interest and under circumstances where Claimants knew at the time that he was not acting under color of State authority. Under these circumstances, this Tribunal cannot — consistent with principles of international law — attribute the alleged misconduct to the State.

A. Claimants Have Neither Alleged Nor Proved That Judge Zambrano Solicited A Bribe To Further The Interests Of The State

185. Judge Zambrano's purported solicitations of bribes from private citizens — first from Chevron and later from the Plaintiffs, then Chevron again and then the Plaintiffs again[362] — and his alleged acceptance of a bribe from the Plaintiffs, were not part of his official duties and were motivated by personal gain only. How do we know? **First**, Mr. Guerra himself concedes that the Government was never involved and never interfered with the Lago Agrio proceeding in any way. In his words, the Government REDACTED "[363] Consequently, according to Claimants' own chief witness, Claimants' grand conspiracy allegation involving the Government, while perhaps good theater, has been groundless from the start. **Second**, Mr. Guerra claims that Judge Zambrano, through him, *twice* elicited bribes from *Chevron* — the Republic's party-opponent — in search of a bigger payoff.[364] Absent proof that Judge Zambrano solicited a bribe on behalf of the Republic, the solicitation would necessarily have been intended to further his own, personal, pecuniary interest, and not to advance some alleged vindictive, national agenda on behalf of the Republic.

186. From the inception of this proceeding, Claimants have sought to conflate the (1) Plaintiffs, (2) alleged wrongful actors and (3) State as if they were one. But international law

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362 R-1218, Callejas Aff. ¶¶ 7-8 (Dec. 7, 2012); R-1219, Racines Aff. ¶ 4 (Nov. 29, 2012); C-1616a, Guerra Decl. ¶ 12 (Nov. 17, 2012).

363 R-1213, Guerra Recorded Conversation (June 25, 2012) at 109 (emphasis added).

364 C-1616a, Guerra Decl. ¶¶ 12, 20 (Nov. 17, 2012), *filed in RICO*.

requires significantly more precision before the State can be found liable for an international delict based on the acts of individuals.

B. Acts Perpetrated By A State Actor To Further His Own Private Interests And Without Apparent Authority Are Not Attributable To The State

187. A State is internationally liable only for unlawful conduct attributable to it under international law.[365] Chapter II of the Draft Articles sets forth the applicable attribution principles. Under Article 4, the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other official function.[366] Article 7 establishes that conduct attributable to a State encompasses even the *ultra vires* conduct of a state organ, or a person or entity empowered to exercise elements of governmental authority, *so long as* "***the organ, person or entity acts in that capacity***."[367]

188. There are, however, substantial limitations on these principles of attribution. For example, private conduct is not attributable to the State.[368] The mere fact that conduct is attributable to a person who is a state official does not mean that the conduct is carried out in an official capacity. In this regard, Professor Crawford describes the distinction between *ultra vires* conduct of a state official that is attributable to the State versus the "private conduct" of a state official that is not attributable to the State as follows:

> [T]he distinction between [these] two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are

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365 RLA-549, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY art. 2. (Cambridge Univ. Press 2002). This is consistent with the Treaty at issue here, which requires an act of state before liability can attach.

366 C-625, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY art. 4. (Cambridge Univ. Press 2002).

367 RLA-549, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY art. 7. (Cambridge Univ. Press 2002) (emphasis added).

368 *Id.* art. 4 at 91(3). The State is not responsible for "the autonomy of persons acting on their own account and not at the instigation of a public authority." *Id.* art. 4 at 91(2).

> officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority.[369]

Apparent authority arises when a State gives "the impression, or allowed the impression reasonably to arise, that the particular acts or omissions were within the authority of the body or person."[370] If a state actor is acting without actual or apparent authority, his acts are not attributable to the State.

189. The question whether a state actor is acting with apparent authority clearly arises when there is an alleged solicitation and acceptance of a bribe by and for a public official. This question has been addressed by previous arbitral tribunals. Both the Iran-U.S. Claims Tribunal and an ICSID tribunal have agreed that a state actor ***is not*** acting with apparent authority in soliciting and receiving bribes in circumstances analogous to those Claimants have alleged. In *Yeager v. Islamic Republic of Iran*, the Iran-U.S. Claims Tribunal (chaired by Karl-Heinz Bockstiegel) found that the solicitation and acceptance of a bribe by an Iran Air agent in exchange for a prepaid airline ticket was not imputable to Iran because, although the agent was a state official, he was acting for his own pecuniary interest:

> It is widely accepted that the conduct of an organ of a State may be attributable to the State, even if in a particular case the organ exceeded its competence under internal law or contravened instructions concerning its activity. It must have acted in its official capacity as an organ, however. ***Acts which an organ commits in a purely private capacity, <u>even if it has used the</u>***

369 *Id.* art. 7 at 108.

370 RLA-555, F.V. García-Amador, et al., RECENT CODIFICATIONS OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 247-48 (Springer 1974).

> ***<u>means placed at its disposal by the State for the exercise of its function</u>, are not attributable to the State***.[371]

190. The Iran-U.S. Claims Tribunal concluded that the bribery at issue did not impute to Iran because "[t]here is no indication in this case that the Iran Air agent was acting for any other reason than personal profit, or that he had passed on the payment to Iran. He evidently did not act on behalf or in the interest of Iran Air."[372]

191. Nor was it material to the *Yeager* tribunal that the Iran Air agent issued the prepaid airline ticket to the claimant — an act which clearly was executed in his official capacity — after soliciting and accepting the bribes — an act which clearly was executed in his personal capacity. The *Yeager* tribunal instead underscored the claimant's own inaction, finding that the acts of the Iran Air agent could not be imputed to Iran where "***[t]here is no evidence that the claimant sought any protection [from the bribery]***."[373] Like in *Yeager*, the Claimants here similarly chose to watch the alleged bribery scheme unfold, without making any effort to report it, much less prevent it.[374]

192. Likewise, in *World Duty Free Company Limited v. Republic of Kenya*, the claimant had paid then-Kenyan President Moi a US$ 2 million bribe to induce him to procure a duty-free retail contract between claimant and the Kenyan Airport authority.[375] The ICSID

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371 RLA-547, *Yeager* Award ¶ 65 (citations omitted).

372 *Id.*

373 *Id.* ¶ 67.

374 Professor Crawford addressed the *Yeager* decision and supported its rationale. In particular, he noted that although the Iran Air agent was a state employee who was "able to extract a bribe ***by virtue of*** his position, [he] did not hold himself out as acting on behalf of the state." RLA-556, James Crawford, STATE RESPONSIBILITY: THE GENERAL PART 138 (Cambridge Univ. Press 2013) (emphasis added). Professor Crawford contrasted the bribery of the Iran Air agent in *Yeager* with the forcible seizure of funds from claimant by other Iranian state agents, which conduct was held attributable to Iran. The procurement of funds by seizure is attributable to the State because the authority of the State was exercised to extract the funds, and it was not simply "by virtue of" the officer's position that the illicit payment took place. *Id.*

375 RLA-548, *World Duty Free* Award at ¶¶ 128, 167.

tribunal, including President Veeder, concluded that the bribe solicited by Kenya's Head of State could not be attributed to Kenya:

> ***Mr. Ali's [claimant's CEO's] payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself***. If it were otherwise, the payment would not be a bribe. It is also important to recall that the Respondent in this proceeding is not the former President of Kenya, but the Republic of Kenya."[376]

The tribunal further held that,

> "[T]here can be no affirmation [of the illegally procured contract] or waiver in this case based on the knowledge of the Kenyan president attributable to Kenya. The President was here acting corruptly to the detriment of Kenya and in violation of Kenyan law. ***There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery***."[377]

Thus, when a government official — even the head of state who is synonymous with the State for most other purposes — acts to further his own personal, pecuniary gain by soliciting and receiving a covert and illegal bribe, those acts are not legally to be imputed to the State. Absent proof to the contrary, the alleged solicitation and acceptance of a bribe by Judge Zambrano is not an *ultra vires* act for which the Republic is responsible; it is private conduct carried out for personal profit and for which state responsibility does not attach.

C. Claimants Have Failed To Prove Judge Zambrano's Alleged Misconduct Is Attributable To The Republic

193. In the absence of any documentary or forensic evidence tying Judge Zambrano to the alleged bribery, Claimants are forced to gamble on Mr. Guerra, a witness whose credibility is at best seriously damaged. As for Mr. Guerra, who allegedly solicited bribes from Chevron as a

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376 *Id.* ¶ 169; *see also id.* ¶ 178 (finding that the *World Duty Free* tribunal "does not identify the Kenyan President with Kenya").

377 *Id.* ¶ 185 (emphasis added).

former judge, directly and indirectly, he is a private actor here — not an officer of the Ecuadorian Judiciary or an organ of the Republic. Article 8 of the Articles on State Responsibility provides for the imputation of a private actor's conduct to the State only if the State instructed the act.[378] That has not been alleged here, and the evidence is to the contrary.

194. Relying primarily on Mr. Guerra's purchased and uncorroborated declarations and testimony, Claimants allege that Judge Zambrano not only participated in but even directed the alleged bribery scheme.[379] Even assuming the truth of these unproven submissions, they fail to overcome the presumption that Judge Zambrano "was here acting corruptly to the detriment of [Ecuador] and in violation of [Ecuadorian] law" for at least five reasons.[380]

195. **First**, there is no proof that Judge Zambrano's purported solicitation and receipt of bribes were either part of his official duties or intended to further any state interest. Nor do Claimants allege that he intended to turn over to the Republic any illicit payments that he supposedly expected to receive. That Judge Zambrano, through Mr. Guerra, allegedly solicited bribes from Chevron reflects the intent to further only his own, personal, pecuniary interests, not those of the State. Like the bribery solicitations of Kenya's then-head of state in *World Duty Free* and the Iran Air agent in *Yeager*, any alleged solicitation of a bribe and consummation of an illicit agreement cannot be imputed to the State.

196. **Second**, Claimants do not allege failure by the Republic to regulate Judge Zambrano. Respondent has implemented a rule of law within its boundaries that condemns

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[378] *See* RLA-549, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES art. 8 at 110 (Cambridge Univ. Press 2002) ("The principle [of attribution to private actors] does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control."). As discussed below, the Republic had a rule of law enshrined in the Constitution and the Organic Law of the Judiciary to ensure a just and impartial judiciary.

[379] *See* R-1218, Callejas Aff. ¶¶ 7-8 (Dec. 7, 2012); R-1219, Racines Aff. ¶ 4 (Nov. 29, 2012); C-1616a, Guerra Decl. ¶ 12 (Nov. 17, 2012), *filed in RICO*.

[380] RLA-548, *World Duty Free* Award ¶ 185.

bribery. Article 172 of the 2008 Constitution requires that "Judges shall administer justice subject to the Constitution, international human rights instruments and the law . . . . Judges shall be responsible for damages to the parties as result of delays, neglect, denial of justice and lawbreaking."[381] The Constitution and the Judicial Code enshrine the principle of judicial independence and impartiality.[382] Since 2009 it has also condemned private meetings with parties.[383] And it condemns bribery: Article 128(10) of the Judicial Code expressly prohibits judges from "receiv[ing] or demand[ing] dues, fees, or contributions . . . in the course of their duties."[384]

197. **Third**, Claimants' contemporaneous knowledge of the alleged bribery scheme eliminates any argument that Judge Zambrano acted with "apparent authority." Claimants instead knew better. They claim that Judge Zambrano, through Mr. Guerra, repeatedly solicited bribes from *Chevron*.[385] At the time of the alleged solicitations, Judge Zambrano was the acting president of the Lago Agrio Court and in that capacity was the judge designated to preside over the Lago Agrio Litigation. In approximately February 2010, Judge Ordoñez was elected President of the Court and replaced Judge Zambrano as the presiding judge. Just one month later, Chevron moved to recuse Judge Ordoñez for alleged inattention to his docket.[386] Chevron did so with full knowledge that under the Court' procedural rules *Judge Zambrano* would replace

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381 RLA-164, Constitution of Ecuador (2008), art. 172.

382 RLA-303, Ecuadorian Organic Law of the Judiciary, arts. 8-9, 21, 100.

383 *Id.* art. 9.

384 *Id.* art. 128(10).

385 Claimants have provided affidavits from their own legal team claiming that as early as the fall of 2009 they knew Mr. Guerra was soliciting bribes from Chevron and would seek bribes from the Plaintiffs. R-1218, Callejas Aff. ¶¶ 7-8 (Dec. 7, 2012); R-1219, Racines Aff. ¶ 4 (Nov. 29, 2012). After Judge Zambrano returned to the case in October 2010, Claimants allege that Chevron's attorneys in Ecuador were again approached by several purported emissaries of Judge Zambrano — still unnamed and referred to as Doe 1 and Doe 2 — requesting a bribe. R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 94:25-95:9 (Doe 1), 114:24-115:15 (Doe 2).

386 R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 66:12-22; *see also* Respondent's Track 2 Rejoinder ¶ 239.

Ordoñez.[387] Thus, if Claimants' case is to be believed, Chevron not only failed to report Judge Zambrano's bribery solicitation, but it affirmatively orchestrated Judge Ordoñez' removal specifically so that Judge Zambrano — the judge they believed had solicited a bribe — would resume his post as presiding judge.

198. According to Claimants' theory, Chevron was armed with this supposed information but chose not to disclose it to the judicial and police authorities in Ecuador nor — for many years — to this Tribunal. Like the claimant in *Yeager*, Claimants failed to seek protection from or otherwise attempt to prevent the alleged bribery they claim was unfolding before them. If nothing else, Chevron could have filed a disciplinary action against Judge Zambrano or raised their allegations of fraud through the CPA or otherwise sought his recusal.[388] They did none of these. Instead, if they are to be believed, Claimants knowingly sat on their hands, watching the illicit conduct play out and lying in wait, hoping to use the circumstances as an insurance policy protecting against loss in this arbitration.

199. **Fourth**, Claimants cannot prevail by arguing that the Lago Agrio Judgment was issued under color of state authority because the solicitation and receipt of a covert and illegal bribe, absent proof to the contrary, are private acts for which the state is not responsible under international law. As we have shown, the issue is whether *the alleged bribes* were solicited and received under color of State authority.

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387 *See* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 69:14-25.

388 The Collusion Prosecution Act provides a forum for redress of allegations of fraud in the Republic's courts. *See* Respondent's Track 2 Rejoinder ¶ 214; Respondent's Track 1 Counter-Memorial ¶ 76 n.110. Claimants concede their choice not to seek redress through the Collusion Prosecution Act. Claimants' Track 2 Supp. Merits Memorial ¶ 116.

200. **Fifth** and finally, the Republic's appellate court conducted a *de novo* review of the record and upheld the factual findings of the Lago Agrio Court. Claimants do not contend that the appellate court's decision affirming the Lago Agrio Judgment was procured by bribery.

IV. Claimants' Denial Of Justice Claim Must Fail

201. Claimants assert that Ecuador "cannot deny that the *facts* of this case are extreme" — Ecuador's judiciary has committed a denial of justice by "collaborating with the Plaintiffs' lawyers to produce and enforce the fraudulent US$ 19-billion Lago Agrio Judgment."[389] As they have throughout the arbitration, Claimants confuse facts with allegations.

202. Claimants' *allegations* are indeed extreme, but Claimants have failed to establish the *facts* necessary to support them. Claimants have spent enormous sums and engaged in unconscionable witness enticement and intimidation to try to support their claims. That includes securing witness testimony in exchange for extraordinary cash payments;[390] flooding a small Ecuadorian court with a barrage of spurious and untimely motions to overwhelm its capacity;[391] paying a former drug offender and a Chevron contractor to surreptitiously attempt to entrap Judge Núñez;[392] forcing witnesses to recant testimony through intimidation and the spectre of economic ruin;[393] and, if Chevron's allegations are to be believed, deliberately withholding information from Ecuadorian authorities regarding an alleged scheme to corrupt the judicial process.[394] But no amount of overzealous lawyering on Claimants' behalf can substitute for an

389 Claimants' Track 2 Reply ¶ 266 (emphasis added).

390 *See supra* § II.

391 *See* Respondent's Track 2 Counter-Memorial ¶¶ 138-156.

392 *See* Respondent's Track 2 Counter-Memorial ¶¶ 157-162 & Annex C.

393 *See* Respondent's Track 2 Rejoinder ¶¶ 62-63 (discussing Mr. Beltman and Ann Maest, formerly of Stratus Consulting).

394 *See supra* § III.

objective evaluation of the evidence. Based on that evidence, Claimants have failed to establish a denial of justice.

203. As a threshold matter, Claimants' denial of justice claim falls outside of the jurisdictional reach of the BIT. By Claimants' own admission, this claim is predicated on a concession contract that expired *five years before* the applicable BIT entered into force and which, under the express terms of the BIT, does not qualify as a covered investment for purposes of treaty protection.[395] Respondent's jurisdictional objections are addressed in Section A, *infra*.

204. Even if this Tribunal accepts jurisdiction over Claimants' denial of justice claim, Claimants do not satisfy the elements of a claim for denial of justice as a matter of international law. They have asserted two distinct bases for their claim: "(1) the Lago Agrio Judgment is the product of judicial fraud, and corruption and violations of due process; and (2) the Lago Agrio Judgment's factual findings, legal holdings, and assessment of damages are so unjust that they constitute additional evidence of a denial of justice independent of whether that Judgment is a product of judicial fraud and corruption."[396] Neither of these predicates is sufficient to sustain a denial of justice claim under international law.

205. Claimants' denial of justice claim premised on fraud fails for at least two reasons: (1) Chevron has failed to exhaust available remedies, and (2) Claimants have failed to meet their high evidentiary burden. Respondent addresses the fraud claim in Section B, *infra*.

206. Claimants' denial of justice claim premised on alleged judicial error fails for at least three reasons: (1) Chevron has failed to complete its appeal from the Judgment; (2) legal error — which is denied — does not constitute a denial of justice, and (3) the Lago Agrio record conclusively demonstrates that Claimants have failed to meet their burden of showing that the

395 Claimants' Track 2 Reply ¶ 267.

396 Claimants' Track 2 Supp. Merits Memorial ¶ 56.

Lago Agrio Judgment, as affirmed by the Court of Appeal and National Court, is devoid of factual and legal support. Respondent addresses the legal error claim in Section C, *infra*.

A. The Tribunal Lacks Jurisdiction Over Claimants' Denial Of Justice Claim

207. Respondent established in its Track 2 Counter-Memorial that Claimants' denial of justice claim does not allege any violation of rights related to a covered investment and, therefore, the claim is beyond the jurisdictional reach of the BIT.[397] In fact, it is only in Claimants' Reply Memorial, filed four years after the start of this arbitration, that Claimants have sought to offer jurisdictional grounds for their denial of justice claim.[398] However, none of those grounds supports a finding of jurisdiction over Claimants' denial of justice claim.

208. Claimants concede that their denial of justice claim "does not depend upon a breach of the Settlement Agreements" and instead arises out of the 1973 Concession Agreement.[399] But that agreement terminated by its own terms more than *five years before* the entry into force of the BIT and, under the express terms of the BIT, does not qualify as a covered investment. The Republic respectfully refers the Tribunal to Respondent's submission of February 18, 2013; there Respondent addresses and refutes Claimants' contention that the lifespan theory, which this Tribunal adopted in respect of Claimants' claims under the Settlement Agreements, can be extended to circumvent the express temporal limitations of the BIT concerning Claimants' denial of justice claim.[400]

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397 Respondent's Track 2 Counter-Memorial ¶¶ 203-214.

398 Claimants' Track 2 Reply ¶¶ 271-279.

399 *Id.* ¶ 267.

400 Respondent's Track 2 Counter-Memorial ¶¶ 206, 212-214. As Respondent has made clear, any connection between the due process allegations behind Claimants' denial of justice claim and the 1973 Concession Agreement is too remote to support a finding of jurisdiction over this claim. *See also id.*, cf. CLA-1, *Commercial Cases* Interim Award ¶ 180 ("[T]hese lawsuits concern the liquidation and settlement of claims relating to the investment and, therefore, form part of that investment.").

209. Claimants' contention that the Tribunal has jurisdiction over their denial of justice claim rests on a number of additional arguments, none of which carry any weight. For example, Claimants argue that among the bundle of rights Chevron acquired as an indirect shareholder in TexPet was the former's right to "limited liability."[401] Yet there is no basis to characterize Claimants' purported right to "limited liability" under U.S. law as a covered investment granted to it under the BIT.

210. Claimants also allege that they have the right to assert (undefined) "defenses" as a releasee under the 1995 Settlement Agreement and the Municipal Settlement Agreements,[402] but those defensive rights — whatever they may be — are not implicated in their denial of justice claim.[403] Claimants specifically concede this point in their Reply.[404]

211. Claimants lastly suggest that because Chevron was sued in the Lago Agrio Litigation on account of TexPet's conduct, it is "entitled to all procedural rights and substantive legal defenses of TexPet."[405] But even assuming *arguendo* the validity of Claimants' argument, there is no support for the extraordinary proposition that Chevron's rights and defenses in the Lago Agrio Litigation "form part of Chevron's protected investments under the BIT." In fact, this Tribunal has already held that Claimants' alleged rights under the Settlement Agreements

401 Claimants' Track 2 Reply ¶ 273 ("Chevron's bundle of rights as an indirect shareholder of TexPet includes, *inter alia*, [Chevron's] right to limited liability.").

402 Claimants' Track 2 Reply ¶ 274.

403 The Tribunal already has found in its Partial Award that the 1995 Settlement Agreement does not give Chevron the right to be indemnified, held harmless, or defended by the Republic in the Lago Agrio Litigation. First Partial Award on Track 1 (Sept. 17, 2013) ¶ 79. Moreover, the Lago Agrio claims themselves do not afford the Tribunal a basis to exercise jurisdiction over Claimants' denial of justice claim.

404 Claimants' Track 2 Reply ¶ 267 (stating that their denial of justice claim "does not depend upon a breach of the Settlement Agreements.").

405 *Id.* ¶ 275.

are "inapplicable to a non-contractual claim made by a third person in its own right."[406] Such is the case here. The Lago Agrio Plaintiffs have asserted third-party claims in each of his or her own right to prevent continuing harm to their lives, health, and property resulting from the contamination. There is thus no link between Claimants' denial of justice claim and the 1995 Settlement Agreement.

B. Claimants' Failure To Exhaust Local Remedies Bars Their Claims Predicated Upon Allegations Of Fraud And Corruption In The Judgment

212. It is axiomatic that exhaustion of local remedies is a *substantive* element of a claim for denial of justice.[407] Claimants' own counsel has publicly acknowledged that "[t]he exhaustion of local remedies rule is . . . a material necessity before any international responsibility may be established, in the same way it is *a material element* of the international delict of denial of justice."[408] This is so because the charge of denial of justice must, by force of law, be directed to the entire judicial system as a whole, including its ability to correct error and accord justice.[409] Exhaustion of local remedies for any claim challenging the adjudicative process is therefore not a matter of procedure or admissibility, but an inherent, material element

406 First Partial Award (Sept. 17, 2013) ¶ 79. The Tribunal found that "all claims falling within the scope of the release could only be made by the Respondent (with or without PetroEcuador), thereby making such provisions *inapplicable to a non-contractual claim made by a third person in its own right.*" *Id.* (emphasis added).

407 It is universally accepted that State responsibility for denial of justice can occur only when the system as a whole has been tested and has failed to deliver justice. Overwhelming authority confirms this proposition. *See, e.g.*, RLA-61, Paulsson, DENIAL OF JUSTICE at 100, 108, 111-12, 125; RLA-310, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 311-12, 404 (1970); RLA-311, John R. Crook, *Book Review Of Denial of Justice in International Law By Jan Paulsson*, 100 AM. J. INT'L L. 742, 742 (2006); RLA-312, Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT'L L. 539, 558-59 (1928). The list goes on.

408 RLA-61, Paulsson, DENIAL OF JUSTICE at 90.

409 *Id.* at 109 ("The obligation is to establish and maintain a *system* which does not deny justice.") (emphasis in original).

of the delict.[410] As Professor Paulsson forcefully and unambiguously observed: "***There can be no denial before exhaustion***."[411]

213. Here, it is an undisputed fact that Chevron has chosen *not* to assert a claim under Ecuador's Collusion Prosecution Act ("CPA"). As a matter of municipal law, the CPA provides the precise remedy to address Chevron's allegations of fraud in the Lago Agrio Litigation. As a matter of international law, Chevron has failed to exhaust available remedies in Ecuador and has therefore failed to test Ecuador's system of justice.

214. Claimants have failed to substantiate their assertions that a CPA action is "ancillary" and "not legally viable" here.[412] Accordingly, Claimants' deliberate failure to exhaust available domestic remedies by bringing a CPA action renders their denial of justice claim deficient as a matter of international law.

1. Ecuador's CPA Provides An Available Remedy to Claimants' Allegations of Fraud and Corruption

215. To show that remedies are available, the respondent State "must prove the existence, in its system of internal law, of remedies which have not been used."[413]

216. Ecuador's CPA specifically and expressly provides for proceedings to address allegations of fraud or collusion in the issuance of judgments — precisely the kind of infirmities that, Claimants allege, have tainted the Lago Agrio Judgment.[414] The CPA affords "[a]ny person

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410 *Id.* at 90, 100.

411 *Id.* at 111. *See also* RLA-557, Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, 63 Int'l & Comp. L.Q. 867, 900 (Oct. 2014) (A denial of justice cannot be "consummated until the foreign national's substantive right has been finally denied with the adjudicative procedure."); CLA-44, *Loewen* Award ¶ 151 ("[A] court decision which can be challenged through the judicial process does not amount to a denial of justice.").

412 Claimants' Track 2 Supp. Merits Memorial ¶¶ 12, 118.

413 *See, e.g.*, CLA-317, *Ambatielos Claim (Greece v. U.K.)*, 23 I.L.R 306, 334 (Award of Mar. 6, 1956).

414 RLA-493, Collusion Prosecution Act.

who has suffered harm, in any way, by a collusive procedure or act" the right to bring a civil action to, *inter alia*, nullify the allegedly fraudulent procedure or act and obtain a judgment for damages.[415]

217. The CPA provides an aggrieved party a full opportunity to be heard and to proffer evidence of any alleged fraud.[416] Where an aggrieved party has alleged fraud in the issuance of a judgment, "[t]he judge shall request the record of the proceedings where the collusion allegedly played a role, as well as that of the associated proceedings, if any."[417] Furthermore, the aggrieved party need not wait until the ultimate conclusion of the case in question: if the requested proceedings are ongoing (e.g., on appeal), "the judge hearing the CPA action shall order copies of the record in the underlying case."[418] Accordingly, Chevron could have filed a CPA action immediately upon learning of the purported evidence of alleged "ghostwriting" of the Judgment, even while its appeal was pending resolution by the Court of Appeal and/or the National Court. Indeed, Chevron could still file such an action. The CPA affords Chevron a full and ongoing opportunity to present its claims, put forth what it considers to be evidence of "ghostwriting" and fraud, and participate in a hearing on those claims.[419]

218. As noted above, available remedies under the CPA include nullification of a judgment shown to be fraudulent, and an award of damages.[420] Should the aggrieved party succeed in substantiating its claims, the judge shall issue all necessary "***measures to void the***

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415 *Id.*, art. 1; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 88-89.

416 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 89.

417 *Id.*; RLA-493, Collusion Prosecution Act, art. 5.

418 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 89; RLA-493, Collusion Prosecution Act, art. 5.

419 Respondent's Track 2 Rejoinder ¶¶ 208, 214-221.

420 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 88; RLA-493, Collusion Prosecution Act, art. 6. Available remedies also include imprisonment and disciplinary proceedings against those involved (including both the lawyers and judges). *See id.*, arts. 6-7.

collusive proceeding . . . invalidating the act or acts . . . and, as a general matter, restoring the things to the state prior to the collusion."[421] In addition, the judge shall also order full reparation of any and all damages that the aggrieved party may have suffered as a result of the fraudulent proceedings.[422] These are the very remedies that Claimants have sought from this Tribunal in their request for nullification of the Lago Agrio Judgment.[423] It is thus beyond dispute that a CPA action is an available local remedy that would permit Claimants to address — and, if supported by persuasive evidence, obtain effective redress for — Chevron's claims of fraud and "ghostwriting" of the Lago Agrio Judgment.

2. The CPA Is The Proper Remedy To Address Claimants' Allegations of Fraud and Corruption

219. Claimants allege that they were denied an opportunity to assert their fraud allegations on appeal, and they reject Ecuador's CPA as a viable and available remedy.[424] Claimants' allegations have no basis in law or practice. Under Ecuadorian law, filing and pursuing a complaint under the CPA is the only correct procedure for Chevron to air its allegations of fraud and corruption.[425] Claimants *admit* that those allegations *could not have*

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421 RLA-493, Collusion Prosecution Act, art. 6 (emphasis added); RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 88 n.173.

422 RLA-493, Collusion Prosecution Act, art. 6. The CPA also provides for additional remedies that, while not intended to restore the aggrieved party to the *status quo ante*, also fall within the general spirit of prosecuting and punishing the kind of fraudulent conduct that Claimants allege has infected the Lago Agrio Litigation. For example, if the CPA action is successfully brought against the judges and attorneys who participated in the underlying proceeding, "the [CPA] judge shall forward copies of the [CPA] court file to the Judiciary Council to initiate proceedings for removal from office or suspension of the professional practice, as the case may be, without detriment to sentencing them to joint payment of compensation for damages." *Id*. Moreover, the CPA allows the aggrieved party to request the imprisonment of all persons involved in the fraudulent proceedings for up to one year. *See id*., art. 7.

423 Claimants' Track 2 Supp. Merits Memorial ¶¶ 15, 199.

424 *Id.* ¶¶ 116-124.

425 Respondent's Track 2 Rejoinder ¶¶ 208, 214-221.

been heard by the Court of Appeals or the National Court.[426] In fact, neither the Appellate Court nor the National Court would have had competence to do so.[427] The reason is rooted in clear and longstanding precepts of Ecuadorian civil procedure: Chevron's allegations necessitate the production of evidence outside the trial court record, but the applicable rules of procedure do not allow for the production of *any* evidence at the appellate level.[428]

220. Ecuador's Code of Civil Procedure further requires that, in matters of appeal of judgments issued in oral summary proceedings, appellate courts rule on the basis of the trial record.[429] This is black letter law in Ecuador. New evidence submitted at the appellate level is thus inadmissible, and there are no exceptions.[430] The judges did nothing wrong.

221. Identical restrictions apply at the National Court. The Law on Cassation expressly prohibits the filing of new evidence, which is inadmissible as a matter of law, during the cassation appeal proceedings.[431] Reliance on inadmissible evidence by any Ecuadorian court (including the National Court) is tantamount to a violation of due process[432] and renders the

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426 *See id.* ¶¶ 215-218.

427 C-991, Lago Agrio Appellate Decision at 10; C-1975, National Court Decision at 95 ("The affirmation made by the court of appeals is the correct one, as it is not within its scope of that court to have jurisdiction to hear collusive action cases within a summary verbal proceeding, or procedural fraud, judges' behaviors.").

428 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 70-72.

429 RLA-198, Ecuadorian Code of Civil Procedure, art. 838. RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 70.

430 RLA-164, Ecuadorian Constitution, art. 76.4. *See also* R-1296, Hernando Devis Echandía, 1 GENERAL THEORY OF JUDICIAL EVIDENCE 359 (1974) ("Evidence untimely submitted, even if it is documental, cannot be considered by a judge, 'otherwise the judge would be violating the principle that he must adjudge '*justa allegata et probata*' according to the concept of Lessona, because probative evidence is that which complies with the formalities and requirements established by law.'").

431 RLA-558, Law on Cassation, art. 15 ("PROCESSING. – During the processing of the cassation recourse, no request for or order to produce evidence may be issued, and no incidental process shall be accepted whatsoever."). Similarly, the Supreme Court has stated that "[new evidence] is not relevant, within the recourse that is subject to decision of this Chamber; since, in accordance with art. 13 of the Cassation Law. 'During the processing of a cassation recourse, no evidence can be requested nor the practice of any evidence, and no incident whatsoever shall be accepted,' which is exactly what the defendant attempts." RLA-559, Supreme Court, Cassation Record 244, O.R. 169 (Apr. 14, 1999).

432 RLA-560, Extraordinary Action of Protection 28, O.R. Supp. 209 (Mar. 21, 2014).

consequent decision subject to nullification at the cassation or Constitutional Court level, as the case may be.[433]

222. Against this background, and without addressing Claimants' admission on this point, Claimants' expert, Dr. Coronel, argues that the National Court "seriously erred" by (1) affirming the appellate court's decision not to "hear and decide the allegations of procedural fraud made by Chevron regarding, *inter alia*, the secret drafting of the lower court judgment by the plaintiffs in the Lago Agrio Litigation" and (2) by holding that it, too, lacked the requisite competence to consider and decide those allegations.[434] Dr. Coronel not only contradicts Claimants' own admission, but he also premises his opinion on material misrepresentations of Ecuadorian law.[435]

a. *Ultima Ratio*

223. Claimants contend that the CPA action is unavailable to Chevron because the action is subject to the *ultima ratio* condition — meaning that it may be filed only when no other mechanism is available to resolve the matter. Claimants argue that Chevron has had available to it other mechanisms because (1) "[t]he appellate court and Cassation Court were obligated to address [Chevron's claims]" and (2) "those same claims are currently before the Constitutional Court."[436] But Claimants' contention underscores that their denial of justice claim is premature and wrong as a matter of law.

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433 RLA-164, Ecuadorian Constitution, art. 76.4; RLA-558, Law on Cassation, art. 16; RLA-459, Organic Law of Guarantees and Constitutional Control, art. 63 ("The Constitutional Court shall determine whether the judgment has violated constitutional rights of the plaintiff and if it declares a violation, it shall order comprehensive reparation to the affected party.").

434 Coronel Expert Rpt. (May 7, 2014) ¶¶ 6, 19-26.

435 The Republic respectfully refers the Tribunal to RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 68-76 for a more detailed analysis and rectification of Claimants' misrepresentations of Ecuadorian law.

436 Claimants' Track 2 Supp. Merits Memorial ¶¶ 120-122 (citing Coronel Expert Rpt. (May 7, 2014) ¶ 29).

224. Initially, Claimants' contention that "[t]he appellate court and National Court were obligated to address [Chevron's claims]" is frivolous. As amply demonstrated by their submissions to this Tribunal, Claimants rely on materials outside the trial record to support their allegations of fraud and corruption. Since the applicable Civil Procedure rules expressly preclude the production of *any* evidence outside the trial record, both at the appellate and cassation levels, it is beyond dispute that neither the Appellate Court nor the National Court afforded Chevron a forum to obtain judicial review of this material. Furthermore, as explained above, CPA Article 5 makes clear that filing appeals with Ecuador's Court of Appeal and, subsequently, the National Court do not bar litigants from also filing a CPA action in any event.

225. Claimants' contention that a CPA action is not available because those same claims of fraud are now before the Constitutional Court fares no better.[437] Recourse to the Constitutional Court by means of an Extraordinary Action of Protection ("EAP") is a constitutional remedy to review final judgments of Ecuador's National Court where constitutional rights have allegedly been infringed by a judicial authority.[438] But the EAP also does not permit the submission of new evidence.[439] The alleged violation of a constitutional right must instead be *clear, direct, manifest, obvious and evident* from the trial court record.[440]

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437 *Id.* ¶ 122; *see also* Coronel Expert Rpt. (May 7, 2014) ¶ 31.

438 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 96 (citing to RLA-164, Constitution of Ecuador (2008), art. 94; RLA- 561, Constitutional Court, Case 0038-08-EP (July 20, 2009); RLA-562, Constitutional Court, Case 041-11-SEP-CC (Dec. 21, 2011); RLA-563, Constitutional Court, Case No. 0373-10-EP (in all cases the Court accepts the EAP, declares that the underlying judgments are devoid of any legal effect, remands the proceedings to the corresponding courts and orders full compensation in favor of the Plaintiffs)).

439 RLA-561, Constitutional Court, Case 0038-08-EP (July 20, 2009) ("excludes the possibility to practice probative tests, in order to determine the contents and scope of the alleged violation of a constitutional right").

440 *Id.* at 16 (emphasis added) (explaining that in order for the EAP to be successful, it is necessary that the "violation against a constitutional right can be reduced in a clear and direct, express, ostensible and evident manner . . . must be a direct consequence of said judgment or writ issued by a body of the judicial function. This violation must be inferred in an express and direct manner from the dispositive part of the judgment, since this is what really binds and causes real effects.").

Accordingly, the Constitutional Court may examine only the record (including procedural acts, orders and decisions of the trial court, Court of Appeals, and the National Court) and the evidence contained in the records of those court proceedings.[441] Again, to the extent Claimants wish to rely on evidence not in the trial record, their only recourse is under the CPA.[442]

b. The CPA Is Not Limited To Fraudulent Practices Related To Real Estate Transactions

226. Claimants incorrectly assert that the CPA is not an available remedy to Chevron because the statute is limited to claims concerning corrupt and fraudulent practices in real estate transactions.[443] This contention has no basis in law or practice.

227. When the CPA was enacted in 1945, the purpose of the statute was to combat collusive and fraudulent real estate actions. But the law has since changed, a point overlooked by Claimants and their expert. The CPA was amended in 1953, 1977, and again in 2009**,** precisely to expand its scope of application, extending it to fraudulent practices affecting *any* right, including the due process rights of any litigant in any type of legal proceeding in Ecuador.[444] Indeed, since 1977, the CPA, by its own terms, is available to "any person who has suffered harm in *any* way" by an act of collusion, including deprivation of property rights or of "other rights that are legally due to such person."[445] The law is plainly drafted, unambiguous, and its meaning is not subject to reasonable dispute. Claimants fail to mention the legal

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441 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 97.

442 The Constitutional Court's jurisprudence shows that a request for relief under the EAP is admissible only if the alleged infringement of the constitutional right is evident from the analysis of the trial court record. *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 97.

443 Claimants' Track 2 Supp. Merits Memorial ¶ 122 (citing to Coronel Expert Rpt. (May 7, 2014) ¶ 28).

444 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 90-91.

445 RLA-493, Collusion Prosecution Act., art. 1. Ecuador's jurisprudence, including a case cited by Claimants' own expert, confirms that the CPA's applicability is not limited to real estate transactions. *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 90-92.

evolution of the CPA since 1945 and omit any reference to what the statute actually provides today. In so doing, Claimants ignore their own expert's opinion, which directly contradicts their misrepresentation of Ecuadorian law.[446]

3. There Is No Merit To Claimants' Assertion That A CPA Action Would Be Futile

228. Given the statute's plain wording and its clear availability to any aggrieved litigant in Ecuador, the burden shifts to Claimants to show that such remedy is ineffective and obviously futile. Indeed, "[i]t is for the respondent . . . *merely* to prove that the particular procedural remedy was *available*. Then it is for the plaintiff . . . to adduce the evidence and prove that the particular procedural remedy was *ineffective.*"[447] This rule is well established, and authority on which Claimants rely confirms this point.[448]

229. A remedy is considered effective if it is "capable of producing the anticipated result."[449] Conversely, "the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies."[450] Because the CPA was specifically designed to address precisely the type of allegations of fraud and collusion at issue in Claimants' case, this statutory remedy is by

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446 *See* Coronel Expert Rpt. (May 7, 2014) ¶ 28, n.29 ("In my opinion, and despite the fact that legal practice has basically referred to real estate, the text of the law currently in force leaves open the possibility for the action for collusion to be filed as well when other types of rights are affected. In fact, Article 1 of the Collusion Act starts by saying *anyone who has been harmed in any way . . . by an act of collusion*' mentioning as example, the loss of property and other rights over real property '*or of* ***other rights*** *legally pertaining to him.*'" (emphasis added)).

447 RLA-320, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 290; s*ee also* RLA-61, Paulsson, DENIAL OF JUSTICE at 116; Respondent's Track 2 Counter-Memorial ¶ 230.

448 *See* Claimants Track 2 Reply ¶ 280 (relying on CLA-472, J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure*, 31 BRIT. Y.B. INT'L L. 452, 458 (1954) ("[T]he burden of proof rests upon the respondent State, if it relies upon the rule as a preliminary objection or defence, to show that local remedies were available; if it discharges this burden, the burden of proof falls on the claimant State to show that the local remedies indicated were not in the circumstances of the case effective.").

449 RLA-636, Jo M. Pasqualucci, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 132 (Cambridge Univ. Press 2003).

450 CLA-317, *Ambatielos Claim (Greece v. U.K.)*, 23 I.L.R 306, 334-35 (Award of Mar. 6, 1956).

definition "capable of producing the anticipated result." Claimants seek nullification of the Lago Agrio Judgment and full reparation of any collateral harm sustained by Chevron as a result of the alleged fraud, and those are the remedies set forth in the statute. Thus, the Republic has more than satisfied its burden on this issue.

230. On the other hand, Claimants have failed to show that the CPA would afford Chevron no hope of redress. Nor could they. Chevron's own counsel in Ecuador, Santiago Andrade, contributed to this long history of jurisprudence while serving as a Supreme Court Justice, confirming from the bench that an action under the CPA is an effective remedy to address allegations of corruption or collusion in legal proceedings.[451] In fact, several decades of CPA jurisprudence in Ecuador confirm that this mechanism is effective.[452]

231. Moreover, as a matter of international law, Claimants are excused from pursuing available judicial remedies only if the pursuit of the remedies would be "obviously futile — not merely futile . . . but obviously so."[453] Claimants cannot meet this test.

232. In fact, as noted by Professor Borchard, another authority relied on by Claimants,[454] a claimant cannot be "relieved from exhausting his local remedies by alleging . . . a pretended impossibility or uselessness of action before the local courts."[455] Similarly, in the recent decision in *Apotex v. United States*, the tribunal, while agreeing with the claimant that it

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451 *See*, *e.g.*, R-987, Supreme Court, Cassation File 162 (Sept. 17, 2002). The decisions cited by Claimants' own expert demonstrate that a CPA action is an effective remedy under Ecuadorian law. *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 92-93.

452 *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 93 n.184.

453 RLA-62, David Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 398-99 (1964); *see also* CLA-318, *Finnish Ship Owners* Award at 1498, 1543.

454 Claimants' Supp. Merits Memorial ¶ 181.

455 RLA-165, Edwin M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 824 (1915).

was "unlikely to secure the desired relief,"[456] stressed that likelihood of success is not the applicable test to establish futility:

> [U]nder established principles, the question whether the failure to obtain judicial finality may be excused for "*obvious futility*" turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.[457]

233. In *Apotex*, the claimant argued that because its chances of a successful outcome if it were to appeal its case to the Supreme Court were "unrealistic," its remedy was "objectively futile" and should be treated as if it were unavailable.[458] The *Apotex* tribunal rejected this claim, requiring that remedies be "'manifestly ineffective' — which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued."[459]

234. Because Claimants cannot show that a CPA action would have been obviously futile, Chevron's failure to pursue it requires dismissal of Claimants' denial of justice claim.

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456 RLA-564, *Apotex* Award ¶ 276.

457 *Id.*

458 *Id.* ¶ 288.

459 *Id.* ¶ 284 (internal citations omitted). *See also* CLA-44, *Loewen* Award ¶ 2 (finding that 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"). There, claimant asserted, *inter alia*, that to appeal the decision of the Mississippi Supreme Court to the U.S. Supreme Court offered no reasonable remedy. Competing expert opinions filed by each party differed on whether the prospect of obtaining *certiorari* was so remote that the Supreme Court route could not be considered a reasonably available remedy. The tribunal concluded that it had no basis for deciding which opinion to rely on, and that, because claimant had failed to establish that neither of the local remedies identified by the respondent was reasonably available and adequate, the denial of justice claim was inadmissible. *Id.* ¶¶ 210-212.

a. Enforceability Of The Lago Agrio Judgment Is No Exception To The Requirement Of Exhaustion

235. Claimants argue that they are "not required to exhaust any further domestic remedies because the judgment ha[s] become enforceable."[460] Referencing the Republic's alleged violation of the First and Second Interim Awards, they claim that because the enforcement proceedings are "a consequence of Ecuador's continued refusal to comply with its international duties under international law," the Tribunal should "view the exhaustion requirement with a degree of 'elasticity' in order to enforce international law and protect its ability to issue a fair and just decision based on the circumstances of this case."[461] Claimants' own plea that this Tribunal apply a "degree of elasticity" is itself an admission that they are asking this Tribunal, yet again, to go beyond the rule of law. Indeed, they have provided no legal support for their proposed loophole in a settled requirement of international law, and Claimants fail to carry their burden of showing how the existence of an enforceable judgment warrants this Tribunal crafting a novel exception to the requirement of exhaustion.[462]

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460 Claimants' Track 2 Supp. Merits Memorial ¶ 104.

461 Claimants' Track 2 Reply ¶ 284. *See also id.* ¶ 286 (arguing that it is "Ecuador's fault, not Chevron's, that the Lago Agrio Judgment became enforceable domestically" and that this somehow militates against the application of the exhaustion requirement); *id.* ¶ 290 (claiming that Ecuador "handed the Plaintiffs a loaded gun"). Claimants also repeat arguments here that Respondent previously has refuted, including Claimants' tired discussion of how they should be excused for not having asked the Ecuadorian court to determine a reasonable bond amount that could have been posted by Chevron to avoid the risk of which it now complains. Claimants' Track 2 Supp. Merits Memorial ¶ 104; Claimants' Track 2 Reply ¶ 291. Nor do Claimants cite any evidence for their self-serving speculation that any bond that Chevron would have posted was "unlikely ever to be returned." Claimants' Track 2 Reply ¶ 286. Similarly, the speculative "the-sky-is falling" predictions uttered by Professor Paulsson have not materialized. Professor Paulsson, who does not profess to be an expert in the laws or enforcement procedures of Argentina, Brazil or Canada, nevertheless attempted to support Claimants' argument by referring to these enforcement jurisdictions as "jurisdictions of uneven reputation for probity," which is unjustified at best. *Id.* ¶ 285.

462 The Republic rejects Claimants' suggestion that Ecuador violated international law by allowing the Judgment to become enforceable. *See* Claimants' Track 2 Supp. Merits Memorial ¶ 106. Claimants themselves concede that the Judgment became enforceable by operation of law upon affirmance on appeal on January 3, 2012, well before this Tribunal issued its First and Second Interim Awards. *See* Claimants' Track 2 Reply ¶ 281. More fundamentally, and contrary to Claimants' argument, the issuance of interim relief in the form of interim awards by the Tribunal did not subject the Republic to an international obligation, the breach of which could constitute an international delict. Article VI(6) of the Ecuador-U.S. Treaty reflects an obligation in respect of final awards on the merits only, and this Tribunal's finding of breach of the First and Second Interim Awards does not and cannot

236. Claimants' extraordinary request that Chevron be relieved of its obligation to exhaust local remedies is not only unsupported by precedent, but it is devoid of all logic. Claimants recently proffered that "[a]ll of [this Tribunal's] orders and awards on interim measures were issued to preserve the *status quo* so that the Tribunal could assess the merits' [sic] allegations at the proper time and in the proper way in accordance with due process."[463] In other words, the interim awards were never intended to grant to Claimants new substantive rights. Rather, they afford only *interim* protection — protection that, by design, will expire upon issuance of a final award.[464] But Claimants now urge the Tribunal to use the interim awards *not* as interim protection as they argued was their purpose just seven weeks ago, but instead as swords, and serve them up as independent predicates for a denial of justice. This is the proverbial tail wagging the dog. As Claimants are wont to do, they rely on the Republic's alleged international delict — which itself cannot be resolved until this Tribunal considers in Track 3 the Republic's March 1, 2013 request to reconsider the Fourth Interim Award — to put them in a *better* position than they would be in absent such purported violation of international law. This is, of course, fundamentally at odds with well-established international law doctrine.[465]

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equate to a finding of breach of an international obligation. The Republic respectfully refers the Tribunal to Respondents' Letter to the Tribunal (Mar. 1, 2013), and to Respondent's Show Cause submissions dated Apr. 15, 2013, and July 19, 2013, on this very issue.

463 Claimants' Letter to the Tribunal (Sept. 29, 2014) at 15.

464 Of course, as a now-historical matter, the interim awards were not necessary to achieve this aim: the Plaintiffs have failed to enforce the Lago Agrio Judgment — and this Tribunal's (contested) jurisdiction is still very much intact. But if it were determined by way of a final award that the Claimants are not otherwise entitled to a finding of State responsibility, then the interim awards would be rendered moot and arguably should not have been issued in the first place.

465 *See infra* § VI.

237. Claimants further argue that they should be relieved of their obligation to exhaust local remedies because there is "an extraordinary sum at stake."[466] Claimants again offer no legal support allowing the amount of an enforceable judgment to justify a deviation from customary international law. Moreover, as Claimants' own demands for compensation at the Show Cause procedure reveal, the sums at stake as a result of current attempts to enforce the Judgment are far less than "extraordinary."[467] Indeed, there is no indication from any enforcing court that Chevron is in any imminent danger of being ordered to satisfy any portion of the Lago Agrio Judgment any time soon. To the contrary, while the Plaintiffs' counsel have made grandiose threats over the years and Claimants' counsel have used those statements for effect in this forum, any actual enforcement of the Judgment is literally years away.[468]

238. Claimants also aver that international law does not give a state the "right to correct itself" before it can be held liable for a denial of justice.[469] This contention is obviously incorrect. While Professor Paulsson now asserts that no such right exists,[470] he has, at least before he was retained by Claimants, always recognized such a right. Indeed, in his first expert report, Paulsson explained: "[L]ocal remedies must be exhausted. Insofar as denial of justice is concerned, this is . . . a substantive element of the delict; since errors are endemic to any legal system, a state must be granted a reasonable opportunity to take measures to correct faulty results."[471] Similarly, in his treatise on denial of justice, Professor Paulsson wrote: "[A] claim of

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466 Claimants' Track 2 Reply ¶ 289.

467 Claimants' Amended Show Cause Pleading (June 12, 2013) ¶¶ 29, 35, 38, 42.

468 *See* R-443, Pollack Aff. (Aug. 15, 2012) (regarding enforcement proceedings in Canada); R-444, Uyeda Junior and Janoni Aff. (Aug.15, 2012) (regarding enforcement proceedings in Brazil).

469 Claimants' Track 2 Reply ¶ 283 (quoting Paulsson Expert Rpt. (June 3, 2013) ¶ 21).

470 Paulsson Expert Rpt. (June 3, 2013) ¶ 21.

471 Paulsson Expert Rpt. (Mar. 12, 2012) ¶ 63.

denial of justice would fail substantively in the absence of proof that the national system was given a reasonably full chance to correct the unfairness in question."[472] His unexplained and unsupported change of position is pure advocacy, not expert opinion.

239. Finally, Claimants contend that a CPA action would not be effective because Chevron would not be able to obtain interim relief while it pursues such a claim, and "[i]in the meantime, the Lago Agrio Judgment would remain enforceable inside and outside Ecuador during the entire pendency of the litigation."[473] At the outset, the Republic notes that Chevron had the legal right to post a bond and stay enforcement of the Judgment pursuant to Ecuadorian law, but it chose not to.[474] Further, Chevron itself acknowledges that it has been in possession of the purported evidence of fraud for almost three years now,[475] and yet it alone made the strategic choice not to file a CPA action. Claimants, not the Republic, bear full responsibility for the foreseeable consequences of Claimants' litigation strategy. In either event, as noted above, there is no imminent danger that any portion of the Lago Agrio Judgment will be enforced any time soon.

4. Claimants Are Estopped From Asserting A Claim On The Basis Of Allegations Of Fraud Because They Failed To Raise Those Claims At The First Instance Level

240. Claimants assert that they were in contemporaneous possession of evidence of a tainted judgment in the works, but failed to take *any* measure against the judge whom they say was actively fixing the case against them. Claimants' allegations, even if accepted as true,

472 RLA-61, Paulsson, DENIAL OF JUSTICE at 8.

473 Claimants' Track 2 Supp. Merits Memorial ¶¶ 123-124.

474 Claimants' Track 2 Reply ¶ 286.

475 Respondent's Track 2 Rejoinder ¶¶ 238-375.

cannot give rise to a denial of justice because, again, Chevron had remedies available to it in Ecuador to address the alleged fraud, in real time, but chose not to avail itself of such remedies.

241. Specifically, Claimants allege that Mr. Guerra and Judge Zambrano solicited bribes from both Chevron and the Plaintiffs in exchange for authorship of and control over the Judgment. In fact, Claimants allege that they knew Mr. Guerra was soliciting bribes from Chevron and the Plaintiffs as early as the fall of 2009.[476]

242. Chevron could have reported, but chose not to report, the alleged bribery solicitations to the Judiciary Council or to this Tribunal.[477] Chevron could have sought, but chose not to seek, Judge Zambrano's dismissal from the bench. What did Chevron do instead? It chose to recuse Judge Ordoñez in August 2010 so that Judge Zamabrano could resume his position as presiding judge.[478]

243. It is trite law that a claimant cannot predicate an international delict on the basis of a claim that it chose not to raise at the national level. As Claimants' counsel Paulsson explains, "[a]ll arguments to be raised at the international level must also have been invoked in the municipal proceedings."[479]

244. The arbitral tribunal in *Finnish Ships* explained:

> [A]ll the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent government ha[s] committed a breach of international law by the

476 Claimants have provided affidavits from their own legal team to attest to the allegation that Mr. Guerra solicited bribes from Chevron. *See* R-1218, Callejas Aff. (Dec. 7, 2012); R-1219, Racines Aff. (Nov. 29, 2012).

477 Just one month after the alleged solicitations, Claimants came before this Tribunal in connection with one of their interim measures applications. Claimants accused the Republic of all manner of "collusion" with the Plaintiffs but inexplicably chose not to reveal to the Republic and this Tribunal the alleged private bribery scheme to which they contend they were privy.

478 *See* C-1289, Chevron's Motion to Recuse Judge Ordoñez (Aug. 26, 2010); *see also* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 66:24-67:22.

479 RLA-61, Paulsson, DENIAL OF JUSTICE at 126.

> act complained of, must have been investigated and adjudicated upon by the municipal Courts.[480]

245. Simply put, a party may not withhold certain defenses or relevant facts at the municipal level only to seek relief from an international tribunal at a later time. As held by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial to raise it only in the event of an adverse finding against the party."[481] The exhaustion rule requires both the pursuit of appeals and that a claimant avail itself of the existing *procedural* mechanisms available under municipal law — failure to do so is "fatal" to a denial of justice claim.[482]

246. Claimants seek to rely here on knowledge and evidence that they allegedly possessed years ago, in circumstances where Chevron had readily available remedies. Indeed, Chevron availed itself of the very same remedies — with success — in obtaining the successful recusal of Judge Núñez from the case and his subsequent dismissal from the bench.[483] Having chosen to forego utilization of the same local remedies against Judge Zambrano — notwithstanding the evidence Chevron claims to have had against him before the Judgment was issued — Claimants plainly forfeited their right to raise such claims before this Tribunal.

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480 CLA-318, *Finnish Ship Owners* Award at 1502.

481 RLA-546, *Prosecutor v. Deliac*, No. IT-96-21-A (Feb. 20, 2001) ¶ 640.

482 RLA-61, Paulsson, DENIAL OF JUSTICE at 127; *see also* RLA-150, D.P. O'Connell, INTERNATIONAL LAW 1059 (2d ed. 1970).

483 After engaging a Chevron contractor and a former convict to entrap Judge Núñez in a sham bribery scandal, Chevron filed a motion for sanctions against Judge Núñez before Ecuador's Judiciary Council. R-1220, Chevron's Motion for Sanctions Against Judge Núñez (Oct. 14, 2009). After Chevron filed a complaint against Judge Núñez before the Prosecutor General's Office on August 31, 2009, Judge Núñez immediately recused himself from the case. C-227, Motion from Judge Juan Núñez Recusing Himself from the Case (Sept. 3, 2009). The Judiciary Council ordered Judge Núñez' dismissal from the bench on October 27, 2010. *See* C-662, Judiciary Council Resolution (Oct. 27, 2010). Judge Núñez subsequently resumed his position on the bench. *See* R-1221, Judiciary Council Resolution (Nov. 17, 2010).

5. Claimants Have Failed To Meet The High Evidentiary Burden Required To Establish A Denial Of Justice

247. International law requires Claimants to prove their denial of justice claim by clear, convincing, and conclusive evidence.[484] For example, in *Chattin*, the tribunal observed that "*convincing evidence* is necessary to fasten liability" for denial of justice.[485] Similarly, in *El Oro Mining*, the tribunal found it "obvious that such a grave reproach can only be directed against a judicial authority upon *evidence of the most convincing nature.*"[486] Likewise, in *Putnam*, the tribunal established, "[o]nly a *clear and notorious injustice, visible . . . at a mere glance*, could furnish ground for an international tribunal . . . to put aside a national decision presented before it and to scrutinize its grounds of fact and law."[487] 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.

248. Claimants do indeed level grave allegations against the Republic, but fall far short of establishing their claims by way of clear and convincing evidence. In fact, as explained above, Claimants' purported evidence of ghostwriting and their evidence of solicitation and receipt of a bribe by Judge Zambrano is so lacking as to render their allegations groundless.[488] Even if the Tribunal were to relieve Claimants from the strictures of international law on denial of justice and allow their claim to proceed, Claimants' fraud claims fail on the merits.

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484 Respondent's Track 2 Counter-Memorial ¶¶ 244-246.

485 CLA-39, *Chattin v. United Mexican States*, 4 R. Int'l Arb. Awards 282, 288 (1927) (emphasis added).

486 RLA-324, *El Oro Mining & R.R. Case v. United Mexican States*, 5 R. Int'l Arb. Awards 191, 198 (1931) (emphasis added).

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

488 *See supra* § II.

C. Claimants' Denial Of Justice Claim Based On Alleged Judicial Error Fails As A Matter Of International And Municipal Law

249. Claimants also try to advance their denial of justice claim on the contention that "the Lago Agrio Judgment's factual findings, legal holdings, and assessment of damages are so unjust that they constitute additional evidence of a denial of justice independent of whether that Judgment is a product of judicial fraud and corruption."[489] Claimants' charge must fail because (1) Claimants' claims are still pending before the Constitutional Court and therefore, premature and (2) Claimants are held to a high evidentiary standard, which they cannot meet.

1. Because Claimants' Action Before The Constitutional Court is Ongoing, Their Claims Predicated Upon Alleged Legal Error In The Lago Agrio Judgment Are Premature

250. Claimants filed an extraordinary action for protection ("EAP") with the Constitutional Court on December 23, 2013.[490] The Constitutional Court, a fully independent judicial body, offers an effective remedy for Chevron's claims relating to the legal basis for the Lago Agrio Judgment.[491] If the Constitutional Court finds that the judicial authority violated Chevron's constitutional rights, it has the power to invalidate the underlying decision and remand the case to the corresponding court to continue from the point where the violation occurred until a decision is reached.[492]

251. In their Track 2 Supplemental Merits Memorial, Claimants assert that they do not have to pursue a constitutional action before bringing a claim for denial of justice because an extraordinary action to the Constitutional Court is "not a 'vertical' remedy of the kind typically

489 Claimants' Track 2 Supp. Merits Memorial ¶ 104.

490 *See* C-2409, Chevron's Extraordinary Action for Protection (Dec. 23, 2013).

491 Respondent's Track 2 Counter-Memorial ¶ 232 (citing RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 80-84). The Constitutional Court is bound by the Constitution and Organic Law of the Judiciary and it is fully independent of the Executive branch. *See* Respondent's Track 2 Counter-Memorial, Annex A.

492 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 96.

required for purposes of international exhaustion."[493] That is nonsense. There is no support for Claimants' invention of an exception based on "vertical" remedies. The only issue is whether the available remedy addresses the wrong complained of, and Chevron's appeal to the Constitutional Court clearly does so.[494]

252. Damage is, of course, a fundamental element of any claim. Claimants cannot establish any damage for a denial of justice because the judicial process on which they base their claim is ongoing. "Damage can only occur when the adjudicative process reaches its final conclusion."[495] And, as explained above, "[a] denial of justice implies the failure of a national system as a whole."[496] In exploring what it means to test the national system as a whole, Professor Amerasinghe confirmed:

> [T]he alien must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress.[497]

253. Similarly, the UN General Assembly's Articles on Diplomatic Protection, which require that a party exhaust all local remedies as a prerequisite to presenting an international claim for denial of justice, define local remedies as "legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the

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493 Claimants' Track 2 Supp. Merits Memorial ¶ 115.

494 *See* CLA-44, *Loewen* Award ¶ 151 ("[A] court decision which can be challenged through the judicial process does not amount to a denial of justice."); *see id.* ¶¶ 209-216 (finding that both filing for bankruptcy and pursuing an appeal before the United States Supreme Court were necessary to show that the claimant had exhausted his available remedies, notwithstanding that filing for bankruptcy is *not* a vertical remedy).

495 RLA-557, Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q. 867, 894 (Oct. 2014).

496 RLA-307, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award of April 23, 2102) ¶ 273; *see also id.* ("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.").

497 RLA-320, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 198.

State alleged to be responsible for causing the injury."[498] There is no restriction to "vertical" remedies.

254. The Constitutional Court is an available and effective remedy for Claimants' allegations regarding the alleged errors in the Lago Agrio Judgment and they are obligated to test the system before they can meet all the elements of a viable claim for denial of justice.

2. National Judiciaries Are Entitled to A Presumption of Regularity

255. International tribunals are not supra-national courts of appeal and do not sit in judgment of municipal court decisions applying municipal law. Denial of justice is a grave charge, and the proponent of the accusation must overcome the presumption in favor of the judicial process by means of clear and convincing evidence of highly egregious conduct.[499]

256. In fact, because of the enormity of an accusation of denial of justice and the repercussions of its validation by an international tribunal, international law imposes special principles that must guide adjudication of a denial of justice claim: (1) the presumption of judicial regularity; (2) the duty to demonstrate highly egregious conduct; and (3) the requirement to prove such conduct by clear and convincing evidence. Claimants cannot overcome the first principle and have utterly failed to meet the latter two.

257. Claimants indisputably assume 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.[500]

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498 RLA-565, UN General Assembly on Diplomatic Protection, art. 14.

499 CLA-232, *EDF* Award ¶ 221 (the party alleging bribery must do so by "clear and convincing evidence"); RLA-332, *Case Concerning Oil Platforms* Higgins Opinion ¶ 33 (stating that there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on"); CLA-81, *Bayindir* Award ¶ 143.

500 Respondent's Track 2 Counter-Memorial ¶ 247.

258. As observed by the *Putnam* tribunal, foreign court decisions "must be presumed to have been fairly determined."[501] 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:

> [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.[502]

259. In their Reply Memorial, Claimants state, incorrectly, that there is no presumption of regularity owed to sovereign courts in international law.[503] This assertion is flatly contradicted by Claimants' own sources. Claimants rely on an authoritative scholar, Durward Sandifer, for the proposition that such presumptions of regularity as applied by international tribunals "are so variously stated, and there is such a lack of uniformity in the circumstances of their application, that no general rules in the matter can be stated."[504] But reading a little further in the same text, one learns that Sandifer confirms the very same consensus on the presumption of regularity that is disputed by Claimants:

> [W]ith respect to the presumption of the correctness of judgments of national courts of last resort: "Nations are considered to be equal and with but few exceptions judgments of their 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 on an alleged denial of justice by the courts assumes the obligation of***

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

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

503 Claimants' Track 2 Reply ¶ 304.

504 *Id.* (quoting RLA-637, Sandifer, EVIDENCE 141).

> ***establishing by clear evidence that the presumption does not apply to his case."***[505]

260. Claimants assert that "even if national judiciaries are *generally* presumed to be fair and regular, the Ecuadorian Judiciary, *specifically* as shown here, is not entitled to any such presumption,"[506] and that the Tribunal should not defer to the Ecuadorian Judiciary because it has been "accused of participating in fraud, corruption and a denial of justice."[507] Once again, Claimants cannot invoke the severity of their *own allegations* either to discard the presumption of correctness and deference owed to the sovereign courts of Ecuador or to lower the standard of proof required to convert allegations into the Tribunal's findings based on established facts. Claimants try to turn the presumption of regularity on its head and subject the Ecuadorian courts to a presumption of *irregularity* only because Claimants have *accused* them of participating in fraud, corruption and denial of justice. Claimants' contention that the "strong presumption in favor of correctness,"[508] as confirmed by Professor Sandifer, can be overcome simply by "well-pleaded factual allegations" of a denial of justice, is wholly unsupported and, frankly, ludicrous.[509]

261. Even in denial of justice cases alleging affirmative wrongdoing by the challenged judiciary, it has been held that "there must be a presumption of deference to the foreign court

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505 RLA-637, Sandifer, EVIDENCE 144 (quoting 5 Hackworth, Digest 526-27) (emphasis added).

506 Claimants' Track 2 Reply ¶ 306.

507 *Id.* ¶ 305.

508 RLA-637, Sandifer, EVIDENCE 144.

509 Claimants' Track 2 Reply ¶ 306. Claimants cite the *Loewen* and *Mondev* Awards to support their claim that "any presumption of regularity can be overcome with well-pleaded factual allegations showing a denial of justice," but neither of the cited references supports Claimants' assertion. *See* CLA-44, *Loewen* Award ¶ 123; CLA-7, *Mondev* Award ¶ 142.

whose performance is being judged."[510] There is no support for Claimants' assertion that "deference to national judiciaries is a matter of discretion, not obligation."[511]

262. In the words of Professor Paulsson, "[i]t is not easy for a complainant to overcome the presumption of adequacy and thus to establish international responsibility for denial of procedural justice."[512] Unsurprisingly, Claimants ignore Professor Paulsson's published position confirming that, to establish a denial of justice in national courts, international law has deliberately set a high bar that requires the proponent to overcome presumptions of deference to, and adequacy of, those national courts. Claimants have not overcome that burden here and instead seek to evade it.

3. The Threshold Of Qualifying Conduct Is High

263. 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, 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."[513]

264. Here, both Parties have cited the *Azinian* tribunal with approval, which requires "*clear and malicious misapplication of the law*" to support a finding of denial of justice.[514] The

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510 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 1, 7 (Todd Weiler ed., 2005).

511 Claimants' Track 2 Reply ¶ 308.

512 RLA-61, Paulsson, DENIAL OF JUSTICE at 97.

513 *Id.* at 60.

514 CLA-299, *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award of Nov. 1, 1999) (Paulsson, von Wobeser, Civiletti) ¶ 103 (emphasis added); Claimants' Supp. Merits Memorial ¶ 236; Respondent's Track 2 Counter-Memorial ¶ 252.

Mondev tribunal likewise confirmed that the standard is elevated 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*."[515] 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*."[516]

4. Claimants Have Failed To Show That The Lago Agrio Court's Decision Is Malicious Or Offends A Sense Of Judicial Propriety

a. Claimants Improperly Focus Their Claims On The Proceedings At The First Instance Level

265. Claimants allege errors in the Lago Agrio Judgment. But that Judgment has been superseded by the substitute judgment issued by the Appellate Court. An independent three-judge panel reviewed the record *por el merito de los autos* — a *de novo* review of the record.[517] Based on the *de novo* review, the Appellate Court upheld the trial court's findings of fact and law, holding that the trial record contains ample evidence of widespread contamination traceable to TexPet and is sufficient to support the Lago Agrio Court's finding of Chevron's liability.[518]

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

516 *Id.* (emphasis added).

517 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 85-86. As the Second Circuit noted, Chevron itself has previously acknowledged that appellate courts in Ecuador conduct a *de novo* review of the case before them. RLA-585, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 237 (2d Cir. 2012) ("Under Ecuadorian law, as characterized by Chevron's expert, the intermediate court based its ruling "on the merit of the record."); *see also* RLA-198, Ecuadorian Code of Civil Procedure, art. 838. This standard of review is comparable to the American standard of *de novo* review, and is applicable to questions both of fact and of law.

518 *See infra* § VII.

266. As Professor Paulsson has noted, a "denial of justice is not consummated by the decision of a court of first instance . . . [A] trial judge who misconducts himself simply does not commit a fully constituted international delict imputable to the state."[519]

267. No allegations of fraud or ghostwriting have been leveled by Claimants against the Appellate Court's decision. Hence, there is no doubt that this Tribunal is duty bound to give deference and a presumption of regularity to the Appellate Court decision, to the extent it was upheld by the National Court.

268. Claimants aver that the Appellate Court did not conduct a proper *de novo* review of the trial record based solely on their contention that there was insufficient time for the Court to conduct such a review before it rendered its decision.[520] Claimants appear to have relegated to themselves the arbitrary right to determine what is too fast and what is too slow, complaining that the Ecuadorian courts are either too slow (e.g., in determining its jurisdictional defense) or too fast (e.g., in conducting a *de novo* review of the trial court proceedings). But the Ecuadorian courts ruled in a timely fashion consistent with Ecuadorian procedural practice, and no violation of any required time period has been alleged.

269. But even on its face, this allegation that the appellate court acted too promptly has no merit. As Claimants acknowledge, appointments to the appellate panel were made as early as March 24, 2011, and even accounting for changes in the panel's membership, each judge had at least 147 days (approximately five *months*, not five weeks) to examine the record and resolve the appeal.[521] Nor is there any requirement that an appellate judge review every page of the record

519 RLA-61, Paulsson, DENIAL OF JUSTICE at 108-09

520 Claimants' Track 2 Supp. Merits Memorial ¶ 25; Claimants' Track 2 Reply ¶¶ 214-216.

521 Appellate panel Presiding Judge Toral, and Judges Encarnación and Legna spent 287, 246 and 147 days, respectively, examining and resolving Chevron's appeal. *See* Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 98, 105.

while crafting the opinion. As Claimants no doubt know, the same holds true in the practice of appellate judges in the United States. Here, the Appellate Court had no reason to review parts of the record that were irrelevant to the issues on appeal, or which might otherwise have been duplicative or cumulative.[522]

270. The Appellate Court decision was sixteen pages. By comparison, the RICO decision authored by Judge Kaplan consisted of a 485-page Opinion and an 85-page Appendix, and Judge Kaplan issued this decision just six weeks after receiving the final post-trial memorandum in a case that amassed more than 3,750 exhibits totaling more than 82,800 pages, and which included a 2,969-page trial transcript, 1,033 pages of written direct testimony, and 7,340 pages of deposition designations. Claimants do not appear to be offended by the record-breaking turn-around displayed by Judge Kaplan in issuing his RICO decision in their favor.

b. The Cassation Decision Conclusively Disproves Any Allegation Of Due Process Violations In The Lago Agrio Proceedings

271. Claimants have now redirected to the National Court the rhetoric and pejoratives they have employed for years against the Lago Agrio Court, and subsequently, the Appellate Court, challenging its reasoning and findings as, *inter alia*, "absurd," "pedantic," "overly formalistic," and further evidence of a denial of justice.[523] But as the National Court's decision confirms, not one of Claimants' allegations of legal error is supported by law or Ecuadorian

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[522] Where the appellant challenges only discrete aspects of the trial court's ruling, the appellate review will be limited to those aspects. RLA-198, Ecuadorian Code of Civil Procedure, art. 334 ("The judge before whom the referred appeal is lodged may confirm, reverse or amend the ruling under appeal based on the merits of the proceedings, including when the lower court judge has omitted a decision on one or several of the disputed points in his ruling. In this case, the higher court judge shall rule on them and shall set a fine between fifty cents of a US dollar to two US dollars and fifty cents, for said omission."); *id.* art. 408 ("If the party that appealed the judgment did not explicitly determine, within ten days from the date it was informed of the reception of the proceedings, the points on which the appeal is based, the judge hearing the case, upon request of a party, shall dismiss the appeal and send the proceedings back to the first level court, for the enforcement of the judgment."); *id.*, art. 838 ("The Superior court shall rule on the merits of the record, and said ruling shall be subject to the recourses permitted by law.").

[523] Claimants' Track 2 Supp. Merits Memorial ¶¶ 135, 138.

court precedent. Nor are Claimants' appellate allegations appropriate for this forum or legally sufficient to establish a claim for denial of justice under international law. This Tribunal is not a supra-national appeals court, and it is required to pay deference to the findings of Ecuadorian courts, particularly on matters of interpretation of Ecuadorian law.[524]

272. The Republic nonetheless addresses and debunks in Annex A to this submission each of Claimants' allegations of legal error, and sets the record straight on the multiple misrepresentations of Ecuadorian law on the basis of which Claimants have predicated this aspect of their denial of justice claim.

V. Claimants' Treaty Claims Are Meritless

273. Claimants' treaty claims fail for three principal reasons.[525]

274. **First**, in Respondent's Track 1 Supplemental Counter-Memorial, the Republic showed that Claimants' Treaty claims are derivative of their breach of contract claim.[526] Because the Ecuadorian Government did not breach the 1995 Settlement Agreement, Claimants' Treaty claims — as derivatives of their failed contract claim — also must fail. Claimants cannot use the BIT to augment their very limited set of rights under the 1995 Settlement Agreement.[527]

275. **Second**, Claimants have not established that Ecuador's judicial system violated the Republic's Treaty obligations under the BIT. Claimants base their Treaty claims primarily upon the now-obsolete first instance Lago Agrio Judgment. But that Judgment is not the

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524 *See* Respondent's Track 2 Counter-Memorial ¶¶ 320-321 (citing RLA-304, *Barcelona Traction* Award at *158 ("If an international tribunal were to take up these issues and examine the regularity of 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."); *see also* RLA-159, Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39 (7th ed. 2008) ("Interpretation of their own laws by national courts is binding on an international tribunal.").

525 Claimants did not include a Treaty claims section in their Track 2 Supplemental Memorial; this section responds to Claimants' Track 2 Reply.

526 Respondent's Track 1 Supp. Counter-Memorial ¶ 50; Respondent's Track 2 Counter-Memorial § IV.

527 *See generally* Respondent's Track 1 Supp. Counter-Memorial §§ I, II & III; *see also* Respondent's Track 2 Counter-Memorial § IV.

operative decision any longer. The Ecuadorian appellate court conducted a *de novo* review and independently affirmed that Chevron is responsible for the environmental devastation to the lives, health, and property of the Oriente residents.[528] The Tribunal has a duty to acknowledge and give appropriate deference to the rulings of Ecuador's higher courts, which have properly evaluated the substantial body of evidence establishing Claimants' responsibility for the pollution in the region.[529]

276. **Third**, Claimants' Treaty claims depend upon the false premise that investment treaties create standards that are divorced from and more favorable to investors than those under customary international law. Having failed to establish a denial of justice under customary international law,[530] Claimants cannot prevail by repackaging their flawed denial of justice claim as treaty claims.

277. The first and second points above are self-explanatory and have been addressed in more depth elsewhere in the Republic's pleadings.[531] We elaborate on the third point below.

A. Claimants Cannot Revive Their Failed Denial Of Justice Claim By Re-Labeling It As A Treaty Violation

278. Claimants predicate their Treaty claims on their allegation that Ecuador's judicial system mishandled the Lago Agrio Litigation, failed to act impartially, failed to act independently from the Executive, and failed to afford Chevron due process. But Claimants are prohibited from circumventing traditional denial of justice *standards*, including the rule of exhaustion, by repackaging their claim as a Treaty claim. As Respondent has shown previously,

528 *See supra* § IV.C.4.

529 *See supra* § IV.C.2; *see* Annex A §§ B, C, F; *see also infra* § VII.F (establishing pollution sufficient to support the damages awarded in the Judgment).

530 *See supra* § IV.

531 For the first point, *see generally* Respondent's Track 1 Supp. Counter-Memorial §§ I, II & III; *see also* Respondent's Track 2 Counter-Memorial § IV. For the second point, *see supra* § IV.C.4.

Ecuador and the United States — in agreeing to the terms of the BIT — specifically intended to reinforce the minimum standard of treatment under customary international law; they did not intend the Treaty's investor-protection standards to permit either State's judiciary to be adjudged by different legal principles from those governing denial of justice under customary international law.[532] Claimants fail to rebut this showing.[533] Indeed, before joining Claimants' team, Professor Paulsson acknowledged that even where states expressly agree in an investment treaty's text that their respective nationals may initiate international arbitration without exhausting local remedies, a denial of justice claim cannot succeed without proving exhaustion because it is a substantive element of that type of claim:

> [S]tates may, and do, enter into treaties that provide for direct access by foreigners to international tribunals without first having to exhaust local remedies. . . .
>
> ***In the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented. . . .*** This is neither a paradox nor an aberration, for ***it is in the very nature of the delict that a state is judged by the final product — or at least a sufficiently final product*** — of its administration of justice.[534]

279. There is no "explicit waiver" of the rule of exhaustion in the Ecuador-U.S. BIT of the kind Professor Paulsson describes.

280. International tribunals have consistently rejected investors' attempts to circumvent this essential requirement by recasting their denial of justice claim as one for breach

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[532] At least one commentator, Zachary Douglas, has noted that all "acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards nationals." RLA-557, Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q. 867, 895 (Oct. 2014). In other words, denial of justice is "the *exclusive* form of delictual responsibility towards foreign nationals for acts or omissions associated with a domestic adjudicative process." *Id.* at 893 (emphasis added).

[533] *See* Claimants' Track 2 Reply § IV.C.1.

[534] RLA-61, Paulsson, DENIAL OF JUSTICE at 108 (emphasis added).

of an investment treaty's FET clause. For example, in *Jan de Nul*, the investor urged the tribunal not to assess the conduct of the Egyptian judiciary "under the [customary international law] standards of ordinary denial of justice, but rather as part of a broader violation of the [treaty] obligation of fair and equitable treatment."[535] The tribunal there rejected the investor's plea and instead held that when a national court's "[j]udgment 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***. . . . Holding otherwise would allow [claimant] to circumvent the standards of denial of justice."[536]

281. In so holding, the *Jan de Nul* tribunal relied on Professor Crawford's opinion that it was "***fatal***" to the investor's denial of justice claim where, as here, its appeal was still pending before the national courts.[537] In this case, not only is an action pending before Ecuador's Constitutional Court, but additional remedies are available to Claimants under the CPA, the law designed to address the precise types of claims they are alleging here.[538]

282. Claimants nonetheless try to circumvent the Treaty and these authorities by suggesting that there may be a "trend" for tribunals to dispense with the exhaustion requirement when assessing the performance of a state's judicial system, specifically citing the *Commercial*

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535 CLA-230, *Jan de Nul* Award ¶ 178.

536 *Id.* ¶ 191 (emphasis added).

537 *Id.* ¶ 182 (emphasis added). *See also* RLA-40, *Duke Energy* Award ¶ 391 (interpreting the Ecuador-U.S. BIT and finding that Article II(7) "*seeks to implement and form part of the more general guarantee against denial of justice*") (emphasis added); CLA-42, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/98/2 (Award of Apr. 30, 2004) (Crawford, Civiletti, Gómez) ¶ 97 (citing *Loewen* with approval and finding that for a claim based on judicial action, "[t]he system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim"); Respondent's Track 2 Counter-Memorial ¶ 360 n.646 (citing the Awards in *Loewen*, *Mondev*, and *Duke Energy*).

538 *See also supra* § IV.B.4 (discussing that Claimants are now time-barred from bringing certain of their local remedies designed to prevent the issues about which they now complain).

Cases, *Occidental* and *CME* decisions.[539] Their reliance on these cases as evidence of such a trend is misplaced, however, because those decisions turned on facts absent here.

283. The *Commercial Cases* tribunal found that an investor claiming a violation of Treaty Article II(7) (effective means) is "*required to make use of all remedies that are available* and might have rectified the wrong complained of."[540] That tribunal expressed "no view on whether and to what extent the requirement of exhaustion of local remedies might apply under other provisions of the BIT."[541] The rationale underlying the *Commercial Cases* decision to apply a qualified exhaustion requirement under Article II(7) was based on systemic judicial delay. Here, by contrast, Claimants have alleged a denial of justice in a single case, where it is indisputable that Chevron has failed to employ all local remedies available to it: pursuing an action under the CPA; awaiting a decision from the Constitutional Court; and seeking dismissal of an allegedly corrupt judge who, Claimants assert, twice solicited bribes from Chevron itself.[542]

284. Similarly, Claimants' analogy to the *CME* and *Occidental* awards is inapt because the treaty violations there had no connection whatsoever to conduct of the State's judiciary or the adjudicative process.[543]

285. Claimants next argue that merely "[b]y its consent to the BIT, Ecuador has undertaken a broader set of substantive obligations than those imposed by customary international law."[544] For this extraordinary proposition, Claimants rely on academic literature

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539 Claimants' Track 2 Reply ¶ 318.

540 CLA-47, *Commercial Cases* Partial Award ¶ 326 (emphasis added).

541 *Id.* ¶ 323.

542 *See supra generally* § IV.

543 CLA-92, *CME* Partial Award (involving interference with a broadcasting license by a regulatory agency); RLA-57, *Occidental I* Award (involving interference with an oil investment due to unanticipated and inconsistent taxation).

544 Claimants' Track 2 Reply ¶ 319.

discussing BITs generally.[545] For example, Claimants cite F.A. Mann, who stated in 1981 that the FET provision "envisages conduct which goes far beyond minimum standard."[546] But this sweeping language says nothing about the intentions of the Contracting Parties when they agreed to include an FET provision in the Ecuador-U.S. BIT, nor anything about the rule of exhaustion or its applicability to an FET claim when the state conduct concerns the judicial branch. Moreover, even Mann clarified one year later that:

> [i]n some cases, it is true, *treaties merely repeat*, perhaps in slightly different language, *what in essence is a duty imposed by customary international law*; the foremost example is the familiar provision whereby states undertake to "accord fair and equitable treatment" to each others' nationals.[547]

286. Likewise, neither of the two other sources Claimants cite supports a finding that a State, simply by ratifying a BIT, waives application of the customary principles of denial of justice to claims concerning the adjudicative process.[548]

287. Claimants cite the language of Treaty Article II(3)(a) that "investments . . . shall in no case be accorded treatment *less than* that required by international law" to argue that the BIT's substantive protection may be broader than that provided by customary international

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545 Claimants' Track 2 Reply ¶ 319 n.773 (citing CLA-212, F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, BRIT. Y.B. INT'L LAW 1981 (Oxford 1982); CLA-446, Christopher Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. OF WORLD INV. & TRADE 357 (2005); CLA-214, Rudolf Dolzer & Magrete Stevens, BILATERAL INVESTMENT TREATIES 60 (Martinus Nijhoff Publishers 1995)).

546 Claimants' Track 2 Reply ¶ 319, n.773 (citing CLA-212, F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, BRIT. Y.B. INT'L LAW 1981 (Oxford 1982) at 244).

547 *See* 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, 58 (2002) (quoting F.A. Mann, *The Legal Aspects of Money* at 510) (emphasis added).

548 The two other sources cited by Claimants note that there is no general agreement on the precise meaning of the FET provision, although the authors suggest that the better view is that FET is a self-contained standard. Both sources, however, agree that the language in the specific BIT is determinative. *See* CLA-446, Christopher Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. OF WORLD INV. & TRADE 357, 359-67 (2005); CLA-214, Rudolf Dolzer & Magrete Stevens, BILATERAL INVESTMENT TREATIES 60 (Martinus Nijhoff Publishers 1995).

law.[549] But as the tribunal in *Azurix v. Argentina* held, the purpose of this language is simply "to avoid a possible interpretation of these standards *below* what is required by international law."[550] Claimants point to absolutely nothing in the Treaty indicating that the Contracting Parties agreed to a level of investment protection from a denial of justice different from the customary international law standard. More to the point, nothing in Article II(3)(a) reflects agreement to waive or modify the rule of exhaustion long embedded in the way customary international law evaluates the conduct of a state's judiciary.[551] This is hardly surprising since the architects of the U.S. BIT program have repeatedly confirmed that the Treaty incorporates customary principles of international law.[552]

288. Finally, Claimants argue that denial of justice principles, including the rule of exhaustion, do not apply to their Treaty claims because Article II(7) is *lex specialis.*[553] Claimants do not even attempt to support this *ipse dixit.* Contrary to Claimants' unsupported assertion, former U.S. BIT negotiators Professors Kenneth Vandevelde and Jose Alvarez, U.S. State Department Transmittal Letters, and numerous other authorities[554] all confirm that the provisions of U.S. BITs, including Article II(7), "sought to reaffirm, not derogate from, relevant customary law" and are properly interpreted as "efforts to include customary protections as a part of a BIT's protections" rather than to "exclude these ordinarily applicable general legal rules as

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549 Claimants' Track 2 Reply ¶ 319.

550 CLA-225, *Azurix* Award ¶ 361 (emphasis added); *see also* RLA-566, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 (Award of Oct. 31, 2012) (Khan, Williams, Hanotiau) ¶ 419; CLA-373, *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15 (Award of Oct. 31, 2011) (Caflisch, Bernardini, Stern) ¶ 336; 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) ¶ 611.

551 Respondent's Track 2 Counter-Memorial § V.D.2.

552 Respondent's Track 2 Counter-Memorial § V.D.

553 Claimants' Track 2 Reply ¶ 320.

554 *See* Respondent's Track 2 Counter-Memorial § V.D.

does *lex specialis.*"[555] Professor Vandevelde has further confirmed that Article II(7) merely incorporates the customary international law principle of denial of justice without adding any additional protection.[556] Claimants neither challenge these citations nor advance contrary authority.

289. In sum, the customary denial of justice principles apply here no matter how Claimants characterize their claim because the alleged delict concerns a state's judiciary.

B. Claimants' Treaty Claims Fail For Additional Reasons

290. Claimants have asserted various Treaty claims, each of which is discussed herein.

1. Ecuador Has Afforded Claimants Effective Means

291. Ignoring the intent of the BIT signatories discussed above, Claimants invoke the *Duke Energy*, *Commercial Cases*, and *White v. India* awards for the proposition that, under Article II(7), states must provide not only a system to enforce rights but also "one that is effective in enforcing legal rights in individual cases."[557] Of course, even if these three decisions stood for the proposition for which Claimants invoke them, the overwhelming majority view requires only that the state's system has in place institutional mechanisms to properly adjudicate disputes.[558] That a particular case, or even a group of cases, fails to live up to the

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555 *See* Respondent's Track 2 Counter-Memorial ¶¶ 364-365; *see also id.* ¶¶ 362-401.

556 *See* RLA-21, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at 415 (2009) (referring to the effective means clause as the judicial access clause, and noting that this provision was removed from the 2004 U.S. Model BIT because the "US drafters believed that the customary international law principle prohibiting denial of justice *provides adequate protection and that a separate treaty obligation was unnecessary*.") (emphasis added).

557 Claimants' Track 2 Reply ¶ 323.

558 *See* Respondent's Track 2 Counter-Memorial ¶¶ 368-386; 408-412; *see also* RLA-21, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS at 415 (2009) (referring to the effective means clause as the "judicial access" clause).

standards enshrined in the state's laws does not give rise to a breach of the Treaty's "effective means" provision. A successful outcome is not required in every instance or case.[559]

292. Respondent previously has identified Claimants' numerous successes over the years in the Ecuadorian justice system, including in cases against the Government itself.[560] In fact, even with respect to this case, Claimants have achieved their fair share of victories in the Ecuadorian courts, including Judge Zambrano's rejection of the Plaintiffs' requested damages award,[561] the National Court's 2013 decision halving the damages award,[562] and the 2011 dismissal of the criminal charges against, among others, two of Claimants' counsel.[563] Thus, Claimants concede (as they must) that institutional mechanisms for redress do exist, and that aggrieved litigants routinely and successfully have invoked those mechanisms.

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559 Claimants' expert Professor Caron confirms that Article II(7) "is not a guarantee as to the final outcome of those means." Caron Expert Rpt. ¶¶ 102-105, 121. As the *Amto* tribunal found: The standard "is systemic 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 [the] Article." RLA-343, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Award of Mar. 26, 2008) ¶ 88 (Cremades, Runeland, Soderland).

560 *See, e.g.*, R-808, *Texaco Petroleum Co. v. Ministry of Energy and* Mines, S. Ct. 2nd Div., Case No. 46-2007 (Jan. 23, 2008) (reversing the dismissal of a multi-million-dollar case brought by Texaco against the Government); R-816, *Texaco Petroleum Co. v. Ecuador and PetroEcuador Co.*, 1st Civ. Ct. of Pichincha 2003-0983 (Feb. 26, 2007) (wherein Texaco received US$ 1.5 million court judgment against the Government); R-809, *Texaco Petroleum v. Ecuador*, Super. Ct., Case No. 152-93 (May 22, 2002), Super. Ct., Case No. 153-93 (May 22, 2002), Super. Ct., Case No. 154-93 (May 21, 2002) (wherein Texaco prevailed against Government motions to dismiss three civil cases pending in the Superior Court of Quito); R-812, *TexPet and Ecuadorian Gulf Oil Co. v. Ministry of Energy and Mines*, S. Ct. Tax Div., No. 12-93 (Oct. 17, 2000) (wherein a Texaco subsidiary and other foreign oil companies won major income-tax cases against the Government); R-975, *Reinoso Magno v. Texaco Petroleum Co.*, S. Ct., Case No. 0055 (May 5, 1994); R-976, *Segundo Valentín Pueyo Cerón v. Texaco Petroleum Co.*, S. Ct., Case No. 0014 (Nov. 4, 1999); RLA-977, *Texaco Petroleum Company v. Municipality of Orellana*, Case No. 0002 (Aug. 24, 1999); RLA-978, *Municipality of Lago Agrio v. Texaco Petroleum Co.*, S. Ct. Case No. 0227 (May 15, 1997). Texaco also submitted many affidavits in the *Aguinda* case stating that Ecuadorian courts provide an adequate alternative forum for the claims asserted by the *Aguinda* plaintiffs. *See, e.g.*, R-22, Dr. Ponce y Carbo Aff. (Dec. 17, 1993) ¶¶ 7-8, 12; R-23, Dr. Bermeo Lañas Aff. (Dec. 17, 1993) ¶¶ 10, 12; R-24, Dr. Ponce Martinez Aff. (Dec. 13, 1995) ¶¶ 4-5; R-107, Dr. Pérez Pallares Aff. (Dec. 1, 1995) ¶ 7.

561 Respondent's Track 2 Rejoinder ¶ 362.

562 C-1975, National Court Decision at 129-135, 145, 208, 221-22.

563 Respondent's Track 2 Counter-Memorial, Annex B § I.E.

293. In any event, the three cited cases do not stand for the proposition for which Claimants cite them. The *Duke Energy* tribunal, for example, found that Article II(7) "guarantees the access to the courts and the existence of *institutional mechanisms* for the protection of investments."[564] Instead of holding that Article II(7) relieved the investor from the rule of exhaustion, the *Duke Energy* tribunal ruled that the claimants there had not exhausted their local remedies, that they had prevented "the Ecuadorian legal system" as a whole from coming "into play," and, as a consequence, they could not succeed on their Treaty claim.[565] The *Duke Energy* tribunal's analysis of Article II(7) is thus consistent with the authority above and Respondent's position here.

294. The awards in *Commercial Cases* and *White v. India* are similarly inapposite. Both addressed claims based on systemic judicial delay, which rendered the investor's *access* to the local courts an impossibility, despite the continuing vitality of the rule of exhaustion.[566] In contrast, Claimants have enjoyed unfettered access to Ecuador's domestic courts at every level. They have availed themselves of their rights to present evidence and to be heard in the first-instance court, the appellate court, the National Court, and now the Constitutional Court. Claimants thus have relied, and are continuing to rely, on institutional mechanisms available to them under Ecuadorian law, which, as noted above, they have successfully invoked in Ecuadorian courts, as have a great number of other litigants. The obstacles that effectively

564 RLA-40, *Duke Energy* Award ¶ 391 (emphasis added).

565 *Id.* ¶ 398.

566 CLA-47, *Commercial Cases* Partial Award ¶¶ 250-251, 260 (analyzing "unreasonable" judicial delay affecting *seven* different cases in *three* separate courts); RLA-347, *White Industries Australia v. India*, UNCITRAL (Final Award of Nov. 30, 2011) ¶¶ 11.4.18-11.4.20 (Brower, Lau, Rowley) (finding that the chronic delay in India's judicial system leading *inter alia* to its courts' inability to dispose of a jurisdictional claim in nine years constitutes breach of the "effective means" obligation). *See also* Respondent's Track 2 Counter-Memorial ¶ 386 (showing that the *Commercial Cases* decision is an aberration in conflict with overwhelming precedent).

barred access to local courts addressed in *Commercial Cases* and *White v. India* have no counterpart here.

295. Regardless of how Article II(7) is construed, Claimants have failed to show that any specific "means" associated with Ecuador's judiciary are "ineffective." With two exceptions,[567] Claimants' Track 2 Reply simply rehashes allegations that the Republic has already refuted.[568] For example, that Ecuadorian law requires that environmental claims be heard via oral summary proceedings did not prevent Chevron from asserting its claims.[569] And while joinder of defendants for contribution purposes is not permitted under Ecuadorian law, Chevron has always been free to bring its own suit against PetroEcuador for indemnification or

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567 Of the eight bullet points listed in paragraph 325 of Claimants' Track 2 Reply, only points four and parts of five are new.

568 Claimants' Track 2 Reply at paragraphs 325-326 ignores for the most part the Republic's prior responses to their allegations. *See* Respondent's Track 2 Counter-Memorial ¶¶ 413-414 & Annex F (rebutting Claimants' allegation that Chevron could not effectively assert its claims because the Executive branch interfered in the Lago Agrio Litigation and Ecuador's judiciary generally); Respondent's Track 2 Counter-Memorial, Annexes C and E (rebutting Claimants' allegations that they were not afforded due process because, *inter alia*, the Court failed to properly handle the allegations of fraud associated with Judge Núñez and Engineers Cabrera and Calmbacher); *id.* at Annex G (refuting Claimants' allegations of judicial bias and explaining why each of the Court's actions was performed in accordance with Ecuadorian law and rules of procedure, including, but not limited to, its decisions to appoint certain experts, to close the judicial inspections phase, to reject the submission of certain kinds of evidence, to sanction Chevron's lawyers, and to pierce the corporate veil); *see also* RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 7, 29-40, 59-67, 93-103 (same); Respondent's Track 2 Counter-Memorial, Annex G at 5-8, 21-25 & RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 7(e), 74-77 (rebutting Claimants' allegation that the appellate panel was improperly constituted and that it failed to consider evidence of fraud); Respondent's Interim Measures Briefs, dated March 1, 2013 and July 19, 2013; the Hr'g Tr. from the Interim Measures Hr'g, Feb. 11, 2012 at 78:7-84:9; Respondent's Track 2 Counter-Memorial § VII (refuting Claimants allegations that measures taken by the Court and the Ecuadorian government to promote the enforcement of the Judgment inside and outside of Ecuador violated Article II(7)).

569 For this claim and similar allegations previously addressed by Respondent, the Republic incorporates by reference its prior responses, which address and dispositively refute them. *See, e.g.*, Respondent's Track 2 Counter-Memorial ¶¶ 406-407 & Annex G § I; RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 7, 9, 12, 17-19 (rebutting Claimants' allegation that the Court's failure to consider at the outset Chevron's *res judicata* and jurisdictional defenses violated Article II(7)). *See also* Annex A § F.1.

contribution — as is the law in states the world over.[570] It has been Chevron's choice not to exercise this prerogative.[571]

296. Claimants' two new "effective means" arguments fare no better than their recycled ones. Claimants now allege that the Court's decision not to consider PetroEcuador's potential liability violated Article II(7). However, Chevron is jointly and severally liable for all of the pollution in the Concession Area resulting from oilfield operations from 1965 to June of 1990. That another joint tortfeasor, not made a party-defendant to the proceeding, might share responsibility does not relieve Chevron of its liability to Plaintiffs.[572] It is a basic principle of joint and several liability in Ecuador, and in other legal systems, that an injured plaintiff can sue and, if successful, recover for the entire harm from any joint tortfeasor. Moreover, the Court could not properly have assessed damages against PetroEcuador, since it was not a party in the Lago Agrio Litigation.[573] If Chevron believes that PetroEcuador is liable for a portion of the damages award due to pollution that it may have caused, its remedy under Ecuadorian law is to sue PetroEcuador for contribution in the appropriate court. It has chosen not to.[574]

297. Claimants argue in the alternative that if the Tribunal were to adopt the Republic's view that Article II(7) imposes liability only for a system-wide failure, the Republic still is in breach of Article II(7) because "Ecuadorian courts have proven to be biased and

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570 *See* Respondent's Track 2 Counter-Memorial ¶¶ 412, 446 & Annex G ¶¶ 3-6; RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 3-6, 7, 21-28; *see also infra* § VII.

571 Claimants have dropped their argument that they were denied effective means to assert their claims based on criminal proceedings initiated by Ecuador against two of their lawyers. *Compare* Claimants' Merits Memorial ¶¶ 473, 478 *with* Claimants' Track 2 Reply ¶ 325.

572 *See infra* § VII.

573 *Id.*

574 With respect to Claimants' second new allegation, i.e., that the Plaintiffs' ghostwrote numerous rulings and the Judgment itself, Respondent directs the Tribunal to § II herein.

politicized in all matters in which the State takes an interest."[575] As we have shown previously, the facts of this case do not support Claimants' allegations.[576] Claimants assert that Ecuador's judicial system lacks independence, but they fail to acknowledge Claimants' own successes referenced above.[577] Claimants' attempt to blame their legal defeats in Ecuador's courts on bias and fraud, while attributing their more numerous successes to mere happenstance,[578] is not credible.

2. Ecuador Has Afforded Claimants Fair And Equitable Treatment

298. Claimants assert that the FET provision requires a state: "(1) to act in good faith; (2) to ensure due process; (3) not to frustrate an investor's legitimate expectations; (4) to refrain from coercion or harassment; and (5) to promote and protect investment."[579] Claimants further assert that Respondent has addressed only item (3), legitimate expectations, but "[w]ith respect to the remaining standards, Ecuador is either silent or provides merely conclusory statements."[580]

299. In fact, Respondent has addressed fully each of the other four prongs of the FET standard[581] in its Counter-Memorial on the Merits, and reviews the analysis in more detail below.

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575 Claimants' Track 2 Reply ¶ 326.

576 *See* Respondent's Track 2 Counter-Memorial, Annex A. *See also* R-1222, Brief For The Republic Of Ecuador As Amicus Curiae In Support Of Neither Party at § II, *filed in Chevron v. Steven Donziger*, Case No. 14-826 (2d Cir. July 8, 2014).

577 *See supra* ¶ 293.

578 *See supra* n.560.

579 Claimants' Track 2 Reply ¶ 328.

580 Claimants' Track 2 Reply ¶ 330.

581 Contrary to Claimants' assertion, and with the possible exception of legitimate expectations, these five categories of conduct are not stand-alone protective standards. *See, e.g.*, CLA-209, *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9 (Award of Sept. 5, 2008) (Sacerdoti, Veeder, Nader) ¶ 258 (observing that language in the preamble of a BIT, such as the duty to protect and promote an investment, "is not a legal obligation in itself for the Contracting Parties, nor can it properly be defined as an object of the Treaty"). A breach of any of these categories of conduct will not automatically or in isolation constitute breach of the FET provision.

300. The Republic has previously established that the FET standard adopted in U.S. BITs, including the Ecuador-U.S. BIT, is that imposed by customary international law.[582] Claimants have failed to address the voluminous authority, including declarations by negotiators of the U.S. BITs, submitted by Respondent.[583] As those authorities demonstrate, no arbitral tribunal is free to impose its own subjective evaluation of what constitutes "fair" or "equitable." Instead, this Tribunal must give effect to the Contracting Parties' own interpretation of the provision.[584]

301. With respect to the legitimate expectations obligation, Claimants assert that "Ecuador disingenuously argues that neither TexPet nor Chevron is entitled to rely on this standard because TexPet was not a defendant in the Ecuadorian litigation and Chevron was not the original investor in Ecuador."[585] Claimants misstate Respondent's argument. The Republic argues that even assuming the legitimate expectations test were an obligation under the FET clause, which it is not, Chevron cannot rely on *TexPet's* expectations any more than TexPet can rely on *Chevron's* expectations. The expectations of each investor are measured at the time that it made its investment.[586]

302. Chevron's first alleged investment here was in 2001, when it acquired its interest in TexPet. Thus, even if Chevron were entitled to invoke TexPet's rights under the 1995 Settlement Agreement, Chevron's expectations must be measured at the time it made its

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582 Respondent's Track 2 Counter-Memorial § V.D.

583 Claimants' Track 2 Reply ¶¶ 318-320.

584 Respondent's Track 2 Counter-Memorial § V.D.

585 Claimants' Track 2 Reply ¶ 331.

586 *See, e.g.*, 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) ¶ 157; CLA-226, *PSEG Global Inc. v. Turkey*, ICSID Case No. ARB/02/5 (Award of Jan. 19, 2007) (Orrega Vicuña, Fortier, Kauffman Kohler) ¶ 240; 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) ¶ 252; CLA-42, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (Award of Apr. 30, 2004) (Crawford, Civiletti, Gómez) ¶¶ 73, 98.

operative investment.[587] In any event, Claimants have presented no evidence as to what TexPet's or Chevron's expectations were *at the time* they made their respective investments. Accordingly, their FET claims must fail for this reason alone.

303. Furthermore, Respondent's Counter-Memorial fully addresses and refutes each of Claimants' four examples of legitimate expectations they contend were frustrated — namely: (i) the alleged Núñez "bribery"; (ii) the alleged evisceration of the 1995 Settlement Agreement and the (undefined) "arrangement upon which TexPet relied in choosing to invest in Ecuador"; (iii) the alleged "public disparagement of Claimant and its employees"; and (iv) the criminal proceedings.[588]

304. Additionally, Respondent has previously addressed the other four categories of conduct relied upon by Claimants, i.e., coercion and harassment, failure to promote or protect Claimants' investment, bad faith, and failure to ensure Claimants due process.[589] Contrary to Claimants' argument, none of the factual allegations underlying their FET claim has been proven and none amounts to an FET violation.[590] Moreover, while Claimants' Reply cites to "newly-

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587 RLA-567, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005 (Final Award of Sept. 12, 2010) (Böckstiegel, Steyn, Berman) at 192-193, 241-242.

588 Claimants' Merits Memorial ¶¶ 495-497, 499. *See* Respondent's Track 1 Supp. Counter-Memorial §§ I, II & III; Respondent's Track 2 Counter-Memorial ¶¶ 424-430 (addressing Claimants' allegations regarding breach of the 1995 Settlement Agreement); Respondent's Track 2 Counter-Memorial, Annex B (addressing Claimants' allegations regarding the now dismissed criminal proceedings), Annex C (addressing Claimants' allegations that Judge Núñez was the subject of a bribery plot) & Annex F (addressing Claimants' allegations of "collusion"). The purported frustration of Claimants' legitimate expectations regarding their alleged rights under the 1995 Settlement Agreement is further undermined by the Tribunal's finding that Claimants in fact do not have the rights they claimed to have under that agreement. *See* First Partial Award on Track 1 ¶ 79 (finding that the 1995 Settlement Agreement did not provide Claimants with the right to be held harmless, indemnified, and defended by the Respondent or PetroEcuador if Claimants were sued "for any legal obligation or liability for Environmental Impact arising from the Consortium's operations").

589 Claimants' Track 2 Reply ¶¶ 328-330.

590 *See* Respondent's Track 2 Counter-Memorial ¶¶ 404-405, 430 (refuting Claimants' allegation that the criminal investigation, which was dropped, amounted to coercion and harassment); Respondent's Track 1 Supp. Counter-Memorial; C-1975, National Court Decision at 174-198 (explaining that the Republic did not fail to promote or protect Claimants' investment because the Government did not breach the 1995 Settlement Agreement or otherwise fail to give Claimants finality); Respondent's Track 2 Counter-Memorial, Annexes B-G (refuting

revealed conduct" that supposedly violates these four purported standards,[591] very few of these "new" examples are actually new,[592] none has been proven, and none amounts to breach of the FET clause, as discussed below.

305. Claimants now allege that Respondent breached the FET clause because Plaintiffs ghostwrote the Judgment.[593] But that allegation does not withstand careful scrutiny and, *inter alia*, is directly contradicted by authenticated contemporaneous documents and REDACTED It is Claimants who have been forced to rely on purchased testimony from an admitted liar.

306. Claimants' allegation that Ecuador breached the FET standard because the Court did not deduct the quantum of damages they believe may have been caused by PetroEcuador is legally baseless.[595] Again, Claimants can file a subrogation or contribution action against

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Claimants' allegations that the Republic acted in bad faith); Respondent's Track 2 Counter-Memorial §§ IV & V.B-D (refuting Claimants' allegations concerning a lack of due process in the Lago Agrio Litigation).

591 Claimants' Track 2 Reply ¶ 332.

592 Claimants recycle longstanding allegations regarding the drafting of the Cabrera report, their criticisms of Judge Zambrano for failing to consider evidence of alleged fraud in the litigation, and their claim that the Republic has violated this Tribunal's Interim Award and the BIT by encouraging the enforcement of the Judgment. All of these are familiar allegations which have been volleyed and returned *ad nauseum. See, e.g.*, Respondent's Track 2 Counter-Memorial, Annex G §§ II, III (refuting Claimants' allegations with respect to piercing the corporate veil and that the appellate panel was "handpicked" and that it abdicated its responsibility to consider evidence of fraud); Respondent's Interim Measures Briefs, dated Mar. 1, 2013 & July 19, 2013; Respondent's Letter to the Tribunal (April 15, 2013); Interim Measures Hr'g Tr. (Feb. 11, 2012); Respondent's Track 2 Counter-Memorial § VII (all refuting Claimants' allegations that measures taken by the Court and the Ecuadorian Government to encourage enforcement of the Judgment violated the FET provision); RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 100-103 (refuting Claimants' allegations concerning Mr. Cabrera); Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 9-65 & Annex G ¶¶ 11-20 (refuting Claimants' allegations regarding Mr. Cabrera and the Courts failure to consider allegations of fraud in the litigation); Respondent's Track 2 Rejoinder ¶¶ 341-365 (discussing the Court's actions with regard to Cabrera and how any fraud he allegedly committed cannot be imputed to the Court). Many of these same allegations are also refuted herein. *See, e.g.*, *supra* § II.C (discussing the Court's actions with regard to Cabrera and how any fraud he allegedly committed cannot be imputed to the Court).

593 Claimants' Track 2 Amended Reply ¶ 329.

594 *See supra* § II.

595 *See infra* § VII.F.1.

PetroEcuador, though they have apparently made — and are continuing to adhere to — a deliberate strategic choice not to do so.[596]

307. Nor can Claimants show that the Republic breached the FET standard by failing to investigate the allegations of fraud and corruption concerning the Judgment. Many of the allegations, including those concerning Judge Núñez, were investigated and shown to be frivolous and trumped up by Claimants in their effort to stage his entrapment and sabotage the Lago Agrio Litigation.[597] Other of Claimants' charges are currently being investigated by the Prosecutor in Sucumbíos, who is conducting two ongoing criminal investigations regarding alleged conduct in the Lago Agrio Litigation.[598] Because of the rules of confidentiality governing these proceedings,[599] it is not possible to know at this time the full scope of the investigations.

308. Lastly, the Tribunal cannot fairly assess the findings of Ecuador's courts in the Lago Agrio Litigation on the amount of contamination, or the validity of the award of damages, without examining and quantifying the pollution and harm caused by Chevron. That record will not be complete until Respondent has had an opportunity to fully present its case, including conducting the requested site visit and completing briefing in Track 3.

3. Ecuador Afforded Claimants Full Protection And Security

309. Customary international law imposes a duty to provide foreign investors with physical protection from violence.[600] The Treaty does not impose upon the Republic a higher

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596 *Id.*

597 Respondent's Track 2 Counter-Memorial, Annex C.

598 C-2000, C-2001, C-2002, C-2004 (communications with and orders issued by the Prosecutor's office in connection with allegations of criminal conduct committed in connection with the Lago Agrio Litigation).

599 RLA-367, Ecuadorian Criminal Code, art. 584.

600 *See* Respondent's Track 2 Counter-Memorial ¶ 433; *see also id.* § V.D.

duty to accord full protection and security than that required under customary international law.[601]

310. Claimants attack Respondent's "blanket assertion" that full protection and security affords protection only from violence, and contest the applicability of Respondent's cited cases. But all three cases support Respondent's position.[602] In *AMT v. Zaire*, the tribunal compensated claimant for Zaire's inability to provide claimant's investment with physical protection from violence.[603] In *AAPL v. Sri Lanka*, the tribunal likewise held that the full protection and security clause was violated because Sri Lanka failed to protect the investment from physical violence.[604] That the tribunal compensated claimant based on the value of its defunct shareholding does not alter the fact that liability was predicated on the failure to protect the investment from violence.[605] Finally, in *Wena Hotels v. Egypt*, the tribunal found that Egypt similarly violated the full protection and security standard for its failure to protect claimant's hotel from physical seizure and violence.[606]

311. Claimants say that Respondent ignored the cases cited by Claimants to support its allegation that "full protection and security extends to legal protection of intangible assets."[607] In so arguing, Claimants rely upon *Vivendi II*, which conflated the FET and full protection and

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601 The 2004 and 2012 U.S. Model BITs state that "'full protection and security' requires each Party to provide the level of police protection required under customary international law." R-543, 2004 U.S. Model BIT, art. 5.2(b); R-544, 2012 U.S. Model BIT, art. 5.2(b).

602 Claimants' Track 2 Reply ¶ 334 (referring to *AMT v. Zaire, AAPL v. Sri Lanka, Wena Hotels v. Egypt*).

603 CLA-103, *American Manufacturing & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1 (Award of Feb. 21, 1997) (Sucharitkul, Golsong, Mbaye) ¶ 40.

604 CLA-86, *Asian Agric. Prods., Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (Award of June 21, 1990), 4 ICSID Rep. 246 (El-Kosheri, Goldman, Asante) ¶ 85.

605 *Id.* ¶¶ 99-100.

606 CLA-403, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award of Dec. 8, 2000) (Leigh, Fadlallah, Wallace) ¶¶ 88, 95.

607 Claimants' Track 2 Amended Reply ¶ 335.

security clauses, so the case is clearly inapposite: "Article 5(1) of the Treaty – guarantees that '. . . investments . . . shall enjoy . . . protection and full security ***in accordance with*** *the principle of fair and equitable treatment* referred to in Article 3 of this Agreement.'"[608] The *Azurix* tribunal likewise conflated the FET and full protection and security clauses, though the tribunal conceded that the two "appeared as separate protections" in the applicable treaty like the BIT at issue here.[609]

312. And while some cases such as *Azurix* have observed that full protection and security in some instances may protect intangible assets, "no tribunal seems to have awarded compensation for nonphysical harm to investment based solely on the full protection and security standard."[610] The full protection and security standard that Claimants endorse is thus clearly overbroad and at best exceptional. In *PSEG v. Turkey*, for example, the tribunal found that the full protection and security standard was "developed in the context of the physical safety of persons and installations, and only *exceptionally* will it be related to the broader ambit noted in *CME*."[611]

313. As the *Sempra Energy v. Argentina* tribunal declared:

> There is no doubt that historically this particular standard has been developed in the context of physical protection and the security of a company's officials, employees and facilities. The Tribunal cannot exclude as a matter of principle the possibility that there might be cases in which a broader interpretation could be justified. *Such situations would, however, no doubt constitute specific exceptions to the operation of the traditional understanding of the*

608 CLA-228, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* ("*Vivendi II*"), ICSID Case No. ARB/97/3 (Award of Aug. 20, 2007) (Rowley, Bernal Verea, Kaufmann-Kohler) ¶ 7.4.13 (emphasis added).

609 *Id.* ¶ 7.4.16 (citing CLA-43, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Award of July 14, 2006) (Sureda, Lalonde, Martins) ¶¶ 406, 407)).

610 RLA-107, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY POLICY, AND INTERPRETATION 244 (Oxford Univ. Press 2010).

611 CLA-226, *PSEG Global Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5 (Award of Jan. 19, 2007) (Orrego Vicuña, Fortier, Kaufmann-Kohler) ¶ 258 (emphasis added).

> *principle.* If such an exception were justified, then the situation would become difficult to distinguish from that resulting in a breach of fair and equitable treatment, and even from some form of expropriation.[612]

314. In *BG Group v. Argentina*, the tribunal similarly found it "inappropriate to depart from the originally understood standard of protection and constant security."[613]

4. Ecuador Did Not Act In An Arbitrary Or Discriminatory Manner With Respect To Claimants' Alleged Investments

315. Claimants' argument under Treaty Article II(3)(b) is baseless. In its opening Memorial, Claimants argued that the Contracting Parties "agreed that local remedies need not be exhausted within the Ecuadorian legal system as a precondition" to filing a claim under Article II(3)(b).[614] Respondent's Track 2 Counter-Memorial demonstrated instead that the exhaustion requirement applies to Article II(3)(b) claims that arise from the conduct of the Ecuadorian judicial system.[615]

316. In their Reply, Claimants contend that the Republic is "internationally responsible for the conduct of all of their constituent branches, including the judiciary."[616] Claimants' rebuttal misses Respondent's point entirely: Respondent is internationally responsible for certain conduct of its judiciary, subject to the exhaustion requirement, and Claimants have not exhausted

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612 RLA-106, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (Award of Sept. 28, 2007) (Orrego Vicuña, Lalonde, Rico) ¶ 323 (emphasis added).

613 CLA-100, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL (Award of Dec. 24, 2007) (Alvarez C., Garro, van den Berg) ¶ 326; *accord* CLA-224, *Saluka Investments BV v. Czech Republic*, UNCITRAL (Partial Award of Mar. 17, 2006) (Watts, Fortier, Behrens) ¶¶ 483-484 ("The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.").

614 Claimants' Merits Memorial ¶ 526. Article II(3)(b) provides: "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. 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."

615 Respondent's Track 2 Counter-Memorial ¶¶ 436-437.

616 Claimants' Track 2 Reply ¶ 339 (citing CLA-288, ILC Articles on State Responsibility, art. 4).

their local remedies as to their Article II(3)(b) claims.[617] In any event, the Republic previously refuted each of Claimants' allegations of arbitrary conduct on the part of the Ecuadorian Judiciary and Government, and there is no need to repeat that discussion here.[618] Claimants nonetheless assert that this allegedly offensive State conduct — what they characterize as procedural judicial errors in the Lago Agrio Litigation — lacked any rational justification and hence is arbitrary within the meaning of Article II(3)(b).[619] In each instance, however, Respondent has explained why the conduct at issue was rational and proper under Ecuadorian law.[620] Tellingly, Claimants' Track 2 Reply Memorial and their pleadings filed since then have failed to address any part of Respondent's showing.

317. Claimants' allegations of discriminatory conduct remain as utterly incoherent in their Track 2 Reply Memorial as they were in their Memorial on the Merits.[621] Discrimination is a comparative standard that requires Claimants to establish that the State engaged in unjustified differential treatment against a foreign investor compared to a similarly situated domestic entity.[622] Claimants fail to explain how the *Lago Agrio Plaintiffs'* decision to sue Chevron for contamination, or the Lago Agrio Court's hearing of that suit in accordance with Ecuadorian law, constitutes unlawful discrimination by the State. Similarly, Claimants fail to explain how the Public Prosecutor's decision to initiate a criminal investigation against officials of both TexPet *and* PetroEcuador, an investigation which was ultimately dismissed by the competent Ecuadorian court, constitutes unlawful discrimination against Claimants.

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617 Respondent's Track 2 Counter-Memorial ¶¶ 436-437.

618 *Id.* ¶ 440 (citing Annexes B, E).

619 Claimants' Merits Memorial ¶¶ 527-28, 533; Claimants Track 2 Reply ¶ 339.

620 Respondent's Track 2 Counter-Memorial ¶ 440; *see also* Annex A.

621 *Compare* Claimants' Track 2 Reply ¶ 341 *with* Claimants' Merits Memorial ¶¶ 532-536.

622 *See* Respondent's Track 2 Counter-Memorial ¶ 444 (quoting 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).

318. Claimants' allegations of discriminatory government conduct also lack any causal connection or evidentiary support.[623] Claimants do not establish that the purportedly "discriminatory" public statements of Government officials impacted the outcome of the Lago Agrio Judgment, much less the *de novo* decision of the Ecuadorian court of appeals and the decision of the National Court.[624] To the contrary, Claimants' allegation that the Executive branch's support for the Plaintiffs influenced the outcome of the Lago Agrio Litigation lacks any basis and, for that matter, is no different than public support offered by any politician of any State on behalf of a litigant.[625]

319. Finally, Claimants complain that PetroEcuador complied with lower remediation standards than those imposed on Chevron by the Lago Agrio Court. Yet Claimants again have not met their burden to prove discrimination. Chevron cannot rightly compare PetroEcuador's voluntary clean-up, which was limited to the remediation of certain *pits*, to a court-ordered, comprehensive remediation as part of a decision in an adjudicated proceeding.

VI. Claimants Have Failed To Establish That The Nullification Remedy They Seek Is Available Or Appropriate In The Circumstances Of This Case

320. Claimants are under the misimpression that Chevron is entitled to a free pass. They contend that if the Tribunal finds a denial of justice or Treaty violation, the appropriate remedy is to nullify the Lago Agrio Judgment and award damages to Chevron. In effect, Claimants argue for a presumption that Chevron would have prevailed completely on its

623 CLA-173, *Lauder v. Czech Republic*, UNCITRAL (Award of Sept. 3, 2001) (Briner, Cutler, Klein) ¶¶ 234-235, 274 (requiring a causal connection between the alleged discriminatory act and the harm alleged).

624 Respondent's Track 2 Counter-Memorial ¶ 445.

625 *Id.* at Annex F § V. Additionally, vocalized support by a government for victims of an environmental disaster occurring within its nation's borders is hardly unique to Ecuador. *See, e.g.*, Supp. Track 1 Hr'g Tr., April 29, 2014 at 435-436 (quoting President Obama among others in regards to the U.S. Government's response to the BP oil spill and referencing exhibits R-537, R-619, R-620).

defenses in the Ecuadorian courts (including through the exhaustion of appeals), and would have defeated the Lago Agrio Plaintiffs' claims in their entirety.

321. No principle of international law supports such a presumption, much less the nullification remedy Claimants seek. Rather, the relevant authorities (including, prominently, Professor Paulsson) elucidate what common sense dictates: The appropriate remedy is to put the claimant in the position it would have occupied but for the alleged international wrong. Accordingly, if the Tribunal finds that there has been a denial of justice, it must determine how the Plaintiffs' claims against Chevron should fairly have been decided. It then must craft a remedy that puts Claimants in a position no better than if that result had obtained.[626] Even if Claimants had shown that nullification were an available remedy here (which they have not), they have failed to demonstrate that it is an appropriate remedy in these circumstances.[627]

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626 The Tribunal already ruled that all "extant quantum issues," Procedural Order No. 18, ¶ 7(2) (Aug. 9, 2013), including the amount of any actual harm, if any, *suffered* by Claimants, will be determined during Track 3. By the same token, the amount of any actual harm *caused* by Chevron or Texaco also must be determined during Track 3.

627 There is no merit to Claimants' contention that the Republic is "offer[ing] to espouse the Plaintiffs' claims before this Tribunal" in contravention of "its previous claims that Ecuador could never adjudicate environmental claims on behalf of private third-party plaintiffs." Claimants' Track 2 Reply ¶ 360. If espousal were even a relevant concept in the investor-state context (which it is not), it would entail Ecuador taking title to its citizens' claims and seeking an affirmative award of damages against Chevron. That did not happen. It was *Claimants*' decision to seek from this Tribunal an award impugning the Republic's Judiciary and requiring the Republic to indemnify Claimants for the Lago Agrio Judgment that triggered a State interest both in defending its judiciary and in showing the extent of Chevron's liability. Those interests compel the Republic to object to Claimants' attempt to circumvent Ecuadorian justice, and to evade liability to the indigenous plaintiffs, in a forum in which the indigenous plaintiffs have no voice. Ecuador urges that the Tribunal reject Claimants' request for an order effectively *extinguishing* the Plaintiffs' rights to any damages award against Chevron. As scholars have recognized, the interests of justice require balancing an investor's demand against the effects of that demand on the host state's population:

> [A] progressive interpretation of the 'fair and equitable standard,' which has been systematically adopted in BIT practice . . . entails that the investor who seeks equity for the protection of his investment ***must also be accountable, under principles of equity and fairness, to the host state's population affected by the investment***. It is hard to conceive of equity as a one-sided concept: equity always requires fair and equitable balancing of competing interests, in this case the interests of the investor and the interest of individuals and social groups who seek judicial protection against possible adverse impacts of the investment on their life or their environment.

RLA-568, Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. No. 3 at 739 (2009) (emphasis added).

322. None of the "four factors" on which Claimants rely in their Reply "counsel[s] in favor"[628] of "nullifying the existence, validity, and all effects of the Judgment, and declaring that the Judgment is a nullity as a matter of international law,"[629] and then "issu[ing] [a] Final Award on the Merits as soon as possible after the [Track 2] hearing."[630]

323. **First**, none of the arbitral decisions Claimants cite conclude that nullification is the appropriate remedy for a denial of justice. That is clear from the assessment of those cases by Professor Paulsson, Claimants' former expert and current counsel.

324. **Second**, the U.S. and U.K. national court decisions on which Claimants rely are inapposite. They involve an appellate court's unremarkable exercise of jurisdiction to vacate in full or in part the judgment of a lower court over which it has supervisory authority pursuant to national legislation. In this case, that authority is vested exclusively in Ecuador's National Court and Constitutional Court.[631] No principle of international law confers on this Tribunal the power to usurp that authority and supplant the decisions of those courts with a decision of its own.

325. **Third**, the *Commercial Cases* tribunal, after finding a Treaty violation, proceeded to decide the merits of the underlying actions to determine appropriate damages *assuming no*

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628 Claimants' Track 2 Reply ¶ 284.

629 *Id.* ¶ 424(8).

630 *Id.* ¶ 358.

631 Claimants' nullification request violates the limited scope of relief that they originally told the Second Circuit Court of Appeals they would be seeking from this Tribunal. *See* R-1215, Oral Arg. Tr. for *Yaiguaje, et al. v. Chevron Corp., et al.*, Case No. 10-1020-CV (2d Cir. Aug. 5, 2010) at 53:10-54:3 ("JUDGE LYNCH: Are you representing to us that you are not asking the arbitrators to have the Ecuadorian courts shut down this litigation by these plaintiffs, but instead that you have no objection to the Ecuadorian court proceeding to judgment, and to enter a judgment in the case, who pays it, what happens after that, whether there's an indemnification is a different question. Is that a representation that you're making to us or not? MR. MASTRO: I want to be crystal clear, Your Honor. We have not . . . . We have not asked the arbitration panel to shut down the proceeding. JUDGE LYNCH: Have not or will not? MR.MASTRO: We are not intending to ask, and we are not—we have not, we're not intending to, we have no present intention to ask them to shut down their proceedings."); *id.* at 55:19-21 ("No Your Honor . . . we have not asked the arbitration panel to dismiss the lawsuit at this point."); *id.* at 56:25-57:4 ("I can't state this clearly enough. We have not asked that arbitration panel at – at this point, and we don't have any present intention of doing so, to try and shut down anything in Lago Agrio"); *id.* at 61:9-14 ("again we have not sought to stop [the Lago Agrio Plaintiffs] from getting a judgment…we[']re not going towards stopping a judgment from being entered.").

Treaty violation. The tribunal found that it would have been unjust simply to have awarded Chevron everything it asked for in its various lawsuits in the respective Ecuadorian courts without examining the merits of Chevron's damages claims and Ecuador's defenses. It would be equally unjust to grant Claimants' request for nullification — a free pass to which they are not entitled. Claimants' attempt to distinguish the *Commercial Cases* is unpersuasive and should be rejected.

326. **Fourth**, the overwhelming weight of authority demonstrates that nullifying the Lago Agrio Judgment would unjustly enrich Chevron. In his most influential work on the topic, Claimants' former expert *and current counsel*, Professor Paulsson wrote: "It seems difficult to justify the conclusion that the prejudice to a claimant who was prevented from having his grievance heard should be deemed equal to whatever relief he had initially seen fit to ask."[632]

327. If the Tribunal finds Chevron was denied justice in the Ecuadorian courts, it cannot achieve a just result simply by granting Claimants' request to nullify the Judgment and award them damages. The Tribunal must instead determine and take into consideration Chevron's actual liability in fashioning any final award.

A. Claimants' Request For Nullification Is Not Supported By International Law

328. Claimants contend that "[i]nternational law recognizes that the nullification of a tainted judgment is the only appropriate legal remedy in cases of denial of justice that result in an improper judgment against a defendant."[633] But that is plainly wrong. They cannot cite a single case that demonstrates as much. They instead proffer opinions prepared for this case by Professor Paulsson, which are flatly contradicted by his own scholarly writings on this very point.

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632 RLA-61, Paulsson, DENIAL OF JUSTICE at 227.

633 Claimants' Track 2 Reply ¶ 367.

329. Without any citation to authority, Professor Paulsson opines in his second report:

> If the Tribunal upholds Chevron's challenge, the correct approach to remedies is to declare the defective judgment a nullity. When an international tribunal is confronted with a defective judgment it is not the role of that tribunal to fix it. It must simply decide whether it is defective enough to breach international law. If it is not, then the judgment stands. If it is, then the international tribunal simply deems it a nullity as a matter of international law, and it is then for the legal system domestic to the judgment to act on that authoritative predicate.[634]

330. This is in sharp contrast to the often-cited views of Professor Paulsson prior to his engagement as Claimants' expert (and now counsel), which provide *no* support for Claimants' request that the Tribunal simply nullify the Lago Agrio Judgment if it finds a denial of justice has occurred. To the contrary, in *Denial of Justice*, Professor Paulsson explains that an arbitral tribunal finding a denial of justice must determine the claimant's actual damages before issuing its award. In support of that view, Professor Paulsson discusses *Amco II*, the lead arbitral decision on which Claimants rely for their nullification argument. The issue before the *Amco II* Tribunal was "whether tainted proceedings in the local administrative procedure at issue (including, but not limited to, procedural irregularities) necessarily rendered the underlying decision unlawful, even if substantive grounds may have existed for such a decision."[635] As Professor Paulsson explains:

> The *Amco II* tribunal's review of the precedents [including *Idler* and *Chattin*] cogently demonstrated that the authorities relied on by the parties ***did not*** in fact answer the question as framed: does international law consider that damages should be awarded solely on account of a denial of justice even if it can be demonstrated that the substantive outcome would have been justified even without the violation of due process? ***But having done so, the critical***

634 Paulsson Expert Rpt. (June 3, 2013) ¶ 31.

635 Claimants' Track 2 Reply ¶ 369.

> ***reader might well reflect, the Amco II tribunal does not appear to have answered the question either.***[636]

Professor Paulsson thus confirms that none of Claimants' cited cases (*Amco II*, *Idler*, or *Chattin*) address — let alone support — Claimants' assertion that the Tribunal must or can nullify the Lago Agrio Judgment.

331. Indeed, longstanding international authority supports Ecuador's position that nullification is not the appropriate remedy for a denial of justice in the circumstances presented here. According to the seminal *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that ***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***.[637]

332. In Professor Paulsson's second report for Claimants, he opines that Ecuador's reliance on *Chorzów Factory* for the principle that Claimants' actual damages must be ascertained "stretch[es] the holding in that case beyond even the many extrapolations to which it is routinely subject."[638] But once again his scholarly work squarely supports Ecuador's position:

> The unstated premise [of the *Amco II* tribunal's analysis] appears to be that if there has been an international delict, reparations are due. But that of course is not what international law affirms; *Chorzów Factory* is trite law to the effect that in the wake of a breach the damages caused must be repaired. ***And so the question***

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636 RLA-61, Paulsson, DENIAL OF JUSTICE at 221 (emphasis added).

637 CLA-406, *Chorzów Factory* Award at 47 (emphasis added). Claimants misconstrue this excerpt from *Chorzów Factory* to suggest that the Tribunal should restore Chevron to its pre-domestic-court-proceeding position. Were that true, the ICJ's reference to "in all probability" would have been unnecessary. Determining Chevron's pre-litigation position (not paying anything) is easily done *with certainty*. Instead, the reference to "in all probability" recognizes that follow-up work is required to determine a claimant's position but for the denial of justice, not but for domestic court proceedings entirely. The relevant question is, "in all probability," what would have been the extent of Chevron's adjudicated liability absent the alleged denial of justice?

638 Paulsson Expert Rpt. (June 3, 2013) ¶ 27.

remains: what are the damages if the outcome would have been the same even if the national authorities had acted properly?[639]

As Professor Paulsson observes, "[t]he questions left open by *Amco II* suggest that this dimension of the inquiry was overlooked."[640] This Tribunal should not similarly overlook a critical dimension of the inquiry here.

333. International scholars agree that *Chorzów Factory* "requires the comparison between a real situation, on one hand, and a hypothetical situation, on the other; that is, how would reality have — in theory — evolved had the unlawful act not occurred."[641] In other words, "to properly apply [the *Chorzów Factory*] test to cases involving the breach of non-expropriation standards of treatment, in the exact sense, one has to compare the situation now (*ex post*) with the situation as it would have evolved had the government pursued in all likelihood the same policy, but complied with the applicable procedural and/or substantive rules."[642]

334. More broadly, "in the context of treaty or contractual obligations . . . the loss to be compensated is the financial harm caused by the breach, established by measuring the difference between the actual financial position resulting from the breach and that which otherwise would have obtained."[643]

335. Once more, Professor Paulsson has presented views to this Tribunal as *Claimants'* international law expert that are irreconcilable with his well-accepted public views — which, in fact, support Ecuador's position: "The goal of reparations in international law is to restore the

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639 RLA-61, Paulsson, DENIAL OF JUSTICE at 221 (emphasis added).

640 *Id.* at 225.

641 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1057; *see also* RLA-413, Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 272 (Oxford Univ. Press 2008) ("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.").

642 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1082-83.

643 RLA-569, John Barker, *The Different Forms of Reparation: Compensation* in THE LAW OF INTERNATIONAL RESPONSIBILITY 601 (Crawford *et. al* ed. Oxford Univ. Press 2010).

victim of a breach to the position it would have enjoyed if the infraction had not occurred. That general principle applies to cases of denial of justice."[644] He explains further that

> [i]f 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***.[645]

336. Professor Paulsson recognizes, moreover, that "if [the complainant's] case had been given a fair hearing, it may have been a poor one in any event. . . . The appeal may have had little chance of success even in the absence of the denial of justice."[646] Yet Claimants urge the Tribunal to adopt precisely the conclusion Professor Paulsson finds "difficult to justify,"[647] namely, that Chevron necessarily would have prevailed — completely — over the Lago Agrio Plaintiffs. Nothing in Professor Paulsson's opinions submitted for Claimants provides a basis under international law to justify such a result here.

337. As Professor Paulsson further explains: "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."[648] (Once more, Professor Paulsson's published

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644 RLA-61, Paulsson, DENIAL OF JUSTICE at 226.

645 *Id.* at 225 (emphasis added). Suppose, for example, that the federal court in New York had denied Texaco's motion to dismiss the *Aguinda* Plaintiffs' claims. After what presumably would have been a long and expensive trial (as typically is the case in U.S. civil cases alleging environmental pollution), the New York court may well have held Texaco liable for environmental harm, individual damages, and inadequate remediation, and awarded substantial damages for those wrongs. Claimants ask the Tribunal to disregard that eventuality, even though Professor Paulsson's writings, and other pertinent authorities, militate against Claimants' position. Indeed, other scholars have understood Professor Paulsson to mean "that a material breach of the due process principle implicit in 'denial of justice' ***does not lead to an award as if the investor had prevailed in the incriminated litigation***." RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1088 (emphasis added).

646 RLA-61, Paulsson, DENIAL OF JUSTICE at 226-27.

647 *Id.* at 227.

648 *Id.*

work precisely mirror's Ecuador's position here.) "The notion that no international wrong must go unpunished is arguably inconsistent with *Chorzów* if its consequence is that it leads to recovery even in the absence of demonstrable prejudice. Such recovery could only be viewed as a penalty in the interest of the international rule of law."[649]

338. Again, this is common sense: "If a denial of justice claim resulted in compensation equal to the claim, then the investor would in effect swap a risky litigation claim for certain, risk-free income,"[650] and in the process, the State unfairly would be denied the opportunity to present evidence establishing offsetting damages. Claimants are attempting just such a bait-and-switch, notwithstanding that it "could be qualified as 'double recovery' except in cases where on the basis of the facts and law available, the domestic court had in the tribunal's view no other choice but to adjudicate fully in favour of the claimant."[651] This treaty-based dispute unquestionably is ***not*** a case in which the Ecuadorian court had "no other choice but to adjudicate fully in" Chevron's favor.[652] Accordingly, to avoid gifting Claimants a double recovery, the Tribunal must "apply a litigation risk discount to [Claimants'] denial of justice claim,"[653] equal to the amount of its actual liability.

339. To be sure, determining the appropriate litigation risk discount involves a certain degree of speculation, and "[i]t is not always easy to determine what the hypothetical consequences would have been if denial of justice had not occurred."[654] But as scholars have explained, that is what *Chorzów Factory* requires:

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649 *Id.*

650 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1088.

651 *Id.*

652 *Id.*

653 *Id.*

654 RLA-61, Paulsson, DENIAL OF JUSTICE at 226.

> [The *Chorzów*] standard relies on speculating how a hypothetical course of events would develop. Thus, in most cases, it will not provide significant certainty. It requires going back in time to the moment before the unlawful act occurred. From that moment on, however, the intellectual operation becomes difficult: should one omit only the unlawful act and forecast how things would have moved on; or should one conjecture how the government would have been able and likely to act in a lawful way? In this comparison one should not assume that life would simply have stood still, but should identify what it is most likely that the government would and could legitimately have done.[655]

340. Through its experts, Ecuador has provided the Tribunal with a robust record of Chevron's environmental liability. Because the evidence is more than sufficient to find that Chevron is legally responsibility for at least *some* of the environmental harm, [656] the law of joint and several liability renders it liable for the entire whole, subject to any claims for contribution it might bring against PetroEcuador.[657] But if this Tribunal were to determine that an international delict calls into question either underlying liability or the amount of the Lago Agrio Judgment, either or both of these issues would be considered in Track 3.

341. Re-determining Chevron's actual liability would require some effort, but that does not make it any less necessary an undertaking. *Myers v. Canada* is illustrative. There, "the tribunal carried out an in-depth analysis of lost and delayed business entailing an endless chain of interdependent and market-related speculations. [After finding] that Canada's discrimination (ie closing of the border for hazardous waste exports) destroyed and delayed parts of Myers' income stream,"[658] the tribunal:

> carried out a very detailed analysis of what would have happened if the export ban had not been in force, including an analysis of the

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655 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1057-58.

656 *See infra* § VII.

657 *See infra* § VII.F.1.

658 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1085.

> competitive situation — as it was before the ban, after the ban, and speculating on how it might have been if the ban had not been imposed, in a complex interaction between Myers, its customers, and its other competitors, usually through tendering procedures. In addition, availability of equipment, the estimation of how Myers, its customers, and competitors thought the Canadian authorities might decide, all played a role; the tribunal had to speculate itself about the plausibility of the speculation by the witnesses produced. It had to hypothesize about the likely success rate of Myers' bids in tendering, but also about the likely impact on the price levels (presumably lower) if Myers as a foreign competitor had participated in such tenders.[659]

A similarly diligent and thoughtful analysis is required here. Contrary to what Claimants suggest, it would be manifestly improper to dispose of a reasoned analysis of *any* kind in favor simply of giving Claimants a free pass. International authority — including Professor Paulsson's scholarly work — confirms as much. His opinion submission on Claimants' behalf, urging that the correct approach when an international tribunal is confronted with a defective judgment is to declare that judgment a nullity, is overwhelmingly refuted by the relevant sources of international law.

B. Claimants' "National Court" Authority Does Not Support The Remedy Of Nullification

342. Claimants' reliance on the practice of national courts in vacating fraudulent judgments without reaching the merits is plainly ineffective.[660] The national court decisions they cite stand for the unremarkable proposition that an appellate court may be authorized by national law to vacate in full or in part the judgment of a lower court over which it has appellate jurisdiction, where it finds the judgment or portions of the judgment to be fatally flawed:

- CLA-448, *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 128 (9th Cir. 1995): Direct appeal of a federal district court's decision to set aside a defense verdict for fraud on the court under U.S. Federal Rule of Civil Procedure 60(b).

659 *Id.* at 1085-86.

660 Claimants' Track 2 Reply ¶ 363 n.846.

- CLA-449, *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1994): Invoking Rule 60(b) and the All Writs Act, 28 U.S.C. § 1651, to vacate the appellate court's own earlier judgment and that of the federal district court for fraud on the court.

- CLA-431, *Hazel-Atlas Co. v. Hartford-Empire*, 322 U.S. 238 (1944): Confirming power of appellate court to vacate its own earlier judgment, and direct vacatur of a district court judgment, on discovery of fraud.

- CLA-432, *The Ampthill Peerage* [1977] AC 547: Reciting the proposition that "fraud in a strict legal sense" — "conscious and deliberate dishonesty" by which the result was obtained — can be grounds for reopening an earlier proceeding. (No such fraud, however, was proved in this case.)

- CLA-450, *Patch v. Ward* [1867-68] L.R. 3 Ch. App. 203: Appellate court reciting that "actual positive fraud" is required to set aside a lower court's decree. (And finding no such fraud in this case.)

- CLA-451, *Jonesco v. Beard* [1930] AC 298: On appeal, reciting that fraud must be proven with particularity before it will justify setting aside a judgment below. The House of Lords reversed the Court of Appeal's decision to set aside a judgment for fraud.

343. As Claimants stress when the argument serves their purpose, this Tribunal is not an appellate court.[661] Appellate review is no analogy to this Tribunal's limited jurisdiction bestowed by Treaty to determine whether Ecuador, a sovereign nation, breached international treaty obligations by committing a denial of justice against Chevron, a foreign investor.

C. Claimants' Attempt To Distinguish The *Commercial Cases* Award Is Unpersuasive

344. Claimants next contend that it would not conflict with the *Commercial Cases* Award — in which the tribunal decided the merits of the underlying action — for this Tribunal to decline to decide the merits of the underlying action. To state that argument is to refute it. Claimants assert that two features distinguish that arbitration from this one, but neither feature makes a difference here. **First**, the fact that "TexPet was the plaintiff" in *Commercial Cases* and "Chevron was the defendant in the Lago Agrio Litigation"[662] has no bearing on the appropriate

661 *See, e.g., id.* ¶ 366.

662 *Id.* ¶ 364.

remedy for a denial of justice. Offset is required in either case. Claimants are simply wrong to assert that "[a]s a matter of quantum, there is no need (or mandate) to determine the underlying case in order to determine Claimants' damages, as was necessary in the *Commercial Cases* Arbitration."[663] To avoid unjustly enriching Claimants, by awarding them damages commensurate to a guarantee that it would have prevailed in Ecuadorian court absent a denial of justice, the Tribunal *must* determine Claimants' actual damages.

345. It is no answer to suggest, as Claimants do, that this Tribunal is ill-equipped to make such a determination. As Ecuador has pointed out, considerable evidence exists in the arbitration record to prove the environmental damage attributable to Chevron in the Oriente and to its residents.[664] To the extent the Tribunal determines it requires more evidence to assess Chevron's "actual damages," it need only ask for it. In discussing an international arbitration in which the tribunal did not take this extra step, Professor Paulsson suggests it should have:

> [O]ne is left to wonder why the arbitrators *did not ask for* such evidence as there might be – and then let the chips fall where they may. An international tribunal faced with a claim for denial of justice is not an appellate jurisdiction required to deal with an immutable factual record. . . . [T]he real difficulty of denial of justice is less legal principle than the evaluation of facts.[665]

346. **Second**, Claimants assert that the *Commercial Cases* tribunal "could not cure the breach of international law by nullifying a tainted decision, because the failure of the Ecuadorian courts to issue *any* judgment was precisely the wrong that triggered the breach of undue delay, and merely deciding that undue delay existed would not have compensated Claimants for their monetary losses."[666] But "cur[ing] the breach of international law" in cases of denial of justice

663 *Id.*

664 *See infra* § VII; *see also* Respondent's Track 2 Counter-Memorial ¶¶ 472-478.

665 RLA-61, Paulsson, DENIAL OF JUSTICE at 123-24.

666 Claimants' Track 2 Reply ¶ 380.

requires ascertaining the claimant's actual damages — not simply giving it a free pass. Nullification, without more, would not *cure* the alleged breach; it would instead gift to Claimants a remarkable windfall.

D. Nullification Of The Lago Agrio Judgment Would Unjustly Enrich Claimants In Contravention Of International Law

347. It is disingenuous for Claimants to deny that they would be overcompensated and unjustly enriched if this Tribunal were to grant the relief they request.[667] "Misunderstanding the risk associated with a business activity when valuing the business may result in over-compensation. . . . Failure to factor in the impact of the risk would put the investor in a significantly better position."[668] "[A] proper reflection of the risk of the investment can be achieved primarily by applying a discount rate that reflects the risk."[669] Claimants bear the risk that Chevron would not have prevailed, in whole or in part, in a properly conducted domestic-court proceeding. In light of the record both in Ecuador and in this proceeding, it is clear that the Ecuadorian courts could have found Chevron liable and awarded damages fully consistent with international law. (We, of course, believe that is precisely what in fact happened.) This Tribunal, in turn, must ascertain those damages to appropriately discount any award Claimants might otherwise receive.

348. Claimants' failure to acknowledge the unjust enrichment that nullification would engender reflects a fundamental misunderstanding of denial of justice claims. "But for" a denial of justice Chevron would *not* have enjoyed "legal freedom" from claims of environmental harm.[670] Instead, it would have faced those same lawsuits, which would have proceeded without

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667 *Id.* ¶ 365.

668 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1064-65.

669 *Id*. at 1065.

670 Claimants' Track 2 Reply ¶ 365.

any alleged violations of Ecuador's Treaty obligations.[671] To suggest that Chevron should, with a wave of the hand, suddenly be exonerated of the wrongs for which it has faced trial would permit it to benefit, handsomely, from Respondent's alleged international wrong.

349. To prevent this type of unjust enrichment, tribunals commonly adjust the damages figures to account for offsetting factors and produce awards that fairly and equitably compensate the injured party, rather than over-compensate it. Although the reasons for such an offset are varied (e.g., contributory fault, abuse of rights, business risk, the financial environment), the principle remains the same: the tribunal should place the claimants in the same — not better — pecuniary position than if there had been no offsetting factors.

350. For example, the *Occidental Petroleum v. Ecuador* ("*Occidental II*") tribunal concluded that Claimants "acted negligently and committed an unlawful act" when they "failed to obtain prior ministerial authorization to transfer rights" under the participation contract at issue.[672] After determining that Ecuador's termination of that contract violated its treaty obligations, the tribunal also resolved that "as a result of [Claimants'] material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they

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671 As the Republic explained previously, "[b]ecause the pollution claims would presumably now be time-barred, the Plaintiffs could not initiate 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." Respondent's Track 2 Counter-Memorial ¶ 465. It is no answer to contend, as Claimants do, that "[t]he Plaintiffs . . . do not have clean hands; in the event they are unable to pursue their environmental case due to the fraud and corruption that permeated the Lago Agrio case, Ecuador and the Plaintiffs have only themselves to blame." Claimants' Track 2 Reply ¶ 385. As an initial matter, this Tribunal cannot make findings regarding the clean or unclean hands of third parties not present in this arbitration. And if the Tribunal were to consider Claimants' "unclean hands" argument anyway, it of course would be obligated also to consider Chevron's own unclean hands. Respondent addresses Chevron's unclean hands in the Introduction to this submission, and has covered this ground in more detail in several previous submissions — largely without a response from Claimants. Finally, an Ecuadorian court has discretion to separate any alleged bad conduct by a party's counsel from the blameless party itself. A finding that Plaintiffs' *counsel* might have unclean hands does not translate into a finding that the *victims* of the contamination have unclean hands.

672 RLA-587, *Occidental II* Award (Oct. 5, 2012) ¶ 679.

suffered."[673] The tribunal characterized the damages adjustment as a "fair and reasonable" "apportionment of responsibility."[674]

351. Similarly, the *MTD v. Chile* tribunal found that the investors should bear responsibility for their own decisions that substantially increased their risks. Accordingly, it reduced by half the damages that otherwise would have been awarded: "The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment."[675]

352. In *Petrobart v. Kyrgyz Republic*, the tribunal did not award the full amount of the losses proved because it was not convinced that the investor could have recovered that amount but for the respondent State's treaty breach:

> The weak financial situation of the governmental company (KGM) would, most likely, have prevented it from paying the invoices in full. The tribunal, however, stated that had it not been for the actions of the government, Petrobart, in a hypothetical bankruptcy sale of KGM's assets, would most probably have recovered substantial parts of the unpaid invoices. Therefore, it ruled that the Republic had to reimburse Petrobart for 75 per cent of its justified claims against KGM.[676]

As one scholar put it: "This application of an 'enforcement risk discount' mirrors the 'litigation risk discount' concept introduced by Jan Paulsson for 'denial of justice' damages."[677]

353. More recently, in *Yukos v. Russia*, the tribunal sliced US$ 17 billion off the award[678] because of claimants' tax avoidance schemes, including their abuse of a double taxation

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673 *Id.* ¶ 687.

674 *Id.*

675 CLA-221, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7 (Award of May 25, 2004) (Rigo Sureda, Lalonde, Oreamuno Blanco) ¶ 243.

676 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1087; *see also* CLA-219 *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003 (Award of Mar. 29, 2005) at 84.

677 RLA-570, Wälde & Sabahi, *Compensation, Damages, and Valuation* at 1087.

treaty.[679] The tribunal also considered Yukos's non-payment of a US$ 1 billion loan secured by its assets and its "published threat of a 'lifetime of litigation'" against anyone purchasing certain assets in a U.S. bankruptcy proceeding involving a Yukos subsidiary, but determined that these actions did not rise to the level of contributory fault.[680]

354. Finally, Claimants argue that "a declaration of nullity would not run afoul of the *Monetary Gold* principle," that is, that a third-party's consent is required for a tribunal to exercise jurisdiction over it.[681] From this starting point, Claimants conclude that this Tribunal's resolution of the Lago Agrio case in a manner that effectively terminates the rights of the Plaintiffs is perfectly permissible under international law. Professor Paulsson's supporting commentary in his second report to this Tribunal once again reflects party advocacy. He states there that *Monetary Gold* "does not apply to prevent an international law dispute between two parties being resolved by an international tribunal where the subject matter of that dispute involves the rights of a third party under a different applicable law, here Ecuadorian law."[682] But this portion (indeed the final four paragraphs) of his opinion is *ipse dixit*, devoid of any citations to authority, and would lead to manifest injustice if followed in this case.[683] There is no principled justification for limiting *Monetary Gold* to disputes between states (or disputes where the absent third party is also a state). Indeed, Professor Paulsson recognizes an analogous expansion regarding *Chorzów Factory*: "[A]s every practising international lawyer knows, the

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678 RLA-571, *Yukos* Awards ¶¶ 1826-1827.

679 *Id.* ¶¶ 1615, 1633-1637.

680 *Id.* ¶¶ 1608-1609, 1622-1632.

681 The Republic responded to Claimants' arguments regarding the *Monetary Gold* principle in several earlier submissions, including its jurisdictional briefing. *See* Respondent's Memorial on Jurisdiction ¶¶ 168-181; Respondent's Reply Memorial on Jurisdiction ¶¶ 211-220.

682 Paulsson Expert Rpt. (June 3, 2013) ¶ 48.

683 *See id.* ¶¶ 48-51.

fact that *Chorzów Factory* involved two states litigating pursuant to the mechanism of diplomatic protection has not prevented that case from becoming a seminal precedent for the calculation of damages in a myriad of international arbitrations initiated by private parties."[684]

VII. Claimants' Past Practices And Polices Caused And Continue To Cause Significant Risk Of Harm To Human Health And Environmental Damage

355. Much of the Plaintiffs' claimed damages can be traced directly to Texaco's skewed cost-benefit decision to save money rather than honor its legal, contractual, and moral obligations to protect the environment and the indigenous population from the harmful effects of its oil field operations.[685] In particular, Texaco, on behalf of its subsidiary, TexPet, decided not to line its earthen waste pits to prevent the spread of contamination because it found the US$ 4.2 million price tag too expensive. It is hardly surprising that an oil company that makes such a decision is subsequently held liable for the necessary cleanup. Nor is it without precedent.[686]

356. Into its unlined pits TexPet pumped large quantities of carcinogenic and toxic contaminants.[687] According to internal TexPet records, when TexPet tested each new well's production capacity, it released hundreds of barrels of crude oil directly into the unlined pits. Chevron's appointed expert in the Lago Agrio trial, Mr. Gerardo Barros, estimated that this testing released up to 42,000 gallons per well.[688] If TexPet repeated this at every well, and there is every indication that it did, it dumped over 14,448,000 gallons of oil into pits around its 344 wells. Internal TexPet documents show TexPet's "cover up" strategy to deal with these pits — it

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684 RLA-61, Paulsson, DENIAL OF JUSTICE at 215.

685 R-202, Texaco's Internal June 25, 1980 Letter CGE-398/72 from R. M. Bischoff to M. E. Crawford at 1-2.

686 *See* RLA-572, *Corbello v. Iowa Prod.*, 850 So. 2d 686, 705-06 (La. 2003) (awarding damages to remediate contamination resulting from the use of unlined pits, including groundwater used to store produced water); RLA-573, *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 243, 262 (La. 2010) (awarding damages to remediate unlined pits, sediments, and groundwater used to store produced water and oil wastes).

687 The American Petroleum Institute ("API") has compiled data showing the toxic and carcinogenic components of crude oil. RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.4.1.

688 C-381, Expert Rpt. of Eng. Barros at 9-10.

covered them with soil, without any cleanup.[689] Chevron continued that "cover up" strategy as an integral component of its Lago Agrio trial strategy and it remains to this day part of Claimants' strategy to evade responsibility for the damages caused.

357. The Republic has noted previously that it was Texaco's company policy to cover up evidence of contamination. As early as July 1972, Texaco's Chairman of the Board, R.C. Shields, sent a "Personal and Confidential" memo to TexPet's management entitled "Reporting of Environmental Incidents." In that memo, Texaco's Chairman directed Texaco's employees in Ecuador to avoid recording any spill or accident unless it had already "attract[ed] the attention of the press and/or regulatory authorities or in your judgment merits reporting."[690] This concealment policy followed a tour of Texaco's Ecuadorian operations two months earlier by G. Warfield Hobbs, a Texaco employee. In his trip memorandum to his superiors, Mr. Hobbs recounted that "[m]any of the wellsites have been left in disgraceful condition after the drilling rig has moved off the location"; "[m]any wellsites and their adjacent natural drainage are contaminated with crude oil due to inadequate burning and containment during well testing"; and "[t]he pits which are generally used for mud and well cuttings during the drilling of the well are generally in need of repair and inadequate to contain test oil by the time a well is tested."[691]

358. The Republic reaffirms its longstanding request that the Tribunal visit the Oriente to better understand the scope of Claimants' contamination — and the legacy they left behind.

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689 R-1223, Hobbs Memo. to Texaco (May 16, 1972); C-12, Fugro McClelland § 6.4.3 ("An internal memorandum dated May 16, 1972 contains suggestions which indicate that reserve pits should not be used for well test, that small deep slush pit would be dug for well test, and that the slush pit should be filled in and the location graded once well testing was completed.").

690 R-201, Memo from R.C. Sheilds and R.M. Bischoff to M.E. Crawford re Reporting of Environmental Incidents New Instructions (July 17, 1972).

691 R-1223, Hobbs Memorandum to Texaco (May 16, 1972).

A. Chevron's Pollution Of The Oriente Is Central To This Case: No Resolution Can Be Had Without First Resolving Chevron's Environmental Liabilities

359. In the face of the overwhelming evidence of massive environmental damage in the Oriente, Claimants now argue that the contamination is irrelevant to this arbitration.[692] To the contrary, it is highly relevant. It was *Claimants* who first introduced environmental evidence, replete with expert reports, into this proceeding.[693] They argued that the Lago Agrio trial and resulting Judgment lacked any scientific basis and could therefore only be the product of fraud.[694] The record evidence, however, establishes that:

- TexPet employed substandard oil field practices in Ecuador;
- TexPet released carcinogenic and toxic contaminants in massive amounts into the region's soil, waters and air;
- TexPet's contamination persists in the Oriente more than twenty years after TexPet's departure from Ecuador;
- TexPet's contamination continues to migrate; and
- TexPet's contamination has harmed and continues to harm the region's residents and their environment.

360. As shown more fully below, the Lago Agrio Court's fundamental findings on these matters are reasonable, well-supported by scientific evidence, and correct in all material respects. Consequently, the Court's Judgment provides no basis for Claimants' claims against the Republic under international law.[695] And even if this Tribunal were to find Respondent

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692 Claimants' Supp. Merits Memorial ¶ 140.

693 Claimants' Merits Memorial, § II.D.6 ("There is no Significant Risk to Human Health or the Environment Associated with TexPet-Remediated Sites.").

694 *See* Claimants' Supp. Merits Memorial ¶ 38 (asserting that "[t]here is no competent evidence in the Lago Agrio record to support the Judgment's enormous damage figures"); Claimants' Track 2 Reply, § II.D.6 ("The Lago Agrio Judgment Is Not Supported by Any Competent Environmental Evidence").

695 RLA-557, Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q. 867, 883 (Oct. 2014) ("[I]nternational courts and tribunals are compelled, in conducting their review of domestic adjudication, to assess the reasonableness of the substantive outcome of the procedure.").

responsible for an international wrong arising out of the Lago Agrio Litigation, the Tribunal would then have to fashion an appropriate remedy that takes into consideration Chevron's actual liability.[696] To do otherwise would be to confer upon Claimants a windfall and put them in a substantially better position than they otherwise would have been but for the (alleged) wrong. "[T]he Tribunal's task is to make the Claimants whole, *and not more than whole*, under international law."[697]

B. Claimants' Reliance On The RAP In Track 2 Is Entirely Misplaced

361. Faced with a record that amply demonstrates that TexPet's contamination exists (and persists) in the Oriente, Claimants rely almost exclusively on the Remedial Action Plan ("RAP") for the proposition that that they are not responsible to the Plaintiffs for any cleanup beyond what they did under the 1995 Settlement Agreement.[698] But the scope and reach of the RAP has yet to be decided and is reserved for Track 1;[699] and the Claimants themselves have acknowledged that the RAP is "of course moot" for purposes of Track 2.[700]

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696 *See supra* § VI.

697 RLA-351, *Commercial Cases* Final Award ¶ 306 (emphasis added). Claimants' environmental misconduct is also relevant in addressing Claimants' continuing allegation that the Republic breached the Treaty by commencing a criminal investigation — since dismissed — against twelve individuals, including two of Chevron's Ecuadorian counsel. Claimants' Merits Memorial ¶ 18. According to Claimants, the Criminal Proceedings were a sham because they were based on the "manifestly untenable" conclusion "that the environmental remediation work conducted by TexPet from 1995 to 1998 was incomplete and improper." Claimants' Merits Memorial ¶ 304. The Republic is entitled to show that there was both a legal and a factual basis for the criminal investigation.

698 Claimants' Merits Memorial ¶¶ 116, 122 ("After remediating each site, consistent with the RAP's specifications. . ."); Claimants' Track 2 Reply ¶ 144 ("Texpet complied with its obligations under the RAP"); Claimants' Track 2 Supp. Merits Memorial ¶ 156 (LBG refuses to acknowledge that "TexPet remediated its share of environmental impacts in the Concession Area pursuant to the RAP."). *See also* R-1225, Email from J. Connor to D. Mackay at 1 (June 13, 2006) ("We claim that we have 'no responsibility' for things not included in the Contract of 1995, but the Plaintiffs do not agree.").

699 Tribunal Procedural Order No. 23 ¶¶ 4, 5.

700 Claimants' Track 2 Supp. Merits Memorial at 83 n.349.

C. Claimants Have Failed To Refute The Environmental Case Against Them

362. The Republic has already filed two extensive merits memorials and ten expert reports establishing the existence of TexPet-caused contamination in the Oriente. As bulleted below, Claimants cannot contest — and in some instances directly admit — more than enough facts to justify the Judgment against them.

- TexPet drilled approximately 344 wells in the Oriente,[701] an area that was pristine rainforest before TexPet came.[702]
- TexPet drilled each well using the same techniques and practices.[703]
- According to Claimants' expert, 95 percent of the contamination from a well occurs early in that well's lifetime.[704]
- Chevron's own analysis shows TexPet dumped contamination into three to four unlined earthen pits per well site, creating over 1,000 pits across the Concession.[705]
- Years before the RAP investigation began, TexPet either covered many of their pits with soil, without any cleanup, and without recording their locations or left them uncleaned and uncovered.[706]
- Contamination that TexPet dumped into the environment is still found today at sites for which TexPet accepted responsibility in the 1990s.[707]

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701 Connor Expert Rpt. (June 3, 2013) at 7.

702 RE-14, Theriot Expert Rpt. (Dec. 12, 2013) at 3.

703 Connor Expert Rpt. (Sept. 3, 2010) at 17-18.

704 R-1263, Connor & Bianchi *Burlington* Expert Rpt. (Sept. 20, 2012) at 10.

705 Chevron identified 148 pits during 45 total well site inspections. Connor Expert Rpt. (Sept. 3, 2013), Table C.1.A (49 Remediated pits, 15 NFA Pits, 1 COC Pit, and 83 Non-RAP pits); *see also* Connor Expert Rpt. (Sept. 3, 2010) at 16-20.

706 *See, e.g.*, R-1223, Hobbs Memorandum to Texaco (May 16, 1972). There is no evidence that TexPet recorded the locations of any of the thousands of pits it dug. Claimants' own experts have spent hundreds of hours trying to piece together the number of pits TexPet dug in the Oriente based on third-party audit reports and investigations. Despite ample opportunity and an obvious need for a definitive answer, Claimants have never offered any contemporaneous record of how many pits they dug or where they dug them.

707 For example, LA-02 was a RAP site for which TexPet accepted responsibility. Pit 3 at LA-02 was dug early in the life of LA-02 but had been covered by the time the RAP auditors inspected the site. Because TexPet had no records of its location and the pit had been covered, Pit 3 went unnoticed and unremediated during the RAP. But Chevron's PI report acknowledged the pit's existence and that contamination continues to exist at LA-02. R-929, Chevron's Lago Agrio 02 JI Playbook at GSI_0498282. Claimants' experts concede that LBG's recent studies "confirm" what Claimants knew during the Lago Agrio trial, i.e., that contamination persists at many sites, including

- The Toxicity Characteristic Leaching Procedure ("TCLP") test employed by TexPet during the RAP to show that the Concession Area was not contaminated was not designed to assess the existence of petroleum hydrocarbons.[708]

- Chevron conducted extensive, unauthorized Pre-Inspections ("PIs") so that it would know exactly at what locations and at what depths pollution would be found.[709]

- Chevron used its PI results to avoid detection of pollution during official JIs by sampling in different locations and at different depths than the known contamination.[710] As Chevron's expert reported from the field, because of the PIs, Chevron's experts "don't collect impacted environmental samples."[711]

- Chevron contested the existence of known contamination sources when those sources were identified by the Plaintiffs, including pits and spills, despite acknowledging them in its own internal PI reports.[712]

- Chevron blamed contamination-caused health problems experienced by the residents in the Oriente on causes it knew were not sufficient to explain them,[713] and which the Lago Agrio Court considered and rejected.[714]

- Ecuador's recent remediation efforts at selected sites, which Chevron uses as a reference for the costs of remediation, is for *pits* only and not designed to address the spread of contamination.[715]

LA-02. R-1268, Email from D. Mackay to R. Hinchee (June 10, 2006) ("I doubt seriously that there never were any significant environmental or public health impacts, so don't want to imply that."); R-950, Bjorn Bjorkman's Sacha Norte 1 JI Summary Notes at BJORKMAN00061693 (stating that "no good clean point could be found even some distance away from the pit footprint" and buried contamination was "fairly ubiquitous").

708 *See also* R-1114, Hinchee Expert Rpt. (Sept. 3, 2010) on Remedial Cost submitted to the Lago Agrio Court at 4 ("Crude oil, particularly the weathered crude in the Oriente, is viscous and does not easily mix with soil or water."); Respondent's Track 2 Rejoinder ¶¶ 153-156.

709 Respondent's Track 2 Rejoinder ¶¶ 126-136; *see also* R-1226, Email from F. Morales to J. Connor (Sept. 4, 2007) at 1 (noting the unofficial nature of the PI samples that were never submitted to the court).

710 *See* RE-23, LBG Expert Rpt. (Nov. 7, 2014) Appendix B § IV. *Cf.* R-1266, Email from J. Connor to B. Bjorkman, et al. (Sept. 8, 2007) at 1 ("[I]f you think you can score a clean SW sample, I'd grab it."); R-1269, Photo produced by B. Bjorkman Identifying Potential Clean Sample Locations (undated).

711 R-1227, Email from B. Bjorkman to S. McMillen (Oct. 29, 2007) at 1.

712 *Compare* R-940, Chevron's Sacha 13 JI Playbook at GSI_0492622 (identifying four pits) *with* R-1262, Chevron's Sacha 13 Judicial Inspection Report at iv (identifying two pits).

713 Respondent's Track 2 Rejoinder ¶¶ 164-165.

714 C-931, Lago Agrio Judgment at 115.

715 Claimants' Track 2 Supp. Merits Memorial ¶ 141; R-1228, Letter from Ministry of Energy and Mines to President of the Superior Court (Nov. 14, 2007) (stating that "the scope of the [Republic's remediation] Project constitutes the elimination of the primary source of contamination (pits), but not an integrated repair that will cover the remediation of surface water, groundwater, flora, fauna, or repair of the effects to the health of populations located in the areas of influence of the developed operations that may have resulted in damages.").

- Total project costs for remediation of all contamination, not just the pits themselves, will be multiple times the cost per cubic meter of the Republic's removal of soil and refilling of pits only.[716]

- The Judgment appropriately defines the area to be remediated based on both parties' expert reports and its own visual observations[717] and in accord with Chevron's experts' opinions expressed in other cases.[718]

- The Judgment's pit count is a reasonable estimate of the total number of pits that exist in the Concession Area.[719]

- Chevron distorted academic literature by paying authors to advocate its positions without disclosing the fact that it was engaged in a carefully planned propaganda campaign.[720]

- Naturally occurring clay — Claimants' alleged cure-all for preventing the spread of contamination — does not actually halt the spread of contamination, a fact that has been known since the 1920s.[721]

- Even where clay soils do exist, they are often interlaid with sandy soils, fractures, and root casts which are all an active transportation pathway for contamination.[722]

363. These admitted and uncontested points alone prove the environmental case against Claimants: Claimants contaminated the Oriente during their operations; that contamination persists; and the people of the Oriente are exposed to that contamination.

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716 *See supra* § VII.F.2; R-1263, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012) at 57-59.

717 Respondent's Track 2 Rejoinder ¶ 185; R-1057, Connor Dep. Tr. (Nov. 8, 2013) at 341:24-342:15; *see supra* § VII.F.3.a.

718 *See, e.g.*, R-959, Connor Dep. Tr. (Dec. 6, 2012) at 331:4-7, *taken in Saldana v. Shell*.

719 Respondent's Track 2 Rejoinder ¶¶ 181-185; *see supra* § VII.F.3.a.

720 Respondent's Track 2 Rejoinder, ¶¶ 166-168. As noted by one of its own, Chevron had a pattern of recruiting and using "heavier" academics. *See* R-1229, Email from B. Bjorkman to D. Reagan re Biodiversity Report (Jan. 24, 2008) at 1-2. In response to one academic's concern that he "[was] not sure that [his] contribution would merit joint authorship," Mr. Bjorkman replied, "Sara [McMillen of Chevron] is interested in joint authorship mainly for the purposes of adding a 'heavier' name to the report. She is a firm believer of the impressing power of big credentials." *Id*. at 1.

721 RE-17, Templet Expert Rpt. (Dec. 16, 2013) at 5; Respondent's Track 2 Rejoinder ¶¶ 169-170. As the API said in 1932, "[w]e are only 'kidding' ourselves when we think we can dispose of salt water by solar evaporation from earthen ponds." RE-17, Templet Expert Report at 5 (quoting Report to the API by V.L. Martin, Chairman of the API titled "Committee on Disposal of Production Wastes" (1932)).

722 Respondent's Track 2 Rejoinder ¶ 171; *see also* R-1277, Email from D. Mackay to P. Alvarez and R. Hinchee (May 21, 2006) at 1 ("I looked at several road cuts in the area and one can see fractures, small inclusions, etc., suggesting that the primary migration pathway might well be such media within the clays.").

364. The Lago Agrio Court extensively discussed Claimants' liability in Part VII of the Judgment ("Civil Liability, The Basis of the Obligation"), finding sufficient evidence of pollution arising from TexPet's operations and a credible threat of contingent harm to those exposed to the contaminated lands and waters.[723]

365. To avoid liability Claimants argue that the Lago Agrio Court: (1) failed to conduct any coherent causation analysis to establish a sufficient relationship between TexPet's operations and the alleged harm; (2) failed to distinguish between the harms caused by TexPet and those attributable to PetroEcuador; and (3) improperly apportioned all of PetroEcuador's liability to TexPet.[724] But as discussed in Section VII.F.1 below, Claimants misapprehend (or otherwise ignore) long-standing legal principles of objective (strict) liability and joint and several liability governing torts arising from hazardous activities.[725] Because liability is presumed in these cases, Plaintiffs had to prove only that (1) TexPet engaged in hazardous activities, and (2) contamination occurred and still remains, raising a threat of contingent harm to the health, lives and property of those exposed to that contamination. Claimants concede both are true.[726] And

723 C-931, Lago Agrio Judgment at 74-90.

724 Claimants' Track 2 Reply ¶¶ 98-102.

725 The production, manufacture, transport and operation of hydrocarbon substances constitutes inherently dangerous and risky activities. *See* C-1586, *Delfina Torres* (Oct. 29, 2002) at 24 ("Our Court is in complete agreement with this decision, since the production, manufacture, transport and operation of hydrocarbon substances undoubtedly constitute dangerous and risky undertakings."). Under Article 2229 of the Ecuadorian Civil Code, hazardous activities are subject to an objective standard of liability and entail a presumption of fault on the party conducting such activities. The respondent, to reverse the presumption of fault, must prove that the ensuing harm was either due to *force majeure* or unforeseeable circumstances, or the result of the exclusive fault of the victim or a third party. *Id.* at 21 ("Article 2256 [now Article 2229] of the Civil Code . . . considers tort liability for high risk or dangerous activities, in which negligence is inferred, and which saves victims of a harm from having to show evidence of negligence, lack of care, or incompetence, and where it falls to the defendant to show that the harm occurred due to force majeure, or to an accident or the intervention of something that is beyond the control of the party causing the harm or due solely to the fault of the victim."). RE-20, Andrade Expert Rpt. (Nov. 7, 2014) § 3.1.

726 *See, e.g.*, R-1268, Email from D. Mackay to R. Hinchee (June 10, 2006) ("I doubt seriously that there never were any significant environmental or public health impacts, so don't want to imply that.").

under the law of joint and several liability, neither the Plaintiffs nor the Lago Agrio Court were required to consider PetroEcuador's role as a potential contributory source of contamination.[727]

D. LBG's Supplemental Site Investigation Further Confirms That Widespread TexPet Contamination Is Present In The Former Concession Area

366. In 2013, LBG conducted site investigations, sampling at five oil production well sites in the former Concession Area in the Oriente. That sampling confirmed what LBG's prior data review had already shown: (1) petroleum contamination continues to exist at each of the former Concession Area well sites visited; (2) pollution is directly attributable to TexPet's operations; and (3) there is every indication that the same results would be found throughout the Concession Area.[728] LBG visited the Concession Area again in 2014 to conduct site investigations at eight additional former TexPet-operated sites. As detailed below and in the accompanying expert reports, the 2014 site investigations confirmed LBG's earlier conclusions: TexPet-caused contamination continues to exist in the Oriente and affect the people and environment there.

1. Site Investigations Conducted By LBG In 2014 At Eight Additional Former TexPet Sites Confirm That Oriente Residents Are Still Exposed To TexPet-Caused Contamination

367. LBG's 2014 site investigations again tested Claimants' hypothesis that the contamination is highly weathered, immobile, and limited to the pits where TexPet put it. Confirming the results from LBG's 2013 investigation, the 2014 investigation showed that Claimants' hypothesis is wrong. TexPet contamination has migrated, polluting soil, groundwater, surface water, and sediments, all of which are currently impacted by still-mobile petroleum that is neither localized nor contained.

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727 Annex A ¶¶ 38, 43; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 21-22.

728 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 § 4.1 ("LBG's Site Selection Process").

368. In this most recent round of sampling, LBG conducted site investigations at AG-06, LA-16, SSF-13, SSF-34, AG-04, LA-35, SSF-43, and SSF-55. At each site, LBG found contamination attributable to Claimants that exceeds the Lago Agrio Judgment thresholds, and thresholds established by current Ecuadorian regulations and/or standards set throughout the world.[729] LBG also conducted additional testing at LA-02 and SSF-25, originally part of the 2013 site investigation, and confirmed that groundwater at both is contaminated due to migration from those former TexPet pits.

[729] The Judgment determined that Ecuadorian law prohibited TexPet from polluting the Oriente and required Chevron to return it to its original clean state. C-931, Lago Agrio Judgment at 60-66; *see also* Respondent's Track 2 Counter-Memorial § II.A.2.d ("Standard Of Environmental Protection Required Of TexPet During Its Operations"). To determine the costs of remediation, the Court used a conservative threshold of 100 mg/kg TPH (the "Judgment Cleanup Standard") to approximate the original clean state. To provide further context for LBG's test results, as well as those obtained during the Lago Agrio Litigation by both parties, the Republic refers to this Judgment Cleanup Standard and to a variety of other standards, including the RAP standard and Ecuadorian and U.S. regulatory standards. In the related *Burlington Resources v. Ecuador* arbitration, Mr. Connor testified that he would expect naturally occurring TPH to be zero. R-1205, *Burlington* Counterclaims Hr'g Tr. at 1627-1629.

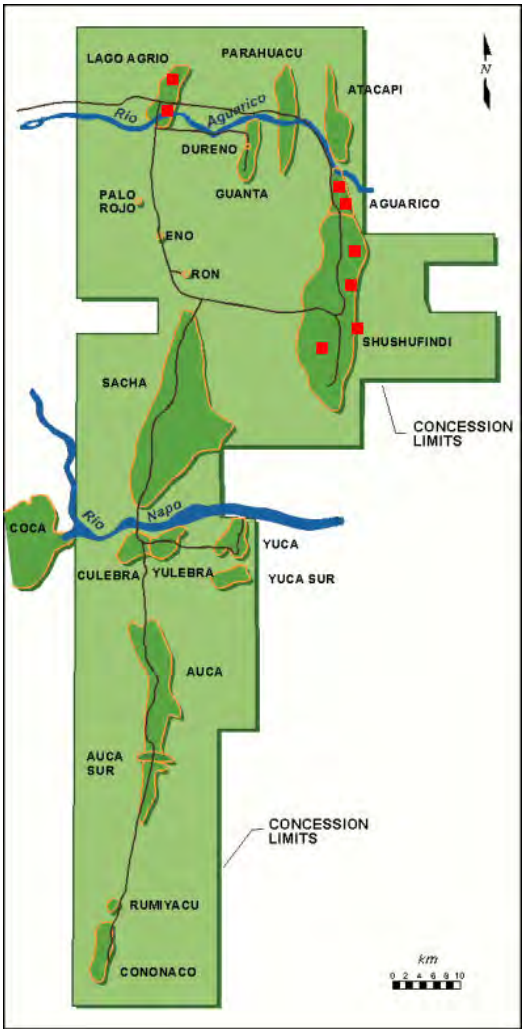

Figure 1: Map of the Concession Area with red boxes marking approximate locations of well sites visited by LBG in 2014[730]

a. AG-06: TexPet-Only Pits Seep Oil Downhill Into A Nearby Wetland

369. AG-06 was drilled by TexPet in 1974 and closed in 1986.[731] No further oil production occurred there after 1986.[732] TexPet identified two of its former pits at this site.[733] In

730 R-938, 2007 Clickable Database, Interactive Site Maps.

731 R-954, Clickable Database 2006, AG-06, Site Documentation, Pre-Remediation Audit Summary Tables: Fugro-McClelland 1992 at Table 6.2.

732 *Id.*; R-1258, GSI Master Well List.

733 R-954, Clickable Database 2006, AG-06, Site Documentation, WC Remedial Action Project Report.

1992 TexPet investigators found both pits were "seeping oil"[734] and "contamina[tion] ha[d] migrated beyond the confines of the pit" and was being discharged into a nearby stream.[735] Not long after TexPet's departure, a sample taken at this site by a TexPet contractor showed the presence of crude oil over twenty-five times the Judgment Cleanup Standard.[736] Although only TexPet extracted oil from this site and the site was designated for cleanup during the RAP, neither pit was remediated because both were designated by TexPet's auditors as "closed" since sometime earlier the pits had been covered with dirt without being remediated.[737]

370. LBG has identified at least seven TexPet pits at this site. Two of these pits site buried next to the well platform at the top of a steep slope. About forty meters downslope of these buried pits, a wetland in a densely wooded area coalesces into a small stream. Crude oil from the two TexPet-buried pits flows with the groundwater down the hillside creating oil seeps that collect in the wetland. Over time, a tar cover has formed overtop crude oil-soaked sediments.[738] LBG's 2014 sampling found that the wetland contains petroleum contamination by as much as 140 times the Judgment Cleanup Standard,[739] and the small stream formed by the wetland was contaminated with crude in exceedance of the Judgment Cleanup Standard and Ecuadorian regulations.[740]

371. The groundwater is also contaminated. LBG installed six groundwater monitoring wells at AG-06, all of which revealed crude oil at levels as high as twelve times the

734 *Id*. at AG-06, Site Documentation, Pre-Remediation Audit Summary Tables: Fugro-McClelland 1992 at Table 6.4.

735 *Id*. at AG-06, Site Documentation, HBT Agra Table F.5, Description of Contamination Associated With Well Site Pits.

736 R-963, 2013 Chevron Access Database results for HBT Agra AG-06-SOIL-1.

737 R-954, Clickable Database 2006, AG-06, Site Summary Report.

738 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Appendix F at Photos 12-17.

739 RE-23, LBG 2014 SI Rpt. § 5.2.

740 *Id*. § 5.2; *id.* at Figure 5.2-1; 5.2-2.

limits specified by Ecuadorian regulations.[741] LBG's groundwater monitoring wells also revealed napthenic acids, a toxic water-soluble crude oil component that does not occur naturally, removing all doubt that the groundwater is contaminated.[742] What is more, barium — a chemical that according to Mr. Connor is used during drilling operations and therefore an indicator of TexPet's contamination[743] — was found in amounts eight times the limits in Ecuadorian regulations.[744]

b. LA-16: Crude Oil Migration From TexPet Pits Has Caused Significant Soil And Groundwater Contamination

372. LA-16, located to the north of the Concession Area, is surrounded by houses and farmland. TexPet drilled LA-16 in 1970 and abandoned it in 1981.[745] Chevron identified at least two TexPet pits at this site. Chevron's experts noted that Pit 1 was "clearly visible in 1976 but appears to have been covered by the expansion of the platform sometime before 1986" and was never identified by TexPet for remediation.[746] The second pit was identified in the RAP, but not remediated because it was labeled as "closed," (i.e., covered with dirt and never remediated).[747]

373. There are at least two families that live in the two houses near LA-16. Soil samples taken in the families' cornfield adjacent to the pits revealed oil contamination seventy-

741 *Id.* § 5.2.

742 *Id.* § 5.2.

743 R-1263, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012) at 21.

744 RE-23, LBG 2014 SI Rpt. §5.2.

745 R-938, Clickable Database 2007, LA-16 Site Map, LA-16 Site Documentation, Environmental Site Summary Report Form: Part 1. TexPet drilled another well on this platform, LA-16B, in 1985, which PetroEcuador later converted into a produced water reinjection well. R-1230, GSI Summary of Site Specific Information, LA-16 (July 7, 2007) at 1.

746 R-1230, GSI Summary of Site Specific Information, LA-16 (July 7, 2007) at 1.

747 *Id.*

five times greater than the Judgment Cleanup Standard.[748] Overall, two-thirds of soil samples at LA-16 evidenced petroleum contamination.[749]

374. LBG also tested the groundwater from which the families draw water through hand dug wells. LBG's groundwater monitoring wells showed petroleum contamination directly tied to TexPet[750] at levels four times greater than Ecuadorian regulations.[751]

c. SSF-13: Supposedly "Closed" Pit Leaks Contamination To Stream

375. SSF-13 was drilled by TexPet in 1972[752] and stopped producing oil in 1998.[753] TexPet dug at least three pits around the well and left an area of degraded crude oil in a drainage area to the north of pits 1 and 2. Although TexPet dug all three pits, TexPet never remediated Pit 3 because it had been "closed" in 1976.[754] And even though Pits 1 and 2 were remediated by TexPet during the RAP, Chevron's expert noted that there was contamination migrating from these pits that "could be petroleum wastes in the remediated pits or petroleum wastes that had migrated beyond the area of remediation before the remediation began, or both."[755]

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748 RE-23, LBG 2014 SI Rpt. § 5.3.

749 *Id*.

750 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 § 3.4.3. Barium levels were eleven times higher than Ecuadorian standards, tying the contamination to TexPet. *Id*.; LBG 2014 SI Rpt. § 5.3.

751 RE-23, LBG 2014 SI Rpt. § 5.3.

752 R-938, Clickable Database 2007, Environmental Site Summary Report Form.

753 R-1231, Chevron's Shushufindi 13 JI Rpt. at 2.

754 R-610, Remedial Action Plan for the Former Petroecuador-TexPet Consortium at CA1100894; R-1232, D. Mackay, Trip Summary Rpt. (May 31, 2006) at 11; R-1231, Chevron's Shushufindi 13 JI Rpt. at 2.

755 R-1232, D. Mackay, Trip Summary Report (May 31, 2006) at 11. Mackay further noted, "I observed oily material in . . . samples . . . , suggesting that some residual petroleum contamination exists." *Id*. at 13; *see also* R-1267, Email from D. Mackay to P. Alvarez and R. Hinchee (June 14, 2006) ("The [subsurface's] permeable paths can allow migration of water, emulsions or oil. If oil or emulsions were outside the remediation efforts, then they could either migrate or contribute dissolved species to groundwater migrating. The oily material seen NOW in the drainage at SSF-13 may be material that was already outside the pit areas when the pits were remediated.").

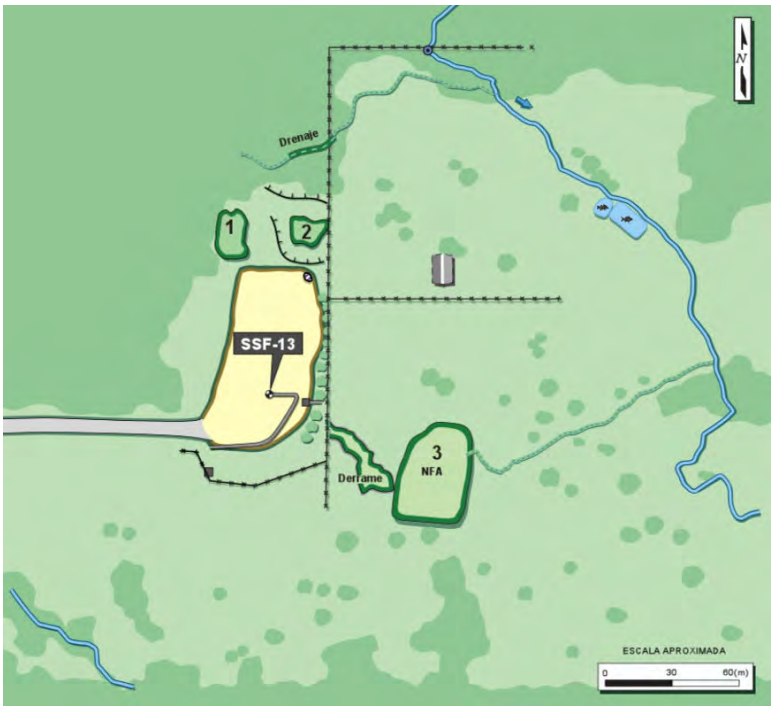

Figure 2: Sketch Map of SSF-13 from Chevron's Clickable Database[756]

376. Pit 3, which is now part of a cow pasture, is immediately to the east and downhill from the well site.[757] The former pit wall has a cut in the northeast corner, which drains the pit contents to a stream.[758] LBG found crude oil, with concentrations almost 200 times greater than the Judgment Cleanup Standard, in the TexPet pit.[759] In the stream that receives Pit 3's runoff, LBG uncovered significant amounts of crude oil downstream, with sediments containing petroleum contamination almost 400 times the Judgment Cleanup Standard.[760]

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756 R-938, Clickable Database 2007, SSF-13 Overview.

757 R-1232, D. Mackay, Trip Summary Report (May 31, 2006) at 12.

758 R-1231, Chevron's Shushufindi 13 JI Playbook at GSI_0462747.

759 RE-23, LBG 2014 SI Rpt. § 5.4.

760 *Id*. § 5.4.; *see also id*. at Figure 5.4-1

d. SSF-34: Hidden TexPet Pit Exceeds All Contamination Thresholds

377. SSF-34 was drilled by TexPet in May 1973 and abandoned and sealed in September 1983 when it ran dry.[761] There have been no petroleum operations at the site since. Upon leaving, TexPet identified only one pit at this site.[762] However, it was later discovered that there are actually at least three pits, two of which were remediated by PetroEcuador.[763] The third pit, however, was only recently discovered by the neighboring farmer when he expanded his field.

378. During LBG's visit, liquid crude oil was present just beneath the surface of this hidden pit.[764] Analysis shows that the contamination in this pit exceeds any possible threshold. For example, one sample contained petroleum contamination at a concentration of 140,000 mg/kg, which is 1,400 times the Judgment Cleanup Standard.[765] In the hidden pit, LBG also found Polycyclic Aromatic Hydrocarbons ("PAHs"), including the known carcinogen benzo[a]pyrene, in excess of Ecuadorian regulations.[766] The petroleum contamination has migrated outside the pit boundaries: LBG found crude oil in the groundwater.[767]

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761 R- 1261, GSI Well Plugging and Abandonment Summary at GSI_0000820.

762 C-043, Woodward Clyde Final Report Vol. 1, Table 3-25.

763 R-1258, GSI Master Pit List.

764 Finding liquid crude is not surprising. As one of Chevron's Lago Agrio Litigation experts noted, "free product" (i.e., liquid crude) was present in a pit, which "all in all [looked] pretty bad as it was supposed to be a remediated pit, specifically one the FDA said was badly remediated." R-1227, Email from B. Bjorkman to S. McMillen (Aug. 18, 2007) at 1.

765 RE-23, LBG 2014 SI Rpt. § 5.5.

766 *Id.* § 5.5

767 *Id.* § 5.5.

e. AG-04: Liquid Crude From TexPet Operations Is Present Today

379. AG-04 was drilled by Texaco in 1974 and abandoned in 1986.[768] Spill records document three spills associated with the site, at least one of which resulted in the release of 200 barrels of oil (8,400 gallons) covering one hectare.[769] Previously identified pits at this site are still filled with oil and tar.

380. LBG focused its sampling on the RAP-remediated pit just north of the well site platform. This location proved to be heavily contaminated: one sample had 690,000 mg/kg of petroleum contamination, the other had 590,000 mg/kg.[770] This crude oil contamination is over 500 times the limits specified by Ecuadorian regulations. What is more, PAH content was twenty to forty times the limit in Ecuadorian regulations.[771]

f. LA-35: Contamination From TexPet Pit Migrates Via Groundwater And TexPet-Installed Gooseneck Pipe

381. LA-35 was drilled by TexPet in 1988 and is currently operating as a production well. After TexPet left, no pits were reported at this site; however, in 2007, Chevron's experts identified a TexPet pit at this site in aerial photographs from 1990.[772] This hidden, unremediated pit — with a TexPet-installed gooseneck pipe still protruding from the side[773] — leaks contamination into a nearby stream.[774]

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768 R-954, Clickable Database 2006, AG-04, Site Documentation, Pre-Remediation Audit Summary Tables: FugroMcClelland 1992 Table 6.2.

769 R-938, Clickable Database 2007, AG-04, Site Documentation, Spill Reports.

770 RE-23, LBG 2014 SI Rpt. § 5.6.

771 *Id*.

772 R-1255, GSI Summary of Site Specific Information, LA-35 at 1.

773 *See* Respondent's Track 2 Counter-Memorial ¶ 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).").

774 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.2, *id*. at Annex 1 § 3.2.

382. LBG collected sediment and surface water samples immediately down gradient from the gooseneck pipe connected to the interior of the TexPet pit. The gooseneck pipe still drains water and oil from the pit directly into a drainage ditch leading to a small stream. Crude oil contamination in sediments extends the sampled length of the stream.[775] The surface water is also contaminated with petroleum and related toxic compounds many times higher than the regulatory limits.[776]

g. SSF-43: Groundwater Has Been Impacted By TexPet Operations

383. SSF-43 was drilled by TexPet in December 1973.[777] TexPet's investigators identified three pits in 1992,[778] two of which they described as having "oily wastes present," with evidence that "[c]ontaminants have migrated beyond confines of the pit."[779] Chevron's investigation at this site in 2007 revealed as many as five TexPet pits.[780] By the summer of 2014, the site was an open area with homes and grass covering the former TexPet pits. Behind one home, built (at it turns out) partially on top of a TexPet pit,[781] the family had dug a drinking water well. Although the well is no longer used, the family had used it for many years.[782] The groundwater surrounding the domestic well is contaminated with TexPet petroleum and contains

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775 RE-23, LBG 2014 SI Rpt. § 5.7 (exceeding Ecuadorian standards by almost 90 times); *id*. at Figure 5.7-1.

776 *Id*. §5.7; *id*. at Figure 5.7-2.

777 R-954, Clickable Database 2006, SSF-43, General Description.

778 *Id*. at SSF-43, Site Documentation, Pre-Remediation Audit Summary Tables: FugroMcClelland 1992 Table 6.4.

779 *Id*. at SSF-43, Site Documentation, HBT Agra Table F.5.

780 R-1236, GSI Summary of Site Specific Information, SSF-43 (July 10, 2007) at 5.

781 This home was also identified by Chevron in 2009. R-1236, GSI Summary of Site Specific Information, SSF-43 (July 10, 2007) at 5 ("The closed pit described in the plaintiff report . . . was not included as a part of the RAP probably because it was already closed. This pit is located just N of the NW quadrant of the platform . . . and has a shed and a house built on top of it. The owner has complained about seepage from the pit. During the HBT-Agra Audit, a sample collected from this pit had a distinct odor and contained 14,000 ppm oil and grease.").

782 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.2.

napthenic acids.[783] The soil is contaminated with crude oil at twenty times the Judgment Cleanup Standard.[784]

h. SSF-55: Sediments Show Impacts of Contamination

384. TexPet drilled SSF-55 in 1975,[785] but in 1983 it was closed down by TexPet.[786] According to Chevron's own summary of the site, TexPet covered at least one pit[787] that its consultants described as "seeping oil" from "the walls [of the pit]."[788] Chevron's experts noted in 2008 that 900 square meters of the swamp south of the platform was obviously contaminated with oil.[789]

385. Today, a road cuts through the former platform and a pasture covers TexPet's former pits. Downhill from those pits there is an impacted wetland area with a stream from which cattle drink. Almost all sediment samples from that wetland far exceeded regulatory thresholds, by as much as fifty times.[790]

2. Supplemental Testing At Two Sites Previously Investigated By LBG's Further Confirms The Presence Of TexPet Contamination

386. As part of the 2014 site investigations, LBG re-visited LA-02 and SSF-25, two sites that were also part of the 2013 site investigation. With a more complete understanding of the hydrogeology (the flow of groundwater) of each site, LBG installed new groundwater

783 RE-23, LBG 2014 SI Rpt. § 5.8.

784 *Id*. § 5.8; *id*. at Figure 5.8-1.

785 R-1237, GSI Summary of Site Specific Information, SSF-55 at 1 (July 30, 2007).

786 R-954, Clickable Database 2006, SSF-55, Site Documentation, Pre-Remediation Audit Summary Tables: Fugro-McClelland 1992 Table 6.2. No further oil production occurred at this site after 1983. *Id*.

787 R-1248, URS Remediation Summary Report for SSF-55 (Feb. 6, 2008) at 4.

788 *Id*.

789 R-1245, Email from R. Landazuri to E. Baca (Jan. 8, 2008) at BJORKMAN00060043 ("The swamp that is located to the south of the platform was obviously affected."); R-1239, Email from E. Baca to R. Landazuri (Jan. 8, 2008) at BJORKMAN00056317 ("The impacted area at the swamp of SSF-55 must be close to 900 m2.").

790 RE-23, LBG 2014 SI Rpt. § 5.9; *id*. at Figure 5.9-1.

monitoring wells where groundwater flows out of TexPet pits.[791] These groundwater monitoring wells confirmed that crude oil and its constituents are migrating out of the pits.[792]

3. TexPet's Hidden Pits And Practices Jeopardize Future Generations

387. Throughout the Lago Agrio Litigation, the Plaintiffs alleged that TexPet had left "hidden pits" throughout the Concession Area that were *de facto* minefields for Oriente residents. Chevron denied the existence of these "hidden pits." But internal Texaco documents confirm that even TexPet could not find up to 25% of the pits they dug.[793] And Chevron's experts likewise admitted in internal correspondence that they had discovered some of TexPet's hidden pits during the Lago Agrio trial. For example, at AG-08, Bjorn Bjorkman found a hidden pit while shadowing Mr. Cabrera: "This pit was called a 'natural marsh' in the RAP report. Unfortunately there is an obvious gooseneck pipe installed to drain it to the marsh to the east, so it sure is not natural."[794]

388. Oriente residents, and particularly farmers, have uncovered some of these hidden pits. For example, a farmer living next to SA-15 — a well that stopped oil production after abandonment by TexPet in the 1980s[795] — dug into the embankment next to his field to expand his cornfield and found contamination that had migrated from one of TexPet's pits. Years later,

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791 *Id.* §§ 4.6, 4.7.

792 *Id.* §§ 5.10, 5.11.

793 R-1240, Texaco Memorandum from J.E. Marin to File re ENV-Environmental Matters (May 1, 1995) (stating that during a site visit with prospective remediation contractors, they "found only 24 of the 32 pits that were suppose[d] to be located at the 17 sites visited. Of the 24 found: 2 have been closed correctly, 6 have been closed incorrectly, and 1 is a large fish pond." Presumably the other fifteen were still open.)

794 R-1257, Email from B. Bjorkman to S. McMillen (Aug. 18, 2007) at 1; *see also* R-1223, Hobbs Memorandum to Texaco (May 16, 1972); C-12, Fugro-McClelland Report at 6-32, § 6.4.3.

795 R-1258, GSI Master Pit List.

when he again tried to create more usable land on his property, this time next to the river, he again discovered a hidden TexPet pit.[796]

389. In 2014, a farmer living 400 meters from SSF-34 cleared an area of jungle between his house and an abandoned well, revealing a pit filled with crude oil. When LBG sampled it, they found that the pit's contamination had spread into the surrounding groundwater.[797] Notably, Claimants have sought to focus attention on how Judge Zambrano estimated the number of pits used to calculate damages in the Judgment, but Claimants still refuse to identify how many pits TexPet actually dug in the Oriente — information that is within Claimants' exclusive control. As the Republic has shown, the number of total pits almost certainly exceeds 1,000,[798] but Claimants have apparently elected to remain silent as to the true number of total pits for fear that it would serve only to increase their liability.

E. The Risk Of Health Impacts To Oriente Residents Living Near Former TexPet Facilities Requires Remediation, Health Monitoring, And Treatment

390. In the face of the Republic's showing of significant, current contamination in the Oriente that indisputably comes from former TexPet sites, Claimants have retreated to the untenable position that exposure to crude and its carcinogenic components — at levels that violate the Judgment Cleanup Standard, current Ecuadorian standards, and most standards from around the world — poses no threat to human health. As an initial matter, by showing that pollution exists in the Oriente and that substantial health risks to the population exist as a result,[799] the Republic has in its prior pleadings more than justified Judge Zambrano's finding of

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796 This is very similar to what happened to Servio Curipoma, who submitted a witness statement with the Republic's December 16, 2013 Rejoinder. R-1179, Servio Curipoma Witness Statement (Dec. 12, 2013) (attesting to hidden pit found on property located at Sacha-56 while attempting to build a home).

797 RE-23, LBG 2014 SI Rpt.§ 5.5.

798 Respondent's Track 2 Rejoinder ¶¶ 180-184.

799 *See id*. ¶¶ 200-203.

liability and the imposition of remedies designed both to (1) remediate and remove contamination, and (2) at least *monitor* the health of the residents. The Republic provides additional information regarding the health risks below.

391. While Claimants argue that the evidence does not link specific contamination to specific injury for any particular plaintiff, Claimants do not contest that the Republic's experts — largely relying on the record evidence — have adequately demonstrated health risks sufficient to warrant a massive clean-up of the region. In particular, Claimants' expert Dr. Thomas McHugh distinguishes between a health risk sufficient to trigger clean-up versus "an actual health effect."[800] Dr. McHugh effectively concedes that the Republic has proven the former, justifying remediation.[801] This alone establishes that the Judgment's required remediation is supported by the evidence and rebuts the claim that the damages are not based on science.

392. As shown below, however, the contamination left by TexPet has reached, and will continue to reach, people living around TexPet's former well sites such that there is a substantial risk to their health. As the Lago Agrio Court found after its review of the record, that risk justifies both remediation and ongoing health monitoring and treatment.

1. The Republic's Health Experts Have Demonstrated A Substantial Risk To Human Health That Shows The Judgment To Be Reasonable

393. Claimants' expert, Dr. Suresh Moolgavkar, suggests that epidemiological studies are "necessary to reach a conclusion that an exposure resulted in adverse health outcomes" because epidemiology "evaluate[s] what actually *did* happen," while risk assessments "evaluate[ ] [only] what *might* happen."[802] But other methods, not just epidemiological studies, may be relied upon to support scientifically-based findings of risk and causal associations

800 McHugh Expert Rpt. (May 7, 2014) at 6.

801 *See id.*

802 Moolgavkar Expert Rpt. (May 9, 2014) at 3.

between harmful events and adverse health outcomes. Here, case and occupational studies, epidemiologic studies in similar settings, risk assessments, and other toxicology data all demonstrate a causal relationship between oil and adverse health outcomes.[803] The oil company-funded epidemiological studies on which Claimants rely do nothing to refute the Republic's health experts' collective conclusion that the residents who have been exposed to contamination from TexPet's oil activities are at risk of suffering serious health consequences, including cancer.

a. Claimants' Experts' Epidemiological Studies Underestimate Risk

394. Respondent's expert, Dr. Philippe Grandjean, has shown that despite Dr. Moolgavkar's assertions to the contrary, serious health hazards not only exist in the Oriente but are likely underestimated, especially with regard to cancer.[804] In so finding, he rejected Dr. Moolgavkar's view that epidemiological studies are required, concluding instead that risk assessments and other types of data can be and often are relied upon to demonstrate risk and a causal relationship between a harmful event and adverse health outcomes.[805] Dr. Grandjean further explains that gaps in epidemiological data do not establish the absence of adverse health effects.[806] Rather, data gaps tend to *underestimate* the health hazards. Studies with inconclusive data, for example, are frequently used — and abused — by industries that claim inconclusive data mean no harm when they just mask the harm.[807] The epidemiological studies performed by Claimants' experts do just this.

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803 *See* RE-21, Grandjean Expert Rpt. (Nov. 7, 2014); RE-26, Strauss Expert Rpt. (Nov. 7, 2014); RE-22, Laffon Expert Rpt. (Nov. 7, 2014).

804 RE-15, Grandjean Expert Rpt. (Dec. 16, 2013) at 1, 13; RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 3.

805 RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 2-3.

806 RE-15, Grandjean Expert Rpt. (Dec. 16, 2013) at 13; RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 3.

807 RE-15, Grandjean Expert Rpt. (Dec. 16, 2013) at 9, 11, 12; *see also* RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 4 (cataloguing occupational cancers in various industries that were initially ignored).

395. For example, Dr. Moolgavkar's most recent expert report and epidemiological study, by design, underestimates adverse health effects to the Oriente population, and certainly do not prove the absence of harm. **First**, the data on which Dr. Moolgavkar relies are flawed in that they: (a) include persons living in cantons where there is little or no oil production,[808] and (b) fail to account for migrant workers who should be considered as part of the Concession Area population at their times of death.[809] **Second**, as is discussed in more detail by Dr. Harlee Strauss, the information contained in the death certificates on which Dr. Moolgavkar relies is inaccurate, or at least uninformative, because as a matter of practice in Ecuador the cause of death is usually given as the immediate cause (e.g., pneumonia), not the underlying disease (e.g., leukemia).[810]

396. **Third**, Dr. Moolgavkar has ignored ample toxicological evidence that the immunotoxic effects from exposure to crude oil contribute to the poor health of the Oriente residents,[811] and, more generally, that epidemiological studies confirm the significant impact that immune-suppressing toxins have on the health of exposed populations.[812] Recent studies have

808 RE-15, Grandjean Expert Rpt. (Dec. 16, 2013) at 7; RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 5 (explaining that comparisons with other cantons where E&P activities were occurring would necessarily yield inaccurate results); *see also* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 4.2 (same).

809 RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 5 (explaining that many people who worked in the oil industry in the Concession Area are considered to be residents of, among other cities, Quito, even though they should be considered as part of the population living in the impact zone for purposes of any epidemiological study).

810 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 4.1.

811 RE-12, Strauss Expert Rpt. (Dec. 16, 2013) at 42, 48; *see also* RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 3-4.

812 RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 3-4; RE-26, Strauss Expert Rpt. (Nov. 7, 2014) §§ 2.4.1, 2.6 (stating that petroleum industry reports have shown that dermal contact with crude oil is associated with skin cancer and immune dysfunction).

also shown that health risks were underestimated when immunotoxicity was not taken into account in setting exposure limits for toxins comparable to the ones here.[813]

b. Epidemiological Studies Of Populations Exposed To Oil Establish Health Risks, Including Cancer

397. Numerous epidemiological studies have reported that workers who clean up major oil spills, and residents in areas close to the spills, suffer adverse health outcomes. Studies of the 2002 *Prestige* oil spill off the coast of Spain, for example, found significant damage in the DNA of people who worked on the clean-up.[814] These studies are important for at least two reasons. **First**, the vast majority of carcinogens, including those found in oil, are genotoxic, i.e., they can damage a person's DNA.[815] There is no permissible level of exposure to these chemicals: "every molecule of a [genotoxic] carcinogen is presumed to pose a risk."[816] **Second**, epidemiological studies have established a causal association between genetic alterations and cancer.[817]

398. While it can take from twenty to forty years from the time of exposure to a chemical carcinogen until the clinical detection of a tumor,[818] biomarkers can detect a risk of cancer at a much earlier stage. Biomarkers serve "as proof of exposure to a carcinogen" or as "an indication that a preliminary genotoxic event or actual DNA damage has occurred."[819] The

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813 RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 3-4 (discussing a study wherein a current threshold limit was shown to be too high by up to 100-fold because immunotoxic damage was not taken into account in setting protective limits).

814 RE-22, Laffon Expert Rpt. (Nov. 7, 2014) § 2.6.

815 *Id.* § 2.4.

816 *Id.* at 10.

817 *Id.* § 2.5.

818 *Id.* § 2.4.

819 *Id.* § 2.5.

epidemiology studies conducted to measure cancer risk in those exposed to oil following spills have used biomarkers.

399. Studies by Respondent's expert, Dr. Blanca Laffon, found significant DNA damage in those involved in the cleanup of contaminated birds, beaches, and rocks following the *Prestige* oil spill.[820] The initial *Prestige* studies show that DNA damage increased with length of exposure, but several months of exposure was sufficient to produce chromosome damage.[821]

400. Here, the individuals living in the Oriente have been exposed to TexPet's oil contamination for decades, not months. And unlike occupational exposure (where workers go home at night, on the weekends, etc.), there has been no recovery period from the exposure for the local residents, a population that includes vulnerable groups, including children, pregnant women, and the elderly.[822] The two populations also differ in that the workers in the *Prestige* studies wore protective clothing and had access to clean drinking water throughout their exposure; the inhabitants of the Oriente have continued to touch, breathe, and ingest TexPet's oil for years. These differences make clear that the *Prestige* oil spill studies *underestimated* the adverse health effects from TexPet's contamination of the Oriente.

401. Long-term studies following the *Prestige* oil spill show increased levels of genotoxicity biomarkers in exposed individuals for at least two years after exposure ended, meaning that cancer risk in the exposed individuals was increased during that two-year period.[823] A recent follow-up study found that although there was no evidence of persistent genotoxic

820 *Id.* § 2.6; *see also id.* (discussing a study conducted by Paz y Miño *et al.*, 2008, that similarly found DNA damage and chromosomal aberrations in occupational workers exposed to oil in Ecuador's Orellana province).

821 *Id.*

822 *Id.* § 2.1.

823 *Id.* § 2.7.

damage,[824] exposed individuals continued to experience endocrine and immunological alterations that can lead to an inability to control tumor growth and microbial infections.[825] Dr. Laffon also observed a decrease in the percentage of cells involved in immune surveillance against cancer cells.[826] (Of course, the health risks to the population in the Concession Area are even greater because their exposure to TexPet's oil contamination is ongoing.)

402. Thus, individuals who are no longer exposed appear to experience a recovery from genotoxic effects, but not from immunotoxic and endocrinologic effects. The recovery rate from genotoxic effects is unknown, however, particularly in populations exposed for decades, as in the Oriente. After their studies of the *Prestige* oil spill, Dr. Laffon and her colleagues recommended health monitoring of the persons previously exposed.[827] Similar monitoring is provided for in the Lago Agrio Judgment.[828]

c. The Toxicological Data Indicate That TexPet's Contamination Has Caused Present And Future Risk Of Adverse Health Effects

403. Toxicology, case studies, risk assessments, and clinical observations all have shown that exposure to oil spills causes adverse health outcomes.[829] While Dr. Strauss's risk assessments were conducted to determine whether there were sufficient health risks to warrant clean-up (not to evaluate whether a harmful event caused an adverse health outcome in a particular person or group of people),[830] the evidence is overwhelming that TexPet's

824 *Id.*

825 *Id.*

826 *Id.*

827 *Id.*

828 *See infra* at VII.F.3.

829 RE-22, Laffon Expert Rpt. (Nov. 7, 2014) § 2.3; RE-12, Strauss Expert Rpt. (Dec. 16, 2013) at 38, 39, 43.

830 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.0 (noting that while exposure assessment methodology can be used to evaluate actual harm, the risk assessment conducted here was intended to be a regulatory risk

contamination poses real health risks to the people of the Oriente.[831] That risk will continue absent remediation.

404. Moreover, and contrary to Claimants' assertion,[832] Dr. Strauss's prior (and current) risk assessment is *conservative*. It relies on realistic exposure assumptions based on the facts and data,[833] takes into account the actual environmental conditions and exposure measurements,[834] represents risk scenarios throughout the region,[835] and employs appropriate toxicity data.[836]

2. Residents Of The Oriente Have Been And Will Continue To Be Exposed To TexPet Contamination In Multiple Ways

405. Claimants argue that the Republic has not shown *current* exposure to this contamination. This is false — and a red herring. The Plaintiffs first brought suit against Claimants in 1993, alleging that TexPet's practices dating back to 1964 had polluted their lands and harmed them individually. Claimants successfully delayed the environmental litigation for more than a decade — first through their efforts to transfer it to Ecuador and then in the Ecuadorian court. Claimants' supposition that the only relevant exposure is current exposure—occurring in 2014 — is unfounded.

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assessment). Nonetheless, Dr. Strauss has noted that there are several instances where exposure to the contamination caused by TexPet has created immediate health effects. *See, e.g.*, *id.* §§ 2.1, 2.2.

831 *Id.* §§ 2.1, 2.2, 2.5, 2.6, 3; *see also* RE-12, Strauss Dec. 2013 Expert Rpt. at 4. Claimants' argument that aerial spraying of pesticides causes the same health effects is a red herring because there was no aerial spraying or other pesticide use in the areas under investigation. RE-12, Strauss Dec. 2013 Expert Rpt. at 40-41.

832 Claimants' Track 2 Supp. Merits Memorial ¶ 181.

833 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) §§ 2.2, 2.3.

834 *Id.*

835 *See* RE-23, LBG Expert Rpt. (Nov. 7, 2014) Annex 1 § 4.1 ("LBG's Site Selection Process") (explaining that the sites selected by LBG are representative of all the sites in the Concession Area); *see also* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.1.

836 *See* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.4 (discussing the variety of acceptable methods that she has used for evaluating TPH).

406. **First**, Claimants no longer seriously contest that residents of the Oriente were exposed to oil contamination for decades. Chevron's own interviews conducted during its secret PIs confirm that Concession Area families drank from contaminated local water sources — primarily streams and hand-dug wells.[837] Only after experiencing health problems and learning that those health problems might be lessened by, e.g., changing water sources, did some residents choose to rely more on municipal or rain water or to dig a new well.[838] Regarding past exposure, Claimants contend only that the 1995 Settlement Agreement and RAP addressed it to the extent necessary, but that is not a defense or otherwise at issue in Track 2.[839]

407. **Second**, the Republic has without a doubt shown that TexPet contamination continues to exist in the Oriente at a level that is harmful to humans, their animals, and their environment. LBG testing shows contamination of sediment, surface soils, and groundwater in locations that are readily encountered by residents and their livestock.[840]

408. **Third**, the Republic has in fact demonstrated *current* exposure to contamination. Claimants implausibly suggest that remediation of the regional water supply — and presumably the surrounding soils that continuously pollute the groundwater, surface waters, and sediment — may not be necessary because some residents now seek out and rely on alternate sources.[841] But Claimants cite no authority for the novel proposition that current use is the only criterion by which to judge the necessity of cleaning up contaminated water supplies (or removing the sources of contamination) or that individuals' efforts to find temporary alternatives obviates the

837 R-1274, Chevron Guamán Field Interview for Well Site AG-02 (Mar. 3, 2006); R-1180, Guamán Witness Statement (Dec. 12, 2013) ¶ 6; R-1178, Jaramillo Witness Statement (Dec. 13, 2013) ¶ 2.

838 *See, e.g.*, R-1178, Jaramillo Witness Statement (Dec. 13, 2013) ¶ 2 (attesting to family's attempt to use a river one kilometer away for laundry and bathing, but rainwater for drinking water so as to minimize use of contaminated well).

839 *See supra* § VII.B.

840 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.2; *id*. at Annex 1 §§ 3.3.2, 3.4.2, 3.5. *See also supra* § VII.D.

841 Claimants' Track 2 Supp. Merits Memorial ¶ 171.

need to clean the inhabitants' original water sources. That some residents now rely on alternative sources of water does not eliminate potential health risks from many years of past exposure. Nor does it absolve Chevron of the obligation to make the Oriente's water resources usable again.

409. Claimants' perverse position that the *victims* should incur the expense and daily burdens necessary to avoid *TexPet's* pollution has no basis in Ecuadorian law and trivializes the hardship imposed on the Oriente's residents. Avoiding known pits when planting, keeping animals away from contamination, walking long distances to a municipal water source, paying for municipal water to be trucked to their property, and digging multiple wells seeking safe water may work in some cases, but none of these efforts is foolproof. Grazing animals cannot be completely contained. Farmers accidentally expand their fields into pits previously hidden by Claimants.[842] And even for those who can find safe water, there is not enough to meet all of their drinking, cooking, and washing needs.[843] The income of many Oriente residents is simply too low to pay for safe water.

410. What is particularly pernicious about TexPet's contamination is that it affects so many aspects of everyday life for the Oriente's residents. Many families who live near TexPet's former sites survive off the land. In the absence of contamination they would rely completely on the rainforest around them to provide water for cooking, cleaning, bathing, recreation, and drinking. They grow and raise their food (both plant and animal) on their own properties, and they fish in the streams and ponds near their homes. Many walk barefoot through mud and dust, depending on the season. As a result, residents are exposed to pathways to contamination virtually every minute of the day, throughout their lives.

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842 *See supra* § VII.D.3 (discussing pits undisclosed by Claimants).

843 *See* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

a. Oriente Residents Are Exposed Through Bathing And Swimming

411. Residents living near TexPet's former sites are exposed to contamination in well and stream water and in sediment while bathing and swimming. In her prior risk assessment, the Republic's expert Dr. Strauss conservatively estimated, based on U.S. Environmental Protection Agency ("EPA") guidance, that infants and children up to age six bathe and swim in contaminated water for an hour every day and older children and adults bathe and swim for 35 minutes every day.[844] Claimants' expert Dr. Thomas McHugh countered that "[t]hese rates are at the high end of typical behavior in the U.S." and that "[i]n [his] experience, parents try to minimize the time required to bathe their infants."[845]

412. But Dr. McHugh overlooks the fact that what matters is typical behavior in the Oriente, not the United States. Even if he has never been to the Oriente, the differences are obvious. While Houston, Texas (where Dr. McHugh resides) may reach temperatures similar to the Oriente at certain times of the year, the lives of its residents could not be more different than the lives of the Plaintiffs. Nearly all Houston homes have indoor plumbing[846] and those that have swimming pools fill them with filtered water. Houston is known as the "air conditioning capital of the world,"[847] and an extensive network of tunnels snake through downtown Houston

844 RE-12, Strauss Expert Rpt. (Dec. 16, 2013), Appendix A § 3.3.7.

845 McHugh Expert Rpt. (May 7, 2014) at 3. McHugh criticizes Dr. Strauss for relying on what he terms "anecdotal" data, even though he has relied on anecdotes from his experiences in the United States rather than provide data provided from interviews with Oriente residents. Importantly, despite the evidence supporting the bathing/swimming durations used in her risk assessments, Dr. Strauss reran the analysis using just thirty minutes as the estimate for young children and determined that such a change had minimal impact on her assessment of the risk to their health.

846 R-1242, Craig Hlavaty, *National Report Shows Areas Of Texas That Still Lack Indoor Plumbing*, HOUSTON CHRONICLE (Apr. 25, 2014) at 2 ("In Harris County [which includes Houston], only 0.734 percent of 1.4 million housing units lack complete plumbing facilities").

847 R-1243, Lisa Gray, *Air-Conditioning Capital of the World*, HOUSTON CHRONICLE (June 21, 2012).

to permit office workers to never leave the comforts of air conditioning during the city's hottest months.[848]

413. By contrast, residents of the Oriente rely exclusively on naturally occurring water to cool themselves and their children year-round.[849] They bathe and swim in contaminated stream water, standing in contaminated sediment as they do. They bathe in well water drawn from contaminated groundwater. And those who have learned to avoid it do so at great hardship and expense. Examples of such past, present, and future contamination exposure include:

- LA-16: One family pours well water over their children several times a day — and even more frequently when it is hot outside.[850] *See* Figure 3, below. That well contains petroleum contamination that causes the water to smell of oil.[851] Another family's nearby well is likewise contaminated.[852]

Figure 3: A girl at LA-16 pours water over her little brother's head.

848 R-1244, *Building, Streets and Tunnels*, DOWNTOWNHOUSTON.ORG.

849 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.3.3.

850 *Id.*

851 *Id.* § 2.2.

852 *Id.*

- SSF-43: A family here relies on rainwater and water it purchases to avoid using a contaminated well. Recent testing confirmed the well is so contaminated it is unsurprising that the water smells of oil.[853]

- SSF-25: Residents use municipal water piped to them for bathing, but delivery is not reliable. However, the nearby stream, which could serve as a water source when the municipal water runs dry, contains visible petroleum contamination.[854] Testing also showed significant groundwater contamination, making it impossible for these families to dig clean wells to avoid use of the stream when the municipal water is insufficient.[855]

- AG-02: During its 2013 investigation, LBG identified a location at TexPet's former pit at AG-02 where buried oil leaks slowly downhill to the stream below, resulting in dangerous levels of contamination.[856] José Guamán has attested that his family and other nearby residents use the stream for bathing.[857]

414. Claimants acknowledge that indigenous people bathe and swim in contaminated streams[858] but argue that: (1) the RAP did not require it to clean up the contamination;[859] and (2) the pollution is "covered by new layers of solid or semi-solid material"[860] such that "there is no evidence that the limited contamination present in the stream sediment is affecting the quality of the stream water."[861] That response fails twice over. **First**, the RAP's applicability will be settled in Track 1 and is "moot" for Track 2 purposes. **Second**, Claimants fail to explain why

853 *Id.*

854 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 § 3.4.2.

855 *Id.* § 3.4.3.3.

856 LBG testing found TPH amounts in excess of 31,000 mg/kg — well above any Ecuadorian regulation and more than six times Claimants' accepted RAP threshold of 5,000 mg/kg. LBG 2013 SI Rpt. at RS-29; *see also* Connor Expert Rpt. (Aug. 5, 2010) at 37.

857 R-1180, Guamán Witness Statement (Dec. 12, 2013) ¶ 6.

858 Claimants' Supp. Merits Memorial ¶ 172.

859 *Id.* ¶ 172. Claimants make this argument even though Dr. Hinchee admits TexPet cleaned up one stream as part of the RAP. Hinchee Expert Rpt. (May 9, 2014) at 15.

860 Claimants' Supp. Merits Memorial ¶ 186.

861 *Id.* ¶ 172.

contaminated sediment is relevant only if it impacts stream water. Local residents are affected regardless because they walk through and stand in the contaminated sediment.[862]

415. While Claimants contend that all contaminated sediment is buried and therefore contained, they incongruously note that LBG collected samples that showed contaminated sediment suspended in the stream water. The latter disproves the former. The contamination is neither limited nor contained. And as anyone who has ever walked in a stream can affirm — or as the Tribunal may observe when it visits the Oriente — sediment is always disturbed, and contaminants released, when a person or animal walks through a stream.[863]

b. Oriente Residents Are Exposed To Contamination Through Washing Their Clothes

416. Families in the Oriente wash their clothing in the available water — in some instances the same contaminated streams just discussed. Moreover, young children often play in water nearby while their mothers do laundry. Families also sometimes wash their clothes with well water, which LBG has also determined is contaminated.

- AG-02: As noted, LBG confirmed significant contamination of the stream below where a former TexPet pit continues to leak oil. At the location where contamination enters the water, LBG found a platform for washing laundry.[864] An April 2014 visit to this site confirmed this assessment as two women washed their clothes while surrounded by children playing in the water, captured in Figure 4 below.

862 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.5.2; *id*. at Annex 1 § 4.1 (observing that disturbance of the sediment causes release of oil in sheens and globules).

863 This is why LBG's surface-water-sampling-technician stands on the bank's edge (not entering the water), uses a tube to access the water, then allows any sediments to settle before sampling. LBG 2013 SI Rpt. Attach. 3.

864 RE-11, LBG 2013 SI Rpt. at RS-28. Chevron's PI interview notes also described residents using the river to bathe and wash clothes. R-935, Chevron's Aguarico 02 Judicial Inspection Playbook (Oct. 2006) at GSI_04598423; R-1274, Jose Guamán Field Interview for Well Site AG-02 (Mar. 3, 2006). *See also* R-1180, Guamán Witness Statement (Dec. 12, 2013) ¶ 6.

Figure 4: Women wash clothing in contaminated water while children play nearby.

- LA-16: As noted LBG confirmed significant contamination in the well at LA-16,[865] from which residents draw laundry water.[866]

- LA-02: Because the stream next to her house is highly contaminated,[867] the mother of the family living at LA-02 hauls the family's clothes down the road to her mother's house to do laundry in the stream there.

417. Exacerbating the problems identified above, local families are further exposed to toxic chemicals when they wear their "clean" clothes.[868]

c. Oriente Residents Are Exposed Through Drinking Contaminated Water And Eating Food Cooked With It

418. Oriente residents also rely on the region's water to drink and to cook. As an initial matter, Claimants challenge Dr. Strauss's water-consumption estimates by pointing to amounts used by the U.S. EPA and World Health Organization.[869] But, as Dr. Strauss previously

865 *See supra* § VII.D.1.b.

866 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

867 RE-11, LBG 2013 SI Rpt. at RS-16 (As LBG's 2013 investigation showed, the stream is contaminated by petroleum hydrocarbons, metals, and phenols, as well as naphthenic acids, a water-soluble fraction of oil.).

868 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.0.

869 Claimants' Supp. Merits Memorial ¶ 182.

explained, Claimants ignore the relevant climate and activity of the individuals affected when citing this guidance.[870] The U.S. Occupational Health and Safety Administration, which assures working conditions for Americans, advises that for a heat index greater than 91 degrees Fahrenheit (33 degrees Celsius), a 1 liter per hour consumption rate is appropriate.[871] California guidance for outdoor workers echoes this.[872] The Oriente is an exceedingly hot climate and many residents spend their days working outdoors — whether cultivating crops or performing domestic chores in and around non-air-conditioned homes. Dr. Strauss's estimate of 7.5 liters per day is not only reasonable, but consistent with the environmental conditions Claimants ignore.

419. Examples of Oriente residents who still drink and cook with contaminated water or who must go to great expense and difficulty to avoid contaminated water include:

- SSF-43: Residents living here used water from a hand-dug community well before determining that it was contaminated.[873] As noted, LBG confirmed that the well is so contaminated it is unsurprising that the water smells like oil.[874] Residents now purchase drinking water from a municipal truck — an expense that would be unnecessary if their property were remediated.[875]

- AG-06: A man who lives with his family not far from AG-06 tends to his fields surrounding the well site. Although the family relies on a combination of trucked-in municipal water, rainwater, and well water to avoid contamination at home, on hot days the father of the family still drinks 5-6 liters of water per day from the stream adjacent to AG-06 as he tends to his fields near the stream.[876] LBG testing confirmed contamination of that stream ten to twenty times the Judgment Cleanup Standard.[877]

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870 RE-12, Strauss Expert Rpt. (Dec. 16, 2013) § 2.2.2.4.

871 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.3.1.

872 *Id.*

873 *Id.* §§ 2.1, 2.2.

874 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 § 3.2; RE-23, LBG 2014 SI Rpt. § 5.8.

875 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

876 *Id.*

877 RE-23, LBG 2014 SI Rpt. § 5.2.

- SSF-13: Residents living near SSF-13 have constructed a drinking-water collection point along the stream. LBG tests just below this point confirmed contamination.[878]

- AG-02: José Guamán has attested that his family tries to drink rainwater but when it does not rain enough they "often are forced to drink the water out of the polluted stream."[879]

d. Oriente Residents Are Exposed To Contaminated Dust And Dirt

420. Families living near TexPet's former well sites remain vulnerable to contamination even in their own homes. As Dr. Strauss explains, U.S. EPA and industry guidance supports her assumption that individuals exposed to contamination near TexPet well sites ingest 200 mg per day of soil and 100 mg per day of sediment.[880]

421. Additionally, residents often walk their properties barefoot. As a result, they experience dermal exposure to all surface contamination. That said, whether wearing shoes or barefoot, residents track contamination into their homes. So do their animals. For example:

- LA-02: Soil and wipe samples taken at LA-02 confirm that contamination infiltrates the homes of Oriente residents. There, LBG found contamination at the surface of the soil at the doorstep to the home, in the living area, and in the kitchen.[881] LBG even confirmed contamination on a toddler's toy riding horse, showing that the pathway of contamination reaches the tiniest of hands in the Oriente.[882]

e. Oriente Residents Are Exposed To Contamination Through Their Livestock And Fishing

422. Most residents living near former TexPet wells routinely fish and/or keep animals on their property to provide food for their families. Interviews reveal the impacts of oil contamination on livestock, and the residents' efforts to mitigate these effects:

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878 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

879 R-1180, Guamán Witness Statement (Dec. 12, 2013) ¶ 6.

880 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.3.2.

881 *Id.* § 2.2.

882 *Id.*

- LA-02: Residents have built a cage to prevent young chickens and ducks from accessing contaminated sediment near their house, where many have died. Residents also found that older chickens that fell into a pit on their property died soon thereafter; the owner consequently covered it.[883] Test results at this location have confirmed significant contamination of the sediment behind the house.[884]

- AG-02: During Chevron's PI visit to this site in 2006, residents explained that the drainage from the pit collected and emptied into a stream nearby. Their animals would drink water from the stream and would develop scabs and starve.[885] Chevron's own PI test results revealed petroleum contamination nine times over the regulatory limits.[886] As noted above, this contamination was confirmed by LBG in 2013.

- AG-06: A resident reported that his cows drink from a contaminated stream near the former well site and disproportionately have suffered illness and premature death. By contrast, the resident's chickens, which are no longer affected because they now primarily drink from municipal or rain water.[887] Test results showed significant contamination of the stream.

- SSF-13: During its 2014 visit to Ecuador, LBG observed that local residents used the land surrounding SSF-13 as a cow pasture, with a herd of approximately three dozen cows grazing within the footprint of the former pit, drinking the standing water in the pit, and drinking from a stream flowing out of the pit through a breach in the pit walls. LBG's testing at this location has revealed that these cows have been drinking contaminated water and walking through contaminated sediment, with results showing petroleum contamination in the sediment of 39,000 mg/kg.[888]

- SSF-55: This site includes swampland through which cows roam freely. Claimants' experts noted the contamination in the swamp.[889] Recent LBG testing shows significant sediment contamination, posing a significant risk to the livestock.[890]

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883 *Id.*

884 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.5.3.

885 R-935, Chevron's Aguarico 02 Judicial Inspection Playbook at GSI_0459423; *see also* R-1180, Guamán Witness Statement (Dec. 12, 2013) ¶ 7 (attesting to loss of livestock); R-1274, Jose Guamán Field Interview for Well Site AG-02 (Mar. 3, 2006).

886 R-935, Chevron's Aguarico 02 Judicial Inspection Playbook at GSI_0459415.

887 RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

888 RE-23, LBG 2014 SI Rpt. § 5.4.

889 R-1245, Email from R. Landazuri to E. Baca (Jan. 8, 2008) at BJORKMAN00060043; R-1239, Email from E. Baca to R. Landazuri (Jan. 8, 2008) at BJORKMAN00056317.

890 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 § 3.5.3; RE-23, LBG 2014 SI Rpt. § 5.9; *see also* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 3.1.

423. Chevron's expert noted in the Lago Agrio Litigation that "[m]ost farms have some cows" and those cows "are forest trained and roam fairly freely."[891] With no limits on their movements, the livestock inevitably drink from contaminated streams and meander through polluted land.

f. Oriente Residents Are Exposed To Contamination Through Farming

424. Many of the residents near former TexPet well sites practice subsistence farming while others farm to sell crops. In both instances, the farmers have been exposed to contamination when they uncover pits previously hidden by TexPet.[892] Residents working with the land around their properties also come into contact with contamination in the soil on or just below the surface. For example, LBG testing confirmed significant contamination of the soil near SSF-13, presenting a significant risk to anyone farming that soil.[893]

F. The Lago Agrio Judgment Is Reasonable

1. Chevron Is Jointly And Severally Liable Under Ecuadorian Law For All Pollution Present At Its Well Sites

425. In Ecuador, like in many countries, joint tortfeasors are held jointly and severally liable to those affected by the tortious act.[894] Chevron itself has acknowledged as much. During the Lago Agrio trial, at the Sacha Norte 2 Judicial Inspection ("JI"), Chevron attorney Adolfo Callejas advised the court that Chevron and PetroEcuador "share any liability for purported

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891 R-1260, Email from B. Bjorkman to Chevron Contractors (Nov. 1, 2007) at BJORKMAN00054546.

892 For specific examples, *see supra* § VII.D.3.

893 RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 3.2; *id.* at Annex 1 §§ 3.3.3, 3.5.2; RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.2.

894 Respondent's Track 2 Rejoinder ¶ 79 ("Ecuador's Civil Code is clear: Claimants are jointly and severally liable for damages caused by contamination in the Oriente, even if PetroEcuador subsequently contributed to that contamination.").

harm."[895] Another Chevron attorney, Ivan Racines, elaborated that "there was not one tenant here, but two; two parties to a consortium, and therefore, all liabilities must be shared."[896]

426. But Claimants' ignore that it is in the victim's sole discretion to seek reparation from one or more of the joint tortfeasors. Claimants nonetheless now criticize that choice. But their criticism of both the Court's and Respondent's experts for (1) not allocating responsibility between Chevron and PetroEcuador, and (2) failing to "carve out" PetroEcuador's percentage contribution from the Judgment's calculation of damages is baseless.[897]

427. To the first point, Claimants' arguments are misplaced because Ecuadorian courts cannot lawfully assign responsibility to a contributory tortfeasor who is not a party to the case. Ecuadorian law instead requires that a judgment be rendered against a first joint tortfeasor *before* that tortfeasor can seek indemnification from another potentially responsible party in a separate, subsequent suit. Claimants assert such a process is "absurd,"[898] notwithstanding similar processes elsewhere, including in the United States and England.[899] Moreover, Claimants knew

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895 R-926, Sacha Norte 2 JI Acta at 14-19.

896 R-926, Sacha Norte 2 JI Acta at 14-19; *see also* C-931, Lago Agrio Judgment at 61 ("Texas Petroleum Company likewise have expressed that they will assume joint responsibility with the two mentioned Ecuadorian companies, for all the obligations that the latter undertake toward the Ecuadorian Government, as a consequence of the transfer of the application of concession made by Texas Petroleum Company.").

897 *See, e.g.*, Claimants Track 2 Reply ¶¶ 31-33, 140; Claimants Track 2 Supp. Memorial ¶¶ 134-136, 156, 162-63. *Cf.* R-1265, Email from S. McMillen to B. Bjorkman, et al. (Jan. 21, 2008) at 2 ("An important conclusion needs to be that no one can establish a 'chronology' as requested in the Wray petition. This is critical in case the judge doesn't buy the argument that there is no impact. The 2nd line of defense will be that no one can discern the impact to biodiversity from Texpet's operations versus PE's operations.").

898 Claimants' Track 2 Supp. Merits Memorial ¶ 135. Also misleading is Claimants' contention that summary oral proceedings are inappropriate for this case because joinder of third parties (e.g., a joint tortfeasor) is not allowed under such proceedings. *Id*. But for a few exceptions — none of which applies here — joinder of third parties is not allowed in Ecuador regardless of the type of proceeding. *See* Andrade Expert Rpt. (Nov. 7, 2014) ¶ 25. In Ecuador, therefore, a separate action for contribution is necessary in all but a few very limited cases.

899 *See infra* § Annex A §B.

or should have known this to be the law of Ecuador when Texaco and Chevron persuaded the U.S. courts to transfer the case to Ecuador.[900]

428. To the second point, as explained below, Claimants improperly ignore that Chevron is jointly and severally liable to the Plaintiffs for *all* pollution at its former well sites.

a. Ecuadorian Law Provides Joint And Several Liability For Parties Who Have Simultaneously Or Successively Contributed To Environmental Harm At The Same Sites

429. Any injury to the Plaintiffs attributable to TexPet's drilling activities, whether from deliberate or negligent conduct or the performance of a hazardous activity, left Chevron either solely liable or, if another contributed to the injuries, jointly and severally liable. Under no circumstance is Chevron without fault.

430. In Ecuador, "[i]f an intentional or unintentional tort has been committed by two or more persons, each of them shall be jointly and severally liable for any damage stemming from the same intentional or unintentional tort."[901] As in other civil and common law regimes, so long as both actors are found to have contributed to the same injury, it makes no difference whether either actor's contributory tortious conduct was prior to, contemporaneous with, or subsequent to the other's conduct.[902] As Dr. Fabián Andrade notes, the existence of a potential second (non-joined) contributory tortfeasor (e.g., PetroEcuador) alleged to be jointly and severally liable does not alter the presumption of causation against the first tortfeasor (e.g., Chevron) nor reduce or

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900 *See, e.g.*, Claimants' Track 2 Reply ¶¶ 31, 33, 143; Claimants' Track 2 Supp. Merits Memorial ¶¶ 134-136, 156, 162-63. In New York, too, a money judgment can be rendered in a second suit for contribution only after the first joint defendant has actually paid more than his equitable share to the plaintiff. *See* RLA-589, N.Y. C.P.L.R. §§ 1401 *et. seq*.

901 RLA-163, Civil Code of Ecuador, art. 2217. Neither of two narrow exceptions applies here.

902 *See, e.g.*, RLA-454, *Viñan v. Federación Médica Ecuatoriana et al*. (upholding the principle of joint and several liability of several people for damage caused by separate events that took place at different times). *See also* C-1586, *Delfina Torres* (Oct. 29, 2002) (finding Petroecuador, Petrocomercial and Petroindustrial jointly and severally liable).

eliminate its liability.[903] This remains so regardless of how great or limited the first tortfeasor's liability might be relative to the second tortfeasor's liability.[904]

431. To mitigate any resulting unfairness in respect to unknown, unavailable, or judgment-proof tortfeasors, Ecuador's Civil Code provides that the victims of a tort (here, the Plaintiffs) inflicted by alleged, multiple joint tortfeasors (here, Chevron and purportedly PetroEcuador) are entitled, at their sole discretion, to file a complaint against any one or more of the alleged joint tortfeasors and to obtain full, un-apportioned recovery of all resulting damage from any joint tortfeasor who is adjudicated as liable.[905] The Plaintiffs thus had discretion to seek damages from Chevron alone, PetroEcuador alone, or Chevron and PetroEcuador together.

432. Ecuadorian law also protects defendants in tort actions, allowing any joint debtor who has satisfied more than his proper share of total joint liability to seek recourse in the nature of subrogation (sometimes called "contribution" or "indemnification" in other legal systems) against any potential second contributory tortfeasor.[906] This legal framework applies to the Lago Agrio proceedings as follows:

433. **First**, the Lago Agrio Court did not err in assessing full liability against Chevron vis-à-vis the Plaintiffs, because any purported joint liability by PetroEcuador did not alter the

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903 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 22; *see also* C-1975, National Court Decision at 163.

904 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 22. Chevron's Lago Agrio attorney, Alberto Racines, likewise has conceded that "responsibility is shared." R-1246, Summary: JI Sacha Norte 2 at BJORKMAN00054340 (Dec. 8, 2005).

905 RLA-163, Civil Code of Ecuador, art. 1530 ("The creditor can act against all the joint and several tortfeasors jointly, or against any of them, at his discretion, without the latter being able to oppose the benefit of division.").

906 RLA-163, Civil Code of Ecuador, art. 1538 ("The joint and several debtor who has paid the debt, or has canceled it through any of the means equivalent to payment, remains subrogated in the creditor's legal action with all his privileges and securities, but is limited, vis-à-vis each of the co-debtors, to this co-debtor's part or share of the debt."); *see also* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 23

presumption of causation against Chevron or reduce Chevron's liability to the Plaintiffs.[907] As noted in the Judgment, Chevron's joint and several liability under Ecuadorian law cannot be reduced or "extinguished" by allegations — even if ultimately proven — of additional contributory harm caused by PetroEcuador as a non-joined, putative tortfeasor.[908]

434. **Second**, because PetroEcuador was not a party to the Lago Agrio proceedings, and had no opportunity to defend itself, the Court could not lawfully determine what portion, if any, of Chevron's liability should be attributed to PetroEcuador.[909]

435. **Third**, Chevron's interests remain protected. It may bring a separate subrogation action against PetroEcuador in Ecuador's Contentious Administrative Court, where claims against all Ecuadorian government entities are heard.[910] To date, it has chosen not to do so.

b. Ecuadorian Principles Of Joint And Several Liability Mirror U.S., English, And Civil Legal Systems

436. Ecuadorian and U.S. tort law generally mirror each other, although regional variations exist among the U.S. States. Under the law of Chevron's home state, California, the

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907 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 25.

908 C-931, Lago Agrio Judgment at 123-24 ("[T]he obligation of reparation imposed on the perpetrator of a harm is not extinguished by the existence of new harm attributable to third parties. . . . [T]he thing for which reparation should be made . . . has been subject to various harms of different types and origin . . . . [T]hose harm that have not been the object of the complaint . . . have not been considered as reparable by this judgment.").

909 C-931, Lago Agrio Judgment at 122-24; *see also* C-1975, National Court Decision at 116-17, 197-98 ("If Petroecuador had any degree of participation or liability, then this liability would have to be treated separately so that this company could exercise its corresponding right to a defense. . . . Petroecuador is not an indispensable party without which the court could not issue a judgment on the merits . . . Chevron Corporation, a company that participated and fully and extensively exercised its rights in this litigation, raising its defenses and making its arguments, without need of the State and Petroecuador as defendants in this case."); *see also id.* at 124; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 26-27; Coronel Expert Rpt. (June 3, 2013) ¶ 53 (confirming that the Judge did not consider other harms produced by causes other than TexPet's hydrocarbon exploration and exploitation activities).

910 RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 27 (citing RLA-516, Ecuadorian State Modernization Law, art. 38; RLA-164, Constitution of Ecuador (2008), art. 11(9); RLA-163, Civil Code of Ecuador, art. 1538).

doctrine of joint and several liability is generally applied among multiple tortfeasors,[911] a term interpreted to embrace "joint, concurrent and successive tortfeasors."[912]

437. As in Ecuador, defendants in California who have already satisfied a judgment are entitled to bring a separate contribution claim against an alleged joint tortfeasor.[913] In New York — where Texaco's headquarters were located before its merger with Chevron — a jointly liable defendant may bring a separate contribution action against a non-joined co-obligor to determine that co-obligor's "equitable share" of all liability, if the co-obligor in question cannot be impleaded into the primary action.[914] What is more, in New York, as in Ecuador, when a claim is made against the State for contribution, the action must be brought in a special claims court after the first debtor makes full payment.[915]

438. English law likewise includes the doctrine of joint and several liability and its related contribution claim. Where multiple tortfeasors breach independent duties and cause the same harm:

> the claimant is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it.

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911 California's pollution liability law mirrors federal law, and thus, the U.S. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") jurisprudence is instructive. In general, once a party is found liable under CERCLA, that party is jointly and severally liable for all of the U.S. EPA's remediation costs, regardless of relative fault. RLA-574, *United States v. Capital Tax Corp.*, 545 F.3d 525, 534 (7th Cir. 2008).

912 RLA-575, *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 283 (Cal. Ct. App. 1983); *see also* RLA-576, *El Escorial Owners' Ass'n v. DLC Plastering, Inc.*, 154 Cal. App. 4th 1337, 1353 (Cal. Ct. App. 2007) ("The term 'joint tortfeasor' is broad."); RLA-577, *GEM Developers v. Hallcraft Homes of San Diego, Inc.*, 213 Cal. App. 3d 419, 431 (Cal. Ct. App. 1989).

913 RLA-578, *Coca-Cola Bottling Co. v. Lucky Stores, Inc.*, 11 Cal. App. 4th 1372, 1378-80 (Cal. Ct. App. 1992) (citing Cal. Civ. Pro. Code § 875). Unlike in Ecuador, however, in California parties can cross claim for "equitable indemnification" so that liability may be apportioned among wrongdoers. RLA-588, Cal. Civ. Pro. Code § 428.10(b); RLA-579, *Woodward–Gizienski & Assoc. v. Geotechnical Exploration, Inc.*, 208 Cal. App. 3d 64, 67 (Cal. Ct. App. 1989); *see also* RLA-580, *Newhall Land & Farming Co. v. McCarthy Constr.*, 88 Cal. App. 4th 769 (Cal. Ct. App. 2001).

914 RLA-589, N.Y. C.P.L.R.§§ 1401-1402, 1501-1502.

915 *See* RLA-581, *Bay Ridge Air Rights, Inc. v. New York*, 44 N.Y.2d 49, 54 (N.Y. 1978) (tortfeasor was required to seek contribution from state in separate action in court of claims). *See also* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 26.

> If the claimant sues defendant A but not B and C, it is open to A to seek "contribution" from B and C in respect of their relative responsibility but this is a matter among A, B, and C and does not affect the claimant. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contributions or indemnity by one tortfeasor against the others.[916]

439. The same universal principles apply in civil law nations throughout the world.[917]

2. Claimants' Comparison Of PetroAmazonas' Costs For Pit Remediation Is An Apples-To-Oranges Comparison To The Court-Ordered Remediation

440. Claimants argue that "the best evidence of whether the Judgment is a product of corruption and fraud is not speculation based on cursory post-Judgment sampling . . . but actual remediation costs that Petroecuador has been and continues to incur."[918] Claimants then rely on a US$ 70 million estimate Petroecuador provided for cleanup of only ***pits*** (not all contamination) in ***part*** (not all) of the Oriente. Claimants' reliance on the PetroEcuador estimate is misplaced.

441. **First,** Petroecuador's US$ 70 million estimate was for a partial cleanup of ***pits only***. In contrast, the Lago Agrio Judgment orders Claimants to remove ***all contamination***, whether in pits, the jungle, or streams. As LBG has documented, the Judgment ordered cleanup is a large and expensive problem[919] that will require an in-depth remedial investigation to understand the scope of cleanup at each site.[920]

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916 RLA-582, WINFIELD & JOLOWICZ ON TORT 987-988 (18th ed. 2010) (footnotes omitted); *see also id.* at 988 n.4 (citing *GNER v Hart* [2003] EWHC 2450 (QB); *Roe v Sheffield* CC [2004] EWCA Civ 329 at [34]).

917 The law is equally clear in France and Germany. *See, e.g.*, RLA-583, JCl Civil Code (France), *Fasc. 220: RÉGIME DE LA RÉPARATION. – Action en réparation. – Parties à l'instance* ¶ 138; RLA-584, *Bürgerliches Gesetzbuch* ("BGB") § 830 (Germany).

918 Claimants' Track 2 Supp. Merits Memorial ¶ 141.

919 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Annex 1 1.

920 A "remedial investigation" is:

> [A]n in-depth site assessment involving (a) collection and analysis of environmental samples and associated data interpretation, (b) to determine detailed site characteristics and define the extent and magnitude of

442. **Second,** in another arbitration against the Republic, *Burlington Resources v. Ecuador*, the oil company's experts and attorneys (the same as Claimants' in this arbitration) calculated ***total project costs for a <u>non-governmental local contractor</u>***[921] ***to clean up all contamination around a site in the Oriente, not just the pits, that are significantly greater*** than Petroecuador's cost to clean up just pits.[922] In *Burlington*, Mr. Connor estimated the unit cost for excavation/treatment/disposal by local contractors of contamination to be US$ 100 per cubic meter,[923] an amount similar to PetroEcuador's cost for similar portions of cleanup (US$ 70 per cubic meter).[924] Mr. Connor's own calculations in *Burlington* show that that unit cost for excavation/treatment/disposal is at most 33 percent of the total remediation cost.[925] As a result, Mr. Connor's own calculations show that ***the total cost of cleanup for any given site is at least 3-4 times the unit cost for the technical remediation tasks of excavation/treatment/disposal.***[926]

> contamination and describe fate and transport mechanisms and outcomes to evaluate potential impacts on human health and the environment and (c) to establish cleanup criteria. Such an in-depth investigation covers any environmental media (including air, surface and subsurface soils, sediments, surface water and groundwater, as well as waste deposits) where contaminants may have been dispersed to create chemical exposures for human health or ecological "receptors" (*i.e.*, people, animals [fish, wildlife, and domestic stock] and vegetation [indigenous species, as well as crops used for food or animal feed]).

RE-10, LBG Expert Rpt. § 2.6.1. In this instance, even cleaning up pits would require some level of investigation to identify undisclosed pits.

921 Respondent is unaware of any local contractors who have ever performed a remediation of this magnitude.

922 R-1263, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012) at 57-59. *See also* Hinchee Expert Rpt. (May 31, 2013) at 26 n.132 (discounting TexPet's historic cost to remediate each pit because "the higher cost includes non-remediation costs").

923 R-1263, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012) at 56-57 ("The average reasonable unit cost for excavation of impacted soils, followed by treatment and disposal at an off-site remediation facility, is approximately $100/ m^3.").

924 Hinchee Expert Rpt. (May 9, 2014) at 14 ("This cost is below $70/$m^3$.").

925 Mr. Connor's calculations in Burlington yield a per site average cost of $779 per cubic meter or a $295 per cubic meter. R-1248, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012), Appendix H Table H.1 ("Cost Estimate").

926 R-1248, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012), Appendix H Table H.1 ("Cost Estimate").

Claimants' expert's less than forthright testimony in this proceeding cannot be reconciled with his *Burlington* opinions.

3. Claimants' Refusal To Respond To The Evidence Proving The Reasonableness Of The Judgment's Damages Does Not Make Those Damages Unreasonable

443. In its Rejoinder, the Republic analyzed the award of damages and explained how each category was comfortably supported by the Lago Agrio Record.[927] Claimants dismiss this discussion as "attorney argument," as if that obviates the need to respond. By doing so, Claimants have conceded the Republic's argument, and failed to support their own "attorney argument" that the Lago Agrio Court's damages award was "untethered to any evidence that remotely supports the imposition of nearly US$ 10 billion in damages."[928] In fact, *every* category of damages awarded by the Lago Agrio Court is reasonable and supported by the trial record. It bears repeating: Claimants cannot will away the evidence by ignoring it.

a. Claimants' Silence Concedes That The Damages For Soil Remediation Are Supported By The Record And Are Reasonable

444. Claimants make no attempt to respond to the Republic's discussion of the voluminous record evidence supporting the Judgment's largest damages category. Damages for soil remediation are the result of a simple calculation:

(Pit Count) x (Average Pit Size in m^3) x (US$ per m^3) = US$ Cost for Soil Remediation

445. Each of the numbers the Lago Agrio Court plugged into this equation was the result of extensive fact finding and review of the trial record. Claimants do not even attempt to

927 Respondent's Track 2 Rejoinder § III.

928 Claimants' Track 2 Supp. Merits Memorial ¶ 196.

respond to the reasonableness of two elements of the soil remediation equation as set forth in the Republic's Rejoinder.[929] These points are summarized below:

- **Pit Count**: Chevron's own analysis, as performed by Mr. Connor and confirmed by the Fugro-McClelland and HBT Agra reports, estimated a total of 1131 pits at 344 sites.[930] The Judgment's 880 pits eliminated Chevron's potential liability by more than 250 pits, and was thus most conservative.

- **Average Pit Size in m^3**: The Lago Agrio Court determined pit area by performing the same analysis as Chevron — using the data points provided by Chevron to delineate the pits. Mr. Connor has testified that Chevron delineated the pits to determine the outer clean boundaries, thus defining the internal area that must be remediated.[931]

446. Instead Claimants argue only that the third element — the cost per cubic meter — is inherently unreasonable because it is higher than PetroEcuador's cost per cubic meter.[932] But cost estimates Mr. Connor prepared in *Burlington Resources* prove that the Judgment's cost estimate is quite reasonable. Of the sites above the mean, several are expected to cost over US$ 900/m^3, including: US$ 3,300/m^3 (Coca-04), US$ 981/m^3 (Jaguar 07 and 08), US$ 908/m^3 (Jaguar 02), and US$ 1,100/m^3 (Yuralpa PAD A).[933] These estimates for remediation of *similar* sites with *similar* features and *similar* problems definitively prove that the Judgment's average soil remediation cost of US$ 730/m^3 falls well within the realm of reasonableness, and plainly is *not* the "sham" Claimants insist.

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929 Respondent's Track 2 Rejoinder ¶¶ 182-189.

930 Respondent's Track 2 Rejoinder ¶ 183. Claimants argue that the number of pits was derived from a Cabrera Annex but do not contest that the actual number used, 880, was reasonable. Indeed, the number almost certainly *underestimates* the total number, perhaps substantially. *Id.* ¶¶ 182-184. Claimants' supposition that the Court relied on Cabrera for its 880-pit count is demonstrably false. *See supra* §II.C.

931 R-1057, Connor Dep. Tr. (Nov. 7, 2013) at 317:6-318:8. In *Burlington Resources*, another expert from GSI testified: "[B]ased on our samples, now we have a clean margin, and this is the area that should be remediated. This is the impacted area that we have delineated based on sampling. . . . [W]hatever is inside that margin, will be identified for remediation or removal." R-1205, *Burlington* Counterclaims Hr'g Tr. (June 5, 2014) at 1447:1-20; C-381, Expert Rpt. of Eng. Barros at 9-10 (noting that pits were dug approximately 2m deep).

932 Claimants' Supp. Merits Memorial ¶ 196.

933 R-1248, Bianchi & Connor *Burlington* Expert Rpt. (Sept. 20, 2012) Appendix H, Table H.11 ("Cost Estimate").

447. Claimants also challenge a chart showing the cost of other remediations conducted around the world, which the Republic offered to show that the awarded remediation damages are reasonable. According to Claimants, the sites are "simply not comparable."[934] It is true that every oil spill presents unique issues; that does not preclude comparisons of those aspects that are similar. And as Claimants' expert Dr. Robert Hinchee knows from the report he submitted in the Lago Agrio trial, marine spills are not unique in their large costs for cleanup. For example, cleanup of the DuBose Oil Products Co. site in Florida cost US$ 812 per m^3 in 2011 dollars.[935] Similarly, the Bonneville Power Administration Ross Complex site in Washington State cost US$ 908 per m^3 in 2011 dollars.[936]

448. Finally, Claimants allege that the Judgment required soil to be cleaned to a much lower level than necessary, thus driving the per cubic meter cost up unreasonably. Contrasting the Republic's showing that Italy required a massive oil spill in Trecate to be cleaned to an even lower level, Dr. Hinchee claims that Trecate "was not remediated to 50 mg/kg [TPH,]" insisting instead that the Italian authorities accepted remediation at ranges that "varied up to and exceeded 5,000 mg/kg."[937] But Dr. Hinchee's unsupported claim that standards "varied up to and exceeded 5,000 mg/kg" is in direct contrast to the relevant documents that say that the target clean-up level was 50 mg/kg.[938]

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934 Hinchee Expert Rpt. (May 9, 2014) at 14.

935 Hinchee Expert Rpt. (May 31, 2013) Ex. 7.

936 *Id.*

937 Hinchee Expert Rpt. (May 9, 2014) at 15.

938 *See, e.g.*, R-1259, SoilCAM Rpt. at 9 ("Landfarming reduced surface soil TPH concentrations from excess of 10,000 mg/kg to approximately 50 mg/kg soil, the designated target clean-up level.").

b. Claimants' Silence Concedes That The Damages For Groundwater Contamination Are Supported By The Record And Are Reasonable

449. Claimants attempt to show that the costs for *sediment cleanup alone cannot* justify the US$ 600 million damages. But Claimants again ignore the Judgment's breadth of expectation for groundwater remediation that included cleanup of "every trace of the hazardous elements referred to in this ruling . . . from the sediments of the rivers, estuaries and wetlands, that have received the discharges produced by Texpet or the leaks from the pits constructed."[939]

450. By all accounts sediment contamination is ubiquitous around former TexPet sites. Texaco observed in real time that "[m]any wellsites and their adjacent natural drainage are contaminated with crude oil."[940] When LBG visited the region, it confirmed the near universal presence of sediment contamination. Indeed, LBG ordinarily identified sediment contamination first because it was the easiest to find; the teams could then trace the contamination to its source.

451. As "proof" that the sediment remediation costs are "grossly unreasonable," Dr. Hinchee points to remediation of a stream that ran next to two sites (SA-89 and SA-05), which TexPet remediated during the RAP. But Dr. Hinchee provides no information about the remediation cost except to say that it was included in TexPet's total remediation cost. Without numbers it is impossible to assess his conclusion. It is interesting to note that Claimants apparently agreed that stream remediation was required by the RAP in this instance, calling into question why similar sediment remediation was not performed elsewhere.

452. Dr. Hinchee then points to PetroAmazonas's remediation of one affected stream. If the remediation cost of just one stream were an appropriate consideration when determining

939 C-931, Lago Agrio Judgment at 179.

940 R-1223, Memo from G. Hobbs to E.L. Johnson re Misc. Suggestions for Operations (May 16, 1972) at CA11001897; *see also* R-1264, Email from B. Bjorkman to J. Connor, et. al. (July 12, 2007) at BJORKMAN00056397-98.

the total project costs for cleaning the entire Oriente — which it is not — Dr. Hinchee's example shows that clean up of a *single* stream costs *at least* US$ 414,903. Even assuming only half of the sites in the Concession Area have just one contaminated stream,[941] the cost of sediment remediation would be no less than US$ 71 million. And applying the total project cost factor discussed above (the total project costs are multiple times higher than just the cost of technical remediation tasks), stream sediment cleanup alone would cost hundreds of millions of dollars.[942] And this does not even begin to address cleanup of surface water and groundwater.

c. Claimants' Silence Concedes That The Damages For Potable Water Are Supported In The Record And Are Reasonable

453. During the Lago Agrio Litigation, Chevron conceded that residents at numerous sites could no longer use their hand-dug wells or local rivers and that they instead must rely on rainwater or municipal water supplies.[943]

454. In determining the cost of potable water for the Plaintiffs,[944] the Lago Agrio Court relied on Chevron's nominated expert Mr. Barros[945] and the documentation he provided from the European Reference Centre for First Aid Education (CEREP), the United Nations International Children's Emergency Fund (UNICEF), and the United States Agency for International Development (USAID). Those agencies had calculated a per person cost to provide potable

941 As Mr. Connor explains in his recent article, when a site is contaminated, it is likely that the sediments, surface water, and groundwater will also be contaminated. *See* Connor Expert Rpt. (June 3, 2013) Ex. 4, *Nature, Frequency, and Cost of Environmental Remediation at Onshore Oil and Gas Exploration and Production Sites*, REMEDIATION (Summer 2011) at 131 (Exhibit 5).

942 *See supra* ¶ 442.

943 *See, e.g.*, R-1231, Chevron's SSF-13 JI Rpt. at 15.

944 Respondents' Track 2 Rejoinder ¶ 191.

945 C-931, Lago Agrio Judgment at 182-83.

water[946] but had raised the spectre that delivery to the more rural portions of the population would cost additional money. The Court agreed with Mr. Barros that some of the estimates were greater than US$ 400 million were too high and instead awarded only US$ 150 million. As the Court held, this award was necessary because "the contamination of local waters is precisely the problem that makes it impossible that the collecting of water be local."[947]

d. Claimants' Silence Concedes That The Damages For A Healthcare System Are Supported In The Record And Are Reasonable

455. Claimants state without support that there is no "basis for the . . . health care costs set forth in the Judgment" and that there is no "credible science to support the notion that TexPet caused such personal injuries."[948] But the Judgment focused not on past injuries, but instead on the prospect of future injury and the need for ongoing medical monitoring and care for a group of people whose health has undoubtedly been put at risk by Claimants' contamination.[949]

456. Claimants have again chosen not to respond to the Republic's showing that the Lago Agrio Record supports the Court's damages award for a healthcare system. Dr. Carlos Picone, a well-respected Washington, D.C.-based medical doctor who participated in multiple medical missions to Ecuador, submitted a long, well-reasoned report to the Lago Agrio Court on the then-current state of the healthcare system in the Oriente.[950] He used the per-capita expenditures for healthcare in Ecuador to calculate that the cost of providing healthcare to the

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946 Claimants' internal documents show that they were aware of these and other studies and the associated costs with providing potable water systems to rural communities in the Oriente. R-1251, GSI *Unit Costs for Rural and Small Town Water Supply and Sanitation Programs* (Chart) (Nov. 20, 2007).

947 C-931, Lago Agrio Judgment at 183.

948 Claimants' Supp. Merits Memorial ¶ 197.

949 Respondent's Track 2 Rejoinder ¶¶ 192-195; *supra* § VII.E.

950 R-1065, Carlos E. Picone, M.D., *Estimated Cost of Delivering Health Care to the Affected Population of the Concession Area of Ecuador* (Sept. 10, 2010).

residents most affected by TexPet's operations would be US$ 469 million for ten years.[951] This approach is similar to that advocated by Claimants for soil remediation (damages should be no higher than the government's costs for providing the same service) and is therefore, again, exceedingly conservative.

e. Claimants' Silence Concedes That The Damages For Ecosystem Restoration Are Supported In The Record And Are Reasonable

457. Claimants concede by their silence that the Judgment's award of US$ 10 million per year for twenty years to restore native flora, fauna, and aquatic life to its former pristine conditions is reasonable and supported by the evidence.[952] As the Republic explained in its Rejoinder,[953] Dr. Edwin Theriot evaluated TexPet's operations and their impact, finding that Claimants' historic activities significantly altered the Oriente ecosystem, leaving behind "intermittent fragments of vegetation," rather than "the abundant species of a typical rainforest."[954] Dr. Theriot noted that the "[d]amage caused by Texpet to the flora and fauna and other natural resources in the Concession Area goes well beyond the footprint needed to conduct E&P operations."[955] Despite this extensive habitat destruction, the Court awarded damages that are significantly *less than* the cost estimates proposed by both the Plaintiffs' supplemental expert, Lawrence Barnthouse (between US$ 874 million and US$ 1.7 billion)[956] and the global damages expert, Mr. Cabrera (US$ 1.697 billion).[957] Claimants have responded to none of this.

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951 R-1065, Carlos E. Picone, M.D., *Estimated Cost of Delivering Health Care to the Affected Population of the Concession Area of Ecuador* (Sept. 10, 2010) at 5-6.

952 Respondent's Track 2 Rejoinder ¶¶ 196-199.

953 *Id.*

954 RE-14, Theriot Expert Rpt. (Dec. 12, 2013) at 12.

955 *Id.* at 13.

956 C-931, Lago Agrio Judgment at 182.

957 C-212, Cabrera Supp. Rpt. at 53.

f. Claimants' Silence Concedes That The Damages For A Health Plan To Address Cancer Are Reasonable And Supported By The Record

458. In their second Supplemental Memorial on the Merits, Claimants do not even attempt to address the reasonableness of the Judgment's conclusion that damages are appropriate for the provision of healthcare to those who are at risk of suffering from cancer. As the Lago Agrio Court found, "a serious public health problem exists, whose causes are reasonably attributable to hydrocarbons production."[958]

459. As the Republic's expert Dr. Laffon explained, exposure to petroleum contamination triggers an increased risk of cancer, both through DNA damage and effects on the exposed person's immunological and endocrine systems.[959] Following her studies of the *Prestige* oil spill in Spain, Dr. Laffon recommended health monitoring of the exposed population (a population exposed for far less time and through fewer pathways than that of the Oriente) for precisely this reason.[960]

4. The Court Properly Found Claimants Liable Notwithstanding Claimants' Efforts To Minimize And Hide The Contamination

460. The Republic has presented substantial, and largely undisputed, evidence that during the Lago Agrio Litigation Chevron purposefully sought to conceal contamination from the Court.[961] Among other things, Chevron: (1) conducted secret Pre-Inspections ("PIs") to determine where contamination existed; (2) used that knowledge to design its Judicial Inspections ("JIs") sampling strategy; (3) avoided locations where the PIs revealed

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958 C-931, Lago Agrio Judgment at 184.

959 RE-22, Laffon Expert Rpt. (Nov. 7, 2014) § 2; *see also supra* VII.E.1.b.

960 RE-22, Laffon Expert Rpt. (Nov. 7, 2014) §1.3; *see also supra* VII.E.1.b.

961 Respondent's Track 2 Rejoinder § II.D.

contamination;[962] (4) took surface samples to avoid contamination buried below; (5) used composite sampling outside of pits to dilute the presence of contaminants; and (6) used analytical methods that limit the amount of petroleum detected.[963]

461. As a result of Chevron's actions, the Court never had the opportunity to consider all of the available evidence. The Court nonetheless relied, as it was entitled to, upon its own senses — observing and smelling the oil at the judicial site inspections — and the voluminous first-hand testimony in rendering its verdict. That Chevron's own data established the existence of contamination, notwithstanding the company's attempt to minimize its presence, speaks to the ubiquitous presence of the contamination and the scope of the tragedy that has unfolded in the Oriente. Simply, the Court got it right.

G. The Ecuadorian Courts Properly Determined That There Was Ample Evidence That Chevron Contaminated The Oriente

1. Claimants' Reliance On Judge Kaplan's RICO Decision Does Not Excuse Their Failure To Address The Record Evidence of Contamination Here

462. Claimants try to imbue Judge Kaplan's RICO decision with talismanic properties.[964] That effort must fail across the board — *especially* in respect of pollution, given Judge Kaplan's strident proclamations that pollution evidence had no place in the RICO trial.

463. According to Claimants, the RICO trial proved that any evidence of pollution presented in the Lago Agrio trial was the result of fraud. That argument fails for at least two

962 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Appendix B § II ("Chevron did not reoccupy any PI surface sample location with a concentration higher than 700 ppm TPH_{8015}. Excluding the pit locations, Chevron did not reoccupy any PI surface sample location with a result higher than 200 ppm TPH_{8015}.")

963 RE-25, Short Expert Rpt. (Nov. 7, 2014) § 4.1 (Chevron's method "detects less than 20% of the petroleum actually present in samples of soils or sediments").

964 Claimants' Track 2 Supp. Merits Memorial ¶ 28.

independent reasons. **First**, although he "assume[d] that there is pollution in the Oriente,"[965] Judge Kaplan *excluded* the introduction of all evidence of contamination. Of course, a decision that deliberately avoided ruling on the issue of pollution and which excluded all evidence relevant to that issue could not have determined whether that same evidence is fraudulent.

464. **Second**, the Lago Agrio Record, including evidence that Claimants themselves submitted, plainly shows that remediation is necessary. The Lago Agrio trial record includes forty-one site-specific reports submitted by the Plaintiffs, forty-five site-specific reports submitted by Chevron, and eleven reports submitted by court-designated experts. These reports, covering fifty-six different sites and comprising almost 80,000 pages of the record, do not include *any* material that Claimants allege to be tainted. The record also includes, among other things, the Court's own observations from the judicial site inspections and the testimony of many affected witnesses, none of whom have ever been implicated in any alleged fraudulent scheme. Again, this case is substantially bigger than Steven Donziger.

2. Claimants Cannot Manipulate The Evidence Submitted During The Judicial Inspections To Support Their Claims

465. Claimants seek to bolster their denials of liability by pointing to the testimony of environmental consultants who have been embroiled in heated payment and contract disputes with Plaintiffs' counsel. Contrary to Claimants' assertions, these experts in fact found evidence of TexPet contamination at the sites they visited. But even if they had not, Claimants' allegations would still not prove that the Judgment is flawed because *the Lago Agrio Court never considered this allegedly tainted evidence in reaching its verdict*, as Claimants have now largely been forced to admit.

965 C-2135, RICO Opinion at 4.

a. Dr. Calmbacher Found Pollution At The Sites He Inspected

466. Claimants continue to insist that the Plaintiffs substituted their conclusions for those of their former and disgruntled expert, Dr. Charles Calmbacher, allegedly because the Plaintiffs needed to manufacture evidence of pollution where there was none.[966] Of course, there was no need to "manufacture" proof of contamination; the record is replete with it.

467. But Claimants' assertion fails for at least three additional reasons. **First,** as shown below, Dr. Calmbacher's test results in fact show contamination at the two JI sites he sampled — results which are corroborated by Chevron's own inspection reports.[967] **Second**, the Plaintiffs continued to find an upward trend of contamination as the JIs progressed.[968] **Third**, and dispositive here, Claimants do not dispute that the Court never considered Dr. Calmbacher's reports anyway.[969]

468. It is common ground that Dr. Calmbacher's raw data from both SA-94 and SSF-48 evidence pollution. His soil results from SA-94 show TPH soil measurements exceeding the Ecuadorian standard of 1,000 mg/kg by more than *seventy* times.[970] Additionally, a water

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966 *See* Respondent's Track 2 Counter-Memorial, Annex E ¶ 5 (noting Dr. Calmbacher's fee dispute with and animosity towards the Plaintiffs). The Plaintiffs terminated Dr. Calmbacher after he failed to timely complete rebuttal reports for the Lago Agrio Court. *See* R-1247, Calmbacher SA-94 Timeline at DONZ00034007; R-1224, Calmbacher SSF-48 Timeline at DONZ00034008. Additionally, his JI reports were only 40 pages and 65 pages, respectively, as compared to an average JI report which was 800 pages.

967 Drafts of Calmbacher's SSF-48 and SA-94 reports produced by Dr. David Russell are substantially similar and in some respects nearly identical to those filed with the Lago Agrio Court, including findings of pollution and volume of soil to be remediated. *See* R-1270, Calmbacher, SA-94 Draft JI Rpt. at DLR_00008211; R-1271, Calmbacher, SSF-48 Draft JI Rpt. at DLR_00008495.

968 Respondent's Track 2 Rejoinder, Annex A ¶¶ 3-5; *see also id.* ¶ 6 (discussing Dr. Calmbacher's peripheral role in the litigation).

969 C-931, Lago Agrio Judgment at 48-49 ("[T]he comments and conclusions appearing as stated by Dr. Calmbacher shall not be taken into consideration for the issuing of this judgment."). Claimants cannot and do not dispute that many of Dr. Calmbacher's contemporaneous emails contradict his deposition testimony. *See* Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 6-7.

970 Dr. Calmbacher's JI testing revealed 73,000 mg/kg of TPH, at a depth of 2.2-2.5 meters. R-963, 2013 Chevron Access Database, JI Plaintiff, SA-94 SW5 2.95-3.15 m; *see also* Respondent's Track 2 Counter-Memorial, Annex E ¶ 6.

sample he took at this site shows exceedances of Ecuadorian regulations for chromium VI, copper, lead, nickel, and zinc.[971] Similarly, Dr. Calmbacher's sampling at SSF-48 found TPH values of 7,800 mg/kg and 5,400 mg/kg,[972] and five other borings he sampled exceeded the TPH threshold by more than 150 percent.[973] Dr. Calmbacher also collected a water sample at SSF-48 with exceedances of barium, chromium VI, copper, lead, nickel, and zinc.[974]

469. Chevron's own JI data confirm Dr. Calmbacher's test results, and in some cases, reveal even greater and more widespread pollution.[975] For example, Chevron's SSF-48 site data recorded naphthalene concentrations *forty-nine* times the Ecuadorian standard.[976] And Chevron's testing inside pits 2 and 3 demonstrated TPH exceedances at more than four times the Ecuadorian threshold.[977] Finally, the soil samples taken on the periphery of these pits showed even greater contamination: five samples were all at least 1,100 percent greater than the Ecuadorian threshold.[978]

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971 R-963, 2013 Chevron Access Database, JI Plaintiff, SA-94 NW4 1.7 m.

972 *Id.*, JI Plaintiff, SH48-SE3 1.55-1.7 m (7,800 mg/kg), SH48 SE3 2.75-3.00 m (5,400 mg/kg).

973 *Id*. at SH48-SE3 2.28-2.55 m (1600 mg/kg), SH48-SE4 2.20-3.40M (1,700 mg/kg), SH48-SW2 1.2-1.3 m (2,000mg/kg), SH48-SW3 0.85 - 1.31 m (2500 mg/kg), SH48-N3 1 - 1.2 m (2,700 mg/kg).

974 *Id.* at SH48-SE3 PROF: 4.70M.

975 Chevron's soil samples reveal that both sites contain excessive amounts of toxins: anthracene, benzopyrene, benzoperylene, naphathalene, barium, copper, cadmium. At SA-94, Chevron recorded a TPH level of 8700 mg/kg outside pit 2. R-963, 2013 Chevron Access Database, JI Chevron, at JI-SA94-SW5-SS-230CM. In a supposedly remediated pit, Chevron documented 5,600 mg/kg of TPH, as well as seven other TPH exceedances. R-963, 2013 Chevron Access Database at SA-94-JI-PIT1-SB1 G (SS) 1 (5,600 kg/mg in pit 1); JI-SA94-SW5-SS-3.05M (4,600 mg/kg), JI-SA94-SW5-SS-2.30M (4400 mg/kg), JI-SA94-SW5-SS-305CM (3,700 mg/kg), JI-SA94-SW5-SS-380CM (1,300 mg/kg), JI-SA94-SW5-SS-3.80M (2,400 mg/kg), JI-SA94-SW5-SS-435CM (1500 mg/kg). Chevron's PIs also confirmed the polluted state of the site. R-963, 2013 Chevron Access Database at SA-94-FOSA-B-SED (8,700 mg/kg), SA-94-FOSA-A-SED (1,100 mg/kg).

976 R-963, 2013 Chevron Access Database, JI Chevron, JI-SH48-SW3-SB1-4.60M (the Ecuadorian standard for naphthalene is 0.1 mg/kg for soil).

977 *Id*. at SSF-48-JI-PIT2-SB1-1.9 M (5000 mg/kg), JI-SH48-SW3-SS-4.50 M (4,200 mg/kg).

978 *Id*. at JI-SH48-SE3-SS-2.28 M (1,1000 mg/kg), JI-SH48-SW3-SS-0.95 M (1,3000 mg/kg), JI-SH48-SE3-SS-2.75 M (16,000 mg/kg), JI-SH48-SE3-SS-1.55 M (17,000 mg/kg), JI-SH48-SE4-SS-1.50 M (19,000 mg/kg).

470. Claimants' reliance on Dr. Calmbacher is yet one more example of their systematic disregard of contemporaneous evidence in favor of uncorroborated, subsequent testimony.

b. Mr. Russell's Contemporaneous Emails Evidence Significant Contamination And Complete Confidence In His Cost Estimates

471. Claimants also rely on Judge Kaplan's finding that Mr. David Russell's US$ 6 billion estimate to remediate the Concession Area was nothing more than a "scientific wild ass guess."[979] But Mr. Russell's estimate is irrelevant to the Lago Agrio Judgment because *it was never submitted to (or indeed even prepared for) the Lago Agrio Court.* Indeed, in his RICO declaration, Mr. Russell states that his 2003 estimate was "just for PR purposes."[980]

472. Mr. Russell's recent pronouncements that there was "no evidence" of contamination in the Oriente or that his previous US$ 6 billion estimate was too aggressive[981] were made only after his relationship with the Plaintiffs' legal team soured into a lawsuit over a payment dispute. Before the lawsuit, Mr. Russell consistently represented, in internal correspondence with Plaintiffs' counsel, that analysis of the sites showed that heavy metals, petroleum, and other petrochemical contamination exceeded acceptable standards. For example:

- In August 2004, Mr. Russell emailed Mr. Donziger to say that he was seeing high concentrations of petroleum, 48,000 ppm, in pits that TexPet had allegedly remediated.[982]
- Roughly two months later, Mr. Russell advised both Dr. Calmbacher and Mr. Donziger that even by conservative standards he was finding PAH concentrations in the soils 200 times the permissible exposure limits.[983]

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979 Claimants' Track 2 Supp. Merits Memorial ¶¶ 142-144.

980 R-980, Russell Decl. ¶ 11 (Oct. 3, 2013), *filed in* RICO.

981 Claimants' Track 2 Reply ¶ 156.

982 R-1302, Email from D. Russell to S. Donziger (Aug. 4, 2004) at CVX-RICO-1339437.

983 R-1303, Email from D. Russell to S. Donziger (Oct. 2, 2004) at CVX-RICO-1337723.

- In yet another email from that time period, he represented to Mr. Donziger that the groundwater contained Chrome-VI at four times the EPA limit, barium at 2.5 times the EPA limit, and that soil samples promised to show TPH as high as 7,000 mg/kg.[984]

- Mr. Russell explained in yet another email to Mr. Donziger that "[m]any of the soil samples analyzed show unacceptably high levels of diesel oils well above even the generous Ecuadorian limits," leading him to conclude that "Texaco did not remediate but concealed their wastes by burying them in the soils where they could damage the community."[985]

473. To this day, Mr. Russell has never disclaimed his cost-per-unit analysis, which is the basis of his 2003 estimate. To the contrary, Mr. Russell continued to affirm the basis for his US$ 6 billion estimate well beyond 2003, even suggesting on multiple occasions that the estimate was too low.[986] In a December 2004 email, Mr. Russell explained to the Plaintiffs' legal team that the portion of his 2003 cost estimate for pit remediation, US$ 455 million, was low because it "did not include supervision, testing, and other factors."[987] In that same email chain, he estimated that the real cost of pit remediation would likely be closer to "1,650 Million," more than three times his 2003 cost estimate.[988]

474. In an email from March 2005, Mr. Russell again affirmed that remediation costs may well be higher than his 2003 estimate.[989] And as late as June 2005, Russell affirmed that his cost units and remediation techniques were sound.[990] It is hard to square Russell's new statement that the cost estimate is unreliably "high" with his prior, repeated affirmations — as late as 2005

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984 R-1256, Email from D. Russell to S. Donziger (Nov. 11, 2004) at CVX-RICO-1334499.

985 R-1252, Email from D. Russell to S. Donziger (Nov. 13, 2004) at CVX-RICO-1334690.

986 R-1255, Email from D. Russell to C. Bonifaz (Dec. 13, 2004) at CVX-RICO-1334968; *compare with* C-813, Email from D. Russell to S. Donziger (Dec. 27, 2004) at 1, 6 (establishing certain cost units while acknowledging that the estimate would have to be adjusted depending on how much soil will need to be remediated and to account for economies of scale at certain sites).

987 C-813, Email from S. Russell to S. Donziger (Dec. 27, 2004) at 3.

988 *Id.*

989 R-1253, Email from D. Russell to S. Alpern (Mar. 21, 2005) at CVX-RICO-1343958.

990 R-1254, Email from D. Russell to S. Donziger (June 15, 2005) at CVX-RICO-1349733.

— that the actual cost of remediation might be 300 percent greater than what he originally estimated.

c. There Was Substantial Pollution At Sacha 53 Regardless Of The Report Filed By The Court-Appointed Settling Experts

475. The settling experts' report for Sacha 53 does not advance Claimants' theory that the Plaintiffs needed "an expert they could control" for at least three reasons.[991] **First**, contrary to Claimants' supposition, the report had nothing to do with the Plaintiffs' decision to withdraw their remaining nominated JIs, since their request was made *before* the Sacha 53 report was issued.[992] Claimants cannot contest this since it was their own Ecuadorian lead counsel who testified to this timing in the RICO case.[993]

476. **Second**, there is overwhelming evidence affirming contamination at this site.[994] Even Claimants' witness Mr. Russell has admitted that the Sacha 53 data were "[t]errible for Texaco."[995] In a November 2004 email to Mr. Donziger, Mr. Russell stated:

> In the water there is Chrome 6 (toxic heavy metal at about ***4 times USEPA limits for Drinking Water***), plus barium at about 2.5 X EPA limits, PLUS 650 mg/1 of TPH tha's [sic] ***HUGE***!
>
> The soil data are equally bad having both GRO and DRO in the soils. some times as high as 7000 mg/Kg where the Ecuadorian limit is 1000 mg/Kg. This is a site they said was a clean remediation.[996]

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991 Claimants' Track 2 Supp. Merits Memorial ¶ 31.

992 Respondent's Track 2 Rejoinder, Annex A ¶ 9.

993 R-982, Callejas Direct Testimony (Oct. 9, 2013), *filed in* RICO ¶ 40 ("just days before the report for Sacha-53 was issued . . . the Lago Agrio Plaintiffs filed a request to 'withdraw' from 26 of their judicial inspections").

994 Respondent's Track 2 Rejoinder, Annex A at ¶ 9 n.24 (showing exceedances as high as 12,000 mg kg for DRO and BTEX compounds in the sediment).

995 R-1256, Email from D. Russell to S. Donziger (Nov. 11, 2004) at CVX-RICO-1334499.

996 *Id*. (emphasis added).

Chevron's sampling data and experts' notes all corroborate Plaintiffs' findings.[997]

477. **Third**, the events surrounding the drafting of the inspection reports for this site do not show that the Court was abetting the Plaintiffs' alleged fraud. As Judge Kaplan instead acknowledged, Judge Yánez (who later appointed Mr. Cabrera) was *not* even aware of the Plaintiffs' allegedly improper relationship with Messrs. Reyes and Pinto (Ecuadorian environmental experts), let alone conspiring to have them appointed to monitor the settling experts for this site.[998] In fact, Judge Yánez did not agree to appoint Messrs. Reyes and Pinto as experts for this particular site,[999] and he declined to hear their concerns about the settling experts' work.[1000]

d. The Global Assessment Or Damages Phase Does Not Advance Claimants' Allegations Of Environmental Fraud

478. In their Second Supplemental Memorial, Claimants continue to attack the damages phase of the Lago Agrio Litigation to support their theory that the Plaintiffs could prove contamination only by manipulating the evidence and bribing the global damages expert. But

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997 During the JI of this site, Chevron found barium exceedances of 762 and 560 mg/kg outside pits 1 and 3, respectively. R-963, 2013 Chevron Access Database, JI Chevron, JI-SA-53-P3-1.3M (SS), JI-SA-53-P3-0.4M (SS); *see also* R-1275, Chevron's SA-53 JI Rpt. at MACKAY00004318. Seven additional results showed TPH as DRO exceedances greater than 10,000 mg/kg, the highest result yielding 20,000 mg/kg. R-963, 2013 Chevron Access Database, JI Chevron, SA-53-JI-SB2-4.0M (20,000 mg/kg), SA-53-JI-SB1-3.93M (16, 000 mg/kg), JI-SA53-NW6-0.8MSS (16, 000 mg/kg), JI-SA53-NW6-6.28MSS (15,000 mg/kg), JI-SA53-NW6-5.6MSS (13,000 mg/kg), JI-SA-53-NW4-SS-1.70M (12,000 mg/kg) JI-SA-53-NW4-SS-0.60M (10,000 mg/kg). Additionally, Chevron found quantities of pyrene and naphthalene at fourteen and 200 times greater than the legal limit. R-963, 2013 Chevron Access Database, JI Chevron, SA-53-JI-SB2-4.0M (Pyrene 1.4 mg/kg), JI-SA53-NW6-5.6MSS (Naphthalene 20 mg/kg). Chevron also recorded this contamination during its PIs. *See, e.g.*, R-1279, Chevron's SA-53 JI Playbook at GSI_0499196 (showing "weathered hydrocarbon content in excess of the 5000 ppm TPH action level" in pit 3); R-1279, Chevron's SA-53 JI Playbook at GSI_0499198 (showing "oily soils with TPH > 5000 ppm" in supposedly remediated pits 1 and 2).

998 C-2135, RICO Opinion at 62-63. Claimants suggest that the Plaintiffs tried to hire Messrs. Reyes and Pinto to "independently" monitor and criticize the court-appointed settling experts. Claimants' Track 2 Supp. Merits Memorial ¶¶ 147-148.

999 C-2135, RICO Opinion at 64-66.

1000 *Id*. at 65.

the Plaintiffs' actions with respect to Mr. Cabrera — whether true or not — are irrelevant because the Court did not consider Mr. Cabrera's report to reach its verdict.[1001]

479. In rendering his award for damages, Judge Zambrano relied on testimony from dozens of fact witnesses, hours of legal argument, and the other 100 expert reports that were submitted to the Court analyzing nearly 64,000 soil and water sample results.[1002] Notably, of the 100 other expert reports submitted, more than ten were reports drafted by Chevron's own *global* experts.[1003] This evidence, assembled over eight years, was more than enough to support the damages awarded, as the intermediate appellate court found.[1004]

480. Finally, while there is no evidence that Judge Zambrano relied on Mr. Cabrera's Reports, there is also no reason to believe that his data were invalid.[1005] In fact, LBG has concluded that Mr. Cabrera's TPH sample results were valid and analytically equal to the results obtained by Chevron during the JI phase.[1006] LBG further concluded that Chevron's "shadow samples" corroborate Mr. Cabrera's sampling data at many of the sites he investigated.[1007] This finding is not surprising, of course, given that contemporary, internal communications among Chevron's experts demonstrate that even they believed Mr. Cabrera was a capable expert.[1008]

1001 C-931, Lago Agrio Judgment at 50-51; *see also* § II.C.1.

1002 Respondent's Track 2 Counter-Memorial, Annex E ¶ 47 (explaining that the reports for ***each and every*** JI revealed the presence of carcinogens and other chemicals associated with adverse impacts on human health, in many cases exceeding the legal limit many times over).

1003 Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 32-35.

1004 *See supra* VII.F.3; *see also* supra § II.B (showing that the intermediate appeals court, like the lower court, did not consider Mr. Cabrera's report in its *de novo* review of the relevant portions of the trial record).

1005 *See, e.g.*, Respondent's Track 2 Rejoinder ¶¶ 12-19; *see also id.* Annex A ¶¶ 10-21 (wherein the Republic demonstrated that the Stratus witness statements deliberately *avoided* declaring the absence of contamination).

1006 RE-23, LBG Expert Rpt. (Nov. 7, 2014), Appendix C1.

1007 RE-23, *Id.* § II.B.

1008 R-1257, Email from B. Bjorkman to J. Connor (Aug. 18, 2007) at BJORKMAN00056051 (Mr. Cabrera should not be "underestimate[d]" and that his sampling techniques "seem[ ] OK.").

VIII. Conclusion And Relief Requested

481. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:

a. Declaring that it lacks jurisdiction over Claimants' denial of justice and Treaty claims against the Republic.

b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, it should dismiss Claimants' denial of justice and Treaty claims against the Republic as meritless.

c. Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.

d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.

e. Denying all the relief and each remedy requested by Claimants in relation to Track 2, including the relief requested in Paragraph 199 of their Supplemental Track 2 Memorial on the Merits.

482. Alternatively, if any of Claimants' claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:

a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron's actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes into consideration such liability.

b. Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred in any enforcement action in any jurisdiction.

c. Declares that Claimants are not entitled to moral damages.

d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.

483. In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration

proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.

484. The Republic incorporates by reference its Request for Relief in Track 1[1009] and in its Track 2 Counter-Memorial and Rejoinder on the Merits[1010] to the extent that such Requests remain pending.

485. The Republic reserves its rights to supplement its pleadings and request for relief.

Respectfully submitted,

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Procuraduría General del Estado

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November 7, 2014

1009 *See* Respondent's Track 1 Counter-Memorial ¶ 263; Respondent's Track 1 Rejoinder ¶ 192; Respondent's Track 1 Supp. Counter-Memorial ¶ 143.

1010 *See* Respondent's Track 2 Counter-Memorial ¶ 542; Respondent's Track 2 Rejoinder ¶ 387.